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Wage-hour class action not subject to arbitration clause

Agency principles don't shackle nonsignatory

By Pat Murphy

A wage-and-hour class action was not subject to an arbitration clause in a vendor agreement between the defendant and the independent contractor that the plaintiff deliveryman drove for, the 1st U.S. Circuit Court of Appeals has held.

CHURCHILL
Attorney for plaintiff driver

The defendant, Dynamex Operations East, LLC, contended that under federal common law principles of contract and agency, the plaintiff driver was bound by the arbitration clause, even though he was not a signatory to the vendor agreement.

But the court disagreed, specifically rejecting Dynamex's argument that the plaintiff was subject to the terms of the contract because he was an "agent" of the vendor.

Writing for the unanimous panel, Judge Sandra L. Lynch said the plaintiff was bringing his claims

against Dynamex "on his own behalf and purportedly on behalf of other similarly situated drivers. The alleged agency relationship between [the plaintiff and vendor] is irrelevant to the 'legal obligation in dispute.'"

Moreover, Lynch ordered Dynamex — now known as TF Final Mile LLC — to show cause as to why the court should not assess double costs for the defendant "needlessly consuming the time of the court and opposing counsel."

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Hospital can't shield communications

Policy doesn't support 'peer review' privilege

By Eric T. Berkman

A surgeon who brought a discrimination suit against the hospital where she used to work was entitled to discovery of allegedly defamatory communications between her former supervisor and another hospital that subsequently rejected her application for credentials, a U.S. magistrate judge has ruled.

COOK
Represents plaintiff doctor

Plaintiff Deepa Soni, formerly a neurosurgeon at Berkshire Medical Center in Pittsfield, Massachusetts, sought production of communications between Berkshire's chief of surgery, who was also a defendant in her lawsuit, and Catholic Medical Center in Manchester, New Hampshire, which denied her credentials three years after she left Berkshire. Soni was apparently told the communications played a role in Catholic Medical Center's decision.

Catholic Medical Center, a third-party witness in the case seeking to shield the documents from production, argued that a federal common-law "peer review" privilege based on New Hampshire's "quality assurance privilege" law protected the communications.

But Judge David H. Hennessy disagreed.

"[O]ther courts in this Circuit addressing the issue have … refused to recognize a medical peer review privilege in the con-

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Social Security applicant cannot bring ADA claim

By Thomas E. Egan

An employee who applied for Social Security Disability Insurance benefits claiming to be unable to work because of a disabling condition could not hold her former employer liable for failing to reasonably accommodate her disabilities, a U.S. magistrate judge has found.

The defendant employer argued that the plaintiff could not perform the essential functions of her job and thus was not a "qualified individual with a disability" under the Americans with Disabilities Act.

"I conclude that no reasonable juror could reconcile her position in this ADA litigation with her position in the SSDI process," Rhode Island's Judge Lincoln D. Almond wrote.

Almond's recommendation that the employer be awarded summary judgment was later adopted by U.S. District Court

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IN-HOUSE WITH …

NANCY M. CREMINS
GLOBALIZATION PARTNERS

After practicing at law firms for more than a decade, Nancy M. Cremins had what she calls "an existential career crisis." Then a partner at Gesmer Updegrove, Cremins found herself wondering what she wanted to do for the next 10 years of her life.

The answer came to her when one of her clients, Globalization Partners CEO Nicole Sahin, told her about a new six-week sabbatical program she wanted to create at the company. While Cremins joked, "Where do I sign," before she knew it the prospect of going in-house at the professional employer organization had become a reality.

"Within a month I had signed an employment agreement," says Cremins, who joined the company — which helps primarily U.S. companies expand internationally — in May 2016 as its chief administrative officer and general counsel.

As one of the company's first 10 employees, Cremins was tasked with building the legal department and defining its mission. Today, Globalization Partners numbers more than 65 — with three attorneys in the legal depart-

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Fired university officers can bring civil rights case

Claim retaliation for unmasking 'scheme'

By Pat Murphy

Two security officers at the University of Massachusetts-Lowell could sue for violations of their First Amendment rights based on claims they were fired for speaking out publicly against unfair hiring practices and sexual harassment, a Superior Court judge in Massachusetts has found.

The individual defendants, which included the school's former chancellor and current chief of police, argued that the plaintiffs could not show they were speaking "as citizens on a matter of public concern" for the purpose of maintaining a freedom-of-speech claim in the public employment context.

But Judge Kathe M. Tuttman, in denying in part a motion to dismiss, found the plaintiffs' allegations satisfied those elements of a prima facie case under the framework iterated by the U.S. Supreme Court most recently in *Garcetti v. Caballos* and *Lane v. Franks*.

With respect to their status vis-à-vis the speech at issue, Tuttman wrote that the plaintiffs were "speaking as citizens (rather than employees) because their speech concerned hiring practices and the report of sexual misconduct, neither of which formed part of the plaintiffs' official duties as police officers. While the plaintiffs learned of the issues by virtue of their employment, that fact alone has no bearing on the citizen analysis."

The 23-page decision is *McLaughlin, et al. v. Meehan, et al.*

Egregious behavior?

Plaintiffs' counsel Laurence E. Sweeney said he did not file claims under state whistleblower laws protecting public employees because his clients could not satisfy certain essential elements for such claims, particularly the need for aggrieved employees to provide employers the opportunity to rectify a problem before going public in the form of written notice.

"The claims that we brought were more than sufficient," the North Chelmsford lawyer said.

Sweeney said the most significant issues raised in the case involved the free speech rights of public employees.

"This clearly was a matter of public concern when you're talking about safety issues and sexual misconduct," Sweeney said.

The university, which was represented by the Attorney General Office, declined an interview request, instead issuing an email that stated it was pleased the judge dismissed "certain counts and an employee from the lawsuit under the very low standard of proof that must be applied at this early stage of the proceedings. We expect similar favorable results as the litigation proceeds and the applicable standards of proof for the plaintiffs become higher."

Boston employment and business litigator Andrea C. Kramer said the decision was "very much" in line with the current trend in Massachusetts of allowing more employment cases to get past the dispositive motion stage.

Meanwhile, Springfield litigator Amelia J. Holstrom said she was struck by the egregiousness of the defendants' behavior alleged in the complaint.

"I think this is going to be one of those cases that settles or one that a jury is going to decide," Holstrom said. "Based on credibility [of the witnesses], a reasonable fact-finder may very well side with the two employees."

'Patronage scheme'

Plaintiff Paulino Carteiro began working as a security officer in the UMass-Lowell Police Department in 2009. Plaintiff Timothy McLaughlin joined the department in 2011.

In 2010, the school hired defendant Randolph Brashears as police chief. The plaintiffs alleged that, shortly after his arrival, Brashears implemented a policy of filling job openings in the department with retired police officers from New Hampshire who hoped to earn a second pension in Massachusetts.

According to the plaintiffs, security on campus suffered as a result of the "patronage scheme," partly because New Hampshire hires typically neglected their duties by taking two- to three-hour lunch breaks at local eateries. The plaintiffs further claimed that officers who voiced their objections to the hiring practices were ridiculed and subjected to verbal and written reprimands.

In 2012, Carteiro began sending anonymous letters to newspapers and law enforcement describing the situation. In a February 2013 letter to the FBI, Carteiro complained about the patronage policy and sexist behavior by one of the officers in the department, writing that he feared "the hostile work environment we currently face creates an environment in which one of us or myself will snap and put the entire university at risk."

According to the plaintiffs, the department commenced an investigation to identify the source of the letters.

Carteiro alleged that, while on duty in the early morning hours of March 28, 2013, he was approached by Kenneth Wilson, a department supervisor, who insisted that he "go for a ride" with him. Carteiro claimed Wilson drove him to a nearby campus police station where he was interrogated about the FBI letter by two fellow officers, Scott Childs and Mark Schaaf.

Carteiro admitted to writing the letter, but refused to provide further information, even though Childs and Schaaf allegedly threatened "things were going to get ugly" and that Carteiro could be brought before a grand jury. Allegedly under pressure, Carteiro did sign a consent form for a search of his home computer. He then drove home in his own car followed by Schaaf and Childs in an unmarked cruiser.

The two officers seized Carteiro's computer and, after getting the password, left. Department heads returned the computer the following day.

All told, Carteiro claimed he was detained for approximately seven hours.

The university subsequently suspended Carteiro for falsely claiming he was a police officer, publishing false claims about the department's hiring practices, and publishing a false threat to campus safety. The university terminated Carteiro on May 31, 2013, following a disciplinary hearing.

McLaughlin's claims stemmed from an alleged sexual harassment incident that he observed at work in October 2013. According to McLaughlin, he observed Schaaf watching a video online in connection with a sexual assault case. McLaughlin claimed he heard Schaaf comment — with female officers present in the room — that the complainant was "more of a slut than a victim." Schaaf also allegedly made other sexist comments about the victim.

The plaintiffs alleged that even though McLaughlin reported the incident to his superiors, Schaaf escaped discipline and soon obtained a promotion to detective.

According to the complaint, Childs and two Nashua police officers came to McLaughlin's house in late March 2013, at the same time Carteiro was under suspicion by colleagues in the department for sending the FBI letter. McLaughlin claimed the officers accused him of being the author of the FBI letter.

Shortly after the incident, the department levied disciplinary charges against McLaughlin for conduct unbecoming, gross insubordination, and many of the same charges levied against Carteiro. McLaughlin was terminated on June 13, 2013, following a disciplinary hearing.

Carteiro and McLaughlin subsequently sued Martin T. Meehan (the UMass-Lowell chancellor at the time of the events in question before becoming president of the UMass system), Brashears, Wilson, officers Childs and Schaaf, and several other school administrators for various civil rights violations and intentional torts.

The defendants moved to dismiss for failure to state a claim.

Motion to dismiss

Turning to the complaint's First Amendment claims, Tuttman said plaintiffs alleging violations of free speech rights in the public employment context must show: (1) they were speaking as citizens on a matter of public concern; (2) their interest in commenting on matters of public concern outweighed their employer's interest in promoting the efficiency of the public services it provides; and (3) the protected expression was a substantial or motivating factor in the adverse employment decision.

In addition to finding the allegations showed the plaintiffs were speaking as citizens on a matter of public concern, Tuttman found the plaintiffs satisfied the second factor of a prima facie case.

"Given the significance of the allegations concerning both the sexual misconduct and the patronage scheme, if true, as I must assume at this point, the defendants can put forth no justification that would outweigh the plaintiffs' interest in exposing the misconduct," the judge wrote.

On the issue of causation, Tuttman concluded the complaint set forth in "compelling detail" the link between the speech in question and the alleged retaliation.

"Presently, viewing the facts alleged and the exhibits attached in the plaintiffs' favor, the speech about the sham hiring practices was the primary reason the plaintiffs were fired," Tuttman wrote.

The judge likewise concluded that the complaint stated a First Amendment freedom-of-association claim, observing "the plaintiffs were a minority group within the Department, associating with each other for the purpose of redressing grievances about the Department's hiring practices and the sexual misconduct of other officers."

Tuttman found Carteiro pleaded a valid Fourth Amendment claim in that Schaaf, Wilson and Childs failed to articulate either reasonable suspicion or probable cause for the seizure and detention of Carteiro and his computer.

The judge also decided the plaintiffs could proceed with claims under G.L.c. 12, §§11H and 11I. Those sections of the Massachusetts Civil Rights Act provide remedies for interference with the exercise of constitutional or statutory rights by threats, intimidation or coercion. Tuttman similarly found grounds for proceeding with several tort claims, including invasion of privacy, false imprisonment, defamation and intentional infliction of emotional distress.

As to the tort claims, Tuttman rejected the argument that the defendants were shielded by common law qualified immunity, pointing to allegations that they "acted out of a corrupt motivation to shield and perpetuate their unlawful hiring practices."

On the other hand, the judge found the complaint's allegations failed to indicate the school's human resources chief had any knowledge of the events in question. Accordingly, Tuttman dismissed all claims as to that defendant.

In addition, Tuttman dismissed the plaintiffs' claims for substantive and procedural due process violations, as well as federal civil rights claims alleging the defendants conspired to deprive them of equal protection of the law. NEIH

Investors, board members not liable for CEO's pay

'Management' standard under Wage Act clarified

By Pat Murphy

Two former board members and investors in a biotechnology startup had no personal liability under the state Wage Act for compensation due the limited liability company's former president, the Supreme Judicial Court in Massachusetts has decided.

The plaintiff president argued that the defendant board members and investors were officers or agents "having the management" of the company for purposes of imposing individual liability under G.L.c. 149, §148.

But Justice Scott L. Kafker, writing for the unanimous court, found that the defendants did not exercise management authority to the extent necessary to hold them personally responsible for Wage Act violations.

"The defendants were not designated as company officers and had limited agency authority," Kafker wrote. "Indeed, the only officer having the management of the company was the plaintiff, not the defendants."

The 37-page decision is *Segal v. Genitrix, LLC, et al.*

Landmark decision

Peter M. Durney of Boston represented defendants H. Fisk Johnson III and Stephen Rose. At the end of the day, he said, the SJC enforced the Wage Act as written.

"The decision sends a calming message to investors and businesses in Massachusetts," Durney said.

"The decision sends a calming message to investors and businesses in Massachusetts."

— Peter M. Durney, Boston

Boston attorneys Timothy J. Wilton and Kathy Jo Cook represented plaintiff Andrew Segal. Wilton said the ruling exalted corporate formalities over practical realities.

The defendants' actions met the threshold for what the Legislature intended for individual liability under G.L.c. 149, §148, he added.

"The Legislature would have thought that someone who ran the business was [liable under the statute] as an agent having management of the company," Wilton said.

Cook, meanwhile, pointed out that Superior Court Judge Paul D. Wilson, in awarding treble damages, found the defendants acted in bad faith by keeping Segal working so that they could get all the intellectual property that he had developed at a discount price.

