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ACC Association of Corporate Counsel
BALTIMORE

FOCUS

President's Message

Dan Smith

Greetings and welcome to the 2021 Third Quarter newsletter! It is hard to believe that we are already into October. We are starting to get that fall chill in the air, Justin Tucker has already set an NFL record for the longest field goal in league history, and the fall routines are starting to kick in. Oh, and we still are living with this thing called COVID.

One of the ways that the Chapter is trying to adjust is by holding events outdoors. We just completed a successful outdoor gathering, the annual Golf/Spa event, which was adjusted to Golf/Wine, because of the concern of hosting indoor Spa activities. In another change, the event was held at the Rolling Road Golf Club this year. Six teams competed for the coveted ACC Baltimore Cup in the golf outing and a nice crowd came together for the Wine tasting on the veranda of the Club. And, a third group of potential golfers gathered for a Golf Clinic taught by the Club pro (I hope to see them on the course next year). The evening concluded with a dinner that was set on the Club's patio near the pool. Fortunately, the weather cooperated; we all remained dry, and a lovely evening was enjoyed by all. I hope we see you next year.

We continue to monitor the recommendations of health officials and to be guided by feedback from each you, our members, and with our law firm sponsors to determine how events will continue to be held. As the weather cools, our opportunities for hosting outdoor events will diminish along with the decreasing temperatures, and we expect to be hosting virtual events. The bottom line is that ACC Baltimore continues to be an active Chapter, and we are continually looking for opportunities to bring programming to each of you, socially and professionally.

As evidence of that, we hope you were able to take advantage of the "Cocktails by the Lake" in August, sponsored by Jackson Lewis. Members and others were able to gather at Citron, located at Quarry Lake, for networking and cocktails. The view from the patio at Citron is quite lovely and unexpected. The Chapter also offered a (virtual) seminar on Protecting Your Brand and Your Creativity, presented by our sponsor Gordon Feinblatt. Ned Himmelrich of the firm gave the member of the Chapter a fascinating look at how each of our companies can protect their key intellectual property in a number of areas, including copyright, trademark, and even tips in dealing with cybersquatters. As one who dabbled in trademark registration, I picked up a few new hints and ideas. Thank you, Ned.

We continue to work on additional programming for the rest of this year, so keep an eye out for further announcements. I hope to "see" you there (or maybe without the quotes).

On a personal note, as we continue to navigate through this pandemic, I hope that you have taken some time to step away in order to relax and recharge. Some things have gotten a bit easier, with more expanded options for travel and leisure, but it can still be a challenge to get that time. COVID continues to make life a challenge, 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 attend in person, but I know that the ACC will have some great content - they always do.

Stay Safe!

The Role of Lawyers in the Face of Increasingly Capable Technology

By David Field, Canon Australia, Chief Legal Counsel and Director, People & Finance

It is something of a tired cliché these days to talk of the threat of artificial intelligence (AI) replacing lawyers. There are already substantial places where increasingly intelligent technology is performing tasks that lawyers used to perform, and we should expect technology to make increasingly aggressive inroads into the practice of law in upcoming decades.

No sensible lawyer should resist this trend, and in fact, the true challenge for lawyers lies in achieving a type of collaboration with technology. Lawyers need to use technology to rapidly and efficiently solve high-volume or routine issues, freeing themselves to apply their uniquely human skills to deliver more value for clients and the community.

So, what are these uniquely human skills, and how should we be looking to deliver more value with them? I'm being told I need to collaborate — what's my contribution to the collaboration?

In this discussion, I have been somewhat undisciplined in relation to how I use terms like "artificial intelligence." A common definition of artificial intelligence relates to the use of technological systems to perform tasks normally associated with human intelligence. The definition is fuzzy and slightly circular, but the linkage back to "normally associated with humans" is very well suited to the present discussion. We're talking about technology that does things we (or people like us) used to do.

The impact of technology on the practice of law could be described as disruptive. Many established businesses seem to fear disruption and treat it as something to be avoided, as though disruption were something random and calamitous, like an asteroid collision striking the earth.

But the reality is that, at its heart, if your business is disrupted it means that someone else has found a better or cheaper way to add more value to your customers. If you want to avoid being disrupted, either as a business or in your professional career, you should be focused on delivering as much value as possible and should keenly embrace any tool or technology that allows you to achieve this.

Much of the traditional role of lawyers has been intermediating complex information and processes for clients. The average layperson lacks the time and training to research the law themselves or execute complex processes such as a sale of business. Lawyers are trained where to look for the law and how to understand it when they find it; and have training and experience in navigating complex legal processes.

Without wanting to be disrespectful, much of the routine practice of law for the average consumer of legal services can boil down to the skillful, neat, and efficient execution of administrative processes. When seen in this way, technology can facilitate equal access to law.

Legal knowledge, processes, and logic-flows can be captured in technological systems that guide laypeople through the options available to them and the key decisions they need to make, making legal advice accessible without the need for an expensive professional human to dedicate their time. From a public policy perspective, and provided quality control concerns can be met, more people having greater access to the law at lower cost must be a good thing, and lawyers should be embracing it.

A perpetual dilemma for industries and enterprises faced with threatened disruption is the need for cannibalism of legacy revenues. Many would be familiar with the story that Kodak invented the digital camera in the 1970s but didn't invest in further developing it because it was incompatible with their lucrative film businesses.

