Knoxville Bar Association

THE CONSIGLIERE

FALL 2011 Vol. 6, No. 4

"The best thing about the future is that it comes one day at a time ."

--Abraham Lincoln

Let us know your ideas and suggestions for *THE CONSIGLIERE:*

- Call or e-mail Chris Field at 312-8183 or ccf@lyblaw.net, Nick McCall at 632-4161 or jhmccall@tva.gov, or Marsha Wilson at 522-6522 or mwilson@knoxbar.org.
- Submit an article for consideration.
- Give us your feedback on this newsletter.
- Tell us about CLE topics or networking events you would like the Section to sponsor.

FROM THE CO-CHAIRS

As 2011 winds down, it is time to reflect on the strides made by the Corporate Counsel Section over the last year. Our annual extended CLE program, which is our banner event, covered modern risks for corporate counsel and featured local attorneys Ron Hill, of Egerton, McAfee, Armistead & Davis; Chuck Young, Babcock & Wilcox Technical Services, Y-12, LLC; and David Morehous, Siemens Medical Solutions USA. In addition, for the first time, we offered two 1-hour CLE programs as part of our In-House Counsel Toolbox Series. The first, which was presented by Bob Fox of Luedeka, Neely & Graham, covered intellectual property basics. The second, which is coming up on November 17th, will be presented by Scott Griswold of Paine, Tarwater & Bickers, and will cover workplace bullying. We also held a "themed" social event in which DeRoyal Industries' Jeff Taylor answered questions about his in-house experience with Bridgestone's Americas tire operation in Brazil.

The section has also continued its great tradition of publishing *The Consigliere,* a quarterly publication containing a wealth of information submitted by a variety of local corporate counsel and edited by Nick McCall (TVA) and Chris Field (Lowe, Yeager & Brown). Nick, who has been involved with the newsletter from the beginning, has been instrumental in producing this excellent resource. As Nick steps down from his editor role and officially hands the reins over to Chris, I want to be the first to commend Nick on a job very well done. If you have enjoyed *The Consigliere* over the years, I hope that you get a chance to thank Nick for his hard work and will support Chris moving forward.

As you have read the above, I hope that you have noticed a common theme: the success of this section depends upon the support and participation of local corporate counsel. As such, I want to challenge you to get involved. At the November 17th CLE, we will take a few minutes to talk about the upcoming year and to elect our officers for 2012. David and I are agreeable to serving as co-chairs for another year and, as mentioned, Chris Field has agreed to serve as editor of *The Consigliere*. Ned Morgan (Voices Heard Media) has agreed to continue as chair of the Membership Committee. However, we are open to more nominations for these positions and will also need leaders for the CLE Committee. If you are interested in being nominated for a leadership role or in serving in any capacity with the section, please feel free to contact either David or me or the KBA's Marsha Wilson prior to the November 17th meeting. Also, if you have any ideas or suggestions for the section, please be sure to let us know at the meeting.

I hope to see you November 17th, but if not, I wish you a happy holiday season. I look forward to a successful 2012 for our section!

With Kindest Regards,
Marcia A. Kilby, Co-Chair

CORPORATE COUNSEL SECTION CLE:

"In-House Counsel Toolbox Series: What You Need to Know About Workplace Bullying" (Don't Miss it)

UPCOMING SECTION EVENTS

CORPORATE COUNSEL SECTION CLE:

In-House Counsel Toolbox Series: What You Need to Know About Workplace Bullying

WHEN: Thursday, November 17, 2011, 5:30 p.m. - 6:30 p.m.*

WHERE: Sullivan's at Franklin Square (9648 Kingston Pike)

COST: KBA Members: $20; Non-KBA Members: $30**

KBA Member J. Scott Griswold (Paine, Tarwater & Bickers, LLP) will define workplace bullying and spend time reviewing public awareness campaigns, lawsuits using traditional causes of action, new state laws, policies to implement, and ways to deal with complaints of bullying. This program is of interest to corporate counsel and other practitioners who advise local businesses.

This program has been approved for 1 Hour of General CLE Credit.

* Please try to arrive at 5:00 p.m. so that section members have an opportunity to visit before the CLE begins at 5:30 p.m.

** A reservation is required in advance of the program. There is a $5 additional charge for registration on the day of the program. KBA Members not wishing to receive CLE credit may attend the program at no charge (handout materials not included).

