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FOCUS

President's Message

Steven Lockhart



Wow, what a great end to the 2010s and unprecedented beginning of a new decade! As we all know, the global COVID-19 pandemic has changed the way that we communicate, socialize and do business. We all hope that you, and your families, are doing well and continue to do so. We are working on ways to modernize our

educational, social and charitable activities during these unique times.

I'm honored to serve as your Central Florida Chapter President, and hope that we're able to make 2020 the best year to date. We are in the process of planning our 2020 CLO/GC Symposium this summer. This event has some amazing sponsors, and is the premier opportunity for Chief Legal Officers and General Counsels to socialize, educate and enjoy. Be on the lookout for more information in the coming months.

As always, we have some amazing programs and sponsors lined up for the upcoming educational and social calendar, and welcome all members to get more involved. Any interested member should reach out to any of our Board of Directors and discuss how to serve on a Committee – there's always something! We look forward to seeing, serving and socializing with you all soon!

Steven Lockhart
ACC Central Florida Chapter President

2020 UPCOMING EVENTS 2020 Program information is also posted on the [ACC Central Florida website](#)

In accordance with the most recent CDC guidelines and the Florida Department of Public Health regarding the COVID-19 virus, the Central Florida Chapter is postponing all live scheduled meetings and events through May 15, 2020 and working toward transitioning what we can to webinars. We will continue to monitor the situation closely and will re-evaluate our calendar schedule as more information becomes available.

Tuesday, April 21, 2020

Afternoon CLE presented by Platinum Sponsor: Jackson Lewis
This program has been postponed due to the COVID-19 pandemic. Updated information will be released soon.

Wednesday, May 20, 2020

Afternoon CLE presented by Platinum Sponsor: Weinberg Wheeler Hudgins Gunn & Dial
Time and venue: TBD

Thursday, June 4, 2020

Happy Hour with Fisher Phillips
5:30 – 7:30p.m.
Venue TBD

Thursday, June 18, 2020

Afternoon CLE presented by Silver Sponsor: Burr Forman LLP
Time and venue: TBD

July 31 – August 2, 2020

CLO/GC Symposium Weekend Beach Retreat
Location: Omni Amelia Island Plantation

Wednesday, September 16, 2020

Afternoon CLE presented by Platinum Sponsor: Foley & Lardner Offices of Foley & Lardner LLP
111 N Orange Ave STE 1800, Orlando, FL
Registration: 1:30 – 2:00p.m.
Program: 2:00 – 5:00p.m.
Reception: 5:00 – 6:30p.m.

Wednesday, November 18, 2020

Afternoon CLE presented by Platinum Sponsor: Littler Mendelson
Winter Park Farmer's Market
200 W New England Ave, Winter Park, FL
Registration: 1:30 – 2:00p.m.
Program: 2:00 – 5:00p.m.
Reception: 5:00 – 6:30p.m.

Thursday, October 14, 2020

Afternoon CLE presented by Platinum Sponsor: Gray Robinson
Offices of Gray Robinson 301 East Pine Street, Suite 1400, Orlando FL
Registration 1:30 – 2:00p.m.
Program: 2:00 – 5:00p.m.
Reception: 5:00 – 6:30p.m.

Be on the lookout for calendar updates on our website!

Stress and Distress in the Hospitality Industry Due to the Coronavirus

By Richard J. Bernard, Daniel Bachrach, Ethan D. Lenz, Clifford J. Risman

Coronavirus Resource Center

The coronavirus outbreak has impacted the hospitality industry disproportionately more than other industries. For many companies, revenues have fallen off the cliff. Further, the uncertainty and likely overhang of coronavirus for the hospitality industry will continue for the foreseeable future.

To weather the coronavirus storm, you should consider the following:

Conserve Cash

With seriously reduced or no revenues, hospitality industry companies need to look for ways to conserve cash, which includes analyzing essential spends, idling operations, working with vendors, landlords and suppliers regarding credit terms, and applying other methods.

Communicate with Lenders

Open a dialogue with lender regarding draw down of available lines of credit and support through these uncertain times. In many cases, going concern value of the business exceeds any liquidation value, especially under current circumstances. Discussions may include forbearance, amendments, extensions, restructuring, standstills, and increases of availability.

The growing levels of stress and distress may make lenders more receptive to alternative options to preserve value.

Review and Update Cash Flow Forecasts

Forecasts need to reflect the current economic environment, projected out to account for reasonable upside, as well as downside, scenarios regarding the impact of the coronavirus on revenues. These forecasts may be shared with lenders and other stakeholders, depending on circumstances.

