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Inside

A publication of the Corporate Counsel Section of the New York State Bar Association

Building High Performing In-House Teams: A Powerful Approach to Recruiting

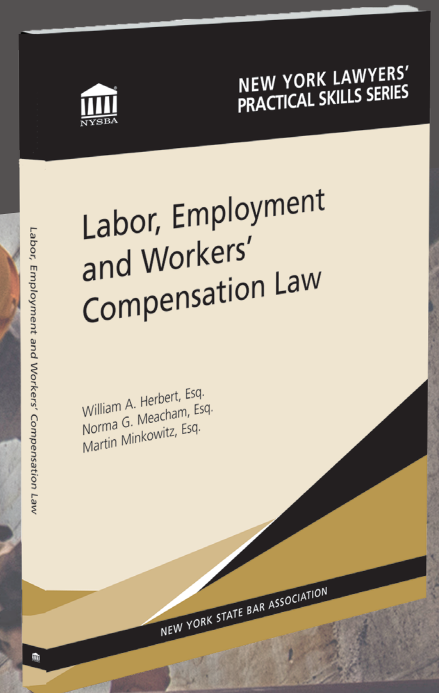
The Power of Inclusion: Seven Powers To Cultivate Change

The Employment Impacts of Marijuana Legalization in New York

PUBLICATIONS

Labor, Employment and Workers' Compensation Law

Authors
Willam A. Herbert, Esq.
Norma G. Meacham, Esq.
Martin Minkowitz, Esq.



Part One of this practice guide is designed to provide the general practitioner who encounters occasional workplace issues with an overview of the complex and interrelated issues in labor and employment law. Coverage includes the state and federal laws prohibiting discrimination and retaliation in employment, wage and hour laws and workplace health and safety, and more.

Part Two focuses on the essential questions related to workers' compensation law in New York State, with tips on evaluating your client's claim and an overview of the many related forms and their uses.

Workers' comp forms have been reviewed and updated, and new forms relating to labor and employment practice have been added.

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Inside

Editor
Elizabeth J. Shampnoi
Shampnoi Dispute Resolution
and Management Services, Inc.
elizabeth@shampnoiadr.com

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Corporate Counsel Section

Section Officers

Chair
Yamicha Stephenson
Deloitte
30 Rockefeller Plz
New York, NY 10112
ystephenson@deloitte.com

Chair-Elect
Naomi K. Hills
naomikhillslaw@gmail.com

Vice-Chair
Miya T. Owens
miya@jvclegal.org

Vice-Chair
Sanoj Stephen
Sotheby's International Realty
650 Madison Ave Fl 2
New York, NY 10022-1070
sanoj.stephen@sothebyshomes.com

Secretary
Barbara M. Levi
blevilankalis@gmail.com

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Message From the Chair

Greetings to all,

My name is Yamicha Stephenson, and I am honored to be your chair. Outside of NYSBA, I am a manager in the anti-money laundering (AML) and sanctions practice at Deloitte Transactions and Business Analytics LLP. Previously, I was an assistant district attorney at the Kings County District Attorney's Office.

Yamicha Stephenson

I have been involved in the Corporate Counsel Section since 2010 when I was a summer intern at the New York Power Authority through the Section's Kenneth G. Standard Diversity Internship Program. After completing my internship, I continued to be involved in the Section and served as the Section's first diversity intern alumnus member, co-chair of the 2015 Corporate Counsel Institute, secretary, treasurer, alternate delegate to the House of Delegates, and Chair-Elect. Through these positions and experiences, I have learned so much about the State Bar, our Section and members.

This year, our goal is to increase our engagement with our members, host more social events virtually (and hopefully in person soon), and provide an overall added benefit to you.

We hope to "see" you at one of our upcoming events, work with you on one of the Section committees or read your article in our Section publication, *Inside*, which is free for Section members!

Please view our website for more details about our upcoming events and committees. If you have not yet, make sure to join the Section's LinkedIn group (https://www.linkedin.com/groups/3948259/) or follow our Twitter account (@CorpCounsNYSBA) to get instant updates.

Opportunities To Get Involved

Please consider participating in Section committees and activities.

Our Section has the following committees:

- CLE and Meetings
- Compliance
- Diversity
- Diversity Internship
- Membership
- Pro Bono
- Publications
- Technology and New Media
- 2021 Corporate Counsel Institute Planning

If you are interested in joining or learning more about a committee(s), please reach out to me at ystephenson@deloitte.com.

Please consider becoming a host company for the Kenneth G. Standard Diversity Internship Program, which is the Section's paid diversity internship program. If your company is interested in being a host company, please reach out to Tatiana Medina, chair of the Diversity Internship Committee, at kgsdiversityinternshipprogram@gmail.com. Our past host companies include Ayco, Chubb, Con Edison, Goldman Sachs, PepsiCo, Pfizer, Salesforce, TakeRoot Justice, Unilever and Visiting Nurse Service of New York.

We look forward to working with you!

Yamicha Stephenson

Chair

Message From the Editor

Elizabeth J. Shampnoi

Greetings Valued Readers,

Welcome to the second issue of *Inside* for 2021. As always, we strive to bring you practical articles of interest that cover a broad array of topics, substantive areas, and industries of interest to in-house counsel. We hope we have succeeded in doing so in this issue.

We are currently preparing the next issue of *Inside*. If you have a topic in mind, please contact me at elizabeth@shampnoiadr.com. We are also seeking law student volunteers to conduct interviews of in-house counsel and to attend and write about Section events. This is a terrific opportunity for law students to become more active in the Corporate Counsel Section, network and be published.

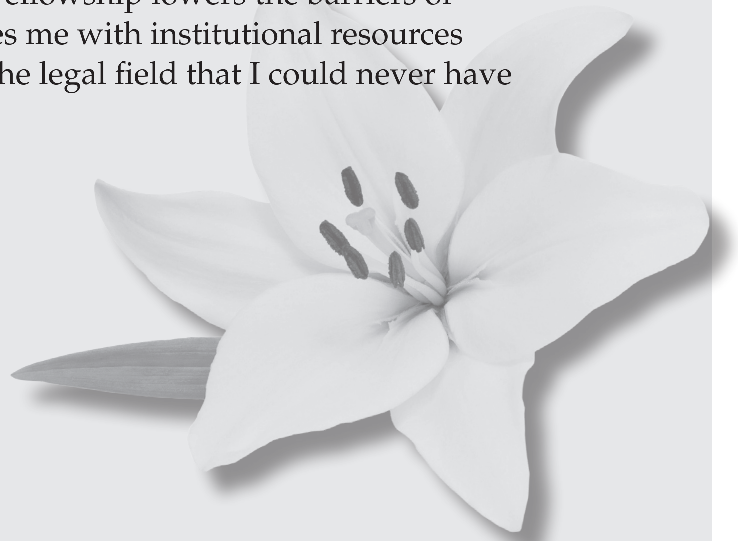
A special note of thanks to Corrine Shea, a member of the Corporate Counsel Section Executive Committee, whose assistance in preparing this publication is greatly valued. Corrine Shea is a mediation program attorney in the Office of Mediation and Conflict Resolution at the New York City Commission on Human Rights. She can be reached at Corrine.shea@gmail.com.

As always, if you have any comments or suggestions, please do not hesitate to reach out.

The Jana Springer Behe Corporate Counsel Section Fellowship: Shaun Wang

Shaun Wang

"The New York Bar Foundation Corporate Counsel Fellowship allows me to work at an organization whose mission and values align with my own, and obtain invaluable experience in corporate law which will provide a foundation for my future career. As a first-generation law student from a multicultural background, the Fellowship lowers the barriers of entry and provides me with institutional resources and networks in the legal field that I could never have dreamed of."



Corporate Counsel Section

An Invitation from the Corporate Counsel Section

In honor of our friend and colleague, Jana Springer Behe, Esq., please consider making a donation in her memory to The New York Bar Foundation for the **Jana Springer Behe Corporate Counsel Section Fellowship Fund**.

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Your gifts to The New York Bar Foundation are tax-deductible as charitable contributions as permitted by law.

The Kenneth G. Standard Diversity Internship Program

The Corporate Counsel Section's Diversity Internship Committee (the "Committee") is responsible for administering and managing all aspects of the Section's Kenneth G. Standard Diversity Internship Program (the "Program"), named in honor of former NYSBA President Kenneth G. Standard and his commitment to initiatives aimed at increasing diversity and inclusion in the legal profession. Our goal is to provide students from a diverse range of backgrounds with the experience of in-house legal practice, and to increase such student representation in future corporate legal departments. Diversity is one important factor, among many, which helps contribute to a robust exchange of ideas in the legal community.

Since 2006, the Program has proudly placed over 100 interns from every law school in New York State. The Program has been a great success and we look forward to building upon past efforts. The Committee members spend a lot of time and energy liaising with law schools and host companies. In addition, the Section commits a certain percentage of its budget to help facilitate the cost of internships. However, many of our host companies do fully provide students' salaries. Due to the generosity of many of the host companies, more students each year are able to participate. This year's host companies are Disability Rights of New York, Pepsi Co, Salesforce, TakeRoot Justice, Unilever, and Visiting Nurse Service of NY. This year's selected host non-for-profit organization recipient of the Jana Springer Behe CCS Fellowship is Start Small Think Big.

Thanks to the Committee's efforts, we launched our first virtual Open House and had over 70 attendees. Special thanks goes to Barbara Levi, founding chair of the Committee, and Rossalyn Quaye, Anthony Radin, and Denisse Mira, for helping create, promote, and organize the event. I also want to extend my gratitude to the speakers: David Bryer, 2020 intern at Unilever; Fatin Haddad, Esq., 2010 intern at Pfizer, Inc.; and Ivette Sanchez, Esq., 2015 intern at VNSNY.

The event consisted of a brief introduction to the Committee, including why the Program was created; a segment about the host companies and why they value the Program; and a panel discussion with former interns of the Program. For both students and hosts, the Program provides a rewarding experience. One law student said, "Hearing former interns from various years speak highly about the Program shows me just how much of a positive impact the Program has had on them."

In a survey, all audience members indicated that they would recommend the Program to others. Common feedback from the audience was that the Program was insightful, beneficial, and worth applying to!

We are actively seeking additional companies interested in hosting law students in what has proven to be a "win-win" for all. If you think your organization may have an interest in joining the Program next year, please contact the Committee at KGSDiversityInternshipProgram@gmail.com for more information.

We are also always looking for volunteers to join the Diversity Internship Committee. If interested, please reach out to me at it22mr@gmail.com.

.

Tatiana Medina Rodriguez, Chair
Diversity Internship Committee

N E W Y O R K S T A T E B A R A S S O C I A T I O N

REQUEST FOR ARTICLES

If you have written an article you would like considered for publication, or have an idea for one, please contact the Editor:

Elizabeth J. Shampnoi
Shampnoi Dispute Resolution
and Management Services, Inc.
elizabeth@shampnoiadr.com

Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information and a headshot.

Battle of the Tech Titans: *Google LLC v. Oracle America, Inc.*

By Amy B. Goldsmith

Amy B. Goldsmith

On April 5, 2021, in a closely watched U.S. Supreme Court case, a fair use battle of the tech titans was won by Google. *Google LLC v. Oracle America, Inc.*, 593 U.S. ___ (2021). The U.S. Court of Appeals for the Federal Circuit had held that the contested programming code was copyrightable and negated a jury verdict in Google's favor that had relied on fair use. The Supreme Court (6-2) reversed, holding that "Google's copying of the Java SE API, which involved only those lines of code that were needed to allow programmers to put their accrued talents to work in a new and transformative program, was a fair use of that material as a matter of law." *Google*, 593 U.S. ___, at 1. The Supreme Court punted on the question of whether Java's API was copyrightable, assuming only "for argument's sake" that "the entire Sun Java API falls within the definition of that which can be copyrighted." *Google*, 593 U.S. ___, at 15.

A Little Bit of History of This 10-Year Battle

On January 23, 1996, the popular programming language Java was released by Sun Microsystems (later purchased by Oracle). Java allows programmers to write programs that are interoperable, meaning that they can run on any computer. Oracle owns a copyright registration for Java SE, the current platform. In 2005, Google acquired Android, and it began to build its own software platform for smartphones. When Google's license negotiations with Sun Microsystems broke down, Google's programmers copied about 11,500 lines of programming code, comprising 37 packages, from Java SE, using it in the Android Application Programming Interface (API). An API allows programmers to save time and code more efficiently by using this pre-written code to build functions into their own programs rather than writing their own from scratch.

As described by the U.S. District Court for the Northern District of California (*Oracle America, Inc. v. Google Inc.*, 872 F. Supp. 2d 974, 980-981 (N.D. Cal. 2012), the Java SE technology comprises three parts:

- **Method call** is language that a programmer enters to invoke a task from within the API; one series of text corresponds to a single task located within a particular class, which is in turn located in a particular package.
- **Declaring code** are the lines of code "that provide that organization and name the methods, classes and packages."
- **Implementing code** tells the computer which steps to follow to carry out each task that an API calls up.

Fast Forward

What exactly did Google do that caused Oracle to sue?

It incorporated portions of the declaring code from 37 packages within Java SE. This was useful for Google, as the Java SE declaring code provides a shortcut between the method call and implementing code. The declaring code also has an organizational structure. Google independently wrote all of the implementing code for the Android platform. Oracle purchased Sun Microsystems in 2010 and sued Google in the Northern District of California for copyright and patent infringement (the jury rejected this claim, and it was dropped from the litigation). The Supreme Court decided that it would review the questions of copyrightability and fair use.

Fair Use

Before reviewing the four fair use factors (17 U.S.C. § 107), the Supreme Court reviewed the 1978 findings of the congressional commission that had determined that

Amy B. Goldsmith is a partner at Tarter Krinsky & Drogin (www.tarterkrinsky.com) where she chairs the privacy and cybersecurity group and guides clients through the legal aspects inherent in building immediately recognizable brands, developing desirable products and services, and devising strategic IP plans to mitigate risk. With respect to IP risk management, Amy advises clients on U.S. and non-U.S. trademark due diligence, patent go-to-market strategy, and copyright compliance. Amy designs commercially responsive privacy policies, terms of use, end-user licenses, software-as-a-service agreements and cybersecurity policies and guidelines.

granting copyright protection for computer programs was "desirable"—but had warned that copyright "should not grant anyone more economic power than is necessary to achieve the incentive to create." 593 U.S. at ___, 16. The Supreme Court also reiterated that fair use is a mixed question of law and fact, including in the computer-code context, and disagreed with Google that "'the right of trial by jury' includes the right to have the jury resolve a fair use defense."

Factor 1: The Nature of the Copyrighted Work

Here, the Supreme Court closely scrutinized the declaring code's purpose, finding that it was "inextricably bound" to the implementing code, which Google did not copy, and, importantly, these non-copyrightable functions:

> 1. A general system, namely the division of computing tasks.
>
> 2. The concept of organizing tasks into packages and classes.
>
> 3. The method calls.

Following this analysis, the Supreme Court determined that the declaring code, "if copyrightable at all," was further away from the core of copyright than most computer programs. Hence, this factor favored fair use. 593 U.S. at ___, 22-24.