"That is not ordinary board member or investor activity," she said.

According to Cook, the SJC reversed the course of Wage Act cases that had interpreted the statute liberally to protect workers from unscrupulous employers.

Benjamin G. Robbins filed an amicus brief on behalf of the New England Legal Foundation. Robbins agreed with the decision and said it was important that the SJC issued model jury instructions that clarified the distinctions between the powers and responsibilities of board members, investors and "agents having the management of such corporation" as used in the Wage Act.

"What is very satisfying here is the court is drawing a presumptive line that if you are acting as a director with management oversight of the company or an outside investor exercising a degree of responsibility or control over how your own funds are being used, you are not an 'agent' of the employer," Robbins said.

Boston business litigator William T. Harrington said the fact that the plaintiff was both the president of the company and made the decision not to pay himself likely weighed heavily in the SJC's decision.

"The court is trying to limit liability under the statute to a [company] president or treasurer or someone who is the functional equivalent of a president or treasurer," Harrington said. "With respect to board members, they made clear the board acts collectively, not individually, so to hold a board member personally liable for a decision of the board would be extraordinary."

Boston employment lawyer Renee Inomata said she saw *Segal* as bringing clarity to Wage Act liability for board members and investors in the context of the fluid "startup" economy in Massachusetts.

"It gives [board members and investors] a little bit more security in terms of being liable for the tremendous damages under the Wage Act if an officer of the company makes a decision not to pay their employees," Inomata said.

That said, the decision provides a warning to board members or investors of cash-strapped companies who may get "overzealous" and step into interim president or CEO roles instead of hiring someone else to do those jobs, she added.

Unpaid wages

Plaintiff Segal and defendant Johnson formed Genitrix in 1997 as a Delaware LLC. The biotech company was founded as an investment by Johnson into cancer research performed by the plaintiff. While Johnson provided the initial funding, the plaintiff served as president and chief executive officer.

Defendant Rose represented Johnson in negotiations over the formation of the company. Under the terms of the LLC agreement, the plaintiff transferred his intellectual property rights in his research in exchange for a substantial equity interest.

An employment agreement that the plaintiff was required to sign as a condition of Johnson's investment designated Johnson as a third-party beneficiary authorized to enforce the company's rights under the agreement.

The plaintiff and Johnson each had authority to appoint two board members to Genitrix's four-member board of representatives, in which most decisions required a 75 percent majority to pass. After serving as a board member himself, Johnson appointed Rose to the board in 1999.

In 2003, Johnson began funding Genitrix through defendant Fisk Ventures, an LLC owned by Johnson and Rose. As a result, Fisk Ventures became the largest shareholder in Genitrix and obtained the authority to appoint a fifth member to the board.

As president and CEO, the plaintiff managed Genitrix's daily operations, supervising the laboratory and all company employees.

Beginning in early 2006, the company began running into funding problems.

In January 2007, the plaintiff stopped taking his salary so that the company would be better able to meet its expenses. The plaintiff also proposed as cost-cutting measures laying off the company's only other employee, a lab worker, and selling the company's lab equipment.

The board initially blocked those moves, with Rose indicating that the lab worker was too valuable to lose based on his work developing a cancer-fighting molecule.

Money problems continued, and in May 2007 the board did vote to terminate the lab worker. When Johnson and Fisk Ventures board members later deadlocked with Segal board members, Rose filed a petition on behalf of Fisk Ventures to dissolve Genitrix in Delaware court.

The plaintiff opposed the dissolution, filing counterclaims for breach of fiduciary duty and breach of the LLC agreement. During the dissolution proceedings, the plaintiff continued working as president, protecting the company's intellectual property and making necessary tax filings.

The plaintiff would later testify that he continued to work without pay because he expected to be compensated when the company sold its patents.

In early 2009, the plaintiff sued Rose and Johnson under the Wage Act for unpaid wages from 2007 to 2009. At about the same time, the Delaware Chancery Court ordered Genitrix's dissolution. In the ensuing liquidation of assets, Fisk Ventures obtained the company's IP at auction for $300,000.

Back in Massachusetts, a Superior Court judge granted the defendants' motion for summary judgment on the plaintiff's Wage Act claim, finding that Johnson and Rose did not "have the management" of the company for purposes of imposing liability. The Appeals Court reversed, and a jury later found Johnson and Rose liable for non-payment of the plaintiff's salary.

The SJC granted direct appellate review from the denial of the defendants' motions

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Terms of severance extinguished exec's right to stock options

By Pat Murphy

The terms of a software company executive's severance agreement completely extinguished rights to preferred shares and stock options granted during the periods of his employment, the Massachusetts Appeals Court has found.

The plaintiff argued that a general release of claims in his severance agreement, when read in context with other provisions, was ambiguous and unenforceable with respect to his rights to shares and stock options.

But the Appeals Court disagreed, reversing in part a Superior Court judgment that included a jury verdict holding the defendants liable for refusing to honor the plaintiff's exercise of 1,000 stock options.

"Simply put, the plain language of the release is only susceptible of one reasonable interpretation: barring something to the contrary elsewhere in the severance agreement, [the plaintiff] released all rights to the preferred shares and stock options," Judge William J. Meade wrote for the unanimous panel.

The 13-page decision is *MacDonald v. Jenzabar, Inc., et al.*

'Pristine example'

Connecticut lawyer Michael D. Blanchard represented defendant Jenzabar, a Boston tech company. Blanchard said the court's decision was a "pristine example" of the application of Massachusetts law regarding releases as interpreted by the Supreme Judicial Court.

"There are rules of interpretation that require, when you have a general release, there can only be an exception if it is expressly stated," Blanchard said. "There was none here."

"Basically, any [right] that's not specifically carved out is going to be extinguished."

— Mark M. Whitney, on merger clauses in severance agreements

Counsel for the plaintiff, Colin R. Hagan of Chelsea, pointed to language in a confidentiality clause in the severance agreement as "basically affirming" the continuing existence of his client's stock option rights.

"We think it is clear that the [general release] did not release [the plaintiff's] vested property interests," Hagan said. "To the extent there is any claim it did release or forfeit those options, we would point to the trial court's decision that there is an inherent ambiguity in the document."

But Marblehead attorney Mark M. Whitney, who drafts and negotiates severance, noncompete, stock option and other agreements for companies and counsels executives regarding such matters, said he has learned over the years that merger clauses in severance agreements are "deadly."

"Basically, any [right] that's not specifically carved out is going to be extinguished," he said.

While Whitney said he agreed with the Appeals Court on the issue of the plaintiff's preferred shares, he said he was "troubled" by the court's treatment of the confidentiality clause in the severance agreement. Under the language of the clause, the plaintiff agreed to an "egregiously long" five-year noncompetition period, with his right to stock options in addition to his service as a senior executive referred to as apparent consideration, he said.

"It appears the court was willing to allow the five-year restrictive period to continue, while it also appeared willing to ignore part of the consideration for that five-year period." Whitney said. "I hope they appeal it."

Unexercised stock options

Plaintiff Alan MacDonald worked for several years at Jenzabar before becoming the company's chief financial officer. In June 2004, he executed an employment agreement under which the company was to issue him shares of preferred stock as well as options to acquire common stock.

The plaintiff's stock option rights were specified in two written agreements executed at the same time. Under those agreements, the defendant issued the plaintiff options to purchase a total of 1,516,000 shares of its common stock. The stock options vested in equal allotments over a three-year period. Those agreements further provided that the options to purchase expired after 10 years.

The plaintiff left the company in 2007. At the time of his departure, the plaintiff had not received any preferred shares or exercised any stock options.

The plaintiff returned to Jenzabar in 2008, assuming the position of mergers and acquisitions research developer. The plaintiff left for good six months later without receiving any preferred shares or exercising any stock options.

Under a severance agreement executed in May 2009, the defendant agreed to continue to pay the plaintiff's salary and a portion of his health insurance for six months.

The severance agreement also included a general release under which the plaintiff agreed to unconditionally discharge the company from "any and all claims, liabilities, obligations, promises, agreements, damages, causes of action, suits, demands, losses, debts, and expenses of any nature whatsoever, known or unknown, suspected or unsuspected, arising on or before the date of this Agreement."

A merger and integration clause provided that the agreement terminated and superseded "all other oral and written agreements or arrangements" between the parties.

After leaving the defendant in 2009, the plaintiff began discussions with company representatives exploring possible avenues for converting his preferred shares and stock options into cash. On two occasions, the plaintiff attempted to exercise his stock options.

Citing the release in the severance agreement, the defendant rebuffed the plaintiff's initial attempt to exercise 1,000 options and a subsequent attempt to exercise his remaining 1,515,000 options.

In 2012, the plaintiff sued the defendant in Superior Court for breach of contract. Judge Janet L. Sanders, sitting in the Business Litigation Session, ultimately ruled that the severance agreement unambiguously extinguished the plaintiff's rights to preferred shares. However, Sanders further ruled the severance agreement was ambiguous regarding the stock options.

After a trial on the limited issue of liability for the stock options, the jury found the defendant liable for refusing to honor the plaintiff's initial exercise of 1,000 stock options. Jurors found no liability with respect to the plaintiff's attempt to exercise the remaining options.

Unambiguous agreement

In addressing whether the severance agreement was ambiguous, Meade first addressed the language of the release. The judge found the release "clear and broad," expressly extinguishing the plaintiff's employment agreement as well as his rights under any and all agreements predating the severance agreement, including his stock option agreements.

To avoid the conclusion that he had released all rights to preferred shares and stock options, the plaintiff argued that an ambiguity arose by virtue of language in the severance agreement concerning the survival of a confidentiality agreement he had signed when he returned to Jenzabar in 2008.

Specifically, the plaintiff pointed to a sentence explaining his agreement to extend from two to five years noncompete and nonsolicitation periods in the confidentiality agreement. The sentence stated the extended term was "reasonable in light of … the Company's grant to you of a considerable number of options to purchase common stock."

But Meade rejected the plaintiff's contention that that language suggested his rights to the preferred shares and stock options survived the general release. The judge noted that the confidentiality clause in the severance agreement did not mention preferred shares at all.

"By no means, therefore, is there any ambiguity regarding MacDonald's rights to the preferred shares; those rights were extinguished by the general release," Meade wrote.

Turning to the issue of stock options, the judge wrote that nothing in the severance agreement's confidentiality clause indicated the plaintiff would be retaining rights to stock options as consideration for the extension of the noncompete and nonsolicitation periods.

To understand the sentence mentioning the stock options, he wrote, it needed to be read in its entirety.

"The sentence refers not only to MacDonald's stock options, but also to the 'senior' roles and positions he held at Jenzabar, as chief financial officer and mergers and acquisitions researcher," Meade wrote. "When read as a whole, therefore, the sentence affirms the historical justification for the five-year noncompete and nonsolicitation periods: namely, that MacDonald had held both high-level positions at, and vested stock option rights in, Jenzabar."

The judge emphasized the policy in Massachusetts is to give effect to general releases, requiring the parties to state any exceptions in clear terms.

"If the language in [the confidentiality clause] was intended to create an exception for MacDonald's rights to the preferred shares and stock options, it fell well short of achieving the required level of clarity," the judge observed.

In concluding that the plaintiff's severance agreement was unambiguous and extinguished rights to both shares and stock options, Meade further noted the contract's merger and integration clause.

"MacDonald and Jenzabar clearly provided that the severance agreement terminated and superseded all other oral and written agreements or arrangements, but for the confidentiality agreement," Meade wrote. "In so doing, they showed that, when they intended to, they knew how to properly craft an exception. In so doing, they also revealed, by way of omission, that they did not intend to create an exception for the preferred shares and stock options." NEIH

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Cyber risk and insurance: what your business needs to know

Joseph S. Sano

As we try to learn from the events of 2017 and make our business plans for 2018, it is apparent that managing "cyber risk" — the risk that your enterprise will be impacted by a data breach — has become an imperative for many.

There is good reason for that. Many have noted that 2017 marked a turning point in social attitudes around cyber breaches. Rather than seeing data breach as the unavoidable consequence of modern life, petty crimes perpetrated by petty criminals (a fat kid on a laptop in his bedroom), we now focus on the conduct of the entity whose data was hacked, and as consumers we react and punish those businesses that failed to prevent, mitigate or timely report their breaches.

Equifax, Uber, Yahoo are just three, among many examples of companies criticized in these areas in the last year. Many more small, medium and large enterprises were negatively impacted by data breaches.

Indeed, there are few enterprise risks more harmful than unmanaged cyber risk. While the financial impacts of data breaches can be substantial, the greatest, potentially existential, threat from cyber risk is the impact of an unmitigated data breach on your company's reputation.

Thankfully, there is a large, growing and competitive market for insurance products to address, allocate and potentially mitigate cyber risk, and many of these products are keyed to reputational risks.

This article identifies the key components of the cyber risk management process and cyber risk/data breach insurance, and describes critical provisions, variations and limitations in commercially available coverages to provide an initial knowledge base for further inquiry.

Cyber risk/data breach insurance and risk management

Defining cyber risk in the context of your specific business is the first step in managing this risk.

Companies that interact directly with the public, and companies that rely on third-party payment processors, are exposed to significant financial risk from data breaches, while those enterprises whose business model is based on confidentiality and trust (e.g., banks, law firms, doctors, insurers) are also exposed to substantial reputational risk.

The risk management process requires the management of each company to consider the "what if's" of several data breach scenarios.

For example, what potential negative outcomes might flow from a data breach involving a community bank or credit union? Does my business model make me a target for cyber extortion? Am I compliant with applicable statutory and regulatory regimes regarding data protection?

Those and other "what if's" and inquiries such as "how am I vulnerable" may identify operational vulnerabilities, and non-insurance risk mitigation measures (e.g., additional hardware/software protections, white hat breach or vulnerability assessments, vendor and customer contractual breach allocation measures), and help the enterprise properly assess the need for cyber risk insurance as a cost effective risk transfer mechanism.