The rest is history, to the point where a "Kodak moment" has become synonymous with an incumbent missing the opportunity to pivot into a new opportunity, therefore dooming themselves to irrelevance. Any lawyer who resists opportunities to use technology to deliver more value to clients is courting their own "Kodak moment."

So, if lawyers increasingly delegate lower-order tasks to technology in order to deliver better value for their clients, where should they be looking to offer unique human value-add? I propose the following (non-exhaustive) starting list of higher-order skills that lawyers should be looking to deploy for clients:

- Insights and opportunities
- Judgment/wisdom
- Values
- Empathy

Insights and opportunities

If you asked clients to describe what they expect from their lawyers, I doubt many would offer the words "insight" and "opportunity." However, it is one of the easiest ways to add profound value to a client and establish yourself as a trusted adviser. In the process of performing more traditional legal functions, lawyers often have an opportunity to see the client's business or affairs from a perspective that the client themselves rarely sees.

Where the lawyer is working on disputes, they will be able to see repeat issues or root-causes of problems that are causing unwanted expense, distraction, and customer dissatisfaction. Where the lawyer is working on customer contracts, they will be able to see repeat issues that are triggering customer objections, slowing sales, or causing mismanaged customer expectations. A good human lawyer is on the look-out for these sorts of insights to help their client improve.

Similarly, through being a repeat-player on some of the most challenging parts of clients' lives, lawyers are often in the box-seat to identify opportunities to generate value for clients. A key example that comes to mind is the role that the Disney

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legal team played in recent decades in their IP protection strategy.

Disney is faced with the progressive expiry of copyright in large swathes of its catalogue, starting with the iconic Steamboat Willie, which brought Mickey Mouse to the world, and becomes public domain from 2024. The Disney legal team has been able to pivot the focus of IP protection from copyright into trademarks, extending the useful life of the catalogue.

Judgment/wisdom

Perhaps not surprisingly for a higher-order human skill, I struggle to precisely define judgment and wisdom. I think the relevant sense in which I am using it here is the ability to go beyond data to a synthesis of complex environmental factors that shape or constrain the courses of action that are genuinely available.

By way of example, in a large corporation dealing with consumers, it is essential that any proposed course of action is judged against a social media or talk-back radio test. The company's contractual rights may be perfectly clear, but if enforcement of those rights would be judged harshly by a substantial community when reported or discussed on Facebook, Twitter, or talk-back radio, then any quality legal advice on the subject should reflect this.

Values

In a similar vein, recent regulatory developments such as the Hayne Royal Commission and the Bergin Inquiry into Crown Casinos here in Australia, have shown that poor corporate values can result in serious adverse commercial outcomes, and highlighted that anyone responsible for brand, reputation, and risk in a company should be keenly interested in the corporation's values, and the mechanisms for ensuring actions are aligned with those values.

Among many other excellent reasons for having strong values, alignment between a company's actions and its stated values will be a critical factor in determining the degree of trust placed in the company by customers, partners, regulators, and the broader community. As with the social media or talk-back radio test, there will be courses of action that are legally available that simply do not align with the company's values. Legal advice that does not flag important values issues is inadequate legal advice.

Empathy

Intertwined with the last two skills is empathy — the ability to understand the thoughts and feelings of another human. I am aware of research on areas such as robotic interpretation of body language, and that humans are often nowhere near as good at reading another human's emotions as they would like to think. However, I would assert that it's impossible to provide quality legal advice in complex situations without empathy.

Ideally, to provide quality legal advice in complex situations you need to be able to understand as much as you can of the circumstances, aspirations, values, risk appetite, and concerns of your client in order to provide the legal advice that they need. Obviously not all issues justify that — the answer to some simple questions may be black and white, and some problems simply don't justify the additional legal effort. But in complex situations involving competing considerations and a degree of risk, the legal solution must be responsive to the needs of the individual client sitting in front of you.

Ultimately, law is a human system. Yes, the practice of law involves data and logic-flows in ways that may not have been apparent to our legal forebears, but ultimately legal systems add the most value when they serve humans. Across the economy there is strong market demand for people with the skills, awareness, and passion to make systems work better for humans, and I personally believe the legal profession will not be an exception. I know what I'm going to be trying to contribute to this collaboration.

ACC News

2021 ACC Virtual Annual Meeting: October 19-21

It's here! The 2021 ACC Annual Meeting program is ready and it's jam-packed with valuable substantive and career-focused content you don't want to miss. Check it out!

ACC In-house Counsel Certification Program: November 1-11

The In-house Counsel Certification Program covers the core competencies identified as critical to an in-house career. This virtual training is a combination of self-paced online modules and live virtual workshops. The workshops will be conducted over a two-week period, four days a week for three hours each day.

2021 ACC Securities Law Disclosure: November 3-5

New York, NY

Join the conversation in the room where it happens! Amp up your securities law skills at this one of a kind executive level seminar where we will teach you everything you need to know to participate in those C-suite discussions.

ACC Data Steward Program

Law firms are holding some of your company's most sensitive data but are you certain that it is secure? The Data Steward Program – Single Client Option – allows you to gain assurance that your law firms are secure, while the DSP Program does all the work. Learn more.

