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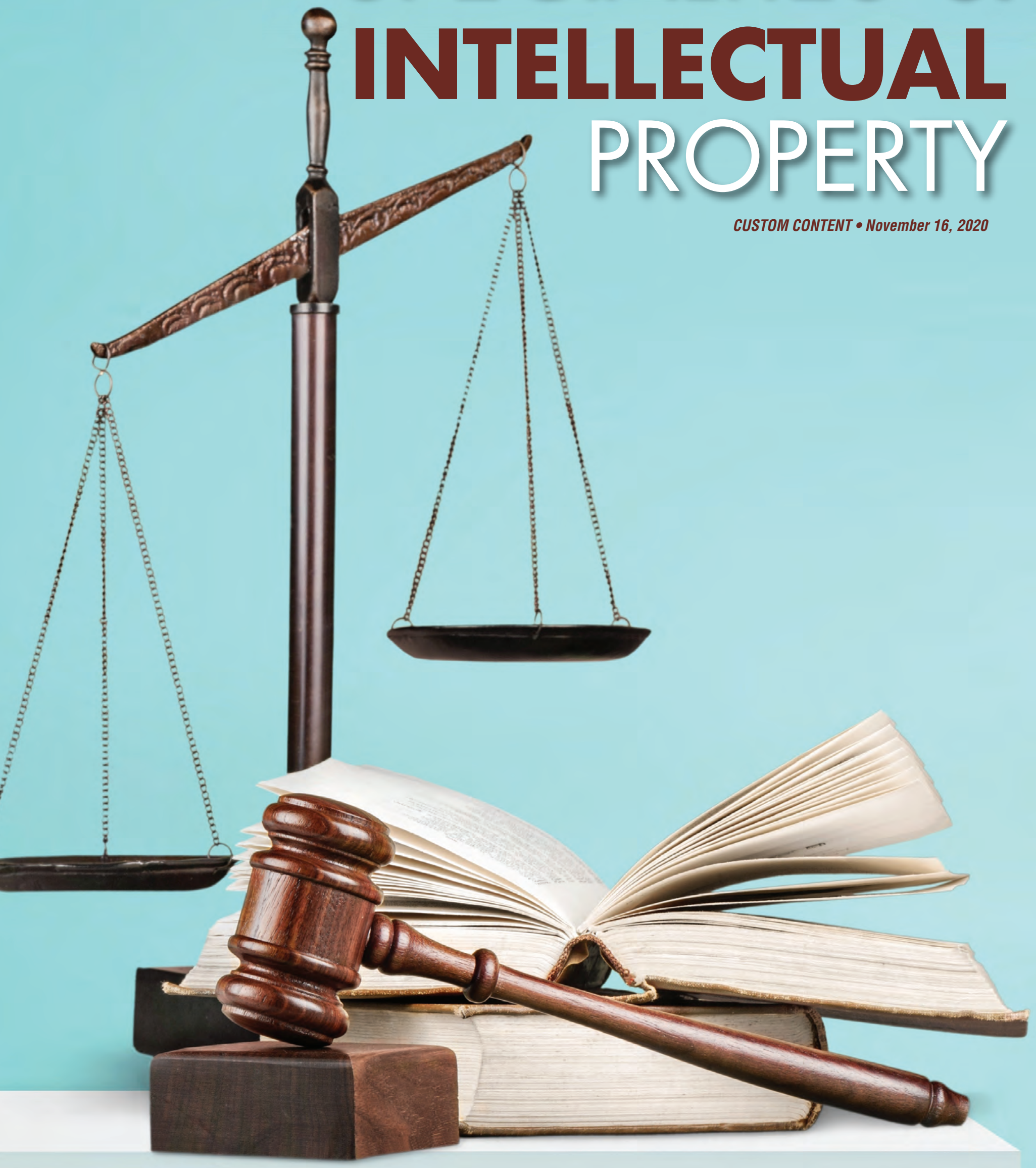
CUSTOM CONTENT • November 16, 2020



Understanding Employment Law Trends to Keep Pace with the Evolving California Workplace

By Ashley A. Halberda, Esq. and Denisha P. McKenzie, Esq.

In our socially, legally and politically evolving landscape, staying ahead of employment law trends cultivates a collegial work environment (both remote and in-person) that will improve employee retention and foster the growth of the enterprise. Companies should understand not just the substance of new employment laws but also, the spirit behind these laws.

The coronavirus pandemic has altered the lives of people and industries on a global basis. Companies were forced to shut down completely or to push forward in the face of diminished profits and serious potential health and safety risks. Employees continue to need work flexibility to deal with illnesses, school closures, as well as economic and food insecurity. Businesses continue to be significantly burdened in providing this flexibility. Now, more than ever, employers need a legal partner to assist with navigating changing regulations, supporting their employees, and ensuring their businesses are profitable and survive this storm.

Businesses Should Be Prepared for Additional Employee Time Off Requests

California greatly expanded the protections under the existing California Family Rights Act ("CFRA") and now requires employers with just five employees to provide up to twelve weeks of job-protected leave (SB1383). This is a drastic deviation from prior CFRA requirements, which denied protection to employees employed at small businesses with less than 50 employees. The law takes effect on January 1, 2021, and will require small employers to provide CFRA leave to employees who are unable to work because they or a qualified family member has a serious health condition, to bond with a new child, or due to a qualifying exigency related to active duty in the armed forces. Employees who take leave under the CFRA must (with some exceptions) be returned to their previous position at the end of their leave. Smaller employers with five to forty-nine employees will no longer be able to avoid CFRA based on their size. This reinforces the legislative trend in California to nurture better work-life balance for employees, recognizing the unique personal obligations that employees experience outside of work.

This trend is similar to many of the leave laws enacted in response to the pandemic, including the recent expansion of California's COVID-19 paid sick leave requirements, which now require employers with 500 or more employees to offer time off to their employees (the law previously applied to employers with 500 or less employees). Now small and large employers in the state of California must provide up to 80 hours of paid sick leave for employees affected by COVID-19. This is in addition to the twelve weeks of CFRA leave that nearly all California employers must now provide. While paid sick leave requirements are set to expire on December 31, 2020, they likely will be extended into the New Year.

As this gauntlet of a year ends, California employers must prepare for the demands of leave obligations in ways that were never previously required. Employers should focus on updating their policies, preparing contingency plans to deal with greater employee absences, budgeting for approved overtime hours for employees not on leave, securing contracts with reputable staffing agencies for temporary employees, and adjusting business processes to improve efficiency in the event of more frequent employee absences.

Pay Equity is No Longer Just Required, It Will Be Monitored

Starting in 2021, employers will be specifically required to monitor and report on diversity and inclusion within the workplace, particularly as it relates to pay equity and corresponding data reporting. These changes are not surprising, given California's recent legislative initiatives tied to encouraging a diverse and inclusive workforce. In recent years, California outlawed discrimination on the basis of certain hairstyles worn by primarily minority employees such as dreadlocks, braids and other natural hairstyles (employers should update their dress code policies if they have not already done so). Similarly, discrimination based on religious dress and grooming practices (such as a Hijab) is outlawed under California law, and some employers have been hit hard for failing to comply with these evolving dress standards.

