Inside 1Q2020

ACC Association of Corporate Counsel
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FOCUS

President's Message

Larry Venturelli

I am honored to step in to 2020 and assume the position of the President of the Baltimore Chapter. I would like to take a moment and thank my predecessor, Prabir Chakrabarty, for the wonderful job he did as President and leading a successful 2019 for the ACC Baltimore Chapter! Also, a big thank you to our Chapter Administrator, and former President, Lynne Durbin, for everything she does behind the scenes and beyond to help this Chapter run smoothly.

I look forward to working with our Board as we plan another great year of chapter activities for our members. We will strive to bring you exciting and relevant topics at our monthly luncheons, electrifying socials with our Premier sponsors, charitable projects, our sponsor social, continued outreach through diversity and inclusion events, and our biggest event of the year, our annual golf/spa event.

The 2020 year started off with our annual Recruiter Update with Amy Hyman Baum of Robert Half Legal and Randi Lewis of MLA Global, where we learned about the current state of the legal market, both locally and nationally, and how you can best position yourself for that next career move. As always, this was a very insightful lunch and a reminder to make sure I own my career. A special thank you to Matthew Wingerter for moderating the lunch!

My fellow Board members and I are looking forward to our first winter social with our newest premier sponsor, Jackson Lewis. Details will be coming out in the next week or so regarding the social which will be a cooking class/demonstration.

Finally, if there is a topic that you would like to learn more about at one of our lunches, please feel to reach out to myself, any of our Board members, or our Chapter Administrator, Lynne Durbin.

I look forward to a memorable 2020!

Best Regards,
President
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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Why Better Business Communication Matters and How to Improve It

By Elizabeth A. Colombo

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

By the numbers

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

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

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

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

Poor communication can lead to employees becoming frustrated that their time isn't valued. But, when employees are purposefully engaged, it yields tangible results, according to bluesource: "Productivity improves by up to 25 percent in organizations with connected employees."

More than employee turnover, company finances are also drained by poor communication. According to a Holmes report, the global PR leader found:

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

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

Be transparent

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

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

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

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

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

Listen actively

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

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

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

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

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

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

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

Communicate effectively at all levels

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

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

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

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

Use a variety of communication methods

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

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

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

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

Know your audience and message

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

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

Value inter-generational communication

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

- Around a quarter of employees think email is a major productivity killer.
- 78 percent of people who text wish they could have a text conversation with a business.
- 81 percent of millennials think "state of the art technology" is paramount to an ideal working environment over perks or amenities.
- 44 percent of employees want wider adoption of internal communication tools.
- 49 percent of millennials support social tools for workplace collaboration.
- 74 percent of all online adults prefer email as their main method of commercial communication.

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

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

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

Keep up with technology and 2020 work styles

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

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

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

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

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

Mind your delivery

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

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

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

Parting words

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

Author:

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

ACC News

ACC Xchange: Rates Increase After March 18

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

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:

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

ACC 2020 Global General Counsel Summit

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

2020 ACC Annual Meeting: Early Bird Rates End March 25

Lock in at the lowest available rates for the 2020 ACC Annual Meeting, taking place October 13-16 in Philadelphia, PA. Earn up to a year's worth of CLEs, get the essential knowledge and insights you need to navigate today's increasingly complex business environment, and make meaningful connections with your in-house peers from around the globe. No other event delivers such a wealth of education and networking opportunities for corporate counsel all in one place at one time. Group discounts are available. Check out the full program schedule at acc.com/annualmeeting.

New to In-house? Are you prepared?

The ACC Corporate Counsel University® (June 24-26, Denver, CO), combines practical fundamentals with career building opportunities, which will help you excel in your in-house role. Come to this unrivaled event to gain valuable insights from experienced in-house counsel, earn CLE/CPD credits (including ethics credits) and build relationships and expand your network of peers. Register at acc.com/ccu.

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- Mini MBA for In-house Counsel, March 31-April 2, May 5-7 (Log Angeles), June 1-3, September 22-24, and November 17-19

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Are you prepared to comply with new state privacy laws?

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Maryland's General Assembly Overrides "Ban the Box" Veto – What's Next for Employers

By Fiona W. Ong and Elizabeth Torphy-Donzella

On January 30, 2020, the Maryland General Assembly voted to override Governor Hogan's veto of the "Ban the Box" bill that was passed in the last legislative session, just as we predicted in our veto E-lert. The law will prohibit employers in Maryland from inquiring about an applicant's criminal history until later in the application process. It takes effect on February 29, 2020, and Maryland employers should prepare now to comply with the new requirements.

