As the financial crisis of 2008 drifts further into the rear-view mirror, the cost of capital available for commercial real estate financing is historically low and accessible, frequently coming in the “non-recourse” variety and without the requirement of personal guarantees by the key principals of borrowers and their sponsors. In a perfect world, non-recourse loans limit the liability for the loan to the real property collateral securing the loan, shielding the principal’s personal assets from liability. There are considerations, however, that borrowers and their legal counsel must take into account to make sure that the non-recourse loans they’ve entered into stay that way.

In almost every non-recourse loan situation, lenders require a “carve-out guaranty”, more colloquially referred to as a “bad-boy guaranty”, from the principals. These bad-boy guaranties list certain acts and occurrences that would cause the principals to be liable for either the actual losses incurred by the lender due to such acts and occurrences (commonly called “above-the-line” events) or, in the event of certain acts and occurrences, the full amount of the loan (“below-the-line” events). As non-recourse loans have developed, lenders, seeking to protect themselves in ways they hadn’t prior to the last real estate crash, have steadily expanded the list of acts that can trigger increased recourse liability. Borrowers, their principals and executives, and their legal counsel should be acutely aware of which carve-outs are contained in the bad-boy guaranties, and whether they are of the above-the-line or below-the-line variety.

Initially limited to bad acts by borrowers and their key principals and executives, such as fraud, waste, commission of criminal acts, gross negligence and misappropriation, bad-boy guaranties now often contain questionable carve-outs for broader sets of acts and occurrences, including failure to maintain insurance and pay real property taxes, failure to deliver final statements and reports, certain transfers of the property or ownership interests in the borrowing entities, or termination of leases by tenants. In addition to lenders themselves, in the rare instances where litigation involving bad-boy guaranties even makes it to trial, courts have taken a fairly strict approach to bad-boy guaranties, more often than not strictly enforcing their terms and deferring to the judgment of the parties who negotiated and entered into the guaranties.

Fortunately for borrowers, the expansion of bad-boy guaranties has also come with an expansion of the lenders’ willingness to negotiate such documents. When bad-boy guaranties consisted of standard boilerplate language and contained relatively few carve-outs, and all consisted of true bad-acts such as fraud and misappropriation of funds, borrowers and their legal counsel were left with little bargaining power — trying to convince a lender to take a soft approach, or negotiate a cure-period for instances of fraud, for instance, would have gotten you (and still will) laughed off of a conference call. The current favorable lending environment gives borrowers and their counsel additional leverage to open negotiations on loan documents that in tighter lending climates are off limits for discussion.

Borrowers and their counsel should seek to limit carve-outs to acts solely within the control of the borrower and their principals, and not of acts by third parties. One of the actions commonly found in current bad-boy guarantees that would trigger recourse liability is the commencement of involuntary bankruptcy proceedings against the borrower. These involuntary proceedings are outside of the control of borrowers, and borrowers should request to have these events removed from the listing of carve-outs. At a minimum, borrowers and their counsel should attempt to specifically limit these carve-outs to involuntary proceedings which borrowers have consented to, acquiesced in or orchestrated, bringing the carve-outs back within the realm of their control.

Another common, and usually negotiable, carve-out contained in current bad-boy guaranties imposes recourse liability when the borrower fails to pay real estate taxes on the property. While non-payments is certainly a troubling occurrence for borrowers and lenders alike, borrowers should seek to limit recourse to the amount of the lender’s actual losses and only to instances of willful non-payment, and not of instances where insufficient income from the property is the cause of the failure to pay. This change transforms the carve-out from something that could be triggered by a poorly performing property (which is inherent in the risk taken by the lender making the loan and factored into the pricing of the loan), to one truly caused by the borrower’s inaction, or in this case, inaction, of the borrower, and more in line with the spirit of a bad-boy guaranty.

Lenders should not use bad-boy guaranties as a repository for all events of default under the loan. Borrowers should carefully read bad-boy guaranties to ensure that events that are typically defaults, but not the variety to be included in bad-boy guaranties, are not included in the agreement. Some common examples of acts found in bad-boy guaranties that wrongfully trigger recourse liability include: failure to meet financial reporting deadlines, failure of the borrower to stay solvent, any transfers of the property or ownership interests of the borrower, failure of the borrower to allow lender and their agents to inspect the property, and the recordation of any liens or encumbrances against the property. While these all have their place in the loan documents, and are ripe for negotiation by both the business and legal representatives of borrowers and lenders, they shouldn’t be included in bad-boy guaranties.

The expansion of lenders’ willingness to make funds available for commercial real estate financings creates great opportunities for new acquisitions, development and refinancings, but borrowers, their principals and their legal counsel shouldn’t let their guard down because the loan is of the non-recourse variety. A standard bad-boy guaranty signed ten years ago looked significantly different than a standard bad-boy guaranty today, and borrowers should take all of the necessary steps to understand the scope of their liability, and work with lenders to limit that scope to apply only to true bad-acts within the control of those signing the document.

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Appellate lawyers are usually the lawyers you call to step in and take a case to the next level after an adverse judgment has been obtained or the opposing party challenges a favorable judgment. But over the last decade, clients and trial lawyers have increasingly recognized the value of calling in appellate counsel before a notice of appeal is filed, often hiring appellate counsel to assist with strategy and legal arguments during trial, or as soon as a complaint is filed or dispositive motions are at issue. Most often, these cases involve issues of institutional importance, potential precedent-setting law or large dollar amounts. But even in cases without these features, clients have found appellate lawyers add value.

To fully understand the value of calling appellate counsel into a case early on, a short primer on the appellate process is helpful. The trial courts are the fact-finding tribunals; their focus is on the introduction of evidence and resolving factual disputes. The intermediate appellate courts police the trial court proceedings for error; they do not retry cases or (with rare exceptions) take new evidence. The intermediate appellate courts’ role is to examine the trial record for error and determine, if an error occurred, whether it was of such magnitude that it probably impacted the outcome of the case.

Appellate courts take a conservative approach to reviewing trial court decisions. A judgment or order of the trial court is presumed to be correct; a party seeking relief on appeal must overcome this presumption and affirmatively show error. Likewise, the appellate court will generally not review new legal theories on appeal that were not presented to the trial court for determination in the first instance, particularly where the factual record in the trial court was not developed on key points needed to decide the new legal theory. Nor will the appellate court review legal error that the appealing party “invited,” or asked the trial court to make (such as where a party seeks to complain on appeal about a jury instruction it asked the trial court to give).

Finally, the appellate court will only reverse if it determines that there was a legal error that made a difference in the outcome of the case; the existence of legal error alone is not enough to warrant reversal. The search for prejudicial error is made within the four corners of the fixed trial record. As our own court of appeal here in Orange County has put it: “When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two.”

Given the contours of the appellate process, an appellate lawyer most obviously can assist by helping to preserve the record for appeal. For example, appellate counsel can flag key junctures at which objections should be made, evidence proffered, rulings obtained or legal arguments presented.

Two recent appellate decisions from the Fourth Appellate District, Division Three, in Orange County, highlight the importance of preserving legal arguments in the trial court. In one case, trial counsel requested a modified version of the California form CACI jury instructions; the CACI instruction at the time had not yet been modified to reflect an intervening change in the law. Over the defendant’s objections, the trial court gave the unmodified CACI instruction instead. The Court of Appeal reversed. Had there been no objection to the erroneous instruction, or had the defendant requested the unmodified CACI form instruction, the defendant would have forfeited the right to appeal the improper instruction.