Factor 2: The Purpose and Character of the Use

Why did Google copy the 37 packages of declaring code? The Supreme Court answered this way: "Google copied portions of the Sun Java API precisely, and it did so in part for the same reason that Sun created those portions, namely, to enable programmers to call up implementing programs that would accomplish particular tasks." But the legal analysis did not stop there, looking further into the purpose: to expand the "use and usefulness of Android-based smartphones. . . . [which] use was consistent with that creative 'progress' that is the basic constitutional objective of copyright itself." 593 U.S. at ___, 25. The Supreme Court adopted Google's worldview: Google copied Sun's API (which Sun originally created for desktops and laptops) in a limited way, only to the extent needed to "include tasks that would be useful in smartphone programs" and "only insofar as needed to allow programmers to call upon those tasks without discarding a portion of a familiar programming language and learning a new one." 593 U.S. at ___, 26.

In computer speak, this is called "reimplementation," and many of the amici briefs from the tech industry supported Google, stating that reasonable fair use of functional code allows for new opportunities for the Java developer community, and computer programming in general, to grow. The Supreme Court also discounted the fact that Google's use of the declaring code was indisputably commercial in nature, noting that the use was transformative within the Android system. 593 U.S. at ___, 27. Lastly, the

Supreme Court was not interested in evaluating good faith/bad faith in view of the strength of the other factors pointing toward fair use. Interestingly, the Court did note its prior skepticism about whether good faith/bad faith use has any place in a fair use analysis. 593 U.S. at ___, 28.

Factor 3: The Amount and Substantiality of the Portion Used

The Supreme Court recognized that the 37 packages of declaring code that Google copied was virtually all of the declaring code required to call up hundreds of different tasks, while noting that the percentage of declaring code was only 0.4% of the entire Java SE code. Again, the Supreme Court adopted Google's worldview: Don't look at what we copied; look at what we didn't copy—the implementing code. And we copied the declaring code because everyone knew how to work within Java, and it would have been prohibitively expensive to design a new system. And, by the way, we copied to create a transformative platform outside of the desktop/laptop environment, namely, for smartphones. In the Court's view, the use of the declaring code was the "key" that unlocked "programmers' creative energies" to "create and improve [Google's] innovative Android systems." The substantiality factor, accordingly, weighed in favor of fair use. 593 U.S. at ___, 29-30.

Factor 4: Market Effects

What is the effect of the copying (or "reimplementation") in the "market for or value of the copyrighted work"? 17 U.S.C. § 107(4). The Supreme Court had no doubt that, in the computer programming context, this is not an easy analysis. Going back to the jury, there was ample evidence that the primary market for Java SE was laptops and desktops, that Sun had not been successful in moving into the mobile phone market, that mobile devices that used Sun's software were feature phones and not smartphones, and that Android was not a market substitute for Java's software. 593 U.S. at ___, 31-32. As for the failed licensing negotiations, they related to more than just the declaring code, and "the jury's fair use determination means that neither Sun's effort to obtain a license nor Oracle's conflicting evidence can overcome evidence indicating that, at a minimum, it would have been difficult for Sun to enter the smartphone market, even had Google not used portions of the Sun Java API." 593 U.S. at ___, 33.

The Supreme Court did recognize that a lot of money flowed into Google's coffers as a result of Google's copying of the declaring code, but it found that the profitability's source had as "much to do with … programmers' investment in Sun Java programs . . . . and correspondingly less to do with Sun's investment in creating the Sun Java API. We have no reason to believe that the Copyright Act seeks to protect third parties' investment in learning how to operate a created work." 593 U.S. at ___, 34.

Google convinced the Court that, "given programmers' investment in learning the Sun Java API, to allow enforcement of Oracle's copyright here would risk harm to the public." 593 U.S. at ___, 34. Rather than being a "key" to allow the development of transformative programs, enforcement would create a declaring code "lock," with Oracle holding the only get-out-of-jail-free card. This viewpoint was critical in determining that the fourth factor favored Google.

And the Winner of the Battle Is Google

> We reach the conclusion that in this case, where Google reimplemented a user interface, taking only what was needed to allow users to put their accrued talents to work in a new and transformative program, Google's copying of the Sun Java API was a fair use of that material as a matter of law. 593 U.S. at ___, 35.

Industry Implications

For companies that develop and license code, the Supreme Court's refusal to decide whether the declaring code is copyrightable is likely disappointing—even more so because the Court said that "if [the code were] copyrightable at all," it was further away from the core of copyright than most computer programs. It isn't likely, now, that programmers who incorporated other APIs and who never had licenses will be sued for copyright infringement. On the other side of the equation are startups that develop APIs: How will they be compensated? If this decision results in a no-compensation model, will their creativity be diminished?

Further, even though this decision relates to fair use of code, defendants will no doubt cite to it to support their fair use defenses in industries outside of programming. So, which other industries may the decision affect? The film and publishing industries supported Oracle; these industries are quite protective of their content. Indeed, it will be interesting to see whether *Oracle v. Google* is applied in the music context, where short phrases of lyrics and composition could be analogized to functional code. Pending cases include a copyright infringement dispute between the owners of the 1973 hit song "Let's Get It On" and Ed Sheeran (2014's "Thinking Out Loud") and The Nevels Sisters and Eddie Howard's complaint against Dawn Richard for allegedly infringing their copyrights in the song and recordings of "Abundance of Rain." Will this decision be applied to the use of photographs or artwork in an allegedly transformative way? Only time will tell.

Building High Performing In-House Teams: A Powerful Approach to Recruiting

By Alexander Misch

Alexander Misch

Not finance. Not strategy. Not technology. It is teamwork that remains the ultimate competitive advantage, both because it is so powerful, and so rare.—Patrick Lencioni

One of the most daunting tasks I have ever faced was helping a law firm transform itself from a homogenously white group of mostly men chosen from a small selection of elite law schools to meeting the then-newly legislated black economic empowerment criteria in South Africa. This included introducing black partners into the partnership, hiring black associates, and making extensive use of black service providers, for example—all without impacting the normal flow of operations (and, more importantly, the normal flow of fees) that made the firm so successful.

How do you do that? Well, the fundamental building block of this transformation program (and all subsequent hiring decisions that I have been involved in since) was a complete overhaul of that firm's recruiting process. As it turns out, the almost universal mantra of "we only hire the best graduates from the best law schools" is as common as it is (usually) ineffective.

Your website may proclaim that your people are your most valuable assets, though few companies ever treat their employees as such. Most prefer to "sweat" their (human) assets until they reach the end of their useful lives.

Earlier this year, I dialed into a webinar during which a recruiter evaluated resumes submitted by his audience. I learned that, apparently, making use of colored text boxes in your resume was a sure sign of the candidate's uncontrollable sense of independence, who was clearly going to be "impossible to manage." All that from a maroon text box.

Of course, if you are looking for someone to perform entirely mundane tasks under the supervision of a micromanaging superior, then yes, go on and eliminate all candidates with any kind of personality.

On the other hand, you could use every vacancy as an opportunity to create a truly high-performing team of professionals. Here is how:

1. Every vacancy creates an opportunity to redesign your internal processes; and to become more effective.

   There are several forces at work out there that are creating more and more pressure, even on in-house legal departments, to redefine what it means to add value to your organization. Consider the ever-increasing cost pressures that all companies are facing. Considering those pressures, when last did your in-house legal department consciously and deliberately increase the value it adds to the company?

   Or what about emerging legal-tech and the use of artificial intelligence (AI) in the legal sector. Already AI is transforming the way some large law firms interact with their clients. Legal-tech firms are transforming the fields of discovery and legal research. The knowledge that lawyers previously carried in their heads, and had acquired over a lifetime of practice, is now readily available to anyone skilled in the use of new research tools.

   Many companies are beginning entirely to eliminate the use of in-house counsel in their contracting processes.

   The point is: If you still work the way you used to work ten years ago, you might have reason to be concerned. Cost pressures, new technologies, and AI may be coming for your job.

   So, what can you do about that?

1. An area to explore is a relentless drive for more and more automation. Have a look at the processes in your in-house legal department and consider what parts of these you can redesign with a view to automating as many tasks as possible.

Alexander Misch is admitted to practice both in New York and in South Africa. Apart from his experience as a legal practitioner both in private practice and in-house for over 12 years with a Fortune 500 information and communications technology company, Alex is passionate about helping practitioners with challenges typically associated with the business of law. He operates a consulting business, Entrepreneurological.com, from his home in the Hudson Valley. You can contact Alex at alex@eological.com.

2. While reviewing your processes, and the tasks that a new member of staff would be required to perform, it is also useful to classify the work into broad categories along a spectrum ranging from complex problem-solving tasks, which require creative new ideas and lateral thinking (on the one side of the spectrum), to highly process-driven, high volume, low complexity tasks (on the other side of the spectrum), which are best performed by people who are inspired more by the management of the process, than they are by the tasks themselves.

   Typically, most in-house positions tend to involve work that falls somewhere between these two extremes, in the middle of the spectrum, where the work is not easy, but not exactly rocket science either. Here, the best performers often distinguish themselves by some solid (but not necessarily spectacular) experience and the ability to manage multiple projects in parallel.

   You will note how each of these three (theoretical) categories of work would appeal to three entirely different personalities.

   Ask yourself, what type of person would be most successful in the position you are looking to fill, and then test for those characteristics as part of the recruiting process.

3. Yogi Berra is attributed as saying that "You've got to be very careful if you don't know where you are going, because you might not get there." Of course, there are dozens of variations of the quote,

one of them being that "if you don't know where you are going, then you are sure to get there."

The same applies when recruiting someone. If you do not know who you are looking for, you will probably not recognize them when you meet them. The point is: the better you know your ideal candidate, the more you have considered their character traits, their likes, dislikes, and preferences—as well as your own character traits, your own likes, dislikes, and preferences—the greater the chance that you will be able to recognize the best candidate when they present themselves.

Personally, I prefer hiring for attitude, rather than spectacular levels of skill. When managing a team, I have always found that I can teach most people the skills they need to be successful in their position. The one thing that I have never been able to teach anyone, however, is their attitude, their values, the things that get them excited, and the things that turn them off. Those are things that each candidate brings with them, and that will continue to define them throughout their employment.

Here, it is useful to employ a combination of tools, for example:

- A personality profile of the ideal candidate, that is as detailed as you can make it. What drives them; are they assertive; are they team players or driven by a desire for personal success; are they (long-term) career builders or (short-term) resume builders; do they have a high need for recognition; are they comfortable with the relevant level of supervision; should they be agreeable or uncompromising; and
- A personality indicator tool. Myers Briggs is useful, for example. It not only creates a personality profile of the person, but also serves as a useful guide to which personality types are more likely to be able to work together, and which personality types should not work together in specific settings.

Form as accurate a personality profile of your ideal candidate, and test for those attributes during the recruiting process

4. As you push your in-house counsel team up the value chain, the complexity of tasks to be performed by your team members will necessarily increase. Beyond merely creating a broad personality indicator, it will be worthwhile to have your candidates assessed for their current maximum level of mental processing capability.

   When the complexity of the cognitive processing required by the role to be filled is lower than that of the candidate, the person may feel underemployed. When the complexity of their cognitive processing is higher than that of the superior to whom they will be reporting, they may end up feeling insufficiently recognized, or challenged.

   Assessing maximum levels of mental processing capabilities is not an easy process and will require expert skill but can be extremely valuable—particularly for very senior staff.

Using these four principles, the law firm I spoke of above managed to reach the highest levels of compliance with the new regulations within two years— all while not only continuing to deliver superior service, but also increasing its turnover and its profitability. The transformation from a traditional firm of attorneys to a high-performing team was, quite simply, remarkable.

Building high-performing teams requires, at its very foundation, that team members trust each other. Trust empowers team members to overcome the natural fear that seeks to protect the individual's status. Trust also empowers team members to overcome the natural fear of (healthy) conflict within the team. Trust creates a safe space for creativity, communication, accountability, and a commitment to team results (as opposed to a constant need to prove one's personal value).

Team members do not necessarily need to *like* each other to trust each other. But they need to *respect* each other; and respect is built on a sense of worth, or excellence, of the other person.

When building your in-house team, selecting the right candidates will enable the creation of trust and respect. Trust and respect are the most powerful foundation, and cement, of any team and will empower you to achieve exponential increases in performance and of value to your employer.

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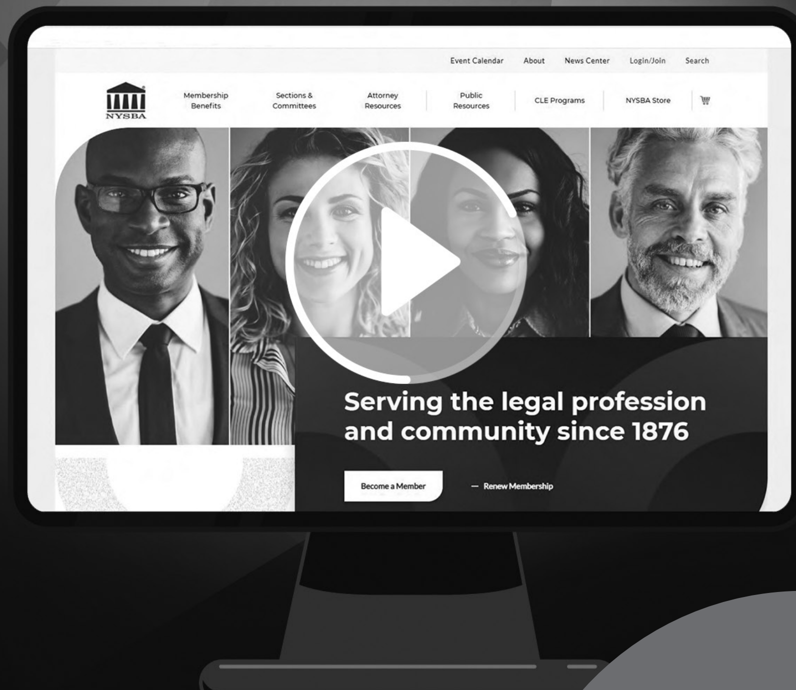

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The Power of Inclusion: Seven Powers To Cultivate Change

By Cecilia B. Loving

Cecilia B. Loving

George Floyd's daughter said "daddy changed the world," and she is correct. In many respects, the death of George Floyd was pivotal in denouncing centuries of violence and hatred against Black, Indigenous, and other People of Color (BIPOC) in this country, including Latinx and Asian American and Pacific Islander communities. Many have awakened to the ongoing racial trauma suffered by BIPOC and the impact of racial injustice in the workplace, realizing the need to respond to the demand for diversity, equity, and inclusion (DEI). Commitment to lasting change, however, requires tapping the power we have to manifest change. Here are seven powers we can use to cultivate a more diverse, equitable, and inclusive work environment.

1. The Power of Wisdom

We have the wisdom necessary to bring about change. Lasting change begins within. An honest conversation with yourself and continued personal development for better awareness in DEI are essential to organizational change. What are your core values? What is your leadership philosophy? If you are committed to doing whatever is necessary to support a diverse, equitable, and inclusive work environment, you will succeed. Unlike mandatory training, the wisdom gleaned from educational or learning opportunities is quite different, as the former is completed merely to "check the box." A mandatory implicit bias course does not bring about change because it alone is not enough. Education is an ongoing effort to improve oneself with deep listening, developing growth mindsets, uncovering assumptions, and collaborating to gain insight that can never be achieved independently.

