

EXPLORING THE TOUGHEST ISSUES: REPORTS OF ROUNDTABLE DISCUSSIONS



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Exploring the Toughest Issues Roundtable Discussions

ALFA International's 2013 Labor & Employment Seminar

*A Game of Thrones: Competing Forces Align as
You Prepare for the next Wave of Labor & Employment Issues*

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MANAGING LEAVE AND ATTENDANCE ISSUES: A CASE STUDY

One of most vexing problems all employers face is making sense out of the overlapping set of duties and rights that arise when employees become sick or injured. As most workforces have downsized in recent years, every employee counts, and the importance of developing a comprehensive set of policies and procedures that address attendance and leave issues has never been higher. Left to their own devices, individual managers who are pressed to meet deadlines and budgets can often create liability for a company by failing to understand the intricacies of the laws that govern this area, or by retaliating against an employee who is sick and injured and is viewed as a “malingerer.”

Every company will have sick and/or injured workers who will need to miss time from work. Not only are there three different laws – the FMLA, the ADA and workers’ compensation – at issue, you also face three different enforcement agencies – the Department of Labor, the EEOC and state agencies on workers’ compensation claims. Walking through this thicket of complementary, but at times contradictory, regulations can be maddening and is fraught with pitfalls.

To facilitate a discussion of this topic, a hypothetical situation was posed which evolves over time. The reality of these “cases” is that they are not “one and done.” Instead, most medical problems play out over a period of time, often weeks or months, but they can also reoccur a year or two later as in the case of chronic conditions. We could have picked any number of medical problems, but we selected the most frequently occurring physical problem – “the bad back” – to demonstrate and analyze how these issues arise and how employers should respond.

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CASE STUDY: SAM’S ACHING BACK – PART ONE

You operate a national manufacturer, the Acme Company, with a small facility in the Midwest. This company has 4,000 employees, but this facility only has 80 employees. The Company has a no-fault attendance policy that mandates termination after 15 days of absence.

Sam has been working full-time for 2 years at the plant where he packs goods for shipment to customers. He has missed 14 days of work over the past year, but never more than 1-2 days in a row. Under the Company’s attendance policy, his next absence will result in termination.

Sam works second shift and calls his supervisor on Friday morning to tell him that he cannot come to work that day, as he is having back pain and has visited a doctor who told him to stay in bed all weekend and see him for a follow-up on Monday.

1. WHAT DO YOU DO?

FMLA ANALYSIS:

- Since Acme has more than 50 employees, it is covered under the FMLA.
- Since Sam has been working more than 12 months and more than 1250 hours, he is a covered employee.
- Since Sam will see his doctor two times and be unable to work for more than 3 consecutive calendar days, this is a “serious health condition” under the FMLA.
- Sam does not need to specifically state he needs FMLA in order to invoke the statute.
- Sam cannot be terminated under the no-fault attendance policy since his FMLA leave will protect him and cannot be counted against him.
- Acme should provide Sam with the FMLA paperwork.

ADA ANALYSIS:

- Is it a disability? Depending upon the extent of the injury, it may well qualify as a physical impairment that substantially limits a major life activity. The requirements for what constitute a disability have been significantly loosened since the EEOC adopted new regulations under ADAAA which were effective May 24, 2011.

WORKERS’ COMPENSATION ANALYSIS:

- Acme does not yet know whether the injury occurred on the job.

CASE STUDY: PART TWO

Sam’s back injury turns out to be serious, as he is severely limited in standing and walking.

Sam believes he injured his back at work.

After 9 weeks off he returns to work and wants his old job back.

2. WHAT IS YOUR RESPONSE?

FMLA ANALYSIS:

- Sam is entitled to return to his original position or to an equivalent position (with equivalent pay, benefits and other terms).

ADA ANALYSIS:

- Given the severity of his condition, Sam is likely disabled under the ADA.
- If Sam can perform the essential functions of his job, with or without an accommodation, he is a qualified individual with a disability.
- Sam is entitled to a reasonable accommodation, if requested.

WORKERS' COMPENSATION ANALYSIS:

- Since Sam hurt himself at work, he likely is eligible for workers' compensation benefits.
- FMLA and WC leave can run simultaneously.

CASE STUDY: PART THREE

Upon his return to work after 9 weeks off, Sam discovers that he is still not able to perform all aspects of the job of a packer. You offer him a light duty job in the office, but he declines and goes home for another 3 weeks.

