

## Baird Holm's In-House Counsel & Ethics CLE Webinar

Thursday, December 10, 2020  
Starts at 12:00 p.m.

Legal advice is often highly dependent on the facts unique to each situation. As such, the content of this presentation is not legal advice and is provided for general information purposes only. No attorney-client relationship is created by the use of this content. Any opinions that we express herein are our own and do not necessarily represent the opinions of Baird Holm LLP.

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## Welcome

Aaron B. Johnson

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## 2020 Corporate Law Update Starts at 12:05 p.m.

J. Scott Searl  
Kevin P. Tracy

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**CORPORATE WASTE**

*IN RE TESLA MOTORS, INC. STOCKHOLDER LITIGATION*

- Tesla - SolarCity merger - \$2.6 billion
- Musk owned 21% of Tesla, 22% of Solar City. Merger converted his Solar City stock into \$500m of Tesla stock
- Plaintiffs allege SolarCity was on verge of insolvency pre-merger
- Plaintiffs must prove deal was so one sided no business person of ordinary sound judgment could conclude adequate consideration received
- Waste: difficult to prove, but not impossible. If fully informed stockholders approve transaction, waste extremely difficult to prove - stockholders unlikely to approve wasteful transaction
- Court rules if SolarCity insolvent when acquired waste claim may be sustained
- Case settles for \$60m. 16.8m atty fees

TAKEAWAY: Full Disclosure, Business Justification

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**OTHER CORPORATE WASTE CLAIMS**

- Excessive Compensation
- Political Contributions

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**INDEMNIFICATION**

*NORTHEASTERN AVIATION CORP. v. PASTERNAK*

- Indemnification sought from aircraft charter/mgt company by its pilot for legal fees arising from random FAA-required drug testing
- Testing officer determined pilot left test before completed, resulting in automatic failure - FAA revoked pilot's certificate to fly
- Pilot appealed and prevailed
- Bylaws provide mandatory indemnification for directors, officers, employees, and agents to extent permitted by DGCL
- Company argues pilot not acting in pilot role during test, not subject to test due to company affiliation, and did not act in good faith when he left the test
- Court held pilot = agent entitled to indemnification - and awarded attorneys' fees (\$140,000)
- Court said if company desired to avoid payment of fees-on-fees, it could have tailored its indemnification provision to exclude such payments

DGCL 145(a); Neb. Rev. Stat. 21-2,118(f); Iowa Code 490.858(6)

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**CAREMARK CLAIM**  
*HUGHES v. XIAOMING HU*

- Suit against Audit Committee, CEO, and three successive CFOs after company restated F/S for 3 years Alleged failure to establish board
- Suit alleges lack of oversight and internal controls and sought damages for costs incurred with the restatements, reputational harm and defense of several suits
- Audit Committee may rely in good faith upon mgt./expert reports but must be some monitoring system, not blind deference to and complete dependence on mgt.
- Court: Reasonable inference that Audit Committee failed to provide meaningful oversight over company's financial statements and financial controls
  - Directors lacked expertise, deferred to management
  - Trappings of oversight - Audit Committee/charter, CFO, internal audit dept., code of ethics, independent auditor
- Audit Committee never met for longer than one hour, typically once/ year; purported to cover multiple agenda items

TAKEAWAY: Don't just focus on minutes - look to qualifications, frequency and length of meetings, reporting lines. Implement effective annual review. Consider educating board and Audit committee - e.g. yearly memo

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**CONFLICTED BOARD**  
*SALLADAY v. LEV*

- Loeb Holdings owned 42% of Intersections - 6 person board
- Board included Loeb's managing director, co-founder of Loeb predecessor who owned 9% of intersections stock and another director owned 5%
- Intersections board formed special committee of 3 independent directors to explore capital raising
- After sp. comm. disbanded, Subscribed makes offer and meets with Intersection reps, including conflicted directors
- Board reconstitutes sp. comm. to negotiate deal
- 3 of 6 directors stood on both sides of merger subjecting it to entire fairness review unless cleansed via procedural safeguards
- Two methods (absent a controlling stockholder) to review business judgment review
  - informed, un-coerced vote of majority of shares held by those free of conflict (Corwin)
  - or
  - Unconflicted board comm. w/full scope to negotiate and enter transaction (Trados #)
- Sp. Comm. did not cleanse merger - not constituted and authorized ab initio
- Prior to sp. comm. conflicted dir. expressed value range that might be acceptable, and expressed interest in rolling over stock

