



THE 2024 GENERAL COUNSEL TOOLKIT CONFERENCE

The Trusted Advisor: C-Suite Essentials

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Proskauer»

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Hypothetical

- The founder of a late-stage company with private equity and other investors is looking to renegotiate her compensation package in light of a possible IPO or sale of the company.
- As leverage, she has been working with a subordinate in the project-development team to develop a fix to the company's core product, which reduces PFAS levels to permissible standards in drinking water. The product has not yet performed as advertised and the company is aware of customer complaints to regulators.
- If the founder's comp demands are not met, she will leave with the subordinate to join a competitor. For good measure, the two are romantically linked and other employees charge favoritism in awarding promotions and bonuses.

Hypothetical Raises Numerous Legal Issues and Considerations

- Executive Compensation
- Investigating the Relationship/Employment Law
- Managing the Regulatory/Product Liability Issues

Executive Compensation

Renegotiation of CEO's Compensation Package

- Business Context
- Procedural Considerations, Process and Roles of Different Parties
- Type of Agreement and Level of Contractual Protection
 - Offer Letter
 - Employment Agreement
 - Impact of Term – fixed, automatic renewals, evergreen
- Key Features of Comp Package
 - Base Salary
 - Bonus/Short-term Incentives
 - Long-Term Incentives (typically, equity awards)
 - Fringe Benefits/Perquisites
 - Miscellaneous: Benefits, Vacation, Relocation, etc.

Renegotiation of CEO's Compensation Package

- Impact of Termination of Employment
 - Death, Disability
 - Voluntary Termination
 - Without Cause/Good Reason
 - Severance – amounts, triggers and components
 - Release requirement
 - Any enhancement on change in control?
 - IRC section 280G/golden parachute considerations
 - Cause
- Restrictive Covenants and Protection of Trade Secrets
 - Non-competition: state law and FTC ban
 - Non-solicitation of customers/clients and employees/contractors
 - No hire
 - Confidentiality
 - Non-disparagement
 - Carve-outs/Exceptions (e.g., NLRA, whistleblower, DTSA)
 - IP covenants

Renegotiation of CEO's Compensation Package

- Clawbacks
- Stock Ownership
- Reporting/Scope of Authority and Duties/Efforts and Time Commitment
- Permitted Outside Activities
- Compliance with Code of Conduct and Policies
- Indemnification and D&O Liability Insurance
- Governing Law
- Dispute Resolution
- IRC Section 409A (deferred compensation/additional income tax and penalties)
- Executive Representations

Investigating the Relationship/Employment Law

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Relationships & Favoritism in the Workplace

- Consensual Relationship Policy
 - What is it?
 - Why have one?
- Workplace Investigations
 - What Triggers an Investigation?
 - Internal versus External Investigator
 - Scope
 - Prompt, Thorough
 - Setting Expectations
 - Written versus Verbal Reports
 - Sharing of Conclusions

Potential Legal Claims

- Claims of Favoritism
 - Generally not actionable but that does not mean claims won't be brought
 - Perceived favoritism can impact morale and potentially lead to legal risks
- Risk of Claims From Subordinate in Relationship
- Resolving Workplace Romantic Relationship Claims
 - New York General Obligations Law Section 5-336 bars settlement provisions “that would prevent the disclosure of the underlying facts and circumstances to the claim or action unless the condition of confidentiality is the complainant's preference.”

Managing the Regulatory/Product Liability Issues

Address Issues Holistically

- Managing the Regulator
- Dealing with Politics
- Litigation Risks
 - Customers
 - Third-Party Claims: Bodily Injury, Property Damage and Medical Monitoring
- Media Scrutiny
- Brand/Reputation Concerns

Shape The Narrative

- Keep it simple
- Keep Eyes on the Prize
 - Not every point needs to be addressed.
 - Reassuring those not sufficiently “defended”.
- Embrace bad facts, but separate proactive from reactive statements.
- Stress test to be sure critiques are:
 - helpful to the narrative;
 - immaterial; or
 - false.