Another Orange County appellant was not so fortunate. The Court of Appeal rejected an exhaustion of remedies argument in an employment appeal because the defendants had waited until after the bench trial ended to raise the issue. Even though it was the plaintiff’s burden to plead and prove timely exhaustion of administrative remedies for a FEHA claim, the defendants could not ignore the issue until after the claims were submitted to the factfinder for decision.

Appellate counsel plays other important roles in the trial court as well. An appellate lawyer tends to focus on the legal and procedural aspects of a case, whereas the trial lawyer focuses on the factual elements of the case. Appellate lawyers therefore can add to case strategy by providing independent suggestions and opinions concerning how a case may best be pursued or defended based on applicable legal and procedural issues, and provide advice on whether to develop the facts in light of these legal issues. This can add a new dimension to the case, and help maximize the chances of success in the trial court so that, if there is an appeal, the client will be the respondent rather than the appellant.

Appellate lawyers also keep up on the “big picture” development of the law and emerging legal trends in California and elsewhere, and may have already briefed an issue and be in a position to readily provide answers or arguments. An early assessment of the legal issues in a case and their likelihood of success on appeal can also help a client set reserves, or assess settlement value; in that sense, appellate counsel may serve as a general risk advisor for the litigation.

Having an appellate specialist on the trial team has a multitude of benefits for trial counsel as well. Appellate counsel can focus on the larger legal issues while trial counsel focuses on trial strategy and the evidence needed to drive that strategy. Appropriate legal arguments can be made at the outset to avoid claims of waiver. The specialist can help tighten legal arguments in dispositive motions, suggest post-trial motions, evaluate opportunities for interlocutory appellate intervention, protect the record for appeal, and prevent an adverse decision from the appellate court. And, to the extent the appellate lawyer takes the laboring oar in dispositive motions, motions in limine, jury instructions and verdict forms, the trial attorney is freed up to focus his or her energies on preparing witnesses and marshaling the evidence needed for trial.

In short, the role of appellate counsel has expanded. Appellate counsel are now part of the litigation or risk management team, and actively position a case to achieve the maximum result from the time the first pleadings are filed.

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Ms. Sungaila, an appellate partner at Snell & Wilmer, has consistently briefed and argued appeals raising cutting edge core business issues and has also provided strategic advice before and during trial. She can be reached at mcsungaila@swlaw.com or 714.427.7006.

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A nyone who has worked at a company in California with 50 or more employees has probably participated in a formal training session regarding sexual harassment in the workplace. That is because for nearly ten years, California has required such employers to provide “sexual harassment training and education” to all supervisory employees once every two years. While preventing unlawful harassment in the workplace is really the law everywhere in the United States, only a handful of states actually mandate this type of training like California does. Well, effective January 2015, California has taken this a step further.

In September of this year, Governor Brown signed into law A.B. 2053 which amended California’s employee harassment training statute (Government Code section 12950.1). The existing law requires employers with 50 or more employees to provide supervisory employees with training and education including “information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.”

Thus, the training required by existing law has always focused on preventing sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.”

The recent amendment adds something totally new. Now, employers must also include “prevention of abusive conduct” as a part of the harassment training and education. While it is certainly good business to train supervisors on ways not to be abusive of employees, the new requirements raise grave concerns as to whether this training statute can be used—or abused—to improperly expand the scope of employment discrimination laws well beyond the type of discrimination-related conduct that the law recognizes to be impermissible.

The amendment defines “abusive conduct” as “conduct of an employer or employee in the workplace, with malice, that a reasonable person would find hostile, offensive, and unrelated to an employer’s legitimate business interests. Abusive conduct may include repeated infliction of verbal abuse, such as the use of derogatory remarks, insults, and epithets, verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating, or the gratuitous sabotage or undermining of a person’s work performance.”

Governor Brown signed into law A.B. 2053 which amended California’s employee harassment training statute (Government Code section 12950.1). The existing law requires employers with 50 or more employees to provide supervisory employees with training and education including “information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment in employment. The training and education shall also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination, and retaliation, and shall be presented by trainers or educators with knowledge and expertise in the prevention of harassment, discrimination, and retaliation.”

Evidence in the legislative record that the amendment was intended to create a new basis for employment cases, but in California, there is no shortage of employment plaintiff lawyers willing to push the envelope.

For now, if your company is required to have harassment prevention training, be sure your trainer is compliant with these changes, and be vigilant to police against workplace bullying—of any kind.

Daniel J. Kessler
Daniel J. Kessler is the head of BKCG litigation department and one of the firm’s founding partners. Mr. Kessler handles a wide variety of labor and employment related matters, including termination lawsuits, wage claims and employment related counseling and training. Mr. Kessler has litigated and tried a wide variety of business cases ranging from employment terminations to real estate development disputes to fraud and conspiracy to water rights. Mr. Kessler has successfully defended eight-figure claims for his clients, as well as secured multiple million-dollar jury verdicts for his clients, including significant punitive damage awards. Mr. Kessler is a strong advocate for alternative dispute resolution as well, participating both as an advocate and a neutral mediator. For more information, please contact Mr. Kessler at 949.975.7500 or dkessler@bkcglaw.com.

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Weaving Another Layer to the Web: New California Employment Laws For 2015

by Melissa Yoon, Founding Partner, Katz Yoon LLP

Hallowe'en may be over, but the web of California employment laws recently got more complicated. On September 30, 2014, Governor Jerry Brown signed into law a number of new bills that modify the legal landscape for employers of all sizes. Below are some of the most noteworthy.

Arbitration Under Attack

Despite a recent court victory upholding the validity of class action waivers in the employment context, California is sure to retain its reputation as a state hostile to arbitration. AB 802, which goes into effect on January 1, 2015, requires private arbitration providers, such as AAA and JAMS, to publish on their websites at least quarterly a report on consumer arbitrations handled by the provider for the prior five years, including employment cases. The report must state (1) the name of any non-consumer party involved in the arbitration, if the non-consumer party is a corporation or other business entity; (2) the nature of the dispute; (3) whether the non-consumer party was the initiate or responding party; (4) the amount (in a range) earned by the employee involved in the arbitration; (5) the amount of the claim, which party prevailed, and the amount of any award, including attorneys’ fees and any other relief awarded; (6) whether the employee was represented by an attorney and, if so, the name of the attorney and law firm; (7) the name of the arbitrator and the amount of the arbitrator’s fees; and (8) the total number of times the employee previously has been a party in arbitration or mediation before the private arbitration company.

It’s not hard to see from this piece of legislation that the California Legislature has significant concerns about the fairness of arbitration for employees and other “consumers.” By vitiating one of the main benefits of arbitration – confidentiality and privacy – this bill will likely discourage this important form of alternative dispute resolution.

Discrimination and Harassment

Several new laws amend California’s Fair Employment and Housing Act (FEHA) effective January 1, 2015. First, AB 1443 amends FEHA to extend discrimination and harassment protections to unpaid interns and volunteers. Next, AB 1660 amends FEHA to prohibit discrimination against an employee because he or she holds a driver’s license indicating the employee is undocumented. Finally, AB 2053 amends FEHA to require that mandatory sexual harassment training include training on the prevention of “abusive conduct,” which is specifically defined by AB 2053 and need not have any connection to gender or any other protected characteristic.