3. CAN HE DO THAT?

FMLA ANALYSIS:

- Yes, under FMLA, Sam does not have to accept a light duty job, as he is entitled to his full 12 weeks off under the FMLA.

ADA ANALYSIS:

- Both a leave of absence and a light duty assignment may qualify as a reasonable accommodation under the ADA.

WORKERS' COMPENSATION ANALYSIS:

- Although Sam is entitled to take another 3 weeks off under the FMLA, he may not be eligible for continued WC benefits after refusing a light duty job that is within his physical restrictions.

CASE STUDY: PART FOUR

When Sam finally returns to work after being off for a total of 12 weeks, his back is still a problem, but he wants to return to his prior job. He says that he can do the job if given a tall chair on which to sit, is allowed to take a 5 minute walk every hour, and can come to work 30 minutes late every Friday so that he can see his doctor.

4. IS SAM ENTITLED TO THESE REQUESTS?

FMLA ANALYSIS:

- Since Sam has used his FMLA leave for the year and will be entitled to be returned to his prior job or an equivalent job if (as discussed below in Question 5) he is released to return to work without material restrictions.

ADA ANALYSIS:

- An ad hoc analysis must be performed to determine whether Sam can perform the essential functions of his packer job with the accommodations he has requested. If providing the

accommodations will allow Sam to perform his job, then Acme should provide them to Sam, unless it can demonstrate that they pose either an undue hardship to Acme or an imminent risk of harm to Sam's co-workers.

- Acme should also make an assessment of other possible accommodations, including a job transfer to a vacant position, and have an interactive discussion with Sam about the full range of accommodations that are available.
- Ultimately, it is Acme's decision as to which accommodation to provide that is best suited to the circumstances.

WORKERS' COMPENSATION ANALYSIS:

- If Sam returns to work with the accommodations requested or other accommodations, then he will most likely no longer be eligible for WC benefits.

CASE STUDY: PART FIVE

You want Sam to provide medical certification stating that he is ready to return to work and that he needs the accommodations set forth above.

5. WHAT MEDICAL CERTIFICATION ARE YOU ENTITLED TO RECEIVE?

FMLA ANALYSIS:

- The FMLA allows an employer to request that the original certifying physician certify that the individual is ready to return to work. The certification is limited to the particular health condition that caused the need for the leave.
- Acme may provide the physician with a job description to use in determining whether Sam can return to work and perform the essential functions of his job.
- Acme can seek clarification and/or authentication of the certification in the same manner as doing so for the original certification (only after the employee has had a chance to cure any deficiencies in the certification and the contact should be done by a health care provider, human resources professional, leave administrator or management official and not the employee's direct supervisor).
- No second or third opinions are allowed.
- May not be done for leave on an intermittent or reduced leave schedule (but can request periodic recertifications).

ADA ANALYSIS:

- The ADA permits job-related medical inquiries that are consistent with business necessity, including requesting medical information as part of the "interactive dialogue" that takes place in discussing a potential accommodation.

WORKERS' COMPENSATION ANALYSIS:

- An IME is typically allowed in most states, as well as a requirement that employees who suffer a work place injury sign a release for all relevant medical records.

CASE STUDY: PART SIX

Sam returns to work and does not have any more absences, but shortly after one year his back issues flare-up. He comes to you and says that the flare-ups usually incapacitate him for 3-4 hours and are occurring 2-3 times a week, and that on certain days he may need to come to work late or leave early because of his back.

6. WHAT DO YOU DO NOW?

FMLA ANALYSIS:

- It has been more than 12 months, so Sam will be eligible for 12 weeks or 480 hours of FMLA time-off and should be given FMLA paperwork.
- He is allowed to take the time-off on an intermittent basis if required by his serious health condition.
- Acme should request a physician's certification to verify Sam's condition.
- Acme cannot require that Sam transfer to another position since the use of his intermittent leave is not foreseeable.
- Acme cannot request recertification until the original certification period expires or 6 months have passed, whichever is shorter, unless there is a request for an extension of the leave, the circumstances changes (e.g., duration or frequency of the absences), or fraud is suspected.
- Acme can request a fitness-for-duty certificate once every 30 days if reasonable safety issues exist.