What the Law Does. The "box" refers to the box contained on many employment applications, which must be checked if the applicant has a criminal record. This bill is intended to give those with criminal records a better chance at finding jobs by prohibiting employers with 15 or more employees from asking about an individual's criminal record prior to the first in-person interview. During that interview, however, such information may be required to be disclosed.

"Employment" is defined as any work for pay and any form of vocational or educational training, with or without pay. It includes contractual, temporary, seasonal, or contingent engagements, as well as those engage through temporary or other employment agencies.

"Criminal record" is defined as: an arrest; a plea or verdict of guilty; a plea of nolo contendere (i.e. no contest); the marking of a charge "STET" on the docket (i.e. no further prosecution); a disposition of probation before judgment; or a disposition of not criminally responsible.

The bill provides for exceptions to the prohibition where an employer is required or authorized to seek such information by Federal or State law or where an employer provides programs, services, or direct care to minors or vulnerable adults. In these cases, the employer may require the disclosure of a criminal record upon application.

Employers are also prohibited from retaliating or discriminating against an applicant or employee for claiming a violation of this law. The Commissioner of Labor and Industry may assess a civil penalty of up to $300 for each applicant or employee as to whom there was a violation. The law does not allow applicants to bring a lawsuit against employers for violations.

No Preemption of Local Laws. Of note, the bill specifically does not preempt any local ban-the-box laws, such as those previously enacted by Baltimore City, Prince George's County, and Montgomery County. Those local laws impose greater restrictions on employers than this bill. (Now is also a good time for employers in Baltimore City, Prince George's County, and Montgomery County to ensure that they are complying with the requirements of those laws). It is possible that the business community will seek to revise the law to include such preemption during the current legislative session.

Use of Criminal History Information

Once an employer is legally able to receive the criminal history information, whether directly from the applicant or through a background check (at or after the in-person interview), the employer still must be careful in using the information to disqualify an applicant from further consideration for employment. The Equal Employment Opportunity Commission has targeted policies that automatically disqualify applicants based on criminal background, asserting that such policies have a disparate impact on minority applicants, who are statistically more likely to have a criminal record.

According to the EEOC, which has issued an Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, an employer may not rely on arrests in making hiring decisions, and convictions must be job-related in order to be disqualifying. There are three factors that the EEOC deems relevant:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense or conduct and/or completion of the sentence; and
- The nature of the job held or sought.

In looking at these three factors, employers are supposed to conduct an individualized assessment. According to the EEOC, an "{i}ndividualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity." Such additional information may consist of specific evidence such as:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program

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The EEOC acknowledges that there may be certain positions for which the employer may adopt a policy that particular felonies are automatically disqualifying, but any such policy "would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question."

As we discussed in our August 2019 E-Update, the U.S. Court of Appeals for the Fifth Circuit (which covers Louisiana, Mississippi, and Texas) found that the Equal Employment Opportunity Commission exceeded its authority when it issued this Enforcement Guidance, and the Fifth Circuit therefore prohibited enforcement of the Guidance against the State of Texas.

We would expect the EEOC to continue to apply the Guidance to employers located outside the Fifth Circuit. While those other employers could similarly argue that the Guidance is unenforceable, it is possible that a different court could side with the EEOC. But even if the Guidance were ultimately found to be wholly unenforceable, the general principles articulated in it, which are drawn from prior caselaw, may still be applicable to a discrimination claim.

Thus, employers should continue to be thoughtful when considering an applicant's or employee's criminal background, and should do so on an individualized basis.

Next Steps for Employers.

Employers must revise their application forms to remove the criminal history question and update any agreements with agencies to ensure that there is no requirement to seek criminal history information before it is legally allowed. In addition, recruiting personnel and hiring managers must be trained to avoid asking about an applicant's criminal record until the first "in-person" interview. An open question is whether a telephone interview would be considered "in-person," particularly since some employers only do telephone interviews. (Baltimore City employers should be aware that they may not ask for criminal record information until a conditional offer of employment is made; Montgomery County employers must wait until the end of the first interview.)

Finally, employers that are permitted or required to obtain criminal history as a condition of employment still will be allowed to do so as part of the application process. However, in most cases only some positions will fall within this exception. Thus, employers may decide that adopting a uniform rule of delaying criminal history inquiries until the first interview is more administratively workable.