California employers must now focus on new statutory changes mandating equal pay across race and gender. Starting on March 31, 2021 (and every year thereafter), private employers with 100 or more employees are required to submit a pay data report to the California Department of Fair Employment and Housing ("DFEH") that discloses pay band data for employees (by race, ethnicity, and gender) who are employed in specified job categories, so that the DFEH can identify potentially discriminatory pay practices. For the next few months, especially during the year-end evaluation and bonus period, employers should proactively review and make any necessary changes to their pay policies and practices before the DFEH reviews such data (which becomes a public record once submitted). Employers should also anticipate future legislation placing these same reporting requirements on smaller companies, similar to the changes implemented to California's leave laws

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As an employer in California ourselves, CDF Labor Law LLP ("CDF") understands the unique pressures tied to running a successful business and managing the various requests from employees. No matter what the circumstance, employers have to be able to navigate the complex and ever-changing legal landscape in California, while also appreciating that the workplace is full of people with unique backgrounds and perspectives, fluctuating life circumstances, and an overall need to work to provide for themselves and their families. CDF has worked alongside employers for over 25 years providing *Counsel to California Employers*® including advice and counseling for litigation avoidance and defending them when employment claims prove unavoidable. We look forward to continuing our partnership with companies that have workforces in California in 2021 during these evolving and challenging times to assist in building back their workforces and ensuring their economic success.

Ashley A. Halberda is a Partner in the Orange County office of CDF Labor Law LLP, a California-based labor, employment and immigration defense law firm with offices throughout the state. Ashley's practice focuses on counseling and defending businesses in labor and employment matters, including claims of wrongful termination, discrimination, sexual harassment, and wage and hour violations. She is also a frequent speaker, author and resource to employers. She can be reached at ahalberda@cdflaborlaw.com.

Denisha P. McKenzie is Senior Counsel at CDF Labor Law LLP, where she defends and counsels employers in all areas of labor and employment law in state and federal courts, including claims of discrimination, wrongful termination, sexual harassment, and wage and hour violations. She is a graduate of the University of California, Irvine School of Law and also the Past-President of the Thurgood Marshall Bar Association of Orange County. Denisha can be reached at dmckenzie@cdflaborlaw.com.

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Employee Issues Abound in Mergers and Acquisitions

When a business owner begins thinking about selling the business, a team of advisors is assembled often years before the target sale to posture the business in the best possible way to make it attractive for sale and to get the best sale price. Employment-related issues are sometimes overlooked during this process, and an employment-related claim can arise at the most inopportune time. Employment risks make the business less desirable and may require the seller negotiate a lower sale price due to the unaddressed risk factors. With most statutes of limitation on employment-related claims running three or four years, when a business owner starts thinking about selling, that is the right time to clean up any employment-related exposure.

Engaging experienced employment counsel to conduct a thorough audit of the business' employment practices is a good first step. The audit can identify potential areas of concern and help the business owner navigate these hazards by identifying and correcting any areas of concern. Employment-related risk can be significantly diminished once those risks are identified, especially in the area of wage and hour claims which can prove devastating to a business.

On the buyer's side, ensuring that the due diligence team includes experienced employment counsel is imperative. Obtaining an in-depth review of the target business' employment documents and employment-related issues can be invaluable. The Department of Fair Employment and Housing (DFEH) reported that complaints filed with the DFEH increased more than eight percent last year compared to the year before, and there were more favorable class certification rulings for employee plaintiffs last year than in any other year in the past 10 years. The adage "buyer beware" rings true when it involves taking on potential employee liability, especially in California.

For both the seller planning for an eventual sale or the buyer ready to make a purchase, reviewing key employment issues will save a lot of headache and heartache during the process. Wage and hour issues are often front and center. Both sides will want to ensure that the business' meal and rest break policies are accurate and up to date. Running an analysis to confirm that non-exempt employees are taking a full 30-minute meal break and that the first meal break begins no later than the end of the fifth hour will reduce the risk of a lawsuit seeking unpaid meal break premiums. Inadvertent paystub violations may also lead to expensive lawsuits, so ensure that the information required by California Labor Code section 226 and other paystub requirements are reflected on the paystubs and that the information is accurate.

Conducting an audit of the exempt status of each job position is key as well. Misclassification of employees (treating them as exempt/salary when they should be non-exempt/hourly) can lead to an expensive predicament. Misclassification of exempt status can trigger claims of unpaid overtime, unpaid meal or rest break premiums, penalties for incorrect paystubs, interest, attorneys' fees, and more.

Misclassification of workers is another issue that can trigger serious liability. As part of the buyer's due diligence it will be important to obtain a list of workers who receive 1099s to identify whether the seller has been paying workers incorrectly. Misclassification is a risk not only faced by businesses who may receive a claim from a private plaintiff, but also an audit from the Employment Development Department, Franchise Tax Board, or Internal Revenue Service.

Sellers are also well-advised to take a look at all employment agreements that they have in place before the sale so that they can identify whether there are particular provisions in those agreements that need to be addressed before the sale. Of note, some employees may have negotiated severance provisions or change of control provisions in their terms of employment and these will need to be addressed in conjunction with the sale. And some sellers may offer a payment to employees at the closing as a way of thanking employees for their hard work and years of service. This may be an opportune time to tie the payment to a release of claims as a sort of insurance policy that may reduce the risk of a claim after the sale of the business has been completed.

State and federal WARN obligations should be considered by the parties and negotiated as part of the deal terms. Failure to comply with WARN can lead to steep penalties. If an employer violates the WARN Acts it must pay back pay and benefits to each affected employee for each day of the violation, up to a maximum of 60 workdays. It is imperative, therefore, that the buyer and seller address how the WARN obligations will be treated, for example, by requiring that the buyer hire enough of the seller's employees to prevent the obligations under WARN from being triggered.

Finally, the buyer and seller should anticipate the timing of the announcement to employees of the sale and how that messaging will be delivered. Retaining top talent during the transition may be of utmost importance to both sides so how this message is delivered and by whom will take some planning and forethought.

From the buyer's side, identifying potential employment concerns may allow the buyer to negotiate into the deal terms some additional protections. And from the seller's side, knowing that you have addressed employment issues correctly will maximize the purchase prices and minimize the chance that the sale will be sidelined by employment-related issues. As you're navigating the sale or purchase of a business, keep those employment-related issues at the forefront to avoid unnecessary risk, expense, and delay.

Colleen M. McCarthy, Esq. is a Partner and chairs the Firm's Employment Practices Group. She has dedicated her practice to representing and protecting employers, through preventative counseling and sound practical advice. Ms. McCarthy has counseled employers about the complicated employment laws that impact their businesses to ensure that they are in compliance, and to reduce the chance of costly litigation.
Ms. McCarthy may be reached at (949) 608-6900 or cmccarthy@ferruzzo.com.

