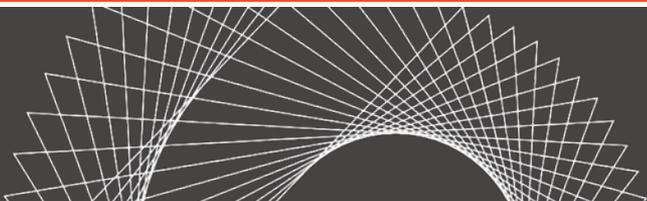


Shifting In-House Counsel Priorities Amid Uncertain Times



Akin Gump

STRAUSS HAUER & FELD LLP

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Shifting In-House Counsel Priorities Amid Uncertain Times

- The United States of America is facing several crises at once, including:
 - COVID-19 pandemic
 - A reckoning on issues of racial and social justice, and rapid call to action
 - High unemployment levels
 - Economic uncertainty
 - Political realignments and 2020 elections
- Past practice may not necessarily be indicative of future results

Today's Speakers



John Goodgame
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Bob Lian
Partner
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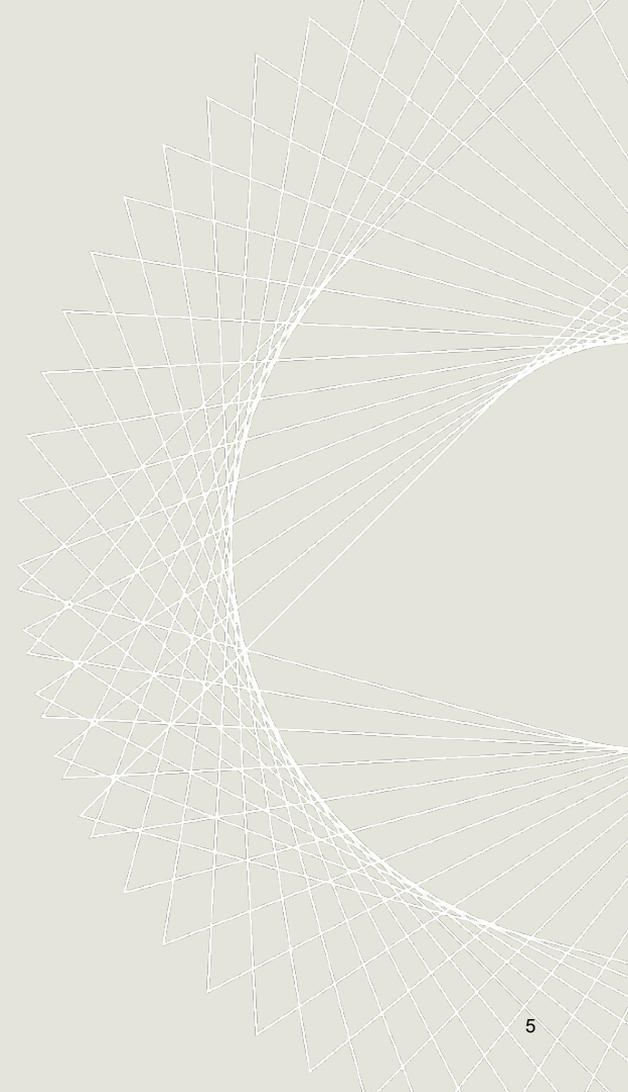


Arshi Siddiqui
Partner
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Agenda

- Applicable Legal Duties – Corporations, Boards, Officers, Company Counsel
- How the Changing Landscape Affects Duties and Priorities
- Workplace Legal Considerations
- A Shifting Political Landscape & Uncertainty at Every Level
- Key Takeaways
- Questions?