Move Here and We'll Pay You: State and Local Relocation Incentives

By Nicole Lacoste Folks, Gordon Feinblatt LLC

States have long used economic development incentives, such as tax abatements, grants and training programs, to encourage certain businesses to relocate there or keep their operations inside state lines. Now, states and municipalities are using more individualized economic incentives to entice remote workers to relocate to their small towns and urban areas on either a short-term or permanent basis.

In Alaska, paying residents to live there is not new. In 1982, the state legislature authorized annual dividend payments to all six-month state residents with the first payment totaling $1,000 per person. In 1988, Alaska established its Permanent Fund Dividend Division, funded by the state's oil revenue, and tweaked its program requirements after a couple state court rulings. The residency requirement was changed to one calendar year and dividend recipients had to demonstrate proof of residency or an intent to establish residency in Alaska. The dividend amount fluctuates depending on the annual oil revenue the state receives. In 2019, the dividend was $1,606; in 2020, the amount was $992. Since the program was established, the highest annual dividend paid was $2,069 in 2008 and the lowest, $331.29 in 1983.

The Vermont legislature recently enacted two incentive programs to help increase its population and address the aging workforce available to Vermont employers. The New Remote Worker Grant incentivizes remote workers to move to Vermont while they continue to work for an out-of-state employer with a one-time maximum award of $7,500 based on qualifying relocation expenses. This program will become available in early 2022. The New Relocating Worker Grant provides a one-time maximum award of $7,500 based on qualifying relocation expenses to an individual relocating to Vermont on or after July 1, 2021, who's working a full-time job identified by the state Department of Labor as having the most available openings. These jobs include secondary school teachers and substitute teachers, farm and ranch workers, carpenters, registered nurses, and hospitality sector positions, such as bartenders, cashiers, hostesses, cooks and dishwashers. Both programs disburse funds on a reimbursement basis after the individual relocates to Vermont; funds are available on a first-come, first-served basis.

West Virginia is combining its Ascend WV Program with its great outdoors to attract new residents. The state will pay new residents $12,000 to move to Morgantown, Lewisburg or Shepherdstown. If the new resident resides in the state for a second year, the state will pay an additional $2,000 incentive. Eligible recipients must be able to work remotely for a business outside of West Virginia or must be self-employed with an out-of-state business that can be managed remotely, if necessary. Free local co-working office space is also provided. To capitalize on the state's natural beauty, the Ascend WV Program also offers participants access to free gear rentals through West Virginia University's "gear library," including kayaks, bikes, climbing gear and other equipment. To help acquaint new residents with West Virginia's various landmarks, program participants are offered a complimentary pass on the Country Roads tour.

Local municipalities are also offering their own incentive programs. Topeka, KS, and Shawnee County have their Choose Topeka program to attract new residents working for a local employer or working remotely. The program offers on-site program participants $10,000 toward residential rental payments or $15,000 toward the purchase of a house. Remote workers can receive up to $5,000 toward residential rental payments or up to $10,000 toward the purchase of a house. Under the program, on-site participants must confirm that their local employer is participating in the Choose Topeka program and remote worker participants must work for an employer outside of Shawnee County. As a bonus, Jimmy John's Gourmet Sandwiches may award an additional $1,000 to program participants who relocate in one of three Topeka delivery zones designated by Jimmy John's and meet other conditions.

Another approach to attracting new residents is giving away free buildable lots. Lincoln, KS, offered free buildable residential lots, ranging between 14,000 and 35,000 square feet, that were connected to public streets and water and sewer systems. If an applicant agrees to build a residential structure on the lot at the applicant's own expense while complying with the town's design guidelines and restrictive covenants, the City Council would vote on the application and if approved, the applicant and the City would sign an agreement before a deed could be recorded in the local land records. With this incentive, a participant does not need to physically move to Lincoln and establish residency there. The program allows participants to re-sell the property to another would-be resident once the structure is completed and all obligations under the signed agreement are fulfilled.

These incentives augment employer efforts to attract the right employee talent in the right place. While individual employer relocations are targeted on an as-needed basis, these public funds can attract a broader population with no local employment connection and encourage remote workers who could practically live anywhere to experience a new place while supporting a local economy.

Author:

Nicole Lacoste Folks

Nicole Lacoste Folks is a Member of Gordon Feinblatt's Real Estate & Environmental & Energy Teams. She focuses on acquisitions, leasing, zoning, land use and administrative approvals for complex commercial projects. Her experience also includes Planned Unit Development ordinances and amendments, digital billboard conversions and retail/office sign approvals, liquor license approvals, and economic development incentive contracts, such as tax abatement incentives and statutory incentives.

Her clients vary from local small businesses to Fortune 50 companies, each benefiting from her experience with retail, residential, office and industrial projects. Nicole's interest in land development, community livability and administrative approvals lead her as a law student to pursue a dual degree of law and urban planning. Her clients continue to benefit from her planning background as she effectively communicates with local governments on real estate matters.

Union and Non-Union Employers Beware: New NLRB GC Signals Intention to Favor Employees and Unions

By Chad M. Horton, Shawe Rosenthal, LLP.

