stare decisis

PRIMERUS™

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chair column

by michael smith

Michael Smith is a civil defense litigator with Cardelli Lanfear Law. His practice focuses primarily on retail and hospitality litigation, automobile negligence, contractor liability, premises liability and commercial litigation (including breach of contract, unfair competition, collections and other business disputes). Mike's litigation experience provides a unique perspective which allows him to provide clients with practical strategies to minimize their potential for future risk in non-litigation matters as well.

The issues of hiring and retaining talent continue to be a challenge for all industries, including ours. At the 2022 Global Conference in San Diego, I had the privilege of hosting a roundtable during which I was able to discuss these challenges with dozens of my Primerus™ colleagues, with experience levels ranging from managing partners to second-year associates. The firms who have been successful in attracting and retaining young lawyers, and the young lawyers who have stayed for several years (despite constant invitations from recruiters to interview elsewhere), had one common theme for their advice to others: Connection.

In today's market, young lawyers are leaving firms at an alarming rate because they do not feel a connection to their law firm. This has been exacerbated by the rise in remote-work and the lack of in-person connection with their colleagues. The firms who have been successful in attracting and keeping their young talent are intentional about developing this connection, despite a more challenging environment. Though it is easy to become cynical, throw our hands up, and say "it's impossible to keep people," the opposite is necessary. We must invest in our young talent, more than ever, to overcome the challenging environment and create that connection.

Primerus™ provides many great opportunities to invest in our young lawyers. Encourage them to attend conferences (Primerus™ often has a discounted rate for YLS Section members), to seek a leadership position in their practice section, to write articles, and to speak at conferences. Most of all, encourage them to get involved with the Young Lawyers Section. Attend the monthly calls, get to know their colleagues, and attend the YLS Leadership Conference. Involvement in Primerus™ helps a Young Lawyer start to view this profession as a career rather than a job. Each time you invest and allow a young lawyer to step away from the grind of daily billable hours to work on the other things that make a great lawyer (marketing, business development, understanding the business of running a law firm, and continuing legal education), you are creating a stronger connection that is much tougher for a recruiter to overcome.

I have been at my firm since 2010 and have been encouraged to participate in Primerus™ since the outset. I began attending the YLS Conference in 2012 when it was a "Bootcamp", and I was actually "Young." I have developed lifelong friendships and business relationships that are invaluable. I have more recently joined the Executive Committee of the Primerus™ Defense Institute Transportation Practice Group. Over the last 12 years, I have been approached by countless recruiters and each time, I have declined, with my involvement and investment in Primerus™ being a strong factor for doing so.

I am looking forward to the next year serving as your Chair of the Young Lawyers Section Executive Committee, helping Primerus™ firms develop and retain the next generation of "Good People who Happen to Be Good Lawyers™."

words to the wise

How did you become a lawyer?

Dominic Wai: I was already a mature student when I studied law. I always wanted to study law but my exam results after high school were not good enough. At the time, there was only one law school in Hong Kong, so it was very competitive. So, I studied banking and joined a bank after graduation. After that, I joined the Government with the Independent Commission against Corruption (ICAC). Both of these jobs had legal elements. When my contract with the ICAC expired, I received a gratuity and used the money to start studying law. I was 28 years old. By that time, a second law school had opened so there were more additional law school spots. That's how I began studying law and became a trainee solicitor when I was over 30.

Caroline Berube: Initially, I didn't want to work as a lawyer and always thought I would do an MBA after law school and move to the business aspect. I decided to go to law school as I believe it would provide me great analytical and critical skills together with drafting skills. These skills would be useful in business, no matter what and they could also be useful if I decided to pursue journalism, politics, teaching, etc. Law is a great foundation. My plan was to start by doing a law degree and then move into business. In law school, I decided to find a niche. At that point, it was the mid-90s, and everybody who wasn't staying in Quebec was heading to New York. I wanted to do something different. I looked at a map of the world and thought to myself, there's so many people in China and in Asia in general that they will need contracts and have disputes over the contracts! They would be happy to have somebody who knows the West but lives in Asia. Hence, I decided to move there as soon as possible and started studying Chinese law at the National University of Singapore. I had a love at first sight for Asia and never left.

Klaus Oblin: This is what I have been asking myself all along. In fact, I started to aspire at being a court room lawyer long before graduating from high school which usually is when you pick your college major. Being a litigation lawyer offers to combine many talents and/or interests: art of debate, writing skills, competing, sometimes even acting, and – last but not least – ethical behavior. And yes, in life I believe it is about doing the right thing. Applied to our profession this sometimes means "do it like Atticus Finch did or would have done". However, the idealism fades, the principles do not, at least they haven't in my case.

Has the practice of law met your expectations? How is it different than when you first began practicing law?

Dominic Wai: The practice of law has met my expectations because I've always wanted to do something that relates to rights and justice. That's what you deal with in the legal profession, even if you are working on commercial matters. As far as the practice of law itself is concerned, it has become increasingly international and cross-border. In Hong Kong, we say it is "cross-boundaries." In terms of the work, you need to be more attuned not only to different laws and jurisdictions, but also different cultures, languages, practices, timing – all these factors that arise in your practice. These things that you have to take into account are not legal per se. Nowadays, you have to take all these things into account.

Caroline Berube: Law and my legal profession have really met my expectations. It's a lot more fun and exciting than I thought it would be. I suspect that it is because I join law and business, and assist entrepreneurs in their mergers and acquisitions/tech work in Asia. I am constantly dealing with people from different countries in different industries. I learn constantly and I keep being challenged. It's a lot more exciting than I thought it would be. After 25 years, I still really like it!

Klaus Oblin: It has surpassed them; practicing law is what I do for a living and has thus become a part of my

life. Personally, I was an employed associate back then striving after partnership in a Magic Circle law firm; today I am running a firm, i.e. also taking care of acquisition and administration as opposed to solely dealing with legal issues. On the other hand, in court not much has changed, except for the technical developments – but that probably goes for most professions, industries, and daily life.

Describe your philosophy on client relationships and management.

Dominic Wai: At ONC Lawyers, we have a motto: "Solutions, not complications." I abide by that philosophy. We try to make sure that we provide solutions to our clients in terms of client relationships and management. It's not just the legal process, but other issues as well. "Solutions" is wider than just legal solutions. Of course, sometimes it is just pure legal solution, but there are other possible ways of trying to resolve a matter or trying to get things done in an easier way, as the legal way may be too complicated sometimes. We try to manage clients in terms of establishing relationships in that we try to provide – where possible – solutions more creatively, efficiently, or innovatively, and try to manage the client's expectations on that. Particularly in these days, clients are frequently also concerned with costs, so we try to manage expectations and be as prompt as possible in terms of responsiveness.

Caroline Berube: Two things: first, I believe the client is king. At the end of the day, I always say to my team that I am not their boss. The client is the boss of everyone, including me. A happy client speaks to eight potential clients and an unhappy client speaks to 13. So, you want the client to be happy, because if they're not, they spread the word at a much faster rate. Second, we are in a service business, so trust is really important between the client and ourselves. We are offering a personal service. Service and trust are key and you really need to create a special relationship with the client. Most of the times, client will follow the individual rather than the law firms.

Klaus Oblin: Primus inter pares – first among equals.

What are some things associates can do to help maximize the relationship with a client?

Dominic Wai: It is helpful when associates really know and understand the client's business and what the client is doing – what the client is involved in while we are serving them and helping them with their legal matters. Knowing exactly what the client is doing gives the client a good impression and helps to foster the relationship. It is also helps when trying to think of solutions to the client's issues. So, associates should be really mindful of what the client is doing, for example, what projects they are working on and what difficulties they are facing. This is helpful to enhance the relationship with a client.

Caroline Berube: Show interest in the client, in their business, their strategy in Asia, put yourself in the client shoes.... It's not only a billable matter. Show genuine and authentic interest in the industry and the transaction. The associate should be street-smart, meaning they should not only look at the legal aspects, but should try to understand the business interests the client is trying to achieve. Sometimes, even if something makes sense from a legal perspective, it may not be the right decision from a business perspective. At an early stage, try to put yourself in the shoes of the person operating the business and whether certain types of contracts would make sense for them. It is also important to respond promptly. Clients really appreciate that, especially entrepreneurs who are visionary. Lastly, put in the extra miles. For example, just recently, a client in the US wanted to have a call and the only time that worked for him was 9 AM New York time on Saturday morning. Straightaway, two of my associates said that they would be at the office, which, in our time zone, was 9 PM on a Saturday. Of course, it is not ideal to have a call on Saturday night – that's just the reality – but they were still keen to offer their support. I was really grateful for that.

Klaus Oblin: Be proactive and keep them in the loop. And don't be shy to remind your supervisor of tasks at hand, deadlines etc.

What is your expectation of associates when it comes to business development?

Dominic Wai: Generally, I think that business development is the responsibility of partners, unless the associate is very experienced or senior. Of course, it is great when an associate helps out, and it is also helpful for their career if they are able to build their client base and get people to know more about themselves and our practice. They can do their part by trying to be, as I have mentioned, prompt in responding to clients, proactive, and by remembering to mention the firm and our services in their social circles and at events. That helps people to learn more about what we as a firm are doing – what kinds of cases we are working on, what kinds of talks we are giving, things like that. Through that, associates can promote themselves and the firm. In Hong Kong, some firms have arrangements where, if you bring in business, you share in a percentage of the fees in terms of the business volume that the client brings in. Our associates know this, so it is beneficial for them as well if they bring in business.