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BUSINESS TRIAL LAWYERS

Why You Should Hire a Trial Attorney for a Case That Will Never Go to Trial

By Jennifer Keller

Litigation can feel like a never-ending safari. And actually going to trial can seem as likely as encountering a white rhino. In 2015, there were 4,734 federal civil jury trials, down almost forty percent from 7,933 in 2000. Federal trials have also gotten shorter. In 2015, only 14 lasted twenty days or more, compared to 85 in 2000. Local trends are the same. In California, there were 1,726 civil jury trials in 2015, down more than fifty percent from 3,868 in 2000. And here in Orange County, there were only 176 civil jury trials in 2014, down from 364 in 2000.

These statistics raise the question: if trials are becoming an endangered species, why hire a trial attorney? The answer: dispute resolution, like any other business decision, should be cost-effective. Seasoned trial attorneys are best equipped to save companies money because they know how to avoid distractions and focus on what is important in a case. And hiring a veteran trial attorney shows the other side you're serious, and prepared to go the distance.

Trial Lawyers Frame the Case for Trial from the Outset

The only way to become a trial lawyer is by trying cases. Due to the scarcity of civil jury trials, it takes many years, often in public practice as a prosecutor or criminal defense attorney, for an advocate to develop into an effective trial attorney. Trial advocacy is a skill mastered only in the courtroom, not in the classroom or from an office.

Unfortunately, many people who claim trial expertise have conducted few, if any, actual trials. Perhaps they've "been members of a trial team," which could mean being one of dozens who worked on a case in the office, but never examined a witness in court. The client needs to bluntly ask, how many jury trials have you personally "first chaired" to jury verdict? Not mediations, not arbitrations, not summary judgment motions or bench trials, but trials to jury verdict. Surprisingly often, the answer will be none.

Spending years in front of juries trains an attorney to appreciate from a case's outset what a jury will find to be significant. This vision separates trial lawyers from litigators. Even before the first discovery request is served, a trial lawyer conducts an extensive internal review and frames the case in a tight narrative supported by meritorious legal theories and intuitive storytelling themes. The narrative is grounded in the causes of action or defenses most likely to survive pretrial motions and end with a jury verdict.

Discovery is the process by which trial attorneys refine, not discover, the narrative. The story becomes the fulcrum upon which a trial attorney decides between what is important and what is meaningless. By framing the case for trial from the start, less becomes more. Every aspect of pretrial litigation is custom-fit to distill the narrative. Trial attorneys avoid litigation jousting over things that do not affect the story, and that waste the client's time and money. And trial attorneys understand that overindulgence in discovery will merely educate the opponent about their respective clients' trial strengths and weaknesses.

Trial Lawyers Conduct Discovery by Agreement

Trial attorneys start discovery with agreements, not disputes. From the very beginning of every case, plaintiff or defense, trial attorneys seek to agree on discovery covenants. These agreements naturally move cases towards trial and avoid litigation that seeks to stall and delay going to trial. Discovery disputes should rarely be taken to court, and only when the issue is critical to the narrative. By slimming down the discovery process, the client will benefit from increased efficiency. They will also be likely to see a courtroom far earlier than they normally would.

Trial Attorneys Use Depositions to Prepare for Trial

Whether taking or defending a deposition, a trial-focused approach creates austerity in depositions. The best trial attorneys take only necessary depositions, and those tend to be bespoke. Meandering questioning of witnesses fritters away time and money, while misuse of potent impeachment evidence may accomplish nothing more than to educate the opposition about its weaknesses. This is especially true of experts. Every question should be surgical, purposeful, and tied to the trial theory.

When defending depositions, trial attorneys lean on experience to thoroughly prepare their witnesses to give trial testimony during the deposition. Near the end of the deposition, when the opponent and witness are exhausted, trial attorneys seize on opportunities to elicit testimony helpful to their own case. A transcendent deposition may cause the opponent to abandon calling the witness at trial, while preserving the trial attorney's ability to introduce choice parts of the deposition testimony at trial.

Trial Attorneys Emphasize Teamwork

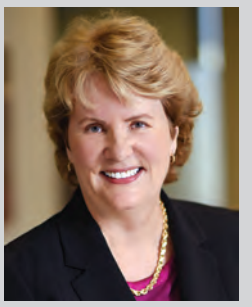
Adept trial attorneys pair with accomplished pretrial litigators to prepare cases for trial. This teamwork has been the norm for hundreds of years in England, where barristers and solicitors develop cases together. Work is not leveraged through multiple layers of lawyers of different experience and billing rates. Instead, each task is handled by the one lawyer best suited for the task. "One task, one attorney" is the rule, not the exception. And the team uses streamlined communication and technology to assure unimpeded work flow and avoid duplication.

Trial Attorneys Use Their Experience to Leverage Better Settlements

Trial attorneys enjoy immeasurable leverage in settlement negotiations. In civil dispute resolution, the best negotiating tool is the looming threat of trial against a top-notch trial lawyer. An opponent with few, if any, jury trials under the belt, has an inherent incentive to settle. Fear of the unknown is a powerful motivator. Dread over being exposed to the client as a trial novice is another. Meanwhile, the experienced trial lawyer is comfortable sizing up the boundaries of what a real-life jury may actually do, and crafts a settlement offer accordingly. Judges, for their part, quickly determine which lawyer seems to be the more knowledgeable practitioner. The pressure mounts on the novice. (And the novice might be a 40-year litigator who has somehow always avoided a jury, and whose client has no idea that is the case.) Even while posturing for the client, the trial rookie becomes queasy hearing the jurors' footsteps coming up the courthouse stairs, and frequently settles immediately before the panel is sworn.

If Your Case Goes to Trial…

Finally, while jury trials are getting rarer, they are sometimes inescapable, especially in bet-the-company scenarios. If your case turns out to be the white rhino and your company's fate will be entrusted to "twelve good people and true," you need a seasoned, fearless, winning trial lawyer at your side. A trial attorney with nerves of steel honed by years of experience is your best insurance policy against injustice in a legal system designed to reward the best advocate.



Jennifer L. Keller is one of America's most successful trial attorneys. Her practice focuses on high-stakes commercial, intellectual property, white collar criminal and securities litigation. A few of her awards for excellence as a trial lawyer include: ranked the #1 attorney in Southern California by *Southern California Super Lawyers* for 2020; a 2018 inductee into the California Lawyers Association Trial Lawyer Hall of Fame, one of only thirty-three attorneys so honored throughout the years; *Chambers USA and Chambers Global* ranking of lawyers, recommended in General Commercial Litigation and Trials; The *Lawdragon 500 Leading Lawyers in America* and *Lawdragon Legend*; *Benchmark Litigation*'s "Top 100 Trial Lawyers"; thirteen times on the *Los Angeles Daily Journal*'s "California's Top 100 Lawyers"; and "*The Best Lawyers in America*®." Jennifer's trial victories have led to three *California Lawyer* Attorneys of the Year (CLAY) awards. Ms. Keller is a fellow of the invitation-only American College of Trial Lawyers, widely considered the most significant honor a trial attorney in North America can receive. Contact her at (949) 476-8700 or jkeller@kelleranderle.com.

