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WELCOME TO OUR SECOND INSTALLMENT of USLAW Magazine, our bi-annual publication designed to address a wide-range of topics important to our valued clients, client advisors, and member firms.

The Fall 2008 edition of USLAW Magazine focuses on the economy and its profound impact on business. Inside you’ll find articles to help you:

- Structure a reduction-in-force (RIF) while sidestepping potential legal pitfalls in this complicated process;
- Manage M&A deals in a new environment profoundly impacted by the sub-prime and financial market meltdowns;
- Protect your company when doing business with financially troubled companies;
- Evaluate litigation and alternative routes to resolution in turbulent economic times.

In addition to our economic focus, we have a range of information in this issue for businesses operating today, from ICE audits and how to avoid them to antitrust issues and an often overlooked area of antitrust laws — pre-transaction or discovery meetings between two competitors contemplating a merger or an acquisition — and how to mitigate the legal risks associated with these exploratory meetings.

Since 2008 began, we’ve launched our new podcasting program, USLAW Radio, and we are preparing to launch an online education series, USLAW EduNET.

USLAW NETWORK continues to grow, geographically and in the service we offer our clients and member firms. Our success is built on the tireless efforts of our members who continuously strive to make this organization more relevant to clients from industries as diverse as aviation, oil and gas, biotechnology, manufacturing and high-tech.

Thank you for the privilege to serve as USLAW Board Chair. It’s been a great ride, and I am deeply grateful for the trust you placed in me to lead this outstanding organization.

Sincerely,

Mark Solheim
Chair, USLAW NETWORK, Inc.
Partner, Larson & King, LLP
St. Paul, Minnesota
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CORRECTION

In the Spring 2008 issue of USLAW Magazine, an incomplete bio for Karen Painter Randall, author of Mistakes that Lead to Malpractice, accompanied her article. The correct version appears below.

Karen Painter Randall (krandall@connellfoley.com), a Certified Civil Trial Attorney, is Chair of the USLAW Professional Liability Practice Group. She also serves as Co-Chair of the Professional Liability and Chair of the Director and Officer Litigation Practice Groups at Connell Foley, USLAW NETWORK’s New Jersey firm. Andrew Sayles is an associate with Connell Foley. For more information on Connell Foley, please visit www.connellfoley.com or call (973) 535-0500.
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The U.S. credit markets started a downhill slide in August of 2007 with heavy losses in the sub-prime lending industry. The ramifications of this downturn, coupled with the looming threat of inflation, led to increased volatility in the equity markets and an overall softening of the economy. This age of economic uncertainty has prompted a re-evaluation of commonly held beliefs and routine practices in the world of mergers and acquisitions (M&A). Corporate leaders and counsel should consider strategic adjustments to structuring and positioning M&A transactions. It is equally essential that associated documentation offer both the most solid legal protections for the client while taking into account the affect of a weakened economy on the deal. It behooves lawyers to fully analyze M&A proposals, monitor pending case law, and revise the related documentation as needed.

Over the past nine months, private equity firms involved in M&A deals have endeavored to negotiate or renege on several high-profile transactions as a result of various factors, including the sluggish markets, lack of financing and poor decision making. Some equity investors, due to inadequate finances, have employed strategic and tactical legal maneuvers to avoid obligations stipulated under M&A transactional documents. In many cases, buyers relied upon financing contingencies and material adverse change (MAC) clauses to circumvent contractual obligations in consummating deals.

In the wake of these developments, transactional lawyers are teaming with their attorney colleagues to gain negotiating leverage by raising the threat of litigation or adverse proceedings to renegotiate transactions or avoid liability under transactional documents. These developments require renewed focus on pre-deal planning and careful attention to drafting to ensure an integrated transaction document that provides maximum flexibility.

MAC CLAUSES
A MAC clause, also known as material/adverse event/effect or MAE clause, is a method for parties to a transaction to allocate risk. When a company agrees to an acquisition, by definition there is a waiting period between the dates of the original transaction agreement and the closing. A MAC clause enables the M&A parties to contractually allocate which party will bear the risk of adverse events which may occur during this interim period. Sellers usually attempt negotiating as narrow a definition as possible to shift as much risk to the buyer. Not surprisingly, buyers often attempt to negotiate as broad a definition as possible to
provide leeway for terminating an agreement if a post-signing, but pre-closing adverse event(s) occurs. The specifics of MAC clauses vary with each M&A transaction and subsequent negotiations are subtle and critical to the successful consummation of the deal.

Parties often define a material adverse effect as "an effect, event, development or change" that, individually or in the aggregate, is materially adverse to the business. Results of operations or financial conditions of the company and its subsidiaries, taken as a whole. MAC could also be defined to include an "effect, event, development or change" that would affect the ability of the buyer or seller to complete the proposed transactions in a timely manner.

Fraught with ambiguity, these definitions impede negotiations, especially given the current economic climate. A threshold issue that must be addressed is whether the "effect, event, development or change" is restricted to the "business" or applies to other aspects such as seller's results of operations, assets or prospects. Most MAC clause negotiations also include "carve-outs," which define materially adverse events excluded from the definition of a MAC event. A seller's ability to meet earnings projections and changes in the price of the securities of the issuer are common MAC exclusions. Generally, parties negotiate carve-outs to allocate market risk to the buyer and closing risk to the seller for adverse events.

Because buyers will often structure a MAC clause in broad a form as possible, the inclusion of the clause provides certainty for the buyer. The ambiguity, uncertainty and legal risks of MACs stem from the fact that most are defined in qualitative as opposed to quantitative terms. Additionally there is a lack of reported legal precedents interpreting such clauses.

A buyer-initiated MAC clause does not necessarily insinuate an intention to cancel the transaction. It may indicate a strategic move by the buyer to obtain a price reduction. Buyers may also invoke or threaten to use MAC to curb risks and discourage any legal challenges from the seller.

Due to upheaval in the capital markets, invocation of MAC clauses is now the norm rather than the exception in M&A transactions. Arguably, MAC clauses were initially designed to analyze how well or poorly a company has performed relative to its peers from the date the sale agreement was signed to the closing date. As MAC clauses evolve, buyers seek to expand the scope of such clauses to encompass broader changes in market conditions.

FINANCING CONTINGENCIES

Until the recent credit crunch, financing contingencies were increasingly narrowed or eliminated from M&A transaction documents. The recent tightening and collapse of some credit markets facilitated the need for transactional lawyers to incorporate financing contingencies in M&A proposals.

In many recent cases, buyers relied on the issue of financing, or alleged revocation of financing, as a means for renegotiating and/or terminating transaction documents. As in the case of the invocation of the MAC clause, the reliance on such a legal position, relative to financing contingencies, can well be viewed as an effort to renegotiate the basic deal, terminate the transaction, or invoke a reverse termination fee.

REVERSE TERMINATION FEE

The reverse termination fee provides the buyer a right to abandon a transaction in return for payment to the seller of a fixed fee, generally in cash. These clauses provide sellers with a clear financial and legal remedy analogous to a liquidated damage clause.

BEST EFFORTS AND SPECIFIC PERFORMANCE CLAUSES

In response, many savvy sellers are negotiating and requiring the inclusion of "best efforts" clauses into transaction documents. Such clauses require buyers use best efforts to enforce debt and equity financing letters. Prudent sellers also employ specific performance clauses in transaction documents requiring buyers close a transaction as specified.

HELL OR HIGH WATER CLAUSES

In the regulatory context, sellers are incorporating "hell or high water" provisions into transaction documents. A cousin of best efforts clauses, these stipulations oblige buyers to insure they comply with regulatory mandates as a condition to closing.

CHARTING A COURSE TO CLOSING

To weather the storm of economic instability across the board, prudent lawyers will keep some of the following suggestions in mind as they work through the M&A landscape:

1. Avoid letters of intent and rely on signed transaction deal documents.
2. Wherever possible, keep things simple.
3. Encourage clients to assemble a qualified team of professionals: attorneys, investment bankers and accountants and to deal with reputable firms and lenders.
4. Review, revise and update boiler plate transaction documents to insure they are relevant to the new realities of the marketplace. MAC clauses, reverse termination fees, specific performance, best efforts, and hell and high-water clauses, cannot be read in a vacuum lest these clauses provide tactical opportunities for renegotiation or open an invitation to litigation. Counsel should not rely on boiler plate forms to document transactions.
5. Avoid complex drafting.
6. Know your client’s objectives and goals so they can be set forth in a coherent and cohesive transaction strategy.
7. Communicate with your litigation colleagues and monitor recent case law developments. Transactional lawyers cannot work in a legal vacuum and today's headlines are filled with the details of deals gone bad. The prospect of litigation — something every transactional attorney hopes to avoid — cannot be underestimated. Plan accordingly.
8. Pay attention to the boiler plate provisions. In today's world, venue and choice of law provisions cannot be given short shrift and often carry significant strategic value.
9. Financing documents are critical. Clients and their counsel should request, review and scrutinize closely any commitment and financing letters.