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**MAXIMIZING SHAREHOLDER VALUE**  
*IN RE ESSENDANT, INC. STOCKHOLDER LITIGATION*

- Stock-for-stock merger with Genuine Parts - est. to yield \$13.30-23.90/sh - incl. \$8.35-11.25 in synergies
- After announcement, Sycamore Partners makes cash offer for \$12.80/sh
  - 11% discount to then-trading stock price.
  - GP merger had value range > all-cash offer, but Bd. obtained opinion that cash offer was fair
  - Cash offer = 51% premium to stock price prior to GP merger announcement
- Class action suit alleged breaches of fiduciary duties in failure to obtain highest value
- Court: criticizing price at which board agrees to sell, without more, does not make a bad faith claim
  - Board followed good process: Negotiated with both parties, fairness opinion, other non-price factors
  - Board made business decision that office supply industry would face challenging headwinds that made cash offer more attractive: Antitrust concerns

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**PRIVILEGE RELATED TO TRANSACTION COMMUNICATIONS**  
*DLO ENTERPRISES, INC. V. INNOVATIVE CHEMICAL PRODUCTS GROUP, LLC*

- Buyers acquired substantially all of the assets of Seller.
- In a claim related to defective products sold by Seller, Buyers seek to compel the production of two categories of responsive privileged documents:
  - Communications between the Seller's owners and their acquisition counsel, which were previously produced in in redacted form (the "Category One Documents"); and
  - Documents reflecting communications between the Seller's owners and acquisition counsel, which were left in email accounts purchased by Buyer (the "Category Two Documents").

- Category One Documents:** Buyers contend they purchased the right to waive privilege over Seller's deal negotiations via the Purchase Agreement.
  - Court disagreed; default for asset purchase is that such rights do not transfer unless expressly contemplated.
  - Seller was saved saved by definition of "Excluded Assets", which included "the [Seller's] rights under or pursuant to this Agreement and agreements entered into pursuant to the Agreement."
- Category Two Documents:** Buyers contend Seller's owners waived any privilege when they transferred Seller's email accounts (and continued to use such accounts post-closing).
  - For emails sent following closing, court applied Delaware common law test regarding employee's expectation of privacy over emails.
  - For emails sent prior to closing, court found test may be whether Seller shareholders deliberately and voluntarily relinquished the right to assert their claim of privilege when they transferred the email accounts to Buyers and remanded for further consideration.




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**THIRD PARTY BENEFICIARY; CONTRACT AMBIGUITY**  
*CHS/COMMUNITY HEALTH SYSTEMS, INC. V. STEWARD HEALTH CARE SYSTEM LLC*

- Claim for indemnification under an asset purchase agreement, where Steward Health Care System (Buyer) agreed to assume and pay all future obligations under certain "assumed contracts" and to indemnify CHS (Seller) and its *Affiliates* (as defined in the Purchase Agreement).
- The APA listed a series of "Seller Entities" that would "sell to [Buyer] ... substantially all of [their] assets ... which are ... used in connection with ... [a] "Healthcare Business."
- Following close of the transaction, an *Affiliate* of the Seller incurred \$3M in contractual liabilities under the assumed contracts, and sought to recover those costs from the buyer.

- Agreement contained a "no-third-party-beneficiary clause," which provided that the terms and provisions of the Agreement are intended solely for the benefit of Seller, Buyer, their *Affiliates* and the Agreement shall not confer third-party beneficiary rights upon any other person other than the "Seller Entities" and the "Buyer Entities", which the parties agree are express third-party beneficiaries of the rights of Seller and Buyer, respectively."
- Buyer argued that the no-third-party-beneficiary clause precluded indemnification because the seller *Affiliate* was not itself a "Seller Entity".
- The court determined the language of the clause to be ambiguous, requiring extrinsic evidence of the parties' intent to provide an interpretation, and therefore denied the buyer's motion to dismiss.




