Inside 3Q2020

ACC Association of Corporate Counsel

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President's Message

Larry Venturelli

Greetings and welcome to the Q3 2020 newsletter! It is hard to believe that by the time all of you are reading this newsletter summer will be coming to a close and the fall season will be upon us. If you are like me, you continue to work from home with little travel to the office, along with gearing up for a virtual start to my kids' school year.

As you know, after much deliberation, including a survey to our members, the ACC Baltimore Board made the difficult decision to postpone our annual Golf/Spa event until next year. This is truly a special event that is enjoyed by all who attend, and I look forward to planning the event for 2021. We will keep you posted on timing for next year's event as we continue to monitor the progress of COVID-19 advances through the end of the year.

In addition, the Board has also decided that luncheon programming and any social events shall be held virtually through at least the end of October. The Board continues to meet regularly to discuss the most recent COVID-19 guidelines and whether we will continue to operate remotely through the end of the year. We will continue to provide you legal presentations virtually as we work with our Sponsors.

We hope you were able to take advantage of the three series webinar last month- Leveraging LinkedIn to Advance Your Career: A Three-Part Career Development Series. The series featured Chris Batz, a Legal Recruiter of the Lion Group, who provided insightful principles on how to best showcase your experience on LinkedIn, how to make the LinkedIn Algorithm work for you and four steps to LinkedIn Visibility. Many thanks to Chris Batz for providing such great content and to past Board Member, Ed Paulis, for putting us in contact with Chris.

As we continue to navigate during this pandemic, I hope that everyone has been able to step away for a bit to relax and recharge, even with the limited options for travel and adventure. This year has thrown some new challenges at us and it is easy to find ourselves overwhelmed or becoming physically, mentally or emotionally drained. I urge you all, if you have not already, to take some time off and disconnect from the technology that is at our fingertips every day.

Lastly, I hope everyone took advantage of the new low rate for the Virtual ACC Annual Meeting. It certainly will be different not being able to see all of you there, but I know ACC will have some great content like they always do.

Stay Safe!

Yours truly,
Larry Venturelli

If you ever want to share any ideas or comments with the board, here is the current list of officers and directors:

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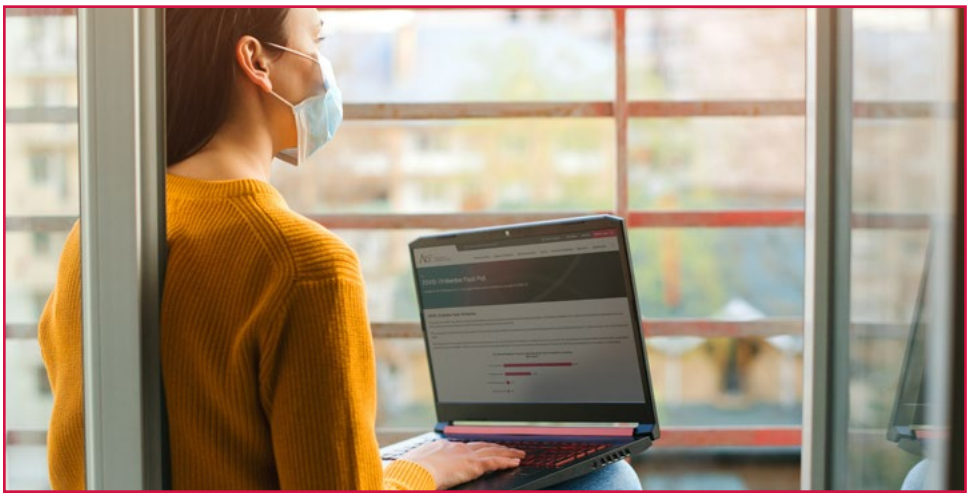
Upcoming Events

October 7, noon to 1:30 pm

Womble Bond Dickinson presents "You're Not Google, Facebook, Amazon or Apple: Why You Should Care About Congressional Antitrust Investigations into the Tech Sector"

How In-house Leaders Can Use Technology to Better Prepare for the Next Crisis

By Olga V. Mack



Members of my team recently asked me a question that many in-house lawyers have likely been hearing in one form or another: "The COVID-19 crisis is hurting the small business community. What are we, as a company, going to do about it?"