TAX TIDBIT:

IRS Announces New Voluntary Classification Settlement Program

By Darsi N. Sirknen of Woolf, McClane, Bright, Allen & Carpenter, PLLC

One of the most contentious issues for businesses in the tax arena is the classification of workers as either employees or independent contractors. Generally, an employer must withhold and pay to the government income taxes, Social Security and Medicare taxes, and unemployment contributions with respect to wages paid to an employee. Additionally, the classification of a worker as an employee generally makes the employer liable for the employee's actions taken within the scope of his employment and makes the employer subject to workers' compensation and other labor laws. Because most, if not all, of such requirements do not apply when a worker is classified as an independent contractor, many businesses classify workers as independent contractors in order to lessen their costs and administrative burdens. Unfortunately, many of those workers are not properly classified as independent contractors under the tests established by the IRS and/or by the federal and state Departments of Labor.

TAX TIDBIT:

IRS Announces New Voluntary Classification Settlement Program

In recognition that misclassification of workers resulted in a large amount of uncollected tax, the IRS previously initiated a nationwide Questionable Employment Tax Practices program with the goal of increasing voluntary compliance with employment tax rules and regulations. Over the years, this program resulted in numerous employment tax audits. While some audits were resolved with favorable settlements, others resulted in expensive litigation.

On September 21, 2011, the IRS announced a new Voluntary Classification Settlement Program ("VCSP") that will enable employers to resolve past worker classification issues and achieve some level of certainty under the tax law going forward. Essentially, the new VCSP will allow employers who have previously misclassified workers the opportunity to come into compliance by making a minimal payment covering past payroll tax obligations.

Employers must meet the following criteria in order to be eligible for the VCSP: (1) the employer must have consistently treated workers as nonemployee independent contractors; (2) the employer must have filed all required Forms 1099 for the workers for the previous three years; (3) the employer is not currently under audit by the IRS, Department of Labor, or any state agency regarding worker classification issues; and (4) if the employer has previously been audited by the IRS or Department of Labor regarding the classification of workers, the employer must have complied with the results of the prior audit.

If an employer is accepted into the VCSP program, then, in exchange for the employer's prospectively treating workers as employees and complying with all future employment tax rules and regulations, the IRS has agreed to allow the employer to pay ten percent of the employment tax liability that would have been due on compensation paid to the workers for the most recently-completed tax year, determined under the reduced rates of Section 3509 of the Internal Revenue Code. This is advantageous because, in the event of an audit, the employer would be liable for 100% of employment tax liability for at least three years, and the liability would not be calculated at § 3509's favorable rates. Further, under the VCSP, the IRS will not impose any interest or penalties on the liability, and it will agree not to audit the employer with respect to worker classification for prior years. The employer, however, must extend the period of limitations for assessment of employment taxes from three to six years for each of the first three calendar years in which the employer first treats the workers as employees.

The employer must also agree to treat the class of workers as employees for future tax periods, meaning the employer must thereafter begin withholding and paying employment taxes, unemployment contributions, etc. Further, the employer may find itself subject to new requirements and/or increased premiums for workers' compensation insurance and even general liability insurance. In connection with announcing the VCSP initiative, the IRS and the Department of Labor entered into a Memorandum of Understanding setting forth their agreement to share information and collaborate in reducing the incidents of employee misclassification. The IRS has also indicated that it will share information with state and municipal taxing agencies under tax return information sharing agreements entered into between state and federal agencies. Certainly, an employer who enters into the VCSP program must also register with state employment agencies (if it has not already done so) and comply with the requirements of those agencies on a going-forward basis, but it is unclear whether an employer's entry into VCSP will increase the likelihood that the employer will be audited by those state agencies for previous periods.

VCSP is the newest settlement option offered by the IRS with respect to

worker classification issues, but obviously it will not be appropriate for everyone. If an employer believes that its workers may be classified incorrectly, it should seek the advice of counsel to determine whether VCSP, another settlement option, or maintaining the status quo will be in its best interests.

OUR FEATURE ARTICLES

***Editor's Note**: The* U.S. v. Stevens *case out of Maryland has captured the attention of corporate counsel across the nation—and for good reason. This issue of* The Consigliere *provides you with two perspectives of the case, along with advice on how to protect your client's interest in the course of government investigations while avoiding the risks of potential criminal liability. – C.F.*

CRIMINAL LAW

GLOBAL WARMING: The Climate of Over-Criminalization of Corporate Conduct, A Truth That's, Well, Inconvenient...

By Loretta G. Cravens of Eldridge & Blakney, P.C.