Many businesses may benefit from receiving knowledgeable and objective input from third-party legal and other professional advisors in assessing and managing cyber risk.

Once the impact of data breaches on your business has been identified, and mitigated to the extent practicable with internal measures, it is time to consider cyber risk insurance as a risk transfer mechanism.

Key features of cyber risk insurance

If there is one notable feature of commercially available cyber risk or data breach insurance, it is the lack of standardization.

Most business owners can easily explain what is covered under their commercial general liability, or CGL, insurance — coverage for defense cost and settlements or judgments for claims involving bodily injury or property damage.

Since CGL policies are written on highly standardized policy forms, with limited variations, insureds can focus on pricing or claim service reputations in making CGL purchase decisions. The standardization in CGL policies also limits pricing variability among different insurers.

In comparison, cyber risk insurance, a relatively new line of coverage, is highly variable. In a recent experience, pricing for the same basic cyber risk liability limits quoted by four insurers varied by more than 150 percent.

Moreover, while pricing and claim service are important issues in cyber insurance, the lack of policy standardization and knowledge gaps about the operation of key provisions makes the cyber risk purchase decision fraught with uncertainty.

Ditch the jargon and focus on the protection provided

Making sure your cyber risk policy addresses the key financial and reputational risks your business faces is far more important than understanding whether a specific coverage is considered as "third-party" versus "first-party" coverage.

However, since your broker and even some insurers may use these terms in describing coverages found in cyber risk policies, a little background may be helpful.

"Third-party coverage" is used to describe liability insurance. If a third party makes a claim or sues you for the harms resulting from a data breach, third-party coverage in a cyber risk policy will address the circumstances in which the insurer will defend or indemnify its insured from such third-party claims.

The sources of such claims and suits may be the third parties whose data was breached, credit card companies who suffered fraudulent claims because of the breach, or governmental regulatory authorities charged with enforcing data breach protection laws.

By contrast, the words "first-party coverage" are ordinarily used to describe property coverages in which the insured receives payment from the insurer for damages to its own property caused by a covered cause of loss.

In the cyber risk insurance context, first-party coverages reimburse the insured for certain expenditures that the insured makes following an actual or threatened data breach. Examples of such first-party cyber risk coverages may include reimbursement for credit monitoring services the insured provides for breach victims, crisis management and/or public relations costs incurred by the insured following a breach, or even reimbursement of cyber extortion payments made to avoid a threatened breach.

By following through on the risk identification/management strategy, the business owner can assess whether a policy being considered adequately addresses the risks identified without regard to the label the insurer or broker puts on such coverages.

Coverage triggers, exclusions and other limitations

In buying any insurance, it is critical to understand how the coverage operates. That means understanding what circumstances are covered and how claims are processed, as well as what circumstances are not covered or under what conditions the insurer is relieved from paying a claim.

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SPECIAL FEATURE

Ballot questions may end up proving costly for employers

Gary D. Finley

Come November, Massachusetts voters may have an opportunity to decide two ballot questions with significant — and potentially expensive — implications for employers in the commonwealth.

The proposals would (i) increase the Massachusetts minimum wage, in stages, to $15 an hour, and (ii) create a statewide program that would provide paid, job-protected family and medical leave for Massachusetts employees.

Though it is not yet clear whether the proposals will be placed on the ballot this fall, Massachusetts employers should keep a close eye on the process and consider how their operations might be impacted if the proposals become law.

Minimum wage

The first proposed ballot question would gradually increase the minimum wage for employees in Massachusetts, which is currently $11 an hour. Specifically, the proposed measure would raise the minimum wage to $12 an hour on Jan. 1, 2019; to $13 an hour on Jan. 1, 2020; to $14 an hour on Jan. 1, 2021; and, finally, to $15 an hour on Jan. 1, 2022.

Additionally, beginning in 2023, and each year after that, the commissioner of the State Department of Labor Standards would be required to adjust the minimum wage, based on the 12-month percentage increase, if any, of the Consumer Price Index, as published by the U.S. Department of Labor.

The proposed measure would also gradually increase the minimum guaranteed hourly wage for tipped employees. That minimum wage would increase from its current level — $3.75 an hour — to $5.05 on Jan. 1, 2019; to $6.35 on Jan. 1, 2020; to $7.65 on Jan. 1, 2021; and, finally, to $9 on Jan. 1, 2022.

Thereafter, the minimum wage rate for tipped employees would also be subject to adjustment annually based on the Consumer Price Index.

Finally, the ballot question would create a process that could potentially increase wages for family child care providers who contract with the state to provide services to low-income or at-risk families.

Up until now, such workers have generally been excluded from minimum wage requirements. Under the proposed measure, however, the state attorney general would determine pay rates for such child care providers that are "substantially equivalent to the minimum wage."

Paid family and medical leave

The second proposed ballot question would provide for employee leaves of absence similar to those protected under the federal Family and Medical Leave Act, but on a paid basis and for differing durations than under FMLA. The measure would apply to both private and public sector employees, though municipal employees would be covered only if the proposed law were adopted by a vote of the city or town.

Significantly, and unlike many similar leave statutes, a private employer would not have to have a minimum number of employees in order for its employees to be covered.

Under the proposed measure, covered workers would be permitted to take up to 16 weeks a year of paid leave to: (1) care for a child after the child's birth, adoption or placement in foster care; (2) care for a seriously ill family member; or (3) address needs arising from a family member's active duty military service.

Even more liberally, covered workers would have a right to take up to 26 weeks a year of paid leave to address their own serious medical conditions. Employees would

Significantly, and unlike many similar leave statutes, a private employer would not have to have a minimum number of employees in order for its employees to be covered.

be permitted to use medical leave for inpatient hospital, hospice or residential medical care, or continuing treatment by a health care provider.

In either case, an employee's leave would run concurrently with any leave to which he might be entitled under FMLA or the Massachusetts Parental Leave Act. Further, an employee's total annual leave entitlement under the new law would be capped at 26 weeks, even if the employee were to take separate leaves for family and for medical reasons.

While on leave, an employee would be eligible to receive up to 90 percent of his average weekly earnings, up to a maximum of $1,000 a week.

The proposed law would also create a new Massachusetts Department of Family and Medical Leave, which would issue regulations implementing the law, process applications for benefits, and, when necessary, conduct hearings.

This new benefit would be funded through a trust fund into which employers would initially pay an amount corresponding to .63 percent of each employee's annual wages, up to the Social Security contribution and benefit base limit. Up to one half of the .63 percent could be funded through deductions from employees' wages.

Self-employed individuals who elect coverage and businesses that contract with self-employed individuals would each be

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MEPA is coming: an overview of the pay equity audit process

Barry J. Miller **Hillary J. Massey**

Major changes to the Massachusetts Equal Pay Act, G.L.c. 149, §105A, will take effect July 1. In some ways, the Massachusetts legislation goes farther than any prior pay equity legislation in the U.S.

Is your company prepared? The best way to avoid pay equity claims — and take advantage of a unique affirmative defense under the new Massachusetts law — is to conduct a pay equity audit under the protection of the attorney-client privilege.

Overview of the law

New justifications for wage differentials

The existing Massachusetts law and the Federal Equal Pay Act have long required "equal pay" for "equal work." The new law, in contrast, will prohibit differences in wages for people of different genders who perform "comparable work": work that is "substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions." "Wages" are defined broadly to include "all forms of remuneration for employment."

In contrast, the prior version of the law, which was in effect for decades but hardly litigated, required employees to prove that they earned less than an employee of the opposite gender who performed a job with similar content.

In two decisions interpreting that version (the *Jancey* decisions), female school cafeteria workers sued a school committee alleging that they were paid less than male custodians. The Supreme Judicial Court ruled in favor of the school committee, concluding that the jobs were not comparable because their content was not similar.

After the *Jancey* decisions, the statute was essentially ignored by plaintiffs' attorneys. Until now.

When the law takes effect, an employer will be permitted to explain wage differentials between employees of opposite genders by relying on one or more of the following factors: (i) a system that rewards seniority (provided that time spent on protected parental, family and medical leave does not reduce seniority); (ii) a merit system; (iii) a system that measures earnings by quantity or quality of production, sales or revenue; (iv) geographic location in which job is performed; (v) education, training or experience (to the extent such factors are reasonably related to the job); and (vi) travel (if a regular and necessary condition of the job).

The federal and most state-level pay equity laws provide a catchall defense for any "factor other than sex," but the Massachusetts statute has no similar provision.

The law will be enforced by the Attorney General's Office. While the AG's Office is not required to promulgate regulations or issue informal guidance, we anticipate that it will do so soon. Information provided by various sources indicates that the AG's Office is preparing definitions and guidance related to the six factors.

For example, we anticipate that the AG's Office may provide guidance on what constitutes a "system." Does it have to be in writing? Does it have to be objective and/or measurable? We also anticipate guidance on when geographic location may be a valid reason for a wage disparity.

Other new requirements

Among other changes, the new law makes it unlawful for employers to prohibit employees from discussing or disclosing wages, and prohibits Massachusetts employers from requesting the compensation history of an applicant prior to making an offer, unless the applicant "voluntarily" discloses such information.

New self-evaluation defense

The new law creates an affirmative defense to wage discrimination claims for an employer that has (1) completed a self-evaluation of its pay practices that is "reasonable in detail and scope in light of the size of the employer" within the three years prior to commencement of the action; and (2) made "reasonable progress" toward eliminating pay differentials uncovered by the evaluation.

The new law contains no information on what is required to establish that an audit is "reasonable" or what constitutes "reasonable progress." Because this defense is unique to Massachusetts, there is no other body of law or experience that sheds useful light on what these standards may require of an employer.

As mentioned above, the Attorney General's Office is expected to issue informal guidance that addresses these standards. We anticipate, based on several sources, that the AG's Office will define "reasonable" as depending on the size and complexity of an employer's workforce, the jobs and employees and information evaluated, and the sophistication of the method used.

The AG's Office is expected to provide a guide for employers about how to conduct a self-evaluation, potentially including template forms. And the office is expected to define "reasonable progress" with respect to the size and resources of the employer.

Risks of the defense

While the new self-evaluation defense may have advantages, it also creates substantial risks. If not adequately protected, any evaluation used to substantiate a defense under state law might be used against a company in litigation under the federal Equal Pay Act or Title VII, which provides no similar defense.

> While the new self-evaluation defense may have advantages, it also creates substantial risks.

Thus, Massachusetts employers should work with counsel in order to protect the assessment process and results with the attorney-client privilege, as discussed below.

Protection of attorney-client privilege

Employers conducting a pay equity assessment should protect the process and results by working closely with legal counsel and limiting the number of internal personnel involved in the process. Without these protections, the self-evaluation (and any wage differentials identified by it) may be discoverable in the event of a lawsuit.

Protecting the assessment does not restrict an employer's ability to share or rely on the results at a later stage, but rather permits the employer to decide whether and when to do so.

Even Massachusetts employers that anticipate relying on the self-evaluation defense would be wise to cloak the entire audit process with the attorney-client privilege until they can evaluate the results and determine whether to rely on the defense. Otherwise, if the assessment uncovers significant wage differentials, and it is prohibitively expensive for the employer to make "reasonable progress" toward remediation, the "defense" will provide no protection.

Protecting a pay equity review with the cloak of the privilege requires caution and diligence as to the creation, storage and sharing of documents, including limiting the dissemination of documents by email, encrypting files that may contain personal or other sensitive information, and taking care to include the attorney/client privilege designation on all materials.

The materials created in the course of a pay equity review can be extraordinarily sensitive and subject to exploitation by adverse parties once disclosed, which may favor the use of outside

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SPECIAL FEATURE

Mergers & acquisitions in 2018: trends and risks

Stephen Honig

M&A is going to be red hot in 2018. High valuation multiples, dry powder, booming public markets, tax cuts. How can you fail?

Beyond doing diligence and avoiding over-leverage, what information do you need to succeed as a business acquirer?

Two year-end studies give insights into the M&A market: Pitchbook's "2018 Private Equity Outlook" and the ABA's "Deal Points Study" of the private M&A market.

PE predictions

We start with Pitchbook's 2018 predictions. Not surprisingly, all purchasers, not just PEs, will enjoy active years, given pressure to deploy funds and driven by booming public equity markets that, in turn, are highly correlated with purchase price multiples.

Since almost all the pundits in January were bullish on the equity markets, upward valuation pressures seem expectable. Pitchbook also references "relatively easy access to financing," the accuracy of which prediction may be confused in the mid-term by projected fed actions and a possible burst of long-awaited inflation, but for the short term this prediction also seems plausible.

Valuations in all buy-outs, including but not limited to PE deals, in the first nine months of 2017 remained at the highest level since the 2008 market break. Notwithstanding, November 2017 saw the second greatest number of announced M&A deals in two decades. Why?

Part of the answer is the "dry powder" factor. Pitchbook credits strong PE fundraising, leading to such firms holding $65.9 billion in investable funds at the end of last March. That money needs to be deployed within each fund's investment period.

Growing investment competition from family offices and likely from corporate acquirers (given tax reform and repatriation of offshore cash) will drive deal competition and thus valuation inflation, provided public equity markets do not surprise by an unexpected collapse.

There is lack of clarity relative to PE funds selling to other PE funds. You would think that the second fund, buying a prior fund's company, might worry about how much more profit could be squeezed out of the investment. Nonetheless, per Pitchbook, a "secondary" purchase by a second fund represented 50 percent of all PE sales through December 2017, and 19 percent of all M&A.

Perhaps funds concentrated on a particular sector will be more willing to enter into secondary acquisitions, on the theory that their expertise in the vertical will uncover values that the prior PE fund missed.

Another Pitchbook prediction is the continued emergence of niche sector funds, because of LP desire to invest with sharp focus.

What will be the hottest investment areas? Software, which provides many targets with recurring revenue models "typical of a SaaS business model." Proliferation of companies specializing in software solutions for non-high-tech businesses also promises further growth in this vertical.