A turbulent market and a liquidity crunch have given rise to new types of litigation surrounding M&A activity. To adapt and protect themselves, many buyers are leveraging a number of new strategies when structuring transactions to avoid subsequent litigation. As is often the case, the best defense is a good offense — know what’s happening up front in the market and structure your M&A team accordingly, including your bankers, lawyers and accountants. Prudent selection of your team is critical to crafting the details of the deal and sheltering it from litigation.

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At the dawn of 2008, an annual survey conducted by human resources consulting firm Career Protection predicted a 37 percent increase in planned corporate layoffs nationwide. Completed by more than 1,375 corporate executives, it was the worst layoff forecast logged in five years.

In April, Reuters reported a 68 percent spike in planned layoffs by U.S. companies from the prior month. The April layoffs were the deepest cuts since the 100,315 job losses reported in September of 2006, according to employment consulting firm Challenger, Gray and Christmas Inc.

Experts predict that the remainder of the year will bring no end to layoffs, commonly known by company leaders and the legal community as reductions in force (RIFs). Complicated and costly to implement, RIFs open up companies to a host of legal risks. Laid-off workers sometimes perceive they were unfairly treated in a RIF process and level complaints seeking compensation or other remedies from their former employers.

“RIFs are a legal minefield. One wrong step and a company is at risk for an onslaught of costly litigation,” says Timm Schowalter, an attorney with Lashly & Baer in St. Louis, Missouri, who specializes in corporate labor-employment relations law. Companies legally unprepared for implementing a RIF face significant risks if they aren’t well versed in the myriad technicalities that govern these reductions.

“The majority of claims in the wake of a workforce reduction allege discrimination based upon protected status,” says Yvonne Shorts, with St. Paul, Minnesota-based Larson • King, LLP.

Legally, discrimination protection covers a wide territory and virtually every type of employee. Because of that, a RIF process, whether it impacts 50 or 500 employees, has
significant potential to impact members of a protected class, and that’s where RIF risks become truly potent. Employers have to be extremely circumspect in implementing a RIF, from the way they identify those employees whose positions are targeted for reduction or elimination and how they document and validate the selection of those positions slated for elimination to the way they communicate during and after the reduction in force.

From gender, race and ethnicity to age and sexual orientation (in many jurisdictions), employers must take extra care with these protected groups to avoid future RIF-related litigation.

In recent years, RIFs have been legal trip wires for employers in the reverse discrimination arena as companies contend with a significant increase of these complaints by white male workers.

“Nearly 50 percent of my recent RIF cases have been brought by white males who were displaced,” notes Schowalter.

Gender claims are another area where employers must tread carefully. During fiscal year 2007, 24,826 discrimination charges were filed with the Equal Employment Opportunity Commission (EEOC), a substantial leap from the 23,247 filed in 2006. Last year ranked fourth in the number of filings recorded by the EEOC since 1997, but monetary awards for 2007 claims far outpaced those of previous years at $135.4 million, suggesting a stricter EEOC stance and broadening of scope of these laws.

Associational discrimination is also emerging as an employer risk. In an associational discrimination claim, the employee alleges the employer discriminated against him or her because the employer knew that the employee was married to a person of a different race or had a child with a disability.

To mitigate litigation risk, employers must be comprehensive in their reviews of personnel files prior to approving the decisional unit — the group selected for termination. Often overlooked in a company’s evaluation of the group slated for reduction are employees who have engaged in protected activity, such as whistle blowing or retaliation claims. Employers must be thorough in their review of personnel and other employment files to ensure the decision to eliminate certain positions is not related to an employee’s alleged “protected activity.” An employee participates in “protected activity” when the employee complains in good faith of a violation of law or public policy, initiates legal action or participates in a legal proceeding.

If an employer is contemplating a workforce reduction, it is imperative that they be vigilant in establishing and documenting the objective business reasons for a RIF. Employers must take special care to document hard evidence that leaves as little room as possible for motives to be called into question. Typical examples include documentation of a loss or downturn in business, reorganization or technological advances that reduce the need for manual labor.

In identifying the decisional unit, employers must take documented and judicious measures to ensure that no single protected group or class of employees is impacted disproportionately, evaluating carefully the composition of employees in positions targeted for elimination, including older workers, women, minorities, and others. In doing so, employers should conduct a statistical impact analysis to ensure that each protected group is not being adversely impacted.

FROM GENDER, RACE AND ETHNICITY TO AGE AND SEXUAL ORIENTATION (IN MANY JURISDICTIONS), EMPLOYERS MUST TAKE EXTRA CARE WITH THESE PROTECTED GROUPS TO AVOID FUTURE RIF-RELATED LITIGATION.

“When an adverse impact is identified, employers often, in an effort to minimize litigation risk, revise the original employee layoff list. It is imperative that employers do not create any evidence that may establish the manipulation of the RIF demographics to achieve a diversity quota or to eliminate an adverse impact,” says Schowalter. Given the complexities and risks associated with a RIF, all analyses should be conducted with counsel to maintain attorney-client privilege and ensure the documents are not subject to discovery.

While the risks employers run are myriad and complex, Shorts says she’s witnessed a surge in age discrimination claims by terminated workers. Age discrimination claims can be an extremely slippery slope for employers.

Congress passed the Age Discrimination in Employment Act (ADEA) in 1967 to promote employment of older workers based on ability and prohibit discrimination based on age. In 1990, the ADEA was amended by Congress with passage of the Older Workers Benefit Protections Act, (OWBPA) which further protects older workers by imposing strict safeguards on the waivers of rights under the ADEA. Anyone age 40 and above qualifies as part of this protected class and, with a skilled attorney, can wield these rights against former employers. Together, these federal laws contain very strict requirements and, depending on where your company operates, employers may also face additional labor and employee regulations at the state, county and local government levels.

Frequently in RIFs, the employer will offer a severance package or early retirement that may include perks such as extended medical coverage. Workers over the age of 40 have 45 days under federal law to decide if they will accept the offer and sign a waiver releasing the employer from liability.

The waiver itself brings significant employer risk. Melissa Weldon, also with Larson & King, warns that if waivers aren’t accurate or carried out exactly as prescribed by law, they get thrown out as invalid. Courts require strict compliance with all legal mandates. “The waiver process is hyper-technical and every requirement must be met,” stresses Weldon.

A waiver of age claims must comply with the requirements of the OWBPA to qualify as a valid release from liability for employers. To ensure validity, employers must communicate to all affected employees in readily understandable language which classes, units or groups of workers are covered by such a program, any eligibility factors and any applicable time limits. In addition, employers must release the job titles and ages of all persons eligible or selected for the program, and the ages of all those in the same job classification or organizational unit who are not eligible or selected for the program.

Even if a waiver gets carried out to the letter, Weldon says the EEOC has a separate legal right to pursue the employer. Although an employee can be prevented from a personal recovery, the EEOC retains the right to enforce discrimination laws and might bring its own action, with the employee’s assistance, despite a valid waiver.

RIF DAMAGE CONTROL

In many situations, the courts have sided with the terminated employee making proper planning and management of the process from the outset absolutely critical to avoiding litigation.

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The uncertain economy magnifies the already risky proposition of doing business with companies in financial trouble. Fortunately, there are a number of strategies commercial entities can employ to minimize the risks of non-payment. The Bankruptcy Reform Act of 2005 has given creditors new resources to collect payment or secure restitution when obligations go unmet.

GUARANTIES AND LETTERS OF CREDIT ENHANCE COLLECTION

Certain tools can help ensure payments to businesses selling goods or services on credit, even if the borrower may be spiraling toward bankruptcy. Credit fortification via a guaranty or letter of credit from a third-party has several advantages. It not only provides another source of recovery, but may also ensure that the guaranteed debt receives priority treatment by the customer as it stretches payments to other vendors to protect the guarantor. When obtaining a guaranty, include language specifying that it is a guaranty “of payment,” not “of collection.” The payment guaranty allows the creditor to sue the guarantor immediately without waiting to see if it is possible to collect from the primary debtor. In some situations, the seller should consider requiring the guarantor to secure the promise of payment with a security interest in property owned by the guarantor.

