



# 105 Issue Spotting Hot Employment Law Topics

Howard Levitt  
*Counsel*  
Lang Michener, LLP

Marsha M. Lindsay  
*Legal Counsel, Labour and Employment Law*  
Purolator Courier Ltd.

## Overview

The relationship between legal and human resources departments as corporations execute hiring, termination, remuneration and benefits, and other personnel actions is crucial to the success of companies as they compete in the marketplace. Strong collaboration between these departments helps companies navigate the complex web of regulatory, personnel and employer liability management, and benefits and compensation policies, while minimizing the likelihood of disputes that can detract from a corporation's mission and affect its bottom line. Especially in the last decade, companies are realizing that it is in their best interest that legal and human resources departments not simply collaborate when a dispute arises, but that they work together to reduce exposure from the onset.

This article is the product of a request by an ACC member that we examine this issue of departmental collaboration between legal and human resources and question whether the legal function is becoming more entwined with the human resources role. The following Practice Profile focuses on the in-house attorney's role with regard to the human resources function on matters not in litigation.

In putting together this Profile, ACC approached corporations serving diverse industries, as well as an expert in the area of legal and human resources collaboration, to examine the relationship between corporate legal and human resources departments. Profile Participants commented on their collaborative practices on issues involving hiring and terminations, benefits and compensation, training, regulatory responsibilities affecting compliance and corporate governance, business management team building, and employer liability management matters. Participants also explained the legal review process for HR actions and delineated operating procedures for review of HR-related decisions. Profile Participants were also asked to share what elements of their company's legal review policies regarding human resources functions they considered to be leading or best practices.

From discussions with the profiled companies, it is evident that the level of collaboration between the legal and human resources departments has evolved over the past 10-15 years to one where there is a higher level of understanding, respect, and trust, as leaders from both departments have come to realize that it is in the best interest of the corporation to work together from the onset. Legal scholars observe that "the ability to communicate with and to integrate [a multidisciplinary management team] is essential for dealing effectively with the thorny problems that can lead to major litigation as well as economic and reputation losses."<sup>1</sup> Johnny Taylor, Immediate Past Chairman, Society for Human Resource Management, added that "the rising costs of defending avoidable lawsuits, coupled with the bruising defendant companies receive from the public as word of lawsuits hit the media, has also contributed to a rethinking of the old paradigm." Several other Profile Participants stated that managing workplace risk for the organization globally has produced a realization that collaboration among both functions is critical to establishing and achieving common goals. Teri Monti, Director of Employee Relations, RBC Financial Group, underscored this important principle: "It is absolutely critical that there be a good relationship between law and human resources in order to have effective collaboration....Without a really good relationship, you can't go into critical situations as effectively....That is fundamental."

LEADING PRACTICE PROFILES SERIES:

## Leading Practices in Collaboration between Corporate Legal and Human Resources Departments on Non-Litigation Matters



Association of Corporate Counsel  
1025 Connecticut Avenue NW, Suite 200, Washington, DC, 20036  
ph: 202.293.4103 www.acc.com

**Leading Practices in Collaboration between Corporate Legal and Human Resources Departments on Non-Litigation Matters**

Featured in this Practice Profile are five companies engaged in health industries, financial services, food production and retail, and the US space program. Also featured is an interview by an expert in legal/HR collaboration who served as Chairman of the Society for Human Resources Management. Participants include:

**Johnny Taylor, Jr, President & CEO, Black Web Enterprises and Immediate Past Chairman, Society for Human Resource Management..... 6**  
**A Financial Services Company ..... 10**  
**RBC Financial Group ..... 12**  
**USANA Health Sciences, Inc. .... 15**  
**United Space Alliance..... 16**  
**A Food and Beverage Company ..... 19**

Three of the profiled companies granted interviews with an Assistant General Counsel or an Associate General Counsel who oversees employment law issues. USANA Health Sciences, Inc., spoke to us through its Assistant General Counsel and its Vice President for Human Resources. RBC Financial Group shared its practices through its Director of Employee Relations. We also spoke with Johnny Taylor, Jr., an attorney with vast professional experience as both general counsel and director of human resources, about trends in legal and human resource departmental collaboration.

Profiled businesses shared information on their practices, strategies, and goals. They also shared elements of their practices of which they are most proud – their leading practices, significant achievements in the area of legal/HR collaboration.

Section I summarizes key themes and leading practices gathered from discussions with the Profile Participants. Section II highlights the trends in collaboration between legal and human resources departments. Section III describes the practices of each of the five participating companies in greater detail. The final section provides a list of resources that may be helpful in developing, evaluating, and improving strategies and practices for collaboration.

**Contents**

**I. SUMMARY OVERVIEW OF THEMES AND LEADING PRACTICES ..... 4**  
 Themes..... 4  
 Leading Practices..... 4  
**II. TRENDS IN COLLABORATION ..... 6**  
**III. PARTICIPANT PROGRAM SUMMARIES..... 10**  
**IV. RESOURCES ..... 22**

**I. Summary Overview of Themes and Leading Practices**

The corporations featured in this Practice Profile all recognize the value of a cohesive legal and human resources management team that is capable of managing risk more holistically and more proactively. Companies appreciate that a legal/HR team capable of globally managing workplace risk for the organization can defuse issues before they develop into costly lawsuits. As a result, many of the companies that participated in this Profile share themes and leading practices designed to foster collaboration and minimize exposure in the area of human resources.

**Themes**

Several themes emerged from our interviews with in-house counsel and HR leaders:

*Open Communication, Mutual Respect, and Recognizing the Value of a Cohesive Legal and Human Resources Management Team* are common themes embraced by all the Profile Participants.

*Legal Should View its Role as One of Counselor, Not Decision-Maker.* Several Profile participants emphasized that in-house counsel should remember that their role is to counsel and give advice – not to make decisions. Attorneys should be careful not to view their role as one of vetoing a business decision. Rather, an employment attorney advising human resources staff should understand his or her role as one of assessing risk, advising the client, and, if necessary, identifying options for minimizing risk. When the lawyer comes to the table believing he or she will make the decision, he or she risks alienating business management teams and injecting tension into working relationships. Lawyers should keep in mind what their role should be in the organization in order to quell friction over territory.

*Close Collaboration Issues.* In all of the corporations interviewed, the legal department works closely with human resources on terminations. The legal department in all but one of the interviewed corporations also works closely with human resources in areas of executive compensation and benefits plans. A majority of the legal departments also work closely with human resources on EEO issues and on revisions or redrafts of HR policies.

**Leading Practices**

Profile participants were asked to identify elements of their legal/HR collaboration programs they considered to be leading or best practices. Some of these program elements are listed below. Individual observations from one expert in Section II and the program summaries in Section III provide additional detail on these and other practices and program elements.

