Department of Energy Contractor Attorneys' Association, Inc.
www.doecaa.org

DOECAA SPRING 2019 CONFERENCE
MAY 2-3, 2019

May 2nd: all day (8:00 to 5:30), networking event (5:30-7:00) Cash Bar
May 3rd : half-day (7:30 to 12:00)
Location: University of California, Washington Center, 1608 Rhode Island Ave. N.W., Washington D.C.

Thursday -May 2, 2019

Time	Topic	Moderator
8:00-8:05	**Welcome and Preliminary Comments by Glenn McKeown**; Safety Topic-**Strange Surroundings**; On a lighter note, Value Creation-**Succession Planning, Know Your Field Of Play** (Keynote), Overview of Agenda by **Donald Murano (General Counsel Fluor-BWXT Portsmouth LLC)**	Glenn McKeown-ANL General Counsel
8:05-9:20	**What's New in Labor and Employment Law?** This moderator-led discussion will consider three diverse, emerging issues that present new challenges for the DOE contractor community in the area of employment. Specifically, we will consider (i) an array of potential employment law consequences of both a memorandum issued by Deputy Secretary Dan Brouillette in late 2018 proposing policy changes that may restrict sensitive country foreign nationals ("SCFNs") from working in sensitive research areas at DOE laboratories and proposed policy restrictions on participation by DOE-funded researchers in foreign talent recruitment programs sponsored by certain countries as reported on and reprinted in *Science Magazine*; (ii) the recently announced proposed changes to the regulations that govern exemption from the Fair Labor Standards Act and the Service Contract Act and to the definition of "independent contractor;" and (iii) the #MeToo movement and what it suggests about how employers at DOE facilities should update their sexual harassment policies to take account of the new and enhanced risks the #MeToo movement represents. **Panelists – George Ingham and Jody Newman (Hogan Lovells); Shlomo Katz (Brown Rudnick LLP); Saurabh Anand (Laboratory Counsel, SLAC). Mary Anne Sullivan (former DOE General Counsel).**	Mary Anne Sullivan-Hogan, Lovells
9:20-9:30	Morning Break	

9:30-10:45	**State of the False Claims Act Within the DOE Complex**. This moderator-led discussion will examine trends and emerging issues under the False Claims Act from the perspective of the Department of Justice (DOJ), DOE Office of Inspector General (OIG) and relator's counsel. The panel will address hot topics, such as: (a) the real-world impact and application of the Supreme Court's Escobar decision and what it means for DOE contractors; (b) the implementation of the "Granston" memorandum (e.g., when is it used? what criteria are applied?); (c) emerging issues and case developments that are impacting DOE sites, to include the recent MSA-Hanford FCA lawsuit, the November 2018 OIG Special Report on Hanford, etc.; and (d) how the DOJ, OIG and relators coordinate in conducting investigations and FCA matters; the practicalities of increasingly common parallel civil and criminal proceedings; and privilege and strategy issues that arise when the government or relators target multiple defendants in the same action. **Panelists –Don Williamson (DOJ, Senior Trial Counsel); John Dupuy (DOE Deputy Inspector General for Investigations); Rob Vogel (relator's counsel).**	Peter Hutt II-Covington
10:45-11:40	**Effective Selection, Preparation and Use of Experts for Litigation in the DOE/NNSA Complex.** The panel will examine techniques and suggestions when identifying the best expert to engage in support of litigation and in preparing and presenting the expert's opinion and testimony, with a focus on the types of litigation often faced by contractors on remedial DOE sites and DOE and NNSA national laboratories. Many high stakes cases can turn on the ability to present compelling expert opinions and evidence. The panel will also examine litigation from both the outside counsel's perspective and in the management of outside counsel on large DOE sites. **Panelists- Lisa Daley Mangi (NNSA Labor & Employment Counsel); Chip Hicks (partner Frost Brown Todd, Pittsburgh Office, prior in house counsel for the Savannah River MOX facility, and outside counsel litigating complex issues relating to DOE sites) Mike Berman, Geosyntec Consultants.**	Tami Azorsky-Dentons
11:45-12:30	**DOE's New End State Contracting Model**. On December 12, 2018, DOE's Office of Environmental Management issued a Special Notice - Modification to End State Contracting Model (ESCM). On February 14, 2019, DOE issued the first RFP using the ESCM--for the Hanford Central Plateau Cleanup Contract. Among other things, the new contract model is designed to result in the award of a single Indefinite Quantity Indefinite Delivery contract. And offerors will propose IDIQ Labor Rates. The rates included by the Contractor will be binding for purposes of Task Order pricing. The model contemplates breaking the work into tasks that will be negotiated using the contract rates in order to chunk the work while not disrupting contract continuity. Does the new ESCM model have a future? Does it have a past? Our panel will discuss the new model and address your questions**. Panelists- Gena Cadieux (Former DOE Acting Under Secretary for Management and Performance,**	Ken Weckstein-Brown Rudnick LLP

	counsel at Harris, Wiltshire & Grannis); Angela Watmore (DOE Senior Advisor, Office of Environmental Management).	
12:30-1:15	Lunch Break- Live, Web-Based Interactive Presentation bridging Washington D.C. and Piketon, OH - **The Generation Jungle. Dr. Jason Lovins**	Donald Murano- Portsmouth General Counsel
1:15-2:15 (ethics)	**Another Day in the Life of a DOE Contractor Attorney.** This panel discussion will examine case studies highlighting ethical dilemmas in-house counsel working in the DOE complex may face. The panel will consider the issues from the perspective of both (1) the attorneys' ethical obligations under the ABA Model Rules of Professional Conduct and state rules of professional conduct and (2) their government contractor clients' ethical obligations under relevant federal laws and regulations. **Panelists- Mary Blatch (Associate General Counsel & Director of Advocacy, Association of Corporate Counsel), and Skip Hindman (Baker Donelson).**	Ivan Boatner-Baker Donelson
2:15-3:15	**Maintaining an Engaged Safety Culture in the DOE Nuclear Complex- Investigation and Enforcement of Nuclear Safety Complaints.** This panel will provide a brief overview of the DOE nuclear safety requirements with a focus on investigations and the enforcement of safety-related complaints. The panel will as well share their insights into the investigation of "whistleblower" complaints from the DOE's and contractor's perspective. Best practices and lessons learned arising through the enforcement process will be presented as highlighted in recent cases in which safety violations were identified. **Panelists- Kevin Dressman (Acting Director of the DOE Office of Enforcement), Virginia Grebasch (DOE Counsel to the Inspector General).**	John Englert- Saul Ewing Arnstein & Lehr LLP.
3:15-3:25	Afternoon Break	
3:25-4:25	**Making the CBCA Work for You.** This moderator-led panel will examine best practices and potential pitfalls of litigating disputes at the CBCA from the perspective of CBCA judges, M&O contractors and DOE practitioners before the Board. Based on their own experiences in litigating before the Board, the panelists will (a) provide practical guidance and tips for litigating at the Board; (b) discuss the benefits and potential disadvantages of engaging in the various types of ADR available at the CBCA; and (c) provide practical advice on how to maximize the chances of a successful ADR at the CBCA. **Panelists-- Judge Jeri Somers (Chair of the CBCA); Pablo Prando, Deputy General Counsel of Triad National Security LLC (M&O contractor for Los Alamos); Panel may be supplemented.**	Gail Zirkelbach- Crowell & Moring
4:25-5:30	**Conflicts of Interest in Federal Contracting**. This program will focus on conflict of interest rules in federal contracting from the perspective of the Department of Energy employees, contractors, and enforcement personnel. The panel will address (a) personal conflicts of interest under various, statutes and regulations such as the Procurement Integrity Act and the Ethics Reform Act, (b) revolving door	Edmund Amorosi- Smith Pachter McWhorter PLC

	regulations; (c) organizational conflicts of interest; and (d) attempts to improperly influence the procurement process through gifts and gratuities. The panel discussion will draw on case law for examples and hypotheticals to illustrate the complex questions that arise. **Panelists, J. Rob Humphries (Bechtel National Inc.), Steven Schooner, Nash & Cibinic Prof. of Gov't Procurement Law, George Washington University, Todd Garland (Smith Pachter).**	
5:30-7:00	DOECAA Sponsored Networking- Following Conference at Conference Location-**Cash Bar**	

Friday -May 3, 2019

Time	Topic	Moderator(s)
7:30-8:30 8:00-8:30	DOECAA Continental Breakfast DOECAA Business Meeting, Election of Officers	Glenn McKeown
8:30-9:40 (ethics)	**Charting a Course Through Uncertain Waters**. **Understanding Key Ethical Issues Regularly Facing In House Counsel for DOE and NNSA Contractors**. This panel will walk through several different hypotheticals that will highlight key ethical issues facing in house counsel for the LLC's performing under clean up or laboratory operations contracts. Each hypothetical will examine several different issues, with each issue's implications explained under the Model Rules of Professional Responsibility and relevant ethics opinions. The focus will be on specific types of issues and concerns relevant to DOE and NNSA contractors, including examining the rules on confidentiality, understanding which entity or entities are the client, making smart steps in structuring internal investigations from an ethics standpoint and managing ethics risk when dealing with third parties, as well as a number of other issues. **Panelists- Hamilton P. (Phil) Fox, Head of Washington DC Office of Disciplinary Counsel; Mark Olsen, General Counsel, Battelle Energy Alliance LLC.**	Mark Meagher-Dentons
9:40-10:00	Morning Break	
10:00-11:15	**Corporate Transactions, CFIUS and FOCI: Best Practices & Emerging Issues for DOE Contractors**. The panel will provide an overview of best practices for corporate transactions involving DOE contractors and contracts, including tips for conducting due diligence and areas that require particular attention during diligence (e.g., organizational conflicts of interest, intellectual property, contract novation). The panel also will address significant emerging issues for transactions and financing arrangements that require approval from the Committee on Foreign Investment in the United States (CFIUS) or mitigation of foreign ownership, control or influence (FOCI) over DOE contractors. This will include a discussion of the new CFIUS reform law (FIRRMA), critical technologies and mandatory CFIUS filings under the new pilot program and anticipated new regulations to implement CFIUS reforms	Scott Freling-Covington

	pursuant to FIRRMA and to identify emerging and foundational technologies pursuant to the Export Control Reform Act of 2018. **Panelists- Damara Chambers (Covington); Panel may be supplemented by representative from applicable agency.**	
11:15-11:40	**Inspector General Teri Donaldson, A DOE Complex Overview.** A brief discussion of the IG's initial impressions of the DOE Complex, and her quest for a framework to address areas of mutual interest, such as the prevention and detection of waste, fraud, and abuse. Q/A session	
11:40-12:00	**Timothy Fischer, NNSA Deputy General Counsel for Procurement, Intellectual Property & Technology Transfer, The Current State of the NNSA.**	
12:00	Conference Concludes- A Box Lunch Is Provided	

To the above participants, our DOECAA members and guests will greatly appreciate the time and effort put forth to generate such a stellar program. THANK YOU!

Point of Contact: Donald Murano, Fluor Corporation (C): 314-276-7676 (before and during DOECAA Conference should issues arise).

Glenn McKeown

General Counsel

Biography

Glenn McKeown is General Counsel for Argonne National Laboratory. Prior to his appointment at Argonne, Glenn served as Associate General Counsel in the University of Chicago's Office of Legal Counsel.

Glenn has a bachelor's degree in political science from Columbia College, Columbia University; a master's degree in public administration from Harvard University's John F. Kennedy School of Government; and a juris doctor from Harvard Law School.

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Biography for Donald K. Murano, Esq., CCEP

General Counsel and Secretary Fluor-BWXT Portsmouth LLC

Mr. Murano is a proven professional with extensive legal, business, and environmental experience. He will apply his 30+ years of experience to forge a practical solution to manage your complex business challenges where the law intersects with business acumen.

As in-house counsel for large global firms, Mr. Murano facilitated extensive training programs for senior and mid-level management and could apply that insight to your company. He has generated sound advice through his in-house expertise as well as his outside legal counsel function to strictly adhere to every facet of employment law and regulatory compliance.

For over a decade, Mr. Murano litigated civil and criminal matters in state and federal courts as the principal litigator in The Murano Law Firm LLC. His firm's client list ranged from companies having fewer than five employees, to multi-billion dollar organizations. One common theme prevails in that spectrum of clients - it is far easier to avoid legal troubles through advanced business and legal planning than to pull an organization out of a lawsuit in the aftermath. Reputation capital is always at stake in the midst of a legal skirmish, which is invariably riddled with hefty legal bills, distractions from the mission at hand, and uncertain outcomes.

Hogan Lovells

Sexual harassment in the #MeToo era

DOECAA Conference

Washington, D.C., May 2, 2019

SEXUAL HARASSMENT IN THE #METOO ERA:
WHAT'S NEW FOR EMPLOYERS

SEMINAR MATERIALS*

Part 1: What Has the #MeToo Movement Changed for Employers?

The #MeToo movement, which began on social media in Fall 2017, is shedding a bright light on the continuing problem of sexual harassment in the workplace. Women and men have been emboldened to take allegations of sexual harassment against high-profile individuals public, even when the alleged harassment occurred many years ago or the claims are subject to a confidentiality agreement. What has the #MeToo movement changed for employers? Although the movement's full implications remain to be seen, following are some key early lessons for employers:

- **Harassment and Other Legal Claims Are Likely to Increase.** Even before the #MeToo movement began, the Equal Employment Opportunity Commission ("EEOC") reported that nearly a third of all EEOC charges included claims of harassment. EEOC, *Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs Chai F. Feldblum & Victoria Lipnic at 6 (June 2016). As more employees are emboldened by #MeToo to report harassment, and to take their claims public through news outlets and social media, harassment claims may well increase. As a result, employers need to be more proactive in preventing, investigating, and remedying sexual misconduct in the workplace. The #MeToo movement also is likely to lead employees and employers alike to focus on other issues beyond harassment. For example, there is growing legal pressure on employers on the issue of pay equity.

- **Sexual Misconduct Matters When It Violates the Law and When It Does Not.** Employers, as always, need to understand the legal standards for sexual harassment claims. But even if a sexual harassment claim is outside the statutory limitations period or is otherwise not legally "actionable," the #MeToo movement has shown that an employer can be harmed by failing to properly deal with the complaint and/or the underlying conduct. In the #MeToo era, even non-actionable claims can increase legal risks for a company and result in damage to reputation, recruitment, employee retention, and workplace morale. Moreover, a bungled response to a non-actionable complaint can create actual liability in the form of retaliation down the line. See Part 2, below, for more information on what constitutes unlawful harassment and why even non-actionable claims matter.

- **Strong Policies Are Just the Starting Point for Good Legal Risk Management and Prevention.** In today's climate, strong anti-harassment and anti-retaliation policies and effective complaint procedures are a must, but in light of #MeToo, they may no longer be sufficient. Employers should evaluate their preventive measures to determine whether they are sufficient in light of #MeToo. One resource to consider is the EEOC's latest guidance on harassment, which recommends additional preventive measures—including, for example, that senior leadership frequently, clearly, and unequivocally express commitment to anti-harassment policies, and that companies regularly train all employees on their policies and complaint procedures—a best practice that is now legally required in some jurisdictions. See Part 3 for more information on preventive measures.

* These materials contain condensed summaries of legal principles. They are not meant to be and should not be construed as legal advice. Individuals with particular needs on specific issues should retain the services of competent counsel.

- **Prompt, Thorough Investigations Remain Crucial**. Timely, unbiased, and thorough investigations of harassment complaints are a must, and such investigations are another key to reducing the employer's legal exposure. Failure to properly respond to all complaints—even those that appear non-meritorious—can increase liability down the road. See Part 4 for guidance on how to investigate harassment claims.

- **Corrective Action Needs to Be Appropriate in the Circumstances.** When a determination is made that harassment in violation of the organization's policies has occurred, immediate and effective corrective action must be taken. The goal should be to implement corrective action that is proportionate to the offense. Although "zero tolerance" (meaning automatic dismissal for any harassing conduct) sounds attractive, and dismissals are often appropriate, such a policy may not be the most effective approach, due to unintended consequences. See Part 5 for additional details on taking proportionate disciplinary actions in today's environment.

- **Confidentiality of Sexual Harassment Claims Is Becoming Controversial.** In the wake of #MeToo, employers' ability to condition settlements of harassment claims on confidentiality, and to require mandatory confidential arbitration of harassment claims as a condition of employment, has become more of a question mark. Traditionally, employers and employees have considered confidentiality of harassment disputes to be valuable. But new laws and pending legislation in some jurisdictions provide a disincentive to, or outright prohibition on, the ability to maintain confidentiality. See Part 6 for a discussion of the latest legal developments.

Part 2: What's Illegal and What's Not, and Does It Matter?

Key Discussion Topics: Legal Standards and Best Practices for Reducing Legal Risk

- What constitutes illegal sexual harassment?
- Does inappropriate conduct outside of the workplace constitute unlawful workplace harassment?
- How should employers handle inappropriate conduct that does not rise to the level of being unlawful?
- What should employers do about time-barred claims?
- What are the risks related to unlawful retaliation?

Sexual Harassment

Harassment in the workplace – whether based on race, sex, age, religion, or another characteristic protected by law – is a form of discrimination that is prohibited by Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq*., and similar state and local laws. The most common form of unlawful workplace harassment is sexual harassment, which is the primary focus of the #MeToo movement.

- **What is sexual harassment**?

    - The EEOC has defined sexual harassment as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when: (i) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (ii) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (iii) such conduct has the purpose or effect of unreasonably interfering with an individual's work

performance or creating an intimidating, hostile or offensive working environment. 29 C.F.R. § 1604.11.

- **Does harassment require a tangible employment action**? Taking a tangible employment action based on an employee's submission to or refusal to submit to sexual advances or other sexual conduct is sexual harassment. This is sometimes referred to as "quid pro quo" harassment. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751-752 (1998). For example, conditioning a promotion on sexual favors, or firing an employee who refuses to grant sexual favors, is clearly prohibited. But hostile work environment harassment can occur even without a tangible employment action. *Id.*

- **What is a hostile work environment?** Hostile work environment harassment is verbal, visual, or physical conduct related to the workplace that is (1) unwelcome; (2) occurring based on sex; and (3) severe or pervasive enough to affect a condition of employment and create an abusive environment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64-67 (1986). Examples can include: unwanted sexual advances or requests for sexual favors; sexual jokes and innuendo; verbal abuse of a sexual nature; commentary about an individual's body, sexual prowess or sexual deficiencies; leering, catcalls or touching; insulting or obscene comments or gestures; display or circulation in the workplace of sexually suggestive objects or pictures (including through electronic means); and other physical, verbal or visual conduct of a sexual nature. Whether harassment can be legally attributed to an employer is discussed below in the discussion of employer liability.

- **Unwelcome**: To determine whether conduct is unwelcome, the EEOC examines "the record as a whole and the totality of circumstances." 29 C.F.R. § 1604.11(b); *see also* EEOC, *Policy Guidance on Current Issues of Sexual Harassment: Determining Whether Sexual Conduct is Unwelcome*, No. 915-050 (Mar. 19, 1990), https://www.eeoc.gov/policy/docs/currentissues.html.[1]

  - **Based on sex**: The conduct complained of must have occurred "because of sex," but this does not mean that it must be motivated by sexual desire. It can include conduct that disparages an employee because of his or her gender—for example, making sexist comments or using gender-based epithets.
  - **Severe or pervasive**: Whether behavior is "severe or pervasive" also involves a close look at all the facts, including: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct was physically threatening or humiliating instead of a mere offensive statement; and (4) whether the conduct unreasonably interfered with an employee's work performance. *Harris v. Forklift Sys, Inc.*, 510 U.S. 17, 23 (1993). The Supreme Court has held that Title VII does not create a "general civility code" for the workplace, so simple teasing, offhand comments or isolated incidents that are not severe typically do not constitute unlawful harassment. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

[1] This outline references EEOC informal guidance documents on harassment issued in the 1990s. In January 2017, the EEOC issued for public comment proposed new guidance that, if it becomes final, will replace the 1990s guidance documents. *See Proposed Enforcement Guidance on Unlawful Harassment*, https://www.regulations.gov/docket?D=EEOC-2016-0009.

- **In what circumstances can harassment occur?** Harassment can arise in situations that might not be obvious. For example:

    - A harasser can be male or female, and harassment can occur between individuals of the same or opposite sex. The Supreme Court has held that same-sex sexual harassment is actionable under Title VII. *Oncale*, 523 U.S. at 79-81.
    - The harasser can be a supervisor or co-worker, or can be a non-employee, such as a customer or vendor.
    - The harassment can occur in the workplace, or it can occur outside the workplace, such as during a business trip.
    - Harassment can occur via social media or text messages.
    - The intent of the harasser is irrelevant. For example, the harasser need not be motivated by sexual gratification, and need not believe his or her conduct is unwelcome, for the claim to succeed.
    - The harassing conduct need not be specifically targeted to the complainant to be actionable.

- **Is harassment based on sexual orientation or gender identity legally prohibited?** Although the Supreme Court held that same-sex sexual harassment is actionable in *Oncale*, whether Title VII prohibits harassment based on an individual's sexual orientation or gender identity (for example, harassing an employee based on transgender status) remains unsettled.

    - The EEOC takes the position that discrimination based on sexual orientation or gender identity is discrimination based on sex and thus violates Title VII, and in 2017 the Seventh Circuit became the first federal court of appeals to adopt the EEOC's position. *See Hively v. Ivy Tech Comty. College of Ind.*, 853 F.3d 339 (7th Cir. 2017) (en banc). In early 2018, the Second Circuit joined the Seventh Circuit in recognizing sexual orientation discrimination as a cause of action under Title VII. *See Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. 2018) (en banc). Other circuits, however, have held that sexual orientation is *not* a protected characteristic under Title VII. *See, e.g., Evans v. Ga. Reg. Hosp.*, 850 F.3d 1248 (11th Cir.), *cert. denied*, 138 S. Ct. 557 (2017); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 751-752 (4th Cir. 1996). Because the Supreme Court has thus far declined to resolve the circuit split, the question remains unsettled at the federal level.

    - Some state and local laws, by contrast, explicitly include "sexual orientation" and/or "gender identity or expression" as protected classes under their antidiscrimination laws. For example, both the District of Columbia Human Rights Act as well as Maryland's Fair Employment Practices Act prohibit discrimination on the basis of sexual orientation and gender identity. *See* D.C. Code § 2-1402.11; Md. Code Ann., State Gov't § 20-606. A bill pending in the Virginia House of Delegates would amend the Virginia Human Rights Act to explicitly prohibit discrimination based on "sexual orientation or gender identity." *See, e.g.*, Va. House Bill No. 401.

- **When is an employer liable for harassment?**

  - **Liability for supervisor harassment**: When a supervisor engages in harassment that results in a tangible adverse employment action such as termination of employment, failure to hire/promote, or a change in compensation, the employer is vicariously liable for the supervisor's conduct, and there is no defense available.

    When the supervisor's harassing conduct does not culminate in a tangible adverse employment action, the employer can avoid liability by proving that (1) it used reasonable care to prevent and correct the harassment; and (2) the victim failed to take advantage of the corrective or preventative measures provided. *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998). *See also* EEOC Enforcement Guidance, *Vicarious Employer Responsibility for Unlawful Harassment by Supervisors*, No. 915.002 (June 18, 1999), https://www.eeoc.gov/policy/docs/harassment.html. Note that although state law typically follows federal law on the standards for employer liability, some state courts do not recognize this defense.

    - **Supervisor**: The Supreme Court has defined "supervisor" narrowly to mean an employee empowered by the employer to take tangible employment actions against the complainant, regardless of the extent to which the employee controls the complainant's day-to-day work activities. *See Vance v. Ball State Univ.*, 570 U.S. 421 (2013).

  - **Liability for co-worker harassment**: If a co-worker engages in harassment, the employer is liable if the victim can show that the employer knew or should have known of the misconduct and failed to prevent or correct it. *See Vance*, 570 U.S. at 453-454; 29 C.F.R. § 1604.11(d); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 333-334 (4th Cir. 2003). This is a negligence standard.

  - **Liability for non-employee harassment**: An employer can also be liable under a negligence standard when non-employees, such as contractors, vendors, or customers, sexually harass its employees related to the workplace. The employer may be liable if the employer (or its agents or supervisory employees) knew or should have known of the conduct and failed to take immediate and appropriate corrective action. *See, e.g., Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 424 (4th Cir. 2014). In reviewing these cases, the EEOC will consider the extent of the employer's control over the non-employee and any other legal responsibility that the employer may have with respect to the conduct of the non-employee. 29 C.F.R. § 1604.11(d)(e). On the flip side, an employer can also be responsible in situations when its employees sexually harass employees of its customers or vendors related to the workplace.

  - **Liability for conduct outside the workplace**: An employer can be liable for harassment that takes place outside the workplace if the harassment has consequences within the workplace. *See, e.g.*, *Ferris v. Delta Airlines, Inc.*, 277 F.3d 128, 135-137 (2d Cir. 2001) (hotel room that employer had reserved for the flight crew's use during a layover was part of the work environment, where a coworker raped the plaintiff and the employer knew that the coworker had a history of sexually assaulting female flight attendants but did nothing to prevent it); *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409-

410 (1st Cir. 2002) (conduct of a coworker who followed the plaintiff home and broke into her house, in addition to grabbing her and following her around at work, explained why his presence around her at work created a hostile work environment).

- **Are individual employees liable for their own harassing conduct?** Courts have held that employees cannot be held individually liable under Title VII. *See, e.g., Gary v. Long*, 59 F.3d 1391, 1399 (D.C. Cir. 1995). However, other laws in some jurisdictions, including, for example, the District of Columbia and California, permit claims against the individual harasser as well as the employer. *See* D.C. Code § 2-1401.02(10); Cal. Gov't Code § 12940(j)(3).

- **What remedies are available to a harassed employee?** Employees subject to unlawful harassment typically have the following remedies available to them

    - Lost compensation/backpay
    - Future earnings
    - Compensatory damages (*e.g.*, pain and suffering)
    - Punitive damages
    - Injunctive relief
    - Attorneys' fees and costs
    - Equitable relief, such as reinstatement or employment training

  Under Title VII, there is a cap on compensatory and punitive damages that depends on the size of the employer. Statutory caps specify that for each plaintiff the damage award may not exceed: $50,000 for employers with 15-100 employees; $100,000 for employers with 101-200 employees; $200,000 for employers with 201-500 employees; and $300,000 for employers with 501 or more employees. 42 U.S.C. § 1981a(b)(3). Back pay, future lost earnings and attorneys' fees and costs are not subject to the federal cap. Some state laws, such as the D.C. Human Rights Act, do not cap damages. *See Wallace v. AlliedBarton Sec. Servs., LLC*, 309 F.R.D. 49, 53 n.1 (D.D.C. 2015).

- **Can employees bring sexual harassment lawsuits under Title IX?** The answer is yes, in some jurisdictions, and no, in others. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq*., prohibits discrimination on the basis of sex in federally funded education programs or activities. Title IX covers virtually all public and private colleges and universities as well as public preschool, elementary, and secondary schools. Title IX protects both students and employees of covered institutions from sex discrimination, including sexual harassment. The statute is primarily enforced by the U.S. Department of Education's Office for Civil Rights ("OCR"), which has its own regulations and procedures separate from the EEOC, although OCR sometimes transfers employment discrimination complaints to the EEOC for processing.

  Federal courts of appeals are split on the question whether employees can bring court actions alleging sex discrimination, harassment, or retaliation under Title IX when the claims could have been brought under Title VII. The Fourth Circuit (which covers Maryland, North Carolina, Virginia, and West Virginia) allows employees to bring Title IX claims in court, *see Preston v. Va.*, 31 F.3d 203, 205-206 (4th Cir. 1994), as do the First and Third Circuits. *Doe v. Mercy Catholic Med. Ctr.,* 850 F.3d 544, 559-563 (3d Cir. 2017); *Lipsett v. Univ. of Puerto Rico*, 864 F.3d 881, 895-897 (1st Cir. 1988). The Fifth and Seventh Circuits, conversely, have held that the availability of remedies under Title VII precludes employees from bringing their claims in

court under Title IX. *See Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 861-862 (7th Cir. 1996); *Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995).

Retaliation

The anti-harassment laws provide remedies for persons who experience sexual harassment – and also provide remedies for persons who complain about it and suffer an adverse action as a result, whether or not they are victims.

- Title VII prohibits retaliation against an applicant or employee who opposes any practice prohibited by Title VII, files a charge of discrimination under Title VII, or testifies, assists, or participates in an investigation or proceeding under Title VII. 42 U.S.C. § 2000e-3.

- Taking an adverse action against an employee who engages in "protected activity" is retaliation. Courts generally analyze retaliation claims under the three-step, burden-shifting test created by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). To state a claim for retaliation, an employee must allege that (1) he or she engaged in a protected activity; (2) the employer took adverse action against him or her; and (3) the protected activity was causally connected to the adverse action.

    - **What is "protected activity"?** There is not a precise definition; however, the general guidelines are as follows:
        - Mere complaints about unfair treatment are not protected activity.
        - Complainants do not need to prove that the conduct they opposed actually was discriminatory or illegal. Instead, they must demonstrate that at the time they engaged in protected activity, they had a reasonable, good faith belief that the underlying conduct violated the law.
        - The complaint can be made internally, to Human Resources or a supervisor, or it could be made externally, to the EEOC or a court.

    - **What is "adverse action"?** In retaliation cases, an adverse action is an action that would discourage a reasonable employee from complaining about discrimination or harassment. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 68 (2006). It can be an action that materially changes the employee's employment status—such as discharge or demotion, or a decrease in pay, but actions that fall short of a change in status can also support a retaliation claim if they are "materially adverse." *Id.* Depending on the circumstances, such actions could include, for example, a significant change in duties, or relocation to a less desirable work place, or a negative performance review.

    - **What is a "causal connection"?** A causal connection exists when the employer has knowledge of the employee's protected activity, and there is some factual connection between the protected activity and the adverse action.

        - **Temporal proximity**: In determining whether there is a causal connection, courts carefully consider the length of time between the protected activity and the adverse action. Most courts have held that a period of a year or more is too long to support an inference of causation, and some courts have held that even a gap

of a few months between the employee's protected activity and the employer's adverse action erodes any inference of causation where there is no other evidence of causation. Nevertheless, there is no "safe" amount of time after which an employer may take adverse actions without risk of retaliation claims.

- Retaliation claims are frequently litigated and remain a significant focus of the EEOC"s enforcement activities. According to the EEOC's annual statistics, the number of charges alleging retaliation has more than doubled in the last 15 years. In the late 1990s, complainants alleged retaliation in 22% of charges filed. The number climbed to 45.9% by fiscal year 2016.

- Retaliation claims can expose employers to significant liability. Awards of hundreds of thousands or even millions of dollars have been awarded. *See, e.g., Anderson v. City of Fort Pierce,* No 14-cv-14095 (S.D. Fla. Aug. 27, 2015) (jury awarded $508,500 in lost wages, benefits and emotional distress damages for demotion after filing an EEOC charge complaining of sexual harassment); *EEOC v. RadioShack*, No. 10-cv-02365 (D. Colo. Feb. 28, 2013) (jury awarded $674,938 in damages); *Black v. Pan American Labs., LLC*, No. 1:07-CV-924 (W. D. Tex. Jun. 11, 2009) (jury found that employer retaliated against plaintiff after she complained about inappropriate sexual comments and awarded $1.05 million in actual damages and $2.4 million in punitive damages).

Does it matter to employers whether sexual misconduct is illegal?

- As shown above, conduct that constitutes unlawful harassment, or retaliation for a harassment complaint, can put an employer at significant risk.

- But conduct that is not illegal – such as because it is old or deemed to be "minor" – can cause the employer significant harm, too. So in a practical sense all inappropriate conduct matters, and as a result a prudent employer recognizes the risks associated even with claims that might not be actionable before the EEOC or a court. Among those risks:

    - **Time-barred claims still matter**: Time-barred claims or circumstances may be used as evidence in a later case concerning a new claim that arises within the limitations period, whether the new claim is by the same employee or a different employee.

    - **Retaliation risk**: Taking adverse action against an employee because the employee makes a complaint of harassment – whether internally or before the EEOC or a court – constitutes retaliation, even if the complaint itself is not meritorious. Moreover, taking adverse action a short time after the protected activity occurs can be especially problematic, because it can create an inference of retaliation that may be difficult to rebut.

    - **Subsequent conduct risk**: An accused employee may have engaged in conduct that is boorish or inappropriate, but not illegal. Failing to address that conduct when it first occurs may lead to problems down the road. For instance:

        - The complaining employee may ultimately be subjected to conduct that is in fact illegal, at which time the employee may allege that the employer

improperly ignored earlier complaints – a result that might not have occurred if the employer had paid sufficient attention to the earlier offending conduct.
    - Other employees may be subjected to subsequent actionable conduct by the same accused employee – a result that might not have occurred if the employer had stepped in to correct the bad behavior that occurred earlier.

- **Reputational risk**: As the #MeToo movement has demonstrated, employers can be subject to great reputational risk where they fail to address bad conduct, even if the conduct is not ultimately legally actionable. Among other things, employees who do not feel that they are listened to by Human Resources may decide to tell their stories publicly, such as through social media or the press.

- **Culture/morale issues**: Even conduct that is not illegal, if not addressed, can undermine employee morale and productivity and interfere with an employer's advancement of its core mission.

Part 3: What Have We learned About Preventing Harassment in Today's Environment?

Key Discussion Topics: Legal Standards and Best Practices for Reducing Legal Risk

- Does the law require employers to take particular measures to prevent harassment?
- Do employers need to update their policies in light of #MeToo?
- What avenues should be established for employees to make complaints?
- Are anonymous complaint hotlines a good idea?
- What kind of harassment training should be considered?
- Should employers be rethinking their personal relationship policies?
- What about anti-bullying policies?
- What is a "culture review," and should your organization conduct one?

Legal Standards

- **Preventive Measures Can Significantly Reduce Liability for Harassment.** As discussed above, under federal law an employer can avoid liability for harassment by a supervisor that does not result in a tangible employment action if it can establish that (1) it used reasonable care to prevent and correct the harassment; and (2) the victim failed to take advantage of the corrective/preventative measures provided. *Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998). Similarly, an employer is not liable for harassment by a non-supervisor or coworker unless it knew or should have known of the misconduct and failed to prevent or correct it. *See, e.g., Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 333-334 (4th Cir. 2003).

  Case law provides examples of how these rules apply. Courts have held that an employer exercised reasonable care to prevent and correct harassment by supervisors where, for example, the employer adopted, disseminated to all employees, and enforced through its human resources department a comprehensive anti-harassment policy and conducted on-site, small group harassment training. *Lacasse v. Didlake, Inc.*, 712 F. App'x 231, 237-238 (4th Cir. 2018). Conversely, courts have found no reasonable care in responding to supervisor harassment where the employer's anti-harassment policy was not disseminated to all employees, and the

complaint procedure did not permit employees to make harassment complaints to anyone but their own supervisors. *See, e.g., Faragher v. City of Boca Raton*, 524 U.S. 775, 808 (1998).