Dialogue with Stakeholders

Companies should open communications with vendors, landlords, bondholders, equity holders, and other interested parties to assure them that they recognize the challenges presented by the coronavirus and have a plan to address them.

Labor Issues

Companies need to focus on the issue on whether to furlough or terminate employees, recognizing the costs of each.

Reporting Requirements

Public companies should review and make accurate required disclosures, in the event that business operations are impacted such that a reporting requirement is triggered.

Government Assistance

Depending on the business, companies should keep apprised of the potential for government assistance. Although the government may provide some bailout or support for the hospitality industry, the timing and scope remains unclear.

Insurance

Companies should review insurance policies to determine possible coverage in the event of a business disruption, and comply with all applicable notice requirements. Again, companies may not be able to rely on insurance proceeds for business interruption to save them. To review the top five considerations, regarding insurance coverage, [click here](#).

In sum, the hospitality industry must take steps now to mitigate and address the impact of the coronavirus. For more information about recommended steps, please contact your Foley relationship partner. For additional web-based resources available to assist you in monitoring the spread of the coronavirus on a global basis, you may wish to visit the [CDC](#) and the [World Health Organization](#).

Foley will continue to keep you apprised of relevant developments. [Click here](#) for Foley's Coronavirus Resource Center for insights and resources to support your business during this challenging time. To receive this content directly in your inbox, [click here](#) and submit the form.

Welcome New Members!

Daniel Aidif

RoadRunAir, LLC

Sara Cunnard

FARO Technologies, Inc.

Lindsey Davis

Signature Flight Support Corporation

Andy Garcia

Siemens Gamesa Renewable Energy, Inc.

Ryan Garka

NASCAR, Inc.

C. Happer

American Automobile Association

Katie Hoffman

NASCAR, Inc.

Donald Letizia

L3Harris Technologies

Tyrone Martin

Foundation Partners Group, LLC

Kelsey Pincket

NASCAR, Inc.

Lynne Ringers

QUALITY LABOR MANAGEMENT LLC

Patrick Rinka

Signature Flight Support Corporation

Nicole Sbert Costa

Holiday Retirement

Jose Vento

Tactual Labs Co.

Jillian Wheelock

Halifax Health

#MeToo Backlash and Other Emerging Trends in Employment Law

By Matthew T. Gomes, Weinberg Wheeler Hudgins Gunn & Dial

#MeToo. Parental leave. Legal marijuana. Ban the box. The workplace is changing, requiring companies to rethink policies and practices.

#MeToo Backlash

In a 2018 survey by Survey Monkey and Leanin, 28% of male managers reported they were uncomfortable participating in common work activities with a woman. Fast forward one year and the number jumped to a whopping 60%. These days, men may be treading lightly, fearing the appearance of impropriety. The potential fallout is a #MeToo backlash that could have women, already underrepresented at the C-suite level, restricted in their development and networking opportunities.

Employers should push back on the backlash and apply common sense rules:

- trade chivalry for common courtesy. Experts warn that well-intentioned behaviors such as carrying a woman co-worker's luggage on a business trip or insisting on paying for meals may create a negative power dynamic that undermines her confidence and competence and may make her feel indebted.
- focus feedback on talents, performances and competencies, not appearances
- create public environments for meetings and mentoring sessions
- stress the positive aspects of mentoring and professional development in harassment prevention training

Arbitration Agreements

It may become easier to take sex discrimination complaints to court. Federal legislation that would ban companies from requiring employees to resolve legal disputes through mandatory arbitration was introduced this year. The Forced Arbitration Injustice Repeal (FAIR) Act would prohibit predispute arbitration agreements that require arbitration of employment, consumer, antitrust or civil rights disputes as well as agreements that prohibit class or collective arbitrations. The arbitration clause is included in mil-

lions of employee contracts. If passed, the act will give employees access to courts in cases ranging from overtime disputes to sexual harassment.

Workplace Violence

The reality is that workplace violence has become the "new normal." Nearly 10% of fatal workplace injuries were intentionally inflicted by another person, according to data collected by the U.S. Bureau of Labor.

