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Securities Law Updates for Equity Compensation

By Steven J. Boender and William J. Goodling, Stoel Rives LLP

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Many Oregon companies issue equity compensation to recruit and retain key employees. Start-up and development-stage companies often issue equity compensation to provide their employees attractive compensation packages when their cash flow may not permit generous cash compensation. Private equity firms also often cause their portfolio companies to issue equity compensation to the executives of the portfolio companies. Companies that issue equity compensation believe it aligns the interests of the employees with the interests of the other equity holders and motivates the employees to facilitate a successful sale or other liquidity event on the foreseeable horizon, since the employees would potentially participate in the proceeds from the sale or other liquidity event by holding equity compensation.

While issuing equity compensation often makes strategic sense, companies should be aware that the issuance of equity compensation (including restricted stock, stock options, restricted stock units, and stock appreciation rights) often constitutes the offer and sale of a security that is subject to federal and state securities laws and exposure to liability for non-compliance.

Federal Securities Laws

Section 5 of the Securities Act of 1933 (Securities Act) makes it unlawful for any business to offer or sell any security unless (i) the offer and sale is made pursuant to a registration statement declared effective by the Securities and Exchange Commission (SEC) or (ii) an exemption from the registration requirement is available. The time and expense required for a registered offering are substantial and, upon completion of a registered offering, the company becomes a “public company” subject to the burdensome and ongoing periodic reporting obligations to the SEC pursuant to the Securities Exchange Act of 1934. For these reasons, most Oregon businesses seek to rely on exemptions from registration under the Securities Act for issuances of their securities, including issuance of securities as equity compensation.

Section 4(a)(2) of the Securities Act is a key exemption and provides that any “transaction by an issuer not involving any public offering” is exempt from the registration requirement. Based on this, it may be understandable for Oregon businesses to believe that their issuance of equity compensation to their own employees is not a transaction “involving any public offering” and is therefore exempt from the Securities Act’s registration requirement. But the United States Supreme Court’s first case interpreting this exemption, *SEC v. Ralston Purina Co.*, 346 U.S. 119 (1953), held that a company’s offer and sale of stock to its own employees required registration under the Securities Act in the circumstances of the case.

To avoid uncertainty and promote equity compensation in circumstances where a registered offering would not be efficient, the SEC adopted Rule 701. The rule creates a safe harbor from the the Securities Act’s registration requirement for offers and sales of securities by private companies to employees, directors, and other specified persons for compensatory

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Steve Boender is a partner in the corporate group at Stoel Rives LLP. Steve advises clients on a broad array of corporate transactions and issues, including mergers and acquisitions, startup formation and fundraising, and SEC reporting and compliance.



Will Goodling is an associate in the corporate group at Stoel Rives LLP. Will advises clients on mergers and acquisitions, financings, securities-law compliance, and other corporate transactions and issues.

purposes (as opposed to capital-raising purposes). The rule has a number of conditions, including:

- **Written plan or contract.** The issuance must be made pursuant to a written compensatory benefit plan or written compensation contract and copies of these documents must be delivered to the recipient of the securities.
- **Maximum sales amount.** The aggregate sales price or amount of securities sold in reliance on Rule 701 during any 12-month period must not exceed the greatest of (i) \$1 million, (ii) 15% of the total assets of the issuer (as of its most recent balance sheet date), and (iii) 15% of the outstanding amount of the class of securities being offered and sold under Rule 701 (as of the issuer's most recent balance sheet date). With respect to stock options, the sale price is deemed to equal its exercise price and the sale occurs on its grant date.
- **Disclosure requirements.** If the aggregate sales price or amount of securities sold during any consecutive 12-month period exceeds \$10 million, the issuer must deliver to the investors, at a reasonable period of time before the sale, specified disclosures, including risk factors relating to the securities and specified financial statements.

Compliance with Rule 701 can present a number of complicated issues and calculations, and the analysis can differ depending on the nature of the securities being offered. For example, the rule provides: "In calculating outstanding securities for purposes of paragraph (d)(2)(iii) of this section [i.e., clause (iii) of the maximum sale amount described above], treat the securities underlying all currently exercisable or convertible options, warrants, rights or other securities, other than those issued under this exemption, as outstanding. In calculating the amount of securities sold for other purposes of paragraph (d)(2) of this section, count the amount of securities that would be acquired upon exercise or conversion in connection with sales of options, warrants, rights or other exercisable or convertible securities, including those to be issued under this exemption. Amounts of securities sold in reliance on [Rule 701] do not affect 'aggregate offering prices' in other exemptions, and amounts of securities sold in reliance on other exemptions do not affect the amount that may be sold in reliance on [Rule 701]."