An anti-harassment policy, an anonymous complaint hotline, and annual harassment training coupled with prompt investigation and remedial action has been held to defeat a co-worker harassment claim. *See Cooper v. Smithfield Packing Co., Inc.*, No. 17-1002, 2018 WL 1151787, at *5 (4th Cir. Mar. 5, 2018). On the other hand, an employer that has appropriate policies in place but fails to enforce them promptly or effectively by repeatedly failing to investigate complaints may potentially be liable for co-worker harassment. *See Hoyle v. Freightliner, LLC*, 650 F.3d 321, 335-336 (4th Cir. 2011).

- **Some States Require Sexual Harassment Policies or Training.** Note that some states have enacted statutes requiring employers to take specific measures to prevent workplace harassment. A few states, such as Maine and Massachusetts, require employers to adopt formal harassment policies. California and Connecticut require sexual harassment training for supervisors; Maine requires it for all employees.

Best Practices for Reducing Legal Risk

In general, a professional, positive work environment, where all employees are made to feel respected and valued should greatly reduce the risk of sexual harassment occurring. When the leadership champions and models inclusion, collegiality, professionalism, and equitable treatment of others in the workplace, it sends the clear message that misconduct such as harassment will not be tolerated. As more women enter leadership positions, that too sends a signal and has positive impact.

On the specific topic of sexual harassment, the EEOC's regulations strongly encourage employers to undertake affirmative efforts to prevent it:

> Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, and informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f).

The EEOC's guidance documents on harassment describe a number of recommended preventive and corrective actions. The EEOC's recommendations do not necessarily have the force of law, but employers can consider them in evaluating how to reduce legal risk. The recommendations include:

- **Leadership and accountability**: Senior leadership can demonstrate a commitment to a culture in which harassment is not tolerated by, for example,
    - promoting a culture of civility and respect in the workplace and clearly, frequently, and unequivocally stating that harassment is prohibited;
    - providing sufficient resources and staff time for effective prevention efforts; and

- periodically evaluating the effectiveness of existing preventive measures.

- **Comprehensive and effective harassment policy**: An anti-harassment policy should, among other things,

  - be disseminated and easily accessible to all personnel, including by incorporating the policy into handbooks and posting it in common areas and on the company intranet;
  - be translated into all languages commonly used by employees;
  - state that it applies to all employees, applicants, and third parties such as customers and vendors;
  - provide an easy to understand description of prohibited conduct, including examples
  - explain the organization's harassment complaint system;
  - state that the employer will provide a prompt impartial, and thorough investigation and take appropriate corrective action; and
  - state unequivocally that retaliation for reporting harassment or participating in a harassment investigation is prohibited.

- **Effective and accessible harassment complaint system**: Recommendations for complaint procedures include:

  - providing multiple avenues for easily reporting complaints (not just to the employee's supervisor);
  - requiring supervisors to inform leadership in Human Resources of instances of harassment of which they become aware
  - encouraging complaints by "bystanders" who witness harassment of others;
  - stating that confidentiality of all persons involved in the investigation will be maintained to the greatest extent possible, consistent with legal requirements and a thorough, impartial investigation;
  - reiterating the prohibition on retaliation; and
  - maintaining records of all harassment complaints.

  Note that EEOC regulations generally require that personnel or employment records be preserved for one year from the date of the creation of the record or the personnel action, whichever is later. 29 C.F.R. § 1602.14. However, it is usually prudent to retain documents related to harassment complaints longer in order to identify patterns, and because, in light of the #MeToo movement, individuals are taking public claims that may have been investigated years ago. Some laws may also contain longer retention periods. For example, larger federal contractors are required to keep personnel records for two years. 41 C.F.R. § 60-1.12.

- **Effective harassment training**: According to the EEOC, harassment training is most effective when it is, among other things:

  - championed by senior leaders;
  - repeated and reinforced regularly;
  - provided to all employees at every level, in all languages commonly used by employee;
  - tailored with examples specific to the particular workplace and workforce;
  - supplemented for supervisors and managers with additional information about how to address harassment and reports of harassment;

- conducted by qualified trainers, live when feasible; and
- interactive, whether presented live or online.

See, e.g., EEOC, *Promising Practices for Preventing Harassment* (Nov. 2017), https://www.eeoc.gov/eeoc/publications/promising-practices.cfm; *Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs Chai F. Feldblum & Victoria & Lipnic, Appendix B (June 2016).

Part 4: Who Should and How to Investigate?

Key Discussion Topics: Legal Standards and Best Practices to Reduce Leal Risk

- What are the important components of an adequate investigation of harassment claims?
- Who should conduct the investigation?
- When is it appropriate to bring in an external investigator?
- What about privilege issues when counsel is involved?
- What are the limits on the confidentiality of investigations?
- What if the person aggrieved does not want an investigation?
- How should employers handle investigations of social media complaints?

Legal Standards

Federal statutes and regulations do not impose particular requirements on an employer's internal investigation of harassment complaints, but case law and EEOC guidance have acknowledged components of a good investigation. A good investigation is necessary for an employer to determine whether harassment has occurred and if corrective action is required.

- **Prompt and Thorough**: A prompt and thorough investigation can be powerful evidence in the employer's favor in litigation. *See Crawford v. BNSF Ry. Co*., 665 F.3d 978, 985 (8th Cir. 2012) (concluding that employer exercised reasonable care to prevent and correct harassment when it initiated an investigation upon receiving a harassment complaint, placed the alleged perpetrator on administrative leave within two days, and terminated him within two weeks). *See also Crockett v. Mission Hosp. Inc.*, 717 F.3d 348, 356-358 (4th Cir. 2013) (employer conducted a prompt and thorough investigation when it immediately instituted an "intensive" investigation of plaintiff's complaint, which included interviewing the complainant and numerous employees and supervisors in her department and encouraging complainant to provide more details to support her vague allegations; employer's failure to grant the complainant a desired transfer during the investigation was not unreasonable since she repeatedly failed to provide details to support her allegations).

  Likewise, a cursory or dilatory investigation of a harassment complaint substantially increases legal risk. Failure to conduct an investigation in a timely manner is a particularly common complaint made in the #MeToo movement, as it suggests that the employer is brushing the investigation under the rug. *See, e.g., EEOC v. Mgmt. Hospitality of Racine, Inc.*, 666 F.3d 422, 436 (7th Cir. 2012) (two-month delay in initiating investigation was not a reasonable response); *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 465-66 (5th Cir. 2013) (en banc) (20-minute investigation in which investigator did not take any notes or ask any questions during his meeting with the complainant, never contacted the employer's EEO officer or sought advice about how to handle the matter unreasonable). The reasonableness of an investigation

depends on the circumstances, and more severe allegations, or allegations of repeat offenses, likely will require a more robust investigatory response. *See, e.g., Pryor v. United Airlines, Inc.*, 791 F.3d 488, 497-500 (4th Cir. 2015) (holding that jury could find employer failed to exercise reasonable care when employee documented a racist death threat aimed at her and other employees, where the complaint followed other racist incidents, and supervisors failed to report the incident to human resources, contact the police, contact other employees, or institute any security measures).

- **How to Handle Confidentiality**: Investigations can be especially tricky when the complainant requests confidentiality. Courts have held that when the alleged conduct is minor, honoring the confidentiality request and not taking further action can be a reasonable response. But in most cases, and particularly when the alleged conduct is more severe, the employer is obligated to investigate and take appropriate corrective action, even against the complainant's wishes. *See, e.g., Torres v. Pisano*, 116 F.3d 625, 639 (2d Cir. 1997). In any situation where an employer believes it is appropriate to agree to a confidentiality request, the employer should nonetheless be proactive in giving guidance to the employee about handling the situation and reporting further concerns and look for ways to monitor the situation.

- **Erroneous Decisions and Bad Faith Claims**: What if the employer conducts a prompt and thorough investigation but reaches a conclusion that later proves to be wrong? In such cases, an alleged harasser who has been wrongfully disciplined or discharged may sue the employer claiming he or she was the target of discrimination. But employers are not liable for erroneous dispositions of harassment complaints as long as the employer "honestly and reasonably believed that the underlying sexual harassment occurred." *Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 496 (D.C. Cir. 2008). A thorough, unbiased investigation is important for meeting this standard.

  A similar rule applies to bad faith allegations of harassment. Title VII does not protect employees who make bad faith harassment complaints, and a decision to terminate an employee for making such a complaint will not support a retaliation claim, even if the employer is mistaken, so long as the determination that the employee acted in bad faith rests on a reasonable investigation. *See Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 901-904 (4th Cir. 2017). Obviously, terminating an employee on the basis a claim was made in bad faith is fraught with risk of a retaliation claim and needs close scrutiny.

EEOC Guidance/Best Practices to Reduce Legal Risk

The EEOC makes the following recommendations for conducting effective investigations of harassment complaints:

- Commit sufficient resources and personnel so that investigations of complaints can be prompt and thorough.
- Ensure that personnel responsible for conducting investigations are well-trained in interviewing witnesses and evaluating credibility.
- Investigators should be neutral. For example, the investigator should not be in the complainant or the accused's chain of command.
- Ensure that alleged harassers are not prematurely presumed guilty or prematurely disciplined for harassment.

- It may be necessary to take intermediate measures while the investigation is pending to eliminate the risk of continued harassment, such as making scheduling changes to avoid contact between the parties, transferring the alleged harasser, or placing the alleged harasser on administrative leave with pay pending the outcome of the investigation. It is important not to involuntarily transfer or otherwise burden the complainant, because such action could constitute retaliation for filing the complaint.
- Take all complaints seriously, including those that seem minor but could lead to more serious problems if the conduct is unchecked.
- Document every aspect of the investigation from the initial complaint to resolution.
- Convey the resolution of the complaint to the complainant and the alleged harasser. If complainants are not informed of the outcome of the investigation, they may lack confidence that the complaint was properly handled and bring unnecessary claims.

See, e.g., Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai F. Feldblum & Victoria & Lipnic at Appendix B (June 2016); EEOC Enforcement Guidance: *Vicarious Employer Liability for Unlawful Harassment by Supervisors*, No. 915.002, at V.C.1 (June 18,1999), https://www.eeoc.gov/policy/docs/harassment.html.

Part 5: How to Decide on Corrective Action Without Over- or Under-doing It?

Key Discussion Topics: Legal Standards and Best Practices to Reduce Leal Risk

- What are the risks of over and under correction?
- What are the pros and cons of "zero tolerance policies"?
- How to determine the appropriate corrective action for harassment?
- What are the corrective options when the harasser is not an employee?

Once it is determined that harassment or other inappropriate behavior has occurred, choosing the appropriate corrective action can be challenging. On one hand, under-correction risks liability, because the chosen remedy may be insufficient to stop the harassment or other inappropriate behavior from recurring. On the other hand, over-correction can invite claims by the offender.

There are non-legal risks to consider, as well. Under-correction can leave the complainant dissatisfied and may dissuade other harassment victims from coming forward due to the perception that "nothing will change." Ironically, over-correction can also discourage employees from bringing future complaints, because an employee may not want a co-worker to be severely disciplined or discharged for misconduct that the employee just wants to have stopped

Legal Standards

- **Appropriate corrective action reduces risk for harassment claims.** The reasonableness of the corrective action that the employer selects matters to the availability of the employer defenses to harassment claims discussed above. In cases of supervisor harassment that does not result in a tangible adverse employment action, the employer must prove that it used reasonable care to prevent *and correct* the harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). In cases of coworker harassment, the standard is whether the chosen "remedial action [was] reasonably calculated to end the harassment." *EEOC v. Xerxes Corp.*, 639 F.3d 658, 669 (4th Cir. 2011).

- **The reasonableness of a corrective action is case-specific.** The reasonableness of any given corrective action depends on the circumstances. In the case of off-color remarks, "prompt admonitions" to stop the conduct, without any other disciplinary action, may suffice. *Curry v. District of Columbia*, 195 F.3d 654, 661 (D.C. Cir. 1999). Greater sanctions are generally warranted for conduct that is more severe or that persists after initial corrective action is taken. *See, e.g.,* EEOC, *Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs Chai F. Feldblum & Victoria & Lipnic at 40 (June 2016) ("sexual assault or a demand for sexual favors in return for a promotion should presumably result in termination of an employee; the continued use of derogatory gender-based language after an initial warning might result in a suspension; and the first instance of telling a sexist joke may warrant a warning").

  The extent of the employer's control over the harasser is also a relevant consideration. When the harasser is a third party such as a contractor or customer, courts weigh the options that are available to the employer to stop the harassing conduct. *See, e.g., Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 424 (4th Cir. 2014) (jury could find employer's handling of independent sales representative's harassing conduct unreasonable, where it could have restricted his access to the complainant before conduct escalated).

  If the accused employee has an employment contract, such as one that distinguishes termination for cause from termination without cause, the employer should carefully consider the contractual rights of the employee in developing corrective action.

- **Consistency also is important.** Although the reasonableness of a corrective action depends on the circumstances, employers should take care to impose similar discipline for similar harassing conduct to the extent possible. Failure to do so creates the risk of a discrimination claim if, for example, members of a particular sex or racial or ethnic group routinely receive harsher discipline than non-members for substantially similar offenses.

EEOC Guidance/Best Practices to Reduce Legal Risk

- **Proportionality**: Consistent with the case law, the EEOC recommends that "[d]isciplinary measures should be proportional to the seriousness of the offense. If the harassment was minor, such as a small number of 'off-color' remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. On the other hand, if the harassment was severe or persistent, then suspension or discharge may be appropriate." EEOC, *Select Task Force on the Study of Harassment in the Workplace*, Report of Co-Chairs Chai F. Feldblum & Victoria & Lipnic at 40 (June 2016). The EEOC cautions against adoption of "zero tolerance" policies that "may contribute to under-reporting of harassment." *Id.*

- **Effect on Complainant**: The EEOC also recommends remedial measures should not adversely affect the complainant, as such measures could be deemed retaliation for making the complaint. For example, if the complainant and the accused need to be separated, the complainant should not be subjected to an involuntary transfer. EEOC Enforcement Guidance: *Vicarious Employer Liability for Unlawful Harassment by Supervisors*, No. 915.002, at V.C.1 (June 18, 1999), https://www.eeoc.gov/policy/docs/harassment.html.

Part 6: New Laws on Nondisclosure, Reporting, and Deductions

Key Discussion Topics: Legal Standards and Best Practices to Reduce Legal Risk

- What are the latest legal developments around nondisclosure agreements in the wake of the #MeToo movement?
- Should employers continue asking for nondisclosure agreements when settling sexual harassment disputes?
- How are nondisclosure agreements enforced?
- What are the pros and cons of agreements requiring confidential arbitration of employment disputes in today's climate?

Since the #MeToo movement began in Fall 2017, dozens of bills related to workplace harassment have been introduced in Congress and state legislatures across the country. Many of these measures seek to limit employers' ability to resolve harassment complaints confidentially. Employers need to consider these new laws when evaluating whether to include nondisclosure provisions in settlements of employment disputes involving harassment allegations, and whether to condition employment on an employees' agreement to resolve potential disputes through confidential arbitration.

Legal Standards

- **IRC § 162(q)**: The Tax Cuts and Jobs Act of 2017 added a new provision to the Internal Revenue Code providing that "[n]o deduction shall be allowed under this chapter for—(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney fees related to such a settlement or payment." This means that if an employee brings a harassment complaint against a coworker or supervisor, and the matter is settled, neither the settlement payment nor any payment of attorney's fees in connection with the settlement can be deducted as a business expense. The provision applies to amounts paid or incurred after December 22, 2017.

  The contours of the new law remain to be fleshed out. For example, the law does not define "sexual abuse," and it is not yet clear whether the law applies when there are no specific claims of sexual harassment but the settlement contains a general release that includes sexual harassment claims.

- **Representative State Initiatives**

  - **New York Senate Bill S7507C**: The New York legislature passed a wide-ranging anti-sexual harassment bill on March 30, 2018, and Governor Cuomo is expected to sign it into law. Among other things, the bill prohibits the use of nondisclosure provisions in settlement agreements that include sexual harassment claims. It also prohibits mandatory arbitration of sexual harassment claims "except where inconsistent with federal law," and this prohibition applies retroactively. (Note that there is a bill pending in the Senate to amend the Federal Arbitration Act (FAA) to prohibit mandatory arbitration of sexual harassment claims.) Notably, the New York bill extends protections against sexual harassment to non-employees such as contractors, consultants, and vendors.

- **Maryland Senate Bill 1010**: Titled "Disclosing Sexual Harassment in the Workplace Act of 2018," this bill passed the Maryland General Assembly on April 9, 2018 and was awaiting Governor Hogan's signature as of the date this outline was prepared. If it becomes law, it will require employers with more than 50 employees, starting in 2020, to report the number of sexual harassment settlements they enter into each year, whether there have been past settlements involving the same employee, and whether the agreements contained confidentiality provisions. Aggregate data will be reported publicly, and some employer-specific data will be available for public inspection.

- **California Senate Bill 820**: Introduced in January 2018, this bill would prohibit confidentiality or nondisclosure agreements in settlements relating to claims of sexual harassment, sex discrimination, or sexual assault, unless the complainant requests the provision. The bill would apply only to settlements of claims that have been filed in court, so settlements entered when litigation is only threatened could still contain nondisclosure provisions. If this bill becomes law, parties could still keep the amounts of settlement payments confidential but could not be restricted from discussing the facts underlying the claim.

Best Practices to Reduce Legal Risk

- Consider tax implications, legal risk, and risk of reputational harm before deciding whether to include a nondisclosure provision in any settlement of a sexual harassment claim.

- Although many employers do not require mandatory arbitration of claims as a condition of employment, some employers who do are already moving away from mandatory arbitration clauses as a result of the #MeToo movement. Microsoft, for example, recently announced that it is doing away with contractual requirements that its employees pursue sexual harassment claims through arbitration, rather than in court. Some organizations may choose to require arbitration agreements only for higher-level employees.

- Employers should keep abreast of legal developments in the jurisdictions where they have employees. Standard employment agreements and severance agreements may need to be modified in light of new laws.

Meet the team

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Patricia Ambrose combines deep knowledge of employment laws with well-honed judgment to help employers solve complex employment matters. Widely recognized for her strategic and practical approach, she navigates clients through a wide range of employment issues, disputes, and compliance challenges.

Whether it's salary equity, disability accommodation, other equal employment issues, employment contracts, faculty rights, layoffs, other terminations of employment, internal complaints and investigations, affirmative action, best practices, or other employment topics, Pat brings insight and experience to advise clients on a plan of action. She works with a variety of businesses and has particular experience with nonprofit employers, such as associations and universities, as well as federal contractor and law firm employers.

Chambers USA notes that clients praise her as being "extremely knowledgeable, practical and strategic in her advice."

Representative experience

- Represented prominent national university in negotiating employment contract with its incoming president.
- Advised board of directors on investigation of allegations of sexual harassment against its CEO and appropriate corrective action.
- Represented client in an OFCCP audit of its affirmative action plans and data, including in-depth analysis of compensation for alleged disparities.
- Advised university concerning requiring medical examination and other measures for abusive faculty member.
- Advised trade association on process for termination of its CEO and negotiated separation agreement.
- Advised university concerning layoffs of faculty members.

Practices

Employment

Industries

Aerospace, Defense, and Government Services

Education

TMT

Real Estate

Consumer

Energy and Natural Resources

Diversified Industrials

Areas of focus

Employment

Education and admissions

Education

J.D., Georgetown University Law Center, 1978

B.A., LeMoyne College, 1973

Bar admissions

Virginia

District of Columbia

Memberships

Member, Labor & Employment Law Section, American Bar Association

Member, Labor Relations Section, District of Columbia Bar Association

Member, National Association of College and University Attorneys

Court admissions

— Assisted clients to comply with new laws on pregnancy and breastfeeding accommodations and sick leave.

— Advised university on implementing best practices for pay equity.

Awards and rankings

Labor & Employment, *Chambers USA*, 2015-2017

Latest thinking and upcoming events

Publications

"District Court Bars DOL From Implementing Controversial Overtime Rule that Would Have Made Millions of Currently-Exempt Workers Eligible for Overtime" *Employment Alert*, November 2016

"DOL Sex Discrimination Final Rule for Federal Contractors" *Employment Alert*, July 2016

""Pay Transparency" Final Rule Bans Government Contractor Pay Secrecy Practices" *Employment and Government Contracts Alert*, October 2015

"Executive Order Establishes Paid Sick Leave for Federal Contractors and Subcontractors" *Labor and Employment Alert*, September 2015

"District of Columbia Wage Theft Law Update" *Employment Alert*, March 2015

"Amendments to District of Columbia's Wage Theft Law Will Resolve Important Concerns" *Employment Alert*, February 2015

U.S. Court of Appeals, District of Columbia Circuit

U.S. Court of Appeals, 5th Circuit

U.S. Court of Appeals, 4th Circuit

U.S. District Court, District of Columbia

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For more than 25 years, Bill Flanagan has worked side-by-side with clients, from start-ups to global businesses, on their most difficult employee and workplace challenges. He advises them on legal compliance and works with them to develop best practices and strategies to avoid litigation.

When disputes arise, he helps them achieve success in complex litigation, from individual cases to class actions, before federal and state courts and governmental agencies in the mid-Atlantic region and nationally. His cases range from individual claims to class and collective actions involving thousands of employees.

Bill works with management on all types of employment disputes, including those under federal and local anti-discrimination, employee leave, whistleblower, wage payment, and other employment statutes. He has extensive experience representing clients on corporate raids, trade secrets, and non-competition matters, and he litigates cases seeking emergency injunctive relief to protect client confidential information. Much of Bill's work has been for major companies and institutions in the energy, defense and government services, education, real estate, financial institutions, and life sciences sectors.

Bill also regularly advises clients on business restructuring programs (whether voluntary buyouts or reductions-in-force), and on all employment-related aspects of corporate transactions, including negotiating deal terms, leading diligence efforts, and negotiating and drafting the full spectrum of executive employment, compensation, and severance agreements.

Bill's practice extends beyond the United States. He works with colleagues from offices throughout the world on projects involving employee mobility, secondments, data transfer, and the development of cross-border policies,

Practices

Employment

Industries

Aerospace, Defense, and Government Services

Education

Energy and Natural Resources

Real Estate

TMT

Areas of focus

Education and admissions

Education

J.D., The George Washington University Law School, 1988

A.B., University of Detroit, 1980

Bar admissions

Virginia

District of Columbia

Court admissions

U.S. Court of Appeals, District of Columbia Circuit

U.S. Court of Appeals, 5th Circuit

U.S. Court of Appeals, 4th Circuit

practices, and procedures.

Representative experience

- Successfully defended a major commercial carrier at trial against a Sarbanes-Oxley whistleblower claim brought by a member of its legal department.
- Conducted a far-reaching sexual harassment investigation at a major university's campus in Asia.
- Successfully defeated class certification in a discrimination case for a national telecommunications company.
- Assisted global financial services firm in crafting and implementing a global compensation program covering the Americas, Europe, and Asia.
- Obtained permanent injunctive relief after government contractor's teaming partner unlawfully solicited over 100 of our client's key employees.
- Defended real investment private equity firm against bet-the-company claims arising from alleged breach of contract and fraud claims.

Awards and rankings

Employment and Labor, *Washington, D.C. Super Lawyers*, 2007-2011

Employment and Labor, *Virginia Super Lawyers*, 2006-2011

Labor & Employment (Virginia), *Chambers USA*, 2007-2017

"Legal Elite" for Labor/Employment, *Virginia Business Magazine*, 2005-2011

Latest thinking and upcoming events

Publications

"The Seventh Circuit's Recent Ruling on Sexual-Orientation Discrimination" *Education Alert*, April 2017

"District Court Bars DOL From Implementing Controversial Overtime Rule that Would Have Made Millions of Currently-Exempt Workers Eligible for Overtime" *Employment Alert*, November 2016

"Department of Labor Issues New Independent Contractor

Classification Guidance, Stating That "Most Workers" Are Employees" *Employment Alert*, July 2015

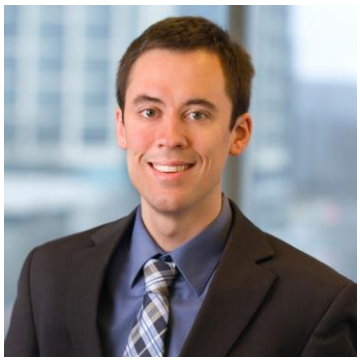
"New I-9 Form" *Employment Alert*, April 2013

"Employment Cases to Watch in the Supreme Court in 2013" *Employment Alert*, March 2013

"New FMLA Poster Required by March 8, 2013" *Employment Alert*, February 2013

George W. Ingham

Senior Associate, Northern Virginia



+1 703 610 6286, Northern Virginia
george.ingham@hoganlovells.com

George Ingham represents and counsels clients in a wide range of labor and employment matters. Experienced in deciphering the complex and ever-changing landscape of employment law, he offers guidance that takes his clients' practical needs into account.

George has successfully represented clients in litigation, arbitration, and administrative proceedings. His experience includes providing advice to clients in the areas of discrimination, whistle-blowing, non-competition agreements, background checks, personnel policies and practices, labor and employment laws applicable to government contractors, and labor-management relations. George is especially well-versed in a number of current hot topics in employment law, including paid sick leave laws and "wage-theft" laws.

Prior to joining the firm, he served as a law clerk to the Honorable Karen LeCraft Henderson of the U.S. Court of Appeals for the District of Columbia Circuit and the Honorable W. Harold Albritton III of the U.S. District Court for the Middle District of Alabama. George is a member of the Virginia and District of Columbia Bars.

Representative experience

- Achieved total dismissal of claim in federal district court on the basis that it was completely preempted by the Labor Management Relations Act.
- Achieved total dismissal of a seven-count complaint in Virginia state court on the basis that it was barred by res judicata.
- Successfully represented client in settlement of Fair Credit Reporting Act class action.
- Successfully represented client in transfer of retiree medical benefits responsibility to a VEBA, including a class action settlement.

Practices

Employment

Litigation

Areas of focus

Employment

Education and admissions

Education

J.D., summa cum laude, George Mason University School of Law, 2010

Economics Degree, cum laude, The College of William & Mary, 2007

Bar admissions

District of Columbia

Virginia

Court admissions

District of Columbia Court of Appeals

Supreme Court of Virginia

U.S. Court of Appeals, District of Columbia Circuit

Latest thinking and upcoming events

Publications

"District Court Bars DOL From Implementing Controversial Overtime Rule that Would Have Made Millions of Currently-Exempt Workers Eligible for Overtime" *Employment Alert*, November 2016

"DOL Sex Discrimination Final Rule for Federal Contractors" *Employment Alert*, July 2016

"DOL Final Rule Expands Overtime Obligations for Millions of Currently Exempt Workers" , May 2016

"Millions Of "White Collars" Will Soon Become Hourly Workers" , May 2016

"Expanded Overtime and Recordkeeping Obligations Expected to Cover Millions of Currently-Exempt Employees" *Employment Alert*, April 2016

""Pay Transparency" Final Rule Bans Government Contractor Pay Secrecy Practices" *Employment and Government Contracts Alert*, October 2015

Amy F. Kett

Attorney, Northern Virginia

+1 703 610 6185, Northern Virginia
amy.kett@hoganlovells.com

Amy Kett focuses her litigation practice on persuasive brief writing. She has submitted briefs on behalf of clients at virtually every stage of litigation before numerous federal and state trial and appellate courts, and the U.S. Supreme Court. In addition, she has successfully orally argued cases before federal and state courts of appeal. She has also represented clients in proceedings before the EEOC and the NLRB.

Amy's experience has spanned a variety of substantive areas, including employment and education law, products liability law, class action law, and administrative law. She is particularly well-versed in the anti-discrimination laws applicable to the employment and education sectors. Amy also counsels clients on the development of employment policies consistent with current state and federal laws.

Prior to joining the firm in 1993, Amy served as a law clerk to Justice Sandra Day O'Connor of the U.S. Supreme Court and to Judge Laurence H. Silberman of the U.S. Court of Appeals for the District of Columbia Circuit. She graduated magna cum laude from Harvard Law School, where she was Executive Editor of the *Harvard Law Review*.

Latest thinking and upcoming events

Publications

"The Seventh Circuit's Recent Ruling on Sexual-Orientation Discrimination" *Education Alert*, April 2017

"Preparing For New Paid Family Leave Laws" *Law360*, May 2016

Practices

Administrative and Public Law

Education

Employment

Litigation

Industries

Education

Areas of focus

Appellate and Supreme Court Litigation

Civil Rights Compliance

Class Actions and Group Litigation

Labor and Employment Matters in Education Institutions

Product Litigation

Education and admissions

Education

J.D., Harvard Law School, 1991

M.A., Harvard University, 1987

B.A., Oberlin College, 1984

Bar admissions

Virginia

District of Columbia

Court admissions

U.S. Court of Appeals, District of Columbia Circuit

U.S. Court of Appeals, Federal Circuit

U.S. Court of Appeals, 4th Circuit

U.S. District Court, District of Columbia

Jody L. Newman

Partner, Boston

+1 617 371 1006, Boston
jody.newman@hoganlovells.com

Jody Newman helps clients solve employment disputes. She is also an experienced workplace trainer, having developed and conducted individualized employment law and professionalism trainings for businesses large and small.

Jody has represented clients in a wide variety of disputes, including employment-related contract, tort, discrimination cases, and business litigation. Jody has extensive experience in civil litigation before state and federal courts and government agency forums. She has conducted jury and non-jury trials and appeals, and is also skilled in various forms of alternative dispute resolution, including mediation and collaborative law. She is a tenacious and passionate advocate for her clients.

Her background as plaintiff's counsel provides a valuable perspective to employment defense work. Jody brings this unique vantage to her effective legal strategies for resolving employment disputes. This viewpoint helps her bridge the gap between corporate views and a plaintiff's perspective, resulting in agreeable solutions. Beyond litigation, Jody is skilled at investigating high-risk claims in the workplace and on college campuses.

Jody is also skilled in a neutral role. She is a Massachusetts certified mediator who has conducted many successful mediations. She is also a trained arbitrator and a member of the American Arbitration Association's Employment Law Panel.

Jody began her career more than 30 years ago with Collora LLP, now Hogan Lovells' Boston office, serving as Managing Partner from 2007 to 2012. She also serves on the Boards of the Lawyers' Committee for Civil Rights, the Women's Bar Association, and Massachusetts Appleseed Center for Law and Justice, devoting significant time to those nonprofit

Practices

Litigation

Employment

Industries

Life Sciences and Health Care

Financial Institutions

Areas of focus

Alternative Dispute Resolution

Commercial Litigation

Education and admissions

Education

J.D., cum laude, Suffolk University Law School, 1983

B.A., cum laude, University of Delaware, 1980

Bar admissions

Massachusetts

Memberships

American Arbitration Association, Roster of Employment Law Arbitrators

Boston Bar Association

Lawyers' Committee for Civil Rights

Massachusetts Appleseed Center for Law and Justice, Inc., Board of Directors Member

Women's Bar Association of Massachusetts

Court admissions

U.S. District Court, District of

endeavors.

Awards and rankings

Employment Litigation, Alternative Dispute Resolution, *Super Lawyers*, 2004-2017

Labor & Employment: Mainly Plaintiffs Representation (Massachusetts), *Chambers USA*, 2012-2017

Massachusetts

U.S. Court of Appeals, 1st Circuit

DeMaris E. Trapp

Senior Associate, Washington, D.C.

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demaris.trapp@hoganlovells.com

DeMaris Trapp counsels clients on a variety of employment matters within the complex field of employment law. She represents clients in a variety of employment-related disputes, including federal and state anti-discrimination investigations and litigation, wage and hour litigation, and breach of contract and other wrongful termination employee actions.

She also advises clients regarding a range of employment matters, including U.S. employment law requirements for global employers, personnel policies and practices, worker classifications and other federal and state regulatory compliance, employment agreements (including non-competition and other post-employment obligations), and employee privacy and background checks.

Prior to joining Hogan Lovells, DeMaris worked for another major law firm. She also served as a legal intern for the Office of the Legal Counsel, U.S. Equal Employment Opportunity Commission, and as a student attorney at the Public Justice Advocacy Clinic, where she handled disability discrimination, unemployment compensation, and wage and hour matters.

Practices

Employment

Litigation

Education and admissions

Education

J.D., with honors, The George Washington University Law School, 2013

B.B.A., summa cum laude, Fox School of Business and Management at Temple University, 2008

Bar admissions

Pennsylvania

District of Columbia

New Jersey

Memberships

Court admissions

District of Columbia Court of Appeals

Supreme Court of Pennsylvania

Supreme Court of New Jersey

U.S. District Court, Eastern District of Pennsylvania

U.S. Court of Appeals, 3rd Circuit

Alicante
Amsterdam
Baltimore
Beijing
Birmingham
Boston
Brussels
Budapest
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta
Johannesburg
London
Los Angeles
Louisville
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Moscow
Munich
New York
Northern Virginia
Paris
Perth
Philadelphia
Rio de Janeiro
Rome
San Francisco
São Paulo
Shanghai
Shanghai FTZ
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar
Warsaw
Washington, D.C.
Zagreb

Our offices
Associated offices

Check out our employment blog!

https://www.hlemploymentblog.com/

www.hoganlovells.com

Hogan Lovells

George W. Ingham

Senior Associate
Northern Virginia

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george.ingham@hoganlovells.com

Biography

George Ingham represents and counsels clients in a wide range of labor and employment matters. Experienced in deciphering the complex and ever-changing landscape of employment law, he offers guidance that takes his clients' practical needs into account.

George has successfully represented clients in litigation, arbitration, and administrative proceedings. His experience includes providing advice to clients in the areas of discrimination, whistle-blowing, non-competition agreements, background checks, personnel policies and practices, labor and employment laws applicable to government contractors, and labor-management relations. George is especially well-versed in a number of current hot topics in employment law, including paid sick leave laws and "wage-theft" laws.

Prior to joining the firm, he served as a law clerk to the Honorable Karen LeCraft Henderson of the U.S. Court of Appeals for the District of Columbia Circuit and the Honorable W. Harold Albritton III of the U.S. District Court for the Middle District of Alabama. George is a member of the Virginia and District of Columbia Bars.

Representative experience

Practices

Employment

Litigation

Areas of focus

Employment

Education and admissions

Achieved total dismissal of claim in federal district court on the basis that it was completely preempted by the Labor Management Relations Act.

Achieved total dismissal of a seven-count complaint in Virginia state court on the basis that it was barred by res judicata.

Successfully represented client in settlement of Fair Credit Reporting Act class action.

Successfully represented client in transfer of retiree medical benefits responsibility to a VEBA, including a class action settlement.