Companies must enact a zero-tolerance policy covering workers, visitors, contractors and other individuals who may come in contact with personnel. Additional steps recommended include:

- assess the worksite and identify potential risk factors
- be alert to signs of potential workplace violence
- develop an active shooter action and evacuation plan

Marijuana in the Workplace

More than half the states allow marijuana for either medical or recreational use. Florida enacted a bill in 2017 that legalized access to marijuana in pill, oil, edible and vape form, and in 2019, the legislature passed a bill that made smoking marijuana a legal method of medication for Florida patients. However, the fact remains that under federal law, marijuana use is still illegal. Users in some jurisdictions are therefore finding job protection in the courts. Medicinal users with valid medical certification have had courts rule in their favor over claims of unlawful firings and denial of employment after positive drug testing. While nondiscrimination provisions typically exclude jobs that require drug testing under federal law, companies will need to re-evaluate policies to reduce the risk of litigation, especially as more states consider legalization.

Paternity Leave

Companies are increasingly recognizing the importance of parental leave for fathers. Yet, the benefits for men still lag

behind those for women. In some cases, challenges are being taken up in the courts alleging that leave policies discriminate based on sex at certain companies.

It is legal to provide women with more time off after childbirth but only as it relates to physical limitations imposed by pregnancy or childbirth, not for purposes of bonding or childcare. In addition, it is permissible to require employees to use paid time off before collecting parental leave pay as well as to have Family and Medical Leave Act (FMLA) policies run concurrently with parental leave. To mitigate risk, firms should set eligibility for parental leave requirements such as a minimum length of service.

Ban the Box

Momentum is growing to have companies remove the "check box" in job applications asking if applicants have criminal records because of its disproportionate impact on minority candidates. This practice already is prohibited in more than 20 states and 150 municipalities across the country. Florida has not followed suit yet, but bills were introduced in the Florida state house and senate in January 2020, and are still pending. The Fair Chance Act, which prohibits federal agencies and their contractors from requesting that applicants disclose criminal history before receiving a conditional offer, passed the U.S. House of Representatives in July 2019 and is now in the Senate. Companies should review policies to ensure compliance.



Matthew Gomes is a partner at Weinberg Wheeler Hudgins Gunn & Dial where his practice focuses on labor and employment law. He provides clients with preventative counseling and training

involving discipline, discharge, reductions-in-force and other personnel matters, employee handbooks, employment agreements, affirmative action plans, and audits and inspections from government agencies. Contact him at mgomes@wwhgd.com.

Why Better Business Communication Matters and How to Improve It

By Elizabeth A. Colombo

When asked in job interviews, “Are you a good communicator?” your gut reaction is, “Of course!” But, the truth is, we could all fine-tune our communication skills, whether you’re new to in-house or a chief legal officer. This month’s column will explain, using surprising statistics, why good business communication is important and how to improve your and your company’s communication.

By the numbers

While there are many causes of poor workplace communication, the lack of time spent on it doesn’t seem to be the problem. According to [Polly](#), “time spent on calls, emails and meetings has increased by 25 percent to 50 percent in the last two decades.” However, good communication is more than transmitting messages; they must be delivered impactfully.

Every day, [205.6 billion emails](#) are sent around the globe, but only one third of emails are actually opened. Additionally, although companies host an average of 61 meetings per month, 39 percent of people sleep through them, and [73 percent do other work during these meetings](#).

The same Polly article shows these unnecessary emails and long meetings can take a toll on a company, particularly with employee engagement:

“Employees who feel respected by their employers and are engaged at work are 87 percent less likely to leave their organization and seek new employment. Yet only 38 percent of employees say their company treats them with respect.”

Poor communication can lead to employees becoming frustrated that their time isn’t valued. But, when employees are purposefully engaged, it yields tangible results, according to [bluesource](#): “Productivity improves by up to 25 percent in organizations with connected employees.”

More than employee turnover, company finances are also drained by poor commu-

nication. According to a [Holmes report](#), the global PR leader found:

“[US\$37 billion is the] total estimated cost of employee misunderstanding (including actions or errors of omission by employees who have misunderstood or were misinformed about company policies, business processes, job function or a combination of the three) in ... corporations in the United States and United Kingdom.”

Some of these statistics may be a bit alarming, so how do we solve this wasteful problem? Below are recommendations on how to improve your and your organization’s communication skills.

Be transparent

To show that companies care about their employees, they must be transparent. I’m sure we’ve all worked in a company where everything felt like a secret that only management knew. That type of culture breeds discontent.

Of course, management cannot divulge everything happening in a company, but they should strive to be as open as possible. That way, employees feel like they belong and are part of the organization’s overall plan.

As in-house counsel, we have a duty to ensure confidentiality. However, that doesn’t mean that we can’t support senior management’s efforts to be transparent if it won’t harm the company.