In-House – Legal Duties



Role of in-house counsel in context

- Important to consider the duties and responsibilities of directors and officers in properly assessing the legal obligations and priorities of in-house counsel
- Duties arise from several sources
 - Statutory and common law obligations
 - Fiduciary duty
 - Duty of care
 - Duty of loyalty
 - Unique duties on in-house counsel

Fiduciary Duties: General Overview

- Fiduciary Duties under Delaware law are owed to the Company and its Shareholders
 - Duty of Care
 - Make an **informed** and **deliberate** business decision
 - Act with the care that an **ordinarily prudent person** would use in similar circumstances
 - Act in good faith
 - Best interest of corporation
 - Not be wasteful
 - Duty of Loyalty
 - Welfare of the Company and shareholders above personal interests and preferences
 - No self-dealing

Fiduciary Duties: General Overview

- Business Judgment Rule
 - As a general matter, directors' actions and decisions will have the protections afforded by the business judgment rule.
- Breaches of Fiduciary Duty Of Care can arise if:
 - **No Action** is taken in a situation where a careful person **would have taken** action
 - If decisions are made
 - Without taking into account necessary and available information
 - Without taking time and opportunity to deliberate
 - Without being diligent in reaching a decision
- Ignorance is not bliss

Officer Duties and Obligations

- Fiduciary duties identical to Board duties
 - Duty of care
 - Duty of loyalty
- No exculpation
- Unclear whether Business Judgment Rule applies to officers
- Little case law guidance

Priorities Pre-2020

- Determine “Tone at the Top”
- Oversee the company’s strategic operations and prospects
- Monitor new developments and consent to strategic and operating decisions
- Promote long term focus, while being mindful of short term goals and challenges
- Other pre-2020 Board priorities include:
 - Cybersecurity
 - Gender diversity and #MeToo
 - Climate change
 - Shareholder activist preparedness
 - Sanctions

Governing in 2020

- **Oversee Financial Planning**
 - Review liquidity: current and foreseeable cash positions and cash flows
 - Understand access to capital and availability of options
- **Oversee Financial Reporting**
 - SEC Public Statement (June 23, 2020) “*Statement on the Continued Importance of High Quality Financial Reporting for Investors in Light of COVID-19*”
 - Critical role of Audit Committees
 - Disclosure of significant and well-reasoned judgments
 - Financial reporting must reflect and be consistent with specific facts and circumstances



Governing in 2020

- Re-assess strategy and operating plans and direction
 - Oversee innovation
 - Monitor results
 - Pivot when something can be done better
 - Identify and question what short-, medium-, and long-term changes are being considered?
- Oversee communication and communication strategies
 - Balance between hope for the future and realism of the present
 - Words matter

Governing in 2020

- Consider Cultural Impacts on Company Performance
 - We are all living through uncertain times but the impact is not equal
 - Beware of a gulf between executives and the workforce
 - in the workforce
 - in the workplace
 - local and national communities in which your company operates
 - in the home
 - Evaluate both management and board performance throughout the crisis
 - Identify “weak links” and reevaluate bench strength
 - Reassess succession plans, taking into account qualifications, experience, engagement, human capital EQ and diversity