*Mutually Understand Respective Roles.* It is crucial that the general counsel and the head of human resources engage in frank, open dialogue about the role of each member of this team as they serve the corporation. Just as critical, however, is for each of the two senior executives to understand what the other person understands his or her role to be, and then reach a consensus. According to one Profile Participant, “It is key for those two executives to have an honest, candid discussion about where they work together, and what is clearly the domain of one or the other.... This ensures the company [will] have a united front on issues.”

**Mutual Respect for the Other's Role.** One company credits its successful collaborative model on the mutual respect of the legal and human resources departments for the expertise that the other party brings to the table. According to another Profile Participant, "Where you don't have that trust and respect and where you don't have that in-depth knowledge of one another, it is more difficult to collaborate when that need arises."

**Work in Partnership.** Several participants underscored the importance of a team approach between the legal and human resources functions. One in-house counsel advises employment attorneys to regard themselves as "having a partnership with HR, so that the lines of communication are always open and HR clients will contact [their attorney(s)] early on in the process, before things get messy or litigation ensues.... That partnership is the most important business practice that you can have as an employment lawyer." Another participant has fostered a "hand-in-hand relationship between the legal and HR, where legal takes a proactive role in ensuring that HR is informed of emerging legal developments and HR readily consults with the law department when questions arise."

**Top-down Communication of the Legal and Human Resources Roles.** Once the legal and human resources department heads understand each other's role, the corporation should communicate that understanding throughout all levels of staff, from the senior management teams to the supporting staff. One corporate counsel added that it is important for companies to have transparent operating procedures and to have open door policies to facilitate upward and downward communication.

**Do Not Aspire to Zero Risk.** One company's successful collaborative model is partly the product of an understanding by its employment attorneys that the organization is going to incur legal risk simply by operating. These attorneys understand that it is important to balance the legal risk against the business needs of moving forward, and not try to aspire to an unrealistic, unworkable "zero risk" model. At another company, the legal department strives to manage expectations and find a workable middle ground. "There are some decisions that are made based on risk assessment and risk evaluation. The company is more risk averse in certain areas than it is in others. Legal understands that and is willing to provide its advice, with the understanding that business risk may, at the end of the day, dictate the final decision. At the end of the day, everyone is on board."

**Abide by the Simple Rule: "Don't Fly Solo."** The legal and human resources teams in one company acknowledge and utilize all facets of expertise within the company as HR and other personnel issues arise. Added an in-house counsel at another corporation: "It's impossible to operate in a vacuum."

**Link Legal Risk Issues with Business Considerations and Human Resources Management.** An in-house counsel that possesses experience in the business world should draw from those experiences in advising about legal risk issues. This advice should be provided in conjunction with the human resources component.

**100% Legal Involvement in Contingent Workforce Issues.** One company's legal staff is involved in all term-extension requests by its contract employees. According to its employment counsel, this involvement manages the overall legal risk for the company.

**Institute a "Post-Mortem" Process into the Collaboration Scheme.** One participant shared that she will implement an after-action review to look at what worked well on any collaborative issue, what did not, and what both legal and HR can do to improve on the relationship before the next issue arises.

## II. Trends in Collaboration: Legal and Human Resources

In order to gain a broader perspective of the state of collaboration between legal and human resources departments and to understand the factors that have helped shape these teams, we contacted Johnny C. Taylor, Jr., the Immediate Past Chairman of the Society for Human Resource Management. Taylor is the founding President & CEO of Black Web Enterprises, Inc., a newly launched programming unit of IAC/Interactive Corp. Prior to assuming his current role, Taylor served as the Senior Vice President of Human Resources for IAC/InterActiveCorp.

From 2005-2006, Taylor served as Chairman of the Society for Human Resource Management (SHRM). SHRM is one of the world's largest HR professional organizations, representing over 210,000 members in 130 countries. The Society's mission is to advance the human resource profession and to ensure that the profession is recognized as an essential partner in developing and executing organizational strategy.<sup>2</sup>

While serving as chairman at SHRM, Taylor was also President of McGuire Woods HR Strategies LLC, the human resources consulting subsidiary of McGuire Woods LLP. As President, Taylor managed an HR consulting firm that provides senior-level consulting on HR issues that have significant legal and public relations implications.

Prior to joining McGuire Woods, Taylor served as Executive Vice President, General Counsel and Secretary of Compass Group USA, Inc.; Vice President, HR/Employee Relations for Blockbuster Entertainment Group/VIACOM; Vice President, legal affairs for Alamo Rent-A-Car, Inc.; and General Counsel and Senior Vice President of HR, Paramount Parks, Inc. Taylor is a member of the Florida, Illinois, and Washington, D.C. bars, and holds a Senior Professional in Human Resources (SPHR) certification.

### Changing Relationships: The Evolution of Collaboration

According to Taylor, the legal and human resources function historically operated under a clear demarcation of responsibilities, which dictated that a matter still under the control of the HR department was not to be touched by legal. Conversely, once it became a legal matter, HR relinquished further involvement. There was a bright line – it was either an HR issue, or a legal issue. The two departments collaborated minimally because HR executives wanted to establish their independence and autonomy. If HR reported to the General Counsel, as was often the case, it felt subordinated to the legal department, especially as perceived by the CEO and other members of senior management. Human resources executives wanted to remain separate from the legal function so the company would fully understand its contributions.

After the Civil Rights Act was amended in 1991 to provide for jury trials, opening the door to class action lawsuits, corporations began to recognize that it was not good that both departments were not collaborating from the onset. According to Taylor, historically, "the legal position was often reactive, the HR position was often uninformed, and the result was often really bad. The HR people were doing what they did without guidance from legal because it was not yet a legal matter, and the legal department only became involved at the end, too late to advise HR on how to help avoid the situation."

We asked Taylor to comment on changes in the area of collaboration between the legal and human resources fields over the past decade. According to Taylor, over the last 15 years or so, there

has evolved an understanding and an acceptance of the fact that, optimally, HR and legal work together, *from the beginning*, on matters that involve employees and affect the employer.

"Over the last 8-10 years, especially, those lines have become much more blurred. Law departments and HR departments have begun working together more closely as they have come to realize it is in the best interest of their client/employer that they work together as early on as possible. The rising cost of defending avoidable lawsuits, coupled with the bruising defendant companies receive from the public as word of lawsuits hit the media, has forced these departments to cooperate."

While departmental power struggles still exist, and likely always will, corporations have come to understand that if they wait until a lawsuit has been filed before the two departments function cohesively as a team, it is too late. Taylor believes there is now a greater awareness that the legal department can play an active role in helping the HR department develop its training curriculum, especially around the "Employment Law-101" training matters: how to hire, fire, discipline personnel, and address immigration and privacy issues. "There is so much of the law involved in those decisions and in making those determinations, that it is understood that training is a huge opportunity to work proactively to stave off problems. To look at training as a matter that falls exclusively under the domain of HR, so that legal should not be involved, is a foolish distinction to make. So much of what HR practitioners do involves workplace laws and compliance with rules and regulations: To the extent that the legal department can help (and should help) the company mitigate its risk, HR should involve them."

