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Inside

A publication of the Corporate Counsel Section
of the New York State Bar Association

Message from the Chair

I am honored and excited to be Chair of the Corporate Counsel Section. I have been active with the Corporate Counsel Section for over 5 years now and I couldn't ask to be a part of a more active, vibrant and caring community.

Over 5 years ago I was asked to be on a panel at the Corporate Counsel Institute and speak about social media and related emerging legal issues. I have been an active member of the Section since.

Through the Corporate Counsel Section, I have seen programs like the Kenneth G. Standard Internship and Diversity programs flourish as well as timely, innovative CLEs and dedication to Pro Bono Initiatives.

This year, I would like to focus my efforts on Pathway to the Profession. Some of us may have come into the legal profession as a second career. Others, like myself, studied overseas and came to the United States to practice. While not lacking in its challenges and struggles, I also think there is a determination and focus that is found in those that find themselves in the profession by not-so-conventional paths. I feel that being active in bar associations like NYSBA and others has helped me further myself both personally and professionally. This is why I would like to focus on Pathway to the Profession since it is a program dedicated to cultivating the next generation of lawyers by getting law

Inside

NYSBA

students involved with NYSBA and its Sections prior to graduation.

Also, being a tech-oriented attorney both by practice and personally, I would like to help advance the Corporate Counsel Section's and NYSBA's technology efforts to make the Section, CLE and other initiatives more accessible to the legal community at large. I have already seen this impact having served on NYSBA's Electronic Communication Committee, through which we rolled out the NYSBA website you see today.

Please don't hesitate to contact me and reach out to the Section. We are always happy to hear suggestions, feedback, etc. We look forward to your involvement and to bringing Section members the programs and membership benefits they desire.

Natalie Sulimani

Inside *Inside*

In-house Counsel must tackle a wide range of issues—especially with regard to employees. Whether its advising on hiring matters and what can and can't be asked or considered, policies on appropriate dress, ensuring leave policies are both complied with and not abused, and best practices regarding investigating whistleblower or harassment claims, company counsel has its hands full. We have asked contributors to this issue of *Inside* to delve into these subjects as well as designations of independent contractor versus employees, use of volunteers and interns, and what you need to think about on the labor and employment front when starting a company. This issue of *Inside* also features a review of a book, written by a former editor of *Inside*, which addresses the state of education privilege, as well as conversations with in-house lawyers about their career paths and experiences.

We owe a special thanks to Liz Shampnoi, a member of the Corporate Counsel Section's Executive Committee, for connecting us with so many of this issue's authors.

We hope you will find the variety of materials compiled interesting and informative, and that you'll be inspired to contribute articles of your own to *Inside*. Here's to inspiration!

Jessica Thaler
Matthew Bobrow

Jessica Thaler is an attorney with Bliss Lawyers, currently working on secundment for Credit Suisse. Prior to engaging with Bliss, she spent a year acting as the Chief Legal Officer of My Sisters' Place, a not-for-profit organization working for the benefit of domestic violence and human trafficking victims throughout Westchester County. Jessica has a rich experience as a corporate-transactional generalist, gained through her work at NYC law firms and her solo practice. She is an active member of NYSBA, acting as immediate past chair of the Committee on Lawyers in Transition, on the executive committees for EASL and Corporate Counsel Sections, as a long-standing member of the Membership Committee and the Committee on Law Practice Management and, now, as a co-editor of *Inside*. Jessica is also a House of Delegates representative for the Westchester County Bar Association. She is a graduate of UCLA, cum laude (1995), and Fordham University School of Law (1999).

Matthew Bobrow is a 3L law student at New York Law School where he is a Staff Editor for the *New York Law School Law Review*. He is participating in a training program with a Legal and Compliance rotations at Credit Suisse AG and is law clerking with Shafer Glazer LLP. Matthew is excited to be helping edit his first issue of *Inside*. Whenever possible, he is always looking for ways to contribute to the New York City legal community.

Request for Articles

If you have written an article and would like to have it considered for publication in *Inside*, please send it to either of its editors:

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Articles should be submittted in electronic document format (pdfs are NOT acceptable), and include biographical information.

www.nysba.org/Inside

Effectively Managing the Collective Wisdom of a Multi-Generational Workforce Drives Business Success in the Information Age

By Adriana Kierszenbaum

Introduction

What drives business success in the Information Age? Human ingenuity does, because successfully advancing a strategic corporate vision requires effectively managing the collective wisdom of a multi-generational workforce.

"For the first time in history, there are four generations working alongside each other in the workplace…[which] serves as an impetus for a business to build and promote a learning environment where older and younger generations can mentor each other…"

Impact of Social Media in the Business and Legal Settings

Adept use of social media allows a business to recruit and retain talent as well as leverage brand awareness through mobile marketing.[1] However, in the labor and employment law context, an employee's use of social media may also result in the misappropriation of trade secrets, violate the duty of loyalty to an employer, or violate an employee's obligations under restrictive covenants.[2] Likewise, the termination of an employee for negative comments in a public social media forum may subject non-union businesses to answer charges of unfair labor practices based on "recent Administrative Law Judge decisions that signal a potentially vast expansion of the jurisdiction of the NLRB, premised upon social network postings being the functional equivalent of a gripe session among a group of disgruntled employees endeavoring to decide upon the next step to take collectively."[3]

Interestingly, an employee who knowingly violates an employer's policy on social media usage and is discharged for cause may be entitled to receive unemployment insurance benefits where the claimant had a clean disciplinary record and the behavior in question was an isolated incident.[4] Since content in an employee's "virtual home" is stored by a third-party network service provider, the applicable level of privacy protection is determined by which category it falls into in the Stored Communications Act ("SCA"), which was enacted by the U.S. legislature in 1986 as part of the Electronic Communications Privacy Act ("ECPA"). Thus, while the information may be discoverable under a Fourth Amendment analysis, it still may be afforded protection under the federal statute.[5]

Increasing the Likelihood of Business Success Through the Implementation of Synergistic Mentoring Opportunities to Promote Collective Norms and Consensus Building in a Multi-Generational Workforce

For the first time in history, there are four generations working alongside each other in the workplace (i.e., Traditionalists, Baby Boomers, Generation X and Millennials) because Traditionalists and Baby Boomers generations are delaying retirement either for financial considerations or personal fulfillment reasons. This change serves as an impetus for a business to build and promote a learning environment where older and younger generations can mentor each other, and in doing so the business can establish collective norms fostering creativity.

The nuances of the differences amongst the four aforementioned generations along with the fifth generation (i.e., Generation Z) are beyond the purview of this article. Accordingly, I recommend reading Lauren Stiller Rikleen's book entitled "You Raised Us—Now Work With Us: Millennials, Career Success, and Building Strong Workplace Teams" (which was supplied recently at the New York State Bar Association to attendees of the Labor and Employment Law Section), as well as the online staff development materials prepared by the Executive Office of the United Nations Joint Staff Pension Fund's Talent Management Team's New York Secretariat Headquarters entitled, "Traditionalists, Baby Boomers, Generation X, Generation Y (and Generation Z) Working Together. What Matters and How They Learn? How Different Are They? Fact and Fiction,"[6] which discuss the aforementioned four generations as well as the fifth generation by focusing on how their respective "socioeconomic experiences impacted their work and leadership styles."

For example, the younger generations may be more accustomed to using social media and technology to communicate (e.g., instant messaging, tweeting and posting) whereas the older generations may put greater value on face time (no pun intended with the Apple application of the same name). As applied to the collaborative work-

place analysis discussed above, a business that promotes open communication within its multigenerational workforce and encourages the development of a collective wisdom based on shared values that transcend generations would be able to gain a competitive advantage by listening to the technologically savvy suggestions of its younger generation (e.g., creating a greater mobile presence on social media sites vis-à-vis developing company blogs with continuous live feed posts) and using the corporate experience of the older generations to assure its seamless rollout within the organization.

Conclusion

Multigenerational collaboration is a necessary prerequisite for business success in a technologically driven marketplace. A learning environment that takes advantage of multigenerational mentoring relationships fosters collective creativity—the source of human ingenuity.

Endnotes

1. The first ever Smart Mobile Cross Marketing Effectiveness (SMoX) study "showed that mobile is a strong driver of campaign performance across the entire purchase funnel. From upper funnel metrics like awareness and image, to purchase intent and actual behavior (foot traffic or sales), the empirical evidence proves that mobile has a fervent contribution to campaign results, justifying a double-digit allocation of the entire media budget (not just digital) to mobile. *See* Erin Lockhart, *The MMA Announces Results From First-Ever Cross Marketing Effectiveness Research (SMoX) Conducted for Mobile, Based on In-Market Campaigns from Coca-Cola, Walmart, Mastercard and AT&T,* Marketwatch (Mar. 17, 2015, 7:30 AM), http://www.marketwatch.com/story/the-mma-announces-results-from-first-ever-cross-marketing-effectiveness-research-smox-conducted-for-mobile-based-on-in-market-campaigns-from-coca-cola-walmart-mastercard-and-att-2015-03-17.
2. *See* Marisa Warren & Arnie Pedowitz, *Social Media, Trade Secrets, Duties of Loyalty, Restrictive Covenants and Yes, the Sky Is Falling*, 29 Hofstra Lab. & Emp. L.J. 99, 106 (2011).
3. *See* Mary Noe, *Facebook: The New Employment Battleground*, N.Y. St. B.J. 10-4 (June 2014).
4. *See* Sullivan v. Brookville Ctr. for Children's Services, Inc., 123 A.D. 3d 1273 (N.Y. App. Div. 2014).
5. Tara M. Breslawski, *Privacy in Social Media: To Tweet or Not to Tweet? Court of Appeals of New York People v. Harris (Decided June 30, 2012)*, 29 Touro L Rev 1283, 1286-87 (2013).
6. Executive Office, Talent Management Team, *United Nations Joint Staff Pension Fund New York Secretariat Headquarters, Traditionalists, Baby Boomers, Generation X, Generation Y (and Generation Z) Working Together. What Matters and How They Learn? How Different Are They? Fact and Fiction*, Office of Human Resources Management of the United Nations http://www.un.org/staffdevelopment/pdf/Designing%20Recruitment,%20Selection%20&%20Talent%20Management%20Model%20tailored%20to%20meet%20UNJSPF%27s%20Business%20Development%20Needs.pdf (last visited Mar. 20, 2015).

Employment Trends for 2015: "Ban the Box" Movement on the Rise, Paid Sick Leave Laws Sweep the Nation and "Look Policies" Under Fire

By Mara B. Levin

Introduction

If 2014 is an indication of what is to come, employers can expect more "ban the box" legislation: laws that prohibit employers from inquiring about an applicant's criminal history during the initial application process. Indeed, 42 jurisdictions enacted Ban the box laws last year alone. Employers who do not operate in jurisdictions where such laws have passed should keep abreast of pending legislation—this movement is on the rise, and could be coming soon to a city near you.

Additionally, in the last year, "paid sick leave" laws, which guarantee employees annual paid sick days that can be used to care for themselves or their family members, continued to sweep the nation, with legislation popping up in states and cities nationwide. To date, three states and more than 25 cities have adopted paid sick leave laws. The movement is expected to gain further momentum this year: 25 states have either paid sick leave legislation pending or campaigns under way.

Employers should also be aware that the U.S. Supreme Court is expected to render a significant decision this year concerning "look policies," which could impact employers' ability to use "look policies" as a barometer for employment eligibility decision. The decision should more clearly define when it is permissible to refuse employment if the applicant's "look" does not fit within the company's image.

Growing National Trend to Ban the Box

While employers often try to obtain as much information about job applicants as possible in making hiring decisions, inquiry into an applicant's criminal history is being severely curtailed across the country. While most jurisdictions still permit inquiry into criminal history on an employment application, blanket denial of employment based on checking the "yes box" to such an inquiry (i.e., "Have you ever been arrested or convicted of a crime?"), can have a disparate impact on those with a criminal history. As a result, many jurisdictions began enacting laws, and the EEOC issued Enforcement Guidance, requiring a showing that the exclusion of an applicant from consideration for a position based on his or her criminal conviction was job related and consistent with business necessity.[1] Employing that analysis at the application stage may soon become obsolete given the proliferation of ban the box legislation: laws that prohibit employers from inquiring into an applicant's criminal history during the initial stages of the employment process.

The rationale behind the movement is to allow applicants to be judged first on their qualifications and skills, rather than on their criminal history. By delaying that inquiry until after a job offer has been extended, job seekers can get their foot in the door without the stigma of a prior arrest or conviction and be placed on an equal playing field in the job market to demonstrate their capabilities.

The ban the box movement is a reaction to the large number of Americans with criminal records. A 2011 study by the National Employment Law Project ("NELP") found that nearly 65 million people in the U.S.—more than one in four adults—were estimated to have criminal records.[2] NELP has since revised that number up to approximately 70 million U.S. adults.[3] Moreover, the Center for American Progress reported in 2012 that while people of color make up about 30 percent of the United States' population, they account for 60 percent of those imprisoned.[4] The incarceration rates disproportionately impact men of color: 1 in every 15 African American men and 1 in every 36 Latino men are incarcerated compared to 1 in every 106 white men.[5]

Ban the box laws are spreading rapidly across the country. In 2012 alone, 15 jurisdictions enacted ban the box laws, 20 jurisdictions followed in 2012 and, in 2014, a surge of 42 jurisdictions enacted ban the box laws.[6] By the end of 2014, more than 100 jurisdictions—including 13 states and approximately 100 localities—had adopted a ban the box law in one form or another.[7] Georgia followed suit in February, bringing today's total to 14 states.[8] While many of the laws only apply to public employers, six states—Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, and Rhode Island—have ban the box laws that apply to private employers.[9] In addition, at least 25 cities and counties now extend ban the box laws to private employers.[10]

Many of these laws vary widely and employers must review each in their applicable state or local area to understand the obligations these laws impose. Some of the laws make inquiries into criminal history dependent on timing. Hawaii, for instance, prohibits such inquiries until after a conditional offer is made.[11] While some laws apply only to larger employers, many apply to smaller businesses. For example, New Jersey's ban the box law applies to employers with 15 or more employees.[12]

Moreover, while there is no Federal ban the box law, the Equal Employment and Opportunity Commis-

sion ("EEOC") has taken the position that, regardless of whether an employer's application uses "the box" inquiry into criminal history, an employer must engage in a multi-pronged analysis before disqualifying an applicant based on a criminal conviction.[13] In its 2012 Enforcement Guidance, the EEOC effectively endorsed removing questions or checkboxes regarding criminal history from job applications. The EEOC set forth recommendations for employers, which include eliminating "policies or practices that exclude people from employment based on any criminal record" and creating a "narrowly tailored" policy for evaluating applicants for past criminal conduct.[14] The EEOC's position indicates its view that federal civil rights could be impacted when employment decisions are made based on an applicant's criminal history.

Given the strong momentum for ban the box legislation, it is likely that more jurisdictions will adopt similar laws in 2015. Accordingly, private employers who may not currently be subject to such laws should consider reviewing and revising their employment applications and should keep a close watch on any proposed ban the box legislation that may affect them. Of course, employers who operate in jurisdictions which have enacted ban the box laws should review their applications and ensure that all inquiries comply with state and local law. Employers should also ensure that those who are involved in the hiring or recruiting process are aware of the applicable ban the box laws.

The Year of the Sick Leave

Without doubt, one of the biggest trends of this past year was the proliferation of paid sick leave laws in states and cities across the country.

In 2006, San Francisco became the first locality in the nation to adopt a paid sick leave law.[15] Connecticut became the first state in the nation to provide paid sick leave in 2011[16] and in 2013, several U.S. cities followed.[17] By 2014, the paid sick leave movement was in full swing with California and Massachusetts, along with 10 U.S. cities, adopting paid sick leave laws.[18]

To date, three states and more than 25 cities have adopted paid sick leave laws—and the paid sick leave momentum shows no sign of slowing down. Just last month, Philadelphia became yet another jurisdiction to pass a law guaranteeing paid sick leave for employees. At least 16 states have paid sick leave legislation pending or campaigns under way and include: Alaska, Arizona, Florida, Hawaii, Illinois, Iowa, Michigan, Minnesota, Nebraska, North Carolina, Oregon, New York, New Jersey, Pennsylvania, South Carolina, and Washington.[19]

The movement is designed to help workers paid low wages who disproportionally lack access to a paid sick leave benefit. The Economic Policy Institute ("EPI") said in a report released in October 2013 that almost 40 million U.S. employees, or about 40 percent of the nation's private-sector workforce, currently have no right to paid sick leave.[20] As a result, EPI stated, these employees commonly go to work sick or leave their sick children home alone because of fear they will be fired for missing work.[21] Even if they are not terminated, the loss of pay they suffer takes a dramatic toll—particularly since jobs without sick pay are concentrated among low-wage workers.[22]

Generally speaking, paid sick time laws give covered employees the right to paid time off to recover from illness, to care for a sick family member, to obtain preventative care or diagnosis or to help a family member obtain such care or diagnosis. The laws also include anti-retaliation provisions, prohibiting employers from taking any adverse employment action against an employee who exercises his or her rights under the paid sick leave law.

