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ACC Association of Corporate Counsel
ARIZONA

FOCUS

President's Message

Mark Rogers

Many thanks to Bowman and Brooke, Ogletree Deakins, Payne & Fears and Quarles & Brady for the articles in this newsletter. These articles were selected because they cover important topics and timely information for in–house counsel in Arizona. I hope you were able to attend some or all of the exceptional CLE programs these firms offered to our members during this last quarter.

As we near the end of our 2018 – 2019 year, I want to thank you for your membership in ACC Arizona Chapter! We appreciate you and hope that you have found the Chapter to be a valuable tool in your career development and professional networking. Each year we strive to improve the value of AZ Chapter membership and to serve the best interests of our 500 Chapter members.

We have a busy year beginning in October 2019! We have another year of excellent and diverse CLE programs from a base of loyal sponsors. With the support of these sponsors, our Chapter continues to grow our membership and remains the single greatest source of CLE for the in–house community in Arizona. This year, I would like to ask each Chapter member to help us maintain a strong relationship with our sponsors by helping to make their Sponsorship of the AZ Chapter a wise marketing investment. You can help us in three easy ways:

- Consider engaging AZ Chapter sponsors when you are searching for outside counsel or law department service providers;
- When you are working with Chapter sponsors, please let them know you appreciate their support of the AZ Chapter; and
- When you engage firms that are not AZ Chapter sponsors, please let them know about our activities and ask them to consider supporting us.

I am excited to welcome the ACC Annual Meeting to Phoenix in October! We have an excellent opportunity to showcase our region and it's vibrant in–house legal community over the three days of meetings and events. If you have not attended the Annual Meeting recently (or ever), you should consider doing so this year. The CLE programs and networking opportunities are absolutely top–notch!

The full calendar of events is on our Chapter webpage and is routinely included in our weekly member emails. Take a minute now to calendar the Chapter meetings. Our Annual Pass for Tuesday meetings is on sale now through October. Get yours before we sell–out! Annual Passes are the easiest and most economical way to attend our Tuesday meetings. Our Thursday members-only meetings will continue to be free of charge.

Make this the year that you make the time to become an active member of the Chapter. Of course, we look forward to seeing our "regulars" at our meetings this year, but we hope to meet more of you who haven't attended meetings in the past. We want all 500 Arizona Chapter members to take advantage of the unique local benefits your Arizona Chapter offers.

Remember, if you miss a program, the CLE materials are available on a member–restricted page on our Chapter website – just login and download.

I look forward to seeing you at the ACC Annual Meeting in October and at our 2019–2020 Chapter events!

Please plan to join us for our upcoming meetings:

September 12, 2019
at The Capital Grille
MEMBERS-ONLY CLE: What's Market - M&A - Customary Terms in Non-Disclosure Agreements M&A - NDAs & LOIs

September 17, 2019
at Blanco Biltmore
Defending Against Litigation Before It Begins: How to Do More Than CYA

September 24, 2019
at Blanco Biltmore
SEC Enforcement

The Modern Partnership: In-house and Outside Counsel

By Cathy Landman and Margo Wolf O'Donnell

As lawyers take on increasingly sophisticated business advisor roles in today's marketplace, the partnership between in-house and outside counsel has become more important than ever. And while every lawyer wants to provide the best possible service to the client, the practical steps for achieving outstanding service in this context are not always clear. Drawing on our shared experience, we have identified four key steps lawyers on both sides of this relationship can take to help them build their credibility and deliver solutions that advance their business.

1. Develop a commercial point of view, and base the legal strategy on business goals

So many skilled lawyers bring a nuanced understanding of the law to their work, but when it is time to apply that knowledge and counsel to the company's business strategy, they have difficulty bridging the divide between the worlds of law and business. The key to becoming a valued business advisor and in-house lawyer is understanding not just the legal risks for the company on a given matter, but also the interplay between those risks and the company's larger business goals.

In a legal practice, that means having a conversation early on to ensure an understanding of the desired result. And that conversation needs to continue as a matter unfolds and new information comes to light.

An understanding of what the company is trying to achieve — where they are now and where they want to be — should drive the legal strategy and lead you to the legal remedy that furthers those goals. That may mean litigating or not, finding a resolution outside of litigation, or coming at the problem from another angle, such as a new approach to a deal or contractual language.

2. Educate each other and constantly reflect on what you are learning

It is crucial for both sides of this partnership to make time to educate each other — for the outside counsel to educate the client on the most pressing legal issues they may face, and for the in-house team to educate the outside counsel on how their business works. To facilitate communication that extends beyond just the discovery phase, develop a work process that includes shared folders, files, timelines, and project plans, and encourage both teams to check in regularly.