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- Won an application for an emergency temporary restraining order for the City of Costa Mesa that led to abandonment by the state and federal governments of efforts to use the Fairview Developmental Center in Costa Mesa to quarantine coronavirus patients.
- Obtained for a former board director of an online retailer dismissal with prejudice of an investor's federal securities fraud action filed in the Central District of California.

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FOUR WORK-FROM-HOME MEASURES FOR BUSINESSES TO ADOPT TO SAFEGUARD PROPRIETARY INFORMATION

For many employers, the COVID-19 pandemic caused a sudden shift to requiring or permitting employees to work remotely. But in the haste to implement widespread work-from-home strategies, employers may have overlooked important considerations with respect to data security, which can have significant ramifications. For example, failing to have sufficient measures in place to safeguard data can be fatal to a trade secret claim. Further, companies that possess personal private information of consumers may inadvertently violate various laws by failing to have proper data security measures in place.

Below are some action items employers should consider to safeguard their data in light of the shift to working from home.

1. **Implement policies regulating use of personal devices and non-secure connections.** While working from home, most employees are likely to use their personal devices for work, whether through their personal computers or their cellphones. Personal devices, particularly those without security systems, are susceptible to cybersecurity threats. Employers should consider the following policies:
   - Allowing remote access through a virtual private network (VPN);
   - Requiring all employee devices to be equipped with the employer-provided security software;
   - Prohibiting working from public places, such as coffee shops or on public transportation, where third parties can view screens and printed documents;
   - Prohibiting use of public WiFi, and requiring the use of secure, password-protected home WiFi or hotspots;
   - Imposing additional credentialing or multifactor authentication with respect to the ability to download certain sensitive data; and
   - Prohibiting communication about work-related matters using non-work means (e.g., text messages, zoom, or FaceTime), and only allowing enterprise-wide adopted systems for work-related communications.
2. **Educate your employees about cyber security threats.** In addition to implementing new policies, employers should consider offering specific training to their employees regarding common cyber security threats, the importance of taking precautions with respect to company data, and remedial steps to follow in the event of a suspected or potential breach.
3. **Revise agreements (e.g., employee confidentiality agreements) to address work from home specifically.** To the extent employers have any confidentiality agreements in place with their employees, they might consider revising those agreements to include or reference specific work from home policies. Revising the agreements before any issues arise and addressing specific work from home concerns in those agreements will likely lead to fewer inadvertent breaches over time.
4. **Have a response plan in case of breach.** Despite the safeguards in place, it's possible that an employee may still encounter a data breach. Employers should designate a person for employees to report any potential breaches, and set up a protocol for the response team to follow upon receipt of such notice.

The "work from home" model is here to stay for the foreseeable future. While the above items are not intended to be exhaustive, these tips provide some practical steps employers can take to safeguard their data in adapting to the new normal.

ALLISON ECKSTROM
Partner – Irvine
+1 949 223 7173
allison.eckstrom@bclplaw.com

Allison Eckstrom represents clients in complex wage and hour litigation, involving claims for employee misclassification, rounding violations, regular rate of pay issues, meal/rest period compliance, expense reimbursement, off-the-clock issues, as well as derivative claims under California's Unfair Competition Law (UCL) and Private Attorneys General Act (PAGA). Ms. Eckstrom also represents clients in single-plaintiff employment matters, involving claims for discrimination, harassment and retaliation under both California and federal laws.

TRACI CHOI
Associate – Irvine
+1 949 223 7169
traci.choi@bclplaw.com

Traci Choi is an associate in the firm's Irvine office. Her practice focuses on commercial litigation, representing banking institutions and businesses in state and federal court. Ms. Choi has litigated complex business disputes and matters relating to wrongful foreclosure. Ms. Choi also defends against employment claims relating to harassment and discrimination. She has experience in all stages of litigation, including discovery, motion practice, trial preparation, and appeals.

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PARTNERS IN BCLP'S IRVINE OFFICE

ALLISON ECKSTROM
+1 949 223 7173
allison.eckstrom@bclplaw.com

RENEE GABBARD
+1 949 223 7134
renee.gabbard@bclplaw.com

AILEEN HUNTER
+1 949 223 7138
aileen.hunter@bclplaw.com

MEGAN IRWIN
+1 949 223 7000
megan.irwin@bclplaw.com

JAMES KOUSOULAS
+1 949 223 7177
jpkousoulas@bclplaw.com

HOLLY LOPEZ
+1 949 223 7152
hplopez@bclplaw.com

MARK MERSEL
+1 949 223 7160
mark.mersel@bclplaw.com

AMIT PAREKH
+1 949 223 7105
amit.parekh@bclplaw.com

KAMAO SHAW
+1 949 223 7207
kamao.shaw@bclplaw.com

BRETT SOUZA
+1 949 223 7119
bjsouza@bclplaw.com

STEVEN SUNSHINE
+1 949 223 7200
ssunshine@bclplaw.com

VANESSA SUNSHINE
+1 949 223 7122
vanessa.sunshine@bclplaw.com

1920 Main Street, Suite 1000
Irvine, CA 92614
+1 949 223 7000
bclplaw.com

BRYAN CAVE LEIGHTON PAISNER BCLP

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Eight New California Employment Laws to Know for 2021

As 2020 comes to a much-welcomed close, employers should be aware of several new laws taking effect in 2021. Covering common (or now common) topics such as COVID-19, workers' compensation, leaves, protected time off, pay data and settlement agreements, employers should understand how these laws may affect their operations, consult with counsel to address any questions, and position themselves for what hopefully will be a more "normal" next year.

COVID-19.

Employers will continue to be challenged by COVID-19. AB-685 created Labor Code § 6409.6 which requires employers to notify, within one day, workers of potential exposure to COVID-19. All employees and contractors who were on the premises during the "infectious period" must receive information about what COVID-19 related benefits the employee is entitled to and the employer's disinfection and safety plan.

Additionally, if an employer has an "outbreak" of COVID-19, within 48 hours, it must notify the local public health agency. An outbreak is "at least 3 probable or confirmed COVID-19 cases within a 14 day period in people who are epidemiologically linked in the setting, are from different households, and are not identified as close contacts of each other in any other investigation."

SB-1159 (Labor Code §§ 3212.86-3212.88), which went into effect July 6, 2020, creates a presumption that a worker who contracted COVID-19 within 14 days after a day that the employee worked at the employer's worksite contracted the virus at work, and it is therefore a work related illness for workers' compensation purposes.

Expanded Protected Family Leave.