Another excellent protection, the letter of credit, is probably one of the most beneficial tools for “bankruptcy-proofing” your guarantee of payment. A bank issues a letter of credit guaranteeing the payment for the creditor. The debtor then owes the bank if the letter of credit is drawn.

It is often far easier to obtain a guaranty or letter of credit at the outset of the credit relationship, when the customer is confident that it will perform. However, these protections are sometimes available as part of a forbearance agreement even after default.

NOT ALL GUARANTIES ARE EQUAL

Not all credit guaranties are created equal, especially where a spouse is involved. If credit is extended to a business and the vendor requires a guaranty from a customer’s principal and his or her spouse, the federal...
Equal Credit Opportunity Act (ECOA) may be implicated. If one of the spouse-guarantors is not active in the business, not only is the ability to collect from the non-business spouse in question, but such a request can result in thousands of dollars in affirmative sanctions against the creditor. ECOA attempts to ensure that businesses engaged in extending credit do so on a fair basis, without discrimination on the basis of sex or marital status. All forms of credit are potentially affected by ECOA. While potential problems exist, with competent legal advice a vendor can procure the benefit of a spousal guaranty or a pledge of jointly-owned property.

A PAYMENT RECEIVED IS NOT ALWAYS A PAYMENT KEPT
Some payments received may not always be kept. If a customer makes a payment on a credit account and then files a bankruptcy petition, within 90 days afterward, the payment may be recoverable as a “preference” under Federal Bankruptcy Code. The goal of the Bankruptcy Code is to make the ultimate distribution to a debtor’s creditors equitable by re-collecting into the bankruptcy “estate” payments made within the 90-day period and redistributing those funds to creditors on a pro-rata basis. Notwithstanding this potential threat, specific defenses to preferences exist under the Code and applicable case law.

Defending against a preference lawsuit typically requires a detailed analysis of historic business dealings between the parties and consultation with a bankruptcy attorney. Trustees and debtors generally send a demand letter before filing suit. Vendors and their credit managers are often adamant in their refusal to repay a preference. That resistance must be directed into a vigorous defense. To ignore a preference demand is to waste an opportunity to significantly reduce the amount recoverable by a preference. Any credible defense argument must be accompanied by detailed supporting data and be signed by an attorney. Settlements are always an option and should be negotiated based on remaining exposure after all possible defenses have been exhausted.

According to Judy Thompson, a partner with the USLAW North Carolina firm of Poyner & Spruill, “We use every defense. Then we create a few more arguments to help drive the ultimate exposure down. We never pay more than 80% of the bottom-line exposure. Even then, we can often find other trade-offs to avoid or minimize our clients having to come ‘out-of-pocket’.”

NEW AND IMPROVED PREFERENCE DEFENSES OFFER CREDITORS ADDITIONAL RECOURSES
The Bankruptcy Reform Act, effective in October of 2005 (the “2005 Amendments”), significantly modified and improved preference defense law for cases filed after that date. For typical unsecured creditors, the “ordinary course” and “new value” defenses are the most commonly used, but other approaches may also be available. Upon the first indication of the threat of a preference suit, consult a bankruptcy attorney specializing in defending preferences. The attorney can provide you with a template for submitting data for analysis and build various defenses. Because of case law and jurisdictional variations, it is rarely advisable for a creditor to perform its own defense analysis.

The “ordinary course of business” defense was made substantially more useful to creditors in the relaxed requirements of the 2005 Amendments. Specifically, creditors facing a preference demand may now defend by showing that preferential payments were commonplace in the course of dealings between the parties, or ordinary in the industry. These technical defenses must be supported by data and, in the case of industry terms, generally require expert testimony. The ordinary course defense involves calculation of payment time for 6 months to a year prior to the petition.

NEW CODE PROVISIONS PROVIDE A WINDFALL TO THOSE WHO SELL ON CREDIT
The 2005 Amendments also opened a new door to unsecured sellers of goods enabling them to be paid in full for sales shortly before a customer’s bankruptcy filing. When a business files a bankruptcy case, its suppliers are entitled to an administrative claim equal to the value of any goods received by the debtor in the ordinary course of its business within 20 days before the bankruptcy petition date. This can be a valuable claim for a creditor because it may result in a 100 percent payout on a claim that might otherwise net only “cents on the dollar.”

Gregg Schaaf of the USLAW Kentucky firm of Greenbaum, Doll and McDonald cautions, “It is important to act promptly after the bankruptcy filing by consulting legal counsel and filing a request for payment of the administrative claim under Section 503(b)(9) of the Bankruptcy Code. The vendor should seek legal advice to ensure that proper, supporting documentation accompanies this valuable claim.”

FILING A PROOF OF CLAIM PRESERVES YOUR RIGHTS
Generally, you should always file a proof of claim. Some of your dealings may be with sole proprietorships. In these cases, the business owner files an individual bankruptcy under chapter 7, 13 and possibly chapter 11 of the Bankruptcy Code. Most chapter 7 cases are designated as “no-asset” cases because there will be no payments to creditors. In such cases, filing a Proof of Claim is not necessary, unless assets are discovered. If the chapter 7 trustee discovers sufficient assets for a distribution, creditors will receive notice, at which time creditors must file a Proof of Claim to receive any distributions.

Creditors should always file a Proof of Claim in chapter 13 cases. Chapter 11 cases are primarily used by a business to reorganize operations and/or capital structure or conduct an orderly liquidation of its assets. In such cases, a creditor whose claim is listed by the debtor on its schedules as “disputed, contingent, or unliquidated” or a creditor who is owed more than the amount scheduled by the debtor, must file a Proof of Claim. All Proofs of Claim require attachment of relevant documentation and must be accurate under penalty of perjury. Filing deadlines are generally within three months of the bankruptcy file date, so close attention must be paid to the notice of the Proof of Claim deadline. If the creditor holds any deposit, it must be accounted for on the Proof of Claim. In addition, the

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Following the Sept. 11, 2001 attacks, national security concerns set off sweeping changes in government departments, processes, and procedures. The heightened focus on border security prompted elimination of entire federal departments and the birth of massive, powerful new ones. Notably, the Immigration & Naturalization Service (INS) was eliminated and the purview of its services shifted to the then newly-formed Department of Homeland Security (DHS).

Under DHS, three branches now oversee immigration issues: The U.S. Citizenship and Immigration Services (USCIS), The U.S. Customs and Border Protection (CBP) and the U.S. Immigration and Customs Enforcement (ICE).

The USCIS processes visa and green card applications and manages naturalizations. CBP or Border Patrol is charged with shielding the borders from Mexico to Canada. And the new ICE department focuses on protecting the nation’s infrastructure — its ports, airports, and harbors — while managing worksite enforcement of federal immigration laws.

 Recent ICE raids on meatpacking plants in Iowa, Colorado and elsewhere have brought intense focus to the role and function of ICE, and, more importantly, to the compliance procedures of employers across the industry spectrum, from manufacturing and meatpacking to construction, retail, and hospitality.

“Based on the most recent ICE worksite investigations, retail establishments, agricultural facilities, and construction sites are increasingly ‘under the microscope’ across the nation. Companies need to make sure their I-9 documentation is in good order,” says Ronda Butler Harkey, a Texas immigration attorney with Orgain Bell & Tucker, LLP in Beaumont, Texas.

In this new era of intensified scrutiny of immigration compliance, companies must be cognizant of the new and stricter federal structure for documenting and managing employees, while taking steps, particularly in certain industries, to sidestep the risks of an ICE audit.

Omaha, Nebraska-based Tufly Company, a construction firm, took a simple, but effective approach in an audit situation. “We stayed positive and answered inquiries with honest and direct statements. We cooperated fully and our employees knew that. It is critical in this process that your employees know you are in compliance,” explains Terrie Tufly, Tufly’s Human Resources Coordinator.

The company made it through the process with its reputation and employee morale well intact. But for any company faced with an ICE audit, Tufly strongly advises preparation and collaboration to make the process go as smoothly as possible. “Organization of files is very important. We also cooperated and tried to make the audit easy for the ICE agents, by setting up a well-organized room with all the information we believed they would want to review,” stresses Tufly.

**THE BASICS**

In 2007, a revised I-9 form, a document that must be completed for all employees hired after November 1986, was issued. Like the old form, new I-9s must be completed on the date of hire and verification of employee identification and eligibility docu-
ments must be completed within three business days from the hire date. With the change in late 2007, employers are required to use the new form for all new hires and to re-verify expiring work authorization documents. Failure to use the new I-9 forms exposes the company to fines and penalties. The new forms are not required, however, for existing employees, except for re-verification.

