Survey: companies lagging in compliance with GDPR

EU’s cybersecurity reg battles ‘toothless’ myth

By Pat Murphy

A government rule that threatens forfeiture of 4 percent of a company’s annual worldwide revenues would seem a sure bet to grab every business leader’s attention.

But a new survey finds that many companies in the U.S. and abroad have greeted last year’s implementation of the European Union’s landmark cybersecurity regulation with a resounding lack of urgency.

The EU’s much-heralded General Data Protection Regulation went into effect May 25, 2018. Yet a year later, an average of one out of four companies in every country reported having a low degree of confidence in their readiness to respond to a data breach covered by GDPR. That’s according to a survey of more than 1,200 organizations in the U.S., Europe, China and Japan.

Moreover, only 18 percent of respondents expressed a high degree of confidence in their ability to communicate a data breach to the relevant EU regulators within 72 hours of awareness, as required by GDPR. That lack of preparedness exists despite nearly 50 percent of respondents admitting they’ve experienced at least one data breach subject to the EU regulation’s reporting requirement.

The survey, “A Global View of GDPR Progress,” was conducted by the PwC’s Cybersecurity practice. ”The study found there is a lot more work to do,” says Mark E. Schreiber, co-leader of McDermott’s privacy and cybersecurity practice. “For companies in the U.S., and especially for those in Europe, the urgency.

In #MeToo era, more ‘reverse discrimination’ queries fielded

By Barry Bridges

With today’s increased focus on diversity and inclusiveness in the workplace, some employment attorneys are reporting that employees are raising more concerns about so-called “reverse discrimination.”

“People are generally more aware now that they may have legal rights in employment, and because of that heightened awareness, they are looking at an adverse employment action and wondering if they have a potential claim,” said Boston employee-side lawyer Nancy S. Shilepman.

Employer-side attorneys are also aware of the recent shift.

“With what I have seen, at least anecdotally, is an uptick in employees who do not fall within the ‘classic’ protected-class designations — such as employees who are male and white — internally going to HR and complaining of discrimination,” said Providence attorney Alicia J. Samolis.

Furthermore, Samolis said she is seeing more lawyers’ letters cross her desk, which she described as a potential indication that “those employees who are complaining are more likely to go out and find an attorney.”

IN-HOUSE WITH ... 

MICHELLE BUGBEE
EASTMAN CHEMICAL CO.

An in-house lawyer at Eastman Chemical Co. is leading the charge to correct a glaring lack of gender diversity among inventors.

Michelle Bugbee co-chairs the Women Inventors Subcommittee for the Intellectual Property Owners Association. At its annual meeting in September, the IPOA released the subcommittee’s “Gender Diversity in Innovation Toolkit” — a call to action for businesses in the U.S. and abroad to take the internal steps necessary to “capture” the full intellectual potential of their technical workforces.

The 96-page toolkit cites one study in particular as sounding a clarion call for businesses and organizations to address diversity with respect to women and other groups. The first step involves increasing awareness and support at the executive level and among female and other diverse members of the technical workforce.

Second, organizations are called on to assess the “root causes” of the problem. Step 3 involves developing short- and long-term programs to address relevant root causes, whether they involve the attitudes of managers, IP professionals and other inventors, or relate to workplace culture and in-house processes. For example, it would be common to:

1. “Capture” the full intellectual potential of their technical workforces.
2. Identify and address the root causes of gender diversity.
3. Develop short- and long-term programs to address relevant root causes.
4. Address the attitudes of managers, IP professionals, and other inventors.

Continued on page 4

Continued on page 16
ERIDIA class-action plaintiffs not entitled to jury

Fiduciary claim not ‘suit at common law’

By Eric T. Berkman

Plaintiffs who brought a class action accusing their former employer of breaching its fiduciary duties by mismanaging its employee retirement plan were not entitled to a jury trial, a U.S. District Court judge in Massachusetts has found.

The plaintiffs sought a monetary award against the defendant, Fidelity Investments, for allegedly managing their retirement plan in a manner that caused substantial losses. The plan is subject to the federal Employee Retirement Income Security Act of 1974.

In objecting to the plaintiffs’ jury demand, Fidelity argued that the claim did not constitute a “suit at common law,” and thus the plaintiffs had no right to a jury trial under the Seventh Amendment to the U.S. Constitution.

While calling it a “close call,” Judge William G. Young agreed.

“After close study of historical practice and ERISA’s text, this Court concludes that a money award, if any, that the plaintiffs might win would be an equitable surcharge, not legal damages,” Young wrote, granting Fidelity’s motion to strike the plaintiffs’ demand. “As a result, the Court rules that the Seventh Amendment does not require a jury trial in this case.”

Nonetheless, citing the “vital role” of juries, Young ordered that an advisory jury be empaneled.

The 24-page decision is Moitoso, et al. v. FMR LLC, et al.

‘Steep climb’

Lead plaintiffs’ counsel, Kai H. Richter of Minneapolis, declined to comment. Attorneys for Fidelity, meanwhile, could not be reached for comment prior to deadline.

But Gavin G. McCarthy, a Portland, Maine, lawyer who defends ERISA class actions, said Young’s ruling would not come as a surprise to plan administrators.

“A plaintiff suing under ERISA for breach of fiduciary duty will typically have a very steep climb trying to get to a jury given the statute’s roots in the common law of trusts, where most proceedings were equitable,” said McCarthy, who also practices in Massachusetts.

At the same time, McCarthy predicted that Young’s decision to order an advisory jury could motivate parties in future cases similarly to characterize the jury question as a “close call” and suggest an advisory jury as a fallback position.

That would shift the fight to a whole different set of issues, he said, explaining that by empaneling an advisory jury, the court is creating an inefficiency because it will need to exercise its independent judgment once the jury renders its advisory verdict.

“Also, generally speaking, the sorts of equitable issues to which no jury right attaches involve more issues of judgment and discretion than legal issues,” McCarthy said.

Boston ERISA attorney Stephen Rosenberg said it was noteworthy that the plaintiffs tried to apply the “immediate and unconditional payment” exception to circumvent the equitable barrier to their jury demand.

“Also, generally speaking, the sorts of equitable issues to which no jury right attaches involve more issues of judgment and discretion than legal issues,” McCarthy said.

Boston ERISA attorney Stephen Rosenberg said it was noteworthy that the plaintiffs tried to apply the “immediate and unconditional payment” exception to circumvent the equitable barrier to their jury demand.

Here, the plaintiffs argued that while they technically brought their complaint on behalf of the plan, making the suit sound in equity, they had an immediate and unconditional right to relief because they could withdraw funds on demand, an argument that Young rejected.

The plaintiffs — all former employees of Fidelity who participated in the Fidelity Retirement Savings Plan — filed a class action on the plan’s behalf alleging Fidelity breached its fiduciary duties under ERISA by mismanaging the plan.

“The court’s analysis [of whether the exception applies] is a perfect illustration of the traps for plaintiffs embedded in historical trust doctrines, as well as the extent to which those historical doctrines favor defendants … when imported into modern-day ERISA cases,” Rosenberg said.

Johanna L. Matloff, an ERISA litigator in Boston who Continued on page 6
Survey: companies lagging in compliance with GDPR

Continued from page 1

China and Japan, there’s a ways to go.”

But Ponemon Institute founder Larry Ponemon sees a light at the end of the tunnel.

“While many organizations are having a hard time getting into compliance, it’s all part of a process,” he says. “Things are going to get better.”

Broad reach

In addition to companies located inside the EU, GDPR applies to organizations outside the EU that offer goods or services to individuals in the EU. Importantly, the regulation also applies to organizations outside the EU that collect data on individuals inside the EU.

“Certainly companies that do business in Europe, that sell or want to sell to consumers there, including on their websites, have to take these obligations seriously,” Schreiber says.

Linn F. Freedman, who chairs the data privacy and cybersecurity section at Robinson & Cole in Providence, Rhode Island, says “myths” about the reach of GDPR have confused company decision-makers in making a commitment to compliance with the EU regulation.

“I’ve been finding that some companies assume GDPR doesn’t apply to them, so they don’t even check if they have to comply,” Freedman reports. “On the other hand, I see companies that really might not have to comply putting in all these processes either because their lawyers don’t [understand] GDPR and are doing it as a ‘bells and suspenders’ strategy, or they’re just doing it to cover themselves.”

Schreiber admits that it’s harder to sell GDPR compliance to the mid-sized Worcester, Massachusetts, company that may have only online sales and EU consumers.

Some companies have simply decided to avoid the problem by implementing measures to prevent web traffic or purchases from Europe and avoid targeting or tracking individuals while they are in the EU, the Boston lawyer says.

“Other companies have decided it’s a low risk, so they won’t do much of anything,” Schreiber says. “And still other companies have started down the compliance route because they want to preserve that 1 or 5 percent of sales.”

While GDPR imposes more robust data processing safeguards, requires more detailed privacy notices, and over-all affects EU residents greater privacy rights, the regulation notably requires organizations to report data breaches to an affected country’s regulator within 72 hours and becoming aware of a breach.

The 72-hour breach notification may come as a shock to U.S. companies used to dealing with 30- and 60-day notification requirements under various state laws, Schreiber says.

“That’s a very short time. In the U.S., it often takes that amount of time just to engage the forensic vendor [to address] a hack or outside threat actor,” he says.

Tough penalties

For the most serious GDPR violations, companies can be fined up to 20 million euros (about $22 million) or up to 4 percent of a company’s annual worldwide revenue of the preceding financial year, whichever is greater. Fines and penalties are determined by regulators in the individual EU countries.

Schreiber says he’s not aware of any Massachusetts companies that have been hit with GDPR penalties thus far. However, he cautions that the EU data protection authorities are currently working through a backlog of tens of thousands of cases, so companies can’t assume they’ve dodged a bullet.