Caroline Berube: To sell your expertise well, you need to have experience and diverse experience. When you meet new people and speak about what you do, being able to talk about your work in practical terms gives you credibility. For this reason, I don't think an associate can do business development at the early stage. The first few years are used to build expertise and when the associate is confident enough and has really been involved in deals, they should start meeting clients. This can be in terms of writing articles, attending conferences and events, etc.. I also differentiate between rainmakers and the grinders. Some people are simply not cut out for business development but they are great at grinding. Both the rainmaker and the grinder need each other. Some associate can be put out there, and they will go with the flow, while I know that others won't be as great in business development initiative. It's important to respect that. If somebody is really not cut out for business development, I wouldn't push them but rather would let them focus on doing more behind-the-scenes stuff, which is equally important. There are also different aspects of business development: it's not only about meeting potential clients or giving speeches, it can also be about writing articles and preparing for potential client meetings.

Klaus Oblin: Not much when it comes to acquisition, but I am always open to new ideas to improve daily work. Do put yourself on the map by attending conferences and publishing articles, newsletters, etc.

What are you and fellow partners looking for in associates as it relates to work product, partner relationships, and community involvement? What other things are important for associates to remember about firm expectations?

Dominic Wai: As I said, our motto is to help clients find solutions rather to than complicate things. Sometimes, the legal process can be very complicated, time-consuming, and costly. It is important for associates to know their stuff and be practical, not just in terms of doing their work, but also figuring out how to solve the client's problems and issues. Associates should also know the client's expectations. Sometimes, clients just want an answer. At other times, they want a full analysis. They should be mindful of that in terms of getting the work product out. The client needs solutions without any distractions or hassle. So overall, we try to remind our associates that, apart from continuing to learn, which is never ending, they need to be meticulous and make sure that they understand the needs of the client and whether they are really answering the client's questions.

Caroline Berube: It is important to think outside the box and be willing to put in the extra miles and find creative solutions meeting the clients' business objectives. This also relates to helping other colleagues as well as volunteering at and coming to work events. For example, recently, we had a Canada Day event in Singapore. I'm the president of the CanCham Singapore, so we had 12 seats at our firm's table and expected some associates to attend. It's also important for associates to have good social skills with people that they meet, because those people are potential clients. I also expect associates to be interested and curious. They should try different things. Some may realize that they are not so good at meeting people outside of work, they prefer to be behind-the-scenes and to do more legal work. But it's important at least to try. At one point, we wanted to do small posts on LinkedIn, Twitter, and Instagram and as lawyers, we don't know how to do these things. But an associate was keen to try and help. This willingness is very important.

Klaus Oblin: All for one, one for all.

From your perspective, what makes an associate stand out?

Dominic Wai: In terms of what I've already said, I really want to highlight the part about understanding the client, listening to the client's needs and addressing and answering those needs. That's the most important thing. If an associate is able to do that, that would easily make the associate stand out. Sometimes, that's not easy to do.

Caroline Berube: Dedicated and smart associate. I don't mean smart only intellectually, but also street-smart. They also stand out if they are creative and think outside the box, especially for our type of work, because there is always a lot of red tape when doing business in Asia. We can't just say to the client that the law does not allow them to carry on their business. We need to be creative and find solutions for our clients.

Klaus Oblin: Being committed to point 6 above is more than sufficient.

What lessons or mistakes did you make (or witness others make) as an associate? What advice do you have on how associates can avoid similar mistakes?

Dominic Wai: When I was an associate, sometimes I would make a mistake in the sense that I would miss something, such as an issue or even a hearing. It's very important to record and mark everything, which brings me back to the client's instructions and what they really need. Sometimes, you think that you have addressed the issue of the client, but you may not have actually done so. To avoid mistakes such as the ones that I made, you need to be prepared and have a good diary and record system. It's also sometimes necessary to get people to review your work. If there's anything that's missing, they may be able to catch that.

Caroline Berube: In my case, I started to do business development at a very young age with the French and the Canadian Chambers of Commerce in Asia and all French speaking organisations. I tried to be involved in those organisations and offered my time and skills. I liked it and was fine with it but again, it depends on the type of associate you are. It's good to encourage people to do it when they can. I always say, we usually have to be in the office between 8 AM and 7 PM but it is the extra mile you put in before 8 AM and after 7 PM that makes the difference as everyone does 8am to 7pm!

Klaus Oblin: Do not steal learning opportunities from your colleagues. I learned this quite early on when I tried to help out a colleague by taking over one of her tasks without having been asked to do so – needless to say, she was not very happy.

What advice would you give yourself when you were new to the practice of law?

Dominic Wai: Read carefully, listen carefully, and really understand the instructions and what is required from you in terms of solving the problem or answering the question. Sometimes, we have the tendency of thinking that we know the question or answer, but when we look at the whole underlying context, there may be things that weren't expressed clearly but that the client may want to know nonetheless. It's very important to try to, at least, extract that from the client or understand the context – the overall objective – that the client wants to achieve, and then to address and answer that. When we're distracted, we miss out on such things. We miss out on the client's instructions and what they actually want help with.

Caroline Berube: You have to be passionate because it's not an easy career. You have to be passionate about doing the work, learning the work, putting in the hours, and taking on challenges. When my boss asked me to do something even when it was arbitration work rather than M&A work, I always said yes. I didn't have any weekends the first 5 years of my career. I believe in the 10,000-hour rule. The more you do something, the better you get at it. Expect to work long hours and to put in those 10,000 hours. The sooner you do them, the sooner you can bring in your own clients and have visibility, credibility, trust from your boss, and more interesting challenges. So do not give up, even if it's tough sometimes!

Klaus Oblin: Stay true to yourself.

Dominic Wai's practice at ONC Lawyers focuses on advising clients on matters relating to anti-corruption, white-collar crime, law enforcement, regulatory and compliance matters in Hong Kong, including advice on anti-money laundering. He also handles cases involving corporate litigation, shareholders' disputes and insolvency matters, defamation cases, domestic and international arbitration cases, cybersecurity, data security and privacy law issues, competition law matters, e-Discovery and forensic investigation issues as well as property litigation.

Caroline Berube is the Managing Partner of HJM Asia Law, a boutique law firm with offices in China and Singapore. She is admitted to practice in New York and Singapore, holds a BCL (civil law) and an LL.B. (common law) from McGill University (Montreal, Canada) and studied at the National University of Singapore with a focus on Chinese law in the mid 1990's. Caroline worked in Singapore, Bangkok and China for UK and Chinese firms prior to establishing her own firm more than 14 years ago.

Klaus Oblin of OBLIN Rechtsanwälte has been successfully representing prominent businesses and state-entities for many years.He stands out in cross-border proceedings where politically sensitive issues meet commercial matters and has been consistently engaged as lead counsel and arbitrator in a number of high volume arbitrations under various internationally acknowledged rules. Drawing from both civil and common law practical experience, he is known for his ability to concurrently lead teams from multiple jurisdictions.

member spotlight

by aaron duell

An Arizona native, Aaron Duell grew up in the Valley and found his way to a law degree after briefly considering an engineering career. He joined Burch & Cracchiolo in 2019 to focus his practice on employment law/litigation and commercial litigation. Before joining Burch & Cracchiolo, Aaron clerked for the Honorable Dominic W. Lanza at the U.S District Court for the District of Arizona. Prior to that, he worked at the Arizona Attorney General's Office as an Assistant Attorney General in the Government Accountability and Special Litigation unit. There, he was awarded the 2017 "Emerging Star Award" for the Civil Litigation Division. Aaron pursued legal action against cities, counties, and towns deemed to have violated state law and the Arizona constitution. In addition, Aaron investigated and prosecuted violations of the Arizona Consumer Fraud Act. Aaron is admitted to practice in Arizona and is admitted to the U.S. District Court, District of Arizona.

What led you to become an attorney?

When I first entered college, I didn't have a clear career direction. I initially considered a degree in business or engineering, but ultimately settled on a double major in political science and history, simply because those majors seemed interesting. During my junior year, I signed up for an undergraduate Constitutional Law class, in which the professor taught the basic theories of constitutional interpretation and how to read and interpret case law. The class was engrossing—I decided during that class that I wanted to become a lawyer so I could interpret legal texts and advocate those positions.

What type of law do you practice?

The primary emphasis of my practice is employment litigation on behalf of employers. Recently, I've begun advising employers on ways to avoid litigation, including by revising their employee handbooks. This way, I am assisting employers to implement appropriate policies, procedures, and best practices. In addition, to my employment-law practice, I practice general commercial litigation, which can include contract disputes, construction defects cases, and wrongful death suits.

What do you like most of your practice?

There are two components that I really enjoy about my practice. First, I love the art of persuasion, particularly in motion practice. Attempting to convince a judge that my client's position (not the opponent's position) is most supported by evidence and authority is definitely a labor of love for me. Second, I enjoy developing friendly relationships with my clients. When I have a friendly relationship with a client, delivering a great result is extremely satisfying.

How is a normal business day for you like?

My typic business day involves performing various litigation-related tasks, including drafting discovery requests or responses, drafting motions or responses to motions, speaking on the phone to my clients or experts, and reviewing documents produced during discovery. On particularly exciting days, I may have an oral argument or take a deposition.

What do you do to market yourself and your practice?

I've found that the most effective way to market myself and my practice is to maintain non-professional relationships with friends and acquaintances. By spending time with people in a non-work setting, they get to know me on a personal level. Inevitably, we discuss our professions and the fact that I'm an attorney. When my friends and acquaintances have a need for an attorney (or their friends or acquaintances have such a need), I'm often the first attorney that comes to mind.

What do you do when you are not working?

When it's not 100 degrees in Phoenix, I love outdoor activities. One of my favorite activities is hiking the various trails around Arizona. Not only is it fantastic exercise, but it also provides amazing views. Additionally, I love playing sports like basketball and volleyball. Currently, I play in a City of Phoenix softball league with several other attorneys.

What do you like most of the Primerus™ network membership? What Primerus™ events have you attended, if any?

