Association of Corporate Counsel
ARIZONA

FOCUS

President's Message

Mark Rogers

Thank you to Lewis Roca Rothgerber Christie, Rusing Lopez & Lizardi, Perkins Coie, Polsinelli and Casepoint for the articles in this newsletter. We are pleased to offer these articles from our AZ Chapter Sponsors for the benefit to our members. If you have an in–house peer who is not a member of the Chapter, please forward this Newsletter to them and suggest they join the Chapter. If you would like to invite them to attend a meeting as a guest, please email the Chapter. We are happy to offer potential members a complimentary lunch.

We have one more Ethics CLE program before the June 30 CLE reporting deadline. We have offered a total of 6 Ethics CLE programs this year – all sold–out! Thank you for supporting these offerings. It is always rewarding for our Sponsor/Speakers to see a crowded room for presentations. On that note, we are in the process of collecting CLE sponsor applications for the upcoming year – let's work to keep strong attendance numbers at our lunches. It is a win–win–win–win: members win great CLE; sponsors win full audiences; the Chapter wins more sponsor applications; and members win valuable door prizes for attending!

While applications for next year's sponsorships are out to sponsors already, it's not too late to send your ideas for CLE topics and social activities for next year. We want to be meet member needs and preferences. Please reach out to the Chapter or a Board member with your ideas. We are always pleased to welcome new sponsors. If you know of a law firm or legal department service provider that you would like to have us contact about sponsorship, please email the Chapter with the contact information. We can take it from there!

As we embark upon Arizona's string of 100++ degree days, don't forget that our CLE lunches continue throughout the summer and offer a cool respite from the heat. We have great topics during July and August, and many are free of charge, so please try to join us – and get a head start on your CLE requirements now.

If you missed any of the Chapter lunch meetings but would like to review the CLE materials, we make those available to you on our Chapter webpage. Simply go to the Events page and click on the "Past Program Materials" tab on the right–hand menu. These materials are now contained on a Member–Restricted page, so you need to login to ACC before you will see this tab on the menu.

As you are all aware by now, the ACC Annual Meeting is in Phoenix this year. We hope to have great attendance from our Chapter as the "Home" Chapter. The CLE programming and speakers are top–notch, and the networking opportunities are unparalleled, with about 3,500 in–house counsel attending, sponsor social events and an Exhibit hall filled with sponsor SWAG! Please register to attend. If you don't have time or budget for the 3–day program, consider a single day–pass.

As always, thank you for your loyal support of the Chapter. If you have any questions, please email the Chapter, or better yet, join us at a meeting to ask us in person.

See you at an upcoming Chapter event soon!

Please plan to join us for our upcoming meetings:

June 18, 2019 at Blanco Biltmore
ETHICS: Ethical Issues - Can They Really Do That? Ethical Minefields & How to Dodge Them

JULY 11, 2019 at The Capital Grille
MEMBERS-ONLY CLE: AZ Update on Product Liability Law

JULY 23, 2019 at Blanco Biltmore
Do Your HR & Business Policies & Procedures Create Employment Law Liability

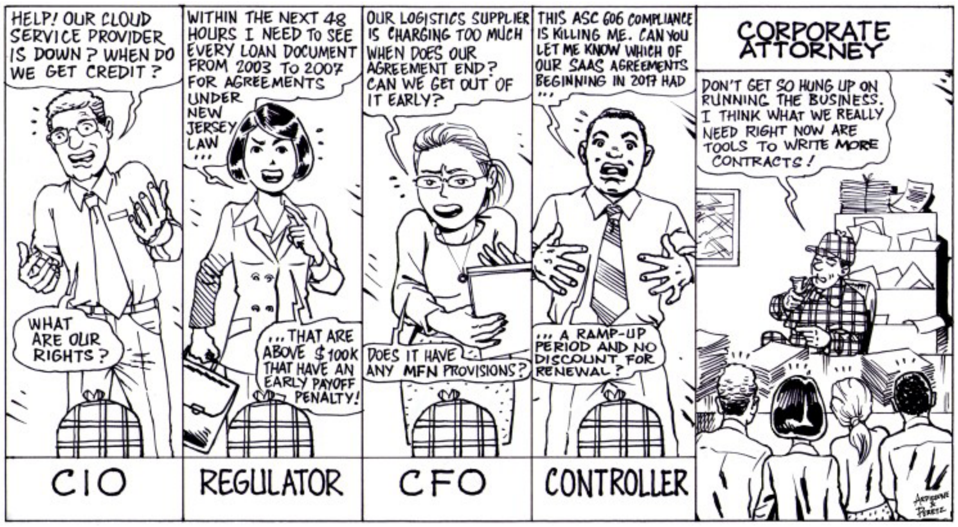
AUGUST 1, 2019 at The Capital Grille
MEMBERS-ONLY CLE: Recent Developments in AZ Law: What Employers Need to Know

AUGUST 8, 2019 at The Capital Grille
MEMBERS ONLY CLE: GDPR - Unraveling the Newest Development in Data Protection

AUGUST 20, 2019 at Blanco Biltmore
Avoiding Wage & Hour Mistakes under Federal & State Law

How to Elevate Your In-house Practice by Taking a Page from the CFO Playbook

By Neil Peretz, Contract Wrangler, Inc.



Art by F. P. Ardizzone. fpaoloardizzone@gmail.com

Companies need lawyers closer to their day-to-day business operations to handle the new, complicated, and increasingly global legal landscape. The proliferation of new regulations, combined with the need for businesses to move faster than ever before, present major opportunities for in-house attorneys. But before you demand a spot on the executive committee, it's time for an attitude check.

In order to truly succeed in-house, you need to become an involved business partner, rather than a detached advisor. It's no longer your job to be a detached professional advisor whose work is judged on the sheer number of hours worked or "points scored" by finding flaws and dangers around every bend.

These days, the most successful, indispensable in-house attorneys are those who become a member of the company's core senior leadership team. To do that, attorneys would be wise to learn lessons from the chief financial officer (CFO) world, where a similar transition occurred over the last decade. Previously, the CFO was considered a "scorekeeper" who would tally results and perhaps push others for budget forecasts. Today, the successful CFO has transitioned from keeping score to becoming a day-to-day partner with the CEO in growing the business.