On August 12, 2021, the recently confirmed General Counsel (GC) of the National Labor Relations Board (NLRB), Jennifer Abruzzo, issued her first official memo. Per an NLRB press release, GC Memo 21-04 "lays out a clear agenda…on some priorities of the Office of the General Counsel." The memo directs NLRB field offices to submit cases addressing issues identified in the memo to the Regional Advice Branch of the Office of the General Counsel. Often, such submissions are the first step on the path to overturning existing case law that a sitting GC seeks to change.

As a reminder, the National Labor Relations Act (NLRA) applies to almost all private-sector employers regardless of whether they are unionized. In particular, Section 7 of the NLRA grants employees the right to engage in concerted activities (not just unionization) for their mutual aid or protection, while Section 8 prohibits employers from interfering with the exercise of that right. Accordingly, both union and non-union employers should pay close attention to this memo, which signals the intentions of the GC and foreshadows where the law may be headed.

For All Employers – Whether Unionized or Not. The following issues identified by GC Abruzzo are applicable to all employers regardless of union status.

- **Work Rules:** It should come as little surprise that GC Abruzzo led with cases involving the applicability of *The Boeing Co.*, the case that altered the standard for analyzing facially neutral work rules. The GC specifically called out Boeing's applicability to "confidentiality rules, non-disparagement rules, social medial rules, media communication rules, civility rules, respectful and professional manner rules, offensive language rules, and no-camera rules."
- **Protected Concerted Activity:** As her predecessor Peter Sung Ohr had done in GC Memo 21-03, GC Abruzzo denounced what she believed to be the Trump Board's narrowing of what constitutes concerted activity. Additionally, the GC seeks to examine cases involving the "inherently concerted" doctrine. On the latter issue, it appears that the GC will seek to expand the doctrine to include "subjects other than wages, but that regularly arise in the workplace, such as issues involving employees' health and safety."
- **Confidentiality in Workplace Investigations:** In 2019, the Board held in *Apogee Retail Group LLC d/b/a Unique Thrift Store* that employers may maintain and enforce rules requiring confidentiality for the duration of a workplace investigation. That holding overruled an Obama-era decision in *Banner Estrella Medical Center*, which required that an employer show a "legitimate and substantial business justification that outweighs employees' Section 7 rights." *Banner Estrella* also held that an employer could not maintain a rule requiring confidentiality in every case but, rather, must evaluate each individual investigation to determine whether special circumstances warranted employee confidentiality and outweighed employees' Section 7 rights. Many employers believed meeting the *Banner Estrella* standard was a fool's errand. And we may soon see a return to something resembling the *Banner Estrella* standard, making it extremely difficult for employers to require employee confidentiality during a workplace investigation.
- **Separation Agreements:** The GC would like to re-examine *Baylor University Medical Center*, which found lawful separation agreements containing confidentiality and non-disparagement clauses, as well as agreements prohibiting the separating employee from participating in claims brought by third parties against the employer.
- **Union/Contractor Access to Employer Property:** Ms. Abruzzo cited three Trump Board decisions that expanded employer property rights and permitted employers to exclude union organizers and off-duty contractor employees more easily – the latter issue has been remanded to the Board since this GC memo issued. Employers can expect the GC to seek to overturn those decisions and, at minimum, return to the standards that existed prior to the Trump Board's decisions, which will afford union organizers and off-duty contractors greater access to employer property than currently required
- **Employees' Use of Employer E-mail and Other Electronic Communication Platforms:** GC Abruzzo will reassess cases involving the applicability of *Rio All-Suites Hotel and Casino*, which reversed the maligned *Purple Communications* decision. In *Rio All-Suites Hotel and Casino*, the Board held that employees do not have a Section 7 right to use employer e-mail or other IT resources to engage in non-work-related communications. Thus, employers may lawfully restrict employee use of such resources provided it does not discriminate against union or other protected communications, or unless the system is the only reasonable means for employees to communicate with each other. Thus, the GC seemingly seeks a case calling for a return to the *Purple Communications* standard, which would provide employees with a presumptive right to use e-mail systems on non-working time for communications protected by Section 7 of the NLRA, including engaging in union organizing efforts on employer e-mail systems during non-working time. In addition, the GC encouraged Regions to submit cases involving employees' use of other electronic communication platforms, including Slack, Discord, and Groupme, which suggests a possible expansion of the *Purple Communications* standard beyond e-mail.

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- **Employee/Independent Contractor Status:** The GC seeks cases involving the applicability of *SuperShuttle DFW, Inc.*, which set a new standard for determining whether a party has met its burden of establishing independent contractor status, and emphasizes the significance of "entrepreneurial opportunity." Independent contractors do not have Section 7 rights under the NLRA. Thus, just as many federal agencies will likely do in the coming years, expect the GC to push a case to the Board with the hope that the Board will re-establish a standard that makes it more difficult for a party to establish that a worker is an independent contractor rather than an employee.
- **Extending *Weingarten* Rights to Non-Union Employees:** Currently, *Weingarten* rights provide only unionized employees a right to representation (by their union) during an investigatory interview that may result in discipline to the employee. Thus, if the Board extends these rights to non-union employees, as has long been discussed but never implemented, those employees may have the right to representation during an investigatory meeting.
- **Employer Statements During Union Campaigns:** GC Abruzzo specifically required field offices to submit cases regarding the applicability of a decision that permits employers to tell employees that their access to management will be limited if the employees opt for union representation. Employers can expect other statements often utilized during campaigns to come under close scrutiny under this GC.