Duties and Responsibilities of Corporate Counsel

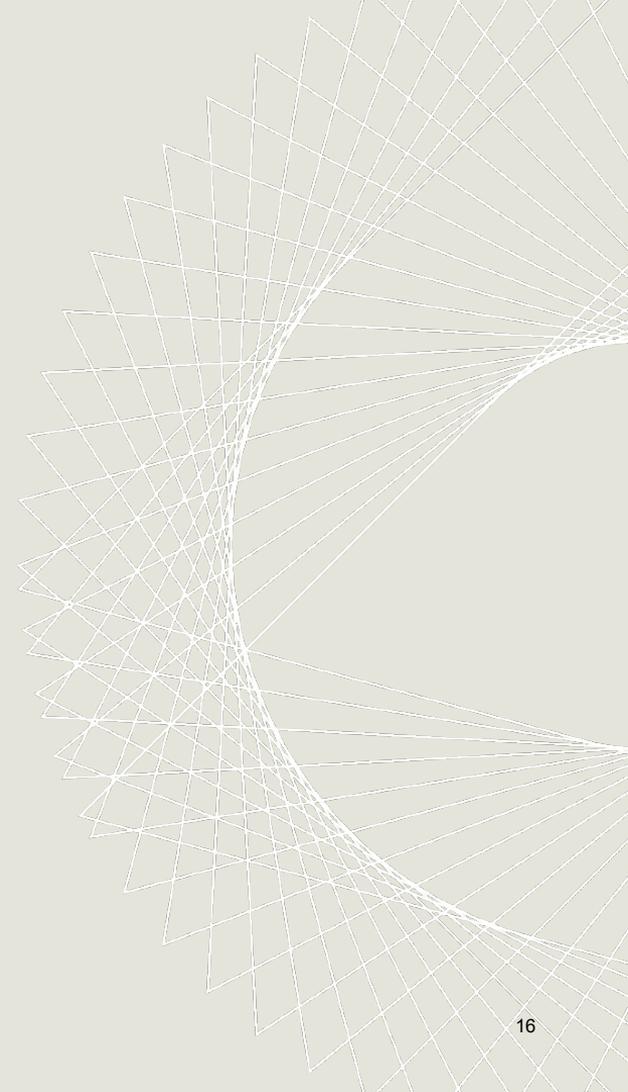
- Duties as officer (if lawyer also holds officer position)
- Duties as agent as corporation
- Ethical duties under applicable bar rules
 - TX Disciplinary Rule of Professional Conduct 1.01 – Competent and Diligent Representation
 - Comment 1: “A lawyer generally should not accept or continue employment in any area of the law in which the lawyer is not and will not be prepared to render competent legal services. Competence is defined . . . as possession of the legal knowledge, skill, and training reasonably necessary for the representation. Competent representation contemplates appropriate application by the lawyer of that legal knowledge, skill and training, reasonable thoroughness in the study and analysis of the law and facts, and reasonable attentiveness to the responsibilities owed to the client.
- Professional duty of care
- Assistance in guiding priorities of board and officers

Unique Challenges Facing In-House Counsel

- Duty to remain informed in rapid-fire, shifting environment
- Anticipating changing standards and norms – PPP example
- Guiding company leadership on legal and practice consequences of company response to issues of pressing social concern
- Balancing preservation of privilege with need for evidence of considerations and decisions

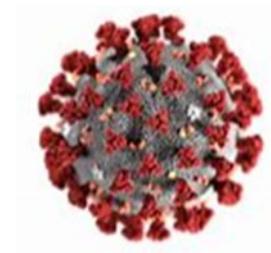
Workplace Legal Considerations

Benchmarks, Standards and Landmines for Navigating A Pandemic,
Social Unrest, Economic Dislocation and Other Challenges



Operational and Leadership Challenges with COVID-19

- Liability and insurance issues
 - Officer and director personal liability
 - Workers' compensation and tort claims
 - Potential exclusions from general liability insurance
- Federal safety rules and guidance
 - Few specific mandates or requirements
 - Guidance from Centers for Disease Control and Prevention and Occupational Safety and Health Administration
 - EEOC and COVID-19 guidance
- Evolving state and local rules and standards
 - State and local ordinances governing safety and health measures – mandates and guidance
 - Renewed shut-down orders in hot spots



Employer Response to Protest Activity

- Widespread activism around racial equality, politics, and other issues, combined with social media, presents expanded challenges for businesses in managing legal, reputational, and other issues.
- Protected employee activity
 - NLRA protects employee discussions and protests about **working conditions**
 - Exceptions:
 - Posting on employer-sponsored social media platforms
 - Sending messages on business email systems
 - Rude or profane statements
 - Disloyal conduct
 - Some federal and state laws protect **whistleblower** activity
 - First Amendment protects against state action that infringe, but does not limit what private employers can do.
 - Handful of state and local laws protect **off-duty** conduct (e.g., California, New York)