Nonetheless, Pitchbook's citation of this sole sector is interesting. Per the ABA study of private middle-market acquisitions, software is not the overwhelming acquisition category. While "technology," the largest sector for the ABA (23.7 percent), likely contains some software companies, the health care category is almost equal (21.6 percent) and, even then, over half of the targets are not accounted for.

There is no separate target data in either report for the cutting-edge new economy darlings that futurists tell us are the businesses of the future: nanotech, AI, genetics, robotics.

Although no doubt some such companies are buried in other generically named categories, the absence of deal statistics for these narrow categories suggests that none make up a significant sector currently.

Perhaps these companies are not so numerous, at least at the stage to be acquired (as opposed to being VC targets). But the growth of specific sector PE funds that focus on these verticals must at some point encourage acquisitions.

Lastly, the Pitchbook report suggests reshaping of the PE landscape. Liquidity has been falling in given funds even while aggregate dry powder has been growing. The absolute number of LPs in PE funds fell in 2017 for the first time since at least 2000, perhaps reflecting more active direct investments by historical LPs such as family offices, sovereign wealth funds and pension plans.

Pitchbook predicts a continued decline in the total number of PE firms during 2018.

ABA study

The ABA's annual study of private acquisitions sampled acquisitions not by PE firms but rather by public companies (where disclosure of contracts is legally required).

The study covers major negotiated aspects of M&A transactions: purchase price adjustments, earn-outs, MAC, warranties, closing conditions, indemnity, rep insurance and dispute resolution, among others. Below are two issues that call for careful client focus.

One part of the M&A process that is vexatious, expensive and exasperating: post-closing adjustments. Disputes might arise over alleged misrepresentations, which may or may not either be insured or fall into a de minimus "basket."

But even without any claim of misrepresentation, deals typically require "post-closing purchase price adjustments." The operation of the business between signing and closing may change the economic value of the target. Since the deal price was struck based on financial statements at a prior date, how do you compensate the buyer for any economic deterioration, or compensate the seller for any improvement?

The classic manner, embodied in the ABA Model Asset Purchase Agreement, is to adjust based on changes in working capital. If it increased, the buyer pays more. If it decreased, the seller refunds the decrease.

For the last decade, over 80 percent of transactions have included some adjustment either based on a single factor or (in 73 percent of the cases) in tandem with other adjustments.

And of these adjustment provisions, last year 89 percent relied on working capital measures either alone or together with an added metric (debt level and cash on hand are typical).

In most cases, the target will make a pre-closing estimate of this adjustment, and the closing payment will reflect this estimate. Only 16 percent of deals gave the buyer the right to question the closing estimate presented by the target even if it increased the closing payment, which is surprising since less than half the sellers were required to escrow funds to secure a negative adjustment when post-closing working capital is calculated.

Acquisition agreements provide in 95 percent of all deals that the post-closing working capital calculation be prepared by the buyer. And in the vast majority of cases, this adjustment is paid from the first dollar. There is no threshold, for example, of working capital deficiency before adjustment is made (unlike the typical "basket" for misrepresentations so that sellers are "not nickeled and dimed to death").

These adjustments depend on the definition of working capital, for which there is no universal formulation. Counsel is often ill-prepared to negotiate, and the discussion falls on the seller's CFO and accountants. The seller's senior management needs to be deeply involved.

Different results in different companies can be driven by excluding one or more often-excluded items from current assets or liabilities: debt, net debt, cash and equivalents, transaction expense, tax attributes, employee liabilities, and — in 52 percent of deals — "other" unspecified items.

Management will be unable to get granular guidance from counsel on this matter, and must be intimately involved in understanding the target's particular working capital cycles.

Another post-closing economic problem is the "earn-out." When there is debate as to the value of a target, one solution is to fix closing valuation at what the buyer believes, but also to provide that the seller will be paid more if future performance exceeds buyer expectation. An accounting is kept of post-closing performance, often measured by revenue or EBITDA although sometimes based on other specific criteria.

Seller's counsel often may advise the seller "don't take the risk, rather try to negotiate even a modest increment of closing cash in lieu of accepting the earn-out because you never know how it is going to work out and you will end up fighting with the new owner."

The key to protecting the seller in these cases is to gain control of post-closing operations, to be sure that actual business decisions align with the criteria by which success in earn-out is achieved.

Will the new owners allow management to pursue a goal of increased EBITDA, or of higher gross volume, and (whatever their goal) will they measure earn-out on that metric?

Who controls the budget and CapX? What happens if the acquirer is acquired? Will the seller's management be in charge of the business during the earn-out period?

Will the seller be protected by obtaining a covenant that the buyer will operate the business as in the past? Is the seller protected by the implied contractual covenant of good faith and fair dealing if the buyer makes management decisions that negatively affect reaching the earn-out trigger?

What if the buyer rolls up other companies and drops them into the same entity; how do you measure the earn-out in that case? Conversely, can the buyer acquire and keep separate a competitive entity?

Conclusion

In a hot 2018 M&A market, acquirers will need to look out for competing bidders while dealing with the growing body of learning that defines the ground rules for negotiating the deal terms.

If predictions prove true, 2018 is going to be a vibrant M&A year. NEIH

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Del. Supreme Court issues 'notable' ruling in Dell case

In the November issue of New England In-House, I predicted that the Delaware Chancery Court decision — which held that the going private pricing of the Dell transaction was undervalued by $7 billion — would be reversed based on the trend in the Delaware courts to put heavier reliance on fully negotiated deal price accuracy notwithstanding shareholder claims of underpricing.

In December, the Delaware Supreme Court did just that, putting another nail in the coffin of appraisal claims of underpricing in M&A transactions.

True to emerging Delaware judicial thinking, the Supreme Court relied on the efficiency of the market in determining fair deal value. The court relied on the lower market value of the traded Dell shares and the fact that, after the actual deal was priced but before it was closed, the company had the opportunity to "go shop" and offered the deal to 67 other potential buyers.

The board's special committee also had negotiated six price increases before signing the deal, and had been advised by its own law firm and two investment banks.

Notably, the court supported the deal price even though it involved an interested party in a management buy-out (Michael Dell was staying in the deal) and despite the court acknowledging that the deal price was likely fair even though not the "best" price.

The decision is notable as it now provides clear guidance to boards faced with M&A opportunities that must be priced. The growing legal practice of filing lawsuits in public acquisition deals almost automatically based on the appraisal statute appears dead and buried in Delaware, absent blatant board failure to follow common-sense valuation practices.

Product Liability Strategies

A roundtable sponsored by MINTZ LEVIN

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MASSACHUSETTS LAWYERS WEEKLY: Are product liability exposures truly rising? Why do so many product liability claims asserted today carry the risk of being a mass tort or an MDL?

RALPH CAMPILLO, MINTZ LEVIN: On a daily basis we see cases being rushed to an MDL or a state-coordinated proceeding by lawyers who are very sophisticated and know defendants' pressure points, such as e-discovery. It is very rare to see a product liability case involving medical products being filed by a solo practitioner or a general practitioner. Instead, we see very sophisticated lawyers who have had a lot of experience in the mass tort arena. They know how to angle for MDL positions where they benefit from common funds, and which makes their involvement lucrative despite not necessarily having hundreds of cases. We see this happening on a daily basis, which has a tremendous impact on the transactional cost for manufacturers.

Mass litigation has become quite attractive to plaintiffs' lawyers. They now work together much more than they used to. They coordinate well with each other. And the availability of technology, media coverage, access to FDA warning letters and other such information online makes it easy for them to find causes and clients. These developments are indeed having a tremendous impact on the cost of defending products liability cases.

STEVEN REYNOLDS, SENSATA TECHNOLOGIES: I think different industries and different companies will have different experiences with that. Our experience as a component manufacturer, mostly in the transportation market, is that we haven't necessarily seen a marked increase in numbers, but I would absolutely agree that you do see changes. You see waves of types of cases that occur. You see more sophisticated plaintiffs' attorneys. It is an entrepreneurial activity, the plaintiffs' bar. They are using financing tools, and they're using ways of trying to be better positioned. If you can take a common set of facts that you've developed and then be able to leverage that in multiple cases and multiple jurisdictions, it's not a bad business plan, and I think that a lot of what you're seeing is there are increasingly sophisticated business people.

CAMPILLO: One other thing that should be noted is that some jury research has shown the American public really expects products to be 100 percent safe. They believe that's feasible, and they can't understand why a product could get on the market without being put through long-term detailed very thorough testing which we know is not practical or feasible in many contexts. But that mentality makes these cases very attractive to the lawyers on the other side.

LAWYERS WEEKLY: What are the key things a manufacturer should consider to minimize product liability exposure?

YALONDA HOWZE, MINTZ LEVIN: It's important to assess exposure proactively. That's really one of the best things that a company can do — understanding where the pressure points are in terms of exposure, looking at any data that you get from the post-market experience, assessing that data ahead of time, looking at operating procedures internally and making sure that key decision makers in the various departments who are responsible for the product are complying with those Standard Operating Procedures or at least are aware of them.

This is very important because with product liability cases what you're often doing is glancing backwards at what happened in some timeline that has long since passed, and so if companies are proactively looking at the same kind of information that you would be looking at in the event of an actual case and making sure that exposure is minimized, it really prevents the greatest exposure later.

ANGELO LOPRESTI, IPG PHOTONICS: There are several things that are important. The first is obviously good product engineering and testing and making sure the whole team understands the risk that's involved. As lawyers you have to understand the difference between high risk and low risk, and you should approach your executive management and have a frank discussion with them if you think it's a high-risk product and ask for additional testing, if necessary, or additional reengineering.

Second, I think as counsel and chief legal officer one has to instill a culture of honesty with one's peers, as well as the people who work under them, in order to encourage transparency and reporting up of issues. It's important to have relationships with not only your legal department but with business people, and so that way they're comfortable in reporting up to you.

Lastly, you have to get ahead of the issue and sit down during the monthly or quarterly business reviews with your finance and sales teams to find out what's going on, and have your ears open to at least the beginning of a problem. You're not always going to be able to stop it before it goes out the door, but you have to understand and get ahead of the issue and alert your management team.

HOWZE: I would just add that a lot of this can be done internally with existing internal staff. So if you're beginning to hear noises on the street, so to speak, about a particular product, that's really a good time to proactively get your hands around it and not wait for the complaint to hit your doorstep.

JOSEPH BLUTE, MINTZ LEVIN: I think culture is the number one thing in product liability. If you focus on excellence and safety and accident avoidance and that's seen within the company as part of the core culture, companies that can effectively do that are much less likely to have employees writing really stupid e-mails. They're much less likely to have employees do something like backdating a document because they think it's going to help the company or themselves in litigation.

You don't want to create an environment where your employees see litigation as a game where we're the good guys all the time and all plaintiffs' lawyers are in it just for the money and all of these claims are nonsense. I think it's a bad thing for company employees to get that attitude. They have to look at this as, "We're selling products and occasionally they may injure somebody. Let's do the best we can to avoid that. If someone is injured and we're sued, at least we'll be able to present to the world that we did our best."

AARON GROSSMAN, ZOLL MEDICAL CORPORATION: It's not litigation avoidance, it's quality. It starts with quality, and quality is all about culture. And culture, ultimately doesn't rest with the legal department. As highly as I think of the jobs that we do, it starts with the CEO. It starts there, and then it cascades down through the organization. Quality has to be more than a department. It has to be a key goal for the company. People need to feel that if they raise a concern and it stops the line, that that's okay. At the end of the day when you get sued, it's often because either there was a quality breakdown or customer expectations breakdown, and that's all about honesty, transparency, and focusing on doing the best you can to make a good quality product.

> "Quality has to be more than a department. It has to be a key goal for the company. People need to feel that if they raise a concern and it stops the line, that that's okay."
>
> **— Aaron Grossman, ZOLL Medical Corporation**

LAWYERS WEEKLY: What will be the impact of the U.S. Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of California* on forum shopping by litigants?

BLUTE: This case is important for several reasons. First of all, going back to our discussion about the aggregation of litigation, the plaintiffs' firms for very entrepreneurial reasons and economic reasons prefer to aggregate cases. And they prefer to aggregate them in jurisdictions that are friendly to plaintiffs and to aggregation.

That's given rise to what's called litigation tourism, where the plaintiffs try to aggregate cases in one of these jurisdictions, and they get as many claims as they can. Very often they get them from out of state. This particular case involved the drug Plavix, which is a blood thinner. There were hundreds of cases asserted in California against Bristol-Myers Squibb, and 600 of the plaintiffs had no connection to California. The California Supreme Court said notwithstanding that, since Bristol-Myers did so much work in California generally and since its distributor was a California company, that was enough to exert jurisdiction. But the Supreme Court said no. They said you have to have a connection between the individual plaintiff case/claim and the individual defendant. The jurisdiction has to be established plaintiff by plaintiff, defendant by defendant, and importantly, claim by claim.

CAMPILLO: I think some caution should be exercised by companies before filing dismissal motions. There may be downsides. Do you really want cases spread over 50 states? You will need more and better quality local lawyers and you may lose the value of having coordinating counsel. You run the risk of inconsistent verdicts, and from the company perspective it puts a heavy burden on its people in discovery.

In a coordinated proceeding or an aggregated proceeding you should have a single deposition of key players. But, if you have cases moving forward to the beat of different drums in different states, you're not likely to be able to protect company

witnesses from being deposed and re-deposed. You're going to see different discovery rulings, different breadth of discovery. A potential mess!

REYNOLDS: Sometimes consolidating can be to your advantage. The largest product liability experience that we had was an automotive recall, both the car company and the component maker being brought into the private lawsuit. It actually was very helpful that we ended up with a federal MDL in Michigan and a state MDL in Texas, in Austin, because [there was] one deposition of the key design engineer, then it was used in hundreds of cases. The administrative burden of having to fight wars all over the country and have key talent being forced to spend enormous amounts of time in the discovery process is a mess.