“Eventually, they will adjudicate those complaints;” he says. “A lot of them will be minor, requiring only a warming or some cleanup, but in others there will be fines.”

But Freedman says she got a different signal when she sat down with data protection authorities in the EU.

“They’re not going after small companies in Providence,” Freedman says. “A small business that does 95 percent of its business in Rhode Island and the U.S. is not going to be a No. 1 target of these data protection authorities.”

And while levying a penalty of 4 percent of a company’s revenue could be devastating for many businesses, Freedman expects such draconian fines to be relatively rare.

“I know these regulators, and they’re not looking to put a company in Providence out of business,” Freedman says, adding that regulators will give weight to a company’s good-faith efforts at compliance.

“Running around and saying you’re going to go out of business because of GDPR is extreme.”

Many U.S. companies early on were not especially dutiful in complying with their new EU data protection obligations because regulators hadn’t levied any fines, Schreiber says. The more recent announcement of eye-popping fines for GDPR violations has gotten the attention of the business community.

For example, the French regulatory authority fined Google $57 million in January for failing to disclose to users how it was collecting data over its various platforms for use in creating personalized advertising. And in April, Ireland’s Data Protection Commission announced the opening of an investigation against Facebook that reportedly could lead to a $2.2 billion fine based on an allegation that the company mistakenly stored millions of user passwords in plain text.

As a result, Schreiber says, more companies have gotten the message and are taking GDPR compliance more seriously.

“You’ve already seen some of the larger fines come out, mostly against major tech companies,” Schreiber says. “We probably won’t know for another two or three years what if any Massachusetts companies may get caught up in this.”

Attorneys should be advising clients that are not up to speed on GDPR compliance to conduct risk assessments defining their exposure under the EU regulation, he says. Clients also should be advised to engage forensic professionals who can identify vulnerabilities and recommend improved cybersecurity procedures and infrastructure for companies, he adds.

Private right of action

The most “ominous” aspect of GDPR that should get the attention of all companies is that the regulation provides a private right of action for persons whose data rights have been violated, says Boston cyber law attorney Joel K. Goloskie of Rhode Island-based Panmone, Lopes, Devereaux & O’Gara. He anticipates “lawsuit mills” springing up to handle GDPR claims, particularly since the regulation also authorizes not-for-profit organizations to stand in the shoes of individuals and sue on their behalf, collecting compensation afforded under the laws of a member EU state.

“What you’ve got under GDPR is an individual’s right to sue you in your home nation for any violation, even if it’s not a [data] breach,” Goloskie says.

Mid-sized companies that don’t have the compliance departments of large companies may find themselves to be most vulnerable to private suits under GDPR, he says.

But small businesses do have options to protect themselves, Goloskie says.

“You don’t need to be IBM. There are [law and IT] firms out there that do enough of this to do it at a cost-effective rate,” he says.

Ashley Winton has an on-the-ground EU perspective as a partner in McDermott’s London office. Rather than being alarmed, Winton says he was heartened by some of the Ponemon survey’s findings.

“It is clear that a very large number of companies have expended a great deal of effort in their GDPR compliance,” Winton says. “That is not just limited to European headquartered companies, but to U.S.-headquartered ones, too.”

The study found that approximately one-third of companies carried cyber risk insurance and that 43 percent of respondents reported that their insurance covered GDPR. In addition, 85 percent of respondents reported having a GDPR data protection officer.

While Freedman believes the need for GDPR compliance can be blown over in some cases, she says it would be short-sighted for companies to completely ignore the problem of cybersecurity.

In stead, with the strict California Consumer Privacy Act going into effect in January 2020, she says it’s actually a good time for companies to tighten their cybersecurity policies in order to be in a good compliance posture for both CCPA and GDPR.

“We can’t expect our U.S. experience to be of much use to GDPR,” Freedman says, noting the Massachusetts Legislature is considering a data privacy bill modeled after the California law.

“It’s never too late,” she adds. “The timing right now is perfect for companies to be looking at compliance with GDPR, CCPA and a slew of new privacy laws that are coming down the pike.”

Understanding the rapidly changing landscape of Privacy and Data Security is critical. With dozens of state and federal laws governing the collection of personal information, privacy, data security and data breach, almost every business needs help navigating the complex web of compliance.
Continued from page 1

proposes programs tailored to eliminate bias, intimidation or simple confusion in a company’s invention submission/patenting process.

The fourth step involves implementation and monitoring of programs.

Bugbee, senior counsel at Eastman Chemical’s offices in Indian Orchard, Massachusetts, teamed with her subcommittee co-chair, Sandra Nowak of Minnesota, and Washington, D.C. attorney Mercedes K. Meyer in leading the effort to draft a blueprint for companies and organizations to remedy the lack of gender parity in innovation.

Bugbee says the toolkit provides a concrete action plan that addresses an undeniable problem.

“There are plenty of women out there who are innovating and doing things, but they’re not patenting,” she says.

She recently spoke with NEHI’s Pat Murphy.

***

Q. Why is gender diversity in innovation an important issue that needs to be addressed?

A. There’s a large part of the technical workforce that’s not having their ideas captured, necessarily, and that results in a lost opportunity cost. A recent equity in innovation report from the Institute for Women’s Policy Research found that about 20 percent of U.S. inventors between 1975 and 2010 were women. A World Intellectual Property Organization report found that less than 30 percent of [Patent Cooperation Treaty] applications had a least one woman on it (identified as an inventor).

Q. What are the institutional factors that prevent women inventors from fully developing and patenting their ideas?

A. We found that sometimes it’s just women’s desire to be perfect, to get everything exactly right before they submit it. Sometimes women aren’t put on the right projects that lead to more innovation.

Sometimes you have a group of people working on it. When you’re getting ready to file, patent attorneys ask whether [every inventor has been included]. Sometimes somebody doesn’t let you know that a woman was involved in a project. Sometimes women don’t speak up, whereas men tend to be much more likely to speak up and say, “Yes, I am an inventor on that. This is what I did. This is my work.”

Q. What are some of the specific problems that your toolkit targets?

A. Oftentimes the patent attorneys or IP professionals are [white] males. There’s not the same access to women and diverse inventors who may want to seek out [the IP professionals]. There’s need for training programs for various affinity groups — women’s groups, Asian groups, Hispanic-American groups, African-American groups — to increase awareness of the patenting process, [teach how to fill] out invention disclosure forms, and make the patent attorneys more accessible.

Q. Does the problem boil down to women inventors not getting the credit they deserve?

A. That may be true in some cases, but I don’t think it’s true in a number of cases. If that were true, we’d have bigger problems because not naming the correct inventors on your patents may be cause for invalidating them.

More often (the woman inventor’s) ideas are not going forward. They’re not being considered. Sometimes (the problem is) the patent review committee that looks at invention disclosures. We’ve found that in some of the companies we’ve worked with those committees may be all male. It’s not necessarily that women aren’t being credited. It’s that their ideas aren’t even moving forward to get to the stage of drafting and filing patent applications.

Q. In 2018, you had companies and organizations test a draft version of the toolkit. What were some of the important lessons you took from the feedback given in those dry runs?

A. Many of them found the toolkit in the alpha stage to be really helpful. Many of the companies that we worked with were not even aware that there was a problem until we started talking about the toolkit. When they stop to think about it and consider the women inventors that they work with, they realize that maybe there is a problem.

Q. What suggestions would you have for in-house counsel to ensure their companies take full advantage of their intellectual capital?

A. If you’re in-house, be visible. Find ways to meet with your innovative community. Get in among those groups. If there’s a woman in an engineering group or [someone from other affinity groups], [provide] that additional exposure to get people motivated. Get out there and make sure people know you exist as the IP attorney.

Have training sessions. If someone has worked with another company, they may not be familiar with [your company’s] invention disclosure process. Think about [your invention disclosure process], is it accessible to everybody? People coming out of college may never have filled out an invention disclosure form.

From the perspective of the IP professional, it’s also about being aware. Is it always the same people that you’re hearing from? Are there other people who seem to be afraid to speak with you? Reach out to them. Maybe you can find out that they have some ideas that are not being captured.

Q. What other suggestions would you have for in-house counsel to ensure their companies fully understand their intellectual property?

A. If you’re in-house, be visible. Find ways to meet with your innovative community. Get in among those groups. If there’s a woman in an engineering group or [someone from other affinity groups], [provide] that additional exposure to get people motivated. Get out there and make sure people know you exist as the IP attorney.

Have training sessions. If someone has worked with another company, they may not be familiar with [your company’s] invention disclosure process. Think about [your invention disclosure process], is it accessible to everybody? People coming out of college may never have filled out an invention disclosure form.

From the perspective of the IP professional, it’s also about being aware. Is it always the same people that you’re hearing from? Are there other people who seem to be afraid to speak with you? Reach out to them. Maybe you can find out that they have some ideas that are not being captured.
Our work is all over Boston. Our name is Day Pitney.

Local Knowledge. International Reach.

Wherever you look in Boston, you see the impact of Day Pitney clients — from leading financial enterprises and real estate developers to energy and technology companies to non-profit institutions to individuals and families of wealth.

As a full-service law firm with more than 300 attorneys, we proudly provide sophisticated legal advice with exceptional client service. Let us help you make your mark on Boston.
Continue from page 2

represents defendants, said she was not surprised by the decision, particularly since one of the underlying goals of ERISA is to encourage employers to offer these types of benefits to employees.

"If employers know they have exposure to expensive and time-consuming jury trials, they may not be as likely to take on the risk of offering such benefits," Matloff said.

John J. Roddy, a Boston lawyer who represents plaintiffs in ERISA class actions, said that while there is "no stauncher advocate of the jury trial" than Young, beneficiaries claims against trustees are so bound up in the constraints of equity jurisprudence that there was no viable way to find a right to jury trial under the circumstances.