Designate time for reflection at important milestones throughout the project so that the in-house and outside teams may ask of themselves and each other what they have learned and how it might alter the goals or process going forward. Finally, make sure both teams are speaking the same language by using the right tools and a shared vocabulary.

While written word is the order within law firms, the business community tends to rely on tools like PowerPoint for communication. Sometimes translating a lengthy document into a more visual mode can facilitate understanding and even yield creative, new solutions to the problem.

Always be thinking not just about communication between the inside and outside teams, but also how to enable the in-house team to present ideas to their internal clients, the business leaders.

3. Build a shared roadmap that can evolve, and demonstrate good judgment

The in-house counsel is continuously juggling big priorities with the day to day responsibilities of the job. The best outside counselors help their clients anticipate what is on the horizon and determine whether the current approach and practices will put the company on the right trajectory.

Timeliness is an important factor in building a workable roadmap. Good business advisors understand how to foreshadow what is to come so business leaders have time to digest information and then decide. The partnership also depends on crystal clear communication and a willingness to use technological tools to improve efficiency.

Because skillful navigation involves looking both at your feet and the path ahead, teams must constantly be asking what's coming next, what's the precedent if we do X, and what are the potential costs and benefits? This is where creative problem solvers can demonstrate significant value. Nothing beats good

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judgment, a great strategy, and a thoughtful plan to execute it.

4. Move beyond a transactional mindset and nurture the relationship

Good client service cannot be merely transactional, so outside counsel can truly demonstrate their worth by providing value outside the billable hours. That means making time to learn their client's business, conduct on-site visits, and make themselves available as a resource. It's also important for other members of the outside team beyond the billing partner — including associates and paralegals — to take ownership of the work.

The in-house counsel can create these connections by inviting everyone on the team to an on-site visit to learn the business and understand the goals of the project. This is an investment in the outside team, which is just an extension of the in-house team, and the work will be more efficient and effective if everyone works together as one entity. The complex legal matters businesses face today require that everyone is on board and invested in achieving the optimal outcome.

In-house and outside counsel see legal and business challenges through distinct lenses that are shaped by their respective training and approach to problems. We need both perspectives to create innovative legal strategies. By embracing the key steps we have outlined above, lawyers can build a thriving, long-lasting inside-outside partnership that yields creative solutions for the company and its outside partners.

Authors:

Cathy Landman is the chief legal and human resources officer at Corelle Brands.

Margo Wolf O'Donnell is the partner and co-chair of the labor and employment practice group at Benesch.

ACC News

2019 ACC Annual Meeting: Rates Increase after September 25

Mark your calendars for October 27-30 in Phoenix, AZ for the 2019 world's largest event on 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.

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, September 9-11, and November 4-6
- Finance and Accounting for In-house Counsel, September 23-25

Learn more and register at 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 us $100 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.

In-house Counsel Certified (ICC) Designation

If you are an in-house lawyer seeking to become proficient in the essential skills identified as critical to an in-house legal career, the In-house Counsel Certified (ICC) designation is precisely what you need. To be eligible for the designation, you'll need to participate in the ACC In-house Counsel Certification Program, which includes live instruction, hands-on experience, and a final assessment. Those who successfully complete the program will earn the ICC credential. Attend one of these upcoming programs:

- **Amsterdam, Netherlands**, September 10-13, 2019
- **Berkeley Heights, New Jersey**, November 4-7, 2019

For more information visit *acc.com/certification*.

A Glitch in the Matrix: Evaluating Usage of Virtual Reality Training in the Workplace

By Nonnie L. Shivers, Ogletree Deakins

New employee took the blue pill — first day of reality is today. After necessary paperwork and verifications, your new employee is ready for training. She expects talking heads but when she enters the training room, she sees no podium, no speaker and (thankfully) no PowerPoint teed up. Instead, the instructor hands her an "Oculus Rift" virtual reality headset. The instructor then directs her to put the headset on, and what seems like a scenario right out of a sci-fi movie begins. She no longer sees the instructor but only the unbelievably life-like virtual world around her showing the customer service center. Looking around the once-empty training room, she is now surrounded by digital customers staring at her. A new voice tells her training will consist of completing a variety of tasks and conversing with these customers about different situations she might encounter at work, including safety issues like evacuations.