ADA ANALYSIS:

- After Sam has exhausted his FMLA time, Acme may have a duty to accommodate and will need to conduct an ad hoc analysis and engage an interactive dialogue with Sam.
- The ADA permits job-related medical inquiries that are consistent with business necessity, including requesting medical information as part of the interactive dialogue that takes place in discussing a potential accommodation.

WORKERS' COMPENSATION ANALYSIS:

- Sam may be eligible for WC benefits for his time-off.

INTERNAL INVESTIGATIONS: THRESHOLD ISSUES AND BEST PRACTICES

Virtually every company in the next 12 months will be faced with a complaint that requires a response. The larger the organization, the more likely you will be faced with the need to conduct an internal investigation. For publicly traded companies, the need to have a well-developed process by which complaints can be made and properly responded to is essential.

This roundtable discussion group focuses on five key threshold issues which must be addressed when receiving a complaint. During our discussions, a number of common points and suggestions were identified which are outlined below. We hope you find this report of our discussions to be useful in evaluating your company's existing policies and procedures in this area.

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DISCUSSION TOPICS

I. When should an investigation be conducted?

- Investigation should be done any time the law requires it (harassment) or any time there is possible financial irregularity or alleged criminal activity.
- Many companies have hotlines to allow employees to register complaints. Most agree that all complaints reported to a hotline should be investigated.
- Investigate areas where there is possible adverse publicity.
- Nature and scope of investigation will vary based on nature of alleged wrongdoing and the identity of alleged perpetrator.
- All investigations must be conducted ASAP. If an investigation is to occur, do it as soon as possible and do not allow the investigation to be unreasonably delayed. Time is frequently of the essence.

II. Who should conduct the investigation?

- The person chosen to do the investigation depends upon the nature of the investigation and what is being investigated.
- Most participants agree that, if company size and budget permit, it is best to have full time trained investigators, rather than frontline managers selected ad hoc to investigate problems.
- Some companies use certified investigators, recognizing the importance of skill, experience and qualifications of the investigator function.
- Remember that the investigator will be the key witness if the matter goes to trial.

- Some companies use outside counsel at all for investigations while others do not. Those who do not tend to use outside attorneys to investigate allegations of executive or high level misconduct only.
- Several participants commented that it is important to use the same investigation protocol (process and procedures) when investigating similar types of allegations.
- Be careful to avoid appointing an investigator who might have a stake in the outcome of the investigation. While the person who is doing the investigation should ideally be properly trained, they do not need to be “Perry Mason.”
- There was a consensus that whoever conducts the investigation must be trained and have the requisite skills to conduct the investigation, and the investigation should be handled consistent with past practices absent unique circumstances.

III. What preliminary steps should be completed before commencing interviews?

- Though not a consensus, some seek to secure a written, signed statement from the alleged victim before the investigation begins.
- A universal sentiment was that preliminary matters (gathering related documents, etc.) should be handled ASAP so that interviews could commence quickly.
- It is wise to have a checklist in place before an investigation starts.
- It is important to identify and collect key documents to review prior to interviews. Key documents may include:
 - Records of any prior investigations or complaints against the alleged harasser/perpetrator;
 - Records of prior complaints by the complainant;
 - Personnel files of individuals involved; and
 - Company policies and procedures.
- Setting a report-back deadline or timeline before interviews begin in an effort to keep the investigation moving forward expeditiously may be a wise move.
- The inclination is to be thorough, but “keep it simple stupid.” In many situations, there will be a temptation to chase rabbits to dead-ends, but a trained investigator will bring judgment to the process and keep it on track.

IV. What are the best practices to follow during an interview of the complaining party?

- It is important to express empathy.
- The investigator must make the employee feel like he/she has been heard, even if he/she goes away dissatisfied from the process or the results.
- It is a good idea to ask the complaining party what he/she thinks should be done, or would like to have happened.
- Confirm the exact nature and extent of the facts and issues about which the employee is complaining.
- Confirm that the employee does not have any additional issues other than those identified.
- Leave the door open for communication. Communication is never bad. Make sure the communication is done both during and after the investigation.
- Follow-up with the complaining party can be crucial, particularly to help diffuse potential retaliation issues. Consider “babysitting” the potential whistleblower.
- One attendee has had a lot of success using an international Ombudsman Program which includes unconditional confidentiality.