In March 2022, I attended the 2022 Young Lawyers Section Conference, which was my first Primerus™ event. My favorite part of membership in Primerus™ is that I developed friendships with several like-minded attorneys, who are in a similar place in their career as me. Having a network of trusted attorneys across the country is an invaluable asset for me and my clients.

quick tips

getting the most out of mentorship

by natalie cerón cuellar

Natalie Cerón Cuellar is a partner at Cacheaux, Cavazos & Newton, where she has worked since 2010. She is a graduate of the University of Texas at Austin, where she received a bachelor's degree in business administration in 2007 and her law degree from the University of Texas School of Law in 2010. Her practice centers on representing publicly traded, emerging, and privately held companies and individuals in matters ranging from entity formation to multi-million-dollar acquisitions and corporate governance. Natalie advises clients in the energy, healthcare, food, real estate, transportation, and manufacturing industries on corporate and transactional matters, with a focus on cross-border transactions with Mexico and other Latin American countries. She has served as expert witness on U.S. and Texas corporate law in proceedings before Mexican administrative courts. She is a frequent presenter on foreign investment in Texas and Foreign Corrupt Practices Act compliance. Natalie is currently legal counsel to the San Antonio Mexico Friendship Council.

Having a trusted mentor or mentors is crucial to the career development of any young attorney. Consider that mentoring covers more than hard skills (career specific abilities, knowledge learned through education, hands-on experience, or training) and encompasses law practice management, career advancement and development, managing the attorney-client relationship, networking and marketing your practice. To get the most out of the experience, you must approach mentorship as if you are setting up your own personal advisory board and staffing it with the best and most diverse talent to help you reach your objectives.

1. **Identify your mentorship goals.** Be clear as to your goals and what you expect to get out of the mentor – mentee relationship. Establish joint criteria to assess progress towards reaching your goals.

2. **Find the right mentor(s).** Consider that someone who has 2-5 years more experience than you may be able to provide better guidance on certain matters when compared to someone that has 20+ years of experience. A combination of mentors including senior mentors and peer mentors may provide the best outcome.

3. **Seek mentorship opportunities outside your organization.** Someone that is outside your organization can sometimes offer a fresh take on any issues you are facing or on ways to improve your professional development. Look to leaders in your community, the local bar association and/or professional organizations that you are part of for mentors with qualities that can add value to your network of advisors.

4. **Be open to different perspectives.** While it is great to have mentors that share your background and are similarly situated, challenge yourself to collaborate with professionals who come from different backgrounds. Ultimately, the goal is to broaden your horizons and obtain as many different viewpoints as possible. Much has been written about generational differences in the workplace, and while we can only hope that each new generation does better than the last, there is value in taking time to understand the viewpoints of those who came before you. Along the same lines, be open to constructive criticism even when you may not agree.

5. **Do your part.** The mentor – mentee relationship requires work on both parts; however, a mentee should show a willingness to learn and show appreciation for their mentor's time by demonstrating initiative. For example, be proactive and be the one to set up a meeting and coordinate logistics. If your mentor assigned or recommended a task, complete it and report on your progress. The best way to show you value a mentor's time is to demonstrate how you benefit from their feedback.

6. **Pay it forward.** One of the best ways to thank and honor your mentors is to impart the knowledge you acquired from them on future generations of young attorneys and/or professionals. Keep in mind that a mentorship relationship should be as rewarding for the mentor as it is for the mentee and both individuals will be better because of such experience.

understanding information blocking

by elissa niccum

Elissa Niccum is an Associate Attorney with Wilke Fleury's Healthcare transactional team. She is a talented lawyer who is admitted to practice in both California and Hawaii. Prior to joining Wilke Fleury, Elissa worked as a law clerk with the California Medical Association, worked in legal aid, and has served as general counsel for pediatric subacute hospitals.

As a patient, you might be quite familiar with patient portals and advances in electronic access to medical records. Nowadays, it seems like every medical detail you could need is just a click away. Notifications on your phone alert you to the results of lab work you had done that morning. A quick message to your doctor allows you to request refills or adjustments to a prescription. When you arrive at your doctor's office, GPS tracking alerts you that it's time to check in, letting you answer questionnaires and submit your copayment before you have even left the car. And of course, during lockdown everyone became quite familiar with telehealth appointments.

But when it comes to your physician and health IT clients, do you understand the regulatory scheme surrounding electronic health records access and patient portal development?

Passed in 2016, the federal 21st Century Cures Act looks to update the health IT infrastructure of the nation's medical system by regulating the development of electronic health record (EHR) systems, giving providers a broader selection of systems to choose from, and allowing patients to access their electronic medical records for free.[1] The Act pushed for greater adoption of EHRs through incentive programs for Medicaid and Medicare providers.[2] Rules relating to the act are promulgated by the Office of the National Coordinator for Health Information Technology (ONC), part of the Department of Health and Human Services.[3]

While HIPAA gives patients a right to review and receive copies of their medical records,[4] the CURES Act gives patients the right to access their electronic health information (EHI).[5] EHI is a subset of electronic protected health information (ePHI).[6] To facilitate access, one major component of the Act is a prohibition on

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[1] OFF. NAT'L COORDINATOR HEALTH INFO. TECH., ONC's Cures Act Final Rule, U.S. DEPT. HEALTH & HUMAN SERVICES, https://www.healthit.gov/curesrule/ [hereinafter ONC's Cures Act Final Rule].
[2] U.S. FOOD AND DRUG ADMIN., 21st Century Cures Act (Jan. 31, 2020), https://www.fda.gov/regulatory-information/selected-amendments-fdc-act/21st-century-cures-act.
[3] ONC's Cures Act Final Rule, supra note 1.
[4] U.S. Dept. Health and Human Services, Right to Access, https://www.hhs.gov/hipaa/for-individuals/right-to-access/index.html.
[5] ONC's Cures Act Final Rule, supra note 1.
[6] OFF. NAT'L COORDINATOR HEALTH INFO. TECH., Understanding Electronic Health Information, U.S. DEPT. HEALTH & HUMAN SERVICES, available at https://www.healthit.gov/cures/sites/default/files/cures/2021-12/Understanding_EHI-Scope-Diagram.pdf [hereinafter Understanding EHI].

"information blocking."[7] Information blocking is defined as "a practice that... is likely to interfere with, prevent, or materially discourage access, exchange, or use of electronic health information."[8]

Over the past several years, the ONC has been rolling out regulatory compliance goals in stages,[9] giving the industry time to adapt and get up to speed. Several deadlines were delayed due to the COVID-19 pandemic, but as with the rest of the world, things are getting back on track. The next stage took effect on October 6, 2022, and will expand the definition of EHI for information blocking purposes.[10]

Currently, EHI for the purposes of information blocking is "limited to the EHI identified by the data elements represented in the United States Core Data for Interoperability (USCDI)."[11] The USCDI is a standardized set of data classes and elements such as allergies and intolerances, immunizations, clinical notes, patient demographics, and vital signs.[12] However, in October, the definition of EHI expanded to include any electronic health information that would be in a Designated Record Set under HIPAA.[13] Some items, such as psychotherapy notes and information compiled in anticipation of legal action, are still excluded.[14]

Of course, the ONC recognizes that it is not always feasible or wise to fulfill every request for EHI. Accordingly, there are eight exceptions to information blocking, divided into two categories: denials of requests for EHI, and procedures for fulfilling EHI requests.[15] When communicating with your client about the impact of the Cures Act on their practice or business, it is important that you be familiar with these exceptions:

Exceptions that involve not fulfilling requests to access, exchange, or use EHI:[16]

1. **Preventing Harm** – If fulfilling the request could lead to an unreasonable risk of harm to the patient or other persons.
2. **Privacy** – If the request would be prohibited under state or federal privacy laws.
3. **Security** – If the request would jeopardize the security of EHI.
4. **Infeasibility** – If the request cannot be fulfilled due to uncontrollable events, the inability to segment the request EHI, or infeasibility under the circumstances (such as an inability to obtain the necessary means to fulfill the request)
5. **Health IT Performance** – If the health IT system is temporarily unavailable or degraded for maintenance or upgrade purposes.

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[7] 21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program, 85 Fed. Reg. 25,642 (May 1, 2020) (codified at 45 C.F.R. pt. 170-71).
[8] OFF. NAT'L COORDINATOR HEALTH INFO. TECH., Information Blocking, U.S. DEPT. HEALTH & HUMAN SERVICES, https://www.healthit.gov/curesrule/final-rule-policy/information-blocking.
[9] See, e.g., OFF. NAT'L COORDINATOR HEALTH INFO. TECH., ONC's Cures Act Final Rule Highlighted Regulatory Dates, U.S. DEPT. HEALTH & HUMAN SERVICES, available at https://www.healthit.gov/curesrule/overview/oncs-cures-act-final-rule-highlighted-regulatory-dates.
[10] Id.
[11] OFF. NAT'L COORDINATOR HEALTH INFO. TECH., Understanding the Scope of Electronic Health Information (EHI_ for the Purposes of the Information Blocking Definition, available at https://www.healthit.gov/cures/sites/default/files/cures/2021-12/Understanding_EHI-Scope-Diagram.pdf [hereinafter Understanding the Scope of EHI).
[12] OFF. NAT'L COORDINATOR HEALTH INFO. TECH., U.S. Core Data for Interoperability, https://www.healthit.gov/isa/united-states-core-data-interoperability-uscdi (last accessed Aug. 11, 2022).
[13] Understanding the Scope of EHI, supra note 12.
[14] Understanding EHI, supra note 6.
[15] OFF. NAT'L COORDINATOR HEALTH INFO. TECH., Information Blocking Exceptions, available at https://www.healthit.gov/cures/sites/default/files/cures/2020-03/InformationBlockingExceptions.pdf [hereinafter Information Blocking Exceptions].
[16] Id.

Exceptions that involve procedures for fulfilling requests to access, exchange, or use EHI:[17]

6. **Content and Manner** – Permits alternative manners of fulfilling a request under certain conditions.
7. **Fees** – Permits charging fees relating to the development of technology (but not for individuals accessing their record).
8. **Licensing** – Permits licensing and royalties for innovations a party has developed.