Corporate criminal liability is certainly not a new phenomenon. Courts have been holding businesses vicariously liable for the acts of their agents/employees under common law principles of agency for centuries. In the United States, corporations have been subject to criminal liability for the intentional criminal acts of its employees for more than one hundred years and in certain circumstances corporate officers have been held accountable for strict liability crimes as well.**1** The United States Supreme Court first recognized the doctrine of Responsible Corporate Officer, which subjects a corporate officer to criminal liability for the criminal conduct of the corporation, in the 1940s.**2** Corporate officers have been held liable by virtue of their position as a result of their failure to exercise their authority to supervise the conduct of the corporation.**3** If the corporate officer at issue is ultimately responsible for the oversight of the action or actor, then they may also be responsible for the crimes committed by the actor**.4**

Perhaps it was the indictment of a number of Arthur Anderson, WorldCom, and Enron executives in the early 2000s, which drew the ire of the general public, which has led to the current level of hostility toward corporate officials. The movement in favor of criminal prosecution of corporate officers has greatly expanded over the last several decades.**5** Moreover, with the popular "occupation" movements sweeping through the country, public distrust of corporate officials seems to be continually waxing. Regardless of its origins, this trend shows no signs of slowing.

Arguably, the criminal liability of corporate officers is divided into two eras: Before Enron and After. In the wake of Enron, the announcement of another indictment of a corporate officer slowly ceased to even garner the attention of

the most astute observer, up to and including the indictment of former Goldman Sachs director, Rajat Gupta,**6** occurring contemporaneously with the drafting of this article. News forums have been replete with such stories in recent years.

As I began to look at this trend toward prosecuting the executives, I discovered that such prosecutions are so frequent that they have become a commonplace occurrence. Increasingly, the federal government is utilizing federal criminal laws to hold corporate officers and executives criminally responsible for conduct occurring in response to regulatory investigations or for acts or omissions inconsistent with applicable regulatory schemes. Much to my surprise, however, I discovered that the government may now have set its sights on the lawyers.

In 2010, the Department of Justice sought and obtained an indictment in the District of Maryland against Lauren Stevens, a former vice president and associate general counsel for GlaxoSmithKline.**7** Ms. Stevens was charged with six counts of making false statements, obstructing justice, and falsifying and concealing documents.**8** The Stevens case was perhaps poised to make an indelible mark on the landscape of corporate counsel's exposure to criminal liability. The Stevens case, however, received more attention from the blogosphere than it did from mainstream media**9** and it ultimately failed to live up to the government's hype.

All of the allegations against Stevens stemmed from her conduct as in house counsel for GlaxoSmithKline and her communications with the Food and Drug Administration ("FDA") in response to an FDA investigation related to GlaxoSmithKline's marketing of one of its medications.**10** After the FDA requested documents pertaining to GlaxoSmithKline's promotion of the drug in question, Stevens was tasked with taking charge of the response to the FDA's inquiry. She led a team of legal professionals that included other in-house counsel, outside counsel, and paralegals in gathering documents and information pertaining to the FDA's request. It was Stevens who signed letters submitted to the FDA in response to the investigation. The government's primary argument was that Ms. Stevens had committed the alleged crimes, by withholding slides used by a speaker during a promotional presentation and by her act of signing a letter stating that GlaxoSmithKline's response was complete when the slides had not been produced.**11**

From the beginning of her prosecution, Stevens asserted that she had relied upon the advice of outside counsel in responding to the FDA's inquiry and that this reliance negated the intent necessary to be convicted of making false statements or obstructing the FDA's investigation as charged.**12** Stevens asserted that she had consulted with outside counsel in gathering documents, determining what responsive information must be produced, and determining the manner and timing of production. Further, Ms. Stevens argued that she had intended to present the slides sought by the FDA to the regulatory investigator during the course of a face-to-face meeting.**13** However, her multiple attempts to arrange for such a meeting were declined by the FDA, and ultimately the slides were not produced.**14**

During the course of pretrial motions, Stevens' counsel moved for disclosure of the grand jury transcript.**15** Thereafter, the Court undertook an *in camera* review and discovered that a grand juror had asked the prosecutors specifically about the relevance of Stevens' reliance on the advice of outside counsel and that the government had informed the grand jury that reliance on outside counsel's advice was an issue that could be raised as a defense at trial, but was not a matter for consideration for the grand jury in making a

probable cause determination.**16**

Judge Roger W. Titus found this to be an erroneous instruction to the grand jury and dismissed the indictment based on that basis.**17** Judge Titus' dismissal was, however, without prejudice to the government, who was free to seek a new indictment with a new grand jury correctly instructed.**18** The government did just that, obtaining a superseding indictment for the same charges and upon which Ms. Stevens went to trial less than two months after the initial indictment was dismissed.**19** After a ten day jury trial, before submitting the case to the jury for deliberation, Judge Titus took another bold action – he granted Stevens' motion for Judgment of Acquittal as to all counts.**20**