How did the CFOs make this transition? And are there lessons for lawyers who want to follow in their footsteps from the role of specialist counselor to core decisionmaker?

Embrace digital transformation

A 2018 study by Accenture involving over 700 senior finance leaders revealed that a key contribution of top CFOs was to lead many of their organization's digital transformation efforts. The result affected the entire company, not just the financial or accounting department. The entire C-suite had new data and insights to guide the business, which led to better corporate decision-making and growth. Rather than focusing on tools targeted solely at making their own life easier, the CFOs set out to make the entire senior team smarter.

Find new value

Over 80 percent of the successful CFOs surveyed focused on how to go beyond their traditional purview of cost-cutting to finding new value or revenue streams for the business. At Adobe, for example, the CFO was integral to the decision to launch a cloud-based subscription service that has propelled the company's growth. In addition to helping the company's financial performance, this strategy also helped make other team members — ranging from legal ops to product to sales and marketing — into revenue-enhancing heroes. It's not a surprise that these other senior executives suddenly wanted more CFO involvement in key business decisions.

Share information widely

More than two-thirds (67 percent) of successful finance leaders worked to train non-finance executives how to take aspects of financial planning, budgeting, and forecasting into their own hands, according to the Accenture study. Rather than hoard information as a source of power, the top finance executives built their power base by essentially deputizing employees in other departments to add a financial perspective and fiscal discipline to their own work.

So, what can in-house attorneys looking for personal and professional growth learn from the tremendous strides made by CFOs?

1. Lawyers have a tremendous opportunity to enable the company's digital transformation because almost all of their company's core business relationships pass through their hands. The next time you work on a business agreement for a colleague, start asking how that business relationship will be operationalized after the contract is signed. Are there key systems that need to be installed to monitor performance or record goals? As a lawyer, you are at the forefront of identifying key business processes that can brought from separate paper archives into the digital shared world.
2. Lawyers often overlook the opportunity to leverage technology investments by the company to make themselves more accessible and efficient. For example, in the software industry, large engineering teams utilize systems like Trello and Jira to assign and track tasks, and cloud-based applications like Google Docs to enable team- and project-based collaboration. Your company may already have

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a license to use tools like these, along with expert users just down the hall from you. Examine your ability to utilize this technology for your law department. A task could be assigned to a lawyer through a system like Jira or Trello and be fed into a prioritization queue that each lawyer could manage, easing collaboration and communication with those outside the legal department. Similarly, using a shared Google doc across multiple departments is a low-cost way to gather feedback or seek approvals where there are many internal stakeholders in an agreement under negotiation.

3. Remember that the law does not just create roadblocks and restrictions: It can also create new opportunities for competitive advantage for your company. If you can find the most cost-effective or efficient method to comply with a new rule, you can gain a tremendous lead on your competitors. Your job as a business partner is to think about how something could be done in a compliant manner by digging into the history, spirit, and nuance of rules, a task for which you are uniquely qualified.

4. Learn what would make your colleagues successful in their jobs, rather than focusing solely on your department's accomplishments. Find out what your internal clients need most to excel in their own areas. Learn about which information will enable them to make better decisions on a day-to-day basis, rather than just serving as their scrivener at the outset of a new business relationship, or their advisor after a mishap has already occurred. You helped them form those external business relationships, negotiating and drafting agreements with everyone from software providers to landlords to investment bankers. Find a way to help everyone remember the key metrics for executing on those agreements, which is much more rewarding than developing ex post facto arguments based on bad facts.

5. Remember that corporate law and corporate contracts are not a temple, and you are not a high priest. Contracts exist to serve businesspeople and their departments. Use your legal interpretation skills to help colleagues turn contracts into day-to-day goals and tasks that they can carry out. Deputize each relevant department to ensure that the value from contracts is maximized.

None of these steps requires you to sacrifice your legal judgment. Rather, these provide an opportunity to use your legal skills from the catbird seat at the heart of business negotiations, which will make your colleagues appreciate your value to the business much more than they already do today.

Author: **Neil Peretz** General Counsel of Contract Wrangler, which brings business agreements to life through attorney-trained artificial intelligence. Peretz has been general counsel of multiple financial services companies and also served as a DOJ Trial Attorney and co-founder of the Consumer Financial Protection Bureau's Office of Enforcement. His law degrees are from the University of California, Los Angeles (UCLA) School of Law and from Katholieke Universiteit Leuven, in Belgium, where he was a Fulbright Scholar.

ACC News

2019 ACC Annual Meeting: Where In-house Counsel Connect

Mark your calendars for October 27-30 in Phoenix, AZ for the 2019 world's largest event for in-house counsel. Earn up to a year's worth of CLEs, get the essential knowledge and insights you need to navigate today's increasingly complex business environment, and make meaningful connections with your in-house peers from around the globe. No other event delivers such a wealth of education and networking opportunities for corporate counsel all in one place at one time. Group discounts are available. Check out the full program schedule at *am.acc.com*.

Law Department Leadership: Strategic Decision Making for In-house Counsel

Making effective decisions is arguably your most critical responsibility as a professional manager. In uncertain and changing business situations, you need a practical framework to make effective decisions quickly. Attend the Law Department Leadership program (23 September, Toronto, ON) to gain influence and advance your career by learning how to make better business decisions. Register today at *acc.com/LDL*.

2019 ACC Europe Conference: Being a Change Agent in Disruptive Times

Join your in-house colleagues from across Europe in Edinburgh 12-14 May for the ACC Europe Annual Conference. This year's theme is *Being a Change Agent in Disruptive Times* and will have three dynamic programme tracks that will give you the opportunity to broaden the skills necessary to succeed in today's legal environment. Register today.

Global General Counsel Summit: London Calling

Are you driving the discussion on corporate sustainability? Positive financial performance, regulatory pressure, material risk, and shareholder expectations are some of the reasons why you should be. Join the critical conversation on "Driving Corporate Sustainability—the Expanding Role of the GC" with your fellow CLOs from around the world, May 22-24, in London, UK. Register today.

Are you prepared to comply with new state privacy laws?

Rapidly growing data privacy regulations from California to New York make you accountable for all third-party service providers that access, process, or store your company's personal data. Visit *acc.com/VRS* for more information.