The process of education can be uncomfortable because it triggers the soul. We learn to be comfortable with being uncomfortable by moving from a fixed to a growth mindset. A growth mindset is conducive to "education." Education helps us improve our relationship with ourselves and others through videos, webinars, virtual books, or infographics—all of which tell stories, provide introspection, and result in teachable moments for lasting change. Education is one of the many steps in maintaining an inclusive culture but is an indispensable one. The best way to educate yourself is to use the resources and expertise of a thought leader whose job is to provide the wisdom (training, education, and accountability) that you need to learn and stay informed.

2. The Power of Leadership

We have the leadership that we need to bring about change. A chief diversity and inclusion officer (CDIO) is essential, but one leader is not enough. Our organizations are comprised of outstanding leaders as each one of us is a leader, charged with leading ourselves. However, the entire organization is accountable for achieving overall success, especially those leading the organization in the C-suite. When a CDIO fails, it is because leadership failed to support the goals of DEI. Likewise, when a CDIO succeeds, the entire organization worked hard to turn the curve toward lasting change. This means that the CDIO must report to the head of the organization. Otherwise, there is a significant risk that the CDIO's ideas will be diminished by an additional layer of supervision—whether intentional or not. Even those supportive of DEI have their own agendas, which may impact the CDIO's ability to do their job. The issues confronted by a CDIO are challenging, which would be complicated by a third party or intercessory.

Also, a CDIO is set up to fail if they are not provided with administrative support. At a minimum, they need a small team. In the same manner that general counsel cannot respond to every legal issue without a legal team, a CDIO cannot do everything. A CDIO needs administrative, creative, legal, and managerial support and a devoted team of champions providing their ideas, creativity, and understanding of the work culture.

Cecilia B. Loving is an expert in diversity, equity, and inclusion. She is a winner of the National Diversity Council's 2021 Top 100 Diversity Officers Award, a 2021 Innovation Award for FDNY's Inclusive Culture Strategy, Lawline's Top Women Faculty of 2020 Award, the City Bar Association's 2020 Diversity and Inclusion Champion Award, and many others. She is the author of several books, including a new book entitled *THE POWER OF INCLUSION: Meditating with Compassion, Healing with Generosity, Leading with Love*, which discusses the power, benefits, and importance of being inclusive.

3. The Power of Measurement

We have the ability to measure where we begin to establish where we want to go. Commitment to DEI requires the establishment of a baseline for transparency, contrast, and goal setting. What are the demographics for all areas of your organization? You can simply look at who is in your organization and what they do, and the story tells itself. You need to measure where you are to determine your baseline for improvement. What other benchmarks can you measure? Are you willing to dig deep enough to ask the question and be accountable for whatever issues have caused people to feel "less than"?

Deep listening is required. Influencing key stakeholders requires creativity. In addition to demographics, what are your hiring practices, promotional and advancement practices, programs, pipeline development, internships, stretch opportunities, etc.? Do you reflect the country's demographics in all aspects of your operations? Who comprises your board and staff? You first have to be honest about what is wrong in order to commit to what is right.

For accountability, we have to create a culture that wants the truth and realizes its importance. We need to promote transparency, confront our assumptions, start with where we want to end, and monitor success. Whether you use recruitment stats, climate surveys, focus groups, feedback surveys, testimonials, or other accountability systems, the evidence is vital to tell the truth about what has taken place and what has the potential to be done.

4. The Power of Vision

We can envision beyond the present to create our best. Defining what success looks like for you requires creating a vision, which is aspirational; a mission, which you expect to accomplish as part of your long-term plan; and goals, which are concrete steps towards completing your mission. Your vision, mission, and goals are the centerpiece of your strategic plan. You will also need an inclusive culture strategy that encompasses your organizational core values and provides a catalyst for operational support. How can you build upon the success that you achieve as part of your operations? What operational slogans are already used that support

inclusion? You want input from as many stakeholders as possible. What some call a “listening tour” is actually strategic planning, building bridges for community, educating for accountability, and cultivating partners for collaboration.

Your inclusive strategy should not merely be identified for messaging but also encompassed in a written plan. Plans provide an opportunity to apply your inclusive culture strategy to concrete goals. Create a timeline for your journey, showing where you have been and the trajectory of where you need to go. In addition to setting forth what you would like to accomplish and why your goals are essential to creating a more positive and holistic workplace, include the testimonials of those who have benefited from programs. This qualitative and quantitative data can also be used for an annual report. Over time, you can share awards, successes, resources, and measurements establishing your accomplishments.

5. The Power of Opportunity

There will be resistance to DEI goals in every organization, but all forms of resistance and resisters can be cultivated as supportive partners to help push the needle for progress. Some partners may appear adversarial, applying pressure both within and outside the organization, but they still present opportunities to support change. Potential partners include government agencies or offices requiring status reports, evaluations, or audits; foundations, boards, and clients who pay for services and demand change; legal authorities, decisions and/or monitors; affiliated organizations, employee resource groups, internal compliance systems; and those who make it their business to keep you informed. These are all “partners” who provide opportunities for creating reliable systems to survey, track and keep tabs on accomplishments and areas for improvement, including those issues that trigger and traumatize employees and thus should be prioritized as a critical DEI goal. Thus, instead of resisting them, take advantage of every challenge to push beyond your comfort zones to achieve success. Pushback just means that there is a better way just waiting to be discovered.

6. The Power of Champions

We have champions, many of whom are just waiting to emerge. Many DEI efforts begin with the input of a diversity committee or council comprised of key stakeholders. Councils or committees should have charters, setting forth a statement of their goals, leadership, members, sub-committees, meeting structure, accountability, and other attributes. The development of DEI champions should not stop with one vehicle. When creating DEI champions, “the sky” should be the limit. Task forces can be formed to address challenging issues, providing focused action plans, root cause analysis, and possible results. Diversity and/or inclusion advocates can be used to advocate, champion, message, teach, counsel, and hold space for the improvement of DEI. Communications strategists and mobile messaging units created from the employees in the work culture can help improve and disseminate the DEI message throughout the organization. A community of stakeholders should grow until the entire organization comprises those committed to DEI goals.

7. The Power of Creativity

The late Paul Robeson said art is power; it affects politics and brings about change. The messages inherent in artistic expression raise consciousness, build trust, enhance authenticity, and provide the courage to create lasting change. The best way to realize our common ground and respect and include each other is through art, including infinite expressions of our stories. Art in all of its various forms—posters, books, videos, infographics, cards, screensavers, vignettes, drama, cards, animation, games, play, dance, song, music, talks, poetry, paintings, drawings—brings about change. The power of art is the reason why broadcasting companies, museums, and other cultural institutions are considered guardians of the truth and sanctuaries of our experiences. Data shows that people revere cultural institutions like public broadcasting companies; they are more trusted than any other source of information. Art, which is one way to “enjoy the process of inclusion,” reminds us that innovation is at the heart of creating and sustaining a diverse, equitable, and holistic environment.

There is a lot of cynicism and impatience around diversity, equity, and inclusion. The emphasis is on what has not been done rather than what we have the power to do. We have the power to be better than we were in the past. Unlike our ancestors, we are not distracted by a wilderness of physical survival. Despite the fear of scarcity, there is ample good available for us all to succeed. The power of inclusion recognizes that we can uplift, encourage and bless everyone with success through wisdom, leadership, vision, opportunity, champions, and creativity.

Post-Pandemic 'Hybrid' Meetings and Mediations: Paving the Way With Technology and Technique

By Chris McDonald

Chris McDonald

For many attorneys and litigants, resolving a civil lawsuit through mediation often meant travel, and always meant meeting face-to-face with the mediator. COVID-19 changed all that. A typical pre-pandemic mediation—indoors and in person—suddenly became, in the parlance of the CDC, a "small gathering" that counseled in favor of masks and social distancing.[1] Virtually overnight, "virtual" mediation by way of a videoconferencing platform became the only option that allowed mediation participants to actually see each other when speaking with each other.

The CDC thankfully revised its guidance this past May: with some exceptions, "[f]ully vaccinated people can resume activities without wearing a mask or physically distancing."[2] Accordingly, in-person mediation has again become a viable option. And, as many had predicted, "virtual" mediation continues to be used as well. It may take some time to get a handle on the percentages, but a significant subset of matters eligible for in-person mediation are instead going (with apologies to the film industry) "direct to video."[3]

With both methods now in use, how common will it be to have mediation sessions that utilize both methods simultaneously? Stated differently, how often will there be "hybrid" mediations where some key participants meet face-to-face with the mediator, while other key participants (not the "telephone standby" type) meet face-to-screen, viewing and hearing and speaking with everyone else through their computer?

Whether hybrid mediation will be rare or routine may depend, to some extent, on the success of hybrid meetings in another context—the workplace. Companies have been thinking through what "post-pandemic" adjustments must be made to best accommodate having some of their employees return to the office, having employees return to the office some of the time, or both. While a degree of coordination and collaboration can and will occur by phone or email, there is an expectation that maximizing productivity in "hybrid" work environments will also require "hybrid" meetings—several colleagues in the same conference room being joined by one or more colleagues "Zooming in."

The Challenge of Making "Hybrid" Meetings Work

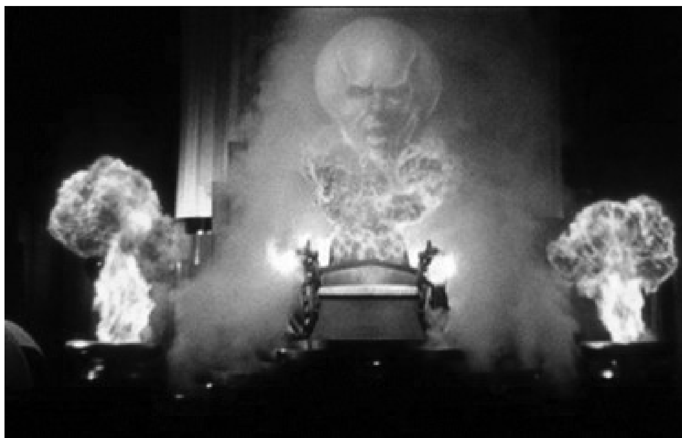
Perhaps counterintuitively, some of America's largest corporations are finding that returning to the office means that their videoconferencing needs aren't shrinking, but expanding. And with that expansion comes increased concern that remote participants in hybrid meetings will feel disadvantaged. In March of this year, the *Wall Street Journal* reported that executives at the travel company Expedia were "trying to figure out how to have in-person meetings that don't disadvantage those who aren't in the room." As explained by Expedia CEO Peter Kern: "If a team comes together in-person, but not all can make it, that potentially creates a subpar experience" for remote participants. One executive at insurance giant Prudential "insisted on adding video capacity in more small meeting spaces, not just conference rooms, so people working from home won't feel excluded."[4]

Taking "adding video capacity" to a whole new level, Google's Mountain View, California campus has added a room designed for hybrid meetings called "Campfire." As reported by the *New York Times*, to ensure that "virtual participants are on the same footing as those physically present," Campfire is outfitted "with impossible-to-ignore, large vertical displays . . . [that] show the faces of people dialing in by videoconference."[5] Similarly, The Verge reported that Microsoft had researchers, engineers, and others developing "prototype hybrid meeting spaces" at its Redmond and U.K. campuses. Kurt DelBene, Microsoft's head of corporate strategy, said the group "is investigating different meeting configurations and technologies like multiple screens, cameras and mixed reality scenarios to understand the most effective, inclusive set-up for hybrid work."[6]

Chris McDonald is the principal of the ADR Office of Chris McDonald in Rockville Centre, New York. He is a mediator, FINRA arbitrator, and consultant, and a member of NYSBA's Dispute Resolution Section, Mediation Committee, and Mentorship Working Group. Mr. McDonald also has over 25 years of experience as a litigator of commercial, securities, and antitrust disputes, and spent several years in house as a senior attorney in the law and public policy department of a telecom company. He can be reached at chris@mcdonaldadroffice.com.

To state the obvious, most companies don't have the wherewithal to experiment with different "mixed reality scenarios" for their conference rooms. Videoconference platform vendors are looking to bridge that gap by offering "rooms" of their own. Different companies offer different suites of products, licenses, and services, but the end result is basically the same: for a fee, your conference room will be enabled to be used with that vendor's platform and equipped with compatible hardware such as screens, cameras, speakers, microphones.[7] Once operational, those in the "Zoom Room" or "Microsoft Teams Room" or "[pick your vendor] Room" can host hybrid meetings and be joined by colleagues working remotely. But, as noted on Vox.com earlier this year, no matter what the setup, the videoconferencing companies will "have to make it natural for those physically present to communicate effectively with their remote counterparts, without one or the other feeling disadvantaged."[8]

To again state the obvious, many entities—particularly small businesses—may not have the wherewithal to do that either. Hosting a hybrid meeting may require some DIY ingenuity to get the most out of one's chosen videoconferencing platform. There are "hybrid meeting setup" how-to videos on YouTube with instructions, tips, and tricks. With a laptop, competent IT staff, and some consumer electronics (e.g., a big screen TV or other large monitor, a cellphone or other camera with a stand, maybe a microphone or two), it is possible to host hybrid meetings in rooms not pre-packaged for that purpose.



Early example of technology being used to ensure that a virtual participant in a hybrid meeting was not disadvantaged.[9]

All of which is to say that the richest companies with the coolest toys will have the most sci-fi-esque hybrid meetings, companies that can afford tricked out conference rooms will hire vendors to set them up, and companies that can't afford to hire vendors will have to make do (or do without). But even with the best equipment, in-room participants in a hybrid meeting will still be able to see and hear each other if technical glitches affect remote participants. And if someone in a "hybrid" conference room makes an off-mic quip, remote participants will hear the laughs, but they won't be in on the joke. In other words, more and better technology, standing alone, may not be enough to ensure that remote participants in hybrid meetings feel included and stay engaged.

The Challenge of Making "Hybrid" Mediation Work

Videoconferencing took some getting used to, but for most people a "Zoom call" isn't a big deal anymore. Just as with videoconferencing, hybrid meetings will no doubt take some getting used to. Over time, the ongoing experimentation with hybrid meetings in the business setting may produce dos and don'ts, cautionary tales, and war stories (or "I am not a cat" stories[10]) from which best practices emerge. If remote participants don't, in fact, feel disadvantaged, then the increased familiarity with "hybrid" workplace meetings may pave the way for parties to accept hybrid mediation as well.

Or not! If offered the option to "Zoom in" to an otherwise in-person mediation, it's easy to envision litigation counsel responding: "I understand that I could do that, but why on earth would I?" Arguably, not participating "live" could mean lost opportunities to build rapport with the mediator, to size up opposing counsel, or to get a better sense of how the client, adversaries, or co-parties might perform on the stand if the mediation fails. The real or perceived advantages of "being there" may mean that a sort of FOMO—fear of missing out—will act as a barrier to the uptake of hybrid mediation, or at the very least act as a counterweight to the obvious benefit of reduced time and effort spent for mediations that are out of town. Time will tell.