We can also be transparent in our day-to-day work. For example, I’ve collaborated with fantastic contracts managers and analysts. Over time, I learned that I could trust them and, thus, I was candid with them about unneeded redlines in a negotiation.

That transparency signaled to the contracts analysts that I trusted them, which expedited the negotiation process and ultimately strengthened my company’s relationships with our clients and vendors.

Listen actively

Active listening is an overlooked communication tool. During a busy work cycle, it is easy to multitask while someone is talking to you. However, if we are not truly listening to someone to understand their message, we do them, our company, and ourselves a disservice.

For example, if you’re reviewing a contract and someone stops by your office with a question, you have many choices. Let’s take three of those options:

1. You can half listen to the person while half keeping an eye on your phone and computer and continuing to review the contract.
2. You can stop everything you’re doing, turn to the person, and have a productive conversation with them.
3. If you are in the middle of something that needs to get done, you can arrange to meet with the person at another time when you can give your full attention.

If you pick the second or third option, you’ll learn more from the person speaking to you and, likely, can better address what they’re discussing with you. If you pick the first option, you may be forced to have the same conversation again because you missed key elements of it the first time or you may have to redo work if you misunderstand the ask and start to work on it.

A wonderful active listening tool is to check for understanding. For example, let’s say you explain a complex concept to a colleague. It may help to ask, “Does that make sense?” This way, your colleague has a chance to say, “No,” and tell you where there is a misunderstanding. Likewise, if a colleague is explaining something to you, repeat the basics of it back to them. This ensures that you’re not misunderstanding their message.

Because our attention often meanders and because we are often only hearing our colleagues, not truly listening, we spend a lot of time clearing up miscommunications, backtracking, and fixing mistakes.

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Imagine an organization with people who all employ active listening. You wouldn't have to repeat yourself as much as you do now. There would be fewer misunderstandings. Meetings and phone calls would be more productive. Employee morale would be higher.

Communicate effectively at all levels

The need for better communication is not limited to young or entry level employees. No matter your title, you can improve business communication. In fact, "senior leadership" ranked second on Kincentric: A Spencer Stuart Company (formerly, Aon)'s list of top engagement opportunities. The aforementioned Holmes Report also confirmed this:

"Companies that have leaders who are highly effective communicators had 47 percent higher total returns to shareholders over the last five years compared with firms that have leaders who are the least effective communicators."

To facilitate conversations between employee leaders and their team, consider using digital communication channels in the workplace, such as Slack, Jabber, or Microsoft Teams.

As in-house counsel, if you have the clout to influence change, encouraging senior management to be effective communicators would serve your organization well. If you don't have that social capital, improve your communication style and hope others take your lead.

Use a variety of communication methods

Using different communication styles can help spread a message faster. I spoke with a director of corporate communications recently who described her tactic when communicating a change in a company practice. The organization was telling employees to dial six instead of nine when calling an external phone number.

Her department's strategy included posting table tents and signs throughout the building, emailing the update, and distributing business card size reminders. This is bril-

liant. Employees are busy. As the statistics show, they aren't even reading all of their emails or paying attention in meetings.

Sharing a message through various avenues will increase the odds that the staff sees the message. Employees are bound to see physical reminders, and if they don't, their colleagues may tell them. Thus, word-of-mouth may help spread your message even further.

Know your audience and message

When communicating with someone you work with regularly, know your audience. Meaning, if you know someone reads his email religiously, email him. If you know another colleague communicates best via the phone, call her.

Always share information in compliance with your company's privacy and data security policies and encourage others to do the same. If the information is sensitive or confidential, be mindful and share it (or don't) accordingly. Everyone in a company should be careful about sensitive information and we, as in-house counsel, have a unique opportunity to be leaders in responsible guarding of sensitive data.

Value inter-generational communication

Working with people of all ages benefits the company, as it adds diverse thought to the office. However, different generations (or different people, regardless of age) may view communication differently. The following statistics from the previously mentioned bluesource article paint a picture of the challenges workplaces face with different communication preferences:

- Around a quarter of employees think email is a major productivity killer.
- 78 percent of people who text wish they could have a text conversation with a business.
- 81 percent of millennials think "state of the art technology" is paramount to an ideal working environment over perks or amenities.
- 44 percent of employees want wider adoption of internal communication tools.

- 49 percent of millennials support social tools for workplace collaboration.
- 74 percent of all online adults prefer email as their main method of commercial communication.

If you aren't in a leadership role, it may be hard to effect a companywide change. However, on an individual level, you can know your audience and communicate accordingly.