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New to In-house? Are you prepared?

The ACC Corporate Counsel University® (June 26-28, Minneapolis, MN), combines practical fundamentals with career building opportunities, which will help you excel in your in-house role. Come to this unrivaled event to gain valuable insights from experienced in-house counsel, earn CLE/CPD credits (including ethics credits) and build relationships and expand your network of peers. Register at [acc.com/ccu](acc.com/ccu).

Drive Success with Business Education for In-house Counsel

To become a trusted advisor for business executives, it's imperative for in-house counsel to understand the business operations of your company. Attend business education courses offered by ACC and the Boston University Questrom School of Business to learn critical business disciplines and earn valuable CLE credits:

- Mini MBA for In-house Counsel, June 3-5, September 9-11, and November 4-6
- Finance and Accounting for In-house Counsel, September 23-25
- Project Management for in-house Law Department, November 13-14

Learn more and register at [acc.com/BU](acc.com/BU).

Connect Your Circles…Expand Your Reach!

When your in-house peers join ACC, you create opportunities to engage with colleagues, expand your professional network, and share ideas and expertise. Now through 30 September, you are automatically entered into a $100 USD monthly drawing when you recruit a new member. As an added bonus, your new recruit is automatically entered into a separate drawing, too! Learn more at acc.com/MemberConnect.

Questions Remain about SB1271's Impact on Existing Contracts

By Gregory Harris and Frances Haynes, Lewis Roca Rothgerber Christie

Construction projects can be rife with disputes. In the private sector, developers, contractors and subcontractors expend considerable time and effort negotiating and documenting how the risk of loss will be allocated. This commonly includes such terms that require contractors, subcontractors or design professional to indemnify other parties from liability resulting from negligence of another party so long as the putative indemnitor is at least partially at fault.

The enactment of SB1271 (signed into law as Laws 2019, Ch. 60) changed this dynamic. The new law sets a statutory standard for how building owners, developers, contractors and subcontractors may permissibly arrange the contractual relations associated with the construction effort. SB1271 makes clear that in the future, contracts involving the construction of residential dwellings will face limits that did not previously exist with respect to indemnification clauses on private construction projects. Under SB1271,

> A covenant, clause or understanding in, collateral to or affecting a construction contract or architect engineer professional service contract involving a dwelling that purports to insure, to indemnify or to hold harmless the promisee from or against liability for loss or damage is against the public policy of this state and is void only to the extent that it purports to insure, to indemnify or to hold harmless the promisee from or against liability for loss or damage resulting from the negligence of the promisee or the promisee's indemnitees, employees, subcontractors, consultants or agents other than the promisor.

SB1271, sec. 4 (enacting section 32-1159.01(A)).

For this reason, the road ahead has become clear in some respects. A subcontractor may no longer be required it indemnify the general or the owner for negligence or breach by another party. However, the clarity on this point did not address how the law impacts contracts entered into before the effective date of SB1271.

Parties to dwelling projects – together with their insurers and counsel – will be left to grapple with the fact that SB1271 provides no guidance about the measure's impact on existing contracts. The measure does not indicate how the bill applies to disputes arising under projects commenced but not completed before the effective date of the bill. Further, questions also remain about judgments entered after the measure's effective date, claims made after the effective date and about actions arising after the effective date of SB1271. Each of these questions seems destined to be raised in dwelling action litigation as parties seek to test – or resist – the reach of the new law.

Some will argue that the law prevents any change of existing contracts entered into before the law becomes effective. Others will argue the new law could apply to contracts executed before the effective date. Still others will argue that the law could have been applied to contracts entered into after the effective date of the measure but only if the legislature had enacted language to that effect. Others will argue that the prohibition found in A.R.S. §1-244 does not apply to SB1271, except to the extent to which rights have "vested" under existing contracts. Still others will point to the narrow and unrelated retroactivity clause embedded within SB1271 wholly unrelated to indemnification.[1] The

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[1]This clause addressed only the continuation of a study committee created in 2108 that was to phase out in 2019, but which not remains in place until late 2020.

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confounding existence of this provision seems certain to be cited both to support and oppose retroactivity and that at most will serve only as an added complication in terms of discerning whether the substantive provisions of SB1271 will have any applicability to contracts entered into before SB1271's effective date – for the reasons explored below.

Under Arizona law, "no statute is retroactive unless expressly declared therein". A.R.S. §1-244. This straightforward statement suggests an answer, but on closer inspection, does not resolve the question about how the new law will impact ongoing construction projects initiated under contracts executed before the enactment of SB1271. This follows because under Arizona law, the judgment must be made whether the new law impacts "vested rights". The leading case, Hall v. A.N.R. Freight System, Inc., 149 Ariz. 130, 717 P.2d 434 (1986), examined how the enactment of the Uniform Contribution Among Tortfeasors Act (UCATA), which changed the allocation of fault laws, impacted actions arising under the state's tort laws before UCATA's effective date.

Litigants can be expected to dispute or support the application of SB1271 to contracts entered into before the law's enactment. Arguments will be raised – to challenge the idea – that parties have a settled expectation or a vested right in a contractually agreed upon allocation determination under the framework in place before SB1271. Notably, the *Hall* court considered similar arguments with tort litigants, and yet unlike UCATA, SB1271's language provides little direction related to the impact of SB1271 on existing contracts. Some will find that absence of legislative guidance telling. Others will argue that because the legislature made only a portion of the measure retroactive, the substantive provisions cannot be retroactive. Others will find the necessary guidance in the analytical framework employed in *Hall*, specifically with respect to the question of whether the law would be retroactively applied or would involve the application of the law to "antecedent facts". Into this mix will almost certainly be added constitutional considerations relating to "impairment of contracts".

To answer the challenges presented by UCATA, Hall employed a 3-part test to evaluate how to apply a new law. First, the court considered whether the measure retroactively impacted substantive legal rights. Second, the court addressed whether the shift in the allocation of liability by UCATA impaired substantive legal rights. Third, the court considered whether the change in the allocation of responsibility may permissibly be retroactively "changed". These three questions may likewise be applied to SB1271:

1. Whether SB1271 retroactively impacts a substantive legal right.
2. Whether the shift in the allocation of liability for dwelling actions impairs substantive legal rights.
3. Whether the change enacted in SB1271 impacts vested rights.