SB-1383 repeals the New Parent Leave Act ("NPLA") and expands the California Family Rights Act ("CFRA") to cover employers with 5 or more employees instead of employers with 50 or more or 20 or more employees respectively. Employers must grant a request by an eligible employee to take up to 12 workweeks of unpaid protected leave during any 12-month period to bond with a new child of the employee or to care for themselves or a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner. To be eligible for leave, the employee must have at least 1,250 hours of service with the employer during the previous 12-month period. The law also eliminates the 75-mile radius for purposes of counting employees and provides that an employer that employs both parents of a child must grant leave to *each* employee, as opposed to a combined total of 12 weeks.

Sick Leave.

Current law requires an employer that provides sick leave for employees to permit an employee to use at least half of the employee's accrued and available sick leave to attend to the illness of a family member ("kin care"). AB-2017 does not require additional kin care leave but amends the law to provide that the designation of the sick leave is at the "sole discretion" of the employee. Employers cannot force employees to use their kin care leave instead of other forms of leave.

Protected Time Off for Domestic Violence Victims.

AB-2992 expands the prohibition of discharging, discriminating, or retaliating against employees for taking time off who are victims of domestic violence to include "or other crime or abuse" "that caused physical injury or that caused mental injury and a threat of physical injury" and "a person whose immediate family member is deceased as the direct result of the crime."

Pay Data Reporting for Employers of 100 or more.

SB-973 requires, beginning on March 31, 2021 and annually thereafter all private employers with 100 or more employees to submit a pay data report to the DFEH. This report must include the number of employees by race, ethnicity, and sex in each of the following job categories: executive or senior-level officials and managers, first or mid-level officials and managers, professionals, technicians, sales workers, administrative support workers, craft workers, operatives, laborers and helpers, and service workers. Employers must also report the number of employees by race, ethnicity, and sex and hours worked for employees whose annual earnings fall within each of the pay bands set by the U.S. Bureau of Labor Statistics in the Occupational Employment Statistics survey. The DFEH is authorized to seek an order requiring an employer to comply, and recover the costs associated with seeking the order for compliance.

No Hire Provisions in Settlement Agreements.
AB-2143 amends Cal. Code of Civil Procedure section 1002.5, which prohibits the use of no-rehire provisions in settlement agreements of filed employment-related disputes unless the employer has made a good faith determination that the aggrieved party engaged in sexual harassment/assault. The amendment now also permits a no-rehire provision if the aggrieved party has engaged in criminal conduct. These exceptions for sexual harassment/sexual assault/criminal conduct only apply if the employer has documented the conduct before the employee filed a lawsuit or charge. (Note that as with the prior version of the law, no-hire agreements are permissible where there has been no claim filed against the employer in court, before an administrative agency, in arbitration or through the employer's internal complaint process.)

Expanded Labor Code Retaliation Protections

AB-1947 extends the time period for a person who believes that he or she has been discharged or otherwise discriminated against in violation of any law enforced by the Labor Commissioner to file a complaint with the DLSE from six months to one year.

*Apart from SB-973 and SB 1159, the provisions discussed above go into effect Jan. 1, 2021.

Gabrielle Wirth the head of the Southern California and Montana Labor & Employment departments at Dorsey. Her successful trial experience in a broad range of employment disputes including wage and hour, whistleblower, wrongful termination, discrimination, harassment, retaliation, breach of contract, and trade secret/noncompetition cases and her work with the corporate team on acquisitions and startups equip her to nimbly assess and provide legally compliant options, whether in the counseling or litigation defense role. She also represents employers before a wide variety of state and federal agencies. She can be reached at (714)800-1455 or wirth.gabrielle@dorsey.com.

Erica Haggerty Chen is an associate in the Southern California office of Dorsey & Whitney and a member of the firm's Labor and Employment Group. Erica has represented businesses at various stages of the employment litigation process, including single-plaintiff discrimination, harassment, and retaliation claims, as well as wage and hour class actions. She is skilled at dispute resolution, consistently achieving her client's goals. She can be reached at (714)800-1441 or chen.erica@dorsey.com.

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The Cyturion Elite™ Alliance - Providing Security in the New Normal

The New Normal

In our current world, protection of individual and corporate information assets is essential. COVID has accelerated digital adoption as well as the rise of the remote worker – with more than 42% of the workforce now working from home — a 500% increase – and is not expected to decrease as more productivity, reduced costs and greater worker safety is being reported. As the remote worker has become the norm, this has not gone unnoticed by hackers – evidenced by skyrocketing phishing attacks (up 600%), costing medium-sized businesses an average of $1.6M. Many small businesses even go out of business after a Phishing attack. Similar trends are being found with ransomware attacks. These trends and statistics are not limited to businesses – high-net-worth individuals and family offices are also reporting an increase in data privacy attacks, because, as noted by attackers, "That's where the money is." The cyber hackers have taken advantage of the pandemic to cause business disruption to threats to our country's infrastructure, putting us all at risk. Digital Transformation and Artificial Intelligence (AI), each an important part of the new economy, has also accelerated and exacerbated the rate, effect and consequence of cyber-attacks.

Hackers and Cyber Attacks are Closer Than We Think

The digital environment and cyber landscape that has been brought into our homes in the current environment have also brought associated cyber risks. Social media, as just one of the digital tools used daily by the general public, is also a portal for hackers, potentially infiltrating the information that we receive on the economy, for public health and safety, political considerations and other valuable user data. Social media can become weaponized through divisive content and even providing deceptive information and news stories. Hacking sources can emanate from pranksters to malevolent foreign powers. Regardless of the source of the cyber risk, the result remains the same – data assets become vulnerable to cyber-attacks. Ancillary consequences can also include undermining confidence, fostering dissent and propagating false information. Social media can even be considered part of our country's infrastructure that could have a debilitating effect on national security, economic stability and/or national public health or safety.

Transforming the Approach to Cyber Security

How do you find cybersecurity experts in today's new environment, to fight cybercrime and to assist in the data transformation of the new economy, obtaining solutions and Best-In-Class technology? The CYTURION ELITE™ Alliance has been established for this purpose — combining a unique blend of Cyber Security and Physical Security from Talon Cyber Tec LLC (TCT), Data Privacy, Legal Governance and Compliance from ST.GEORGE & CARNEGIE Law Firm and Insurance & Risk Management from Orion Risk Management, an Alera Group Company, to provide proper execution of security of information assets with privacy and data protection compliance with risk management. We are merging the law with these essential disciplines and rapidly developing new security technologies through the Solutions and Licensing company, NAUTILUS GLOBAL SOLUTIONS LLC.

Through our CYTURION ELITE™ Alliance, we are addressing the ever-changing landscape of legal cyber regulations that govern compliance, such as the California Consumer Privacy Act (CCPA) and the General Data Protection Regulation (GDPR). As well, we are focusing our practice on risk assessment to assess and counter the adverse effects of reputational harm, business interruption, cyber liability, cyber extortion and notification costs.