As part of the legal team, you can also help draft communication policies. For example, a bring your own device (BYOD) policy covers and can solve some communication concerns. You can also offer risk management advice to senior management.

Overall, with different communication options in the workplace, be respectful of each other's preferences, and clearly explain why you prefer a certain method of communication.

Keep up with technology and 2020 work styles

With ever-evolving technology, sometimes it seems hard for our communication methods to keep up. For example, a [Gallup study](#) shows that 43 percent of US employees work remotely some of the time.

For remote employee programs to be effective, it's important that the organization creates a policy that supports the remote worker, and that the remote worker remains connected through phone calls, video conferencing, and emails. When handled effectively, remote workers can be just as connected as onsite workers.

As in-house counsel, we should be wary of telecommuting employees complying with company data policies. To avoid this problem, partner with senior management and IT to ensure that you're addressing where and how data is stored and shared.

Another issue is the employee's ability to "unplug." This constant connectedness can be a blessing and a curse: It's a blessing to be able to work from wherever, but it's a curse to constantly feel pressure to perform.

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Gone are the days of going home and being unreachable by work. Thus, it's important to make sure wage and hour laws are being adhered to and that employees are maintaining a healthy work-life balance.

Mind your delivery

Picture yourself going to a restaurant. Your server tells you that they are out of a dish that you were looking forward to eating. If your server flippantly says, "We're out of that," it may irritate you. However, if your server says, "I'm sorry, but we ran out of that. I'd love to get you something else that you would enjoy," it makes a world of difference. The message is the same, but the tone may alter how it's perceived.

It helps to think about who you are talking to. If you have a prior relationship with someone, you may know them well enough to tailor your message to them. If I know I'm talking to someone who can be a bit sensitive, I may deliver my message accordingly. If I know I am talking to a colleague who learns best visually about contracting with complex entities, maybe I'll sketch it out.

If I don't know the person I am talking to well, I strive to be clear in my message and see how they respond to it and understand it. This is one of the many benefits of active listening skills.

Parting words

The topic of how to better communicate could take up whole books, but the bottom-line message is to constantly work on being a better communicator because it saves you and your company time, headaches, and, often, money.

Author:

Elizabeth A. Colombo is a former corporate counsel with Konica Minolta Business Solutions U.S.A., Inc. She has experience working cross-functionally with the relevant business teams and stakeholders to draft, review, and negotiate commercial transactions of moderate to high complexity from the bid phase through contract execution.

ACC News

ACC Xchange: Rates Increase After March 18

Xchange 2020 (April 19-21, Chicago, IL) offers **advanced, practical, interactive, member-driven** education for in-house counsel and legal operations professionals that you won't find at any other conference. By uniting complementary professions to exchange ideas and best practices, this program creates a powerful and unique environment that offers a fresh take on how to deliver your in-house legal services more efficiently and effectively. [Register today at acc.com/xchange](http://acc.com/xchange).

In-house Counsel Certified (ICC) Designation

The [ACC In-house Counsel Certification Program](http://acc.com/icc), helps in-house counsel become proficient in the essential skills identified as critical to an in-house legal career. The program includes live instruction, hands-on experience, and a final assessment. Those who successfully complete the program will earn the elite ICC credential. Your law department and your employer will benefit from having a lawyer that returns with global best practices in providing effective and efficient legal counsel. Attend one of these upcoming programs:

- **Dubai, UAE**, March 2-5
- **Melbourne, Australia**, August 10-14

ACC 2020 Global General Counsel Summit

Join CLOs from multinational companies to discuss Championing Trust in Business at the [ACC 2020 Global General Counsel Summit](http://acc.com/gcsummit) in Zurich this June. Open exclusively to the highest-ranking legal officer of an organization, the 2020 Summit offers you an opportunity to collaborate, share, and network with your peers in an exclusive, highly interactive setting. [Register now at acc.com/GCSummit](http://acc.com/gcsummit).

2020 ACC Annual Meeting: Early Bird Rates End March 25

Lock in at the lowest available rates for the 2020 ACC Annual Meeting, taking place October 13-16 in Philadelphia, PA. 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 acc.com/annualmeeting.

New to In-house? Are you prepared?

The ACC Corporate Counsel University® (June 24-26, Denver, CO), combines prac-

tical 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](http://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, March 31-April 2, May 5-7 (Log Angeles), June 1-3, September 22-24, and November 17-19

Learn more and register at acc.com/BU.

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 www.acc.com/VRS for more information.