In its analysis of these issues under UCATA, the *Hall* court analyzed UCATA's impact on the defense of contributory negligence and whether the legislature's change impacted a substantive legal right. The court determined that this question required the further evaluation of whether a party has a vested right in the defense contributory negligence at any point before the commencement of a lawsuit at which the defense would be raised. The court looked at this question to determine whether that party had a vested right to the defense before the need existed for the defense to be raised at all. From this, the court announced that "any inquiry to the effect of a statute on antecedent events must have as its touch stone a consideration of A.R.S. §1-244." *Hall* at 442 (quoting Bouldin v. Turek 125 Ariz. 78, 607 P.2d 957). The *Hall* court noted that a statute is not considered retroactive if it is merely procedural and does not affect an earlier established substantive right. The Court explained that these observations mean that substantive legal rights may be changed, but *only if* they have not vested. The court observed that "if the rule were otherwise, our continuingly changing landscape of ideas and laws would instead resemble a petrified forest populated by the outmoded concepts of the past." *Hall* at 443.

The *Hall* court likewise determined that "laws are not retroactive simply because they relate to past events." *Hall v. A.N.R. Freight System, Inc.*, 149 Ariz. 130, 139 (Ariz. 1986). The court noted that "laws are not retrospective by their mere relation to antecedent conditions." *Hall*, 149 Ariz. at 139 (quoting "*Cohen v. State*, 121 Ariz. 6, 9, 588 P.2d 299, 302 (1978)). The court used an example to explain this point:

> In *Tower Plaza Investments Ltd. v. DeWitt*, 109 Ariz. 248, 508 P.2d 324 (1973), this Court considered the effect of a tax which, though measured by gross receipts recorded after the enactment of the statute, was based upon leases entered into prior to the statute's enactment. We concluded that the tax was not retroactive, because "[i]t is a general principle that a statute is not retroactive in application simply because it may relate to antecedent facts." *Id.* at 250, *508 P.2d at 326*.

Hall, 149 Ariz. at 139. *Hall* thus made clear that the future implementation of the terms of a contract entered into in the past may indeed be subject to changed laws, even to changes that could impact the economics of that contract.

> In *Hall*, the court considered a number of different scenarios to evaluate the circumstances to which UCATA could be made applicable. The court determined that the key consideration had to be upon whether the new law impacted a vested right. The court then turned to the evaluation of whether a right has vested – which cannot be retroactively impacted – to be distinguished from a right that is expectant or contingent, which may be impacted without violating the retroactive application prohibition. *Hall* concluded that "a right vests only when it is actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust." *Hall* 149 Ariz. at 140. With respect to UCATA, *Hall* held that the defense of contributory negligence "while a substantive right, does not vest until a lawsuit has been filed. Prior to that time it is merely an inchoate right which can-

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> not be asserted "until the happening of some future event." *Hall*, 149 Ariz. at 140 (citation omitted). Until the action commences, the defense remains contingent or theoretical. The court remarked that the "notion that rights do not vest until the commencement of legal proceedings is not new to our jurisprudence." *Hall*, 149 Ariz. 140 (Ariz. 1986), citing cases involving changes to the collateral source rule and to tax law. From these the court concluded that Arizona courts have "consistently defined statutory changes as retroactive only when they affect cases already in litigation." *Hall*, 149 Ariz. at 141.

Arguments will likely be made that parties to dwelling projects negotiated the allocation of risk and responsibility and that SB1271 prevents that bargained-for exchange from being realized. The strength and appeal of this argument serves to demonstrate how the absence of a clear line in the text of SB1271 sets the stage for further litigation rather than providing for the consensus agreement about how the law will be applied. Notably, *Hall* anticipated and considered this expectations argument in its analysis of UCATA:

> Nor can we say that the defendant has so substantially relied upon the common law rule of contributory negligence that it would be manifestly unjust to apply the Act to antecedent facts. It would be startling indeed if the defendant acted in substantial reliance upon the contributory negligence rule when the accident occurred, since "[i]n the usual case, the negligence on both sides will consist of mere inadvertence or inattention, or an error in judgment, and it is quite unlikely that forethought of any legal liability will in fact be in the mind of either party." Prosser, *Torts*, § 67, at 433 (4th ed. 1971). Dean Prosser's observation certainly rings true with respect to contributory negligence. As our brethren on the Supreme Court of Washington noted, "It almost goes without saying that the existence or lack of such an affirmative defense has no effect on the everyday conduct of individuals. Defendants do not act less negligently or more so because of the presence or absence of an affirmative defense of contributory negligence." *Godfrey v. State*, 84 Wn.2d 959, 961, 530 P.2d 630, 632 (1975).

Hall, 149 Ariz. at 142. Would owners, generals or subcontractors be more prone to error-free work with pre-SB1271 indemnifications in place or with post-SB1271 indemnification agreements? *Hall* suggests that the answer to these questions has no impact on the determination of how the law should be applied. Instead, *Hall* indicates that the *vesting* of the allocation of liability under a new law occurs once the lawsuit has been commenced.

Thus, if this reading of the *Hall* analysis controls, SB1271 would be applicable only to actions commenced after the law's effective date, including with respect to contracts executed before the effective date of the law.

How courts will address SB1271's application remains to be seen. The inclusion of a provision to guide courts – and potential litigants – would have eased the resolution of the many questions that will arise under this new law. Absent a legislative prescription, the courts will be called upon to resolve those disputes, and in so doing, could arrive at an outcome that differs from the intention of the drafters of SB1271. One conclusion is certain: it is critical that those who engage in residential, including multifamily housing projects, take SB1271 into account after the recent enactment of the measure in order to understand and plan for the potential results that might ensue given the uncertainty over whether the limits in the law apply to existing contracts.

Authors:
Gregory Harris is a Partner and Chair of Lewis Roca Rothgerber Christie's Government Relations industry group and **Frances Haynes** is a Partner and Chair of the firm's Real Estate and Construction industry group. For more information about this article and SB1271, please contact Gregory Harris at gharris@lrrc.com or Frances Haynes at fhaynes@lrrc.com.