To complicate these calculations, issuers often rely on the Regulation D exemption from registration for equity compensation issued to accredited investors (which include directors and executive officers of the issuer) and Rule 701 for equity compensation awarded to employees who are not accredited investors.

In recent years, the SEC has demonstrated a heightened interest in Rule 701 and has engaged in a number of actions relating to it, including:

- **Rule 701 in mergers and acquisitions.** In July 2016, the SEC issued several interpretations regarding the application of Rule 701 when an acquiring company in an acquisition assumes the stock options or other securities that were previously issued by the target to its employees or other eligible service providers under Rule 701.
- **Confidentiality.** In November 2017, the SEC issued an interpretation concerning the measures that companies may take to protect the confidentiality of the information they are required to disclose to their employees or other eligible service providers under Rule 701, including their financial statements.
- **Enforcement action.** In March 2018, the SEC investigated and obtained a civil penalty against a privately held San Francisco tech company for its violation of Rule 701 arising from its failure to provide its employees the requisite disclosures prior to awarding them stock options.
- **Disclosure threshold.** In July 2018, the SEC amended Rule 701 to increase the disclosure threshold from \$5 million to \$10 million (as adjusted for inflation every five years).
- **Concept release.** In July 2018, the SEC issued a 36-page concept release soliciting comments on various ways to improve Rule 701, including whether it would be appropriate to amend Rule 701 to expressly permit issuances of securities to "gig economy" workers that may not qualify as employees or other persons identified as eligible investors under Rule 701.

In light of all this recent activity, we expect that the SEC will continue to take actions to clarify or amend Rule 701 and to pursue actions for non-compliance.

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Many Oregon businesses have found that equity compensation is an important part of their recruitment and retention efforts.

Oregon Securities Laws

A business that issues securities pursuant to Rule 701 will have an exemption from registration at the federal level, but the business must also comply with applicable state securities laws.

Under the Oregon Securities Law, the offer and sale of any security in the state must be registered with the Department of Consumer and Business Services unless an exemption from the registration requirement is available.

Prior to February 2017, Oregon did not have a generally applicable registration exemption comparable to Rule 701. A department regulation provided that an issuer could register securities if their issuance was exempt from federal regulation under Rule 701. The registration requirements included submitting a Form U-1 (Uniform Application to Register Securities) to register the securities, a Form U-4 (Uniform Application for Securities Industry Registration or Transfer) to register a salesperson for the securities, other specified disclosures, and an annual filing fee.

Oregon's registration scheme for Rule 701 transactions was an anomaly, as we learned in a 50-state analysis of registration requirements. All other states provided an applicable exemption for transactions exempt at the federal level under Rule 701 that was either self-executing or required only a notice filing.

To the relief of Oregon securities law practitioners, on February 1, 2017, the department repealed its registration regulation and adopted a new regulation that exempted Rule 701 offerings from state registration requirements, which put Oregon in line with other states on this topic and reduced compliance costs and burdens.

The new regulation creates an exemption from Oregon registration if:

- the offer and sale of the securities is exempt from federal registration under Rule 701,
- a notice on a form approved by the director of the department is filed with the department no later than 30 days after the initial offer and sale in reliance on the regulation,¹ and
- a fee of 1/10 of 1% of the amount offered in Oregon (subject to a minimum of \$200 and maximum of \$1,500) is paid to the department.

While the regulation does not require an annual renewal filing or fee, the regulation requires the issuer to amend the filing when there are "material changes in the terms and conditions of the original notice or plan" and defines that phrase to mean:

- an increase in the aggregate amount of securities to be offered in Oregon,
- a change in the type of securities, or
- a "change in the identity of the issuer or owner."²

A filing fee is required for any amendment that increases the offering amount, and the fee is calculated in accordance with the fee for the original filing, less amounts previously paid under the prior notice (subject to a minimum fee of \$100 for the amendment).

Conclusion

Many Oregon businesses have found that equity compensation is an important part of their recruitment and retention efforts and provides key employees incentives to help the businesses reach a successful sale or liquidity event in the future. While equity compensation serves these objectives, businesses should work with experienced securities counsel to assist them in complying with applicable securities laws and to mitigate legal risks. ♦

Endnotes

1. The regulation provides that a failure to file the notice does not affect the availability of the exemption if, within 15 business days after discovery of the failure or after demand by the director, whichever occurs first, the issuer files the notices and pays the applicable fee.
2. We suggest that the Department of Consumer and Business Services could ameliorate uncertainty for issuers without detriment to investors if the department issued an amendment or appropriate written guidance to (i) clarify the meaning of "the identity of an issuer," (ii) provide that an amendment filing is required in respect of a change in an owner of the issuer only if the change in owner constitutes a change of control of a majority of the voting securities of the issuer, and (iii) specify whether the amendment is due on the date of the event or within a specified period thereafter.