Finding that it would be a miscarriage of justice to permit the jury to consider the case, Judge Titus concluded "that only with a jaundiced eye and with an inference of guilt that's inconsistent with the presumption of innocence could a reasonable jury ever convict this defendant."**21** Thankfully for Ms. Stevens, and perhaps for all corporate counsel called upon to respond to investigations by regulatory authorities, Judge Titus fulfilled his duty under Rule 29 of the Federal Rules of Criminal Procedure, and directed Ms. Stevens' acquittal. It remains to be seen, however, if the Department of Justice learned a lesson by its failed attempt to prosecute Ms. Stevens or if the government will continue to further its efforts to prosecute corporate officers by taking aim at other in-house counsel.

Conclusion

In today's climate, the scope of the matters with which corporate counsel must familiarize themselves is virtually unlimited. Not only must corporate counsel rigorously educate themselves on the minutia of a multitude of laws and regulations governing almost every aspect corporate activity, in the present climate of ever increasing criminalization of corporate conduct and the movement to hold corporate officers as individuals increasingly responsible for corporate crimes, (and prosecutors penchant for trying to stretch the facts to fit some criminal statute), in-house counsel must be more vigilant that ever before in the exercise of their duties and effectuating their obligation to zealously represent the corporation, lest counsel find themselves downwind of their own an indictment.

1. Webb, Dan K., Tarun, Robert W., Molo, Steven F., Corporate Internal Investigations, § 1.02 [1], Law Journal Press 2004 edition.
2. *See United States v. Dotterweich*, 320 U.S. 277, 285 (1943).
3. *See United States v. Park*, 421 U.S. 658 (1975).
4. *Id.*
5. Webb, Dan K., Tarun, Robert W., Molo, Steven F., Corporate Internal Investigations, § 1.12[2], Law Journal Press 2004 edition.
6. Whitehouse, Kaja and Golding, Bruce, *Indicted Gupta finds that greed isn't good,* New Your Post, October 27, 2011, available at http://www.nypost.com/p/news/business/indicted_gupta_finds_that_greed_unf4o4yBBxXGFI794TXUWI
7. *U.S. v. Stevens*, 771 F.Supp.2d 556 (D. Maryland 2011).
8. *Id.*
9. *See, e.g.,* Stout, David, *Case Against GlaxoSmithKline Lawyer Dismissed, for Now,* MainJustice.com, available at http://www.mainjustice.com/2011/03/25/case-against-glaxosmithkline-lawyer-dismissed-for-now/print/ (March 25, 2011);Stout, David, *Lauren Stevens: A Case the DOJ Would Probably Like to Forget*, MainJustice.com, available at http://www.mainjustice.com/2011/05/11/lauren-stevens-a-case-

the-doj-would-probably-like-to-forget/print/ (May 11, 2011);Reisinger, Sue, *Update: Former Glaxo Lawyer Acquitted!*, Law.com, available at www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202493405517 (May 10, 2011); Douglass, David, *Commentary: The Lauren Stevens Prosecution; Lessons for All*, Compliance and Enforcement Register, May 2, 2011.
10. *Stevens*, 771 F.Supp.2d 556, 559.
11. *Stevens*, 771 F.Supp.2d at 564-65.
12. *Id.*
13. *Lauren Stevens Trial: Week Two. Where is the Coverage?* White Collar Crime Prof Blog, A member of the Law Professor Blogs Network, available at http://lawprofessors.typepad.com/whitecollarcrime_blog/2011/05/lauren-stevens-trial-week-two.htmlMay 3, 2011.
14. *Id.*
15. *Id.* (What motivated defense counsel to seek the grand jury transcript, if there was in fact a specific motivation behind doing so, is not clear from the Court's opinion.)
16. *Stevens*, 771 F.Supp.2d 556, 564-65.
17. *Id.* at 567-68.
18. *Id.*
19. *U.S. v. Stevens,* Indictment, Doc. 149, Case No. 8:10-cr-00694-RWT, (April 13, 2011 D. Maryland).
20. *U.S. v. Stevens,* Judgment, Doc. 194, Case No. 8:10-cr-00694-RWT, (May 13, 2011 D. Maryland).
21. Nell, Martha, *In Mid-Trial Ruling, Federal Judge Axes Obstruction Case Against Ex-Glaxo In-House Lawyer,* ABA Journal May 10, 2011 available at http://www.abajournal.com/news/article/federal_judge_summarily_dismisses_obstruction_case_against_ex-glaxo_in-hous/

Responding to the Government: Protect Your Client and Yourself

By Brian Z. Schott, London & Amburn, P.C.