Taylor believes the flip side is true of legal departments: Legal departments have also erred in viewing a matter as belonging exclusively to the attorneys once it was handed over from HR. This approach is shortsighted because HR was the first responder to the situation. "If the lawyers think they can simply defend the matter without involving HR, the results can be disastrous."

Taylor adds that two additional factors have influenced the change in the level of interaction between the legal and human resources functions:

- First is the litigious nature of our society and the huge settlements and verdicts that came out of the employment law matters. These have had a big impact in increasing momentum toward team-building. CEOs are becoming more vocal in expressing dissatisfaction over walls between the two departments. Over the past decade, companies have begun to realize that departments operating in a vacuum cost them money, and that the exposure can be mitigated if the legal and human resources functions work together.
- Another factor has been the realization that promotion succession and employee development requires a team approach to mitigate the exposure risk. The decision to promote or develop certain employees was often a product of an HR and aligned management discussion, without the involvement of legal counsel. Especially on cases involving gender discrimination, what was at first just an HR issue and just a line management issue (i.e., who gets the job, who gets promoted, who gets paid what), has some significant legal issues that must be addressed. If HR acts alone and promotes or develops without consultation with legal, then the company may risk exposure to a class action suit where the charge is that there was a systematic (even if unintentional) creation of a pathway to the boardroom for everyone but women and minorities. Where lawyers are involved in those early decisions, there is more likely to be a call to pause and consider the legal ramifications of these practices.

## Areas Where Collaboration is Critical

Taylor urges legal and human resources departments to work as a team in three areas:

- **Training:** "This is absolutely an opportunity for the HR and legal people to work together to jointly own the matter. Training should emphasize litigation avoidance."
- **Union avoidance:** When does an organizing campaign become a legal matter? Taylor explains, "If you wait until there are unfair labor practice allegations, then it's too late because whatever the HR staff shouldn't have done, they've done; the only thing the legal department can do at that point is to create a defense to what was already done." In collective bargaining/labor issues, collaboration between the two functions is critical.
- **Development of policies and procedures:** Taylor believes it can be counterproductive for an HR department to operate unilaterally in drafting or circulating HR handbooks. Legal review is essential to ensure compliance with current employment laws. Policies and procedures handbooks present a great opportunity for both departments to work together to produce a product that meets the needs of the organization.

## Knowing When to Seek Assistance

Based on current conventional wisdom that lawyers can no longer operate in a vacuum when it comes to marketing, finance, or operations matters, and that managers, too, must be responsible for having a basic understanding of legal requirements,<sup>3</sup> we asked Taylor whether this philosophy applies (or should apply) in the legal/HR context. We also asked whether HR departments have become savvier in gleaming where there may be legal issues and bringing in counsel early on.

Taylor believes that this conventional wisdom also applies to lawyers as they work with human resources personnel, and vice versa. "HR departments now clearly understand that their decisions cannot be made in a vacuum, and that there are laws and policies and regulations that impact how they should operate on a daily basis when it comes to issuing decisions."

The lawyers have also become more increasingly aware that they must understand what decisions are being made about people in the HR context, and that it would be really a good idea to know before those decisions were made. Once the decision is made and the damage is done, it is too late. If lawyers were brought in at the onset, either by invitation from HR or by injecting themselves into the decision-making process, then the result could be different."

Taylor cautions in-house counsel to be prepared for the fact that their attempts to intervene may be met with resistance. In this regard, he believes here is a real opportunity for HR organizations and bar associations to be more cognizant of the fact that the decision-making process often makes it difficult or awkward for professionals on either side to interject themselves, for fear of being received poorly. "There should be awareness that territoriality and jurisdictional spats have no place in corporate decision-making."

Taylor adds that non-legal personnel will sometimes defer to lawyers, based on the bias that lawyers probably know more. This creates an interesting dynamic, one that discourages HR personnel from bringing lawyers in and risk being upstaged. "Rightly or wrongly," Taylor observes, "no one wants to bring in someone who is going to take over the show."

Taylor advises lawyers to remember that their role is to give advice, to counsel – and not to make the decision. "If lawyers keep in mind that their role is to give advice and to counsel the client, then they have done their job. When the lawyer comes in believing that he or she will make the

decision, then there is a possibility that tension or resentment may develop. Lawyers should keep in mind what their role should be in the organization. This will help quell territoriality friction."

If the organization is being asked to do something that is patently illegal, then lawyers have an ethical obligation to respond.<sup>4</sup> Much more often than not, the matter does not rise to this level. "Lawyers often forget their fundamental role in the organization; the head of HR and the employment lawyer are counterparts, in many ways, but, at the end of the day, the lawyer's role is to provide advice or counsel to his client, the head of HR." Short of a situation where the head of HR is preparing to do something that is illegal or unethical, Taylor cautions that the lawyer must recognize that her role is to provide counsel, and accept that the decision is the client's to make.

### Establishing a Superior Legal/HR Team Model: Leading and Best Practices

Taylor's professional career includes the role of General Counsel for Compass Group, which employed over 438,000 people and was the eighth largest employer in the world. Taylor also served as the head of human resources at Blockbuster. Based on his extensive experience heading both large legal (50+) and HR departments (500+), Taylor offers two best practices for achieving a collaborative process that serves its organization optimally:

1. First, the General Counsel and the head of Human Resources must come together to "understand what the other person's understanding of his or her role is, and then reach agreement. There has to be an understanding of the other person's understanding. It is key for those two executives to have an honest, candid discussion about where they work together, and what is clearly the domain of one or the other. If there are two experienced people who each understand that there are many grey areas, neither will be affected that one department or the other is not involved on something. A meeting of the minds is critical. This ensures the company will have a united front on issues."

He adds: "Usually, the two departments do not talk until they have to; at that point, territorial spats over jurisdiction are more likely and problems tend to be more engrained. It is critical that at the outset, each of the two senior executives understand what the other person understands his or her role to be, and then reach a consensus."

2. "The second part of the process is that the corporation must then communicate that understanding throughout the organization, up to the senior management team. There is nothing worse than for people within the organization to be unclear as to what department owns what, or at least who they should go to first. Without a clear policy, staff does not know where to turn."

The trends identified by Taylor were echoed by other Profile Participants. Open communication, mutual respect, and valuing team-building are common themes among all of the participating companies.

## III. Participant Program Summaries

### A Financial Services Company

This financial services company employs 90 in-house attorneys; the vast majority of them service the lines of business within the organization. The company's two employment attorneys work within the corporate affairs unit. The corporate affairs unit has oversight over HR and corporate governance issues.