For Unionized Employers. GC Abruzzo also identified a number of issues relevant to unionized employers specifically.

- ***Joy Silk* Bargaining Orders:** In what could be cause for significant employer alarm depending on the her intent, GC Abruzzo will re-examine whether to seek the reincarnation of *Joy Silk* bargaining orders. Prior to the adoption of the Gissel bargaining order standard, unions could obtain bargaining orders where an employer refused to recognize and bargain with a union that presented evidence that a majority of unit employees signed authorization cards unless the employer could establish a good faith doubt as to the union's majority status. The GC will focus on cases where an employer has engaged in unfair labor practices or where the employer "is unable to explain its reason for doubting majority status in rejecting the union's demand." While concerns that *Joy Silk* bargaining orders could serve as a stand-in for card check may be overstated (or not), employers should be rightly concerned with what the GC may require of employers when arguing its "good-faith doubt" of a union's majority status.
- **Unilateral Changes During Term of CBA:** In the Board's 2019 *MV Transportation* decision, the Board adopted the "contract coverage" standard for analyzing employer unilateral changes (i.e., changes to employee terms and conditions without first notifying and bargaining with the employees' union). Under the *MV Transportation* standard, employer unilateral action is permitted provided that the change is within the "compass or scope" of existing language in the parties' CBA. This standard replaced the "clear and unmistakable waiver" standard, which was a more onerous standard for employers that has been consistently rejected by the D.C. Circuit (the court with jurisdiction to hear all appeals of Board decisions). Despite this, it appears that GC Abruzzo is seeking a vehicle to overturn *MV Transportation* and reinstate the prior standard.
- **Remittance of Union Dues Post-Contract Expiration:** In *Valley Hospital Medical Center*, the Board held that an employer may cease deducting and remitting union dues following the expiration of a CBA. That decision provided employers with additional leverage during bargaining: without employer deduction and remittance of dues, unions would have to seek the dues directly from employees (or not at all), something unions are loath to do if it can be avoided. That decision appears to be in GC Abruzzo's sights.
- **Requests for Information:** Unions may obtain increased access to employer documents and information. Ms. Abruzzo has signaled her intention to re-examine cases concerning when an employer must turn over its financial records to a union during bargaining, whether an employer must provide the union with documents and information concerning plant relocation decisions, and whether an employer must furnish information concerning to customer complaints related to employees.
- **Anticipatory Withdrawals of Recognition:** Put simply, the GC seeks to overturn recent decisions making it easier for employers to withdraw recognition from a union that may no longer be supported by a majority of the bargaining unit employees. Currently, if within 90 days from CBA expiration an employer receives evidence that a majority of unit employees no longer wish to be represented, it may notify the union of its intention to withdraw recognition at the expiration of the CBA. To reacquire majority status, the union must file a petition with the NLRB, which will administer an election to determine employees' wishes concerning continued union representation. GC Abruzzo presumably seeks to return to the previous "last in time" rule, which permits a union to surreptitiously reacquire majority support, thereby setting up the employer to commit unfair labor practices when it withdraws recognition and makes unilateral changes to employee working conditions following the withdrawal of recognition.
- **Withdrawing Recognition During Term of CBA:** GC Abruzzo would like to "assess" whether the Board's 2007

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decision in *Shaw's Supermarkets* should be overruled. That decision allowed for employers to withdraw recognition from a union at any point after the third year of a contract of a longer duration – three years is also the length of the "contract bar," which prevents rival and decertification petitions outside of the 30-day "window period" just prior to the contract's expiration. While it is too early to speculate what position the GC may stake out, whatever that position may be would likely make it more difficult for an employer to withdraw recognition during the term of a lengthy CBA.

Conclusion. It is customary for new GCs to state their policy priorities upon taking office. And it is of no surprise that GC Abruzzo would push for the overturning of decisions that she perceives to be employer-friendly or, more importantly, union-unfriendly. This memo typically foreshadows upcoming changes in the law. If that is the case, employers can expect the GC to push for reversal of precedent that will make it easier for unions to organize, strengthen unions' bargaining position, and making it more difficult for employers to withdraw recognition from a union even where the union is no longer supported by a majority of employees.

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The opinions expressed are those of the author and do not necessarily reflect the views of the firm or ACC Baltimore, or any of their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Maryland Makes Additional Changes to State Mini-WARN Law

By Clifford B. Glover III, Esq. and Yodeski Y. Acquie, Esq., Jackson Lewis PC

At the beginning of the COVID-19 pandemic, many Maryland employers were faced with challenging decisions associated with layoffs and reductions in force. Fortunately, for many employers in Maryland, the economic uncertainty surrounding the early days of the pandemic has subsided, and shutdowns and closures are no longer top of mind. Nonetheless, the Maryland legislature has passed two rounds of material amendments to Maryland's Economic Stabilization Act (Mini Warn Law). Corporate counsel should make sure they are aware of these changes.

