Inside 2Q2023

ACC Association of Corporate Counsel
BALTIMORE
FOCUS

President's Message

Taren Butcher

It is finally Summer…time for beach vacations, outdoor social events and lots of fun in the sun! As we close out the first half of 2023, the ACC Baltimore Chapter has been busy providing our members and colleagues with exciting programming and events that I would like to highlight.

ACC Baltimore hosted a number of luncheons with its law firm sponsors on an array of new legislation and issues popping up around the country including: (1) Jackson Lewis' DEI legal trends and ways for companies to mitigate risk when building out DEI programs; (2) Shawe Rosenthal's timely presentation on conducting reductions in force and related legal implications under WARN; (3) a presentation by Miles and Stockbridge on the FTC's proposed prohibitions on non-compete agreements and recent NLRB decisions impacting companies; and (4) an insightful presentation by Gordon Feinblatt on state and federal climate change laws and its impact on businesses. We received lots of positive feedback on our recent webinar presentations and we remain focused and committed on providing our members with engaging and relevant programming throughout the rest of the year. We welcome any and all feedback and suggestions on topics that may be of interest to our members.

In April, ACC Baltimore hosted an interesting and insightful discussion and networking event at the Center Club with Erek Barron, U.S. Attorney for the District of Maryland. We are grateful for the time spent speaking with Mr. Barron about his professional journey, the top priorities of the office and his insights on corporate compliance and how to protect your company from cybersecurity incidents. It was definitely a memorable evening!

Last, but not least, our annual Golf and Wine Event at the Rolling Road Golf and Country Club was a great success with over 60 people in attendance. The golfers had great weather and those members that attended the wine event and dinner had a beautiful sunset and delicious food to pair with the various wines offered out on the veranda. We are grateful to our sponsors that help make the event possible and always show up with interesting and grab-worthy swag for the members. I would also be remiss if I did not thank board member Corey Blumberg for his commitment over the last 4+ years to help coordinate the Golf and Wine event to make sure everything goes smoothly on the day of the event. We appreciate your hard work!

In the coming weeks, the chapter will host its Board retreat in Annapolis where we will spend time getting to know each other better, planning and brainstorming new and innovative ways to improve the Chapter and receive insightful information from ACC National on how to leverage ACC's resources to improve our chapter. I'm excited for the opportunity to spend this much needed time with the board and cannot wait to see what new opportunities and programming may stem from our retreat.

Lastly, ACC Baltimore is now on LinkedIn! If you have not done so already, please make sure you follow us on LinkedIn for exciting updates about the Chapter and its members and sponsors.

I look forward to all of the exciting programming and events we will host in the second half of 2023, and I remain grateful for the partnership and dedication from our sponsors, board members and members to make our chapter a success!

All the best,
Taren Butcher

How In-house Counsel Can Help Navigate a Banking Crisis

By Michael Greene, Legal Resources Manager

Whether facilitating financing, evaluating vendor relationships, or advising leadership on new risks, in-house attorneys can play a vital role in helping their organizations navigate the banking crisis whose effects rippled beyond the US market.

The March collapse of Silicon Valley Bank (SVB), which had about US$210 billion in assets, left many organizations scrambling to keep pace with fast-moving developments.

Just days after SVB's failure, Signature Bank, with about US$110 billion in assets, also closed, causing further unease about the stability of the financial system. And turmoil in the banking sector continued this month after US regulators seized California-based First Republic Bank.

The fallout has left many organizations calling upon their in-house legal counsel to get to the bottom of core issues and advise them on next steps.

"There was definitely a sense of panic for several days while a lot of uncertainty was in the air, and many company employees look to in-house counsel for guidance and leadership during a time of potential crisis," Shane Mulrooney, general counsel of New Era ADR, said. In-house counsel must be "transparent and reassuring at the same time in any communication to the rest of the company," he affirmed.

Here are some takeaways on how in-house attorneys can help their organization grapple with the ongoing disruption to the financial sector.

Stay calm and develop a plan

The best advice for in-house counsel is "don't panic," James Goepel, general counsel and director of education and content at FutureFeed, said.

FutureFeed, a startup that provides cybersecurity compliance solutions, opened an account with Silicon Valley Bank shortly before the run that caused the bank's collapse.