INTRODUCTION

The recent *U.S. v. Stevens* case should give general counsel pause to consider the personal implications that may arise when representing a corporation during a government investigation. When general counsel receives an inquiry from a government agency requesting that the corporation turn over documents, the attorney has the difficult task of deciding how best to comply with such a request while still placing the corporation in the most favorable position possible. In the case of attorney Lauren Stevens, former general counsel of GlaxoSmithKline ("GSK"), the decisions she made in responding to an inquiry made by the Food and Drug Administration ("FDA") led to a six count indictment filed against her for falsification of records and obstruction of justice. *U.S. v. Stevens*, 10-cr-694-RWT (D. Md.). On May 10, 2011, the federal district court judge granted Stevens's motion for a judgment of acquittal concluding that "vigorously and zealously representing a client is no basis for charging an offense under the Obstruction of Justice chapter."

THE UNDERLYING INVESTIGATION

On October 9, 2002, the FDA sent a letter of inquiry to GSK asking it to turn over all promotional materials related to the drug Wellbutrin, including copies of all slides, videos, handouts, and other materials presented or distributed at any GSK program or activity. The purpose of this inquiry was to determine

More Implications for In-House Counsel as to the U.S. v. Stevens Decision

whether GSK was promoting Wellbutrin for uses not approved by the FDA. In preparing GSK's response, Stevens sought the advice of both in-house counsel and retained outside counsel and established a paper trail of these communications. As part of GSK's response, Stevens also sent six letters to the FDA updating it on the status of GSK's internal investigation. After coming to a consensus with all attorneys involved, Stevens decided to withhold some of the slides and promotional materials requested by the FDA.

THE CRIMINAL PROCEEDING

Based on her responses to the FDA, the Attorney General's office charged Stevens with two counts of Obstruction of Justice in violation of 18 U.S.C. §§ 1512 & 1519, for failing to turn over all materials requested, and four counts of making material false statements in violation of 18 U.S.C. § 1001, for statements made in her response letters. These charges carry maximum sentences of 20 years imprisonment. Throughout the criminal proceeding, Stevens's primary defense was that she relied in good faith on the advice of counsel.

In granting Stevens's motion for acquittal, the judge specifically noted that Stevens made a "studied, thoughtful analysis in an extremely broad request from the [FDA] and made an enormous effort to assemble information and respond on behalf of the client," with no intent to commit a crime or fraud. Thus, this lawful, bona fide legal representation barred the criminal prosecution for obstruction of justice against Stevens under the Safe Harbor provision of 18 U.S.C. § 1515(c). As for the false statement charges, the judge determined that the statements alleged by the government to be false were taken in isolation and not in context with the entire letter written. He further asserted that Stevens should be permitted to resume her legal career and that although attorneys do not get a free pass to commit crimes, "a lawyer should never fear prosecution because of advice that he or she has given to a client who consults him or her."

CONCLUSION

This case demonstrates that general counsel may rely in good faith on the advice of other attorneys when responding to a government inquiry. To better demonstrate such good faith reliance, an attorney should consider seeking counsel from other attorneys' shortly after receiving the inquiry. Further, counsel may want to create documentation showing the legal analysis that was used by the attorneys in responding to the inquiry. If counsel chooses to create such a paper trail, it is a good idea to have the materials clearly marked as "Attorney-Client" correspondence. Moreover, general counsel should consider gaining a consensus among the attorneys involved before proceeding to respond to the government inquiry. By taking these steps, general counsel can carry out its duty to zealously represent its corporate client while still appropriately responding to a government agency's concerns.

Disclaimer: The information contained herein is strictly informational; it is not to be construed as legal advice.

Employment Law: Focus on Workplace Bullying

EMPLOYMENT LAW

Recognizing and Addressing Bullying in the Workplace

By Leslie Beale of The Beale Firm, PLLC

Bill is your supervisor. When you take a written report to him, he barely looks at it, throws it back across the desk at you, and tells you that you are "clueless." You complain about this behavior to human resources. In a meeting with Bill and the human resources representative, Bill tells you that you need to "toughen up" and learn to "take some punches." Over your objections, he puts you on a 90-day performance review plan, and tells you that he is already looking for your replacement. You are being bullied.