The specific coverage and provisions of paid sick leave laws vary in each jurisdiction. Some laws require employers to provide paid sick days to all employees, regardless of the employer's size, while the laws in other jurisdictions are dependent on the size of the employer's workforce. For instance, in New York City, employers with five or more employees are required to provide employees with up to five days of annual sick leave; however, those employers with fewer than five employees are required only to provide up to five days of *unpaid* sick leave annually. The laws also vary with respect to how long an employee must be working for an employer before paid sick leave accrues and the manner by which (if any) unused and accrued sick leave can be carried over from one calendar year to the next.

While there is no Federal law mandating employers to provide *paid* sick leave, the Healthy Families Act (H.R. 2460, S. 1152), which was introduced to Congress in 2013 and is strongly supported by President Obama, would require employers with 15 or more employees to provide workers with up to seven days of paid sick leave. The law would cover the sickness of the employee or to care for sick parents or children, and visits to a health care provider for a specific issue or preventative care as well as "an absence resulting from domestic violence, sexual assault, or stalking."

It is critical that employers review and understand the requirements of the paid sick leave laws in the jurisdictions where they have employees. Employers should carefully review their current policies and handbooks to ensure that they are in compliance with all applicable laws and make any necessary revisions. Managers and human resources employees should receive training concerning appropriate implementation and application of paid sick leave laws including, but not limited to, the situations that allow for the use of paid sick time, how much sick time employees may use in a given year, how and when sick days accrue, and under what circumstances employers can request documentation from an employee regarding the use of accrued sick time.

Employers who operate in jurisdictions that have not enacted a paid sick leave law should keep abreast of pending paid sick leave legislation in their area. Given the incredible momentum of paid sick leave laws in the last year alone, employers can anticipate this trend to continue with more jurisdictions enacting these laws in 2015.

U.S. Supreme Court Takes a Close Look at "Look Policies"

Many employers, typically in the retail and hospitality industry, have a brand image they want to relay to their customers. While this is generally represented through marketing and advertising materials, many companies express their corporate image through their employees. These employees act as "brand ambassadors" and are the company's first point of contact with the customer. Accordingly, these employers look to hire individuals who have a "look" that best represents the brand. In order to maintain this image, employers issue look policies which set forth rules governing the employees' appearance. The policies can be very specific and generally include detailed rules concerning the type of clothing that can be worn, the colors that can be worn, permissible caps and other head coverings, hairstyles and grooming, and permissible jewelry and accessories.

Sounds like straightforward brand imaging, right? Not necessarily. In the closely watched religious discrimination case of *EEOC v. Abercrombie & Fitch Stores, Inc.*, the U.S. Supreme Court is currently examining how look policies are enforced with respect to applicants who cannot comply due to their religious practices.[23]

When Samantha Elauf, a young Muslim woman, interviewed for a position at a children's branch of Abercrombie & Fitch ("Abercrombie"), she wore her hijab, a headscarf worn by Muslim women as a symbol of modesty. During her interview, Elauf did not mention that she was Muslim or that she wore her hijab for religious reasons. During the application process, Elauf was given a high enough score in every category to be recommended for hiring; however, she received a low score for her "appearance" since her hijab was in violation of the company's look policy. Abercrombie, in order to maintain its "East Coast collegiate style," maintains a look policy that requires employees to wear clothes in the same style as those sold by Abercrombie. The look policy specifically prohibits black clothing and caps. As a result of this policy, Elauf did not receive the position.

Elauf turned to the Equal Employment Opportunity Commissions ("EEOC"), who sued the store on her behalf, claiming Abercrombie engaged in religious discrimination. Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees or potential hires based on their religious belief or practice. Employers can maintain a look policy, that prohibits head coverings, but if an applicant or employee needs to wear one for religious reasons, employers are required to make an accommodation, unless they prove that to do so would cause an "undue hardship" on their business.[24]

The trial court found that, in refusing to hire Elauf based on her religious practice, Abercrombie wrongfully discriminated against her.[25] On appeal, the appeals court found in favor of Abercrombie, explaining that if Elauf wanted a religious accommodation, it was incumbent on her to have asked for it.[26] The U.S. Supreme Court granted the EEOC's petition for writ of certiorari and agreed to hear the case.

In February, the U.S. Supreme Court heard oral argument in the case. The Justices focused on what level of knowledge an employer must have that an employee or applicant's religious practice may conflict with a job requirement, and from what source, before it has a duty to consider an accommodation. Does the applicant or employee bear the burden of telling the employer? Does the employer need to have actual notice from any source (even if it is not from the applicant or employee) that the "look" being sported by the applicant is pursuant to a religious practice? Or is even something less than an employer's actual notice sufficient to trigger the duty to accommodate?

The justices expressed skepticism for Abercrombie's position that only *actual* knowledge from an applicant of the religious belief is adequate to put the employer on notice of the duty to accommodate. Justice Ruth Bader Ginsburg asked Abercrombie's counsel how Elauf would even know to ask for an accommodation when she was not aware that company had a policy that banned head coverings. Several justices suggested that an employer should simply describe its dress code and ask if it posed a problem. That would shift the burden to the applicant, they said. If the applicant then raised a religious objection, the employer would be required to offer an accommodation so long as it did not place an undue burden on the business.

While Abercrombie's counsel argued that this approach would require stereotyping, Justice Elena Kagan said that the approach was the lesser of two evils. On the one hand, it could require an "awkward conversation," she said. "But the alternative to that rule is a rule where Abercrombie just gets to say, "we're going to stereotype people and prevent them from getting jobs."

One of the more probing questions for Abercrombie came from Justice Samuel Alito who challenged the company's counsel as to whether Abercrombie was "willing to admit that there are at least some circumstances in which the employer is charged with that knowledge based on what the employer observes." Justice Alito asked Abercrombie's counsel, to imagine "a Sikh man wearing a turban," "a Hasidic man wearing a hat," "a Muslim woman wearing a hijab" and "a Catholic nun in a habit" come in for an interview. In order to be accommodated, would these individuals have to say, "I'm dressed this way for a religious reason?"

The Justices also seemed to struggle with the EEOC's position that "rigid notice requirements" should be abandoned and suggesting that an employer who suspected a possible religious conflict could simply advise the applicant of the relevant work rules and ask whether and why the applicant couldn't comply. At least some of the justices appeared to share Abercrombie's concern that the EEOC's position would promote stereotyping. Chief Justice John G. Roberts challenged the EEOC that its solution "may promote stereotypes to a far greater degree than what you're objecting to."

Indeed, Abercrombie's counsel argued that an employer faced with the EEOC's rule could only protect itself by "training their managers to stereotype about possible religious beliefs because a judge or jury might later find that…an employer correctly understood, or must have correctly understood" that the applicant had a religious belief incompatible with a workplace rule.

It is notoriously hard to predict the Supreme Court's decision in a case based on oral argument. However, we can expect the Court to clarify what notice triggers an employer's duty to explore religious accommodations as part of the application process. In the meantime, employers should consider reassessing the role their look policy plays with respect to applicants and consider modifying such policies to accommodate religious practices.

Endnotes

1. In New York, employment cannot be denied on the basis of a prior conviction, unless (1) there is a direct relationship between one or more of the offenses and the specific employment sought by the applicant; or (2) the granting of employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. As such, employers in New York cannot simply deny employment on the basis of a prior conviction standing alone. N.Y. Correction Law §750 (Consol. 1974).
2. Michelle Natividad Rodriguez, Maurice Emsellem, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment*, The National Employment Law Project (Mar. 2011), http:/ www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1/.
3. Michelle Natividad Rodriguez, *"Ban the Box" Research Summary*, The National Employment Law Project, http://www.nelp.org/page/-/SCLP/2014/Guides/NELP_Research_Factsheet.pdf?nocdn=1.
4. Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, Center for American Progress (Mar. 13, 2012), https://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/.
5. *Id.*
6. *Number of Jurisdictions Adopting Fair-Chance Reforms is Growing Rapidly*, NELP, http://www.nelp.org/page/-/images/Fair-Chance-Figure-2.png?nocdn=1 (last visited Mar. 10, 2015).
7. By the end of 2014, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico and Rhode Island had adopted ban the box legislation. *Ban the Box Resource Guide*, NELP (Jan. 2015), http://www.nelp.org/page/-/SCLP/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf?nocdn=1.
8. *State of Georgia Executive Order* (Signed Feb. 23, 2015), https://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/document/02.23.15.03.pdf; *Georgia Governor Signs "Ban the Box" Executive Order,* NELP (Feb. 24, 2015), http://www.nelp.org/page/-/Press%20Releases/2015/PR-Georgia-Ban-the-Box-Executive-Order.pdf?nocdn=1.
9. Haw. Rev. Stat. §§ 378-2, 378-2.5; 820 Ill. Comp. Stat. § 75; Executive Order 1 (2013); Mass. Gen. Laws ch. 151B, § 4 (9 ½); ch. 6, §§ 171A, 172; Minn. Stat. § 364; AB 1999; R.I. Gen. Laws §§ 28-5-6, 28-5-7.
10. *Ban the Box Resource Guide*, NELP (Jan. 2015), http://www.nelp.org/page/-/SCLP/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf?nocdn=1.
11. Haw. Rev. Stat. §§ 378-2, 378-2.5.
12. 2014 N.J. A.B. 1999.
13. *EEOC Enforcement Guidance,* No. 915.002 (Apr. 25, 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.
14. *Id.*
15. *State and Local Action on Paid Sick Days*, Nat'l Partnership for Women & Families (Nov. 2014), http://www.nationalpartnership.org/research-library/campaigns/psd/state-and-local-action-paid-sick-days.pdf.
16. *Id.*
17. The cities of Portland, Ore., New York City and Jersey City, N.J. adopted paid sick leave laws in 2013. *Id.*
18. Newark, N.J., Eugene, Ore., San Diego, the state of California, and the New Jersey cities of Passaic, Paterson, East Orange and Irvington enacted paid sick leave laws in 2014. In November 2014, paid sick days ballot measures passed in Massachusetts, Oakland, Calif., and the New Jersey cities of Montclair and Trenton. *Id.*
19. S.B. 12, 29th Leg., 1st Sess. (Alaska 2015); H.B. 2505, 52nd Leg., 1st Sess. (Ariz. 2015); H.B. 1185, Reg. Sess. 2015 (Fla. 2015); S.B. 1490, Reg. Sess. 2015 (Fla. 2015); H.B. 9, 28th Leg., (Haw. 2015); H.B. 3297, 99th Gen. Assemb., (Ill. 2015); S.B. 101, 2015-2016 Leg. Sess.(Mich. 2015); S.F. 481, 2015-2016 Biennium 89th Leg., Reg. Sess. (Minn. 2015); L.B. 493, 104th Leg., 1st Sess. (Neb. 2015); H.B. 100, Gen. Assemb. N.C., 2013 Sess. (N.C. 2013); S.B. 454, 78th Leg., Reg. Sess. (Or. 2015); S.B. S01208, 2015-2016 Reg. Sess. (N.Y. 2015); H.B. A03894, 2013-1014 Reg. Sess. (N.Y. 2013); H.B. 2354, 216th Leg. (N.J. 2014); S.B. 906, 120th Gen Assemb., 2013-214 Sess. (S.C. 2014) H.B. 1356, 64th Leg., 2015 Reg. Sess. (Wash. 2015).
20. Gordon Lafer, *The Legislative Attack on American Wages and Labor Standards, 2011–2012,* Economic Policy Institute (Oct. 31, 2013), http://op.bna.com/dlrcases.nsf/id/rsmh-9grst8/$File/Economic%20Policy%20Institute%20%20Briefing%20Paper.pdf.
21. *Id*.
22. *Id.*
23. E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 135 S. Ct. 44 (2014).
24. *See* Trans World Airlines v. Hardison, 432 U.S. 63, 74 (1977).
25. E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 798 F. Supp. 2d 1272 (N.D. Okla. 2011).
26. E.E.O.C. v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, (10th Cir. 2013).

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Managing Employment-Related Leaves of Absence[1]

By David B. Lichtenberg

Disability management in the workplace is a legal maze. Worse, it is a maze that has become more intricate and difficult to navigate in the recent past. Lawyers who practice employment law, whether they be in-house or outside counsel, have likely seen an uptick in this area. Indeed, a recent report issued by the Administrative Office of the U.S. Courts notes that there were 1,108 lawsuits filed in 2014 under the Family and Medical Leave Act ("FMLA"), a federal leave statute, compared to 877 in 2013, and just 291 in 2012.[2]

The causes underlying the uptick are not hard to pinpoint. First, disability management laws are employee friendly, on the whole, putting a myriad of obligations on employers while setting low thresholds for employee protection. Second, employees are becoming savvier and gaining more knowledge about these laws and their rights under them. While disability management laws are drafted with noble intentions, empirical evidence has shown that they are subject to abuse by employees who understand their nuances, and the prohibitions they place on employers. Third, disability management laws rarely, if ever, "come off the books." Instead, while the finer points of the more mature laws are litigated in the courts, newer laws are regularly being drafted and implemented which add layers to leave management administration. There is no doubt that the promotion of employee rights is a good political talking point, and these types of laws allow supporters to claim that they are championing the "little guy" while opponents are said to be trampling on employee rights.

Fourth, and perhaps creating the greatest cause of concern for employers, is that there is no "one size fits all" solution in the disability management arena. The laws, regulations, and most notably the agencies that enforce these laws, have made it clear that employers need to treat disability management scenarios like snowflakes. Therefore, each employee's situation needs to be addressed on a case-by-case basis to determine whether, prior to implementing an adverse employment decision, a requested accommodation is reasonable or would create an undue burden. A Regional Attorney with the EEOC, who is heading a case against a large national employer who maintained a policy of terminating any employee unable to return to work after 12 months of total leave, was reported as issuing the following comment, which is both telling and instructive: "The key to avoiding trouble under the Americans with Disabilities Act is to be constantly asking the question 'Can we get this employee back on the job with a reasonable accommodation?' and certainly not to be asking only 'Has this employee been on leave long enough for us to get rid of him?'"[3] It is difficult to fathom that a policy which allows employees 12 months of total leave time prior to termination could be unlawful. However, the point the EEOC attorney was making is that it is not the total amount of time that governs the inquiry; rather, it is the steps that an employer has taken to ensure that its processes and procedures in managing leaves are both thorough and fair, and simultaneously allow the employer, if challenged, to argue with force that an adverse employment decision was only reached after due consideration of the underlying issues and a full and frank discussion with the employee as to what could be done to ensure that the employee was able to return to work, or not return to work.

"[T]here is no 'one size fits all' solution in the disability management arena. The laws, regulations, and most notably the agencies that enforce these laws, have made it clear that employers need to treat disability management scenarios like snowflakes."

The threshold inquiry for properly managing health issues in the workplace is determining what law or laws potentially apply. In answering the question, it is not enough to examine the company, but the facts surrounding the employee also need to be examined.

Start with the employer side of the equation. Employers who have more than 50 employees in a 75 mile radius are covered by FMLA, which grants covered employees up to 12 weeks[4] of unpaid, job-protected leave in a 12-month period for their own or a covered family member's serious health conditions.[5] The FMLA is accompanied by a set of highly technical regulations, which provide guidelines for determining who is and who is not a covered employer. For example, a company must employ 50 or more employees in 20 or more workweeks in the current of preceding year to be covered.[6] However, where two or more businesses exercise joint control over employees, the employees from both businesses may be aggregated for purposes of the 50 employee calculation.[7] In addition, employees with no fixed worksite (e.g., truck drivers, salespeople) are counted as part of the 50 employee equation for the location to which they are assigned as their home base.[8] Employers who employ more than 15 employees are covered by the federal Americans with Disabilities Act ("ADA"). The ADA protects employees who are qualified to perform a job's essential functions and have a disability from discrimination.[9] It further requires employers to provide employees and applicants with any change or adjustment to a job or work environment that

permits a qualified applicant or employee with a disability to perform the essential job functions, also commonly referred to as a reasonable accommodation, unless an employer can demonstrate that said change or adjustment would constitute an undue burden.[10]

State and local laws may also apply. For example, employers with more than 4 employees are covered by the New York State Human Rights Law ("NYSHRL"), which, similar to the ADA, requires employers to provide reasonable accommodations to employees and applicants with disabilities.[11] Keep in mind that New York City has its own employment laws. Every employer in New York City is covered by the New York City Earned Sick Time Act, commonly referred to as the NYC Paid Sick Leave Law ("NYCPSL"), which went into effect in April 2014, and requires employers with 5 or more employees to provide paid sick leave to covered employees, and those with less than 5 employees to provide unpaid sick leave to covered employees.[12] Moreover, New York City has its own discrimination law entitled the New York City Human Rights Law, which protects against disability discrimination. Clearly, given the wealth of potential laws in play—and the above analysis does not include applicable workers' compensation laws—it is important that the beginning of the analysis focus on which laws apply, as there are differing requirements and obligations under each.

Once it is determined that an employer is covered, the focus needs to move to whether the employee is covered. Under the FMLA, an eligible employee is an employee of a covered employer who has been employed by the employer for at least 12 months and has been employed for at least 1,250 hours during the 12 month period immediately preceding the commencement of the leave.[13] The 12 months of employment need not be consecutive, and a break in service of up to seven years must be counted for purposes of determining whether the employee has been employed by the employer for at least 12 months.[14] Other laws have different qualification requirements. The NYCPSL covers employees who work more than 80 hours in a calendar year.[15] The ADA and the NYSHRL cover all applicants and/or employees who suffer from a qualifying disability. The ADA generally defines this to mean having an impairment that substantially limits one or more major life activities. The NYSHRL defines this to mean a physical, mental or medical impairment which prevents the exercise of a normal bodily function.[16]

After moving past the threshold inquiries, an employer must have a process in place to ensure that what happens next complies with the applicable laws.