Artwork by Below the Sky / Shutterstock.com

Goepel said his organization stayed informed of related developments and created a plan to deal with the bank's collapse. FutureFeed, ultimately, didn't see a significant disruption to its business from the bank failure, he said. The company also decided to continue its relationship with Silicon Valley Bank after federal regulators took actions in response to the banking crisis.

> In-house counsel must be able to read through their organization's balance sheet as part of evaluating their risks.

Those actions included the US Treasury Department, Federal Reserve, and Federal Deposit Insurance Corporation ensuring that accounts at the two failed banks would be backstopped beyond the US$250,000 limit on federally insured deposits. The Federal Reserve also created the Bank Term Funding Program (BTFP), a lender of last resort to help cash-strapped banks cover their deposits.

The implications could have been worse, but most startups and small businesses were able to weather the storm, Goepel said.

Similarly, other in-house attorneys said in-house counsel must keep up with related developments and provide a calming influence for their organization.

"In addition to the standard role counsel can play in facilitating finance and leadership in whatever they need to secure company finances — rapid response time, introductions to new banking relationships, etc. — in-house attorneys at every level should make sure they are fully informed on all new developments as they progress to appropriately reassure other employees and maintain calm throughout the company."

Shane Mulrooney

Understand your company's risk profile

In-house attorneys also stressed the importance of understanding their organization's risk profile.

"More than ever, in-house counsel have a critical role to play in enterprise risk identification and management," Rebecca Kronlund, general counsel at Stearns Bank, said. "Every in-house attorney needs to understand their company's risk profile, which includes vulnerabilities of your strategic partners."

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Artwork by catshila / Shutterstock.com

In-house can be invaluable partners in mitigating financial risk. "Once you understand those vulnerabilities, you can more effectively mitigate risk including through contract negotiation," she said.

In-house counsel must be able to read through their organization's balance sheet as part of evaluating their risks.

"As we learned from the recent bank failures, poor investments may be lurking as significant unrealized losses," she said.

"Understand your company's retained earnings — is there a cushion for hard times ahead?" she asked. "This type of financial acumen will enable in-house counsel to participate and provide guidance around the financial discipline that is needed to weather the ups and downs in your business."

Evaluate your vendors (including banks)

The crisis has also caused many organizations to reevaluate their relationships with vendors, including banks.

"Every company has a bank relationship at its epicenter which provides access to credit, the ability to send and receive money, and make payroll," Kronlund said. "A key takeaway from the recent bank failures is to do basic due diligence on your bank, like you would any other strategic partner to your company," she added.

Most bank financial information is public, which provides organizations with a way to keep tabs on their financial stability. However, from a practical standpoint, many in-house attorneys may find it difficult to parse through a bank's balance sheet while also helping their organization run its business.

A key takeaway from the recent bank failures is to do basic due diligence on your bank, like you would any other strategic partner to your company.

There are some key metrics in-house counsel can pay close attention to when reviewing whether their banks are financially sound. "One key metric to know is your bank's tangible common equity which will capture capital, exposure to unrealized losses and strength of earnings," Kronlund said.

Meanwhile, companies are also assessing their relationship with other vendors who may have been affected by the bank failures. "Gaining a solid understanding on the implications of potential fallout to any key vendors or customers is important as events unfold, particularly if there is still a lot of uncertainty in the air," Mulrooney said.

However, Mulrooney cautioned that attorneys must be mindful of the fact that vendors are also trying to manage the events on their own. "Securing your company's risk is of course standard for in-house counsel, but not at the expense of key relationships that have a much broader impact on the business," he added.

ACC News

2023 ACC Annual Meeting – Register Now!

For decades, the ACC Annual Meeting has proven to be the premier conference for in-house legal professionals. The experience is transformative and unmatched. In fact, 97% of attendees said they will attend again! Find everything you need for 2023 and beyond in this year's program schedule and register NOW!

ACC365 App Now Available to Download

Your work goes beyond your desktop and now so does the ACC member experience. The brand-new ACC365 app is now available to download. Stay connected and get the ACC experience in the palm of your hand. With one tap, you are plugged into the people, resources, and knowledge that accelerate your career.

Expand Your Network of In-house Peers – Recruit a member today!

