

# FOCUS

## President's Message

**Karen Davidson**

It is truly an honor to assume the position of President of the Baltimore Chapter, which our website rightly notes is home to the friendliest and most charming in-house counsel in the USA! I thank my predecessor, Christine Poulon, for the wonderful job she did as President. I look forward to working with our Board as we plan another year of great lunches and learning, our annual golf/spa event aka the happiest day of the Chapter Year, and continued outreach through diversity and inclusion events, which strengthen our Chapter and our profession.



We have had a wonderful start to 2018: a January lunch with long time sponsor Kramon & Graham on Arbitrating Business to Business Disputes. In addition to the very fine K & G attorneys John Bourgeois and Geoff Genth, our own Chapter member Kristin Pickett Herber of Under

Armour was a member of the discussion panel. The entire presentation was timely and well delivered.

We also had a great topic to end 2017: updates in employment law with attorney Donny English of Jackson Lewis as the main presenter. If you were able to attend, you know it was a fantastic session with many questions and humor as well.

This year we will again be planning a Board retreat to ensure we continue to deliver the very best for our in-house members. If there is a topic you would like to hear more on during one of the lunches, please reach out to any of our Board members, listed below, or our Chapter Administrator, Lynne Durbin. I look forward to a great 2018!

Best Regards,  
Karen Davidson

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

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## Upcoming Events

**February 27**  
Recruiter Update  
Roy's Restaurant, 720 Aliceanna St,  
Baltimore, MD 21202

**May 14**  
Annual GOLF/SPA Event at  
Elkridge Country Club and  
About Faces Spa

**October 21-24**  
ACC National Meeting,  
Austin, TX

# Building a Better Team: Chief Legal Officers as Talent Management Leaders

By Ramsey Robert Saleeby

The role of the Chief Legal Officer (CLO) is ever expanding with increased responsibility for both legal and business functions. However, as CLOs secure and maintain their seats at the executive and board tables, it is imperative that they continue to assess and develop the talent of their legal departments. Talent management and development remains high on the priority list for legal departments of all sizes because it plays an integral role in the efficiency and longevity of the department.

## Assessing Talent in A Legal Department

Before venturing to explore strategies for developing talent within a legal department, CLOs must assess the department's current talent landscape. After all, it would be impossible to determine the needs of a legal department before first determining the status quo. There are a number of strategies for talent assessment, and CLOs must adopt a methodology that best suits their department. However, irrespective of the exact approach, it is important that it be proactive in nature. A proactive approach is demonstrated by having direct involvement in assessing talent, rather than waiting for deficiencies in skills to surface. This approach allows legal departments to assess whether they require new hires to fill in skill gaps or whether to develop current staff. Further, a proactive approach, although time consuming and sometimes costly, enables a more efficient realization of department strategy.

### Internal Methodical Assessments

Internal assessments are critical in measuring the performance of each member of the legal department. One approach mentioned at the 2017 ACC Annual Meeting CLO Roundtables (Roundtables) involved implementing an evaluation comprised of an objective



nine-block assessment. The assessment identified “star performers,” mid-level performers who require professional development to fill in skill gaps, and lower-end performers. Interestingly, star performers are sometimes lulled into a sense of a security and dropped to mid-level performers. Further, some mid-level performers are motivated to learn new skills that empower them to become star performers.

Another approach of note discussed at the Roundtables is defining roles in three dimensions. The first dimension is organizational or functional. This involves identifying technical expertise, for example, litigation or intellectual property. The second dimension involves identifying skills that align with the department's strategic outcomes, such as the implementation of artificial intelligence to boost productivity. The third dimension involves assessing other skills that the team may require, such as a second language or leadership experience. This approach offers both an objective and subjective approach and lends itself to legal departments of all sizes.

### Partnering with HR

Another approach to assessing talent involves partnering with the human resources department. CLOs can collaborate with HR to conduct personality assessments, for example. The results of the personality assessments would then be taken into consideration when making decisions regarding an individual's role in the legal department's overall strategy. Although this approach does not offer a comprehensive methodology to assessing talent, it can serve as an effective complement to other processes.