Employer Response to Protest Activity

- Business and legal risks with employer statements and actions
 - Chilling protected activity
 - Failing to take action when off-duty conduct could damage the company's reputation
 - Maintaining outdated policies regarding off-duty conduct and social media
 - Treating employees who engage in similar inappropriate conduct differently
 - Lawfully exercising employer rights could still create reputational/publicity risks

Legal Issues with Workplace Diversity, Inclusion and Equality

- Diversity efforts must comply with Title VII and other federal, state, and local anti-discrimination laws.
- Well-intentioned efforts to promote diversity may expose an employer to liability for reverse discrimination (e.g., white employees can bring claims for race discrimination).
- Affirmative Action v. Diversity Initiatives
 - Affirmative Action = Giving a preference to a protected group when making an employment decision (i.e., race-conscious or sex-conscious employment actions)
 - Diversity Initiatives = Policies and programs reflecting a company’s desire to attract and retain employees of diverse backgrounds and foster an inclusive environment

Lawful Diversity Initiatives

- The law does not prohibit diversity policies or practices aimed at recruiting a more diverse applicant pool or encouraging the development of minorities and women.
- Some courts distinguish between inclusive and exclusive techniques in assessing whether diversity initiatives result in reverse discrimination.

Inclusive Techniques = Lawful

- Expanding the applicant pool to include more women or minorities, designed to increase the number of qualified applicants.
- Recruitment and other techniques of inclusion do not affect the ultimate selection process for hiring or promotion.
- Seeking to ensure that as many qualified candidates as possible make it to the selection process.

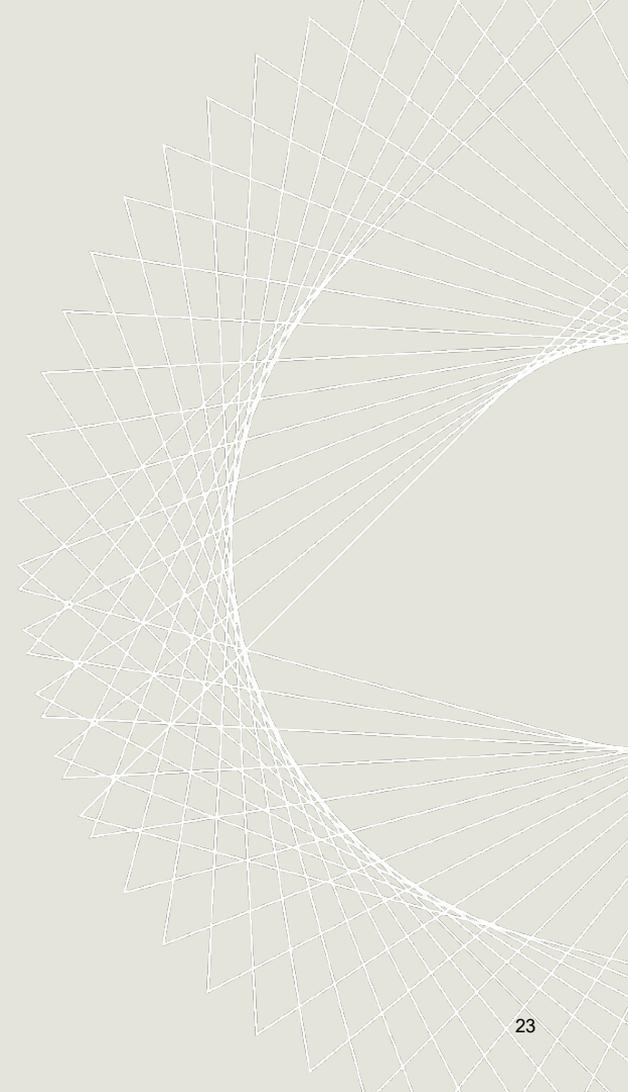
Exclusive Techniques = Legally Problematic

- Usually work to select some candidates rather than others from a pool.
- Exclusive techniques include setting quotas for vacancies and displacing workers of a particular sex or race through layoffs.
- Have the potential to help, to varying degrees, minorities and women be selected at the expense of someone else.
- Discriminatory exclusion causes harm to third parties.