### Review of HR Issues

This company utilizes a highly collaborative, successful model for review of HR issues. The result has been very few internal complaints have been filed (only 6 EEO charges in 2005, 6 in 2006, and 2 thus far in 2007), and even fewer cases filed with government agencies or in courts. The company has faced a small number of administrative complaints, all resolved short of litigation. The collaborative model has led to an extraordinarily low rate of losses and adverse decisions against the company. In fact, according to the Assistant General Counsel who spoke with us, there have been no adverse decisions or HR-related losses against this company in the two years he has been there.

The company divides the review process for HR matters into two categories: those issues that always involve a legal review to assess risk; and those issues where review is conducted as needed.

1. The legal department in this corporation always reviews the following HR actions for legal risk: terminations, internal HR investigations, executive compensation matters, and every change to an HR policy (sometimes HR drafts the proposed language for the change, which is reviewed by legal, other times legal does the redrafting.) The legal department also always prepares severance agreements and analyzes any reductions in force (both in terms of process and the selection decisions themselves).

The legal department is always involved in all term-extension requests for the company's contract workers. Legal involvement is critical in managing legal risk in this area, which is fraught with issues concerning employment classification, IRS issues, and overtime issues. Involving legal in these matters helps this company maintain a manageable risk level.

2. Employment attorneys review, as needed, other issues that may create legal exposure. In this second category, HR is usually the one to identify issues that may merit legal review and to approach legal. Issues that receive review under this category are those that deviate from policy or practice, or present a changed way of going forward. Issues under this category include ADA, FMLA, FLSA, recruiting practices, immigration issues (although most immigration legal issues are handled by an outside counsel managed by the law department), employee discipline, compensation (for compliance with federal and state compensation laws), internal audits of job classification (which present an opportunity for a very collaborative process between legal and HR), employee benefits issues, employee leave issues, contingent worker issues, EEO issues, and other employment issues.

The legal department engages in infrequent review of leadership development and training matters because these do not tend to trigger legal compliance or risk questions as often. The bulk of the day-to-day decisions do not need legal review, but where situations arise in those areas that

raise legal questions, HR seeks legal review and advice. The Assistant General Counsel explained that the legal department does not view its role "as one of vetoing the business decision. Rather, we see our role as one of assessing risk, advising the client, and, if necessary, identifying options for minimizing the risk." This approach, which does not aspire to zero risk, is a leading practice for this corporation.

The legal department utilizes decision-making templates in evaluating termination and ADA matters:

1. Before terminating an employee, the legal and human resources departments ensure that the reason for the termination has been documented in a memorandum. Next, the first-level manager, a second-level manager, and an HR professional engage in a thorough review of the decision. The legal department then reviews the job description and performance evaluation of the individual to make sure that what is in them is consistent with the rationale for termination. Finally, the legal department conducts a legal risk assessment. The termination review template allows for a seamless process between both departments and a rapid turnaround. This template also ensures that, in the event a termination is challenged, the company can be sure that it will survive scrutiny, it has the documentation it would need to establish the rationale, and everything is consistent and fair.
2. When an employee requests a reasonable accommodation under the ADA, the template calls for a two-step process that includes a visit to the in-house health clinic to determine whether the accommodation request is reasonable, followed by a legal assessment to determine whether the ADA applies. Once the health clinic provides medical documentation to support the request, the legal department collaborates with the medical professionals of the clinic, the benefits office, and the employee's manager to determine what accommodations they can make for the employee, taking into account whatever legal obligations the company may have. Finally, these groups engage in an interactive process with the employee to come up with a solution. The process is a highly collaborative, successful model where different groups work together seamlessly.

### Evolution of the Collaborative Model

This company had no employment lawyers on staff as recently as 10 years ago. Its lawyers were generalists who handled multiple areas, including employment law issues. The company currently employs two full-time employment lawyers who specialize in employee benefits and executive compensation, respectively, in addition to providing tax assistance as needed. The company's collaborative model has evolved and continues to evolve in response to the speed of corporate change.

### Leading Practices: Keys to the Success of the Collaborative Model

Unlike companies where the relationship between human resources and legal may be marked by some tension, this company's success with its model has produced a different working relationship. According to the in-house counsel who spoke with us, four key factors can be credited with this success:

1. The first crucial element is that each department shares a mutual respect for the expertise that the other one brings to the table. The legal department believes that the human resources department adds a great deal of value to the company, and the human resources department values what legal brings to the table in identifying legal risk and helping to minimize it.
2. The second element is that the employment attorneys do not aspire to "zero risk." They understand that simply by operating, a business is going to incur legal risk and that they need to balance the legal risk against the business needs of moving forward, without trying to aspire to a "zero risk" model, which is not realistic, impedes a good relationship with the client, and prevents business success.
3. A third important element is the linking of legal risk issues with business considerations and HR management considerations. An attorney's experience in the business world serves to influence his advice, allowing him to advise about legal risk issues in conjunction with providing advice from an HR management standpoint. This advice is provided in a respectful way, one that acknowledges the expertise of HR while adding benefit and enabling a collaborative, creative solution.
4. Finally, the legal department abides by the simple rule: "Don't fly solo." In-house counsel should recognize and take advantage of all of the expertise within the company, located in the different departments, as HR and other personnel decisions arise.

### RBC Financial Group

RBC Financial offers a full range of financial products and personal and commercial banking, wealth management, insurance, corporate and investment banking, and transactions processing services on a global basis. RBC is the largest bank in Canada as measured by assets and market capitalization. In the US, RBC provides personal and commercial banking, insurance, and investment banking services.<sup>5</sup>

Both HR and law are part of RBC's Global Functions Group and report to the Chief Operating Officer. The COO and the Global Functions Group were established in 2005 with the objective of providing a "one functions team" approach to supporting RBC's businesses. This approach requires extensive collaboration among all the functions the group incorporates, including law and HR.

### Law Group

RBC's law group employs 228 people internationally and is a global function with all lawyers (approximately 125 of them) reporting directly or indirectly to the General Counsel. The law department utilizes several approaches to advise the enterprise. A number of lawyers work very closely with businesses to design products and advise on risk issues that are very specific to those businesses. There are also functional approaches to certain areas of practice, including litigation, employment law, M&A, and corporate services. Within the employment law practice, there are two lawyers in Canada who do general employment law, and one lawyer providing pension and benefits legal assistance. In the US, there are two employment lawyers who provide employment law support to the US operations.

In Canada and the US, the employment lawyers report within litigation groups rather than to a

corporate services group. The relationship between HR and the law group on both sides of the border has grown out of their involvement in litigation matters.

The two employment law groups in Canada and the US do not have a common reporting line until they reach the General Counsel because of the geographic division at the operational level. The US employment group reports to the US Deputy GC, who reports to the GC. The Canadian employment law group has a similar reporting line to the GC through an Assistant GC.