That said, it's not hard to envision a scenario in which hybrid mediation might be the only option. An obvious justification for Zooming into an otherwise in-person mediation is that participating remotely will reduce one's risk of contracting the novel coronavirus. Whatever "normal" looks like when COVID-19 is contained, the disease (and its potentially more worrisome variants) won't be eradicated entirely. For some, post-pandemic decisions about airlines and elevators, hotels and restaurants, handshakes and hugs, are likely to be different than what they were pre-pandemic. Even without factoring in the cost savings of virtual participation, some litigants are likely to decide that, for safety reasons, they would prefer to: (a) not travel, and (b) not spend hours in a room talking with other people and breathing the same air. Other litigants will undoubtedly insist on in-person mediation if it is available. When litigants on opposite ends of the COVID-risk spectrum wind up on opposite sides of the "v." in litigation, the only choices may be hybrid mediation or no mediation at all.

Having a mediation in which a participant feels disadvantaged by how the mediation itself is conducted

is a recipe for failure. To avoid that fate, no matter how technologically crude or advanced the hybrid setup is, the job of the mediator will be the same: to ensure that all participants, whether they be in the room or on the screen, are actively engaged and invested in the process. Indeed, the skills and tools of the mediator—actively listening, posing questions that encourage participation and dialogue, summarizing, reframing, showing empathy, allowing a party to vent when necessary, reality testing when necessary, even caucusing with subsets of participants when necessary—are tailor-made for ensuring that virtual participants in a hybrid mediation feel included and valued, seen and heard.

Think of it this way. A big part of what makes Zoom calls work is that Zoom levels the playing field. Everybody is in the same size box on the screen; nobody can hear if you're talking while on mute (and everybody lets you know); everybody is interrupted if you're talking when you're supposed to be on mute (and everybody lets you know). The platform itself is a great equalizer. But another critical factor in whether a Zoom call works is whether the host runs it well or poorly. If the playing field is tilted, as is arguably the case with hybrid mediations (and other hybrid meetings), then how the meeting is run becomes all the more important.

Final Thoughts

From setting the agenda, to targeted questioning, to establishing and enforcing ground rules regarding attendee participation, mediation techniques can help overcome structural imbalances that disadvantage remote participants in hybrid meetings. In short, to level the playing field, better tech is *a* solution, but it isn't the *only* solution. This should be heartening news, particularly for small businesses that might otherwise forgo the opportunity to hold hybrid meetings because their technological capabilities are limited.

To hyperextend an analogy, when talking about "paving the way" in this context, it might be best to picture a two-way street. Technological advances and best practices developed for and in the workplace may be adopted and employed to benefit future hybrid mediations. But mediators *already* employ practices that are likely to benefit anyone leading a hybrid meeting, be it in the workplace or elsewhere. The tools in the mediator toolkit help parties identify problems, steer conversations towards productive ends, invite collaboration, and encourage the exploration of creative solutions. In that respect, hybrid mediation may not follow from hybrid workplace meetings; mediators may instead help show the way forward.

Endnotes

1. *See* https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/holidays/small-gatherings.html.
2. *See* https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html.
3. For a small sampling of articles touting the success of virtual mediation in different contexts and/or implying if not outright predicting that it is "here to stay," *see* Thomas A. Stander, *The (Zoom) Room Where It Happens*, Michigan Lawyers Weekly, March 2020, https://milawyersweekly.com/news/2020/12/29/the-zoom-room-where-it-happens/, Jeffrey T. Zaino, *Virtual ADR Becomes a Practical Option for Corporate Bankruptcies*, New York Law Journal, October 20, 2020, https://www.law.com/newyorklawjournal/2020/10/20/virtual-adr-becomes-a-practical-option-for-corporate-bankruptcies/, James Yellen, *Zoom Zooming Into Mediations in COVID-Times*, Securities Arbitration Alert, March 3, 2021, https://www.secarbalert.com/blog/zoom-zooming-into-mediations-in-covid-times/, Diane M. Welsh, *Why Virtual Mediation Is Here to Stay*, The Legal Intelligencer, February 3, 2021, https://www.law.com/thelegalintelligencer/2021/02/03/why-virtual-mediation-is-here-to-stay/.
4. Emily Glazer and Chip Cutter, *Companies Wrestle With Hybrid Work Plans—Awkward Meetings and Midweek Crowding*, Wall Street Journal, March 19, 2021, https://www.wsj.com/articles/companies-wrestle-with-hybrid-work-plansawkward-meetings-and-midweek-crowding-11616146200.
5. Daisuke Wakabayashi, *Google's Plan for the Future of Work: Privacy Robots and Balloon Walls*, New York Times, April 30, 2021, https://www.nytimes.com/2021/04/30/technology/google-back-to-office-workers.html.
6. Tom Warren, *Microsoft To Start Reopening Headquarters on March 29th, With Hybrid Workplace Focus*, The Verge, March 22, 2021, https://www.theverge.com/2021/3/22/22344273/microsoft-redmond-headquarters-open-hybrid-workplace.
7. *See, e.g.*, https://zoom.us/zoomrooms; https://www.microsoft.com/en-us/microsoft-teams/microsoft-teams-rooms; https://www.webex.com/video-conference-equipment/webex-room-series.html; https://www.bluejeans.com/products/rooms.
8. Rani Molla, *The Pandemic Was Great for Zoom. What Happens When There's a Vaccine?*, Vox.com, December 4, 2020, https://www.vox.com/recode/21726260/zoom-microsoft-teams-video-conferencing-post-pandemic-coronavirus.
9. If you don't recognize it, this might help: https://www.youtube.com/watch?v=of8f7Kj1yiE.
10. *See* Daniel Victor, *'I'm Not a Cat,' Says Lawyer Having Zoom Difficulties*, New York Times, February 9, 2021, https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html.

There's No Place Like Home: Long-Term Labor and Employment Legal Considerations for Post-COVID Remote Work

By Jeffrey Douglas and Valerie K. Ferrier

Prior to COVID-19, companies were already beginning to assess the advantages and disadvantages of remote work policies. However, the coronavirus turned theoretical discussions into an immediate necessity. Now, over a year into the pandemic, and with widespread remote work the new norm in many industries, companies are evaluating whether to return to the office full-time, remain remote, or implement a hybrid model. As the emergency work-from-home phase draws to a close, employers must consider long-term legal risks and ramifications of maintaining a work-from-home option. This article identifies and addresses some of the labor and employment issues that in-house counsel should consider when advising their internal clients about ongoing work from home arrangements.

Jeffrey Douglas

Valerie K. Ferrier

Does Your Company Have the Legal Infrastructure To Support Long-Term Remote Work?

As a threshold issue, employers must know the physical location of remote employees to ascertain whether their presence constitutes the company "doing business" in that particular state. A company is considered "domestic" only in its state of formation. In all others, that company is considered "foreign" and may be subject to certain requirements, including qualification or registration to do business in a given state. While each state may have its own rules and regulations, the physical presence of workers may trigger such an obligation.

Companies may be subject to tax requirements in foreign jurisdictions in which employees work. Pursuant to the physical presence rule, not only must employees pay taxes to the state where they physically work, their employers also have tax and withholding obligations to those states, for example unemployment and paid family leave. Requirements vary among states and become more complicated for hybrid work, such as when an employee works from home in one state but travels to another to work in the office.

Employers must maintain workers' compensation insurance in all states where employees work, both remotely and in-person. Businesses must determine whether their current workers' compensation insurance provides protection in multiple jurisdictions, as well as whether remote work accidents are covered under the policy. Some policies may require employers to ensure that remote workers maintain a designated and safe workplace. If so, this requirement should be incorporated into formalized remote work rules.

Jeffrey Douglas is a partner and co-chair of the Labor and Employment Practice Group at Kane Kessler, P.C. Jeffrey represents companies in a wide-range of labor and employment matters. He partners with clients to formulate and implement employment policies and procedures, provides daily personnel advice, conducts trainings and represents clients in all aspects of union relations. Jeffrey also defends clients in employment litigation matters in federal and state courts and before administrative agencies. He received his undergraduate degree from the School of Industrial and Labor Relations at Cornell University and his law degree from Fordham Law School.

Valerie K. Ferrier is the co-chair of the Labor and Employment Practice at Kane Kessler, P.C. Valerie is a management-side labor and employment attorney, advising and defending clients of all sizes. Valerie prides herself on her ability to help her clients address their HR issues to mitigate risk. An experienced litigator and trial attorney, Valerie also provides tailored sexual harassment training, employment agreements, policies, and employee handbooks. She graduated from St. John's University School of Law and began her career in the General Counsel's Office of the New York City Transit Authority before transitioning to private practice.

Employers must also assess their cybersecurity infrastructure and risks associated with permitting remote work to avoid a data breach. Companies ought to consider conducting risk management audits and establishing detailed and strictly enforced rules regarding the security of confidential business information for remote (as well as in-person) workers. To that end, employers should decide whether to supply devices to remote employees, or to permit or require employees to use their own equipment.

Does Your Company Have a Plan To Manage Remote Workers?

Assuming a company has the appropriate infrastructure to support ongoing remote work, employers must then plan to address the full spectrum of employee relations with remote workers, including recruiting, hiring, onboarding, managing, disciplining, and terminating employees.

When recruiting, businesses must be aware of state and local laws governing what information may be included in job postings. For example, in some jurisdictions "ban the box" laws prohibit employers from subjecting applicants to a criminal background check as a prerequisite to hiring. If an employer permits remote work, and has such a requirement on its job postings and/or applications, the company may be subject to liability in some states but not others.

Conducting remote interviews may also pose unique legal challenges with respect to jurisdictional laws limiting the types of questions that employers may ask, such as those regarding salary history. Businesses should have multiple interviewers to ensure appropriate conduct. Although recording remote interviews may appear to be a reasonable alternative, employers must be cognizant of statutory recording prohibitions.

When companies plan to hire remote workers, they must determine if state or local laws govern the content of employment agreements or offer letters, including whether any offer may be made conditional pending the results of background checks. At the conditional offer stage, employers must follow any jurisdiction-specific rules regarding withdrawal of an offer based on the results of background check. In addition, jurisdictionally unique rules that apply where remote workers are located need to be considered when drafting onboarding documents, such as wage notices, handbooks, benefits policies, and commission agreements.

Remote work poses supervisory challenges for managers, who must be adept at enforcing company employment policies. A key component of this is providing training so supervisors are equipped to proactively and properly identify and manage employee issues. Supervisors must also partner with human resources to document issues that may warrant discipline, while communicating appropriately with remote employees to avoid potential claims of unlawful conduct. Furthermore, supervisors must understand what types of communication and conduct among remote workers may constitute concerted activity protected under the National Labor Relations Act to avoid unfair labor practice charges.

Particularly in a remote setting, companies must scrupulously track non-exempt employees' time to ensure appropriate payment and avoid liability for unpaid overtime and state or local required premiums such as spread-of-hours. Companies should train supervisors to manage hours worked to avoid inadvertently triggering overtime obligations, such as by casually texting or emailing outside an employee's regular workday. At the same time, non-exempt employees should be instructed that they are neither expected nor permitted to respond after-hours, absent prior permission from a manager. An added benefit is resolving a common complaint among those working from home: that there is no longer a definite end to the workday. Setting clear workday boundaries promotes a better work-life balance.

Remote work requires new consideration of employee communications. Recently, many states have enacted sexual harassment training and policy mandates. Employers should ensure that their policies and programs also protect and account for remote workers. In addition, companies should stress that employees may only use company communication platforms, (such as email, Slack, instant messenger, and work phone, for both calls and texting) for work purposes. Businesses should monitor these channels for any inappropriate communications. It also behooves employers to ensure that remote workers have regular access to multiple managers to create alternative reporting channels in the event that one supervisor is engaging in any inappropriate conduct.

When considering whether to impose discipline or terminate a remote employee, businesses must be aware of jurisdiction-specific requirements, such as those governing notice of termination or payment of accrued but unused paid time off. If severance is being offered, companies must assess whether there are any state or local requirements regarding written agreements and releases of claims.

Is Your Company Prepared To Respond to Requests for Remote Work as an Accommodation?

Even for those employers who plan to require their workforce to fully return to the office, the remote work considerations discussed above may remain relevant. After more than a year of remote work, not all employees will return to an office willingly, whether out of a preference for the flexibility of working from home, objection to vaccines based on health or religious beliefs, fear of

the coronavirus, or other reasons. Employers must have a procedure in place to evaluate and respond to requests for accommodations by employees who ask not to return to in-person work. The Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964, respectively, require employers to engage in an interactive process to determine whether they can reasonably accommodate workers who have a disability or a sincerely held religious belief that conflicts with their return to the office. The employer must provide a reasonable accommodation unless doing so would impose an "undue hardship" on the business.

In addition, certain states and localities may have their own laws governing the consideration and response to requests for accommodation. For example, New York City requires a "cooperative dialogue" (by contrast to the federal "interactive process"), culminating in a written final decision provided to the employee. Businesses should also be aware that the legal definitions of "disability" and "religious belief" are far more expansive than one might suspect. Allowing remote work, then, may be a reasonable accommodation, if an employee is able to perform the essential functions of their job without being on site.

Denying accommodation requests, even if legally supported, may still pose risk. Businesses may be hard-pressed to assert that someone who has effectively worked remotely during the pandemic cannot continue to do so. Even if an employee is not legally entitled to remote work as an accommodation, risk management and other businesses considerations may impact a company's decision.

At the same time, making exceptions to a return to the workplace for people who do not fall into a legally protected category can be thorny. Businesses want to avoid any appearance of favoritism among employees, which is not only bad for morale, but can itself lead to charges of discrimination. Consistent application of objective criteria, while providing reasonable accommodations, will help protect a company in the event of a discrimination claim.

Businesses must weigh numerous factors when deciding whether and to what extent to allow long-term remote work. This article provides a general roadmap for the decision-making process.

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COVID-19 Leads to Temporary Modifications to Key Real Estate Lease Provisions Under the Bankruptcy Code

By Leslie Berkoff and Michael Troiano

In-house counsel ("counsel") to commercial landlords and asset-based lenders ("clients") are no strangers to the challenges created by the bankruptcy filings of financially beleaguered tenants. When confronted with a bankruptcy filing, counsel must be prepared to advise clients regarding imminent abated rent payments, potential impact of pre-petition payments or settlements, likelihood of recouping pre-petition rent arrears, and the turbulent waters of chapter 11 plan negotiations and the confirmation process, among myriad additional legal and practical concerns. The economic standstill wrought by the COVID-19 pandemic further complicated these dynamics, as many commercial tenants have been unable to perform their payment obligations for months at a time given outside constraints including government restrictions, greatly limiting the menu of solutions available to both lessee and lessor. [1]

Leslie Berkoff

Michael Troiano

On December 27, 2020 then-President Trump signed into law the Consolidated Appropriations Act, 2021 (the "CAA"), an omnibus spending bill that included amendments to the Bankruptcy Code in an attempt to ameliorate some of the issues currently plaguing commercial tenants by delaying tenants' obligations to make post-petition rent payments, extending the deadlines by which tenants must decide to assume or reject a lease, and encouraging landlords to work out payment schedules to address arrears with struggling tenants.[2] Counsel should familiarize themselves with this new paradigm in order to properly advise clients in anticipating and preparing for the CAA's continued impact on landlord-tenant relations.