LAWYERS WEEKLY: What are the best ways to handle discovery and e-discovery issues?

ERIN HAYES, BOSTON SCIENTIFIC: Turning first to scope as it pertains to discovery in product liability cases — it's really important that when broad discovery requests come in that the company focuses on the specific product and the specific time period at issue in its attempt to narrow scope. To put it another way, a company may change how a product is manufactured or designed over the lifetime of that product — which could span decades. There may be different product iterations. Components may change. Manufacturing facilities may change. All of these variables should be considered, and the scope of discovery should be limited accordingly whenever possible to the specific product alleged to have caused injury.

It varies by jurisdiction in terms of the scope of discovery that a court may allow, but many courts will utilize the tests of "substantial similarity" or "reasonable similarity" of products when a plaintiff seeks discovery for products beyond those alleged to have caused injury. When a court uses such tests, it is important that the responding company really focus upon the changes to a product that I mentioned earlier in an effort to narrow the scope. Plaintiffs should not be able to gain discovery on products beyond those alleged to have caused injury, or at the very least, are substantially similar to those products. As another consideration, if the "substantially similar" product was also alleged to suffer from some defect in another case, a responding company should also attempt to exclude evidence of defects that are not similar. For example, an alleged defective airbag in one case does not mean that a plaintiff should have access to evidence concerning a defective seatbelt in a prior case.

HOWZE: From the outside counsel perspective we definitely want to be focused on narrowing scope wherever possible, to go back to opposing counsel and have a conversation and reach an agreement about that. It's also important to come to an agreement if you have multiple cases and these cases aren't in an MDL. You still want to get the benefit of that kind of coordination. It's important to try to reach agreement with opposing counsel at the outset as to how we're going to handle witnesses, so you're not having the same witness deposed eight or nine times in eight or nine jurisdictions. And you want to put all of this in writing and not rely on e-mail traffic.

Sometimes it's more cost efficient to work with third-party vendors and not law firms to review some documents, and so it's important from an outside counsel perspective to get an understanding with in-house counsel as to how we want to structure this in a way that really makes sense, that's going to keep costs down and that's going to make sure that they have one bite at the apple for all of the key witnesses.

LAWYERS WEEKLY: What is the effect of testimony from company witnesses on the outcome of product liability litigation? What strategies should be considered regarding the selection, training, and supervision of employees involved in the development, approval, launch, and/or sale of products?

GROSSMAN: The testimony of company witnesses can make or break a case, so it's critical that the company witnesses fully understand the case prior to any deposition and prior to being asked to sign any affidavits or any declarations.

Too many times I've seen people make the mistake of putting documents in front of a company witness for signature not fully realizing that that document may come

up in the future. Before any interaction between a company witness and the litigation, the witness has to have as complete an understanding as possible of the facts and circumstances, the plaintiff's legal theories, the twists and turns the case may take, so that he or she can be completely comfortable with the truth and accuracy and completeness of any statements that he or she is making and understand how it may be used in or out of context.

That comes down to communication with internal and outside counsel, and sometimes removing barriers and disintermediating so that outside counsel is speaking directly with the company witness. I think to the extent you can facilitate those relationships it's critically important.

HAYES: In terms of selecting the appropriate company witness, there's oftentimes a lot of reasons why the person who may be the most knowledgeable isn't necessarily the person that you want to choose. This is where in-house counsel is critical, to select the individual who is going to most appropriately and best represent the subjective opinions of the company that will then be imputed to the company at large.

In terms of just generally preparing individuals who are involved in development and approval, it goes back to having robust policies and procedures in place that relate to quality, that relate to testing, that relate to sales, and then ensuring that these policies and procedures are followed, and the best way to do that is to have appropriate training for those individuals and document the training. Policies are only as good as the training that goes into those policies and procedures.

"I think as counsel and chief legal officer one has to instill a culture of honesty with one's peers, as well as the people who work under them, in order to encourage transparency and reporting up of issues."

— Angelo P. Lopresti, IPG Photonics

GROSSMAN: I would add that in selecting the individuals, their ability to dedicate time to the project is really important. Adequate litigation performance requires a lot of investment in time. Doing a good job in deposition or trial is not a natural skill that most people have. It takes a lot of practice, a lot of study, and a lot of dedication, and if somebody is not going to be able to dedicate themselves to it the way they need to, they're probably not the right person for the job.

CAMPILLO: What I have found is that if upper management lets those employees know that this is important to the company and that they should invest the time to do the things Aaron is talking about, then you get much better results. Getting upper management to buy into the importance of this and having their message passed on to the people who are going to be in the trenches is hugely significant.

BLUTE: As Erin said, the person with the most knowledge may not be the best witness, may not have the skills, because it is a skill. I think you need to really spend time thinking about who your witness is going to be. You've got to think of things like, how do they come across? What's their appearance? Their gender and age might be important in a particular case. Being a witness is not something that people who go into engineering or science study for. So you want to try to get somebody who the lawyer thinks can with preparation handle that.

HAYES: The other point that I want to tackle is making sure that they understand the themes of the litigation because I feel like when the witness is on the stand, you want them really focusing on answering the question as opposed to wondering why the lawyer asked the question and how it plays into the case, because you can almost see sometimes their minds working and trying to think about how it fits in.

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LAWYERS WEEKLY: How do cybersecurity concerns impact your industry? Does the risk of a cyber attack raise any unique concerns?

LOPRESTI: Cybersecurity concerns affect every aspect of our lives: personal, law firms, and certainly our corporations. Depending upon what type of company you are, whether you're a consumer-facing company or a commercial-facing company, there's a different level of concern.

I think facing everyone is the risk of financial fraud and phishing. Corporations are just big pots of money, and we attract cyber criminals. So we have to get down to the nuts and bolts. Even for wire transfers to do a closing, we have to go through additional procedures now to make sure that someone hasn't found a party's e-mail and sent you fraudulent wire instructions. We have to develop new procedures and really educate the staff every time one of these new phishing attempts comes in. We as lawyers have to look at risk mitigation and making sure we defend the reputation of the company and address the concerns of the board because cybersecurity is a big focus of all public company boards these days.

"I think one thing you have to avoid is having the company say, 'Here's my offer. I'm not going to ever go a dime above it,' and later they increase the offer. If you're ever going to take that posture, you really have to stick to it."

— Ralph A. Campillo, Mintz Levin

And I would say for internal counsel: You have to get a seat at the table. If IT is meeting with your business partners on cyber matters, you have to be there and understand what the issues and risks are. Even though they may not be implementing software for you, you have to understand what's going on and make sure that your concerns are being understood.

REYNOLDS: There's no question this is an increasing issue with all kinds of products: consumer products, industrial products, medical device products. Products are increasingly communicating. They're sending data to cloud-based systems. The data's being utilized and monetized. It will change all sorts of industries, and therefore the security of that data is going to become critical. In the automotive industry, it's not only the use of communications protocols to send data out when previously it might have been internal to the car in a wire harness, but rather the entire change of the industry from a product industry to a service industry, the notion that vehicles will become autonomous, vehicles will communicate with each other and will no longer have the human-controlled interface of the driver but rather [will be] computer-run entirely.

Other industries will experience similar change, and the whole notion of liability will change. What happens with auto insurance in a world where it's not an individual driver of a car where the company is evaluating their driving record and accident history, but rather you are sitting in a vehicle that is doing the driving? What's going to happen with products cases in that instance as well? It's a lot easier for a plaintiff's lawyer, I'd imagine, to bring a case against mechanical products than it will be to dive into the world of how a sophisticated algorithm operated or didn't operate in certain circumstances.

LAWYERS WEEKLY: Are there pre-litigation strategies that it makes sense to utilize, for example, providing certain information to plaintiff's counsel early in the process in the hopes of discouraging a filing?

GROSSMAN: I think it's helpful to remember that most plaintiffs are people with valid concerns who don't understand why they're injured or why their loved one has died. They may be in a period of emotional difficulty, and it can be helpful to provide information that may answer some of their questions. Oftentimes, they're in a position of ignorance or uncertainty and as the manufacturer you have information that can answer their questions. Your device may capture certain data or information that might explain the incident that happened, and then that can sometimes satisfy an emotional need and, frankly, address the liability issue.

Also, plaintiff's counsel has an obligation to conduct an investigation. They need to satisfy their own interests to make sure that the case is worth spending their own time on. They need to be able to answer their clients as to what they did. And so to the extent you can provide information early on in the matter that can address people's questions and concerns, I have found it very helpful to do so.

HAYES: It depends on the factual circumstances surrounding the case and the degree of liability exposure, the gravity of the injuries, the specific facts. Did the device fail? Did it work as it was intended? When these things come in to the company, they tend to come in through the Quality channels or through the Sales organization. The doctor is already aware that the device has failed. So I find that you're not typically blindsided by a letter from a plaintiff's attorney; you already know that it's out there.

So, what you share pre-litigation is going to depend upon the strategy that you intend to take with respect to this event based on surrounding circumstances. Is this an isolated event? Is this something that relates to a design? Is this a particular device that failed? Is it the way the physician used the device that caused the problem? Is it on-label? Is it off-label? All of those things would factor into whether I was going to share something. If it's something like the physician placed it off-label, that would probably be information that I would strongly consider sharing depending on the other circumstances of the case.

HOWZE: Sometimes once you talk with the opposing counsel, you're able to get a sense of what their immediate objectives are. Sometimes they are on the hunt, and they want information. Sometimes they want to talk their client off the ledge, and they don't really want to pursue the case, and they need enough ammunition to go back and say, "You know, I don't really think there's a 'there' there. We should really let this go." But I think it takes a good deal of instinct to know what situation you're facing and when it makes sense to turn over some information at the outset or not.

LAWYERS WEEKLY: Should you follow a settlement policy, for example, settling so as not to incentivize other litigants or, on the contrary, settling so as to avoid the risk of creating legal precedent off of bad facts?

BLUTE: I think it depends on the case. For example, if you have a product that's new on the market, patented, and these cases come in, there's a reputational interest, and you don't think there's anything wrong with that product, then I think it's good for the business and the morale of the people you work with to aggressively defend those cases. But if I've got a product that's sort of a legacy thing where the product isn't even on the market anymore, then it may be a different strategy.

You make individual decisions during the course of litigation. If you're early in what could be repeat litigation and the first case that happens to come up for trial [is before] a particular judge or an unfavorable jurisdiction, you may decide that's not the case that I want to try first. So maybe strategically the company decides let's not lead with that one, if possible let's lead with another one. There are no hard and fast rules.

GROSSMAN: I do think it's important to at times take a no settlement approach to certain kinds of cases. If you know there will be a recurring fact pattern that you believe you can adequately defend, I think you can send the wrong signal to be settling that kind of case. Despite the fact that you can assert confidentiality in a settlement, I don't really believe it exists. I believe that some plaintiffs' lawyers talk, and so I would never rely on that.

And there are morale issues when you settle cases, for your internal team. It's very helpful for your sales organizations to understand that you've never had to settle a case involving a certain issue. It gives them more confidence when they're talking to doctors or other potential customers.

CAMPILLO: I think one thing you have to avoid is having the company say, "Here's my offer. I'm not going to ever go a dime above it," and later they increase the offer. If you're ever going to take that posture, you really have to stick to it, or your outside counsel, or your negotiator, loses a lot of credibility, which can impact future dealings as well.

Helping boards ID warning signs of toxic corporate culture

Joseph J. Floyd

Daniel J. Terceiro

Boards of directors bear enormous responsibilities for the tone at the top and corporate culture of the companies they are entrusted to oversee. This fiduciary duty is evident in the selection of senior management and when assessing the overall ethical climate for the enterprise.

The recent settlement by the U.S. Securities and Exchange Commission with former accounting and finance personnel at Bankrate, related to an alleged financial reporting fraud, provides an excellent example of the perils of an adverse corporate culture as well as the warning signs for potential problems.

Bankrate is an online publisher of financial information and operates several websites, primarily focusing on personal finance. According to the SEC, the former Bankrate employees intentionally manipulated the company's revenue and expenses in order to improve financial results for the second quarter of 2012.

Below is a brief overview of the fraud alleged by the SEC at Bankrate and specific examples of internal Bankrate communications indicative of corporate culture problems.

Also provided below are proposed questions to ask and factors to consider when assessing corporate culture. Legal counsel advising boards of public registrants may find these considerations useful in guiding their clients to avoid similar problems resulting from corporate culture issues.

Background

In August 2017, the SEC reached settlements with the former CFO and director of accounting for Bankrate for alleged violations of federal securities laws. The settlements included fines and suspensions from appearing or practicing before the SEC under Rule 102(e) of the SEC's Rules of Practice.

Per the SEC, Bankrate's former CFO directed others in the organization to record fraudulent revenue without any justification or support, for the sole purpose of meeting analyst expectations.

When Bankrate's external auditor sought supporting documentation regarding some of the additional revenue, the VP of finance responded with what the SEC characterized as a "misleading, generic explanation," a message that both the CFO and director of accounting reviewed and approved.

Emails among these individuals provide details regarding the alleged auditor deception and, of particular concern, an environment in which numerous people had knowledge of the improper behavior.

During this same quarter, according to the SEC, the CFO instructed one of the division accountants to reduce an accrued expense account for the sole purpose of fabricating an earnings number. The CFO had been using the accrual account as a "cushion" or "cookie-jar" account that could be arbitrarily manipulated as needed.

The company also improperly capitalized accounting expenses as "deal costs" rather than expensing them as required under GAAP.

The inflated financial results emanating from these improper accounting entries caused Bankrate to materially overstate its adjusted EBITDA and adjusted EPS for the second quarter of 2012.

Per the SEC, within the two weeks following the Q2 2012 earnings release, the CFO sold Bankrate stock at an artificially inflated price. The company ultimately corrected its Q2 2012 financials as part of a broader restatement in June 2015.