In completing the I-9, employers must be careful to act in accordance with the law. They may not ask for specific documents to support or complete the form. Doing so lays the groundwork for a discrimination claim. At the time of hire, employee-chosen eligibility documents from the I-9 document list must be produced within three days or a receipt provided proving a replacement document has been requested, which must be received within 90 days. If documents are not produced and verified in this timeline, employers cannot continue to employ the employee.

A consistent records management program is essential. Not only must employers retain I-9s for terminated employees for a specific period of time, they must consistently maintain I-9 support documentation in I-9 employee files. If an employer retains copies of identity and eligibility documents for one employee, they should retain them for all. Set a policy for retention of certain documents in a file, apply that policy uniformly across the workforce, and keep back ups.

Harkey advises that “In the event of an ICE audit, employers should have a separately maintained I-9 file system for easy production. For large and small companies protecting themselves against loss of these important documents due to severe unforeseen events such as hurricanes and fires, employee I-9s should be maintained electronically both at the company’s central office and at a backup location.”

Many employers are concerned about evaluating the validity of the produced work authorization documents, but the current legal standard stated by immigration law is broad. Employers are not required to be experts in document verification — they must determine that the produced documents are “valid on their face.” However, if authorization documentation is presented that has an expiration date, such as a work visa, employers must re-verify the employee’s work authorization in the appropriate I-9 section.

Employers are not wise to knowingly hire subcontractors who employ unauthorized workers. Employers who knowingly hire subs who are unauthorized or one who hires unauthorized workers can be held in violation of federal immigration law. To protect themselves, employers are advised to include indemnity provisions in all contracts with subs and other third parties for any potential breaches of immigration law by the sub and their employees.

**ESCALATING IMPACTS OF ICE INFRACTIONS**

Despite good intentions, proper documentation and judicious document review, the risk of ICE enforcement remains potent. In 2006, ICE unveiled its comprehensive enforcement program, stating that “employers that knowingly and recklessly employ illegal aliens must be punished.”

The most significant change to the new ICE policy is a shift from solely administrative fines and sanctions to penalties that include both administrative fines and criminal charges. ICE’s new policy makes the hiring of illegal workers with the requisite knowledge of a potential crime for employers, and the agency can now seize illegally-derived corporate assets from employers who break the law.

Not only has the threat of criminal prosecution increased employer risk, but the financial damages have also escalated. Under the new penalty structure, employers who knowingly hire or continue to employ unauthorized workers are subject to fines ranging from $275 to $2200 for each worker (based on documentation) on the first offense to $3300 to $11,000 per worker for each offense after the second violation notice. And a pattern of practice in hiring illegal workers can bring up to six months in prison for employers.

If ICE suspects a company of violation, they first issue a Notice of Intent to Fine. From there, employers have 10 days to cure paperwork violations. Companies with a history of infractions are denied the 10-day cure and are subject to fines immediately.

The best defense in an ICE audit is proper documentation and a comprehensive immigration compliance plan. Now more than ever, employers must thoroughly and accurately process I-9 forms. Employers that fail to comply run the risk of getting slapped with recently escalated penalties.

Immigration compliance plans (ICPs) can help a company sidestep ICE audits and defend themselves in the event of an audit. Plans should make clear that the employer enforces federal immigration law on all its work sites and work areas at all times and requires compliance from all employees.

The language of the ICP must make clear that I-9s are required for all employees and are to be fully completed by all.
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For more information, visit us at www.uslaw.org or contact Roger Yaffe at roger@uslaw.org.
Businesses Caught by Surprise
The year 2006 ended, and 2007 began with a bang, with the filing of what eventually became hundreds of class action lawsuits alleging violations of a federal regulation known as the Fair and Accurate Credit Transactions Act (FACTA). The lawsuits alleged that businesses — both large and small — had violated a credit card receipt truncation requirement by printing more than the last 5 digits of the card number and/or the expiration date on customer receipts.

The class plaintiffs sought penalties ranging from $100 to $1,000 for each willful FACTA violation, (each credit card transaction). After a year of litigation, most of these class actions remained unresolved. Nonetheless, many class settlements were approved, providing the putative classes with various discounts in lieu of monetary recovery. Plaintiffs’ counsel, however, received compensation typically exceeding six figures. Yet, it was not litigation, but a Congressional Act, which expedited resolution of the remainder of these lawsuits. In June 2008, H.R. 4008 was signed into law, defining the inadvertent printing of a credit card expiration date as non-willful under FACTA, and, thus, temporarily eliminating the pecuniary incentive for further class litigation.

However, FACTA is just one of several provisions in the Fair Credit Reporting Act (FCRA) of 1970, which may subject businesses to onerous civil penalties and protracted litigation. Despite the passage of H.R. 4008, unsuspecting businesses may still be vulnerable to litigation stemming from an FCRA violation in conducting routine, day-to-day transactions.

More Than Meets the Eye
As the credit card truncation or FACTA example illustrates, FCRA — as amended in 1996 — governs much more than the credit reporting industry and the financial information of individuals. FCRA not only applies to consumer reports and consumer reporting agencies, but also to individuals and creditors. The following suggested questions can assist you in determining whether your company or client may be subject to FCRA compliance:

1. Does the company obtain consumer records — credit reports — in connection with employment decisions?
2. Does the company obtain consumer records — credit reports — for any reason?
3. Does the company obtain medical information about its customers?
4. Does the company use or obtain investigative consumer reports?
5. Does the company provide any sort of credit information to consumer reporting agencies?
6. Does the company share consumer information with its affiliated companies?

A “yes” answer to any of these questions suggests your company may be subject to FCRA and its penalty provisions. New procedures and safeguards should be in place to ensure compliance with FCRA as the use, retention and disposal of consumer credit information is now highly-regulated.

The Devil is in the Details
Despite its name, FCRA’s reach is not limited to the credit reporting industry or to credit information. If your company receives customer financial information, obtains medical information for credit purposes or issues credit, it may be subject to FCRA. By way of illustration, many businesses routinely obtain consumer reports when deciding whether to hire, retain, reassign or promote employees. The use of such credit reports in employment decisions is now directly governed by FCRA, which contains detailed disclosure and notification requirements that must be followed to avoid hefty civil penalties. While some exceptions apply, violations of the FCRA may subject your company to the same civil penalties which spawned FACTA class actions, seeking $100 to $1,000 per violation.

In short, FCRA governs the use, retention and disposal of not just credit report information by credit reporting agencies, but also routine business activities, such as the truncation of credit card receipts, use of medical information, workplace investigations, employment applications, and notice of consumers. Some fairly routine business practices are governed by FCRA, even after the passage of H.R. 4008. Close examination of the text of FCRA is highly recommended if your company engages in any of the aforementioned activities. Only strict compliance with the text of FCRA may protect your company from protracted and expensive litigation.

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M&A Transactions: Exchanging competitively sensitive information without running afoul of the antitrust laws.

BY STEVEN A. ELDER AND A. MICHAEL FERRILL
COX SMITH MATTHEWS INCORPORATED

Mergers and acquisitions activity in the U.S. mirrors continuing industry consolidation as companies acquire their competitors. While most businesses are well-versed in U.S. antitrust laws when conducting day-to-day operations, complying with the antitrust laws in connection with a potential M&A transaction of two competitors involves a distinct set of challenges.

When evaluating a potential M&A transaction between competing entities, analysis often focuses on two significant antitrust issues:
- Is the transaction subject to challenge under the antitrust laws?
- Is notification to the Federal Trade Commission (FTC) and the Antitrust Division of the United States Department of Justice (DOJ) required under the Hart-Scott-Rodino Antitrust Improvements Act of 1972 before the transaction may be consummated?

AN OFTEN OVERLOOKED ISSUE

While these issues are important, there is a third antitrust issue that should be, but often isn’t, identified and addressed early in the M&A process. Special risks arise from the exchange of competitively sensitive information and other communications between competitors during exploratory discussions. Although the exchange of competitively sensitive information is necessary in order to evaluate and structure a proposed M&A transaction, there is no exception to the antitrust laws for discussions with a competitor in the context of a potential M&A transaction.

In contacts between direct competitors, the antitrust laws proscribe, inter alia, concerted conduct that has the purpose or effect of fixing, establishing or stabilizing prices, dividing or allocating customers or markets, or restricting the output of the firms’ respective products or services. The antitrust laws condemn not only explicit agreements to engage in such activities, but also other conduct, such as exchanges of pricing information, when that conduct is calculated to facilitate tacit coordination between the competing firms. A violation of these prohibitions is punishable as a felony. The penalty upon conviction is a fine up to $100 million per count if the defendant is a corporation ($1 million per count if a natural person), imprisonment or both. Larger fines may be imposed under the Comprehensive Crime Control Act and the Criminal Fine Improvements Act. Violations also give rise to civil liability, including the mandatory award of treble damages to anyone injured in their “business or property by reason of such violation.”

