

LEGAL ALERT

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Protect yourself and the environment

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Understanding private equity deals



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Environmental management plans

Protect yourself and the environment

IF YOUR BUSINESS is subject to federal, state or local environmental rules, you may need to develop — and document — an environmental management plan (EMP). The good news is that, if your business is like most businesses, you already have in place much of what you need to assemble a comprehensive EMP.

Do you need an EMP?

The Environmental Protection Agency (EPA) defines an EMP as the actions a business takes to determine how the business affects the environment, complies with rules, keeps track of environmental activities and meets environmental goals and targets.

An EMP also documents key elements of environmental management, including a company's:

- Environmental policy,
- Assignment of responsibilities,
- Environmental manual,
- Standard operating procedures (SOPs) and best management practices (BMPs),
- Recordkeeping, and
- Communication and training.

The EMP provides a framework for ensuring your business complies with the rules and uncovers opportunities for improving environmental management and cost savings.

Establishing your environmental policy

An environmental policy states your business's commitment to the environment. In addition, the policy commits your business to comply with the law and institute reasonable and appropriate BMPs. The policy works as a touchstone for planning that your business can refer to throughout the development process to keep you focused on the important issues.

Environmental policies usually include a commitment to prevent pollution and continually improve environmental

performance, along with a statement on how the business will fulfill that commitment. So your policy should cite only strategies and actions you're willing to execute.

Creating the manual

An environmental manual outlines your approach to complying with or exceeding the requirements imposed by statutes and rules. It describes how you have organized environmental-management activities within the business. By putting everything in writing and in one place, you increase the likelihood that environmental tasks will be performed consistently throughout your business.

Arrange the manual logically, perhaps according to the major areas of environmental regulation, including emergency preparedness and training, and managing waste, air quality, and waste and storm water. Depending on the type of business, your manual also might incorporate sections on specific substances such as PCBs or pesticides. This organizational structure will help you identify any gaps — particularly regarding mandatory activities.

Your environmental manual should also include detailed information on:

Environmental plans and permits. The manual must list each plan and permit required by rule or that you've decided to use to manage the business's environmental affairs, and state where the current copy of each is located.

Environmental SOPs. The manual should list the SOPs your business applies to help ensure that critical tasks aren't overlooked and are easily communicated. Each SOP



Monitoring your EMP

Simply establishing an environmental management plan (EMP) is not sufficient — you must monitor the plan and your business to confirm you're on the right course and can take corrective action when necessary. The EPA recommends two types of monitoring: compliance and performance.

Environmental-compliance monitoring focuses on determining whether your business complies with the law and whether your employees are following the compliance-related standard operating procedures and best management practices. Audits — whether done internally or by a third party — have proven an effective method. But no matter how you conduct compliance monitoring, you should undergo a comprehensive audit every few years to catch any new business activities that could affect the environment, as well as any changes in regulatory requirements.

Environmental-performance monitoring verifies that your business is achieving the EMP's goals. Monitoring requires a method for measuring progress. Measures are frequently expressed in numbers, such as tons of generated waste or pounds of emitted volatile organic compounds. If the measures are based on volume, your monitoring must take into account changes in production levels to prevent production shifts from distorting the progress you've made.

Finally, you must correct any problems the monitoring identifies, particularly if the problem affects your compliance with law.

should spell out the topic it addresses, whom it covers and the steps needed to carry it out. For example, an SOP might cover how to turn over chemical waste to the person responsible for arranging its shipment.

Environmental BMP. When compiling the manual, check for any BMPs appropriate to your business or industry. Trade associations, universities and governmental assistance programs often serve as sources for BMPs.

Remember to review your environmental manual regularly to determine whether changes to regulatory requirements, business operations, SOPs or BMPs necessitate revisions.

Recordkeeping

Maintaining proper records is critical because that's where government inspectors often begin. To ensure proper records are kept, you first should confirm that your business possesses all records necessary to comply with regulatory requirements. Other relevant records include those that:

- Are likely to prove useful in an urgent situation such as a chemical spill,
- Protect your business from legal and financial problems,
- Substantiate that your business satisfies its EMP commitment,

- Provide data on business performance, and
- Can be used to demonstrate to customers that your business is "green."