Shared Liability for Temporary Workers

Employers who contract with an employment or staffing agency to hire temporary employees should beware of AB 1897. This new law, effective January 1, 2015, states that employers with 25 or more employees who hire or contract for more than five temporary employees at a time from a staffing agency are liable for any failure by the agency to pay the wages or secure workers’ compensation insurance for the contracted employees.

Paid Sick Leave

The most notable – and complex – of these new laws is, without a doubt, AB 1522, which requires employers of any size to provide paid sick leave. The law, which goes into effect on July 1, 2015, is known as the Healthy Workplaces, Healthy Families Act of 2014. Under the new law, exempt and non-exempt employees who work in California for at least 30 days within a year of the date they are hired are entitled to a minimum of three paid sick days per year. Employees must accrue paid sick leave at a rate of no less than one hour for every thirty hours worked, but employers have the option of making available the full amount of paid sick leave at the beginning of the year. Employees begin accruing paid sick leave immediately but cannot use such leave until the nineteenth day of employment. Employers can establish a reasonable minimum increment of time for the use of sick leave, but that minimum cannot exceed two hours.

Paid sick leave is also subject to capping and carry-over rules. Namely, employers can limit the annual accrual of paid sick leave to six days or 48 hours, and must permit employees to carry over at least three days or 24 hours of paid sick leave from one year to the next. However, employers that make available the full amount of paid sick leave at the beginning of the year are not required to comply with these accrual and carry-over rules. In one bright spot for employers, accrued but unused sick leave need not be paid to employees upon separation from employment. However, if an employee is rehired within one year, the employer must reinstate the accrued but unused sick leave balance that the employee had at the date of termination.

Paid sick leave may be used by employees for themselves or to care for certain family members, and leave may be used for preventive care; the diagnosis, care, or treatment of an existing health condition; or for certain legal matters if the employee is a victim of domestic violence, sexual assault, or stalking. Leave is paid at the regular rate, but AB 1522 specifies how this rate should be calculated if the employee had different hourly rates, received commissions, or was a nonexempt salaried employee.

The law also contains various notice, posting, and recordkeeping requirements. For example, employers must be notified of their paid sick leave rights at the time of hire, and the amount of accrued sick leave available to an employee must be stated on each itemized wage statement or in a separate writing provided to the employee each payday. Employees who wish to use paid sick leave must provide reasonable advance notice of the need for leave if the need is foreseeable; otherwise, the employee must provide such notice as soon as practicable. In addition, the law requires employers to display a poster explaining paid sick leave rights. A willful violation of this requirement is subject to a monetary penalty. Finally, employers must keep three years of records of the sick leave accrued and used by employees.

Of greatest concern to employers is how this new law will be administered and enforced. The law vests the Labor Commissioner with authority to administer and enforce it, as well as to promulgate regulations implementing it. The Labor Commissioner can also investigate violations and impose administrative fines. Furthermore, the Labor Commissioner or the Attorney General can recover civil penalties for violations, as well as attorneys’ fees.

The law also contains anti-discrimination and anti-retaliation provisions, and creates a rebuttable presumption of retaliation under certain specified circumstances.

On the bright side, if an employer already has a paid sick leave or paid time off (PTO) policy, the employer is not required to provide additional paid sick days if (1) the amount of leave made available to the employee is the same and may be used for the same purposes and under the same conditions as specified in the new law; and the policy (2) satisfies the accrual, carry-over, and use requirements of the law; or (3) provides at least 24 hours or three days of sick leave, or equivalent paid leave or PTO each year of employment or calendar year. Every employer should carefully review its current PTO policies well before July 1, 2015 to confirm that the policies comply with the numerous and detailed requirements of this new law.

While AB 1522 contains no exemption for small employers, it does establish certain other exemptions. For example, the law does not apply to employees covered by certain collective bargaining agreements, and certain employees in the construction and airline industries, as well as providers of in-home support services.

Despite these new layers of laws impacting the workplace, California employers do have something to be thankful for: Governor Brown vetoed a proposed bill that would have established a right of action for discrimination based on employment status. Thus, in the words of Igor in Young Frankenstein, “Could be worse.”

Melissa Yoon
Melissa Yoon is a founding partner of Katz Yoon LLP. She represents employers in cases ranging from wage and hour class actions to single-plaintiff claims of harassment, discrimination, retaliation, and wrongful termination. She also provides day-to-day counseling on legal issues impacting the workplace. Her clients include multi-national corporations, restaurant chains and technology companies, among others. Contact Ms. Yoon at 949.748.1909 or myoon@katzyoon.com.

About Katz Yoon LLP
Katz Yoon LLP is a premier business litigation and trial boutique firm based in Irvine. The firm is majority female-owned. Its partners hail from Morrison & Foerster, Kirkland & Ellis, and Manatt Phelps & Phillips.
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As 2015 approaches, California employers should brace for two new laws that may require notable policy changes. Under Assembly Bill 1897, companies will share responsibility for wages and workers’ compensation coverage for workers supplied by labor contractors. The Healthy Workplaces, Healthy Families Act of 2014 will require employers to start providing paid sick leave to all employees. Both new laws are potential liability minefields for unwary employers.

**Assembly Bill 1897**

Effective January 1, companies will be liable for wages and other penalties if they use a labor contractor that fails to pay its own employees or secure valid workers’ compensation coverage. A.B. 1897 applies to companies that obtain workers from a contractor to perform labor “within the usual course of business” (e.g., companies that utilize a staffing agency). The law does not apply to companies that:

1. employ less than 25 total workers;
2. obtain five or fewer workers from a labor contractor; or
3. obtain workers from nonprofit organizations, certain labor organizations or apprenticeship programs, or motion picture payroll service companies.

The practical effect is that a company may no longer deny liability for wages by arguing that it is not the employer. A business may be liable regardless of knowledge of the contractor’s violations or an existing written contract. Further, a worker may, after giving 30 days advance notice, sue the company directly without first seeking relief from the contractor. A company, however, may contractually require the contractor to indemnify it.

**Healthy Families Act**

Many companies will need to revise their existing sick leave or paid time off policies next year. Starting July 1, employers must provide paid sick leave to employees who work at least 30 days in the first year of employment. Employees will accrue one hour of paid sick leave for every 30 hours worked. Employees may use paid sick days for a personal or family members' health condition or for leave related to domestic violence, sexual assault or stalking. Accrued hours carry over annually, but employers are not required to pay out unused accrued sick leave upon an employee’s termination. The law also prohibits employers from discriminating or retaliating against employees who request sick leave. Employers must satisfy specific posting, notice and recordkeeping requirements. Failure to comply with the law will subject employers to civil and administrative penalties.

Some limitations and exceptions apply. Employers may limit the use of paid sick days to 24 hours (or 3 days) per year. Companies that already have paid sick leave or time off policies need not provide additional days so long as the existing sick leave may be used for the same purposes and under the same conditions specified in the law. Employers that provide at least three days of paid sick leave at the beginning of the year may opt out of the carry-over and accrual requirements, but they must meet other requirements of the law.