Latest thinking and events

- Hogan Lovells Publications
  - A review of OFCCP's 2018 directives: Potential signs of greater transparency and cooperation with federal contractors? *Government Contracts Alert*
- Hogan Lovells Publications
  - #MeToo Movement's Impact on Nondisclosure Agreements or Clauses Covering Sexual Harassment
- Hogan Lovells Publications
  - Maryland Issues Initial Guidance on Paid Sick Leave
- Hogan Lovells Publications
  - District Court Bars DOL From Implementing Controversial Overtime Rule that Would Have Made Millions of Currently-Exempt Workers Eligible for Overtime *Employment Alert*
- Hogan Lovells Publications
  - DOL Sex Discrimination Final Rule for Federal Contractors *Employment Alert*
- Hogan Lovells Publications
  - DOL Final Rule Expands Overtime Obligations for Millions of Currently Exempt Workers

Education

J.D., George Mason University School of Law, summa cum laude, 2010

Economics Degree, The College of William & Mary, cum laude, 2007

Bar admissions and qualifications

Virginia

District of Columbia

Court admissions

District of Columbia Court of Appeals

Supreme Court of Virginia

U.S. Court of Appeals, District of Columbia Circuit

Hogan Lovells

Jody L. Newman

Partner

Boston

Phone

+1 617 371 1006

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+1 617 371 1037

Email

jody.newman@hoganlovells.com

Biography

Jody Newman helps clients solve employment disputes. She is also an experienced workplace trainer, having developed and conducted individualized employment law and professionalism trainings for businesses large and small.

Jody has represented clients in a wide variety of disputes, including employment-related contract, tort, discrimination cases, and business litigation. Jody has extensive experience in civil litigation before state and federal courts and government agency forums. She has conducted jury and non-jury trials and appeals, and is also skilled in various forms of alternative dispute resolution, including mediation and collaborative law. She is a tenacious and passionate advocate for her clients.

Her background as plaintiff's counsel provides a valuable perspective to employment defense work. Jody brings this unique vantage to her effective legal strategies for resolving employment disputes. This viewpoint helps her bridge the gap between corporate views and a plaintiff's perspective, resulting in agreeable solutions.

Beyond litigation, Jody is skilled at investigating high-risk claims in the workplace and on college campuses, with an emphasis in sexual harassment and

Practices

Litigation

Employment

Commercial Litigation

Industries

Life Sciences and Health Care

Education

Education and admissions

Education

sexual misconduct cases.

Jody is also skilled in a neutral role. She is a Massachusetts certified mediator who has conducted many successful mediations. She is also a trained arbitrator and a member of the American Arbitration Association's Employment Law Panel. She also trains workforces to avoid discrimination.

Jody began her career more than 35 years ago with Collora LLP, now Hogan Lovells' Boston office, serving as Managing Partner from 2007 to 2012. She also serves on the boards of the Lawyers for Civil Rights, the Women's Bar Association, and Massachusetts Appleseed Center for Law and Justice, devoting significant time to those nonprofit endeavors.

Awards and rankings

- Employment Litigation, *Super Lawyers*, 2004-2018
- Labor & Employment: Mainly Plaintiffs Representation (Massachusetts), *Chambers USA*, 2012-2018
- Top 50 Women, *New England Super Lawyers*, 2009-2017
- Employment Litigation: Plaintiff, *New England Super Lawyers*, 2009-2017
- Labor and Employment Law, *New England Best Lawyers*, 2016-2018

J.D., Suffolk University Law School, cum laude, 1983

B.A., University of Delaware, cum laude, 1980

Memberships

Lawyers for Civil Rights, Board of Directors Member

American Arbitration Association, Roster of Employment Law Arbitrators

Women's Bar Association of Massachusetts, Board of Directors Member

Massachusetts Appleseed Center for Law and Justice, Inc., Board of Directors Member

Greater Boston Chamber of Commerce, Women's Network Advisory Board

Bar admissions and qualifications

Massachusetts

Court admissions

U.S. District Court, District of Massachusetts

U.S. Court of Appeals, 1st Circuit

brownrudnick

Washington, DC
P: +1.202.536.1753
F: +1.617.289.0775
skatz@brownrudnick.com

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Shlomo Katz is a member of the Dispute Resolution Department, where he focuses on the areas of government contracts / procurement and commercial law and litigation, wage and hour law and construction law. Shlomo has significant experience in preparing, negotiating and litigating contract claims and bid protests, as well as advising clients on contract compliance, small business, subcontracting, data rights and labor law issues under government contracts. He has participated in mergers and acquisitions of government contractors, advising on issues of assignment and novation, intellectual property / data rights, and security clearances. Shlomo has successfully litigated before federal, state and local courts and the Government Accountability Office and Boards of Contract Appeals.

In addition, Shlomo represents clients in connection with minimum wage, working time and overtime issues under the Federal Fair Labor Standards Act (FLSA), Service Contract Act (SCA), Davis-Bacon Act, federal Executive Orders and state wage payment and prevailing wage laws. This includes conducting proactive wage-hour audits for employers as well as litigation of minimum wage, overtime and wage payment claims by federal and state labor departments and private litigants, including class actions. Shlomo also has represented parties in wrongful termination and discrimination cases before the Equal Employment Opportunity Commission and in federal court.

Shlomo is fluent in Hebrew and is registered to practice architecture in Israel.

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- Successfully opposed a bid protest against a $150 million award to Mantech Advanced Systems International – *Sotera Defense Solutions, Inc.*, B-414056, 2017 CPD ¶46.
- Successfully opposed application for a temporary restraining order and motions for preliminary and permanent injunctions against award of a contract to Seaward Services, Inc. – *Munilla Construction Management LLC v. United States*, 130 Fed.Cl. 131 (2016) & 130 Fed.Cl. 635 (2017).
- Successfully opposed a size protest challenging the small business status and eligibility for contract award of McMurdo, Inc., and assisted the client in winning a favorable size determination – *Size Appeal of ACR Electronics, Inc.*, No. SIZ-5770 (2016).
- Successfully opposed multiple bid protests against the award of a multi-billion dollar multiple award contract to Information Innovators, Inc. – *Pro-Sphere Tek, Inc.*, B-410898.11, 2016 CPD ¶201; *SBG Technology Solutions, Inc.*, B-410898.9, 2016 CPD ¶199.

- Successfully opposed a bid protest of a contract award to Information Innovators, Inc. that raised novel issues relating to compliance with the Federal Information Security Management Act of 2002 ("FISMA") – *Discover Technologies LLC*, B-412773, 2016 CPD ¶142.
- Represented EJB Facilities Services in pursuing a claim for additional costs of elevator maintenance based on the government's misinterpretation of the specifications; successfully opposed the government's motion for summary judgment and then negotiated a favorable settlement – *EJB Facilities Services*, ASBCA No. 57434, 12-1 BCA ¶34964.
- Successfully defended the small business status of Rome Research Corporation and its eligibility for contract award – *Size Appeal of Cambridge International Systems, Inc.*, SIZ-5516 (2013).
- Successfully opposed multiple bid protests against the award of a $120 million contract to Portage, Inc. — *TPMC-EnergySolutions Environmental Services*, LLC, B 406183, 2012 CPD ¶ 135; *Gonzales–Stoller Remediation Services, LLC,* B 406183.2, .3 & .4, 2012 CPD ¶ 134.
- Won dismissal of a Lanham Act suit brought by an incumbent contractor against a bidder for a follow-on contract, and won dismissal of various state law claims against the client and three of its employees – *Kratos Defense Engineering Solutions, Inc. v. NES Associates, LLC et al*, Case No. 10-1452 (E.D. Va., Mar. 23, 2011).
- Represented Sabreliner Corporation and assisted the U.S. Air Force in upholding the contracting officer's determination that the awardee's contract performance would not pose an organizational conflict of interest (OCI) – *Protest of Valdez Corporation*, B-402256.3, 2011 CPD ¶13.
- Won summary judgment on behalf of a Government contractor that was sued in the U.S. District Court in California for alleged copyright infringement and breach of license, persuading the court that the Government, not the contractor, was the proper defendant – *BMMsoft, Inc. v. White Oaks Technology, Inc.*, No. C-09-4562 MMC, 2010 WL 1875727 (N.D. Cal., May 7, 2010) and 2010 WL 3340555 (N.D. Cal., August 25, 2010).
- Developed litigation strategy and conducted discovery and motion practice in both the U.S. Court of Federal Claims and the U.S. Civilian Board of Contract Appeals leading to successful multi-million dollar settlement of approximately 30 changes claims under a Government contract – *CH2M HILL Hanford Group, Inc. v. U.S. Department of Energy* (2009). (Along the way, Shlomo won a procedural victory in *CH2M Hill Hanford Group, Inc. v. U.S.*, 82 Fed.Cl. 139 (2008)).
- Persuaded the Civilian Board of Contract Appeals to dismiss a Government counterclaim against the client – *USProtect Corp. v. Department of Homeland Security*, CBCA 65, 08-1 BCA ¶ 33782 (2008).
- Led the appeals court to reverse the Armed Services Board of Contract Appeals and grant summary judgment to the contractor on its SCA price adjustment claim – *Lear Siegler Services, Inc. v. Rumsfeld*, 457 F.3d 1262 (Fed. Cir. 2006).
- Successfully opposed a bid protest against a multi-million dollar contract award to Ashton-Potter, even though the awarding agency agreed with the protestor that proposal evaluation was flawed – *Banknote Corporation of America, Inc. v. United States*, 365 F.3d 1345 (Fed. Cir. 2004).
-

Persuaded the Federal Circuit to void Freedom, NY, Inc.'s release of its claims – *Rumsfeld v. Freedom, NY, Inc.*, 329 F.3d 1320 (Fed. Cir. 2003).

- Defended a major subway system against a $47 million claim by one of the Metro's construction contractors – *KiSKA-Kajima v Washington Metropolitan Area Transit Authority*.
- Represented a contractor in a successful bid protest against the Army's exclusion of the contractor from bidding on an aircraft maintenance contract – *Fabritech, Inc.*, B-298247, 2006 CPD ¶112.
- Represented a contractor in successfully overturning the award of a multi-year Navy contract to a competitor – *Burns and Roe Services Corporation*, B-291530, 2004 CPD ¶85.
- Represented a contractor in successfully protesting the award of a sole-source contract to its competitor – *Protest of Sabreliner Corporation*, B-288030, 2001 CPD ¶170.
- Won partial summary judgment and negotiated favorable settlement for subcontractor in connection with a dispute arising from a DOE subcontract – *ICF Kaiser Hanford Company v. Westinghouse Hanford Co*. (E.D. Wash., Mar. 30, 1999).
- Won partial summary judgment for contractor in connection with the Army's denial of an unabsorbed overhead claim and then negotiated favorable settlement – *BEI Defense Systems Co.*, ASBCA No. 46399, 95-1 BCA ¶27,328.
- Successfully represented contractor in persuading the ASBCA to vacate its prior denial of the contractor's $21 million claim and to schedule a new hearing, ultimately leading to a multi-million judgment for the contractor – *Freedom, NY, Inc*., ASBCA No. 43965, 96-2 BCA ¶28,502.
- Successfully represented contractor in connection with a size protest – *C&D Security Management, Inc.*fe, SBA No. SIZ-4823 (O.H.A. 2006).

[illegible]

- George Washington University Law School – J.D., 1990
- University of Maryland School of Architecture – B.S., 1986

[illegible]

- District of Columbia
- Maryland
- US Court of Appeals for the Federal Circuit
- US Court of Appeals for the Fourth Circuit

- US Court of Federal Claims

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- Hebrew

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- Shlomo has written or been quoted in dozens of articles on government contracts and wage & hour topics, including:
- Co-author, "Don't Let Organizational Conflicts Haunt Your Gov't Contract," *Law360*, March 2019
- *When Bid Protester Is Promised Agency Fix And Doesn't Get It*, (Law360, July 11, 2018)
- Author, "So, You're Thinking about Government Construction Contracts?" (May 2018)
- *Embrace Holiday Volunteering With Caution, FLSA May Apply*, (Law360, Nov. 16, 2017)
- *When Exempt Employees Don't Meet Performance Expectations*, (Employment Law360, Nov. 1, 2017)
- *Late is Late' Won't Abate When E-Protests Begin at GAO*, (Bloomberg Law, April 5, 2017);
- *Rule Changes Create New Opportunities for Small Businesses* (Bloomberg BNA Federal Contracts Report, August 2, 2016)
- *New Overtime Regulations Expand Service Contract Act Coverage*, (Bloomberg BNA Federal Contracts Report, June 7, 2016);
- *Resolutions to Improve Government Contracts Labor Law Compliance* (Government Contracts Law360, Jan 4, 2016);
- *A Refresher Course on Affirmative Responsibility Determinations* (Government Contracts Law360, Jan 13, 2015);
- *Follow the 'Year of Action' with a Year of Preparation* (Government Contracts Law360, Nov. 11, 2014);
- *Using Common Sense with the FLSA: Dictionaries and the Sandifer Decision* (Employer's Guide to the Fair Labor Standards Act, April 2014);
- *Affordable Care Act Traps for the Unwary Government Contractor* (Government Contracts Law360, Nov. 18, 2013);

- *The FLSA at 75: Persistent Challenges* (Fair Labor Standards Handbook, July 2013);
- *Work Furloughs as a Result of Sequestration - How to Pay Exempt Employees* (HR Compliance Expert Daily Alert, Feb. 27, 2013);
- *How to Avoid Sequestration Wage and Hour Problems* (Corporate Counsel Alert, Feb. 22, 2013);
- *The Blizzard of 2013: Tips for Employers That Are Still Digging Out* (HR Compliance Expert Daily Alert, Feb. 12, 2013);
- *Budget Cuts: Don't Forget About Your Rights, Contractors* (Government Contracts Law360, Jan. 30, 2013);
- *Big Teams Don't Mean Big Conflict of Interest Problems* (Government Contracts Law360, Sept. 17, 2012);
- *How to Avoid a Contract Protest* (Washington Technology, March 22, 2012);
- *New Year's Resolutions to Keep You in Good Standing DOL, Employees* (Employer's Guide to the Fair Labor Standards Act, Jan. 2012).
- Shlomo is co-author of, and writes regular supplements for, the following publications (all published by Thompson Information Services):
- *Federal Contractor's Guide to Employment Law Compliance*
- *Employer's Guide to the Fair Labor Standards Act*
- *The Fair Labor Standards Handbook for States, Local Governments, and Schools*
- *The FLSA Employee Exemption Handbook*
- *The Public Employer's Guide to FLSA Employee Classification*
- *Do I Have to Pay My Employee for This? FLSA Working Time Essentials*
- *Smart Guide to FLSA Exemptions*
- *FLSA Overtime Basics*
- Shlomo also contributes a regular "Legal Corner" column to the Executive Summary, the e-zine of the Association of Proposal Management Professionals - National Capital Area Chapter ("APMP-NCA), addressing legal issues relating to the preparation of proposals for Government contracts. Topics have included:

- *Winning Orals* (Vol. 25, No. 1, Spring 2018);
- *Differentiating Your Company from the Competition* (Vol. 23, No. 1, Winter 2016);
- *What Does Your Customer Really Want? Does it Matter?* (Vol. 22, No. 1, Winter 2015);
- *A Lawyer's Look Back at 2014, and a Look Ahead to 2015* (Vol. 21, No. 4, Fall 2014);
- *Time Management - Do As the Law Says, Not As I Do* (Vol. 21, No. 3, Summer 2014);
- *What's In a Word?* (Vol. 21, No. 2, Spring 2014);
- *Competitive Intelligence - Know Thy Enemy* (Vol. 20, No. 4, Fall 2013);
- *Social Media and the Law* (Vol. 19, No. 1, Winter 2013);
- *Ten Ways to Write a Losing Proposal* (Vol. 18, No. 4, Fall 2012);
- *Myth-Busters vs. Capture Planners* (Vol. 18, No. 3, Summer 2012);
- *Planning Your Pipeline: Some Legal Considerations* (Vol. 18, No. 1, Winter 2012);
- *The Importance of Persuasive Proposal Writing?* (Vol. 17, No. 4, Fall 2011)
- *Oral Presentations* (Vol. 17, No. 3 Summer 2011);
- *Some Legal ABCs of the Bid and Proposal Profession* (Vol. 17, No. 2 Spring 2011);
- *How Proposal Evaluation Is and Is Not Like Grading a College Essay* (Vol. 17, No. 1 Winter 2010-11);
- *Can I Make That Call? Marketing and the Procurement Integrity Act* (Vol. XV, No. 5, Winter 2009);
- *Locking-up Your Team* (Vol. XV, No. 4, Fall 2009);
- *Protect Your Investment* (Vol. XV, No. 3 Summer 2009).
- Shlomo also is a contributor to Brown Rudnick's Government Contracts blog

[illegible]

- *Shutout by the Government Shutdown? Know Your Rights and Obligations as a Federal Contractor*
- *After Trump's First 100 Days: What Remains of Obama's Labor Law Legacy?*
- *Labor Rule Changes: What Government Contractors Should Do to Prepare*
- *Exempt or Nonexempt? Avoiding the High Cost of FLSA Misclassification*
- *Federal Acquisition Regulation (FAR) Workshop*
- *Interns, Volunteers and Seasonal Workers: Avoiding Wage-Hour and Other Legal Troubles*
- *Failing to Properly Compensate Employees Can Be Costly: Tips to Ensure FLSA Compliance*
- *Understanding the Cost/Price Volume So You Win Contracts, Make Money, and Stay Out of Jail*
- *Are Your Wage-Hour Policies Smartphone Smart?*
- *Why Do We Do What We Do? Understanding the Theories and Formalities Behind the Procurement Process*
- *Employment of Interns and Seasonal Workers: How to Avoid Potential Wage-Hour and Other Employment Law Trouble*
- *Whether you're large or small, make the small business rules work for you!*
- *When to Ask for Counsel: An Attorney's View of the Proposal Process*
- *The Legal Implications of Words: Avoiding Undesirable Consequences*

[illegible]

- Member, District of Columbia Bar, Government Contracts and Litigation Section
- Association of Proposal Management Professionals

Stanford University

Stanford | Office of the General Counsel

Saurabh Anand

Senior University Counsel

Saurabh Anand joined Stanford's Office of the General Counsel in 2015. Previously, he was an associate in the Government Contracts group at Covington & Burling LLP, where his practice included representing government contractors and grantees in the full range of proposal, negotiation, performance, compliance, and regulatory issues and disputes. Prior to joining Covington, Saurabh clerked for the Honorable Stephen V. Wilson in the United States District Court for the Central District of California.

Saurabh received his B.S. in mechanical and aerospace engineering from Washington University in St. Louis, and his J.D. from the University of Southern California, where he was Senior Submissions Editor of the Southern California Law Review.

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Biography

Change is driving every part of the energy industry, and the solutions to today's problems require broad perspective and insight. Mary Anne Sullivan's deep experience and her sharp focus on regulatory trends enable her to provide advice that is both shaped by an understanding of the interrelationships across energy markets and adapted to the demands of the future.

Mary Anne's practice spans the energy spectrum. With her past government service as general counsel of the U.S. Department of Energy and her knowledge of the industry, she uses regulatory tools to advance her clients' interests. Whether in the development of new electric transmission for low carbon energy, LNG projects, new nuclear reactor technology, advanced biofuels, novel approaches to demand response, offshore wind development, electric vehicles or new efficiency standards, Mary Anne helps her clients navigate the challenges and find the benefits in the inexorable move to lower carbon energy options. She is at her best when helping her clients tackle their "one off" problems and succeed in their first-of-a-kind projects.

Mary Anne regularly writes and speaks on energy issues. Recognition by her peers includes invited speaker at the 2015 World Sustainability Conference in Abu Dhabi; speaker at the American Wind Energy 2018

Practices

Energy Regulatory

Industries

Diversified Industrials

Energy and Natural Resources

Areas of focus

Environment and Climate Change Legislation and Policy

Education and admissions

Annual Conference, selection as a C3E Ambassador for the DOE/MIT Women in Clean Energy Initiative; and member of the Oak Ridge National Laboratory Technology Partnerships Advisory Board.

Representative experience

Assisted in obtaining federal loans, loan guarantees and grants totaling billions of dollars.

Advising a government entity on the restructuring of its electricity sector.

Representing the largest New England utility in the permitting of a cross-border electric transmission line.

Advising on the first small modular nuclear reactor project in the U.S.

Negotiated the first voluntary agreements to limit greenhouse gas emissions.

Advises on nuclear export control regulations.

Advises on nuclear waste disposal issues.

Represents manufacturers in energy efficiency standards compliance and enforcement matters.

Awards and rankings

- Climate Change (Nationwide), *Chambers USA*, 2009-2017
- Energy Regulatory: Conventional Power, *Legal 500 US*, 2015-2017
- Energy: Nuclear (Regulatory & Litigation) (Nationwide), *Chambers USA*, 2009-2015
- Honorary Doctor of Laws, *Fordham University*, 2014
- Energy: Nuclear (Regulatory & Litigation) (USA), *Chambers Global*, 2011-2016
- Energy and Natural Resources, *Washington, D.C. Super Lawyers*, 2007, 2013
- Energy: Electricity (Regulatory & Litigation) (USA),

Education

B.A., Fordham University, summa cum laude

J.D., Yale Law School

Memberships

Board of Directors, Energy Bar Association

Member, Department of Energy Contractor Attorneys Association

Member, Energy and Environment Section, District of Columbia Bar Association

Bar admissions and qualifications

District of Columbia

Court admissions

U.S. Court of Appeals, District of Columbia Circuit

U.S. Court of Appeals, 9th Circuit

U.S. District Court, Federal District of Colorado

U.S. Supreme Court

Accolades

Chambers Global, 2007-2011

- Distinguished Environmental Advocate, *ABA Section on Environment, Energy and Resources*, 2010-2011
- Energy: Electricity (Regulatory & Litigation) (Nationwide), *Chambers USA*, 2005-2008

Latest thinking and events

- Hogan Lovells Publications
  - New legislation streamlines FERC licensing process for pumped storage and non-power dams *Energy and Natural Resources Alert*
- Published Works
  - Constructing a Robust Legal Framework for the New Energy Economy *ColoradoBiz*
- Hogan Lovells Publications
  - DOE takes action to kick-start a second round of LNG exports *Energy Alert*
- Hogan Lovells Publications
  - CEQs NEPA review officially opens *Environment and Natural Resources Alert*
- Hogan Lovells Publications
  - CEQ's revamping of NEPA regulations: who, what, why, and where? *Energy and Natural Resources Alert*
- Publications
  - New energy legislation introduces tribal opportunities

"Vastly experienced energy attorney and 'well placed to advise clients on the major issues currently affecting the industry.'"

Chambers Global

December 2018 and January 2019 DOE Memoranda from
Dan Brouillette, Deputy Secretary of the U.S. Department of Energy
Substantive Outline

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DOECAA 2019 Spring Conference
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Note: This paper is presented as an informational source only. It does not constitute legal advice and does not constitute an attorney-client relationship between the authors and any reader.

1. **December 2018 Memo from Dan Brouillette re: Department of Energy International Science and Technology Engagement Policy ("December 2018 Memo")**[1]

(a) Announces a policy that, if implemented, would restrict sensitive country foreign nationals ("SCFNs") from working in certain research areas at DOE laboratories unless DOE grants an exemption.

(i) The December 2018 Memo does not define SCFN, but in its Headquarters Facilities Master Security Plan, DOE describes that a sensitive country national is a foreign national who was born in, is a citizen of, or is employed by a government, employer, institution or organization, of a sensitive country. That document defines a foreign national, in turn, as a person born outside the jurisdiction of the United States, is a citizen of a foreign government, and has not been naturalized under U.S. law.[2]

(ii) Given these definitions, it appears that U.S. citizens will not be affected by the DOE policy even if they have a national origin of a sensitive country, or have dual citizenship. On the other hand, it appears that lawful permanent residents may be affected.

(b) DOE will establish a Federal Oversight Advisory Board (the "FOAB"). The FOAB will be a sub-group to the Deputy Secretary Working Group on Economic and National Security Issues. Among other things, the FOAB will create a so-called "Science and Technology Risk Matrix" (the "Matrix"). The Matrix will list specific research areas and technologies on one axis, and certain foreign countries designated as sensitive on the other. Although the exact impact of the Matrix is unknown as it is still under development, its anticipated overall effect will be to prohibit certain SCFNs from performing certain types of work at DOE laboratories, unless the DOE laboratory obtains an exemption from the FOAB.

(c) The exemption process has not yet been established.

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[1] *See* Jeffrey Mervis & Adrian Cho, *New DOE Policies Would Block Many Foreign Research Collaborations*, SCIENCE MAGAZINE, (Feb. 8, 2019), *available at* https://www.sciencemag.org/news/2019/02/new-doe-policies-would-block-many-foreign-research-collaborations

[2] *See* DOE, Headquarters Facilities Master Security Plan, available at https://www.energy.gov/sites/prod/files/2018/10/f56/Chapter-6-Foreign-Interaction-Oct-2018.pdf at 602-5.

2. **Jan. 2019 Memo from Dan Brouillette re: Department of Energy Policy on Foreign Government Talent Recruitment Programs ("January 2019 Memo").**

(a) Provides that "DOL personnel will be subject to limitations, including prohibitions on their ability currently or in the future to participate in foreign talent recruitment programs of countries deemed sensitive by DOE while employed by DOE, or performing work within the scope of a DOE contract. These limitations will also apply to recipients of federal assistance (e.g., grants or cooperative agreements)."

(b) Explains that "DOE personnel" is "inclusive of federal employees as well as contract employees, independent contractors, fellows, interns, grantees, and all other DOE funding recipients within DOE as well as the DOE national laboratory complex."

Employment Issues Relating to December 2018 and January 2019 Memos

Issue	Description
Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2.	Prohibits discrimination in employment practices on the basis of, among other things, race, color, and national origin. Title VII contains a national security exception, which permits an employer to fail or refuse to hire and employ any individual for any position if the job is subject to any requirement imposed in the interest of the **national security** of the United States under any security program in effect pursuant to or administered under any **statute of the United States or any Executive order of the President**, and such individual has not fulfilled or has ceased to fulfill that requirement. 42 U.S.C. § 2000e-2(g).
State antidiscrimination law	Many state antidiscrimination laws parallel Title VII's antidiscrimination provisions, but may protect additional classes from discrimination, or provide for additional rights/remedies.
Executive Order 11246	Prohibits federal contractors from discriminating in employment practices on the basis of, among other things, race, color, and national origin. EO 11246 is enforced by the Office of Federal Contract Compliance Programs which has stated that it follows Title VII and case law principles that have developed under Title VII.
Immigration and Nationality Act, 8 U.S.C. § 1324b	Employers are prohibited from discriminating against "protected individuals" (defined in the statute) based on an individual's citizenship status. Note: although the INA prohibits national origin discrimination, it provides that Title VII enforcement preempts enforcement of national origin discrimination for employers with 15 or more employees. *See* 8 U.S.C. § 1324b(a)(1)-(2).
42 U.S.C. § 1981	Provides that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts [which has been held to include employment relationships] . . . as is enjoyed by white citizens . . . ." and prohibits both private and state actors from discriminating in violation of the statute. Specifically, Section 1981 has been interpreted to prohibit discrimination on the basis of not only race, but also alienage/citizenship.
Faculty and staff handbook / contract issues	Potential breach of contract claims that may apply regardless of antidiscrimination law due to violation of rights under applicable handbooks/contracts. Handbooks may call for discipline of faculty who have not revealed outside involvement with foreign talent recruitment programs.
Temporary or permanent reassignment of affected individuals	Issues around appropriate and equitable decision-making on reassignments and continuation of salary.

State limitations on restrictive covenants	State law typically imposes limitations on an employer's ability to restrict post-employment work of employees. For example, California Business and Professions Code § 16600 provides that, with limited exceptions, "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."
State lawful off-duty conduct laws	Certain states prohibit discrimination against employees from lawful off-duty conduct. *See, e.g.*, Colo. Rev. Stat. § 24-34-402.5 ("It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction: (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or (b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest."
Public Employer Claims	Procedural and Substantive Due process: A state cannot deprive an individual of property without procedural due process of law. Likewise, employees may assert a substantive due process right to pursue a profession. Equal Protection: The Equal Protection Clause prohibits intentional discrimination based on, among other characteristics, national origin and alienage.

Attachment

Science Magazine Article

https://www.sciencemag.org/news/2019/02/new-doe-policies-would-block-many-foreign-research-collaborations

New DOE policies would block many foreign research collaborations

By Jeffrey Mervis, Adrian Cho Feb. 8, 2019 , 4:05 PM

Scientists who work for or receive funding from the U.S. Department of Energy (DOE) in Washington, D.C., are facing a ban on collaborating with researchers from dozens of countries deemed to pose security risks.

The new policy, spelled out in two recent memos from DOE's Deputy Secretary Dan Brouillette, are meant to thwart attempts by foreign governments to steal U.S.-funded research. But some scientists worry DOE may be overreacting to the espionage threat, and fear its approach could stifle progress in areas important to U.S. economic and national security.

The first memo, dated 14 December 2018, restricts DOE-funded researchers **working in unspecified "emerging research areas and technologies"** from collaborating with colleagues from "sensitive" countries. Given DOE's recent research priorities, the affected fields could include artificial intelligence, supercomputing, quantum information, nanoscience, and advanced manufacturing. The sensitive nations are not named, but DOE now gives that label to **about 30 countries for travel and security purposes**. The memo also establishes a new, centralized DOE oversight body that will maintain a list of sensitive nations and research areas and has the authority to approve exemptions from the collaboration ban.

The second memo, issued on 31 January and first reported by *The Wall Street Journal*, **would prohibit DOE-funded scientists from participating** in foreign talent-recruitment programs such as China's Thousand Talents program.

Finding the right balance

Lab directors and university administrators are scrambling to understand the new directives, which DOE officials have yet to flesh out. But Paul Dabbar, who oversees the national labs and the department's extramural research program as undersecretary for science, told *Science*Insider yesterday that the driving principle isn't hard to understand.

"We're not saying that universities can't take money from these countries; that is their decision," Dabbar says. "But if you're working for [DOE], and taking taxpayer dollars, we don't want you to work for them at the same time." Employees at DOE's 17 national laboratories would be given the choice of either severing their foreign ties or leaving their job, he says; academic researchers who maintain their foreign collaborations would no longer be able to compete for DOE grants.

No one disputes the need for the United States to be vigilant, research advocates say. There is ample evidence that other nations have sought to exploit the United States's relatively open research establishment to obtain knowledge that could benefit their own industrial and military sectors. The question, they say, is how far DOE should go to safeguard national security and new technologies.

“There are legitimate concerns about the misappropriation of U.S.-funded intellectual property,” says William Madia, a vice president at Stanford University in Palo Alto, California, who oversees DOE’s SLAC National Accelerator in neighboring Menlo Park. “On the other hand, we can’t just shut down all international collaboration. How do we strike the right balance? … We don’t want to throw out the baby with the bathwater—although we do want to throw out some of the bathwater.”

DOE officials are still working out procedures for implementing the new policies. The December 2018 memo promised that DOE’s new centralized body—known as the Federal Oversight Advisory Body (FOAB)—would release by 31 January a “risk matrix” that spells out which countries and what technologies would trigger a red flag. That deadline has passed, but Dabbar is developing the matrix with his counterparts at the National Nuclear Security Administration, which maintains the U.S. stockpile of nuclear weapons, and DOE’s intelligence branch.

“We don’t have a particular timetable,” he says. “For the labs, we are moving toward implementation right now. For the grants programs, we still have to develop a mechanism for looking at particular grants, as they come forward.”

Dabbar declined to give an estimate of how many researchers would be affected by the new policies, and DOE couldn’t provide the number of grants it awards annually to university researchers.

The new rules apply to both foreign scientists coming to national labs and U.S.-based scientists with ties to foreign governments. In addition to tighter scrutiny of prospective visitors, for example, DOE-funded scientists in certain fields “will be generally prohibited” from traveling to countries on the matrix.

DOE will allow exemptions for “government to government” collaborations, the December 2018 memo notes. That suggests the policy shouldn’t affect major international projects such as the ITER fusion experiment under construction near Cadarache in France, or the Long-Baseline Neutrino Facility being developed at Fermi National Accelerator Laboratory in Batavia, Illinois. It appears DOE will also allow smaller collaborations if researchers can provide officials with “a clear description of why this agreement benefits the United States.”

“The world is a flexible place. So, the policy will allow us to evaluate it as things change over time,” Dabbar explains.

A fraught search for talent

The crackdown on participation in foreign talent programs, outlined in the January memo, appears to have few, if any, loopholes. The memo describes these programs as “any foreign state-sponsored attempt to acquire U.S.-funded scientific research through recruitment programs that target scientists, engineers, academics, and entrepreneurs of all nationalities working or educated in the United States.”

Many countries—including such U.S. allies as Canada, Germany, and Australia—have funded such programs for years as a way to attract world-class foreign scientific talent. But the approach has become a political hot potato in the wake of several instances in which U.S.-based scientists supported by China’s Thousand Talents program have been accused—and in some cases found guilty—of espionage and the theft of intellectual property. The ban is necessary, the January memo says, because such talent programs “threaten the United States’ economic base by facilitating the unauthorized transfer of technology and intellectual property to foreign governments.”

Foreign talent programs are “a very narrow topic” for DOE within the universe of international collaborations, Dabbar emphasizes. “Universities are dealing with this foreign engagement topic at a much bigger level,” he says. “And we’re reaching out to universities and other research organizations to get their input.”

A fight over principles

Toward that end, Dabbar met earlier this week with research administrators at several major universities. He laid out the new policies and answered questions about their scope. “We don’t want to implement this without engaging the universities,” Dabbar told *Science*Insider.

One university lobbyist who requested anonymity admitted that some institutions are not aware of every international collaboration involving faculty members and emphasized that full disclosure is essential. At the same time, noted another university lobbyist, the new DOE policies appear to clash with two core academic principles: allowing students unfettered access to research opportunities and treating people equally regardless of national origin.

In the past, university efforts to protect those core principles have run into a thicket of federal rules designed to prevent improper foreign influence and the theft of intellectual property. The military and NASA, for example, often bar academic researchers from allowing graduate or postdoctoral researchers from certain foreign nations from working on research projects deemed sensitive. The National Institutes of Health **requires researchers to disclose foreign collaborations on grant proposals**. The Department of Commerce has extensive rules regarding what kinds of technologies can be shared with foreign collaborators.

In general, the scientific community has argued that the costs of such rules outweigh their benefits and that the U.S. government should simply classify any research results or patents it wants to protect. The new DOE policies could reignite such debates.

In the meantime, university leaders and lab directors are waiting anxiously to learn more from DOE. And the memos have certainly gotten their attention. Says one lobbyist: “This is a pretty big deal.”