The EPA suggests that the master file include records related to emergency preparedness and training, and managing waste, air quality, and waste and storm water. So you don't miss filing deadlines, prepare a master schedule of reports, notifications and the required permits to comply with rules. The schedule should state the actions to be taken and who is assigned to take them.

Communication and training

Your employees and managers must understand the environmental policy and their roles in the EMP. Rules may even mandate communication of these matters.

Some rules also require employee training. Use your manual to determine what training the law requires, and develop a comprehensive list of required training.

An incremental process

As the EPA notes, development of an EMP is a process. The agency advises business owners to make steady progress without biting off so much at one time that the effort detracts from daily business operations. ■

Who must prove “reasonableness” in an age-discrimination lawsuit?

THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) bars age-related discrimination beginning at age 40. But the act allows employers to take actions that fall unequally on older workers and would otherwise violate the ADEA as long as “the differentiation is based on reasonable factors other than age” (RFOA). So which party — the employer or the employee — carries the burden to prove whether these “reasonable factors” exist?

That was the question before the U.S. Supreme Court when it resolved a split in the federal appellate courts in *Meacham v. Knolls Atomic Power Laboratory*.

Case background

A laboratory needed to reduce its workforce because of a changing market. About 100 employees accepted its buyout offer, leaving another 30 or so to cut.

To accomplish this, the lab directed its supervisors to rate employees on “performance,” “flexibility” and “critical skills.” They didn’t consider any criteria directly related to age. When the scores were added up, and points were given for years of service, the totals determined which employees to let go.

All but one of the 31 salaried employees ultimately laid off were 40 or older, and 28 of them sued.

Employees still have the burden of identifying which particular practices allegedly cause an observed disparate impact.

The initial trial

At trial, the employees alleged that the reduction process discriminatorily affected older workers. The lab countered that its decision was exempt under the RFOA provision.



The jury ruled for the employees, and the Second Circuit initially affirmed. But the lab then appealed to the Supreme Court, which sent the case back to the Second Circuit for further proceedings in light of another decision issued in the interim.

This time, the Second Circuit ruled in favor of the lab, finding the employees bore the burden of proof on the reasonableness of the nonage factors. The employees appealed.

The Supreme Court decides

On appeal, the Supreme Court explained that the RFOA provision represents an affirmative defense against claims of disparate impact — that is, the defendant must affirmatively establish the defense to prevail on it.

But the lab contended that, regardless, the RFOA provision merely elaborated on an element of ADEA

liability. So it argued that an employee must show that the employment practice in question was *not* based on reasonable factors other than age.

The Supreme Court disagreed: “[I]n the typical disparate-impact case, the employer’s practice is ‘without respect to age’ and its adverse impact ... is ‘attributable to a nonage factor.’” In other words, action based on a non-age-related factor is “the very premise for disparate-impact liability in the first place, not a negation of it or a defense to it.” The RFOA defense focuses not on the fact that a non-age-related factor was at work (that is assumed), but rather on the cited factor’s “reasonableness.”

The Court pointed out that employees still have work to do. Under the ADEA, they have the burden of identifying which specific practices allegedly cause an observed disparate impact. In the Court’s view, this burden should prevent employers from being potentially liable for “the myriad of innocent causes that may lead to statistical imbalances.”

Further, the more obviously reasonable the factor other than age is, the easier for an employer to produce evidence raising the defense and convincing the judge or jury that the defense has merit.

Going forward

The Supreme Court acknowledged that its decision “makes it harder and costlier to defend” disparate-impact claims and “will sometimes affect the way employers do business with their employees.” In addition, the Court’s ruling could increase employers’ legal expenses and complicate defending some lawsuits under the ADEA.