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DOJ Indicts Executives for Violating the CPSA Through Late Reporting and Misrepresentations — Plus, How Companies Can Avoid Both Criminal and Civil Penalties

By Holly Drumheller Butler and Dwight W. Stone II, Principals, Miles & Stockbridge

On March 28, 2019, a federal grand jury indicted two executives for failing to timely report that the dehumidifiers their companies imported and distributed were known to catch fire. According to the U.S. Department of Justice, this is the "first-ever criminal prosecution for failure to report under the Consumer Product Safety Act."

Under the Consumer Product Safety Act (CPSA), every manufacturer, importer, or distributor of a consumer product in the United States is obligated to advise the U.S. Consumer Product Safety Commission (CPSC) immediately if it "obtains information which reasonably supports the conclusion that such product . . . contains a defect which could create a substantial product hazard" or "creates an unreasonable risk of serious injury or death."

"Immediately" for purposes of the time to report is defined to be "within 24 hours" after the company has received the information which reasonably supports the conclusion that its product fails to comply with the applicable consumer product safety rules. See 16 C.F.R. 111.5.14(e). This duty extends not only to the manufacturer, importer, or distributor of the consumer product, but also to the individual directors, officers, and agents of those companies.

Failure to provide a required report (commonly referred to as a "Section 15(b) report") is a "prohibited act" under Section 19 of the CPSA. Until this indictment, the Government responded to even glaring instances of failure to report via civil penalties rather than criminal prosecution.

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Here, the companies waited over nine months to alert the CPSC after learning of the defect. In July 2012, the companies received several reports that their China-manufactured dehumidifiers were defective, including a consumer video showing a dehumidifier on fire. The following month, one of the executives, Simon Chu, tested the plastic used in the dehumidifiers and confirmed that the product was indeed flammable and did not meet safety standards. In response, management of the companies instructed executives Chu and Charley Loh to delay any recall to avoid economic loss. Although Loh urged the companies to report to the CPSC and threatened to disclose the "super urgent and important" issue to authorities himself, no action was taken for months. On April 30, 2013, the companies made a report to the CPSC, but falsely maintained in the report that the company had not concluded that the dehumidifiers were defective or that a recall was required and that the product was "safe for use as intended." Approximately four months later, on September 12, 2013, the company and the CPSC announced a recall of approximately 2.2 million China-made dehumidifiers in the United States.

After an investigation, the agency charged the companies with several violations including knowing failure to timely report a defect and unreasonable risk of serious injury, and knowing misrepresentations to CPSC staff during the investigation. The CPSC announced in March 2016 that the companies had agreed to pay a $15.45 million civil penalty to the government. This was the largest civil penalty in the CPSC's history, and the maximum amount then permitted by law.

But the government's enforcement actions did not stop at corporate civil penalties. The DOJ brought criminal charges against the executives for conspiracy to commit wire fraud, to fail to furnish information under the CPSA and to defraud the CPSC, and for aiding and abetting the same. In addition to the conspiracy charge, the indictment also charges the executives with wire fraud and failure to furnish information under the CPSA. If convicted, the executives face up to five years in prison for each of the conspiracy and failure to furnish information counts. Plus, they both face up to 20 years imprisonment for the wire fraud charge.

The DOJ's indictment certainly reiterates its interest in consumer protection. More importantly, it emphasizes the DOJ's intent to prosecute individual misconduct and focus on accountability of the C-suite, at least in the most egregious cases of misconduct.

Given that the DOJ has shown it is willing to use this criminal enforcement tool, it is now even more important for manufacturers, importers, distributors and retailers to ensure that robust practices are incorporated into their companies' CPSC compliance protocols. Doing so will minimize the risks of civil penalties against the company and/or criminal prosecution of either the company or its executives. Here are a few basic guidelines:

1. Investigate credible reports of product defects, and document those efforts;
2. Conduct appropriate testing to determine whether the alleged product defect can be corroborated or replicated, determine the root cause of the issue and assess whether the product complies with applicable safety standards;
3. Promptly inform the CPSC of any known product defect which creates a substantial risk or injury to the public or creates an unreasonable risk of serious injury or death;
4. Ensure all reports sent to the CPSC following notice of an alleged defect are fully accurate and not misleading as to the safety status of the product;
5. Provide necessary training to relevant employees—up though C-suite—as to relevant CPSA reporting obligations and potential civil and criminal liabilities for failure to comply; and
6. Last but certainly not least, consult with experienced CPSC counsel as necessary for all of these issues. In particular, be sure to consult with experienced counsel when there are questions about whether a particular product issue warrants, or requires, reporting to the CPSC, and for guidance on making a report and handling subsequent interactions with the agency.