ACC's annual Member Get a Member campaign is going on now through September 30th. During this campaign, members receive the opportunity to win fabulous prizes for each colleague they recruit to join ACC, and newly recruited members that use the discount code MGAM50 receive $50 off their first-year dues! Learn more about Member Get a Member.

While Remote Work May Lead to An Increase in FLSA Collective Actions, It May Have One Upside – Allowing Employers to Use Personal Jurisdiction to Limit Their Liability

By Tonecia Brothers-Sutton and Alex Cranford, Jackson Lewis P.C.

On February 9, 2023, the U.S. Department of Labor issued a "field assistance bulletin" to clarify the application of the Fair Labor Standards Act ("FLSA") to nonexempt remote workers. The field assistance bulletin served as a reminder that an employer's obligation to maintain accurate records of remote employee's hours worked, including compensable meal periods and short breaks. However, remote work, by its very nature poses a significant challenge to employers who are attempting to track hours worked, which will, inevitably, lead to more FLSA collective actions. In fact, FLSA collective actions have increased post COVID-19 pandemic due to remote work, and other COVID-19 related factors.[1] Additionally, due to remote work, employees are increasingly located in different states and jurisdictions rather than a centralized location. This has led to an increase in multi-state putative opt-in plaintiffs seeking to join a collective FLSA action. For this same reason, however, employers may be able to use their employees' varying state residencies as a procedural mechanism to decrease a collective class's size based upon the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of Cal.*

More recently, district court decisions in the Fourth Circuit indicate that employers within that circuit, when faced with FLSA collective actions, may successfully limit a class size by asserting that the court does not have personal jurisdiction over opt-in plaintiffs who are located outside of the state, including remote workers.

Background

The FLSA provides for a federal minimum wage, child labor protections, and overtime compensation requirements. 29 U.S.C. §§ 206, 207, 212. The Act provides two key enforcement mechanisms. It authorizes the Secretary of Labor to initiate an FLSA action on behalf of employees "in any court of competent jurisdiction." Id. § 216(c). And it authorizes employees to sue "in any Federal or State court of competent jurisdiction" on "behalf of . . . themselves and other employees similarly situated." Id. § 216(b). *Canaday v. Anthem Cos.*, 9 F.4th 392, 394 (6th Cir. 2021).

Under the second option, "similarly situated" employees may join a collective action by filing a "consent in writing," after which they become "party plaintiff[s]." *Id.* Once they file a written consent, opt-in plaintiffs enjoy party status as if they had initiated the action. The Act provides that each similarly situated employee who opts in amounts to an "individual claimant," whose lawsuit counts as "commenced" on the day that the employee files their written consent to join the collective action. *See id.* § 256.When defending collective actions under the FLSA, employers often argue against the inclusion of "opt-in" plaintiffs by relying on the constraints of personal jurisdiction and the Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court of Cal.* In *Bristol-Myers Squibb,* the Court held that state courts cannot exercise personal jurisdiction over any out-of-state plaintiffs' claims against a nonresident company. *Bristol-Meyers* involved a "mass action" brought in California state court against *Bristol-Meyers* by both residents and non-residents alleging defects in a blood thinner drug. The Court held that the California state court could not exercise personal jurisdiction over the non-resident plaintiffs unless they could demonstrate that their claims arose out of *Bristol-Meyers*' contacts with the forum state.

Since its 2017 decision, courts across the country failed to uniformly apply the *Bristol-Myers* decision to FLSA collective actions, resulting in a circuit split. Most recently, On March 6, 2023, the U.S. Supreme Court declined to provide a definitive answer to whether *Bristol-Myers* decision applies to collective actions by declining to review a Third Circuit decision, *Fischer v. Federal Express Corp.*, 42 F.4th 366 (2022).