The CYTURION ELITE™ Alliance team recognizes the threat to Personal Private Information (PPI), Intellectual Property (IP) and Trade Secrets. By using the convergence triad formula of cybersecurity, physical security with governance and compliance, our team provides a comprehensive approach to identifying risks and vulnerabilities to neutralize threats while protecting individual and/or company assets with an integrated compliance program. The Alliance Team evaluates, tests and implements the latest cyber security technologies to provide clients with cutting edge tiered and layered security. Our experts have experience in implementing AI and encryption to protect data residing on-site, in a cloud environment and/or during electronic transfer.

The incorporation of physical security, with governance and compliance – brings a complete, 360-degree approach that allows the CYTURION ELITE™ Alliance to serve clients in a more holistic manner than other firms and/or companies. Our seasoned professionals have real-world experience from the protection of our government to the public and for our country's infrastructure, emanating from the Department of Defense (DoD), Intelligence Community, U.S. Military, U.S. Secret Service (USSS), Federal Bureau of Investigation (FBI), National Security Agency (NSA), Aerospace, Insurance and Private Industry, with certifications and education from top-ranked international and prestigious universities, government organizations and integral associations. Our alliance of resources is positioned to fight cybercrime and to assist in the data transformation of the new economy - the new reality of our world today.

For more information on the CYTURION ELITE™ Alliance and your free consultation, contact Ardelle St.George at ardelle.stgeorge@stgeorgecarnegie.com and (949) 520-2286.

Ron Williams – Talon Companies

As CEO of Talon Cyber Tec, LLC, and a premier security consulting suite of companies under Talon Companies, Ron has come from a successful 22 year tenure with the United States Secret Service. Other credentials include AFAUSSS, ASIS, ATAP, AWWA, ACWA, InfraGard, OSAC, OCPST and commentator on Fox News Channel.

Ardelle St.George – ST.GEORGE & CARNEGIE: NAUTILUS GLOBAL SOLUTIONS, LLC

As Managing Partner of ST.GEORGE & CARNEGIE and President & CEO of NAUTILUS GLOBAL SOLUTIONS, Ardelle advises and counsels high-wealth individuals and corporations, Boards and executive management on governance and compliance as General Counsel and in Board and executive positions, certified from Harvard in Cybersecurity, Digital Transformation and Artificial Intelligence.

Steve Paulin – Orion Insurance & Risk Management

Since 2005, Steve has been advising clients on implementing his holistic cybersecurity best-practices and insurance protection approach. Ultimately, organizations are viewed by cyber insurers as preferred risks, thereby obtaining a program with better terms and conditions, higher limits of coverage at most cost-effective premium.

SMITH DICKSON
CERTIFIED PUBLIC ACCOUNTANTS, LLP

Avoiding Tax Surprises on Settlements/Judgments

By Richard Warner, CPA and Deborah Dickson, CPA, CFF, MAFF

Scenario: You successfully negotiated a settlement for your individual plaintiff client in the amount of $1,000,000 due to claims of emotional distress from non-physical injuries at work. This total includes attorney fees of $400,000. You call it a "win" and are certain that your client will be happy with the $600,000 net result – until you receive a phone call from the client, complaining that her CPA has informed her that she has to pay taxes on the entire $1,000,000 of proceeds, including your $400,000 fees, so her net after tax result is only $200,000! Your client goes away unhappy and you wonder what went wrong.

Deductibility of Legal Fees for Individual Plaintiffs

In this scenario, a partial culprit is the Tax Cuts and Jobs Act of 2017 (TCJA). One of the commonly overlooked changes of the TCJA is the effect on taxable settlement or judgment recipients. This has occurred through the elimination of miscellaneous itemized deductions subject to two percent of adjusted gross income, meaning your legal fees may not be deductible. In many cases, this change has dramatically increased the tax burden on settlements or judgments received by individual plaintiffs.

An individual taxpayer under the old law could deduct miscellaneous itemized deductions to the extent they exceeded two percent of adjusted gross income. Expenses that qualified were certain legal fees, unreimbursed employee expenses, investment expenses, and tax preparation fees.

Under the old tax law, the plaintiff in the above scenario would pay tax on the net amount received of $600,000 since she could deduct the legal fees of $400,000 on her tax return. However, since the TCJA has eliminated miscellaneous itemized deductions, no deduction for legal fees is allowed and the plaintiff is required to pay tax on the gross award of $1,000,000 even though she only received $600,000. Depending on her tax bracket, she may put in her pocket as little as $200,000 on a $1,000,000 gross settlement.

Sexual Harassment Settlements

Another major tax change was enacted regarding settlements that involved sexual harassment. The TCJA denies any deduction to the defendant for legal fees and settlement payments made in connection with sexual harassment or abuse cases if there is a nondisclosure agreement. In contrast, the IRS has issued informal guidance indicating that recipients of settlements related to sexual harassment are not precluded from deducting attorney fees related to the settlement when there is a nondisclosure agreement.

Avoid Tax Surprises

It is tempting to bring a dispute to an end without giving adequate consideration to tax consequences, whether one is a plaintiff, a defendant, or counsel. Before you resolve the case and sign, consider working with a CPA who specializes in the taxation of litigation awards to discuss how your firm should negotiate settlements.

***Richard Warner**, CPA and **Deborah Dickson**, CPA, CFF, MAFF are partners at Smith Dickson, Certified Public Accountants, LLP. Richard is a tax partner and works with attorneys to structure settlements. Deborah is a forensic accountant, provides expert testimony, and is the managing partner. E-mail: richard.warner@smithdickson.com; debbie.dickson@smithdickson.com.*

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Maschoff Brennan
INTELLECTUAL PROPERTY AND COMPLEX LITIGATION

What to Expect for Intellectual Property Policy from a Biden-Harris Administration

With the announcement of Joe Biden as the next President of the United States, it is worthwhile to consider the implications of the forthcoming Biden-Harris administration on intellectual property law and policy. While campaigning, President-elect Joe Biden's "Build Back Better" agenda offered insight into the priorities of a Biden administration. In particular, the Biden administration will likely focus on trade secret law by strengthening enforcement internationally while cutting back drastically on the use of non-compete clauses and no-poaching agreements—policies that may weaken trade secret protections domestically.

Stronger Protection of Intellectual Property from Foreign Actors

The Biden agenda advocates for stronger international enforcement to confront foreign efforts to steal American intellectual property. Biden's platform singles out China's government and other state-led actors on assailing "American creativity," and promises a "coordinated and effective strategy" to confront foreign efforts to steal American intellectual property. Biden's platform also cites China for "dramatically increasing" cyber espionage against U.S. companies, and proposes new sanctions to cut off companies guilty of technology theft from access to U.S. markets. Details about precisely what the "coordinated and effect strategy" would comprise are lacking, however.

Some of that strategy may be seen in a bill introduced in the Senate in 2018 by Vice President-elect Kamala Harris that is intended strengthen the United States' ability to combat economic and industrial espionage. This bill would increase the damages available for trade secret theft, extend the statute of limitations, and expand the extraterritorial scope to include offenses committed abroad.