Bankrate, as a corporation, reached a settlement with the SEC related to the accounting fraud charges and paid a $15 million civil penalty. Bankrate also faced significant restatement costs, loss of shareholder value and confidence, and a class action lawsuit.

Needless to say, the consequences and distractions resulting from financial frauds can be detrimental to a public registrant.

Corporate culture problem

Notably, in Section 9A of its Form 10-K Annual Report for fiscal year 2014, Bankrate admitted it had a culture problem.

Specifically, the company stated that it "did not maintain an effective control environment, which is the foundation for the discipline and structure necessary for effective internal control over financial reporting, as evidenced by: (i) the failure to maintain a corporate culture that sufficiently instilled, prioritized, and supported an adequate enterprise-wide attitude of control consciousness, established or supported sufficient focus on compliance with appropriate accounting policies and procedures, or implemented adequately designed and effective operating controls over accounting in accordance with GAAP … ."

With hindsight, Bankrate disclosed its corporate culture problems, which raises the question: Could the warning signs have been identified earlier?

Corporate culture generally refers to the shared values, attitudes, standards and beliefs that characterize members of an organization and define its nature. While this may sound somewhat abstract, people's common conduct and activities are often indicative of the type of culture that exists in a company. Just as certain traits and actions can signal ethical and proper behaviors, there are indicia that signify potential culture problems.

Based simply on the internal communications highlighted in the SEC release, there were several warning signs of a problematic corporate culture at Bankrate prior to the discovery of the fraud. These warning signs included:

- excessive use of offensive language in emails and other internal communications;

Just as certain traits and actions can signal ethical and proper behaviors, there are indicia that signify potential culture problems.

- hostility, pressure and threats regarding employees;
- widespread knowledge of unethical behavior; and
- multiple instances of lack of integrity.

Select examples of the internal email discussions include the following:

Upon learning of the CFO's demands that the company book unsupported revenue, the director of accounting sent the following email to the VP of finance:

"F[***] me — seriously … You better make sure that the revenue/margin analytics are thoroughly explained so that we avoid questions on this sh[**]. Doesn't [he] realize that all this does is put us in a hole to start [the third quarter of 2012] since it will be reversed when the 'estimate' is trued up? So in Q3 are we going to record even more when the numbers suck? I know you get it but I'm not sure [he] is thinking ahead for what it means."

When the CFO learned that individuals refused to record unsupported revenue, he sent an email to other Bankrate personnel saying that he was "going to rip [the division CEO's] f[***]ing head off" and fire the division accountants if they "f[***] up the accounting."

Bankrate maintained multiple internal spreadsheets with "cushion" accounts and used them to alter financial results. The VP of finance dubbed these accounts "Ed's Cushion."

In 2011, the CFO asked the VP of finance to "review the final Balance sheet and cushion anal[ysis] … I may want to tune our numbers."

According to the SEC, the CFO did eventually use the "cushion" accounts to alter the financial results.

In 2012, the CFO directed the VP of finance to manipulate financial results and "book like $150 in rev to EBITDA in May … [p]lus reverse $75k in accruals."

He also added: "keep it under the radar."

When directing the VP of finance to record certain accounting expenses improp-

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Helping boards ID warning signs of toxic corporate culture

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erly as deal costs, the CFO sent an email instructing the VP of finance to "Charge ALL [auditor] BILLS TO ACCRUED DEAL COST — I DON'T CARE IF THEY COMPLAIN, WE CAN SAY IT WAS A MISTAKE."

The VP of finance forwarded that to the director of accounting and said it was "[a]nother [CFO's name] special."

The director of accounting wrote an email to the VP of finance indicating that he had spoken to the CFO, saying: "he said there may be some additional good guy adjustments coming and I f[***]ing knew that he was going to do something like this … We need to be very careful how this gets reflected to be able to have some basis for the estimate to show [the auditor] if they happen to figure it out."

Of significant concern, per the SEC release and complaint, the improper conduct at Bankrate involved at least nine people in accounting, finance and other areas throughout its various divisions.

Identifying the warning signs

As noted above, corporate culture can seem abstract, which can make it difficult to quantify, measure and assess. Considering the events that took place at Bankrate, as well as best practices, the following examples of questions, observations and considerations will assist boards of directors in assessing the corporate culture of their organizations:

- Consider employee turnover statistics by level and division, as well as information gathered from exit interviews.
- Ensure that financial rewards are tied to ethical behavior and compliance, not just financial performance.
- Tour the company facilities and meet with non-executive employees to assess general attitudes.
- Inquire as to hiring practices, including the characteristics sought in prospective employees.
- Be cognizant of employee stress levels and understand the importance placed on work-life balance within the company.
- Determine whether the company recognizes employees for their participation in community involvement activities.
- Discuss employee recognition programs and the attributes that are rewarded.
- Review employee evaluations to determine if constructive feedback and/or criticism are commonplace.
- Evaluate bonus structures and ensure that they are realistic and do not apply excessive pressure to meet sales, revenue or earnings targets.
- Consistent with the "broken windows" theory, inquire as to how the company handles small lapses in compliance and ethics.
- Monitor management's internal messages for tone and employee treatment.
- Evaluate social media reviews, notably Vault and other public forums for commentary.
- Discuss the company's team-building exercises and social events and how these impact company culture.

Closing

Boards of directors bear a direct oversight responsibility for their company's culture and management's tone at the top. Legal counsel and other advisors for boards can play a key role in helping guide how a board fulfills its fiduciary and oversight responsibilities to shareholders, including the monitoring of corporate culture.

No board wants to find itself dealing with the problems encountered at Bankrate. NEIH

Cyber risk and insurance: what your business needs to know

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Cyber risk insurance is almost universally written on a claims-made basis — meaning that to be covered, the claim or suit against you for a data breach must be first made during the policy period.

While some cyber risk policies include multiple liability insuring agreements tailored to specific claim circumstances (e.g., "data breach event" liability coverage, "regulatory event" liability coverage), other such policies provide a single liability insuring agreement covering many different claims circumstances. Insuring agreements for so-called first-party coverages reflect a similar pattern.

Many insurers impose additional limitations based on the timing of the breach that resulted in the claim, with some policies limiting the coverage to claims where both the breach and the claim took place during the policy period (no prior acts coverage), some setting a limitation on prior acts by using a retroactive date, and others providing unlimited prior acts coverage. The inclusion of limited or unlimited prior acts coverage may be negotiable for many insurers.

Providing timely notice to the insurer of a claim or suit is also crucial. In most jurisdictions, a failure to comply with a claims-made policy's notice provision (how soon after the claim is made against the insurer must the insurer notify the insurer of the claim) will defeat an otherwise covered claim.

The timing for such reporting can be tight, with some policies providing a complete defense to coverage if the claim is not reported "as soon as practicable." Thus, comparing notice provisions across cyber risk policies is important.

While insuring agreements within a policy describe the circumstances under which a matter may be covered, exclusions limit such otherwise available coverage. Not only are such exclusions highly variable in cyber risk insurance, in a number of instances, the scope of such exclusions or even whether the exclusion remains may be negotiable at the outset.

Typical cyber breach policies may exclude the following:

- Claims for property damage or bodily injury (other than emotional distress)
- Claims involving intentional or fraudulent conduct by the insured
- Claims alleging infringement of intellectual property rights
- Insured versus insured claims
- Securities law violations
- Claims arising out of war, riot or governmental orders impacting the use of property

Other critical limitations must also be considered. For example, does the insurer control defense and settlement? Does the policy include a so-called "hammer" clause pursuant to which the insurer limits its liability under circumstances where the insurer and the claimant are willing to settle, but the insured business refuses?

In the first-party coverages, who selects the service provider for those covered expenses (e.g., breach notification)? The insurer or the insured business? Are there limitations in addition to policy limits on the nature of such services or approved providers?

Determining the appropriate amount of any self-insured retention or deductible and the insured's ability to control claims within its self-insured retention are also important issues.

The definitions of key provisions in the policy may also be critical, as in many instances significant limitations may be embedded within such definitions (e.g., an exclusion of regulatory fines in some policies in the definition of covered "damages").

Time for action is now

While some 60 percent of businesses worldwide are insured for cyber breach (up from 20 percent two years ago), we are, in all respects, dealing with an emerging market in which the lack of standardization, and indeed lack of historical underwriting data, have led to highly variable coverage provisions and pricing for cyber risk insurance.

Armed with the information here, most GCs and risk managers should be able to ask the right questions and engage outside assistance as necessary to lead to an informed initial purchase decision for this new and important line of coverage. NEIH

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Missions & Visions

RUBIN and RUDMAN LLP
Attorneys at Law

John J. McGivney is a civil litigation attorney who represents clients in trials, appeals and arbitrations, and is also a certified mediator. He joined Rubin and Rudman as an equity partner 21 years ago. This is his first year as managing partner.

Q and A

John J. McGivney

MANAGING PARTNER, RUBIN AND RUDMAN

Q: How would you describe your law firm's mission?

A: We want to help businesses and individuals with all of their legal needs. We are a multi-disciplinary firm that offers a full range of legal services. We have sizable practices and talented, accomplished lawyers in all our practice areas. In the last couple of years we have also expanded our intellectual property practice considerably, which has added a whole new dimension to our ability to help clients in the technology, life sciences and pharmaceutical sectors.

Q: What is your firm's greatest strength?

A: We are a diverse group of practitioners, but we're also a diverse group of individuals. Nobody here is a carbon copy of anyone else, and we each bring our own perspective to the job of helping our clients. We consider that diversity a strength, because often clients come to a law firm with multiple legal concerns and need more than one kind of legal expertise.

Q: What practice areas do you see as having the most potential for growth in 2018, and why?

A: In Boston, Cambridge and surrounding areas right now, we are in the midst of one of the greatest eras of technological innovation ever. That presents issues to our traditional clients who are encountering the costs and benefits of the new technology as well as to newer clients who are driving that revolution. It's a very exciting time to be practicing law in Boston.

Q: As managing partner, what trends in management do you see as most likely to lead to substantive change in the legal profession?

A: When I started to practice law over 36 years ago, people in law firms mostly conformed to what was expected of them in terms of thought and dress and lifestyle. Today law firms are more inclusive, more diverse places which make them much more alive with the kind of energy that differences produce. And that changes everything for the better.

Q: How is technology changing the practice of law?

A: It has changed it for the better in the sense that we have better efficiency and better economy for ourselves and our clients. Law practice is less labor intensive than it used to be because of technology, and that saves money for the client.

Q: What do you see as the biggest challenge the legal profession will face over the next five years?

A: One of the things that you hear lawyers talking about when you attend meetings with other managing partners is that very large accounting firms in other parts of the globe have started bundling accounting and legal services. That's an interesting concern for regional law firms and accounting firms, who could work together to meet that challenge. And cybersecurity issues are a challenge we share with all our clients.

Q: What do you see as the greatest opportunity the legal profession will face over the next five years?

A: As a lot of new companies begin they will need legal help with their various business law issues, but all of the people who work in those companies will also need help with their personal legal issues. A law firm that is large enough and diverse enough to help a company with its business law needs but is still nimble enough to help individuals with their personal legal needs is the kind of law firm that will win in the new economy.

Q: What is unique about your firm's culture? What sets you apart?

A: Most of our partners came to Rubin and Rudman from other law firms. They all came here looking to serve their clients in the most efficient way they could while still offering their clients the assurance that we can handle almost any kind of legal need. That makes our culture stronger and more inclusive, and a great work environment for our lawyers and staff alike.

"In Boston, Cambridge and surrounding areas right now, we are in the midst of one of the greatest eras of technological innovation ever. It's a very exciting time to be practicing law in Boston."

Q: The local legal community is well known for its commitment to "giving back." What pro bono work does your firm do that you are most proud of?

A: In addition to members of our firm who have served or are serving as officers and directors of community non-profit organizations, and of Bar organizations dedicated to improving the law, the legal system and the profession, some of our colleagues provide pro bono services to Pine Street Inn, Catholic Charities and the Mass. Bar Association Fee Arbitration Board, to name a few examples. Most of us also provide free legal services or discounted legal services to individuals of limited means or to non-profit organizations. Rubin and Rudman has been a part of the community here for almost 100 years, and we're always aspiring to do more for our community.

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Hospital can't shield communications in discrimination suit

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text of federal discrimination claims, highlighting the fact that the 'disclosure of documents and information bearing primarily on employment issues does not materially conflict with the fundamental objectives of promoting quality health care served by the peer review principle,'" Hennessy wrote, quoting *Krolikowski v. Univ. of Mass.*, a 2001 U.S. District Court decision from Massachusetts. "This court finds the reasoning in these opinions sound and will not take a different approach."

"It is a good reminder to fight state law privileges in federal court by invoking the federal public policies that are relevant to the underlying lawsuit."

— Robert S. Mantell, Boston

The 10-page decision is *Soni v. Wespiser, et al.*

Policy interest

Plaintiff's counsel Kathy Jo Cook of Boston said there was "no reason whatsoever" that the judge should have allowed Catholic Medical Center to withhold the communications in question.

"In the context of a medical-malpractice case, there may be an argument [for the peer review privilege]," she said. "It allows doctors to discuss what went wrong, what happened, and how they can do better next time without having to worry that it'll be disclosed to a plaintiff, who says, 'Aha! We know what you did wrong!'"

Here, on the other hand, there would be no public policy interest at all, she said. Instead, Cook said, depriving a plaintiff of this type of information would just perpetuate discrimination.

David C. Harlow, a health care attorney, consultant and blogger in Newton, Massachusetts, said when determining whether to recognize a state privilege under federal common law, the 1st U.S. Circuit Court of Appeals looks to determine if the federal interest outweighs the state interest.

"Where, as here, the federal interest is protecting individuals against race and gender-based discrimination in employment, the peer review privilege doesn't stand a chance," he said.

Laura R. Studen, an employment lawyer in Boston, agreed.