U.S. ex rel. Escobar v. Universal Health Services

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FCA False Certification Liability

- “False certification” is a label for certain FCA cases premised on claims made for goods and services that were actually provided, but where defendant violated an underlying statute, regulation or contractual obligation.
- “Express certification” when the claim expressly certifies compliance with relevant condition of payment.
- “Implied certification” developed for those situations where claim contains no express certification of compliance.

U.S. ex rel. Escobar v. Universal Health Services, 136 S. Ct. 1989 (2016)

- History
  - Teenage Medicaid beneficiary died after receiving treatment from unlicensed and unsupervised professionals.
  - Parents filed complaints with several state agencies and a *qui tam* action.
  - *Qui tam* suit alleged that lack of compliance with state regulations governing staff qualification and supervision rendered claims “false.”

Supreme Court holding in *Escobar:*

- "Implied certification" is a viable theory of liability under the FCA, "at least" in certain circumstances:
  - (1) if the claim submitted by the defendant, in addition to requesting payment, "makes specific representations about the goods and services provided;" and
  - (2) "the defendant's failure to disclose noncompliance with material statutory, regulatory or contractual requirement makes those representations misleading half-truths."

  - Court's inquiry into "materiality" should be "rigorous."

U.S. ex rel. Escobar v. Universal Health Services

- "We now clarify how that materiality requirement should be enforced."
  - Government's right to refuse payment if aware of the violation is insufficient, by itself, to demonstrate materiality.
  - Noncompliance cannot be minor or insubstantial.
  - Proof can include, but is not limited to, "evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory or contractual requirement."
  - Government's payment of "particular claim" or practice of paying "particular type of claims," with "actual knowledge" of violation of certain requirements, is "strong evidence" that those requirements are not material.

DOJ Dismissal of *Qui Tam* Actions

DOJ Dismissal of *Qui Tam* Actions

- In a January 10, 2018 memorandum, Michael Granston (head of DOJ Civil Fraud) provided DOJ attorneys with guidance for evaluating dismissal of non-intervened *qui tam* actions.
- Previously, DOJ had infrequently dismissed non-intervened *qui tam* matters.
- Memorandum (now in DOJ's "Justice Manual" at section 4-4.111) identifies seven factors for DOJ to evaluate.
  - Curbing meritless *qui tam* actions.
  - Preventing parasitic or opportunistic *qui tam* actions.
  - Preventing interference with agency policies and programs.
  - Controlling litigation brought on behalf of the U.S.
  - Safeguarding classified information and national security interests.
  - Preserving government resources.
  - Addressing egregious procedural errors.

DOJ Dismissal of *Qui Tam* Actions (Cont'd)

- DOJ has dismissed all or a portion of several cases in the past year, including the high profile case of *United States ex rel. Campie v. Gilead Sciences, Inc.*, No. 17-936 (Sup. Ct. 2019).
- Courts are divided on whether the government has absolute authority to dismiss cases.
  - The Ninth and Tenth Circuits hold that the DOJ must establish a "rational basis" for dismissing a case. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998).
  - The D.C. Circuit and other courts hold that the DOJ has an "unfettered right to dismiss." *Swift v. United States*, 318 F.3d 250, 251 (D.C. Cir. 2003).

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Peter Barton Hutt is a senior counsel in the Washington, DC law firm of Covington & Burling LLP, specializing in Food and Drug Law. He began his law practice with the firm in 1960 and, except for his four years in the government, has continued at the firm ever since.

From 1971 to 1975 Mr. Hutt was Chief Counsel for the Food and Drug Administration. During his tenure as FDA Chief Counsel, Mr. Hutt led the transformation of the agency from outdated law enforcement to modern administrative law. He promulgated regulations to implement the review of GRAS food ingredients, require nutrition labeling for half the food supply, to define “imitation” food, to establish the emergency permit controls for low acid canned food, and to modernize food standards; to implement the prescription drug requirements of the Drug Amendments of 1962 following a sweeping victory in four Supreme Court cases and to create the OTC Drug Review for nonprescription drugs; to create a process for reevaluating the safety and effectiveness of all biological products that had been licensed since 1902; to rationalize the application of the Delaney Anticancer Clause to animal drugs; to require ingredient labeling for cosmetics and premarket safety substantiation for all cosmetic ingredients; and to prepare FDA for enactment of the Medical Device Amendments of 1976. He created the requirement of preambles for all proposed and final FDA regulations, initiated the use of guidelines (now called guidance) to establish informal FDA policy, and established the use of regulatory letters (later named warning letters) as an inexpensive and efficient enforcement approach. Just before leaving FDA, he wrote the comprehensive proposed procedural regulations that govern all FDA administrative action to this day.

Since 1994, he has taught a full course on Food and Drug Law during Winter Term at Harvard Law School, “Winter Term: Food and Drug Law.” Harvard Law School held a symposium on January 17, 2013, “**Celebrating Peter Barton Hutt’s 20 Years (thus far) at HLS**.” Mr. Hutt has collected all of the papers on Food and Drug Law prepared by his students in an electronic book that is available on his Harvard Law School faculty **website**. He taught the same course at Stanford Law School during Spring Term in 1998. He is the co-author of *Food and Drug Law: Cases and Materials* (Foundation Press, 1st edition 1980, 2d edition 1991, 3d edition 2007, 4th edition 2014) and has published more than 175 book chapters and articles on Food and Drug Law and on health policy. He is a member of the Editorial Advisory Board of the *Food and Drug Law Journal.*

He has represented the national trade associations for the food, prescription drug, nonprescription drug, dietary supplement, and cosmetic industries. While at FDA he was responsible for the legislation that became the Drug Listing Act of 1972 and the Medical Device Amendments of 1976. Beginning in 1962, he has participated in the drafting of major legislation amending the Federal Food, Drug, and Cosmetic Act. Representing the Pharmaceutical Research and Manufacturers of America (then called the Pharmaceutical Manufacturers Association), Mr. Hutt testified before Congress and worked with congressional staff on the Orphan Drug Act of 1983, the Drug Price Competition and Patent Term Restoration Act of 1994, the Drug Export Amendments Act of 1986, and the Export Reform and Enhancement Act of 1996. At the request of the House and Senate staff, he drafted and worked on the Food and Drug Administration Modernization Act of 1997. He has continued to work on FDA-related legislation since then, most recently on the 21st Century Cures Act of 2017. He has testified before the House and Senate more than 100 times either as counsel accompanying a witness or as a witness.

Mr. Hutt has been a member of the National Academy of Medicine (formerly called the Institute of Medicine (IOM)) of the National Academies of Science, Engineering, and Medicine (NASEM) since the IOM was formed in 1971. He has served on the IOM Executive Committee and other NAS and IOM committees. He is currently serving on eight active NASEM report review committees. He recently served as a member of the Working Group on the Innovation in Drug Development and Evaluation for President Obama's Council of Advisors on Science and Technology (PCAST). He served on the Science Review Subcommittee of the FDA Science Board to review the FDA science needs in order to perform its regulatory mission, and published a major analysis that resulted in Congress doubling FDA appropriations during 2008-2013. He also recently served on the Panel on the Administrative Restructuring of the National Institutes of Health and on the Working Group to Review Regulatory Activities Within the Division of AIDS of the National Institute of Allergy and Infectious Diseases. He is a member of the Board of Directors of the Institute of Health Policy Analysis, and a past member of the Board of the AERAS Global TB Vaccine Foundation, the Foundation for Biomedical Research, and the California Life Sciences Association (formerly called the California Healthcare Institute). He has served on a wide variety of other academic and scientific Advisory Boards, on the Board of Directors of venture capital startup companies, and on the Advisory Boards of venture capital firms.

Mr. Hutt is a member of the Board of Directors of the Critical Path Institute (a public-private partnership between FDA and the pharmaceutical industry), and has served on the IOM Roundtable for the Development of Drugs and Vaccines Against AIDS, the Advisory Committee to the Director of the National Institutes of Health, the NAS Committee on Research Training in the Biomedical and Behavioral Sciences, the NIH Advisory Committee to Review the Guidelines for Recombinant DNA Research, the National Committee to Review Current Procedures for Approval of New Drugs for Cancer and AIDS established by the President's Cancer Panel of the National Cancer Institute at the request of President Bush, the Keck Graduate Institute of Applied Life Sciences (one of the Claremont Colleges), and five Office of Technology Assessment advisory panels. He was a member of the New Foods Panel of the White House Conference on Food, Nutrition and Health and authored the panel report. He has twice been a councilor of the Society for Risk Analysis and has served as Legal Counsel to the Society as well as the American College of Toxicology.

He was twice asked to become the Deputy Assistant Secretary for Health -- in the Department of Health, Education, and Welfare in 1973 by Assistant Secretary Charles C. Edwards and in the Department of Health and Human Services in 1986 by Assistant Secretary Robert E. Windom -- but he declined both offers. In 2001, Mr. Hutt's name was informally forwarded by the Bush Administration to Senator Edward Kennedy, then the Chair of the Senate HELP Committee, for consideration as the Commissioner of Food and Drugs. Senator Kennedy blocked the nomination by refusing to hold a confirmation hearing, on the ground that he would never hold a hearing for that position for anyone who has advised and represented the regulated industry. In 2005, following Mark McClellan's and Lester Crawford's tenures as FDA Commissioner, Mr. Hutt's name was again informally discussed for consideration as the Commissioner of Food and Drugs. Senator Kennedy was no longer Chair of the HELP Committee but he again succeeded in blocking any potential nomination by threatening an all-out opposition for the same reason. More recently, Mr. Hutt was under consideration as FDA Commissioner by the Trump Administration. He was one of the three final candidates, but he was not selected.

During the 1960s, Mr. Hutt litigated pro bono cases on behalf of homeless alcoholics and drug addicts. He co-argued the only alcoholism case ever heard in the United States Supreme Court, *Powell v. Texas*, and then drafted the legislation that created the National Institute of Alcohol Abuse and Alcoholism and the National Institute of Drug Abuse. Based on this work, two-thirds of the States have repealed their statutes that had made public intoxication a criminal offense.

He was named by *The Washingtonian* magazine as one of Washington's 50 best lawyers (out of more than 40,000) and as one of Washington's 100 most influential people; by the *National Law Journal* as one the 40 best health care lawyers in the United States; and by *Global Counsel* as the best FDA regulatory specialist in Washington, DC. *Business Week* referred to Mr. Hutt in June 2003 as the "unofficial dean of Washington food and drug lawyers." In naming Mr. Hutt in September 2005 as one of the eleven best food and drug lawyers, the *Legal Times* also referred to him as "the dean of the food-and-drug bar." In April 2005, Mr. Hutt was presented the Distinguished Alumni Award by FDA. In May 2005, he was given the Lifetime Achievement Award for research advocacy by the Foundation for Biomedical Research, and in 2016 he was made a member of the LMG Life Sciences Hall of Fame. The 2017 *Who's Who Legal: Life Sciences* described Mr. Hutt as "the best guy in the business" and the 2017 *Chambers USA* called him "a legend." In 1994, he was elected a Fellow of the Society for Risk Analysis. In 2016 he was elected a Fellow of the Institute of Food Technologists and a member of Phi Tau Sigma, the Honor Society for Food Science and Technology.

Representative Publications

The Federal Food, Drug, and Cosmetic Act

"Food and Drug Law: Cases and Materials," *Foundation Press* (4th edition 2014), Co-Author.

FDA History

"Historical Themes and Developments at FDA Over the Past Fifty Years, " *FDA In the 21st Century* Ch. 1 at 17 (2015).

"The State of Science at the Food and Drug Administration," *60 Administrative Law Review 431* (Spring 2008).

“Turning Points in FDA History,” Chapter 2 in *Perspectives on Risk and Regulation* (2007).

"FDA Comes of Age: A Century of Change," Chapter 3 in *FDA: A Century of Consumer Protection* (2006).

“A Brief History of FDA Regulation of Exports,” Chapter 1 in *Export Expertise: Understanding Export Law For Drugs, Devices and Biologics* (1998).

"The Food and Drug Administration Modernization Act of 1997," *52 Food Technology 54* (May 1998).

"The Transformation of United States Food and Drug Law," *60 Journal of the Association of Food and Drug Officials 1* (September 1996).

Food

"U.S. Government Regulation of Food with Claims for Special Physiological Value," Chapter 16 in *Essentials of Functional Foods* (2001).

"Regulation of Food Additives in the United States," Chapter 8 in *Food Additives* (2d edition 2001).

"A Brief History of FDA Regulation Relating to the Nutrient Content of Food," Chapter 1 in *Nutrition Labeling Handbook* (1995).

"Government Regulation of Health Claims in Food Labeling and Advertising," *41 Food Drug Cosmetic Law Journal 3* (January 1986).

"A History of Government Regulation of Adulteration and Misbranding of Food," *39 Food Drug Cosmetic Law Journal 2* (January 1984), Co-Author.

Dietary Supplements

"The History and Future of the Dietary Supplement Health and Education Act,” *14 National Products Insider*, No. 11, at 16 (October 5, 2009).

"FDA Statutory Authority to Regulate the Safety of Dietary Supplements," *31 American Journal of Law & Medicine 155* (2005).

Drugs

“Commemorating the 50th Anniversary of the Drug Amendments of 1962,“ 68 *Food and Drug Law Journal 449* (2013) (with Robert Temple, M.D.).

“The Regulation of Drug Products by the United States Food and Drug Administration,” Chapter 24 in the *Textbook of Pharmaceutical Medicine* (7th edition 2013).

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"A History of Government Regulation of Adulteration and Misbranding of Medical Devices," *44 Food Drug Cosmetic Law Journal 99* (March 1989).

Teaching Food and Drug Law

"Food and Drug Law: Journal of an Academic Adventure," *46 Journal of Legal Education 1* (March 1996).

Accolades

Fellow of the Institute of Food Technologists (2016)

Chambers USA - America's Leading Business Lawyers, Food & Beverages: Regulatory & Litigation (2014-2018), Healthcare: Pharmaceutical/Medical Products Regulatory (2014-2018)

Recognized by *Who's Who Legal* as a "Thought Leader for Life Sciences" (2018)

Washington DC Super Lawyers, FDA (2007-2018)

Practices

Regulatory and Public Policy

- Food, Drug, and Device
  - Cosmetics
  - Food, Beverage and Dietary Supplements
  - Medical Devices and Diagnostics
  - Pharma and Biotech
- Public Policy

Education

Yale University, B.A.

Harvard Law School, LL.B.

New York University School of Law, LL.M.

Government Service

U.S. Department of Health, Education, and Welfare

John Dupuy

John Dupuy was appointed as Deputy Inspector General for Investigations within the DOE OIG in November 2016. Mr. Dupuy is responsible for investigations of the Department's programs and operations. Mr. Dupuy has been part of the Office of Inspector General (OIG) community since 1991, and has served in a variety of leadership positions throughout his career in both, the field and Headquarters. Mr. Dupuy comes to us from the Department of Homeland Security (DHS) OIG, with prior experience at the Department of the Interior and Department of Housing and Urban Development's OIG. He has served in a variety positions from Special Agent to Assistant Inspector General for Investigations.

Mr. Dupuy graduated from U.C.L.A. in 1987, with a degree in political science. He served in the United States Army as a Military Intelligence Officer from 1987 to 1990. Dupuy later attended Golden Gate University School of Law in San Francisco and the American University Washington College of Law in Washington, DC. He is a member of the Virginia and Washington DC Bar Associations and was an Adjunct Professor at the American University School of Law. John is married and lives with his wife and two daughters in Virginia.

Peter B. Hutt II

Peter Hutt represents clients in False Claims Act and fraud litigation. He has testified before Congress concerning proposed amendments to the False Claims Act. He has litigated more than 20 qui tam matters brought under the False Claims Act, including matters alleging Iraqi procurement fraud, cost misallocation, quality assurance deficiencies, substandard products, defective pricing, health care fraud, and false certifications. He has conducted numerous internal investigations and frequently advises clients on whether to make disclosures of potential wrongdoing.

Mr. Hutt also represents clients in the full range of contract and grant matters, including contract formation, contract disputes and claims, terminations, cost allowability and allocability issues, contract financing issues, price reduction issues, subcontracting, compliance issues, and small business issues. He has litigated significant contract matters in the Court of Federal Claims and the Armed Services Board of Contract Appeals.

Mr. Hutt graduated from Yale University and Stanford Law School, where he served as the Senior Articles Editor on the *Stanford Law Review*. He clerked for Judges William W Schwarzer and Vaughn R. Walker in the U.S. District Court for the Northern District of California.

Representative Matters

- Represented international construction company in False Claims Act investigation concerning quality assurance, supply chain management, defective pricing, and mischarging allegations.
- Convinced Department of Justice to decline intervention in qui tam action alleging false statements concerning eligibility for small business credits.
- Represented major services provider in False Claims Act matter concerning alleged labor category violations.
- Obtained dismissal of qui tam action alleging fraud in connection with Iraqi procurement contracts, United States ex rel. Mayberry et al. v. Custer Battles LLC et al., No. 1:06-cv-364 (E.D. Va. 2008).
- Counseled multiple contractors concerning whether actions fell within scope of the Mandatory Disclosure Rule.
- Won summary judgment on False Claims Act case alleging TINA violations, *United States ex rel. Sanders v. Allison Engine Company*, 364 F. Supp. 2d 699 (S.D. Ohio 2003).
- Tried a $100 million breach claim in Court of Federal Claims, Hughes Communications Galaxy, Inc. v. United States, 47 Fed. Cl. 236 (2000).

Mr. Hutt may be reached at (202) 662-5710, phuttjr@cov.com.

Robert L. Vogel

Rob Vogel is a partner with Vogel, Slade, and Goldstein, LLP, a Washington, DC law firm that represents plaintiffs in *qui tam* cases involving health care, defense, and other kinds of procurement fraud. Since entering private practice in 1990, Mr. Vogel has represented more than 90 plaintiffs in *qui tam* actions that have led to more than a billion dollars of recoveries for the United States treasury. From 1987 to 1990, Mr. Vogel was a trial attorney in the commercial frauds section of the Department of Justice's Civil Division. Since 2008, Mr. Vogel has served as a co-chair of the Procurement Fraud Committee of the ABA's Public Contract Law Section. Mr. Vogel graduated from Amherst College and Stanford Law School, and was a law clerk for the Honorable Frank M. Johnson, Jr., of the U.S. Court of Appeals for the 11th Circuit. Mr. Vogel can be reached at (202) 537-5904, or by e-mail at rvogel@vsg-law.com.

Don Williamson

Don Williamson is a Senior Trial Counsel with the United States Department of Justice, Civil Division, Fraud Section. Since 1997, Mr. Williamson has worked on False Claims Act investigations and litigations involving underlying issues of federal procurement violations, including many matters involving contractors and subcontractors for the Department of Energy. Mr. Williamson works on matters that originate as *qui tam* investigations, as well as matters that originate as internal government investigations.

DOECAA Spring 2019 Conference

EFFECTIVE SELECTION AND PRESENTATION OF EXPERTS

Tami Lyn Azorsky, Partner
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May 2, 2019

Tami's Tips

- Select the right experts: Cover the bases in bite-sized pieces.

- Presenting your experts: Don't tell them, show them

Expert Selection

CERCLA/RCRA/Cleanup

- What is where?
- How did it get there?
- Old Facts
- Remedies/Cost
- Divisibility
- Risk of Harm/Movement
- Resource Value
- Industry/Contract Experts
- Regulatory Experts

Toxic Tort

- Exposure
- Toxicology/Epidemiology
- Clinical Preventive Services
- Medical Specialists
- Occupational Therapists
- Treating Doctors
- State of the Art
- Economist/Damages
- Risk of Injury
- Property Valuation

How Many Do You Need?

- Limit each expert to a credible area of expertise.
  - Education and experience
  - Distinct medical specialties
  - Peer acceptance
- Consider the point you want the expert to deliver
- Consider the time it takes to make that point.
- Consider how the jury will react to your grouping of experts versus your opposition's grouping
- Break harder things into smaller bites: use a teacher and a teller.

Presenting Your Experts
Judge

- Opportunities for educating the judge
    - Scheduling orders
    - Discovery disputes
    - Early motions
- "Science" Days
- Prepare on *Daubert* standards

Presenting Your Experts
Jury

- Prepare a teacher
  - Support
  - Explain opposing experts
- Pretty pictures supported by data
  - Evoke a conclusion
  - Demonstrate the hard data that supports that conclusion

Thank you

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DOECAA Spring 2019 Conference

ADMISSIBILITY OF EXPERT TESTIMONY: *Daubert v. Merrel Dow Pharmaceuticals, Inc.*

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May 2, 2019

What did it do?

- Rejected *Frye* General Acceptance Test
- Set New Standard Applying the Template of the Federal Rules of Evidence
- Established Judge as “gatekeeper” for admission of scientific evidence
- Impacted much more than the admissibility of expert testimony

Kumho Tire

- “Daubert’s general holding -- setting forth the trial judge’s general ‘gatekeeping’ obligation -- applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.”

Proposed Amendment to 702

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, provided that (1) the testimony is the product of reliable facts and data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Duties of a Gatekeeper

- Judge must conduct a *Daubert* analysis
- Judge must determine whether or not the testimony is admissible

Applicable Standard

- Appropriate standard is Fed. R. Evid. 104(a)
  - Do you want a hearing?
  - Do the Federal Rules of Evidence apply to that hearing?
- Appellate standard is abuse of discretion
  - Process
  - Admissibility decision

What to File?

- Potential Motions
  - Motion in Limine
  - Motion for Summary Judgment
  - Motion for Judgment as a Matter of Law

Daubert Factors

- Reliability
- Relevance

Methodology! Methodology! Methodology!

- Testability
- Peer Review and Publication
- Accuracy of Technique
- General Acceptance
  - Is that *Frye* general acceptance?

Daubert Expands

- Cases involving medical causation
  - failure to tie expert analysis to the plaintiffs' exposure or dose level
  - failure to cite epidemiological (e.g. human) evidence showing a statistically significant link between the chemical and the disease at issue

Daubert Expands (cont'd)

- deviation from the Hill Criteria and/or the Federal Judicial Center's REFERENCE MANUAL ON SCIENTIFIC EVIDENCE for evaluating toxicological evidence
- improper extrapolation from animal results to human beings
- improper reliance on "case reports" or "case studies" that cannot offer a scientifically valid basis for opining on causation

Daubert Expands (cont'd)

- improper use of "post hoc, ergo propter hoc" reasoning, in which the expert simply assumes that a chemical must have caused the disease if the onset of the disease followed exposure to the chemical
- improper assumption that where plaintiffs have been exposed to a particular chemical and have a particular disease, plaintiffs exposure necessarily caused the disease
- failure to validate opinions either through testing or through reliance on relevant scientific literature

Other types of experts

- Accountants
- Economists
- Psychologists
- Ergonomists
- Statisticians
- Police Procedure experts
- Engineers
- Financial Institution Experts
- Accident Reconstruction experts
- Safety Engineers
- Communications or Labeling

DEFINING THE METHODOLOGY

Tools

- Regulatory Standards
  - Public
  - Private (ANSI, ASTM)
- Textbooks
- Rules of Professional Organizations
- Industry Standards
- Custom and Practice

Options

- Your experts
- Opposing experts
- Court appointed experts

Relevance or Fit

- Do you believe in werewolves?
- What is your case about?
- Does the expert testimony “fit” the facts?

“Fit” Examples

- Cases involving medical causation
  - improper attempts to analogize to diseases that plaintiffs do not claim to have
  - improper attempts to analogize to chemicals other than the chemicals alleged to have caused plaintiffs’ injuries

“Fit” Examples Cont’d

- Other cases
  - improper attempt to analogize economic performance of different industries
  - improper attempt to analogize performance of different product lines
  - real estate expert’s failure to use appropriate comparable properties for comparison

Don’t stop with *Daubert*!

- Rule 403
- Rule 704

Thank you

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Michael Berman, P.E., CHMM

Specialties: Site Investigation and Remediation; Groundwater Assessment and Remediation; Surface Water and Groundwater Supply Studies and Development; Specialized In Situ Treatment; Environmental Management Assessment and Systems; Brownfields Redevelopment

Practice Areas: Environmental Management

Disciplines: Chemical Engineering, Civil Engineering, Environmental Engineering

Education: M.Eng., Civil and Environmental Engineering, Cornell University, 1998; B.S., Chemical Engineering, Bucknell University, 1993

Registration: District of Columbia, Professional Engineer, PE904406; Maryland Professional Engineer, 32794; Virginia Professional Engineer, 034540; Certified Hazardous Materials Manager, 029413

Michael Berman is a Senior Principal Engineer based in Washington, D.C. with more than 25 years of experience focused on assessing, modeling, and quantifying the nature, extent, and cost of environmental liabilities to support his clients' business decisions.

Corporate managers and their outside counsel know that environmental conditions and their regulatory consequences can significantly impact their business decisions and ongoing operations. These potential liabilities must be appropriately defined or translated into monetary terms to allow decision makers to understand and manage them appropriately. Mike is sought out as a trusted consultant for such complex environmental liability valuation (ELV) services.

Among Mike's key strengths are his broad experience in environmental cost estimating and the management of investigations and corrective actions for contaminants such as chlorinated solvents, petroleum hydrocarbons, and inorganic compounds. He has notable experience in the management of challenging contaminants such as chlorinated solvents; per- and polyfluoroalkyl substances (PFAS); methyl tertiary butyl ether and other fuel oxygenates, 1,4-dioxane, and perchlorate and has addressed these at sites regulated under various RCRA, CERCLA, state-lead, and voluntary cleanup programs. Through his experience in these activities for clients, Mike has established a robust practice focused on ELV services. He frequently provides his industry insight to support industrial litigation efforts, insurance negotiations and cost recovery projects, various types of financial reporting, and corporate due diligence during mergers and acquisitions.

Mike has conducted ELV analyses for thousands of sites across the United States and in Canada, Latin America, and Europe. His broad range of clients includes petroleum and petrochemical producers, mine and railroad operators, electric utilities, industrial and consumer product manufacturers, pulp and paper companies, and commercial municipal waste disposal companies. He develops customized costing models and specialized presentations for attorneys and industrial clients on best practices common to ELV services.

To advance the state of the practice, Mike has co-authored U.S. EPA and other guidance documents on the topics of remediation costing; groundwater remediation technologies, chlorinated solvent bioremediation, in situ thermal treatment, permeable reactive barriers, and technologies for fuel oxygenates.

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Nationally recognized for exceptional client service, Tami has earned a reputation for creative and highly-effective litigation strategies in complex environmental exposure and contamination cases. Her clients have included large multinational defense, chemical, energy, and construction industry clients, among others. Her practice spans the areas of occupational and environmental exposure, environmental litigation, False Claims Act litigation, healthcare fraud litigation, and challenges to federal agency actions and regulations. She addresses issues involving constitutional, statutory, and regulatory disputes in federal and state courts, through arbitration, and before administrative agencies.

As a Washington, DC-based litigator working in highly regulated industries, Tami has developed the relationships and skills to satisfy government regulators in ways that avoid litigation. She is highly experienced in navigating the complex federal regulatory schemes of the Environmental Protection Agency, the Defense and Energy Departments, the Department of Health and Human Services, federal procurement regulatory requirements and numerous others. Because she has decades of experience addressing issues with inherent public and media sensitivities, she is highly experienced in coordinating responses on behalf of her clients to calm the concerns of regulators, courts, stockholders, and other constituencies.

Ms. Azorsky serves as chair of the firm's US Litigation and Dispute Resolution practice. She spearheaded the development and implementation of the firm's proprietary project management and budgeting software, designed to improve budget estimates, matter management, and efficient delivery of client service.

Ms. Azorsky is committed to diversity in the profession. She was the co-founder of the McKenna Long & Aldridge mentoring program for law students through the Georgetown University Women of Color Collective and served as a long term board member of the Hispanic National Bar Foundation.

Full bio is available at https://www.dentons.com/en/Tami-Azorsky.

DOE's New End State Contracting Model

Kenneth B. Weckstein -- Brown Rudnick LLP
Gena Cadieux – Harris, Wiltshire & Grannis, LLP
Angela Watmore – DOE Senior Advisor, Office of Environmental Management

DOE Office of Environmental Management (EM)

- Mission is to address the environmental cleanup resulting from five decades of nuclear weapons production and government-sponsored nuclear energy research.
- When the Office was created in 1989, more than 90 sites existed.
- While only 16 remain, closing out the remaining sites is expected to take decades and cost tens of billions of dollars.

Issues with existing contracting model

- Major EM competitive acquisitions take too long to complete, require extensive “contract trueups” post award, and are costly to both EM and Industry.
- Many EM contracts are not maximizing risk-based cleanups, not adequately reducing EM’s environmental financial liability, and do not contain appropriate cost, schedule, incentives and risk sharing.
- EM program is at a critical juncture where multiple sites are within striking distance of completion, however the current model does not optimize base operating costs which account for a significant proportion of EM budget.
- Cost of entry into the DOE market is significant - proposal costs are often $5-10M.

What's the Solution?

- On December 12, 2018, DOE's EM issued a Special Notice - Modification to End State Contracting Model (ESCM).
- Focus on "end states" or major completion criteria to accelerate and complete the EM legacy cleanup.
- Focus on fidelity of scope and minimize change orders to drive performance.
- EM intends to award IDIQ contracts to the best qualified, best value contractor through a competitive source selection process.

To achieve optimal results...

- EM must negotiate contracts with appropriate requirements, incentives, and risk models.
- The ESCM will employ a two-step process using a competitive RFP for selection of the offeror representing the best value and subsequent single source, Task Order(s) negotiations.

Two-Step Process

- Step 1: Issue Master IDIQ and Award Contract, along with Transition Task Order
- Step 2: Transition and Award of Year One Task Orders. In addition, future Task Order(s) openly negotiated.

Step 1

- Issue single award IDIQ RFP capturing EM cleanup work at the site
  - Site closure or defined End States, as appropriate.
  - Up to 10-year ordering period.
  - Minimum guarantee to-be-determined.
  - Ability to issue Firm-Fixed-Price (FFP) and Cost-Reimbursement (CR) Task Orders.

Step 1 (continued)

- Master IDIQ award based upon CR representative scope of work to be performed, plus Contract Transition.
  - Technical and Management Proposal 25 pages;
  - Includes proposed responses to DOE-provided Performance Based Incentives (3 to 5); and
  - Cost reasonableness and realism of CR task and contract transition costs (including cost of negotiations).
- In addition, offeror to deliver Base Operations/Min Safe Task Order 5 days after Notice To Proceed. + Balance of Work for Year One.

Step 1 (continued)

- Proposal Evaluation
  - Key Personnel (* PM Most Important)
    - Nine elements in Section M new
    - Interview with contractor Program Manager
    - Conduct Orals
  - Technical and Management Approach
  - Relevant Past Performance

Step 1 (continued)

- Source Selection
  - Offeror representing best value where key personnel, technical and management approach and past performance are significantly more important than evaluated price.

Step 2

- Transition Period 60-120 days
  - Award Competitively Evaluated Task Order(s) for YR 1
  - Definitize Base Operations Task Order YR 1
  - Negotiate Balance of Work Task Order YR 1
- Open negotiations for Cost Plus Incentive Fee Task Order(s) for site closure/defined End State(s).
- Complete negotiations within 180 days.
- Agree on scope, schedule and cost, inclusive of discussions with Regulators, as necessary.
- Identify ownership of risks and mitigations.
- Identify any required Government Furnished Services and Information.

Step 2 (continued)

- Develop completion criteria and incentive fee structure (ceiling for scope of work beyond sample task period to include flat portion of CPIF Cost Curve [+/- % of cost]).
- Encourage profit sharing with employees.
- If cannot agree on reasonable price, re-compete the contract after minimum guarantee has been satisfied.

Goals of ESCM

- Reduce burden on industry and taxpayer
- A new contracting model that reflects end states that:
  - achieve significant financial liability and risk reduction,
  - reduce environmental risk;
  - accelerate final cleanup/remediation, and
  - fairly shares risk between the contractor and government.

How did we get here?

- EM released two end state oriented Draft RFPs in September, 2018 seeking industry input.
  - Central Plateau Cleanup Contract (CPCC) Acquisition in Richland, WA.
    - CPCC was the first draft “end state” Cost Plus Incentive Fee contract model.
  - Nevada Environmental Program Services (EPS) Acquisition in Henderson, NV.
- DOE held industry discussions to obtain feedback on the Draft RFPs and the ESCM.

Concerns from industry

- By asking contractors to propose their own milestones to reduce environmental risk, DOE could end up with vendors bidding on a different set of “apples and oranges”.
- Could increase the cost of preparing proposals due to lack of consistent criteria for what work DOE is expecting.
- Generally, many contractors suggested the agency was trying to go too far, too fast.

How did we get here? (continued)

- As a result of the comments received from interested parties, EM decided to move forward with the ESCM utilizing a single award (IDIQ) contract for each acquisition with the ability to issue both Cost Reimbursable (CR) and Firm-Fixed-Price Task Orders.

Ongoing Competing Challenges for EM

- Funding constraints
  - Site budgets
  - Landlord/base Operations Costs
  - Pension/Benefit Costs
- Economic Impact of EM mission completion without replacement
  - Local desire for job retention and growth of EM program
- Evolving understanding of existing risks
- Evolving cleanup preferred technology
- Uncertain disposal paths
- Need to pivot to true “risk-based” cleanup
- Existing regulatory frameworks with milestones not aligned with agreed future land use
- Desire to come to definitive closure on cleanup at particular sites
- Changes in political leadership with differing views of how to achieve success

Growing Liabilities; Growing Pressure to Complete Cleanup and Prioritize Risks

- GAO's High Risk List, issued biennially, has included DOE project and contract management as a risk since its inception over 20 years ago. Latest report issued in March 2019 finds that EM has made progress in one area but has much work left to do in contract and project management: https://www.gao.gov/products/GAO-19-157sp (pp 217-221).
- In January 2019, GAO issued a report challenging EM to better identify the needed funding to complete the cleanup and emphasizing the need for a coordinated strategy to balance risks and priorities across sites for cleanup activities. https://www.gao.gov/products/GAO-19-28

EM's Bias for Action Often Results in Changed Contract Scope and Funding

- EM does not have the luxury of studying solutions and approaches and requirements at length before beginning cleanup work.
- History of cancelling procurements or substantially revising planned contract scope in light of changed priorities.
  - Savannah River Liquid Waste contract – procurement cancelled 2019 after sustained protest
  - Fast Flux Test Facility contract – procurement cancelled after sustained protest in 2005
  - Waste Treatment and Immobilization Plant – sizing and treatment approaches changed throughout the 19 years of the contract so far
- Virtually every major cleanup contract experiences significant funding profile changes and significant cost overruns.