Notwithstanding the DOJ's recent indictment, we anticipate that criminal prosecutions of executives for failure to timely file Section 15(b) reports, or for misrepresentations contained in reports to the CPSC, will be rare and probably reserved for particularly egregious behavior. Still, even the remote possibility of criminal prosecution should ratchet up the level of vigilance of executives of consumer product companies regarding compliance with the CPSA's reporting requirements. Companies who follow the guidelines listed above will both enhance the safety of their products and minimize the risk of either civil penalties or criminal prosecutions.

This article was originally published by Law360 on May 31, 2019.

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

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2020: The Year Ahead for Maryland Employers

By Donald E. English, Jr. and Judah L. Rosenblatt

Changes to Maryland's anti-discrimination, minimum wage, and non-compete laws, as well as the federal overtime and other workplace rules, are among the challenges employers must face in 2020. This article summarizes some significant changes and discusses important employment cases the U.S. Supreme Court will be deciding in the coming year.

Changes to Maryland Law

Expanded Protections under Maryland Anti-Discrimination Law

Amendments to Maryland's Fair Employment Practices Act (FEPA), effective October 1, 2019, increased protections for Maryland workers by:

- Expanding the definition of employee to include independent contractors;
- Organ donation leave;
- Applying FEPA's protections for harassment claims to employers with at least one employee (the rest of the FEPA applies to employers with at least 15 employees);
- Adding harassment to the list of activities prohibited by FEPA and expanding the scope of employer liability (i.e., an employer is liable if its negligence led to the harassment, or the continuation of harassment, of an employee);
- Extending the time for filing a harassment complaint with a local human relations commission (such as the Maryland Commission on Civil Rights or a county equivalent) from six months to two years after the occurrence of the alleged harassment; and
- Extending the time for filing a lawsuit alleging harassment from two years to three years after the occurrence of the alleged harassment.

Maryland's Sexual-Harassment Disclosure Law's Survey Requirements Take Effect July 1, 2020

Maryland's "Disclosing Sexual Harassment in the Workplace Act of 2018," which took effect on October 1, 2018, prohibits certain waivers related to an employee's future sexual-harassment claims and future retaliation claims for making a sexual-harassment claim. The law also requires Maryland employers with at least 50 employees to submit a survey to the Maryland Commission on Civil Rights (MCCR). The survey information must be submitted on or before July 1, 2020, and again two years later (on or before July 1, 2022). The survey must contain:

1. The number of settlements made by or on behalf of the employer of an employee's allegation of sexual harassment;
2. The number of times the employer paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment; and
3. The number of settlements made of an allegation of sexual harassment that included a confidentiality provision.

Minimum Wage Increase to $11.00

Effective January 1, 2020, the minimum wage rate in Maryland for all employers increased from $10.10 an hour to $11.00 an hour. Under new law, Maryland businesses with at least 15 employees must pay workers a series of increases to arrive at $15.00 an hour by 2025. Businesses with fewer than 15 employees will have an extra year to raise wages to $15.00 an hour.

Non-Competes Banned for Low-Wage Employees

Maryland employers are prohibited from entering into non-compete agreements with low-wage workers. The new law, effective October 1, 2019, bars employers from entering into non-compete agreements with workers who earn equal to or less than (a) $15 per hour or (b) $31,200 annually.

Mandatory Unpaid Organ Donation Leave

Maryland's Organ Donation Leave Law, effective October 1, 2019, requires most private employers in Maryland to provide unpaid leave to employees serving as organ or bone marrow donors. Maryland businesses with at least 15 employees working anywhere in Maryland must provide eligible employees up to 60 business days of unpaid leave (in any 12-month period) to serve as an organ donor, and up to 30 business days of unpaid leave (in any 12-month period) to serve as a bone marrow donor. An eligible employee must have worked for the employer for at least 12 months and at least 1,250 hours during the previous 12 months. To receive this leave, an employee must provide a written physician verification to the employer stating that (a) the employee is an organ donor or a bone marrow donor, and (b) there is a medical necessity for the donation of the organ or bone marrow. Organ donation leave may not be taken concurrently with leave under the federal Family and Medical Leave Act.

Gender Diversity Reporting Requirements

Maryland's new Gender Diversity in the Boardroom law, effective October 1, 2019, requires tax-exempt nonstock corporations with an operating budget of more than $5 million, and domestic stock corporations with sales exceeding $5 million, to report to the state the total number of board members and the number of board members who are female. The law does not apply to privately held corporations where at least 75 percent of the company's shareholders are family members.