By the year 2025, Zion Market Research estimates that the global augmented reality ("AR") and virtual reality ("VR") industry will exceed $800 billion. From smart phone applications to video games, VR technology continues to grow in popularity, including in the workplace. One survey conducted by Greenlight Insights revealed that 78% of all Americans are now familiar with VR technology. Even the Olympics and Super Bowl were available for people to watch through VR. While the United States military and NASA have been highlighted for using VR to simulate stressful situations for soldiers or astronauts, private employers are now turning to VR technology to train their employees as well. As of today, VR workplace training ranges from simulating customer interactions during Black Friday shopping to performing complex surgeries in hospitals. Companies are also using VR to train employees to operate virtual machinery that companies claim is OSHA-compliant. VR can also train drivers to prepare for hazards like pedestrians in the street or teach employees interpersonal skills and "compassion" training.

With the increased usage of VR, employers contemplating VR training must assess the pros and cons and potential legal risks. As a threshold matter, employers must be mindful that rolling out new technology can cause fear in the workplace. According to a 2019 report titled, "Automation and Artificial Intelligence: How machines are affecting people and places," about one quarter of all jobs in America are at "high" risk of automation by technology. Employees are well aware of this risk, as a 2018 survey by MindEdge Learning found that 52% of employees at companies that have advanced automation are afraid that they will lose their jobs. Managing the fear associated with new technology may well be a primary practical consideration in managing employee morale and optics.

Other practical considerations employers should review in advance of rolling out VR training programs are whether the company has an existing training or learning development team and how the VR training will be monitored and implemented, including for tangible deliverables. Because there are so many moving parts, a team should likely be solely dedicated to the development, integration, and technical support for the VR technology unless vendors hocking their wares can be fully trusted and integrated to achieve organizational objectives. Additionally, there should be plans to audit and monitor the software so that the company can continue making important business decisions depending on whether the VR training increases or decreases employee performance, including whether it meets training obligations required by various laws, such as workplace safety requirements or interactive harassment prevention training.

Beyond the practical considerations of implementing new training, the primary legal considerations to review before, and after, rolling out VR workplace training include:

- **ADA:** To begin with, the EEOC has issued guidance stating employers may be required to provide alternative training materials to employees as a possible reasonable accommodation if the employee has a disability pursuant to the Americans with Disabilities Act (ADA). The same EEOC guidance also implicates where the VR training takes place, so that all employees have access to the training. If an employer uses VR training to train an employee on essential job functions, employers need to have other options available in addition to VR. Under the ADA, employers should also consider whether employees with visual impairments and other conditions such as motion sickness, vertigo, nausea, and sore eye would be unable to fully participate in the training and carefully structuring and monitoring any medical inquiries to avoid ADA claims. Ultimately, employers must continue engaging in the ADA interactive process when using VR technology, offering reasonable accommodations where necessary and not relying solely on the technology.
- **OSHA:** There are also VR training issues that implicate both the ADA and the Occupational Safety & Health Act (OSHA). For example, companies should review the length of VR training. The longer the training, the higher the risk an employee might experience a potential negative side effect (like falling) or require an accommodation under the ADA. Another ADA/OSHA issue is the long-term effects of VR technology. Because the technology is so new, there have not been long-term studies on side effects such as permanent eyestrain. Moving to OSHA exclusively, VR training must be compliant with all training safety regulations and meet applicable standards/outcomes. This is especially

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important for jobs that involve driving or operating machines and/or vehicles. While some companies currently using VR workplace training believe the training is OSHA-compliant, employers are obligated to and must maintain compliance since the employees will eventually move from a "virtual" atmosphere to the real world and bear the legal risk. Another potential OSHA concern is conducting the training in a large, open space in case an employee experiences a loss of spatial awareness. The training space should be free of any trip hazards if the employee is required to stand or move. The devil is in the details on such programs from start to finish!