During a crisis, corporate counsel deal with many unknowns that make answering a question like this a tricky business. We often need to make decisions long before all the facts are revealed. There are no rulebooks; no straight lines that lead to all the right answers.

We can, however, take advantage of technology to ensure we are better informed during a crisis and better able to assist employees and clients. The use of technology tools can help you take decisive action now while also building continuity and stability into your business systems. This way, you are prepared to deftly manage any future crisis too.

Use technology to provide the stability employees crave

Saying the coronavirus pandemic accelerated remote work arrangements is an understatement. Rather, it forced the change like a mother bird pushing a baby out of the nest. During the pandemic, many employees feel overwhelmed, distracted, and unable to focus even if the switch to remote work is not new.

[Related: In-house at Home: Finding Normalcy in Uncertain Times]

At a time when employees crave order and consistency, technology provides dependable direction. Project management tools support remote coordination of tasks and responsibilities. Remote workers stay more engaged with a system that tracks and records milestone events. Automatic notifications inspire fast action and move projects along reliably. Everyone stays in the loop through informative dashboards.

In many ways, the push to rely more on technology now is helping teams build trust in digital frameworks that provide a strong sense of structure, inclusion, and consistency — the very bedrock of the longed-for stability employees need in the virtual workplace.

Spread your influence with automation

In-house leaders can use technology platforms as a vehicle to spread their influence throughout an organization. Through enterprise-wide automation, you dictate which actions are the inevitable result of a confluence of factors.

For example, Contract Management Software (CMS) automates the creation of contracts based on the information it receives from requesters. But you create the language options the software pulls from during automation. You develop the decision-trees the software uses to suggest alternative language. The result is the uniform inclusion of pre-approved language and clauses in contracts.

[Related: 5 Surprising Ways CMS Can Advance Your Legal Career]

In-house leaders also expand their influence by developing training programs and instruction manuals that help others apply technology in dealing with everyday business problems. These efforts help ensure seamless and long-lasting consistency — especially during the flux of a crisis.

Eliminate chaos with a uniform source of truth

Recently, GCs have needed to collaborate with outside counsel and internal executives to handle employment issues and determine what new legislation, such as the US Coronavirus Aid, Relief, and Economic Security (CARES) Act, means for their business systems.

It is much easier to assess the effects of recent events and legislation when documents are centralized and searchable within a single cloud-based platform. Everyone accesses the same information, which is stored in one location within tools such as client, employee, or contract management platforms. Data is more readily accessible, accurate, and up-to-date than that obtained from manually maintained spreadsheets and long and twisted email chains.

[Related: Remote Collaboration: 3 Ways GCs Can Improve Their Communication Skills]

The resulting uniformity reduces chaos in a crisis. Technology platforms offer

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a single source of truth that helps companies clarify priorities in navigating the ever-changing business and legal landscapes.

Understand business relationships

If you want to craft offers of assistance that are truly useful and meaningful to your business, you must understand the full nature of your contracts. Contract analytics help legal leaders navigate business relationships while centralizing the data and details lawyers need to empower business leaders to help themselves.

[Related: How Technology Shrinks Our Fictional Divide and Fosters Positive Change]

Your team can quickly answer questions like, "Can we create an offer that aids clients whose contracts renew in the next 30-90 days?" Or "Are there enough renewals to make it a worthwhile effort?" In other words, you can empower your team to have a much more functional and transparent relationship with contracts.

CMS and document management platforms also improve how you interact and work directly with others online. Simultaneously collaborating on the same document and communicating in real-time enhances mutual understanding and promotes the free flow of information and ideas.