Leslie Berkoff is a partner at the firm of Moritt Hock & Hamroff LLP, where she is the current Chair of the Dispute Resolution Department and the former Chair of the Creditors' Rights and Restructuring Department. Ms. Berkoff represents various landlords and asset-based lenders in commercial workouts, as well as chapter 11 and chapter 7 case filings nationally.

Michael Troiano is an associate at the firm in the Creditors' Rights and Restructuring Department.

One key obligation under the Bankruptcy Code modified by the CAA is the non-residential debtor-tenant's obligation to pay post-petition rent under Section 365(d)(3) of the Bankruptcy Code. This section generally requires that debtors timely perform their obligations under a lease during a bankruptcy case, including payment of rent, and provides that the bankruptcy courts may extend "for cause" the debtor's time for performance of its obligations for up to 60 days after the filing date. Therefore, as the law existed pre-CAA a debtor-tenant can obtain a 60-day (two-month) abatement of rent payments at the start of the bankruptcy case upon a showing of cause.[3]

The CAA further amends Section 365(d)(3) of the Bankruptcy Code to permit debtors in certain cases — those commenced under Subchapter V of Bankruptcy Code Chapter 11[4] — to now request an *additional* 60-day extension of the debtor's time for performance under a lease if the debtor "is experiencing or has experienced a material financial hardship due, directly or indirectly, to [Covid-19]." This additional extension, in effect, gives Subchapter V debtors a total 120-day abatement of their rent payment obligations from the date of the bankruptcy filing. Counsel should expect courts to routinely grant this additional 60-day extension, as (i) the broad scope of the "directly or indirectly" hardship language will be highly difficult for landlords to persuasively oppose; and (ii) debtors will likely have already established a COVID-related cause for the initial 60-day extension.

While this amendment sunsets on December 27, 2022, it will continue to apply to all Subchapter V cases <u>filed</u> before that date and obviously may be further extended. Counsel should thus, for the next two years, as a matter of cautious planning, anticipate a 120-day rent abatement in any income projections involving financially distressed, potential Subchapter V debtors who have either filed for bankruptcy protection or are on the precipice of doing so.

The goal of the CAA is to balance the impact of these changes and ensure that landlords eventually receive the rent abated during the 120-day extension period. In the event of such an extension, all deferred rent payments during the 120-day abatement will be treated as an administrative expense under Section 507(a)(2) of the Bankruptcy Code for the purposes of Chapter 11 plan confirmation and will fall second in the chain of priority of distribution. Counsel should advise clients, therefore, that clients are well-positioned to receive full payment of the post-petition arrears allowed under the Section 365(d)(3) amendment, that these amounts are not subject to negotiation by the debtor and must be paid in full before virtually all other secured and unsecured creditors upon confirmation of plan of reorganization. Counsel should also, however, advise clients of the possibility that if a debtor-tenant receives the 120-day abatement and does <u>not</u> confirm a plan, then such administrative claim may never be paid unless there are sufficient funds in the chapter 7 case.

The CAA also amends the deadline for a commercial debtor-tenant's obligation to assume or reject the lease.[5] This provision applies to all cases, not just those commenced under Subchapter V. Under pre-CAA Section 365(d)(4) of the Bankruptcy Code, a debtor-tenant of a nonresidential real property lease was required to assume or reject a lease within 120 days of the bankruptcy filing. The court was able to grant a 90-day extension of this deadline "for cause," and extensions were common. As a result, in many cases pre-CAA, the debtor-tenant had 210 days to assume or reject the lease.

The CAA replaces Section 365(d)(4)'s 120-day initial deadline with a new 210-day initial deadline. The debtor-tenant may then seek a further 90-day extension of the 210-day deadline for cause, which means that the debtor-tenant can have almost a year to decide whether to assume or reject its lease. This amendment sunsets on December 27, 2022, at which time the CAA-created 210-day deadline will revert back to the pre-CAA 120-day period. The amendment will, however, continue to apply in all Subchapter V cases filed before the sunset date. The amendment is silent as to the treatment of the leases of non-Subchapter V tenants that are beyond the "new" 120 day deadline upon the sunset date; so as of now the impact on cases pending for non-Subchapter V tenants when the amendment sunsets is unclear—this may simply be a question of lack of clarity in drafting that will be cleaned up eventually but counsel should keep an eye out for updates down the road.

The global impact of these changes for now is that counsel should thus advise clients to anticipate that all tenants who file for bankruptcy protection will be able to remain on the premises for at least 300 days. As a result, counsel might want to consider the business risks associated with waiting almost a year to be paid pre-petition arrears or know what is happening with a lease. Counsel has to consider the possibility of a failed case where administrative obligations are pushed to the end of the case and the client does not get paid. It may be worth a careful risk analysis as to whether there is a benefit to considering a negotiated agreement with a tenant on long-term arrears payment plans in cases where debtor-tenants have accumulated significant arrears; given that client and debtor will likely be tied at the hip for approximately 10 months post-petition it is a long wait to see if the debtor can or will assume a lease. Of course, if there are guarantors, as there often are, counsel should query whether they will provide a source of alternative recovery as those claims are not stayed by the bankruptcy filing or these amendments (although backlog in the state courts may make pursuit of these claims not immediately rewarding).

The CAA also includes an amendment to the Bankruptcy Code's handling of preferential transfers that will significantly increase the amount of solutions available to landlords dealing with defaulting tenants in the months prior to the bankruptcy filing. Pre-CAA Section 547 of the Bankruptcy Code authorizes a debtor in possession or trustee to claw back preferential prepetition transfers made by the debtor to creditors within the 90 days (or one year if the payment is made to an insider of the debtor) prior to the bankruptcy filing on account of a past due obligation. While creditors have several affirmative defenses against preference actions, including that the transfer was made (i) in the ordinary course of business between the debtor and creditor; or (ii) by the debtor in exchange for new value provided by the creditor, these are costly litigations.[6]

As a result of the business restrictions and income shortages caused by the COVID-19 pandemic, many businesses defaulted on their rent payments and/or were paid outside of the ordinary course; landlords, in turn, received delayed payments or entered into rent forbearances and deferral agreements which may have left the landlords open to clawback actions. When payments have been deferred or delayed, landlords have been hampered in asserting certain traditional preference defenses because the arrearage payments were not made in the ordinary course of the business relationship with the tenant (landlords, of course, can contend that forbearance was for new value). The end result was that landlords have ostensibly been punished for extending a life raft to struggling debtors during a global pandemic.

The CAA addresses this unfortunate dynamic by adding subsection (j) to Section 547 of the Bankruptcy Code, which prohibits the debtor or trustee from recovering "covered payments" by debtors to certain creditors as preferential transfers; such covered payments include payment of rental arrearages in connection with an "agreement or arrangement" between the debtor-tenant and creditor-lessor to defer or postpone rent under a lease of nonresidential real property entered into on or

after March 13, 2020. These payments cannot include fees, penalties, or interest in an amount greater than: (i) was scheduled to be paid under the original underlying contract; or (ii) that which the debtor would owe if it had made every payment due under the underlying contract. These amendments apply in all bankruptcy cases and sunset on December 27, 2022 but will continue to apply in any bankruptcy case commenced prior to that date.

Counsel should advise clients that they will no longer be punished for negotiating and securing deferred arrearage payments from financially distressed tenants who may be on the verge of filing bankruptcy. Landlords can now rework defaulted leases with the comfort of knowing that these payments will not be clawed back by the bankruptcy estate, and counsel should thus advise clients that they are incentivized to work out payment arrangements and continue their relationship with defaulting tenants as opposed to exercising termination and eviction rights.

As the impact of COVID-19 rolls forward, there may be other significant changes to the Bankruptcy Code. For now, however, the amendments enacted by the CAA magnify the ramifications of the triggering of a bankruptcy case by a debtor-tenant and significantly alter the normal bankruptcy time frames and dynamics between landlords and tenants. Counsel must advise landlord clients to exercise patience and willingness to explore and realize solutions with debtor-tenants, given the increased time and latitude given to both parties to assess their positions and negotiate during the bankruptcy process.

Endnotes

1. Outside of bankruptcy, other legislation has impacted landlord-tenant matters in New York. On May 4, 2021, Governor Cuomo signed into law an extension of the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020, which places a moratorium on residential evictions until August 31, 2021 for tenants who have endured COVID-related hardship upon submission of a (i) COVID hardship declaration or (ii) document explaining the source of the hardship by the tenant. On that same date, Governor Cuomo extended the New York State COVID-19 Emergency Protect Our Small Businesses Act of 2021, which also places a moratorium on certain qualifying small businesses upon proof of COVID-related hardship until August 31, 2021.
2. Landlords should be aware that the CAA adds an amendment to Section 541 of the Bankruptcy Code, that "recovery rebates" (pandemic relief / stimulus payments) are not considered property of the estate and therefore will not be available to satisfy obligations owed to creditors.
3. A recurring issue which arose during the pandemic is whether the force majeure provision in a lease can excuse a commercial tenant from paying post-petition rent, in light of government-mandated business shutdowns. For helpful opinions on this issue, see *In re Hitz Rest. Grp.*, 616 B.R. 374 (Bankr. N.D. Ill. 2020) and *In re CEC Ent., Inc.*, No. 20-33162, 2020 WL 7356380 (Bankr. S.D. Tex. Dec. 14, 2020). These cases demonstrate courts' disparate treatment of force majeure clauses, as the *Hitz Rest. Grp.* court ruled that government-mandated in-person dining shutdowns triggered the lease's force majeure provision and therefore partially excused the tenant's obligation to pay rent, while the *CEC Ent., Inc.* court ruled that the shutdowns did not trigger the force majeure clause and excuse the tenant's rent obligation.
4. Subchapter V of Bankruptcy Code Chapter 11 was created under the Small Business Reorganization Act ("SBRA"), enacted Feb. 19, 2020. The SBRA was designed to reduce the costs and complexities of the Chapter 11 reorganization process for certain small business debtors ("Subchapter V Debtors"). Currently the debt limits have been increased from aggregate debts of $2,725,625 or less (no less than 50% of which come from the commercial or business activities of the debtor), to $7,500,000 under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act on March 27, 2020, and will revert to the original amount on March 27, 2022.
5. When a lease is assumed all arrears must be paid in full under Section 365(b).
6. *Strategies To Protect Your Company From Clawback Actions During These Turbulent Times and Beyond*, Leslie A. Berkoff, NYSBA Inside Summer 2020, Vol. 38, No. 2.

Protecting Private Equity Investors From Wage-Hour Claims

By Paul P. Rooney

As private equity firms prepare to make follow-on investments in businesses impacted by the COVID-19 pandemic, or make new investments in or acquire distressed companies, there has never been a better time to increase their vigilance against wage and hour claims. These claims, many of which arise from what can only be described as "tricks and traps" for the unwary, pose serious risks not just to a portfolio company but to individual managers of a portfolio company, affiliated companies and, in New York, shareholders.

Paul P. Rooney

Specifically, would-be private equity investors or acquirers should: (a) strengthen their due diligence on wage-hour claims; (b) keep the investment vehicle used by the private equity firm as legally separate from the portfolio company where possible and ensure portfolio company directors and managers stay within their assigned roles; and (c) anticipate possible adverse changes in the law that could expand liability to agents and shareholders.

I. Wage Claim Risks to Portfolio Companies

Hidden wage-hour liabilities in portfolio companies can greatly reduce the value of an investment. Wage violations are extremely common. In one two-year period, the U.S. Department of Labor found that 84% of the full-service restaurants it investigated had committed violations.[1] In 1993, plaintiffs filed 1,457 federal wage-hour cases annually. Today they file over 8,000 annually. If a private equity investor does not find wage-hour law violations in the target company, he or she is probably not looking hard enough.

Wage-hour claims are expensive because the statute of limitations under the Federal Fair Labor Standards Act (FLSA) is three years in the case of "willful" violations (and almost all violations are considered "willful") and six years under New York law. Unless the employer had a "good faith" belief that it was following the law (a difficult standard to prove in this context), liquidated damages equal to 100% of the wages owed will be added to the total damages. Moreover, if the plaintiff prevails, the employer will have the displeasure of paying not just its own attorneys, but the plaintiffs' attorneys. Collective actions under the FLSA (in which plaintiffs can obtain permission from a court to send written invitations to all similarly situated employee to join the case) are easily brought.

As such, wage-hour claim due diligence and plans for compliance going forward should be high on the list of any investor in or purchaser of a company. In the current economic environment, employers may be particularly tempted to cut corners or take legal risks by, for example, classifying employees as exempt when their exempt status is a close call. However, there is no "pandemic defense" to wage-hour claims. Private equity firms should also be looking for failure to give proper notices under the Worker Adjustment Retraining and Notification Act (the so-called "WARN Act") which has already spurred a class action lawsuit against the Hooters restaurant chain.

II. Risks to Individual Managers/Directors and to Parent Companies

One of the dangers of wage-hour claims is the ease with which individual liability can be imposed upon managers of a company who under wage laws are deemed "employers." The same is true of affiliated companies. Adherence to the formalities of corporate separation and making clear distinctions between director and officer duties will protect individuals and affiliated companies from ultimate liability and, just as importantly, will increase the likelihood that lawsuits against them are dismissed early in the case.

A company does not have to necessarily be the one that pays an employee or issue him or her a Form W-2 to be considered an "employer" under the FLSA. Separate entities can be held jointly and severally liable for wage-hour claims if they comprise a "single employer" with another entity or "jointly" employ an employee. The U.S. Court of Appeals for the Second Circuit determines whether an entity is an "employer" by asking whether the putative employer: (1) had the power to hire and fire the

Paul P. Rooney, Esq. is a partner in the Labor and Employment Practice Group of Ellenoff Grossman & Schole LLP where he works on mergers and acquisitions, advises employers on all aspects of employment law and litigates on their behalf.

employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.[2] No single one of these factors is decisive and they do not all have to be satisfied for an entity to be considered an "employer."

In assessing whether an individual is liable as an "employer," the Second Circuit looks to the *Carter* Test, but considers two additional factors: (1) the scope of the individual's "operational control;" and (2) the individual's "potential power."[3] Put simply, this means that, in a wage-hour lawsuit, a court will ask if a person or company had the power to control terms and conditions of employment and whether the use of that power had some relationship to the plaintiff's employment in light of the totality of the circumstances.

If it sounds expensive for lawyers to analyze the facts of a situation to determine if one company is the "employer" of another company's employees or to determine if an individual manager had sufficient "operational control" to be held personally liable for unpaid wages, it is. Because so many factors play into the determination of employer status, a large amount of information is required and precedent in other cases is of little use. Consequently, it is difficult for an employer to win summary judgment on such issues.

In California, private equity firm Ensign Group learned this lesson the hard way when it was sued in a class action wage-hour lawsuit by employees of a nursing care center it owned.[4] Ensign Group owned a "cluster" of companies that together operated the care center. Among the facts the court pointed to in holding that Ensign could be held liable for the care center's wage-hour violations were:

- All the companies shared the same corporate address;
- An Ensign Group staff person recruited the care center's employees; and
- A "seamless flow" of corporate officers between Ensign and its clusters with Ensign employees and former employees serving as secretary, president, and treasurer of these "cluster" of companies.

As a result, a court of appeals revived a class action lawsuit that had been dismissed and sent it back for further proceedings. If Ensign Group had been more careful about keeping its various operations separate, the lawsuit might have been dismissed.

