Breakout Sessions – Series 3

BETTER TOGETHER

FORGING HARMONIOUS RELATIONS BETWEEN THE LEGAL DEPARTMENT AND HR

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Timothy A. Wolfe (Moderator) – Ogletree Deakins (Chicago)

Maureen Cole – Hu-Friedy Mfg. Co., LLC

Gregory J. Hare – Ogletree Deakins (Atlanta)

Amy Perkins – ExamWorks, Inc.
Better Together: Forging Harmonious Relations Between the Legal Department and HR

Presenters
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HR & Legal

- What makes the relationship work?
But First . . . Attorney-Client Privilege

Attorney-Client Privilege

- Enables clients to seek legal advice without fear of having others know what they say to their lawyers.
- Who is the “Attorney”?  
  - The company’s lawyers (in-house as well as outside)  
  - Can include people working at direction of legal counsel
- Who is the “Client”?  
  - Corporate entity  
  - Includes officers, directors, and management  
  - Includes HR reps acting in official capacity
Attorney-Client Privilege (cont’d)

- Prohibits disclosure of covered communications.
- Does not prohibit disclosure of facts.
- What communications are covered?
  - What client says to its counsel for purposes of obtaining legal advice.
  - Communications from counsel for purposes of providing legal advice to client.
- Privilege is held by client; can be “waived” only by client. (Responsibility normally given to a company’s General Counsel.)

Keep in Mind . . .

1. Putting an attorney in a meeting does not automatically privilege everything said in it.
2. Merely “cc’ing” counsel on an email does not automatically make the email privileged.
3. Privilege normally does not apply to communications in the presence of a third party.
4. Telling counsel about a situation does not make the subject of the communication privileged.
   - Email from CHRO to GC (copying CFO) about harassment allegations against CEO would be privileged, but a separate email from CHRO to CFO about the harassment allegations is not privileged.
Additional Confidentiality Rule for Lawyers

- Model Rule 1.6 – Rules of Professional Conduct
- Subject to specific exceptions, *a lawyer shall not reveal information relating to the representation of a client* unless the client gives informed consent or the disclosure is impliedly authorized in order to carry out the representation
- Broader than attorney-client privileged communications.
- Applies to all information relating to the representation.

Working Together
What Lawyer Is Right for You?

FIXER?

Helper?

Trusted Advisor?

Co-Equal?
Factors That Impact the Relationship

- Context/Organizational Structure
- Relationships to Key Stakeholders (e.g., CEO)
- Prior Experience
- Tenure
- Strengths
- Resources
- Personalities/Ego
The View From HR

- HR Compliance is a core function of HR.
- Employee relations and labor relations
  - Part HR and Part Legal
- Legal provides resources and expertise.
- Company values may outweigh legal risk.
- Mitigating legal risk has to be balanced against attracting and retaining talent.

The View From Legal

- Expectations of General Counsel/CEO
- What if they don’t want my help?
- Is anybody listening?
- Trust and confidentiality
- Decision maker vs. advisor
- Business judgment vs. legal judgment
- Protect the company vs. advise the client
Suggestions for HR – What Works

- Engage with counsel when planning, not at execution.
- Communicate deadlines (I need by X date because...)
- Legal advice is only as good as the facts provided.
- Very rarely is a legal answer actually black and white.
- Define what you need
  - What’s required by law vs. what’s recommended by counsel.
- Get counsel to confirm your interpretation of advice that he/she provided.
- Sometimes it’s better not to put things in writing.

Suggestions for HR – What Works

- You’re a consumer of legal services, so be sure you get what you need.
  - What does the law say?
  - What’s the risk?
    - Business risk vs. legal risk
    - Financial vs. non-financial
    - Likelihood of liability vs. amount of liability
  - What do you recommend?
  - Can we do this?
  - Should we do this?
  - Push back when necessary. (Why? What if...?)
Suggestions for Legal – What Works

1. Understand the GC-CHRO relationship.
2. Go slow – build the relationship first.
3. Patience – trust is earned.
4. Be clear about what goes “in the vault.”
5. Legal answer is not always the right answer.
6. Business risks can outweigh the legal risks.
7. Better to advise than decide.
8. If you force a change, you own it.
9. Know when to escalate.
10. Never let a crisis go to waste.

Now it’s your turn...
You Can’t Handle the Truth

- You are the in-house counsel and are aware of an internal ethics complaint alleging that the HRVP is bullying one of her current employees. That matter is being handled by the company’s ethics office.
- You receive a charge of retaliation from the local EEO agency alleging that the HRVP has retaliated against the same employee for requesting intermittent leave for her multiple sclerosis.
- You are required to notify the CEO because the HRVP is an officer of the company.
- Should you tell the HRVP about the retaliation charge and, if so, when?

Can You Handle the Truth?

- Employee complains to her manager that she is paid less than her male counterpart.
- Manager has been doing some digging and thinks that there may be some problems with the compensation system.
- HR has begun analyzing this issue and collecting data.
- How should it be handled internally?
All in the Family

- As the company’s Associate Counsel – Employment Lawyer, you are responsible for managing the company’s employment litigation matters.
- You receive a demand letter from a law firm, accusing the company of underpaying female employees in the IT Department.
- The demand letter includes a chart breaking down the components of compensation (including year-over-year raises) for all 50 persons working in the IT Department.
- After some investigation, you learn that the complainant’s sister started working for the company as an HR Admin just 3 months earlier. You suspect a leak.
- What should you do?

Trouble Ahead, Trouble Behind...

- Your company is under a lot of pressure to reduce its benefits costs, which are highest among the employees in the maintenance department.
- The CFO has come up with a plan to convert the employees in the maintenance department to independent contractors.
- Because the plan will result in the termination of 10 or more employees, it must be reviewed by the in-house counsel before it can be presented to the CEO.
- Counsel believes that the plan will result in significant liability for the company and advises HR against it.
- What should HR do? What should Legal do?
Inside Out

- You are the VP of Compensation at a large retailer.
- You have inside sales and outside sales employees. Most of the salespersons work in a call center attached to your product warehouse, but some work on-the-road, working directly with customers and using home offices.
- All sales employees, both inside and outside, are paid straight 5% commissions based on leads that are converted into realized sales.
- You tell the Company’s outside HR consultant your concerns that the inside salespeople are misclassified as exempt and should be recording their hours and receiving overtime.
- The consultant tells you everything is fine ... he checked on hr.com and confirmed that all employees are being compensated correctly. You ponder, should you report your concerns to the company’s General Counsel? What can be done?

Questions?
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