- **FLSA:** There are also considerations under the Fair Labor Standards Act (FLSA) such as when the training takes place and how long the training lasts. While the company must view, test, and approve the VR training, employers should also consider basic FLSA issues like whether employees are required to provide their own VR headsets that attach to their phones (similar to providing tools or a uniform). Additionally, employers must continue to satisfy all recordkeeping and documentation requirements when using VR training. Thorough documentation will remain key for workers' compensation claims stemming from injuries during the training or sickness from the VR. The largest area of slippage may be usage of apps and information when off-duty and exposure to potential off-the-clock claims, so employers using the technology should be cautious to lock usage down to avoid class exposure.
- **Data Privacy:** In a time when Americans half-jokingly complain that Russia is collecting data from their phone or webcam, VR technology raises both real and perceived privacy risks as well. Potential data implications of VR training include what type of data the VR software collects, how the data will be stored, who will have access to the data, who will "own" the data, and how the data will be used. Any biometric data that is collected could also implicate a variety of state laws. For example, the California Consumer Privacy Act, effective January 1, 2020, is aimed at ensuring Californians know what personal information is being collected about them, whether the information is sold or disclosed and to whom, and that the individual right to access personal information is preserved. Similarly, plaintiffs have used the Illinois Biometric Information Privacy Act as a tool to initiate class proceedings against employers. To combat these potential issues, employers using VR should have clear policies and procedures to not only handle VR data, but to inform employees what happens with the data.
- **Bias and Discrimination:** Finally, like in many other aspects of the workplace, discrimination and bias will continue to be an issue with VR training. Artificial intelligence and VR tools are computer programs and can therefore be inadvertently biased. Accordingly, this potential bias could lead to a disparate impact on a protected group. This factor is extremely important if a company uses VR training to influence employment related decisions such as benefits or promotions based on the training score. Employers must also be aware of potential age discrimination claims, partly because of stereotypes about aging and adaptability to new technology. For example, older employees may become frustrated if younger employees "get it" more quickly and are therefore better able to perform their job duties. To combat this issue, implement VR training as one, but not the only, training component.

VR workplace training has seen a huge increase in the past few years, and will likely continue to become more widely used as VR technology advances, becomes cheaper, and is more widely available. Companies that decide to either experiment with or actually roll out VR workplace training programs should continue to carefully adhere to all laws affecting the workplace. Whether utilizing the ADA interactive process, maintaining workplace safety, or eliminating discrimination in the workplace, VR presents many new issues. Now that almost 80% of Americans are at least familiar with VR technology, companies should carefully weigh the benefits of VR training against the company's ability to manage new legal risks that accompany the technology.

Author:

Nonnie Shivers is a partner in the Phoenix Office of Ogletree Deakins. She partners with employers and managers in three primary ways: litigation avoidance through proactive and maximally compliant 50-state counseling and training; complex workplace investigations including at the C-Suite level; and litigating legally complex and factually challenging cases to defend employers' actions.

Telling Your Story Through Corporate Witnesses: Leveraging Inside and Outside Counsel Expertise

By Amanda Heitz, Bowman and Brooke

Nobody tells your company's story like your employees. You know it. Your outside counsel knows it. And, critically, your opposing counsel knows it too. Corporate counsel plays a critical role in protecting your company's story by working with outside counsel to identify, prepare, and support your corporate witnesses.

Know Why It's Important

Under Federal Rule of Civil Procedure 30(b)(6), as well as corresponding state court rules in Arizona and elsewhere, corporate entities testify through designated corporate representatives. These representatives testify as the company, so if their testimony goes poorly, there are no takebacks. You can't distance yourself because your corporate representative binds the whole company. Bad deposition or trial testimony can tank your case.

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But the risk does not end there. Unfavorable corporate representative testimony never really disappears. The witness can quit, be fired, or die, but the testimony remains the sworn testimony of your company. A well-connected plaintiff's bar ensures that bad corporate testimony will resurface again and again. And, in jurisdictions like Arizona, there is little you can do to prevent one witness's bad day from haunting your company for years.

Recent proposed changes to the Federal Rules of Civil Procedure have only increased the stakes. Under the proposed new Rule 30, parties will be required to meet and confer about 30(b)(6) witnesses, including both the topics of testimony and identities of witnesses. Whereas the current rules allow corporations the exclusive right to choose who testifies on their behalf, if the new rules take effect, your opposing counsel will have a say in selection. If you have a witness who gave damaging deposition testimony in the past, that witness will be requested again.

Understand, Clarify, and Challenge the Notice if Necessary

To take a corporate representative deposition, your opponent must serve a notice of deposition outlining with reasonable specificity the topics about which it seeks testimony. That notice is the blueprint for the deposition and defines what testimony your witness must provide. Accordingly, the first step to managing your company's story is ensuring that the notice governing the deposition is appropriate and working with your outside counsel to clarify and challenge it if it is not.

Either through inartful drafting or by design, 30(b)(6) notices frequently request deposition topics that are vague, overbroad, irrelevant and sometimes nonsensical or abusive. You are not stuck with the notice—unless you fail to object. If your outside counsel waits until the deposition itself to object to unclear or inappropriate topics, it may be too late. There is a body of case law providing that failing to file a request for protective order waives any objection to the noticed topics.