Fortunately, employers can ensure that these tests will not have to be applied by having officers, directors, and parent companies "stay in their lanes" so clearly that allegations of "employer" status are not even plausible:

- A private equity firm should allow the board of directors of the portfolio company to manage it. In particular, a private equity firm should not have one of its employees (ostensibly acting as a "representative" of the portfolio company board) set up a direct line with the portfolio company managers and tell them what to do, bypassing the portfolio company board.
- Private equity firms should not "lend" their employees to portfolio companies or have their employees directly supervise portfolio company employees.
- Portfolio company directors should stick to acting as directors and not get involved in day-to-day management. The one bright line rule in this sphere is that directors are not, by their mere status as directors, considered "employers" under wage-hour laws. That is because, individual directors (while many may think otherwise) have no formal authority to do anything on behalf of a corporation or, on their own authority, to force any corporate agent to take any action. If directors step outside of their assigned roles, however, and become too closely involved in management, they put themselves at risk for potential wage-hour claims.

III. Risks to Shareholders Under New York Law

Additionally, New York law imposes joint and several liability (along with the employing entity itself) for unpaid wages on the 10 largest shareholders of a corporation, and 10 largest unitholders of a limited liability company.[5] Importantly, this also applies to entities formed outside of New York with respect to work performed within New York state.

"No problem," some purchasers may say. "We will simply have a corporation own 100% of the shares and have indirect parent companies in turn own that corporation. That way we will not be one of the ten largest shareholders. In fact, we will not be shareholders at all."

It is sound strategy that has worked. Where a plaintiff attempted to apply BCL § 630 to the shareholders of an employer/corporation's shareholders, Justice Ramos of the Commercial Division of New York County Supreme Court rejected the plaintiff's attempt. In *Local 1181-1061 v. Wayzata Opportunities Fund, LLC*, 2016 WL 3646988 (N.Y. Sup. June 30, 2016), the plaintiff union represented employees of three bus companies (collectively "Atlantic Companies"). Atlantic Express Transportation Corp. ("Atlantic Express") was the sole owner and holding company of the Atlantic Companies. After the union and its employees obtained a judgment for unpaid wages against the Atlantic Companies in a proceeding before the National Labor Relations Board, Atlantic Express and the Atlantic Companies declared bankruptcy. The employees collected only a small fraction of their claims in bankruptcy.

The union then sued the 10 largest shareholders of Atlantic Express, the holding company, under BCL § 630. The court granted the defendant shareholders' motion to dismiss on several grounds, including the fact that the defendants were shareholders, not of the Atlantic Companies, who had employed the plaintiffs, but rather of the holding company, Atlantic Express. The court wrote: "The complaint is subject to dismissal for the additional, independent reason that none of the defendants are alleged to have been shareholders of the Atlantic Companies. . . . As discussed above, BCL § 630 'must be strictly construed' and nothing contained in the statute extends liability beyond the shareholders of the Atlantic Companies, as the entity for which the employees performed their services."[6]

In *Local 1181*, the court discussed a decision of the New York Appellate Division, *Pope v. Halloran*, 76 A.D.2d 770, 772–73, 428 N.Y.S.2d 957, 960 (1st Dep't 1980). The dissenters in that 3-2 decision argued that liability should attach to the shareholder of a parent corporation that wholly owned the corporation that employed the plaintiff employees because the shareholder exercised "control" over the employer. Justice Ramos, in rejecting the plaintiffs' efforts to invoke the dissenting opinion, stated in *Local 1181* that "the First Department majority dismissed the complaint based upon the plaintiff's failure to give timely notice, without addressing — and, therefore, implicitly rejecting — the dissenters' contention that 'control is the key,' not ownership of the corporation."[7]

In other words, while BCL § 630 could not more clearly state that it imposes liability on the 10 largest shareholders of the employer only, in the Appellate Division there were two votes in favor of disregarding the law. The dissenters said, in effect, that while the statute may *say* that only the actual shareholders of the company are liable, our preferred policy is that those who exercise control over wage payments should be liable for these wages.

Given this history, how much trust can a private equity investor or purchaser of a target company have that a New York court will apply BCL § 630 as written if the target company goes bankrupt and wipes out large wage claims of employees? All the more reason, in New York especially, to be absolutely certain that the target company has paid its employees every penny that they are owed.

In summary, while the risks of wage-hour claims to private equity investors area substantial, strict attention to corporate formalities can make them much more manageable and less expensive to address.

Endnotes

1. *Wage Theft in Restaurants*, N.Y. Times, editorial (3/12/2018).
2. *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8 (2d Cir. 1984).
3. *See, e.g., Irizarry v. Catsimatidis*, 722 F.3d 99, 106, 109 (2d Cir. 2013).
4. *Castaneda v. Ensign Grp., Inc.*, 177 Cal. Rptr. 3d 581, 584–85 (2014).
5. *See* N.Y. Business Corp. L. §630 (BCL § 630).
6. Local 1181, 2016 WL 3646988 at *5 (citations omitted).
7. Local 1181, 2016 WL 3646988 at *6.

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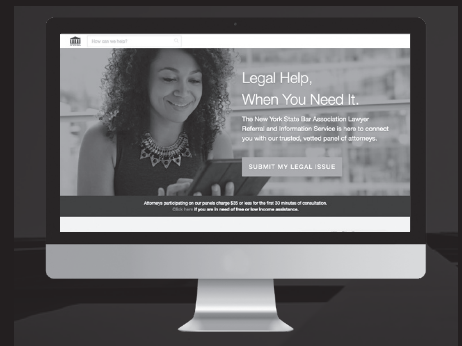

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A Commercial Tenant Cannot Pay Its Rent: Now What? The Latest in New York Force Majeure Litigation

By Stephanie L. Denker and Christie R. McGuinness

March 2021 marked one year since the COVID-19 pandemic became the focal point of nearly all conversations in America, since many people began working remotely and since many businesses halted or limited in-person operations. One looming question has been who will prevail in commercial lease disputes: the tenants or the landlords.

Stephanie L. Denker

Christie R. McGuinness

New York federal and state courts have answered this question in a series of cases. They balanced the real impact that the pandemic has had on businesses with the terms of the leases that these businesses entered. Although tenants have propounded various creative arguments, it has become apparent that New York courts will continue to enforce contractual terms as written without regard to the financial hardship that it may cause a business.

This article will summarize some arguments set forth by commercial tenants and whether New York courts have found them to be persuasive.[1]

Stephanie L. Denker is s a litigation associate in Saul Ewing Arnstein & Lehr's New York office, who focuses on complex commercial litigation. Her practice includes representing individuals and companies in FINRA arbitrations, and state and federal lawsuits. She also represents companies in lawsuits concerning trademark and copyright infringement, unfair competition, unfair business practices, and misappropriation of trade secrets. Her email is stephanie.denker@saul.com.

Christie R. McGuinness is a litigation associate in Saul Ewing Arnstein & Lehr's New York office. Christie works on complex litigation, focusing on managing day-to-day developments for matters, taking and defending depositions, and overseeing the discovery process. Her email is christie.mcguinness@saul.com.

New York Courts Have Split as to Whether the COVID-19 Pandemic Constitutes a "Casualty" Under Commercial Leases

Although some New York courts have found that COVID-19 is not a "casualty" as that term is generally used in commercial leases, others have found the opposite.

For example, in *Gap Inc. v. Ponte Gadea N.Y. LLC*,[2] the court was not persuaded by the tenant's argument that it was entitled to rent abatement because the pandemic constituted a "casualty" under the lease's terms. The court analyzed the lease and found "that 'casualty' refers to singular incidents, like fire, which have a physical impact in or to the premises—and does not encompass a pandemic, occurring over a period of time, outside the property, or the government lockdowns resulting from it." The court also found that its interpretation was consistent with Black's Law Dictionary, which defines the term as "serious or fatal accident" or "person or thing injured, lost or destroyed."[3]

However, another court that applied the ordinary meaning of "casualty" as used in a commercial lease came to a different conclusion. In *188 Ave. A. Take Out Food Corp. v. Lucky Jab Realty Corp.*, the court entered a preliminary injunction prohibiting the landlord from terminating the lease or evicting the tenant during the pendency of the lawsuit even though the tenant stopped paying rent in March 2020.[4] The court concluded that "casualty" means "an 'accident' or 'unfortunate occurrence,' that is, something other than a 'common occurrence' constituting a 'sudden or unexpected' series of events." The court ultimately found:

> The plaintiffs have established that they are likely to succeed on their claim that the COVID-19 epidemic, and the consequent state-mandated suspension of indoor dining at restaurants, constituted a sudden, unexpected, unfortunate set of circumstances, and hence a "casualty" within the meaning of the lease that rendered the premises unusable for a period

of time, and thus relieved the tenant of its obligation to pay rent.[5]

Although this is not a final determination, the court was persuaded by the tenant's argument that it did not owe rent because the pandemic rendered the restaurant partially unusable.

Financial Hardship Is Not Grounds for Avoiding Contractual Obligations

"[F]inancial hardship is not grounds for avoiding performance under a contract."[6] Likewise, "where performance is possible, albeit unprofitable, the legal excuse of impossibility is not available."[7] Despite this well-settled law, commercial tenants have argued that they should be excused from paying rent in light of the economic changes caused by the pandemic. New York courts have generally found this argument unpersuasive.

Indeed, the *Gap Inc.* court stated: "[t]he fact that its continued performance may be burdensome, even to the extent of insolvency or bankruptcy, does not render Gap's performance objectively impossible under New York law."[8] Another court stated: "unforeseen economic forces, even the horrendous effects of a deadly virus, do not automatically permit the Court to simply rip up a contract signed between two sophisticated parties."[9]

The Pandemic Must Have "So Completely" Frustrated the Purpose of the Commercial Lease That the Transaction Made Little Sense

"[F]or a party to avail itself of the frustration of purpose defense, there must be complete destruction of the basis of the underlying contract."[10] New York courts have found that government directives closing a business for a small portion of the lease term did not frustrate the leases' purpose.[11] They have also found that the ability to partially operate a store, such as for counter service or picking up orders, is insufficient grounds to be excused from paying rent under the frustration of purpose doctrine.[12]

Foreseeability Can Be Determinative

Because parties to contracts can allocate foreseeable risks, for a party to be excused from performance under the doctrines of frustration of purpose or impossibility, the event must have been truly unforeseeable. Although COVID-19 in and of itself was unforeseeable, some New York courts have found its resultant effects were foreseeable, precluding the application of these doctrines.

For example, the *Gap Inc.* court granted the landlord's motion for summary judgment as to liability because "the very text of the Lease demonstrates that the conditions that Gap claims render performance impossible were foreseeable."[13]

However, in *International Plaza Associates L.P. v. Amorepacific US, Inc.*, the court denied the landlord's motion for summary judgment as premature.[14] The tenant, whose business included allowing customers to test products, which is limited when wearing face masks and social distancing, argued that there were factual issues as to whether the COVID-19 pandemic was foreseeable and what role the government orders played in the tenant's ability to sell its products. The court found that discovery was required concerning how the defendant "attempted to conduct its business and its alleged failure to do so for a reason never imagined let alone foreseen by either defendant or plaintiff."

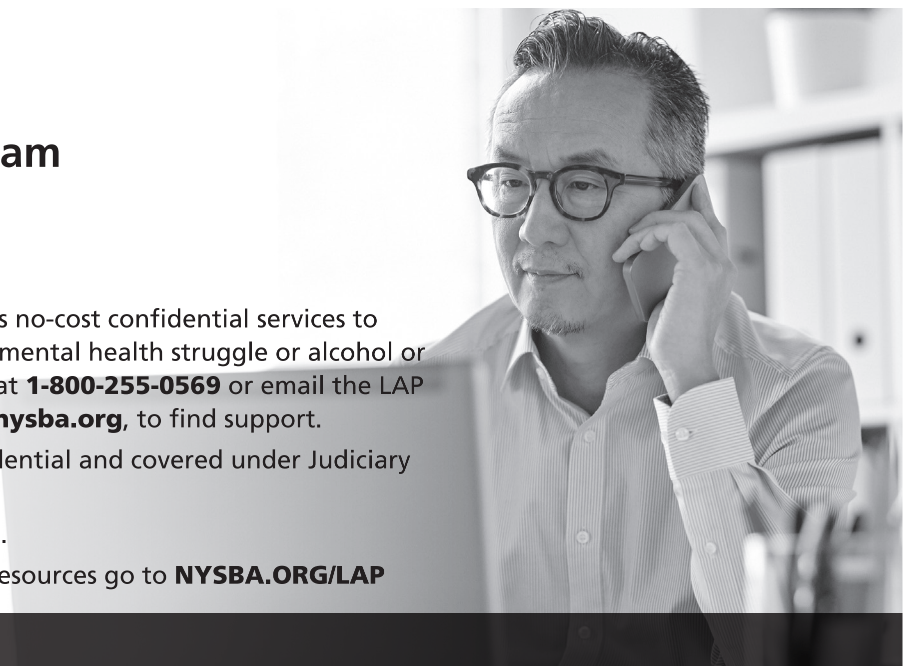
Takeaways

Businesses should carefully analyze their commercial leases and understand their rights and obligations under those contracts in light of New York courts' seeming reluctance to apply common law defenses. Further, when entering into new leases, businesses should allocate the risk of non-payment of rent as a result of a pandemic or closure of in-person business operations. The COVID-19 pandemic has made clear that it is prudent for businesses to spend time and resources cautiously drafting and negotiating commercial leases before they are executed.

Endnotes

1. This is not meant to be an exhaustive list of arguments made in cases arising from the pandemic, but instead an illustration of the trends seen in multiple cases.
2. No. 20-cv-4541, 2021 WL 861121 (S.D.N.Y. March 8, 2021).
3. *Id.* at *7.
4. No. 653967/2020, 2020 WL 7629597 (Sup. Ct. N.Y. Cnty Dec. 21, 2020).
5. *Id.* at *3.
6. *Macalloy Corp. v. Metallurg, Inc.*, 284 A.D.2d 227, 227 (1st Dep't 2001).
7. *Warner v. Kaplan*, 71 A.D.3d 1, 5–6 (1st Dep't 2009).
8. 2021 WL 861121, at *9-10 ("the COVID-19 pandemic has [also] not amounted to a frustration of the Lease's purpose" because "the evidence suggests that Gap has made a business decision to close its stores at 59th and Lexington, perhaps due to the pandemic's greater financial impact on those stores than on its other stores."). See also *Atlantic Garage Management LLC v. Boerum Commercial LLC*, No. 512250/2020, Doc. 70 (Sup. Ct. Kings Cnty Dec. 2, 2020).
9. *35 E. 75th St. Corp. v. Christian Louboutin L.L.C.*, No. 154883/2020, 2020 WL 7315470, at *2 (Sup. Ct. N.Y. Cnty Dec. 9, 2020) ("This is not a case where the retail space defendant leased no longer exists, nor is it even prohibited from selling its products. Instead, defendant's business model of attracting street traffic is no longer profitable because there are dramatically fewer people walking around due to the pandemic.").
10. *Dr. Smood N.Y. LLC v. Orchard Houston, LLC*, No. 652812/2020, 2020 WL 6526996, at *2 (Sup. Ct. N.Y. Cnty Nov. 2, 2020).
11. *See, e.g. Greater New York Automobile Dealers Assn, Inc. v. City Spec, LLC*, No. LT-053560-20/QU, 2020 WL 8173082, at *9 (N.Y. Civ. Ct. Dec. 29, 2020) (finding a four-month closure out of a five-year lease caused by an Executive Order that closed in-person operations did not frustrate the lease's overall purpose); *BKNY1, Inc. v. 132 Capulet Holdings, LLC*, No. 508647-2016, 2020 WL 5745631 (Sup. Ct. Kings Cnty. Oct. 21, 2020) (holding a nine-year restaurant lease was not frustrated by a two-month state-mandated closure).
12. *See, e.g., Dr. Smood*, 2020 WL 6526996, at *2; Gap, 2021 WL 861121, at *8-9.
13. 2021 WL 861121 at *10 (relying on the lease's "Force Majeure Event definition" because it "demonstrate[d] that the parties foresaw, and apportioned the risk associated with, the possibility that government measures in the event of a public emergency could affect performance under the Lease").
14. No. 155158/2020, Doc. No. 26 (Sup. Ct. N.Y. Cnty Dec. 14, 2020). *See also 1877 Webster Ave. Inc., v. Tremont Center, LLC*, No. 29239/2020E, 2021 WL 1621431, at *3 (Sup. Ct. Bronx Cnty Mar. 29, 2021) (declining to dismiss the frustration of purpose claim because "[t]he parties' conflicting arguments regarding the foreseeability of the impact of the Covid pandemic create genuine issues of fact on this record" and noting the lease does not resolve the factual dispute at the motion to dismiss stage).