Majority View: Bristol-Myers Applies to Collective Actions

In *Fischer v. Federal Express Corp.*, a former FedEx security specialist sued for unpaid overtime wages claiming that FedEx misclassified her and other FedEx security specialists as exempt employees. *Fischer*, 42 F.4th 366 (3rd Cir. 2022). The Third Circuit upheld the district court's refusal to allow FedEx employees from other states to join her collective action, which was filed in Pennsylvania. *Id.* The district court, following *Bristol-Myers*, found that it lacked personal jurisdiction over the claims of out-of-state FedEx employees. *Id.* It held that every plaintiff who sought to opt in to the suit must demonstrate his or her claim arises out of or relates to the defendant's minimum contacts with the forum state. *Id.* Accordingly, the district court only certified the collective action and authorized notice with respect to security specialists employed by FedEx in Pennsylvania. *Id.* The Third Circuit affirmed the lower court's decision that it lacked personal jurisdiction over the defendants on the basis that the out-of-state plaintiffs could not demonstrate that their claims arose out of or related to FedEx's contacts with Pennsylvania. *Id.*

In *Fischer*, the Third Circuit joined the Sixth and Eighth Circuits in concluding that *Bristol-Myers* applies to FLSA collective actions, and therefore, courts may not exercise jurisdiction over claims of out-of-state opt-in plaintiffs in putative

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collective actions unless they can establish specific or general personal jurisdiction. However, a divided First Circuit panel held differently. It concluded that out-of-state plaintiffs may join an FLSA collective action without regard to the *Bristol-Myers* jurisdictional issue.

The Supreme Court's decision to deny certiorari leaves the circuit split alive and well, currently favoring employers.

The Fourth Circuit has yet to weigh in on this issue. Importantly, the Middle District of North Carolina recently applied *Bristol-Meyers* to an FLSA collective action, dismissing claims brought by non-resident Plaintiffs. *Speight v. Labor Source, LLC*, No. 4:21-CV-112-FL, 2022 U.S. Dist. LEXIS 71218 (E.D.N.C. Apr. 19, 2022) ("Bristol-Myers, to the extent its holding was anything but application of "settled principles regarding specific jurisdiction," 137 S. Ct. at 1781, requires that the court dismiss the claims in plaintiff's complaint on behalf of putative plaintiffs that opt-in to the collective action to the extent those putative plaintiffs did work in states other than North Carolina or whose employment with defendant otherwise had no connection to this state.").

Further, a recent magistrate ruling within the Fourth Circuit has recommended the district court follow the persuasive circuit authority applying *Bristol-Myers* and finding that the court lacks jurisdiction over out-of-state plaintiffs' claims in the context of an FLSA collective action. *See Hood v. Capstone Logistics LLC*, 2022 U.S. Dist. LEXIS 239400, 2022 WL 18893074 ("While the Fourth Circuit has yet to decide whether the reasoning of *Bristol-Myers* applies to the personal jurisdiction analysis in FLSA collective actions, three out of four circuits and the Eastern District of North Carolina have held that it does. Because the weight of authority supports application of *Bristol-Myers* to collective actions brought under the FLSA, the undersigned respectfully recommends that [the defendant's] Motion to Dismiss or Strike Plaintiff's nationwide collective action claims be granted.)

Take-Away: In Defending Against FLSA Collective Actions Filed by Out of State Claimants, Employers Should Assert Lack of Personal Jurisdiction.

With the expansion of remote work since the COVID-19 pandemic, employers face a new era of challenges, including but not limited to mitigating risk of wage and hour violations when employees are not physically working in the employer's office and/or remotely accessing employer systems. As a practical matter, employers should regularly update their employees' residency records and/or implement policies that require employees to update such information. Additionally, employers should update their policies, procedures, and software to track compensable hours even for remote workers.

Nevertheless, it is likely that remote work will lead to increased FLSA collective action litigation due to the inherent difficulties associated with tracking remote employees' compensable time. When faced with FLSA collective actions filed in the Fourth Circuit, employers with remote workers in different states may successfully limit the class size by asserting that the court does not have personal jurisdiction over opt-in plaintiffs who are located outside of the state under *Bristol-Meyers* and *Speight*. Specifically, employers with employees working remotely in different states should leverage this line of cases. (The Fourth Circuit has found that "[m]ere accommodation of an employee's choice to work remotely cannot alone form the basis of asserting specific jurisdiction." *Fields v. Sickle Cell Disease Association of America, Inc.*, 376 F.Supp.3d 647, 653 (4th Cir. 2018). An employee who seeks to join a collective action in their state of domicile must be able to establish personal jurisdiction on another basis (minimum contacts and/or claims arising out of contact with the forum state) other than their performance of remote work in that state. *Id.* Therefore, employers should assert lack of personal jurisdiction to limit the action to those who can establish residency or specific jurisdiction.