V. Confidentiality and Privacy: Can the investigator make these promises?

- There was a universal consensus that the NLRB's *Banner Health* decision is difficult to follow.
- Most attendees want to ask the witnesses not to discuss the investigation, but all recognize the hazards of requiring confidentiality in light of *Banner Health*.
- It is important to make it clear to everyone interviewed that the investigator is working for the employer. If the investigator is an attorney, it must be made clear that the attorney works only for the employer, and the employer holds any privilege.
- Investigator should promise that there will be no retaliation. Be right up front with the "no retaliation" speech, to every witness.

VI. Other comments and suggestions obtained from the discussions:

- It is important to strike the right balance. The risk with untrained or inexperienced investigators is that s/he may unintentionally and unnecessarily escalate the situation or make the investigation too broad.
- It is important to stress the idea of ownership to employees. Make employees owners of the obligation to report.
- Many attendees thought it was a huge benefit for the investigator to stay in touch with the complaining party, even to the point of providing a cell phone number. All agree that follow-up with the complaining party is crucial.
- Some companies include an analysis of social media in their investigations.
- Investigate/interview in an open room. Avoid any process that could be perceived as intimidating.
- Proper investigations can actually improve company morale.
- All investigations should end with a final recommendation, privilege communications excluded, reported to all that need to know the result. To be effective, the recommendation must be implemented, barring some extraordinary result.
- Consider having the complainant sign a form that they were satisfied with the investigation and what was done.
- Validate the process with the complaining party.

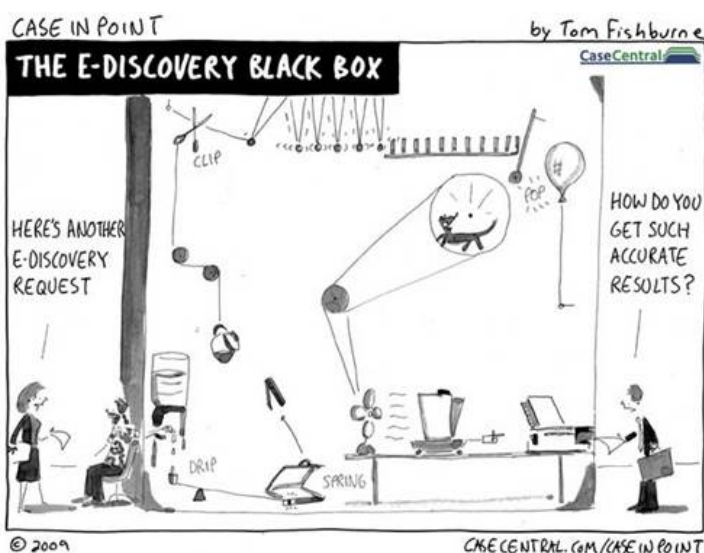
E-DISCOVERY: TOP TEN BEST PRACTICES

Virtually every employment case today will involve electronic discovery, even before a lawsuit is filed in most cases. Electronic discovery (E-discovery) is the process of identifying, preserving, collecting, processing, reviewing and producing electronically stored information (ESI). Each of these steps—identification, preservation, collection, processing, review and production—creates unique challenges. The following report highlights the top ten best practices identified during our discussion. A key component is always to strike the necessary balance between cost containment on one hand while meeting the legal requirements established by court rules and case law which continue to evolve.

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TOP TEN BEST PRACTICES

1. **Identifying relevant ESI requires more than asking to make sure you have everything.** Employees are busy and have priorities other than ESI preservation and processing. Even when directly asked, employees often ignore or do an incomplete job. To the extent feasible, make sure a concerted effort is made to ask your employees, but then follow up in an appropriate manner to ensure compliance. This may involve independently capturing the ESI at a central source, such as the server, and not relying solely on the employees to search and provide. If you follow this practice, the litigation hold notice should advise that the ESI will be captured.

2. **Speaking of litigation holds, DO them--early and every time.** The litigation hold is still one of the most essential elements of a company's overall program. Send out the hold early. The hold should include information regarding how to preserve and collect the ESI. If one slips by and no hold has been in place before litigation, send the hold when litigation commences. Have a policy/procedure in place to deal with departing employees that were under a litigation hold.

3. **Help outside counsel to use the Meet and Confer conversations to narrow the ESI discovery.** Outside counsel and the employer should be in contact early on in the case to identify potential ESI pitfalls. With this knowledge, early conversations with plaintiff's counsel may be effective to narrow the scope of ESI and potentially avoid such pitfalls. Early discovery scope agreements may save expense and hassle.