Lawyer Assistance Program



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New Broader Advance Notice Requirement Before Layoffs, Closures, Relocations or Employment Losses

By Sharon N. Berlin

Effective November 11, 2020, the New York State Worker Adjustment and Retraining Notification Act (NY WARN Act)[1] was amended to expand the required notifications that must be made by certain employers prior to effectuating employment actions including plant closings, mass layoffs, plant relocations and employment losses/reductions in hours.[2] The NY WARN Act was further amended, effective March 24, 2021.[3] Employers contemplating any changes to their staffing levels or worksites must be familiar with the complex NY WARN Act advance notice requirements as a failure to comply can be costly.

Covered Private Sector Employers

The federal Work Adjustment and Retraining Notification Act (WARN Act)[4] requires private sector employers with 100 or more full-time employees (excluding employees who have worked fewer than six months or who work fewer than 20 hours per week) to issue a WARN notice at least 60 calendar days in advance of: (i) a plant closing/closing of a worksite affecting at least 50 full-time employees; (ii) a mass layoff, over a 30-day period, affecting at least 500 full-time employees at a single job site, or 50-299 full-time employees that constitute at least 33% of a site's total active work force; (iii) a temporary layoff of less than six months that meets either (i) or (ii) and which is then extended for more than 6 months; or (iv) a reduction in the hours of work for 50 or more employees by at least 50% for each month in any 6-month period.

Sharon N. Berlin

In effect since 2009, the NY WARN Act imposes more stringent and broader notification requirements than its federal WARN counterpart. The NY WARN Act expands the advance notice required to 90 days, covers smaller private sector employers, and has a lower threshold for triggering events. NY WARN covers certain employers with:

- 50 or more full-time employees; or
- 50 or more employees, including part-time employees, whose hours total at least 2,000 hours per week.

Among the exclusions from the NY WARN Act definition of employer are federal or state governments or their political subdivisions, including local governments and school districts.[5]

NY WARN Act Triggering Events

The NY WARN Act requires covered employers to issue a WARN notice at least 90 days in advance of any of the following triggering events:

1. A mass layoff: a reduction in force which is not the result of a plant closing and which results in an employment loss at a single site of employment during any 30-day period, beginning on the date of the first employment loss, for either:

   a. at least 25 full-time employees constituting at least 33% of the full-time employees at the site; or

   b. at least 250 full-time employees regardless of whether they comprise 33% of the employees at the site;[6]

2. A plant closing: the shutdown of a single job site or one or more facilities or operating units within a single site affecting 25 or more full-time employees during a 30-day period;[7]

3. An employment loss: a single job site reduction in hours of work of more than 50% during each month of any consecutive six-month period;[8] or

Sharon N. Berlin is a partner in Lamb & Barnosky, LLP in Melville, New York. She represents employers in labor and employment matters, including employment litigation, day-to-day labor and employment counseling, investigations, disciplinary proceedings, collective bargaining and arbitration. Sharon has been named a Best Lawyer in America© for Labor Law–Management, Best Lawyers' 2020 Lawyer of the Year for Long Island Labor Law–Management, Best Lawyers Women in the Law–Labor & Employment Law, a Super Lawyer in the New York-Metro Area in Labor and Employment Law, and a Super Lawyer Top Woman Attorney in the New York-Metro Area. She can be reached at snb@lambbarnosky.com.

4. A relocation: the removal of all or substantially all of the industrial or commercial operations of an employer to a location 50 or more miles away where 25 or more full-time employees suffer an employment loss.[9]

Notice Requirement

The NY WARN Act has required that covered employers provide at least 90 days' advance written notice of a triggering event to:

- Affected employees and their union representatives;
- The New York State Department of Labor; and
- The Local Workforce Investment Board for the locality of the site of employment at which the triggering event will occur.[10]

The amended NY WARN Act continues the requirement that notice be provided to the above individuals and entities, but Now also requires that the written notice be provided to:

- The chief elected official of the unit(s) of local government and the school district(s) for the locality of the site of employment at which the triggering event will occur; and
- Each locality which provides police, firefighting, emergency medical or ambulance services, or other emergency services to the site of employment within which the triggering event will occur, as applicable.[11]

There are exceptions to the notice requirement, including where:

1. The need for notice was not reasonably foreseeable at the time the notice would have been required;
2. The employer was actively seeking capital or business at the time the notice was required, and the capital or business sought, if obtained, would have enabled the employer to avoid or postpone the relocation or termination and the employer reasonably and in good faith believed that giving the required notice would have precluded the employer from obtaining the needed capital or business; or
3. The closing or layoff was due to a natural disaster.[12]

Content of the Notice

The amendment does not specify the content of the notice to the local government entities. Until revised implementing regulations are issued, employers should consult with their counsel about whether to provide the same content in their notices as is required by the federal WARN Act and the existing New York regulations for notice to the local Workforce Investment Board.

Failure To Provide Notice

Employers that do not provide the required NY WARN written notice may be subject to paying back wages and benefits to the employees and civil penalties. These amounts can be substantial, especially where the employer fails to provide the required notice, and could include back pay and benefits to each affected employee for the 90-day period, as well as civil penalties of up to $500 per day, for a maximum of 60 days (i.e., a maximum penalty of $30,000).[13]

This article is intended to provide an overview of the NY WARN Act requirements. These requirements, as well as those of federal WARN, are complicated and fact specific and need to be carefully analyzed when considering layoffs, restructurings, relocations or closings.

Endnotes

1. N.Y. Labor Law §§ 860 *et seq*.
2. *See* 2020 Law of New York, Chapter 265, codified at N.Y. Labor Law § 860-b(1).
3. *See* 2021 Laws of New York, Chapter 86.
4. 29 U.S.C. § 2101 *et seq*.
5. N.Y. Labor Law § 860-a(3).
6. 12 N.Y.C.R.R. § 921-1.1(i).
7. *Id*. § 921-1.1(m).
8. *Id*. § 921-1.1(f)(1)).
9. *Id*. § 921-1.1(n).
10. *Id*. § 921-2.2.
11. N.Y. Labor Law § 860-b(1).
12. 12 N.Y.C.R.R. § 921-6.
13. 12 N.Y.C.R.R. § 921-7.2.

The Employment Impacts of Marijuana Legalization in New York

By Thomas G. Eron

Thomas G. Eron

The Marihuana[1] Regulation and Taxation Act (MRTA) legalizes the use and possession of cannabis by adults in New York State, redefines criminal conduct associated with the drug, and establishes an elaborate regulatory scheme to oversee the future licensed cultivation and distribution business.[2] While marijuana has been legal under New York law for certain medical treatments since the Compassionate Care Act (CCA) was enacted in 2014,[3] the MRTA significantly expands the lawful use of marijuana and, as a result, presents significant legal challenges for employers. These issues are complicated by the fact that marijuana remains a Schedule I drug under federal law, rendering use and possession unlawful under the federal Controlled Substances Act.[4]

The MRTA makes it lawful for an adult age 21 and over in New York to possess up to three ounces of marijuana, cultivate up to six plants, and to smoke marijuana in public where smoking tobacco is permitted. Section 127 of the MRTA protects the lawful use[5] and possession of marijuana by loosening the definitions of criminal conduct and prohibiting discrimination against those engaged in lawful conduct in multiple settings, including professional licensing, leasing, school admission, domestic disputes and, significantly, employment.

Amendments to the N.Y. Labor Law

The principal employment regulation arises through amendments to N.Y. Labor Law Section 201-d, which were immediately effective. Section 201-d generally prohibits private and public employers from refusing to hire, terminating or otherwise discriminating against individuals because of, *inter alia*, their legal use of consumable products, or their participation in legal recreational activities outside of work.[6] The MRTA amended Section 201-d to provide that the legal use of consumable products includes the use of cannabis in accordance with state law, and that protected recreational activities also include lawful cannabis (presumably use and possession).

With respect to the use of consumable products and recreational activities, the protections of Section 201-d are limited to activities outside of work hours, off the employer's premises and without use of the employer's equipment or other property. Work hours are broadly defined to cover all work time, including paid and unpaid breaks and meal periods.[7]

In addition, since inception, Section 201-d has not protected conduct that creates a material conflict of interest with the employer's trade secrets, proprietary information or business interests, and, for private sector employers, conduct that violates a collective bargaining agreement. Further, under Section 201-d(4), an employer may lawfully act "based on the belief" that:

i.) the employer's actions were required by statute, regulation, ordinance or other governmental mandate;

ii.) the employer's actions were permissible pursuant to an established substance abuse or alcohol program or workplace policy, professional contract or collective bargaining agreement, or

iii.) the individual's actions were deemed by an employer or previous employer to be illegal or to constitute habitually poor performance, incompetency or misconduct.[8]

The MRTA did not amend the existing subsections of section 201-d to integrate marijuana use or possession into these statutory exceptions and defenses. Instead, the Legislature added a separate subsection 201-d(4-a) as follows:

> Notwithstanding the provisions [on existing exceptions and defenses], an employer shall not be in violation of this section [201-d] where the employer takes action related to the use of cannabis based on the following:
>
> i.) the employer's actions were required by state or federal statute, regulation, ordinance, or other state or federal governmental mandate;

Thomas G. Eron is a member of Bond Schoeneck & King, PLLC and chair of the firm's Labor and Employment Law Department. For over 30 years, Mr. Eron has counseled and represented management on legal and operational issues related to employment.

ii.) the employee is impaired by the use of cannabis, meaning the employee manifests specific articulable symptoms while working that decrease or lessen the employee's performance of the duties or tasks of the employee's job position, or such specific articulable symptoms interfere with an employer's obligation to provide a safe and healthy work place, free from recognized hazards, as required by state and federal occupational safety and health law; or

iii.) the employer's actions would require such employer to commit any act that would cause the employer to be in violation of federal law or would result in the loss of a federal contract or federal funding.

Reconciling State and Federal Law

State laws "legalizing" the use of marijuana are in direct conflict with the federal Controlled Substances Act, which prohibits the use or possession of marijuana as a Schedule I controlled substance.[9] Nevertheless, state laws offering employment protections to individuals who use marijuana are not necessarily preempted by federal law. In a leading case, *Noffsinger v. SSC Niantic Operating Co., LLC*, 273 F. Supp. 3d 326 (D. Conn. 2017), the court held that the Connecticut Palliative Use of Marijuana Act was not preempted by the Controlled Substances Act, because, while the federal law prohibits the manufacture, distribution, and possession of marijuana, it "does not make it illegal to employ a marijuana user [n]or does it purport to regulate employment practices in any manner."[10] A similar rationale likely supports the conclusion that the federal Drug-Free Work Act does not preempt state laws regulating the employment of marijuana users.[11]

No Right To Use Marijuana at Work or on an Employer's Property

As amended, Section 201-d provides that the lawful recreational use or consumption of marijuana outside of work hours and off an employer's premises, constitutes protected activity. It is clear that an employee's use of marijuana is protected only to the extent it occurs prior to the beginning, or after the completion, of the employee's work hours. In other words, Section 201-d does not permit employees to use marijuana during break time or rest periods, whether or not they are paid. Further, an employer may prohibit use or possession on the employer's property, including in vehicles, and in non-work areas, such as parking lots, without running afoul of the new legislation.

Implications for Pre-Employment Drug Testing

Unlike marijuana legislation in New York City and other jurisdictions,[12] the MRTA does not specifically address testing for marijuana use in the employment context. Still, the statute is likely to have a significant impact on existing employment practices.

With respect to pre-employment testing, a refusal to hire based solely on an adult applicant's positive test result for marijuana, under existing standard test protocols, would appear to establish a *prima facie* violation of Section 201-d. The positive test result alone, in the absence of any articulable symptoms of impairment, would likely not establish the defense under subsection 4-a quoted above. Whether such a decision could be defended, for example, as a violation of a collective bargaining agreement or as permissible under an established substance abuse program, would depend on the terms of the relevant labor agreement and substance abuse program.[13]

In particular, the Legislature's inartful drafting of the statute has left unresolved the extent to which an employer's belief that its substance abuse program that bars employment to any applicant who fails a drug test may provide a defense to a Section 201-d discrimination claim brought by an individual who was denied employment based on a positive test for marijuana. In this regard, the existing statutory language appears to be at odds with the broadest interpretation of the intent underlying the MRTA.

Addressing the Effects of Off-duty Marijuana Use on Work Performance

Employers have reason to be concerned about the effects of off-duty marijuana use on work performance in light of scientific findings that tetrahydrocannabinol (THC), the primary psychoactive element in marijuana, can remain in an individual's system for up to 30 days and that even infrequent marijuana use can impair.

Under the MRTA, employers retain their ability to take action where an employee is "impaired by the use of cannabis." In this context, impairment means that an employee "manifests specific articulable symptoms while working" that inhibit the employee's job performance or interfere with the employer's obligation to provide a safe, healthy, and hazard-free workplace.

The Legislature choose not to elaborate on the definition of impairment, in contrast to legislation in other jurisdictions.[14] Further, while current testing protocols can measure an individual's THC level, no widely accepted standard for measuring impairment presently exists. So, a positive test result, for example under a reasonable suspicion or post-accident testing procedure, would not necessarily establish that the employee was impaired. Contemporaneous verification of the symptoms of impairment would be critical to the employer's defense. For many employers, this new statutory standard will require additional managerial training and more robust evaluation procedures to respond to accidents and employee misconduct, as compared to the typical current procedure that relies heavily on drug test results.