Difficulty of Projecting Activities Makes Procurement Process Unwieldy

- Best results have occurred when contracts were competitively awarded and then substantially renegotiated after the contractor was in place and the path to completion was better understood
  - E.g., Rocky Flats, Salt Waste Processing Facility
- Lack of clarity on requirements leads to difficulty in technical and cost evaluation when the entire contract scope is included in the cost proposal.
- Need for DOE and regulators to agree on path forward is not conducive to having multiple competitors with multiple technical approaches

EM's Approach to Separating Contracting from Technical Approach Decisions Logical in Context

- Avoids fictional review of cost proposals for work that likely will not be performed as solicited
- Reasonably expected to reduce cost of participation in competition and duration of competitive process
- Avoids conflict between technical proposal and regulator perspective
- Enables "chunking" of projects to identify near term requirements and cost in order to hold contractor accountable
- Environmental cleanup version of "agile" software development.

ESCM Benefits?

- The proposed two-step ESCM IDIQ model provides EM increased flexibility to partner with industry .
- The IDIQ model allows for better contract management and tasking of discrete scopes of work.
- More realistic, reliable pricing.
- Appropriate incentive structures consistent with the progress and technical challenges in the cleanup.

ESCM Benefits? (continued)

- Reduced upfront proposal preparation costs as the offeror is now proposing on a representative scope of work instead of the entire PWS.
- Aligns the requirements for all offerors, thereby leveling the playing field.
- Shortens the procurement process timeframe.
- Cost realism evaluation will be reduced and less risky due to evaluating one or more representative sample task(s) and transition as compared to five to 10 years of cost data.

ESCM Benefits? (continued)

- Open negotiation of future tasks are based on current Site conditions and regulatory framework leading to more fair risk sharing.
- Lowers the cost of entry for companies new to the EM market.

Small Business Involvement

- The modified ESCM does not change the required subcontracting or Small Business goals for the acquisitions.
- No change to definition for what DOE considers meaningful work.
- Required 2 Mentor-Protégé Agreements

Fee under ESCM

- Fee will be determined on a task-by-task basis and will be commensurate with the associated complexity of work and risk.
- The ESCM approach offers contractors potential fees up to 15%, whereas most fees now are less than 10%.

Contracts Affected

- The following contracts fall under the ESCM:
  - CPCC
  - TWCC
  - Nevada EPS
  - West Valley
  - Idaho Cleanup
  - Portsmouth Decontamination and Decommissioning
  - the Oak Ridge Remediation Contract

What is the future of ESCM?

- Ongoing lessons-learned to improve model
- New entrants.
- Failure to agree on TO's.
- Multiple awards?
- Successful accelerated closure at less cost to offeror(s) and taxpayer.

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Litigation & Arbitration

Biography

Ken Weckstein is a Partner in the Government Contracts & Litigation Group. He represents clients on matters related to government contracts, complex civil litigation and trade secrets law. Ken has substantial experience in a wide range of complex civil litigations (jury and bench trials). He has successfully litigated bid protests before the Government Accountability Office and courts and contract disputes before BCAs and courts. Ken also represents contractors in IG and criminal investigations and handles litigation involving the protection of trade secrets.

In 2003, *Legal Times* named Ken one of 20 Leading Litigators in the Washington, DC area.

In addition to his law practice, Ken promotes professional boxing matches, including a 2019 card that featured a pro who was undefeated in 33 bouts and an undefeated former NFL player. Ken also regularly drives standardbred race horses (trotters and pacers) in pari-mutuel races at racetracks. Since 1990, he has driven at tracks from Rosecroft near Washington, DC to the Meadowlands in New Jersey, to tracks across Europe and in New Zealand.

Representation

Ken's litigation record includes the following:

- **Keystone Turbine Services, LLC (SBA No. NAICS-5996, 2019):** Appeal of a NAICS code designation for Aircraft Engine and Engine Parts Manufacturing. The SBA Office of Hearings and Appeals granted the appeal and agreed that the agency had assigned the incorrect code.

- **InnovaSystems (B-417215, 2019):** Successful defense of three protests against award to client ECS Federal of a large contract by the U.S. Marine Corps for the M-SHARP software system.

- **Sotera Defense Solutions, Inc. (B-414056, 2017):** Successful defense of protest filed against a $150 million award to our client (ManTech Advanced Systems International) for software and engineering support. The protest challenged the Army's cost realism analysis.

- **BCF Solutions, Inc. (GAO, B-413287, 2016):** Protest challenging the Navy's award of $42 million contract for the development of day/night weapon sighting system. GAO sustained the protest and recommended that our client be reimbursed its costs of pursuing the protest, including reasonable attorney fees.

- **Lovelace Scientific and Technical Services (B-412345, 2016)**: Successful defense for client Battelle National Biodefense Institute against a challenge by a competitor to the award of a $480 million contract to operate and manage the Department of Homeland Security National Biodefense Analysis and Countermeasures Center. The protest alleged an organizational conflict of interest and misevaluation of technical proposals.

- **Southeastern Kidney Council (B-412538, 2016)**: Successful defense for client Island Peer Review Organization of protest against a contract awarded by the Department of Health and Human Services for quality improvement services to improve care of patients with end stage renal disease.

- **Onyx-Technica, JV (B-412474, 2016)**: Successful defense for client NES Associates against protest of an award for telecom engineering integration and architecture support services by the Defense Information Systems Agency. The protest alleged that there were misleading discussions and a failure to conduct an adequate cost realism evaluation.

- **DV United, LLC (B-411620; B-411620.2, 2015)**: Successful defense against protest of award of a contract for information technology engineering support services. The protest alleged that the award to our client was tainted by an organizational conflict of interest and a misevaluation of proposals. GAO denied the protests.

- **Advanced Technologies and Laboratories International, Inc. (B-411658, B-411658.2, B-411658.2, 2015)**: Successful defense against protest of award of a $44.5 million contract for laboratory analysis and testing services at the Department of Energy Hanford Site. GAO denied the protests.

- **Paradigm Technologies, Inc. (GAO B-409221.2, 2014)**: Successful representation of protester against award by the Missile Defense Agency of a $43 million contract for strategic planning and financial management support services.

- **Nuclear Production Partners LLC (GAO, B-407948, 2013)**: Representation of LLC comprised of Babcock & Wilcox, URS, Northrop Grumman and Honeywell in successfully protesting the award of a $22.8 billion contract for the management and operation of activities at the Y-12 National Security Complex in Oak Ridge, Tennessee and the Pantex Plant near Amarillo, Texas, as well as the construction of a new uranium processing facility.

- **EMCOR Government Services (GAO B-407917, 2013)**: Successful representation of protester against the Navy's award to a competitor of a $66 million contract for base operating services at Patuxent River Naval Air Station.

- **EJB Facilities Services (ASBCA 57547, 2013)**: We represented the contractor responsible for providing base operating and support services at the Navy's West Sound base. We were successful in appealing the Navy's deductive change for deleted work. The Board awarded our client $810,618 plus three years of interest.

- **Idaho Treatment Group, LLC. (GAO, B-402725, 2010-2011)**: Representation of a special purpose LLC comprised of Babcock & Wilcox, URS and Energy Solutions in successfully protesting DOE's award of a $592 million contract to process and dispose of TRU waste and mixed low level waste. After a re-competition, DOE awarded the contract to Ken's client.

- **CRAssociates v. United States (US Court of Federal Claims, 2010)**: Representation of healthcare contractor in seven protests at GAO and lawsuit at Court of Federal Claims resulting in injunction against award by Army of $234 million contract awarded to competitor.

- **Lear Siegler (GAO, B-401076, 2009)**: Representation of Lear Siegler in protests against awards under the Army's $16 billion R2-3G Program. In response to the protest, the Army took corrective action.

- **Savannah River Tank Closure, LLC (GAO, B-400953, 2009)**: Representation of special purpose LLC comprised of URS, Babcock & Wilcox, Bechtel and CH2M Hill in successfully defending award of $3.3 billion contract for remediation of liquid waste at DOE's Savannah River site.

- **PMTech v. United States (US Court of Federal Claims No. 07-641, 2009)**: Representation of Plaintiff in obtaining judgment on the administrative record regarding an improper sole source award by the Department of Energy.

- **ManTech International (Circuit Court, Fairfax County, Virginia, 2009)**: Successful defense of injunctive action to prevent competition for Army contract, and opposition to enforcement of alleged teaming agreement.

- **Carolinas Center (GAO, B-400456, 2009)**: Assertion and defense of series of bid protests resulting in sustain by GAO, award of contract and recovery of attorney fees.b

- **CH2M-Hill (Civilian Board of Contract Appeals, 2009)**: Recovery of lost profits based on changes and failure to partially fund cost reimbursement contract.

- **AvalonBay (US District Court, Eastern District of Virginia, 2009)**: Successful prosecution of series of embezzlement and RICO cases resulting in approximately $40 million in judgments and four criminal convictions.

- **DataPath v. General Dynamics SATCOM (US District Court, Northern District of Georgia, 2007)**: Successful defense of General Dynamics SATCOM in opposing a motion for preliminary injunction based on an alleged breach of a teaming agreement.

- **Caremark PCS, MSBCA Nos. 2544, 2548, 2568 (March 2007)**: Successful representation of Catalyst Rx in defending against a series of bid protests filed against the award of a billion dollar contract for pharmacy benefit management services.

- **The Ravens Group, Inc. v. United States (78 Fed Cl. 390 2007)**: Representation of intervenor Rowe Contracting Services in successfully opposing an injunction against a contract for janitorial services at Bolling Air Force Base. This case was the culmination of 15 bid protests.

- **PMTech, Inc. (GAO, B-297616, 2006)**: Successful protest against award of a sole source contract by the Department of Energy.

- **FFTF Restoration Co., LLC (GAO, B-294910, 2005)**: Successful representation of contractor against award of an approximately $235 million contract for deactivation and decommissioning of a nuclear reactor.

- **Jones v. Parsons (US District Court, District of Maryland, 2004)**: Successful representation of defendant Parsons Transportation Group, Inc. in obtaining summary judgment in a wrongful death and survival action based on an electrocution at a construction site.

- **KiSKA-Kajima v. Washington Metropolitan Area Transit Authority, 321 F.3d 1151 (D.C. Cir. 2003, cert. denied, 124 S. Ct. 226 (Oct. 6, 2003))**: Representation of transit authority in defending against a claim seeking approximately $50 million based on theories of fraud, breach of contract and unilateral mistake. After a six-week trial and 10 days of deliberations, the jury returned a verdict for Ken’s client. On appeal, the US Court of Appeals for the D.C. Circuit affirmed the judgment.

- **United Payors & United Providers Health Services, Inc. v. United States, 55 Fed. Cl. 323 (2003)**: Obtained permanent injunction against performance of a $225 million contract for health care services. The court also awarded bid and proposal costs to Ken's client.

- **Burns and Roe Services Corporation, 2004 CPD ¶ 85 (GAO 2003)**: Successful representation of contractor against award of $95 million contract.

- **ValuJet v. SabreTech, et. al., (Cir. Ct. for St. Louis County, Mo. 1999)**: Successful representation of defendants in three week jury trial against claim of $2 billion in business losses from crash of ValuJet Flight 592.

- **Informatics Corporation v. United States 40 Fed. Cl. 508 (1998)**: Successful representation of plaintiff in obtaining an injunction against a contract award by the Air Force. The court found the contracting officer had unreasonably concluded that plaintiff had an unavoidable organizational conflict of interest.

- **TRW Inc. and Widnall v. Unisys Corp., 98 F. 3d 1325 (Ct. of App. Fed Cir. 1996)**: The case involved a challenge to the Air Force's decision that TRW's proposal for computer-related devices and services represented the best value to the Government. The GSBCA sustained the protest. On appeal, the Federal Circuit reversed and upheld the award to TRW.

- **Advanced Sciences, Inc., 95-2 CPD ¶ 52 (GAO 1995)**: Successful representation of protester against the award of a $64 million contract to a competitor. In its decision, GAO recommended that the Department of Energy make a new selection decision. GAO also awarded Ken's client its protest costs, including attorney fees.

- **Duke/Jones Hanford Company 93-2 CPD ¶ 26 (GAO 1993)**: Represented Kaiser Engineers Hanford Company in successfully protesting a $500 million contract award to a competitor. Kaiser then was selected for award, and Ken successfully represented Kaiser in defending against an award protest.

- **TRW Environmental Safety Systems Inc. v. United States, 16 Cl. Ct. 520, 18 Cl. Ct 33 (1989)**: Representation of plaintiff in suit to enjoin the Department of Energy from awarding a $1 billion contract regarding the nuclear waste management system. The Court granted plaintiff's motion for preliminary injunction after a four day hearing and granted plaintiff's request for a permanent injunction after a six week trial.

- **Rockwell International, Inc. v. United States, 8 Cl. Ct. 662 (1985)**: Representation of Rockwell in recovering its bid preparation costs.

Education

- George Washington University Law School – LL.M., Taxation, 1979
- George Washington University Law School – J.D., *with honors*, 1976
- American University – B.A., *cum laude*, 1973

Bar Admissions

- District of Columbia
- Maryland
- New York
- Virginia
- US Court of Appeals for the Federal Circuit
- US Court of Appeals for the Fourth Circuit
- US Court of Federal Claims
- US District Courts for the Districts of Columbia, Maryland and Eastern District of Virginia
- US Supreme Court
- US Tax Court

Publications

- Co-author, "Don't Let Organizational Conflicts Haunt Your Gov't Contract," *Law360*, March 2019

- Co-author, "When Bid Protester Is Promised Agency Fix And Doesn't Get It," *Law360*, July 2018

- Co-Author, "Revised cyber security requirements mean more compliance measures for Defense contractors," *Bloomberg BNA Federal Contracts Report*, January 2016

- Co-Author, "Seeking the Opportunity to Compete for Bridge Contracts," *Bloomberg BNA Federal Contracts Report*, April 2016

- Co-Author, "What To Expect From HHS Inspector General in 2016," *Law360*, January 2016

- Co-Author, "When A Contractor's Claim Is Not A 'Claim'," *Law360*, February 2016

- Co-Author, "Prevailing-Wage Takeaways From Circle C," *Law360*, April 2016

- Co-Author, "The Illogical Ban On Contractor Political Contributions," *Law360*, April 2016

- Co-Author, "When is Awarding a Sole Source Contract Promoting Social Policy?" *Bloomberg BNA*, July 2015

- Co-Author, "Contract Disputes Act Appeals: You First, I Insist," *Law360*, June 2015

- Co-Author, "Metcalf and the Government's Implied Duty of Good Faith and Fair Dealing," *BCA Bar Journal*, Spring 2015

- Co-Author, "Recent Cases on “Hours Worked” Require Contractors to Stay Alert," Bloomberg BNA, February 2015

- Co-Author, "Size-Status Lessons From JGB V. Beta," *Law360*, January 2015

- Co-Author, "View From Brown Rudnick: Follow the ‘Year of Action’ with a Year of Preparation,” *Bloomberg BNA*, November 2014

- Co-Author, "A Possible Disagreement Between GAO And Fed. Claims Court," *Law360*, October 2014

- Co-author, "GAO Report Suggests Changes In Store For Big IT Contracts," *Law360*, July 8, 2014

- Co-author, "View From Brown Rudnick: New FAR Rule Extends Reimbursement Cap for Compensation Paid to Contractor Employees," *Bloomberg BNA*, July 7, 2014

- Co-author, "View From Brown Rudnick: The Antideficiency Act—Some Basics Every Contractor Should Know," *Bloomberg BNA*, June 10, 2014

- Co-author, "Be Proactive in Complying With Ukraine-Related Sanctions," *Law360*, April 30, 2014

- Co-author, "Payment of Fixed Fee Under CPFF Contracts," *Bloomberg Federal Contracts Report*, April 8, 2014

- Author, "Things I Wish They Had Told Me in Law School or Early in My Career," *Bloomberg Federal Contracts Report*, November 19, 2013

- Co-author, "ACA Traps for the Unwary Government Contractor," *Law360*, November 18, 2013

- Co-author, “A Closer Look At The SBA's New Presumed Loss Rule,” *Law360*, October 31, 2013

- Quoted, “Top Procurement Lawyer Warns Of Future Doe, Contractor Relations,” *Weapons Complex Monitor*, October 25, 2013

- Co-author, "View From Brown Rudnick: Welcome to the 21st Century—Electronic Submission of Proposals and the FAR's 'Late is Late' Rule," Federal Contracts Report, July 22, 2013

- Co-author, "DOD Proposes a Legislative 'Fix' for Something That Isn't Broken," *Federal Contracts Report*, July 9, 2013

- Co-author, "Inside the Numbers – A Look at Bid Protest Statistics for Fiscal Year 2011," *Federal Contracts Report*, June 26, 2012

- Co-author, "Your Competitor Bribes The Government: What Do You Do?," *Law360*, June 20, 2012

- "Contractor Accountability: To Disclose or Not to Disclose," *Federal Contracts Report*, June 19, 2012

- Co-author, "Why Do Good Contractors Get In Trouble?," *Law360*, April 10, 2012

- Co-author, "How Presidents Use Contracts to Make Law," *Law360*, March 15, 2012

- Co-author, "Gov't In-Sourcing: Where Can Contractors Turn?," *Law360*, February 15, 2012

- Co-author, "What To Do When Your Proposal Is Late?," *Federal Contracts Report*, February 2, 2012

- The 2010 Election – How Will it Affect Government Contractors," *Federal Contracts Report*, November 16, 2010

- Co-author, "Transparency in Government Contracting?," *Government Contracts Law360*, September 20, 2010

- Co-author, "Clean Energy Contracting with the Government: A New Era for Government Funding," *Bloomberg's Sustainable Energy Report*, August 2010

- “Bailout Basics,” *Contract Management<,em>, February 2009*
- “The Financial Bailout Isn’t Just for Big Business,” *Legal Times*, Vol. 31, No. 45, November 10, 2008
- “Government Contracting,” *Corporate Counsel Weekly*, Volume 17, No. 49, December 18, 2002
- “Can You Keep a Secret?,” *Contract Management*, Volume 42, Issue 10, October 2002
- “Bid Protest System Under Review,” *Legal Times*, June 12, 1995
- “Adarand Case Prompts Review of Set-Aside Programs,” *Contract Management*, Volume 35, Issue 9, September 1995

Speaking Engagements

- Ken regularly speaks on Government contracts and litigation topics throughout the country. Recent presentations have included:
- 27th Annual Decisionmakers' Forum, Amelia Island, Florida. New Contracting and Procurement Approaches (October 21, 2015)
- 2015 Department of Energy Contractors Attorneys' Association. DOE Procurements & Contracts: Lessons Learned & Emerging Issues (May 29, 2015)
- 26th Annual Weapons Complex Monitor Decisionmakers' Forum, Amelia Island, Florida. Claims, Protests and Investigations in an Era of Reduced DOE Budgets (October 21, 2014)

Professional Affiliations

- District of Columbia Bar Association

Gena Cadieux is an experienced government contracts attorney and former official with the U.S. Department of Energy.

Prior to joining Harris, Wiltshire & Grannis, Ms. Cadieux served as the Acting Under Secretary for Management and Performance at DOE. The Office of the Under Secretary for Management and Performance functioned as the Chief Operating Officer of the Department and had responsibility for its primary mission support organizations, including human capital, information technology, procurement, project management, and facilities. It also oversaw the Office of Environmental Management, which conducts the cleanup of the environmental legacy brought about from five decades of nuclear weapons development and government-sponsored nuclear energy research, and the Office of Legacy Management.

From 2010 to 2016, Ms. Cadieux served as the Deputy General Counsel for Transactions, Technology, & Contractor Human Resources at DOE. She managed a legal staff responsible for providing legal counsel to the procurement and financial assistance, technology transfer and intellectual property, and contractor labor and pension activities of program offices throughout the Department, including the Offices of Environmental Management, Fossil Energy, Energy Efficiency and Renewable Energy, Nuclear Energy, and Science. Ms. Cadieux joined DOE in 1995 and entered the Senior Executive Service in 2004. She was involved in the placement of tens of billions of dollars' worth of management and operating and large cleanup contracts during that time and was centrally involved in the transformation of DOE's procurement review and defense system into one that is respected and successful. She received the Meritorious Presidential Rank Award in 2014 and numerous Secretarial Appreciation awards for projects throughout her career.

Ms. Cadieux formerly served as co-chair of the American Bar Association Public Contracts Law Section's Bid Protest Committee. Before joining the Department of Energy, Ms. Cadieux's legal experience included practice at Davis, Graham & Stubbs and serving as an Honors Program Attorney in the Civil Division of the Department of Justice. She began her career as a law clerk for Judge Roger Robb of the U.S. Court of Appeals for the D.C. Circuit.

Ms. Cadieux graduated *magna cum laude* from the Cornell Law School, where she was a Senior Editor on the *Cornell Law Review* and a member of the Order of the Coif. She received a bachelor's degree in Political Science with highest honors from the Pennsylvania State University and is a member of Phi Beta Kappa.

Ms. Angela Watmore is a Senior Advisor for the Office of Environmental Management. She has more than 25 years of acquisition and project management experience within the energy, aerospace and national defense sectors. Angela began her career with the US Army Corps of Engineers in Omaha, Nebraska, as a Regulatory Compliance Specialist and Law Clerk working Superfund Sites. She has spent the majority of her career in the private sector as an executive with both Fortune 500 companies and small businesses. Angela has worked in the EM program at both Headquarters and the field, including the Rocky Flats and Hanford sites. She brings a depth and breadth of knowledge in procurement and contracting that is being leveraged in her current role at EM headquarters to provide leadership in contract reform.

She is a graduate of the University of Nebraska and a licensed attorney with a Juris Doctorate from the Creighton School of Law, Omaha, Nebraska.

The Generation Jungle:
Leadership Practices for a Changing Workforce

Jason Lovins, Ph.D., M.B.A., A.P.R.
Assistant Professor, Marketing, Shawnee State University
Communications Specialist, Fluor-BWXT Portsmouth

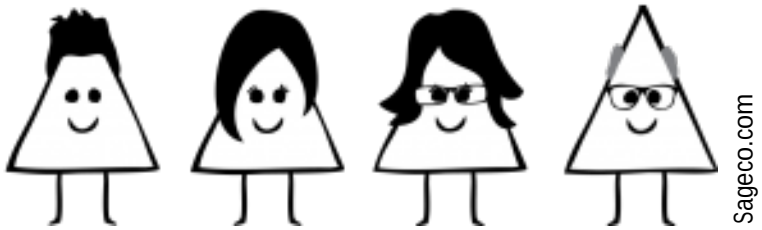
Today's Discussion

- U.S. labor status and four-year projections
- Trends in work team make-up
- Broadly accepted generation categories
- Commonly found generational traits
- Interaction among generations
- Finding common ground
- Q&A

Who's Working Today?
Who Will Be Working in Five Years?

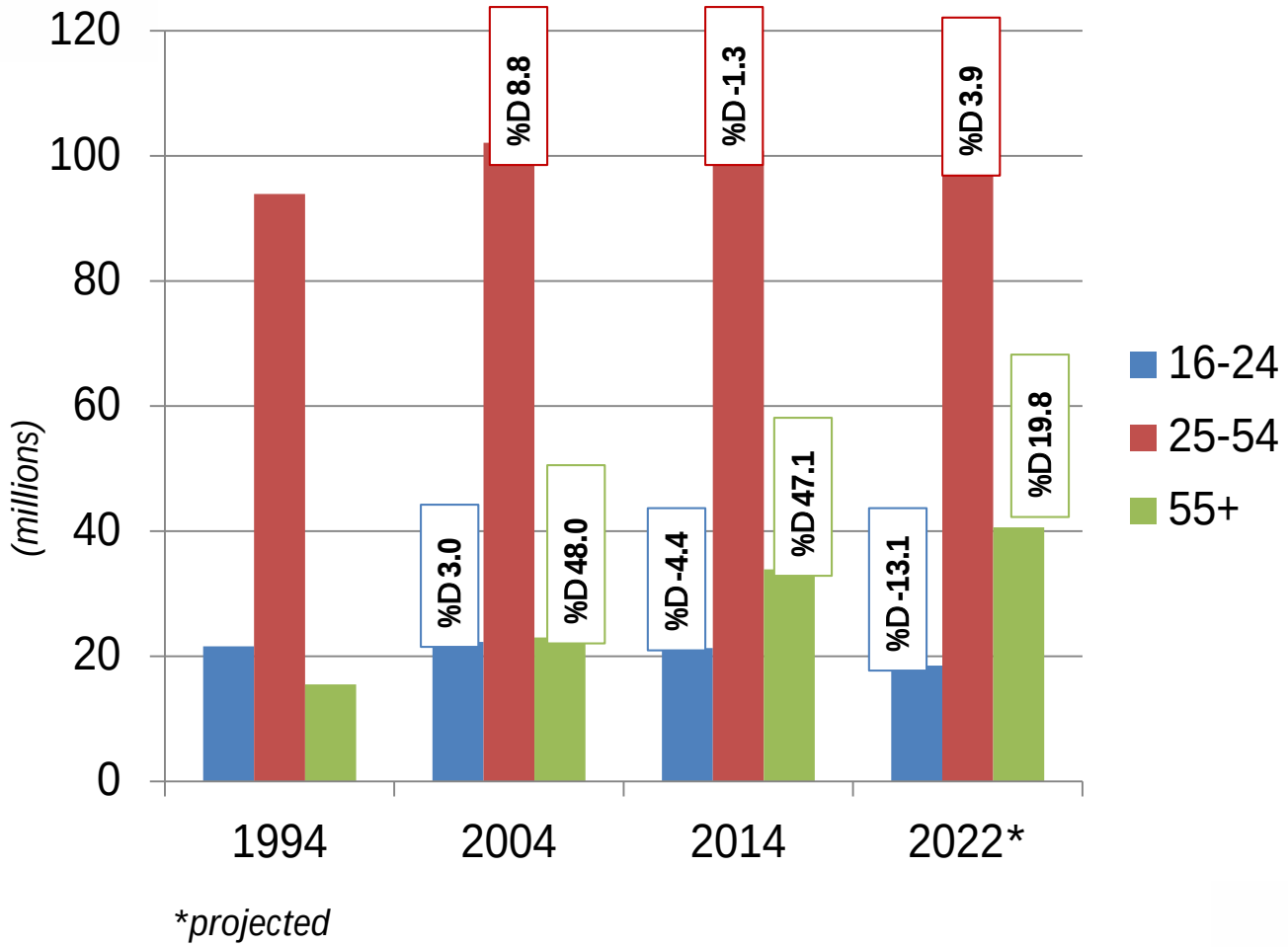
- Total labor force will decrease from 63.2% to 62%
- Fewer 16-24-year-olds (55% now, 49.7% by 2024)
- Slightly more 25-54-year-olds (81% through 2022)
- Working 55+ (41% now to 39.5% by 2022)

For the first time four different generations could be working together.



January 2019 Monthly Labor Review, US Bureau of Labor Statistics

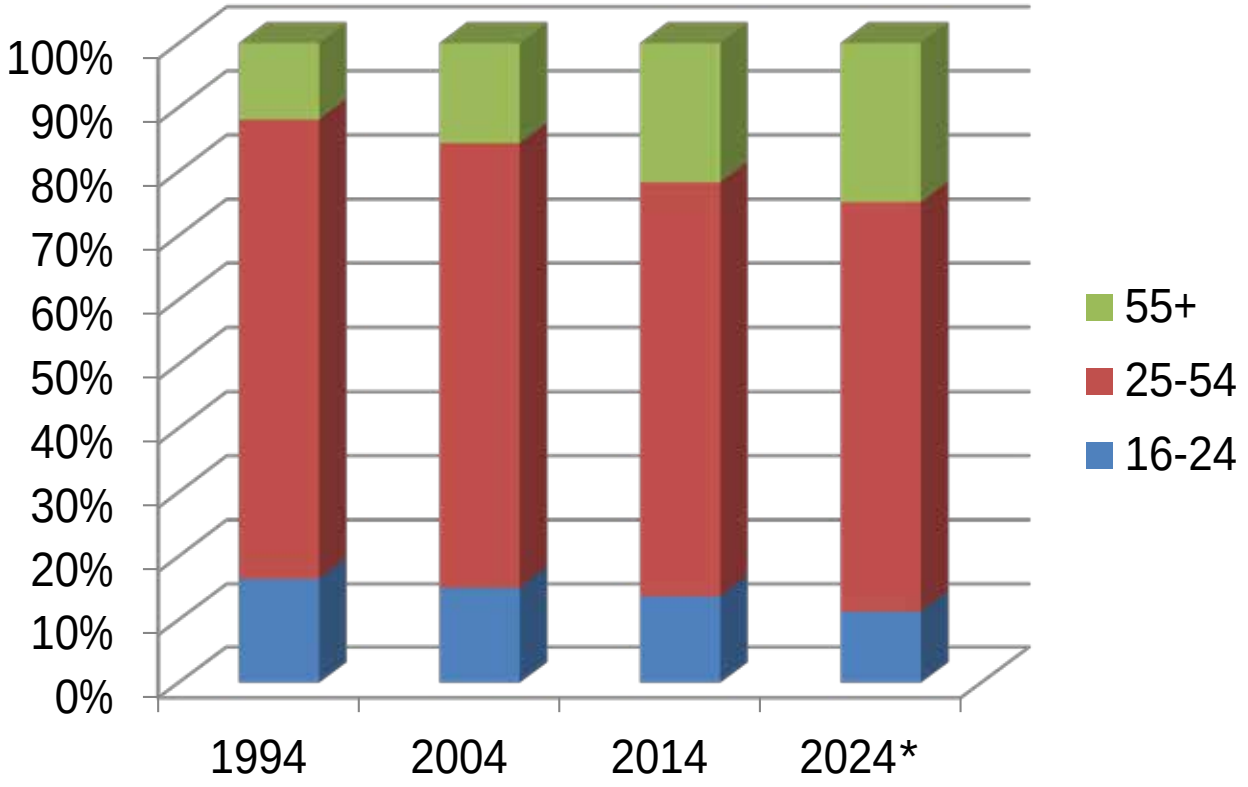
Civilian Labor Force by Age, 1994, 2004, 2014 and Projected 2024



*projected

Economic and Employment Projections, US Bureau of Labor Statistics

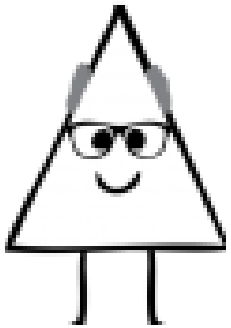
Percentage of Civilian Labor Force by Age, 1994, 2004, 2014 and Projected 2024



**projected*

Economic and Employment Projections, US Bureau of Labor Statistics

Who's Who?



Baby Boomers

- Born 1946-1964 (+/-5)
- The Civil Rights movement, Counterculture, the Cold War and space travel

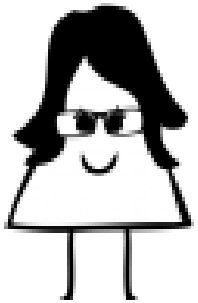
CBS TV

Strengths
- Hardworking
- Team players
- Strong mentoring skills
- Believe in reward-for-performance
- Competitive

Challenges
- Less adaptable
- Less willing to share credit
- Competitive (to a fault)

Hutter, W.F. Understanding the Dynamics of a Multigenerational Workforce. Humanresourcesiq.com
Strengths and Weakness, Millenials, Gen-X and Baby Boomers, Business Insider

Who's Who?



Generation X ("Gen-X")

- Born 1965-1980 (+/-5)
- Berlin Wall falling, Desert Storm, working moms

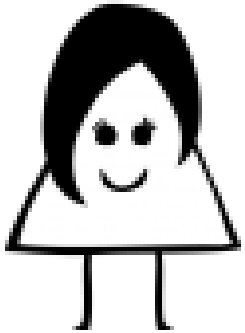
Columbia Pictures

Strengths
- Most effective managers
- Adaptable
- Entrepreneurial
- Biggest revenue-producers

Challenges
- Weak leaders
- Less cost-effective

Hutter, W.F. Understanding the Dynamics of a Multigenerational Workforce. Humanresourcesiq.com
Strengths and Weakness, Millenials, Gen-X and Baby Boomers, Business Insider

Who's Who?



Millennials – or Generation Y (or "Why?")

- Born 1982 – 2000 (+/-5)
- School shootings, domestic terrorism, computers/tech explosion

Strengths

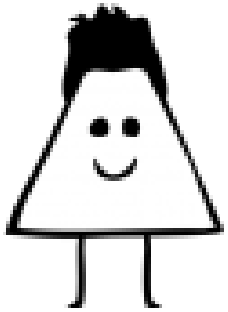
- Tech-savvy
- Enthusiastic
- Adaptable

Challenges

- Seen as non-productive
- Not a team player
- Tech-dependent

Hutter, W.F. Understanding the Dynamics of a Multigenerational Workforce. Humanresourcesiq.com
Strengths and Weakness, Millenials, Gen-X and Baby Boomers, Business Insider
Chester, E. Employing Generation Why?

Who's Who?



Generation Z

- Born after 2000 (+/- 5 yrs)
- Born with digital tech

Strengths
- Realists
- Tech-innate
- Harder workers than Generation Y
- More frugal

Challenges
- Always lived online
- More diverse and unrestrained: only notice diversity if it is absent
- Image-driven (it has to look good)

Hutter, W.F. Understanding the Dynamics of a Multigenerational Workforce. Humanresourcesiq.com
Strengths and Weakness, Millenials, Gen-X and Baby Boomers, Business Insider
Chester, E. Employing Generation Why?