Working with your outside counsel and employees to respond to a notice is one of the best investments in protecting your corporate story that you can make. In addition to spotting and objecting to the easily objectionable topics—e.g., requests for "all" information or requests unbounded by a relevant time frame—by the time a corporate representative deposition is on the horizon, your outside counsel should have spent enough time with the case, your documents, and your company to identify less obvious pitfalls. Ask outside counsel to propose objections and revised topics for your review. It is often useful to have a meeting with outside counsel and some of the people you would consider designating as witnesses on the topics. Particularly when the topics involve technical knowledge, a team of lawyers can easily miss problems that your engineering department will notice immediately.

After this is done, your outside counsel can begin negotiating agreed upon topics with opposing counsel or, if necessary, seek a protective order from the court. In light of the necessary work before approaching opposing counsel or the court, 30(b)(6) notices demand urgency and prompt action from both inside and outside counsel.

Selecting Your Witness or Witnesses

Your company has fairly broad discretion under both Federal and Arizona Rule 30(b)(6). The witness must be reasonably prepared to provide the company's knowledge about designated topics. There is no requirement that the witness have personal knowledge and likewise, no requirement that the witness be a current employee. Indeed, many strong corporate witnesses are former employees.

Importantly, neither rule requires the selected to be the "person most knowledgeable" about any subject. Attorneys—particularly out-of-state plaintiff attorneys—frequently ask for a "PMK" deposition. You are obligated only to reasonably prepare someone to testify. This means that if your CEO is the person with the most first-hand knowledge, she does not have to sit for a deposition if someone else could be reasonably prepared to testify. Or, if your chief engineer is brilliant, but will make a lousy witness, someone else can explain aspects of your design.

Relatedly, PMK requests could trick you into designating more witnesses than is necessary or wise. The Federal and Arizona Rules of Civil Procedure provide presumptive limits on deposition testimony. Although attorneys frequently compromise on the limits, it is rare that your outside counsel will get more than 7 or 8 hours of deposition time with the plaintiff. But if you elect to designate multiple corporate representative witnesses in response to a notice, you could easily give your opponent two-to-three times as much time with your witnesses as you have had with theirs. More deposition time means more opportunities for errors and misstatements. And the more witnesses you designate, the more opportunities your opponent has to create supposed "inconsistencies" between their testimony. Sometimes multiple corporate witnesses are necessary, but the decision to offer more than one witness should be made judiciously.

As corporate counsel, you have a unique window into the universe of possible witnesses. Take note of employees who may make good witnesses—people who are well-spoken, deliberate, and even-tempered. And, in the same vein, be aware of employees who may be great at their jobs, but who exhibit qualities that could be harmful in depositions—for example, people with a tendency to think out loud or who are easily agitated. Additionally, you have access to potential witnesses' supervisors and colleagues too; if you are thinking of asking an employee to testify, see if others agree with your impressions.

Your outside counsel should have ideas too. During visits to your facilities and interviews with your employees, your outside counsel learned about your business and your corporate story directly from your employees, much like a jury will. Outside counsel knows who tells the corporate story well and who explains issues clearly, and can help you identify not just the best witness for a pending case, but

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also employees who may make excellent corporate witnesses in future cases. Even if you have a go-to witness on frequent topics of litigation, it never hurts to identify backups. Someday your go-to witness may retire, change jobs, or otherwise be unavailable to testify.

Make Time to Prepare

Once you have made your selection, you must prepare your witness. The rules require that the witness be reasonably prepared to testify about corporate knowledge. A single afternoon in your office or in your outside counsel's office is rarely sufficient to meet this requirement. Your witness must have access to the people and information he or she needs to reasonably prepare to answer questions about the identified topics. It may be necessary to work with an employee witness's supervisors or colleagues to cover or excuse the witness's regular work responsibilities so that the witness can devote enough time to deposition preparation.

Encourage questions and make sure that you or your outside counsel is available to answer questions about the deposition topics and requirements during the preparation process. Waiting until the date of the deposition is likely too late. In the same vein, if you are designating more than one witness to testify, you and your outside counsel must make clear to each witness the division of labor. Your witnesses should know the topics for which they are responsible as well as the topics for which they are not responsible.

Finally, make time to teach the process. Giving deposition testimony is a stressful experience for most witnesses, and the burden of compiling information from multiple sources to testify about what a corporation (rather than the individual) knew, did, or thought adds to the complexity. Rely on your outside counsel to help your witness understand the deposition process and what to expect from opposing counsel.

Your corporation may be the most important witness in your case. Working with outside counsel, you can help ensure that your company can tell its story through a properly prepared corporate representative.