Transforming the Operational Legal Department to More than Just a Necessity

By Amit Dungarani, Casepoint

Historically, in-house legal departments have operated reactively to support existing corporate needs, rather than acting proactively to correlate with corporate strategy. This concept is now being challenged completely. Corporate legal departments are being restructured in a way that is more strategically focused and facilitates their ability to align with corporate objectives. Legal departments are a necessity for every corporation. When they operate proactively to improve processes and enhance operational efficiency, legal departments can add additional value to the corporation itself.

Legal: From Operational Necessity to Corporate Strategy

Taking this new approach into consideration, General Counsels are now rethinking how their departments are structured. To make Legal a proactive department that furthers business objectives, rather than just an operational arm, visionary General Counsels are identifying what practices will assist in moving the department forward. Cultivating an efficient legal department is the first step to successfully achieve this new model. Interestingly, the segment of legal practice that has shined a light on this new paradigm is the much reviled, but increasingly necessary, focus on eDiscovery.

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eDiscovery: An Important Puzzle Piece Among Many for Law 3.0

Incorporating effective uses of technology to automate processes and track metrics is a fundamental necessity to restructuring in-house legal departments to become more efficient. Applying these efficiencies will allow legal departments to align with business objectives, and ultimately benefit their bottom line. Employing eDiscovery technology has become commonplace. Legal has been more open to embracing eDiscovery and its features. Although, there have been dramatic advancements in eDiscovery technologies over the years. Due to the efficiency benefits Legal experiences when using eDiscovery and its technological advancements, it is now the gateway for this new approach to corporate law. However, eDiscovery is only the tip of the iceberg when it comes to corporations' GCs embracing Law 3.0.

Holistic Approach

One thing that prevents legal departments from capitalizing on the benefits of eDiscovery technology, is being encumbered with multiple software solutions or systems for each of their needs. In preparation for future efficiency, innovative GCs will strive to consolidate their multiple solutions to one with a holistic approach. This will allow leaders to have a bird's eye view and give them insight into metrics for every process. Used to its full capacity, a single holistic eDiscovery software solution can become the entryway into efficiency for in-house legal departments.

How to Transform your Legal Department into an Efficiency Powerhouse

There are a number of things to consider when implementing futuristic systems to ultimately drive efficiency. To find out tangible steps to make this transformation, read the e-book "In-House Legal Departments Rising to Meet Business Goals" written by legal technology expert, Brett Burney.

Fintech Regulatory Sandboxes: Update on Arizona's Sandbox and Other Developments

By Joshua Boehm, Kendra Haar, DJ Mills, Perkins Coie LLP

Arizona's financial technology ("fintech") sandbox ("Sandbox"), the first of its kind in the U.S., has been open for several months and has accepted three participants. Arizona's Attorney General ("AG") announced approval of the first participant, payment platform Omni Mobile, Inc. just one month after the program launched.[1] Followed shortly by two other companies providing consumer lending services, Sweetbridge NFP, Ltd. and Grain Technology, Inc..[2] Arizona's Sandbox may serve as a helpful illustration of what entrepreneurs can expect in Arizona (should they also wish to participate in the Sandbox) as well as in other states that decide to implement similar programs.[3] This article provides an overview of regulatory sandboxes generally, Arizona's Sandbox, and potential future developments.

Due to their novelty, it is often difficult to determine whether and to what extent innovative products or services will be desired by customers before they are deployed in the market. At the same time, financial services activities typically require licensing and are often accompanied by high (or unknown) compliance costs and regulatory responsibilities. This is particularly true for financial products or services based on new technologies such as virtual currencies or blockchain. Regulatory sandboxes aim to mitigate the deterrent effect that fintech businesses face as they weigh these high upfront costs against the uncertain benefits, while still ensuring that the public interest is adequately protected. They do so by providing fintech businesses with the ability to test a product's market viability on a small scale before deciding whether to incur the costs of licensing and compliance. In addition, regulatory sandboxes can provide a fintech business with valuable market insights while maintaining compliance, as well as greater knowledge of the laws surrounding its product or service and the opportunity to begin building a relationship with a regulator.

Consistent with those key characteristics, Arizona's Sandbox allows participants to temporarily test-drive their products, engaging in certain financial services activities under regulatory supervision without undertaking the costly process of securing traditional licenses prior to operation.[4] As Evan Daniels, Fintech Sandbox Counsel at the Office of the Arizona AG, has further explained:

The Arizona sandbox is designed to allow innovative ideas to get to market more quickly by reducing "one-size-fits-all" regulatory requirements in exchange for more active involvement by the AG's Office. It's not a license for participants to do whatever they want, but it is meant to provide a dynamic arrangement where the regulator and participant can observe what's happening in the market and make adjustments as needed regarding monitoring and regulatory compliance at the state level.

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[1] *Arizona AG, Arizona Accepts First Participant into FinTech Sandbox (Oct. 2018),* https://www.azag.gov/press-release/arizona-accepts-first-participant-Fintech-sandbox.
[2] *Arizona AG, Two More Participants Join Arizona's FinTech Sandbox First Arizona-based company enters program (Nov. 2018),* https://www.azag.gov/press-release/two-more-participants-join-arizonas-fintech-sandbox-first-arizona-based-company.
[3] *See, e.g., Wyoming's proposed fintech sandbox bill. H.B. 0057, 65th Leg. (Wyo. 2019),* https://wyoleg.gov/Legislation/2019/HB0057.
[4] *A.R.S. § 41-5602.*

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To be approved, a participant must offer an "innovative" financial product or service.[5] Broadly speaking, this means that the product or service offered is based on either an "emerging technology" or the "reimagination of uses for existing technology."[6] The financial services permitted within the sandbox include those of sales finance, consumer lending, investment management, and money transmission.[7] The AG's Office receives and approves applications in consultation with other state agencies as appropriate and oversees the operation of the program.[8]

Once approved, a participant is free to offer its products or services to the public, subject to certain activity- and consumer protection-based limitations. Among other limitations, these include:

- A participant may test its approved product or service for only two years. After two years, a participant must either apply for a license to continue its service or stop providing the service in Arizona.[9] In limited situations, a participant may apply for an extension of up to one year after the first two-year period has run.[10]
- The Sandbox limits the number of consumers, transactions, and amounts transacted—with specific limitations linked to the particular service or product that the participant provides.[11] For example, a participant engaging in money transmission may provide its service to no more than 10,000 customers, with the aggregate amount of each customer's transactions limited to $25,000.
- A participant must provide specified disclosures to its customers and keep sufficient records for purposes of consumer protection enforcement.[12]
- The Sandbox applies exclusively to the laws of Arizona. Consequently, participants should ensure that their activities do not implicate federal law or the jurisdiction of other states.