Our Community Our Responsibility

Greenberg Traurig is proud to partner with the **ACC Central Florida Chapter** to support local charities, including **Orlando United**, **Special Olympics Florida**, and **United Against Poverty**.

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WORLDWIDE LOCATIONS

United States

Europe

Middle East

Asia

Latin America

Department of Labor issues a new temporary rule to regulate the Families First Coronavirus Relief Act and the leave programs contained therein.

By Jeffrey E. Mandel and Alex G. Desrosiers, Fisher & Phillips LLP



On March 18, 2020, Congress passed, and the President signed, the Families First Coronavirus Relief Act (FFCRA). The FFCRA contains a number of provisions which apply to employers, including two provisions providing paid and unpaid leave to employees forced to miss work because of the COVID-19 outbreak: the Emergency Paid Sick Leave Act (EPSLA), which provides for Emergency Paid Sick Leave (EPSL), and the Emergency Family and Medical Leave Expansion Act (EFMLEA) that expands the use of leave under the Family and Medical Leave Act (FMLA). On April 2, 2020, the U.S. Department of Labor (DOL) issued a “Temporary Rule” consisting of 124 pages of discussion and regulations regarding employee rights and employer obligations under the EPSLA and EFMLEA. This new rule and the regulations therein provide some measure of clarity on many of the pressing questions employers had regarding interpretation and implementation of the FFCRA, a number of which are discussed below.

Definition and Impact of a Federal, State or local quarantine or isolation order:

The first qualifying reason for paid leave under the Emergency Paid Sick Leave Act (EPSLA) — if an employee is covered by a “shelter-in-place” or similar shutdown order issued by a state or local government (something that was becoming increasingly common here in Florida prior to April 2, 2020) — caused a great deal of confusion among employers as to what constituted an order triggering this qualifying reason. The new DOL regulations define the term “quarantine or isolation order” broadly, and includes the increasingly common “shelter-in-place,” or “stay-at-home” orders that cause employees not be able to work even though the employer has work for them. According to the DOL, even orders that advise categories of citizens (such as of certain age ranges or of certain medical

conditions) to shelter in place or stay at home triggering the first qualifying reason for Emergency Paid Sick Leave (“EPSL”).

It is important to understand that the new regulations provide that an employee may only take EPSL for this reason if, “but for being subject to the order,” the employee would be able to perform work that is otherwise available. By contrast, an employee subject to a quarantine or isolation order may not take EPSL where the employer does not have work for the employee as a result of the order or other circumstances. Per the DOL, this is because the employee would be unable to work even if they were not required to comply with the quarantine or isolation order. Thus, the key question is “whether the employee would be able to work or telework ‘but for’ being required to comply with a quarantine or isolation order.” For many employees currently unable to work because their place of employment has closed – whether as the direct or indirect result of a shutdown order – this DOL rule means they will not be eligible for EPSL under this qualifying reason.

This all begs the question whether Executive Order 20-91 issued by Florida Governor Ron DeSantis on April 1, 2020, is a “quarantine or isolation order” under the FFCRA. At first blush, the answer seems clear with respect to senior citizens and those with certain underlying health conditions as the Executive Order provides that such individuals “shall stay home.” However, in more recently issued FAQs, the Governor’s Office has stated that senior citizens and those with certain underlying health conditions “may leave their homes when necessary to obtain or provide essential services or conduct essential activities.” Given this, an argument can well be made that the Governor’s Executive Order is not a “quarantine or isolation order” under the FFCRA with respect to a senior citizen

or employee with certain underlying health conditions who performs an essential function as the Governor’s Executive Order does not prohibit such employee from working. On the other hand, the Governor’s Executive Order does appear to fit within the category of orders that advise categories of citizens to shelter in place or stay at home, in which case it would satisfy the first qualifying reason for EPSL for senior citizens or employees with certain underlying health conditions who perform essential functions.

Caring for an individual: The fourth qualifying reason for paid leave under the EPSLA is that the employee is caring for an individual who is subject to an order or self-quarantine. The DOL has defined the term “individual” an employee’s “immediate family member, a person who regularly resides in the Employee’s home, or a similar person with whom the Employee has a relationship that creates an expectation that the Employee would care for the person if he or she were quarantined or self-quarantined.” Importantly, the DOL has clarified that an “individual” does not include persons with whom the employee has no personal relationship.

Child Care Provider: Both the EPSLA and the EFMLEA generally allow for leave if the employee has to care for their child because their child care provider is unavailable for reasons related to COVID-19. The FFCRA itself makes clear that the term “child care provider” includes licensed facilities. The DOL regulations expand this to include uncompensated and unlicensed family members and friends who regularly care for the employee’s child.