**Preparing For 2015**

Employers should take steps now to prepare for these new laws. Companies should exercise caution when selecting a labor contractor. They should revise their contractor agreements to include strong indemnity provisions and requirements that contractors pay their workers and provide workers’ compensation coverage. Companies should also review their existing paid sick leave policies and consult with an attorney to ensure compliance with the new law.

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Strategic Alternatives For Financially Troubled or Distressed Companies

by Richard Golubow, Shareholder, Winthrop Couchot

Business owners often assume that bankruptcy is the only option for reorganization or orderly liquidation of a distressed company. There are many advantages to a bankruptcy: the process is orderly and reasonably predictable, the bankruptcy court has broad powers, and all creditors are forced to participate and are bound by orders of a bankruptcy court. However, there are several disadvantages to a bankruptcy: bankruptcy tends to be expensive; often prohibitively so in smaller, less complex cases; and can drag on for a long time.

There are several viable alternatives to bankruptcy that, depending on the situation, may reduce, if not eliminate some of the disadvantages of bankruptcy while realizing many of the benefits. It is not that the desired results cannot be achieved through a bankruptcy, but rather the recognition that each business has its own circumstances and diverse set of tangible and intangible interests to protect that may make non-bankruptcy alternatives more appropriate for a particular situation. For example, other options such as the use of out-of-court workouts and agreements, assignments for the benefit of creditors and state or federal court receiverships are alternatives that should be considered.

Out-of-court workouts and agreements, often in the form of compositions, extensions and standstill agreements, can be made without incurring the time and expense of a courtroom proceeding. Such agreements usually are between the debtor and its creditors whereby the creditors agree to revise payment terms or discharge a portion of their claims against the debtor in exchange for payment of a lesser amount than what is actually owed.

An assignment for the benefit of creditors is an out-of-court procedure used to liquidate a debtor’s property for the sole purpose of repaying creditor claims. Under a general assignment, the debtor voluntarily transfers title of all assets to an assignee, which is an independent third party fiduciary, to liquidate and distribute the proceeds thereof to the debtor’s creditors. A general assignment can be an excellent vehicle for transferring all assets of a troubled company to a new owner so that the business can be continued.

In a receivership, a court appoints an independent third party fiduciary to take possession of the property of a debtor and to operate the property to the extent deemed necessary until such time as the property has been liquidated. In this respect, the court acts as a referee in the proceedings.

This article is intended to highlight some, but not all the alternatives to bankruptcy. Other options exist as well, including the use of bulk sales of assets, deeds in lieu of foreclosure, exchange offers, mediation and arbitration. Businesses experiencing financial distress should always consider bankruptcy and non-bankruptcy alternatives, which may provide considerable flexibility not available in bankruptcy, and a substantially less adversarial environment. These non-bankruptcy alternatives, if appropriate, will likely translate into less time, improved commercially-driven solutions, and reduced fees and costs.

For more information, including discussing advantages and disadvantages to bankruptcy and non-bankruptcy alternatives, contact Richard Golubow at 949.720.4135 or rgolubow@winthropcouchot.com.
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Masimo was founded in 1989 by its current CEO, Joe Kiani. Kiani and fellow inventor, Mohammed Diab, created technology that revolutionized the field of pulse oximetry. That technology allows clinicians to noninvasively measure a patient’s blood oxygen in the most-challenging conditions. Today, that measurement has become the most important vital sign. Masimo’s technology saves lives, detects diseases, reduces blindness in premature infants, and reduces healthcare costs. Kiani and Masimo have received scores of awards, including the OCBJ’s Excellence in Entrepreneurship Award in 2006.

Since 1991, Knobbe Martens has been protecting Masimo by obtaining patents on its pioneering technology. Masimo’s patents enabled it to raise the capital necessary to bring its technology to market. Competitors then adopted it without permission, leaving Masimo no choice but to sue. Knobbe Martens was honored to present Masimo’s achievements in two jury trials. The first verdict for $134 million enabled Masimo to go public and enter into an agreement under which it is still receiving royalties. The second trial ended just last month and led to a $466 million jury verdict. More importantly, Masimo’s litigation success has led to rapid adoption of Masimo’s life-saving technology, benefitting patients worldwide. Today, Masimo continues to develop cutting-edge technologies to greatly improve healthcare.

Ill-informed critics of the patent system may cringe at the sight of such large jury awards for a patent owner. But these critics ignore how we all benefit from the great contributions of companies like Masimo. They ignore the critical role patents play in turning ideas into real products. No one would have invested in Masimo if not for its patents, and by now, many of those patents have expired and are free for all to use. Masimo shows that patents do “promote the progress of science and the useful arts,” just as the Framers of the Constitution intended. Masimo and Knobbe Martens are proud to prove the wisdom of the Framers.

Joseph R. Re
Joseph R. Re joined Knobbe Martens in 1987 and handles high-stake patent cases from their Irvine office. He is a nationally recognized trial and appellate attorney, and has successfully tried numerous patents cases before juries throughout the country. He is lead counsel for Masimo in its intellectual property cases, including in both of the jury trials highlighted here. Mr. Re served as the president of the Federal Circuit Bar Association, and since 2005, has been serving as a member of the Federal Circuit’s Advisory Council. For more information, please visit www.knobbe.com or contact Joe at joe.re@knobbe.com or 949.760.0404.
The new law firm of David Hirson & Partners LLP is lead by the highly experienced immigration attorneys David Hirson and Nima Korpivaara and supported by their skilled team of immigration associates, paralegals, and assistants

+ Experience from the very beginning of EB-5 law
+ Provides a full scope of legal services for investors, projects, and regional centers
+ Renowned attorney, lecturer and author
+ Specialist in Immigration and Nationality Law*

I-526 | CP/I-485 | I-829 | I-924

David Hirson is a premier immigration attorney and among the best of the best of the EB-5 industry. With a full scope of investment immigration services, attorney Hirson has guided countless clients to EB-5 success in his more than 30 years of practice. Present in the U.S. Senate when the original EB-5 legislation was being debated, attorney Hirson went on to file hundreds of EB-5 cases of all types. He continues to do so under his new practice, David Hirson and Partners, LLP. Now Hirson leads a dedicated team of EB-5 legal professionals and is a recognized, trusted expert in the field.

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negative options have been defined by the FTC as commercial transactions in which sellers interpret a customer’s failure to take an affirmative action, either to reject an offer or cancel an agreement, as consent to be charged for goods or services. Common forms include continuity plans or the automatic renewal of subscription services pursuant to which a company extends on a payable basis a risk-free trial subscription, or renews a subscribed service by charging a consumer’s credit card or telephone service unless the consumer has affirmatively cancelled the service or the continued delivery of products.

Consumer complaints to the FTC and state enforcement agencies have risen dramatically since the growth of the Internet. Consumers often claim that they are not adequately informed about, or have not agreed to, automatic renewals or the payable continuation of free trials, price increases on renewal, how to cancel, and/or have not received full refunds upon cancelling the service or delivery of further goods. This has led to increased federal and state enforcement agency actions, state legislation, and, more recently, consumer class actions. Accordingly, companies engaged in selling goods or services on a negative option or automatic-renewal basis should be careful to comply with applicable FTC and state statutory requirements.

