TLDR

Important US Legal Developments

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SCALE LLP

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Interest: I'm a Canadian and US corporate lawyer who represents businesses, and their owners, boards of directors, and senior management on corporate governance, strategic transactions, and financing initiatives.

As a former public company GC, I strive to provide pragmatic and actionable advice.

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Bio: Chuck is an international corporate lawyer with 20+ years of legal experience, 15 years of international experience, and 10+ years of public company GC experience. Chuck spent a decade in-house as the GC of 3 different dual-listed public companies in the energy and technology/construction industries, where he led strategic transaction initiatives and capital markets transactions, provided practical day-to-day commercial advice, and was a trusted advisor to executive teams and boards of directors on a broad range of legal and governance matters. Chuck is a US and Canadian lawyer who spent 15 years living and working in Calgary, Canada where he represented public and private companies in cross-border M&A, joint ventures, and capital markets transactions.

Scale LLP is a national, full-service distributed law firm founded by former GCs. We provide modern legal counsel with a focus on real world, actionable solutions in the areas of corporate & securities, fintech & financial services, litigation, real estate & land use, and intellectual property.

The FTC Non Compete Ban

TLDR: The FTC has issued a rule invalidating most existing noncompete agreements nationwide, and banning them altogether in the future. Non competes that existed before the effective date may still be enforced against "senior executives" but not against other workers. New non competes are not allowed after the effective date, regardless of seniority. There are narrow exceptions for "bona fide sale" situations.

In-House Takeaway: This rule will not likely survive a court challenge, but the rule has broad support. Consider other mechanisms to protect the company (trade secrets / confidentiality / non-solicit). The burden of proof will be more challenging (not just a breach of contract case).

The rule was issued following a Biden Administration Executive Order. The proposed rule garnered over 27,000 comments, mostly positive, and included stories of Jimmy John's sandwich shop employees being subject to non-competes. The FTC estimates that over 30 million people are subject to non-competes that will now be invalid.

Many states (CA, CO, ND, MA, MN, and OK) already ban or restrict non competes and others are considering similar bans. Several groups immediately sued to challenge the FTC ban, and many experts believe the challenges will be successful (saying the FTC has exceeded its rulemaking authority).

Congress could act directly, or states could continue to implement restrictions, which could have interesting impacts on worker "forum shopping". California's Constitution bans non competes and studies indicate a 3-5% positive correlation with wages.

The Corporate Transparency Act

TLDR: Canadian companies with US incorporated subsidiaries (and 25%+ beneficial owners of US companies) are subject to CTA disclosures to the US Treasury Department of Financial Crimes Enforcement Network (FinCEN) within 90 days of formation. Existing companies / beneficial owners must report by January 1, 2025.

In-House Takeaway: Audit existing entities and ownership, and build prospective disclosure into contractual obligations. Unlike securities law reporting (where obligation is on owner) the CTA obligation is on the company itself.

Exempt companies include SEC-reporting companies, large operating companies (20+ FTEs / $5mm rev) , banks, insurance companies, sole proprietorships, common law trusts, and general partnerships.

A "beneficial owner" is an individual who (1) directly or indirectly owns or controls at least 25% of the reporting company's ownership interests or (2) exercises substantial control over the reporting company, such as senior offices with substantial influence over important decisions. A "company applicant" is the individual (e.g. paralegal) who (1) files the document creating or registering the reporting company or (2) is primarily responsible for director or controlling the filing of such document (no more than 2 company applicants may be reported).

Report includes passport / drivers license information. Obtain FinCEN Identifier to reference.

Musk's Moonshot Comp Invalidated

TLDR: A Delaware Court invalidated Musk's 2018 $55.8B compensation package, finding that the board process did not satisfy "entire fairness" because Musk (as a "Superstar CEO") had improper influence over a process that was not disclosed in connection with the prior shareholder ratification.

In-House Takeaway: Any process will be judged in hindsight, including GCs acting as go-between re Exec. Comp.

The package was a moonshot, considered impossible to hit and "a laughable publicity stunt" when awarded: Dubbed "6% for $600B", it was 12 tranches of stock options, each representing 1% of Tesla's I/O shares. To vest the first tranche, Market Cap needed to double to $100 billion and either Revenue or Adjusted EBITDA needed to 3X. To vest all 12, Tesla needed to 10X its Market Cap, 15X its Revenue, and 21X its Adjusted EBITDA. Musk achieved it all, but….

Tornetta (a "thrash metal drummer" who owned 9 shares) alleged, and the Delaware Court decided, that Musk was a controlling stockholder of Tesla (already owned 21.9%), and that the "entire fairness" standard of review applied and was not satisfied. The Court found:

- Musk Wielded Significant Influence over Tesla by Virtue of His Existing 21.9% Stock Holdings
- Musk was a "Superstar CEO" whose identity was interwoven with Tesla
- The Board's Independence Was Compromised because of Musk's Personal Relationships
- Musk Controlled the Board's Consideration of the 2018 CEO Performance Award
- The Stockholder Vote Was Deficient because it Contained No Conflict Disclosures and did not Include a Full and Accurate Description of the Process
- As a result, the vote was not fully informed and was therefore invalid, with rescission being the remedy.

P.S.: The Plaintiff's firm has asked for $6.5 billion in legal fees for its victory.

Delaware v Texas

(Tesla's Proposed Texas Redomestication)

TLDR: The Delaware Premium is on the ballot at Tesla's upcoming AGM.

Immediately after the *Tornetta* decision, Musk ran a poll on X asking whether Tesla should "change its state of incorporation to Texas, home of its physical headquarters?" Of 1,102,554 votes on X, 87.1% were in favor. The following day, Mr. Musk posted on X that **"Tesla will move immediately to hold a shareholder vote to transfer state of incorporation to Texas.**" Having formed a special committee and hired expert advisors (and consistent with the Superstar CEO's wishes), the Tesla board has recommended that shareholders approve a resolution to redomesticate Tesla to Texas.

This raises a couple of questions:

1. Would Musk's Moonshot pay have been upheld under Texas law?
2. Is Delaware really better than everywhere else, including Texas?

We'll of course never really know the answer to these questions. As a consolation, the Tesla Proxy Circular provides a wonderfully comprehensive issue-by-issue comparison of the DGCL and the TBOC. The interesting issue seems to be that Delaware's strength may also be its weakness:

The Tesla Proxy Circular notes "the broadly held academic view that Delaware law can be indeterminate because of its use of broad, flexible standards that are applied to individual cases in a highly fact-specific way. [S]cholarship demonstrates a high level of reversal rate for decisions of the Delaware Court of Chancery. This focus on precise facts and circumstances means Delaware decisions may be less predictable for an innovative company like Tesla. Although Texas has less corporate case law, Texas "has a more code-based corporate governance regime," and so does not depend on cases to set out the law as much as Delaware."