Workplace bullying is certainly not a new phenomenon. Almost everyone can think of a time when a co-worker or supervisor bullied them inappropriately. However, with the incidences of workplace violence on the rise, workplace bullying is taking on new importance as an indicator of potentially more dangerous behavior. Common examples of workplace bullying include the following:

- Giving someone the cold shoulder, or otherwise excluding them from workplace activities;
- Screaming at or otherwise humiliating a worker, especially in front of others;
- Making unreasonable demands with regard to deadlines or work hours;
- Staring, glaring, or other non-verbal actions; and
- Threatening demotion, termination or violence against a worker.

A study conducted by the Workplace Bullying Institute in 2010 found that 35 percent of U.S. workers have either experienced bullying themselves, or witnessed such behavior directed towards others. While men are more likely to bully than women (68 percent vs. 32 percent), they most often target other men. Female bullies more often target their behavior toward other women.

Workplace bullying is a costly proposition for employers. Some estimate that a workplace bully could cost a Fortune 500 company as much as $24,000,000 in lost productivity and turnover. *See* Catherine Michael Mattice, M.A., *The Cost of Workplace Bullying,* available at http://noworkplacebullies.com/yahoo_site_admin/assets/docs/Whitepaper_CostofWorkplaceBullying.183131417.pdf, July 2009. These costs include time spent by co-workers in discussing the bullying behavior, time spent by supervisors counseling the bully regarding his or her behavior, and time spent by human resources in recruiting and training a replacement for the bullied employee, among other things. In addition, workplace bullying can contribute to absenteeism, a significant problem for employers which some have estimated costs as much as $300 billion annually in the U.S. alone. *See* University of Massachusetts Lowell, www.uml.edu/center/cph-new/job-stress/financial costs.html.

Despite numerous recent attempts by the Workplace Bullying Institute and others to get anti-bullying legislation passed, however, workplace bullying is not currently illegal in the United States. Thus, it is not legally actionable unless it falls within the parameters of other, pre-existing laws. For example, a workplace bully who targets another worker because of his or her religion is likely to have run afoul of the provisions of Title VII of the Civil Rights Act of

1964. As such, his behavior may be actionable as harassment and/or discrimination. Similarly, a workplace bully who threatens bodily harm to another may have committed either criminal or civil assault. Finally, in cases of severe bullying, the behavior may be serious enough to be considered the basis for a claim of intentional infliction of emotional distress.

Employers concerned about workplace bullying should take proactive steps to ensure a workplace free from such behaviors. Steps may include the following:

- Adopting policies against bullying. These policies may be included as part of an existing workplace violence policy.
- Including a ban on bullying as part of the larger code of conduct.
- Providing numerous methods for reporting bullying behaviors, similar to those reporting mechanisms available for reporting harassment or discrimination. Ensure that all employees are aware of these methods of reporting.
- Investigating complaints of workplace bullying, in much the same manner as allegations of harassment are investigated.
- Preventing retaliation against employees who report workplace bullies.
- Disciplining bullies for their behavior, up to and including termination where appropriate.
- Training human resources to recognize and effectively address bullying.

RANDOM NOTES

Compiled and Collected from Various Sources and Reports

Government Contracting: OFCCP's Increased Focus on Discriminatory Practices in Employee Compensation

In June 2011, the Office of Federal Contract Compliance Programs ("OFCCP") settled a pay discrimination lawsuit against pharmaceutical giant AstraZeneca. Not only did OFCCP require AstraZeneca to agree to some very far-reaching salary/compensation adjustments AstraZeneca agreed to make, but it also imposed even more wide-ranging, prospective action. Federal Secretary of Labor Hilda Solis has praised the OFCCP's efforts to end pay discrimination as one of three key enforcement efforts by the agency; on August 10, 2011, the Department of Labor ("DOL") began its rulemaking process to develop tools to gather and analyze compensation data from Federal contractors.

This June, AstraZeneca agreed to pay $250,000 to 124 women in order to settle a lawsuit claiming pay discrimination against female sales specialists at its Philadelphia business center. The OFCCP claimed the female sales specialists had been paid, on average, $1,700 less than their male counterparts. AstraZeneca agreed not only to provide back pay for the women covered by the lawsuit, but agreed to work prospectively with OFCCP to conduct statistical analyses of pay for hundreds of employees in 13 states and D.C. and to make salary adjustments as needed. In commenting on the Astra Zeneca settlement, OFCCP noted three issues requiring redress to help close the pay gap: (1) a better way to collect good data from employers to identify discriminatory practices; (2) better regulations regarding pay secrecy, which would allow women to talk openly about their salaries; and (3) education of workers and employers about their rights and obligations.