Inevitably, a successful company will need to expand its offerings beyond the framework of the Sandbox in order to grow, at which point standard regulatory requirements will be enforced. For this reason, it will be important for Sandbox participants to keep potential laws and regulations that may apply to their product in mind throughout testing and development. This will better prepare them for their eventual exit from the Sandbox.

Arizona is also making efforts to establish reciprocity among regulatory sandboxes internationally.[13] Arizona has signed an agreement with Taiwan that establishes a "cooperation structure" between the two governments.[14] For now, the agreement is limited to the sharing of information, but it is hoped that it will one day lead to participants in either program having the ability to test their products in each jurisdiction simultaneously. Efforts to create a similar reciprocity structure in the United Kingdom, which has its own fintech regulatory sandbox, are also underway. These agreements may provide participants with the ability to enter markets that were previously unavailable, thereby increasing a company's ability to scale.

Several other states and agencies have proposed or are currently developing programs similar to Arizona's. Accordingly, Arizona may not be the only state to offer this type of program for long. In fact, a proposed bill in Illinois made its way through the state legislature at the same time as Arizona was adopting its Sandbox, mirroring Arizona's program in many ways.[15]

Federal agencies have also discussed the potential for similar programs at the federal level, and several have made some efforts to implement them.[16] For example, the Consumer Financial Protection Bureau ("CFPB") announced plans to develop and implement sandbox-type programs.[17] The CFPB's Office of Innovation—the body charged with administering the CFPB sandbox—has stated that it would like to pursue some form of regulatory sandbox. Notably, Paul Watkins, a key contributor to Arizona's

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[5] *A.R.S. § 41-5603.*
[6] *A.R.S. § 41-5601(4)-(5) (setting forth these and additional criteria in defining "innovative" financial products and services).*
[7] *A.R.S. § 41-5605.*
[8] *A.R.S. §§ 41-5604-05; see also Arizona AG, Arizona Becomes First State in U.S. to Offer Fintech Regulatory Sandbox (Mar. 2018),* https://www.azag.gov/press-release/arizona-becomes-first-state-us-offer-Fintech-regulatory-sandbox.
[9] *A.R.S. § 41-5607.*
[10] *A.R.S. § 41-5608.*
[11] *A.R.S. § 41-5605.*
[12] *A.R.S. § 41-5606.*
[13] *JD Alois, First of its Kind Arizona Fintech Sandbox Looks to Partner with Fintech Leaders in United Kingdom, Crowdfund Insider (Sept. 5, 2018),* https://www.crowdfundinsider.com/2018/09/138658-first-of-its-kind-arizona-Fintech-sandbox-looks-to-partner-with-Fintech-leaders-in-united-kingdom/.
[14] *Arizona AG, supra note 1.*
[15] *Sara Merken, States Embrace Fintech Sandbox Concept as Federal Action Stalls, Bloomberg News (Sept. 21, 2017),* https://www.bna.com/states-embrace-Fintech-n73014464317/.
[16] *Other programs have been adopted by federal agencies that encourage a relationship between regulators and innovators. For example, the Commodity Futures Trading Commission's "LabCFTC" provides entrepreneurs with a communication gateway so that entrepreneurs may work with the regulator in all stages of product development. LabCFTC Overview, U.S. Commodity Futures Trading Commission (last visited Nov. 19, 2018),* https://www.cftc.gov/LabCFTC/Overview/index.htm.
[17] *Bureau of Consumer Financial Protection, BCFP Office of Innovation proposes "disclosure sandbox" for Fintech companies to test new ways to inform consumers (Sept. 13, 2018),* https://www.consumerfinance.gov/about-us/blog/bcfp-office-innovation-proposes-disclosure-sandbox-fintech-companies-test-new-ways-inform-consumers/.
[18] *Bureau of Consumer Financial Protection, BCFP Announces Director for the Office of Innovation (July 18, 2018),* https://www.consumerfinance.gov/about-us/newsroom/bureau-consumer-financial-protection-announces-director-office-innovation/.
[19] *U.S. Department of the Treasury, A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation (July 2018),* https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities—Nonbank-Financials-Fintech-and-Innovation_0.pdf.

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Sandbox while leading the civil litigation division of the Arizona AG's Office, is currently serving as the head of the Office of Innovation.[18] Additionally, the U.S. Treasury Department referenced the potential for fintech sandboxes as part of a broader financial policy position.[19] Although individual federal regulators (such as the CFPB) may choose to implement sandboxes covering their domain of regulated activity, there is unlikely to be a holistic federal fintech sandbox in the foreseeable future, given the fragmented nature of federal financial regulation. As a result, participants would need to confirm that their licensable activity is regulated solely by the federal regulator(s) administering the sandbox they are in before conducting such activity without a license. Notwithstanding such limitations, these developments are notable because they highlight a growing willingness of the federal government to adopt and pursue sandbox-style regulatory tools.

Fintech businesses should closely consider these developments because they allow for a new means of testing and deploying innovative technologies that may be beneficial for them. If a company or entrepreneur wishes to apply to the Arizona Sandbox, or other similar programs, that applicant should consult with legal counsel to ensure compliance with the sandbox's requirements and other regulations that may apply to the product or service offered.

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Avoiding Unnecessary Risks: IP assessment and protection in today's competitive market

By Tim Fontes, Polsinelli

The company is primed and ready, and energy is flowing. Marketing has been hyping the new venture for the company internally for weeks, and the executives are anxious to bring news of the new venture to the public and investors. It might be a new product, a rebrand, the launch of a new business entity, or combinations thereof – but exciting change is coming, and all wheels are in motion. You, as in-house counsel, are tasked with the final approval of the new venture for launch.