"The silver lining here is that the equitable notion of surcharge gives the court the ability to not just restore the parties back to square one but to put the plan participants in as good a position as they would have been but for the claimed fiduciary breach," he said.

Jonathan M. Feigenbaum, an ERISA lawyer in Boston, said Young's characterization of monetary remedies against fiduciaries under ERISA as a surcharge rather than as legal damages follows U.S. Supreme Court and 1st U.S. Circuit Court precedent.

"If employers know they have exposure to expensive and time-consuming jury trials, they may not be as likely to take on the risk of offering such benefits." — Johanna L. Matloff, ERISA litigator

 Jury demand
 In October 2018, the plaintiffs — all former employees of Fidelity who participated in the Fidelity Retirement Savings Plan, a defined-contribution plan — filed a class action on the plan's behalf in U.S. District Court alleging Fidelity breached its fiduciary duties under ERISA by mismanaging the plan.

Specifically, the plaintiffs claimed Fidelity used the plan to promote its own mutual fund business to the detriment of the plan and its participants, by loading it with Fidelity investment products instead of more suitable non-proprietary investments.

As a result, the plaintiffs claimed, for the time period in which data was available, Fidelity's plan performed worse than any other plan with more than $5 billion in assets, sustaining more than $100 million a year in losses compared to the average plan.

"Arguing that as former employees they should not have the right to a jury trial under ERISA, the defendants moved to strike. In the alternative, the plaintiffs requested an advisory jury.

 Matter of equity
 Young found the plaintiffs did not have the alternative, the plaintiffs requested an advisory jury.

The silver lining here is that the equitable notion of surcharge gives the court the ability to not just restore the parties back to square one but to put the plan participants in as good a position as they would have been but for the claimed fiduciary breach," he said.

Jonathan M. Feigenbaum, an ERISA lawyer in Boston, said Young's characterization of monetary remedies against fiduciaries under ERISA as a surcharge rather than as legal damages follows U.S. Supreme Court and 1st U.S. Circuit Court precedent.

"This may not make sense because the relief sought is money — as Justice Ruth Bader Ginsburg has pointed out in as good a position as they would have been but for the claimed fiduciary breach," he said.

John J. Roddy, a Boston lawyer who represents plaintiffs in ERISA class actions, said that while there is "no stauncher advocate of the jury trial" than Young, beneficiaries claims against trustees are so bound up in the constraints of equity jurisprudence that there was no viable way to find a right to jury trial under the circumstances.

"The silver lining here is that the equitable notion of surcharge gives the court the ability to not just restore the parties back to square one but to put the plan participants in as good a position as they would have been but for the claimed fiduciary breach," he said.

Jonathan M. Feigenbaum, an ERISA lawyer in Boston, said Young's characterization of monetary remedies against fiduciaries under ERISA as a surcharge rather than as legal damages follows U.S. Supreme Court and 1st U.S. Circuit Court precedent.

"This may not make sense because the relief sought is money — as Justice Ruth Bader Ginsburg has pointed out in

...a strong roster of leading trial lawyers [handling] complex disputes work."

- Chambers USA

ERISA class-action plaintiffs not entitled to jury
Cannabis and the Municipal Challenge: The Secrets to Successful Permitting

A ROUND TABLE DISCUSSION

SPONSORED BY

Photos by Jared Charney

JAMES E. SMITH
Moderator, Founding Partner, Smith, Costello & Crawford

SIRA R. GRANT
Attorney, Smith, Costello & Crawford

CHRIS MITCHEM
CEO, Diem Cannabis
I joined Smith, Costello & Crawford in November 2017, and it was about the same time that the draft adult use regulations were being released. Since the rollout of adult-use marijuana, we have worked with a number of different cities and towns with varying views on marijuana establishments. We have worked through the varying local processes with different clients and have learned a lot about Massachusetts over the past two years. We have 351 cities and towns in Massachusetts, and we have 351 sets of zoning bylaws.

What we found is that the processes on the local level started taking multiple shapes and forms. The state [cannabis] application requires a certification page signed by both the operator and the city or town that says, “Yes, we’ve entered into a Host Community Agreement.” Some cities want you to get a special permit before they give you a Host Community Agreement. Some say, “No, we’ll give you a Host Community Agreement, and then we’ll worry about the special permit later.” Some have implemented a request for qualifications or proposals process, which is very similar to something you’d see in real estate as a management company.

Let’s say that a city or town wants to see a draft adult use application for an operator as part of that request for qualifications. I create a CIP login, I have to fill in information, I have to print each page individually. And maybe I don’t know the answers to questions like, “What is my plan to remain compliant?” The process can take a long time. And then once you submit it, maybe there will be two selections out of 30 applications.

That is still how the regulations are set up. When the regulations potentially change in the coming months, hopefully those get aligned so I’m not looking at two different buffer zones for an operator that wants a medical use, and an operator that wants an adult use.

In addition, some cities and towns may require cannabis businesses to be 500 feet from a funeral parlor, 500 feet from a playground, 500 feet from a baseball field or a recreational area. Cities and towns have passed this and that’s part of their zoning. It goes beyond what the state law says that you can do. But that’s just how it goes right now.

This hasn’t been litigated yet. So, let’s say that this property is 500 feet from a baseball field, and [the zoning provision] says “recreational areas.” Now we have to call the city or town and say, “Hey, is a baseball field a recreational area?” Or, “Is a dentist office that treats children a place where children commonly congregate?” “Is a karate studio?” These are the questions that we have to answer as we go through the buffer zone analysis.

**TOPIC 2: THE OPERATOR’S PERSPECTIVE**

**CHRIS MITCHEM, DIEM CANNABIS:** Good counsel has been a godsend for us. We’re honestly fortunate that we found Smith, Costello & Crawford. Good counsel is incredibly important given this regulatory climate.

I’m going to talk a little bit about the process of getting an HCA, a Host Community Agreement. We operate out of Oregon. Massachusetts is an entirely different regulatory structure. It’s all new. I actually love what the state of Massachusetts did. They gave all the power to the municipalities to decide who gets to operate within their town or city. And I think that’s really smart. The local folks should be deciding which businesses they are going to host.

But it’s complicated because each municipality has set up unique rules. We’ve been working in four different municipalities in the state. There’s a different recipe for each one. And you go into each city with a smile on your face, understanding that it’s a startup for regulators along with us as operators.

You go into a town. Hopefully you find one that passed Question 4 in 2016. You do your research, target a few communities. [We said,] “We want to go to Worcester, we want to go to Springfield, we want to go to Lynn, we want to go to Orange.” Once we identify the communities that don’t have a ban, we go in and kind of feel out the planning department. We see if...
they're open to it. There’s a lot of passion both for and against cannabis, so we want to make sure that they’re on board and they’re not just saying that they’re on board. Then we get into the community. Securing real estate is incredibly hard. The hardest part about this business is finding real estate. Each municipality has its own regulatory structure that starts with zoning. Some communities break it down to specific streets that you can operate on. From an operator’s perspective, usually the zoning’s pretty restrictive. We have to go to a specific part of the town. And the landlords in that zone know that they have something really special there. So when you’re negotiating a contract, that becomes a huge factor.

It’s the worst one-sided negotiation process, because they’re charging double, triple, quadruple market rates for rent. They don’t want to sell you the building, even though you’re going to have to invest hundreds of thousands of dollars to retrofit it. It is really challenging from an operator’s perspective. Our strategy has been we try to secure multiple properties and throw multiple options at a city, which we did in Worcester and it turned out to be a successful strategy for us there. We were able to give Worcester the luxury of choice for us as operators, and we were lucky enough to get an HCA there.

The process is typically long. I think you can expect at least six months before you get an HCA, sometimes up to a year. As an operator, I have overhead. I have investors that I’m reporting to, I have budgets, I have a P & L. If I’m paying heavy rent on a piece of property for a year, before I even get the HCA, and once I get the HCA then I apply at the state level and that takes another year. We’re talking about securing a property for two years without generating any revenue from it.

JAMES SMITH, SMITH, COSTELLO & CRAWFORD: Everybody in the communities that we deal with, and I think most folks in the public, think this is a goldmine, that nobody can possibly lose money in the cannabis industry. But I tell every client, “You want to be in this industry? Take your money, go to Vegas, put it on red. [You’ll] get far better odds.”

We tell clients, “You walk in the door, you won’t see a nickel for 18 months.” This is a hard industry. You’ve got a lot of people with passion who want to get into this industry. But there are no banks, there are no loans, there are no breaks. The rents are higher. Nothing is market rate in this industry, because everybody is convinced you’re on your way to millions.

Some folks are going to make some serious money. But [you have to] have the capital, the ability to put millions of dollars on the table without a bank and let it sit out there for as long as 24 months.

“This is a hard industry. There are no banks, there are no loans, there are no breaks. The rents are higher. Nothing is market [rate] in this industry.”

— James Smith, Smith, Costello & Crawford

TOPIC 3: NEGOTIATING HOST COMMUNITY AGREEMENTS

SMITH: Host Community Agreements have become incredibly controversial. Ultimately, [what the words in the statute mean is going to] have to be adjudicated. We spend a lot of time negotiating [HCAs] — an inordinate amount of time. And you should have a question in your mind: Why would anybody in their right mind sign one of these things?

There are some key words in this statute. It says [that a HCA] “may” include a community impact fee. It’s not “shall,” it’s “may.” The Legislature thought, “There may be some costs here.” [The statute says that fee should be “reasonably related to the cost imposed upon a municipality.”]

There is a local tax of 3% that’s in the statute. There’s a total tax of 20%. The state gets 17%, the host community gets 3%. [But now, there’s an additional fee] up to 3%, and naturally, every community is at 3%, the maximum regardless of costs.