Technology as a guiding tool

Technology's usefulness has never been more apparent. The COVID-19 pandemic pushed companies to rely on technology as a source of stability in the virtual workplace. Lawyers are finding they can trust automation to facilitate predictability, ensure reliability, and enforce uniformity in decision-making.

Ultimately, using technology now results in faster, easier access to more data-driven insights later, which helps us deal with uncertainty and chaos during a crisis and guides us in making decisions that are beneficial for our companies, our employees, and our clients for years to come.

For more advice and resources on coping during the pandemic, go to the ACC Coronavirus Resource page.

Author:

Olga V. Mack is the CEO and general counsel of Parley Pro, a next-generation contract management company that has pioneered online negotiation technology. Mack shares her views in her columns on *ACC Docket, Newsweek, VentureBeat, Above the Law, Bloomberg Law, and High Performance Counsel*. Mack is also an award-winning (such as the prestigious ACC 2018 Top 10 30-Somethings) general counsel, operations professional, startup advisor, public speaker, adjunct professor, and entrepreneur. She co-founded SunLaw, an organization dedicated to preparing women in-house attorneys to become general counsels and legal leaders, and WISE to help female law firm partners become rainmakers. Mack authored numerous books, including *Get on Board: Earning Your Ticket to a Corporate Board Seat* and *Fundamentals of Smart Contract Security*.

ACC News

2020 ACC Annual Meeting: Now Low Rate for the New Dynamic Experience

ACC will host the 2020 Annual Meeting entirely virtually and we want to see you there. You won't want to miss this year's program — including live interactive workshops, networking without limits, daily marquee speakers, access to the entire meeting's substantive content, and more! Reserve your spot today at acc.com/annualmeeting.

In-house Counsel Certified (ICC) Designation

The ACC In-house Counsel Certification Program, 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:

- **Alexandria, VA**, November 16-19

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:

- Virtual course starts September 12

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.

Force Majeure: How COVID-19 is Impacting Contract Considerations in Maryland

By Indira K. Sharma, Esq. and Douglas A. Sampson, Esq., Saul Ewing Arnstein & Lehr LLP*

Six months ago, that boiler plate *force majeure* clause at the end of a contract was barely noticed as contracting parties focused on negotiating and litigating seemingly more important terms and conditions. In the COVID-19 world, that "boiler plate" provision has become immensely important and could determine whether the contract remains enforceable. Parties are now scrutinizing their existing contracts to determine what excuses to performance may be found in *force majeure* clauses or, on the other side, what grounds exist for insisting on continued performance. Where no *force majeure* clause is present, parties are considering other common law contract defenses including impossibility, impracticability and frustration of purpose to assess performance of contractual obligations.

The COVID-19 pandemic has created numerous impediments to contractual performance arising from supply chain issues, stay-at-home orders, travel restrictions, and the shutdown of non-essential businesses. COVID-19 litigation is already underway across the country in California, Florida, Massachusetts, New York and Virginia with a substantial increase expected in the years to come.

While there is much uncertainty about when COVID-19 will end, one thing is certain – parties can take control right now to reduce their exposure to potential COVID-19 contract litigation in the future by adding pandemic-specific provisions, including *force majeure* clauses, to any new contracts and amending existing contracts where possible. Parties that bear little risk arising out of COVID-19 may want to ensure the other party to the contract performs their obligations by restricting or eliminating *force majeure* provisions.

Whether COVID-19 is deemed an excuse for contract performance will ultimately depend upon the specific language of any *force majeure* clause in the contract and/or the application of other common law contract defenses amid a sea of developing and shifting law, particularly in Maryland where there is little precedent on *force majeure* issues. Taking calculated steps now to protect your interests may prevent more significant legal issues down the road.

What is a *Force Majeure* Clause?

Force majeure is French for "superior force" and a *force majeure* clause is defined by Black's Law Dictionary as "a contractual provision allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled." The purpose of a *force majeure* clause is to allocate risk between parties by relieving them of their obligation to contractually perform when an unforeseen event occurs.