Potential Weakening of Some Trade Secret Protections at Home?

While increasing enforcement for trade secret law internationally, the Biden plan may somewhat weaken trade secret protections here at home. Biden's platform calls for legislation to eliminate employee non-compete clauses, "except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets." The intent is to improve employee mobility and wages, but depending on the details of any proposed law the ability to use such agreements to protect trade secrets may be impaired. Consistent with the stated goal of aiding employees by making it easier to change jobs in search of better conditions, Biden would also seek an outright ban all no-poaching agreements.

Conclusion

With the growing pressure to secure American intellectual property from foreign adversaries, increasing the nation's ability to protect trade secrets and other intellectual property will be a priority in the Biden administration. Companies and individuals may see an increase in trade secret misappropriation cases as the scope and opportunities widen—both domestically and internationally.

Charles S. Barquist, a partner in the Los Angeles office of Maschoff Brennan, is a leading IP trial lawyer and author of the treatise Patent Litigation published by PLI.

Maren Laurence is a litigation associate in the Salt Lake office and assists clients in a diverse range of industries in complex patent infringement cases and trade secret misappropriation lawsuits.

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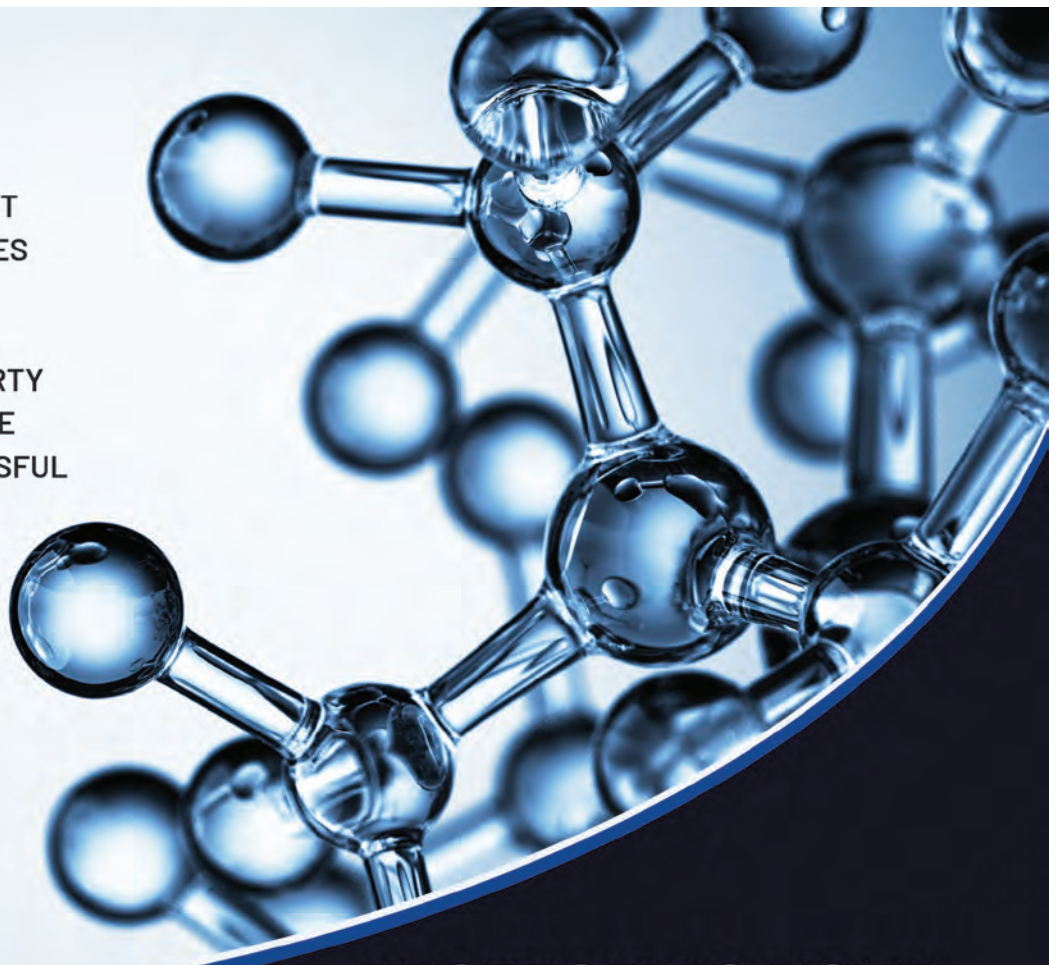

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CORPORATE RESTRUCTURING AND BANKRUPTCY

Lending to your Business – Owners Beware!

It is common for owners of closely held businesses to lend money to their business, especially when the company is experiencing financial difficulties. When doing so, it is of critical importance to always follow corporate formalities. Any loan should be authorized and documented pursuant to corporate resolutions and minutes, and a written promissory note. The loan should be reflected on the company's and the owner/borrower's records and financial statements. It is worth stating the obvious, which is that loan repayments should be made in accordance with the terms of the promissory note. While "owner loans" are an acceptable method of corporate financing, whether such financing is classified as debt or equity can have a substantial impact on the company and its owners for the purposes of federal income tax and subsequent bankruptcy proceedings.

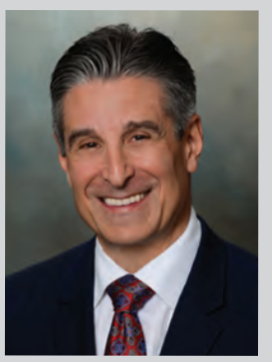
For example, classifying a shareholder contribution as debt could allow the corporation and shareholder to take income tax deductions or grant the shareholder priority over other equity shareholders in the event that the corporation later files for bankruptcy. The simple act of classifying a contribution as debt on the company's books, however, does not end the discussion. Both bankruptcy and tax courts have the power to "re-characterize" corporate debt into disguised wages, dividends or distributions that are taxable income, or equity. Such re-characterization could have disastrous consequences for both the company and its owners.

The factors that courts use to determine whether to re-characterize debt vary between jurisdictions and are generally unclear. Factors courts consider include: (1) names given to the instrument; (2) presence/absence of a fixed maturity date and payment schedule; (3) presence/absence of a fixed interest rate and interest payments; (4) source of repayments; (5) adequacy or inadequacy of capitalization; (6) identity of interest between the creditor and stockholder; (7) security, if any, for advances; (8) extent advances were subordinated to claims of outside creditors; (9) company's ability to obtain loans from outside lending institutions; (10) presence/absence of a sinking fund to provide repayments; and (11) extent advances were used to acquire capital assets.

None of the factors alone are determinative and each may be granted a different amount of weight depending on the facts and circumstances of the situation. Many closely held companies may satisfy some factors, but not others, therefore, making it exceptionally difficult to predict the outcome of any re-characterization case.