As this industry normalizes, an average store might do $5 million in revenue. If you do less than $5 million, you’re probably not going to make it. You might do $10 million in a good store. Today, because there are only 23 or 24 stores open across the commonwealth, they’re doing much more than $5 or $10 million. But as this normalizes, $10 million will be a pretty good store. $5 million a barely OK store, $1.5 to 20 million a phenomenal store. [If you’ve got a $2 million store, you’re paying] $1.2 million in taxes and fees to the communities over and above the property taxes. And we have to fight our way into these communities.

Beyond the 3% tax, communities ask for charitable donations. And “ask” is really a misused verb. They’ll say, “We want $20,000-25,000. They might want more. They want a hundred man hours or person hours, annually, [for] volunteer work. You’ve got to get local vendors. You’ve got to hire local employees. Imagine anybody telling Dunkin’ Donuts and say, “Don’t sell the coconut doughnuts. I don’t like coconut; it’s dangerous.” Yet this language is in agreements where local health departments can walk in.

The Cannabis Control Commission is extraordinarily aggressive when it comes to regulations. They show up unannounced, they bring in six, eight, nine people; they inspect all the time. They’ve approved every single product many times over. [You can’t] allow a health department with no background, no experience, and potentially someone who is not a cannabis advocate, saying, “Those are dangerous, those edibles. We can’t have those sold in our town.” That can essentially shut your business down.

Imagine anybody telling Dunkin’ Donuts, Wal-Mart, or even maybe a bicycle repair shop, any of these things. This is language that should not be in these agreements. The statute says nothing about any of this, yet it’s in most of the agreements.

[One provision] that you absolutely cannot sign is when [towns] have local health departments and want the ability to come in and say, “Well, that product is dangerous. You can’t sell that.” You can’t have that. Nobody can walk into Dunkin’ Donuts and say, “Don’t sell the coconut doughnuts. I don’t like coconut; it’s dangerous.” Yet this language is in agreements where local health departments can walk in.

Beyond the 3% tax, communities ask for charitable donations. And “ask” is really a misused verb. They’ll say, “We want $20,000-25,000. They might want more. They want a hundred man hours or person hours, annually, [for] volunteer work. You’ve got to get local vendors. You’ve got to hire local employees. Imagine anybody telling Dunkin’ Donuts and say, “Don’t sell the coconut doughnuts. I don’t like coconut; it’s dangerous.” Yet this language is in agreements where local health departments can walk in.

The Cannabis Control Commission is extraordinarily aggressive when it comes to regulations. They show up unannounced, they bring in six, eight, nine people; they inspect all the time. They’ve approved every single product many times over. [You can’t] allow a health department with no background, no experience, and potentially someone who is not a cannabis advocate, saying, “Those are dangerous, those edibles. We can’t have those sold in our town.” That can essentially shut your business down. These products are very expensive. You just can’t simply not sell them.

So why sign one of these things? We have no leverage. These are not equal negotiations. Your client comes to you and says, “Well, Jim, I’ve had this property now for about a year. It’s costing me $10,000 a month. I’m
paying you. I’ve got a whole team. I’ve got an architect. I’ve got an engineer. I’ve surveyed. I’ve spent all that money. I’m now finally through the city process. I probably hired local counsel to get through the zoning process locally, and now [this is] the final step before I can go to the CCC. You’re telling me it’s not legal. It doesn’t meet the statutory requirements, but I have [no choice but to] sign it.”

Another issue is that once the city or town says, “Hey, the guy down the street signed this and you have to sign the same thing,” it’s really hard to argue with that. Everybody thinks there is a goldmine here, [and] they’ll sign anything. Then your client walks in with good counsel, and you say, “There are eight or 10 violations of the statute here. I can’t have this signed.” [And the municipality says,]  “We don’t need your client. We’ll get somebody else.” It’s really hard to negotiate with that.

TOPIC 4: PUBLIC POLICY ISSUES

SMITH: There are three basic cannabis licenses. There’s cultivation. You’ve got to grow this product, and that’s frankly where there’s some serious profit margin. There’s manufacturing. You process it, you turn into something. Cultivation and manufacturing ... are typically zoned in the industrial area of town — it’s an industrial or light manufacturing facility. [But even though] there’s no retail operation there, there’s no traffic, [communities] want 3% of your sales.

I don’t think anybody [on the legislative side] really intended the industrial side of this business, the cultivating and the manufacturing, to also have a Host Community Agreement for 3%. The real goal from a public policy perspective is to defeat the illicit market. Estimates tell us that 85% of all cannabis sold in Massachusetts is sold illicitly. You have no idea what’s in that product. You have no idea where it came from. You don’t know if the kid down the street grew it or it came out of a foreign country and who knows what’s inside that product. But 85% of all cannabis consumed today in this state is that product.

We’re the other 15%. Our product is tested. You have no idea what’s in that product. You have no idea where it came from. You don’t know if the kid down the street grew it or it came out of a foreign country and who knows what’s inside that product. But 85% of all cannabis consumed today in this state is that product.

TOPIC 5: SOCIAL EQUITY IN THE CANNABIS INDUSTRY

GRANT: We have worked with some economic empowerment applicants on a pro bono level. We have negotiated some Host Community Agreements for them. But we’ve been approached by a few that we don’t want to take their money because there’s no path.

SMITH: It goes back to this is not an inexpensive industry. There are no banks; there are no lending resources. People come in with a couple hundred thousand dollars — which is a lot of money — and say, “I want to get in the cannabis business.” Well, you can’t. You’re at about a million dollars to open a simple retail store, which is the least profitable segment of the market. So the folks on the poorer side of the equation can’t open one retail store. Without capital, you really can’t have social equity. It’s tragic.

MITCHEM: I just want to make a quick comment from an operator’s perspective to that. This is an issue we’re passionate about. We chose cannabis, in part, because of the social mission. We know that last year 600,000 people got put in jail for carrying small amounts of marijuana, and each one of those people cost us as taxpayers $50,000 a year. Most of them were black or Latino men. They get out of jail, they have a felony on their record, they can’t get an apartment, they can’t get a job. It’s a nightmare, and that’s a big reason why we do this.
What jurors really think about your employment case

As trial lawyers representing employers, we have learned a great deal over time about how jurors tend to think about employment cases. Yet watching a jury deliberate during a mock trial — behind a one-way mirror — is always a wake-up call. It provides an unvarnished look at how jurors actually think and talk about employment claims behind closed doors.

Recently, we conducted a mock jury session on behalf of a client in an employment discrimination and retaliation case. In the day-long exercise, three separate mock juries heard the exact same summaries of both parties’ evidence, including video excerpts of testimony from key witnesses, and then deliberated and reached a verdict.

The results, while different in each room, raised many of the same themes that we have seen in other mock jury settings. Below are 10 key lessons from the mock juries, as well as strategies for how employment counsel can shape a trial narrative in light of juror’s views.

1. But he worked there so long! Jurors empathize with long-term employees.

Legally, an at-will employee remains at will no matter how long he has worked for the employer. But jurors may not agree.

Many jurors think that long-term employees should get special protection whether there is a law requiring it or not. In the mock deliberations, jurors repeatedly said things like: “But he had been a good employee for a long time.” They felt he was owed extra chances to turn around his performance.

They wanted the employer to take special care with him.

Because of this potential bias, go ahead and acknowledge a plaintiff’s long tenure at the company. Express the employer’s appreciation for those years of service. At the same time, explain why, despite that long tenure, the plaintiff’s conduct became unacceptable.

Maybe the plaintiff’s performance declined over time — make that clear. Maybe an egregious instance of misconduct necessitated termination even though it had never happened over the many prior years he had worked for the company — explain why.

Emphasize extra chances the employer gave the plaintiff to turn around performance. Highlight the ways the employer treated the plaintiff well during his years at the company.

2. Jurors are wary of human resources.

It will not come as a surprise that many jurors are suspicious of in-house lawyers, but some may be surprised to learn that they are also suspicious of HR. Yet HR professionals are frequently witnesses in employment cases, and there is often a lot of evidence of their interactions with both the plaintiff and business partners.

In one mock-deliberation, a juror said: “HR is never going to help the employee; their job is always to protect the company.” In response to that sweeping generalization, the rest of the jurors nodded and laughed approvingly.

Jurors who attend two mock trial sessions expect similar thoughts. Jurors share stories of their own, often negative, interactions with HR in their workplaces.

In response, humanize the HR witnesses who will appear before the jury. Make sure the jurors are reacting to those individuals in front of them, as opposed to their generic views of “HR.”

Have HR witnesses give a nuanced explanation of their training and their role. Have them explain that they are a resource for both the employee and the managers, and that the employee’s company follows law and the company’s own policies.

Emphasize how HR treated the plaintiff consistently with others at the company, gave the plaintiff notice of his performance shortcomings, and tried to help the plaintiff.

3. Jurors want employers to follow the progressive discipline policy … to the letter.

Jurors are suspicious of even the slightest deviation from a company’s progressive discipline policy. Plaintiffs’ lawyers try to exploit that by arguing that deviation from the policy is evidence of discrimination.

Regardless of how carefully a progressive discipline policy is worded — with caveats that the employer can go straight to termination if warranted and skip steps as circumstances require — jurors largely prefer to see all of the disciplinary steps followed in sequence before an employer decides to terminate the employee.

For that reason, in our counseling practice, we recommend that employers reconsider whether to have a progressive discipline policy at all if they do not intend to follow it to the letter.

The mock jury sessions highlighted a nuance to that general rule: the mock jurors were very interested in the apparent decision to deviate from the policy and skip to an accelerated termination. They debated at length whether and why the company had deviated and whether any deviation was due to a discriminatory motive.

Knowing that predisposition, spend time explaining to the jurors what the policy actually says: why the employer took the action it did in the sequence it did; why it was well justified; and why, given the context, the employer acted consistently with the policy.

Even if the plaintiff does not emphasize the point, jurors are likely to wonder when they suspect the company did not follow every step of the policy, so it is best to address it head on.