4. **Consider an e-discovery liaison.** The Seventh Circuit E-Discovery Pilot Program has utilized e-discovery liaisons to assist with discovery disputes. Consider designating a liaison for the employer to consistently address ESI discovery. Similarly, consider agreeing on a neutral third-party liaison, who can operate like a special master, to mediate and resolve discovery disputes.

5. **Continue to re-define what constitutes ESI.** We understand that email communications must be retained and produced. We may even understand that "metadata" is present and may be subject to retention and production.

However, continue to consider and institute policies that cover other ESI and new technologies. Develop a policy to address voice mails, texts, instant messaging, internet search histories (cookies). Consider policies requiring employees to delete voice mails, texts, and instant messages.

Develop a policy to address BYOD (Bring your own device) practice. Employees who access the company system on their own device should be advised that the employer retains the right to access their device.

6. **Consider a vendor and plan ahead.** Many cases do not require or justify vendors. If you chose to use a vendor, however, plan ahead and shop around for E-discovery vendors. It is preferable to line up a skilled vendor early. The general consensus was not to accept the first quote. Vendors negotiate.

7. **Get the more tech-savvy involved.** Technology is changing rapidly. Involve the employees who can better understand the available ESI and how to capture it all. Employers (and law firms) should identify employees (and associates) who understand the technology and involve them on the team.

8. **Specifically identify the cost of requests and insist that the cost be borne by the plaintiff.** The consensus was that Courts seem more willing to place the burden back on the requesting party. Support such requests with specific information about the cost and burden. It is important to educate the court on the true cost and burden of the request with affidavits and actual data/numbers. Simply stating that the request is costly and burdensome is not enough.

9. **Do not overlook Rule 26(b)(2)(C)'s proportionality argument.** (The burden or expense outweighs the likely benefit considering the case and issues.) Make the objection and file the motion. Remind the court of FRCP 1, which requires that the rules be applied to “secure the just, speedy and inexpensive determination of every action and proceeding.”

10. **Pick up the ESI-sword against plaintiffs.** ESI requests to plaintiff (and investigation of plaintiff's public internet and social media presence) can be effective discovery tools.

Additional resources: Seventh Circuit Electronic Discovery Pilot Program (www.discoverypilot.com); The Sedona Conference (www.thesedonaconference.org); read the Orders of U.S. District Judge Shira Scheindlin (U.S. Dist. Ct. for S.D. of NY); and your trusted ALFA attorney.

**PROTECTING COMPANY INFORMATION AND ASSETS:
BEST PRACTICES FOR NON-COMPETE AND NON-DISCLOSURE AGREEMENTS**

After introducing a factual scenario based on a hypothetical company engaged in design, manufacturing, sale and distribution of HVAC products throughout several states, the moderators queried participants on how to best protect company information and assets, particularly IP, sales, goodwill, and customer information. The conversation focused on non-disclosure agreements with vendors and suppliers and on non-compete agreements with departing employees.

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Non-Disclosure Agreements - Protecting Company Information from Vendors and Suppliers

Every company has intellectual property which gives it a competitive advantage in its respective market, whether that information is technical product information, formulas, recipes, customer identity and supply needs, or customer preferences. That information often must be shared with outside vendors and suppliers who contribute to the development and sale of your final product or service. Those vendors and suppliers may also work with your competitors. How do you keep them from using your company's information for their own advantage in marketing to another company? Our ALFA clients had some great suggestions for formalizing non-disclosure terms in agreements with your outside vendors and suppliers.

Negotiating an enforceable non-disclosure clause often depends on state law. Duration and permissible scope of the agreement specifically can vary by jurisdiction. One ALFA client therefore opened with the suggestion to involve outside counsel in your negotiations.

A key provision in a non-disclosure agreement is the data which falls within the scope of the protected "confidential" information. One general counsel has had large vendors request that the company label as confidential any information the company deems confidential. He has consistently rejected these requests, because multiple levels of company personnel who may not know the labeling requirement are involved in discussions with the vendors and could potentially waive any claim of confidentiality by not complying with the labeling requirement. His suggestion, therefore, was to designate *all* documents and data provided by the company to the vendors as confidential and not subject to secondary disclosure absent explicit authorization from designated personnel. A request for reciprocal confidentiality should be scrutinized for potential for breach: if the data being supplied to you by the vendor is not actually confidential, no harm becomes of a mutual agreement.