What They Think…

	Boomers	Gen X	Millennials	Gen Z
Born	1946-1964	1965-1981	1982-2000	2000
Influences & Defining Moments	Korean War; Civil, Women and Reproductive Rights and Ecology Movements; Woodstock, Sputnik; TV; dual incomes	moon landing; Watergate; MTV; video games; ATMs; CNN; Web; latchkey; divorce	9/11; Challenger; cell phones; pagers; computers	Mobile tech; financial crisis; Africa-American President; gay marriage
Values	challenge; ambition; achievement; power	leadership; freedom; truth; independence	safety; loyalty; security; hope	Realism; image

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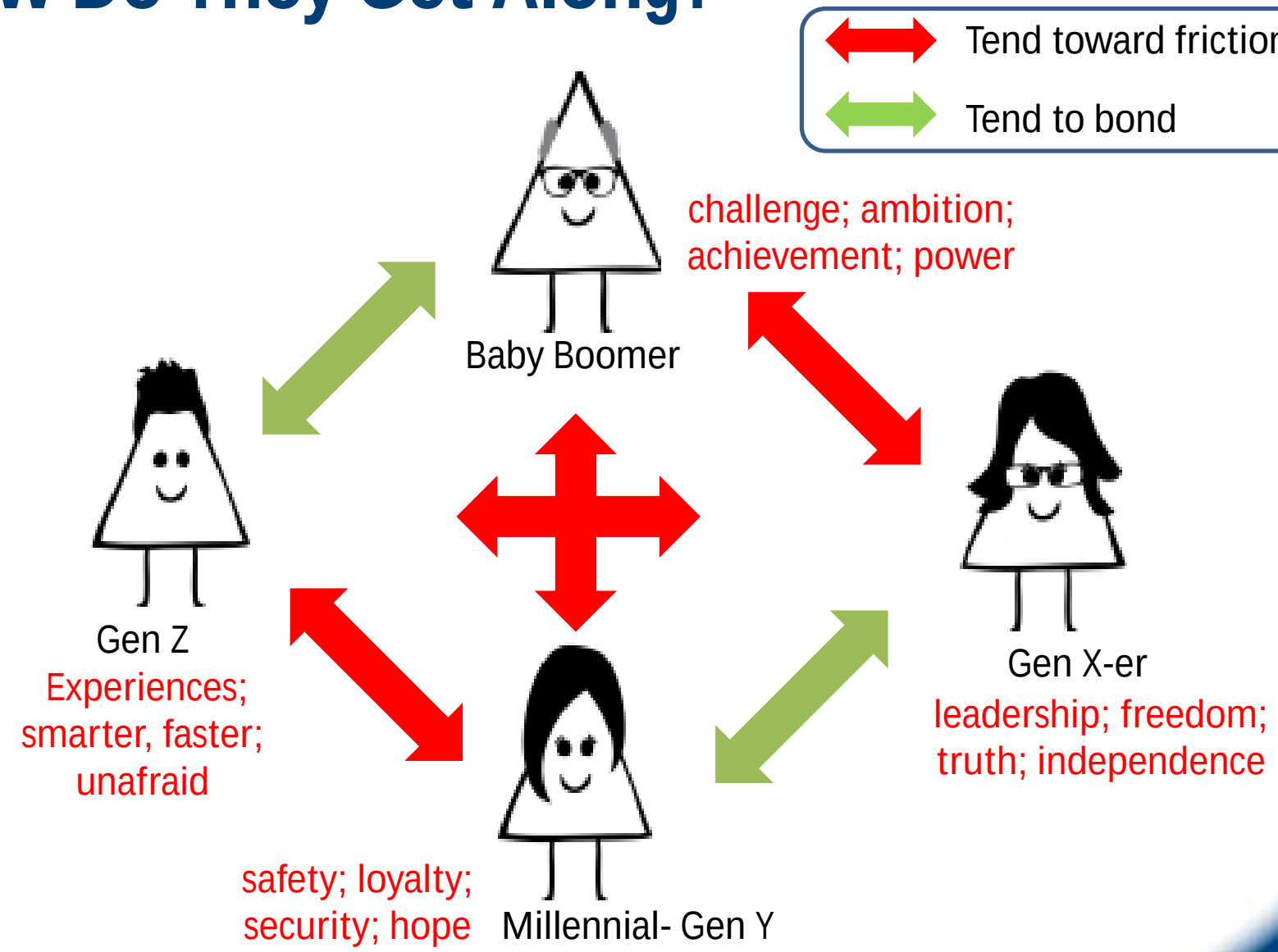
How Do They Get Along?



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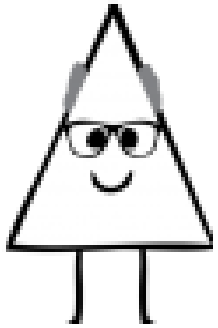
Meeting Expectations…

Baby Boomers

- Expect some flexibility due to their needs
- Thinks of themselves as parents to Gen X-ers and Millennials
- Expect to be rewarded for excelling

As a leader, you can provide them

- More flexibility
- Opportunities to mentor/train
- Reward and recognition



Hutter, W.F. Understanding the Dynamics of a Multigenerational Workforce. Humanresourcesiq.com

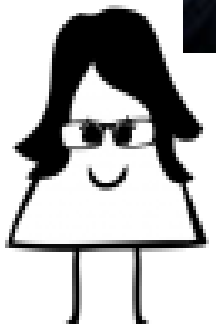
Meeting Expectations…

Gen X-ers

- Focus on goals, regardless of rules
- Go ‘out of the box’ to get things done more quickly
- Are pragmatic

As a leader, you can provide them

- Flexibility to bend rules
- Specific goals and deadlines
- Tools for efficiency



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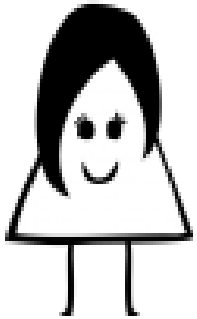
Meeting Expectations…

Millennials

- Are driven to instant results
- Are technology-centered
- Expect tech skills to carry them
- Parents of Generation Z

As a leader, you can provide them

- Space/tools to work with tech
- Education about the bigger business/organizational picture
- Face-to-face mentoring



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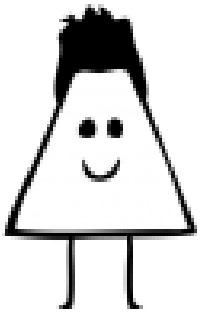
Meeting Expectations…

Generation Z

- Technology IS the experience
- They are ready to prove themselves

As a leader, you can provide them

- Mentorship - expertise
- Freedom
- Incentives



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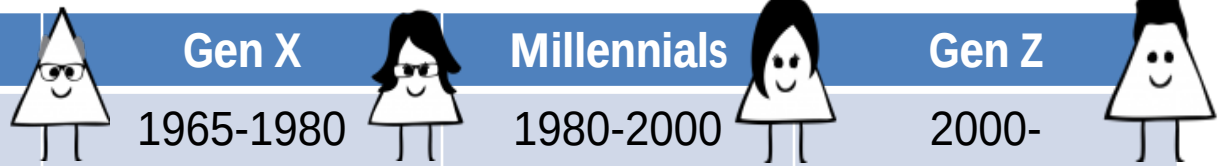
Two Distinct Generations…

NewsCred Insights, www.newscred.com

Meeting Expectations…

	Boomers	Gen X	Millennials	Gen Z
Born	1946-1964	1965-1980	1980-2000	2000-
Work Preferences and Style	politically savvy; competitive environment; challenge authority for feedback; opportunity seekers; frequent job changers	work-life balance; skeptical of authority; self-reliant; oppose hierarchy; innovative; intentional, frequent job changing	diverse culture; collaborate; meaningful work; fun at work; flexibility	Looking for opportunity; willing to work harder; ready to compete; fearless
Meeting Career Needs	define promotional opportunities; annual feedback on progress with documentation	define career path expectations; real time feedback on progress	define career path *opportunities*; real time feedback on progress *and alignment*	define career path *opportunities*; real time feedback on progress *and growth potential.*



Hutter, W.F. Understanding the Dynamics of a Multigenerational Workforce. Humanresourcesiq.com
Center for Generational Kinetics, www.genhq.com

Closing Thoughts…

- Generations are going to shorten due to rates of change
- Generations are about behavior as much as time
- We will end up with six, maybe seven generations in the workforce
- Younger generations will influence and motivate older generations

Closing Thoughts…

- Generational **labels** can be dangerous: no two people are exactly alike – these are broad generalizations
- Generational diversity can be a tremendous **asset** – each of these age groups brings powerful skills to the table
- Your job as a leader is to ***empower*** and ***enable*** so that they can bring the team to organizational excellence


Q
&
A

Another Day in the Life of a DOE Contractor Attorney

Managing Your Professional Ethics and the Ethical Obligations of Your Client

Department of Energy Contractor Attorneys' Association

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Conflicting Obligations – ABA Model Rule Preamble, Paragraph 9

In the nature of law practice, . . . conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. . . . Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Organizational Ethics

- Required by Federal Acquisition Regulation (FAR)
- Government contractors must conduct themselves with the highest degree of integrity and honesty. FAR Subpart 3.1002(a).
- Contractors should have
  - A written code of business ethics and conduct
  - A business ethics and compliance training program and an internal control system that-
    1) Are suitable to the size of the company and extent of its involvement in Government contracting;
    2) Facilitate timely discovery and disclosure of improper conduct in connection with Government contracts; and
    3) Ensure corrective measures are promptly instituted and carried out. FAR Subpart 3.1002(b).

Professional Ethics

- Each state has a code of professional conduct
- For purposes of this presentation, we will refer to the American Bar Association (ABA) Model Rules of Professional Conduct

Govt. K'or Code of Ethics – Requirements

- Policy of FAR 3.1002 applies as guidance to all K'ors 3.1003(a)(1).
- The clause at FAR 52.203-13, Contractor Code of Business Ethics and Conduct, must be included in all K's exceeding $5.5M and performance of more than 120 days
- Whether or not the clause at 52.203-13 is applicable, a contractor may be suspended and/or debarred for
  - Knowing failure by a principal to timely disclose credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations or a violation of the civil False Claims Act
- Knowing failure to disclose as required is cause for suspension and/or debarment until 3 years after final payment (see 9.406-2(b)(1)(vi) and 9.407-2(a)(8)).

Friday, September 15, 2017

9:07 a.m. – Tyrion Lannister has been the general counsel of Casterly, LLC, for almost 30 years. Casterly is the managing and operating (M&O) contractor of a large DOE site located in a remote part of the country. Based his long tenure with the company, Tyrion is widely viewed as the person who "knows things." Consequently, he is frequently asked to serve on all sorts of teams and committees.

Casterly has had the contract for many years. It is anticipated that DOE will compete the contract within the next 18 months. Competition is expected. In fact, large government contracting companies have recently opened offices in town and are starting to attend Chamber of Commerce events and sponsor charity golf tournaments.

Friday, September 15, 2017 (Continued)

Tyrion has been asked to serve on Casterly's capture team to help pull together the company capture strategy and develop the company's proposal. Tyrion's sense of pride is somewhat diminished when the company's president, Ned Stark, says: "Glad you are on the capture team. I ask you to be on all of these teams because, based on some TV shows I watch, everything we say and do when you're on the team is protected by the attorney-client privilege."

What should happen?

- First, Is Ned's statement regarding attorney-client privilege correct?
- How should Tyrion respond to Ned's statement?
- If information relating to the capture team's activities is not protected by the attorney-client privilege, are there other privileges or protections that protect this highly sensitive information?

Keep in Mind: In-House Ethics Are a Little Different

- In-house counsel are governed by all the ABA Model Rules/state rules
- Most of the rules of professional conduct are geared toward private practice
- Differences include
  - Advertising
  - Client Trust Accounts
  - Fee disputes
  - Terminating the engagement
  - In-house attorney is an employee of the company
- **As an employee with compliance responsibilities, regulatory authorities may take a closer look at in-house counsel's actions/inaction**

Wednesday, March 14, 2018

7:15 p.m. -- Brienne Tarth, the business development manager in charge of the Casterly proposal team, runs into Podrick Payne at the local pizza place. Podrick is a DOE contracting officer who has been with DOE for many years. He is leading the DOE selection board for the competition of the contract currently held by Casterly.

On his way out, Podrick talks briefly with Brienne about his desire to work with Casterly after they win the upcoming competition. Brienne says that would be great and that she will talk to the rest of the Casterly team about the possibility.

Wednesday, March 14, 2018
A couple of Beers and 4 Slices Later

8:00 p.m. After enjoying her pizza and cold beer, Brienne notices a thick folder in the booth where Podrick had been dining. She picks up the folder, takes a look at it and discovers that it is DOE's draft source selection plan. Giddy, she goes straight to the office, makes a copy of the source selection plan, puts the original in the plant mail and sends it to Podrick. The plant mail is an anonymous system and Brienne does not leave any kind of note or other indicia that she is the one who found the file.

Thursday, March 15, 2018

10:07 a.m. – Tyrion is a couple of minutes late to the capture team meeting. The only seat available is next to Brienne. Tyrion looks over and notices some documents bearing DOE markings. Upon closer look, Tyrion concludes that the documents are from DOE's source selection plan.

What should happen?

- What should Tyrion do? Look the other way and pretend he didn't see anything? Something else? If he decides to act, when should he do so?

- Let's assume Tyrion decides to do nothing.
  - What are the implications for Casterly?
  - What are the implications for Tyrion?

Procurement Integrity

- Procurement Integrity Act, 41. U.S.C. §§ 2101-07
- FAR Subpart 3.104
- Basics
  - Prohibits
    - Disclosing Procurement Information
    - Obtaining Procurement Information
    - Former Government Official's acceptance of compensation from a contractor under certain circumstances
  - Requires
    - Agency official contacted by offeror concerning possible non-federal employee to report such contacts

“Source selection information” – Definition

- [A]ny of the following information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:
  - Bid prices submitted in response to an agency invitation for bids, or lists of those bid prices before bid opening
  - Proposed costs or prices submitted in response to an agency solicitation, or lists of those proposed costs or prices
  - Source selection plans
  - Technical evaluation plans
  - Technical evaluations of proposals

“Source selection information” – Definition (Continued)

- Cost or price evaluations of proposals
- Competitive range determinations that identify proposals that have a reasonable chance of being selected for award of a contract
- Rankings of bids, proposals, or competitors
- Reports and evaluations of source selection panels, boards, or advisory councils
- Other information marked as “Source Selection Information-See FAR 2.101 and 3.104” based on a case-by-case determination by the head of the agency or the contracting officer, that its disclosure would jeopardize the integrity or successful completion of the Federal agency procurement to which the information relates

Contractor Bid or Proposal Information

- "Contractor bid or proposal information" means "any of the following information submitted to a Federal agency as part of, or in connection with, a bid or proposal to enter into a Federal agency procurement contract, if that information previously has not been made available to the public or disclosed publicly: –
  a) Cost or pricing data (as defined in section 2306a(h) of title 10 with respect to procurements subject to that section and section 3501(a) of this title with respect to procurements subject to that section).
  b) Indirect costs and direct labor rates.
  c) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.
  d) Information marked by the contractor as 'contractor bid or proposal information', in accordance with applicable law or regulation." 41 U.S.C. § 2101(2).

FAR 3.104 Procurement Integrity

- 3.104-3 Prohibition on obtaining procurement information (41 U.S.C. 2102).
  - A person must not, other than as provided by law, knowingly obtain contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates
  - “Person” includes “any contractor, other business entity, or individual who obtains information even if that person is not participating in the procurement.” John Cibinic, Jr., James F. Nagle, Ralph C. Nash, Jr., Administration of Government Contracts, 5th ed. (2016)

Rule 1.13 – Organization as a Client

- If a lawyer knows that an officer, employee or agent is engaged in action, intends to act or refuses to act in a manner that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then, unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if necessary, the highest authority that can act on behalf of the organization.

Variation of Fact Pattern

How does it change the analysis if Podrick had decided to give the information in the source selection plan to Brienne?

FAR 3.104 Procurement Integrity

- FAR Subpart 3.104-3
- A person described in paragraph (a)(2) of this subsection must not, other than as provided by law, knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates. (See 3.104-4(a).)
- Paragraph (a)(1) of this subsection applies to any person who-
  - Is a present or former official of the United States, or a person who is acting or has acted for or on behalf of, or who is advising or has advised the United States with respect to, a Federal agency procurement; and
  - By virtue of that office, employment, or relationship, has or had access to contractor bid or proposal information or source selection information

Penalties/Consequence

- Criminal
  - "…fined under title 18, imprisoned for not more than 5 years, or both." 41 U.S.C. § 2105(a).
- Civil
  - Individual -- not more than $50,000 for each violation plus twice the amount of compensation that the individual received or offered for the prohibited conduct"
  - Organizational – not more than $500,000 per violation and twice the amount of compensation that the organization received or offered for the prohibited conduct" (41 U.S.C. § 2105(b))

Wednesday, June 19, 2019

3:30 p.m. – Tyrion is in his office basking in Casterly's big win, which was announced by DOE almost two weeks ago. The time for unsuccessful bidders to protest at GAO or the agency has passed. Confident that no one will elect to protest at the Court of Federal Claims, Tyrion is comforted by 5 more years of job security. He is interrupted by Casterly's Internal Auditor, Petyr Baelish. Baelish is frantic. In reviewing some recent invoices, Petyr discovered that Casterly has been inappropriately charging DOE for the costs of alcohol at Casterly's weekly afterhours parties. Casterly employees enjoy their wine, beer, and mead. Consequently, they consume a lot of alcohol.

Wednesday, June 19, 2019 (Continued)

Baelish indicated that the purchasing agent in charge of the alcohol purchases stated that he knew the costs were unallowable but had the invoices falsely describe the alcohol as: “Miscellaneous Supplies.” Baelish has not had the opportunity to complete his investigation. Based on the information Baelish has at that time, he does not know the full extent of the problem and who else, besides the purchasing agent, was involved.

What Should Happen?

FAR 52.203-13 Mandatory Disclosure Rule:

- The contractor shall timely disclose, in writing, to the OIG, with a copy to the CO, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed-
  - A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or
  - A violation of the civil False Claims Act (31 U.S.C. 3729-3733)

Investigation Basics

- Determine who will lead
- Develop plan
- Form Team (limit the size)
- Identify reporting chain
- Communicate and enforce protocols to maintain privilege and confidentiality
- Issue document hold
- Identify those with relevant information
- Determine what, when and to whom to disclose

Thursday, June 20, 2019

5:02 p.m. – Tyrion has had a busy day. He met with Casterly's President, Ned Stark, first thing in the morning. Tyrion explained to Ned that they should disclose the potential false claims to the DOE IG and the CO immediately. Ned said that Tyrion was overreacting and that reporting the problem was the wrong thing to do. That is not how Ned wants to end a long and successfully performed contract and transition to the start of a new one. Tyrion disagreed with Ned, so he went to the Chair of the Casterly Board of Directors, Robert Baratheon. Robert also told Tyrion not to report anything. There is nowhere else within the company for Tyrion to go.

What Should Happen?

- What should Tyrion do?
  - By reporting all the way up the chain of command, has he satisfied his obligations?
  - ABA Model Rules 1.2, 1.6, and 1.13
- Can he disclose attorney-client information obtained during his representation of Casterly to DOE, the IG, or others?
  - ABA Model Rules 1.6, 1.13
  - U.S. ex rel. Holmes v. Northrop Grumman Corp. et al., Case No. 1:13-cv-00085(SD.MS), aff'd, (5th Cir. 2016)(in-house counsel breached privilege).
- Withdraw and resign employment?

Thursday June 20, 2019

7:30 – Tyrion is having dinner at the local pizza place. He gets a call from Theon Greyjoy, one of the associate GCs for Casterly. Tyrion explains the current situation regarding the "miscellaneous supplies." Since the restaurant is loud, Tyrion speaks in a louder than normal voice. Special Agent Varys, of the DOE IG's Office, is sitting two booths over and overhears the entire conversation.

Sometimes You Just Need a Reminder

- Although the analysis to this scenario is simple, we should always be reminded of careless ways client confidences can be revealed – this kind of thing happens

- Model Rule 1.6 -- A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

  - **Comments – Acting Competently to Preserve Confidentiality**

Sometimes You Just Need a Reminder
(Continued)

- Lawyer must act competently to safeguard information against unauthorized access by third parties and inadvertent or unauthorized disclosure.

- Inadvertent or unauthorized disclosure of information does not violate the rule if lawyer has made reasonable efforts to prevent access or disclosure.

Tuesday, September 10, 2019

10:00 a.m. – "Partnership Team" Meeting

The new contract contains the following provision: "The Contractor, in partnership with DOE and throughout the Contract, shall seek to identify requirements and processes that impede progress and recommend efficiencies and performance improvements that reduce the actual cost and/or improve the schedule for the work."

Based on his knowledge of the site, Tyrion has been asked to be Casterly's lead representative on a "Partnership Team" with DOE personnel. During the first meeting, there is discussion about a particular DOE requirement. Tyrion knows that removal of this requirement is in the best interest of the "partnership" – it will greatly increase efficiencies and reduce cost. However, removing the order from the contract will increase the risk to Casterly and potentially have a substantial negative effect on Casterly's fee.

What Does Tyrion Do?

- Who is the client? Casterly? The “Partnership”?
- What position should Tyrion advocate for?
- Anything else Tyrion could/should do?
- How is the line between acting as lawyer and business person drawn?

Almost Daily

When Tyrion first started working at the site, there was a DOE Field Counsel, John Snow, within walking distance. Tyrion had an excellent relationship with John and they discussed, within their respective obligations to protect client confidences and other confidential information, almost every issue. DOE has since reorganized and the DOE Counsel responsible for the site is over a thousand miles and several time zones away. It is much more difficult to communicate with DOE Counsel since the reorganization.

Out of convenience, DOE personnel will even sometimes even ask Tyrion for advice.

How Does Tyrion Manage this Situation?

- Is it appropriate for Tyrion to advise DOE personnel?
  - Model rule 4.2, 4.3
- When should Tyrion involve the DOE counsel?

Contacts with Govt. Officials

- **DC Bar – Ethics Opinion 340**
- **Contacts with Government Officials In Litigated Matters**

Under D.C. Rule 4.2(d), a lawyer representing a client in a dispute being litigated against a government agency may contact a government official within that agency without the prior consent of the government's counsel to discuss substantive legal issues, so long as the lawyer identifies himself and indicates that he is representing a party adverse to the government. In addition, the lawyer may also contact officials at other government agencies who have the authority to affect the government's position in the litigation concerning matters, provided that the lawyer makes the same disclosures as stated above. The lawyer cannot, however, contact government officials either within the agency involved in the litigation or elsewhere concerning routine discovery matters, scheduling issues or the like, absent the consent of government counsel.

Wednesday, September 18, 2019

2:36 – As part of the Casterly/DOE “partnership” effort, Tyrion has been given an office in the DOE building. When he works there, his phone is answered by the DOE operator and he has a DOE email address. There is even a large DOE logo behind his desks. Many people assume Tyrion is a DOE employee. When that happens, Tyrion does nothing to correct their mistake.

Since he is there, the DOE FOIA Officer has asked Tyrion to help out and respond to some FOIA requests.

Is There a Problem?

- **Rule 4.3: Dealing with Unrepresented Person**

- When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- Inherently governmental functions
  - Prohibitions
  - Why it’s a problem

Inherently Governmental Functions

- Only government officials can perform “inherently government functions”
  - Functions that are so intimately related to public interest as to mandate performance by government employees, such as:
    - Direction/control of federal employees
    - Determination of budget policy, guidance and strategy
    - Resource allocation or program management duties
    - Approval of contractual documents or administering contracts
    - Obligating Congressional authorized funding
- Contractor identification is a must

Inherently Governmental Functions

- Problems created by contractors performing inherently government functions and/or not properly identifying themselves as contractors include
  - Unauthorized advance release of procurement information - giving unfair advantage to one or more contractors
  - Disclosure of source selection information, such as source selection plans, evaluation factors, exact funding amounts, proposals, and proposal evaluations
  - Risk of unauthorized work direction (contractors mistaken for Gov’t employee)

Bonus Topics

- 10 CFR 719 and the attorney-client privilege
- Dealing with the belligerent attorney
- Contractor Team Arrangements (unless Mark is covering)

Questions

Ivan Boatner

Of Counsel

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With more than 20 years of experience in the government contracting sector, Mr. Boatner brings a thorough understanding of the laws and regulations relevant to government and Department of Energy contractors to his practice as a member of Baker Donelson's Government Enforcement and Investigations Group.

Overview

Mr. Boatner's experience working in the government sector includes representing and advising the government and contractors in a variety of matters, such as government contract claims, the False Claims Act, the Federal Tort Claims Act, the Freedom of Information Act, employment disputes, and whistleblower cases.

Mr. Boatner joined Baker Donelson after spending 14 years as general counsel for Oak Ridge Associated Universities (ORAU), a large government contractor, where he was responsible for overseeing all legal matters, in addition to serving on ORAU's Strategic Leadership Team. Mr. Boatner's duties at ORAU included responsibility for contractor assurance activities such as environment, safety, and health (ES&H), security, risk management, quality, project management and internal audit. Prior to that, he served as a federal litigation attorney for the U.S. Department of Energy (DOE) Oak Ridge Operations. Throughout his career, Mr. Boatner has developed close relationships with decision makers at government contractors in both Oak Ridge and throughout the DOE complex.

Representative Matters

- Negotiated contracts and modifications thereto with more than 20 federal agencies.
- Advised clients on government contract compliance requirements, including the Federal Acquisition Regulation (FAR) and agency-specific regulations such as the Department of Energy Acquisition Regulation (DEAR) and DOE Orders.
- Reviewed proposals, ensured compliance with federal procurement requirements, and drafted sections of a major proposal which resulted in the awarding of contracts valued at more than $4 billion to the client.
- Developed corporate policies and training on matters such as business ethics and risk management.
- Served as DOE counsel in False Claims Act, Federal Tort Claims Act, and Contract Disputes Act litigation.
- Represented the DOE in a federal sector Title VII claim brought by a member of the Senior Executive Service.
- Advised the DOE Oak Ridge Freedom of Information Act Office.
- Served as the DOE Contracting Officer's Representative for legal matters.

- Represented the DOE in numerous whistleblower cases before the Department of Labor and Merit Systems Protection Board.

Professional Honors & Activities

- Member – American Bar Association
- Member – Department of Energy Contractor Attorneys' Association (2004 – present)
- Member – Association of Corporate Counsel (2011 – present)
- Board of Directors – Oak Ridge Public Schools Education Foundation (2015 – present)
- Board of Directors – Oak Ridge Chamber of Commerce (2018 – present)
- Member – Energy Facility Contractors Group, Risk Management Task Team (2016 – 2018)
- Member – City of Oak Ridge 75th Anniversary Committee

Education

- Tulane University School of Law, J.D., 1992, cum laude
  - *Tulane Law Review*, senior associate editor
- Sewanee: The University of the South, B.A., 1989, cum laude

Admissions

- Tennessee, 1992
- United States Federal Court for the Eastern District of Tennessee, 1993

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As a member of Baker Donelson's Government Enforcement and Investigations Group, Joshua Mullen concentrates his practice in government contracts and complex commercial litigation.

Overview

Mr. Mullen focuses his practice on government contracts and complex commercial and business litigation.

Prior to joining Baker Donelson, Mr. Mullen served as a legislative assistant in Washington, D.C., to United States Congressman Marsha Blackburn (now Senator Blackburn), where he primarily advised on issues related to health care and energy policy. Mr. Mullen also worked as an information systems and business process consultant for a multinational business consulting, accounting and auditing firm. Mr. Mullen's diverse experiences in policy and government contracts, business consulting, and complex litigation provides him with a broad skillset and a unique ability to understand and meet clients' diverse business and legal needs.

Representative Matters

- Advised government contract clients regarding the negotiation of subcontracts, negotiation of payment disputes, the Federal Acquisition Regulations (FAR) and similar state and local regulations, and general advice regarding compliance issues.
- Represented government contract clients with asset sales and acquisitions, including the negotiation of novation agreements and advice about business structure.
- Advised government contract clients in connection with the Small Business Administration (SBA) size regulations, including without limitation, the preparation of SBA Mentor-Protégé agreements, joint ventures under the Mentor-Protégé program, and advice about SBA affiliation rules.
- Represented clients in multiple bid protests before the Government Accountability Office (GAO), multiple state procurement departments, municipal governments, and in court.
- Advised government contract clients in the technology services area regarding negotiations of subcontracts, the FAR and similar state and local regulations, and general advice regarding compliance issues.
- Performed government investigations related to FAR and regulatory compliance.
- Represented a client before the Armed Services Board of Contract Appeals (ASBCA) relating to an affirmative government claim, which resulted in the client achieving a six-figure reduction in costs under a contract.

- Served as the government contracts counsel for the negotiation of an asset sale on behalf of two sister pharmaceutical companies. The purchaser was a buyer affiliated with and funded by a Chinese entity. Assets sold consisted of realty and personalty in Kentucky and Puerto Rico, and purchase price, including tax credits and earnouts, equaled $36 million. Representation involved the assignment of contracts with state and federal government agencies, the negotiation of a novation agreement and other assignment agreements, and other regulatory and compliance matters.
- Briefed and argued a motion to dismiss that resulted in the complete dismissal of nine separate counterclaims that were asserted against client. The claims included, but were not limited to, fraud and misrepresentation, fraudulent and deceptive takeover of a corporation, and breach of contract.
- Briefed and argued multiple motions to compel arbitration and managed discovery related to multiple pre-arbitration disputes related to the enforceability of arbitration agreements.
- Advised government contract clients in connection with business structure and formation issues related to Small Business Administration (SBA) size regulations, the Small Business Innovation Research (SBIR) Program, and contract novations.
- Briefed and argued a Response to a Plaintiff's Motion to Amend that attempted to transform a first party insurance case into a major putative class action lawsuit that resulted in a denial of the Motion to Amend and a defeat of the Plaintiff's attempt to bring class action claims against the insurance company client.
- Briefed and argued a motion for summary judgment defending an insurance company in relation to an insurance coverage dispute that resulted in a full dismissal of all of plaintiff's claims.
- Handled several insurance coverage disputes involving claims of bad faith, violations of the Tennessee Consumer Protection Act and breach of contract.

Professional Honors & Activities

- Recognized as a *Mid-South Super Lawyers* Rising Star (2014 – 2018)
- Selected as member of Tennessee Bar Association Leadership Law Class of 2017
- Selected as a member of the inaugural class of the Nashville Bar Foundation Leadership Forum (2014 – 2015)
- Member – Nashville, Tennessee and American Bar Associations
- Member – Williamson County Bar Association
- Member – Federalist Society
- Member – Republican National Lawyers Association

Civic Involvement

- Stakeholder – Church of the City, Franklin, Tennessee
- Williamson County Chamber Young Professionals Board (2014 – 2015)

- Advisory Board Member – Young Jacksonian Society, The Hermitage, Home of President Andrew Jackson (2013 – 2015)

Publications

- "The Limitations on Subcontracting Rule: DOD Makes Immediate Change; FAR Council Issues Proposed Rule" (January 2019)
- "SBA Small Businesses: New Law Increases Annual Receipts Measurement for Size Calculations" (January 2019)
- Co-author – "Sunk: What Protection Does the Sinkhole Statute Offer Your Clients?," *Tennessee Bar Journal*, Volume 49, Number 10 (October 2013)

Speaking Engagements

- "Legal Aspects of Being a Small Business in the Federal Marketplace," United States Army Corps of Engineers Small Business Industry Day (March 2019)
- Panelist – "Lessons Learned from SBA's All Small Mentor-Protégé Program," ABA Public Contract Law Meetings (November 2018)
- Co-presenter – "Government Contract Teaming Agreements," PTAC Construction Opportunities Conference , Nashville, Tennessee (October 2018)
- "Joint Venturing for New Business Opportunities," Energy Technology and Environmental Business Association (ETEBA) Business Opportunities Conference, Knoxville, Tennessee (October 2018)
- Keynote Speaker – "Ethics & Compliance Issues for Government Contractors," Energy Technology and Environmental Business Association (ETEBA) dinner, Knoxville, Tennessee (February 2018)
- Co-presenter – "Defending Sinkhole Insurance Claims in Tennessee," TennBarU CLE webcast (February 2014)
- "Legal Writing Never Gets Erased: Best Practices for Complaints, Answers, Motions, Responses and Appellate Briefs," TennBarU CLE program (March 2013)

Education

- University of Tennessee College of Law, J.D., Order of the Coif
  - Student Materials Editor – *University of Tennessee Law Review*
  - Senior Commentary Editor – *Transactions: The Tennessee Journal of Business Law*
  - Recipient – 2007/2008 Judge Harry W. Laughlin, Jr. Best Case Note Award, *University of Tennessee Law Review*
  - University of Tennessee Baker Scholar; Howard H. Baker, Jr. Center for Public Policy

  - University of Tennessee College of Law Certificates of Academic Achievement: Constitutional Law, Evidence, Legal Process I, National Security Law, Pretrial Litigation
  - Recipient – CALI Awards for Academic Achievement: Constitutional Law, National Security Law, Pretrial Litigation
- Taylor University, B.S., Business Information Systems, cum laude

Admissions

- Tennessee
- District of Columbia
- Eastern District of Arkansas
- U.S. District Court for the Eastern, Middle and Western Districts of Tennessee
- U.S. Court of Appeals for the Sixth Circuit
- U.S. Court of Appeals for the Eighth Circuit

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Mary Blatch

Director of Advocacy and Public Policy
Association of Corporate Counsel

Mary Blatch is associate general counsel & senior director of advocacy of the Association of Corporate Counsel (ACC) in Washington, DC. ACC is the world's largest legal association dedicated exclusively to serving the interests of in-house counsel. With an international membership of more than 45,000 in-house lawyers at more than 10,000 organizations in 85 countries, ACC serves as the "voice of the in-house bar" for corporate lawyers at 98 percent of the Fortune 100 and 51 percent of the Global 1000.

In this position, Blatch directs ACC's regulatory, legislative and judicial advocacy efforts on attorney-client privilege, attorney ethics and mobility, corporate compliance and other issues of importance to in-house counsel.

Prior to joining ACC, Blatch served as a senior manager at Deloitte, working on regulatory advocacy and compliance issues for the tax practice. Before joining Deloitte, she was a litigation associate at McKee Nelson LLP and Hogan & Hartson LLP (now Hogan Lovells LLP). She also served as a federal judicial clerk in the Eastern District of Virginia.

Blatch holds a JD from the Columbus School of Law at Catholic University of America and received a BA from Spelman College.

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About ACC: *The Association of Corporate Counsel (ACC) is a global legal association that promotes the common professional and business interests of in-house counsel who work for corporations, associations and other organizations through information, education, networking, and advocacy. With more than 45,000 members in 85 countries employed by over 10,000 organizations, ACC connects its members to the people and resources necessary for both personal and professional growth. By in-house counsel, for in-house counsel.® For more information, visit www.acc.com and follow ACC on Twitter: @ACCinhouse.*

Maintaining an Engaged Safety Culture in the DOE Nuclear Complex – Investigation and Enforcement of Nuclear Safety Complaints

John Englert - Saul Ewing Arnstein & Lehr LLP
Virginia Grebasch - Counsel to the DOE Inspector General
Kevin Dressman - Director of the DOE Office of Enforcement

Safety Culture

- Definition:
  - An organization's values and behaviors modeled by its leaders and internalized by its members, which servie to make safe performance of work the overriding priority to protect the workers, the public, and the environment.

- Safety conscious work environment:
  - A work environment in which employees feel free to raise safety concerns to management (or regulator) without fear of retaliation.

Safety Culture

- Dealing with Safety Concerns: Establishing Trust and Respect
  - Investigate the concern
  - If verified, develop corrective actions
  - Either way, report back to complainant
- Trust and respect fosters open communication of safety concerns
  - Enables contractors to learn of safety concerns quickly and address them promptly

Whistleblower Processes – Safety Concerns

- 10 CFR Part 708 – DOE Contractor Employee Protection Program
- 41 U.S.C. § 4712 – Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information
- Inspector General Act
- DOE Order 442.1A – Employee Concerns Program
- Energy Reorganization Act - Department of Labor's Whistleblower Protection Program
- Federal and state courts
- 10 CFR Part 851 - worker requests for enforcement investigation

DOE Worker Safety and Health and Nuclear Safety Retaliation Provisions

- 10 CFR Part 851:
  - Contractors are required to…establish procedures for workers to report without reprisal job-related fatalities, injuries, illnesses, incidents, and hazards and make recommendations about appropriate ways to control those hazards
  - Workers have the right to…express concerns related to worker safety and health
- 10 CFR Part 820:
  - An act of retaliation (as defined in 10 CFR 708.2) by a DOE contractor, prohibited by 10 CFR 708.43, that results from a DOE contractor employee's involvement in an activity listed in 10 CFR 708.5(a) through (c) may constitute a violation of a DOE Nuclear Safety Requirement if it concerns nuclear safety.