The leave/job protection statutes need to be at the front of the inquiry, as they are generally less flexible in application. The FMLA has a tightly defined process to follow. Once an employee advises an employer that he/she has a serious health condition, or needs to care for a family member with a serious health condition, the employer is required to send out requisite notice to the employee of his/her rights and obligations. A serious health condition includes an overnight stay in a hospital or a period of incapacity of more than three consecutive, full calendar days, and any subsequent treatment related to the condition.[17] Covered family members include a spouse, parent or child.[18] When an employee requests FMLA leave, the employer must notify the employee of the employee's eligibility to take FMLA leave within five business days, absent extenuating circumstances.[19] Employers also need to be mindful of the fact that FMLA leave does not need to be taken in a continuous block. Rather, covered employees may take FMLA leave intermittently or on a reduced leave schedule under certain circumstances.[20] Intermittent leave can be taken in increments of an hour, or less if the employer uses smaller increments of time to account for other forms of leave.[21] This raises a challenge, as it means that the employee will continue to work while taking FMLA leave. The FMLA has a mechanism by which employers can transfer an employee to an alternate position during a period of intermittent or reduced schedule leave.[22]

An employer may also require that an employee's need for leave be supported by a medical certification, which must be returned within 15 calendar days.[23] The medical certification is a critical part of the process, and should be requested whenever permissible. Employers should make sure that their handbook and/or leave policies contain a requirement that employees seeking FMLA leave must submit a medical certification to support the request. The reason that the certification is so important is that, if filled out properly, it will contain information regarding the employee's anticipated return to work date. If it does not, the employer should instruct the employee to follow up with his/her medical practitioner to obtain this information. Sometimes, the certification will state that the return to work date is uncertain, or cannot be provided until a follow up-visit is conducted. That type of information can be helpful to demonstrate, as the process continues, that the employee's need for leave is indefinite, and most courts have held definitively that it would be an undue burden to provide an employee with indefinite leave.

If an employee's anticipated return to work date is uncertain, prior to the expiration of the 12 weeks of FMLA leave, the employer should follow up in writing to the employee inquiring whether a return to work date can be provided, or whether there is additional medical information for the employer to consider. If an employee is able to return during the FMLA period (or another job protection statute), absent some very limited exceptions, the employee will need to be reinstated to the same or equivalent position he/she held prior to the leave. If the information provided in response to that follow-up inquiry demon-

strates that the need for leave will exceed the allotted FMLA period, the employer will then need to move into the part of the process involving reasonable accommodation laws, such as the ADA, which are more flexible, but also more fact specific.

Under the ADA (and most state/local disability laws), employers must engage in an interactive process with an employee to discern whether reasonable accommodations can be made. That process should be in writing, wherever possible. Continuing the above example, where an employee is not able to provide a return to work date during the FMLA period, once the FMLA leave expires, the employer can ask the employee to have his/her doctor provide information regarding whether the employee can, in lieu of coming back to work, perform his/her essential job functions with or without a reasonable accommodation. While such information may be part of the FMLA medical certification, if it is not, an employer should ensure that it obtains this data as soon as practicable, as it will govern the remainder of the inquiry. Employers should also require employees to provide his/her doctor with a job description, so that the inquiry can be responded to fully and substantively. That job description should be up to date, and preferably break down what is truly essential to the job. Many times, job descriptions omit essential job functions, or list functions that have not been part of the job in years. An inaccurate job description can lead to an inaccurate health assessment, and create an unsupportable outcome. Given that the employer is responsible for maintaining and updating its job descriptions, it will be difficult for an employer to defend itself under those circumstances.

Assuming that the job description is accurate and up to date, if the employer receives responsive information that the employee can come back to work, but needs some form of job modification, whether it be regular breaks, lifting restrictions, etc., the employer will then need to determine whether the modification can be performed, or whether it constitutes an undue burden. An undue burden is not easy to establish. Generalized conclusions cannot be used to support an undue burden conclusion. Rather, an "undue burden must be based on an individualized assessment of current circumstances" that show that a specific accommodation would cause significant difficulty or expense.[24] This includes factors such as cost, the overall financial resources of the company, the type of employer at issue and the impact of the accommodation on the operation of the facility.[25]

If the employer is advised that the employee needs additional time off, the question naturally arises as to how long an employer needs to hold the job for the employee. That question has no definitive answer and, as noted above, when employers try to put hard deadlines in place, they open themselves up to potential liability. Savvy employers continue to memorialize the dialogue. If an employee's doctor is providing a moving return to work date, which continues to move each time a return date approaches, it is imperative that the employer inquire as to why the return date is moving, and force the doctor to either explain whether there is a changed medical circumstance to justify why the past return dates have not been met, or concede that no return to work date can be provided, which would generally allow an employer to conclude that the need for leave is indefinite. The worst situation to be in, as an employer, is to have an employee out for 6 months with no paper trail. Employers should not wait to hear from employees regarding a return to work date. Rather, the employer must have a process in place whereby they can drive the discussion forward.

Disability management is not a topic that employers would describe as pleasurable. However, managing leaves properly is like a muscle, in that the more it is exercised, the stronger it becomes. Frontline managers should be trained to recognize the warning signs that will trigger the leave management process. From there, employers need to make sure that they have people who can capably analyze which laws apply, which paperwork needs to be sent out, and how to manage the process from beginning to end, in order to put the company in the best possible position to defend a claim of discrimination or retaliation if it comes to that point. As cited above, these types of cases are significantly increasing, and no employer wants to see its name attached to a matter in which it becomes public knowledge that the process was mismanaged. Consult with in-house or external employment counsel early on in the process.

Endnotes

1. This article is designed to provide an overview of disability management law. Of course, there is no article that can provide a comprehensive review of this area of law and employers are encouraged to consult early in the process with legal counsel to properly address these issues.
2. *See* Ben James, *FLSA, FMLA Lawsuits Soaring, New Statistics Show*, Law360 (Mar. 11, 2015, 9:24 PM), http://www.law360.com/employment/articles/630168?nl_pk=23f45e50-fcc9-4f9f-aa87-0b0a7cbec6d8&utm_source=newsletter&utm_medium=email&utm_campaign=employment.
3. Jeff Nowak, *The Lesson of EEOC v. UPS and Automatic Termination Provisions: Engage in the ADA Interactive Process*, FMLA Insights (Feb. 19, 2014), http://www.fmlainsights.com/the-lesson-of-eeoc-v-ups-and-automatic-termination-provisions-engage-in-the-ada-interactive-process/.
4. The FMLA additionally provides 26 weeks of job-protected leave in a 12-month period to care for a covered military service member. This article does not discuss application of the FMLA in the military context but employers should be mindful of this additional application of the law.
5. 29 C.F.R. § 825.200 (2013); 29 C.F.R. § 825.214 (2013).
6. 29 C.F.R. § 825.104 (2013).
7. 29 C.F.R. § 825.106 (2013).
8. 29 C.F.R. § 825.111(b) (2013).
9. 42 U.S.C. § 12112 (2008).

10. *Id*.
11. N.Y. Exec. Law § 297 (Consol. 1999).
12. Chapter 8 of Title 20 of the Administrative Code of New York.
13. 29 C.F.R. § 825.110 (2013).
14. 29 C.F.R. § 825.110(b)(2) (2013).
15. Chapter 7 of Title 6 of the Rules of New York, at Section 7-4.
16. N.Y. Exec. Law § 292(21) (Consol. 2014).
17. 29 C.F.R. §§ 825.113-115 (2013).
18. 29 C.F.R. § 825.102 (2015).
19. 29 C.F.R. § 825.300(b) (2013).
20. 29 C.F.R. § 825.202 (2013).
21. 29 C.F.R. § 825.205 (2013).
22. 29 C.F.R. § 825.204 (2013).
23. 29 C.F.R. § 825.305 (2013).
24. See 29 C.F.R. pt. 1630 app. § 1630.15(d) (1996); *see also* Stone v. Mount Vernon, 118 F.3d 92 (2d Cir. 1997) (an employer who has not hired any persons with disabilities cannot claim undue hardship based on speculation that if it were to hire several people with disabilities it may not have sufficient staff to perform certain tasks); Bryant v. Better Bus. Bureau of Greater Md., 923 F. Supp. 720, 735 (D. Md. 1996).
25. *See* 42 U.S.C. § 12111(10)(B) (1994); 29 C.F.R. § 1630.2(p)(2) (1997); 29 C.F.R. pt. 1630 app. § 1630.2(p) (1997).

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Starting Your Start-Up on the Right Side of the Law

By Randi Melnick and Arnold H. Pedowitz

It isn't easy to be counsel for a new company because you have to wear many hats and are expected to be knowledgeable across a wide spectrum of legal practice areas. With that, there is plenty of room for mistakes. In this article, we are going to highlight several areas of employment law to which you may want to pay particular attention. Early scrutiny of employment law issues is critical to ensuring that the company does not end up in a mess of legal troubles before it has had a chance to succeed. Employment law questions arise with your first job posting and continue from there. We think you will find that planning and preparation will go a long way towards your goal of achieving success.

Hiring Practices

Beware that you don't violate the law before you have even hired someone! Federal, State and local laws prohibit discrimination on the basis of membership in a protected class including race, sex, age, national origin, disability, religion, pregnancy or sexual preference. It is unlawful to discriminate. Thus, while it is important for you to inform candidates of the company's culture, you need to avoid making any statements that even give the impression that a hiring decision is being made based upon membership in a protected class. Thus, for example, don't tell a candidate that you are looking for a "young energetic addition" or for "a few good men."

During the interview process, steer clear of any questions that elicit information regarding the candidate's class status. Do not comment on a woman's appearance, do not ask about religious observance, and do not ask how he gets along with other ethnic groups. Stick to job-related questions. Remember, qualification for the job is what's important. The further you stray from the straight and narrow, the more possible it is that a problem can ensue. Seemingly friendly questions, such as, "When are you due?" (to a pregnant person), or "What are your work constraints?" (to a woman wearing a Burka) can be innocent. However, if an applicant is thereafter denied the position she may come to think that discriminatory animus factored into the hiring decision. Asking someone if he or she plays sports where you suspect a disability may "force" the person into self-disclosing a problem and result in a claim that he/she was not selected due to the disability.

Background information is something all employers want, but how you get it can cause problems. If you run a Google search or look at Facebook and learn, for example, that the candidate is gay, or a person of color, or old, and if the candidate is not hired, the employer may find itself in the position of having to defend against a claim that sexual preference, race or age discrimination played a role in the hiring decision. A best practice in this area can be to have a third party do the research into a candidate's background and only report back to you on specified legitimate areas of inquiry. The rule here is to keep the company far away from potential areas that can lead to claims of discrimination.

When you are ready to bring an employee on board, each new hire must complete a Form I-9 as promulgated by the Department of Homeland Security, U.S. Citizenship & Immigration Services. It is required for purposes of verifying the identity and employment authorization of every person hired for work in the United States. Federal law also requires that every new hire fill out a W-2 statement which documents an employee's name and social security number, and a Form W-4 which determines how much the employer should be withholding for federal income tax. Employers are subject to significant fines and penalties for failing to maintain these forms for each employee. Remember, while it may be tempting to hire undocumented workers, penalties for doing so can be severe. In addition, don't forget the need to comply with the many state specific laws. For example, New York ("NY") requires employers to provide new hires with a document known as a "wage theft sheet" which sets forth the rate and manner by which the employee is to be paid.

Employers are also required to post several notices in a conspicuous location in the workplace. These notices inform employees of their rights in the workplace under a number of federal and state laws. Employers are subject to hefty fines and penalties for failure to comply with posting requirements. Also, there has been a lot of press recently regarding unpaid interns and whether they are owed retroactive earnings, benefits and overtime. The days of using "volunteer" or "intern" labor are largely over. Whether an intern qualifies for an exemption from the NY minimum wage laws is strictly regulated. It can be tempting to give a child of your friend an intern position, but be careful that you do not inadvertently run afoul of the legal requirements.

Offer Letters and Employment Agreements

One of the most important documents you will provide your new hire is an offer letter or an employment agreement. This document will outline all of the major terms and conditions of employment. The letter should explain the term (duration) of employment, whether it is open ended or for a specified duration, the employee's duties, compensation, and benefits. If you have hired someone to work for a specified term—one year for example—you should state whether the contract will automatically renew or will terminate at the expiration date.

If the employee is eligible for a bonus, be clear as to how it is determined and whether the employee needs to be working on the day it is ultimately paid. You should also include information about the employee's time and leave benefits. Employees should be informed as to how much time off they are entitled to and how they earn it. This is another area where the laws may vary between localities. New York City, for example, recently enacted a paid sick leave requirement which provides that every worker is entitled to five paid sick days per year.

If you have not contractually committed the employee to a fixed term of employment (six months, a year, or some other defined term), then the employment is "at will" which means that employees can be terminated for any reason or no reason so long as it is not based on an illegal reason. To protect the company, your offer letter should state that the employment is at will, unless the company wants to give additional rights to the employee. If the offer letter provides that the employee may only be terminated for cause, then the letter should carefully set forth what circumstances qualify as cause. Depending on what you consider to be in the company's best interests, you may, or may not, wish to outline what the employee will be entitled to at the end of his/her employment such as severance, benefits continuation, etc. All companies should have a comprehensive employee handbook to further outline the employer's policies and practices. The more detailed, the better, and employers should take great care to follow their own policies and apply the rules evenly to all employees.

Before leaving this area, we want to remind you of the need to have a writing, either in the employment letter or in a separate document, that provides for the confidential treatment of the company's proprietary information, as well as any non-solicitation or non-competition provisions that are deemed necessary to protect the company. NY public policy strongly disfavors non-competition provisions; you must be careful to draft them narrowly or you run the risk of their being declared unenforceable or invalid.

Wage and Hour Laws

All employees must make at least "minimum wage." Effective December 31, 2014, NY increased the minimum wage to $8.75 per hour. That is higher than the federal minimum wage. Local laws may also provide for amounts over and above the state minimum wage, so it is important that you double check the rate that will apply to your company. Compensation in the form of a bonus or equity does not excuse a failure to pay the minimum wage. Note that Governor Cuomo recently signed a law increasing the minimum wage for tipped workers, such as restaurant servers or housekeeping staff, from $5.00 per hour to $7.50 to help insure that, together with their tips, they would at least be earning minimum wage.

NY is protective of its workers. Wages must be paid promptly. Non-exempt employees, that is, those entitled to overtime compensation, must be paid no less frequently than bi-weekly. In the event that the employer makes an overpayment, NY Labor Law does not permit the employer to deduct from the employee's wages. While the employee may agree, in writing, to repay the money, the employer is not entitled to take self-help and must institute a civil action to recoup the funds. Employers are prohibited from retaliating against an employee for electing not to authorize the repayment.

Because it is a complicated area, employers often err when it comes to determining whether a particular employee qualifies for receiving overtime pay or not. This can be very expensive error for an employer. The wage and hour laws categorize employees as either being exempt and non-exempt. Non-exempt employees qualify for overtime and have to be paid a premium of time and one-half for all hours worked in excess of 40 per week. For example, if a non-exempt employee works 50 hour per week at $10 per hour, he/she would earn $10 per hour for 40 hours and $15 per hour for 10 hours. The tricky part, and where most employers get jammed up, is determining who is exempt and who is not.

NY generally mimics the U.S. Fair Labor Standards Act ("FLSA") in determining coverage. Under FLSA, some workers are specifically excluded from FLSA coverage because they are covered by another law, such as the Railway Labor Act, which covers railroad workers.

Whether a particular employee is exempt or not requires looking at the relevant statutes and case law interpreting them. It is critical that you make an informed decision on overtime eligibility, *vel non*, as a vehicle for avoiding liability. The job title or job description for an employee is not determinative of whether he/she qualifies for overtime. Rather, you must evaluate the actual duties and responsibilities of the employee.

There are three typical categories of jobs that qualify as being exempt and therefore do not require the payment of overtime: executive, learned professional, and administrative. If the employee performs in accordance with the description below, he or she will likely be exempt from overtime compensation.

- **Executive:** Regularly supervises two or more employees; has management responsibilities as a primary duty; and has genuine input into the job status of other employees.
- **Learned Professional:** Positions that are predominantly intellectual or require specialized education and involve the exercise of discretion and judgment.
- **Administrative:** Office or non-manual work which is directly related to management or business op-

erations of the employer or the employer's customers, and a primary component of which involves the exercise of independent judgment and discretion about matters of significance.

Determining whether an employee is exempt or non-exempt is necessarily a fact specific task and the Department of Labor has issued numerous regulations and fact sheets to assist employers with correctly categorizing their workforce. The law is somewhat unforgiving towards mistakes in this area, allowing for liquidated damages at both the state and federal level in an amount equal to the wages owed, attorney's fees, and interest. Thus, it is time well spent to thoroughly consider how to categorize your employees.

Classification: Employee vs. Independent Contractor

Despite what an employer or a worker may prefer, it is not the decision of either party as to whether a particular worker is functioning as an employee or as an independent contractor; it does not matter what a contract says. The decision is dictated by federal and state law. Much like the difference between exempt and non-exempt employees, determining whether an individual is an employee or an independent contractor requires a fact-specific analysis. A key distinction between an employee and an independent contractor is the level of control maintained by the employee.