### Feedback by Internal and External Stakeholders

Although not necessarily methodical, feedback from internal and external stakeholders can be an effective tactic for assessing talent in legal departments of all sizes. Using feedback as an assessment is particularly effective when paired with the methods described above. Feedback from colleagues within the legal department, stakeholders from business units within the organization,

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and external stakeholders, such as clients, can be collected to help paint a picture of the talent landscape. Some CLOs have asked whether feedback from outside counsel might also be helpful. Generally speaking, this approach may be problematic given that outside counsel may hesitate to provide a complete and candid assessment of performance.

### **Developing Talent and Filling in Skill Gaps**

Once the CLO has successfully mapped the talent landscape of the legal department, the CLO can then begin to manage that talent. One of the largest impediments a CLO will face in this regard is that raised by flat organizations, or departments with very little turnover and a significant legacy staff. This impediment is bolstered with millennials being hired to fill junior positions, while legacy staff, with low turnover, occupy mid to senior level roles.

Furthermore, CLOs must ensure that developing soft skills is a component of their talent development initiatives. One participant of the Roundtables noted that technical expertise was a “given,” and that soft skills were the chief differentiator. In other words, technical expertise is required, but not sufficient, to excel in an in-house legal department.

How can leaders of legal departments develop talent, including soft skills, with little to no opportunity for vertical mobility?

### **Short-term Projects**

Most CLOs attending the Roundtables noted their use of short-term projects to develop talent. These projects were sometimes non-legal in nature in order to develop soft skills and increase familiarity with the various business functions of the organization. One example was creating a team of attorneys from various legal functions to prepare the organization for compliance with the upcoming EU General Data Protection Regulation. This three-month project developed not only technical skills, but also soft skills

by encouraging collaboration within a newly created team. Another participant identified a skilled attorney with poor interpersonal skills and who frequently garnered negative feedback. The CLO created a team of individuals across the organization outside of the legal department led by this attorney. The team was assigned to tackle a non-legal issue. Interestingly, the attorney thrived and feedback from other team members was overwhelmingly positive. These opportunities for short-term, ad hoc projects invigorate the legal team and drive professional development.

### **C-suite and Board of Directors**

Involving attorneys in C-suite and board activity is another effective tool for talent development. This can include preparing or giving a presentation to board committees or contributing to executive level projects. CLOs at the Roundtable noted that this approach instills confidence in attorneys, offers an opportunity to provide constructive feedback, and exposes attorneys to the skills required for aspiring CLOs.

### **Rotations/Cross-training**

Another method to keep employees motivated and develop talent is the use of rotations and cross-training, whether vertical, lateral, or outside of the legal department. For example, CLOs can move an attorney with real estate expertise to the licensing department. Furthermore, some participants of the Roundtable went so far as to have attorneys work in business functions to expose them to different facets of the business.

### **A Global Perspective**

For those operating within a global legal function and/or an international company, placing talent in regional offices around the world is highly recommended. Exposure to different cultures, environments, and challenges in a deliberate manner is an excellent development tool; however, people mobility and language requirements may be a hindrance.

### **Moving On**

There will be situations in which there are simply no further opportunities for developing a member of the legal department. In a flat organization, in which there is no room for vertical mobility in the foreseeable future, the best option available to a CLO may be to facilitate the transition of that member to a more a senior role in a different organization. This indirectly raises the profile of the legal department as one that goes above and beyond in talent and professional development, thereby attracting top new talent.

### **Conclusion**

There are a number of different approaches that CLOs can employ to assess and develop talent within their legal department. A proactive approach, leveraging both objective and subjective criteria, is critical to ensure the continued success of any legal department.



Ramsey Robert Saleeby is the Assistant General Counsel & Senior Manager of Program Development, with a focus on CLO programming, for the Association of Corporate Counsel (“ACC”). Thank you Joseph Z. Ayanian, Program Development Coordinator, for your research and help in drafting this article.