Overview

In 2020, Governor Larry Hogan declined to veto Senate Bill 780 and thus paved the way for the first set of amendments to the Mini Warn Law. Most significantly, Senate Bill 780, which went into effect on October 1, 2020, requires employers implementing a "reduction in operations" to provide advance written notification of the reduction to affected employees and other relevant stakeholders or face monetary penalties. Importantly, however, the Maryland Department of Labor (MDOL) has yet to issue regulations governing these changes and has indicated it will not enforce the changes until it does so.

Further, in March 2021, the Maryland General Assembly passed House Bill 1154 (2021 Update), which makes additional alterations to the Mini Warn Law. These changes, which will go into effect on October 1, 2021, alter the applicability of the law, limit the required public official notifications, and provide key exceptions to providing timely written notice.

Covered Employers

The Mini Warn Law applies to employers with at least 50 employees operating an industrial, commercial, or business enterprise in Maryland for at least one year.

Like the federal Worker Adjustment and Retraining Notification Act (WARN Act), the Mini Warn Law allows the exclusion of certain employees when determining coverage and whether notice requirements will be triggered. Employees who work fewer than an average of 20 hours per week or who have worked for the employer for less than six months in the immediately preceding 12 months are not counted.

Triggering Event

Notice obligations under the Mini Warn Law are triggered when a covered employer implements a "reduction in operations" at a "workplace." A "workplace" includes a factory, plant, office, or other facility where employees produce goods or provide services. It does not include a construction site or other temporary workplace.

The Mini Warn Law does not apply to "reductions in operations" that:

- Result solely from labor disputes;
- Occur in a commercial, industrial, or agricultural enterprise operated by the state or its political subdivisions;
- Result from seasonal factors that are determined by the MDOL to be customary in the industry; or
- Result when an employer files for bankruptcy.

Importantly, the 2021 Update clarifies the application of the Mini Warn Law with regard to the relocation of employees. After October 1, "reduction in operations" will be limited to "the relocation of a part of an employer's operation from an initial workplace to another existing or proposed site that may reduce the total number of employers at the initial workplace by at least 25 percent or 15 employees, whichever is greater."

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Previously, "reduction in operations" was defined broadly to include any relocation from one workplace to another.

The term "reduction in operations" will still include shutdown of a workplace or a portion of the operations of a workplace that reduces the number of employees, over any three-month period, by the greater of: (1) at least 25 percent; or (2) 15 employees (not counting employees working fewer than an average of 20 hours a week or who have worked less than six months in the preceding 12-month period).

Under the 2021 Update, an employee who accepts an offer to transfer to any other site of employment within 30 days after being offered the transfer will no longer be counted in the determination of a reduction in operations.

Contents of Mandatory Written Notices

Under the Mini Warn Law, if notice obligations are triggered, a covered employer must provide at least 60 days of advance written notice of the reduction in operations. The General Assembly clarified the notice requirement to elected officials in its latest revision. Now, a covered employer must provide written notice to:

- All employees at the workplace who are subject to the reduction in operations (*including* individuals working on average fewer than 20 hours per week and individuals who have worked for the employer for less than six months in the immediately preceding 12-month period);
- Each exclusive representative or union that represents employees at the workplace who are subject to the reduction in operations;
- The Maryland Workforce Development's Dislocated Worker Unit; and
- Either (1) the chief elected official of the political subdivision where the workplace that is subject to the reduction in operations is located; or, (2) if the workplace is located in more than one political subdivision, the chief elected official of the political subdivision to which the employer paid the most taxes for the fiscal year immediately preceding the year in which the reduction in operations occurs (previously "all elected officials" in the jurisdiction).

The notices must include:

- The name and address of the affected workplace;
- A supervisor's name, telephone number, and email address to contact for further information;
- A statement explaining whether the reduction in operations is expected to be permanent or temporary, and whether the workplace is expected to shut down; and
- The expected date when the reduction in operations will begin.

Significantly, the 2021 Update adds certain exceptions to the written notice requirement. An employer is not required to provide written notice if:

- The employer was actively seeking capital or business that would have enabled the employer to avoid or postpone the reduction in operations and believed that providing the written notice required would have precluded the employer from obtaining the necessary capital or business; or
- The reduction in operations occurs due to any form of natural disaster such as a flood, earthquake, or drought.

However, an employer that relies on these exceptions must provide written notice to all the people listed above as soon as practicable containing a brief statement of the basis for not providing written notice at least 60 days before initiating a reduction in operations.

Unlike the federal WARN Act, the Mini Warn Law contains no exception due to unforeseeable business circumstances.

Additionally, for a reduction in operations that will result from a sale of part or all of an employer's business, the 2021 Update requires written notice to be provided to the people listed above both by the seller on or before the effective date of sale and the purchaser after the effective date of sale.

Moreover, while the federal WARN Act and its regulations set specific and different content for each of the required WARN Act notices to employees, unions, the state dislocated worker unit, and the chief elected official of local government, the Mini Warn Law requires an employer to include the same information in its notices, regardless of the recipient of the notice. Therefore, if an employer's "reduction in operations" triggers both the federal WARN Act and the Mini Warn Law, the employer's advance written notices must comply with the requirements of both laws.