You've no doubt crossed off all of the checkboxes you have dutifully laid out for yourself to prepare, double-checked them, and then again. And, hopefully, those checkboxes include some form of intellectual property (IP) diligence. For example, hopefully, at a minimum, you have answered the following:

"Has anyone cleared the new brand associated with the new venture, and is it eligible for trademark registration and use?"

"Does the new venture include a product that may be patentable or eligible for IP protection in some form, and are there competitor patents we should be aware of?"

If such questions have not been considered – there could be serious IP implications. In a competitive market, IP assessment is of increasing importance to achieving business advantage and navigating risk. In other words, failure to assess a new venture from an IP perspective can potentially lead to loss of possible IP rights, or worse yet, subject the company to possible litigation where aspects of the new venture potentially encroach upon IP of another.

Being proactive v. reactive increases the chance of generating or maintaining IP

Being proactive with respect to IP assessment is critical in view of current patent and trademark rules, and a proactive approach, before disclosing or publicly launching a new business venture, can significantly increase the chance of generating or maintaining IP rights.

The United States Patent and Trademark Office (USPTO) has been a "first to file" patent system since 2013. Public disclosure of a new venture that encompasses a patentable invention may result in a bar to patentability of the invention if the disclosure date is not monitored and acted upon within one year; or, may allow a

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competitor to learn from your disclosure and "file first" and possibly obtain rights in the invention - even if the competitor was not the first inventor. For at least these reasons, one should consider filing at least an informal (provisional) patent application before launching a new venture. In other words, failure to take steps to proactively protect the invention before disclosure can create an opportunity for a competitor to beat you to the USPTO for U.S. patent rights to the invention, or result in a forfeiture of the rights altogether.

Costly IP risks are not limited to patents. Proactive trademark assessment is equally important before public disclosure. In an ideal world, a brand should be cleared through a strategic trademark search to determine whether the intended brand is eligible for registration at the USPTO, and perhaps more importantly, whether third parties would object to the new brand and seek to limit or eliminate your rights, which can happen irrespective of any registration you acquire.

Further, an "intent-to-use" trademark application should be considered even if the brand associated with the new venture has not yet been used in commerce. These applications provide a constructive application filing date even if the trademark is not in use on the filing date so long as the applicant eventually shows actual use of the associated trademark, and can provide an advantage down the road in the event of a priority dispute.

Proactive IP assessment can also reduce the possibility of issues arising from IP rights owned by another

A loss of IP rights based on failure to properly assess IP can decrease the value of the business. However, allegations of IP infringement by a third party, based on failure to properly assess IP, can bring a business to a halt.

For example, launching a new brand or product without proper IP diligence can possibly lead to a competitor asserting, via cease and desist letters or otherwise, that the new venture infringes upon patents rights of the competitor. In some cases, the competitor can sue for injunctive relief to prevent sales of the product in addition to pursuing claims for damages. Launching a new brand that infringes upon the trademark rights of another can have similar consequences.

At a minimum, consulting an IP attorney prior to launching any new business venture can at least identify possible risks and/or benefits to safeguarding possible IP rights arising from the new venture. IP attorneys will appreciate this proactive discussion and are often able to provide a complimentary consultation to lay out possible strategy and summarize any IP implications.

Authors

Tim Fontes is an intellectual property attorney with Polsinelli. He provides a broad spectrum of guidance to clients on patent, trademark, and other intellectual property matters. Tim believes in listening carefully to clients with the goal of developing proactive IP strategies and solutions that position clients to compete in today's global market. Tim can be reached at tfontes@polsinelli.com or 602.650.2096. www.polsinelli.com

Workplace Policies That Comply with the NLRA: A Moving Target.

By Shayna Fernandez Watts, Rusing Lopez & Lizardi, PLLC

Think about where you were 15 years ago, how you communicated with co-workers, and how you accomplished the tasks of your job. Did you have a car phone (the true kind that you kept in a bag in your car), a cell phone, or a pager? A little history to begin just for fun:

- 1983: the U.S. Federal Communications Commission approved the first commercial cellular phone. It became available to consumers in 1984 and weighed 28 ounces. (Phones today weigh about 15 grams.)
- 1984: the first Apple Mac home computer went on sale.
- 1992: Earliest version of Outlook for Microsoft launched; Office 97 was released in 1997.
- 1995: Motorola introduced a 2-way pager allowing users to receive texts and e-mails and reply with standardized responses.
- 2003: Myspace launched.
- 2004: Facebook launched.
- 2011: Facebook Messenger launched.

Today, employees have many options when it comes to how to communicate with each other and how often. What used to be office and water cooler talk moved to mobile and online communications over a decade ago. The shift has revolutionized the way was work and workplace policies in turn have tried to adapt. No longer are employees only able to work while at work (think FLSA issues), no longer are comments made to one employee always made directly and only to that employee (think posting comments on Facebook), and no longer is a copy machine the only method of replicating and distributing confidential information (think data security and union activity). This article focuses on company policies regarding employee communications.

The National Labor Relations Act (NLRA) protects the rights of union and non-union employees to act together regarding the terms and conditions of work. The protection extends to conversations conducted on social media. When a communication qualifies as "concerted activity," an employee generally cannot be precluded from or disciplined for

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their involvement. The NLRA is enforced by the National Labor Relations Board (NLRB), a 5-person Board and a General Counsel, all of whom are appointed by the President with Senate consent. Board members are appointed to 5-year terms and the General Counsel is appointed to a 4-year term.

The NLRB began receiving charges related to employer social media policies and specific instances of discipline for Facebook postings in 2010. Since 2010, the NLRB has issued several reports, decisions, and memos focusing on social media and email use. Below are some of the major shifts that have taken place in the past few years.

Purple Communications, 361 NLRB 1050 (2014) and *Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino* (2011)

In *Purple Communications*, an employer's electronic communications policy providing, in part, that the employer's electronic systems and equipment "should be used for business purposes only." The policy also specifically prohibited employees from using the employer's equipment to "engag[e] in activities on behalf of organizations or persons with no professional or business affiliation with the Company" and from "sending uninvited email of a personal nature."