"[The hospital] cannot use peer review privilege as both shield and sword, given the nature of [the plaintiff's] claims and where the proof may likely be uncovered," Studen said. "Shielding it serves no public interest. In fact, the opposite is true where she has credible claims of discrimination and defamation."

Boston employment lawyer Robert S. Mantell said the ruling provides a useful takeaway for plaintiffs' attorneys.

"It is a good reminder to fight state law privileges in federal court by invoking the federal public policies that are relevant to the underlying lawsuit," he said.

But Catholic Medical Center's attorney, Jay Surdukowski of Concord, New Hampshire, said his client was disappointed in the ruling, emphasizing that the hospital takes its credentialing and peer review process seriously.

"CMC will continue to protect the confidentiality of such peer review information to preserve the integrity of the process and CMC's goal of maintaining quality," he said.

Defense counsel Diane M. DeGiacomo of Pittsfield declined to comment.

Motion to compel

Soni, a Harvard-trained neurosurgeon of Indian descent, worked at Berkshire Medical Center from late 2008 until May 2010.

While at Berkshire, Soni apparently raised concerns to her supervisor, defendant Timothy Counihan, the chair of surgery, about unsafe practices in the neurosurgery department.

Soni also complained to Berkshire administration that Counihan, who she claimed resented her because she was a minority female who had achieved greater professional stature than he had, was a poor leader and was unsupportive of her and other surgeons.

In spring 2012, Soni accepted a position with the New Hampshire NeuroSpine Institute. The position entailed providing care at three hospitals in New Hampshire, including Catholic Medical Center, so she had to apply for privileges at all three institutions.

As part of its credentialing process, Catholic Medical Center required references from other practitioners attesting to an applicant's education, training, clinical abilities and competence. Catholic Medical Center also had a practice of contacting references and soliciting additional information from other professionals with whom the applicant had worked.

Catholic Medical Center treated all its actions and all information it generated during the credentialing process as confidential, as is common in the industry.

The two other hospitals where Soni applied granted her the requested credentials, but Catholic Medical Center denied her application. When Soni inquired as to why, Patrick Mahon, chair of Catholic Medical's credentialing committee, allegedly told her she had been denied privileges based on information Counihan provided in a letter and in a follow-up conversation.

Counihan himself also apparently admitted to Soni that he had sent a letter to Catholic Medical Center in which he claimed she had unspecified difficulties while working at Berkshire.

A month later, a member of the credentialing committee allegedly told Soni that Counihan made "vicious and defamatory" statements about her in the letter and that the phone conversation was even more critical. The member did not offer specific details of all the statements, but he did share that Counihan had said Soni would be "trouble" for Catholic Medical Center because she had filed multiple suits against other hospitals.

Without privileges at Catholic Medical Center, Soni was unable to work in the position for which she had been hired.

In March 2016, Soni sued Berkshire Medical Center, Counihan and Berkshire Chief of Staff Robert Wespiser in U.S. District Court alleging discrimination and retaliation.

To build her case, Soni sought discovery of documents about Catholic Medical Center's credentialing process, including minutes of internal deliberations and communications about Soni's fitness from outside sources.

Catholic Medical Center declined to produce the documents, citing New Hampshire's quality assurance privilege, which, it argued, should be recognized as a federal common-law privilege under the circumstances.

Soni moved to compel, arguing that no such privilege existed in the situation at hand.

Unprivileged communications

Following the U.S. Supreme Court's framework, articulated in its 1991 *Univ. of Pa. v. EEOC decision,* for recognizing a state evidentiary privilege under federal common law, Hennessy looked to whether the asserted privilege "promotes sufficiently important interests to outweigh the need for probative evidence."

Hennessy said the Supreme Court stated in the *Univ. of Pa.* case that the "ferreting out" of race and sex discrimination is a "great, if not compelling" interest.

And while *Univ. of Pa.* dealt with a tenure decision in a university setting, "[this] court finds no reason why this interest would be any less compelling in the hospital setting, and the other courts in [the 1st Circuit] who have addressed the issue agree," Hennessy wrote.

Meanwhile, Hennessy said, the objective behind the asserted medical peer review privilege — to enable hospitals to review medical procedures and clinical performance candidly, secure in the knowledge that malpractice plaintiffs cannot later use documents generated during these reviews against them — is not as pressing where the communications in question bear primarily on employment rather than clinical issues.

Accordingly, Hennessy concluded, the plaintiff's motion to compel should be allowed. NEIH

Ballot questions could prove costly for employers

Continued from page 6

required to pay one-half of the required .63 percent. This contribution rate would be reviewed and adjusted annually to ensure adequate funding.

Contributions to the trust fund would begin six months after the effective date of the proposed law, and covered workers could begin taking paid leave beginning 18 months after the effective date.

The proposed law would include an anti-retaliation provision, prohibiting employers from taking adverse action against employees for exercising their rights under the law. At the same time, the measure would offer some protections for employers, including by requiring employees to give reasonable notice of their intention to take leave and provide documentation establishing that the requested leave is covered by the law.

The ballot question process

The process for enacting these measures passed an important milestone last December, when Massachusetts Secretary of State William Galvin certified that supporters had obtained the necessary numbers of voter signatures for the proposals to be sent to the Legislature.

The Legislature may now approve or disapprove the two measures, propose one or more substitute measures, or take no action on them.

For each of the proposals, if the Legislature has not enacted the measure as filed by the first Wednesday in May of this year, proponents must then gather 10,792 additional signatures by early July. If enough signatures are gathered, the proposed law, along with any substitute measures proposed by the Legislature, would be submitted to Massachusetts voters in the next biennial state election — in this case, the November 2018 election.

Finally, if the proposed measures are successfully placed on the November ballot, enacting each of them into law will require that (i) a majority of the voters weighing in on the measure vote "yes," and (ii) at least 30 percent of all voters casting ballots in the election vote in favor of the measure.

What Massachusetts employers should do

Both the proposed minimum wage increase and the proposed paid family and medical leave measure are likely to prove popular with voters if they make it onto the November ballot.

As employers will recall, it has been only four years since a similar measure, providing for mandatory paid sick leave, was easily approved by Massachusetts voters.

Accordingly, Massachusetts employers would be wise to begin considering now the financial and operational impacts that these measures would bring for them.

In addition, employers are encouraged to consult experienced employment counsel to assist them in understanding the details of the proposed laws, particularly the paid family and medical leave statute.

Finally, employers with concerns about the proposed measures might consider joining advocacy groups in order to more effectively articulate their opposition and perhaps lobby for compromise legislation. In particular, the Associated Industries of Massachusetts, which represents approximately 4,000 member employers, has expressed opposition to both proposals, based on the substantial costs they would pose for employers. NEIH

Social Security applicant cannot bring ADA claim

Continued from page 1

Chief Judge William E. Smith.

The 19-page decision is *Pena v. Honeywell International Inc.*

The plaintiff was represented by Mark P. Gagliardi and Alicia M. Connor, both of Providence. The defendant employer was represented by Providence attorneys Neal J. McNamara, Jessica Schachter Jewell and Aaron F. Nadich.

Work-related anxiety

Defendant Honeywell's Cranston manufacturing facility is comprised of several production/assembly areas. In the molding department, the defendant manufactures finished goods and works in process for assembly.

Plaintiff Mayra Pena, a machine operator and associate assembler, frequently worked in the respiratory department, and in the molding department for four hours a day, two to three times a week.

In 2012, the employer decided that all employees who worked in the production and assembly areas should be cross-trained to work in all departments.

On March 8, 2013, the plaintiff provided a letter from her psychiatrist, Dr. James Greer, dated March 4, 2013, that stated: "Currently [the plaintiff] is reporting exacerbation of her anxiety symptoms which are interfering with her ability to function. She reports that these specifically occur when she is being sent to the molding room as opposed to the more typical duties to which she is accustomed."

Greer's note did not explain how the molding department exacerbated the plaintiff's anxiety symptoms when no other department had that effect.

The plaintiff was informed that the note was not sufficient, and thus she would not be excused from working in the molding department as scheduled.

In response, the plaintiff told the Honeywell personnel she was going home and called her daughter to pick her up. The plaintiff never returned to work after March 8, 2013.

The plaintiff applied for Social Security Disability Insurance benefits on Sept. 20, 2013. On her SSDI application, which was completed under the penalty of perjury, the plaintiff stated: "I became unable to work because of my disabling condition on March 8, 2013." The plaintiff further declared on her SSDI application: "I am still disabled."

Based on her statements made in her SSDI application, an administrative law judge determined that the plaintiff had somatoform disorder and was totally disabled as of her last day of work.

"The claimant has been under a disability as defined in the Social Security Act since March 8, 2013, the alleged onset date of disability," the ALJ wrote.

The plaintiff received SSDI benefits retroactive to March 8, 2013.

When the plaintiff sued the defendant employer under the ADA in April 2015, she was asked during a deposition about the statements in her SSDI application.

The plaintiff answered, "The thing is that from that date, the dose of medication for the depression was increased, and also I also got four more pills because of the tachycardia, and also I got medication to help me sleep."

The plaintiff was further asked at her deposition whether, by her statement, she meant that she was unable to do any work, to which she replied, "Yes, at that time when I stated that, yes, because I was under a lot of medications, and my depression increased."

The plaintiff filed for bankruptcy in September 2014, and in the course of that proceeding she again stated that she was not employed and that she was disabled.

Irreconcilable positions

The plaintiff contended that she would have been able to continue working if granted the reasonable accommodation of not being assigned to the molding department. Her psychiatrist's letter noted that she was "completely capable of working" in settings other than the molding department.

In *Cleveland v. Policy Mgmt. Sys. Corp*., the U.S. Supreme Court in 1999 held that when a trial judge is faced with an ADA plaintiff's previous sworn statement asserting total disability, it should require an explanation from the plaintiff of any apparent inconsistency with the necessary elements of an ADA claim.

"The *Cleveland* decision requires Plaintiff to adequately explain the apparent contradiction created by her position in this ADA litigation that she would have been able to continue working on or after March 8, 2013 if reasonably accommodated by Honeywell and her position in the SSDI process that she was too disabled to do any work as of March 8, 2013," Almond said.

"Plaintiff's position in this litigation is irreconcilably at odds with her Application for and receipt of SSDI benefits," he added.

"Applying *Cleveland*, I conclude that no reasonable juror could reconcile that position with her Application for and receipt of SSDI benefits with a disability onset date of March 8, 2013, and thus Plaintiff has not presented an explanation sufficient to defeat summary judgment," Almond concluded. NEIH

The MEPA audit process

Continued from page 7

counsel to avoid any challenges to the asserted privilege based on an assertion that an in-house attorney (who may have limited expertise in pay equity matters) was acting in an executive capacity rather than providing legal advice.

The audit process — time-consuming and iterative

The audit process can be time-consuming, as merely gathering the necessary data can be laborious. Data are often stored in multiple electronic systems that do not interact with each other, or in physical files in different offices, sometimes requiring a significant amount of time to gather.

Experts — such as certified project management professionals — can assist the employer with identifying and gathering the necessary data efficiently and comprehensively.

The iterative nature of the audit process also takes time. The key steps in a typical audit are: 1) selecting the internal and external team, including attorneys and labor economists; 2) collecting the data needed; 3) conducting the initial analysis; 4) collecting additional data and revising the analysis to address unexplained differentials; and 5) considering remediation and revisions to policies and/or practices.

After an employer gathers the initial data and a labor economist performs the initial statistical analysis, the team typically identifies employees whose pay is not explained by the factors considered in the initial model, e.g., their pay appears too low or too high. The team may then review personnel records and other data about the flagged employees in order to determine whether there is a non-gender (or race) based explanation for the differential that has not previously been incorporated into the model.

This iterative process may continue until the employer fully explains the apparent wage differential or concludes there is a problem area and determines whether and how to remediate it.

Finally, remediation can be time-consuming as well, as employers have to decide which employees should receive an adjustment, how the adjustments will be calculated, and when the adjustments will occur, and the internal team must obtain the necessary approvals.

With all of these tasks, an effective pay equity review can take several weeks or even months to complete, depending primarily on the internal resources that the employer can bring to bear on the project.

In light of the July 1 effective date of the new law, employers should consider now whether and when to conduct a pay equity audit by consulting with an attorney experienced in such assessments. NEIH

Wage-hour class action not subject to arbitration clause

Continued from page 1

The 18-page decision is *Ouadani v. TF Final Mile LLC*.

Sending a message?

Boston attorney Stephen S. Churchill, who represented the plaintiff, said the 1st Circuit's decision sends a strong message as to the limited reach of contractual arbitration provisions in the employment context.

"Some employers continue to push the boundaries of arbitration doctrine, but this case serves notice that those boundaries are fixed," Churchill said. "Arbitration might enjoy a favored status under the law, but a party cannot be forced into arbitration without his knowledge and consent."

Defense attorney Diane M. Saunders of Boston declined to comment on the ruling, citing the wishes of her client.

Chip Muller, chairman of the Rhode Island Bar Association's Labor Law & Employment Committee, said while the right to arbitrate can be powerful, certain "formalities" need to be observed.

"Thankfully, the 1st Circuit has come down in favor of common-sense contract principles that you have to actually sign an arbitration agreement in order to be subject to arbitration," the Providence lawyer said.

Still, Muller said he understood why the defendant would press the argument for the application of an arbitration agreement against a nonsignatory. Courts in California had compelled arbitration in similar cases brought by drivers for franchisees of an airport shuttle service, SuperShuttle International, he said.

"That kind of logic has some attraction, so I could see where the employer [in *Ouadani*] was coming from," Muller said.

The basic principle underlying the court's decision is that a party has to agree to arbitration before that party can be compelled to arbitrate, said employment attorney Jack Merrill of Needham, Massachusetts.

"I don't think you're going to see many cases where you are going to see exceptions to that," Merrill said.

Also not surprised by the decision was Boston attorney Sean P. O'Connor, who represents employers in labor and employment matters.