RANDOM NOTES:

OFCCP 's Enhanced Focus on Discriminatory Compensation Practices

This summer, OFCCP announced its proposed rescission of its 2006 "Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Pay Practices," which provided a roadmap for employers to follow as they assessed their compensation practices. With the rescission of these standards, OFCCP may use whatever analysis it deems appropriate in compensation cases. One of the more troubling developments for employers is the use of a test known as the "2% or $2,000 difference" as the trigger to request detailed compensation information. Essentially, if the OFCCP finds a difference in salaries within a pay division of as little as $2,000, or 2%, it will request multiple categories of data to conduct a detailed statistical analysis of pay.

In mid-August, OFCCP issued an advance notice of proposed rulemaking to begin the process of developing a new data collection too. In issuing the notice, the OFCCP made it clear that its focus on pay discrimination is not limited to just gender, as it "continues to plague women and people of color in the workforce." The stated purpose of the proposed tool is primarily as a screening device to allow OFCCP to target possible compensation discrimination more effectively. The tool would also provide OFCCP with information about industry-wide compensation practices. Federal contractors could also use the tool as a means of self-assessment, "used periodically to evaluate the effects of their employee compensation decisions."

So, for those Federal government contractors who have not recently conducted a serious self-evaluation of compensation practices, it would now seem to be high time to do so.
Read the consent decree at http://www.dciconsult.com/alert/astrazeneca.pdf

Read the proposed rule at http://www.gpo.gov/fdsys/pkg/FR-2011-08-10/pdf/2011-20299.pdf

Business Law / Corporate Governance and Directors' Duties: Delaware Court Refuses to Dismiss Loyalty Claims Against Outside Directors in Third-Party Sale of the Company

A recent Delaware Court of Chancery decision refused to dismiss claims alleging that a board of directors breached its fiduciary duty of loyalty in authorizing a sale of a corporation to a third party. The stockholder plaintiff alleged that the sale was motivated by the corporation's former chairman and chief executive officer, who owned 37% of the corporation's common stock and needed liquidity.

The decision is significant (and rather unique) for the court's refusal to dismiss claims of disloyal conduct against outside directors who were disinterested in the transaction and otherwise unaffiliated with the former CEO. As Tennessee (and other states') courts are known to look to business law developments in Delaware's courts as helpful guidance in cases interpreting directors' fiduciary duties of loyalty and care and other key matters of corporate governance: this unique decision may prove highly instructive to corporate lawyers who deal with business entities outside of a strictly Delaware context.

New Jersey Carpenters Pension Fund v. infoGROUP, Inc. involved the sale of infoGROUP, Inc. to a private equity fund during 2010. The stockholder-plaintiff alleged that the sale was principally motivated by the corporation's former chairman and CEO, who owned 37% of the company and "desperately needed liquidity" to fund a new venture and to satisfy $12 million in litigation/settlement obligations The plaintiff claimed that the board breached

Business Law: Delaware Court Holds that Case Against Outside Directors Can Proceed for Duty of Loyalty Questions

its fiduciary duties by caving in to the former CEO's pressure and approving a transaction that was not in the best interests of all shareholders. In addressing the defendants' motion to dismiss, the court first held that the former CEO-- who was still a director of infoGROUP--was "interested" in the transaction. Although all of the corporation's stockholders were to be cashed out at the same price in the merger, the court reasoned that the former CEO had received a benefit not shared with other stockholders in the form of "liquidity." The court concluded that this was, in fact, a material benefit to him.

The court then turned to the remaining members of the board—all of whom, with the exception of the current CEO, were outside directors and none of whom were affiliated with the former CEO—yet, the court found that those directors nevertheless were not "independent." Why? Essentially, they had been controlled by the former CEO through threats and intimidation. The complaint alleged the former CEO

- threatened to sue the directors if they did not pursue a sale of the company;
- told the board that he had discovered potential evidence of financial fraud that could lead to personal liability for the directors;
- was "generally disruptive" at board meetings;
- led the chairman of the board to resign and pushed another director to threaten to resign;
- had "denigrated" the company's management and called for the firing of its then-current CEO, who also sat on the board;
- issued a press release--without board approval--that recommended a sale of the company; and
- "tainted" the sale process by speaking to potential bidders without board supervision, and leaked confidential information in the process.