Author:
Amanda Heitz is senior counsel in the Phoenix Office of Bowman and Brooke. She focuses her practice on civil defense litigation, including trial advocacy as well as advanced motion and appellate litigation. She is an experienced written and oral advocate, leveraging a significant legal writing background—which includes four years clerking in the Arizona Supreme Court and Court of Appeals, as well as active practice.

Goal! Kicking Pay Disparities Aside

By Rhianna S. Hughes and Raymond J. Nhan, Payne and Fears, LLP

The United States Women's National Soccer Team ("USWNT") recently renewed its status as the pride of the Red, White, and Blue—and the thorn of several other nations—as it captured its fourth World Cup win. But, this isn't the only reason the USWNT has captured headlines. In fact, news coverage of the USWNT now seems to focus primarily on the players' demand for equal pay to their male counterparts. This effort has caused fans to shower multiple World Cup victory celebrations with spirited chants of "equal pay." But, why now, and what does it all mean?

In March of this year, USWNT players filed a class action lawsuit in a California federal court alleging the United States Soccer Federation is violating the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. The members argue that, despite their international success and similar job duties, they are paid less than members of the United States Men's National Soccer Team. In their complaint, the USWNT players allege they earn 38% less than a similarly-situated Men's National Soccer Team player.

This suit, and the USWNT's successes, have publicized the issue of equal pay. Based on developments to the Equal Pay Act and recent media attention, Arizona employers should pay close attention to and make every effort to comply with the federal Equal Pay Act and Arizona's parallel statute.

Federal Equal Pay Act

The federal Equal Pay Act, codified at 29 United States Code, section 206, focuses only on wage differences based on gender. To prevail on an Equal Pay Act claim, employees must show that: (1) they receive a lower wage than employees of the opposite sex; (2) they are employed within the same establishment; (3) the work performed requires equal skill, effort, and responsibility, and the work is performed under similar conditions. As to the second prong, each unique location of a business is considered a separate establishment. As to the third element, an employee must show all four elements. The Equal Pay Act, however, expressly exempts employers from liability if they show pay differences are based on: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) any factor other than sex.

In April 2018, there was a major development regarding this fourth defense. In *Rizo v. Yovino*, the Ninth Circuit Court of Appeals held that prior salary—considered alone or in combination with other factors—can never justify a wage deferential. The court reasoned that, at the time of the passage of the Equal Pay Act, an employee's prior pay reflected a discriminatory marketplace that valued the work of one gender over that of another. By considering prior salary information, employers run the risk of perpetuating the wage differential Congress sought to eliminate. The court explained that prior salary, whether considered alone or with other factors, is not job related, and thus cannot fall within the catchall exception. In February 2019, however, the United States Supreme Court vacated the Ninth Circuit's decision in *Rizo* because of a grave procedural defect. *Rizo* is once again pending before the Ninth Circuit. If

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the Ninth Circuit stands by its initial decision—holding that prior salary is *never* a factor in considering pay differential—it would create a circuit split with the Seventh and Eighth Circuits, which have held that prior salary is always a factor in considering pay differential. Such a split would make *Rizo* ripe for Supreme Court review. In the meantime, however, all employers governed by Ninth Circuit law (including those in Arizona), should comply with *Rizo's* ruling and confirm that none of their employees' salaries are being justified by that employee's prior pay.

To be clear, liability under the Equal Pay Act is something to avoid, as employers can be hit with significant back pay as well as with covering the prevailing plaintiff's attorneys' fees and costs. The applicable statute of limitation also threatens substantial exposure, as it not only goes back two years for non-willful violations and three years for willful violations, but it resets each time an employee receives a paycheck.

Arizona's Equal Pay Act

Like the Equal Pay Act, Arizona Revised Statute, section 23-341 prohibits employers from paying employees performing the "same quantity and quality of the same classification of work" differently based on gender. Also, like its federal counterpart, Arizona law does not prohibit paying male and female employees differently based on seniority, ability, skill, differences in duties or services, differences in the hours worked, or any reasonable difference that is not based on gender. The big difference between the two statutes is that the Arizona statute only has a six-month statute of limitation. The result is, most employees bring their claims under the federal Equal Pay Act. Nevertheless, Arizona employers must be mindful that states and cities have been aggressive about updating their equal pay laws. In recent years, California, Connecticut, Delaware, Hawaii, Massachusetts, New York, Oregon, and Vermont have passed legislation banning employers from asking about previous salaries in an attempt to bridge the pay gap. Washington state is also considering similar legislation and the cities of Cincinnati, New York, Philadelphia, and San Francisco have passed similar laws.