The ONC has excellent materials that provide further explanation of each exception and the criterion for each. Not meeting an exception does not mean that a practice automatically constitutes information blocking.[18] It just would not have guaranteed protection against an information blocking claim, and need to be evaluated on a case-by-case basis.[19]

Consider the following scenario – your client doesn't want to adopt an EHR system, as they feel that the time they have to take out of the day to enter information into the system and maintain it negatively impacts the quality of care they are able to provide patients. Could this lack of EHR constitute information blocking if it leads them to be unable to fulfill EHI requests? Knowing the exceptions and their limits will better enable you to advise your client in this situation.

Furthermore, while the Act explicitly seeks to give providers more freedom to choose EHRs that will work best for them and help them to provide the best care, the reality is that IT developers' own fears about information blocking accusations may lead them to make it more difficult for providers to easily switch from platform to platform. Being able to offer your health IT developer clients advice about their own rights to prevent information blocking will give them confidence when interacting and negotiating with providers.

Health IT is rapidly changing, and understanding information blocking and the exceptions is key when it comes to helping your client navigate their options, responsibilities, and roadblocks that may appear.

[17] Id.
[18] 21st Century Cures Act: Interoperability, Information Blocking, and the ONC Health IT Certification Program, 85 Fed. Reg. 25,642 (May 1, 2020) (codified at 45 C.F.R. pt. 170-71).
[19] Id.

doing business in europe

changes in european union legislation and their impact on E.U. member state law

by priscilla de leede & lisanne meijerhof

Priscilla de Leede advises both Dutch and foreign companies on all aspects of employment law. She litigates and negotiates for companies in issues regarding dismissal, restructuring, non-compete disputes, contracts, and the position of directors. Her special focus is on works councils for whom she regularly provides training courses. Priscilla publishes on a wide variety of topics within the field of employment and corporate law, such as employee illness, corporate immigration, and the posting of workers.

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During the summer months, the necessary relevant changes at the European level for, in particular, suppliers and distributors, founders of legal entities and employers came into force. It is therefore time for these distributors and employers to update their distribution and labor agreements, while it becomes easier for foreign founders of companies to establish themselves in the Netherlands for the first time or expand their presence here.

Introduction

Laws established at a European Union level must be imbedded into the member state's national legislation. New legislation at a European Union law level thus can have large consequences for EU member state law. Especially if the member state's national law up to that moment differed significantly from the European Union law changes, new legislation at a European Union level can have a large impact on the law system of a specific EU member state. An advantage of legislation established at a European Union level is that all EU member states use more of less the same legislation with regard to these cross-border topics. This lowers the threshold for non-European entrepreneurs to do business with European countries and thus creates a pleasant investment climate.

In this article, we discuss three recent European legislation changes, namely (1) the revision of the Vertical Block Exemption Regulation (VBER), (2) the amendment of Directive (EU) 2017/1132 on the use of digital tools and processes in the context of corporate law and (3) the arrival of the Directive (EU) 2019/1152 on transparent and predictable working conditions. The abovementioned changes have had large consequences for the legislation regarding these topics in the Netherlands – and we assume also for other EU member states. In the following, we will discuss the abovementioned three European legislation changes and their impact on Dutch legislation more elaborately.

1. Revised Vertical Block Exemption Regulation (VBER): additional rules regarding the restriction of competition for suppliers and distributors

Agreements between companies that restrict competition are prohibited: the cartel ban. The cartel ban also applies to producers/suppliers who want to make agreements with their distributors. Because of the ban on cartels, some agreements between producers/suppliers and distributors are forbidden. As a result, such agreements cannot be included in distribution agreements. A well-known example of a prohibited agreement in a distribution agreement is the imposition of a fixed resale price.

Some agreements are exempted from the cartel ban because their positive effects outweigh their (competition law) negative effects. These exemptions were previously included in the VBER. However, the European Commission has recently adopted the updated VBER and the accompanying vertical guidelines (VGL). The revised VBER has entered into force as of 1 June 2022. The revised VBER contains a number of new rules for suppliers and distributors. We discuss the most important changes below:

- Information exchange in dual distribution is further restricted

  Dual distribution occurs when the supplier sells its goods or services through independent distributors, but is also active at the retail level itself. The growth of online sales (web shops) has greatly increased the phenomenon of dual distribution.

  In the revised VBER, the rules for dual distribution have been sharpened. Dual distribution remains permitted if the parties' combined market share on the retail market is no more than 10%. Information exchange between the supplier and the distributor then remains exempt from the cartel ban. If the market share is more than 10% but less than 30%, dual distribution is still permitted. However, in this case stricter rules apply to the extent that information is exchanged between parties: the exchange of information is only exempt from the cartel ban if it is directly related to the performance of the distribution agreement and is necessary to improve the production and distribution of products.

- Dual pricing will be allowed

  Suppliers will have more leeway to charge distributors a higher rate for products that will be sold online than the rate charged for products intended for offline sale (dual pricing). However, the price difference must be attributable to a difference in the costs incurred per sales channel. Moreover, the price difference must not be aimed at limiting Internet sales by the distributor.

- Restrictions on Internet sales

  The revised VBER prohibits all arrangements in distribution agreements that have as their object the prohibition of Internet sales. Also prohibited is any restriction that effectively prevents customers from using the Internet to sell their products or services online. Some restrictions on Internet sales are still permitted. For example, a supplier may prohibit its distributors from selling through online marketplaces and may require that the distributors who wish to sell online also have a physical store or workshop for the sale of the concerned products.

- More flexibility in exclusive and selective distribution

  The revised VBER offers more flexibility in exclusive distribution schemes: suppliers can now designate up to five customers for one customer group or one territory. In addition, the revised VBER makes it easier to operate different distribution systems (open, exclusive or selective) side by side. For example, the distributor (and its customers) can be prohibited from actively selling in areas where the supplier applies an exclusive system. In addition, the distributor (and its customers) may be prohibited from

selling actively and passively to unauthorized distributors in territories where the supplier applies a selective system. This will improve the ability of suppliers to set up closed distribution networks.

In conclusion, the new rules discussed above mean that current (Dutch) distribution agreements must be checked and made compliant to the new European competition restriction rules.

2. The amendment of Directive (EU) 2017/1132: member states must create the possibility to establish a company entirely online

Currently, founders of a legal entity are required to identify themselves in person. Especially when a legal entity (company) is incorporated from abroad, this obligation may pose a challenge. After all, in that case the founder will have to visit a local notary who can confirm the identity of the founder. Such a visit entails the necessary costs.

By means of the amendment of the Directive (EU) 2017/1132, EU member states must make it possible that a legal entity is established entirely online. This means that the founder will no longer have the obligation to appear in person before the Dutch or - if the legal entity is incorporated from abroad - the local notary. Instead, the founder can identify him/herself via a digital audio-video link and with a digital means of identification. The Netherlands has chosen to start imbedding this new European Union legislation for the establishment of a private company with limited liability (B.V.). Thereafter, the Netherlands may decide to also create a possibility for entirely online establishment for the other legal entities.

3. The arrival of Directive (EU) 2019/1152: transparent and predictable working conditions

For employers, too, things have changed this summer with the arrival of the Directive (EU) 2019/1152. This Directive aims at making working conditions of employees more transparent and predictable. The main changes, as it is implemented in Dutch law, are as follows:

- Information obligation
  Under Dutch law, the employer already had to provide certain information to its employees in writing. The employer's obligation to provide information to the employee is now extended. For example, the employer must provide the following information:
  - the place of work, whereby, if the work is not (mainly) performed at a fixed place, it must be stated that the employee performs the work at several places or is free to determine the place of work;
  - the employee's entitlement to paid leave;
  - the duration and conditions of the probationary period (if any);
  - if the employee's work pattern is entirely or mostly predictable: the length of the standard working day or week, any arrangements (including renumeration) for overtime and, if any, the arrangements for shift changes;
  - if the employee's work pattern is largely unpredictable:
    - that the work schedule is variable, the number of guaranteed paid hours and the remuneration for work outside these hours;
    - the hours and days on which the employee may be required to work;
    - the minimum notification period before the start of the work as well as the cancellation deadline;

› the procedure to be observed by the employer and the employee in case of termination of the employment agreement.

Usually, this information is included in the employment agreement or personnel handbook. Although the aforementioned obligations sound comprehensive, it will in many cases be sufficient to include a reference to the relevant law provisions or the applicable collective labor agreement.

- Ancillary activities

  An ancillary activities clause is null and void under the new legislation, unless it can be justified on the basis of an objective reason. The employer is not obliged to disclose the justification in advance. The employer may therefore give the objective reason justifying the clause at the time it is invoked. However, if the employer fails to provide such a reason at that time, the clause will nevertheless be deemed null and void. Examples of objective justifications are the health and safety of the employee, the protection of confidentiality of business information or the avoidance of conflicts of interest.

- Mandatory training

  For training that the employer is obliged to provide to the employee by law or under the applicable collective bargaining agreement, the employer may not charge the employee for the study costs involved. This means that a study costs clause agreed with the employee is not valid for this mandatory training. In addition, the mandatory training should be regarded as working time and must, as far as possible, be received during working hours.

Conclusion

Depending on what was already included in the law of the different EU member states, the Directive will have less or greater impact for suppliers and distributors, founders of legal entities and employers. We have described the impact of the three aforementioned amended or new EU legislation mainly from a Dutch perspective.

For suppliers and distributors, more flexibility has been created in some respects, while in other areas they are more restricted by the revised legislation. They will have to adjust their distribution agreements accordingly. For foreign entrepreneurs, it has become significantly less burdensome to incorporate a Dutch legal entity, now that the creation of the company can be arranged online. Lastly, the discussed changes with regard to more transparent and predictable working conditions for employees require employment contracts, personnel handbooks and other policies (such as training policies) to be updated by employers.