LEGITIMATE VS. ILLEGITIMATE INFORMATION EXCHANGES

While such information exchanges in connection with a proposed M&A transaction are generally deemed pro-competitive, as they facilitate the decision-making process, they also raise three dangers, one at the inception of discussions and two more if the proposed transaction is abandoned.

The first danger relates to the underlying justification for the information exchanges. As noted above, certain agreements between competitors are facially unlawful, and give rise to both civil and criminal liability. If the proposed transaction is characterized as one designed to fix prices, divide or monopolize markets or restrict output, information exchanges designed to facilitate such conduct will be deemed unlawful. Similarly, other transactions involving competitors, such as joint ventures, mergers and acquisitions, may be lawful or unlawful depending upon the facts of the particular case, including the size of the par-
ties, their respective shares of the market and the terms of the transaction. It is important at the outset to carefully define the transaction under consideration, so that an initial assessment of its antitrust implications may be made, and a pro-competitive justification for subsequent information exchanges be established.

Two other dangers arise when a proposed M&A transaction of competitors is ultimately abandoned. Each party may be tempted to use the other’s confidential information to gain a competitive advantage. These concerns are often addressed through a confidentiality agreement before nonpublic information is exchanged. Under such an agreement, each party promises to use the information exchanged in exploratory discussions only for the purpose of evaluating the proposed transaction, and to return all such information upon abandonment.

Such an agreement does not fully address the third danger. Instead of using competitively sensitive information to compete, the parties may use such information to engage in collusion. While competitors rarely engage in sham merger negotiations for the purpose of facilitating price-fixing, market allocation or other anticompetitive ends, reciprocal exchanges of competitively sensitive information may serve as instruments for collusion once even good-faith negotiations are aborted. Because both issues — the “good” or “bad” faith of the negotiations and exchanges, and the subsequent use of the information — are judged in hindsight, parties must minimize the possibility that negotiations and exchanges could be characterized as anticompetitive. Federal antitrust enforcement authorities emphasize that “between the time competitors agree to merge and when they consummate their transaction, they are separate economic actors who are bound by the competition laws,” and that an agreement to coordinate pre-consummation activities may be held illegal under section 1 of the Sherman Act and/or section 5 of the FTC Act.

To avoid the risk that exploratory discussion may be deemed anticompetitive or collusive, companies must take careful steps to characterize and manage these discussions, the exchange of information, and its future use.

**RELEVANT CONSIDERATIONS**

If information necessary to evaluate a transaction can be obtained from sources other than the proposed transaction partner, the concerns noted above are mitigated. In addition to outside sources, a party to a proposed transaction may have the ability to internally generate evaluative data.

However, certain information to evaluate a proposed transaction can only come from the other party. From an antitrust perspective, the most sensitive information is that relating to the competitor’s prices, costs, profits, products and services, customers and marketing plans. General information relating to operations, organizational structures and asset values is less sensitive. Information exchanges between sales or marketing personnel of the respective firms are more troublesome than disclosures to financial and administrative personnel (or, better yet, outside consultants) charged with the responsibility for evaluating the proposed transaction. Five primary factors impact the characterization of confidential information exchanges between competitors:

- The reasons for the exchanges;
- The nature of the information exchanged;
- The persons who have access to the information;
- The timing of the disclosures;
- The procedures used for monitoring and controlling the disclosures.

The first four are interrelated. The nature of the information exchanged, as well as the determination of to whom such information may be disclosed, are influenced heavily by the reasons for the exchange, which in turn are determined by the stage of the evaluation and negotiation process at the time of disclosure.

Accordingly, the timing of information exchanges may affect the perceived bona fide of those exchanges. As a general proposition, it is advisable to stage such exchanges, beginning with disclosures of general valuation information during initial exploratory discussions, and proceeding to disclosures of more specific information as the parties proceed from active negotiations over terms and structure into due diligence review, which typically occurs after the general parameters of the transaction have been established. Before competitively sensitive information is exchanged, the transaction itself should receive a preliminary antitrust evaluation by counsel. Going forward, any information exchanged should be related to a transaction-specific purpose, and access should be limited to those persons necessary to accomplish the specified task. Special scrutiny should be focused on justifications for competitor access to prices, costs, customers and marketing plans.

Meetings present special problems. Advance consideration should be given to identifying those persons to whom disclosure is necessary to accomplish each identified transaction-specific task. The recommended safeguards are similar to those used in connection with other contacts between competitors, such as trade association meetings. Written agendas for meetings can minimize the risk that discussion drifts into prohibited areas. Counsel should be present in order to answer questions, avoid improper subjects and, when necessary, terminate the meeting.

**IMPLEMENTATION**

Experienced antitrust counsel should be consulted at an early stage to design effective procedures for exchanging competitively sensitive information. Because such exchanges are evaluated in hindsight, it is important not only to govern the flow of such information but also to document the parties’ efforts to avoid the potential for collusion if the proposed transaction ultimately is abandoned and the information exchanges are later challenged. Safely assuming that at the time this question arises the party making inquiry (whether the DOJ, FTC, state regulator or competitor) is aware that discussions have occurred, the benefits that flow from documenting the parties’ efforts to control the use of competitive information likely will outweigh any disadvantages in having to produce and explain such documents. In this regard, however, care must be given to fashioning a written plan that can be easily understood and comply with and building a record that will support a benign characterization of the parties’ conduct.

The principal components of such a plan are:

- Defining the proposed transaction and assessing its likely antitrust implications at the earliest possible time;
- Identifying each area of information to be obtained at each stage of the process (e.g., internal evaluation, negotiations or due diligence review);
- Relating each area of information to a transaction-specific purpose;
- Limiting access to those persons necessary to evaluate the information;
- Instructing those persons concerning the limited purpose for which such information may be used;
- Appointing a liaison for each party to monitor compliance, coordinate the exchange and return of competitive information and work with counsel in reviewing and recording the information requests and exchanges;
- Documenting the parties’ compliance with the plan.

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Continued on page 17
Implementing consumer privacy policies in stores across the country?

National retailers face a complex and often competing array of government regulations, consumer protection laws, employment and labor statutes and zoning issues. To sidestep legal challenges and effectively manage litigation when it arises, multi-store and multi-state retailers can’t afford to work with a team of lawyers unfamiliar with multiple jurisdictions.

USLAW knows the territory. Our member firms have a deep bench of professionals who focus on retail legal issues and opportunities — giving you access to tested legal counsel with experience — if not brick and mortar operations — in virtually every jurisdiction you find yourself in.

From employment policy matters and government regulations to premises liability, leasing, zoning and complex litigation, national retailers count on USLAW.

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Because the government will be looking for documents that raise antitrust implications, business analyses should not attempt to evaluate, or even discuss, the antitrust implications of the transaction.

Oral communications also raise antitrust concerns. Never assume that a discussion is “off the record.” Also, there is no such thing as a “gentlemen’s agreement.” Under subpoena, employees may be required to disclose, under penalty of perjury, all “informal” discussions, both within the company and with representatives of the competitor. When preparing interoffice memorandum regarding contacts with any competitor, care should be taken to avoid the use of imprecise language, as “loose” references to competitive matters may be misinterpreted to suggest conduct that is suspicious or collusive. Memoranda that suggest discussions between competitors mentioning prices, supply or sales practices likewise may be misconstrued as evidence of wrongdoing.

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A. Michael Ferrill (amferrill@coxsmith.com) is a shareholder in the Business Litigation Department of Cox Smith Matthews Incorporated, focusing on antitrust and securities litigation.
In 1871, pioneering lawyer Eustace Gibson founded a law firm now known as Huddleston Bolen in Huntington, West Virginia. Acting as legal counsel to railroad tycoon and town namesake, Collis P. Huntington, Gibson set the tone and vision for what would become one of the state’s oldest and most successful law firms. Since its inception, Huddleston Bolen has grown to serve the diverse needs of Fortune 500 companies as well as private companies and individuals. Proud of its heritage, but committed to future growth, Huddleston Bolen is poised and prepared to deal with the changes and challenges its clients face.

Today, Huddleston Bolen proudly serves as USLAW NETWORK’s West Virginia member, covering the entire state from its offices in Huntington and Charleston. An interesting mix of tradition and youth, Huddleston Bolen’s professionals work hard to provide aggressive and thorough counsel to its diverse set of clients. In formal surveys and casual conversations, Huddleston clients point to the firm’s dedication to understanding their business and a fierce determination to help them grow and succeed. This determination and dedication has forged strong client relationships, and Huddleston is proud of its exceptional rate of repeat business and growth through referrals.