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**MATERIAL ADVERSE EFFECT**

*CHANNEL MEDSYSTEMS, INC. V. BOSTON SCIENTIFIC CORPORATION*

- Boston Scientific Corporation (BSC) terminated merger agreement with Channel Medsystems, Inc., an early stage medical device company with one product seeking FDA approval.
- After signing the merger agreement, Channel discovered its VP of Quality had falsified expense reports and other documents as part of a fraudulent scheme by which he stole approximately \$2.4 million from the company.
- The corporate theft complicated, but did not significantly delay, the FDA approval process, which was a closing condition to the merger.
- To be a valid termination, BSC's election required **both** (i) certain representations in the Agreement were inaccurate and (ii) such inaccuracy was or reasonably would be expected to have a "Material Adverse Effect" on Channel.

- Absent a defined threshold in a purchase agreement, Delaware courts have found that an adverse effect is *material* if it "should substantially threaten the overall earnings potential of the target in a durationally significant manner."
- BSC failed to prove an MAE, considering both qualitative and quantitative factors.
- BSC's claim that it would need to start over with quality control process, despite FDA approvals, was found to be unsubstantiated speculation.
  - BSC did not take actions you would expect a buyer with this concern to take.
- With respect to quantitative factors, the court noted that there is an bright line test, but that one treatise suggests a decreases in profits of 40% or more is a benchmark and that an oft-cited Delaware case found an MAE where costs would equate to 21% of equity value.




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**FRAUD; MATERIAL ADVERSE EFFECT  
AGSPRING HOLDCO, LLC V. NGP X US HOLDINGS, LP**

- Private equity fund sold all of its membership interests in a portfolio company to another private equity fund buyer pursuant to a Membership Interest Purchase and Contribution Agreement (the "MIPCA").
- The portfolio company's EBITDA projections were revised downward three times, but buyer was not made aware of the last revision which reflected a 39% reduction in projected EBITDA.
  - Management certified a financial model to buyers prior to closing that did not contain the most up-to-date projections.
- After actual EBITDA was much less than anticipated (\$70k vs. \$3M), two members of the management team resigned and buyer sued the management team and the private equity fund seller for fraud.
  - Fraud claims based on missed projections are typically not sustainable in Delaware; however, there were two written representations in the MIPCA that allowed buyer's claims to survive seller's motion to dismiss:
    - That no event had occurred that might give any other person the right to declare a default or exercise a remedy under any material contract; and
    - That there had not been any Material Adverse Effect at the company.
  - MAE definition contained carve-out related to failure to meet projections, which the seller attempted to use as a shield. However, such carve-out expressly did not include the underlying cause of the missed projections.
  - Company's poor performance which necessitated a reduction of approx. 47% of the company's EBITDA forecast was sufficient to support a reasonable inference of a MAE at the pleadings stage.
  - Additional claims related to aiding and abetting fraud, civil conspiracy, and breach of fiduciary duty.

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**NEBRASKA CASE LAW  
NATHAN V. MCDERMOTT**

- Sale of all outstanding stock of Nebraska Medical Mart II, Inc. ("NMMI").
- Prior to closing, the Buyers' lender raised concerns regarding company financials and recommended precautionary steps, including negotiation of a reduction in the purchase price.
- Buyers did not abide by lender's recommendations.
- Following closing, in mid-October 2015, Buyers emailed documents detailing the financial discrepancies to their attorney.
- In mid-December 2015, Buyers' attorney sent a formal notice of their claims and a demand for indemnification to Sellers.
- The agreement contained an indemnification provision, which - apart from fraud claims - was the exclusive remedy of the parties.
- A party claiming a loss under the agreement was required to send notification "in writing within forty-five (45) days after the [claiming party] becomes aware, or should have reasonably been aware, of any such claim."
- The Supreme Court accepted the U.S. Supreme Court's definition of "aware" in *Guarantee Co. v. Mechanics' & Co.*, which requires a party "to be informed of" or "apprised of" and does not require the party to have a "complete grasp of the facts supporting" a claim for indemnification.
- Because the indemnification request was not sent within the required timeline, all of the Buyers' breach of contract claims were precluded.
- The Court also determined that, the Buyers' breach of contract and fraud claims were derived from the same factual basis and therefore the fraud claims were precluded by the agreement's sole remedy language.