The Board decided that employees who have been given access to their employer's email system for work have a presumptive right to use that system, on nonworking time, for communications protected by Section 7 of the NLRA. The case overruled *Register Guard*, 351 NLRB 1110 (2007) which held that while union-related communications cannot be banned because they are union-related, facially neutral policies regarding the permissible uses of employers' email systems are not rendered unlawful simply because they have the incidental effect of limiting the use of those systems for union–related communications. *Purple Communications* also recognizes that an employer has the right to establish "uniform and consistently enforced controls over its email system to the extent such controls are necessary to maintain production and discipline."

In December 2017, the newly appointed NLRB General Counsel, Peter Robb, issued a memo containing a broad overview of his initial agenda as General Counsel. The memo cited *Purple Communications* as a case that might result in an "alternative analysis." Less than one year later, in August 2018, the Board announced it would invite briefing on whether it should "adhere to, modify, or overrule *Purple Communications*." The Board made the announcement in *Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino*, a pending Board case that applied *Purple Communications*.

In *Caesars*, the Administrative Law Judge found that the employer's policy prohibiting the use of its email systems to send non-business communications violated Section 8(a)(1) of the NLRA under *Purple Communications*. The employer excepted to the decision and asked the Board to overrule *Purple Communications*. Rather than immediately issue a decision, the Board invited the public to comment on this issue and has extended the deadline for filing until October 5, 2018. Various unions, senators, and interested groups on both sides of the issues filed a total of nineteen amicus briefs.

Although the Board has yet to issue a decision in *Caesars*, the Board and GC's actions appear to indication that employers may win this battle and the Board may return to the *Register Guard* standard noted above.

Boeing Company, 365 NLRB No. 154 (2017)

Boeing established the widely accepted new standard for evaluating whether workplace rules, policies, or employee handbook provisions unlawful under Section 7. Under the *Boeing* standard, the NLRB will *balance* the impact an employer's rule on an employee's right to engage in protected concerted activity versus the employer's business justification for the rule. The balancing test overrules the "reasonably construe" standard in place since 2004. (Under the "reasonably construe" standard, the NLRB could conclude that a proffered work rule violated the NLRA so long as an employee could "reasonably construe" the rule to interfere with their Section 7 rights. The Board's new balancing test seeks to provide employees, employers and unions with greater clarity and certainty.)

The Board delineated three categories of workplace rules and considering which category your policies fits in should help you analyze your policies. *Category 1* includes rules that the Board designates as lawful because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. *Category 2* includes rules that warrant individualized study in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications. *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.

Requiring the NLRB to consider the business purpose of a rule is a remarkable shift in the Board's evaluation of workplace rules, policies and employee handbook provisions. The take-away is that employers should clearly articulate the business justification for a policy, particularly policies that could plausibly implicate NLRA rights.

Lyft Co., 20-CA-171751 (2018)

Lyft was one of the first cases decided under *Boeing* standard. The case looked at Lyft Inc.'s intellectual property and confidentiality policies after the Teamsters Union (Joint Council 7) challenged them as unlawfully overbroad. The intellectual property rule barred employees from making use of Lyft's logo without writ-

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ten permission. The confidentiality rule barred employees from using or disclosing "User Information" and other confidential and proprietary information about Lyft's business. The policy defined "user information" as the personal information of both riders and drivers who use the Lyft platform.

Ultimately, the intellectual property rule was lawful because, although some protected concerted activity might fall under the rule's ambit (including fair use of an employer's intellectual property on picket signs and leaflets), when reasonably interpreted, most employees would understand that the rule would prohibit only commercial and other non-Section 7 protected uses of the logo. Further, even if the rule could be interpreted by employees to prohibit the use of logos for protected activity, the rule is unlikely to deter using the logos, or the protected activity itself.

The confidentiality rule was found to be lawful because it was allegedly unlikely to interfere with employees' protected rights under the NLRA. Employees would not reasonably interpret the rule to prohibit the sharing of 1) information about working conditions, or 2) employee names and contact information. Rather, the rule is primarily designed to prohibit the disclosure of "technical, financial, strategic, and other proprietary" information, and does not specifically reference "employee information."

Kumho Tires Cases, 10-CA-208153 and 10-CA-208414 (2018) – Concerted activity may not be protected when there is misappropriation.

In this case, an employee who was active in a union organizing campaign posted a photo on Facebook in a forum for union supporters. The photo was of a team leader's bonus request form seeking a bonus for "non-union support." The photographed form had been taken off the desk of a supervisor. Kumho determined the employee violated their social media policy and terminated the employee.

Kumho Tire's policy prohibited posting of "internal reports, policies, procedures, or other internal business-related confidential communications." The GC for the NLRB found Kumho Tire's policy to be lawful under the NLRB's decision in *Boeing*, and therefore determined that the employer did not violate Section 8(a)(1) by firing the employee for violating the policy.

The advice memo explained that the employee was engaged in concerted activity by posting the photo in the forum, but it also found the conduct was not protected because the photograph was improperly obtained. The GC ordered the Regional Director to dismiss the charge based on his finding that the conduct lost the protection of the Act because the fired employee knew that his fellow employee had "misappropriated the form."

Policies Generally and *Boeing* Category 3 Type Policies to Avoid.

Policies that prohibit employees from engaging in protected activity are likely to be invalid. A few examples pf policies that the NLRB has ruled to be invalid are:

- Prohibiting disclosing "salaries, contents of employment contracts . . ."
- Prohibiting the disclosure of "any information pertaining to the wages, commissions, performance, or identity of employees of the Employer."
- Prohibiting disclosures to "any media source" information "regarding employment at [Employer], the workings and conditions of [Employer], or any . . . staff member."
- Prohibiting employees from criticizing the employer.
- Regulating membership in outside organizations, specifically unions.

Conclusion

Whether the employee's communication is considered protected concerted activity or whether a company social media policy is lawful is a fact-intensive question that requires analysis on a case-by-case basis, especially in consideration of the shifting opinions of the NLRB. Employment policies should be regularly reviewed for compliance with the NLRA and other changing laws. Further, before you decide to take any disciplinary action, consult with an employment attorney to ensure your actions do not run afoul of the law.

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The Arizona Chapter gratefully acknowledges the support of our 2018–2019 Newsletter Patron

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