4. Jurors will scrutinize the plaintiff’s performance and conduct.

In many of our cases, the mock juries also scrutinized the plaintiff. They were receptive to evidence that the plaintiff himself bore responsibility for his performance and should have foreseen the discipline and ultimate termination.

They made statements like: “I had caused my company to lose this much money, I would definitely have been fired.” One said: “I had failed to attend a meeting with my boss’s boss, I would be gone.”

They relied on, and shared with each other, their own life experiences as to what conduct was acceptable in their own varied workplaces.

At the same time, what were employers’ legitimate expectations about performance and results? They also viewed the plaintiff’s own video testimony critically, with one juror dismissing it as “feeling over facts.”

For that reason, emphasize where and when the plaintiff made poor choices, what the logical consequences of those choices were, and why the employer felt that the performance failures or misconduct was significant.

Point out all the different choices the plaintiff could have made to avoid discipline or termination, that’s why a company follows law and the company’s own policies.

Emphasize how the plaintiff treated the company consistently with others at the company, gave the plaintiff notice of his performance shortcomings, and tried to help the plaintiff.

5. Jurors need timelines to keep track of the facts.

We are always impressed by how jurors can process a lot of new facts in a short amount of time. However, watching a jury deliberate also reveals that jurors can get confused about details, especially about the sequence of key events and which came first in a series of rapid-fire, crosscutting emails.

In the mock deliberations, we had a whiteboard in our observation room on which we tracked what they were confused about. Let’s just say there were more than a few entries.

For that reason, we regularly use color-coded timelines as demonstratives during trial to demonstrate clearly the chronology of events and eliminate any confusion. Make them bright, eye-catching and compelling.

Resist the urge to include every event; limit it to just the events that the jurors must remember.

With the court’s permission, leave the timeline up as witnesses testify. Reinforce the timeline and use any visuals again in the closing argument. The sequence of events is often critical in employment cases, so leave no room for confusion.

6. Jurors don’t like hasty decisions.

Jurors do not like when they believe that an employer or manager acted too quickly by terminating the last juror in their group. While we see a plaintiff have multiple chances to turn around performance or make amends for misconduct.

Our mock juries thought the company moved very quickly in deciding to terminate and were suspicious of the haste. “And then, bam — he was gone!” one juror said, prompting nods. Even defense-oriented jurors openly shared that they wished the manager had given the plaintiff more time or reflected longer before making a termination decision.

Knowing that predisposition can help inform trial strategy. Sometimes employment decisions need to happen quickly a plaintiff’s poor performance or misconduct is causing financial losses or safety issues, or affecting co-workers. Make sure that jurors clearly “get” those impacts.

At times it was critical, say and explain why. Have customers, co-workers or others testify directly about the financial, safety or morale impacts of the plaintiff’s conduct. Help the jurors put themselves in the shoes of the decision-makers and not just the plaintiff.

7. Hey, that’s not fair!

Jurors may hear “blah, blah, blah” when the lawyers focus on the claims, defenses and key witnesses. Jurors want to get down to brass tacks: What is fair?

Throughout the three sets of mock deliberations, jurors’ discussions focused on whether the company’s decisions seemed fair and whether the plaintiff was fair in the way he interacted with his managers. Was it fair for the plaintiff to cause the company to suffer large losses due to negligence and still expect to stay employed? Did the managers really give the plaintiff notice of the problem and an opportunity to improve? Were the managers fair in their expectations of the plaintiff? Were the plaintiff’s demands of the employer reasonable? Was the ultimate decision to terminate fair in light of all the circumstances?

Knowing that will be a focus for jurors can help frame the trial narrative. Consider using the testimony of fairness as the opening statement and closing argument. With witnesses for the employer, explore why the managers took the actions they did and why they concluded that those actions were the right and fair ones.

8. A careful juror or two may do a dramatic reading of the jury charge.

While fairness is the touchstone, jurors may also review the jury instructions carefully.

In our mock jury sessions, the jurors had a copy of the charge, consistent with many jury practices. While not all jurors focused on it in detail, a few did and then read the key language aloud to the group.

One juror then interpreted the language in his own words, saying: “This means that if there is even one iota of discrimination, we have to find for the plaintiff.” The whole room stopped to re-read the section of the charge.

So it is critical to review every word of the charge carefully and object vigorously to any erroneous or prejudicial instruction in the charge conference. Maybe the most important point is to make sure that the charge is written in a way that a lay juror can easily understand.

Remember that sometimes jurors are just listening to the judge read the charge and are not rereading it themselves, so resist the urge to make it long and too complicated. If there is an issue about the charge on which you want jurors to focus, note it in the closing, give them a page number if you have it, and show it to them in a demonstrative.


While the charge will instruct the jurors to consider liability and damages separately, and not to consider damages at all unless they first find liability, it is not always clear what the lay jurors do.

We watched one of the three mock juries reason its way through the special verdict

Dawn R. Solowey is senior counsel and Lynn A. Kappelman is a partner at Seyfarth Shaw in Boston.
Stephen M. Honig practices at Duane Morris in Boston.

It’s been a busy season for Delaware corporate law

While seemingly quiet, the last few months have in fact been one of the most active periods in the annals of Del- 
aware corporate law.

I’ll review here significant developments affecting aggrieved minority shareholders in MKA transactions; expan-
sion of fiduciary duties of directors; and the wide-ranging attack on current un-
derstandings of the role of the American corporation by none other than chief 
justice of the Delaware Supreme Court.

About appraisals

It used to be that almost every MKA transaction involving public companies swamped class actions on behalf of alleged-
ly aggrieved shareholders resulting in both inadequate disclosure of material facts and short-changing of equity holders.

In the Trulia case in January 2016, the Delaware Chancery Court closed the door on the industry of some plaintiffs’ counsel to bring suits for MKA non-disc-
losure and then promptly settle those suits by providing non-beneficial addi-
tional disclosures in the proxy solicita-
tion. Counsel would then receive sub-
stantial fees for their efforts.

That cynical practice was embraced by the very companies being sued, because entering into a global settlement would protect the companies from future liabil-
ity; the process consequently represent-
ed inexpensive “deal insurance.”

Delaware was the location of much of the litigation. (See my December 2017 column commenting on Trulia and also noting that appraisal was often unwise as courts frequently held that “the deal price was the most reliable indication of fair value.”)

Not surprisingly, the many appellate lawsuits based on alleged improper dis-
closure has fallen markedly. Ever-resourceful plaintiffs’ lawyers have therefore attempt-
ed to end-run Delaware jurisprudence by bringing the same cases, challenging dis-
closure and fairness of return, to federal courts all over the country.

Federal judges, inexperienced in han-
dling such cases, have not always ad-
opted the Delaware view. According to published statistics, state court actions of this sort fell 34 percent during 2018, while federal court challenges surged.

In a related development, Delaware Chancery drove another nail into the coffin of appraisal by holding that sophisti-
cated shareholders who agree, at the start of a transaction, to waive future appraisal rights can be denied subsequent appraisal.

In Mantti Holdings, the court held that appraisal rights were not mandatorily required by statute, in that shareholders can elect not to pursue appraisal; they are not “trapped” and accorded no protection.

The court ruled that a pre-closing waver of appraisal by unambiguous contract language would be enforced, at least where the waiving parties were sophis-
ticated, held all the equity in the target, and negotiated away rights of appraisal in exchange for other contractual benefits.

‘Caremark’ claims

Until recently, although Delaware courts theoretically imposed an obliga-
tion on corporate directors to supervise the business of their corporations (based on the Caremark case), proving that a director had failed in supervisory obli-
gations proved too high a burden in virtu-
ally all asserted litigation.

However, in derivative litigation deter-
moved on Oct. 1 (In re: Clovis Oncology), 
Caremark found that board mem-
bers could be held liable for breach of the duty of care for permitting misleading public reporting that inflated the success of company drug trials.

The touchstone liability under Care-
mark is found where there is either the failure of a board structurally to institute appropriate “oversight sys-
tems” to monitor company performance, or a conscious disregard for red flags about improper company actions.

There is a tenuous balance here. Mere negligence by the board does not necessarily create liability. Thus, at least under Care-
mark, it is possible to be ined and not be held liable for breaching any director duty by reason of making a costly mistake.

In Clovis, the court held that estab-
lishment of relevant committees en-
gaged in oversight was sufficient to meet the mechanical elements of the over-
sight obligation. However, members of the board in Clovis were sophisticated, having deep experience in clinical drug trials. The board nonetheless signed the annual report and a prospectus contain-
ing inflated drug trial results.

The blind eye of those directors was con-
trived by the court as of necessity conscious, thus violating their director duty.

Caremark was underscored by the court as of necessity conscious, thus violating their director duty.

The scope of Strine’s recommenda-
tions can be garnered from a simple list:

• Large companies should create board-level committees focused entirely on the interest of employees;

• Strine contends: “We don’t have an approach to running our economy where we treat the people who create the profits — the workers — with due regard and give them a good pay”;

• Workforce interests should apply not only to employees but also to contractors;

• Asset managers should consider the social interests of their investors when voting shares;

• Since most public investors have a longer timeline than one year (through 401k Plans and S29 Plans, for example), the long-term capital gains holding peri-

• “Annual say on pay” votes in public cor-

• “Annual say on pay” votes in public cor-
parations, mandated by the SEC, are abused as we should not be compensating or rating CEOs based on such a short timeline;

• These rules should apply based on size of company and whether a company is publicly or privately held;

• We should tax financial transactions in order to fund social change;

• We should change accounting rules to require narrative disclosure of invest-

ments in “human capital”;

• Public companies could not under-
take political spending without a 75 per-
cent shareholder vote.

Strine bases his recommendations on his avowedly “liberal” belief that the country must be brought together, and that freedom can only be achieved when there is a pre-
cence of economic justice. He traces this view to Franklin Delano Roosevelt and the New Deal, and sees his recommenda-
tions as tending to heal rifts in our society.