Tips for Employers

Arizona employers should be cognizant about potential liability under federal and state equal pay laws. This is especially so given the popularity of the USWNT's high profile advocates for equal pay, and the prevailing legislative trends across the country.

The most important step an employer can take is to establish guidelines for how compensation decisions are made and a protocol for reviewing those decisions on a regular basis. Deviation from the guidelines should be minimized and always done only for business-related, nondiscriminatory reasons. Employers should be mindful that small pay differences can magnify over time with percentage-based pay increases, making what was once a justifiable difference so large that it is no longer reasonably related to the original reason for the difference in pay. But, with regular review, disparities that will not withstand legal scrutiny can be managed before they become a problem for the employer.

Authors:

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Employee Use of Marijuana - Where Are We Headed?

By Stephanie Quincey, Quarles & Brady

As more and more states adopt protections for employees who use medical marijuana and also legalize recreational marijuana, employers are left with more questions than answers. For employers in certain industries, there are even more challenges. A recent study on marijuana use by industry and occupation ("The Smith Study") found higher marijuana use by restaurant industry employees than any other industry. (Smith R, Hall KE, Etkind P, Van Dyke M. Current Marijuana Use by Industry and Occupation — Colorado, 2014–2015. MMWR Morb Mortal Wkly Rep 2018;67:409–413. DOI: http://dx.doi.org/10.15585/mmwr.mm6714a1 .) The Smith Study showed that the occupation with the highest percentage of employees who admitted to current marijuana usage at 32.2% was "Food Preparation and Serving." But even in the "Construction and Extraction" industry, employees self-reported a 16.5% usage rate.

While Arizona does not have recreational marijuana, some expect that it will by 2020. This will likely add even more complexity to the choices for employers in Arizona when it comes to employee drug use as employers are faced with more and more employees using marijuana. Arizona does already have the *Arizona Medical Marijuana Act* ("The Act"), *codified at Ariz. Rev. Stat. Sec. 36-2801 et seq.* Briefly, this Act provides:

Employment Protections:

Employees cannot be punished for being medical marijuana identification card holders or for positive drug tests unless they used, possessed or were impaired by marijuana at the place of employment or during work hours.

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Employer Protections:

If employers have policies and drug testing programs consistent with state law, there is no employee cause of action for adverse employment action based on a good faith belief that an employee used, possessed, or was impaired by any drug **while on the employer's premises or during the hours of employment**.

The Act also makes clear that an employer has a defense to a lawsuit (where it has established a policy and initiated a testing program) based on:

- **Actions taken in good faith based on the results of a positive drug test or alcohol impairment test (but for medical marijuana card holders, not based exclusively on a positive drug test for marijuana).**
- **Actions taken based on the employer's good faith belief that an employee used or possessed any drug while on the employer's premises or during the hours of employment.**
- **Actions taken based on the employer's good faith belief that an employee was impaired while working.**
- **Actions taken to exclude an employee from performing in safety-sensitive positions. A.R.S. § 26-493.06(B).**

Some employers, such as those in health care, transportation, and construction, have many "safety- sensitive positions." "Safety-sensitive positions" include any job that the employer designates as "safety-sensitive," and/or any position which includes duties that the employer believes in good faith might affect the safety or health of the employee or others. Examples of "safety-sensitive positions" include the operation of a motor vehicle, other vehicle, equipment, machinery or power tools; repairing, maintaining or monitoring certain equipment; performing duties in the residential or commercial premises of a customer, supplier or vendor; preparing or handling food or medicine; and working in any occupation regulated by Title 32 of the Arizona Revised Statutes, which includes Arizona's regulated industries, such as the medical profession. To take advantage of this protection, an employer must have a drug testing policy that complies with Arizona law. It is critical that this be done before an employee comes forward as a medical marijuana card holder, in fact, employers should do this *now* if they have not done so already.