A *force majeure* provision must be expressly included in a contract in order to be invoked. It is not a statutory or common law right. Whether the provision actually excuses performance will be determined on a case-by-case basis and will depend on the specific language of the provision, the law of the jurisdiction, and the specific facts of the case.

A *force majeure* clause may be in the form of an exclusive provision if it lists specific triggering events such as war, civil unrest, labor strikes, fire or extreme weather. A *force majeure* clause can also be inclusive (i.e., non-exclusive) where it includes "catch all" language that expands the scope of the type of events covered simply by using the words to the effect of "including" or "without limitation" to indicate that the events listed are possible triggering events but do not constitute an exhaustive list.

An Act of God is a particular type of *force majeure* event often listed as a triggering incident for the clause to apply. An Act of God is a natural event that is not man-made and that is beyond human control. This means that an Act of God cannot be caused by human intervention or even human negligence. Natural events typically include natural disasters such as hurricanes, tornadoes, earthquakes and floods. Courts in other jurisdictions have held that illness is an Act of God. In order for an event to be deemed an Act of God so as to excuse contractual performance, the Act of God must be the sole event causing the breach of contract. Jurisdictions are split on whether Act of God clauses are enforceable. The few Maryland cases that have addressed the issue have generally stated that a party may not recover damages for injury inflicted by an Act of God.

Force Majeure Clauses in Maryland

Maryland courts have been virtually silent on the application of *force majeure* causes. There is little binding precedent on the issue within Maryland jurisprudence.

The critical issue with COVID-19 *force majeure* litigation is whether Maryland courts will recognize the pandemic as a *force majeure* event. Most *force majeure* provisions do not currently list pandemic, illness, disease or health emergency as a triggering event making it generally difficult to invoke a clause on the basis of COVID-19. It is more likely that a *force majeure* clause will list "Act of God" as a triggering event and then the issue will become whether COVID-19 qualifies as an Act of God.

Under the cases in other jurisdictions establishing that an illness is an Act of God, one could certainly argue that COVID-19 qualifies because it is a natural virus. The counter arguments to anticipate are (1) that COVID-19 could have been manmade in a laboratory, as some have hypothesized and/or (2) COVID-19 itself is not the sole cause of any breach

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because it is the human response to the virus that is causing the breach. Specifically, many of the breaches at issue in *force majeure* litigation are not caused solely by the existence of the virus itself but are instead caused by government orders relating to the shutdown of operations, social distancing, prohibitions on gatherings and travel restrictions. Any type of human interference or other intervening factors contributing to the breach will prevent a party from raising Act of God as an excuse for contract performance.

Even where a *force majeure* clause does not include pandemic, illness, or Act of God, it may disclaim performance due to governmental orders or regulations. Due to the thousands of executive orders and regulations promulgated across the United States, failure to perform due to governmental orders may be the heaviest litigated COVID-19 issue. Whether the governmental regulation triggers the *force majeure* provision will depend on whether the regulations were mandatory or suggested guidance.

The Unpredictability of *Force Majeure* Clauses

The enforceability of *force majeure* provisions can vary widely from jurisdiction to jurisdiction. In some jurisdictions, courts will only excuse performance if the events are specifically enumerated in an exclusive contractual provision. In other jurisdictions, courts will excuse performance if they believe that the more expansive "catch-all" phrase in an inclusive (i.e., non-exclusive) provision includes the event at issue. For example, Delaware courts have held that including "any reason whatsoever" as part of the *force majeure* clause may expand its protections.

The dichotomy in the approaches by various states is further complicated by the lack of relevant case law. There is a dearth of opinions interpreting and enforcing *force majeure* provisions, particularly as they relate to a pandemic and government regulations during a state of emergency. The case law that is available provides that *force majeure* clauses should be considered on a case-by-case basis. The lack of a bright-line rule and substantive case law will lead to inconsistent and unpredictable outcomes as COVID-19 litigations inundate courts over the next several years.