Much of Huddleston Bolen’s focus stems from West Virginia’s heritage in the areas of natural resources, which significantly shaped the firm’s history. Today, natural resources such as coal, natural gas, oil and lumber still have a strong influence on the area and global economy. Huddleston Bolen continues to mix tradition with growth, by shaping its practices to address the diverse needs of the state’s industries along with newer business interests. Through 14 practice groups, Huddleston Bolen represents the interests of the state’s businesses, including natural resource providers, transportation companies and chemical companies. The firm also represents many industries that provide support for natural resource and chemical processing and sale, including banks and finance companies, support industries, major railroads, trucking companies, barge lines, and related transportation providers. Exemplifying its diversity and understanding of current legal issues, Huddleston Bolen continues to address the needs of its entire client base, with strong experience and creative solutions in mass torts, litigation, insurance, professional liability, labor, business, and appellate law.

As the needs of the region have grown, Huddleston Bolen has expanded its legal services. Today, the firm offers commercial clients and individuals a wide array of legal services, including:
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- Litigation
- Natural Resources & Environmental
- Real Estate
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- Trusts, Estates & Taxation

The attorneys that comprise the Huddleston Bolen law firm have consistently been recognized by their peers in such publications as Chambers USA®, Best Lawyers®, and SuperLawyers®. To facilitate top-quality legal service, Huddleston deploys state-of-the-art technology to manage its cases. Over the last five years, the firm has invested millions of dollars in its information technology resources, including a state-of-the-art document imaging system that digitizes evidence and documents. Huddleston also boasts a multi-media center, which facilitates presentations, conferencing, synchronization of media for trial, and employee training. The firm also owns one of the nation’s largest private law libraries.

To learn more about Huddleston Bolen, visit www.huddlestonbolen.com.
Ahmuty, Demers & McManus successfully defended Yankee Parking Garage against a negligence charge in which the plaintiff was seeking in excess of $4 million in damages. After deliberating for two days, the jury found no evidence of negligence and rendered a verdict in favor of Yankee Parking Garage.

Five of Carr Allison’s attorneys: Russell Q. Allison, Charles F. Carr, Donald B. Kirkpatrick II, Thomas L. Oliver II, and William H. Sisson were named Alabama Super Lawyers for their commitment to excellence in their practice areas. In addition, Charles F. Carr, Thomas L. Oliver and Bennett L. Pugh were chosen as “The Best Lawyers in America” by their peers across the nation.

Jones, Skelton & Hochuli announced its Membership in the Council on Litigation Management (CLM). The Council is a nonpartisan alliance committed to furthering the highest standards of litigation management. The Council sponsors educational programs, provides resources, foster communications, and recognizes lawyers who meet high standards. Selected attorneys and law firms are extended membership by invitation only, based on nominations from CLM Fellows.

Marks Gray, PA attorneys Marianne Lloyd Aho, Jeptha F. Barbour, Victor M. Halbach, Jr., Allison H. Hauser, Nicholas V. Puligiano, Jr., and Gerald W. Weedon have been named by Florida Super Lawyers magazine as some of the top lawyers in Florida for 2008. Only five percent of legal counselors in the state earn a spot on the listing.

Health care attorney Ken Burgess of Poyner & Spruill received the 2007 Volunteer Of The Year Award by the Jessie F. Richardson Foundation, an organization supporting projects worldwide to provide health care related services to seniors. The recognition is in honor of Burgess’s fundraising efforts for the renovation and expansion of a shelter for homeless seniors in Jinotepe, Nicaragua.
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Washington, the Evergreen state, is a leading lumber producer, hosts numerous national parks and more than 1,000 dams. The Columbia River continues to serve as a central driving force of the state’s economy. Over the years, Washington has garnered international recognition as the birthplace and headquarters of Starbucks, Boeing, Amazon and the Microsoft empire.

Williams Kastner has been providing businesses and individuals with a full range of legal services since 1929. With more than 90 attorneys in offices throughout Washington and Oregon and affiliated offices in Shanghai, Beijing and Hong Kong, the firm offers global capabilities and vision from a local sensibility.

Williams Kastner has truly expanded its practice to meet the legal needs of the Northwest’s booming business economy, rich natural resources and international trade capability. As USLAW NETWORK’s member firm in Washington and Oregon, Williams Kastner is the NETWORK’s source for counsel and guidance for clients with needs across both states. The firm handles legal matters of national and international scope, serving Fortune 500 companies, as well as smaller commercial entities.

Williams Kastner’s well-established credo and mantra is “Practicing law with greater resolve.” For clients, this means that Williams Kastner has an unrivaled record of trial and litigation success. Washington Jury Verdicts, a compilation of reported data for Washington State by Jury Verdicts Northwest, ranks the firm as the leading record in jury verdicts for the period of 1984-2007.

The firm represents tribal clients in Washington State, Oregon, Alaska, Montana, California and throughout the United States, as well as Fortune 500 and publicly-traded companies doing business in Indian Country. Their team of Native and non-Native attorneys provide tribal governments and enterprises legal counsel for business, litigation and governmental matters.

Williams Kastner offers vast experience in mass tort litigation involving consumer goods, industrial and occupational products as well as pharmaceutical and medical devices. The firm possesses substantial experience in a broad range of areas such as administrative law, antitrust, aviation, bankruptcy, breach of contract, class actions, commercial torts, construction, drug products, employment practices, fire and marine, insurance coverage, insurance defense, environmental and land use, lender liability, products liability, professional liability, real estate, securities, toxic torts and hazardous waste. Because of the complexity and scope of the work performed on behalf of clients, Williams Kastner deploys leading technological resources to optimize legal service delivery and create efficiencies that save clients time and money.

To learn more about Williams Kastner, please visit www.williamskastner.com.
In today's global marketplace, legal needs often transcend geographic boundaries. Clients with complex legal needs turn to USLAW NETWORK member firms to represent them in the courtroom and the boardroom, next door and across the United States.

When a complex legal matter emerges – whether in a single jurisdiction or nationwide – USLAW is there. We represent some of the country’s leading businesses in matters ranging from complex commercial litigation, employment law, products liability, and professional malpractice defense.

USLAW NETWORK is a national organization composed of more than 60 independent firms in 45 states with over 3,500 attorneys. An alliance with the Trans-European Law Firm Alliance (TELFA) gives us added access to 23 European law firms representing 600 lawyers.

USLAW NETWORK is an affiliation of law firms across the United States who:
- Are fully vetted and subject to a rigorous review process;
- Are AV-rated by Martindale-Hubbell;
- Become part of the USLAW NETWORK by invitation only;
- Possess broad commercial legal capabilities;
- Have substantial litigation and trial experience.

USLAW / TELFA Affiliation Provides Resources Across Europe

In 2007, USLAW established a mutual relationship with TELFA, the Trans-European Law Firm Alliance, a network of 23 law firms in Europe representing more than 600 lawyers. Our affiliation with TELFA offers USLAW member firms and their clients access to top-quality, qualified counsel in Europe.

TELFA offers USLAW clients:
- Pan-European coverage;
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- Swift access to the institutions of the European Union;
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TELFA member firms subscribe to formal quality, training and IT standards. As a result, TELFA does much more than enable referrals. Instead, it coordinates and facilitates their clients’ needs for counsel in unfamiliar markets, while offering the assurance and peace of mind that the quality of advice and service they will receive is consistent across TELFA firms.
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When implementing a reduction in force (RIF), proper documentation is essential. This entails more than simply justifying the decision. Managers must consider which documents will remain open for government agency review and which can be protected by attorney-client privilege. Retaining legal counsel very early in the process is highly recommended, especially for company leaders inexperienced with RIFs. Proper documentation includes:

- **Establish a set of criteria and goals for the RIF**
  - Determine and document objective business reasons as to why layoffs are necessary. Is the company losing ground financially, losing its competitive edge and perhaps started a slide into the red? Or is restructuring needed to boost efficiency and productivity? This assessment should also include an explanation as to why alternatives to a RIF are not feasible.

- **Form your decision-making team**
  - Depending on the size of your company and the laws that may come into play affecting a RIF, management must understand federal, state and local provisions dictating the composition of the team. It is recommended that all members of the committee sign a confidentiality agreement restricting any disclosure about the process. Local legal counsel can help to ensure compliance with state and local laws.

- **Determine RIF Criteria and Process**
  - There are several methods typically used for deciding which jobs are reduced in a RIF and why, each of which comes with some degree of risk. These practices include: a call for voluntary resignations, terminations based on objective or subjective criteria and a hybrid incorporating subjective and objective criterion.

