



VANTAGE POINT: Bryant McFall of Ogletree Deakins' Dallas office says his firm is getting deluged with phone calls from corporate clients concerned about health care reform compliance.

JAKE DEAN

Health care reform school

LAWYERS SEE UPTICK IN LEGAL WORK HELPING COMPANIES SORT OUT LEGISLATION AND CHOICES RELATED TO INSURANCE PLANS

BY SHAINA ZUCKER AND DEBBIE BOLLES | STAFF WRITERS

Attorney Bryant McFall spends a lot of times these days analyzing a 2,000-page document and translating it as best he can to his corporate clients.

But with mandates from health care reform still a murky mess, figuring out the impact to North Texas employers isn't so easy.

Since President Barack Obama signed the Patient Protection and Affordable Care Act into law in March, local lawyers' workloads have grown as they rush to make sense of the law and phased-in compliance deadlines.

"When it first passed, much time was spent training clients on the impact it would have," said McFall, managing shareholder of Ogletree Deakins' Dallas office. "Frankly, most people didn't know what it included. A lot of time is spent unraveling the 2,000 pages, explaining

what was coming down the pike in the future."

McFall, with Ogletree Deakins since 1994, said his firm has seen a significant increase in legal work since the bill became law — and it will only grow in the coming months. Ogletree Deakins is one of the nation's largest labor and employment firms, with 20 lawyers working in Dallas.

"We haven't had to hire more people, but lawyers are spending a lot more time — I'd say 10 to 15 percent more time

— just trying to understand the law and then be in a position to counsel clients," McFall said.

Ogletree Deakins has been swamped with issues related to grandfathered employers' health plans. If an employer health care plan was in place on March 23, 2010 and had not been "materially modified," an employer can apply for grandfather status, exempting the company from some of the law's requirements.

"Most of our work now is trying to determine whether or not their plans can be

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Q&A: Legal land mines in starting a business

Jonathan Hustis of Phillips & Reiter-The Outsourced General Counsel, advises new entrepreneurs to make sure they cover their bases on issues ranging from formation of type of company to protection of intellectual property and trade secrets

BY DEBBIE BOLLES | SPECIAL SECTIONS EDITOR

With a challenging economy resulting in high unemployment and corporate consolidation, many business leaders consider now the perfect time to launch a new venture. Jonathan K. Hustis, an attorney with the Dallas office of Phillips & Reiter-The Outsourced General Counsel, was asked about the legal pitfalls and steps entrepreneurs should be aware of in launching a business. Hustis specializes in advising emerging businesses on legal matters such as entity formation issues, commercial agreements and intellectual property.

DBJ: What are some of the most important legal issues entrepreneurs need to tackle when starting a business?

Hustis: Determining who owns the business is important when more than one person is involved in the startup. Business ownership issues arise when there is no structured discussion and documentation of ownership interests. One person may contribute cash, while another brings in a revenue-producing consulting project. Others may contribute labor, expertise, new ideas, industry contacts, etc. What are these things worth? What do these people get in

return? Disagreements even occur about whether someone has any ownership at all. The solution is to sit down and document a legal ownership structure. This helps entrepreneurs focus on business success when they need to, and avoids unnecessary squabbling.

Who owns assets used in the business also raises issues. Independent contractors may perform development and creative services, providing critically important intellectual property to the business. Without appropriate written agreements, ownership of these works remains with the independent contractor, not with the business. This can be catastrophic when investigation by a potential investor, strategic alliance or merger partner uncovers defects in ownership. Avoid this problem by using standard and customized written agreements with contractors to place ownership of intellectual property with the hiring business.

"Who has what authority?" is also an important issue. The authority to hire and fire, to buy and sell, to borrow and lend — all of these should be discussed early and can be established legally in business formation documents such as bylaws, ownership agreements and employment contracts.

DBJ: What are some other legal pitfalls to avoid in starting a business?

Hustis: Know and comply with laws about payroll taxes. This includes accounting, withholding and payment. Don't kid yourself about who is a W-2 employee and who is a Form 1099 independent contractor. Even honest entrepreneurs risk criminal charges and financial penalties by ignoring these rules.

DBJ: What contracts should be in place for a new business?

Hustis: Confidentiality and intellectual property agreements with employees and independent contractor contributors are a must, as are written debt or equity agreements that are clear about repayment obligations and the nature of the funder's interest in the business.

Written agreements with key suppliers should provide some predictability as to pricing and costs, delivery terms, service levels, allocation of casualty risks and insurance. They also should identify intellectual property ownership. For your customers, use standard or customized agreements that state obligations clearly, disclaim warranties that you don't intend and can't afford, preserve your intellectual property and clearly spell out what to expect.

For employees, use written offer letters that document salary, bonus, vacation and other benefits. Expressly reserve "at-will" employment status to help avoid an unintended employment contract term. In addition to written offer letters for individuals, set written employment policies for the company.

Finally, maintain written purchase and lease agreements for key equipment and facilities. Know what's in them, your rights to use these assets in your business, and the tax implications created by these arrangements.

DBJ: What are legal issues to address regarding protection of assets such as intellectual property?