The FTC issued a Trade Regulation Rule in 1973 establishing basic requirements for companies engaging in the practice. Over the years, the FTC has brought actions challenging companies alleged to have failed to comply with its Negative Option Rule or otherwise: (i) by not disclosing the material terms of an offer before consumers have incurred a financial obligation; (ii) by not making such disclosures clearly or conspicuously or in an understandable manner; (iii) by not obtaining a consumer’s affirmative consent to the offer; and (iv) by impeding the effective operation of cancellation procedures.

A recent form of alleged abuse occurs when a company sends text messages to consumers promising free gift cards or rewards upon entering personal information, such as a mobile phone number or PIN. According to the FTC, the consumer often is either given no notice or inadequate notice that confirming his or her number leads to continuous monthly charges for “Premium” text messaging services. But the risks can apply to any automatic-renewal offer when the full terms are not disclosed clearly and conspicuously.

Increasing the legal risks, a number of states have recently passed statutes addressing negative option/automatic renewal practices, and even adding further obligations beyond those impose under the FTC’s Negative Option Rule. Such states include California, Connecticut, Colorado, Florida, Georgia, Hawaii, Illinois, Louisiana, and North Carolina.

The state statutes usually provide that a violation will also constitute an unfair or deceptive trade practice, thereby allowing for remedies such as restitution of payments made by consumers and recovery of attorneys’ fees. Some states also provide—as does the FTC—that products delivered after notice of cancellation are to be considered free gifts to the consumer. As a result of these statutory developments, consumer class actions have started to be brought—particularly in California—claiming violations of the applicable state statutes and seeking restitution for members of the alleged classes.

In the current environment, companies offering goods or services with negative options or other forms of automatic renewals should review the federal and state obligations to help avoid consumer suits. A company generally can comply with the federal and state laws by doing the following:

- Provide clear and conspicuous disclosure of the full terms of the offer upfront.
- Obtain unambiguous, affirmative consent from the consumer for any automatic charge or renewal.
- Provide timely reminders to the consumer prior to charging for any auto renewal, including clear and conspicuous written notice of cancellation rights prior to the end of a free or low-rate initial period.
- Provide an easy-to-use cancellation mechanism, such as a toll-free telephone number and/or email address for cancellation.

**Stepped Up Enforcement Against Inadequate Negative Option/Automatic-Renewal Disclosures**

by Ed Chansky and Irving Scher, Greenberg Traurig LLP

About Greenberg Traurig LLP

Greenberg Traurig LLP is an international, multi-practice law firm with approximately 1750 attorneys serving clients from 36 offices in the United States, Latin America, Europe, Asia, and the Middle East. The firm is among the “Power Elite” in the 2014 BTI Client Relationship Scorecard report, which assesses the nature and strength of law firms’ client relationships. For additional information, please visit www.gtlaw.com.
In what has been described as the largest insider trading case ever filed in Orange County by the Securities and Exchange Commission (SEC), a jury earlier this year took only a few hours to return a verdict that found no wrongdoing by Manouch Moshayedi, the co-founder and former Chairman and CEO of sTec, Inc. The SEC had filed the case in the Santa Ana federal court, claiming that Mr. Moshayedi unjustly enriched himself by $267 million when he and family members sold nine million shares of the company’s stock while allegedly in possession of material, non-public information. The SEC also alleged that Mr. Moshayedi made material misrepresentations about sTec’s business. On June 6, 2014, the jury rejected all of the SEC’s claims.

Five days later, Andrew Ceresney, the SEC’s Director of Enforcement, gave a speech announcing that the SEC would start bringing more insider trading cases in administrative proceedings rather than in court. Mr. Ceresney claimed that the move was not related to recent court losses, but the Moshayedi decision came shortly after the SEC lost several other high-profile insider trading cases brought in federal courts around the country. Regardless, it is a significant development that the SEC has decided to bring more of these cases in what is quite literally its home court, rather than in the traditional venue of the U.S. district courts.

After the Dodd-Frank Act, the SEC may use administrative proceedings to obtain a range of remedies, including disgorgement of allegedly ill-gotten gains, and even the imposition of civil penalties for violations of the securities laws. Yet these administrative actions are brought before administrative law judges who are appointed by the SEC and are subject to procedural rules established by the SEC. Even though SEC enforcement attorneys often take years to investigate a case, including the use of subpoenas to gather evidence and obtain witness testimony, once an administrative action is commenced, the defendant is subject to a “rocket docket” that requires the case be decided in less than a year. The defendant has limited rights to obtain pre-trial discovery of the evidence. The normal rules of evidence do not apply; for example, hearsay may be allowed in an administrative proceeding. There is no jury. Then, after the administrative law judge renders an “initial decision” on a case, the final judgment is rendered by the SEC itself, that is, the same body of five commissioners who approved the enforcement staff’s internal request to file the case in the first instance. Altogether, it is not difficult to see why the administrative route might be considered easier for the SEC than having to prove its case before a jury in a court of law.

Not surprisingly, expanded use of administrative proceedings is the subject of considerable criticism, and is being challenged by some defendants as an improper abridgement of the right to due process and of other constitutional protections. Until such a challenge is successful, however, the SEC’s increased use of administrative proceedings means that defendants will have to be ready to defend allegations of even the most serious securities violations on an expedited basis in an inhospitable forum. A critical first step will be to engage counsel with the experience and resources to contest such charges efficiently and effectively.

Christopher McGrath and Howard Privette are litigation partners in the Costa Mesa office of Paul Hastings LLP and focus their practice on securities litigation and enforcement matters. Contact Mr. Privette at 714.668.6201 or howardprivette@paulhastings.com or contact Mr. McGrath at 714.668.6244 or chrismcgrath@paulhastings.com. Paul Hastings served as trial counsel for Mr. Moshayedi in the SEC enforcement action referenced in the article.

Christopher H. McGrath and Howard M. Privette, Partners, Paul Hastings
ONE - The federal DOL is not focused on putting you out of business (except egregious employers, of course). Its primary functions are to award back-pay to employees when owed and bring businesses into compliance.

TWO - DOL investigators do not target just any old business. They are authorized to (1) pursue complaints (generally made by disgruntled employees, unions, or competitors), and (2) target businesses within a previously established framework. That's it. In targeted investigations, businesses may be selected by criteria like recidivism, location, or size. If your company is other than a garment factory, car wash, restaurant or other low-wage employer (i.e. a workforce that generally earns $12/hour or less) and you are being investigated, chances are you are the subject of a complaint-driven investigation.

THREE - Do not fail the attitude test. Being combative with the investigator will get you nowhere, and may even hurt your position. DOL investigators have subpoena power at their disposal and may obtain a search warrant when necessary. But, there are limits to the amount and type of information to which they are entitled. When an investigator darkens your door, explain that you intend to cooperate, ask for proof of identity, and explain that you want to contact your attorney. Request 72 hours to make records available.

FOUR - Before the investigator steps foot inside your business, he or she may have already pulled your business's Form DE-6 (Quarterly Wage and Withholding Report) from the EDD. Investigators are trained to read general ledgers, tax returns, payroll journals and other financial documents to look for anomalies. The investigator may have staked-out your operations surreptitiously, even watching what time employees enter and leave the building. The investigator is likely armed with an arsenal of information about you and your company before you are aware that an investigation is underway.