Thus, employers must carefully review any employment policies that could cause a disparate impact on older workers to ensure the policies are based on reasonable non-age-related factors. They would also be wise to document their rationale for and implementation of these policies, as well as the outcomes. ■

Advance-notice bylaw proves pivotal in shareholder suit

DELAWARE’S CHANCERY COURT, where many U.S. corporations are incorporated, recently handed down an opinion narrowly interpreting a corporation’s advance-notice bylaw. The ruling in *Levitt Corp. v. Office Depot Inc.* illustrates the importance of carefully drafting advance-notice provisions.

The notice issue

Levitt held slightly more than 1% of Office Depot’s outstanding common stock. Because of what it perceived as “performance problems,” Levitt wanted to replace two members of Office Depot’s 12-member board with its own nominees at the company’s April 2008 annual meeting.

In March, Office Depot notified shareholders of the annual meeting and solicited proxies to elect 12 board members. The notice specified that the election of a slate of directors would be on the agenda. Three days later, Levitt filed with the Securities and Exchange

Commission its own preliminary proxy statement soliciting proxies in support of its two nominees. It didn’t provide advance notice of its intention to propose the nominees.



Office Depot argued that its advance-notice bylaw requires that — unless a business item is “properly brought before the meeting” — the annual meeting can’t consider it. To accomplish this, an item can appear on the agenda for consideration if:

1. The board includes the item in its meeting notice,
2. The board otherwise properly brings the item before the meeting or directs it to be brought before the meeting, or
3. A shareholder otherwise properly brings the item before the meeting.

Delaware law doesn’t require advance notice of a shareholder’s intent to nominate directors at an annual meeting unless the corporation has imposed this requirement. Earlier versions of Office Depot’s bylaws had explicitly required advance notice of director nominations, but the current bylaws didn’t. Delaware law does, however, provide that bylaw ambiguities will be interpreted in favor of shareholder electoral rights.



The court’s analysis

First, the Chancery Court considered whether a shareholder’s nomination of a director constitutes “business” under the advance-notice bylaw, which requires that, “at an annual meeting of stockholders, only such business shall be conducted as shall have been properly brought before the meeting.”

The court found that the term “business” includes any affair or matter to be conducted or considered at an annual meeting, including nominating directors. Hence, the court held that the nomination of directors must be “properly brought.”

The court considered the question of whether Levitt was indeed required to provide advance notice of its intention to nominate two directors.

Next, the court considered the question of whether Levitt was indeed required to provide advance notice of its intention to nominate two directors. Levitt argued advance notice wasn’t necessary because Office Depot’s notice had already specified that the business of the meeting would include electing directors. Office Depot countered that the notice provided only for the limited business of voting for or against its nominee slate.

The court found that the bylaw provided that one way to bring business properly before a meeting is for the board to specify the business in its meeting notice. So the court held that Office Depot’s meeting notice properly brought the business of electing directors before the annual meeting. And the business of *electing* directors includes the business of *nominating* directors for election — especially when neither Office Depot’s bylaws nor Delaware law contains any guidance on the nomination process.

So the court concluded that, because the board had properly brought the business of electing and nominating directors before the annual meeting via its notice, the court couldn’t prevent Levitt from nominating candidates.

The takeaway for corporations

Corporations should closely review their advance-notice bylaws to ensure they achieve their intended effects. In particular, consider whether the provisions apply to shareholder proposals and shareholder nominations. And remember that bylaw amendments may require you to file a Form 8-K and make a disclosure in Form 10-Q or 10-K. Your attorney can help you with both drafting and filing matters. ■

Understanding private equity deals

SMALL TO MIDSIZE BUSINESSES — like their larger counterparts — are seeing more acquisitions conducted as private equity (PE) transactions. Before entering this arena, you need to understand some of the significant distinctions between private equity deals and traditional merger and acquisition (M&A) transactions.

Sponsors vs. buyers

PE sponsors seek out companies that will reap them a healthy return on investment when they later sell the company or make its stock available in an initial public offering (IPO).

By contrast, strategic buyers that already operate in a target company's industry or a related industry generally pursue M&As. Their interest stems primarily from the desire to grow their own businesses.