## Human Resources Group

Within human resources, the operating model is similar. Human Resources is a global function that includes:

1. Groups of HR business partners that are very closely aligned with businesses globally, providing business-specific assistance. This group acts as a liaison between HR professional centers and the business world, helping HR understand what business strategies are so that they can develop strategies that are aligned with those of the business side. They also help communicate to businesses the HR strategies.
2. HR centers of expertise or professional centers (in other words, subject matter experts that provide businesses with advice and strategies). The professional centers within HR include: recruitment and learning, employee relations, talent management, performance management, compensation, pension and benefits, leadership development, and organizational development.
3. The operations center, which includes an HR technology group, an employee help line, payroll, and pension and benefits administration. This reporting line feeds into both the global technology and operations function and the HR function. The operations center, which is staffed by approximately 200 people, is separate from the 479 staff members who comprise human resources.

## Legal and Human Resources Collaboration

The legal group has no written policy or formal procedure for review of HR issues. Rather, these matters are handled ad hoc: Where HR believes it needs legal assistance, it seeks it from legal. Teri Monti, the Director of Employee Relations, highlighted three areas of close collaboration between legal and HR:

1. Pension and benefits. When revising or drafting a pension plan, the HR group relies on the legal group for advice "at every step of the way," according to Monti. In this area, HR works closely with pension and benefits lawyers, both internally and externally. Members of the law group are involved in meetings of the pension management committee and in subcommittee meetings and are there to answer questions as they arise.
2. Executive compensation. The HR team also works closely with the legal group in the area of compensation to ensure compliance with disclosure obligations globally. The legal department's public company group and HR work together to determine the extent and wording of the disclosure.

3. In its US offices, RBC's legal and HR groups work together closely on transactional matters, including issues of termination, discipline, EEO compliance and complaints, affirmative action rules and compliance, and other policy matters. The two groups interact almost daily. In the US, the law group handles the EEO matters, whereas HR develops and manages affirmative action plans and compliance.

## Distinction in Canadian/US Collaboration

The two groups interact much more closely in the US than in Canada. RBC is seeking to enhance collaboration in Canada on terminations, policy development, performance management, and employment equity obligations (which are different from affirmative action obligations in the US), to reach greater parity with its US offices. Monti believes there is room for a greater level of involvement of the Canadian legal team in those areas. Compared to the US offices, the Canadian legal team is more focused on managing litigation issues than on assisting with more operational and strategic aspects of HR.

Monti explains that differences in the litigation and regulatory experience in the US and Canada account for the disparity in the level of interaction between each of the offices. The US approach is proactive: its US legal, HR, and business groups focus more on risk prevention than the Canadian groups, owing perhaps to greater awareness in the US of the risks associated with HR processes. The mindset of the US legal team is more focused on getting ahead of the curve and developing training and other materials to ensure the organization does not run into litigation problems and regulatory issues. And the HR team is quicker to seek legal advice for the same reasons. So, in part because of its litigation and regulatory experiences, in part because of differences in employment laws, RBC's US legal and HR operations function in a more unified and proactive manner.

In Canada, the law group tends to focus on individual cases over systemic policies. Because employment class action lawsuits are less common, there have been no regulatory crises on the scale of those in the US, and because employment regulators are less aggressive, the Canadian HR group historically has developed its policies unilaterally, seeking less legal input. According to Monti, the interest has been in getting a basic level of compliance, then allowing employees and managers a lot of latitude in how they deal with each other. In short, Canada has not experienced the same "fear factor" that drives the level of active collaboration seen in the US offices. Nevertheless, the HR team is working toward a more collaborative model for its Canadian operations.

## Evolution of Collaboration

Notwithstanding the noted differences in the Canadian and US approaches, Monti explained that there has been a shift in the nature of collaboration between HR and law globally. The law group has begun to manage litigation on a more holistic basis. Both groups have also begun to examine issues at a slightly higher level to be more proactive in assessing and managing potential risk.

While this shift in the level of interdependency has required both groups to adapt to a different way of doing things, the common goal of managing workplace risk for the organization globally has become better articulated in the past year. The company realizes that achieving this goal requires enhanced collaboration between law and HR.

The process of establishing a more collaborative framework in the area of workplace risk has



required both groups to work together to arrive at a common, one-function team approach where law and HR together work out mutual strategies and present a common recommendation to business, rather than one group or the other approaching the business end unilaterally. Like other Profile Participants, RBC realizes that it is critical for the groups to understand which of them – whether HR, law, or business – is the ultimate arbiter of any labor issue.

The law and compliance groups face similar challenges in the area of workplace risk as they grapple with questions of where law ends and compliance begins and who determines what level of risk is acceptable for the organization. These questions underscore the importance of candid communication from the onset of the relationship.

According to Monti, "It is absolutely critical that there be a good relationship between law and HR in order to have effective collaboration. Where you don't have that trust and respect and where you don't have that in-depth knowledge of one other, it is more difficult to collaborate when the need arises. Sometimes that need arises in a very urgent and immediate basis. Without a really good relationship, you can't go into those critical situations as effectively as you could if you had a good relationship. That is very fundamental...." Other Profile Participants agree.

Monti also underscores the importance of after-action review planning. Among her goals is implementing a "post-mortem process" into the collaboration scheme that would require a discussion at the end of a process to look at what went right and what may need improvement. Such a review process is "critical to effective collaboration."

## USANA Health Sciences, Inc.

USANA Health Sciences, Inc., is a network marketing company that manufactures and sells scientifically based nutritional supplements and personal care products through its independent associates. In 2006, the company netted \$374 million in sales and operated in 13 markets: Australia, New Zealand, Canada, the United Kingdom, the Netherlands, Hong Kong, Japan, Taiwan, Korea, Singapore, Mexico, Malaysia, and the United States.

Founded in 1992, USANA employs more than 900 people worldwide, including approximately 615 people at the corporate offices in Salt Lake City. USANA's legal department consists of three full-time attorneys: a General Counsel, an Assistant General Counsel, and an Associate Legal Counsel. Eleven people staff the company's human resources department, including a director of HR for the international group. Ms. Hardy is the Vice President of Human Resources. The HR department operates through its employee relations, HRIS, compensation, benefits, recruiting, and security and wellness offices. Both the legal and HR departments are located at the company's corporate headquarters.

USANA has been successful in ensuring that communication is handled without issues, thanks to its inter-departmental open door communication policy. The goal among all departments is "to collaborate as much as possible to obtain the most beneficial and desirable goals," relates Kevin McMurray, Assistant General Counsel. As such, the legal department does not utilize a standard operating procedure in determining which issues it will review. Instead, USANA has implemented an intra-company contract review policy that requires the legal department to assist with or review any contract, whether it originates from the human resources department or any other department.

The legal department initiates reviews on a case-by-case basis, depending on the risk for exposure. Likewise, the human resources department does not have a template for determining which mar-

ters to refer to legal for review.