Finally, Maryland employers implementing mass layoffs will still be subject to the pre-existing requirement to provide a separate bulk separation notice to their local office of Unemployment Insurance if laying off, at the same time, at least 25 employees at a single establishment permanently, indefinitely, or for more than seven days. This notice must be provided 48 hours in advance of the layoff or at the time of the layoff, if the employer has no advance knowledge. The definition of a "mass layoff" for this bulk separation notice is entirely different from the definition of a "reduction in operations" under the Mini Warn Law. For example, when determining if a bulk separation notice is triggered, all affected employees at the affected site are counted without regard to whether they are part-time or have worked for less than six months. In comparison, under the Mini Warn Law, these part-time and newly hired employees are excluded when determining employer coverage and if notice is triggered, as discussed above. As a result, depending on the details of the layoff implemented, an employer may be required to provide one or both notices.

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Regulations on Continuation of Benefits

The Mini Warn Law instructs the Maryland Secretary of Labor, in cooperation with the Workforce Development Board, to develop mandatory regulations for employers facing a reduction in operations. These regulations will include the continuation of benefits (such as healthcare, severance, and pension) that an employer facing a reduction in operations should provide to employees whose employment will be terminated. Additionally, these regulations will include specific mechanisms that employers can use to request assistance from Maryland's quick response program.

Enforcement and Regulations

Once the MDOL promulgates regulations on the Mini Warn Law and the 2021 Update, if the Secretary determines an employer has violated the laws, the Secretary is authorized to issue an order compelling compliance and to assess a discretionary civil penalty of up to $10,000 for each day the employer was not in compliance. The Mini Warn Law and the 2021 Update do not specify whether this penalty is per employee or per violation.

In determining the amount of the penalty, the Secretary is directed to consider the following factors:

- The gravity of the violation;
- The size of the business;
- The employer's good faith; and
- The employer's history of prior violations of the Mini Warn Law.

The Secretary's penalty will be subject to notice and hearing requirements contained in the Maryland Administrative Procedure Act, which includes judicial review by a circuit court.

The Mini Warn Law does not specify whether a private right of action is allowed.

According to its website, the MDOL is "actively working to develop regulations that facilitate implementation" of the Mini Warn Law. Employers should closely monitor the MDOL website for updates.

Authors:

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Jackson Lewis attorneys are committed to helping employers make the best business decisions. Please contact a Jackson Lewis attorney if you have questions about the new law or need guidance handling workplace issues.

Opportunity Economy: Risks in Antitrust Enforcement

By David B. Hamilton, Sarah Motley Stone, Mark P. Henriques, Womble Bond Dickinson

Takeaways

- The Biden administration's recent executive order takes a hard line on limits to employment mobility, such as non-compete agreements.
- No-poach agreements—companies agreeing not to recruit each other's employees—and wage-fixing are a particular target of the federal focus on antitrust.
- Companies should take a number of proactive steps, including reviewing employment contracts, reviewing M&A due diligence guidelines, establishing an antitrust compliance program, and ensuring HR professionals are informed about antitrust risks.

While the COVID-19 pandemic remains a public health and economic concern, companies are adapting and adjusting, finding new and better ways to do business moving forward. Womble Bond Dickinson is taking a comprehensive look at this new Opportunity Economy from a wide range of viewpoints. For example, Womble Bond Dickinson attorneys David Hamilton and Sarah Motley Stone examined a renewed federal focus on antitrust enforcement and the challenges this presents to companies operating in the Opportunity Economy. They recently spoke to Womble Bond Dickinson attorney Mark Henriques on an episode of the "In-house Roundhouse" podcast, and the article below is based on that conversation.

While the COVID-19 pandemic remains the biggest X-factor in how businesses plan for the near future, other important factors remain in play and should be considered by business leaders as they position their operations to move forward.

One of these factors is a renewed federal emphasis on antitrust enforcement. The Biden administration has made economic competition and wage suppression points of emphasis. Given that virtually any routine business activity potentially can involve antitrust issues, company leaders and their legal counsel need to be aware of how antitrust law is changing and how they can best avoid running afoul of federal regulators.

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Executive Order Sets the Tone

President Biden issued a wide-ranging executive order on July 9 with the intent of limiting the power of large corporations. The order includes 72 initiatives across a dozen federal agencies and nearly every economic sector is impacted.

Hamilton said the executive order puts into action goals Biden set forth during the 2020 campaign. His election also resulted in three significant executive appointments:

1. Tim Wu to the National Economic Council. Wu, an economics professor at Columbia University, has been an outspoken critic of Big Tech. He served as the primary author of the administration's executive order on competition.
2. Lina Khan as Chair of the Federal Trade Commission. Like Wu, Khan is a favorite in progressive circles who favors bold action in curbing the power of large companies.
3. Jonathan Kanter to lead the DOJ's Antitrust Division. Kanter is seen as a hawk on antitrust enforcement, and in private practice, he has represented plaintiffs in high-profile antitrust litigation against large tech companies.

"These three appointments very much reflect that there is a battle for the soul of antitrust law," Hamilton said. "The Biden administration and these appointees in particular view existing antitrust law as inadequate and antiquated."

The executive order does not have the effect of law, but Hamilton called it "a flag in the ground." He expects the Biden administration to seek legislative action to add teeth to the executive order. Potential targets could include no-poach agreements, wage-fixing, and price-fixing. Targeted industries include tech, pharma, and health care, and manufacturing.