EBITDA's role

A target company's earnings before interest, taxes, depreciation and amortization (EBITDA) play an instrumental role in PE transactions. PE sponsors usually use the target company's assets to secure the funding necessary to complete the deal (typically referred to as a leveraged buyout). A company's EBITDA indicates whether the company will generate sufficient cash to pay off the loan that was used for the acquisition and the fees the PE sponsor's management company charges for overhead.

Strategic buyers tend to rely on their own cash to fund the transaction and have no management fees to worry about, making EBITDA less critical. This cash strength means they can target more companies as potential acquisitions.

The seller's role

As opposed to most M&A transactions, the seller in a PE deal will likely continue on with the acquired

company. The PE sponsor depends on the seller to oversee daily operations. But a strategic buyer frequently removes management and streamlines the company by eliminating positions that have become redundant from previous mergers of similar companies.

In a PE deal, the sponsor may require the seller to reinvest some of the purchase price in the new company to create an incentive for the seller to perform. Employment agreements with the seller are also common features in PE transactions.

The deal usually restricts the seller's stock so that the seller can't cash it in until a "liquidity event" occurs, such as the sale of the company or an IPO. The stock may be subject to vesting requirements, where the seller must reach a specified amount of time or level of performance before benefiting. The PE sponsor also might retain repurchase rights on the seller's stock — if the seller leaves the company, the investor is entitled to buy back the stock. Similarly, a PE sponsor may restrict the stock's transferability so the company doesn't end up with an unwanted partner. Potential restrictions include rights of first offer or first refusal for the sponsor.

Note that the seller's stock is actually in a holding company formed by the PE sponsor to hold the target company's stock and any related acquisitions. Likewise, the sponsor buys the majority of the holding company's stock — not the target's. A wholly owned subsidiary of the holding company ultimately makes the acquisition.

Look before you leap

PE acquisitions may offer some benefits over traditional M&As, depending on the circumstances. But they are extremely complicated transactions. Don't enter these deals lightly — seek advice from experienced counsel. ■



SPOILIATION AND THE DUTY OF PRESERVATION

A formal, written, electronic document retention policy is a sound business practice for a variety of reasons, not least importantly is the potential for future litigation, where such data is often the most significant, or only, evidence available. "Spoliation" refers to the destruction or material alteration of evidence, or the failure to preserve property for another's use as evidence, in pending or *reasonably foreseeable* litigation. The standard is not limited to pending litigation. Rather, the duty to preserve evidence extends to that period before litigation when a party reasonably should know that the evidence may be relevant to the anticipated dispute, a scary prospect in an age where businesses are regularly threatened with lawsuits. Perhaps more frightening is the power court's wield to remedy or sanction a party when spoliation is found to have occurred, which includes, in the most egregious and prejudicial instances, the "ultimate sanction" of dismissal or entry of a judgment.

The spoliation doctrine is a rule of evidence, administered at the discretion of a trial court, to respond to circumstances in which a party fails to preserve, loses, or destroys evidence. It is critical for business owners and operators to be aware, and understand, the necessity of maintaining not only their paper records, but their electronic documents, and specifically e-mails which are often at the evidentiary forefront of a dispute, in light of this rule and the potential ramifications it carries with it. A formal retention policy, which is implemented and followed in the normal course of business, is the first step in alleviating a company's potential liability in this regard. Specifically, deleting e-data intermittently without regard to document retention exposes a company to, at least, an allegation that such action was undertaken with malice. Thus, an established protocol should be implemented and followed accordingly.

Once a company has reason to believe that litigation involving an employee or client may ensue, they have an affirmative obligation to take appropriate action to preserve the relevant data, referred to as a "litigation hold", including notifying the network host, if necessary, to prevent its subsequent deletion. The litigation hold will apply to data in "native format" as well as paper documents. Merely printing out electronic data is not preservation. Anytime a company has reason to believe a lawsuit may be forthcoming, they should not delay in contacting their attorney for advice and consultation about document preservation.

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