"The key fact in this case is that we are talking about a nonsignatory," he said. "The 1st Circuit was also probably a little perturbed by the fact that this individual did not have any knowledge of the underlying contract whatsoever."

O'Connor took note of the court's show cause order.

"It's certainly a message being sent to the defendant in this case," O'Connor said. "That's not to say that the legal arguments [raised by the defendant] were entirely frivolous, but I think the court showed some frustration with the way those arguments were raised in the context of the facts involved in this case."

Wage-and-hour claim

According to the complaint, plaintiff Djamel Ouadani applied for a job as a delivery driver with the defendant in early 2016.

The plaintiff interviewed for the job at Dynamex headquarters in Wilmington. After completing several standard forms, Dynamex officials gave the plaintiff an identification badge with the company's name and written information on the services performed by delivery drivers. The company told the plaintiff he would be paid $18 an hour for his four-hour work shifts.

In addition to being required to purchase a Dynamex work shirt, the plaintiff was instructed to "associate" with one of three Dynamex affiliated vendors. The plaintiff associated with Selwyn and Birtha Shipping LLC, a company owned and operated by another Dynamex deliveryman.

The relationship between Dynamex and SBS was governed by an independent contractor agreement under which SBS agreed to perform delivery services subcontracted by Dynamex. The contract authorized SBS to hire employees or subcontractors to perform delivery services. Neither SBS nor Dynamex classified the plaintiff as an employee.

The contract between Dynamex and SBS also call for the binding arbitration of all disputes "between the parties." While the Dynamex/SBS contract required all SBS subcontractors to enter into separate written agreements to abide by all terms of the Dynamex/SBS contract, the plaintiff never signed such a contract and in fact was unaware of the terms of the independent contractor agreement.

After working as a delivery driver for approximately six months, the plaintiff complained about the arrangement to Dynamex. The plaintiff was terminated shortly after he raised his complaints.

In October 2016, the plaintiff filed a putative class action in U.S. District Court, alleging Dynamex misclassified him and other drivers as independent contractors in violation of federal and state wage and hour laws.

Dynamex responded by filing a motion to compel arbitration pursuant to the terms the Dynamex/SBS vendor agreement. Chief Judge Patti B. Saris denied the motion in May.

'SuperShuttle' cases distinguished

Dynamex presented three basic arguments for the proposition that the plaintiff was bound by the arbitration clause in the SBS vendor agreement.

First, the defendant argued that the plaintiff was bound as an agent of SBS.

In addition to pointing out that the plaintiff's agency status was irrelevant because he was bringing wage-and-hour claims on behalf of himself and other drivers rather than SBS, Lynch found distinguishable cases from other circuits holding an agent subject to a principal's arbitration agreement.

"Those cases held that nonsignatory defendants who are agents of a signatory corporation may compel arbitration against signatory plaintiffs," the judge wrote. "These holdings were predicated on (1) the fact that the claims of the signatory plaintiffs arose from the nonsignatory agents' conduct on behalf of the signatory principals, and (2) the signatory principals' intent to protect their agents by means of the arbitration provisions."

Lynch wrote that those rationales did not apply to the case before the 1st Circuit because the plaintiff was "a nonsignatory plaintiff who is trying to avoid arbitration, not a nonsignatory defendant seeking to compel it."

The judge next rejected the defendant's argument that the plaintiff was bound to arbitrate under the principle of equitable estoppel, which generally bars a party from enjoying the benefits of a contract while at the same time avoiding its obligations. Lynch observed that courts have been "reluctant" to apply equitable estoppel to a nonsignatory attempting to avoid arbitration in the absence of evidence that that party otherwise "embraced" the contract at issue.

On that point, the judge emphasized that the benefits of the arbitration clause in the vendor agreement accrued to the signatories — Dynamex and SBS — not to the plaintiff.

"Ouadani can hardly be said to have 'embraced' the Agreement when he was unaware of its existence," she added.

The judge also found distinguishable two California cases involving the enforceability of an arbitration clause against drivers for the airport shuttling service SuperShuttle.

In one case, a federal judge compelled arbitration against nonsignatory drivers of SuperShuttle franchisees because they "knowingly exploited" the rights and privileges afforded under the franchise agreements.

In the second California case, a state judge compelled arbitration against nonsignatory SuperShuttle drivers, reasoning that the financial benefits they received from the franchise agreement formed the basis for their state wage-and-hour claims.

Lynch wrote that those cases were distinguishable because, unlike the secondary SuperShuttle drivers, "Ouadani did not 'knowingly exploit' or 'participate actively and for compensation,' in the rights described in the [vendor] Agreement — he did not even know that the Agreement existed. And the Agreement does not provide the only basis for Ouadani's claims, which stem from his arrangement with Dynamex."

Finally, Lynch rejected the defendant's argument that the plaintiff was bound to arbitrate pursuant to a third-party beneficiary theory.

The judge explained that the critical factor in applying such an analysis to extend arbitration to a nonsignatory is whether the underlying agreement evinces an intent to confer specific legal rights upon that party. The judge wrote that the defendant could not point to any language in its vendor agreement with SBS that conferred specific legal rights on drivers like the plaintiff.

"In short, Dynamex's failure to show that the parties to the Agreement intended to provide any legal rights to Ouadani is fatal to its third-party beneficiary claim," Lynch wrote. NEIH

IN-HOUSE WITH ...

NANCY M. CREMINS • GLOBALIZATION PARTNERS

Continued from page 1

ment — and has a reach that extends into 150 countries.

Even as she has helped guide the company's rapid growth, Cremins has stayed heavily involved in the Women's Bar Association, where she's a board member and past president, and several initiatives she helped start to assist women entrepreneurs both in Boston and abroad.

She recently sat down with New England In-House's Matthew Cove to talk about the challenges of bringing her company's services to 150 countries and how an in-house role can be rewarding for an "efficient" lawyer.

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Q. *What was the biggest adjustment in moving in-house from a law firm?*

A. I think it's a mental shift. First of all, I don't bill hours anymore, so that's a big change. The other thing is, when you're outside counsel, the expectation is what you turn in to clients should be pretty much perfect, whereas here I have business directives, and the business directives are to get to the good enough answer as quickly as possible. It takes 80 percent of the time to get that last 20 percent.

Q. *Globalization Partners has an "Employer of Record" program that's central to the business. What does the program entail?*

A. It really goes back to what we are as an organization. In the U.S., the PEO [Professional Employer Organization] model is different. It's a co-employment model. Internationally, there really isn't a recognition of a co-employment model, and our clients don't have the time, energy or resources to set up in the countries where they might like to do business. So we are the sole employer, in the countries where we provide our clients' services. That is, we act as the employer of record. The employees do all their work on our clients' behalf, but we take care of all the technical employment details.

Q. *What are the biggest challenges of offering your services in so many countries?*

A. One of the biggest challenges is making sure that we are fully compliant with all the employment laws where we do business, because they change all the time. So, in addition to our own work and expertise, we have local counsel everywhere that we are in pretty regular contact with.

Data privacy and data security is a huge issue that every multinational that has business in Europe has to address. The [General Data Protection Regulation] comes into effect May 25 of this year. It has some pretty high standards for compliance, and the failure to comply is very expensive. Because we collect all this HR data, we have to ensure we have as tight a data security plan as we can. It's not sexy, but it's super important.

Q. *When you look for local counsel internationally, how do you select firms to work with?*

A. A lot of it is responsiveness. Another big piece of it for us is their ability to grasp our business model. Because the industry is pretty young, it often requires some creative problem-solving. We are looking to comply with the laws, but the laws aren't exactly designed for what we do, so we often have to figure out ways to be compliant that require some creative thinking.

Q. *When you hire local firms, do concerns ever arise about their culture or makeup not being as progressive as it might be domestically — for example, if you're doing business in the Middle East?*

A. We do have business dealings in the Middle East. I would say it's not an impossible task for a women-led company to have business relationships there. I'm always looking to have access to at least one woman on an outside counsel team, just because that's important to me. But many of the primary people are men. That's just a factor of lawyers and law firms, both domestically and abroad. But we haven't found any particular partner to be so dismissive or so non-progressive that it was a gating factor for us.

Usually, it's more about whether they're responsive. And it's a very U.S.-centric approach, but we need someone who can speak English well. Language is hugely important. If we can't have a conversation where we actually understand each other, that's going to be a gating factor.

Q. *Is an in-house role more accommodating for a working mother than being at a law firm?*

A. What I have liked about working in a place like this, specifically in this place, is that much of the executive leadership team [is made up of] working mothers who don't come with preconceived notions about commitment.

Frankly, most of the working mothers I know are ruthlessly committed to and ruthlessly efficient at their jobs and to their families. So they are really good at prioritizing. But we also make it pretty clear to the rest of the staff that you don't have to work all the business hours. People are entrusted to get the job done whenever they need to.

Having the full faith and trust of my CEO to get my job done but to be able to organize my life is a huge benefit, which I think can be missing from law firm structures that value face time over quality time. And whenever you have billable hours as the model for revenue, it can be a challenge for people who might actually just be more efficient at their jobs.

Q. *Outside of your day job, you co-founded She Starts, designed to support women entrepreneurs. How did that originate?*

A. The organization launched in March 2014. At Gesmer, we worked with emerging companies, and getting out into the entrepreneurial community I met tons of women who conveyed similar themes. They felt isolated; they didn't feel particularly welcome at some of these more generalized startup events. So having had experience through the Women's Bar Association of being supported and having an organization that existed to help women survive and thrive in the legal profession, I thought that that might be something that would be valuable to the women's entrepreneurial community.

We hold programs and events and work to provide a place where people can turn if they need a warm referral or need connections or access to talent, potentially access to angel investors or VCs.

Q. *You were also a founding member and board member of Prosperity Catalyst. What's the mission of that organization?*

A. It trains women to become entrepreneurs in areas that have had natural disasters or periods of war. We have projects in both Haiti and Iraq at the moment, and the thesis is that when women have access to revenue, they reinvest that revenue in their communities and make their communities more stable and more peaceful. So that's an organization that is near and dear to my heart. As my kids get older and time has to be prioritized, I just had to take a break from serving on the board. NEIH

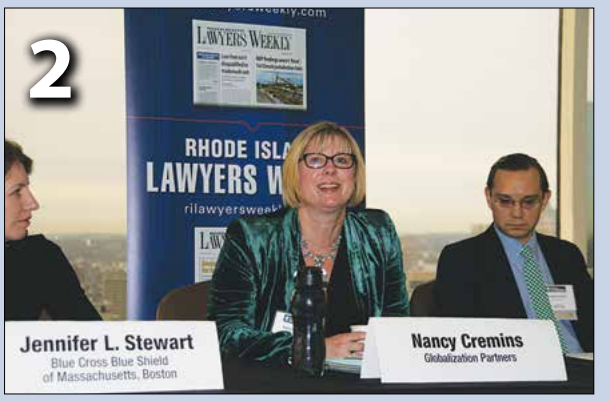
Classifieds

ALTERNATIVE DISPUTE RESOLUTION

ON THE TOWN

In-house attorneys swap stories on how they got to where they are

Lawyers Weekly hosted a "Path to In-House" breakfast panel on Dec. 15 at the offices of JAMS in Boston. Sponsored by MARCUM, the panel discussed how lawyers can pursue in-house counsel roles and the opportunities and challenges involved in making the transition. Participating were Jennifer L. Stewart of Blue Cross Blue Shield of Massachusetts, Nicole Rizzo Smith of Seqirus, Nancy Cremins of Globalization Partners, Craig Blumsack of Sensitech, and moderator Susan Bocamazo, publisher of Lawyers Weekly.



1 Frank E. Rudewicz of MARCUM addresses the room.
2 Panelist Cremins of Globalization Partners
3 Panelist Rizzo Smith of Seqirus
4 Sensitech's Blumsack
5 Blue Cross Blue Shield's Stewart
6 Guests listen to the discussion.
7 Moderator Bocamazo of Lawyers Weekly
8 The panel fields questions.
9 From left: Stewart, Rizzo Smith, Cremins, Blumsack and Bocamazo

Investors, board members not liable for CEO's pay

Continued from page 3

for judgment notwithstanding the verdict and a new trial.

No individual liability

The Wage Act authorizes employees to sue an "employer" for unpaid wages. For corporations, G.L.c. 149, §148 imposes liability on persons who are the "president and treasurer" of the corporation, as well as "any officers or agents having the management of such corporation," in addition to the corporation itself.

Since neither defendant was ever president or treasurer of Genitrix, the plaintiff argued liability arose because they were "agents having the management" of Genitrix.

Looking at the plain text of the statute and its history, the SJC concluded that the Legislature intended to impose personal liability on the president and treasurer of the corporation and "on other officers or agents who may not hold these titles, but who have assumed and accepted as individuals significant management responsibilities over the corporation similar to those performed by a corporate president or treasurer, particularly in regard to the control of finances or payment of wages."

Kafker said the defendants had limited express agency authority by virtue of Johnson's right as third-party beneficiary to enforce the terms of the plaintiff's employment contract and Johnson's affirmation in an email that Rose spoke for him.

But the defendants' limited agency powers, when viewed in the context of the corporation's overall structure, did not make either defendant agents having management of the company, Kafker said.

The plaintiff argued that the defendants became agents having management authority when Rose as a board member and Johnson through his board appointments refused to authorize the plaintiff's cost-cutting proposals to save the company.

However, Kafker explained that §148 "specifically imposes personal liability on those who have assumed individual responsibility as officers or agents. It does not impose individual liability on board members, acting as board members, or outside investors overseeing their investments."

Given that the plaintiff was the only person expressly designated as an officer or agent of Genitrix, particularly with respect to the payment of wages, "neither Rose's ordinary board activities on behalf of Genitrix, his investment activities on behalf of Fisk, nor his actions as Johnson's agent, alone or in combination, rendered either him or Johnson personally liable for any Wage Act violations as agents having the management of Genitrix," Kafker wrote. NEIH