If an employer tells the worker when, where and how to do his or her duties, chances are that the worker is an employee. Employee relationships are likely to be found where the employer provides fringe benefits, reimburses for expenses, and places restrictions on the individual's ability to perform services for competitive businesses. By contrast, some hallmarks of independent contractor status are: the workers are in business for themselves; they make their services available to the public; and they operate without supervision, direction or control. Independent contractors are likely to make their own schedules, advertise their services, and use their own tools and supplies.

The categorization of an individual as an employee or independent contractor has widespread implications for employers. For starters, employers have different tax requirements for employees and independent contractors. Second, independent contractors are not subject to wage and hour laws so if you have mischaracterized someone as an independent contractor when he or she should have been an employee, you could find yourself liable for unemployment insurance payments and penalties, workers' compensation insurance payments and penalties, wages, overtime compensation, damages, etc. In order to avoid making this mistake, carefully evaluate the tasks, scope, and oversight that the employee will be subject to. The offer letter or employment agreement should specifically outline the terms of the relationship created in order to avoid confusion or a misunderstanding of the expectations.

Conclusion

As you can see, many things need to be considered before bringing on a new hire. So do your homework and consider consulting an employment lawyer with your questions. Some law firms even offer packages that are targeted specifically to help new businesses get started on the right track. Whether you go it alone or hire outside counsel for direction, employment law issues will arise in every business and arming yourself with the information you need to know before you hire will protect you from having to be in a defensive position later on.

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Litigation Trends Under the Fair Credit Reporting Act

By Ian G. Nanos and Maxine Adams

Many employers perform routine background checks. After all, a background check can be a useful tool. It can be a matter of exercising sufficient due diligence, allowing the employer to discover potentially problematic issues in an employee's or applicant's past or to identify whether the employee or applicant provided the employer with potentially falsified information. In some industries, performing a background check can even be a matter of legal compliance.

The Fair Credit Reporting Act ("FCRA") acknowledges the usefulness of background checks, but the statute—as well as the various mini-FCRA statutes that have been enacted in New York and other states—also establishes specific requirements and limitations on the use of background checks.

Employers considering whether to perform a background check, therefore, should be aware of the obligations and requirements set forth in the FCRA and its state counterparts. Equally important—employers should be cognizant of the current trends in FCRA lawsuits.

Simply put, the popularity of FCRA claims is on the rise and, as discussed below, the potential exposure in litigation can be significant. Between 2013 and 2014, the amount of employment-related FCRA class-action lawsuits tripled, with upwards of 30 claims being filed nationwide. Over this past the summer alone, 12 FCRA employment-related claims were filed against employers. Make no mistake, this is a growing trend of increased FCRA litigation.

Understanding the FCRA

The FCRA covers, in broad brush strokes, "any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for… employment purposes." Further, a consumer reporting agency is defined, in similarly expansive terms, as "any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

The critical component: Employers that elect to use consumer reports or investigative consumer reports to obtain information about prospective and current employees are obligated to follow the procedural requirements set forth in the FCRA.

As a general rule, before obtaining a consumer report, the FCRA mandates that the employer is to provide the employee/applicant with written disclosure that clearly and conspicuously indicates that the employer may obtain a consumer report and might use the information for decisions about his or her employment/application. Additionally, the FCRA requires that employers receive written permission from the employee/applicant prior to obtaining a consumer report from a Consumer Reporting Agency ("CRA"). If an employer would like to obtain an investigative consumer report, the employer is also required to allow the employee or applicant to request information regarding the "nature and scope" of the investigation and the employer must respond in writing to any requests within five days.

Once an employer receives a report from a CRA, the FCRA imposes additional requirements. Indeed, employers are expected to provide the employee/applicant with documentation (a copy of the consumer report and a Summary of Rights) and allow the individual to discuss the results of the report with the employer prior to taking any adverse action as a result of the information contained in the report.

Before taking an adverse employment action based on the results from a CRA, the employer must provide the applicant or employee with a notice that includes a copy of the consumer report relied upon to make the decision and "A Summary of Your Rights Under the Fair Credit Reporting Act," which employers should receive from the CRA used to obtain the report. If, after all of these steps have been followed, the employer choses to take an adverse action against the employee or applicant, the FCRA requires that the employer provide the employee/applicant with an adverse action notice, indicating that the adverse action was taken because of information in the report, and which includes: (1) "the name, address, and telephone number of the CRA…that furnished the report to the person;" (2) a statement that the CRA did not make the adverse employment decision and the specific reasons for the action being taken; (3) a statement including the employee/applicant's right to (a) obtain a free disclosure of his or her report from the CRA if he or she makes a request for disclosure within 60 days and (b) the employee/applicant's right to dispute directly with the CRA regarding the accuracy of the information contained in the report.

The FCRA does include a notable exclusion to the advance notice and consent requirements. Specifically, the statute's advance notice and consent requirements do not apply to an employer's investigation of "suspected misconduct relating to employment" or where the investigation pertains to "compliance with Federal, State or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer." Where this exclusion is applicable, the employer's obligation is limited to providing disclosure to the employee *only after* having taken an adverse action based in whole or in part on the background check. This is an incredibly useful exception in the employment context, but it will generally not apply to routine background checks.

An employer that is found to have willfully failed to comply with the FCRA can face damages including between $100–$1,000 in actual or statutory damages for each violation as well as punitive damages. More importantly, the FCRA incentivizes the plaintiffs' bar to pursue FCRA litigation by providing the successful attorney with the right to recover attorney fees and costs.

Although each individual violation may not make employers wary, the risk of facing steep demands for attorneys' fees and costs, coupled with the growing threat of FCRA cases presented in a class action posture, have forced many employers to agree to significant settlements. A review of recent cases shows that employers routinely settle such claims for amounts in excess of several million dollars.

A Review of Recent FCRA Litigations

A preliminary review of FCRA litigations reveal several important takeaways. First, there is a swelling tide in FCRA litigation and the trend does not appear to be subsiding. Second, the plaintiffs' bar has gone after—and continues to pursue—FCRA litigation across multiple industries. Third, these challenges are not limited to a single practice; rather, plaintiffs' counsel may seek to challenge any number of employer practices under the FCRA. Fourth, these cases can be expensive to defend.

Many Industries Are in the Cross Hairs

In the last year, employers have had to defend against FCRA litigation across various sectors, including retail, hospitality, manufacturing, finance and transportation. Exemplary cases on active dockets include:

- *Paramo v. Genwest Transp., LLC and Gencom Transp., Inc.*, Case No. 8:15-cv-00293 (S.D.C.A. 2015)
- *Rivera v. Pizza Hut of America Inc., et al.*, 1:15-cv-00308-cv-06388 (S.D.N.Y. 2015)
- *Castro v. Michaels Stores Inc.*, Case No. 3:15-cv-00276 (N.D. Tx. 2015)
- *Sweet et al. v. LinkedIn Corp.*, 5:14-cv-04531 (N.D. Cal. 2014)
- *Gezahegne v. Whole Foods Market*, Case No. 4:14-cv-00592 (N.D. Cal. 2014)
- *Camacho v. ESA Management, LLC*, Case No. 14-cv-1089 (S.D. Cal. 2014)
- *Saye v. CSK Auto, Inc. d/b/a O'Reilly Auto Parts, et al.*, Case No. 2:14-cv-3470 (C.D. Cal. 2014)

Challenges Are Not Limited to Any Single Practice

Another key issue in this trend is that plaintiffs have asserted a wide-ranging list of challenges, indicating not only that background check practices are under scrutiny, but that the plaintiffs' bar is testing the courts' willingness to hear (and employers' willingness to defend) FCRA cases in all shapes and colors. As discussed above, the FCRA generally requires employers to provide compliant notices and obtain proper authorization before requesting a background check. Not surprisingly, much of the recent class action claims are directed at this provision, challenging whether the employer met the requirement to provide "a clear and conspicuous disclosure…before the report is procured or caused to be procured, in a document that consists solely of the disclosure."

For example, some recent allegations focus on the timing of the disclosure, alleging that the employer did not provide the advance notice "before the report is procured." In other instances, the challenges are directed at the form of the disclosure. The most common of these form-based challenges allege that the employer did not provide the disclosure on a stand-alone document, that the disclosure was not sufficiently "clear and conspicuous" or that the disclosure included extraneous information, such as a general release of liability, along with the authorization.

A variation on these challenges is content-based and, in those cases, the plaintiff alleges that the employer's disclosure did not contain all of the requisite information. Indeed, the FCRA requires that all employers provide the employee/applicant with a summary of rights before conducting a background check. This summary of rights information must include a description of the employee's right to obtain a copy of the consumer report, the right to dispute any information in the file of the consumer, the right to request additional disclosures concerning the nature and scope of the investigation for the consumer report, and a description of how to obtain a credit score from a consumer reporting agency.

Whether the allegation is timing, form or content-based, recent case filings show that plaintiffs are challenging practices associated with both traditional hard-copy applications as well as on-line applications.

Two filings in January of this year demonstrate both the breadth of potentially challenged practices as well as the potential scope of at-issue conduct that may be challenged in an FCRA litigation. For example, in *Rivera v. Pizza Hut of America Inc., et al.*, the plaintiff alleged that Pizza Hut failed to provide "clear and conspicuous" disclosure because (1) the authorization provision included a liability release and (2) the authorization appeared on the same page of the employment application that requests the applicant's educational background, employment history, and personal reference. Highlighting the potential scope of an FCRA lawsuit, the complaint indicated that the potential class should cover any individual that applied for employment at any of Pizza Hut's 6,000 locations across the United States since January 1, 2013.

Similar to the challenge in *Pizza Hut*, the plaintiff in *Castro v. Michaels Stores Inc.* also focused on the alleged failure to provide "clear and conspicuous disclosure language." Unlike *Pizza Hut,* however, the *Castro* complaint takes issue with the retailer's disclosures in connection with online applications. In particular, the online application included a section regarding "Disclosure," "State Law Notices," and "Authorizations." This section of the online application contained state-specific disclosure information and further discussed authorizations that would remain effective during employment. Directly following this section, the application requested that the applicant release Michaels and all third parties from any liability while also authorizing a background check. In that instance, the plaintiff's challenge focused on the aggregation of disclosures and other extraneous information in a manner that, according to the plaintiff, rendered the information *un*clear and *in*conspicuous. Likewise, *Raini Burnside v. Michael Stores, Inc.*, Case No. 6:15-cv-3010 (W.D. Mo. 2015), another action filed against *Michaels,* also contested the retailer's online application materials for failing to provide requisite disclosures in a standalone document. In yet another action, *Graham v. Michaels Stores Inc.*, Case No. 2:14-cv-07563 (D. N.J. 2014), a class action claim filed against Michaels based on the FCRA and the New Jersey Fair Credit Reporting Act, plaintiffs have challenged both electronic and paper employment applications.

Michaels, however, has decided to fight back and has filed a motion to dismiss (which is still pending) in the *Graham* case. In its briefing, *Michaels* argues that the plaintiff failed to state a claim because the plaintiff agreed to the terms and conditions of the online application by clicking "I agree" before completing the application. In addition, Michaels points out that the plaintiff was not harmed as result of the background check because she was hired and subsequently left her position at Michaels by voluntarily quitting her position.

In another recent filing, this time a class action against the transportation company Genwest/Gencom Transportation LLC, the plaintiffs allege that, in addition to relevant California laws, the employer's authorization and disclosure statements improperly included an authorization for the employer to also obtain additional personal information, such as authorization to conduct drug and alcohol tests. As a second cause of action, the plaintiff alleged that the employer failed to provide adequate disclosures regarding the applicant's rights. In particular, the complaint alleges that the written disclosure statement failed to inform applicants of their right to request additional disclosures concerning the nature and scope of the investigation for the consumer report. Moreover, the plaintiff alleges that Genwest/Gencom Transportation LLC was required—but failed—to provide a separate document disclosing the required applicant rights.

These cases—active on current dockets around the country—shed light on the procedural requirements of the FCRA and litigation trends directed at the sufficiency of an employer's background check and application process.

Beyond these timing, form and content-based challenges, a recent filing against *LinkedIn Corp.* demonstrates efforts to expand the application of the FCRA. There, in *Sweet, et al. v. LinkedIn Corp.*, the complaint alleged that the company's practice of providing "reference reports" to members that subscribe to LinkedIn's program for a fee, brought LinkedIn within the coverage of the FCRA as a CRA. Specifically, the complaint contended that LinkedIn was a consumer reporting agency because LinkedIn collected and distributed consumer information to third parties and the reference reports "bear on a consumer's character, general reputation, mode of living, or personal characteristics, and/or other factors listed in 15 U.S.C. § 1681a(d)." Although LinkedIn does not portray itself as a traditional consumer reporting agency, the plaintiffs intended to prove otherwise.

According to the complaint, LinkedIn violated the FCRA because it should have provided FCRA compliant disclosure and followed the reporting obligations applicable to CRAs. For example, a CRA cannot provide a consumer report for employment purposes unless the person obtaining the report certifies that he or she will comply with § 1681(b) of the FCRA, which outlines the permissible uses of consumer reports. Additionally, the CRA is responsible for identifying each prospective user of the consumer report and verify that the purpose of the report is valid. Moreover, the plaintiffs alleged that LinkedIn's practice necessarily failed to include the safeguards established within the FCRA because the veracity of the information is dependent on LinkedIn members to accurately provide and update information. According to the plaintiffs, the lack of safeguards violates § 1681e of the FCRA because LinkedIn does not follow "reasonable procedures" to assure the information is accurate before disclosing the information to paying members.

LinkedIn moved to dismiss the complaint arguing that the plaintiffs' interpretation of the statute was too broad and, moreover, that it was inconsistent with the facts. A federal judge agreed and dismissed the complaint. According to the court, these reference searches could not be considered "consumer reports" under the law—and LinkedIn was not acting as a CRA—because, in part, the plaintiffs had voluntarily provided their information to LinkedIn with the intention of it being published online. (The FCRA excludes from the definition of a consumer report a report that contains "information solely as to transactions or experiences between the consumer and the person making the report.") Further, the allegations suggested that LinkedIn "gathers the information about the employment histories of the subjects of the Reference Searches not to make consumer reports but to 'carry out consumers' information-sharing objectives.'" This may not be the end of the matter, however, as the court granted the plaintiffs the opportunity to file an amended complaint.

The *LinkedIn* case should nevertheless serve as a warning of the growing threat of FCRA litigation and the likelihood of further creative challenges from the plaintiffs' bar. At the same time, this case should serve as a reminder to employers of a fact that is already well-known: The broad wording of the statute pertains to "any written, oral or other communication of any information *by a consumer reporting agency…"* and the equally expansive (and potentially growing) definition of a CRA can apply in numerous situations that extend beyond the traditional notion of a consumer reporting agency. When dealing with a CRA, the FCRA requires that employers obtain the appropriate employee authorization, disclose the applicant's rights, and follow the required procedure before and after taken an adverse employment action based on the findings of a consumer report.

Employers will need to continue to be wary when retaining services to conduct background inquiries, including, perhaps, services like those challenged in the *LinkedIn* case. As the courts continue to develop the law in the area of consumer reports, it is important to confer with legal representation to ensure compliance

Litigating FCRA Cases Can Be Expensive

It is no secret that in 2015, the cost of defending litigation is of paramount concern for in-house counsel. The litigation trend in FCRA cases reveals that FCRA claims carry the threat of significant verdicts and often result in costly settlements. For example, in many of the class actions discussed above, the plaintiffs sought statutory damages between $100–$1,000 for each class member, punitive damages, and attorney's fees. Those damages can add up. As noted above concerning the *Pizza Hut* case, the alleged violations can be multiplied to cover all applicants across geographic regions during extended time-periods.

The sticker prices on several recently settled cases should help drive this point home:

- *Goode et al. v. LexisNexis Risk & Information Analytics Group*, Case No 2:11-cv-02950, (E.D. Pa. 2014). (settled for $2.38 million).
- *Singleton v. Domino's Pizza*, No. DKC 11-1823 (D. Md. 2012) (settled in 2014 for $2.5 million).
- *Marcum v. Dolgencorp., Inc.* (Dollar General) 3:12-cv-00108 (E.D. Va. 2012) (settled in 2014 for $4.08 million).
- *Ellis v. Swift Transportation Co. of Arizona*, 3:13-cv-00473 (E.D. Va. 2013) (settled in 2014 for $4.4 million).
- *Knights v. Publix Super Mkts., Inc.*, No. 3:14-cv-0072 (M.D. Tenn. 2014) (settled in 2014 for $6.8 million).

The FCRA and the Growing Trend of FCRA Litigation Should Be on Your Radar

The spate of recent case filings emphasizes the importance of thoughtfully considering the benefits and risks of performing background checks and, if doing so, ensuring that such background checks are fully compliant with the FCRA as well as any applicable state-specific mini-FCRA. With a careful consideration of the FCRA's requirements, employers can take steps to appropriately conduct background checks and can avoid facing costly class actions.