Acts of retaliation involving worker safety and health or nuclear safety issues are considered violations of Parts 851 and 820, respectively, and could result in the imposition of civil or contract penalties through the issuance of a PNOV to a DOE contractor.

DOE Office of Enforcement
Retaliation Cases Considerations

- The Office of Enforcement considers many factors when evaluating cases of alleged retaliation:
  - Safety nexus - many retaliation claims do not involve issues within the scope of Parts 820 or 851
  - Status of claim - we avoid interfering with civil proceeding
  - Management level associated with the retaliation
  - Contractor procedures for evaluating employee concerns and their adherence to procedure
  - Contractor's response when retaliation is affirmed
- Decision on enforcement action is independent of the validity of the safety concern. The act of retaliation is itself a safety concern due to the chilling effect it has on employees' willingness to speak up about safety issues.
- The Office of Enforcement does not determine if retaliation has occurred or have the authority to order restitution for an employee; only to impose civil penalties when contractors violate regulations.

Enforcement Cases Involving Retaliation

Contractor – Location	Outcome
Savannah River Nuclear Solutions, LLC – Savannah River Site	Part 851 Preliminary Notice of Violation – 2017
Computer Sciences Corporation – Hanford Site	Part 851 Pending before the DOL/ARB
Bechtel National, Inc. – Hanford Site	Part 820 Preliminary Notice of Violation - 2008
Safety and Ecology Corporation – Portsmouth	Part 820 Preliminary Notice of Violation - 2005
Westinghouse Savannah River Company – Savannah River Site	Part 820 Enforcement Letter – 2004

MAINTAINING AN ENGAGED SAFETY CULTURE IN THE DOE NUCLEAR COMPLEX – INVESTIGATION AND ENFORCEMENT OF NUCLEAR SAFETY COMPLAINTS

SPEAKER BIOGRAPHIES

Kevin Dressman
Acting Director, Office of Enforcement, U.S. Department of Energy

Kevin Dressman is the Acting Director of the Office of Enforcement within the Office of Enterprise Assessments, the DOE organization that implements the Department's Congressionally-authorized regulatory enforcement program in the areas of nuclear safety, worker safety and health, and classified information security. Mr. Dressman has led and performed evaluations of safety and security performance of DOE and National Nuclear Security Administration operations in a wide variety of operational contexts, and regularly promotes performance improvement through sharing of lessons learned.

Mr. Dressman has over 25 years of experience in developing, implementing and evaluating occupational and nuclear safety, fire protection, environmental compliance, and physical security programs in a wide variety of mission environments at three Executive Branch agencies. Prior to his current assignment, Mr. Dressman served as the Director of the DOE Office of Worker Safety and Health Enforcement, where he led a staff of senior technical experts who monitor DOE nuclear, non-nuclear, and high hazard research laboratory and industrial operations for worker safety and health performance and compliance with the Department's occupational safety, industrial hygiene, fire protection, and related regulations and consensus standards.

Mr. Dressman previously served in senior management positions with the U.S. Environmental Protection Agency and the U.S. Department of Agriculture where he led agency-wide programs for developing and implementing environmental, health, and safety (EHS) policies and programs as well as EHS inspections and audits.

Mr. Dressman holds a Master of Science degree in Environmental Science from Johns Hopkins University, a Bachelor of Science degree from Frostburg State University, and has completed the Federal Executive Institute's Leadership for a Democratic Society program.

Virginia Grebasch
Counsel to the Inspector General, U.S. Department of Energy

Virginia Grebasch was appointed Counsel to the Inspector General in August, 2012. She provides comprehensive legal advice to the Inspector General and senior leadership, serves as the Whistleblower Protection Coordinator, leads the Office of Inspector General's (OIG) privacy and disclosure mission (FOIA, Privacy Act, *Touhy*, and discovery) and is the OIG's liaison to Congressional staff.

Prior to joining the Office of Inspector General, Ms. Grebasch served for four years as a Senior Assistant Counsel in the Office of General Counsel, U.S. General Services Administration (GSA), where she provided legal advice to the Federal Acquisition Service's Office of Travel and Transportation, the Office of Government wide Policy, and the Office of Emergency Response and Recovery. In addition, Ms. Grebasch represented GSA in bid protests of major contracts before the Government Accountability Office. From 1991 to January 2008 Ms. Grebasch served in GSA's Office of Inspector General (OIG), first as an Assistant Counsel and then, from 1996 through 2007, as the Deputy Counsel. In that capacity she provided legal advice to the OIG and assisted the Department of Justice's Commercial Litigation Branch in pursuing cases that resulted in tens of millions of dollars in settlements under the civil False Claims Act.

Ms. Grebasch began her career with five years of active duty service in the Navy Judge Advocate General's Corps. After leaving active duty, she affiliated with the Navy Reserve, where she holds the rank of Captain, has commanded three units, and continues to serve. Ms. Grebasch holds a B.S. in Biology from Loras College in Dubuque, Iowa, and a J.D. from Creighton University in Omaha, Nebraska. She is licensed to practice law in Iowa and Maryland.

John Englert
Partner, Saul Ewing Arnstein & Lehr, LLP

John Englert has almost 40 years of diverse environmental experience. His career started in 1980 as an Environmental Scientist for NLO, Inc. working at the Niagara Falls Storage Site. He then joined Dames & Moore at the West Valley Demonstration Project where he performed safety and environmental assessments related to the decontamination of the country's only commercial nuclear fuel reprocessing plant, vitrification of high level radioactive waste and management of radioactive and mixed waste. John left West Valley to manage the cleanup of the former NUMEC facilities in Apollo and Parks Township in western Pennsylvania.

Mr. Englert received his law degree in 1993 and has practiced environmental and energy law since then. His experience spans a broad spectrum of environmental matters, ranging from environmental permitting of large and complex energy and industrial facilities to remediation of nuclear facilities and hazardous waste sites. John counsels a wide array of industrial and energy clients on environmental safety and health matters, assisting them with securing, amending and maintaining the government permits they need to operate and defending them in enforcement actions when things go awry. He also assists with first and third party appeals of environmental permits and counsels on environmental risks and regulatory challenges that clients face as they explore investment in or expansion of their operations.

Mr. Englert has participated in and led conducted numerous internal investigations and root cause investigations for private companies and for DOE contractors concerning safety and environmental matters, and alleged wrong doing in the environmental and safety areas.

Mr. Englert has bachelor's degree in biology, a master's degree in natural sciences and a juris doctor degree, all from the University of Buffalo. He is licensed to practice law in Pennsylvania and New York.

Making the CBCA Work for You

May 2, 2019

Judge Jeri Somers
Pablo Prando
Gail Zirkelbach

Litigating at the CBCA

- Preparing the Complaint and Answer
- Conducting discovery
  - Role of the Rule 4 File
  - Resolving disputes
- Motions practice
- Hearing expectations
- Post-hearing briefings

ADR at the CBCA

- Facilitative Mediation
- Evaluative Mediation
- Min-Trial
- Non-Binding Advisory Opinion
- Summary Binding Opinion

Making ADR Successful (or not)

- Appropriate format
- Committed parties
- Discrete issues
- Failure examples

LANL ADR Example

- MOU between NNSA, the Lab and the CBCA
- Interagency funds from NNSA to GSA
- How used to resolve subcontractor disputes
- Benefits and cost savings
- Next generation proposal

Questions?

Gail Zirkelbach is a partner in Crowell & Moring's Government Contracts Group and resident in the Los Angeles Office. She also serves as a member of the firm's Government Contracts Group Steering Committee. Gail's practice focuses on internal investigations, defense of fraud actions, and counseling aerospace and technology companies and operators of DOE laboratories in all government contracts and compliance areas at the federal, state, and local levels.

A leading government contracts attorney for more than 20 years, Gail concentrates her work on the defense of *qui tam* actions under the False Claims Act, conducting internal investigations, in the U.S. and abroad, and assisting clients with the development and implementation of compliance programs. She litigates at both the federal and state levels and at the Armed Services Board of Contract Appeals (ASBCA), the Civilian Board of Contract Appeals (CBCA), U.S. Court of Federal Claims, and U.S. Court of Appeals for the Federal Circuit. Her knowledge of both government contracts law and litigation strategy and technique enable her to conduct investigations and litigation effectively and efficiently. She has negotiated successful settlements involving complex legal issues with both governmental and private entities. Gail also assists clients with defective pricing and termination cases and bid protests, and counsels clients on intellectual property, cost accounting, cybersecurity, export, and compliance issues.

Judge Jeri K. Somers is the Chief Judge (Chair) of the United States Civilian Board of Contract Appeals. In addition to managing the CBCA, Judge Somers carries a full docket, and presides over trials involving multi-million dollar contract disputes arising from all civilian Federal agencies, including the United States Department of Transportation, the United States Department of Homeland Security, and the United States Department of Justice. Judge Somers also served in the United States Air Force as a Judge Advocate, retiring in the rank of Lieutenant Colonel in the United States Air Force Reserves. In her last assignment, she served as a Military Trial Judge, where she heard felony and misdemeanor cases involving military defendants. These cases included complex drug cases, cases involving criminal uses of the internet, sexual assaults, theft, and other cases involving a wide variety of crimes.

Judge Somers is currently an Adjunct Professor with George Washington University School of Law, where she teaches, among other courses, the *Government Contracts Experiential Learning Court - Moot Court, Formation*; *Formation of Government Contracts*; and *Government Lawyering*. In addition, she is an Adjunct Professor with the American University Washington College of Law, where she teaches *Government Contracts - Performance*.

Judge Somers earned her J.D. from the American University Washington College of Law and her B.A. in Biology from George Mason University. She holds bar memberships in Virginia and the District of Columbia.

Pablo Prando serves as Deputy General Counsel at Los Alamos National Laboratory (managed and operated by Triad National Security, LLC). As part of his duties as Deputy GC, Pablo is responsible for managing the Intellectual Property (IP), Litigation Management (LM) and Chief Privacy Officer / FOIA groups within the Office of General Counsel.

Prior to serving as Deputy GC, Pablo was the LM Group Leader for approximately five years. As the LM Group Leader, Pablo was responsible for directly overseeing the management of litigation (federal, state and administrative) arising from the operation of LANL. As the LM Group Leader, Pablo also advised management on a wide variety of non-litigation issues, including internal and external investigations, information practices, subcontract disputes, etc.

Prior to joining LANL in 1998, Pablo received a B.A. in Political Science with an emphasis in American Politics in 1995 from Occidental College in Los Angeles. Pablo then received his Juris Doctorate from Southern Methodist University School of Law in Dallas in 1998. Pablo participated in an International Comparative Law Program at Oxford University in 1997 and in 1998 became a member of the New Mexico State Bar.

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Department of Energy
Contractor Attorneys Association
2019 Spring Conference, May 2, 2019

Conflicts of Interest in Federal Contracting

Moderator:
Edmund M. Amorosi, SMITH PACHTER MCWHORTER PLC

Panelists:
J. Robert Humphries, Bechtel National, Inc.
Steven L. Schooner, Professor of Gov't Procurement,
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Full Bios at End

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Conflicts of Interest

- Personal Conflicts of Interest – "Revolving Door"
- Organizational Conflicts of Interest ("OCI")

Personal Conflicts of Interest

"Revolving Door"

- Former government employees may not represent contractors, or attempt to influence government officials, on programs they participated in while still employed by the government
- Statutory prohibitions for former government employees :
  - 1 year ban
  - 2 year ban
  - Lifetime ban
  - Foreign activity rules

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Personal Conflicts of Interest (cont'd)

"Revolving Door"

- Conflicts may arise in situations not expressly covered in FAR 9.505 or in the examples in FAR 9.508
- Each individual contracting situation should be examined on the basis of its facts and the nature of the proposed contract.
- The exercise of common sense, good judgment, and sound discretion is required in the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it.

Revolving Door - 1 Year Ban

- Accepting compensation from a contractor
  - Applies to Officers, Enlisted & Civilians
  - 41 USC 423(d); FAR 3.104-3(d)
- Communicating with employee's former agency for a 3rd party regarding any matter the 3rd party seeks official action from the employee's former agency
  - Applies to "Senior employees" including General/Flag Officers, and certain SES & SES-equivalent employees
  - 18 USC 207(c)(1)
- Representing/assisting a foreign government/political party before a Federal agency with intent to influence a decision by Federal agency
  - Applies to "Senior employees" including General/Flag Officers, and certain SES & SES-equivalent employees
  - 18 USC 207(f)
- Aiding/advising "the other side" in trade/treaty negotiations
  - Applies to Officers & Civilians
  - 18 USC 207(b)(1)

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Revolving Door - 2 Year Ban

- Attempting to influence the government regarding a government contract/other matter that employee did not participate in personally and substantially as a government employee, but that was under the employee's official responsibility during his last year in the government
  - Applies to Officers & Civilians
  - 18 USC 207(a)(2)
- Further restrictions on "Very Senior Personnel"
  - 18 USC 207(c)(1)

Revolving Door

Lifetime Ban

- Attempting to influence the government regarding a government contract/other matter that the employee participated in personally and substantially as a Federal employee
  - Applies to Officers & Civilians
  - 18 USC 207(a)(1)

Foreign Activity Rules

- Bars all 'senior" and "very senior" executive branch employees from certain duties in the area of representational or advocacy activities for or on behalf of a foreign government or foreign party for one year
  - 18 USC 207(f)

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Organizational Conflict of Interest

FAR 2.101 defines OCI:

- "[OCI] means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be impaired, or a person has an unfair competitive advantage."

FAR 9.502(c) further states:

- "An OCI may result when factors create an actual or potential conflict of interest on an instant contract, or when the nature of the work to be performed on the instant contract creates an actual or potential conflict of interest on a future acquisition. In the latter case, some restrictions on future activities of the contractor may be required."

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Organizational Conflict of Interest (cont'd)

FAR Subpart 9.5

"Organizational and Consultant Conflicts of Interest"

- 9.505-1 - Systems engineering and technical direction
- 9.505-2 - Specifications or work statements
- 9.505-3 - Evaluation services
- 9.505-4 - Proprietary information

DEAR Subpart 909.5

Organizational Conflict of Interest (cont'd)

Three groups:

(1) Biased ground rules:

a firm has, as a government contractor, prepared or assisted in preparing written specifications or a statement of work or otherwise submitted material to the government that lead directly, predictably, and without delay to such materials. Primary concern is that the firm could skew the competition in favor of itself.

(2) Unequal access to information:

a contractor had an opportunity in connection with performance of a government contract to access nonpublic information. Concern relates to risk that the firm may gain a competitive advantage in a later competition.

(3) Impaired objectivity:

a firm has conflicting obligations under different government contracts. Concern here is the firm's ability to render impartial judgments is compromised because of conflicting roles.

Organizational Conflict of Interest (cont'd)

- Contracting Officer's duties (FAR 9.504; DEAR 909.504):
  - Identify/evaluate OCI as early in the acquisition process as possible, and;
  - Avoid/neutralize/mitigate potential conflicts before award
- Contracting Officer should exercise "common sense, good judgment and sound discretion." FAR 9.504, 9.505; DEAR 909.504
- When an agency cannot avoid/neutralize a conflict, proper action is to disqualify offeror or cancel solicitation. DEAR 909.504.

What Are CO's Doing to Detect OCIs?

- Contracting Officers are required to:
  - Analyze planned acquisitions for potential OCI
  - Identify and evaluate potential OCI as early in the acquisition process as possible
  - Avoid, neutralize or mitigate OCI before contract award
  - Obtain advice of counsel and assistance from technical experts
  - Before issuing a solicitation, recommend a course of action for resolving the OCI to the head of the contracting activity. DEAR 909.504
- If it is in the best interests of the United States to award the contract notwithstanding the OCI, a request for waiver may be submitted to the Head of Contracting Activities, per a delegation. DEAR 909.503

Types of Work that Trigger OCIs

- Systems Engineering and Technical Direction
  - SETA or SE&I work
- Preparing specifications or statements of work
  - Preparing specifications for non-developmental items
- Providing evaluation services
  - Proposal or products evaluation; performing test and evaluation services
- Having access to non-public Government or third-party proprietary information
  - Management support services; government program/acquisition management office support; advisory and assistance services; computer network support services

Fundamental Business Decisions

- What kind of work will your business do?
- Making a clear choice can be ***branded*** and sold as a ***strength***
  - Some RFPs are now evaluating OCI risk, strength of plans, etc., as a competitive element
- Doing all kinds of work increases risk and costs
  - Costs to ensure compliance, and
  - Defend against when raised by competitors (even if it's not an actual OCI)

Contractors Need Procedures for

- Identifying actual or potential organizational conflicts of interest (OCIs) before proposals get started;
- Mitigating identified OCIs;
- Complying with applicable regulations and contractual OCI-related terms and conditions; and
- Protecting certain competition-sensitive information when teams within the business unit or other business units are competing for the same procurement

Why Are Those Procedures Needed?

- Consider special clauses and requirements that may necessitate adjustments to your process:
  - DEAR 952.209-8 Organizational Conflicts of Interest Disclosure-Advisory and Assistance Services (Jun 1997)
  - DEAR 952.209-72, Organizational Conflicts of Interest (Aug 2009)

Starting Points

- Code of Business Ethics and Compliance
  - Set the 'Tone at the Top'
  - Code is likely more general, but sets the foundation for subsequent/specific policies and procedures dealing with conflicts of interest (organizational and personal)
- An internal control system to:
  - Identify potential issues (preventative)
  - Reasonably assure compliance
  - Flag waiver/mitigation needs (detective)

Mitigation Techniques

- Communications restrictions
- Physical security for printed and electronic documents
- Restriction on use of program and/or systems sensitive information
- Workspace separation and access controls
- Protection of third-party proprietary information
- Employee awareness
- Periodic compliance reviews
- Restriction on employee job assignments
- Restriction on financial incentives
- Subcontractor work assignment monitoring

Someone Needs to Be Responsible for Compliance with the Mitigation Plan (PM?)

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Best Practices Include

- A Standing Review Process/Tool
  - Designated OCI Coordinator
  - Designated Reviewers
- Template Mitigation Plans:
  - Employee Level
  - Program Level
  - Independent Proposal Team Firewall Plans & NDAs
  - Subcontractor Level
- An OCI Tracking System/Tool
- Regularly Scheduled Training - tailored to the level and function of employees

Do it the same way every time to reduce likelihood of gaps in the process

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More on OCI Training

- Not just a Contracts and BD issue: everyone needs to understand it, especially those working on programs
- Strong training program allows your team to identify OCI issues with the competition as well
- Online Training helps:
  - Gets to people that work remote
  - Facilitates record keeping of training
  - Enables training at employee's pace/schedule

Contractor Disclosure

- Treat OCI identification as an integrity/responsibility issue since the government will increasingly do so
- Agency may shift burden of finding OCIs to the bidders
  - Existing contract disclosure clauses
  - Solicitation disclosure requirements
  - Discussions during procurement
  - Site visits and pre-award audits
  - Post-award audits required by contract

OCI False Claims Liability

- Contractor's failure to disclose OCI can constitute a false claim under the False Claims Act. See United States v. Sci. Applications Int'l Corp., 555 F. Supp. 2d 40 (D.D.C. 2008); United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908 (4th Cir. 2003); U.S. ex rel. Ervin & Assocs., Inc. v. Hamilton Sec. Grp., Inc., 370 F. Supp. 2d 18, 51-52 (D.D.C. 2005)

- U.S. v. Mission Support Alliance, LLC et al., Case No. 19-cv-5021 (E.D.Wa., Feb. 8, 2019) (complaint alleges that OCI led to inflated payments and FCA liability).

- Disclosure of OCI protects from integrity/responsibility issues later

- Disclosure of OCI reduces likelihood of protest later

Communicate with Agency

- Communicate with agency personnel
  - CO can accept mitigation plan or work with your company to prepare an acceptable mitigation plan before you spend $$ preparing proposal
  - CO will know that OCI issues are being considered and to what extent a contractor has declined to submit a proposal for a particular procurement
  - Agency exchanges with offeror regarding OCI mitigation plan ***generally*** do not constitute discussions

Communicate with Team Members

- Communicate with potential team members or vendors
- Coordinate OCI mitigation plans with team members and other interested parties
- Tailor teaming agreements and subcontracts
  - Require early disclosure of actual or potential OCIs
  - Require mitigation of OCIs

GAO Decisions Show Limits of Mitigation

- Nortel Government Solutions, Inc., B- 299522.5, B- 299522.6, 2009 CPD ¶ 10 (mitigation plan was not sufficiently detailed; agency should evaluate impact on offeror's technical approach to the extent plan relies on having review performed/augmented by government personnel/contractors)
- Cognosante, LLC, B-405868, 2012 CPD ¶ 87 (firewall would not adequately mitigate impaired objectivity OCI)
- TriCenturion, Inc., B-406032, *et seq.*, 2012 CPD ¶ 52 (divestiture plan provided specific details and milestones adequate to mitigate potential OCI)
- The Analysis Group, LLC, B-401726.3, 2011 CPD ¶ 166 (after CO determined that there was a remote possibility of OCI that could not be mitigated, CO properly executed a waiver of the residual OCI)

OCI Mitigation Strategies

- Mitigation strategies depend on the type of OCI
  - Unequal access to information
  - Biased ground rules
  - Impaired objectivity
- Plans are not effective if not enforced
- Ad hoc or post hoc mitigation is less likely to survive scrutiny

Unequal Access Mitigation Strategies

- Contractor has access to nonpublic information in the performance of a government contract that may give it an unfair competitive advantage in a later competition
- Fire walls and NDAs will usually be effective if done early and enforced
- Difficult to mitigate after the fact
- Release of information to competitors is often not practical

Biased Ground Rules Mitigation

- Biased ground rules
  - Contractor has ability to set the ground rules for another government procurement
  - Examples –
    - Contractor writes the specifications or SOW for a procurement; or
    - Procurement for a system that contractor provided under a Systems Engineering Technical Assistance (SETA) contract
  - Difficult to mitigate
  - Releasing conflicted contractor's work product will usually not sufficiently mitigate

Impaired Objectivity Mitigation

- Impaired objectivity
  - A contractor performing work under one government contract is required to:
    - Evaluate work it performed under another contract;
    - Evaluate work performed by a separate entity in which it possesses a financial interest; or
    - Evaluate work performed by a competitor
- Primary concern is contractor will not be able to evaluate work objectively because of economic interests

Impaired Objectivity Mitigation (cont'd)

- Pertains to organizations, not individual employees
- Firewalls within organization are not effective
- "Firewalled subcontractor" – Mitigation may be possible by separating the work that results in the conflict and subcontracting to another, unaffiliated contractor
  - Under this solution, subcontractors more closely resemble prime contractors because government must increase oversight of subcontractors.
  - Solution is only appropriate when scope of work is large and minor portion of the work would result in OCI.

Identifying OCIs in Competing Proposals

- Research internet for press releases about the contract and previous contracts of awardee
- Follow up with corporate record research and inquiries to industry contacts
- McTech Corp., B-406100; B-406100.2, 2012 CPD ¶ 97 (anonymous source leads to OCI exclusion)
- Ask for information about awardee at your debriefing
- Post-award protest may be untimely if you were aware of facts giving rise to potential OCI of competitor; brought concerns to agency's attention; agency responded that competitor's involvement was not improper; and you do not challenge agency's failure to preclude competitor from competing prior to closing time for receipt of proposals. See Honeywell Tech. Solutions, Inc., B-400771, 2009 CPD ¶ 49; but see Guident Tech., Inc., B-405112.3, 2012 CPD ¶ 166 (post award protest timely when agency did not advise protester that competitor was eligible)

Turner Constr. Co., Inc. v. United States, 645 F.3d 1377 (Fed. Cir. 2011)

- Post-award, post-bid protest investigation and analysis can be considered
- Subsequent discovery of significant potential OCI warrants post-award evaluation
- CO may disqualify firm from competition where firm may have obtained unfair advantage, even if no actual impropriety can be shown, so long as determination is based on hard facts, and not mere innuendo or suspicion
- Agency may provide information and analysis regarding OCI at any time during a protest; such information may be considered in determining whether the CO's OCI determination is reasonable

Jacobs Tech., Inc. v. United States, 100 Fed. Cl. 198 (2011)

- Unequal access to information OCI identified with respect to initial procurement
- Arbitrary and capricious for agency not to conduct additional analysis to determine if any potential OCIs existed for the re-procurement
- Although neither the Court nor GAO can conduct its own OCI analysis in the absence of agency action, they may require the agency to conduct further OCI analysis

Netstar-1 Gov't Consulting v. United States, 101 Fed. Cl. 511 (2011)

- CO improperly relied on contractor to identify OCIs where CO knew or should have known that potential OCI existed.
- CO failed to investigate and verify contractor's mitigation plan (policy of having employees sign internal nondisclosure forms and receive security training; establish "firewalls").
- While the FAR plainly adopts a strong preference in favor of resolving OCIs earlier rather than later, the failure by an agency to identify the existence of a potential significant OCI before the issuance of a solicitation is not fatal, so long as the agency can implement an effective mitigation plan.
- Remedies adopted after-the-fact cannot be effective if they only look forward and fail to address adequately OCI problems that occurred in the past.

Waiver of OCI Protest

- Concourse Grp., LLC v. United States,131 Fed. Cl. 26 (2017)
  - Post-award protest alleging OCI due to "unusually close" relationship between incumbent awardee's subcontractor and agency
  - Held: protester knew or should have known of protest "well before contract award" based on public documents upon which protester relied
  - Lesson: if aware competitor has impermissible OCI, protestor may waive protest ground by waiting until after contract award to protest

- A Squared J.V., B-413139, 2016 CPD ¶ 243
  - Agency excluded offeror because of OCI
  - Protest untimely because agency informed offeror of OCI but offeror failed to challenge determination before award

SRA Int'l, Inc. v. United States, 766 F.3d 1409 (Fed. Cir. 2014)

- Appeal of CFC decision regarding OCI waiver
  - CFC dismissed case but held CFC had jurisdiction to consider waiver issue notwithstanding FASA bar on task order protests
- Federal Circuit: OCI waiver issued in connection with a task order
  - Vacated CFC decision and instructed CFC to dismiss protest for lack of jurisdiction

Recent GAO Decisions

- A-P-T Research, Inc., B-413731.2, 2017 CPD ¶ 112
  - RFP identified contracts that could give rise to OCI
  - Awardee identified subcontractor that held identified contract
  - CO failed to assess awardee's "firewalled subcontractor" mitigation plan
- Advancemed Corp., B-415062, 2017 CPD ¶ 362
  - Conflict if contractor under RFP and Medicaid management information systems (MMIS) contractor in same geographic jurisdiction
  - Agency failed to consider conflict created by parent company of MMIS
- Ares Tech. Servs. Corp., B-415081.2, 2018 CPD ¶ 153
  - GAO review limited to determining if agency OCI waiver is in writing, describes extent of the OCI, and approved by appropriate individual

Recent GAO Decisions (cont'd)

- Archimedes Glob., Inc., B-415886.2, 2018 CPD ¶ 179
  - Agency excluded protester from consideration due to possible OCI
  - GAO: exclusion not based on facts, but innuendo and supposition

- Dell Servs. Fed. Gov't, Inc., B-414461.3, 2018 CPD ¶ 213
  - Individual helping prepare awardee's proposal had access to competitively useful, nonpublic information about protester
  - The information was not proprietary or source selection sensitive but GAO failed to consider if awardee had an unfair competitive advantage

- C2C Innovative Sols., Inc., B-416289, 2018 CPD ¶ 269
  - Rejected agency's OCI analysis; scope of OCI review insufficient

SPEAKER BIOS

Edmund M. Amorosi is the Managing Member of SMITH PACHTER MCWHORTER PLC and focuses his practice in government contracts and construction law. After graduating from George Mason University School of Law, Mr. Amorosi served as a law clerk to Judge Loren A. Smith on the U.S. Court of Federal Claims. Mr. Amorosi's government contracts practice includes bid protests, contract claims and disputes, and audits and investigations. Mr. Amorosi also practices construction law where he represents owners and general contractors in construction disputes. He has litigated cases in Federal and state courts, in international and domestic arbitrations, and before GAO and the boards of contract appeals. Before private law practice, Mr. Amorosi worked in the U.S. Senate and U.S. House of Representatives as a legislative aide and press secretary.

J. Robert (Rob) Humphries is Senior Counsel with Bechtel National, Inc. in Reston, Virginia. After joining Bechtel in 1995, Rob has supported numerous projects, primarily involving work for the Department of Energy and the National Nuclear Security Administration. He has supported procurements, protests and contract transitions throughout the DOE Weapons Complex. And despite visiting many of the DOE/NNSA sites, his last primary support was for the FUSRAP Program in Oak Ridge. Rob was one of the initial members of the DOE Contractor Attorneys' Association.

Before joining Bechtel, Rob was in private practice, specializing in government contracts law, at Arnold & Porter and at McKenna, Conner & Cuneo (now Dentons), in Washington, D.C. While in private practice, Mr. Humphries represented Bechtel in a number of matters, primarily bid protests before GAO. He also served as the Chairman of the ABA Section of Public Contracts Law, Ethics, Compliance Committee and Professional Responsibility Committee. Rob began his involvement in the DOE complex in a non-legal capacity, while serving as a lieutenant in the U.S. Navy, assigned to Admiral Rickover's staff at the Division of Naval Reactors.

He received his J.D. from George Washington University and is admitted to practice law in California, Virginia, and Washington, D.C. Rob has a Bachelor of Science in Naval Architecture and Marine Engineering from the Massachusetts Institute of Technology and a Master of Science in Shipping and Shipbuilding Management, a joint program of the Department of Ocean Engineering and the Sloan School of Management at MIT.

GW LAW | GOVERNMENT PROCUREMENT LAW

Steven L. Schooner is the ***Nash & Cibinic Professor of Government Procurement Law*** at the George Washington University Law School. Before joining the faculty, he was the Associate Administrator for Procurement Law and Legislation at the Office of Federal Procurement Policy (OFPP).

He previously served in the Commercial Litigation Branch of the Department of Justice; practiced with private law firms; served as a Commissioner at the Armed Services Board of Contract Appeals; and taught as an Adjunct Professor at the Judge Advocate General's School of the Army, in Charlottesville, Virginia. He is a Fellow of the National Contract Management Association and he serves on the Board of Directors of the Procurement Round Table.

He is author or co-author of numerous publications including THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT (now in its fourth edition). Professor Schooner's recent scholarship is available through the Social Science Research Network at h*ttp://ssrn.com/author=283370*. Follow Professor Schooner on Twitter, *@ProfSchooner*.

Todd M. Garland is a Senior Associate at SMITH PACHTER MCWHORTER PLC. His practice focuses on government contracts and construction law, procurement disputes, bid protests, and complex commercial litigation.

He has worked on dozens of bid protests at the Government Accountability Office ("GAO"), U.S. Court of Federal Claims, and the agency level. He also has experience representing contractors before agency boards of contract appeals, and contractors and subcontractors in commercial disputes in federal and state court.

Additionally, Mr. Garland has worked on white collar defense matters involving anti-corruption issues, mandatory disclosure obligations, and the civil False Claims Act.

Mr. Garland graduated *cum laude* from the University of Louisville Brandeis School of Law. He received his undergraduate degree from the College of William and Mary.

Questions

Charting a Course Through Uncertain Waters:

Understanding Key Ethical Issues Facing In House Counsel During Investigations

Moderator:

Mark J. Meagher, Partner, Dentons US LLP

Panel:

Hamilton (Phil) Fox, Washington DC Bar Disciplinary Counsel

Mark D. Olsen, General Counsel, Battelle Energy Alliance LLC

May 3, 2019

Background

- Sarah Collins is General Counsel for Photon Partners LLC (Photon), the management and operating (M&O) contractor for the High-Frequency Infrared Pulsating Laboratory ("HIP Lab" or Laboratory). The Laboratory is owned by the Department of Energy (DOE) and engages in advanced research in a number of different disciplines using its advanced, pulsating particle accelerator. Photon regularly enters into purchase agreements for the specialized equipment needed for the Laboratory's experiments and research.

Scoping the Investigtion

- Sarah is sitting at her desk late on a Thursday afternoon when Frank Ireland, the head of Photon's Internal Audit, rushes in to describe a new set of preliminary audit findings. Frank explains the following:
  - A whistleblower has alleged that an employee in Photon's purchasing department, Cassandra Brown, has a conflict of interest affecting the acquisition of a major piece of equipment by Photon to Optical Corp. The whistleblower alleges Cassandra has a close friendship with Optical's ownership team.
  - The whistleblower also has alleged that Cassandra's immediate supervisor, Bob Raymond, was knowledgeable about Cassandra's conflict of interest but did not take action to stop the procurement. The whistleblower provided no facts in support of this assertion and Internal Audit's initial work did not identify any such support.

Scoping the Investigation

- Internal Audit also explains that they have identified a government employee, Paul Roberts, who may be familiar with the equipment purchased from Optical Corp. Paul works for NASA which sponsors a Strategic Partnership Project at HIP Lab that plans to use the equipment.

Initiating the Investigation

- Sarah consults her Part 719 Legal Management Plan and determines that she needs to be the one to carry out the investigation rather than bringing in outside counsel.
- After informing her DOE counterpart in the Site Counsel's office about the investigation, Sarah huddles with her paralegal to
  - set up an interview schedule for the persons identified by Internal Audit and
  - request that Photon's IT Department image the computers for Cassandra and her supervisor, Bob.

Document Review

- Early Monday morning, the IT Department informs Sarah that the imaging of computers has produced ~1 million records.
- After consulting with DOE Site Counsel, and because Sarah has no prior background in conducting complex document reviews, Sarah directs her paralegal to oversee the review of the documents, including the development of search terms, hiring a team of 20 contract lawyers to conduct the expedited review of documents, and retaining a document management company to create a database for the review that will use AI to identify documents.
- What are Sarah's duties with respect to the review of documents that she has commissioned?

Interview No. 1
Bob Raymond: The Supervisor

- Sarah has Rob Raymond in the second interview slot. Bob appears nervous and apprehensive at the outset of the interview.
- What are Sarah's duties?
- Do those duties include advising Bob to seek his own legal counsel?
- What happens if on a break, Bob seeks to include his personal lawyer in the interview? How should Sarah respond?