Contract Construction and Common Law Defenses During the Pandemic

As in many jurisdictions, Maryland attorneys are left with the pillars of contract interpretation and any guidance from state courts about the application of common law contract defenses such as impossibility, impracticability and frustration of purpose. Using these tools, attorneys can try to anticipate how Maryland courts will address contract issues during the COVID-19 pandemic.

Maryland courts follow the objective law of contracts and will generally interpret a contract clause by looking to the contract language and applying the customary, ordinary and accepted meaning of the language. Maryland courts generally will not excuse performance of a contract if the interruption in performance was foreseeable. Foreseeability is often the deciding factor in commercial impracticability cases.

In some jurisdictions, in order to be excused from a contractual duty, a party must first attempt to perform its obligations and be thwarted by the event. Maryland courts have offered little or no guidance in this area. In the COVID-19 world, attempting to perform a contractual obligation often translates to violating the laws and regulations promulgated by a state in response to the pandemic. Under Maryland law, a contractual provision cannot be enforced if it would break the law or violate public policy. This allows for the argument that contract performance must excused where performance can be deemed to violate an emergency governmental order in response to the pandemic.

Maryland courts recognize the common law contract defenses of impossibility, impracticability, and frustration of purpose. Maryland courts treat the doctrines of impossibility and impracticability identically, because Maryland (unlike other jurisdictions) does not require a showing of actual impossibility of performance. A showing of impracticability because of extreme or unreasonable hardship, expense, injury or loss is sufficient to excuse contractual performance. To establish any of these common law defenses, a party to a contract must establish: (1) that the event was not reasonably foreseeable; (2) the party did not assume the risk of the event or did not fail to protect itself with an appropriate contract provision; (3) performance of the contract is impossible or completely frustrated; and (4) the party seeking to be excused bears no culpability for the occurrence of the event.

Foreseeability will likely be a hot point of contention for disputes involving these common law doctrines. For contracts executed before the pandemic, there is a strong argument that the wide sweeping effects of COVID-19 were not reasonably foreseeable. The analysis is much more complicated for contracts executed once COVID-19 became widespread. For contracts executed during the pandemic, a party may argue that common law defenses are inapplicable because the effects of COVID-19 were well-known and foreseeable when the contract was executed. However, pinpointing the exact time when COVID-19 effects went from unforeseeable to foreseeable is complex. As COVID-19 spread, some states immediately executed emergency orders and shut down non-essential businesses, while others remained open entirely. The public often received conflicting information from health officials, and the federal and state governments. Whether the effects of COVID-19 were foreseeable may depend on both when and where the contract was executed as foreseeability of the impact of COVID-19 could vary across states. As a result, disputes involving common law defenses may be fact intensive, unpredictable, and ultimately determined on a case-by-case basis.

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Careful Contract Construction Can Avoid COVID-19 Issues

As with many contractual disputes, it is vital to have a carefully drafted provision that anticipates potential issues and adequately protects your rights and interests. Regardless of the jurisdiction or the applicable law, courts will give effect to the plain meaning of a contract and enforce the intent of the parties. Accordingly, contract language that specifies COVID-19, pandemic, epidemic, virus, illness, health emergencies, government order and/or shut downs as *force majeure* events should be included in a *force majeure* clause if your goal is to preserve your right to avoid contract performance that may be hindered by these events. On the other hand, if your goal is to ensure that the other party to your contract will perform regardless of COVID-19 circumstances, then you would want to ensure that there is no *force majeure* clause in the contract or that any *force majeure* clause is limited sufficiently to ensure contract performance.

There are a variety of provisions you may want to consider, including unilateral *force majeure* clauses that protect one party, or mutually beneficial *force majeure* clauses that protect both parties equally. These clauses can be adapted for many business models and to ensure protection against liabilities related to COVID-19. Until the pandemic ends, you must anticipate the pervasive effects of COVID-19 and carefully scrutinize pandemic-related provisions to protect your interests.