FIVE - You may be able to negotiate liquidated damages assessed by the DOL, even if it intimates that they are mandatory and non-negotiable. If your company is unable to pay, show the DOL through appropriate documentation that the business cannot afford the assessment. Ask for relief. Go back to number three and read it again.

SIX - Don't assume that a disgruntled employee's complaint will result in a visit from the DOL. Investigators are trained to identify those who stretch truths to pursue self-interests. Investigators won’t waste their time with complainers who have an axe to grind with no basis in fact.

SEVEN - Stay ahead of problems. Make sure that HR personnel understand the “primary duty” tests under the FLSA so that non-exempt workers are not misclassified. Most problems arise in the context of a working foreperson or working supervisor – avoid getting caught in that trap. Don’t pay employees in cash. Cash payments discovered by the DOL will be reported to the IRS and EDD. Wage violations may also be reported to the California Labor Commissioner, but this is less common. Seek legal advice from a competent, experienced attorney who offers preventative counseling.

Colleen M. McCarthy chairs the Firm’s Employment Practices Group and represents and protects employers, with a particular emphasis on risk mitigation through sound practical guidance. For 14 years, Ms. McCarthy has advised employers in every aspect of the employment relationship and counsels clients daily on the complicated employment laws that impact their businesses to reduce the chance of costly litigation.

To receive a free “Checklist in Anticipation of DOL Wage and Hour Investigation,” email your information to Ms. McCarthy at cmccarthy@ferruzzo.com

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According to the 2014-2015 Orange County Workforce Indicators Report published by the Orange County Business Council and the Orange County Workforce Investment Board:

“The Great Recession caused devastating job losses and dealt severe economic hardship to the national and global economy. In Orange County, 2013 was the first year since the downturn that was characterized by widespread recovery. There were lowered unemployment rates, recovered home prices, business expansion and newfound growth in Orange County’s signature industry sectors such as health care, advanced manufacturing and information technology.”

This author has been in the collection business since 1981. That’s a lot of recessions. The same indicators that generally prevail after recessions are starting to prevail now in Orange County: people previously believed to be judgment proof are back at work.

There are some variations compared to prior recessions, though. For example, while median home prices are returning to their pre-recession levels, a robust market awaits more liberal lending policies by the Fed. But one thing is clear: People who were considered judgment proof during the recession are either gone for good or are likely to be rehabilitated, gainfully employed, and, with the increases in social media since the recession, likely to be bragging about it.

Now is the time to look at business write-offs—especially as it concerns the liability of individuals—because these previously "uncollectible" debts may be more collectible than ever.

Judgments obtained during the recession are good for 10 years, renewable to 20. In addition to a large number of private, for-profit, sources of asset information that may be purchased and used by creditors to locate assets, social media provides a new and important tool in determining, among other things, the location, assets and employment of individual debtors who, in all likelihood, were considered write-offs just a few years ago. Some social media—such as LinkedIn—are designed and intended as a gathering place where people advertise where they work. People literally tell you where to go to collect your debt!

There are various arrangements available among collection lawyers—including contingencies—under which recession write-offs can be pursued. Given the improvement in the market, and the greater availability of information, now more than ever a savvy business plan requires a bi-annual look at bad debt—especially bad debt judgments—to determine if it can be converted into found money.

For more information, contact The Judge Law Firm at 18881 Von Karman Ave.; Suite 1500; Irvine, CA 92612; Phone: 949.833.8633; Fax: 949.833.0154; info@thejudgefirm.com; www.thejudgefirm.com.

James A. Judge, Esq.
For nearly three decades, Mr. Judge has devoted himself to representing residential and commercial community associations, property-based corporations, successful businesses and high net-worth individuals with their unique legal needs. His areas of professional discipline include litigation, collection of money owed, real estate developments landlord-tenant law, and creditor representation in bankruptcy.

Mr. Judge is admitted to all courts of the State of California, as well as the United States Supreme Court, the Ninth Circuit Court of Appeals, the Tenth Circuit Court of Appeals, and the United States Court of Federal Claims in Washington D.C. He is an active member of the California Apartment Association (CAA), an active member of the California Association of Community Managers (CACM), and a current author and speaker on numerous subjects related to his practices.
The change in weather coupled with longer lines at the doctor’s office signal the arrival of cold season. Employers know this results in more employee sick days. But what employers may not know is that starting July 1, 2015, a new California law will require employers to provide paid sick leave to most of their employees.

Healthy Workplaces, Healthy Families Act of 2014 (AB 1522)
On September 10, 2014, Governor Brown signed the Healthy Workplaces, Healthy Families Act of 2014 (AB 1522), which requires that employers provide paid sick days to millions of Californians as of July 1, 2015. The law requires that paid sick leave be given to employees who work 30 or more days within a year from the commencement of employment or the operative date of the new law, whichever is later. Governor Brown reportedly stated that the law is intended to apply to all categories of workers, “whether you’re a dishwasher in San Diego or a store clerk in Oakland.”

General Facts Regarding the New Law
- **Who is entitled to the leave?** Employees satisfying the threshold mentioned above, excluding: (1) employees who are covered by a collective bargaining agreement that provides for paid leave; (2) certain construction industry employees covered by a collective bargaining agreement; and (3) in-home supportive service providers and certain airline personnel.

- **How much paid leave?** Employees accrue paid sick days at a rate of “no less than one (1) hour for every 30 hours worked.” Employers may limit an employee’s use of annual paid sick leave to 24 hours or 3 days per year.

- **Which employers are subject to the law?** The law applies to almost all employers, regardless of size. It covers many public employers, including the state and its municipalities.

- **When does the law take effect?** Starting July 1, 2015, employees are eligible for paid sick leave. Employees will be able to use accrued sick leave beginning on their 90th day of employment.

- **For what?** Sick days may be used for “diagnosis, care, or treatment of an existing health condition of, or preventative care for, an employee or an employee’s family member.” Sick days may also be used for an employee who is a victim of domestic violence, sexual assault or stalking.

- **Increments of use?** An employer may set a reasonable minimum increment, up to two hours, for the use of paid sick leave. Otherwise, the employer may determine the increments of use.

- **Notice to employees?** Employers must give written notice to employees of the amounts of sick leave available for their use or the amount of paid time off provided in lieu of sick leave. This information may be included on an employee’s paystub.

- **Recordkeeping?** Employers must keep, for three years, records of hours worked and paid sick leave accrued/used by employees. New posting rules and amendments to Wage Theft Prevention Act disclosures also apply, along with a new Labor Commissioner enforcement regime and anti-retaliation provisions.

Employers Should Review Their Current Sick Leave Policies
California’s new sick leave law is a trap for the unwary and this summary is not exhaustive. Employers should pay particular attention to the complex notice and recordkeeping requirements. The new law will likely serve as a basis for litigation and/or future enforcement actions, so employers should make preparations now by consulting with experienced labor counsel.
Mobile internet usage is predicted to grow faster in the next few years, making online or web-based businesses great opportunities. Over 80 percent of mobile owners use devices while watching TV. They web surf, shop and talk to their friends online.

What does that mean for you if you are starting an online business? It means access to customers and advertising to sell products without the hard cash investment of brick and mortar facilities. It also means that social media can quickly accelerate your business without investing thousands of dollars in print or other advertising.