The duration of a non-disclosure agreement is also a point for negotiation. One company includes a five year tail for all information except trade secrets, which are protected forever.

Another major issue is the enforceability of a confidentiality clause, particularly the ability to prove a breach. Most clients agree it is often very difficult to prove a breach without a smoking gun or an admission. The nearly-universal hope, then, is that the mere threat of suit which comes with inclusion of a strict non-disclosure clause in your agreements with vendors and suppliers is enough of a

deterrent. In the event of a suspected breach, filing suit can be enough to prompt a settlement and deter similar offenses by other vendors and suppliers.

Companies operating in other countries also have to give special consideration to definitions and concepts which impact the vendor agreements, such as whether something is “publicly known.” For example, in many European countries, all information about employees, including their names, is confidential. Your vendor agreements have to carve out exceptions for those countries for information we in the United States consider “public” to avoid the risk of enforcement proceedings by agencies charged with privacy protection.

Non-Compete Agreements - Protecting Company Information from Departing Employees

Effectively preventing the disclosure of company secrets by a departing employee concerns every business. How that information is protected largely depends on the type of information the departing employee possesses. Enforceability of non-compete agreements also varies considerably from state to state. As with vendor agreements, companies are encouraged to consult with outside counsel in the forum state for jurisdiction-specific insight and advice.

All employers who participated in the break-out sessions require employees to maintain the confidentiality of information learned during employment. Some companies also require employee loyalty, whereby employees at all levels agree not to disclose company information during or after employment. For example, if your workforce is comprised of less-skilled workers, such as cashiers and servers, non-compete clauses may be unenforceable in many jurisdictions. Instead, employees can be asked to agree not to disclose information about operations to a company offering similar services or products. The hope is that with the vast majority of employees, the imposition of the obligation alone will be enough of a deterrent, even if enforceability is questionable.

The laws of different states regarding the viability of non-compete agreements vary widely and were discussed in some detail. As with all other employment-related issues, California has enacted a unique set of laws which make non-compete agreements largely unenforceable, while Texas and now Georgia have laws which strongly favor employers. Many states have specific statutory requirements for non-competes. For example, bills have been introduced in New Jersey and Maryland which, if passed, would void non-competes if the employee is deemed eligible for unemployment. The public policy behind the bills is that the state would rather void non-competes than pay unemployment.

Researching the current law in every state is often impossible even for employers with larger legal departments. One California-based company with operations in several other jurisdictions writes its agreements for enforcement in California, knowing it will be enforceable nearly everywhere else. That option does not work for many employers based in other states, particularly since more restrictive agreements could usually be imposed. One client also pointed out that if agreements are written with the intent of being enforced in the most-restrictive state but the laws of that state change, the agreement would be invalidated. As such, this company uses agreements tied to the law of the state of employment with the assistance of outside counsel.

In California, which has a statute that voids non-competes (with limited exceptions), contracts are only valid to the extent necessary to protect trade secrets. The absence of an agreement is evidence of lack of reasonable effort by the employer to protect the information. In many states, the company

must show business necessity to enforce the agreement. That is not the law in Texas, however, where enforcement of the agreements is strongly favored.

Non-compete agreements are being used with more and more employees who possess different types of company secrets; many companies no longer reserve them for highly-compensated executives. One company in the automotive repair industry enters non-compete agreements with all hourly employees because they invest a great deal in training on proprietary processes to improve efficiency. This company doesn't experience much conflict over the agreements, however, because although their employees start with a lower skill set, most of the departing employees don't leave to work for a competitor; once they've had the training which is considered proprietary, the employees are able to move to jobs requiring a higher skill set than the company's competitors.

In all cases, the nature of the employees' job duties - and how their job knowledge could be detrimental to your company if it were shared with a competitor - must be evaluated, because not all employees should be subject to a non-compete. Requiring employees with a lesser amount of proprietary knowledge to sign broad agreements can undermine efforts to enforce the agreements against higher level employees. Precedent is often a factor in contested enforcement actions. Therefore, careful consideration should be given to which employees should be required to sign them at the outset of employment, and the scope must be tailored to the employee's actual duties and knowledge of trade secrets.