All in all, the arrival of these changes shows once again that it is good to have all contracts checked from time to time. Not only Dutch, but also European legislation may require an update.

labor

general overview U.S. labor aspects in Honduras

by reynaldo pineda ulloa

Reynaldo Pineda Ulloa, of Ulloa & Asociados, is a Honduran attorney licensed to practice law, specializing in corporate law. He received his Master's degree in Corporate Law and Antitrust Regulations from Pennsylvania State University in 2021. Having started as a law clerk at a young age, he is a fourth-generation lawyer following his family's legal legacy. Currently, he is employed at a prestigious personal injury law firm in Pennsylvania, preparing to take the bar exam in the near future. His passion for the profession has led him in a path of constant growth, personally and professionally. As a proud Honduran, he aims to bring back invaluable knowledge and lessons learned from highly regarded American lawyers, for the betterment of his career and business.

Labor and the corporate world have a very long and complicated history together, being both very strong and relevant branches of law it is expected. Unions play a very vital role in how nowadays the M&A ecosystem interact with labor laws, this being that usually companies in this sphere are industries that employ an incredibly large amount of people often in several parts of the world.

Since trade unions and corporations grew slightly at the same pace, there are four fundamental changes since they started to protect their rights vis a vis. 1. The enormous growth scale in the employing enterprises; 2. The growing division of labor, breaking down traditional craft jobs into mechanized sub-components that could be performed repetitively by employees trained in that one task; 3. The demographic change as first and second-generation immigrants filled those positions; and 4. The supplanting of the personal relationship between employer/employee.

The Sherman Act declared among many things, “every contract, combination in the form or trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations are punishable”. (“The Sherman Antitrust Act (1890)”)

The Clayton Act gradually developed during the late 19th century, despite the hostile attitude of the courts and the opposition of employers. After a sort of tug of war between parties, there was a solution which is the antitrust act of 1914.

A very important factor in both sides of the comparison that has to be made is the collective agreements. In Honduras, it is an enormous source of the work done in the M&A world, albeit being based in completely different principles. Labor law in Central America value the written agreement between employer and union in a similar way.

The Supreme Court held in some cases in the early 20th century that made it possible to utilize antitrust laws against techniques utilized by unions, as means of combating their actions. This of course, can result in one side gaining an unfair advantage, which is not beneficial to anyone.

The antitrust laws were designed to encourage manufacturers to compete for public favor at least in part through lower prices; this generated pressure on manufacturers to minimize the costs incurred for the factors of production, among which was labor.

A strict application of antitrust policy would induce employers, through individualized bargaining, constantly to bid down the cost of labor (i.e., wages paid) and to secure a competent workforce at the lowest wage that the market would allow. The national labor laws, on the other hand, were based on the congressional judgment that just such individual bargaining and subsistence working conditions caused industrial strife and interruptions in the flow of interstate commerce. Congress's remedy was to foster collective bargaining, which was "anti-competitive" in at least two aspects.

First, wage demands were thus stabilized within a single plant, geographic area or industry; competition was removed from the labor market. Second, and as a result, competition in pricing was restricted in the product market, to the extent that product prices among competitors were determined by the costs incurred by the manufacturers in purchasing labor.

Honduran labor issues are a big problem when interacting with outside capital. There are many reasons to explain why, the main being that foreign capital is a source of employment and a big opportunity to the communities where the operation is grounded (regardless of the industry). Since countries like these are sought for due to cheap labor and lenient regulations, the burden often goes to these parties, while the American counterpart usually just considers the numbers behind it and is more preoccupied with other federal or state regulations.

Latin American countries and this case Honduras has had a very difficult issue to tackle, which concerns the private sector more. There has been a sort of abuse from governmental authorities to the companies in many areas such as tax or labor. We have seen the struggle and history of American unions and how they together with the government have developed a strong network of systems that are reliable. In the Honduran case, there is no figure, the private sector is given the burden and task to take care of basically all the welfare issues, which limits the actions greatly whilst also having the necessity to be lenient in regulating.

Labor law has a complicated history in both legislations. The history behind unionization played a vital role in defining how the corporate world reacts to the necessary labor in all the industries. Even with this rich history, the struggle seems to be the only similarity that can be drawn with the consequences, regarding labor law.

mitigating risk in a hairy business

by melody lins & peter tanella

Melody Lins is an associate in Mandelbaum Barrett's Corporate Law Practice Group. Melody focuses her practice on business entity formation, mergers and acquisitions, joint ventures, commercial transactions and corporate governance concerns, frequently for start-ups, family-owned businesses and closely-held businesses. Melody is also well recognized as a transactional lawyer in healthcare practice transitions, practice sales and purchases, associate buy-ins, start-ups, and the structuring of management services organizations (MSOs). Melody frequently speaks about these practice areas at healthcare industry conferences around the country. She is admitted to practice in New Jersey and New York, and is fluent in Spanish and Portuguese.

Peter Tanella, of Mandelbaum Barrett PC, is an experienced business lawyer and trusted advisor who helps entrepreneurs, start-ups, and small and middle-market businesses through every stage of their growth. Peter frequently serves as outside general counsel to clients from a wide array of industries across the U.S., including retail, manufacturing, wholesale, pharmaceutical, healthcare, life science, transportation, technology, construction, real estate development and hospitality, among others. Peter also has extensive experience helping business owners create succession plans and resolve sensitive matters, including disputes among principals and business divorce transactions. He works under the premise that connecting quality people with one another enhances the likelihood of success for all involved.

Pet grooming is essential not only for pets, but also for veterinary practices that are able to diversify their client services and expand their sources of revenue by offering pet grooming services in connection with their clinical business. Stated differently, pet grooming is an $8 billion industry that still has untapped potential for growth! Despite the numerous advantages associated with the pet grooming business, this industry is also ripe for accidents and the liability that flows from them. Therefore, understanding how grooming accidents rear their ugly head in client/business disputes can be helpful for assessing and mitigating the risks associated with this subspecialty. Unfortunately, when a negative grooming incident occurs, rapid transformations take place, and once loyal clients turn into unwanted adversaries.

Below we have summarized some real-world examples of how pet grooming accidents have turned into significant disputes with clients:

Five-month-old American Bulldog Named Karma: An owner brought his bulldog Karma to a mobile grooming business that had been operating since 2011. It was not the first time that the owner had used this company's services. However, when Karma was returned to him, she appeared injured – blood was coming from her nose, and she was limp. Despite Karma's terrible state, the groomer allegedly offered the owner no explanation and simply told him to take her to a veterinarian. Karma's owner immediately took her to an emergency veterinary clinic where veterinarians worked to remove fluid from Karma's lungs. The veterinarians determined that Karma had respiratory distress that could have been due to causes such as strangulation, near drowning, upper airway obstruction, prolonged seizure activity, or electrocution. Sadly, due to the gravity of Karma's

condition, the owner approved the clinic to euthanize her. Ultimately, the dispute (like most) became a he said/she said situation. Karma's owner claimed that Karma may have experienced physical trauma; and that what happened to Karma was not an isolated incident. Apparently Google business reviews contained numerous accusations against the grooming company including allegations that they had caused a dog to dislocate a hip, cut dogs and cats during the grooming process, and even one incident where a dog died under the company's care. On the other hand, the grooming company refuted all the owner's claims, stating that they were unaware of any customer reports of malpractice or abuse; that Karma was unstable before the grooming appointment; that the owner told the groomer that Karma was unwell; and that the groomer had tried (unsuccessfully) to call the owner several times throughout the appointment. Of course, Karma's owner denied these contentions. The status of this dispute is currently unknown.

Five-year-old Newfoundland Named Samson: A family took their two dogs to a groomer. One of the dogs was a 180-pound Newfoundland breed. Prior to taking their pet to the groomer, they questioned whether the groomer could handle grooming a breed of this size. Samson's owner was assured by the business owner that grooming her pet would not be a problem. However, when the owner went to pick up Samson, she found him lying on the ground near a fan, and barely moving. She also noticed that he was struggling to breathe and could not stand up. The exchange between the owner and groomer quickly escalated as the owner demanded answers about what had happened to her pet. In turn, the groomer blamed Samson's inability to stand properly on "slippery floors" and it being hot in the salon. In a cursory fashion, the groomer concluded that the dog was just tired. Samson's owners immediately rushed him to a veterinary clinic, where they were told that Samson was suffering from heatstroke. His symptoms included red eyes and gums, a temperature of 109.5 degrees, and internal bleeding due to organ failure. The clinic advised the owners that there was a five percent chance that Sampson would survive, but the effect of the stroke on his brain function was unknown. Ultimately, the family decided to let their dog go. The status of this dispute is currently unknown.

While the above incidents happened in connection with small grooming businesses, large supply chain stores such as PetSmart are also affected by similar claims in which pets have died during or soon after getting groomed.

Emotional Support Dog Named Winter: An owner took her pet, Winter, to PetSmart for grooming and agreed to apply bows to Winter's fur after her bath. Unfortunately, this decision and the groomer's alleged negligence caused many unwanted consequences, including the need for Winter to undergo emergency surgery. After Winter's bath, the groomer wrongly decided to wrap rubber-bands which were attached to the bows around Winter's ears, instead of her fur (as is proper). The owner alleged that the rubber-bands were wrapped so tightly around Winter's ears that they cut off circulation to her ears. In turn, Winter required emergency surgery which involved cutting off the bands and repeatedly stabbing her ears with an 18-gauge needle to release blood clots. According to Winter's veterinarian, Winter would have died within 24 hours if her owner had not noticed the problem and responded quickly. Although Winter was bred as an emotional support dog, according to her owner, she now behaves like a previously abused rescue animal – constantly clinging to her owner and demonstrating fear and anxiety. The status of this dispute is currently unknown.