Diversity Initiatives – Permissible Practices

- Do not directly or indirectly tell or pressure decision makers to hire or promote a minority or female candidate.
- Recruiting and candidate outreach efforts to expand diverse slates
- Rewards and incentives/manager accountability
- Diversity training
- Employee networks/affinity groups
- Affirmative action can be legally problematic and should generally be limited to situations required by law (under court order or consent decree, or where required by government contracting laws).

The Shifting Political Landscape



Current Landscape in Washington

- Trump Administration:
 - Decision-making from the top focused on a very distinct worldview and loyal electoral base
 - Less reliance on subject-matter expertise within the federal government
 - Ability to drive the narrative with traditional and digital media
- Congressional Democrats:
 - Driven by an institutional responsibility to negotiate during the current health and economic crisis
 - Laser-focused on the shortcomings of the Administration and the need for electoral change
- Congressional Republicans:
 - President Trump enjoys an outsized impact on Republican votes in Congress
 - A philosophical inclination toward smaller government and a focus on economic recovery

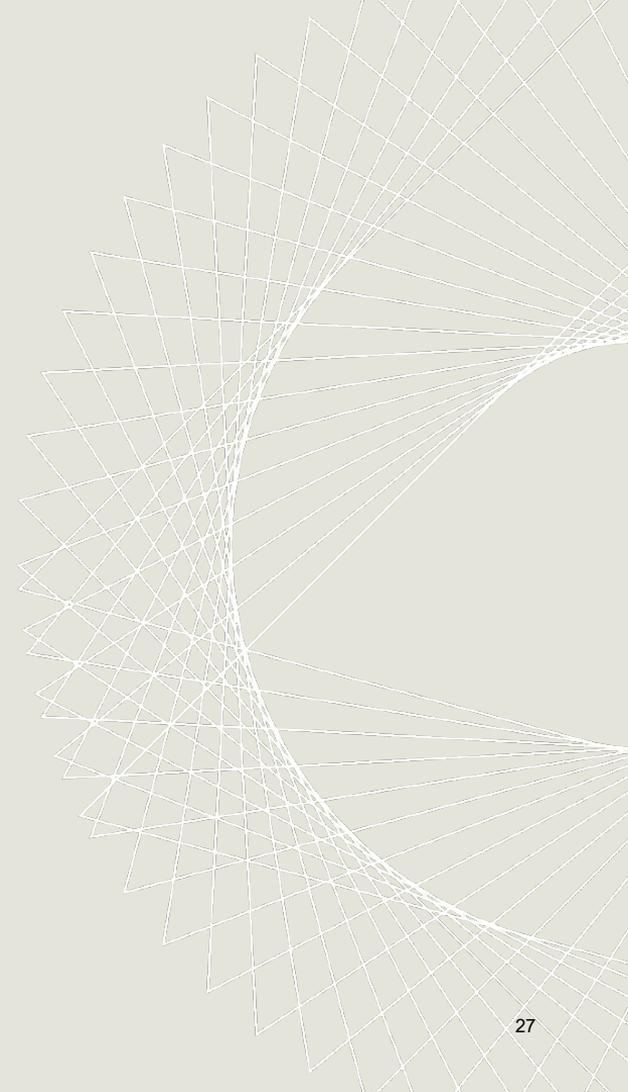
Current Landscape Outside Washington

- COVID-19/Trump/Shelter-in-Place/BLM — a convergence resulting in unprecedented uncertainty.
- Diffused leadership at the federal, state and local levels resulting in geographic disparities with a patchwork of approaches and views.
- Media: Tendency to oversimplify and/or sensationalize the current state-of-play. Multi-dimensional analysis is more the exception rather than the rule.
- Extreme positions on both ends of spectrum command attention leaving the “middle” unrepresented in today’s public discourse and resulting in a skewed picture.
- Instincts to self-censor personal views should not be underestimated in a polarized environment.
- The story is still evolving.