There is a populist underpinning to Strine’s views. In the details of his research paper, he notes that Americans owe much of their wealth to their jobs. That is not just true for the poor but rather, he asserts, for 99 percent of Americans: “On average, Americans get 64 percent of their income from wages and another 13 percent from either retire-
tirement payments or other transfer pay-
ments.” Those percentages climb as one moves up the socio-economic ladder.

Therefore, the role of corporations is to conduct business in a way that creates good jobs, wage growth and “a fair share of the wealth that businesses generate.”

Maximizing corporate profits is not the only driving goal. Board employee com-
mittees are needed, as less than 11 percent of the workforce is protected by unions.

Policing these reforms would be achieved through increased disclosure reporting annually on impact on workers, communi-
ties, the environment and the country.

A particular question of fiduciary duty arises for institutional investors, which are typically obligated to maximize investor eco-
nomic return. Strine recommends a change of focus: require the understanding of goals of investors in different funds within the same fund family. Today, those funds generally invest the same way without regard to the fact that investors in specialized funds have different timelines, which should be re-
flexed in resulting returns.

There is a lot more detail beyond my scope or space. Proposals to establish a federal trust fund with the proceeds of a new financial transaction tax would be used to repair infrastructure.

Strine also points to the states power over prohibiting mandatory consumer arbitration clauses, rather than imposing the Federal Arbitration Act, and he proposes making union elections easier for organizers.

Finally, buried deep in the details of the research paper, he seeks closing the “carried interest loop hole,” which allows managers to have their share of gain taxed at capital gains rates.

Strine brings our national debates about income disparity, political collab-
ation and the proper functions of corpo-
parations to the forefront, seeing them as part of a single issue, one of social jus-
tice. Regardless of one’s politics, a look at the research paper (https://arxiv.org/ abstract=346.1934) is recommended as a glimpse at our possible future.

© Copyright New England In-House 2019

Publisher
Susan A. Bolcunao, Esq.
sbolcunao@lawyersweekly.com

Editor
Henriette Campagne
hcampagne@lawyersweekly.com

Special Sections Editor
Margaret Field
mfield@lawyersweekly.com

Designer
Ellen Krawczynski

Advertising Director
Scott Ziegler

Advertising Traffic Manager 
& Events Director
Adelie Kosciuszko

Account Executives
Melanie Foster
Edwin “Buzz” Fanjohar
Elaine Fanning

You can view New England In-
house online at newer@lawyersweekly.com

For editorial, call 800-444-5297,
Ext. 8192, and for advertising, call 800-444- 
5297, Ext. 8211.

New England In-House is published quarterly by Bridgeport Media.

POSTMASTER:
Electronic Service Requested
Send address changes to New England In-House, 40 Court St., 5th Floor, Boston, MA 02108.
Copyright 2019 The Dolan Company. Material recorded, or used in any manner, in whole or in part, without the publisher’s explicit consent. Any infringement will be subject to legal remedy.

PUBLISHED IN
NEW ENGLAND
IN-HOUSE
November 2019-

This issue is underwritten by:

Boston, MA
ERIKA HAHN

It’s just over a year since the “new” Massachusetts Noncompetition Agreement Act took effect, and it already has had some very tangible, positive effects. However, one aspect of the new law — namely, what consideration is required to support a noncompete — continues to create significant uncertainty.

A review of preexisting Massachusetts noncompete law provides a useful framework for understanding the new consideration requirements.

Prior to the new law (i.e., before Oct. 1, 2018), noncompetition agreements, like other contracts, had to be supported by consideration. See, e.g., Marine Contractors Coastal v. Hurley, 365 Mass. 280, 284–86 (1974) (discussing consideration and noting that “consideration is conclusively presumed for a promise under seal”); Cypress Group Inc. v. Stride & Assocs., 2004 WL 616502, at *3 (Feb. 12, 2004) (Burnes, J.) (“Any time a noncompete is signed by an employee, the employer must provide some clear additional benefit.”)


While there was never any real dispute that the start of employment was the requisite consideration to support a noncompete, courts questioned whether the mere continuation of employment was alone sufficient consideration for a noncompete entered into after employment started.


Russell Beck is a founding partner of Beck, Reed, Riden in Boston. He litigates and advises on trade secret and noncompetition agreement matters nationally and assisted the Legislature with the new noncompete and trade secrets laws. Erika Hahn, a paralegal at the firm, has been a substantial contributor and editor on a book on Massachusetts noncompete law.

Enter the new law:

“The noncompetition agreement shall be supported by a garden leave clause or other mutually-agreed upon consideration between the employer and the employee, provided that such consideration is specified in the noncompetition agreement. To constitute a garden leave clause within the meaning of this section, the agreement must (i) authorize the employer to require the employee to remain employed by the employee within the 2 years preceding the employee’s termination; and (ii) except in the event of a breach by the employee, not permit an employer to unilaterally discontinue or otherwise fail or refuse to make the payments...” G.L.C. 149, §24L(b) (vi) (emphasis added)

With that language, there is no question that complying with the specifications of the so-called “garden leave” will satisfy the statute’s stated consideration requirements. However, the real question is: What will satisfy the statute’s alternative option of other “mutually-agreed upon consideration”?

While some have argued that there is a connection between the value of garden leave and “other mutually-agreed upon consideration,” no such connection exists on the face of the statute. And the legislative history confirms that these two are not tethered together.

We were involved in the legislative process from its beginning and drafted much of the language that appears in the new law. However, there were myriad significant changes to the language of the many bills over the years. Language was added. Language was removed. Language was shifted around from different versions of the bills. It was a work in progress for nearly a decade. And, in the end, the law was, as it needed to be, a compromise.

The dissimilar language concerning consideration is the clearest example, resulting from the conflicting perspectives. Some legislators wanted to ban employee noncompetes (think California, Oklahoma and North Dakota), while others wanted no changes to our existing middle-of-the-road approach.

The diversity of viewpoints came to a head on July 31, 2016 (the last day of the legislative session), when the then-pending House and Senate bills could not be reconciled on the issue of consideration.

The House version (H.4434) provided:

“The noncompetition agreement shall be supported by a garden leave clause or other mutually-agreed upon consideration between the employer and the employee, provided that such consideration is specified in the noncompetition agreement.”

The competing Senate bill (S.2418) provided:

“The noncompetition agreement shall be supported by a garden leave clause or other mutually-agreed upon consideration between the employer and the employee which shall be equal to or greater than the value of the garden leave clause and is negotiated during the 30-day period immediately following the termination of employment.” (emphasis added)

It took until the end of the following legislative session (mid-2018) for the Legislature to reach agreement. Specifically, lawmakers agreed to the language from the House’s bill itself (a compromise), expressing no parameters for “other mutually-agreed upon consideration” other than that it be specified in the noncompete.

The result: While the legislative history demonstrates that “other mutually-agreed upon consideration” was not to be gauged by garden leave, it provides little insight into how to reconcile the legislative compromise of including both options. Instructively, the new law affirmatively changes the consideration required for noncompetes arising after commencement of employment. As to those, the new law lays out a requirement that such agreements "must be supported by fair and reasonable consideration independent from the consideration of employment," G.L.C. 149, §24L(b) — a requirement that does not exist for a noncompete entered at the start of employment. That language appeared early in the legislative process and reflects a recognition that employees have less leverage when presented with a noncompete mid-employment than they have when deciding whether or not to take a job in the first instance.

Reading the two consideration provisions together, the question becomes, if "fair and reasonable consideration" is the standard for consideration for mid-employment noncompetes (when there is a heightened concern for the employee’s leverage), doesn’t that mean that something less than "fair and reasonable consideration" suffices for a noncompete entered at the commencement of employment (when the concern is less pronounced)? The relative concern giving rise to the requirement of "fair and reasonable consideration" seems to support such a conclusion.

Although the conclusion that something less than "fair and reasonable consideration" is all that is required for a noncompete signed at the start of a new job might seem unfair, that is precisely what the law has always been. Courts do not review the consideration of midcontractation, just the fact of it. Although the conclusion that something less than "fair and reasonable consideration" is all that is required for a noncompete mid-employment does not provide a garden leave clause or other mutually-agreed upon consideration, "the law does not concern itself with the adequacy of consideration; it is enough if it is valuable.”

But, if that is what the Legislature intended, why include the option of garden leave? As a practicality, the inclusion of the garden leave option was a necessary compromise to avoid losing all of the progress that had already been made, including notice requirements, a ban on noncompetes for nonemployee employees, a 12-month statutory period, and, of course, the "fair and reasonable consideration" explicit requirements for employees asked to sign a noncompete mid-employment.

Given this, and given the statute in many respects merely codifies existing noncompete law, a fair reading of the statute is that (other than eliminating the ability to rely on consideration substitutes like signing a noncompete under seal) what was adequate consideration for a noncompete entered at commencement of employment before the new law remains adequate consideration after the new law.

But the principal argument against such an interpretation is that it renders the garden leave language unnecessary. So, in a satisfactory way to reconcile all of the statute’s language concerning consideration (i.e., “fair and reasonable,” garden leave clause “other mutually-agreed upon?”)

Perhaps. A possible inference to be drawn is that the garden leave language provides an option from which the parties can negotiate, suggesting that something more than what existed before will be required, though it need not be garden leave nor rise to the level of "fair and reasonable.”

Ultimately, the courts will be asked to interpret the noncompete statute’s consideration requirements. Given the brief period during which the law has been in place, there is, not surprisingly, a dearth of decisions under the new law. To date there are only five reported decisions addressing it, all from the federal court.