The above case studies reflect how serious a grooming accident and its consequences can become. Luckily, there are steps veterinary practice owners and/or groomers can take to mitigate their liability. First, owners of pet grooming facilities can purchase liability coverage for their business. The insurance company would indemnify the company from lawsuits and handle court cases that were filed against them. The insurance company would litigate these claims and even take them to court, if necessary.

Second, important changes in laws that may be applicable to the grooming industry are always occurring. Therefore, owners of pet grooming facilities should stay apprised of ways in which the grooming industry may be regulated in the future. Currently, the grooming industry is unregulated, which means there is no regulatory structure or licensing process for those who provide grooming services. However, this could change, so following legislative updates is crucial. For example, in New Jersey, a bill called the "Pet Groomers Licensing Act;" (designated as "Bijou's Law") was introduced and referred to the assembly regulated professions committee on March 7, 2022. The bill is named after a Shih Tzu whose death was allegedly related to a grooming session in 2011. Specifically, the Act would provide for the licensing of pet groomers and the registration of certain pet grooming businesses. Other bills affecting groomers have been introduced in New Hampshire, New York, and Massachusetts.

Another measure pet grooming facilities can take to avoid liability is to adequately screen, train, and supervise groomers. Owners can check to see whether a groomer candidate is a graduate of a training program and a member of a trade organization. They should also request references from an applicant and check these references. Important interview questions should include whether any animals have been injured or have died while under their care. Training should include (among other things) how to use dryers and avoid overheating, rules and consequences of leaving animals unattended, proper use of collars and tethers to avoid strangulation, and the unique needs of different breeds and animal sizes.

Finally, client screening may also be an effective tool for preventing liability and disputes. For example, groomers can give owners a choice as to whether their pet will be hand- or air-dried. Further, prior to an appointment, groomers should be aware of any health issues that a client's pet may have.

These relatively small measures, coupled with an understanding of the risks, can help owners of grooming facilities continue to grow their business while mitigating the potential liability associated with this service industry.

mexico's supreme court issues decision on scope of powers of attorney

by eduardo parroquín & abigail maya

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In accordance with Mexican law, the granting of authority to a third party, whether by a company or an individual, requires a formal procedure through the execution of a written power of attorney, which in most cases consists of a written instrument establishing the specific authority that the attorney-in-fact will have. The granting of powers and legal authority takes on special importance in the case of companies, considering that the only way such can operate is through representation by individuals, who acquire the character of legal representatives or attorneys-in-fact to carry out those acts the company requires to fulfill its purposes.

The powers that may be granted to an attorney-in-fact can be general, limited or special, depending on the actions that the attorney-in-fact must carry out. In accordance with the provisions of Article 2554 of the Mexican Federal Civil Code ("FCC"), general powers of attorney are described as follows: (i) powers for lawsuits and collections, which are important in the context of litigation or disputes in any matter; (ii) powers for acts of administration, which are essential for the operation of a company and allow for the execution of contracts

and the execution of actions that are intended to preserve the assets of the company; and (iii) powers for acts of ownership, which allow the sale or disposition of the principal's assets.

The general powers contained in the FCC have been the subject of analysis by the Mexican courts on multiple occasions. In one of the most recent case studies, the Mexican Supreme Court of Justice resolved in 2018 through precedent by contradiction of thesis 225/2016, that a power of attorney for acts of administration is different from a power of attorney for lawsuits and collections and that each one has its own nature and purpose, since there is no hierarchy or priority between both types of powers. The foregoing means that a power of attorney for acts of ownership does not contain implicit powers to administer, and likewise, that a power of attorney for acts of administration does not contain implicit powers for lawsuits and collections, as had been interpreted prior to said court decision.

This new Mexican Supreme Court decision is important for companies, as it requires that the powers granted to their attorneys-in-fact must be sufficient and proper for the actions that each attorney-in-fact performs in order to avoid situations in which the actions carried out by the attorney-in-fact could be disputed in terms of their authority. Therefore, it is recommended that companies carefully analyze the authority to be granted to attorneys-in-fact for acts in Mexico according to each case and specific situation.

protecting your company's assets and interests

the importance of getting it right from the start

by reinier russell & melissa demorest

Reinier Russell has been managing partner of Russell Advocaten since 1999. A business owner himself, he knows how to combine legal knowledge with the requirements of entrepreneurs. That makes him the ideal advisor of entrepreneurs. He is also an experienced boardroom advisor and mediates conflicts between managers, shareholders, supervisory directors and works council. In addition to advising and litigating for business owners, Reinier also supervises mediations. Reinier Russell's client base includes international ICT-businesses, importers of high-end fashion and hotels.

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Introduction

In today's increasingly crowded, rapidly changing and incredibly competitive business environment, company directors and company owners are more than ever reliant on those material and immaterial aspects of their company that set them apart from other, similar companies and provide the company with its competitive advantage in the marketplace. Assets such as a company's brand name, patented inventions, trade secrets, customer data base and skillful employees may in this regard prove of immeasurable value, and must be protected and safeguarded by the company at all costs. This, of course, requires companies to not only be able to identify their most valuable assets but also to take all of the steps required to ensure that these valuable assets are optimally protected and safeguarded from any potential threat, misappropriation or third party-infringement.

Yet, all too often, when faced with a potential infringement or misappropriation, companies find themselves woefully underprepared in terms of risk management. This may prove highly detrimental to the company's best interests.

In this article, we will provide guidance on the most valuable assets of a company, and discuss the steps that should be taken by any company director to ensure that these assets are afforded as much protection as

possible from both a US as well as a European perspective. Within this European perspective, we will focus mainly on the Netherlands.

Step 1: Protect your Intellectual Property

The first step any company director should take is to identify – and ensure the protection of – the company's intellectual property. The intellectual property of a business will be comprised of many facets, including, for instance, its innovations and inventions, but also its brand name and logos. A company relies on its intellectual property to set their business apart from other, similar, businesses, as well as to communicate their unique value to their customers.

Any company director should make him- or herself acquainted with the most common types of intellectual property, and ensure that these types of intellectual property are afforded optimal protection within their company.

Patents

Technical products, processes or other inventions or innovations of businesses may qualify for patent protection. Once granted, a patent allows a company to prevent others from making, selling, or importing the patented invention without permission, until the patent expires. Often, such permission will be granted in return for monetary compensation, allowing the company to profit financially from its invention or innovation. Entering into such 'license agreements' may prove to be highly financially rewarding for the company.

Generally, a patent will be granted for inventions if the invention is new, has potential for industrial application and represents an 'inventive step' over what was previously known. It may be an improvement of some aspect of a pre-existing invention.

In the Netherlands, as well as most other European countries, patents are granted on the basis of a 'first-to-file system'. This means that if patent applications are filed for similar or the same inventions, the patent will be granted to the party that was the first to file. For this reason, it is crucial for businesses to file for a patent as soon as possible, to prevent competitors from discovering the details of their inventions and filing for similar patents. Patents are typically granted for a period of twenty years. Upon the end of this period, the invention will no longer be protected and becomes part of the public domain.

For companies operating in multiple countries within the European Union, it might be worthwhile to obtain a European patent. A European patent allows its owner to obtain patent protection in multiple European countries at the same time.

In the United States, unlike most European countries, patents are not necessarily granted on the basis of a 'first-to-file system' unless one party has filed and been granted their patent before the other has even filed.

Instead, when multiple patent applications are filed for similar inventions, generally the patent is granted to the party that proves it first invented the claimed invention. In the US, patents typically run for twenty years from the date of the patent application. The application process may take a few years, so the patent will last for less than twenty years after it is actually issued.

In addition, in the US, employees' inventions may be considered property of the employee, even if created during their employment. It's very important for US employers to have their employees sign intellectual property assignments, to cover all patentable designs and works that may be created during employment.

Trademarks

Effective brand communication is crucial for any company. Brand names, logos or even product packaging communicate the value of a company to its customers and may therefore prove valuable assets. These assets may qualify for trademark protection.

In the Netherlands, as well as most other European countries, trademarks are granted on a 'first-to-file' basis. This means that whichever company applies first will generally be granted trademark protection, regardless of whether this business was actually the first to use the logo, name or other sign subject to the trademark application. Companies should therefore be sure to file for trademark protection as soon as possible. Although most trademarks expire in ten years, they can be renewed indefinitely.

In the United States, unlike most European countries, trademarks are granted on a 'first-to-use' system instead of a 'first-to-file'. Unregistered trademarks have some common law protection, but registering a trademark with the USPTO offers more substantial protection. If you are the first-to-use, but someone else registers the same trademark with the USPTO, you will still be entitled to use that mark in the manner which you had already been using it, but you won't be able to expand the use of that mark. A first-to-use unregistered mark will maintain priority in its geographical area where the mark has been used, but will lose any argument for priority in other geographical areas to the holder of the registered mark. Like in the Netherlands, registered trademarks typically expire after ten years, but can be renewed indefinitely, so long as they are still in use.

Trade secrets

Any piece of valuable information that is not known by the public, has commercial value and is being kept secret by the business may be considered a trade secret, and consequently afforded protection. Trade secret protection arises automatically in Europe and is of indefinite duration.

In the Netherlands, as well as most other European countries, the recognition and protection of trade secrets is a relatively recent development, brought on in part due to directives of the European Union. As a result, many company directors are unaware of the protection afforded to their company's strategies, marketing plans and other sensitive information, and the possibilities they have to prevent – or end – unlawful acquisition or disclosure of these and other trade secrets.

In the United States, the Defend Trade Secrets Act of 2016 (DTSA) amended the Economic Espionage Act of 1996 to establish a private civil cause of action for the misappropriation of a trade secret. Prior to this amendment, the Department of Justice was the only party who could prosecute for a trade secret theft offense. Under the DTSA, companies can now bring their own cause of action and ask the court to either order that the misappropriation of the trade secret stop, be protected from public exposure, or order the seizure of the trade secret. The US Supreme Court has not yet heard a DTSA claim, and the various federal circuits are interpreting DTSA claims in different ways so far.