Loan transactions between closely held-businesses and their owners are always subject to heightened scrutiny. The potential for insolvency heightens the scrutiny. Many closely held businesses borrow from owners with a proper purpose in mind. Yet, given the ambiguity and uncertainty surrounding debt re-characterization claims, it is recommended that the company and its owners retain experienced transactional counsel, insolvency counsel and tax professionals to properly structure and document loans and navigate clear of dangers that can be avoided.

About the Author:



Richard H. Golubow, a founder and managing partner of Winthrop Golubow Hollander, LLP, is an attorney who devotes his practice to representing primarily corporate debtors in out-of-court workouts and Chapter 11 reorganizations. Mr. Golubow has been honored as the recipient of bankruptcy or restructuring preeminent designations or attorney of the year awards by several leading international financial publications and organizations. For more information, contact Mr. Golubow at (949) 720-4135 or rgolubow@wghlawyers.com.

Covid-19 to Cause a Surge in Financial Elder Abuse Cases

By Scott Rahn
Trust and Probate Estate Litigator, RMO LLP

Pre-pandemic estimates suggest that financial elder abuse affects at least 10% of our elders. When the pandemic ebbs, expect a flood of new cases.

That's because elders have been cut off from friends and family, community centers, and other interactions where people look out for them. Perpetrators of financial elder abuse capitalize on this dropoff in oversight. These predators, usually family, caregivers, neighbors or friends, take advantage of their position of trust and confidence for their own benefit.

You can expect the problem to be even worse in major metropolitan areas, like Orange County, where my probate law firm is located (Costa Mesa) and where we have a massive population that skews wealthier than the national average (translation – more victims to target).

We always tell people when dealing with elderly parents, "Stay vigilant and stay involved," because the best way to avoid financial abuse is prevention. Don't be caught in a situation where your mother's neighbor offers "help" with groceries by taking her debit card to the grocery store but then "forgets" to return it, leaving mom vulnerable to theft. The more you're present, the sooner you'll learn about these things, get involved, and prevent harm.

Simply making your presence known can act as a sufficient deterrent to prevent abuse. Facetime, Zoom, and other video chat platforms let you peek into their lives, which allows you to make sure there are no signs of physical abuse. If your loved one shows signs of physical abuse, 99 times out of 100 there likely is financial elder abuse as well.

Look for changes in behavior, such as sudden reliance on a new "friend," lack of responsiveness or confidence, getting off the phone quickly, and illogical concerns that don't comport with their history or situation.

If you think someone is being abused, find the adult protective service organizations in your county, or ask the police for their elder abuse division. If you hit dead-ends, there are elder abuse specialists we work with whom you can consult. Of course, you can always consult with an elder abuse attorney to guide you.

The economic strain of quarantine leads people to take advantage of others. It's a perfect storm where you have economic pressure on one side and economic opportunity on the other. Right now, these storm clouds are colliding.

***Scott Rahn**, Founding and Managing Partner of RMO LLP, represents beneficiaries, professional and corporate fiduciaries in contested trust, estate and probate litigation matters and contested conservatorship issues. He can be reached at (424) 320-9444 or rahns@rmolawyers.com.*

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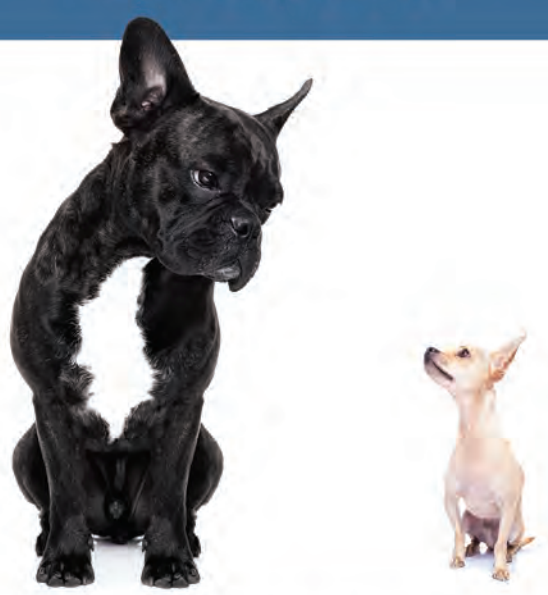

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The Green Card Visa Bulletin: What Is It & What Happened

The State Department regulates the flow of green card issuance. It controls the spigot as to which applicants in the green card process can take the final step which is to actually apply to "adjust" their visa status (Adjustment to status: AOS) from one nonimmigrant (temporary) visa category or another, to the actual permanent green card status. This only impacts those green card applicants that are in the US, typically working on a work visa and not those waiting abroad.

The mechanism the State Department uses is the monthly "Visa Bulletin" (VB) which is basically a chart of countries on one axis and green card categories on the other. The VB typically comes out mid-month of the prior month. A complex algorithm and predictive analytics are used to set the dates indicated on the VB. The dates indicated are "Priority dates" that every green card applicant has. One obtains a priority date by filing the initial step in the green card process. When one's turn is reached, they can file their AOS application.

As a result of COVID-19, US Consulates and USCIS were not interviewing applicants for green cards. Therefore, far fewer green cards were issued, resulting in green card availability for many more applicants. For October 2020 the VB advanced far ahead of what was anticipated even by industry experts, such that hundreds of thousands of applicants would now be eligible to file AOS in October 2020, much sooner than expected. Business immigration lawyers were quite busy preparing these applications for timely filing. This opportunity continues into November.

This has been a most extreme and all-consuming exercise that a historically unpredictable agency has bestowed upon immigration lawyers, employers, and green card applicants. Where the VB will go in future months is very much unknown. Sometimes it advances significantly. Sometime slowly. Sometimes it goes backwards! One thing is for sure, there will never be a dull moment in the business immigration world!

Mitch Wexler is the Managing Partner of Fragomen's Irvine, Los Angeles, and San Diego offices. Mitch is a certified Specialist in Immigration and Nationality Law and has been practicing immigration exclusively for 35 years. He represents, individuals, families, start-ups, small, and very large businesses with regard to their immigration/visa/green card related issues. He can be contacted at Mwexler@fragomen.com. Fragomen is the world's leading immigration law firm with 50 offices and over 4,700 employees.

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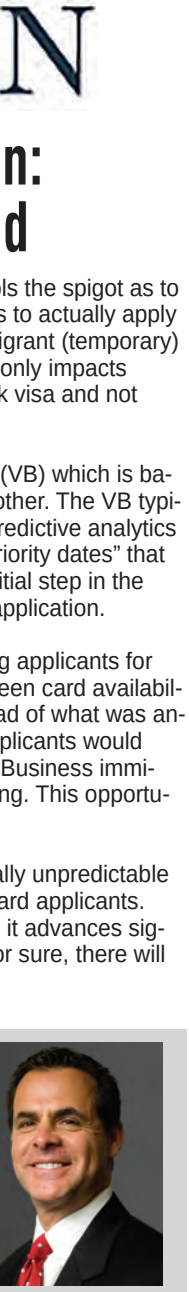

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