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[1] Checking In: Wage Law Classification and Increased Litigation, JD Supra, https://www.jdsupra.com/legalnews/checking-in-wage-law-classification-and-7346476/ (last visited April 19, 2023).

NLRB General Counsel Offers More Guidance on Confidentiality and Non-Disparagement Decision

By Rebecca A. Leaf, Brianna D. Gaddy, Olubusola Olanrewaju, Miles & Stockbridge

The National Labor Relations Board's recent decision in *McLaren Macomb*, holding that the mere proffer of a severance agreement containing a broad confidentiality or non-disparagement clause violates federal law, left many employers questioning what to do with their existing severance agreements and wondering about the practical implications of the decision. (We wrote about the Board's decision here.) In March, the NLRB's General Counsel, who oversees the Board's 26 field offices, released a memo to assist field offices in responding to inquiries from the public about the decision. Below are the key takeaways employers should consider:

- **The case has retroactive effect.** Though the Board did not say whether the case applied retroactively, field offices will apply it retroactively, as Board decisions are presumed to have retroactive application.
- **The Board's statute of limitations period may not limit all claims.** It may be a continuing violation for an employer to maintain or enforce a severance agreement with an unlawful provision, even if the agreement was proffered or signed outside the Board's six-month statute of limitations period.
- **The NLRB will not void an entire agreement based on a few unlawful provisions.** Field offices will make decisions based solely on the unlawful provisions of an agreement and would seek to have only those unlawful provisions voided, as opposed to voiding the entire agreement.
- **Confidentiality as to the financial terms of the agreement is lawful.** Based on 2006 guidance regarding approval of non-Board settlement agreements, requiring an employee to keep the financial terms of a severance agreement confidential is lawful and consistent with the Board's decision in *McLaren Macomb*.
- **Acceptable non-disparagement language is limited to non-defamation.** Employers may restrict employees from making defamatory statements about them, such as statements that are maliciously untrue or that are made with reckless disregard for their truth or falsity.
- ***McLaren Macomb* does not apply to supervisors, with the following caveat.** Supervisors (as defined in the National Labor Relations Act) are generally not protected by the Act, so employers may continue to present them with severance agreements containing confidentiality clauses and broad non-disparagement clauses. However, those severance agreements may not interfere with a supervisor's participation in a Board proceeding. Likewise, an employer may not discipline a supervisor who refuses to proffer an unlawfully overbroad severance agreement to an employee on the employer's behalf.
- **Other severance provisions may also be unlawful.** While confidentiality, nondisclosure, and non-disparagement provisions are the most problematic terms, some other common provisions of severance agreements might also interfere with employees' Section 7 rights, including non-compete clauses, non-solicitation clauses, no-poaching clauses, certain cooperation requirements and broad liability releases and covenants not to sue that go beyond the employer or that may go beyond employment claims and matters as of the effective date of the agreement.
- **A savings clause will not necessarily cure overly broad provisions.** For a savings clause or disclaimer to be effective, it must affirmatively and specifically set out employee statutory rights and explain that nothing in the severance agreement should be interpreted as restricting those rights. The memo lists nine specific rights that should be included in a savings clause. General disclaimers, such as "this agreement is not intended to prohibit an employee from engaging in any lawful or protected activity under federal or state law," are not sufficient.
- **All employer communications are subject to scrutiny if they tend to interfere with or coerce employees in the exercise of their statutory rights.** The impact of *McLaren Macomb* extends beyond severance agreements to apply to all communications from employers to employees, including offer letters. In light of this guidance, employers should consider reviewing their offer letters, as well as other types of employee "communications," such as employment agreements and employee handbook policies.

Miles & Stockbridge's labor lawyers routinely assist employers with NLRB matters, collective bargaining, and other issues affecting unionized workplaces.

Authors:

Rebecca A. Leaf

Rebecca Leaf represents public and private employers on a wide range of traditional labor matters. A veteran litigator in the labor space, Rebecca began her career as a trial attorney at the National Labor Relations Board, where she spent eight years developing a deep knowledge of the National Labor Relations Act, collective bargaining and the unionized workplace. Rebecca and Kristy Eriksson presented the latest updates in labor and employment law for ACC Baltimore members on March 29.

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Board Leadership