The MRTA provides a limited safe harbor for employers concerned with meeting the requirements of applicable federal laws, other statutes, and the terms of federal contracts or grants. As amended, Section 201-d does not preclude an employer from taking employment action against an individual based on off-duty marijuana use if such action is "required" by a state or federal statute, regulation, or other mandate, or if the failure to act would result in the loss of a federal contract or federal funding.[15]

While significant for employers regulated under federal law or party to federal contracts or funding, this exception has important limitations because many federal regulatory schemes and contracts may address employment issues, but do not necessarily prohibit the employment of a marijuana user. For example, the U.S. Department of Transportation (DOT) regulations on drug and alcohol use by employees in safety sensitive positions, such as commercial truck drivers, mandate employment drug testing, including testing for the presence of marijuana.

If an employee fails a drug test, or is otherwise shown to be impaired, the employer is required to remove the individual from the safety sensitive position and not return the employee to a safety sensitive assignment until the employee has completed a return to duty evaluation and treatment regimen.[16] In other words, the federal regulation — although still applicable — does not necessarily "require" termination of an employee based on a positive drug test or even a finding of impairment from off-duty drug use, and termination based on a failed DOT drug test alone would not likely meet the requirements of the 201-d safe harbor.

Expansion of the Medical Marijuana Program

The MRTA effectively extends and expands New York's medical marijuana program as applied in the employment context under terms comparable to the prior CCA.

The new law continues the process by which an individual becomes a certified medical marijuana user. Once certified, the medical marijuana patient is deemed to have a "disability" under the New York Human Rights Law. Accordingly, certified medical marijuana users are entitled to reasonable accommodations, and the employer should engage in the interactive process to determine if there is some reasonable accommodation that allows the employee to perform the essential functions of his or her position without undue hardship to the employer. While the employee, who can perform the essential functions of the job with or without a reasonable accommodation, cannot lawfully be terminated for using marijuana, the statute specifically allows "a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance."[17] Employers are also not required to perform any act that would directly violate a federal law, or that would cause them to lose a federal contract or federal funding.[18]

In addition, the MRTA expands the medical conditions that may serve as a predicate for medical marijuana certification by including the catch-all phrase “any other condition certified by the [medical] practitioner,”[19] opening the door for a significant expansion in the certification of marijuana patients.

Conclusion

While the framework for certification and accommodation of employees who are medical marijuana users has become established in New York, the MRTA has significantly expanded its potential scope. And, as the licensing programs for the cultivation and distribution of recreational marijuana come online in the next several years, New York employers and their counsel will need to be prepared to address the vexing questions raised by their employees’ off-duty use of the drug.

Endnotes

1. Although the legislation uses this alternative spelling, for this article, we use the more common spelling of marijuana.
2. Marihuana Regulation and Taxation Act L. 2021 c. 92 § 1 et seq. Briefly, the MRTA creates an expansive recreational marijuana program; establishes the Cannabis Control Board, the Office of Cannabis Management, and the Cannabis Advisory Board, which are tasked with regulating medical and recreational use of marijuana and hemp extracts; and makes numerous statutory amendments relating to public health, taxation, and criminal conduct, among others.
3. N.Y. Pub. Health law §§ 33600 *et seq*. (McKinney 2021).
4. 21 U.S.C. §§ 801 *et seq*. (2021). A Schedule I drug is a drug that has (1) a high potential for abuse, (2) no currently accepted medical use in treatment in the United States, and (3) a lack of accepted safety for use of the drug under medical supervision.
5. The term “use” includes smoking, vaping, ingesting edibles and consuming cannabis infused products.
6. N.Y. Lab. Law § 201-d (McKinney 2021). Section 201-d also protects against discrimination based on certain political activities, union membership and the exercise of protected rights under the National Labor Relations Act and the Taylor Law. *Id.* at § 201-d(2)(a) and (d).
7. *Id.* at 201-d(1)(c).
8. *Id.* at 201-d(4).
9. In 2013, the U.S. Justice Department (DOJ) curtailed enforcement of the prosecution of marijuana offenses in deference to states’ legalization of the drug. See August 29, 2013 DOJ Memorandum re Guidance Regarding Marijuana Enforcement. The Trump Administration initially disavowed this position, but largely acquiesced to non-enforcement.
10. 273 F. Supp. 3d at 334; see also, *Callahan v. Darlington Fabrics Corp.*, 2017 U.S. Dist. LEXIS 88 (R.I. Super. 2017).
11. The Drug-Free Work Act, 29 U.S.C. § 8102, requires most federal contractors and grantees to maintain a drug-free workplace as a condition of the federal contract or grant. Under the Drug-Free Work Act, federal contractors and grantees must: (1) issue a policy prohibiting possession, use or distribution of controlled substances in the workplace which specifies the consequences for a violation; (2) establish a drug-free awareness program; (3) report criminal drug violations; (4) impose a penalty or require participation in a rehabilitation program for any employees convicted of a drug violation; and (5) make a “good faith” effort to maintain a drug free workplace. The Drug-Free Work Act does not require drug testing of applicants or employees, or prohibit employers from employing individuals who use marijuana.
12. New York City Admin. Code § 8-107(31) generally provides that pre-employment drug testing for marijuana is unlawful, qualified by a substantial list of positions excepted from this ordinance. See also, 26 M.R.S. § 683 (Maine statute on substance abuse testing in employment).
13. *See Devine v. New York Convention Center Operating Corp.*, 167 Misc. 2d 372, 639 N.Y.S.2d 904 (Sup. Ct. N.Y. Co. 1996)(dispute subject to a labor agreement not ripe for §201-d action).
14. For example, under Illinois law, an employer may consider an employee to be impaired or under the influence of cannabis if the employer has a good faith belief that an employee manifests specific, articulable symptoms while working that decrease or lessen the employee’s performance of the duties or tasks of the employee’s job position, including symptoms of the employee’s speech, physical dexterity, agility, coordination, demeanor, irrational or unusual behavior, or negligence or carelessness in operating equipment or machinery; disregard for the safety of the employee or others, or involvement in any accident that results in serious damage to equipment or property; disruption of a production or manufacturing process; or carelessness that results in any injury to the employee or others. 410 Ill. Comp. Stat. 705/10-50(d)(2021).
15. N.Y. Lab. Law § 201-d(4-a)(i) and (iii).
16. See 49 CFR part 382, and 49 CFR part 40, subpart O. These federal DOT requirements apply, regardless of the legal status of marijuana under state law. See DOT, Federal Motor Carrier Safety Admin., available at https://www.fmcsa.dot.gov/faq/does-legalization-use-and-possession-marijuana-state-or-other-country-has-d (last visited, April 30, 2021).
17. *See Gordon v. Consolidated Edison Inc.*, 190 A.D.3d 629, 140 N.Y.S.3d 512 (1st Dep’t 2021).
18. N.Y. Cannabis Law § 42(2) (McKinney 2021). For example, the U.S. Department of Transportation (DOT) maintains that the use of medical marijuana is unacceptable for any employee who is subject to drug testing under DOT regulations. Consequently, an employer may lawfully refuse to allow a medical marijuana patient to perform safety sensitive functions that are subject to DOT regulation. See, 49 CFR §§ 40.151(e), 391.11(b)(4) and 391.41(b)(12)).
19. N.Y. Cannabis Law § 3(18)(McKinney 2021).

Inside Books

Commercial Litigation in New York State Courts, Fifth Edition, Edited by Robert L. Haig (Thomson Reuters, 2020)

Reviewed by Steven R. Schoenfeld

Steven R. Schoenfeld

You are given responsibility to handle or manage your company's commercial litigation in the New York state courts. What is one of the things you should do next? Answer: consult *Commercial Litigation in New York State Courts*, recently published in its fifth edition on the 25-year anniversary of the first edition. This treatise supplies everything the seasoned trial lawyer to the novice needs for commercial litigation from civil procedure to substantive law to the "business" of a litigation practice.

The word "comprehensive" is not comprehensive enough to describe this treatise. Just by the numbers, the incomparable Robert L. Haig, editor-in-chief, estimates that the authors and their law firms donated more than $60 million of time if calculated at their regular billing rates in creating the five editions of this treatise and pocket parts. With the fifth edition Bob and his 256 principal authors, including leading practitioners and 29 judges (Chief Judge Janet DiFiore among them), have compiled a treatise of 10 volumes with 156 chapters and 13,076 pages of text. The treatise has an appendix with an index and tables reflecting the statutes, rules and more than 30,000 cited cases and where such statutes, rules and cases can be found. I still like to be able to pull a book off a shelf but, if space is limited, you can access this voluminous treatise electronically.

Steven R. Schoenfeld has 30-plus years of experience as a commercial and bankruptcy litigator and is a member of the State Bar's Corporate Counsel Section Executive Committee. His law firm, Denlea & Carton LLP, is a litigation boutique based in White Plains, New York, that has been named one of US News and World Reports' "Best Law Firms" for 2021 in commercial litigation. His email address is sschoenfeld@denleacarton.com, and his firm's web site is www.denleacarton.com.

The numbers do not tell the whole story. What is particularly unique about this treatise is the equally in-depth treatment of civil procedure and substantive law. Each chapter also includes useful client counseling sections, practice aids, checklists, and forms, and research references to facilitate further research. The treatise is useful for a quick search for an immediate answer to give a client advice or more in-depth analysis to prepare a motion.

The treatise will take you through each step in a commercial case from the pleadings, the preliminary conference, all phases of discovery (or disclosure in state court parlance), motions, trials (motions *in limine*, cross-examination, admissibility of evidence issues, jury instructions), and appeals. It also covers other parts of commercial litigation such as judgments, settlements, shareholder derivative litigation, cross-border litigation, mediation and non-binding ADR, and domestic and international arbitration. I found the treatise to be very handy when I was in the middle of expert discovery and consulted chapter 33 entitled "Selection of Experts, Expert Disclosure and the Pretrial Exclusion of Expert Testimony" by J. Peter Coll, Jr. and Thomas N. Kidera of Orrick, Herrington & Sutcliffe LLP, and chapter 48 entitled "Expert Witnesses" by Louis Solomon of Reed Smith LLP.

Beyond procedure, the coverage of substantive law by this treatise is breathtaking. The substantive law chapters cover topics such as contracts, insurance, reinsurance, bank litigation, letters of credit, collections, fraud, sales of goods and so on. It is hard to imagine anything that has been left out.

Remarkably, the fifth edition adds 28 new chapters to address subjects important to commercial litigation today that were not covered by the prior edition five years earlier. Those chapters run the gamut from artificial intelligence, limited liability companies, and gaming to third-party litigation funding, comparisons with commercial litigation in Delaware and foreign courts, and litigation management by judges.

By way of example, a couple of chapters may be of particular interest to our Section members. The least expensive litigation is one that never happens. Chapter 71, entitled "Litigation Avoidance and Prevention" by Mitchell J. Auslander and Sameer Advani of Willkie Farr & Gallagher LLP, can help in that regard. That chapter discusses pre-litigation strategies for companies to avoid litigation such as ensuring compliance with applicable law, employee training and good corporate governance. It also discusses strategies for resolving disputes.

We all know that clients cannot always avoid litigation and thus in-house counsel may wish to turn to chapter 75, entitled "Litigation Management by Corporations" by James J. Mangan of Morgan Stanley and Nader H. Salehi of Sidley Austin LLP. It provides a good overview of managing litigation from the corporation's perspective. It covers such issues as the selection and retention of outside counsel, managing litigation costs including fee arrangements, communications, in-house supervision of outside counsel, and developing a litigation plan. The end of the chapter contains a very good example of a litigation budget.

The value in this treatise stems not only from the knowledge and information that it conveys. It stems from the authors sharing their experience and wisdom from many years of practicing or adjudicating commercial matters in New York state courts. The benefits from that experience and wisdom cannot be obtained anywhere else.

Most of the work for the fifth edition was done in the past year during the coronavirus pandemic. New York state courts continued to function, but there is undoubtedly backlog of cases and trials stemming from the pandemic. This treatise will help all of us who are dealing with commercial litigation in the coming years.

Corporate Counsel Section Committee Chairs

CLE and Meetings/Corporate Counsel Planning Institute
Howard S. Shafer
Shafer Partners LLP
125 Maiden Lane
Room 16AB
New York, NY 10038-4949
hshafer@shaferpartners.com

Sanoj Stephen
Sotheby's International Realty
650 Madison Ave., 2nd floor
New York, NY 10022
sanoj.stephen@sothebyshomes.com

Compliance
Marly Valdy Marcellus
New York City Council
250 W Broadway
New York, NY 10013
marly.marcellus@gmail.com

Yamicha Stephenson
Deloitte
30 Rockefeller Plaza
New York, NY 10112
ystephenson@deloitte.com

Diversity
Naomi K. Hills
naomikhillslaw@gmail.com

Diversity Internship
Ingrid Tatiana Medina Rodriguez
NYS Unified Court System
821 Salina Street
Schenectady, NY 12308
it22mr@gmail.com

INSIDE/Publications
Elizabeth J. Shampnoi
Shampnoi Dispute Resolution and Management Services, Inc.
elizabeth@shampnoiadr.com

Membership
Joy D. Echer
330 West 34th Street
Law Department, 4th Floor
New York, New York 10001
jecher@footlocker.com

Pro Bono
Barbara M. Levi
blevilankalis@gmail.com

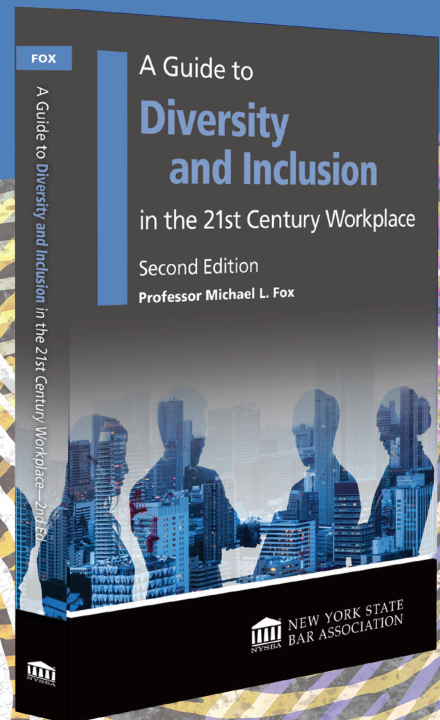
Technology and New Media
Mark Belkin
Boies Schiller Flexner
Albany, NY
markbelkin@gmail.com

PUBLICATIONS

A Guide to Diversity and Inclusion in the 21st Century Workplace

2nd ed.

Author
Professor Michael L. Fox



This book provides the reader a concise reference on the major issues of diversity and inclusion by evaluating federal and New York State laws and regulations that protect against discrimination, retaliation and harassment in employment. Through this evaluation, attorneys, judges, and students will gain an understanding not just of the requirements of the law, but also a respect for diversity. Business professionals, particularly those in human resource management, can rely on this book to better understand their obligations, recognize potential issues, and articulate what they need to discuss with counsel.

The Second Edition includes coverage of the following topics:

- State and federal anti-discrimination, antiharassment and anti-retaliation provisions, including 2019 amendments to New York's laws;
- The U.S. Supreme Court's groundbreaking 2020 decision in *Bostock v. Clayton County*, which addresses sexual orientation and gender identity;
- EEOC hearings and the importance of maintaining clear employer policies and concurrent paperwork;
- Federal and state leave laws;
- Website accessibility for those with disabilities;
- The impact of COVID-19 on employment practices.

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