The future belongs to the mobile internet. If your business is not getting ready for that future today, your business may be in trouble tomorrow.

Start-Up Considerations
Starting an online business has many of the same challenges as starting any other new business, and some additional challenges as well.

1. Consideration needs to be given to the appropriate legal entity to use for the formation of the business. If the intent is to raise venture or other capital in the near future, a Delaware or California corporation is usually best suited. Angel and venture capital investors favor this approach, as it provides them with state governance laws they are familiar with and allows them to use preferred stock which gives investors added protections. If flexibility in profit distributions or tax allocations is desired, then a limited liability company may be the best option.

2. It is important to get the founders committed to the new venture. Founders Agreements typically provide for restricted stock grants containing vesting, forfeiture and repurchase provisions for each founder’s shares, and setting forth voting rights and share transfer provisions (among other things). When restricted stock grants are subject to forfeiture provisions, they should almost always be accompanied by a Section 83(b) election, a special tax election which needs to be filed within 30 days of the restricted stock grant.

3. If there is technology which needs to be transferred to the business, technology assignments need to be obtained from all founders and any consultants who participated in developing the intellectual property.

4. Attracting the right qualified employees and consultants is also important. Stock options can be used to attract employees, consultants, celebrities and others, particularly when a business cannot afford to pay market compensation for these services. Employees and consultants should be required to execute confidentiality and invention assignment agreements to protect the intellectual property going forward.

5. The business name and intended URLs need to be searched and secured.
Immigration law is a constantly developing field. While comprehensive immigration reform may not be a reality in the near future, adjudication trends and policy changes affect the day to day immigration programs of U.S. employers. Below are a few recent developments employers should be aware of:

I-9 Compliance & E-Verify

All employers are required to verify the U.S. work authorization of employees with the use of Employment Eligibility Verification Form I-9. Although only a two-page form, the I-9 routinely gives headaches to even the most experienced HR personnel. Errors on the form can result in fines that can range from hundreds to hundreds of thousands of dollars for an employer. In addition to the I-9 process, more and more states are requiring employers to register for E-Verify, which verifies the work authorization of new hires. E-Verify has several pros and cons, which include the investment of manpower/training in exchange for work authorization extension for select foreign nationals and a presumption of good faith employment practices. E-Verify is one of the few immigration policies many Democrats and Republicans agree on, meaning there is a high probability E-Verify will be made mandatory for all employers in the near future.

Change in Worksites for H-1B Employees

The H-1B visa is the most common visa for professionals, including engineers, IT, business, finance, accounting and more. It is not uncommon for H-1B employees to change worksites during their US employment. The US Citizenship and Immigration Service’s (USCIS) policy on whether an amendment filing is required when an employee changes worksites has been vague. Recently, USCIS has been finding that some employers are in violation of status if their employers failed to file an amendment when the employee changed worksites. This recent adjudication trend makes it imperative for employers to contact their immigration counsel prior to an employee’s change in worksite to evaluate if an H-1B amendment filing is necessary.

L-1B Intra-Company Transferee Adjudication Trends

The L-1B visa is for employees with specialized knowledge transferring from a foreign entity to a qualifying U.S. affiliate. Over the last two years, L-1B petitions have been increasingly scrutinized by USCIS, with significantly higher issuances of requests for additional evidence and denials. This trend may be slowed as the U.S. Court of Appeals for the D.C. Circuit recently overturned the denial of an L-1B visa petition, criticizing USCIS’s inconsistent adjudication of L-1B cases while reaffirming longstanding policy guidelines for the visa category, Fogo de Chao (Holdings) Inc. v. U.S. Department of Homeland Security, No. 13-5301 (D.C. Cir. Oct. 21, 2014).

EB-5 Investor Green Card

The EB-5 investor immigrant visa gives Green Cards to those who invest $500,000 or $1 million (depending on project location/classification) in a U.S. project that will employ at least ten full time U.S. workers. Most EB-5 immigrants invest their money through Regional Centers, which have been designated by USCIS to sponsor capital investment projects for EB-5 investors. From movie studios to major Las Vegas hotel developments, U.S. businesses have recognized the value in attracting EB-5 investment as a cheap source of capital. Companies facing significant capital raises may wish to consider EB-5 derived investment as part of their financing.

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Legal Considerations for Web-Based Start-Ups

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to be sure there are no potential infringement issues. Trademarks need to be registered and patents, if any, need to be filed. Investors are more willing to invest, and at higher valuations, if the intellectual property is properly protected.

6. Website Development and Hosting Agreements need to be prepared, as well as Website Terms of Sale. The Federal Trade Commission (FTC) regulates e-commerce activities, including the use of commercial emails, online advertising and marketing, and consumer privacy; therefore, the FTC rules must also be addressed.

Starting any new business has its challenges and certainly starting an online or web-based business presents these same challenges and many more. What is different for an entrepreneur today venturing into an online or web-based business is the fantastic growth opportunities presented by mobile internet.
Five Tips to Planning a Successful Data Breach Response
by Steven Arnold, Partner, Manatt, Phelps & Phillips LLP

Malignant hackers and other cyber criminals in search of financial gain have been hard at work during 2014. While the number of data breach incidents has been on the rise year after year, 2014 stands out due to the extent of high-profile breaches and is already being dubbed by some as the “year of massive data breaches.” Reported breaches have included prominent retailers such as P.F. Chang’s, Home Depot, Target, and J.P. Morgan Chase. Even charitable organizations such as Goodwill Industries have not been spared. We are now receiving word about a data breach affecting the U.S. Postal Service.

These incidents should serve as a reminder to industry about the importance of maintaining a robust data security program. While many companies have taken meaningful steps to protect their data from unauthorized access, all too often they omit one key element that is a “must” for today’s data security programs – planning the how to respond when a data breach is discovered.

This article offers five tips to planning a successful response when a data breach occurs with your company.

1. Evaluate Applicable Notice Obligations
Most states have data breach notification laws. Additionally, some industries (such as banks and other financial institutions) are subject to regulations that detail customer notification requirements. In order to develop a successful data breach response plan, your company must be aware of these requirements in each state where it does business and ensure that its response plan covers all applicable requirements. Waiting for a data breach to occur before researching or incorporating these requirements into your response plan costs precious time and will delay important actions to mitigate effects of the breach.

2. Put the Plan in Writing
Your data breach response plan should be in writing and incorporated into the company’s policies and procedures. The policy should establish goals of the response plan and identify key employees responsible for implementing the plan. The policy should also give a general description of the duties assigned to those employees. The procedures should outline a strategy and specific actions to be taken in order to implement the response program. The procedures should be periodically reviewed and updated, if needed, in conjunction with periodic program testing.

3. Organize Data Breach Response Team
In order to prepare for an effective response, your company must identify a team of individuals who will be called upon in the event of a breach. This team should include qualified individuals within your organization, as well as other outside professionals who have any specialized skills that will be needed to evaluate and address the breach. The response team should be headed by an individual within your organization with sufficient background and authority (such as your Chief Information Officer) to successfully implement the data breach response plan.