Employment Mobility in the Enforcement Spotlight

The Biden administration is taking a particularly dim view of agreements that impede employee mobility, such as non-compete agreements. Non-compete agreements, which are made between an employer and employee, are coming under scrutiny. In addition, the Department of Justice continues its enforcement of no-poach or wage-fixing agreements—made between two employers.

"It's one thing for an employer & employee to enter an agreement at the start of employment. It's another thing, in terms of competition, for two employers to agree (to restrict employment or wages)," Stone said. She said such alleged agreements have been litigated in the healthcare sector as well as in the fast food industry, where some franchise agreements called for franchisees to avoid recruiting employees from a franchisee of the same restaurant.

In a poll of Womble Bond Dickinson's LinkedIn followers, more than 50 percent of respondents said enforcement of no-poach agreements is their top antitrust concern.

"No-poach agreements are where the DOJ really gets involved – and it has for some time," Stone said. "Generally speaking, non-competes have been a matter of state law for so long. When you start looking at no-poach agreements, they are the ones that go a step beyond that and there has been increased scrutiny on those in recent years, both civil actions and criminal investigations."

In October 2016, the FTC and DOJ published a document titled "Antitrust Guidance for Human Resource Professionals." In this document, federal officials drew a bright red line against no-poach agreements, stating such agreements "eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct." The FTC and DOJ announced they would criminally prosecute companies and executives that engage in such practices, even unofficial, off-the-record no-poach collaboration. Also, the Biden administration is considering, through the FTC and DOJ, revising these guidelines.

Hamilton said the risks to employers have moved beyond the hypothetical. In December 2020, the DOJ brought its first criminal action related to wage-fixing, targeting a staffing agency accused of coming to an agreement to suppress the wages of independent contractors it employs. He noted that civil actions, particularly class actions, typically follow DOJ criminal indictments.

Stone said such class action suits can be brought by customers of the industry, if they believe anti-competitive practices impact prices paid, or by employees themselves who believe wages were improperly suppressed. One recent example of the former is the pending Health First lawsuit, brought by patients of the system who alleged, in part, that the healthcare system requires physicians to refer patients only to Health First hospitals and specialists to maintain admitting privileges.

Managing Antitrust Risks in the Opportunity Economy

So federal agencies clearly are making antitrust enforcement a priority. How should companies respond to help ensure they are in compliance?

"If it wasn't already, it becomes necessary during a merger or acquisition to step up due diligence regarding employee agreements," Hamilton said. A thorough review of all employee contracts should be a company's first step, with particular attention paid to addressing possible no-poach agreements.

Hamilton also said every organization, regardless of size, should have an antitrust compliance program documented and in use. Such a formal program not only helps identify and eliminate risks, he said, but it demonstrates to regulators that the company is serious about complying with the law.

"All companies are big enough to at least identify this as a risk. For companies involved in a merger, acquisition or other transaction, it creates an exposure," Hamilton said.

Stone said, "Even if you are a mid-sized company and aren't looking at M&A

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activity, just check in with your HR professionals. They're on the ground with hiring and compensation practices. Understand where they get their information, what their resources are, and that they know what the antitrust risks are. Even informal conversation (between HR professionals at competing companies) can create antitrust risk."

In-house counsel also should familiarize themselves with the DOJ Antitrust Division's Corporate Leniency Program. Under the program, "corporations and individuals who report their cartel activity and cooperate in the Division's investigation of the cartel reported can avoid a criminal conviction, fines, and prison sentences if they meet the requirements of the program."

Hamilton said that while US law obviously is the focus for most companies, businesses engaged in cross-border transactions and trade need to be aware of the applicable laws in other jurisdictions.

"The law is more vigorous in places like the EU than it is in the US," he said. "Companies have to take into account all the regulatory agencies they have to deal with."

Moving forward, Hamilton and Stone say they expect the Biden administration to increase the pressure on ensuring competition and antitrust compliance. In fact, the administration wants the FTC and DOJ to see if some already completed mergers could be undone under antitrust law. Even if such an extreme scenario doesn't take place, Hamilton and Stone believe there will be an increase in federal investigations and enforcement actions, particularly in targeted sectors such as tech and healthcare. Then, if experience holds, the class actions follow.

"Hold onto your hats—we're going to see a lot of activity in this area," Stone said.

Authors:

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David Hamilton has a long career as a business litigator and as a strategic advisor to businesses and government and community enterprises. As a business litigator, David has quarterbacked and tried numerous antitrust and business competition cases for domestic and multinational companies in sectors such as Healthcare, Manufacturing, Consumer Products, and Financial and Advisory Services.

Sarah Motley Stone

Sarah Stone advises corporations, individuals, and public entities in resolving complex business disputes, defending class actions, and responding to federal regulatory and state attorney general investigations. She provides practical, data-driven advice to clients in order to manage risks and resolve disputes.

Mark P. Henriques

Mark Henriques focuses on complex commercial cases, including the defense of class actions. He has served a lead counsel on four $5M+ class actions filed in North Carolina federal courts since 2018. He has successfully litigated cases involving construction, real estate, fraud, unfair trade practices, non-compete, non-solicit and non-disclosure agreements, and breach of contract.

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