In addition to this federal cause of action, most states have their own laws on the misappropriation or theft of a trade secret. Many states have adopted the Uniform Trade Secrets Act ("UTSA") in whole or in part,

although some states have not. In the years since the DTSA was enacted, many federal courts seem inclined to lump together UTSA state claims and DTSA federal claims into one cause of action. In addition, in states that are hostile towards restrictive covenants, employers are generally more likely to be successful in a DTSA/UTSA claim. If a state is less hostile towards restrictive covenants, an employer would be expected to have non-disclosure agreements in place, and is less likely to be successful on a DTSA/UTSA claim.

Copyright

Copyright protection is granted to literary, musical and artistic creations in the form of, for instance, books, movies, music or software.

Contrary to patent protection and trademark protection, which companies must apply for, copyright protection arises automatically in most European countries, as long as the creator of the work can establish that the work is both original and expressed in a tangible medium. Registration of a copyright is no formal requirement. It is important to note that in some European countries, the Netherlands among them, literary, artistic and musical creations created by employees of a company will not automatically be considered the intellectual property of the company but, rather, of the employee.

In the United States, similar to most European countries, you do not need to register your work to be protected by copyright law. The Copyright Act of 1976 provides that as soon as the work is created (assuming it fits the criteria), it is copyrighted – no registration necessary. However, in order to bring an action for infringement against someone, you will have to register the copyright. Again similarly to the Netherlands, literary, artistic, and musical creations created by employees will be considered the intellectual property of the employee, unless assigned to the employer by a Work Made For Hire agreement.

Step 2: Work with NDAs

While an important first step for company directors is to assess the intellectual property assets of the company, and ensure that these assets are afforded adequate protection through filing the appropriate applications, obtaining intellectual property protection will often not be enough to safeguard the most valuable assets of the company. This is in part due to the fact that not all sensitive information on the company will qualify as 'intellectual property'. Information on, for instance, the customers or business strategies of a company may not qualify as intellectual property but can still be of great value to a company. Furthermore, it may take some time before applications for intellectual property rights, for instance patent applications, are decided upon by the relevant authorities. It may, for instance, take up to a year for a patent application to be granted. In the meantime, the invention will not be protected. Company directors are often unaware of the risk this poses, as any unauthorized disclosure of the invention after the application is filed but before the patent is granted may result in the patent application being denied on the grounds that the invention is 'publicly known'.

Further steps must therefore be taken by a company director to ensure that the assets of the company are protected from potential misappropriation or infringement. These steps include ensuring that any party who has access to the company's most sensitive information – for instance information regarding a company's customers or marketing strategies – are bound by confidentiality obligations with regard to this information.

Non-disclosure agreements (NDAs) should therefore be concluded between the company and any party who has access to the company's confidential information. Employees, too, must be bound by confidentiality obligations. Although companies may ask their employees to sign separate NDAs, the employment agreement itself may also contain a confidentiality clause. Penalty clauses (often called liquidated damages clauses in the US), stipulating that in case of a breach of its confidentiality obligation, the responsible party will automatically owe a contractually agreed upon sum of money to the other party, should always be included.

It is important for company directors to not only work with NDAs and include confidentiality clauses in

employment agreements, but to also be mindful of the (significant) differences between the US and several European countries in this regard.

In the Netherlands, NDAs and confidentiality clauses in employment agreements may very well be interpreted in a very different way by the Dutch courts than would be the case in the US, and may for this reason be less effective if based on a US-model. Any Dutch court will first assess whether the confidentiality obligations laid out in the NDA are reasonable and fair, and may for this reason set aside or significantly reduce penalty clauses. Furthermore, as opposed to some US jurisdictions, punitive damages are not recognized in the Netherlands. If a penalty clause is not included in the agreement, or set aside for being unreasonably high, this means that it is up to the company director to substantiate the damage caused by the violation of confidentiality, which may prove to be rather difficult and may result in no compensation being awarded to the company.

In the US, a court would evaluate an NDA or confidentiality clause differently, in order to determine whether such a clause is enforceable. A US court may review such aspects as: (1) whether the information being protected is truly confidential or valuable; (2) broadness or narrowness of the terms; (3) consideration; (4) who else has access to this information; (5) disclosures to/from third parties; and (6) other factors. A US court may also choose whether to award an injunction to prevent disclosure (which may be temporary or permanent), and whether to award liquidated damages. This type of lawsuit may also be brought in US federal court under the Defense of Trade Secrets Act.

It is therefore of crucial importance for company directors seeking to impose confidentiality obligations to be mindful of these differences, and to draft these clauses in close consultation with local lawyers.

Step 3: Include non-competition, non-solicitation and social media clauses in your employment agreements

Aside from its intellectual property and its confidential, commercially valuable information, oftentimes the employees of a company are one of its most valuable assets. Skillful, experienced employees with knowledge of the company and its processes may be of immeasurable value to the company, and may form an integral part of its lasting success.

A company's dependence on its employees may, however, also prove to be detrimental to the company. One or more of the company's employees may decide to leave the company in favor of a direct rival, taking with them the experience and knowledge gained at their old company. They may even decide to start a rival business of their own, placing them in direct competition with their old employer. In doing so, valued customers of the company may decide to go with them, or may be prompted to go with them. These are liabilities any company director should be mindful of, and should protect the company against.

Amongst the steps to be taken by company directors in this regard are the inclusion of both a non-competition and a non-solicitation clause in their employment agreements. A non-competition clause prohibits employees of the company from being directly or indirectly active or involved in a business performing similar activities to the activities of the company for a certain period of time after the end of the employment agreement. A non-solicitation clause, on the other hand, prohibits the employee from being active for or having contact with clients and business associates of the employer for a certain period of time after the end of the employment agreement.

Under Dutch law, non-competition and non-solicitation clauses are commonly included in

employment agreements. However, there are some caveats to these clauses that company directors should be aware of.

Firstly, it is worth noting that under Dutch law, non-competition and non-solicitation clauses cannot be included in fixed-term employment agreements with a duration of no more than six months. Any such clause in such an employment agreement will be deemed invalid. While non-competition and non-solicitation clauses may, in principle, be included in fixed-term employment agreements, this is subject to certain conditions. Non-competition and non-solicitation clauses may be included only if the company can demonstrate that it has substantial business interests that require the inclusion of such a clause, and if this justification is included in the employment agreement. Without a written justification or without business interests that can be considered substantial, the clause will be invalid. To avoid discussions as well as lengthy legal proceedings, non-competition and non-solicitation clauses in fixed-term employment agreements should always be drafted in close consultation with local lawyers.

Secondly, while under Dutch law agreements can in principle be concluded orally, non-competition and non-solicitation clauses must always be in writing and cannot be agreed upon orally. Furthermore, a written non-competition and non-solicitation clause may also automatically lapse in some circumstances, for instance in the event an employee is promoted and is offered a new employment agreement. In this case, the non-competition and non-solicitation clauses included in the original agreement will lapse and the company should – again – include written non-competition and non-solicitation clauses in the new employment agreement.

Thirdly, it is worth noting that under Dutch law, non-competition and non-solicitation clauses may not always be effective when it comes to the employee's social media accounts. A former employee may, for instance, continue to send LinkedIn requests to the customers of its former company, while routinely promoting its new company or private messaging them promotional material. Company directors should therefore ensure that non-competition and non-solicitation clauses include these types of activities on these platforms. This can be achieved through the inclusion of specific clauses to this effect, stipulating that the employee may, for instance, not contact customers of its former employer on social media for a certain period of time after the end of the employment agreement. More general social media clauses should be included as well, stipulating that the employee may not discredit its employer on social media and may not post – overtly – hateful or otherwise inflammatory messages that could reflect badly on the company. In the event a dispute arises between the employer and the employee with regard to appropriate social media use, the Dutch courts will weigh the fundamental right of freedom of expression of the employee against legitimate interest of the employer.

Lastly, company directors should note that under Dutch law, a non-competition or non-solicitation clause may be deemed unreasonably burdensome for the employee, and hence invalid. This may be the case, for instance, where the term of the non-competition or the non-solicitation clause is deemed by the Dutch courts to be unreasonably long. Penalty clauses included in the non-competition and non-solicitation clauses may also be deemed unreasonable, and consequently ineffective.

In the United States, employment is generally at-will, and many employees do not have written employment agreements. If an employer wants to implement non-competition and/or non-solicitation requirements for an employee, that must be done in writing. However, each state has its own laws and requirements for non-competition clauses. The general movement in the United States is away from non-competition clauses and other restrictive covenants for employees (although they are usually enforceable against the seller of a business and in certain other circumstances). Some states do not allow non-competition clauses or agreements at all (such as California); some require significant consideration, such as a full year's compensation (Massachusetts and other states); and some just require reasonableness of time, type of restriction, and geographic scope (Michigan and many other states). Some states (including Maryland, Illinois, and Washington) have recently implemented income thresholds for non-compete and non-solicitation

agreements, where these types of agreements cannot be used for employees earning under a certain income threshold (ranging between $32,500-$100,000 per year, depending on the state).

Colorado recently enacted criminal penalties for violations of its restrictive covenant law. In Colorado, it's unlawful to use force, threats, or intimidation to restrict competition. Both entities and individuals can be held liable, and potential sentences include both fines and jail time, as a class 2 misdemeanor. In Colorado, there are only 4 general situations where non-compete agreements can be used: sale of a business; protection of trade secrets; recovery of educational/training expense for employees; and executive or management personnel.

California is another very restrictive state and generally prohibits all agreements in restraint of trade, with the limited exceptions of the sale or dissolution of a business (typically when goodwill is a large component of the business) and where employers attempt to restrain employees' competitive use of trade secrets.