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ACA Pay-or-Play Penalties Increase Stakes for Independent Contractor Misclassification

By Katharine Parker

It is no secret that traditional work models have changed. The workforce is more fluid than ever before. The nation's contingent workforce, comprised of independent contractors, consultants, temporary workers and freelancers, has increased exponentially. Recent studies indicate that nearly a third of the U.S. workforce is comprised of independent contractors.[1]

Use of contingent workers offers businesses flexibility to quickly adjust to changing operational needs and volumes of work, access to expertise that may be lacking within their regular workforce, and potentially cost savings in terms of lower tax, benefits and administrative expenses. However, the increasing risks of misclassifying workers as independent contractors require businesses to more heavily scrutinize processes for engaging contingent workers.

Employers have long faced exposure under federal and state wage laws and tax laws in connection with misclassification. However, new laws, most notably the Affordable Care Act ("ACA"), dramatically increase the monetary penalties that could be imposed on a business for misclassifying just a handful of workers as independent contractors. Whereas in the past employers could exclude categories of workers from a health care plan so long as the exclusion was not discriminatory and substantially mitigate the risk of misclassification with respect to health benefits, new ACA mandates have eliminated this option.[2]

Additionally, Federal and state department of labor scrutiny of independent contractor arrangements has continued to increase. Over the last few years, the U.S. Department of Labor ("DOL") has signed agreements to reduce the misclassification of employees as independent contractors with 19 states, including Alabama, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New York, Utah, Washington, and Wisconsin.[3] Last year alone, the DOL awarded $10.2 million in grants to 19 states, including New York, to improve worker misclassification detection and enforcement initiatives in the states' unemployment insurance programs.[4] Increased enforcement efforts have led to significant recoveries for workers as well as government coffers. New York Governor Andrew Cuomo recently announced that recoveries from wage cases resolved in 2014 by the Division of Labor Standards amounted to $30.2 million disbursed to 27,000 workers.[5]

Employee or Independent Contractor?

Most employers do not set out to misclassify a worker. Yet, misclassifications can occur because there is no single test for determining whether a worker is an employee, and due to the nature of the test themselves, it is sometimes difficult to arrive at a clear answer. State unemployment and workers' compensation laws tend to be the strictest in terms of allowing an independent contractor designation, whereas other laws are more lenient and look to a business's right to control a worker. The common law "right to control" test[6] applies when considering employee status under Title VII, the ADA, the ADEA, and ERISA. The broader "economic realities" test[7] applies when considering employee status under the FLSA and the FMLA. Under other laws, a "hybrid" test to determine a worker's classification may be applied.[8] Though these tests consider different factors and produce varying results, an employer's control over the method and means of work is always a key consideration in determining employee status. Other factors common to the tests include:

- Whether the work is part of the regular business of the hiring party;
- The skills required to perform the work;
- The source of the instrumentalities and tools used to complete the work;
- The method of payment; and
- The duration of the working relationship.

Of course, due to the complexities of applying different tests, and the risks associated with treating a worker as an employee for some purposes and an independent contractor for other purposes, many companies elect to apply a stricter test when deciding whether to engage someone as an independent contractor.

The ACA regulations make clear that the common law "right to control" test determines who is an employee for purposes of the ACA. However, because the test is a multi-factor one, companies must be careful in their application of the test and mindful of other tests as well to avoid exposing themselves to ACA penalties, as discussed below.

The ACA and the Pay-or-Play Penalties

The ACA requires employers with 100 or more "full-time equivalent" ("FTE") employees to offer insurance

coverage to at least 70% of their full-time workers (those working 30 or more hours a week) and their children under age 26, starting in 2015, and 95% by 2016. Employers with between 50 and 99 FTEs have until 2016 to start offering insurance to their full-time employees if there is no reduction in the workforce during 2014 and no material change in benefits.[9]

If an employer fails to offer "minimum essential coverage" to at least 95% of its full-time employees (70% in 2015) and their dependents and any full-time employee receives a subsidy to purchase health coverage through an ACA exchange, then the employer is subject to the "A Penalty," which is $2,000 per year for each of the employer's full-time employees (including those that were offered coverage), excluding the first 30 employees (80 employees in 2015).[10]

Even if an employer offers minimum essential coverage to its employees, it may still be liable for the "B Penalty" if the coverage it offers is either "unaffordable"[11] or it does not provide "minimum value,"[12] and a full-time employee obtains subsidized coverage on an ACA exchange. The "B Penalty" is $3,000 for each full-time employee who receives subsidized health coverage on an exchange. Thus, unlike the "A Penalty," which is assessed based on the total number of full-time employees working in a particular EIN, the "B Penalty" imposes liability on employers based only on the number of full-time employees who actually obtain subsidized coverage on an exchange.

Misclassification: An Example

Misclassifying workers as independent contractors and failing to provide them with "minimum essential coverage" (the "A Penalty") can have a detrimental effect on companies. For example, a company with 1,000 full-time employees and 55 independent contractors offers affordable coverage to its 1,000 full-time employees, but not to its 55 independent contractors. After a three-year audit, the IRS deems the 55 independent contractors to be common law employees, who should have been offered health coverage. Assuming at least one full-time independent contractor receives subsidized coverage on an exchange, the penalty assessed is $6,150,000 (1,055 employees—30 employees in 2016 x $2,000 x 3 years = $6,150,000). In addition to this penalty, the employer would still have paid for the coverage it offered to its 1,000 full-time employees during the three-year time period. Moreover, the employer could also be liable for back wages and unemployment insurance premiums. In contrast, the "B Penalty," which applies when an employer fails to offer affordable, "minimum value" coverage to its full-time employees, exposes the employer to significantly less liability. For example, a company with 1,000 full-time employees and 50 independent contractors offers affordable coverage to its 1,000 full-time employees, but not to its 50 independent contractors. In this example, the employer is not subject to the "A Penalty" because it offers coverage to more than 95% of its employees (1,050 x 95% = 998). If all of the independent contractors receive subsidized coverage through an exchange, then the "B Penalty" is $150,000 for each year the employer violates the ACA (50 x $3,000 = $150,000).

King v. Burwell and the Future of Pay-or-Play

In *King v. Burwell*, now pending before the U.S. Supreme Court, the Court will determine whether health insurance subsidies are available to individuals purchasing insurance through the federal exchange, rather than through the state exchanges.[13] The outcome will determine whether the A or B Penalties can be assessed in the 34 states where federal exchanges operate. Pursuant to the ACA, states are required to create "exchanges"—i.e., marketplaces—for their residents to purchase health insurance. These exchanges are intended to provide health coverage for individuals who cannot obtain insurance through their employers or who cannot qualify for Medicare or Medicaid. According to the ACA, if a state refuses to create an exchange, as 34 states have,[14] then the federal government will provide the exchange.

The ACA provides a tax credit for individuals who need financial assistance to purchase health insurance on the exchanges. The Obama Administration has stated that the tax credits are available for purchases under both state exchanges and the Federal exchange. To date, approximately 5.4 million individuals have purchased health insurance through the federal exchange and nearly 90% of them have received a subsidy.[15] Notably, many of these individuals could not afford health insurance without the subsidy.

The challengers in *King* argue that the subsidies are only available to individuals who purchase health insurance on state exchanges. Specifically, the ACA establishes a formula for determining the tax credits, which applies to insurance that is purchased through an exchange "established by the State."[16] Because the formula does not mention the Federal exchange, the challengers argue that the tax credit is available only to individuals who purchase health insurance through the state exchanges.

Significantly, without the subsidy, many individuals will not be subject to the individual mandate to buy health insurance. Further, because the pay-or-play penalties only penalize employers if at least one full-time employee obtains subsidized coverage on an exchange, *King* could have an enormous impact on employers in states that have not established an exchange. Namely, if employees in these states do not obtain subsidies to purchase coverage on state exchanges (because there is no state exchange), based on the plain language of the ACA, employers are not subject to the pay-or-play penalties.

Thus, the outcome in *King v. Burwell* will be important for many businesses in determining exposure due to misclassification of workers.

Takeaway and Best Practices

The key to reducing the risk of incurring the ACA's penalties (and all of the other liabilities that come along with misclassification) is to properly classify workers by having appropriate processes in place at the time of their engagement. Businesses should consider centralizing decision-making regarding engagement of contractors to ensure consistent and proper application of the rules. They should also consider training or re-training individuals responsible for making decisions about classification to ensure they are up to date on developing legal standards. Finally, employers should review their independent contractor agreements and guidelines to ensure they do not contain provisions that indicate a worker is subject to the control of the company rather than simply a vendor in businesses for himself/herself.

Endnotes

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3. *U.S. Labor Department and Wisconsin Department of Workforce Development Sign Agreement to Reduce Misclassification of Employees*, U.S. Dep't of Labor (Jan. 20, 2015), http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20150120.xml.
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6. Lerohl v. Friends of Minn. Sinfonia, 322 F.3d 486, 489 (8th Cir. 2003).
7. *See* United States v. Silk, 331 U.S. 704, 716 (1947).
8. *M*uhammad v. Dallas Cnty. Cmty. Supervision & Corr. Dep't, 479 F.3d 377, 380 (5th Cir. 2007).
9. Shared Responsibility for Employers Regarding Health Coverage, 79 Fed. Reg. 8544 (Feb. 12, 2014) (to be codified at 26 C.F.R. pts. 1, 54, and 301) ("Final Rule").
10. 26 U.S.C. § 4980H(a) (2002). This is the so-called "A Penalty." Both the A Penalty and the B Penalty, 26 U.S.C. § 4980H(b), are assessed monthly and on an EIN basis. Large employers with a high concentration of independent contractors employed at a specific EIN could trigger the A Penalty at that EIN, even if the percentage of independent contractors for the entire workforce is less than 70% (or 95% starting in 2016).
11. Under the affordability safe harbor rules set forth in the Final Rule, coverage is deemed affordable if the lowest cost self-only coverage that provides minimum value does not exceed 9.5% of the employee's W-2 wages, rate of pay, or the federal poverty level.
12. A plan provides "minimum value" if the plan pays for at least 60% of covered benefits on an actuarial basis.
13. King v. Burwell, 759 F.3d 358, 364 (4th Cir. 2014).
14. *State Health Insurance Exchange: State Run Exchanges*, Obamacare Facts, http://obamacarefacts.com/state-health-insurance-exchange/ (last visited Mar. 2, 2015).
15. *Enrollment in the Health Insurance Marketplace Totals Over 8 Million People*, U.S. Dep't of Health and Human Servs. (May 1, 2014), http://www.hhs.gov/news/press/2014pres/05/20140501a.html. As of March 2015, some 11.4 million Americans have enrolled in coverage through the ACA marketplaces, 87% of them doing so with the support of a subsidy. *See also By the Numbers: Open Enrollment for Health Insurance*, U.S. Dep't of Health and Human Servs., http://www.hhs.gov/healthcare/facts/factsheets/2015/02/open-enrollment-by-the-numbers.html (last visited Mar. 2, 2015).
16. 26 U.S.C. § 36B (2012).

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Assessing the Financial Impact of the Misappropriation of Trade Secrets

By Glenn C. Sheets

This article begins with the understanding that the company has reviewed and adequately protected its proprietary and confidential trade secrets by limiting their access to certain employees. These same employees have signed employment agreements written to protect the company from the unauthorized use of the protected information. However, should any of these employees violate the provisions of such agreements, the company will likely realize a significant financial impact to its business. The same is true for agreements with third parties that restrict their disclosure and the use of proprietary and confidential trade secrets.

Once confronted with the knowledge that the company's trade secrets may have been misappropriated, counsel will often need to offer assistance when assessing the magnitude of the actual or potential financial impact to the business. Once the magnitude of the impact is understood, counsel will be well-prepared to recommend the appropriate course of action to minimize and recover damages sustained from the theft of the company's trade secrets.

Potential Damage Recoveries

The Uniform Trade Secrets Act recognizes that a trade secret "…derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use…"[1] In addition to injunctive relief, federal and state case law generally allow the owner of the trade secret to recover the damage it has sustained or to receive the economic benefit realized by the party who misappropriated or inappropriately received the trade secrets.

Assessing Damages to the Owner of the Trade Secret

To assess the magnitude of damages resulting from the misappropriation of a company's trade secret, it is helpful to have an understanding of the various ways in which a company may be impacted. Once the type and magnitude of damage is identified, the company must be able to prove the fact of these damages, as well as how they are causally connected to the actions of the party inappropriately utilizing the trade secret.

On its most basic level, a company may realize lost revenue (sales) and/or increased costs (expenses) resulting from another party exploiting the company's trade secret. When combined, the net impact results in lost incremental profits, both actually sustained in the past and reasonably expected in the future. Generally the damage is measured at its net present value on a specific date, which is the result of applying a reasonable rate of return for being deprived the economic benefit of realizing those lost profits over the relevant time period.

When making inquiries of your client, it is important to consider the financial impact on an *incremental* basis. That is, for the lost sales, what specific costs would be expended to have produced the products or services ("units") that were diverted? There can be significant differences (either higher or lower) between a company's average costs to produce all units sold before the misappropriation when compared to the actual cost to produce just the units lost. Hence, a company's average profit margin on all units sold before the loss of its trade secret may be a misleading measure of the actual profit margin on those units lost once "the secret's out." As an example, certain fixed costs are allocated to all units produced regardless of the volume sold, e.g., rent, depreciation, salaried personnel, allocated general and administrative costs, etc. These costs may not be incrementally incurred to produce the units lost. Conversely, perhaps a new piece of equipment, higher material costs, or a more expensive labor classification would have been required to produce the lost units.

The following is a brief overview of the different ways a company may be impacted when another party inappropriately uses its trade secret.

- Loss sales volumes (direct)—diverted sales of either products or services.
- Loss sales volumes (indirect or collateral)—related products or services lost resulting from the loss of direct unit sales, e.g., lids sold along with a beverage container, replacement parts, extended warranty or service contracts.
- Loss of sales price or price erosion due to the company having to lower its prices to maintain or minimize the loss of units sold.
- Additional costs to maintain or minimize the loss of units sold, e.g., offering complementary products or services, marketing or advertising costs, and other costs to remediate the theft of the trade secret.
- Increased borrowing costs or cost of capital to fund the losses incurred.
- Loss of business opportunities, e.g., the trade secret allowed for ease of planned entry of ancillary or collateral product or service lines.
- Loss of goodwill or diminution in company value, e.g., loss of product or service leader status, loss of

prospective revenue and profit targets, loss of price premiums or lower cost status.

A derivative of measuring the incremental lost profits associated with the trade secret involves establishing its valuation at the time of the misappropriation. Counsel may initially wish to inquire whether the trade secret has been considered for sale by the company which may shed light on its perceived value to an outside party. Inquiries to the company's CFO, Controller, or tax personnel may be helpful if the trade secret has been considered for financial or tax reporting purposes. If the company has corporate development personnel, they may be able to give counsel an idea of the magnitude of value based upon similar transactions observed or their knowledge of the relevant market for the trade secret. Additionally, a preliminary consultation with an industry expert or valuation financial expert may give guidance as to the trade secret's expected current value.

Another measure of the financial impact to the company is the cost to develop and maintain the trade secret. Generally, this is viewed as establishing a floor for damages as it is recouping the investment in the asset, but not necessarily the current value at the time the trade secret was misappropriated. These costs may be substantiated by business records (hopefully prepared contemporaneous to the development and maintenance of the trade secret). Additionally, the trade secret may have been acquired so there are business records that establish the price paid or reasonably allocated to this asset.

Assessing the Economic Benefit Realized by the Party Who Misappropriated or Inappropriately Received the Trade Secret

Generally, federal and state case law supports that the owner of a trade secret may be awarded the economic benefit realized by the other party for its unauthorized use of the trade secret to the extent it does not duplicate the damages determined to the owner as discussed above. It has been mostly supported by case law that the owner of the trade secret need only establish the reasonable level of sales, or value derived by the other party, as the measurement of the amount to be disgorged. It is then the other party's burden to prove that the economic benefit it received was not related to the misappropriated trade secret and, not at the amount alleged by the owner of the trade secret. A typical example is that the owner of the trade secret presents proof of the likely realized sales by the other party. The other party then must demonstrate that its profits on those sales were lower than the alleged sales price and that the sales themselves were not related to the trade secret in its possession.

It is unlikely that the company's business people will have direct knowledge of the other party's specific means of exploiting the trade secret, or its actual or expected incremental profits at the time of the misappropriation. If at this point injunctive relief was not granted (or granted in part), counsel may be able to assess the magnitude of the amount to be disgorged from the other party through inquires with its business people and outside advisors. Similar to assessing the economic impact to the company, the amount determined to be disgorged from the other party should be measured at its net present value on a specific date. Below are several points of inquiry that may be pursued by counsel.

The company's sales personnel may have information and insight as to:

- Specific customers lost; cancelled or revised orders; or reduced sales volumes.
  - Loss on new business quotes and bids; no requests for proposals or quotes from known customers; loss of joint venture or collaborative partner opportunities.
  - Unexplained deviations observed from internally prepared sales forecast or projections.
  - Product or services promoted by the other party through advertising, trade show promotions, or industry publications.
  - Public information regarding product or service announcements, presentations, trade show promotion materials or contract bids.
- With the possible assistance of the company's finance, accounting, or corporate development personnel, perform a general internet search including publicly filed financial reporting disclosures made by the offending party. This information may assist with determining the other party's business expectations; sales volumes and related net income; gross margin and operating profit percentages on sales; and capital investments.
- With the assistance of the company's IT personnel or an outside computer forensic consultant, review emails and files on the company's server or acquired from the hard drives of the suspected parties' computers who misappropriated the trade secrets. Besides the value of a "smoking gun" email, many times valuable financial information may be found that will give counsel insight to the likely magnitude of the offending party's expected economic benefits to be derived from exploiting the trade secret. Below are several types of information that may be useful to counsel.
  - Customer lists; product and service pricing information; and historical sales information copied or taken.
  - Sales forecast or projections prepared by the offending party.