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Intermittent Leave: Employees who seek to take EPSL or EFMLA intermittently must come to an agreement with their employer — meaning it is within the employer’s discretion — regarding use of intermittent leave as well as the increments of time in which the leave may be taken. While best practice is to reduce the agreement to writing, it is not required by rule. What intermittent leave is allowable under the DOL regulations depends on whether the employee is performing work at the employer’s place of business or teleworking.

Employees who are performing work at the employer’s place of business may take intermittent EPSL only with the employer’s agreement and only if the reason for the leave is childcare related — that is, to care for the employee’s son or daughter whose school or place of care is closed, or child care provider is unavailable, because of reasons related to COVID-19. Intermittent EPSL is not allowable for any of the other qualifying reasons as it could expose the employee’s co-workers to the virus.

Employees who are teleworking may take intermittent EPSL or EFMLA Leave with the employer’s agreement for any qualifying reason. There is “broad flexibility” for employers and teleworking employees in reaching their agreements as employees who telework do not present a risk of spreading COVID-19 to their fellow employees.

Documentation Employers May Require:

The DOL’s new rule also clarifies what records employers may request from employees and what records employers are required to keep under the FFCRA. Documentation supporting an employee’s request for EPSL or EFMLA must include an employee’s signed statement with: (1) the employee’s name; (2) the date(s) the employee is requesting leave; (3) the COVID-19 qualifying reason for leave; and (4) a statement that the employee is unable to work or telework because of the COVID-19 qualifying reason. Depending on the COVID-19 qualifying reason for leave, additional documentation may be required. The new regulations do not appear to allow an employer to condition FFCRA leave on receipt of documentation from the employee’s healthcare provider.

Health Care Provider Exemption and Definition:

The FFCRA permits an employer to elect to exclude Health Care Providers from receiving EPSL and EFMLA. The new regulations contain an extremely broad definition of the term “healthcare provider.” Anyone employed at any doctor’s office, hospital, health care center, clinic, postsecondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions. Following this, even a custodian at a hospital could be considered a healthcare provider.

The broad definition of healthcare provider also includes any individual employed by an entity that contracts with any of the institutions described above to provide services or to maintain the operation of the facility where that individual’s services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State’s or territory’s or the District of Columbia’s response to COVID-19. It is broad definitions such as this, and perceptions that the DOL’s new regulations bend over backwards in favor of employers, that has resulted in two members of Congress issuing a letter to the Secretary of Labor protesting various aspects of the regulations as being inconsistent with the wording and spirit of the FFCRA.

Effect On FMLA/Other Paid Sick Leave:

The new DOL regulations confirm the statutory language and previous DOL guidance regarding the interaction of the new leave requirements with existing leave laws

or employer policies. With respect to EPSL, the DOL regulations provide that emergency paid sick leave is “in addition to,” and not a substitute for, other sources of leave which the employee has already accrued, was already entitled to, or had already used, before the law became effective on April 1, 2020. However, an employee is not entitled to retroactive reimbursement or financial compensation for any leave taken prior to April 1, 2020, even if such leave was taken for COVID-19 related reasons.

With respect to how EFMLA leave interacts with traditional FMLA leave for FMLA-covered employees, the DOL regulations confirm that, rather than create an additional and new 12-week leave entitlement, the EFMLA adds a sixth reason to take the 12-week entitlement under the FMLA (specifically, to care for a son or daughter whose school or place of care is closed or child care provider is unavailable due to COVID-19 related reasons). Therefore, if an employee has already taken such leave, the employee may not be able to take the full 12 weeks of leave under the EFMLA.

However, there is one area of inconsistency in the new regulations that remains to be resolved. Section 826.160(c) of the regulations indicates that employers may require the substitution of accrued paid leave for the unpaid portion of EFMLA. Unfortunately, Section 826.70(f) contradicts this and states an employee may elect, but not be required, to do so. The DOL is aware of this contradiction and hopefully will be resolving in in the near future.

Delayed Enforcement: The DOL indicated that it won’t enforce the regulations for employers operating in “good faith” until April 18, 2020, giving employers some breathing room to digest and plan for the many new principles involved.

The DOL’s temporary rule and the regulations therein go a long way toward clarifying many of the issues raised, and answering most of the questions left unanswered, by the FFCRA. Hopefully the DOL will be resolving any remaining issues in the coming weeks. We will post any additional regulations or guidance from the DOL in our COVID-19 Resource Center at <https://www.fisher-phillips.com>.