- **Voluntary terminations with exit incentives**
  - This approach can prove an easy and efficient means of curbing costs, maintaining employee morale and mitigating litigation risks. Typically, employers will offer attractive severance packages or an early retirement incentive for those who volunteer. In crafting this measure, employers should include a caveat permitting them to reject certain volunteers essential to the company’s profitability. Regardless, the employer does acquiesce to reject certain volunteers essential to the company’s profitability. Retaining legal counsel very early in the process is highly recommended, especially for company leaders inexperienced with RIFs. Proper documentation includes:

- **Objective criteria**
  - Use of objective criteria may carry less risk than a purely subjective evaluation. Reliance on objective criteria is more commonly used when a company eliminates an entire department or plant. One method is using a “bottom up” approach by eliminating those employees with the least seniority. This approach can help side-step any ADEA issues and keep morale stable as most employees will perceive it as a fair and logical approach to layoffs. Objective selection criteria may also include measurable indicators of past performance in determining which employees will be terminated. This can prove a risky proposition, especially if performance evaluations are not done consistently and are not well-documented. The system in place should rank performance in an impartial manner, perhaps by using a numerical measure. These terminations must be carefully documented by providing adequate supporting information for each termination decision. As an added protection measure, the evaluation should also be reviewed by the managers of the direct supervisors.

- **Subjective criteria**
  - This approach gives employers the most latitude in the selection process, yet can prove a cumbersome and most risky procedure. In a subjective RIF, the first priority is to form a group of decision-makers who actually work with the employees under review. If possible, it is recommended this group is comprised of diverse individuals of various races, genders and abilities to help insulate the company from discrimination claims. As with any RIF method, the criteria for selection must be documented. The paper trail should include a written description of selection criteria, instructions to the selection committee and an explanation as to how it was applied to each employee. Once the rankings have been compiled, employers will have an initial list of those slated for termination. At this point employers face the complicated task of ensuring the list does not violate EEOC laws governing disparate impact. It is highly recommended to bring in legal counsel to conduct a statistical analysis. All documentation associated with this procedure should be done under the protection of attorney-client privilege. The list may require modifications to comply with EEOC regulations. After a final list is compiled, management should give a final review of the selections to ensure it achieves the overall goals and objectives of the RIF.

- **Hybrid RIFs**
  - Some human resource and legal advisors may opt to implement a hybrid RIF by combining the most advantageous aspects of subjective and objective criteria for evaluating and implementing a layoff. Selecting relevant criteria that is both objective and subjective can enable your company to retain the most qualified, efficient and productive workers while simultaneously sustaining employee morale and smoothing the RIF transition. Using this selection process can also further hedge your legal defenses from potential discrimination litigation, as subjective criteria are often seized on by plaintiffs’ counsel in disputes.

Many variables come to play in implementing a RIF, including the size of the company, the state in which it operates and whether it has a unionized workforce. But, there are certain steps employers of any size can follow to mitigate the risk of employee disputes related to a RIF.

First and foremost, Schowalter, Weldon and Shorts recommend consulting with a local law firm specializing in workforce reduction and engaging them in the process early, preferably before any decisions are made.

“There are many variables employers must be cognizant of and navigate; therefore, we counsel employers to involve a specialist in these matters from the appropriate jurisdiction early on,” says Shorts.

Next, companies must take action to ensure full engagement by all relevant departments in the organization. “Coordinating closely with inside and outside counsel, senior management, human resources, and corporate communications is essential. Collectively, the team must articulate why the RIF is necessary and establish procedures for implementing the RIF while side-stepping any potential legal issues,” notes Weldon.

Prior to implementing RIF programs, companies must consider the following:

- **How many employees are impacted?**
  - The number of employees affected by a RIF is especially pertinent to companies with 100 or more employees. The Worker Adjustment and Retraining Notification Act (the WARN Act) requires employers to provide a 60 day notice of a planned layoff if 50 or more employees or one-third of the workforce at a given site are affected, provided that percentage is more than 50 full-time employees.

- **What is the optimal method for achieving RIF objectives? Options for employers range from voluntary terminations with exit incentives to eliminating positions based on objective, subjective or a hybrid of objective and subjective criteria.**

- **Who are the decision makers charged with identifying the positions selected for elimination? A team that extends beyond the targeted workers’ supervisors is optimal to ensure objectivity.**

- **How are workers identified? How many of those selected for termination are members of a protected class? Will the choices set your company up for a potential “disparate impact” claim?**

Selection of the “class” is a critical deci-
sion with significant repercussions if not properly conducted.

- How will we handle the aftermath? What is the communication plan to address concerns among remaining employees? How will the company address rumors and uncertainty? Often, morale suffers during the RIF process so a proactive plan to address lingering concerns is warranted.

“Most lawsuits are born out of a lack of communication and misunderstandings,” explains Schowalter, “and employers must keep the lines of communication open with employees.” Careful communication to existing employees — explaining the process involved and why layoffs are necessary — can prove beneficial in maintaining positive employer-employee relations. To further ensure the business relationship ends on a friendly basis, Schowalter also counsels clients on ways to conduct effective exit interviews.

But communication must be judiciously managed. “This really is a task where you need that full team of HR experts, legal counsel, and management engaged fully in the process. Employers must ensure that the information provided doesn’t damage confidentiality or compromise security which in turn could instigate ‘the light bulb effect.’ Too much or inappropriate information can open the proverbial legal flood gate and potentially spark a string of litigation that travels throughout the company,” Schowalter says.

All RIFs have potentially damaging repercussions which must be carefully managed, not only from a purely legal perspective, but also from a business continuity standpoint. Often, after all, companies who initiate a reduction in their workforce now have to boost productivity to make up for lost workers.

And there are certain situations where a RIF can be even more complex for employers. In an age where off-shoring and outsourcing are center stage, companies initiating a RIF to move operations elsewhere often face heightened tensions in employer-employee relations.

David Wilk, with Larson • King, cites one case where a company moved its headquarters out of the country and current supervisors were expected to train their overseas replacements.

“This can be a very difficult message to deliver...That’s where it becomes very important for the employer to communicate appropriately and effectively with the employees,” says Wilk.

Many times, RIFs are implemented during a period of significant change for an employer. In some instances, a merger has

The weakened economy and plummeting profits in many market sectors have created the economic necessity for companies across the nation to curtail costs. To keep their companies in the black, some executives will confront the RIF red zone. In-house counsel, human resource professionals and other decision-makers must carefully plot out a path to avoid stepping on a litigation bomb. The following illustrates common RIF risks and advice for safe passage around them.

1) Disparate Impact Claims — Company leaders responsible for planning layoffs must remain cognizant of protected classes when deciding which employees to release. As part of the process, it is recommended that management conduct a statistical analysis of their labor force to ensure the layoff doesn’t disproportionately impact protected classes. A disparate impact analysis should be coordinated with and conducted by legal counsel so that all associated documentation can be classified as “attorney-client privilege.”

2) Identify all Applicable Statutes — Following a RIF, some corporations with 100 or more employees may have to contend with class action suits citing violations of the Workers Adjustment and Retraining Notification Act (WARN Act), the Age and Discrimination in Employment Act (ADEA) and the Older Workers Benefit Protection Act (OWBPA). In these cases, employers often make mistakes by failing to comply with the termination provisions of the federal and state WARN Acts and the decisional unit requirements of the ADEA and OWBPA, thereby invalidating the waiver. Because of the many applicable federal laws, employers must know precisely how to comply with all the guidelines within these federal statutes, as well as state and local laws.

The location of the RIF can also have legal ramifications. Many state, county and city municipalities may also have laws mandating additional compliance requirements. In these cases, employers should hire a local attorney to research all of the legal responsibilities inherent in the RIF. Looking to the statute with the most stringent requirements, the employer should craft a RIF that complies with those legal standards.

3) Warnings for WARN — Large companies implementing a RIF that brings the WARN Act into play face more than just the risk of failure to comply with the law. When it is necessary to lay off 50 or more employees, the 60 day notice requirement also exposes executives to the potential for disruption by disgruntled employees. For example, those with access to proprietary information may undermine the company by covertly offering confidential information to competitors. Employers can opt to call for voluntary terminations with exit incentives attached. Typically, these include a severance package that may also include continued medical coverage or an early retirement package.

4) Employee Morale & the Potential for Unionization — The collective angst generated by tough economic times can often set the rumor mill among employees into high gear. Whether management is planning a layoff or not, news media reports of the economy can create a heightened sense of job insecurity among employees. And, that’s when employers become most vulnerable to unionization, which can have long-term disruptions on operations. Recently, after Starbucks announced the closing of 600 stores nationwide, the employees at its Mall of America store in Minnesota decided to unionize.