- Alternative cost analyses prepared to assess costs, reductions or costs avoided associated with the misappropriated trade secret. These analyses may take the form of "build v. steal" scenarios, e.g., lower cost of entry or higher market penetration expected for the business generated from the misappropriated trade secret.
- Business plans prepared by the offending party for use to determine the viability of the new venture, to support application for loans or capital funding, or used to negotiate new employment arrangements or ownership in another company.
- Valuations or financial opinions prepared to support the underlying economic value of the activities, or new venture associated with the exploitation of the misappropriated trade secret.

Obtaining this information prior to the commencement of discovery will be very useful for counsel for purposes of supporting a cease and desist letter or seeking an injunction. By demonstrating to the offending party that you have information that will likely prove the reasonable magnitude of the expected economic benefit to be disgorged, this should put the company in a position to resolve the situation in its favor without having to disclose additional information held in confidence by the company.

Reasonable Royalty as an Alternative Damage or Settlement Remedy

Counsel may be able to assess the potential magnitude of the economic impact resulting from the misappropriation of the company's trade secret by gaining an understanding of its probable value under a negotiated royalty agreement. While supported by case law as an appropriate measure of damages associated with the misappropriation of a trade secret, a reasonable royalty determination may also have value to counsel as a possible means to achieve a negotiated settlement between the parties. To assess the magnitude of the value of an anticipated royalty arrangement, expected royalties should be measured at their net present value on a specific date.

The assessment of a reasonable royalty by counsel may be dependent upon the company's history negotiating royalties for other products or services. Absent comparable royalty information within the company, counsel may need to consult with an industry or financial expert to perform a preliminary assessment of a likely royalty structure and a reasonable range of royalty rates. Although there may be a "rule of thumb" estimate for a reasonable range of royalty rates for similar products or services, experience has shown that the rate may be very sensitive to the multitude of factors associated with the parties and the products or services under consideration. Some of these factors will consider whether the sales subject to the royalty are to be made exclusively by the offending party and also inclusive of collateral products or services.

Financial experts who assess reasonable royalty rates often utilize the factors contained in the *Georgia-Pacific* case.[2] These factors are a helpful guide for counsel to make the necessary internal inquires to gather information for the assessment or to provide to a consulting expert.

Conclusion

Confronted with the possible misappropriation of a company's trade secret, counsel should work with their client and outside experts to make an early assessment of the magnitude of the economic impact to the company, as well as the estimated benefit the offending party may likely realize from exploiting the trade secret for its benefit. With a good understanding of the significance of the potential damages available to be recovered, counsel will be in a good position to recommend the appropriate course of action to pursue. Preliminary inquiries to the company's business people need not be time-consuming, nor should consulting with an outside expert be expensive, to assess the relative magnitude of damages to be recovered or the present value of a negotiated royalty agreement.

While this article postures this discussion from the position of counsel at the company owning the trade secret, the same approach should be considered by counsel for the party defending a possible action for its alleged misappropriation or inappropriate receipt of a company's trade secret. Either way, the assessment of the magnitude and likely composition of the alleged economic impact to each party is a worthwhile investment of time and resources to all parties involved.

Endnotes

1. Uniformed Trade Secrets Act with 1985 Amendments, § 1(4).
2. *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1121 (S.D.N.Y. 1970), *aff'd*, 446 F.2d 225 (1971).

Glenn C. Sheets, CPA, CFF, CIRA, CGMA, is a Managing Director in the Dispute Advisory & Forensic Services Group at Stout Risius Ross, Inc. ("SRR"). SRR is a premier global financial advisory firm that focuses on Investment Banking, Valuation & Financial Opinions, and Dispute Advisory & Forensic Services. SRR serves a range of clients from Fortune 500 corporations to privately held companies in numerous industries around the world. Mr. Sheets has extensive experience providing a broad range of business and financial advice to trial lawyers and in-house counsel throughout the dispute process. Most of Mr. Sheets' matters involve disputes in complex commercial litigation, many of which include the assessment of the economic impact to parties involving misappropriation of trade secrets, as well as breach of non-competition and non-solicitation actions. Mr. Sheets has testified numerous times as an expert in various state and federal court proceedings, including the U.S. Bankruptcy Court, CCAA proceedings, arbitrations, mediations and depositions, both domestically and abroad.

Inside Interviews

Colleen Sorrell Welker, Esq.

Executive Director, Employment Counsel,
Nomura Holding America Inc.

Ms. Welker was raised in the Syracuse, NY area. She graduated from Cornell University's School of Industrial and Labor Relations. She then attended Fordham University School of Law where she was a member of the Moot Court Board and the *Environmental Law Journal*. She worked as a paralegal before and during her law school career.

Ms. Welker started her legal career at Holland & Knight LLP. After working as an Associate in the Labor & Employment and Litigation groups, Ms. Welker was able to take advantage of an opportunity to join Nomura Securities as in-house counsel. Today, Ms. Welker is Executive Director, Employment Counsel, Americas, at Nomura Holding America Inc.

Ms. Welker was kind enough to provide insight about her journey and experience as in-house counsel.

If you could do one thing differently along your career path, what would it be?

"Maybe I should have made the move to go in-house earlier." While understanding that a certain level of experience is needed before making a transition from a law firm to in-house counsel, Ms. Welker wished that she had more "aggressively positioned" herself to explore those options along the way. She believes in the advice that she received as a first year associate—you are in charge of your own career—and agrees you must be proactive in seeking out opportunities to expand your knowledge in your profession.

Ms. Welker acknowledges her experiences have provided her with a better frame of reference, and appreciates that every situation is different because each builds your experience in a unique way that ultimately aids your overall professional growth.

If you could give a suggestion to someone looking to break into the in-house market, what would it be?

"Network. Networking is key!" Ms. Welker advises that young attorneys and law students take advantage of networking opportunities, especially those that are in-person. She recognizes that these opportunities can be awkward and that building relationships can take work, but maintains how worthwhile they are. It was networking with alumni from her undergraduate school that connected Ms. Welker to her current position as in-house counsel.

What is your favorite part about being in-house counsel?

As in-house counsel, "you are not being brought in only after a legal incident has already occurred." Instead, Ms. Welker states that many times in-house counsel are able to be involved right away and provide counsel to "prevent an incident from becoming a legal issue." In-house counsel's clients are colleagues with whom they work and support on a daily basis. They understand their clients' goals, concerns and "know the players in the game." Ms. Welker appreciates this dynamic because she is able to work with people across different teams, regions and divisions, allowing her to identify the best solutions to offer her client when advising on preventing or resolving any issues.

What is the one thing that most surprised you about the role of an in-house counsel?

Ms. Welker was most surprised about the additional corporate and managerial aspects that must be considered in performing the job in-house. In conducting legal risk assessments, she works to consider the perspective of each group impacted by any business decision. Her job not only entails providing technical legal advice and interpretation of the applicable laws in any given situation, but also counsel on how to deliver a legal message that is practical, effective, and fair.

When Ms. Welker worked at a law firm, her job was to research the law and inform clients as to how it applies to their situation. Clients were counseled, arguments were vetted and briefs were written. Now, as in-house counsel, she is made aware of issues as they are taking place, and looks to provide concurrent advice that is both legally sound and practically applied. She has the responsibility of keeping up with the law and using it to offer advice as situations may arise. It is an ever-changing role.

* * *

Bonnie A. Tucker, Esq.

Vice President & Assistant General Counsel,
JPMorgan Chase Bank, N.A.

Ms. Tucker was raised in New York City where she attended the Bronx High School of Science. She completed her undergraduate degree in psychology at George Washington University. She received her J.D. from Hofstra University School of Law where she was a member of the *Hofstra Labor & Employment Law Journal*. Ms. Tucker started her practice at a mid-size insurance defense firm in Manhattan where she gained much litigation experience. She then moved to a smaller firm handling general commercial litigation and bankruptcy work. Ms. Tucker later practiced in that area at a boutique firm. In 2011, she joined JPMorgan as a Litigation Consultant. Today, Ms. Tucker is a Vice President and Assistant General Counsel for JPMorgan Chase Bank.

If you could do one thing differently along your career path, what would it be?

I would have been "more open to things that didn't necessarily fit the path that I was seeking." In law school, Ms. Tucker knew that she wanted to be a litigator. Accordingly, she sought opportunities that would keep her on "the litigation path." She feels that she could have "taken a broader look at opportunities" to gain experience outside of litigation.

If you could give a suggestion to someone looking to break into the in-house market, what would it be?

Ms. Tucker shared that anyone looking to break into in-house should first gain a very well-rounded background. In-house litigation counsel provide litigation support and also handle business matters. You need to have a "global perspective" and take a "holistic approach" to know how certain decisions will impact a business on the whole. For this, seeking a varied background is beneficial.

What is your favorite part about being in-house counsel?

"The relationship you get to build with your client." Ms. Tucker appreciates that she has one client that she can help "in more than just a litigation sense." She may see some of the same issues, but she likes "getting into the weeds" of those issues and seeing her advice implemented.

What is the one thing that most surprised you about the role of an in-house counsel?

Ms. Tucker was surprised to encounter more than just legal issues. She has been involved in project management, process improvements, and even technology enhancements at JPMorgan.

Ms. Tucker's advice to young attorneys and law students is to be open to different opportunities. If an opportunity "sounds interesting, take it!"

Theses interviews were conducted by Upnit Bhatti, a third-year law student at Syracuse University College of Law. She is the Managing Editor of the Syracuse Law Review*. She is also a member of the Moot Court Honor Society and American Bar Association National Appellate Advocacy Team. Upnit enjoys playing the Indian drums and volunteering in the local Syracuse community. She will be joining Bond, Schoeneck & King in its Syracuse office after graduation and will serve as a law clerk for Chief Judge Theodore McKee of the Third Circuit United States Court of Appeals.*

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Employment Investigations by Independent Investigators: Priorities, Privileges and Protocol

By Christopher A. D'Angelo and Alfred G. Feliu

The complaint comes in. The allegations are serious, the odor of potential litigation is strong. An investigation is clearly warranted. Who is the organization going to ask to conduct the investigation? A human resources representative, in-house counsel, regular outside counsel, or a fully independent investigator?

Increasingly, employers are opting for the independent investigator—one without any affiliation with the organization. The reasons are many, and sound.

An independent investigator, unburdened by any history with the organization or any connection to this particular dispute, is well situated to provide a fresh, less incestuous, and unbiased perspective. The final result therefore is likely to be more clear-sighted and honest. An independent investigator will also more likely carry enhanced credibility with the complainant (and that person's counsel if one has been retained), a government agency, arbitrator, judge, and jury should legal proceedings ensue. On a more practical level, if the investigator is a lawyer (and generally that is the case), the organization's regular counsel will not be conflicted out of representing it, as would likely be the case if counsel conducted the investigation, should a legal action be subsequently filed. Also, the prospect for application of privilege to the investigation would be improved.

What follows are some key considerations for in-house counsel in retaining an independent investigator and managing the investigation process itself, as well tips for boosting the likelihood that the investigation will be a successful one.

Selecting the Investigator

The investigator selected should be one best suited to the particular dispute at hand and the nature of the issues raised. One size does not fit all. If the risk of litigation is real, that would argue for a lawyer-investigator, and one with some litigation experience. If public relations are a concern, the investigator's reputation and credibility in the marketplace may trump his or her experience as an investigator. If the claim is sex-based, some argue that the gender of the investigator should be considered. And, of course, the reputation and independence of the investigator and his or her standing in the community and anticipated credibility with government officials, arbitrators, judges, and juries, is of utmost importance. Time availability is also key—there is no point in retaining someone whose schedule will not allow for him or her to conduct and complete the investigation in a timely fashion.

How do you find an investigator well-suited to your matter? The best sources for potential investigator candidates are outside counsel, who often have occasion to retain investigators for their clients, and other in-house counsel. While credentials are important, more valuable are recommendations from users of the investigator's services. Do not be afraid to ask investigator candidates for the names of counsel with whom they have recently worked.

Terms of Engagement

Once the investigator is selected, the terms of the engagement must be memorialized. Most investigators have standard agreements. Those agreements generally reflect that the investigator is retained as an independent contractor and will provide for indemnification for their services. Most investigators work on an hourly basis and require that their expenses be reimbursed. If travel is required, payment for travel time, if any and on what terms, should be made clear.

It is also important to confirm that the investigation is to be conducted on a confidential basis. Return of investigatory materials at the conclusion of the investigation should also be addressed. A representation that the investigation will be conducted on an expeditious basis is standard; the setting of deadlines is generally not standard as the identity and availability of witnesses before the investigation commences is generally not known.

Scope of Investigation

One of the key decisions to be made in any investigation is as to its scope. John, an African-American in the Marketing Department, alleges that his boss discriminated against him and that the atmosphere in the office is hostile towards employees of color. The first issue to be decided is the scope of the investigation. Is it limited to John's claims against his supervisor? Will it encompass the broader hostile environment claim? Are company policies and controls implicated and should they be put to the test? Whatever the decision is, it must be made prior to the commencement of the investigation and the scope of the investigation must be clearly delineated at that time.

One common and often effective approach is to conduct the investigation in "stages." For example, a preliminary inquiry may be made by the investigator to determine, in effect, what the real issues are and whether they are worthy of being pursued further. The investigator may then report back to management, which then determines what the investigator's mandate will be going forward. Staging comes in many varieties. For example, the investigator may be directed to explore individual issues first, for example John's discrimination claim, and structural concerns thereafter.

The role that the organization wants the investigator to play must also be delineated. Is the investigator only collecting facts? Is he or she finding facts and making credibility determinations? Is the investigator being asked to determine whether the facts found constitute a violation of the organization's policies or applicable law? Finally, is the organization asking the investigator to recommend remedies to any ills uncovered? These mandates are quite different and must be made clear to the investigator at the time of retention.

Point of Contact for Investigator

The investigator will generally need two points of contact—one logistical and one substantive.

The investigator, being an outsider, will need a designated "chaperone" who will assist in the gathering of information and documents, scheduling interviews, securing interview rooms, and addressing practical and logistical issues, large and small. Where that person is in the organization's hierarchy will depend on such factors as the nature and sensitivity of the dispute at hand. Generally, a lower level human resources professional will suffice. However, if the issue is a claim of sexual harassment involving the CEO, the universe of appropriate persons to serve the logistical role will be severely limited.

On the substantive side, there will likely be several decision points along the way. It would be best to have someone with authority designated to interface with the investigator as issues arise. Take, for example, the situation where a new issue, unrelated or only tangentially related to the underlying issues, arises. The decision must be made by the organization as to whether that issue is to be addressed in this investigation, at a later time, or not at all. In addition, the investigator will generally benefit from having available to him or her someone with institutional knowledge who can add some efficiency to the process. For example, it would greatly aid the investigator who is in need of certain information to be able to consult with someone who can guide him or her as to how best to obtain it. ("Joe and Sally both could help, but Joe is disorganized and unfocused, so let me put you in touch with Sally…").

Confidentiality of Process—Legal and Practical Issues

During the course of an investigation it is tempting to promise confidentiality to witnesses, as a means to encourage candor and detail. Complete and absolute confidentiality is never an attainable goal, however, for several reasons. First, even if the complainant or accused is not revealed by name, it is often not difficult for witnesses to deduce their identity either by the nature of the questions asked, or the information sought. In addition, human nature being what it is, the "rumor mill" or "grapevine" is bound to start churning when such an investigation is being conducted. Hence, the better practice is to encourage confidentiality, and state that it will be provided to the extent possible under the circumstances.

A promise of absolute confidentiality, or instructions to witnesses to maintain confidentiality under penalty of discipline, has run into some unexpected legal hurdles over the past few years. Indeed, it has been subject to the scrutiny of an unlikely source, the National Labor Relations Board ("NLRB"). Recent rulings by the NLRB indicate that it will be considered an unfair labor practice for employers to instruct employees not to speak about internal investigations if interviewed, or to refrain from soliciting support from other employees in support of a claim that has been made, or discipline an employee for violating such an instruction. *NLRB Advice Memorandum,* 30-CA-089350 (January 29, 2013); *Banner Health Systems,* No. 28 CA-123438 (July 30, 2012). This analysis can be applied in both the union and non-union setting. The NLRB has reasoned that such direction from the employer, or the imposition of discipline, violates the employee's right to engage in conduct "for the mutual aid or protection" of the workforce. The issue is still working its way through the NLRB and the courts, however, and has been met with much criticism from employers and their representatives. Hence, it is too early to tell whether these initial rulings will gain any significant legal traction.

Gathering and Sources of Information

Again, there is no "one size fits all" approach to determine the scope of discovery. Some organizations and investigators may be tempted to search under every rock and behind every nook and cranny to gather information relating to the investigation. Others may prefer to narrow or limit the information and data obtained to the minimum possible. The nature and scope of the allegations must govern the gathering and sources of information to be employed. The investigator will want to identify the key sources of information and documents that are unequivocally relevant to the investigation, and build from there, to identifying witnesses and documents that may be more broadly relevant. As stated above, there will be many decision points during the investigation, so an initially narrow but thorough investigation can always be expanded, if warranted.