The fifth, however, Nuasive, Inc. v. Day, 2019 WL2287709, at *4 (D. Mass. May 29, 2019) (Casper, J.), seems consistent with the notion that “other mutually-agreed upon consideration” will be interpreted to require something akin to that which was required by existing noncompete law. Specifically, in that case, the court concluded that the following statement of consideration would be sufficient under the new Massachusetts Noncompetition Agreement Act: "The noncompetition agreement and is negotiat- ed during the 30-day period immediately following the termination of employment...” (emphasis added)

Given this, and given that the statute in many respects merely codifies existing noncompete law, a fair reading of the statute is that (other than eliminating the ability to rely on consideration substitutes like signing a noncompete under seal) what was adequate consideration for a noncompete entered after commencement of employment before the new law remains adequate consideration after the new law.

The principal argument against such an interpretation is that it renders the garden leave language unnecessary.

So, in a satisfactory way to reconcile all of the statute’s language concerning consideration (i.e., “fair and reasonable,” garden leave clause “other mutually-agreed upon?”)

Perhaps.

SPECIAL FEATURE

Massachusetts’ new noncompete law: complication happens
SEC settlement in ‘Juniper’ offers lessons for legal counsel

The U.S. Securities and Exchange Commission recently entered into a cease-and-desist order with Juniper Networks, Inc., to resolve the company’s internal controls and recordkeeping provisions of the Foreign Corrupt Practices Act of 1977 through its subsidiaries operating in Russia and China. The facts are described in the SEC’s Accounting and Auditing Release No. 4069, issued on Aug. 29.

Joe F. Floyd, CPA, and attorney, is a partner and co-founder of Floyd Advisory, a consulting firm in Boston and New York City that provides financial and accounting expertise. Marni J. Kaufman, CPA, is a manager in the Boston office.

JOSEPH J. FLOYD MARNI J. KAUFMAN

and their legal counsel to be aware of when dealing with rogue employees, and how to improve a company’s internal controls for sales transactions when discounted sales pricing is common.

Second chances for people who violate company policies and controls is a terrible business decision.

The greatest benefit of reviewing Accounting and Auditing Re-lease, from 2008 to 2013, sales employees in Juniper’s Russian subsidiary misrepresented to senior management the need for increased discounts for sales to channel partners.

In fact, the employees knew the dis-counts were excessive and were unnec-esary, nor would they be passed on to end-user customers. Instead, the employ-ees conspired with the channel partners, who purchased the discounted product and sold it at the usual market price to create a fund with the scheme’s profits for their own personal and entertainment use.

The excess money was known as “com-mon funds.” Once the common funds were established, the employees and channel partners used the off-book funds without having to comply with Juniper’s internal controls, policies or approvals.

The improper conduct occurred in two countries: Russia and China. For the Chinese subsidiary, the problems arose out of sales employees violating the FCPA rules with improper government entertainment expenses that were falsely documented in Juniper’s accounting system.

Similar to other FCPA cases, Juniper’s internal controls were ineffective at detecting the link between the expenses and the sales to governmental entities.

In contrast, Juniper’s situation in Russia involved a unique scheme to override the company’s internal controls over financial reporting for personal gain. The problems arose out of sales employees misrep-resenting to senior management the need to dis-count sales prices to maintain competitive in the market.

The reality is that the rogue employees were conspiring with the channel partners to create available funds to use for im-proper business entertainment purposes, including activities with government offi-cials, in violation of Juniper’s policies and the FCPA rules.

Sales discounts are common in many businesses. However, understanding the Russian Juniper scheme provides a differ-ent perspective. Generally, management’s focus on discounts relates to ensuring satis-factory margins. The facts described below provide lessons and insights for registrants with underspending and challenging the legitimate discount for increased discounts for sales to channel partners.

Background

Per the Accounting and Auditing Re-lease, from 2008 to 2013, sales employees in Juniper’s Russian subsidiary misrepresented to senior management the need for increased discounts for sales to channel partners.

In fact, the employees knew the dis-counts were excessive and were unnec-esary, nor would they be passed on to end-user customers. Instead, the employ-ees conspired with the channel partners, who purchased the discounted product and sold it at the usual market price to create a fund with the scheme’s profits for their own personal and entertainment use.

The excess money was known as “com-mon funds.” Once the common funds were established, the employees and channel partners used the off-book funds without having to comply with Juniper’s internal controls, policies or approvals.

The common funds were used to fund trips for end-user customer employees, including trips that were excessive, incon-sistent with Juniper’s policies, predomi-nantly leisure in nature, and had little or no legitimate business purpose.

The trips paid for customers, including foreign officials, to travel to international tourist destinations, such as Italy, Portu-gal and various U.S. cities, all of which there were no legitimate business justifi-cations. In some instances, the travel included customers’ family members. Of significance, emails existed explicitly discussing entertain-ing VIPs with trip funds. The travel and expenses were then charged to Juniper’s customers’ and their employees’ expense accounts.

The facts available in this matter aren’t sufficient to identify the role Juniper’s legal counsel played regarding establishing policies, providing training and advising management and the Juniper board of directors related to the improper activi-ties and poor risk management described above.

However, the facts provided in the AAER and the existence of the problems offer several useful discussion points for how counsel can help their clients avoid similar problems.

Counsel’s role involves proactive risk management, starting with reviewing the company’s policies related to internal control procedures. Willful vio-lations of such policies should be report-ed to the company’s audit committee, and parties should be held accountable for their actions, including termination for egregious violations similar to those described above.

Notifying the audit committee allows the consideration of an independent investigation, in which counsel’s involve ment may consist of investigative inter views, analytics, etc. Juniper’s problems may have been mitigated if it had put in place such a policy the first time the issue was discovered.

Another proactive risk management action for registrants with government clients is involvement with proper FCPA training. Such training is critical for salespeople and provides a strong message from legal counsel regarding the penalties for violations.

Finally, legal counsel can play a vital role helping audit committees fulfill their oversight roles. This can include assisting the audit committee and engaging with internal and external auditors to ensure thorough risk assessments are in place for FCPA and all other compliance programs.

When considering the penalties in-creased and the reputational harm suffered with the recent FCPA violations, compli ance programs and control improvements will always be a worthy investment.
A recent decision by a federal appellate court underscores the importance of ensuring that forms used in connection with employer background checks comply with the strict requirements of the federal Fair Credit Reporting Act.

In Gilberg v. California Check Cashing Stores, LLC, et al., 913 F.3d 1169 (9th Cir. 2019), the 9th U.S. Circuit Court of Appeals found that an employer’s FCRA background check disclosure form was invalid because (i) the form included extraneous material — consisting of specific-state legal disclosures — not explicitly permitted by the FCRA; and (ii) the form was not worded in a sufficiently “clear” manner.

**Background**

The FCRA imposes detailed requirements upon employers that obtain “consumer reports” — such as criminal history records — on applicants or employees through third-party consumer reporting agencies. In particular, before obtaining a consumer report, the employer must provide the applicant or employee with a “clear and conspicuous” disclosure of the employer’s intent to do so. That disclosure must be in writing, in a standalone document that “consists solely of the disclosure.”

Following his or her receipt of the disclosure form, the applicant or employee must give his or her written consent before the employer can proceed to request a consumer report. If, upon reviewing the consumer report, the employer is inclined to take an “adverse action” — such as revoking a conditional job offer — based on information contained in the consumer report, the employer must first (i) provide the applicant or employee with a written “pre-adverse action notice,” along with a copy of the consumer report and a notice of the individual’s rights under the FCRA, and (ii) give the applicant or employee an opportunity to dispute or otherwise respond to the information in the consumer report.

Finally, if, after considering the applicant or employee’s response (if any) to the pre-adverse action notice, the employer decides to proceed with the adverse action, it must send the individual another written notice confirming that the adverse action has been taken.

Along with these requirements, additional disclosures are required when an employer intends to obtain an “investigative consumer report” — i.e., a report that includes information obtained through interviews with co-workers, neighbors or other associates of an applicant or employee. Employers that fail to comply with the requirements of the FCRA can be held liable for statutory penalties and attorneys’ fees. Frequently, such claims are brought as class actions, which can dramatically increase an employee’s potential financial exposure.

**The ‘Gilberg’ case**

The Gilberg litigation arose from De-Siree Gilberg’s application for employment with CheckSmart Financial in California. As part of the application process, Gilberg was presented with a form entitled “Disclosure Regarding Background Investigation,” notifying her of CheckSmart’s intent to conduct a background check on her. Gilberg signed the form and returned it to CheckSmart to authorize the background check.

After receiving Gilberg’s authorization form, CheckSmart ran a criminal background check on her through a third-party agency. The background check came back clean. Gilberg was then hired by CheckSmart, where she worked for several months. Later, after her employment had ended, Gilberg used CheckSmart on behalf of herself and a putative class of other job applicants, alleging that CheckSmart had failed to provide the requisite disclosures under the FCRA and California’s Investigative Consumer Reporting Agencies Act before running a background check on her.

**9th Circuit’s decision**

Reversing the District Court’s award of summary judgment to CheckSmart, the 9th Circuit concluded that CheckSmart’s disclosure form violated the FCRA for two main reasons. First, the disclosure form did not consist solely of the FCRA’s required disclosure language. Rather, the form also included “extraneous and irrelevant information beyond what FCRA itself requires” — i.e., the state-specific disclosures.

Thus, the court concluded, “[b]ecause CheckSmart’s disclosure form does not consist solely of the FCRA disclosure, it does not satisfy FCRA’s standalone document requirement.”

In addition, the 9th Circuit held that CheckSmart’s disclosure form violated the FCRA because it was not “clear” and therefore failed to satisfy the statute’s “clear and conspicuous” requirement. The form contained language that, in the court’s view, a reasonable person would not understand, including a confusing, fragmented sentence about the scope of the authorization.

Regarding that second point, the court also found that the disclosure forms combined state and federal disclosures would likely confuse readers. For example, the disclosure form included the following language: “New York and Maine applicants or employees only: You have the right to inspect and receive a copy of any investigative consumer report … by contacting the consumer reporting agency identified above ….”