Best Practices:

- Review your existing contracts to determine if you bear any risk arising out of COVID-19 in fulfilling your performance obligations and determine if you can re-negotiate and amend to add a force majeure clause that would cover a pandemic such as COVID-19.
- If you have a force majeure clause and would like to invoke it because of COVID-19, be sure to comply with any notice requirements and deadlines. Even if there is no notice requirement, you should send a notice anyway.
- Be mindful of your duty to mitigate damages.
- Add a force majeure clause to new contracts to protect your right to avoid contractual performance if an event such as COVID-19 occurs.
- Be aware of other parties to your contract requesting force majeure clauses to relieve their obligations to you and negotiate appropriate limitations.
- Specify the alternative options available to the parties if a covered force majeure event occurs.
- Identify specific effects COVID-19 could have on your business model (reduction in work force due to illness, mandatory closure, supply-chain issues, etc.) and plan for these circumstances in your contracts.
- Review your insurance policies to determine if your business interruption or other losses are covered.
- Be mindful of the fact that you might find yourself on both sides of the issue (i.e., wanting to invoke force majeure in one case and then wanting to reject force majeure assertions in another case) and that the legal positions taken should be consistent.

The information in this article is current as of July 28, 2020.

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*Indira K. Sharma and **Douglas A. Sampson** are members of Saul Ewing Arnstein & Lehr's Force Majeure litigation team resident in the firm's Baltimore office. The team advises clients across the country with issues related to contract performance and disputes in light of force majeure events including the COVID-19 pandemic. The team reviews existing contracts for options to delay or avoid performance, drafts and responds to force majeure notices, prosecutes and defends breach of contract litigation involving force majeure and contract-related doctrines. For more information, contact Indira K. Sharma at (410) 332-8621 or indira.sharma@saul.com or Douglas A. Sampson at (410) 332-8661 or douglas.sampson@saul.com. Visit www.saul.com to learn more about the firm and its capabilities.

COBRA Notice Litigation: Heightened Scrutiny Likely in Troubling Times

Devin Karis, Gordon Feinblatt LLC

The COVID-19 virus brought with it not only a national health crisis but also a national unemployment crisis. With workforce reductions, furloughs, layoffs and other cutbacks becoming more common from the virus' fallout, employers and administrators of health plans governed by the Employee Retirement Income Security Act of 1974, as amended (ERISA), would be wise to review the requirements of the notices that must be sent to "qualified beneficiaries" under the Consolidated Omnibus Budget Reconciliation Act (COBRA).

Beginning in 2019, a number of class action lawsuits were brought in federal court against high-profile health plan sponsors (e.g., Pepisco, Petsmart, The Hershey Company and others) alleging certain technical violations of COBRA's notice requirements. Not only have these types of lawsuits continued apace, but in light of 2020's economic downturn, scrutiny of COBRA notices by diligent plaintiffs' counsel is likely to intensify.

As a reminder, COBRA amended ERISA to allow for the continuation of health coverage for an insured employee, spouse or dependent who would otherwise lose coverage as a result of their termination of employment, death or other "qualifying event." In general, COBRA requires that upon a qualifying event, the health plan's sponsor or administrator must provide each qualified beneficiary (i.e., former employee, spouse, former spouse or dependent child of a former employee) the ability to elect, within a specified election period, the option to continue coverage. Notice of the ability to elect continued coverage must meet 14 strict content standards. Most notably, the notice must include the following:

- The name of the plan andthe name, address and telephone number of the party responsible for the administration of the continuation coverage benefits;
- Identification of the qualifying event;
- Explanation of the plan's procedures for electing continuation coverage, including an explanation of the time period during which the election must be made and the date by which the election must be made;
- Explanation of the consequences for failing to elect continuation coverage;
- Explanation of the maximum period for which continuation coverage will be available under the plan, if elected; an explanation of the continuation coverage termination date; and an explanation of any events that might cause continuation coverage to be terminated earlier than the end of the maximum period;
- Description of the amount, if any, that each qualified beneficiary will be required to pay for coverage; and
- Description of the due dates for payments, payment grace periods, the address to which payments should be sent and the consequences of late payment.