Andrea Rattner



Andrea S. Rattner
Partner

Proskauer Rose LLP

Andrea S. Rattner, a partner at Proskauer, practices executive compensation and employee benefits law and counsels clients with respect to the tax, securities, corporate governance, stock exchange, ERISA and other implications affecting all types of executive compensation arrangements and employee benefit plans. For more than 30 years, her practice has focused on a broad range of executive compensation and employee benefits matters, advising clients on an ongoing basis as well as in the context of corporate transactions (including mergers and acquisitions, spin-offs, joint ventures, debt and equity offerings, restructurings, financings and bankruptcies) and other transformative and unique situations. Her clients include public companies, private equity firms and their portfolio companies, boards and their compensation committees, and executives in wide array of industries. Andrea has been also involved in Proskauer's management, serving as a member of the firm's Executive Committee and as a past chair of the Tax Department.

Andrea has been lauded by various legal rankings directories including *Chambers US*, *Best Lawyers* and *Legal 500*, who cite that her "depth of knowledge and involvement in this practice area, [including] the business and trends, is terrific." She is also recognized for having an "excellent understanding of the business community" and for being "pro-active in keeping clients up to date." She writes and lectures frequently on employee benefits and executive compensation matters. Since 1993, she has served as an adjunct professor on the faculty of Cornell University (New York State School of Industrial & Labor Relations-Management Programs). Andrea also serves on the leadership council of the NY Chapter of the Women Corporate Directors Foundation (WCD), the only global membership organization of its kind focused on helping women obtain and succeed in board positions.

Keisha-Ann Gray



Keisha-Ann G. Gray
Partner

Proskauer Rose LLP

Keisha-Ann G. Gray is a distinguished litigator and trial lawyer who has secured significant victories in federal and state courts (jury trial and otherwise) for organizations facing “bet the company”, high-reaching, reputational risk claims. An award-winning partner in Proskauer’s renowned Labor & Employment department and co-chair of the Firm’s Workplace Investigations practice group, she advises clients on high-stakes employment litigation and complex investigations. As important social change movements like Black Lives Matter, #MeToo and LGBTQ Pride continue to shape society and businesses, Keisha-Ann is the go-to advisor for Boards and organizations facing issues related to discrimination, harassment, and DEI risk mitigation matters.

With 20+ years in practice, Keisha-Ann frequently speaks and trains clients on litigation and trial practice, conducting effective investigations, and Anti-Discrimination/Anti-Harassment. A recognized thought-leader in the employment litigation space, Keisha-Ann has also authored the treatise, *Employment Litigation – A Practitioner’s DeskBook* (PLI Press). Her “real talk” style of delivery provides clients with actionable and practical best practice solutions to today’s most challenging workplace issues.

Prior to joining Proskauer, Keisha-Ann served as an Assistant United States Attorney in the Eastern District of New York and federal law clerk in the U.S. District Court for the District of Puerto Rico. The breadth of Keisha-Ann’s experience and background in federal government, coupled with her tenure in private practice as a Big Law partner and employment litigator, gives her the unique ability to meaningfully connect with diverse groups of people. This skill enables her to advocate effectively and successfully (in and out of the courtroom) for her clients. Because of her unique and varied skill set, clients routinely engage Keisha-Ann to handle their most sensitive matters which, due to her involvement, often successfully result in non-public, confidential resolutions – precisely the mandate required by her clients.

Grant Esposito



Grant Esposito
Partner

Proskauer Rose LLP

Grant Esposito is a first-chair trial lawyer with decades of experience in complex commercial disputes and class action litigation. He advises clients in key litigation areas including antitrust, mass torts, product liability, health care, environmental, securities and transactional disputes. Grant serves as a trusted advisor and trial lawyer for multinational companies in a variety of sectors in their most challenging and high-profile matters. In particular, he is recognized for providing expert counsel to life sciences and professional services clients in cross-border disputes.

Throughout his career, Grant has secured notable victories in jury and bench trials throughout the U.S., as well as in arbitration proceedings. He has also been recognized as a leading lawyer by numerous legal and industry publications, including Chambers USA, New York Law Journal and Law 360.

Nate Saint Victor



Nate Saint Victor
General Counsel & Chief Compliance
Officer

Engine No. 1

Prior to joining Engine No. 1, Nate spent 15 years at Morgan Stanley, where he provided legal counsel focused on its prime brokerage, securities lending, and fund administration businesses. Nate started as an attorney at Davis Polk. Nate has served on multiple industry and legal groups, including the Securities Industry Financial Markets Association (SIFMA) Alternative Investment Roundtable and the Board of Directors for the New York City Bar Association.

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