## ACC News

### Go Beyond: Becoming an Indispensable Business Advisor

The 2018 ACC Mid-Year Meeting (April 22-24, Denver CO) is designed to arm experienced in-house counsel with the knowledge and insights required to be better business strategists for their organizations. The program focuses on the most pressing challenges and concrete solutions surrounding both contracts and mergers & acquisitions. The entire curriculum is advanced and offers practical guidance to help in-house lawyers do their jobs more efficiently and effectively. Register today at [www.acc.com/myym](http://www.acc.com/myym).

### 2018 ACC Annual Meeting: Early Bird Rates End March 28

The 2018 ACC Annual Meeting, the world's largest gathering of in-house counsel, is scheduled for October 21-24 in Austin, TX. In less than three days you can choose from over 100 substantive sessions to fulfill your annual CLE/CPD requirements, meet leading legal service providers and network with your in-house peers from around the world. Visit [am.acc.com](http://am.acc.com) for more information.

### Drive Success with Business Education for In-house Counsel

To become a trusted advisor for business executives, it's imperative for in-house counsel to understand the business operations of your company. Attend business education courses offered by ACC and the Boston University Questrom School of Business to learn critical business disciplines and earn valuable CLE credits:

- Mini MBA for In-house Counsel, February 26-28, April 9-11, May 8-10 (Los Angeles), June 4-6, September 12-14, and November 7-9
- Finance and Accounting for In-house Counsel, September 5-7
- Project Management for in-house Law Department, November 14-15

Learn more and register at [www.acc.com/businessedu](http://www.acc.com/businessedu).

### Are You Conducting Diligence on EVERY VENDOR and Third-party that has Access to Your Systems or Data?

Your vendors are now prime targets for data breaches and small vendors can provide easy access for hackers. Even cleaning crews, HVAC vendors, and food distributors, to name a few, can all lead to data breaches, but are often overlooked in the vendor diligence process. ACC's Exclusive third-party due diligence service should be in your arsenal. Visit [www.acc.com/VRS](http://www.acc.com/VRS) for more information.

### Celebrate Pro Bono and Diversity

Have you or someone you know of made great strides in promoting diversity in the legal profession or providing pro bono legal services? Submit your nominations today for the [ACC 2018 Matthew J. Whitehead, II Diversity Award](#) and the [ACC 2018 Corporate Pro Bono Award](#) to have their achievements recognized! You can nominate an individual or organization for either award – self-nominations are welcome – and submit the completed nomination form along with supporting materials to The ACC Foundation, at [foundation@acc.com](mailto:foundation@acc.com). Deadline for submitting your nomination is May 11.

### New to In-house? Are you prepared?

The ACC Corporate Counsel University® (June 20-22, Philadelphia, PA), 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 [ccu.acc.com](http://ccu.acc.com).

### Just Released: ACC Chief Legal Officers 2018 Survey

The ACC Chief Legal Officers Survey offers an opportunity to get data that supports the imperative for the CLO to report directly to the CEO. Other notable findings include what keeps CLOs up at night, reporting structures, how CLOs view the future of departmental budgets and staffing, litigation and contract workload, and where data breaches and regulatory issues have the greatest impact. Download it today at [www.acc.com/closurvey](http://www.acc.com/closurvey).

Have you considered that you and your professional legal services may be subject to malpractice scrutiny? Legal malpractice lawsuits can happen unexpectedly—even to in-house counsel. If you rely solely on the protection of corporate management liability coverage, your personal assets and reputation could be at risk. It may surprise you to learn that some of your peers have discovered firsthand that risky coverage gaps often exist. Since 1996, the ACC has turned to Chubb to address malpractice issues unique to in-house counsel. Learn more about Chubb at [www.chubb/acc](http://www.chubb/acc).

Whether managing compliance and ethics, obtaining permissions, or organizing your company's licensing agreements, Copyright Clearance Center's (CCC) Education Certificate Program will guide you through the complex world of copyright. ACC members receive a **25% discount** through 12.31.18 with **promo code: ACC2018**. Visit <http://go.copyright.com/acc2018/education> for a complete schedule and advance your copyright knowledge today.