Washington, DC and Corporate America: Trend Lines for the Future

- More accountability across-the-board — otherwise current populist tendencies focused on corporate America will impact approaches to public policy on a bipartisan basis.
- Assessing company approaches to issues sooner rather than later, including issues related to —
 - Opportunity and diversity;
 - Responsibilities to customers, employees and local communities;
 - Employee benefits and executive compensation; and
 - Carbon footprint and environmental issues in particular sectors.
- Results matter but are only one part of the story.

Key Takeaways



Pivoting in a Proactive Way

- From a corporate perspective, accurately reading between the lines is critical to forging a path forward.
- This begins with a candid assessment of the current baseline and company goals.
- Alignment throughout the company is critical and a commitment to developing a cogent strategy backed up by company resources is critical to long-term success.
- One-size-does-not-fit-all and a cookie cutter approach can backfire. Varying levels of responsibility and scrutiny based on a company's business model and customer base.
- Integrating political and policy analysis into these discussions can further leverage corporate efforts.

Practical Pointers

- Focus on oversight efforts.
- Stay current on the best available public health, medical, legal, and applicable governmental guidance.
 - Rely on legal and other advisors.
 - Liaise with other industry participants.
- Encourage board and senior management to consider the impact of the totality of these uncertain times on ALL constituents.
- Memorialize evaluation and decision-making process – i.e., where relying on public health advisors for decision-making, keep good records of considerations and advice.
- Debrief on lessons learned and to be learned.
- Prepare for the next crisis.

Questions?

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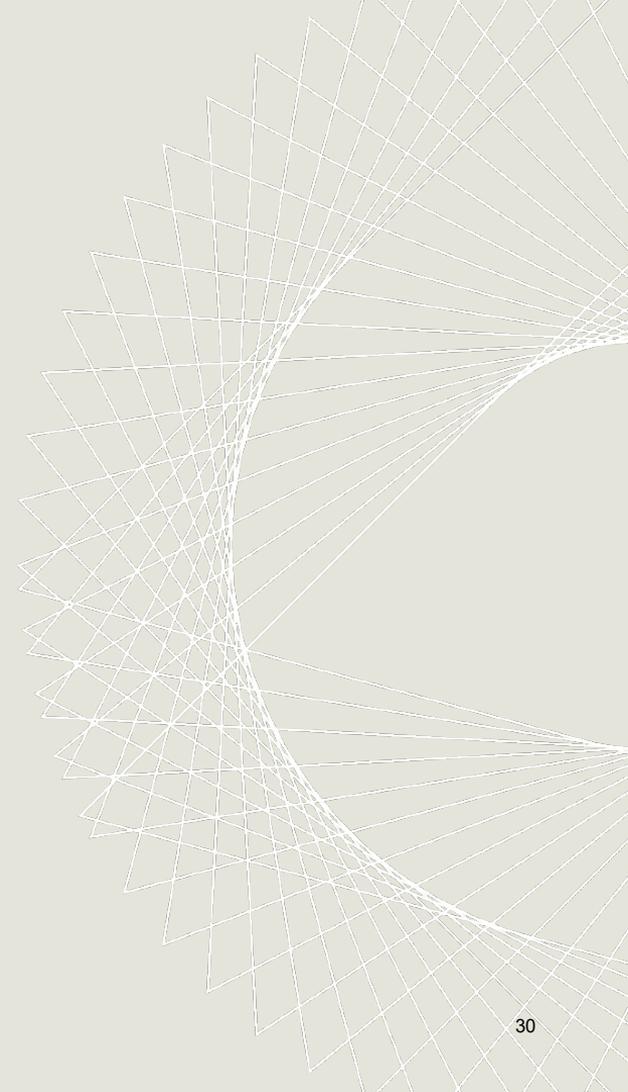
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Thank you for joining us!