Increased Penalties for Equal Pay Violations

Maryland's Amended Equal Work Law, effective October 1, 2019, authorizes the Commissioner of Labor and Industry or a court to require an employer to pay a civil penalty equal to 10 percent of the amount of damages owed by the employer for violating the Amended Equal Work Law if the employer is found to have violated the law at least two times within a three-year period.

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Changes to Federal Law

DOL Finalizes and Issues New Overtime Rule

On September 24, 2019, the U.S. Department of Labor (DOL) issued its final rule regarding amendments to the overtime exemption criteria for the administrative, executive, and professional (EAP) exemptions under the Fair Labor Standards Act (FLSA). The final rule, effective January 1, 2020, does the following:

(a) Increases the salary threshold for the EAP exemptions from $23,660 ($455 per week) to $35,568 ($684 per week);

(b) Increases the total annual compensation requirement for "highly compensated employees," subject to a minimal duties test, from $100,000 to $107,432; and

(c) Allows employers to use commissions, nondiscretionary bonuses, and other incentive compensation to satisfy up to 10 percent of the salary requirement if the payments occur no less often than annually, and subject to a single "catch-up" payment within one pay period of the close of the year.

The DOL estimates an additional 1.3 million workers who are currently overtime-exempt will become eligible for overtime, unless their employers make changes to avoid payment of overtime pay.

DOL Issues Final Rule on Joint-Employer Status

On January 16, 2020, the DOL published its final rule regarding joint-employer status under the FLSA. The DOL's final rule sets forth a four-factor balancing test for determining joint-employer status under the FLSA. In determining whether a second company is a joint employer of a worker, the DOL will examine whether the potential joint employer exercises power to:

- Hire or fire the employee;
- Supervise and control the employee's work schedules or conditions of employment;
- Determine the employee's rate and method of payment; and
- Maintain the employee's employment records.

The final rule makes clear that just maintenance by one company of employment records of another will not establish joint-employer status. The final rule also states that to be a joint employer under the FLSA, a second employer must exercise one or more of the four control factors.

Confidentiality of Employer Investigations

Overturning its prior rule established in *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), on December 17, 2019, the National Labor Relations Board (NLRB) held that employer requirements that employees treat workplace investigations as confidential are "presumptively lawful." *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019). Previously, under *Banner Estrella*, an employer seeking to impose confidentiality in a workplace investigation needed to prove, on a case-by-case basis, that the integrity of an investigation would be compromised without confidentiality.

Employee Email Use for Section 7 Activities

Overturning its prior rule established in Purple Communications, Inc., 361 NLRB 1050, on December 17, 2019, the NLRB restored an employer's right to control employee nonwork use of its information technology and email systems (with some exceptions) without violating the National Labor Relations Act. *Caesar's Entertainment b/d/a/Rio All-Suites Hotel and Casino*, 368 NLRB No. 143. Previously, in Purple Communications, the NLRB held that employees who have been given access to their employer's email system for work-related purposes have a presumptive right to use that system, on nonworking time, for communications protected by Section 7.

Employment Cases to Watch on the U.S. Supreme Court's Docket

Sexual Orientation and Gender Identity

The U.S. Supreme Court heard oral arguments on October 8, 2019, in three cases that could determine whether Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation and gender identity. Two of the cases involve gay men who were allegedly fired for their sexual orientation. The other case concerns a transgender woman allegedly fired for her gender identity. While the Court likely will not reach a decision until June 2020, the Equal Employment Opportunity Commission's position continues to be that discrimination based on sexual orientation and gender identity is prohibited under Title VII.

Deferred Action for Childhood Arrivals (DACA)

In November 2019, the Court heard oral arguments on whether the Department of Homeland Security lawfully terminated the DACA policy, also known as the "Dreamers" policy, enacted by President Barack Obama by Executive Order. The Court's decision will affect more than 700,000 individuals (and their families) who came to the U.S. as children without proper documentation, but who have been able to remain in the U.S. and work under DACA. The Court is being asked to decide a difficult issue: how to balance the life-changing implications for the Dreamers and their value to the economy against the administration's decision to enforce the laws that Congress enacted on undocumented individuals. A decision is not expected before June 2020, and until then, DACA recipients may continue to renew their DACA statuses. In the meantime, Congress could act to provide a safety net for the Dreamers.

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