# Maryland Enacts Mandatory Paid Sick/Safe Leave

By Charles R. Bacharach, Member, Gordon Feinblatt LLC

Maryland has joined the wave of states and municipalities that have enacted mandatory paid sick/safe leave. The Healthy Working Families Act (“HWFA”) was to take effect on January 1, 2018, but in May 2017 Governor Hogan vetoed the legislation. The General Assembly overrode the veto on January 12, 2018. Under Maryland law, the HWFA will take effect on February 11, 2018, thirty days after the override vote. Business interests have indicated that they will ask the legislature to postpone the effective date to allow more time for implementation, but the fate of those proposals is uncertain. Accordingly, all Maryland employers should begin immediately to consider the steps they will have to take to come into compliance.

The following is a summary of the HWFA’s most substantive provisions and an outline of suggested first steps employers should consider when implementing the new law.

## Which Employers are Covered?

All Maryland employers are covered by the law. Employers of 15 or more employees must provide *paid* sick and safe leave as required by the law. Employers of 14 or fewer employees must “at least” provide employees with *unpaid* sick or safe leave at the levels required by the law. The number of employees is determined by calculating the average monthly number of employees employed by the employer during the preceding year. All employees – full-time, part-time, temporary and seasonal, are included in determining coverage, regardless of whether an employee would be entitled to paid leave under the law.

## Which Employees Are Eligible for Leave Benefits Under the Law?

All employees are eligible for sick and safe leave under the law except for the following:

- Employees who regularly work less than 12 hours a week

- Individuals who are recognized as independent contractors under the so-called “ABC” test set forth in the Maryland unemployment law.
- Certain licensed real estate salespersons or licensed associate real estate brokers who are compensated solely on a commission basis and qualify as independent contractors.
- Individuals who are under 18 years of age before the beginning of the year.
- Certain individuals employed in the agricultural sector.
- Individuals employed by a temporary services agency to provide temporary staffing services to another person if the agency does not have day-to-day control over the work assignments and supervision of the individual while the individual is providing the temporary staffing services.
- Individuals directly employed by an employment agency to provide part-time or temporary services to another person.
- Employees in the construction industry who are covered by a collective bargaining agreement under which the requirements of the HWFA are expressly waived. However, janitors, building cleaners, building security officers, concierges, doorspeople, handypersons, or building superintendents, however, cannot be excluded under the terms of a bargaining agreement.
- Employees who are called to work by an employer on an as-needed (PRN) basis in a health or human services industry, if the employee:
  - » can reject or accept the shift offered by the employer;
  - » is not guaranteed to be called on to work by the employer, and;
  - » is not employed by a temporary staffing agency.

## Rules on Leave Accrual and Use

Covered employers must provide sick and safe leave at a rate of at least 1 hour for every 30 hours an employee works, up to 40 hours of paid leave in a year. An employer may award the full amount of earned sick and safe leave that an employee would earn over the course of a year at the beginning of the year, rather than using an accrual system. Employees must be allowed to accrue up to 64 hours of sick and safe leave at any one time, and use up to 64 hours of earned sick and safe leave in a year.

Employees must be allowed to carry over up to 40 hours of their earned sick and safe leave to the following year, unless the employer awards the full amount of leave at the start of each year, or the employee is employed by a nonprofit entity or government employer under a grant which is limited to one year and not subject to renewal.

Employers are not required to allow employees to accrue sick and safe leave during any:

- 2-week pay period in which the employee works fewer than 24 hours
- 1-week pay period if the employee worked fewer than a combined total of 24 hours in the current and immediately preceding pay period
- Pay period in which the employee is paid twice a month regardless of the number of weeks in a pay period and the employee worked fewer than 26 hours in the pay period

Sick and safe leave begins to accrue on an employee’s first day of work, however, employers may prohibit the use of earned sick and safe leave during the first 106 calendar days that an employee works for the employer.

Employers must provide employees paid sick and safe leave at the same pay rate as the employee normally earns.

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Tipped employees must be paid at least the state minimum wage (currently \$9.25/hr.; \$10.10/hr. beginning July 1, 2018) for each hour the employee uses earned sick and safe leave.

In calculating the leave accrual rate for an employee who is exempt from the overtime provisions of the federal Fair Labor Standards Act, an employer must assume the employee works 40 hours each workweek, unless the employee's normal workweek is less than 40 hours, in which case the number of hours in the normal workweek must be used.