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**Questions?**

J. Scott Searl  
ssearl@bairdholm.com  
402.636.8265

Kevin P. Tracy  
ktracy@bairdholm.com  
402.636.8207

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## Litigation in the Time of COVID-19

Starts at 12:50 p.m.

Krista M. Eckhoff

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## Lawsuits of All Kinds

- Healthcare
- Force Majeure
- Insurance Coverage
- Contract
- Employment
- Paycheck Protection Program
- Premises liability

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## Healthcare

- Failure to provide personal protective equipment (PPE)
- Retaliation re: PPE
- Malpractice/liability
  - Sending patient home
  - Failing to isolate patient

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## Force Majeure

- Clause in a contract that may excuse contractual performance
- Relationship with doctrine of impossibility/impracticability
- Is COVID-19 a triggering event?
  - It depends...

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## Insurance Coverage

- Business coverage for COVID?
- Lawsuits filed to obtain coverage

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## Other Contract Disputes

- Failure to deliver under contract
- Leases, Foreclosures

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## Employment

- Payment for time to go through health check
- Safety for meat processing employees
  - Nebraska
- Termination after contracting
- Retaliation for raising safety concerns

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## Paycheck Protection Program

- Banking / financial institution defendants
- Agent percentage owed

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## Premises Liability

- Cruise ships
- Nursing homes
- Contracting COVID-19 on premises
  - Public
  - Employees

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## Other Litigation

- Deceptive practices
- Securities lawsuits
- Constitutional claims
  - Prisoner litigation
  - Freedom of religion

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## Considerations

- Liability for certain cases will be difficult—causation issue
- Effect of various governmental actions
- Dependent on state law (esp. force majeure)
- Statutes limiting liability re: COVID-19
  - PREP Act
  - State statutes

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## Questions?

Krista M. Eckhoff  
keckhoff@bairdholm.com  
402.636.8287

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## Employment and Labor Law

Starts at 1:25 p.m.

Scott S. Moore

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## Wage and Hour Updates

- Fluctuating Workweek Salaries
- Incentives and Base Rate

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## Privacy Interests

- Privacy Interests
- Video Feeds
- Optical Recognition
- Keyboard Tracking
- Productivity Tracking
- Hubstaff
- Teremind

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## Biometrics and AI

- Biometrics
- Artificial Intelligence and Candidate selection

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## Union Organizing

- National Labor Relations Board
- Coworker.org
- Unit.work
- Getfrank.com

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## Harassment Prevention

- Policy Updates related to EEOC Guidance
- PBS recovery on morals clause

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## Diversity and Inclusion

- Affirmative Action versus Quotas
- Race and Stereotyping Order
- Department of Justice Actions
- Culture and candidate pool based not blame and discrimination

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## Other Issues

- Predictive Scheduling Laws
- Non Competition Agreements
- Salary Hiring Bans
- Email, Confidentiality, Workplace Investigation, Moonlighting, Photos, Video, Audio Recording
- Standards of Conduct

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## What's Coming

- Marijuana and Work
- COVID Liability Act Protection
- Paid Family Leave

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Questions?

Scott S. Moore  
smoore@bairdholm.com  
402.636.8315

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**Hot Topics in Technology & IP**

**Starts at 1:55 p.m.**

Grayson J. Derrick  
Eli A. Rosenberg  
Robert L. Kardell  
AriAnna C. Goldstein

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**The California Privacy Rights Act:  
What You Need to Know**

Grayson J. Derrick

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## CPRA Basics

- How did the CPRA become law?
- What are the effects of the CPRA's passage?
- When does the CPRA become effective?

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## New Criteria For Businesses

What's Changed?	
CCPA	CPRA
(1) Has \$25+ million in annual revenue;	(1) Has \$25+ million in annual revenue;
(2) buys or sells, OR receives or shares for business's commercial purpose, PI of 50,000+ consumers, households or devices; or	(2) buys, sells or shares PI of 100,000+ consumers or households; or
(3) derives at least 50% of annual revenue from selling consumer PI.	(3) derives at least 50% of annual revenue from selling or sharing consumer PI.