The court also analyzed an e-mail between two of the outside directors, in which they suggested that some of their comrades might want to "dump the company and run" due to the "pain, trauma, time and everything else." The court held that the plaintiff had successfully rebutted the business judgment rule to state a valid claim that the directors were not independent and had breached their fiduciary duty of loyalty in approving the transaction.

Court rulings--like this one--that refuse to dismiss loyalty claims against outside directors are highly unusual and rare. This is especially so in the context of a third-party transaction in which all stockholders received the same per-share consideration. In addition, none of those outside directors was "interested" in the transaction or affiliated with the key insider who gave rise to the conflict of interest. The *infoGROUP decision* is particularly noteworthy for its conclusion that the directors were not "independent." Under Delaware law, a director is independent when his or her decision is based on the merits of the corporate action and not by extraneous considerations. Here, the court concluded that the directors were *not* independent because they had been "dominated" by the former CEO. This domination, according to the court, was achieved through the former CEO's "pattern of threats aimed at [the directors] and unpredictable, seemingly irrational actions that made managing the Company difficult and holding the position of director undesirable." A finding that general "intimidation" of outside directors can strip them of their independence goes far beyond traditional notions of "domination and control."

Read the case at:
http://courts.delaware.gov/opinions/download.aspx?ID=161250

Employment Law: VETS-100/100A Extension Until 11/30/2011

Employment Law Update: Extension for VETS 100/100A Website

In our Summer 2011 issue, we provided a reminder of the Department of Labor ("DOL") rules for annual EEO-1 and VETS 100/100A filings. *See* "Random Notes--Employment Law: Annual EEO-1 and VETs 100/100A Filings Upcoming-The Basic 'Whos, Whats and Whys.' " DOL has recently has announced that its VETS-100/100A website is not available because of technical difficulties and that it will be unavailable until October 1, 2011. Accordingly, the deadline for filing VETS-100/100A reports has been extended by DOL from September 30, 2011 to November 30, 2011.

Read the DOL's announcement at:
http://www.dol.gov/vets/programs/fcp/main.htm

A Final Word from One of Your Co-Editors

This issue marks the last one in my service to you as Editor and Co-Editor of *The Consigliere* (formerly known as *The Consigliore*). It has been my sincere pleasure to help produce this newsletter since the summer of 2007, and I hope that it has become not only a helpful tool for the members of the Corporate Counsel Section, but also something that you have come to look forward to receiving and reading four times a year.

I leave *The Consigliere* in the capable and energetic hands of our Co-Editor for this past year, Chris Field. Thanks for allowing me to be of service to you and our Section for these last four years.

– Jack H. ("Nick") McCall

NEWS AND NOTES

Thanks to Our Authors!

Thanks to all those who contributed to this issue of *THE CONSIGLIERE.* A very special note of appreciation is due to our authors: to Darsi Sirknen of Woolf, McClane, Bright, Allen & Carpenter, PLLC for her latest "Tax Tidbits" contribution on the IRS's voluntary classification settlement program; to each of Loretta Cravens of Eldridge & Blakney, P.C., and Brian Schott of London & Amburn, P.C. for their articles and perspectives on the fascinating (and troubling) implications, for many in-house lawyers and their clients, of the recent *U.S. v. Stevens* decision; and to Leslie Beale of The Beale Firm, PLLC for her employment law article about workplace bullying and its legal implications.

Knoxville Bar Association
505 Main Street
Suite 50
Knoxville, TN 37902

Phone:
(865) 522-6522

Fax:
(865) 523-5662

E-mail Addresses:
dheadrick@terryadamslaw.com
mkilby@deroyal.com
c.field.law@gmail.com
jhmccall@tva.gov
mwilson@knoxbar.org

We're on the Web!

http://www.knoxbar.org

CONTACT INFORMATION

See the contact information on the left-hand margin of this page. Use the hyperlinks to contact our Co-Chairs, David Headrick and Marcia Kilby; the Co-Editors, Chris Field and Nick McCall; or the KBA's Executive Director, Marsha Wilson.

See the web site address at the bottom of the left-hand margin on this page to access the official Knoxville Bar Association web site by the hyperlink.

Don't forget the Corporate Counsel Section's last meeting of the year on Thursday, November 17, beginning at 5:30 p.m. at Sullivan's at Franklin Square. See you there!