If unionization is underway, employers should take a proactive approach to addressing employee concerns. If this threat arises, employers should regularly hold communications meetings with employees and use that opportunity to foster good employer-employee relations. If appropriate, let employees know that it is a falsehood that unions can guarantee their jobs and it is unlawful for them to make that promise. Employers may also use this time to educate their work force and explain why the company does not need a union. During these meetings, give employees a realistic assessment of the company’s fiscal condition. If a RIF does become necessary, managers may want to consider giving those slated for termination time and perhaps assistance with placement in a new job.

5) Prudent & Effective Communication — While communicating with employees is critical, especially if a RIF becomes necessary, too much information can instigate litigation. Many employees do not realize the painstaking process of implementing a RIF, the expense it entails, and may not fully understand why it is necessary. Keep an open line of communication with your employees and explain as much of the process as is practical. You must, however, judiciously choose what is appropriate to discuss to avoid inadvertently stepping into confidentiality issues or compromising your company’s security. Make sure all communication is coordinated with legal counsel to mitigate risk. Also, to ensure as best you can the business relationship ends amicably, conduct exit interviews with each affected employee.
precipitated the process and there are superfluous positions that result. In others, a company is struggling to cut costs while maintaining outputs, and the company’s profitability and survival may rest in the reduction. Regardless, RIFs are costly, time-consuming, and difficult to implement given the competing laws and regulations companies must address. Legal claims from terminated employees add to the ultimate cost of a RIF.

Seeking legal counsel early in the process and engaging them in all aspects—from conception to selection of workers, and communication with both terminated and retained workers—is essential. Companies must comply with local and state guidelines, while also walking the line among a variety of federal laws, including the WARN Act, ADEA, and OWBPA.

“This is one of the most complex processes a company can undertake. It requires a cross-functional team from within the company and a well-documented path from inception to completion, including a strategic plan for managing morale during and after the RIF process,” says Shorts.

As the economy tightens, unemployment rises and companies continue to shed workers at rates not seen in several decades, understanding the risks of RIFs and laying out a clear strategy for them is more essential today than ever. Recently, Larson•King attorneys Shorts, Weldon and Wilk developed an RIF Desk Reference to guide companies contemplating a workforce reduction. To receive a complimentary copy, please visit www.larsongking.com/rif.

AN EFFECTIVE CREDITOR WEAPON

INVOLUNTARY BANKRUPTCY CAN BE AN EFFECTIVE CREDITOR WEAPON

Another option frustrated creditors have is forcing a delinquent “debtor” into involuntary bankruptcy. This is typically done where there is a concern that assets are being diverted to other creditors or, worse, to friends or insiders (“fraudulent conveyances”). If the debtor has 12 or more creditors, to force bankruptcy three creditors holding undisputed claims must sign an involuntary petition. The target debtor does not have to be insolvent, but the petitioning creditors must have valid, undisputed, non-contingent claims totaling, in the aggregate, in excess of $12,000. As indicated above, vendors may want to consider this more aggressive option when a company is not only failing to pay its general creditors, but is engaged in behaviors harmful to those creditors, such as repaying debt owed to insiders, paying selected creditors while ignoring others, selling off its assets with no guarantee that the proceeds will go to unsecured creditors, and closing the business down and opening up under a new name.

Brian Graham of SmithAmundsen in Chicago recommends this strategy be used whenever a debtor refuses to cooperate, return phone calls or supply requested information. “If a debtor is avoiding creditors it may mean the debtor has something to hide. An involuntary bankruptcy makes all of the debtor’s dealings not only transparent, but makes information easily and cheaply accessible.”

Selling on Credit? (Continued from page 9)

Proof of Claim provides vital information for the Court. Creditors should pay special attention to the mailing address on the Proof of Claim. Creditors must ensure the correct address is provided indicating where future notices and distributions should be sent.

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Effective ICPs call for immigration and I-9 completion training for all key personnel, including HR, and to avoid additional risk, ICPs should require adherence to federal immigration law by all subcontractors, as well as including an indemnity provision.

THE ICE AUDIT — PREPARING AND SURVIVING
Despite taking precautions and engaging in a systematic and strategic immigration compliance program, some employers will find themselves in ICE’s crosshairs.

“Many ICE investigations are due to confidential reports — a company’s competitor or a disgruntled employee who is aware of unauthorized company workers or a substandard I-9 system may file a report,” explains Harkey.

The first stage of the ICE audit is the notification period. ICE provides employers with three (3) days’ notice of its intent to inspect. An employer can and should choose the inspection location.

Upon receipt of the notice, employers may correct “technical I-9 errors,” which will help mitigate any subsequent fines. In making I-9 corrections, employers should be careful to retain both the original and the revised forms and avoid backdating any documents.

ICE requires that all I-9 documents be produced in full at the time of the audit. Companies can ease this burden by maintaining these records separate from standard personnel files. Documents can be furnished electronically or in hard copy format.

As in many situations, communication and access are critical to streamlining the ICE audit process. Prudent employers will assign a company representative or legal counsel to serve as the ICE liaison throughout the process. It is imperative that the liaison be well-versed in immigration law and compliance, I-9 documentation and record retention, and have strong knowledge of the company’s immigration compliance plan and protocol.

“My clients who have been most successful in immigration audits have had not only the involvement of counsel but that of a well-trained HR representative in immigration law and regulations,” says Harkey.

MORE CHANGES AHEAD
Members of the media and citizen activist groups have kept the heat on lawmakers to expand and increase the scope of laws governing illegal immigration. The Comprehensive Immigration Reform acts in the U.S. Congress and U.S. Senate remain in committee. Lesser known but certainly critical is the SAVE Act, currently before Congress. SAVE is the “Secure America through Verification and Enforcement” Act of 2007 (HR 4088 and S 2368).

SAVE has three primary components including international border enforcement, interior enforcement and putting an end to unlawful employment. It is the Ending Unlawful Employment provision that has the greatest impact on employers. With an employment verification pilot program currently in place, the goal of the Act is to make the pilot program permanent. Central to the pilot program is the use of E-Verify, the U.S. employment status authorization verification program. As of February of this year, 52,000 employers had voluntarily signed on to E-Verify.

E-Verify is an internet-based system operated by DHS in partnership with the Social Security Administration. It provides access to SSA and DHS databases to verify the validity of social security numbers and employment eligibility of new hires. It also taps into the USCIS database to verify eligibility. To date, 93 percent of employers’ queries regarding eligibility have been instantly verified as work authorized.

Using E-Verify provides some additional protection to employers. Any employer who uses E-Verify is not liable for hiring an unauthorized alien if an error in eligibility is found in the E-Verify system. It also provides protection in the event of an ICE audit, providing a defense to the employer from penalties.

“E-Verify cases the HR department’s burden to verify work authorization documents during the I-9 process. It helps to remove the risk that they are unknowingly employing workers without proper documentation and subjecting themselves to governmental penalties,” notes Harkey. “But, E-Verify is not a good fit for all companies at this time, and companies should research the details of the program and seek counsel regarding same before entering in Memorandums of Understanding with the government, an E-Verify requirement.”

Tufly agrees and indicates E-Verify makes it easier on employers subscribing to the service by streamlining the I-9 process.

Navigating immigration and hiring requirements for employers is predicted to grow more complex in the coming years. In addition to the new bills on the agenda in the House and Senate, many states are evaluating and implementing their own programs for immigration violation enforcement. Navigating the territory will require employers to have sufficient records management plans in place and a firm grasp of both state and federal employment eligibility requirements.

“Foresight and preparation are key to avoiding immigration compliance problems and penalties. Most companies can avoid these difficulties through careful review of their hiring and I-9 processing systems. Of course, an annual internal I-9 audit will reveal most problem areas that can be corrected,” advises Harkey.

Outsourcing, September 11th, rising corporate layoffs, and increased media scrutiny have created a perfect storm for employers on the immigration issue. In a new era of enforcement, the best defense remains proper documentation, thorough training for all key supervisors and supervisory departments, and a commitment to staying vigilant to avoid infractions.

Ronda Butler Harkey, a partner with USLAW firm, Orgain Bell & Tucker LLP, practices in corporate immigration compliance, corporate and employment-based immigration filings, and individual or family-based immigration filings.

She is experienced in drafting corporate immigration compliance plans and is the author and presenter of “Who’s Who in Immigration Today,” a paper on immigration compliance law and procedure. Ronda can be reached at rbh@obt.com and (409) 838-6412.
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