Employers are not required to pay out unused sick and safe leave upon termination of employment. This rule may differ for employers that provide for sick and safe leave in combination with other forms of leave under a paid time off (PTO) or similar policy, instead of establishing a separate sick leave account. Under Maryland's Wage Payment and Collection Law, vacation leave must be paid out upon termination unless the employer has a written policy restricting the payment of such leave at termination, and the policy was given to the employee at the time of hiring. As a result, where an employer uses a general PTO system for sick and safe leave purposes, instead of establishing a separate sick and safe leave account, the payment of the leave upon termination will be governed by the employer's written policy and the wage payment law.

Any unused sick and safe leave earned by an employee who is rehired within 37 weeks after leaving employment must be reinstated unless the leave was paid out upon termination of employment.

### For What Purposes Can Paid Sick and Safe Leave be Used?

An employee may use earned sick and safe leave:

- To care for or treat the employee's mental or physical illness, injury, or condition.
- To obtain preventive medical care for the employee or the employee's family member.

- To care for a family member with a mental or physical illness, injury, or condition.
- for maternity or paternity leave.
- If the absence from work is due to domestic violence, sexual assault, or stalking committed against the employee or the employee's family member and the leave is used by the employee or family member to obtain medical attention, services from a victim services organization, or legal services related to the domestic violence, sexual assault, or stalking, or during a time when the employee has temporarily relocated due to domestic violence, sexual assault, or stalking.

Employees may take earned sick and safe leave in the smallest increment that an employer's payroll system uses to account for absences or work time, however, an employee may not be required to take earned sick and safe leave in an increment of more than four hours.

### Who is a "Family Member" for Purposes of Using Sick and Safe Leave?

The list of individuals included as "family members" for purposes of the HWFA is substantially broader than the definition of "family member" under the federal Family and Medical Leave Act and includes the following categories of individuals:

- A child, including biological, adopted, foster, or stepchild of the employee, or one for whom the employee has legal or physical custody or guardianship, or for whom the employee stands in *loco parentis*, regardless of the child's age.
- A parent, including biological, adoptive, foster, or stepparent of the employee or the employee's spouse, the legal guardian of the employee, or an individual who acted as a parent or stood in *loco parentis* to the employee or the employee's spouse when the employee or the employee's spouse was a minor.
- The spouse of the employee.

- A grandparent, including biological, adopted, foster, or a step grandparent of the employee.
- A grandchild, including a biological, adopted, foster, or a step grandchild of the employee.
- A sibling, including a biological, adopted, foster or step sibling of the employee.

### Employee Notice of Leave / Leave Denial

Employers may require employees to provide seven days' advance notice when the use of earned sick and safe leave is foreseeable. Where the use of leave is not foreseeable, the employee must provide notice as soon as practicable. Employees may also be required to comply with the employer's regular notice and procedural requirements for requesting or reporting leave so long as those requirements do not interfere with the employee's ability to use sick or safe leave.

Employers may deny a request to take sick and safe leave if the employee fails to provide required notice and "the employee's absence will cause a disruption to the employer." What constitutes a "disruption" to the employer, however, is not defined by the law.

An employer licensed by the state to provide services to developmentally disabled or mentally ill individuals, may deny a leave request if the need to use leave is foreseeable, the employer is unable to secure a replacement after exercising reasonable efforts to do so, and the employee's absence will cause a disruption in service to at least one individual with a developmental disability or mental illness.

### Certification

Employers may require an employee who uses sick and safe leave to provide verification that the leave was used appropriately when the leave is used for more than two consecutive scheduled shifts.

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The law permits an employer to require verification for absences of any length for new employees who use sick and safe leave during the period between the first 107 and 120 days of employment, but only if the employer and employee “mutually agree” to that requirement at the time of employment. To comply with this requirement, employers will have to include a provision allowing such verification during the hiring or orientation process.

If an employee fails to provide a required verification, the employer may “deny a subsequent request to take earned sick or safe leave for the same reason.” The law does not define what “the same reason” means, so it is unclear, for instance, whether a subsequent absence for the employee’s own illness is enough, or whether it has to be the same cause of illness.