The duration of a non-compete is often a term limited by state law. A bill is pending in Massachusetts which would restrict non-competes to a duration of six months; any non-compete with a longer duration would be presumed unreasonable under the law. Florida statutes define permissible duration based on the type of business interests which justify the restriction on the party against whom enforcement is sought, from six months to several years. Delaware provides at most a three-year term for non-compete agreements, outside the context of a sale of a business. If no statutory limit applies, most companies define the duration by the subject employee's job duties and knowledge, from one to two years, with one year being the most common duration. One employer pays severance over the duration of the agreement to incentivize compliance.

Definition of the information as belonging to the company early in employment is also important. Many companies utilize Work for Hire agreements, which specify that intellectual property created by the employee during their tenure belongs to the company, even if done on the employee's own time. The clause is included in the confidentiality and loyalty provisions imposed at the outset of employment. One employer has employees identify proprietary information developed before joining the company, since these issues often don't present themselves right away.

Enforcement options vary by state. The Inevitable Disclosure doctrine exists in many states, particularly in the Midwest. The doctrine assumes that high-level employees with enough knowledge will eventually disclose proprietary information, so employment by a competitor is prohibited. California, of course, has expressly rejected this doctrine. In many states, the employer must have a business interest in enforcement, meaning the employer must have evidence of a business loss before the agreement will be enforced by the court.

In all circumstances, gathering evidence before initiating an enforcement action is critical. The outgoing employee's computer hard-drive, email account, shared documents and company-issued personal devices must be preserved and secured. Professional forensic analysis of electronic equipment

may be worth the expense if a high-level employee is suspected of downloading, copying or disclosing company information prior to termination of employment.

If court intervention is required, injunction is an effective option if the potential for violation of the agreement is caught early. One employer pursues the new employer for tortious interference rather than pursuing the employee. Before seeking court intervention, the company sends the new employer a copy of the non-compete agreement. This company's employment application also asks candidates whether they are subject to an agreement that *might* make them unable to be employed by the company.

Most employers have newly-hired employees provide written verification that they will not reveal trade secrets from and are not subject to any agreements with a prior employer. If an employee discloses a non-compete with a prior employer, the company must give the employee written instruction not to violate the prior non-compete. One company has its legal department analyze the viability of new employees' non-competes. If the agreement is potentially enforceable, the company attempts to place the new employee in a location outside the geographic limits of the non-compete, with the intent of transferring the employee once the non-compete expires. Another employer, who delegates hiring decisions to local stores, does not issue directives on hiring an employee with a non-compete from the legal department, but does caution hiring managers to be conscious of the issue and attempt to accommodate any agreement in place, if possible.

Many employers defend new employees who are subject to agreements with prior employers. Another company assesses the scope of an agreement with a prior employer for enforceability and will ask the prior employer for a release if doing so is not likely to invite a claim.

Although most non-compete litigation results in settlement, alternatives to litigation are also employed by several ALFA clients. One company protects key information internally by physically separating and isolating the design and engineering staff and requiring fob access to the design area. Another company protects formulas by shipping certain products in completed form directly to sales venues, even in other countries. Although often more costly than allowing the remote venues to mix and prepare the final product, divulging the recipe or formula for key products would eliminate all brand-specific customer draw. In some jurisdictions, non-solicitation clauses may work better than non-competes. But California, of course, has case law holding that even an announcing new employment to all clients, without more, is not actionable.

Finally, entities entitled to enforce the non-compete must be clearly identified in the agreement. If you fail to update your pattern contract when corporate mergers and acquisitions occur, enforcement may be impossible. The pattern non-compete should include carefully drafted assignment language and include successors. The agreements should be reviewed and updated often to ensure enforceability.

WORKFORCE REDUCTION: KEY DECISION POINTS AND BEST PRACTICES

Even as hiring begins to pick up in the fourth quarter of 2013, many organizations are still facing the need to reorganize and right-size some of their operations to be better positioned to meet the changing needs of the marketplace. As a result, workforce reductions, even for profitable companies, are a reality in our new economy.

This roundtable group identified seven key decision points for companies to consider when faced with a potential need for an involuntary layoff or a “voluntary incentive” plan. The focus of our discussion was not on dissecting the intricacies of the many federal and state laws that can apply in this context, but was a more practical, hands-on approach to the issues discussed within the context of those laws. Our focus was how companies can minimize the risks of running afoul of the legal requirements. We hope you find this outline of issues, and the points made, helpful when this issue arises for you in the future.