In general, the personnel files of the complainant and the accused are typically reviewed by the investigator. If the complainant has made similar complaints in the past, or there have been other complaints against the accused, that information should be gathered as well.

But identifying witnesses or potential witnesses is usually the easy part. We live now in the information age, where information exists electronically and is maintained in many different forms and environments. This fact can be both a blessing and a curse when conducting an investigation, as the sources of potentially relevant information are varied and not always obvious. Again, the investigator will

be guided by the nature of the allegations. For example, in a harassment case, do the allegations indicate that social media or e-mail was used as a means to harass the complaining party? If so, those communications should be reviewed even before the interviews begin. Even if there are no claims that electronic communications are at issue, the investigator may choose to look to email or social media for information concerning the claim for context as to the nature of the relationship between the disputants.

Investigation strategies decided upon at the beginning of the investigation, however, should not be deemed immutable. The strategy and sourcing of relevant information can and should be flexible, and altered depending upon the information learned during the course of the investigation. Thus, if information arises during the investigation suggesting the existence of relevant electronic data, the investigator is likely to pursue it. The same holds true for witnesses. That is, the investigator may choose to interview individuals not identified at the beginning of the investigation as possible witnesses if the information gathered indicates that they have, or may have, relevant information.

Selecting Witnesses

Speaking of witnesses, the employer should be prepared to assist the investigator in determining the identity of the proper witnesses for the investigation. There can sometimes be tension between the employer, which may want to limit the disruption to its workforce by limiting the number of interviews conducted, and the independent investigator, whose goal it is to gather as much information as possible in order to conduct a thorough investigation. Even if such tension exists, it should not present an insurmountable obstacle to conducting an appropriate investigation.

Consider, for example, a sexual harassment complaint which specifies the operational unit, times, dates and locations of the relevant events; this complaint will itself suggest who the potential witnesses are, even if witnesses themselves are not specifically identified. Those names can be given to the investigator in advance. A complaint that lacks such specificity often requires a more in-depth interview with the complaining party before witnesses other than the most obvious can be identified. In either case, once the likely or potential witnesses are identified, the investigator will determine who will be interviewed, and in what order. To the extent the list of potential witnesses is larger than anticipated, the investigator, of course, can at the very least reassess the list, and the necessity of interviewing each witness, as the investigation progresses.

Representation of Witnesses

A question that often arises during the course of an investigation is the right of a witness to have "representation" during the course of an interview. The issue is often raised by the complainant and accused, but from time to time fact witnesses also seek or desire to be accompanied by an attorney or other representative as well.

Many organizations reflexively object to the presence of an attorney or other outside representative during the course of an interview. The rationale is that the company is conducting an internal investigation that should be free of outside influence and potential disruption.

It has been our experience that the presence of a representative is not nearly as disruptive or negative as often anticipated, provided certain conditions are met. If the request for representation is from a complainant or the accused, it is generally advisable to allow the representative to be present during the interview, provided that the representative's involvement is limited to listening to the questions and answers, and not interrupting unless necessary to preserve the witness's legal rights. The investigation is the employer's and not the representative's to conduct.

If the employer happens to be unionized, a different set of rules applies. Any union member being interviewed who reasonably believes that discipline is possible is entitled to have a union representative present without any conditions attached, pursuant to a 1975 Supreme Court decision, *NLRB v. Weingarten*, 420 U.S. 251 (1975). Known as *Weingarten* rights, the NLRB and courts have gone back and forth over the years as to whether Weingarten rights apply to non-union workers. Currently, the answer is "no," but that could change.

Attorney-Client and Work Product Privileges

Many organizations that hire an attorney to investigate a claim assume that the investigator's communications with it are protected by the attorney-client privilege, and/or the attorney work product privilege. This is not necessarily the case. Indeed, many courts that have confronted the issue have ruled that the communications of independent investigators with the employer are not privileged, because the attorney was not hired to provide legal advice. Certainly, when the employer seeks to use the investigation as a shield against liability in a lawsuit connected to the claims that prompted the investigation, any privilege that may have existed will likely be deemed to have been waived.

If maintaining the existence of either the attorney-client or work product privilege is an important goal for the organization, it is best that the independent investigator report directly to outside counsel. Under these circumstances, there is a better argument that the investigator's communications with outside counsel are protected by the work product privilege, and outside counsel's communications with the company are protected by the attorney-client privilege. Even under these circumstances, however, if the findings and conclusions of the investigation are used as a defense in a subsequent litigation, the privilege will most likely be lost, in whole or in part.

Memorializing Witness Interviews

What kind of "record" should the investigator make? The investigator's role is short-term, but his or her findings may have long-term implications. How is the investigator's work to be memorialized? In particular, how are witness accounts to be preserved?

We do not favor an obvious choice, tape recording interviews, as it tends to inhibit free discussion and may be viewed as intimidating by witnesses. That leaves two basic approaches. First, the investigator may draft memoranda to the file summarizing witness accounts. Alternatively, investigators may prepare draft statements and provide them to witnesses to review, revise, and execute. The latter approach locks in the witnesses' accounts and provides comfort to witnesses that their information has been accurately reported to management. It also, however, may serve to delay the proceedings by adding a step to the process and may compromise the confidentiality of the investigation as draft statements may make their way into circulation. The former approach is more efficient but leaves the investigator's work subject to later challenge as a result of varying recollections or after-the-fact rewriting of history. ("I never told the investigator that!").

Form and Substance of Report

A related question is what form should the final report take—oral, a summary written report, OR a detailed written report? In making that determination, the risk that the report may not be privileged and therefore may be discoverable is a consideration. To whom the final report is directed and who is provided access to it must also be determined, with confidentiality and potential privilege concerns in mind.

Another practical question is whether exhibits, including witness memoranda and witness statements, should be attached to the report. One concern that is often overlooked is the possibility of a retaliation claim brought later by a witness who alleges that he or she was punished for cooperating with the investigation. That risk would be minimized if the witnesses' individual accounts are not disclosed by the investigator but are rather subsumed in the larger tapestry of the report. Of course, if the issue is a "he said/she said" scenario, that it not possible. However, where the issues are more systemic or atmospheric and a larger number of witnesses are interviewed, the investigator may be in a position to provide a thorough report without necessarily identifying particular witnesses. For example, instead of naming the witness who observed certain problematic behavior, the investigator might instead report that a "respected marketing professional observed…"

Final Thoughts

We have conducted many independent investigations and have had a chance to experience first-hand what works and what does not work. If the goal is solely to enhance the organization's defenses to litigation, then an independent investigation may not be the best vehicle to accomplish that goal.

An organization that proactively pursues an independent investigation must understand the implications of its decision and must be willing to risk an unfavorable investigatory result. Most significantly, control over the process is to a large degree bestowed on an outsider. The organization must accept that the process has its own logic. The mistake most commonly made by in-house counsel is the assumption that the independent investigator, like outside counsel, takes direction from them. Certainly, the initial mandate is for in-house counsel and the organization to make, but the manner in which the investigation is conducted is generally not.

The underlying premise in agreeing to an independent investigation should be the desire to take an honest look at the issues at hand and be prepared to remedy them, if wrongdoing or mismanagement is uncovered. While the investigation will undoubtedly provide some benefit should legal action ensue, that should not be the principal goal in agreeing to an independent investigation. Rather, a problem-solving, forward-looking approach is called for, as remedying the events of the past, if appropriate, should be paired with the goal of learning from any mistakes made and reducing the litigation risk going forward. The success of an independent investigation depends, to a significant degree, on the willingness of the organization and its in-house counsel to work as a team with the investigator selected to accomplish these goals.

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Internal Whistleblower Investigations Pose Unique Challenges for Corporate Counsel

By John F. Fullerton III

The Sarbanes-Oxley Act of 2002 ("SOX")[1] requires public companies to implement internal reporting channels to facilitate internal and external whistleblowing on corporate misconduct. Many private companies that are not required to do so under SOX have nevertheless implemented robust internal reporting programs. Companies have established and/or expanded multi-channel internal reporting mechanisms, including, e.g., hotlines, board audit committee complaint procedures, normal supervisory channels, and reporting to the office of the general counsel. The passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010 (Dodd-Frank)[2] added to the whistleblower landscape monetary awards that incentivize employees to skip these internal reporting mechanisms and report alleged corporate wrongdoing directly to the U.S. Securities Exchange Commission ("SEC"). The State of New York is now threatening to get in on the act, as the New York State Attorney General has proposed legislation that would reward whistleblowers who report financial frauds as a separate regime from the federal program under Dodd-Frank.[3] Notwithstanding these incentives to report fraud directly to the government, according to the SEC, over 80% of those receiving awards through last September reportedly raised their concerns internally to supervisors or compliance professionals before going to the SEC.

Handling and investigating reports of corporate wrongdoing made through such internal channels requires thoughtful, careful attention. Whistleblower complaints differ from other types of investigations because they often raise two distinct considerations: (i) the report of corporate fraud or a compliance breach, and (ii) alleged retaliation, or concerns about possible retaliation against the whistleblower. Thus, the investigations often require knowledge and application of both securities law and employment law. Moreover, whistleblowers are generally unlike other types of complainants under other employment statutes because they may be invoking corporate codes of conduct or external rules and regulations regarding fraud; they may have significant internal, non-public information—indeed, they may even work in a compliance, audit or legal function in which their role is to a large extent to identify and correct potentially unlawful conduct—and in some cases the whistleblowers may even have been complicit or participated in the conduct that they are reporting (which, incidentally, does not disqualify them from eligibility for a monetary award from the SEC). Further, depending on the outcome of the internal investigation, the company may have its own reporting obligations—to the SEC or FINRA, for example—which generally do not exist with respect to other types of internal investigations.

Much has been written about how to conduct an internal whistleblower investigation, and the checklist of considerations and pitfalls that must be considered and addressed by those conducting the investigation is a long one. For example, should the investigation be conducted internally or through outside professionals? If the latter, should the investigation be conducted by forensic accountants, an outside law firm, or both? If legal counsel is handling the investigation, what steps must be taken to ensure that documents created during the investigation are eligible for attorney work product protection? What steps must be taken to ensure that communications with legal counsel are protected by the attorney-client communication privilege? If the whistleblower or investigation witnesses request that their counsel be present (particularly after an *Upjohn* notice is given[4]), should those requests be granted or denied? What do you do if employees take documents in violation of internal policy and turn them over to the government? Can they be terminated for violating policy or does having a whistleblower claim give them carte blanche to take documents without permission? What if the whistleblower was also complicit in the wrongdoing? Can you terminate the employee for misconduct without violating the protections in place to avoid retaliation against someone who engages in internal whistleblowing activity?

This article touches on just three of these unique challenges: (i) the dual nature of the investigation and how that affects the decision as to who should conduct the investigation; (ii) the exceptions for audit/compliance professionals, and corporate officers who learn of alleged wrongdoing from another internal whistleblower, who are otherwise ineligible for a monetary award under the SEC's whistleblower incentive program, and (iii) managing the whistleblower who is still a current employee without running afoul of the anti-retaliation protections in the SOX and Dodd-Frank statutes (i.e., avoiding both external enforcement action by the SEC and a separate whistleblower retaliation litigation).

Who Should Investigate the Whistleblower's Claims?

The question of who should perform the investigation arises whenever there is a report of unlawful conduct that requires investigating. In the whistleblower context, there may be additional complications and a broader set of background facts in making this decision that are not

present in other contexts. The identity of the complainant could, for example, be broader than the typical situation in which the employee who believes that he or she has been discriminated against lodges a report with Human Resources. The identity of the complainant could be anonymous, or it could be an affected employee, a manager or supervisor acting on report or observation, or even a third party. The source of the complaint could include a compliance hotline, a letter/memorandum/e-mail/voicemail, a report made to a supervisor or manager, or the Human Resources department. Similar to a discrimination complaint, the individuals identified or implicated in the complaint could include executives, supervisors or managers, co-worker(s), a contractor or vendor or other agent. The subject matter of the complaint may include corporate authority (such as ethics and conduct codes or policies against harassment, discrimination or retaliation), statutory authority (such as securities laws, rules and regulations), audit and accounting standards, or more general business practices (billing, product or service quality, industry standards or market standards). And, of course, the objective of the investigation is a significant driver of the selection of an investigator: Is the objective simply to create a factual record, prepare an investigative report addressing a particular inquiry or legal considerations, provide a basis for decision making, or serve as a defense in anticipated proceeding—or a combination of these objectives.

Corporate counsel must also consider the tension between theory and reality in any whistleblower situation. While the altruistic whistleblower certainly exists and receives most of the media attention and publicity, there is also an undeniable universe of whistleblowers with an agenda, whether it is an employee whose job is already at risk seeking to insulate himself from discharge through the anti-retaliation laws, or simply an opportunist who hopes to set himself or herself up for a financial reward (the SEC regulations, for example, take into account in determining the amount of an award whether the employee reported internally before tipping off the SEC). These considerations may affect whether corporate counsel chooses to perform the investigation himself or herself because there appears to be a genuine desire to fix a problem, or have outside counsel do so because of a heightened suspicion that the whistleblower is posturing for potential litigation.

There are also very practical concerns that must be addressed in selecting an investigator. Corporate counsel may have an existing business relationship with the complainant or to persons named by complainant. The identity of the ultimate decision-maker(s) could also affect the selection of the investigator if there are key relationships in place with potential internal investigators. Naturally, there is the prospect that the investigator will be a fact witness in a subsequent proceeding, a factor that very often counsels in favor of using an external investigator. Further, if the decision is to have legal counsel perform the investigation in order to assert and preserve attorney work product protection and attorney client privilege with respect to the content and results of the investigation, the rules governing those doctrines, and the waiver of them, should receive special attention.

The final consideration to note is the potential dual nature of the whistleblower complaint. It is often the case that by the time the matter is brought to the attention of corporate counsel, there is both a substantive allegation of fraud or other corporate wrongdoing, and a claim of employment retaliation for engaging in protected whistleblowing activity. In some cases the substantive investigation may require specific expertise in securities or other branches of law, in others it may not. In some cases a single investigation into both sets of allegations—most likely by an employment specialist—will be appropriate, but in others, it may be better to treat the issues separately on a parallel course—such as, for example, having outside securities counsel investigate alleged securities law violations, while the Human Resources department investigates the retaliation claims, with proper communication between the investigators so that the investigation proceeds smoothly on both tracks. In another scenario it may be appropriate for a securities lawyer and an employment lawyer to conduct a single investigation in tandem. At the end of the day, there is simply no one-size-fits-all approach to whistleblower investigations, and undoubtedly the combination of substantive allegations of corporate wrongdoing and employment retaliation requires corporate counsel to be attuned to the complications this can create.

The Trusted Whistleblower

Things can become even more challenging for corporate counsel when the whistleblowers work within the legal or compliance unit within the company, or are otherwise corporate officers responsible for receiving internal whistleblower complaints. Are they eligible for a Dodd-Frank incentive award, such that they may be strongly inclined to report the allegations to the SEC even as they should be working to investigate and correct problems internally? Fortunately, the answer is that they ordinarily are *not* eligible for such an award,[5] unless one of the following three circumstances applies:

> (A) You have a reasonable basis to believe that disclosure of the information to the Commission is necessary to prevent the relevant entity from engaging in conduct that is likely to cause substantial injury to the financial interest or property of the entity or investors;
>
> (B) You have a reasonable basis to believe that the relevant entity is engaging in conduct that will impede an investigation of the misconduct; or

> (C) At least 120 days have elapsed since you provided the information to the relevant entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or your supervisor, or since you received the information, if you received it under circumstances indicating that the entity's audit committee, chief legal officer, chief compliance officer (or their equivalents), or your supervisor was already aware of the information.[6]

On August 29, 2014, the SEC authorized its first award to a compliance or audit professional—over $300,000 to an auditor who blew the whistle internally and waited 120 days before reporting to the SEC, during which time the company had taken no action on the allegations.[7] On March 2, 2015, the SEC issued a first-of-its-kind award to a former corporate officer of between $475,000 and $575,000 under the same 120 day exception, after the corporate officer apparently raised and tried to have the issue addressed internally before tipping off the SEC.[8] These cases indicate that the SEC intended to make full use of the "120-day exception" in appropriate cases and make awards to the "trusted whistleblower"—individuals whose job is to identify and correct non-compliant and/or potentially unlawful corporate action.

The exceptions to ineligibility for employees in these categories can place serious pressure on corporate counsel. The failure of a company to act on internally reported wrongdoing can result in a high profile award to a compliance professional or corporate officer who is eligible for such award if 120 days pass once that individual receives and reports the information and the matter has not be resolved. Thus, the regulations create a time pressure challenge on corporate counsel to attempt to avoid having these trusted individuals, including high level executives, report their allegations to the SEC.

Not only is there the time pressure of 120 days (which may or may not be sufficient time depending on the complexity of the allegations, availability of witnesses and workload of the investigator), but corporate counsel may determine within the 120-day window that the allegations lack merit, or have been corrected, and thus the matter has been resolved from his or her perspective. The whistleblower may disagree. As long as the whistleblower waited 120 days before reporting original information to the SEC, if the SEC agrees with the whistleblower, pursues the matter and collects the requisite sanctions from the company (over $1,000,000), the trusted whistleblower is eligible for an award of between 10 and 30 percent of that amount. Thus, it is not just a question of concluding an investigation within 120 days, but ultimately persuading both the whistleblower and potentially the SEC that the conclusion was correct.