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## Sensitive Personal Information

- Government identifiers (such as Social Security numbers and driver's licenses)
- Financial account and login information (such as credit or debit card number together with login credentials)
- Precise geolocation
- Race, ethnicity, religious or philosophical beliefs, or union membership
- Content of nonpublic communications (mail, email and text messages)
- Genetic data; biometric or health information
- Sex life or sexual orientation information

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## Sensitive Personal Information

What's Changed?	
CCPA	CPRA
Implicitly includes sensitive PI in broader regulated dataset, but does not impose separate requirements and prohibitions for sensitive PI (other than increased verification requirements).	Imposes separate requirements and restrictions on sensitive PI: <ul style="list-style-type: none"> <li>• Disclosure requirements</li> <li>• Opt-out requirements for use and disclosure</li> <li>• Opt-in consent standard for use and disclosure</li> <li>• Purpose limitation requirements</li> </ul>

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## New and Modified Rights

What's Changed?	
CCPA	CPRA
<ul style="list-style-type: none"> <li>• Right to Know</li> <li>• Right to Delete</li> <li>• Right to Opt Out of Third Party Sales</li> <li>• Right to Nondiscrimination</li> </ul>	<ul style="list-style-type: none"> <li>• Right to Know</li> <li>• Right to Delete</li> <li>• Right to Opt Out of Third Party Sales and Sharing</li> <li>• Right to Limit Use and Disclosure of Sensitive PI</li> <li>• Right to Correction</li> <li>• Right to Access Information About Automated Decision Making</li> <li>• Right to Opt Out of Automated Decision Making Technology</li> <li>• Right to Restrict Sensitive PI</li> <li>• Audit Obligations</li> <li>• Right to Nondiscrimination</li> </ul>

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## New Enforcement Agency

- Establishes the California Privacy Protection Agency (CPPA)
- Grants the agency investigative, enforcement and rulemaking powers
- Removes the 30-day cure period
- Triples the maximum penalties to \$7,500 for violations concerning minors

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## Exemptions

- The employee and business-to-business (B2B) exemptions are extended through January 1, 2023
- Allows two years for the California Legislature to address employee and B2B privacy questions in a separate bill

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## Questions?

Gray Derrick  
gderrick@bairdholm.com  
402.636.8229

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## Paying Workers in the Gig Economy

Eli A. Rosenberg

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## Gig Workers and How They're Paid

- Many Fintech platforms rely on third party contractors to provide their services
- Example: courier services like door dash that require delivery drivers
- Taxi services like Uber and Lyft that require drivers
- When people refer to the "gig economy" or "gig workers" they mean these types of contractors

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## Gig Workers and How They're Paid

- Fintech's commonly pay gig workers via prepaid debit cards (if they don't use another form of direct deposit)
- As with other aspects of the relationship between the gig worker and the Fintech, the legal issues around how they are paid turn on whether the gig worker is classified as an "independent contractor" or as an "employee"
- Matters for purposes of paying gig workers because, if they are employees, the fintech (and the fintech's bank) must ensure that the payment method offered to the workers –
  - Complies with federal consumer protection laws (Regulation E, EFTA)
  - Complies with state wage and hour laws, including those laws applicable to "Payroll cards"
- Fintech's like Uber and Lyft take a firm position that workers are independent contractors and not employees. Among other things, do not want to have to comply with state wage and hour laws in the method of payment (i.e., not mailing a check)
- But – there is a strong push from states, advocacy groups, and the workers themselves to characterize them as employees, qualifying them for additional benefits and protections under the law

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## Gig Workers Re-Characterized?

Two recent actions in California underscore the current friction and maybe predict future action in other states

- California Court of Appeals orders Uber and Lyft to treat workers as employees under the current law (Oct. 22, 2020)
- Prop 22 ballot initiative –passes in California two weeks later and changes the law to exempt gig workers from the definition of "employee"
- Prop 22 was supported and funded by Uber and Lyft. The companies have already indicated they want similar initiatives in other states to codify the "contractor" status of workers
- Very likely we will see this play out in other jurisdictions soon

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## Questions?