The human resources department does, however, involve the legal department on any issue relating to hiring, termination, EEO, or other workplace matter that creates a risk for potential legal exposure. According to Hardy, "HR drives issues through legal if it believes something may create potential exposure or warrant a second review on particular circumstances." Although the human resources department conducts due diligence before turning to the legal department, "If in doubt, HR initiates the contact and runs the matter past legal."

Even so, the legal department spends only a small fraction of its time on human resources issues, a testament to the HR department, according to McMurray, which understands the business and does a lot on its own to minimize exposure. USANA believes that human resources staffs should be experts who develop leadership teams that, in their own right, are excellent with human relations and employment law.<sup>6</sup> The company believes in solid training of its line managers in all aspects of HR so that they have enough information to take proper steps to prevent potential claims and know when help is needed.<sup>7</sup> According to McMurray, USANA has been fortunate to find solid HR professionals.

In addition to collaborating on issues that involve potential exposure for the company, the legal department and human resources functions work together on training. The goal of collaboration in this area is to provide legal input and collective reasoning on the issues involved in the training: HR conducts the actual training.

Adds McMurray: "It's impossible to operate in a vacuum. It is important for companies to have transparent operating procedures and to have open door policies to facilitate upward and downward communication. And to make sure that everyone in the corporation knows how the company operates. USANA believes in empowering managers to make decisions in the lowest levels possible so that the burden does not always rest with the directors or officers. Training of managers has empowered them to know where the crossroads are, so that they know when it's prudent to seek assistance from other departments before finalizing decisions."

James Bramble, Vice President and General Counsel, underscored McMurray's sentiment, when he assessed the impact of the U.S. Supreme Court opinion, *Burlington Northern & Santa Fe Railway, Co. v. White*<sup>8</sup>: "HR professionals today need to follow a strategic approach where each manager is also considered an HR manager. The responsibility for managing employee behavior rests with the supervisors who interact daily with employees.... HR must ensure that supervisors are trained and have the knowledge needed to meet this responsibility."<sup>9</sup>

## United Space Alliance, LLC

United Space Alliance, LLC ("USA") is headquartered in Houston and is one of the world's leading space operation companies. USA was established in 1996 as a limited liability company and is owned equally by The Boeing Company and Lockheed Martin Corporation. USA employs over 10,000 people in Texas, Florida, Alabama, California, Northern Virginia, and Russia. USA works under contract with NASA as the primary industry partner in human space operations, including the Space Shuttle and the International Space Station.

## Legal Department

USA's legal department consists of five in-house attorneys headed by the General Counsel. Four

other attorneys staff the legal department: one Deputy General Counsel, two Associate General Counsels, and one Assistant General Counsel. The General Counsel and Eileen Groves, an Associate General Counsel, are assigned in Houston. The Deputy General Counsel, the other Associate General Counsel, and the Assistant General Counsel work in Florida.

In-house attorneys at USA are responsible for supporting various areas based on their specializations. Groves is responsible for all employment, labor, and employee benefits issues for the company. The General Counsel is responsible for the various departments that report to him, including internal audits, security, export compliance, technology protection, and legal.

## Human Resources Department

The majority of USA employees work in Florida. The human resources department is divided between the Florida and Texas sites. There are five employee relations representatives and one site director for employer relations in Houston. USA employs seven employee relations representatives, two labor relations representatives, and a site director in Florida. The labor relations personnel work with three union groups. Because the union group in Texas is small – 26 people – there is no designated labor relations person in Houston.

In total, including the labor relations personnel, USA's human resources department consists of approximately 18 people. This does not include the benefits and compensation group, which employs another dozen.

## Legal and Human Resources Collaboration

USA's legal department works closely with the human resources department on cases that go before senior management review boards. In addition, the legal and human resources departments work closely on disciplinary actions that do not go before a review board, on reviewing hiring decisions, reviewing HR policies and procedures, and on reviewing files of employees who are under performance improvement plans.

USA utilizes a senior management review board for cases that could result in termination, or involve timecard abuses or misuse of government equipment. In serious discipline cases where the final action could result in termination, the company has an established procedure: HR consults with Groves, and a senior management review board is organized. The board includes the director of the group that supervises the affected employee, the HR site director, and an independent director. These three people are voting members of the board. Legal (i.e., Groves) sits on all senior management review boards as reviewing counsel. Because there are different site directors and departmental directors on each board, depending on the department involved, Groves is the only continuous member of all review boards. The company convenes approximately 100 management review boards yearly.

The legal department is involved in approximately 10% of the disciplinary cases that do not go before a review board. Groves receives approximately 24 calls per week from USA's employee relations representatives concerning non-board-related disciplinary issues.

The legal department also reviews human resources policies and procedures. USA has approximately 30 HR policies and approximately 50 procedures to back those 30 policies. The human resources department generally drafts those policies and procedures, and submits them to Groves

for review. Company policy requires that all policies and procedures receive annual review. Groves reviews all of the HR policies. If the policy or procedure is a new one, all of the attorneys look at it. The assigned attorney coordinates the comments from the other attorneys and submits consolidated comments back to the sponsoring group that created the policy or procedure.

In its weekly review of performance improvement plan (PIP) cases, the human resources department confers with Groves to determine whether the goals are achievable and the standards are appropriate. Groves may guide HR in the development or implementation of a PIP. If the employee fails while under a PIP, he goes before a senior management review board. Review of PIP cases is ad hoc – Groves usually only hears about those where the employee fails the PIP.

The legal department also renders legal advice to HR in the areas of hiring, remuneration and benefits, and EEO. USA employs an EEO and diversity manager. After an EEO investigation is concluded, the draft response is sent to Groves for review. If there are any questions, Groves may be brought in to review the charges. Despite the several hundred EEO charges filed since the inception of USA, there have been no probable cause findings.

EEO cases are usually followed by retaliation claims. USA has faced no EEO litigation since *Burlington Northern*. According to Groves, HR is indoctrinated with the notion that documentation is critical – *Burlington Northern* has not changed that.

## Percentage of Time Spent on Legal Risk Assessments

Groves spends approximately 20-25% of her time on straight employee relations matters, including benefits and compensation matters. The law department spends roughly 35% of its time on HR non-litigation risk assessments.

## Evolution of Collaboration

When USA was established in 1996, the intent was that it would be staffed by 50 or so employees, and that any other staffing needs would be met by subcontracting. NASA directed that the company have everyone on staff. As a result, USA grew from 50 to 9,000 employees in a period of four months.

For the first three years of its existence, the company did not employ an in-house labor attorney. During this time, there was a limited process for analyzing or documenting interactive exchanges to examine why things were or were not done. The company also had no established approach for processing FMLA or accommodations requests. Groves joined USA as its labor counsel in 1998. Since then, the company's workforce management process has evolved.

The legal and human resources functions now share a "hand-in-hand relationship, where legal takes a proactive role in ensuring that HR is informed of emerging legal developments and HR readily consults with the law department when questions arise," according to Groves. As the company's employment attorney, Groves makes it a point to send out any information on new regulations or changes as they come out: "I am constantly feeding USA's HR personnel relevant information."