In 2021, President Biden issued an executive order asking the Federal Trade Commission to review whether to prohibit the "unfair use" of non-competition agreements. It's unclear what effect this may have on non-competition agreements in the US in general, and whether state or federal law will control in particular situations.

In many US states, there is often less restriction of non-solicitation clauses, and some employers are moving in the direction of using non-solicitation clauses instead of non-competition clauses. In most states, employers may generally prohibit their employees from soliciting customers (past, present, and sometimes even prospective) for a certain period of time after their employment ends. Employers may also prohibit their employees from soliciting co-workers (past or present) to join them in starting a new venture. As in the Netherlands, it may be difficult for an employer to prevent general solicitation by social media (including LinkedIn) or other general marketing.

To be enforceable, non-solicitation agreements (or clauses) have to be in writing and must also be enforceable in the particular state where the employee works. As under Dutch law, a particular clause or agreement may become void if the employee enters into a new employment agreement with the same employer, so employers should pay particular attention to maintaining these agreements in full force and effect.

Many companies in the US now have remote workers in numerous states. Where an employee and an employer are based in different states, the employee's state will generally govern for employment law purposes. Sometimes the employer can use a choice of law provision in an employment agreement, but not all states permit that. In general, if a US employer has employees in multiple states, the employer should either consult counsel in each state, or try to determine which state is most restrictive (typically California) and comply with that state's laws. Employers should also be cautious about knowingly including provisions that may be enforceable in some states and unenforceable in others, because that may cause the whole agreement to be void – or the employer to have some liability – in certain states.

Conclusion

In this article, we have discussed some of the steps that any company director can – and should – take in order to ensure that the company's most valuable assets are afforded as much protection as possible.

Of course, there are many more steps to be taken by company directors. The specific steps to be taken by a company director to ensure that the most valuable assets of a company are afforded maximal protection, will be determined to a significant extent by the type of company, as well as its size, core activities, sector and business strategies. There is, unfortunately, no uniform roadmap to be followed in this regard.

However, now more than ever, proactive and assertive action by company directors is required to ensure that the interests of the company are adequately safeguarded and protected.

restoring a bvi company that has been dissolved

by natalia de obaldía

Natalia De Obaldía is an Associate for the Offshore Department of Quijano & Associates, one of the leading law firms in the Republic of Panama. Natalia studied Law and Political Sciences at the Santa María La Antigua University and was admitted to practice law in the Republic of Panama in 2014. She holds a Master of Law (LLM) from the Columbia University School of Law since 2015. With almost 10 years of professional experience in Corporate Law and Estate Planning, Cryptocurrency and Digital Assets, Natalia has been focused in the North American clients of our International Department. Natalia has also been appointed in Board Positions in some of the most prestigious and largest Associations and Companies. She is Officer of the Board of Directors of the Panama Canal Museum, Officer of the Board of Directors Fundación Trenco, Officer of the Board of Directors of Industria Panameña de Cilindros, S.A., and Officer of the Board of Directors of ENESA (Energía Natural, S.A.)

Abandoned offshore companies harbor assets worth thousands if not millions. Offshore companies may become abandoned for a myriad of reasons, from bad management to bankruptcy procedures to inheritance proceedings or even due to a resident agent that ceases to exist. Sometimes enough time has passed in which the company remains in this state of abandonment, and the company is automatically dissolved by the Public Registry. In these cases of a company that still harbored assets is dissolved, both professional intermediaries and/or their clients may approach us inquiring on the process of restoring their British Virgin Islands ("BVI") company, in order to claim or properly dispose of said assets, and in these cases we assist them with the proper restoration.

Quijano and Associates has had a physical presence and office in the British Virgin Islands for over 30 years, and we are qualified and licensed to assist clients with all legal needs they may have.

A BVI company that becomes struck-off for non-payment of registrar fees can be restored in the Register (at any time prior to it being dissolved) through the payment of the outstanding fees plus a restoration fee.

However, if a company that has become struck-off remains in this way for a period of seven continuous years, it will then be deemed "dissolved."

In order to restore a dissolved company, a petitioner must make a formal application to the Court requesting the restoration. Notice of the application for restoration must be served to: (a) the Registrar; (b) the Financial Secretary of the Ministry of Finance; and (c) if the company was a regulated person, to the Financial Services Commission, as each these authorities is entitled to appear on the court hearing of the application to restore the dissolved company.

An application to restore the company to the Register may be made by a creditor, a former director, a former member (shareholder), or any person who can show an interest in having the company restored. The application to restore a dissolved company must be made within ten years of the date on which the company was administratively dissolved. The application must be accompanied by certain corporate documents, and evidentiary documents, that your registered agent, or the attorney assisting you with the restoration, will request from you. It is important to note that a dissolved company may be restored through any BVI attorney, as long as the above criteria are met. It is not necessary to go through the company's registered agent, this is especially helpful to note in those case in which the company's registered agent has since ceased to exist.

Once the application with its supporting documentation has been filed, if the application is in good order, a court date will generally be scheduled within 30-45 days of the filing date. The intention of this time frame is to accommodate any responses from the Financial Services Commission and Financial Secretary who, as mentioned above, are part of the application.

On the day of the hearing the court will decide whether the restoration of the company shall proceed and grant the order. Once the restoration is granted by the court, after the court order has been finalized, the interested party will have to proceed to pay all outstanding fees with the Registrar in order to restore the company.

In some cases, the matter may be challenged by the Registrar and require an additional submission from the interested party.

It is also important to note that if the matter is one of an urgent nature, and the interested party is able to provide good reason(s) to the Registrar, an urgent hearing may be requested.

Attorney fees for a restoration application will generally vary depending on the claim and/or assets held by the company prior to dissolution. If you have any questions on this process or any other process regarding BVI companies, please feel free to contact us at quijano@quijano.com.

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Young Lawyer Section Updates

YLS Membership Call

The membership calls take place the second Tuesday of every other month.

Here is the call schedule for 2023:

- Tuesday, April 11
- Tuesday, June 13
- Tuesday, August 8
- Tuesday, October 10
- Tuesday, December 12

YLS Committees

- Executive Committee
- CLE Committee
- Membership Committee
- Newsletter Committee
- Community Service Committee

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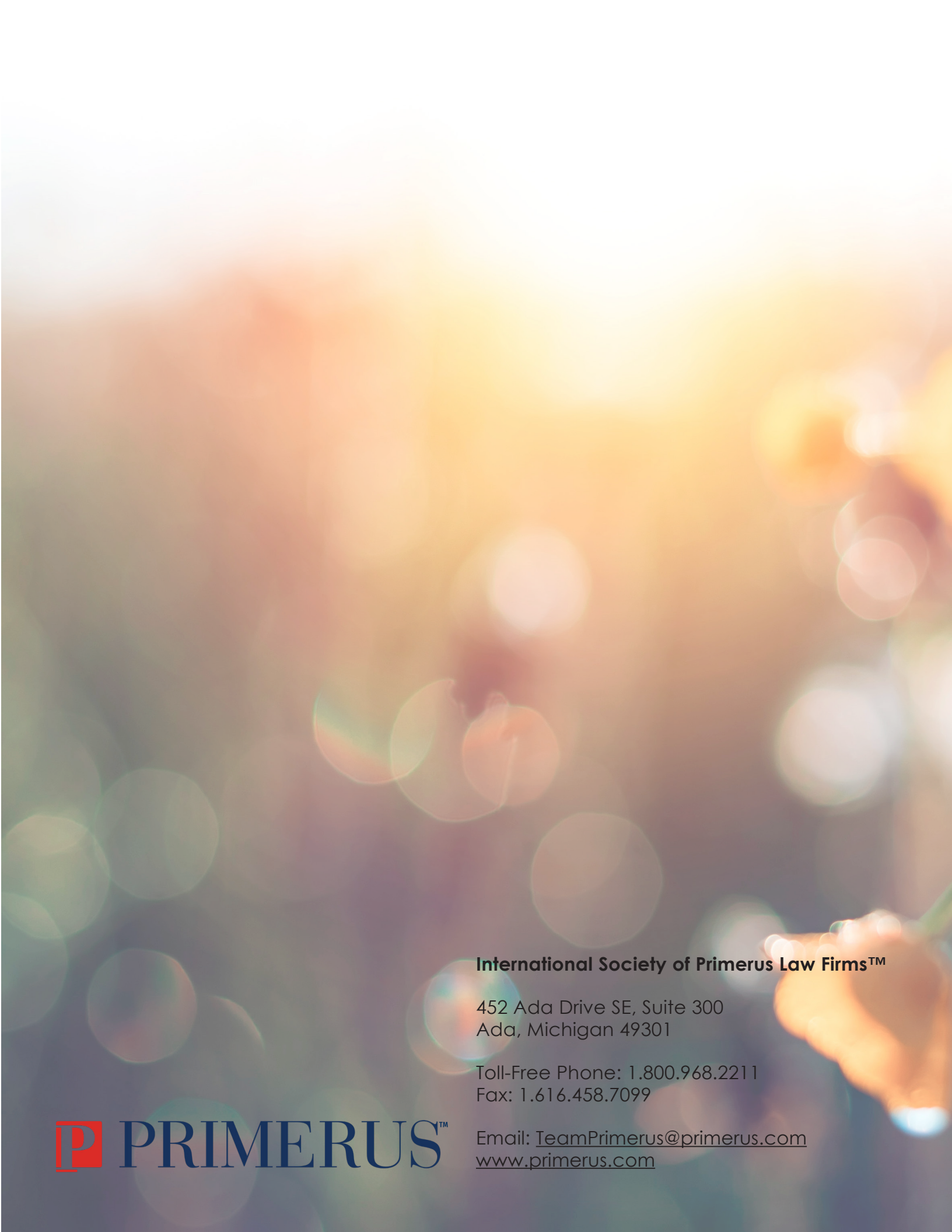

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