Eli A. Rosenberg  
erosenberg@bairdholm.com  
402.636.8295

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## OFAC Guidance on Paying Ransoms

Robert L. Kardell  
Ret. FBI, JD, MBA, CPA, CISSP, CFE, CFF, GSEC, A+, Net+

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## OFAC Guidance – Ransomware Payments

- OFAC
  - Division of US Treasury
  - Enforces economic and trade sanctions
  - Specially Designated Nationals List
  - Embargoed Countries
- Who does OFAC apply to?
  - All U.S. persons, wherever they are located. All U.S. incorporated entities and their foreign branches.
- What happens if you violate OFAC regulations?
  - Criminal and civil penalties apply
  - Up to 20 years in prison per violation
  - Seizure / forfeiture of goods involved

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## OFAC – Ransomware Guidance

- Issued on October 1, 2020
- Directed at banks and any other companies involved in addressing cyberattacks: insurance firms, digital forensics, incidence response companies
- Broadly states that facilitating ransomware payments on behalf of a victim to anyone on the SDN list or to an embargoed country violates OFAC regulations
- OFAC expects security programs to account for the risk that a ransomware attack may require engaging in transactions with an OFAC sanctions nexus
- Take-aways: if a ransomware attack may involve OFAC regulations –
  - Everyone involved in a payment to the attacker (hospital, bank, insurance carrier etc.) faces a risk of violating the law.
  - Likely, a victim's financial institution would refuse to conduct a transaction on behalf of a victim to pay the attacker (e.g., there's no way to "pay the ransom")
  - Attack may no longer be covered by insurance policy

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## Questions?

Robert L. Kardell  
bkardell@bairdholm.com  
402.636.8313

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AriAnna C. Goldstein

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## The Mechanics

- Who?
  - USPTO conducts the audit
- What?
  - Verification of proper trademark use in connection with registered goods and services
- Where?
  - All electronic
- When?
  - Any time after a Section 8 or Section 71 declaration of use
- Why?
  - Use based trademark register

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## The Process

- Audit initiation via Office Action from post registration examiner
  - Registrant Response
- Second Office Action or Notice of Acceptance
- Consequences

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## Audit Preparation

- Best defense is a good offense
  - Careful attention to Section 8 declarations of use
  - Proper documentation
  - Open communication with product teams

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## Questions?

AriAnna C. Goldstein  
agoldstein@bairdholm.com  
402.636.8236

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## Top Wage & Hour Mistakes

Learn From Other Employers' Errors

**Starts at 2:45 p.m.**

Allison D. Balus



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## Why Is FLSA Compliance So Difficult?

- The law is old and was created based on a very different economy
- Often the DOL's interpretation of the law changes with each Administration
- Many compliance questions are fact-specific



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## 10 Most Common and Costly Mistakes

1. Ignoring an employee's actual duties
2. Not understanding the salary basis test
3. Independent contractor misclassification
4. Miscalculation of regular rate
5. Automatic deductions
6. Poor timekeeping and pay policies
7. Poor timekeeping and pay policies
8. Poor timekeeping and pay policies
9. Poor timekeeping and pay policies
10. Poor timekeeping and pay policies

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## "White Collar" Exemptions

- To qualify for the Executive, Administrative, and Professional exemptions, *most* employees must meet all 3 tests:
  - Salary basis test
  - Salary threshold test
  - Duties test



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## Duties Test

- What is their "primary duty"
  - (No, really...)
- Beware job changes!



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## Salary Basis Test

- Must receive a predetermined amount on a weekly basis
- No reductions because of quality/quantity

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## Improper Deductions

- For partial-day absences  
- For loss or damage to employer's property 

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## Improper Deductions

- For absence due to inclement weather or occasioned by the employer 
- When employee is ready, willing, and able to work but no work is available 

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## Misclassifying Employees as Independent Contractors

- Treating large groups of workers as independent contractors is always a risk.



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## Independent Contractors: Common Misconceptions

- A contract with a worker that says that he is an independent contractor is enough
- Individuals who work flexible hours or do not look like traditional employees are automatically independent contractors
- Not paying a worker benefits is dispositive



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## Misclassification Warning Signs

- The worker is paid by the hour.
- The employer provides vacation or sick leave or some other type of PTO to the worker.
- The employer reimburses the worker for his or her business expenses.



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## Misclassification Warning Signs

- The type of work is typically paid by the employer on a W-2 basis.
- The employer has required a noncompete agreement or prohibits the worker from working for other entities.
- The worker has consistently worked for the employer for a number of years.