## Leading Practices

USA's legal department has an open-door policy that encourages anyone in HR or any other department to pick up the telephone and ask any question. This practice ensures open dialogue and fosters trust. The mutual respect that legal and human resources departments enjoy is another leading practice.

Proactive governance requires that company leaders ensure that everyone, from senior management to line employees, understands the range of issues that affect the business and knows when to reach out to one of its specialists before problems develop. Groves believes that companies should establish clear policies about the types of labor law issues that should always receive legal review. Companies should encourage their human resources departments, as well as their plant managers, distribution centers, and regional managers, to call legal if in doubt. These pronouncements help companies reduce exposure and encourage solid teambuilding.

## A Food and Beverage Company

This international food and beverage company employs over 100,000 people. Its legal department is composed of approximately fifty lawyers, most of who are located at the company's US headquarters. Approximately six attorneys work in regional offices within the US, four attorneys work in Europe, and two work in Asia. Included in the legal department are seven full-time dedicated employment attorneys. The number of employment attorneys has more than tripled in the last ten years, in keeping with the company's rapid growth.

The company has human resources departments in locations abroad even where it employs no in-house counsel. One of the company's seven employment attorneys is devoted exclusively to international labor and employment issues. This attorney serves as the point of contact for the human resources offices abroad and the overseas lawyers on the more complex or far-reaching issues that have broad corporate implications. Many HR issues are resolved locally. If there is a lawyer in the area, he or she is usually the one to work with HR, even if he or she is not an employment attorney, if it is a matter that can be resolved easily locally.

The HR issues that arise abroad tend to relate to compensation. Often they may relate to country-specific rules and issues that need the attention on a local level with an attorney. If they raise other issues, such as harassment, for example, the international attorney will likely be involved, especially if it's a higher level.

## Review of HR Issues

As a general rule, the legal department strives to align with its clients and be accessible to them on demand, when needed, for whatever might come up. While there are no standard procedures that govern the review of HR matters, the legal department divides the work based on the client groups so that each lawyer is a primary point of contact for a client group or groups. When HR-related issues arise, the client group knows it can send an e-mail to its primary point of contact. There is a relationship between the lawyer and that client group for employment matters, and that lawyer is the primary point of contact. If the matter is complex, the lawyer might triage the question with another employment lawyer, depending on the circumstances.

When the issue is highly complex, involving, for example, workers compensation, the Family

Medical Leave Act, or the Americans with Disabilities Act, the legal and human resources departments together decide how to proceed. Generally, the HR person seeking the advice is generally able to identify the issue and get others together, as needed, to determine how best to respond. According to the Vice President/Assistant General Counsel who granted the interview, "It is nothing that we've written into a process; it's just a mutual trust and understanding that we can issue-spot and talk about."

## Legal and Human Resources Collaboration

The legal and human resources departments collaborate on executive hiring and firing decisions, as well as on matters that may result in exposure for the company. The two departments also work together closely on benefits and compensation reviews and changes, Equal Employment Opportunity matters, and review of policies that relate to counseling, training, and visa issues.

Executive hiring decisions are the product of a collaborative process between HR, legal, and tax to ensure that the company's departments are aligned on hiring issues. A similar triage takes place with high-level executive terminations, where the legal department almost always reviews the file in advance.

The legal department is not usually involved in lower-level terminations. The exception is for matters that may expose the company to significant risk, such as when the decision involves an employee who is a member of a protected category. Legal review in this area largely depends on the level of the employee involved and the risk profile.

The legal department "regularly walks arm-in-arm with [its] HR clients" on EEO issues. If there is a factual context that gives rise to a potential for retaliation, the legal department counsels HR on that possibility. The *Burlington Northern* ruling has not impacted the day-to-day operations of the legal department in this area.

The legal department is also regularly and closely involved in the drafting and implementing of HR policies. The human resources department also seeks counsel from the employment attorneys in anticipation of changes to policies or practice.

In the area of employee training, legal conducts the training sometimes; other times, it simply provides advice on how best to conduct the training to comply with the law. Especially in the areas of harassment or wage and hour disputes, the legal department works closely with the human resources department in the development and presentation of training programs. The legal department also notifies HR of changes in the law.

Although in-house counsel occasionally becomes involved with workers' compensation matters, these are generally the purview of the risk management department, which is also responsible for developing safety programs for employees in the stores. The employment attorneys work with risk management in formulating programs, but the primary responsibility for implementation is with the latter.

Immigration issues are usually outsourced. One of the corporation's seven employment attorneys works with HR and outside counsel on visa issues.

## Percentage of Time Spent on Legal Risk Assessments

Approximately 15% of the legal department's non-litigation risk assessments involve human resources questions. Some issues are resolved very quickly – in less than an hour – others take days or weeks.

### Leading Practices

Asked which elements of its practices in this area the company would consider to be leading or best practices, the Vice President/Assistant General Counsel replied that a partnership with the client is critical for a successful relationship between both functions. A solid partnership between in-house counsel and the human resources department ensures that the lines of communication are always open and that the client will involve counsel early on. A strong legal/HR team increases the odds that issues can be resolved and addressed jointly, before the situation deteriorates. "That partnership is the most important best practice that you can have as an employment lawyer."

The interviewee added that human resources departments should always contact an employment attorney before attempting to engage in self-critical analyses or learning reports of HR data. Human resources departments should be discouraged from conducting this analysis without including legal counsel.

## V. Additional Resources

Please note that inclusion on this list does not constitute a recommendation or endorsement for any product, service, or company, nor is the absence of any product, service, company, or resource from the list an indication that it is not worthy of your attention. The following are simply resources identified by companies interviewed or by ACC as items of interest that may be helpful to you if you wish to pursue this topic further.

### ACC Sources

#### InfoPAKS

Managing Family and Medical Leaves of Absence: Statutory Entitlements, Employer Commitments, and Reasonable Accommodations, June 2007, an ACC InfoPAK, <http://www.acc.com/infopaks/fmlainfopak.php>.

General Counsel Executive Summary of Employment Law, January 2007, an ACC InfoPAK, <http://www.acc.com/infopaks/emplawsummary.php>.

Responding to EEO Agency Charges of Discrimination, April 2006, an ACC InfoPAK, <http://www.acc.com/infopaks/employment/eoocdiscrimination.php>.

Role of the General Counsel, May 2005, an ACC InfoPAK, <http://www.acc.com/infopaks/genccounsel.php>.

#### Articles

Richard S. Veys and Lily M. Garcia, *The Insider's Guide to Human Resources Audits*, ACC Docket 22, no. 3, March 2004, at 62-79.

*Conflict of Interest and Corporate Counsel: Choosing the Best Path*, ACC Docket 11, no. 4, Fall 1993, at 32.

*In-house Responsibilities in the Post-Enron Environment*, ACC Docket 21, no.5, 2003, at 92-93.