(The foregoing list is a non-exhaustive list of COBRA's regulatory notice content requirements; employers, plan sponsors and administrators should consult the regulations at 29 CFR 2590.606-4 for more detail.) To assist employers with COBRA's notice content compliance, the U.S. Department of Labor (DOL) published a model COBRA notice.

The recent spate of COBRA notice litigation cases all seem to allege similar facts of which plan sponsors and administrators should be aware. Specifically, these cases alleged the following:

- Defendants opted out of using the DOL model notice, choosing instead to draft a tailor-made, arguably deceptive notice;
- Notices omitted the required continuation coverage termination date;
- Notices omitted the specific contact information of the health plans' COBRA administrators; and
- By failing to explain COBRA election procedures clearly, (i.e., omitting important information on missed COBRA premium payments, by providing the required information piecemeal over multiple mailings, and not providing COBRA notices in Spanish, among other issues.) the notices were not written in a manner easily understood by the average plan participant.

Citing the above regulatory violations, plaintiffs' counsel sought injunctive relief, requiring new notices at the employers' expense, "appropriate equitable relief" under ERISA, statutory penalties to of $110 per day for each class action plaintiff, attorneys' fees and costs, and other relief deemed appropriate by the court. Publicly available information reveals settlements as high as $1.25 million.

In light of the nation's economic hardship and increased employee turnover, health plan sponsors and administrators should review their COBRA notices for regulatory compliance, ensure that the method(s) of distribution meet legal standards, and make revisions as needed. Doing so will provide peace of mind for employers weary of the COVID-19 crisis and wary of what else may lie ahead in 2020.

Author:

Devin Karis is Counsel in the Benefits/ERISA law practice in which he focuses on employee benefits and executive compensation.

Devin Karis

Protecting Your Trade Secrets in the COVID-19 Era

By Liane Kozik

The greater number of employees now working from home has made the task of protecting valuable trade secrets more challenging than before the COVID-19 pandemic. However, employers' legal requirement to take reasonable steps to protect their valuable information remains unchanged.

If an employer ends up in litigation over misappropriated trade secrets by a former employee, under both the federal Defend Trade Secrets Act, 18 U.S.C. §1836 *et seq.*, (DTSA) and the Maryland Uniform Trade Secrets Act, Md. Code Ann., Com. L. Art. § 11-1201 *et seq.*, (MUTSA), courts will look at whether:

1. The former employee with access to the company's information converted it for their own use;
2. The information the employee took has independent economic value because it is not generally known;
3. The information the employee took is not readily ascertainable by proper means by others to whom it would be valuable (i.e., competitors); and
4. The employer took reasonable steps to maintain the secrecy of the information.

This article focuses on the "reasonable steps" employers can take to maintain the secrecy of their trade secrets under the last factor. It also includes tips on preserving evidence crucial for a potential trade secret misappropriation claim.

Use Confidentiality Agreements

Confidentiality agreements can help a company protect its trade secrets. Compared to a non-compete agreement, confidentiality agreements are more broadly accepted and have been upheld by the Maryland courts. (Courts in Maryland may not enforce non-competes, however, when an employee loses their job through no fault of their own during a global pandemic with high unemployment.) When determining whether a company has taken reasonable steps to protect its trade secrets, the employer's requiring a confidentiality agreement is considered by the court.

When drafting the confidentiality agreement, clearly define what is considered "confidential" and a "trade secret" so an ordinary employee would understand it. Not all information an employee has access to is a "trade secret." Generally, trade secrets are financial, business, scientific, technical, economic or engineering information, including plans, patterns, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, customer lists, or codes with independent economic value that are not generally known to competitors. 18 U.S.C. §1839(3). Conducting a short training for employees explaining the company's confidentiality policy and what exactly it considers a trade secret will help prevent employees from acting negligently with information the employer wants to keep confidential and show a court how seriously the employer takes protecting its trade secrets.