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Hustis: First, if your business has valuable trade secrets, their unauthorized disclosure might help your competitors, or otherwise damage the business's value. Second, if your business uses or owns rights in intellectual property, then defects or doubts about ownership can damage your ability to operate the company, as well as lower its value. So, to protect valuable trade secrets, use confidentiality agreements and written company policies. To protect ownership and rights to patentable ideas, trademarks and copyrightable material, use written intellectual property agreements and license agreements. This includes protecting software, market studies, training materials, data compilations, white papers and even whiteboard drawings.

DBJ: What are the legal pros and cons of the type of business to set up?

Hustis: Sole proprietorship is the easiest legal structure for a simple, single-owner business. However, limited liability, better availability of equity financing and tax considerations often make corporations and limited liability companies (LLCs) a better choice.

DBJ: What other employee legal issues need to be addressed when opening a business?

Hustis: Get written permission to perform background checks on contractors and employees, and use a professional to perform these checks. Businesses are being held liable for the illegal conduct of their employees in a variety of cases. Background checks should reduce the risk of employees illegally causing injury to other employees and customers, and reduce the risk of employer liability.

Comply with Form I-9 procedures and related rules regarding an employee's ability to work legally within the United States. There are very particular rules about how to gather and review proof of identity, and what records should be maintained.

Create an employment handbook and policies before you hire your first employee. To avoid misunderstandings and compliance issues, document the conduct expected of employees and the conduct expected of the company. Declare "at-will" status for employees who are not being given a contract term of employment.

DBJ: What are some legal issues surrounding switching from working for a business to launching a new business?

Hustis: Your former employers may claim you have built your new business on their

intellectual or other property. Don't bring electronic files or other materials from prior employment. Even if you don't bring actual materials, a previous employer may claim your new business is "inevitably" using trade secrets you learned there because it is competing directly. Talk with your counsel about the scope of your prior job, the trade secrets you received and the scope of your new enterprise.

DBJ: To what extent do new business operators need legal help?

Hustis: Experienced legal counsel should learn the business plan and identify legal requirements, risks and opportunities that apply. Counsel should then recommend a legal action plan that fits the needs and capacity of the business.

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Laws create challenges for corporate lawyers

BY CHRIS CYREK | STAFF WRITER AND TAMMY WORTH | CONTRIBUTING WRITER

During the past year, there have been a number of legal changes that affect the work of corporate lawyers in all industries. Here is a roundup of the various changes and what in-house lawyers should know about each of them.

Nursing mother amendment

An amendment to the Fair Labor Standards Act requires employers to provide break time and a location for nursing mothers to express breast milk while at work. The requirement is effective immediately. It pertains to mothers during the first year of the child's life.

Current controversy surrounding the act concerns a signal from the Labor Department that employees who are exempt from Fair Labor Standards Act guidelines will not fall under the new provision, according to Carrie Hoffman at Dallas' Gardere Wynne Sewell LLP.

"I think the meaning behind (the Labor Department's memo) is that there wouldn't be an unpaid break for exempt employees because they aren't paid by the hour," she said. Employees who are exempt, Hoffman explained, generally have a larger measure of control over their schedule and as such would not need a mandated opportunity to nurse. The law requires breaks, but it does not mandate payment.

Location also could be an issue. The law requires a place other than a public bathroom be set aside. The room must be concealed from public view and be able to be locked. Bathrooms, for example, would not be allowed, Hoffman said.

The mandate for a private space would "really only be an issue in retail or restaurant environments," Hoffman said. "It's easier to find a private space in an office setting."

Employers with fewer than 50 employees may be exempt from the law, but only if it would create an undue hardship on the employer. The employer would have to show that it would be a burden to give the time off or provide the room, something that has traditionally not been easy to prove, Hoffman said. The 50-employee threshold also applies to those employed anywhere by the company, so even smaller chains would fall under the provision as long as the parent company has 50 or more workers.

Lilly Ledbetter Fair Pay Act

The first legislation President Obama signed into law was the Lilly Ledbetter Fair Pay Act, which essentially reversed a Supreme Court ruling regarding the statute of limitations for equal pay litigation. The law says that, as of May 2007, each paycheck someone receives in which he or she was paid unequal pay is a violation of the law, as opposed to the date when the pay was agreed upon.

This allows employees to challenge pay acts for a longer period of time, said Karen Glickstein, a lawyer at Polsinelli Shughart PC in Kansas City, Mo.

"The most important thing that employers need to know is to monitor pay and performance evaluation practices," she said.

The courts already have had to make decisions on what constitutes a pay practice, including a promotion or demotion. Glickstein said that courts have held that a promotion is not covered by the act, leaving a "lot of fuzziness" as to what constitutes a pay practice in the law.

Citizens United v. FEC

The Supreme Court, in the Citizens United v. Federal Election Commission case, lifted restrictions on expenditures by businesses, allowing them to directly spend money that can be used in a political race. Chris Gober, at Fish & Richardson's Dallas office, says he thinks that the option to spend general treasury funds on political advocacy "is going to be made in the same line of thought as any other decision: the bottom line."

The decision on whether to contribute will come down to "is it worth it," Gober said. Gober predicts that corporations and their counsel will ultimately have to rely on political law experts in response to the decision.

Recent controversy surrounding the retail chain Target, which had donated \$150,000 to pro-business organization MN Forward as it works to elect socially conservative Republican Tom Emmer to the governorship of Minnesota, has highlighted some of the potential missteps companies can make in this area.

"One of the questions I ask is, how important is nondisclosure to you?" Gober said.

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