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## Calculation of Overtime



- "Unless specifically exempted, employees covered by the Act must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rates of pay."

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## "Regular Rate of Pay" Includes...

- Non-discretionary bonuses
  - Designed to incentivize/reward employees
  - Apply to workweek(s) it which it was earned



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## "Regular Rate of Pay" Includes...

- Commissions
  - Don't assume "industry standards" are lawful
  - Apply to workweek(s) it which it was earned



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## Proper Timekeeping and Pay Practices

- They are essential
- An ounce of prevention...
- Framework for any defense



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## Timekeeping/Pay Best Practices

- Train employees (not just supervisors) on what is compensable and how they are paid
- Have reporting mechanisms in place for employees to report off-the-clock work

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### Timekeeping/Pay Best Practices

- Publicize complaint mechanisms for when employees believe they have been underpaid
- Require employees to sign off on each week's time record and pay record



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### Timekeeping/Pay Best Practices

- Discipline employees for violating pay and timekeeping policies
- Discipline supervisors for not paying employees correctly or encouraging off-the-clock work



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### Timekeeping/Pay Best Practices

- Communicate in writing that salaries are intended to pay for all hours worked and the limited circumstances under which deductions may be made
- Regularly monitor/audit to ensure accuracy



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## Questions?

Allison D. Balus  
abalus@bairdholm.com  
402.636.8254

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## Tax Considerations for Remote Working Arrangements

**Starts at 3:15 p.m.**

Hannah Fischer Frey  
Jesse D. Sitz

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## Presenters



Hannah Fischer Frey

- Areas of Practice:
- Business & Corporate Transactions
  - Nonprofit & Tax Exempt Organizations
  - Taxation



Jesse D. Sitz

- Areas of Practice:
- Agriculture & Agribusiness Finance
  - Business & Corporate Transactions
  - Estate Planning, Trusts & Estates
  - Nonprofit & Tax-Exempt Organizations
  - Taxation

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## Introduction

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## Multistate Taxation

- Nexus
- Double Taxation
- Challenges
  - Due Process Clause
  - Commerce Clause

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## Remote Workers

- Home office in one state, workers remote from another state
- Workers that travel to multiple states to perform services
- Services performed completely online (e.g., remote teaching)

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## COVID Acceleration

- Work from home (WFH) increased
- Expected to continue post-COVID

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## Topic Overview

- Individual Income Tax Withholding
- Business Income Tax
- Related Issues
  - Registering To Do Business
  - Workers Compensation Insurance
  - Unemployment Insurance

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## Individual Income Tax

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## Imposition of Tax

- Nebraska taxes the entire income of every resident, irrespective of source
- Many states have a similar income tax structure

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## Double Taxation

- For example, California taxes the wages paid to a nonresident individual working in California

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## Withholding

- Employee should consult their accountant as to payment of tax
- In some situations, employers may be technically required to withhold in two states
- Practical approaches

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## COVID Relief

- 17 states, including Nebraska, have temporary relief for employees that do not normally work in the state but are doing so due to COVID-19
- Other states have provided penalty relief or delayed due dates

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## Business Income Tax

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## Multistate Operations

- Selling products or services in multiple states
- "engaging" or "doing business" or "deriving income from sources" in the state

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## Constitutional Challenge

- Commerce Clause
  - Substantial Nexus
- Due Process Clause
  - Minimum Contacts
- P.L. 86-272
- Physical presence

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## Apportionment

- Single-sales factor
- Three-factor, sales, payroll, and property
- Weighted factor formulas
- Market based
- All or nothing

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## Relief

- State-enacted nexus thresholds based on sales or number of transactions
- Work directly with State to agree on an apportionment
- COVID-19 has caused some states to provide nexus waivers for teleworking employees

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## Related Issues

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## Registering to Do Business

- Register with Secretary of State or similar agency
- Relief in some states where Company has limited employees or sales in state

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## Workers Compensation

- State-by-state determination and definition
- Some states have thresholds, such as a number of employees before the Company is covered

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## Unemployment Insurance

- Department of Labor has issued guidance to determine where services are performed
- Depending on State, part-time workers may be treated differently
- COVID-19 relief

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## Practical Considerations

- As a Company expands across state lines, seek analysis of considerations and obligations
- Be cognizant of state thresholds
- Work closely with HR or payroll provider

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## Questions?