The employer also can include provisions in a confidentiality agreement that would help it in litigation. For example, the employer can include a clause where the employee affirms having access to the employer's trade secret information. Such a clause helps guard against the employee claiming otherwise early on in litigation. The employer also can include a provision where the employee agrees to returning or destroying all confidential or trade secrets in their possession upon termination of employment. This gives clear notice of expectations and help demonstrate the employer is taking reasonable steps to prevent disclosure of its confidential information and trade secrets. Additionally, the type of relief (such as injunctive relief and attorneys' fees) the employer would be entitled to if it must enforce the agreement and prevails can be included and can provide leverage in obtaining a preliminary injunction and forcing early resolution.

While confidentiality agreements are routinely signed by employees at the start of their employment, put in their personnel file, and forgotten, these agreements can be reaffirmed throughout employment. For instance, consider asking employees to reaffirm and acknowledge their existing confidentiality agreements when they get a promotion, a raise, or—because of COVID-19—begin working from home. This acknowledgment should reference the original confidentiality agreement they signed and be clear that it is not replacing the old agreement, but simply reminding the employee of their current obligations.

Even an employer that does not have confidentiality agreements with all of its employees may consider a policy on confidential information in its employee handbook. Courts in Maryland have viewed such a handbook policy as a positive indication the employer is taking reasonable steps to maintain the confidentiality of its trade secrets. It is easier to demonstrate the employer took reasonable steps to protect its information if it has *both* a general handbook confidentiality policy and individual confidentiality agreements, in addition to the safeguards discussed below.

Restrict, Monitor Employee Access to Trade Secrets, Computer Systems

Courts also look to what additional safeguards the company has in place, such as restricting or monitoring employee access to its trade secrets to determine whether the employer took reasonable steps to protect its information.

Information the employer truly believes is a trade secret can be limited to employees on a need-to-know basis, such as restricting access to certain employees on the company's computer systems. Another practice to help safeguard trade secrets is to limit employees' ability to download or print trade secret information. Additionally, if employees are working remotely, the employer can require employees to use company-issued computers. This also allows the

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employer to take additional security measures, such as disabling the use of USBs on the laptop, access to personal emails, or uploading to share file websites. These and other measures can make it less likely an employee will be able to misappropriate trade secrets in the first place or store them on a personal laptop or other devices while working from home. In *Glynn v. Impact Sci. & Tech., Inc.*, 807 F. Supp. 2d 391, 435 (D. Md. Aug. 25, 2011), the court said a company's efforts only need to be "reasonable" and not "foolproof."

An employer can also monitor who is accessing, downloading, printing, or otherwise modifying its trade secrets. Cloud-based databases or other software typically have logs of all activity related to certain files that is often stored for a few months, but the storage duration can be increased. These logs can help prove an employee misappropriated trade secrets.

Employee Off-Boarding Procedure

Off-boarding employees can be particularly challenging during this pandemic. Luckily, many off-boarding functions can be performed remotely—the IT Department can disable access to company systems, electronic devices (including removing past emails and data from remote devices), and accounts; exit interviews can be conducted by video or phone; and employees can e-sign documents establishing their continuing confidentiality obligations. Investment in these technologies can help protect the employer's trade secrets. The employer also can ask the employee to certify they have not retained any physical or electronic copies of company data, information, or other property and that everything has been returned or destroyed.

In additional, consider not recycling or upgrading the operating system of computers of newly off-boarded employee right away, especially if the former employee resigned suddenly, was in a position of power with access to some particularly valuable trade secrets, or may be going to a competitor. A forensic evaluation of the computer can prove crucial in trade secret misappropriation litigation. If the computer is needed for another employee, IT can make a full copy of the hard drive before it is reused.

Conclusion

Given the current status of the pandemic, working from home will continue for the foreseeable future. Certain steps can be effective in protecting an employer's trade secrets when employees have more access to that information outside the normal controlled office environment. Further, these and other steps can be an effective way to preserve the employer's legally protectable interest in its trade secrets in the event of litigation.

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