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Michael Drywa
Associate General Counsel,
Central Square Technologies

Member Spotlight

ACC-Central Florida 2020 Q1 Newsletter Member Spotlight Q&A

1) What is a typical day for you?

In reality, there is no such thing as a “typical” day—they vary widely. However, it usually begins with responding to overnight/early morning emails, meeting with my staff and triaging daily priorities, responding to legal letters, attending to human resources matters, legal actions, etc.. Peppared into this fast-paced environment are meetings with key internal stakeholders and executives to discuss strategic business plans and risk. Very fast-paced and dynamic.

2) Why and/or how did you get into in-house law?

Prior to law school I worked in business as an Industrial Engineer and Management Consultant and entered law practice as a business litigation attorney with an eye to eventually moving in-house. When I relocated to Florida from the Northeast, I made a decision to go in house and, luckily, found the right opportunity at the right time.

3) What do you feel is the greatest misconception about in-house counsel?

That we are super-serious and boring. Nothing could be further from the truth—at least on my team. We take our craft seriously, but we have a great deal of fun.

4) Before you worked in-house what is the most unusual or interesting job you have held?

The most interesting. While in law school I worked full-time as an Operations Manager at a mountain bike manufacturing company during the 1990’s boom years in that industry. The best part of that job was that the executives in the industry were young, irreverent, and non-traditional businesspeople. Board shorts and sneakers were standard attire. My company also sponsored a race team along with BMW and every employee was given a mountain bike to conduct “R&D” over the weekends and, sometimes, during work hours. I still have that bike.

5) What is the most peculiar request or question you have received as an attorney?

This is a very difficult question. Although non-business related, one story comes to mind. Very early in my career, while working at a small firm, I took a phone call from a potential client who had been injured in a car accident. Although I did very little PI work (in fact, none), I listened to his tale. Broken bones; hospital stay; lost work. Sounded like a great case for a second-year lawyer. As the conversation turned to the facts of the accident, I asked him about the driver who caused the accident. He then told me he was the cause of the accident as he was distracted and rear-ended a car at a traffic signal. When I told him he had no case, he was miffed because he had heard on TV that if he had been injured in an accident, an attorney could recover money for him. Hilarious!

6) What do you like to do when you are not working?

Travel, of course. Also, pretty much anything outside—golf, beach, biking, hanging by the pool, outdoor concerts, and even yardwork.

7) What do you consider your most important achievement as in-house counsel?

I was able to negotiate down a legal dispute with a potential exposure of \$13M to less than \$550K. It took nearly 9 months of hard negotiation and the other entity was a multibillion-dollar international software company with an army of attorneys. I am exceptionally proud of that outcome.

8) Work and home life. How do you get it all done?

I made a promise to myself years ago that work would not dictate my happiness. So, I focus when I am at work and force myself to leave at a reasonable hour every day. I target 5PM (not always successfully). Although I may still need to respond to emails, texts, or calls after hours or occasionally on weekends, I can do so from home on my time and still be there for my wife, son, and (of course) the dog.

9) What is something interesting about yourself that people may not know?

Since, 2002, I have been serving on an Advisory Board to a non-profit arts organization that screens independent films. Quite a different world for law practice and in-house legal work.

10) What I learned in law school that I still apply today.

My Corporations professor stated on the first day of class that a Corporate Attorney’s success is measured by keeping the client out of court. How true that is. That really resonated with me and I still quote him to this day.

11) What motivated you to become a lawyer?

I entered law school with no intention of becoming an attorney but with an eye toward buttressing my business credentials. However, once I started studying the law, I realized that it really fed my

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continued from page 11

passions for creativity and critical thinking. I knew I had to use this for the rest of my life.

12) What advice to you have for new in-house counsel?

Trust your instincts. You've made it through law school and passed the bar exam, so your intelligence is not at issue. If you believe something is right or wrong based on nothing more than a feeling, go with it and use it in your decision-making.

13) Tell us about your current role.

I am Associate General Counsel presently serving as Interim GC. Although my broader responsibilities have remained essentially unchanged, as GC I am much more intimately involved in ELT activities and strategic business planning. Hectic and demanding, but exciting and challenging.

14) Finish this sentence...If I wasn't a lawyer, I'd be...

A fiction writer.

15) I like being a part of the ACC CFL community because...

The people I've met are awesome. They have been so accommodating to me as a newcomer to Florida and I continue to learn from them and have even socialized with a few. I encourage all attorneys with whom I work to join.



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~ Erma Bombeck

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