Interview No. 2

Cassandra Brown: The Wrongdoer

- Sarah is really not looking forward to doing this interview. She plans to confront Cassandra with the evidence of Cassandra's conflict of interest and to seek to determine if Cassandra was working with any other HIP Lab personnel.
- How should Sarah handle the initial advisements starting the interview? From an ethics standpoint should she communicate anything to Cassandra beforehand?
- What type of confirmation does she need from Cassandra of an understanding with respect to Sarah's position on conflicts and the attorney client privilege?

Interview No. 3
Paul Roberts: The NASA Employee

- Finally, at the end of a long day, Sarah calls Paul Roberts to ask him about anything he might know concerning Optical Corp.'s sale of equipment to the Laboratory.
- Does Paul's status as a Government employee change Sarah's ethical obligations with respect to dealing with a third person?
- How about if Paul, instead of being a NASA employee, is a DOE Contracting Officer with authority over contractual matters at HIP Lab?

Thank you

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Mark Meagher is the Office Managing Partner of the Denver, Colorado office of the international law firm Dentons US LLP.

Mr. Meagher is a leading practitioner, with over twenty years of experience, in representing Department of Energy contractors in all aspects of their operations at DOE national laboratories and clean-up sites. He regularly provides counsel to contractors on the unique cost allowability, cost recovery, performance, contract administration and liability issues at DOE's facilities. He has successfully handled the defense of numerous civil false claims act cases and investigations at various DOE and NNSA sites. He also regularly handles contract adjustments and claims involving DOE and NNSA, as well as litigation between prime and subcontractors in the Complex.

RESUME

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EDUCATION

University of Virginia (BA with Honors in History, 1967)

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Yale Law School (LLB, 1970)

Articles and Book Review Editor, Yale Law Journal

EMPLOYMENT

Law Clerk to Hon. Frank N. Coffin, U.S. Court of Appeals for the First Circuit, 1970-71.

Law Clerk to Hon. Stanley F. Reed and Hon. Lewis F. Powell, Jr., Supreme Court of the United States, 1971-72

Assistant United States Attorney for the District of Columbia, 1972-73, 1974-77

Assistant Watergate Special Prosecutor, 1973-74

Organized Crime and Racketeering Section, United States Department of Justice, 1977-80 (Last position: Deputy Chief)

Private Practice, 1980-2011

Practiced alone or with one partner, 1980-85

Dewey Ballantine, Partner, 1985-90

Sutherland, Asbill, & Brennan, Partner 1990-2009

Practice Group Chair, Litigation (D.C.)

Member, Executive Committee

Of Counsel, 2009-2011

Assistant Bar/Disciplinary Counsel, 2011-2017

Disciplinary Counsel, 2017-

OTHER EMPLOYMENT (Not Full Time)

Associate Special Counsel, House Committee on Standards of Official Conduct, 1983-84

Instructor (Organized Crime), University of Virginia School of Law, 1981-84

Adjunct Professor (Counseling the Corporation in Crisis), Georgetown Law, 2011-17

OTHER EXPERIENCE

President, Assistant United States Attorneys Association, 1988-89

Member (1989-91), Vice Chair (1991-93), and Chair (1993-96), Board on Professional Responsibility

Member (1996-97) and Chair (1997-2000), Committee on Admissions and Grievances, District of Columbia Circuit

Member (2003-2005), Vice Chair (2005-2008), and Chair (2008-2009), D.C. Bar Legal Ethics Committee

Member, D.C. Bar Rules of Professional Conduct Review Committee, 2009-2011

Member, Committee on Unauthorized Practice of Law, 2009-2011

General Counsel and Director, Lawyers Committee on Civil Rights, 2008-2011

OTHER

District of Columbia Bar

Have taught numerous CLE courses on professional responsibility

Mr. Mark D. Olsen

General Counsel and Secretary
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Mr. Mark D. Olsen is the General Counsel and Secretary for Idaho National Laboratory. His career spans more than 30 years and includes service as Associate General Counsel for Battelle Memorial Institute in Columbus, Ohio, from April 2010 through October 2015. That assignment involved significant interactions with Pacific Northwest National Lab, National Renewable Energy Lab, Oak Ridge National Lab (where he served as Acting General Counsel from June 2014 through January 2015), Brookhaven National Lab, and National Biodefense Analysis and Countermeasures Center (a DHS-owned lab in Fort Detrick, Maryland, consisting of BSL-2, -3, and -4 labs). Previously, Mr. Olsen served three nuclear operations contractors at Hanford: Westinghouse Hanford Co. (1990-1991), Kaiser Engineers Hanford (1995-1996), and B&W Hanford Co. (1996-1999). From 1987-1989 and again from 1991-1995, he worked as an attorney for the U.S. Department of Energy-Idaho Operations Office. Prior to his federal service, he worked from 1984-1987 in private practice for a law firm in Idaho Falls, Idaho, where a significant part of the practice involved representation of INL contractors. In his current role, he is the Secretary to Battelle Energy Alliance's Board of Managers and oversees all legal work provided at INL. Mr. Olsen earned a Juris Doctor and a Bachelor of Science in economics from Brigham Young University and is a member of the bars of the state of Idaho and U.S. District Court of Idaho.

Corporate Transactions, CFIUS, FOCI: Best Practices & Emerging Issues for DOE Contractors

Damara Chambers and Scott Freling

May 3, 2019

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Agenda

- Best Practices for Corporate Transactions
- CFIUS Primer
- CFIUS Reform
  - FIRRMA
  - Pilot Program
- FOCI Mitigation Primer

Contractor M&A Climate

- In recent years, we have seen a steady flow of M&A activity across the government contracting industry.

- There has been a range of deals involving DOE contractors, including:
  - Jacobs' acquisition of CH2M Hill,
  - Veolia's acquisition of Wastren Advantage,
  - Veritas Capital's acquisition of APTIM from CB&I,
  - Leidos' acquisition of Lockheed's IS & GS business, and
  - AECOM's acquisition of URS.

- Government contracting is a highly-regulated industry, and corporate transactions must appreciate and account for this reality.

Sampling of Contractor Risks

Contract risks:

- Performance – award fees, CPARs, T4Ds, FAPIIS
- Incremental funding, T4Cs, stop work orders
- Sourcing – BAA and TAA
- Labor – time charging, SCA
- Disallowed costs
- Performance guarantees
- Third-party liability
- Representations and certifications

Audit and investigation risks:

- Contract / FAR compliance
- Incurred costs, indirect rates
- Business systems
- CAS compliance
- Affirmative disclosures
- Present responsibility
- Truthful Cost or Pricing Data

Contractor risks:

- Eligibility to compete – size, OCIs
- Pipeline and protest risk
- Supply chain management
- Cybersecurity
- NISPOM
- FCPA
- Trade controls – ITAR, EAR
- EEO / OFCCP
- Gifts and gratuities restrictions

Company risks:

- Ownership of equity
- Accuracy of financial statements
- IP infringement/open source issues
- Litigation/legal compliance
- Taxes
- Employee matters
- Environmental

Strategies for Prioritizing Diligence

- Spend time at the onset developing your diligence priorities by reference to, among other things:
  - Diligence stakeholders — e.g., board, business units, financial sources;
  - Deal structure;
  - Target's business — e.g., high-risk activities, classified work;
  - Future plans;
  - Regulatory approvals;
  - Integration — objectives and likely challenges.
- Focusing on integration from the onset can also shape diligence priorities and assist with finding synergies and savings pre-closing.
- Regulatory issues and relationships with government customers are of primary concern and should be addressed early on in the process given potential lead time for resolving issues.
- Employee matters (both diligence and integration) often have long lead time.

Organizational Conflicts of Interest

- Will the transaction create an actual or potential OCI for the target, the buyer, or one of their affiliates?
- Financial and legal diligence should consider OCIs:
  - The target's process for identifying and addressing OCIs, and
  - Whether business objectives might be affected by bringing the target under new ownership.
- Focus on overlapping programs, common customers, mitigation plans that might extend to affiliates.
  - Consider activities at all levels: parent, subsidiaries, affiliates.
- OCI risk is not static—must consider today (i.e., current contracts, pending bids) and tomorrow (i.e., pipeline, future business plans).
- Access to information can be a challenge.

Intellectual Property Rights

- Are there government rights or restrictions that attach to material IP?
- Diligence should consider whether there is material IP associated with the target's business or the buyer's post-closing plans.
- If there is material IP, investigate how the IP was developed and the rights and restrictions that might attach. For example,
  - Requirements for substantial manufacturing in the United States that may attach to a subject invention,
  - Royalty-free license rights in subject inventions, and
  - Government use rights in software or other technical data generated during performance of a government contract.

Asset Deals

- What are the challenges to be navigated in getting all of in-scope assets over to the buyer?
- Frequent considerations—
  - Prime contract novation(s)
    - Interim period between closing and novation approval
  - Third-party consents
    - Revenue-generating subcontracts
    - Lower-tier subcontracts
    - Teaming agreements
    - Joint venture agreements
  - Splitting in-scope and out-of-scope assets
    - Shared contracts
    - MATOCs with out-of-scope TOs

Pipeline and Protest Risk

- Will M&A foil a pending proposal effort?

- Potential scenarios—
  - Agency unease leading to a no-award decision
  - Post-award challenges by unsuccessful bidders

- Practical steps—
  - Ensure that the capture team is sensitized to the risk
  - Identify key proposal efforts that require careful scrutiny
  - Confirm that assets and other resources necessary to perform remain accessible
  - Proactive engagement with the agency is generally advisable

CFIUS

CFIUS Overview

- Background:
  - Inter-agency committee of the Executive Branch with authority to review foreign M&A and investment in U.S. business to determine impact on U.S. national security
  - Chaired by U.S. Department of Treasury with eight other voting agencies and several non-voting agencies – effectively "all of government" review
  - Requires approvals of senior political officials at each agency, and reports to President and Congress – literally stuck between both ends of Pennsylvania Avenue
- Authority:
  - CFIUS can review any transaction that results or could result in a foreign person acquiring control over a U.S. business (a "covered transaction")
  - CFIUS can act to mitigate any risk to "*U.S. national security*" that arises as a result of the covered transaction
  - CFIUS can take action to address a threat posed by a transaction through mitigation, but only the President can actually prohibit or unwind a transaction
  - No judicial review of substantive decisions made by CFIUS; some due process rights exist related to the CFIUS review process
- Process Fundamentals:
  - Historically a voluntary filing process, but incentives to file proactively – if approved, there is a legal safe harbor, but with no filing there is no such safe harbor and no statute of limitations
  - Formal process is 45-day initial review plus 45-day investigation, if necessary
  - CFIUS applies a risk-based analysis to each transaction

Committee Composition

Key Jurisdictional Concepts

Foreign Person:

- Defined as "any foreign national, foreign government, or foreign entity," or "any entity over which control is exercised or exercisable by a foreign national, foreign government, or foreign entity." *See* 31 C.F.R. § 800.216.
- "Foreign entity" means "any branch, partnership, group or sub-group, association, estate, trust, corporation or division of a corporation, or organization organized under the laws of a foreign state if either its principal place of business is outside the United States or its equity securities are primarily traded on one or more foreign exchanges." *See* 31 C.F.R. § 800.212.
  - Exception if a majority of the equity interest is ultimately owned by U.S. nationals.
- Thus, U.S. subsidiaries of foreign companies are "foreign persons."

U.S. Business:

- Defined as any entity engaged in interstate commerce in the United States, irrespective of the nationality of the persons that control it. *See* 31 C.F.R. § 800.226.
  - If foreign corporation conducts business in the United States, through a branch or subsidiary, the branch or subsidiary is a U.S. business.
  - Foreign corporation exporting and licensing technology to an unrelated U.S. business, with no fixed place of business in the United States, is not a U.S. business.
- In practice, any collection of assets that could potentially be a going concern are sufficient to comprise a U.S. business.

What is “Control”?

- The ability to “determine, direct, take, reach, or cause decisions” on important matters
- No bright line test; definition considers many different factors
  - Factors include percentage ownership, but no minimum threshold (e.g., “under 10%”)
  - Voting counts more than equity
  - Number and percentage of directors are important
  - Nature of the transaction and identity of the parties are important
- Debt, leases, contracts do not create control
  - But debt can be controlling if structured like equity
- Certain minority rights protected – e.g., power to prevent sale or pledge of all or substantially all assets; anti-dilution rights
  - CFIUS may find other minority protections to be non-controlling on a case-by-case basis

CFIUS Risk Assessment

THREAT X VULNERABILITY X CONSEQUENCE = RISK

- CFIUS conducts a risk-based assessment for each transaction
  - Assessment based in part on a classified threat assessment prepared by the Office of the Director of National Intelligence
- Assessment focuses on three factors:
  - *Threat* is a function of:
    - The access and coercive leverage potential threat actors have to the foreign acquirer;
    - The intent of those threat actors to take actions detrimental to U.S. national security; and
    - The technical and organizational capabilities of those threat actors to exploit vulnerabilities presented by the transaction
  - *Vulnerability* is a function of the attributes of the acquisition target that leave it susceptible to exploitation by a controlling entity
  - *Consequence* is a function of the potential nature, level, and duration of the impact of the transaction on U.S. national security
- If assessment finds an unacceptable risk to national security, CFIUS considers whether risk can be mitigated through an enforceable commitment from the parties that can be monitored
    - CFIUS certification to Congress – "no unresolved national security concerns" – greatly influences the substantive and process considerations

Mitigation of National Security Concerns

- If CFIUS concludes there is a threat to national security, it considers whether threat can be mitigated through an agreement with the parties
- Potential mitigation elements include:
  - *Ownership requirements:* e.g., potential voting/divestiture trust or proxy agreement
  - *Governance requirements*: e.g., U.S. citizen officers or directors; appointment of a "security officer"
  - *Security commitments*: e.g., maintenance of security measures or participation in security programs
  - *Physical access restrictions*: e.g., limitations on visits or access to facilities or premises
  - *IT/data access restrictions*: e.g., limitations on network access or access to IT resources and data
  - *Communications restrictions*: e.g., with the U.S. business and its employees
  - *Administrative processes*: recordkeeping and reporting obligations
  - *Compliance checks/monitoring*: e.g., government inspection, third-party monitor, third-party audit

Current CFIUS Environment

- CFIUS generally remains open to foreign investment – most transactions still getting approved
- China is animating the entire process
  - Not simply a "Trump issue" – concerns originated before Trump and are deeply held in professional U.S. national security community
  - Long-term strategic economic and military rivalry in technologies that define the 21st century
- Implications:
  - "National security" continues to evolve and is now defined more broadly
  - Even non-Chinese transactions are examined through China lens, and greater focus on transactions abroad that may touch on United States
  - Within CFIUS, historically "economic" (i.e., pro-investment) agencies are now often functioning more like traditional "security" agencies on any China-related matter
- As a process matter, CFIUS continues to take longer – easily 5-6 months for most transactions (including draft filing process plus full review)

CFIUS Reform

CFIUS Reform – FIRRMA

- Foreign Investment Risk Review Modernization Act ("FIRRMA") enacted in August 2018 – most significant reform of CFIUS in 30 years, and enacted with strong bi-partisan support
- China not named, but concerns over China animated the legislation
  - Concerns centered on strategic, but non-controlling Chinese investment, technology transfers, and broader business relationships not subject to CFIUS review
- Framework intended to broaden the aperture of CFIUS review through two mechanisms:
  - Expanding CFIUS jurisdiction
  - For the first time, mandating certain filings with CFIUS
- Other key points:
  - Expanded timelines – now a 90-day process
  - Filing fees – 1% or $300,000; not yet effective – must be implemented through rulemaking
- Adjoining legislation to address outbound technology transfers – Export Control Reform Act ("ECRA") to address "emerging and foundational technologies"

Jurisdictional Expansion Under FIRRMA

- Expanded in two ways – both of which require rulemaking to implement:
  - Certain real estate transactions
  - Certain other non-controlling investments in:
    - Critical technology company: produces, designs, tests, manufactures, fabricates, or develops one or more critical technologies
    - Critical infrastructure company: company that owns or operates, manufactures, supplies, or services critical infrastructure
    - Sensitive personal information: company that maintains or collects sensitive personal data of United States citizens that may be exploited in a manner that threatens national security
- New dual-track filing to include "mandatory" declarations for:
  - Three "other investment categories" and control transactions where investment includes "substantial interest" by a foreign government – not yet in effect; requires formal rulemaking
  - Such other investments in the "critical technology" area that CFIUS identifies through rulemaking – implemented through Pilot Program in November 2018

“Other Investments” Criteria

- For U.S. businesses in the foregoing three categories, CFIUS has jurisdiction to review any investment, regardless of size, that affords the foreign person:
  - Access to any material non-public technical information in the possession of the U.S. business
  - Board membership or observer rights
  - Any involvement in substantive decision making regarding critical infrastructure, critical technologies, or sensitive personal data of U.S. citizens
- **Special clarification for investment funds:** Participation of foreign LPs on an investment fund's advisory board or equivalent will not qualify the foreign LP's investment as an "other investment,“ provided that:
  - the fund is managed by a GP or equivalent
  - the GP is not a foreign person
  - the advisory board does not control the decisions of the fund or the GP, and
  - the foreign LP does not otherwise control the fund, directly or indirectly.

Further Clarification for Investment Funds

- Foreign LP (or advisory committee on which foreign LP serves) cannot have ability to approve, disapprove, or control:
  - Investment decisions of the fund
  - Decisions made by the general partner/managing member related to entities in which the investment fund is invested
- Foreign LP cannot:
  - Have access to material nonpublic technical information
  - Have the right to unilaterally dismiss, prevent the dismissal of, select, or determine the compensation of the general partner
- Advisory committee can have following rights without being deemed to control investment decisions of the fund:
  - Waive a potential conflict of interest (e.g., right to approve or disapprove investment by the fund in a company that is an affiliate of the general partner)
  - Waive an allocation limitation in the limited partner agreement (e.g., a requirement that the fund can investment no more than 10% in a given industry)

Pilot Program

- Effective November 10 – mandates declarations for "other investment" category into any U.S. business that:
  - "produces, designs, tests, manufactures, fabricates, or develops a critical technology that is either utilized in connection with the U.S. business's activity in one or more pilot program industries, or designed by the U.S. business specifically for use in one or more pilot program industries"; and
  - is in one of 27 "Pilot Program Industries" – defined by reference to 27 North American Industry Classification System ("NAICS") codes, including aircraft manufacturing, electronic computer manufacturing, nuclear electric power generation, and semiconductor and related device manufacturing, among others.
- Declaration is a 30-day process – at conclusion, CFIUS can approve, say it needs more time, or require a full filing
- Parties that fail to comply with the mandatory filing requirements may be liable for a civil penalty up to the value of the transaction

“Critical Technologies” Definition

- Defined by reference to technology lists maintained by other U.S. regulatory authorities — particularly export control authorities. Specifically, critical technologies include:
  - Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations (ITAR) (22 C.F.R. parts 120-130).
  - Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations (EAR) (15 C.F.R. parts 730-774) and controlled (1) pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or (2) for reasons relating to regional stability or surreptitious listening.
  - Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by 10 C.F.R. part 810 (relating to assistance to foreign atomic energy activities).
  - Nuclear facilities, equipment, and material covered by 10 C.F.R. part 110 (relating to export and import of nuclear equipment and material).
  - Select agents and toxins covered by 7 C.F.R. part 331, 9 C.F.R. part 121, or 42 C.F.R. part 73.
  - Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018.
- Separate rulemaking forthcoming on “emerging and foundational technologies” – thus, the Pilot Program could further expand through the additional identification of new technologies that are controlled under the ECRA.

Pilot Program Industries

NAICS Code	Industry Description
336411	Aircraft Manufacturing
336412	Aircraft Engine and Engine Parts Manufacturing
331313	Alumina Refining and Primary Aluminum Production
332991	Ball and Roller Bearing Manufacturing
334112	Computer Storage Device Manufacturing
334111	Electronic Computer Manufacturing
336414	Guided Missile and Space Vehicle Manufacturing
336415	Guided Missile and Space Vehicle Propulsion Unit and Propulsion Unit Parts Manufacturing
336992	Military Armored Vehicle, Tank, and Tank Component Manufacturing
221113	Nuclear Electric Power Generation
333314	Optical Instrument and Lens Manufacturing
325180	Other Basic Inorganic Chemical Manufacturing
336419	Other Guided Missile and Space Vehicle Parts and Auxiliary Equipment Manufacturing
325110	Petrochemical Manufacturing
332117	Powder Metallurgy Part Manufacturing

NAICS Code	Industry Description
335311	Power, Distribution, and Specialty Transformer Manufacturing
335912	Primary Battery Manufacturing
334220	Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing
541713	Research and Development in Nanotechnology
541714	Research and Development in Biotechnology (except Nanobiotechnology)
331314	Secondary Smelting and Alloying of Aluminum
334511	Search, Detection, Navigation, Guidance, Aeronautical, and Nautical System and Instrument Manufacturing
334413	Semiconductor and Related Device Manufacturing
333242	Semiconductor Machinery Manufacturing
335911	Storage Battery Manufacturing
334210	Telephone Apparatus Manufacturing
333611	Turbine and Turbine Generator Set Units Manufacturing

Conclusions – Takeaways

- Much broader application of CFIUS – important to identify and understand CFIUS issues for timing and execution on M&A involving U.S. assets
- Do not view CFIUS narrowly as only a U.S. issue – China considerations must be considered broadly, including outside of the United States
- Be prepared for CFIUS scrutiny – conduct self-assessment on key CFIUS diligence issues
- Deal structuring and planning can be an important tool in managing and mitigating CFIUS risk

Ultimately, the CFIUS process is manageable and the United States remains open to investment, but it requires appropriate planning and accounting for substance and timing of CFIUS process.

FOCI Mitigation

Background Primer on FOCI Mitigation

- What is FOCI?
  - FOCI stands for "foreign ownership, control, or influence" over U.S. companies that hold, or are under consideration for, a facility security clearance ("FCL").
  - A U.S. company is under FOCI whenever:
    - *A foreign interest has the power, direct or indirect, whether or not exercised, and whether or not exercisable to direct or decide matters affecting the management or operations of that company in a manner which may result in unauthorized access to classified information or may adversely affect the performance of classified contracts.*
  - A company is not permitted to hold a FCL if FOCI is present, but FOCI can be mitigated.
- Why does it matter?
  - U.S. government's policy supports open investment and recognizes the importance of private companies to the interests of the U.S. defense industrial base and national security.
  - FOCI mitigation balances this policy with need to safeguard U.S. classified and controlled unclassified information and the performance of classified contracts.
  - FOCI considerations are relevant to investments in a U.S. business that performs on classified contracts or that has access to classified information.

Background Primer on FOCI Mitigation

- Who is responsible for FOCI?
  - Four U.S. Government agencies have responsibility for security cognizance: Department of Defense ("DOD"), DOE, Nuclear Regulatory Commission, and Central Intelligence Agency
  - Defense Security Service ("DSS") functions as the effective administrator/regulator overseeing industrial security and FOCI mitigation for most U.S. government agencies
- What is the legal authority?
  - President has inherent constitutional authority for national security and there are several statutes, including the National Security Act of 1947 and the Atomic Energy Act of 1954
  - Executive Order 12829 – Established the National Industrial Security Program
  - Government Contracting Statute – 10 U.S.C. § 2536: prohibits foreign government-owned company from having access to "proscribed category of information"
- Is there regulation?
  - A principal authority for contractors is the National Industrial Security Program Operating Manual ("NISPOM"), a quasi-regulatory manual that implements the EO policy to protect classified information
  - Section II of the DOE Safeguards and Security Program Order (DOE O 470.4B) governs FOCI determinations and mitigation by the DOE
  - DoD has codified industrial security procedures and practices for government activities related to FOCI at 32 C.F.R. part 117

FOCI Determination Process

- Sources used to identify FOCI:
  - Standard Form 328 "Certificate Pertaining to Foreign Interests"
  - Key Management Personnel ("KMP") List
    - May include board, officers, executive personnel, general partners, regents, trustees, or senior management officials
  - Company websites and organizational charts
  - Financial documentation (e.g., loan agreements or other financial dependence on or obligation to foreign entities)
  - Governance and incorporation documents (e.g., articles of incorporation, by-laws)
  - U.S. Securities and Exchange Commission ("SEC") Filings
- Changed conditions may justify adjustments to the security terms under which a company is cleared or require use of a particular FOCI mitigation arrangement
- Counterintelligence and supply chain security concerns may also be a focus

FOCI Adjudication

- DSS evaluates FOCI in the aggregate, with respect to the foreign interest and its country of domicile, and any foreign country with significant ties to the foreign interest:
  - Record of economic and government espionage against U.S. targets
  - Technology transfer risk
  - Type and sensitivity of classified information or special nuclear material ("SNM") to be accessed (DOE F 470.1s/DD254s submitted)
  - Source, nature, and extent of FOCI, including majority or substantial minority position in U.S. company
  - Record of compliance with U.S. laws
  - Relevant bilateral and multilateral security and information exchange agreements
  - Whether government of foreign interest has comparable industrial security and export control regimes
  - Foreign government ownership and control
  - Any other factor indicating a foreign interest has the ability to control or influence the operations or management of a U.S. company
- Parallel but separate process from CFIUS with different time constraints and considerations

Forms of FOCI Mitigation

- Board Resolution – applies when foreign shareholder is not entitled to representation on Board
- Security Control Agreement ("SCA") – applies when foreign shareholder has representation on Board, but no effective ownership or control
- Special Security Agreement ("SSA") – applies when foreign shareholder has ownership or control
- Voting Trust or Proxy Agreement – applies in lieu of SSA or, in some cases, when there is access to proscribed information (Passive Mitigation)
  - Effectively interpreted as "no ownership or control" – i.e., just an economic interest
  - Must apply when there is foreign government control that would result in access to proscribed information
- Other FOCI Mitigation Approaches
  - Secretarial Waiver Authority – Secretary may waive prohibition under 10 U.S.C. § 2536 for a foreign government controlled entity to be given access to proscribed information
    - Congressional notification required for certain remediation or waste management contracts
  - Limited FCL – granted where USG has agreement with foreign government for an FCL without additional FOCI negation or mitigation; limited to program involving the foreign government or where compelling need is consistent with national security interests

Forms of FOCI Mitigation

Security Control Agreement	Special Security Agreement	Proxy Agreement/Voting Trust
Governance: • 1 Outside Director required • Inside Director represents foreign shareholder (an "Affiliate"); Outside Directors must equal or exceed Inside Director **Policies and Procedures** • Requirements apply to the "Affiliates," which are defined as the foreign shareholder, each entity that controls the foreign shareholder, each entity that is controlled by the foreign shareholder, or is under common control with the foreign shareholder. "Affiliates" do not include U.S. parent or co-owners. • Government Security Committee ("GSC") oversees policies and procedures to safeguard classified information • Except for routine business visits, all visits between cleared subsidiary and Affiliates must be requested in advance and approved by FSO/GSC • U.S. company and Affiliates may share administrative services, once approved by DSS in an Affiliated Operations Plan • Electronic Communications Plan • Technology Control Plan • Facility Location Plan	**Governance:** • Typically, 3 Outside Directors • Inside Directors represent foreign parent; Outside Directors must exceed Inside Directors **Policies and Procedures** • GSC oversees policies and procedures to safeguard classified information • Except for routine business visits, all visits between cleared subsidiary and Affiliates must be requested in advance and approved by FSO/GSC • U.S. company and Affiliates may share administrative services, once approved by DSS in an Affiliated Operations Plan • Electronic Communications Plan • Technology Control Plan • Facility Location Plan • Access to proscribed information requires National Interest Determination	**Governance:** • Foreign owner relinquishes rights of ownership to security-cleared U.S. citizens and becomes a beneficiary • 3 Proxy Holders/Trustees with no ties to parent exercise management prerogatives; can only be removed in extraordinary circumstances and typically vote to replace themselves • Subsidiary must operate as an independently viable entity **Policies and Procedures** • GSC oversees policies and procedures to safeguard classified information • Visits between subsidiary and Affiliates must be requested in advance and approved by Proxy Holders/Trustees • Sharing of administrative services between U.S. company and Affiliates typically more limited, must be approved in an Affiliated Operations Plan • Electronic Communications Plan • Technology Control Plan

Outside Directors and GSC

- Outside Directors/Proxy Holders are USG-approved security-cleared U.S. citizens with no prior relationship with U.S. company or shareholder(s)
  - Outside Director/Proxy Holder has dual obligation to protect U.S. Government national security interests and to act in best interest of shareholder(s)
  - Outside Director/Proxy Holder has dual obligation to protect U.S. Government national security interests and to act in best interest of shareholder(s)
- Government Security Committee ("GSC")
  - Committee of the Board responsible for overseeing policies to safeguard classified information and FOCI mitigation commitments
  - Composed of Outside Director(s) and cleared officers of company that are also Directors ("Officer/Directors")
  - Approve, implement, monitor FOCI implementing plans
    - Electronic Communications Plan ("ECP")
    - Affiliated Operations Plan ("AOP")
    - Technology Control Plan ("TCP")
    - Visitation Procedures
  - Report attempted violations of Agreement to DSS
  - Facility Security Officer is principal advisor to GSC

Lessons for FOCI Mitigation Process

- Understand the full array of FOCI considerations before entering into a transaction
  - What contracts does the U.S. company have and how sensitive are they? How sensitive is the information that the U.S. company can access?
  - Does the transaction touch on any other considerations – e.g., technology transfer? U.S. government access to critical technologies? Supply chain considerations?
  - How will U.S. government customers view the transaction?
  - What form of FOCI mitigation will apply and how will it affect plans for operating the company?
- To the extent possible, preview transactions with U.S. government for guidance, but only once you have fully thought through the transaction and operational considerations

Questions

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Scott Freling is a Government Contracts partner at Covington in Washington, DC. Mr. Freling divides his practice between working with civilian and defense contractors on traditional government contracts matters and representing buyers and sellers, including a number of private equity firms, in complex M&A deals involving a government contractor.

Mr. Freling represents contractors at all stages of the procurement process and in their dealings with federal, state, and local government customers. In addition, he counsels clients on compliance matters and risk mitigation strategies, including obtaining SAFETY Act liability protection for anti-terrorism technologies. Mr. Freling has been recognized by *Law360* as a "Rising Star" in government contracts. He is sought after for his regulatory expertise and ability to apply that knowledge to the transactional environment. He routinely serves government contracts counsel in corporate deals involving a contractor or grantee. Mr. Freling has deep experience leading due diligence reviews, negotiating transaction documents, and assisting with integration and other post-closing activities. He has been the lead government contracts lawyer in dozens of M&A deals, with a combined value of more than $20 billion.

Mr. Freling is a Co-Chair of the Mergers and Acquisitions Committee of the ABA's Public Contract Law Section.

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Damara Chambers advises clients on cross-border investment and national security matters, including national security reviews by the Committee on Foreign Investment in the United States (CFIUS), and on the application of international trade controls, including export controls and economic sanctions.

Ms. Chambers is recognized in *Chambers USA* and *Chambers Global* for her extensive experience advising clients before CFIUS and advising companies regarding the mitigation of foreign ownership, control or influence (FOCI) under national industrial security regulations administered by the Defense Security Service (DSS), Department of Energy, and other agencies.

Ms. Chambers has been involved in negotiating some of the most significant national security agreements with the U.S. government and has represented clients on a variety of landmark CFIUS and FOCI matters, including Nexen Inc. in its $15.1 billion sale to China National Offshore Oil Corporation; Stanley, Inc. in its $1 billion acquisition by CGI Group; Temasek Holdings in its multi-billion dollar investment in Merrill Lynch; and the Carlyle Group in its $1.9 billion sale of Standard Aero and Landmark Aviation to Dubai Aerospace Enterprise.

In the international trade controls area, Ms. Chambers advises companies on compliance and enforcement matters relating to U.S. export controls administered by the Departments of State, Commerce, and Energy and the Nuclear Regulatory Commission; economic sanctions administered by the Department of the Treasury; and import and licensing requirements imposed by the Bureau of Alcohol, Tobacco, Firearms and Explosives. She also frequently advises on trade control issues in mergers, acquisitions, and divestitures.

Teri L. Donaldson
Inspector General
U.S. Department of Energy

Teri L. Donaldson was sworn in as the fifth Inspector General of the United States Department of Energy on January 23, 2019. Ms. Donaldson began her career as an Assistant United States Attorney for the Middle District of Florida, and received numerous commendations from federal investigatory agencies, as well as Special Commendations from the U.S. Attorney General and the Director of the FBI. She then served as General Counsel for the Florida Department of Environmental Protection, representing the State of Florida on a broad range of environmental and energy matters. Ms. Donaldson joined the private sector in 2004, where she assisted clients with complex investigations, litigation and corporate compliance matters. Most recently, Ms. Donaldson was a partner in the Houston office of DLA Piper, LP (US), where her clients included a variety of major American and international corporations. Ms. Donaldson returned to public service in September of 2017 serving as the General Counsel for the Environment and Public Works Committee of the United States Senate before becoming Inspector General.

BIOGRAPHY

TIMOTHY P. FISCHER
Deputy General Counsel

Timothy P. Fischer has been the National Nuclear Security Administration's (NNSA) Deputy General Counsel for Procurement, Intellectual Property and Technology Transfer since December 2015. Mr. Fischer provides legal advice and counsel to senior NNSA leadership regarding contracts, financial assistance agreements, and other business transactions. He serves as the principal legal advisor to the NNSA General Counsel with respect to all procurement related matters and manages a staff of attorneys performing legal work in this and other areas.

Tim began his Department of Energy career in January 1997, after six years as an active duty Air Force Captain, serving as Judge Advocate. His emphasis was in the business section of the Office of Chief Counsel, primarily working Procurement, Labor Law and Employee Relations issues. He was the DOE legal advisor to every Work Force Restructuring activity at the Savannah River Site between 1997 and 2007. He transferred to the NNNSA's Savannah River Site Office in February 2007, where he became Site Counsel, providing advice and counsel to the Manager. Tim served as the Acting Deputy Manager from April 2008 to September 2008. He added the responsibilities of Business Manager to his portfolio in October 2008. Tim held this dual-hatted position until December 2015.

Born in St Cloud, Minnesota, and raised in Littleton, Colorado, Tim attended St John's University in Collegeville, Minnesota. He graduated in 1985, receiving a Bachelor of Arts degree in Philosophy. In 1986, Tim began his study of law at the University of Denver, Sturm College of Law. He earned his Doctor of Jurisprudence in 1989 and his position as a law clerk with the firm of Gessling and Minton became that of an associate. His practice included handling a wide variety of civil matters.

Tim joined the Air Force as Judge Advocate in 1991. He served three years at Whiteman Air Force Base, Missouri, followed by a second three-year assignment to Aviano Air Base, Italy. Tim left active duty to join DOE but continued his military career in the United States Air Force Reserves. He retired as a Lieutenant Colonel in May 2012 after serving as the Staff Judge Advocate for the 315th Airlift Wing, Charleston Air Force Base, South Carolina.

Tim is a member of the State Bar of Colorado. He is married to the former Karen Kimpton of Littleton, Colorado. They make their home in Alexandria, VA