### **How Does Sick and Safe Leave Work With Existing Employer Leave Policies?**

Employers can comply with the HWFA by adopting or retaining a general paid leave policy, such as a paid time off (PTO) or sick leave policy, so long as the policy meets the HWFA’s minimum accrual requirements and permits employees to use paid leave as required by the law.

### **Interference and Adverse Action Against Employees Prohibited**

An employer may not interfere with an employee’s exercise of his or her rights under the HWFA, or take any adverse action against an employee because the employee exercises rights under the law. In addition, the law prohibits the use of any employer policy that penalizes an employee for using earned sick and safe leave. The restriction is aimed in particular at so-called “no fault” policies, under which points are assessed to account for employee absences, regardless of the reason for the absence, and penalties imposed when specified limits on absences are exceeded. Employers are already prohibited from penalizing employees for absences covered under the federal Family and Medical Leave Act and the Americans with

Disabilities Act. The new restriction under the HWFA will likely have a significant impact on the future effectiveness of “no fault” and similar policies that penalize employees for absences. Nevertheless, the HWFA does allow employers to enforce rules that prohibit the improper use of sick and safe leave.

### **Notice to Employees Of Their Rights Under the HWFA**

Employers must provide employees with a notice of their rights under the HWFA. The Commissioner of Labor and Industry is required to create a model poster and notice, as well as a model sick leave policy, or similar guidance, for employers to use in implementing the requirements of the law.

### **Notice to Employees of Their Current Leave Balance and Recordkeeping**

Each time wages are paid, an employer must provide a written statement to eligible employees regarding the amount of earned sick and safe leave that is available for the employee’s use. This requirement may be satisfied by providing an online system through which an employee can obtain the information.

Employers must also keep a record for at least three years of the earned sick and safe leave accrued and used by each employee. Employers that fail to keep such records (or refuse to make them available for inspection when requested by the Commissioner of Labor and Industry) are subject to a rebuttable presumption that the employer has violated the law.

### **Preservation of Montgomery County Law / Preemption of Future Local Sick/Safe Leave Laws**

The HWFA preserves the more generous provisions of the sick and safe leave law passed by Montgomery County in 2016, but preempts the authority of any other Maryland jurisdiction to enact new sick and safe leave laws.

## **Complaints, Enforcement and Civil Actions**

The Commissioner of Labor and Industry is authorized to conduct investigations to determine whether the HWFA has been violated upon receipt of a written complaint from an employee.

The Commissioner is required to investigate within 90 days and attempt to resolve the dispute informally through mediation. If the Commissioner is unable to resolve the dispute and determines that the employer has violated the law, the Commissioner is required to issue an order directing payment of any unpaid earned sick and safe leave and any actual economic damages sustained by the employee. The Commissioner also has the discretion to award up to three times the employee’s hourly wage for each violation and a civil penalty of up to \$1,000 for each employee with respect to whom the employer is not in compliance. If an employer does not comply with the order within 30 days, the Commissioner may ask the Maryland Attorney General to bring an action on behalf of the employee, and may bring its own action to enforce the order for a civil penalty.

In addition to action by the Commissioner, an employee may bring a civil action to enforce the Commissioner’s order within three years after the date of the order. If the employee prevails, the court may award up to three times the value of the unpaid sick and safe leave, punitive damages, reasonable attorneys’ fees and costs and injunctive or other relief as appropriate.

### **Potential Individual Liability for Owners and Managers**

The law broadly defines “Employer” to include “a person that acts directly or indirectly in the interest of another employer with an employee.” Similar language in other wage laws has been found by the courts to be broad enough to impose liability upon owners and managers who formulate or implement employer practices that affect an employee’s rights under the law.

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## Future Guidance

The Department of Labor Licensing and Regulation is authorized to adopt regulations governing implementation of the HWFA, but has not yet done so.