Jesse Sitz  
jsitz@bairdholm.com  
402.636.8250

Hannah Fischer Frey  
hfrey@bairdholm.com  
402.636.8345

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**Legal Ethics 2020 –  
Back to Basics**  
Starts at 3:50 p.m.

Jonathan R. Breuning

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Nebraska Rules of Professional Conduct

Cited as Neb. Ct. R. of Prof. Cond.  
§3-501.0 to 3-508.5

Topic 1: Professionalism

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**Preamble: A lawyer's responsibilities.**

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs.

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**§ 3-503.1. Meritorious claims and contentions.**

COMMENT [1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure.

**§ 3-503.4. Fairness to opposing party and counsel.**

A lawyer shall not:

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

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### Dumb Lawyer Stories

**Facebook Follies**

"Senior Counsel" acting like a sophomore: "you're fired"

Forget you're a lawyer, not a pundit: "you're suspended"

**At Least Hire a Driver**

Chronic naked driving: indefinite suspension

Chronic drunk driving: 180 day suspension

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### Overly Aggressive Litigation

**LaSalle v. Vogel, Cal Ct. App. 2019**

- \$1 million default judgment in legal malpractice case reversed
- Court found that the lawyer moving for judgment was far too quick to jump on the opportunity
- "[L]awyers who know how to think but have not learned how to behave are a menace and a liability . . . ."

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## Overly Aggressive Litigation

SiteLock LLC v. GoDaddy.com LLC, USDC D. Arizona 10-19-20

- 32 page Order in a discovery dispute demonstrated Court's frustration with "the parties' discovery-related intransigence"
- Court chastised both sides for "unacceptable discovery brinksmanship" and declared that "their bickering and game-playing must stop"

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## Who's Your Client?

### 3-501.13. Organization as client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

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## Who's Your Client?

### Jarvis v. Jarvis, Cal. Ct. App. 2019

- Counsel hired to represent partnership disqualified because the partner who hired counsel did not have authority to do so

### Christian Baker v. Wilmer Cutler, Mass. Ct. App. 2017

- Lawsuit by minority members of LLC against company's lawyers may proceed – alleges that company's lawyers neglected duties to minority members

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## Back to More Basics

State of Nebraska ex. Rel. Counsel for Discipline v. Chvala  
304 Neb. 511, 11-22-19

### The Players

- “Experienced, well-respected lawyer” licensed for 35 years
- Two brothers and their business entities were long-time clients for various corporate, agricultural and real estate matters
- Real estate lease-purchase agreement entered into between (1) lawyer and her husband and (2) clients
- Subsequent dispute over eventual purchase of land, resulting in litigation and ethics charges

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### The Discipline

- Disbarred “despite and otherwise unblemished legal career”
- May not reapply for reinstatement for at least 5 years, and then only after successfully completing the Multistate Professional Responsibility Examination

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### The Lessons

- Supervising staff – Rule 3-505.3
- Who’s your client
- Disclaiming responsibility
- Doing business with clients – Rule 3-501.8(a)

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- Using client information – Rule 3-501.8(b)
- Conflicts – Rule 3-501.7
- Dishonesty and deceit – Rule 3-508.4
- Communicating with clients – Rule 3-501.4

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## Settlement Agreement Tricks and Traps

**“Approved as to Form and Content”**

Monster Energy Company v. Schechter, Cal Sup. Ct. 2019

RSUI Indemnity Company v. Bacon, 810 N.W. 2d 666 (Neb. 2011)

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## Rules Affecting Settlement Agreements

**3-505.6. Restrictions on right to practice. A lawyer shall not participate in offering or making:**

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

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ABA Formal Ethics Opinion 494  
*Conflicts Arising Out of a Lawyer's Personal Relationship With Opposing Counsel*

**Model Rule 1.7(a)(2)**

A concurrent conflict of interest exists if: (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

- Intimate Relationships
- Friendships
- Acquaintances

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Questions?

Jonathan R. Breuning  
jbreuning@bairdholm.com  
402.636.8203

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Thank You!

Thank you for attending Baird Holm's In-House Counsel & Ethics CLE Webinar. Look for an email from us tomorrow with the event survey and continuing education information.

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