There may also be reluctance on the part of corporate counsel to take on an investigation with such dramatic implications, especially if the target of the allegations is also a high level executive or executives. This reluctance must, of course, be overcome. It is also important to note that the general ineligibility for whistleblower awards for corporate officers and audit and compliance professionals does *not* extend to the protections against retaliation. Thus, even if one of these employees were to be deemed ineligible for a monetary award from the SEC he or she would still be entitled to the protection and remedies against whistleblower retaliation. This brings us to the third and final challenge discussed in this article—the currently employed whistleblower.

The Currently Employed Whistleblower

Frequently, allegations that an employee has engaged in protected whistleblowing to his or her manager of supervisor does not come to the attention of corporate counsel until after the company has parted ways with the employee and the employee has commenced litigation against the company. In other cases, however, the whistleblower makes the internal report of wrongdoing claim while still employed. The challenge for corporate counsel at that point is to ensure that the potential wrongdoing is not compounded by unlawful retaliatory acts—or, which can be even more difficult to avoid, the appearance of unlawful retaliatory acts. Monitoring and ensuring compliance with the anti-retaliation provisions of the whistleblower statutes can be one of the most daunting challenges for corporate counsel when the whistleblower remains employed by the company. Under SOX, for example, such acts of retaliation include discharge, demotion, suspension, threats, harassment, or any other manner of discrimination against an employee in the terms and conditions of employment *because* they have made a whistleblower complaint.[9]

The challenge may become even more complicated if it becomes clear that the whistleblower is in fact incorrect regarding the allegations he or she has asserted. Provided that the employee has an objectively and subjectively reasonable belief that the company has engaged in conduct prohibited by the statute, he or she is entitled to protection against retaliation. In addition, needless to say, there are many situations in which the whistleblower's allegations of retaliation are also incorrect, because either there are no actual adverse or otherwise chilling actions being taken against him or her, or the adverse actions are being taken for legitimate, non-retaliatory reasons. It is as important to investigate and attempt to address the latter situations as it is the former, more for litigation avoidance and/or preparation purposes than because there is a chance of changing the employee's mind about the company's motives.

As a threshold matter, internal whistleblowers should be assured by the appropriate investigator and/or by corporate that the company will not tolerate any retaliatory actions against them for coming forward with information or otherwise assisting or participating in the investigation. It is important to stress to the whistleblowers that they should promptly report any retaliation if it does occur so that it can be promptly addressed. Although most companies already make these assurances in writing in their internal reporting policies, it is helpful to reiterate the policy directly to the whistleblowers, as they may not have even read, or read thoroughly, the applicable written policy.

In the same vein, when the whistleblowers' manager or supervisor is interviewed in connection with the investigation, they too should be reminded that retaliation by them against the whistleblower will not be tolerated by the company and could lead to discipline or even discharge if it is found that such managers or supervisors have engaged in any form of retaliation. If such manager or supervisor wishes to take an adverse employment action against the whistleblower for reasons unrelated to the protected activity, it is even more critical than it ordinarily would be for that decision to be vetted with corporate counsel in advance. For this purpose, it is important to remember that the burden of proving retaliation under SOX and Dodd-Frank is not as onerous on the employee as it is under other employment statutes. Although a complainant is required to prove by a preponderance of the evidence that he (1) "engaged in activity or conduct that SOX protects; (2) the respondent took an unfavorable personnel action against [him]; and (3) the protected activity was a contributing factor in the adverse personnel action," once he establishes these elements, the burden shifts to the employer seeking to avoid liability to prove by clear and convincing evidence—a higher evidentiary standard than that imposed on the complainant—that it would have taken the same action regardless of any alleged protected activity.[10]

Aside from the warnings and reminders not to retaliate, the fact is that effectively managing an employee who has made a complaint, especially if the complaint is against the employee's own manager or supervisor, may be one of the most difficult work-related challenges such manager or supervisor could face. Having managers properly trained in advance to identify, respond appropriately and continue to manage effectively can go a long way toward minimizing the potential for a whistleblower retaliation litigation. Yet, there seems to be a surprisingly limited amount of such training occurring. Employers have become better at ensuring that managers receive thorough, periodic training in the areas of equal employment opportunity laws, sexual harassment awareness and avoidance, and other forms of employment law training, and yet, many employers have not yet made whistleblower compliance and anti-retaliation training a regular part of the management training curriculum. In this day and age of heightened regulatory scrutiny and aggressive enforcement of the whistleblower laws, they really should.

Endnotes

1. Pub. L. No. 107-204, 116 Stat. 745 (2002).
2. Pub. L. No. 111-203, 124 Stat. 1376 (2010).
3. *A.G. Schneiderman Proposes Bill To Reward and Protect Whistleblowers Who Report Financial Crimes*, The New York State Office of the Attorney General (Feb. 26, 2015), http://www.ag.ny.gov/press-release/ag-schneiderman-proposes-bill-reward-and-protect-whistleblowers-who-report-financial.
4. Upjohn Co. v. United States, 449 U.S. 383 (1981).
5. 17 CFR § 240.21F-4(b)(4)(iii) (2011).
6. 17 CFR § 240.21F-4(b)(4)(iv) (2011).
7. *SEC Announces $300,000 Whistleblower Award to Audit and Compliance Professional Who Reported Company's Wrongdoing*, Press Release 2014-180, U.S. Securities and Exchange Commission (Aug. 29, 2014), https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542799812#.VP33MXJ0yUk.
8. *Former Company Officer Earns Half-Million Dollar Whistleblower Award for Reporting Fraud Case to SEC Former Company Officer Earns Half-Million Dollar Whistleblower Award for Reporting Fraud Case to SEC*, Press Release 2015-45, U.S. Securities and Exchange Commission (Mar. 2, 2015), https://www.sec.gov/news/pressrelease/2015-45.html#.VP32DHJ0yUk.
9. 18 U.S.C. § 1514A(a) (2002).
10. 29 C.F.R. § 1980.104 (2011); Bechtel v. Admin. Review Bd., 710 F.3d 443, 447 (2d Cir. 2013); Sylvester v. Parexel Int'l, No. 07-123, slip op. at 10 (Dep't of Labor ARB May 25, 2011).

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Volunteers and Interns: The Lifeblood of a Nonprofit

By Jennifer Grudnowski

Volunteers and interns are the lifeblood of nonprofit organizations. Underfunded and understaffed, many nonprofits rely on the skills and expertise of an unpaid workforce to operate their programs, conduct fundraising, support administration, engage in marketing efforts, and perform many other important functions. Making sure these unpaid workers are properly classified under federal and state labor law is critical for both liability and retention purposes.

This article will discuss the legal distinctions between an intern/trainee and volunteer and will provide some suggested best practices for engaging an unpaid workforce. Understanding these distinctions will help a nonprofit minimize its risks associated with misclassification—most significantly, the risk of being required to pay back wages to individuals who have been improperly classified as interns or volunteers.

"Underfunded and understaffed, many nonprofits rely on the skills and expertise of an unpaid workforce to operate their programs, conduct fundraising, support administration, engage in marketing efforts, and perform many other important functions."

Overview

Generally speaking, all workers are classified into one of several categories: employees, independent contractors, temporary workers, interns/trainees, and volunteers. If a worker is classified as an employee then under the Fair Labor Standards Act, he must be paid the federal or state minimum wage unless his position fits into an exemption to the minimum wage requirements.[1] Typically, employees are also eligible to receive other benefits including workers' compensation insurance, unemployment insurance and, in New York, disability insurance. Of the categories of workers listed above, employees create the most significant financial burden on an organization. Consequently, many nonprofit employers search for ways to maximize the output of their workforce without hiring employees, paving the way for the use of unpaid interns/trainees.

Interns/Trainees

Internships can be great learning opportunities for students who want to gain hands-on experience in their chosen fields. But, internships—particularly unpaid internships at for-profit companies—have come under significant scrutiny in recent years.[2] Fortunately, the nonprofit sector has largely avoided these controversies, but it is still important that nonprofits know those factors that distinguish an internship/trainee position from an employee position under state and federal laws.

The federal law does not use the term intern, but uses the term trainee instead. Trainees are not considered employees under the Fair Labor Standards Act and therefore are exempt from the minimum wage requirements of the Act.[3] However, an organization cannot simply decide to classify a worker as an intern/trainee because it wants to avoid paying the minimum wage. A worker's position must satisfy several criteria in order to be properly classified as an intern/trainee.

The U.S. Department of Labor has articulated six criteria that all must be met in order for a worker to be properly classified as a trainee.

(1) The training, including the actual operation of the facilities of the employer, is similar to that which would be given in a vocational school or academic instruction;

(2) The training is for the benefit of the trainees or students;

(3) The trainees or students do not displace regular employees but work under their close supervision;

(4) The employer that provides the training derives no immediate advantages from the activities of the trainees or students, and on occasion its operations may actually be impeded;

(5) The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and

(6) The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.[4]

As in the federal law, the word "intern" is not recognized under the New York Labor Law. Further, there is no section of the New York Labor Law that exempts nonprofit "interns" from the minimum wage. However, should a nonprofit choose to not pay an intern, then it may do so under one of three categories of exceptions for unpaid workers at nonprofits: volunteers, students and trainees/learners.[5]

Nonprofits that wish to engage interns/trainees must ensure that they are meeting federal and state requirements for this category of worker. But, unlike for-profit

employers, nonprofits are permitted to have unpaid volunteers. Since meeting the federal and state requirements for a legal internship can be difficult and time-consuming, many nonprofits may be better served by classifying any unpaid workers as a volunteer rather than an intern/trainee.

Volunteers

Volunteers are individuals who perform services at the direction of a nonprofit solely for their own personal purpose or pleasure without compensation or expectation of compensation. To avoid confusion about their legal classification, volunteers should not receive any compensation (including gift cards) for their service but they can receive reimbursement for reasonable expenses related to their volunteer service as well as small tokens of thanks such as lunches or awards.[6]

Volunteers are different from interns because there are no specific federal or state employment laws governing the type of work they can perform, how they are supervised, or the hours they work. This flexibility leads many nonprofits to classify any unpaid worker as a volunteer.

Although volunteers are not employees, many nonprofits will be well-served engaging a volunteer in some of the same ways that it would engage an employee. For example, nonprofits should conduct interviews for volunteer positions, consult references, and perform criminal background checks or credit checks (if the volunteer's position merits such a check). It would also be prudent for a nonprofit to provide its volunteers with an orientation process, a position description, a volunteer offer letter (which should include language that states that the volunteer arrangement is "at-will" and can be terminated by either party at any time for any reason) and training specific to the role each volunteer will perform. Many nonprofits also use volunteer handbooks or guidelines to set forth expectations for the volunteer. Waivers or releases may also be appropriate to minimize the risk that a volunteer sues the organization.

Conclusion

Volunteers and unpaid interns are an important part of the nonprofit workforce. Knowing how to classify them properly and how to retain them is critical for every nonprofit.

Endnotes

1. 29 U.S.C. § 9206 (1938).
2. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516 (S.D.N.Y. 2013); Wang v. Hearst Corp., 293 F.R.D. 489 (S.D.N.Y. 2013).
3. 29 U.S.C. § 2206 (1938); *Fact Sheet, Wage Requirements for Interns in Not-For-Profit Businesses,* New York State Department of Labor, http://labor.ny.gov/formsdocs/factsheets/pdfs/p726.pdf (last visited Mar. 10, 2015).
4. *Fact Sheet, Wage Requirements for Interns in Not-For-Profit Businesses,* New York State Department of Labor, http://labor.ny.gov/formsdocs/factsheets/pdfs/p726.pdf (last visited Mar. 10, 2015); Walling v. Portland Terminal, 330 U.S. § 148 (1947).
5. *Fact Sheet, Wage Requirements for Interns in Not-For-Profit Businesses,* New York State Department of Labor , http://labor.ny.gov/formsdocs/factsheets/pdfs/p726.pdf (last visited Mar. 10, 2015).
6. N.Y. Lab. Law. § 651(f) (Consol. 1960); 29 U.S.C. § 29 (1938).

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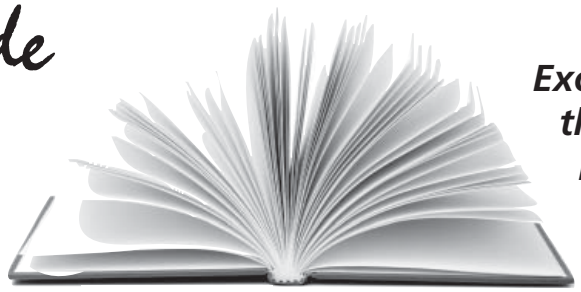
Inside
Books



Excellent Sheep: The Miseducation of the American Elite and the Way to a Meaningful Life

By William Deresiewicz (Free Press, 2014, 245 pages)

Reviewed by Janice Handler

I recently resigned from my adjunct gig at Fordham Law School, where I have taught Corporate Counseling (what else?) for thirteen years. In recent years, I have found the students to be obsessively preoccupied with jobs (and the shortage thereof), consumed with grades (and the raising thereof) and, as I said to the Dean in a farewell letter entitled "Why I will not be teaching at Fordham next year," increasingly humorless, morose, and risk averse. Nobody adjunct teaches for money (there isn't any). You do it for fun, and trust me, law school teaching is no longer fun.

So I was mesmerized by *Excellent Sheep: The Miseducation of the American Elite and the Way to a Meaningful Life*, William Deresiewicz's ruminations on the state of U.S. education. While his thrust is not law school, but rather undergraduate elite education, his observations and concerns fully apply to law school education as well.

Deresiewicz, who was a professor of English at Yale University for ten years, and a graduate instructor at Columbia University for seven, describes what he views as a crisis in our elite undergraduate educational system. This crisis emanates from a confluence of talented, high performing, hurdle jumping, 18-year-olds who come to colleges as "Excellent Sheep," and consumer-oriented schools, which do nothing to change them. The result—students who are smart, talented, ambitious, and driven but also timid, anxious, and lost with little intellectual curiosity and a stunted sense of purpose.

The results? To the students: no passion, no purpose, and herding into the predictable and lucrative professions of law, finance, consulting, and medicine. To the schools: a denigration of teaching and a loss of purpose. To the society: maintenance of the class system, increased social inequality, retardation of social mobility, and perpetuation of privilege.

Deresiewicz, who characterizes this book as a "letter to my twenty year old self," starts with the students, their helicopter parents, and the multiple hoops they must jump through (think multiple AP classes and endless extracurricular activities) to secure admission to elite universities. He then puts the current climate in historical perspective, opining that today's crisis was precipitated by educational changes advanced by Yale in the 1960s, where the educational aristocracy (characterized by the domination of elite schools by prep school grads from wealthy families) gave way to a meritocracy driven by grades and SAT scores. This trend, combined with falling admission rates at top universities, resulted in a scramble to game the system—the new growth industries are SAT tutors, college essay advisors, and alumni fundraisers.

"Students are customers to be pandered to rather than challenged; the commercial relationships supplants the pedagogical; and grade inflation (fueled by a mutual nonaggression pact between students, who want to do as little as possible, and professors, who want to be left alone to pursue their research) results in the old gentleman's C giving way to the default A-."

After admission, the schools, also scrambling to attract the top students, do nothing to wake them up. The undergraduate experience is more of the same. Staffed by armies of low paid adjuncts (the "real" professors occupied by scholarship, not teaching), the universities become technocratic preparation for the professions, lacking purpose and vision.

As baby boomers aged out in the 1980s, expanding enrollments and faculty appointments decreased. Schools started competing for top students, and came to see students as consumers and education as just another business measured by allegedly quantifiable metrics and held hostage to *U.S. News*' annual rankings of top schools. Students are customers to be pandered to rather than challenged; the commercial relationships supplants the pedagogical; and grade inflation (fueled by a mutual nonaggression pact between students, who want to do as little as possible, and professors, who want to be left alone to pursue their research) results in the old gentleman's C giving way to the default A-.

Deresiewicz tries to propose remedies. To the students, he urges: Slow down in deciding your futures; take a year off between high school and college; read great books, study humanities; do low level jobs to learn how

"the other half" lives. To the schools: Bring back teaching to the center of the mission, reverse the trend toward contingent labor and the research model. To these suggestions—particularly the one that students reject the elite schools in favor of liberal arts colleges and state universities—I can only reply "In your dreams." Neither the students nor the schools will change without substantial incentivization. The current economy and job scarcity supports the status quo. And Deresiewicz is silent as to what those incentives for change will be.

Deresiewicz is a good writer. And this book is a fun read—long on anecdote and personal experience. There are weaknesses in this book, to be sure—the scarcity of realistic fixes discussed above being one, the personal axes Deresiewicz has to grind a possible other. Some critics have suggested that this book is Deresiewicz's sour grapes for not getting tenure at Yale; at the least he is, by his own admission, working through some personal issues with his own over competitive and highly driven father. Also, there are places where he appears to be inconsistent—for example, citing both lower admission rates and fewer students as causes of the problem and recommending students apply to lower tier colleges in one chapter and denigrating the same institutions in another.

Nevertheless, this book resonated with me. This year at Fordham Law, I asked those students who wanted to receive annotated copies of their final papers to bring a self-addressed envelope to class. One out of 15 students did so—the others having little interest in my comments once their grades were in hand. If they were excellent sheep, I was nothing but a well-credentialed sheep herder. And that is why I will not be teaching at Fordham next year.

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