## Next Steps for Employers

Employers that do not currently offer sick leave need to develop policies and procedures that comply with the new law. Employers that currently offer sick leave must carefully examine their sick leave policies and practices to determine the changes that will be needed to bring their practices into compliance with the HWFA. We suggest that employers begin by answering the following questions:

- Are there any employees who are not entitled to earn leave under the HWFA?

- Does leave accrue at the required rate under existing policies?
- Do current policies allow carry over of earned leave as required?
- Is leave available for all of the purposes required under the HWFA?
- Do any requirements for doctor's notes/certifications comply with the HWFA's limits and requirements?
- Are there any policies or practices that penalize employees for the use of leave – even if done on a “no-fault” basis?
- Is there a mechanism internally or through the company's payroll service to provide the required notice of leave balance in a form accessible by employees?

- What do current policies provide regarding the payout of leave at termination?

Once these basic questions are answered, employers can develop an action plan for implementing changes to their policies and practices - including educating HR staff and supervisors.



Charles R. Bacharach,  
Gordon Feinblatt LLC

## The Broker Protocol: End of an Era?

By Victoria Bruno, Of Counsel, Womble Bond Dickinson

Morgan Stanley and UBS – two of the largest wirehouses in the United States – recently withdrew from the [Protocol for Broker Recruiting Agreement](#), commonly referred to as the “Broker Protocol.” This move has raised much speculation as to whether other firms will follow suit. A domino effect of departures could lead to the demise of the Broker Protocol and the relative ease it has afforded advisors for over a decade to take their clients with them when switching firms or going independent without violating restrictive covenants against solicitation and competition or regulations that protect the privacy of client information.

The Broker Protocol is a voluntary agreement among member firms that sets forth guidelines for when and how departing advisors can solicit clients to transfer their business without the fear of being hit with lawsuits or restraining orders. Such costly, and sometimes protracted, legal battles over clients – and control of management of their assets – were commonplace before 2004, the year

Merrill Lynch, UBS, and PaineWebber agreed to a cease-fire that essentially sanctioned the practice of luring each other's most profitable producers. Morgan Stanley joined two years later. Since then, the Broker Protocol has become widely accepted in the brokerage industry with hundreds of firms of all sizes signing on over the years. It currently has more than 1,700 active members.

Therein lies the problem, according to statements by Morgan Stanley and UBS. Morgan Stanley – the largest of the big four wirehouses by headcount – withdrew from the Broker Protocol effective November 3. UBS withdrew effective December 1. Morgan Stanley cited as a primary reason for withdrawing the fact that smaller competitors have been increasingly taking advantage of loopholes in the Broker Protocol and gaming the system in ways that defeat the original objective. The Broker Protocol has allowed these smaller competitors to poach talent from the big wirehouses with very little movement in the opposite

direction. This net loss has made the Broker Protocol unsustainable for firms like Morgan Stanley and UBS, who are now focusing their energy and resources on retention rather than recruitment. In the current environment, where the largest firms are desperate to retain their best talent, there may be little to no incentive to remain in the Broker Protocol. The timing of Morgan Stanley's announcement of its withdrawal, which gave its employees only four days to leave while still under the protection of the Broker Protocol, is a tacit acknowledgement of its concern over losing top advisors to the competition. That did not stop several high-profile departures from Morgan Stanley and UBS, accelerated to beat the clock running out.

We may see a return to pre-Broker Protocol days, where firms regularly sued each other when an advisor made the change from one to the other. This is likely to be the case with Morgan Stanley and UBS. Neither one would

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have dropped out of the Broker Protocol without the intention of enforcing rights under non-solicitation and non-competition agreements that the Broker Protocol overrode. The risk of litigation will make it more difficult for advisers to leave non-member firms. There will be less certainty over the amount of business an advisor will port to a new firm. Upfront recruitment bonuses and compensation packages may take a substantial cut to account for expected legal expenses.

For the time being, Merrill Lynch has said that it will remain in the Broker Protocol. Wells Fargo, the fourth of the largest U.S. wirehouses, has not given any indication that it intends to leave. However, if one or both withdraw in the near future, all bets are off. Everyone will have to tread carefully and plan wisely to protect their interests in the trillions of dollars of assets under management that are at stake.



**Victoria Bruno,**  
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