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KEY DECISION POINTS

1. Where to begin – Legal Requirements
 - a. Are there any employment contracts? This question is often overlooked. Make sure you know what exists.
 - b. Company policies
 - i. Early retirement: is there policy that requires or governs
 - ii. Should you consider:
 - Outplacement
 - Reinstatement rights
 - c. WARN ACT and similar State laws, disparate treatment or impact/discrimination laws, unemployment issues, retaliation issues
2. Where to begin – Facts
 - a. How do you want to see your organization going forward
 - i. What job skills are needed going forward
 - ii. What are those affected currently doing, how will it look in the future
 - iii. Should years of service with the company be considered a factor and, if so, how
 - b. Don't forget to look at last performance evaluations in weighing affected employees
 - c. Voluntary packages

- i. Timing issues – what if you don’t get enough to volunteer
 - ii. How rich is the package
 - iii. Maintain discretion to say no – want to avoid losing good performers, but there can be a downside to this approach
 - d. Everyone out—then re-apply: does it work
 - i. Some positives to get people into other opportunities
 - ii. But demeaning to good employees
 - iii. Not a silver bullet - still open to risk
 - e. Consider giving advance notice/transparency and the issues of “messaging” intent informally
 - i. What do I tell and when? Probably better to lay it all out there.
 - ii. Transparency with employees about process is usually the way to go
 - f. Do you allow bumping or look for internal opportunities/reassignment
 - i. Are you then selective in whom you choose
 - ii. Does this really avoid the exposure to claims you fear
 - g. Be careful with labels that don’t fit: Reorganization/restructuring vs. reduction
 - i. Department/Division pools
 - i. Do you have an objective process to make selections
 - ii. You should consider having policies i.e. work force reduction policy – just like a handbook you may limit liability and negative impact
 - iii. Make sure policies condition payment of severance on signing a release or you will pay more to secure a release
 - j. Written severance plan/RIF v. a simple termination from employment
- 3. Disparate treatment or impact
 - a. Create a matrix of those affected – limit its dissemination
 - i. Quality of each going forward
 - ii. Quality of their performance in the past
 - iii. Age, gender, race & other protected categories
 - iv. Recent worker comp/FMLA/other retaliation possibilities
 - v. Years of service
 - vi. Work force needs
 - b. Comparison—last 3 performance reviews

4. Assessing each employee
 - a. Do you use consultants to design restructuring
 - i. If so, do you also convey total control over selection of who is retained
 - ii. Avoids relationship/favoritism issues
 - iii. Outside consultants should be definitive word on management level separations
 - b. How do you keep the best leaders of your management team
 - c. What do you do with couples in the company
5. Document/litigation
 - a. Severance plans & OWBPA
 - i. No deviation from the plan
 - ii. Only for RIF
 - iii. If people get severance, do you later rehire. What becomes of the severance paid, e.g.
 - Severance contract - stops if rehire
 - 18 months - no rehire
 - Pro-rated pay back over time if get job back in severance plan, careful of pay withholding
 - b. Early retirement
 - i. As an incentive
 - ii. Based on what - years of service?
 - iii. Enhanced severance as an incentive
 - iv. Seniority - do you have a tie breaker
 - v. On site outplacement - good for risk reduction
 - vi. OWBPA: Chart those affected [see Matrix above]
 - c. Severance
 - i. Pay lump sum or over time
 - ii. If you continue over time you may hold to conditions of severance contract
 - iii. Repay or discontinue if rehired
 - d. How much do you put in writing. Problems arise with comparisons, e.g. where a lot of diversity, internal disputes on who to include, etc.
6. Unions
 - a. Where a union is involved does it make it easier
 - b. Union v. non-union – who gets treated better
 - c. Call backs –yes at union facility

- i. Versus no call backs because “other reasons why he/she is no longer there”

7. End result issues

- a. Procedures for assisting employees to find other internal jobs (e.g. more than just saying can check postings)
- b. Process – Decision making v. execution
 - i. Message can be all about how or who delivers
 - ii. Less said the better
 - iii. Consider sharing the general outline of decision making factors
- c. General counsel review of Matrix: could be discoverable
- d. Exit interviews
- e. Stop severance on rehire