In the 9th Circuit’s view, that phrasing could lead a reader to conclude — incorrectly — that only applicants living in one of those two states had a right to obtain copies of their consumer reports. On a related note, while the 9th Circuit found that CheckSmart’s disclosure form was sufficiently “conspicuous,” it expressed concern about the format of the disclosure form. The form’s capitalized, bolded and underlined section headings enabled applicants to comprehend what they were signing, and the font was technically legible. However, the court opined that the disclosure form’s 8-point Arial Narrow font was “inadequately” small and cramped.

**Lessons for employers**

The Gilberg decision provides important takeaways for employers that use third-party vendors to run background checks on applicants or employees.

In particular, an employer should ensure that its FCRA disclosure form is truly consistent with recent holdings by other federal courts.

The 9th Circuit concluded that CheckSmart’s disclosure form included five pages of extraneous information, including liability releases, references to other consumer reporting agencies, state law notices, and a statement regarding the consequences of an applicant’s revocation of his or her consent to the background check.

**Conclusion**

Thus, lessons for employers are clear. To avoid such missteps, employers should ensure that their FCRA disclosure form is truly consistent with the FCRA disclosure requirements. In particular, employers should ensure that their FCRA disclosure form includes only information specific to the FCRA and is written in a sufficiently “clear” and “conspicuous” manner.

Similarly, in Hargrett v. Amazon.com DEDC, LLC, 235 F. Supp. 3d 1320, 1327 (M.D. Fla. 2017), the court upheld a class action claim based on an employer’s use of a FCRA disclosure form that included five pages of extraneous information, including liability releases, references to other consumer reporting agencies, state law notices, and a statement regarding the consequences of an applicant’s revocation of his or her consent to the background check.

Employers that use third-party vendors to conduct background checks on applicants or employees should ensure that their FCRA disclosure forms are truly consistent with recent holdings by other federal courts.

For instance, in Mitchell v. Winco Foods, LLC, 379 F. Supp. 3d 1093, 1098-99 (D. Idaho 2019), the court permitted the plaintiff to proceed with his class action claim alleging that the employer had violated the FCRA’s “standalone document” requirement by providing job applicants with a disclosure form that referred both to consumer reports and to investigative consumer reports.

Similarly, in Jones v. Halstead Mgmt. Co., LLC, 81 F. Supp. 3d 324, 332-33 (S.D.N.Y. 2015), the court rejected the employer’s motion to dismiss the plaintiff’s class action FCRA claim, concluding that a background check disclosure form that included “two full pages of eye-straining tiny typeface writing” on extraneous matters failed to satisfy the statute’s “standalone document” requirement.

Lessons for employers

The Gilberg decision provides important takeaways for employers that use third-party vendors to run background checks on applicants or employees.

In particular, an employer should ensure that its FCRA disclosure form is truly consistent with recent holdings by other federal courts.

The 9th Circuit’s decision in Gilberg is consistent with recent holdings by other federal courts.

For instance, in Mitchell v. Winco Foods, LLC, 379 F. Supp. 3d 1093, 1098-99 (D. Idaho 2019), the court permitted the plaintiff to proceed with his class action claim alleging that the employer had violated the FCRA’s “standalone document” requirement by providing job applicants with a disclosure form that referred both to consumer reports and to investigative consumer reports.

Similarly, in Jones v. Halstead Mgmt. Co., LLC, 81 F. Supp. 3d 324, 332-33 (S.D.N.Y. 2015), the court rejected the employer’s motion to dismiss the plaintiff’s class action FCRA claim, concluding that a background check disclosure form that included “two full pages of eye-straining tiny typeface writing” on extraneous matters failed to satisfy the statute’s “standalone document” requirement.
In #MeToo era, more ‘reverse discrimination’ queries fielded

Continued from page 1

attorney willing to take on such an unconventional discrimination case.”

To some degree, the increase may be a response to the #MeToo movement, attorneys say, but it is also a result of members of historically advantaged groups feeling “disadvantaged” when companies roll out new policies meant to level the playing field for all employees.

Increased awareness

Certainly the #MeToo movement has raised awareness of the need for gender equality in the workplace, Shilepsky said. “But for a lot of companies, the concern about inclusiveness and level playing fields has been part of their cultures for a while,” she noted. “Sometimes they get it right and sometimes they don’t, but there are legal ways to promote fairness and opportunity for all. Making room for one group by pushing out another is not legal.”

Employer-side attorney Lisa S. Burton, who practices in Boston, is also seeing more inclusive inquiries. “There is a certain text, sometimes from men who believe that they did not receive a thorough or fair process before being disciplined or discharged. “That is where we are seeing more claims: ‘Employers are not giving me a fair shake,’” she said.

According to Burton, the questions then become whether the action was a “knee-jerk reaction” to credit a woman’s account more than a man’s, and whether a situation was sufficiently investigated or whether it was just “easier to fire the white guy.”

Another factor that an employer may be considering, she said, is the fact that as part of their due diligence in hiring, companies ask job candidates if they have ever been accused of inappropriate conduct in the workplace.

“It will trail you, and people will be asking about it,” Burton said. “I hear from Samolis said that while the uptick is likely partially attributable to #MeToo, it also emanates from a general desire to improve the bad parts of the work environment. But she added that when an employer changes policies or past practices, some people will perceive it as unfair. An employee’s perceptions of discrimination and success in a lawsuit can also depend on what the company’s demographics look like, Samolis said. For example, in a case of the only male employee of a company being terminated, there is a greater risk of gender discrimination being raised if one of many female employees had been terminated.

And while a company may want to create a more diverse workforce or may feel pressure from the marketplace to do so, an employee’s “reverse discrimination” complaint can be spurred by the company’s incorrect assumption that it can favor traditionally oppressed minorities, Samolis said.

“There are people who feel like they can say, ‘We should hire a woman while speaking to a roomful of potential male plaintiffs,’” she explained. “But it’s illegal to hire a woman based simply on her gender, and a company’s focus should be on getting a good pool of applicants and eliminating barriers diverse candidates may face when seeking to be hired or promoted.”

Shilepsky suggested that the number of employers trying to address such issues constructively has increased, at least in Massachusetts.

“These issues are being discussed more openly, although sometimes in ways that don’t conform to the law,” she said. “We need more women to be misunderstood to mean it’s OK to discriminate in favor of women, but that is against the law.”

‘Feeling disadvantaged’

But increased awareness does not necessarily translate into meritious claims.

“When someone comes to me and says, ‘My employer favored my fill-in-the-blank colleague over me,’” I explain that that is just the beginning of the analysis,” Shilepsky said.

There is a difference between illegal discrimination and ‘feeling disadvantaged,’’ she explained. For example, if white men traditionally received “advantages” in a workplace, their employers’ efforts to create a level playing field for all workers may leave those who expected to benefit from “who you know” employment practices feeling disadvantaged.

“But the leveling of the playing field is not unlawful discrimination,” Shilepsky said. “The notion of giving people equal opportunities and making merit-based employment decisions is what it is supposed to be about — not switching around who gets treated unfairly,” she added.

Burton said that because there are usually no witnesses to alleged discriminatory treatment in the workplace, employers often “bend over backwards” to show they are properly investigating allegations.

“And once an employer says ‘zero tolerance’ you have to question whether every alleged violation is worthy of termination,” she said.

Shilepsky said a safe strategy for new employees is to “eat the meal you’re served;” at least until that person has earned a seat at the table. If someone comes in and doesn’t understand the company culture, he may run into headwinds.

For example, she said, organizations may be sticklers for the chain of command and apply that principle across the board.

“As courts have said, ‘bad management, unethical management, unlawful management is not necessarily illegal management,’” Shilepsky said. “Of course, if the rules are not uniformly applied, that’s a different story.”

Employer strategies

The current workplace environment begs the question of what an employer can do to lessen its risk of “reverse discrimination” allegations.

“It’s a cultural shift, but we are trying to get managers to foster discussions among their employees,” Burton said. “If someone is upset in the moment, address it head on and have a positive conversation.”

For larger employers, she recommends a type of “ombudsman process” and the implementation of employee resource groups to “open doors” to employees dealing with day-to-day work issues.

“But you have to offer actual training, with workshops on topics like how to have difficult discussions with your boss and how to diffuse situations that may arise in the workplace,” Burton said.

Samosis said there are two themes that employers would be wise to focus on. First, they should be careful when drafting Equal Employment Opportunity/diversity policies.

“If it’s an initiative where the company is doing something other than having a standard EEO policy, they should definitely call their lawyer,” Samolis said. “Companies don’t understand that they may be subject to the same laws as another company.”

To illustrate, she pointed out that federal contractors are required to follow affirmative action laws and to ask about race when hiring for that purpose, while certain other types of employers are prohibited from doing that. “Thus, it is important not to simply copy the policies of another company.”

Second, Samolis stressed that companies need to have good business reasons backing up their hiring, firing and promoting decisions. Although Massachusettss and Rhode Island are “at will” states where an employer can terminate an employee at any time and for any reason, the termination cannot be for a discriminatory reason.

“In that sense, every person is in a protected class. And most of the time in discrimination cases the employer will have particular burden of proof for a non-discriminatory reason for their actions. I always tell employers it’s a red flag if decisions are being made with no legitimate reason,” she said.

Subjective factors used to justify employment decisions, such as personality or “I have hard time articulating and may not make sense to a judge, a commission or a jury,” Samolis continued. “The test is whether an objective person can understand the business reason why the decision was made if it were to be written out.”

“That is really the key,” Samolis said. “That is also good business advice, as it relates to how the employer maintains and retains the most qualified people.”

Finally, Samolis said that companies should also be particularly careful that managers do not create emails, interview notes, or the like that could contain direct evidence of discrimination, something that is not often seen in the “classic” employment discrimination cases.