4. Develop a Response Tool Kit
Each business should have a tool kit already prepared in the event that a data breach or suspected data breach occurs. The tool kit should include a checklist of people to be called upon and actions to be taken in responding to the incident. Actions on the checklist should include, without limitation, verifying whether a breach has occurred, identifying what information has been compromised, strategies for mitigating damages, determining whether customer notice is required, criteria for giving notice to law enforcement or other regulatory agencies, etc. The tool kit should also include draft customer letters that have been written to comply with applicable state laws in the event that customer notice is required.

5. Periodic Testing
Once established, your data breach response plan should be periodically tested to allow team members to practice their responsibilities and to identify areas that can be streamlined or otherwise improved. Mock incidents should be planned on a regular basis with subsequent meetings to explore what worked well and what did not. Needed improvements should then be incorporated into the policy, procedures and tool kit as appropriate.

Time is of the essence when responding to a data breach. Appropriate planning before an incident will save your company the precious time it needs when the breach occurs. It will also provide clear direction and result in a more thoughtful and effective response. In the end, these efforts are a relatively inexpensive way to protect your company’s reputation and limit legal exposure when the likely data breach occurs.

Steven Arnold
Steven Arnold is an Orange County-based partner in the Financial Services and Banking Practice at Manatt, Phelps & Phillips LLP. Mr. Arnold’s practice focuses on banking and consumer financial services regulatory compliance. He can be reached at samold@manatt.com or 714.371.2545.
EB-5 Investments: Win, Win, Win or Fraud, Losses and Cheaters?

By David Hirson, Esq., Partner, David Hirson & Partners LLP

It is definitely Win, Win, Win; and the winners are: (1) the United States, its economy, employees and taxpayers; (2) developers and businesses; and (3) individual investors who get the opportunity to obtain permanent residence for themselves and their immediate relatives.

What is an EB-5 Investment?

Basically, it is where a foreign investor invests $500,000 or $1,000,000 in a new business, expands an existing business, or saves a troubled business, and in turn receives U.S. permanent residence. The amount depends on whether the business is located in a Targeted Employment Area (high unemployment area) or in a rural area. The United States Citizenship and Immigration Services (USCIS) thoroughly audits and meticulously screens to ensure that the source and path of the funds invested are from a lawful source, and that at least ten full-time jobs are created. Direct hire employees must work at least 35 hours per week, be on payroll and be legally authorized to work in the United States. Indirect and induced job creation can be proved by acceptable methodologies showing the job impact resultant upon the amount of investment. The investor must have certain minimum management responsibilities in the business.

Why It Is a Three-Time Win

First, the EB-5 program stimulates the economy, creates a minimum of ten full-time jobs per investor, and at comes at no cost to taxpayers. The ripple effect of the stimulus to the economy is often not recognized. Investors buy residences, automobiles, furnish their houses, and hire domestic and other service workers, mostly paid for in cash and without requiring any bank or other credit in the United States.

Second, during the difficult financial crisis when credit from traditional sources was not available, many developments were commenced and completed because a component of the capital stack was made up of EB-5 financing. Although credit is more freely available today, the EB-5 program remains extremely valuable to developers and businesses because of the potentially lower interest rates and costs of funds.

Third, it is a win for the immigrant who might not otherwise have the opportunity to immigrate to the United States. These immigrant investors are usually highly-educated, responsible and law-abiding citizens. Their primary goal in most cases is to have their children educated in the United States and become a contributing members to the U.S. community. The investors’ substantial wealth makes it safe to say that it is highly unlikely that they will become a burden to the U.S. medical and welfare systems. It is also rare that any of these immigrant investors are involved in criminal acts.

Latest Statistics

According to the 2012 peer report commissioned by the Association to Invest In the USA (IUSA), an EB-5 trade organization, the EB-5 program has contributed $3.9 billion to the United States Gross Domestic Product (GDP) and supported over 42,000 jobs in the United States for Fiscal Year 2012. This is more than double the amount for Fiscal Year 2011.

The top countries utilizing the program between Fiscal Years 2006 and 2013 in descending order are: Mainland China, South Korea, United Kingdom, Taiwan, Mexico, Iran, India, Venezuela, Canada, Japan, and Russia. Recently, more Vietnamese investors are utilizing the program than in earlier years.

EB-5 Right Now

Retrogression

The U.S. Congress sets limits on the number of immigrant visas that may be issued each fiscal year. In order to become a legal permanent resident, an immigrant visa must be available to the applicant. On August 23, 2014, the Department of State announced for the first time ever that the annual quota of 10,000 EB-5 visas investors had been reached for Fiscal Year 2014. While many feared that this would significantly affect the EB-5 world, it only lasted approximately 6 weeks until new visa numbers were issued on October 1, 2014 and it had no major impact on any current cases being processed.

However, visa retrogression for Chinese investors is expected to commence in June 2015, at which time the visa availability is expected to be backdated to cases filed prior to July 2013. When this occurs, there will be significant impact and delays for investors born in Mainland China, excluding investors born in Hong Kong, Taiwan, and Macau.

Legislative Changes

While it is extremely difficult to find issues that both Republican and Democratic members of Congress can agree on, proposed legislation to improve the EB-5 program has received significant bipartisan support. The proposed legislation includes the following changes:

1. Making the Regional Center Program a permanent program and not allowing it to sunset on September 30, 2015.
2. Changing the way visa numbers are allocated. Instead of the investor, the spouse, and the child/children all requiring a visa number, one visa number will include the investor and all of his/her dependents, which will allow many more investments to be made under 10,000 visa quota. The current visa allocation method only allows approximately 3,600 investments per fiscal year, which creates approximately 36,000 jobs. The proposed change allows 10,000 investments per year, which will create at least 100,000 jobs.
3. Providing greater transparency for investors by making the program more user-friendly and marketable to investors.
4. Creating stricter requirements to deter actual and perceived fraud.
5. Changing the Child Status Protection Act (CSPA) to allow a child under the age of 21 to have his/her age frozen until an immigrant visa number becomes available after the investor’s I-526 petition is filed. In other words, if an EB-5 petition has been filed by an investor before his/her child reaches age 21, then the child will remain included in the parent’s petition no matter how long it takes to obtain the immigrant visa under the visa quota limits.

SEC and Other Enforcement Agencies

The U.S. Securities Exchange Commission (SEC) is seeking full disclosure, compliance and transparency in transactions related to EB-5 investors. Thus, disclosure of all communications received by overseas migration agents for finding EB-5 investors should be disclosed. Additionally, any payment made by an immigration law attorney to an overseas migration agent or other third party related to EB-5 investor introductions is illegal and the lawyer may receive disciplinary action and/or lose his/her license. Payments of commissions or finders’ fees are being scrutinized to determine if the transactions should have been done through a licensed broker-dealer and if they complied with SEC regulations. Methods of advertising and marketing unregistered securities must be done in accordance with SEC rules and regulations.

While the transparency that the SEC seeks may appear daunting, it is in the interest of protecting the integrity and success of the EB-5 program.

Conclusion

While many challenges currently facing the EB-5 industry, the next year will be crucial to the program’s long-term success and sustainability. As Bill Gates, Warren Buffett, and Sheldon Adelson put it in their New York Times op-ed, “People willing to invest in America and create jobs deserve the opportunity to do so.” Hopefully, with the cooperation of EB-5 stakeholders and members of Congress, United States businesses, employees, and investors will all continue to benefit greatly under the EB-5 program for the foreseeable future and Win, Win, Win!

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