Here are some additional basics about the Act:

- **The Act does *not* require employers to allow the use of medical marijuana at work or to allow any employee to work while under the influence of marijuana.**
- **The Act does *not* limit an employer's ability to test an employee or applicant for possible impairment or for the use of illegal drugs.**
- **The Act does *not* prevent an employer from disciplining an employee based on the employee's refusal to submit to a drug test.**
- **The Act *does* limit the actions an employer can take when an applicant or employee who holds a valid medical marijuana card tests positive for marijuana use.**
- **The Act permits employers to "penalize" employees, including cardholders, who are "impaired" while on the job.**

The "safe harbor" of the Act (other than with "safety-sensitive" positions) is taking action against an employee who has a medical marijuana card *only* when the employer has a good faith belief that the employee used, possessed or was impaired at work and not merely based on a positive drug test. While "used" and "possessed" have obvious meanings, unfortunately, "impaired" does not when it comes to marijuana. There are no "legal" levels for impairment of marijuana, unlike alcohol. The American Council for Drug Education has compiled the following list of marijuana impairment indicators:

- Dilated (large) pupils
- Smell of marijuana on clothing, in room, or in car
- Bloodshot eyes
- Sleepy appearance
- Reduced motivation
- Anxiety
- Difficulty thinking
- Distorted sensory perceptions
- Dry mouth
- Feeling/appearing sluggish
- Grandiosity (acting in a pompous or boastful manner)
- Impaired judgment
- Impaired short-term memory
- Inappropriate laughter
- Increased heart rate
- Increased appetite, craving sweets
- Reduced coordination
- Sadness/depressed mood
- Social withdrawal and isolation
- Discolored fingers

The safe approach is to focus on these impairment indicators and document them when an employee appears to be impaired. It is critical that supervisors be trained to observe, document and preserve any evidence of impairment. The law permits an employer to consider any of the following:

- observed conduct, behavior or appearance;
- information reported by a person believed to be reliable, including a report by a person who witnessed the use or possession of drugs or drug paraphernalia at work;
- written, electronic or verbal statements;
- lawful video surveillance;
- records of government agencies, law enforcement or courts;
- results of a test for the use of alcohol or drugs; and
- other information reasonably believed to be reliable or accurate.

A recent court decision highlights the importance of this approach. On February 7, 2019, *Whitmire v. Wal-Mart Stores Inc.*, 2019 WL 479842 (D. Ariz. Feb. 7, 2019), found that the employer violated

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the law when it terminated an employee for a positive drug test that did not prove actual impairment during working hours. In *Whitmire*, the plaintiff, a Wal-Mart customer service supervisor, injured her wrist at work. Upon reporting the injury, Wal-Mart asked Whitmire to submit to a drug test, which it required for all on-the-job injuries. At the time the test was ordered, Wal-Mart did not know that Whitmire was a "Cardholder" (*i.e.* she had an Arizona-issued medical marijuana card) or that she had used medical marijuana the night before. Whitmire disclosed these facts at her drug screen, which revealed the presence of marijuana metabolites in her urine. Wal-Mart fired Whitmire for failing the drug test, pursuant to its policy requiring termination when "any detectable amount" of illegal drugs is found in an employee's body.

Whitmire filed suit in the District Court of Arizona claiming that Wal-Mart violated the Act by discriminating against her on account of her use of medical marijuana. Faced with the preliminary question of whether the Act's employment discrimination provision permits a private cause of action against employers, the court sorted through the statute's language, its legislative history and how other states have interpreted similar provisions. The court concluded that the Arizona legislature *did* intend to create a private cause of action against employers under this law. Specifically, the court concluded that employees who are prescribed and use medical marijuana are permitted to sue their employers if the employer takes an adverse action in violation of the law.

The court found that an employer has a defense to a lawsuit when it has a good faith belief that the employee was impaired during working hours (or on the employer's premises) and a drug test (or other evidence) corroborates that good faith belief. Importantly, a drug test can only be relied upon to corroborate this good faith belief when the drug test proves the employee was actually impaired during working hours. If the drug test only proves recent use - and not actual impairment in the workplace - it cannot be relied upon to prove the good faith element necessary for this affirmative defense. As Wal-Mart relied upon a drug test that only proved recent use and not actual impairment in the workplace, the court ruled it could not invoke the drug testing statute's affirmative defense as a matter of law and granted summary judgment for the employee. Wal-Mart did not support its termination decision with documented observation or anything else that might have supported a good faith belief.

In sum, the direction of the law (including the public, legislature and courts) is getting more permissive toward marijuana use. Employers should carefully consider how to handle drug use issues in the workplace as they arise. The more the employer can demonstrate that the employee's job performance was impacted and that job performance and/or safety are the employer's focus, the more defensible the action will be.

For more information for how Arizona employers handle drug use issues in the workplace, contact Quarles & Brady attorney Stephanie Quincy at stephanie.quincy@quarles.com / 602-229-5407.

Author

Stephanie Quincy is a partner and the Chair of the Labor & Employment Practice Group in the Phoenix office, where she maintains a regular caseload of employment litigation matters and has extensive experience handling class action and multi-plaintiff lawsuits.

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