### Conference Materials

The Growing Role of In-House Counsel: Lawyers as Business Partners, June 3-5, 2007, Munich, 2007 ACC Europe Annual Conference.

### Corporate Sources

RBC Financial Group, <http://www.rbc.com/aboutus/index.html>.

United Space Alliance, LLP, <http://www.unitedspacealliance.com/about/default.asp>.

USANA Health Sciences, Inc., <http://www.usana.com/dot-Com/company/index.jsp>.

### Other Articles

Dipak Jain and David Van Zandt, *Law and Business Find Common Ground*, Chi. Trib. Sept. 25, 2005, at 3.

*Courageous HR Leadership: New SHRM Board Chair Johnny Taylor says Courageous Leadership is a Top Challenge for the Profession*, HR Magazine, January 2005.

*Corporate Compasses: The Increasingly Important Corporate Ethics Function Doesn't Have to be a Challenge to HR's Role in Upholding Ethical Business Behavior*, HR Magazine, June 2004.

*Demonstrating HR's Value to the Business*, HR Works, Inc., October 2005, <http://www.hrworks-inc.com/art-oct102005.html>.

*Are You Up to Date on HR Compliance Issues? HR Works' Quiz Offers a Reality Check*, HR Works, Inc., July 2005, <http://www.hrworks-inc.com/art-july222005.html>.

*HR Managers Faced with Clear and Urgent Priorities for 2005*, HR Works, Inc., Jan. 2005, <http://www.hrworks-inc.com/art-jan022005.html>.

*HR-Finance Collaboration Adds Value, Delivers Results*, HR Works, Inc., March 2004, <http://www.hrworks-inc.com/art-jan022005.html>.

Jathan Janove, *Retaliation Nation: a recent U.S. Supreme Court ruling will stir up a new wave of retaliation claims*, HR Magazine, vol. 51, iss. 10, Oct. 1, 2006, at 62.

### Legal Sources

Labor and Employment Desk Book (Lex Mundi Updated October 2006), available at <http://www.acc.com/protected/Surveys/employment/laboremploymentdeskbook.pdf>.

## Endnotes

<sup>1</sup> Dipak Jain and David Van Zandt, Law and Business Find Common Ground, Chi. Trib., Sept. 25, 2005, at 3.

<sup>2</sup> See, Society for Human Resource Management, <http://shrm.org/about/>.

<sup>3</sup> See, Conflict of Interest and Corporate Counsel: Choosing the Best Path, ACCA Docket, Fall 1993, at 32. See also, Jain and Van Zandt, *supra* note 1.

<sup>4</sup> See, ABA Model Rules of Professional Conduct 1.13.

<sup>5</sup> RBC Financial Group, <http://www.rbc.com/aboutus/index.html>

<sup>6</sup> Jathan Janove, Retaliation Nation: a recent U.S. Supreme Court ruling will stir up a new wave of retaliation claims, HR Magazine, vol. 51, iss. 10, Oct. 1, 2006, at 62, citing to Paul Jones, previous VP for Human Resources for USANA Health Sciences, Inc.

<sup>7</sup> *Id.*

<sup>8</sup> Burlington Northern & Santa Fe Railway, Co. v. White, 126 S. Ct. 2405 (2006) (the sweep of Title VII's anti-retaliation provision extends to any employer conduct, even when it is not employment related, that is severe enough to deter a reasonable employee from exercising her legal right to object to discrimination).

<sup>9</sup> Janove, *supra* note 5, citing to James Bramble, Vice President and General Counsel, USANA Health Sciences, Inc.

**Related Employer Checklist (Canada)**

Excerpted from the 2007 Canadian Labour and Employment Law InfoPAK, available at <http://www.acc.com/infopaks/canadalabour.php>.

The following is a general outline of the various criteria utilized by the OLRB when deciding whether to make a declaration that two or more employers are related employers for labour relations purposes pursuant to the OLRA. It should be noted, however, that the following list represents a variety of general criteria and considerations that may or may not be applicable to a particular business or industry. Accordingly, such general considerations should be further considered in light of the particular nature and structure of the business in question, and the special circumstances of each individual case. Further, it should be noted that no single factor is determinative. The OLRB bases its decision on an appraisal of all the factors in light of the particular circumstances.

**a. Associated and Related Activities**

- Are the businesses or their activities of the same character?
- Do the businesses serve the same market?
- Do the businesses employ the same mode or means of operation?
- Do the businesses utilize the same employee skills?
- Are the businesses carried on to benefit related principals?

**b. Common Control or Direction**

- Common Ownership or Financial Control
  - Is there any legal corporate relationship between the two businesses?
  - Are there any common shareholders of each company?
  - Are there any family ties between shareholders of each company?
  - Are the businesses maintained as independent and separate profit centres?
  - Does each business develop its own financial goals and objectives?
  - Do the businesses share equipment or other assets?
  - Is there joint ownership of real estate?
  - Does one business have a security interest in the assets or inventory of the other business?
- Common Management
  - Are there interlocking officers and directors?
  - Do the businesses maintain separate financial books and records, and are these books and records kept at separate offices at different locations?
  - Do the businesses maintain separate bookkeeping and accounting personnel?
  - Are there any common managers or supervisors?
- Interrelationship of Operations
  - Is there any interchange of employees between the businesses?
  - Do the businesses use separate suppliers?
  - Do the businesses use different subcontractors?
  - Do the businesses utilize and operate from different and separate facilities?
  - Is there any sharing of equipment or other assets?
  - Do the businesses maintain separate office locations?

- Do the businesses maintain separate bank accounts?

**• Representation to the Public as a Single Integrated Enterprise**

- Do the businesses present themselves in such a way that the public perceives the businesses to be separate and independent?
- Do the businesses use separate and distinct names, logos, trademarks, telephone numbers, fax numbers and letterhead, etc.?
- Do the two businesses advertise separately?

**• Centralized Control of Labour Relations**

- Is there any transfer of employees between the businesses?
- Do the businesses maintain separate payrolls?
- Are pay cheques made out in the separate business names?
- Do the businesses maintain separate employee files?
- Are employee records kept in separate locations?
- Do the businesses maintain separate labour relations and personnel policies?
- Are the labour relations and human resources structures separate and distinct?
- Do the businesses implement uniform wage rates and working conditions?
- Do the employees enjoy common benefits?
- Do the businesses maintain separate hiring, firing and disciplinary policies as well as separate performance evaluation systems and structures?

**c. Labour Relations Purposes**

- Is the applicant trade union attempting to disturb existing bargaining rights?
  - Is the applicant union attempting to circumvent the process of organizing employees and applying for certification?
  - Are there employees whose interests would be interfered with by the application?
  - Has the application been made within a reasonable period of time?
- Is the employer attempting to defeat or frustrate existing bargaining rights, such as by transferring work from the unionized business to a non-union business?