Ten Things Every Corporate Lawyer Should Know About Employment Law

By Melissa Healy and Alisha Kormondy, Stoel Rives LLP



Melissa Healy is a litigation associate who practices in the firm's Labor and Employment group. Her practice focuses on providing advice in employment-law matters, representing management in employment litigation, and providing traditional labor support to employers.



Alisha Kormondy is an associate in the Labor and Employment group at Stoel Rives and enjoys learning about her clients' businesses and helping them resolve employment-related disputes.

Behind every business are the employees who keep it running. As employment attorneys, we often find ourselves partnering with our corporate counterparts on employee-related issues. In no particular order, here are ten things we think you should know about employment law.

1. Pay Equity

If you have talked to your clients lately, you may already know that pay equity is at the top of their worry list. Oregon's Equal Pay Act, the majority of which took effect on January 1, 2019, makes it unlawful to pay different wages to employees who perform work of a comparable character unless the employer can justify the discrepancy using one of the enumerated "bona fide factors" such as a merit system, training, or experience. (Paying someone more due to market demands or negotiating skills is not on the list of acceptable reasons.)

Employees who allege violations can file a complaint with the Oregon Bureau of Labor and Industries and/or file a civil lawsuit. There is a limited affirmative defense available to employers that have recently conducted an equal pay analysis and implemented changes as a result. There are different avenues to conduct (and address the results of) an equal pay analysis, and those decisions should be made in coordination with legal counsel to ensure privilege. Generally, however, an equal pay analysis should include consideration of each position to determine which employees are performing work of comparable character and, for those employees that are performing work of a comparable character, a determination as to whether there are one or more bona fide factors to justify any pay discrepancies among the group.

We expect to see a significant amount of litigation arise out of this new law, and it is a good idea to ensure your clients are aware of and taking steps to address its requirements.

2. Addressing Harassment in the #MeToo Era

Your clients may also be asking you whether harassment and discrimination claims should be handled differently in light of the #MeToo movement. Generally speaking, the answer is no, because the underlying law has not changed. It is, and always has been, critically important that employers take complaints of harassment and discrimination seriously and respond promptly. The scope and complexity of any investigation and the nature of the response will depend on the allegations, but some sort of investigation and response is prudent in nearly every circumstance when an employee raises concerns about potential harassment or discrimination.

The movement has changed the level of media attention these types of claims receive, and is certainly affecting legislation related to harassment and discrimination claims. In fact, Oregon recently passed a bill (SB 726) that increases the statute of limitations for harassment and discrimination claims to five years. This bill will have large and lasting impacts on employment litigation in Oregon.

3. Restrictive Covenants

If your clients are worried about protecting their confidential information or ensuring their employees do not leave to work for competitors, you will need to discuss restrictive covenants. This is often the first step where employment attorneys get involved.

The rules for what is permissible vary by state and change often. In Oregon, ORS 653.295 sets forth specific requirements that must be met to enforce a non-competition agreement, including mandates that the employee be exempt from overtime for specific reasons, make a certain amount of money, and be informed that a non-competition agreement is required at least two weeks before starting work. Washington recently passed legislation that similarly limits non-competition agreements. HB 1450: <http://lawfilesexternal.wa.gov/biennium/2019-20/Pdf/Bills/House%20Passed%20Legislature/1450-S.PL.pdf#page=1>

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Non-solicitation agreements (which generally prohibit employees from soliciting employees, or soliciting or transacting business with customers of the former employer after termination), invention assignment agreements (granting employers ownership rights over employee inventions pursuant to their employment), and other employment-related restrictions should also be reviewed by employment counsel to ensure they are reasonable, provide sufficient consideration (if required), and otherwise comply with applicable law.



Offer letters are critically important because, depending on the employee's position and the size of the organization, the offer letter may be the only written document given to employees that sets out the terms and conditions of their employment.

4. Offer Letters

You may find yourself drafting offer letters for clients when an acquisition or merger occurs. Offer letters are critically important because, depending on the employee's position and the size of the organization, the offer letter may be the only written document given to employees that sets out the terms and conditions of their employment.

If an employee does not have an employment contract or agreement, the letter should include a statement that the employment relationship is "at will" and may be terminated by the employer at any time for any lawful reason. A statement that employment is contingent on background checks, references, and immigration paperwork is also crucial. The offer letter should include a description of the position and essential job duties, which may only require attaching a job description to the offer letter.

For entities that do not have job descriptions, some detail about the position and essential job duties should be provided in the letter (and the client may also want to use this as an opportunity to create a job description for the position). Finally, if the employee will be expected to sign a non-competition agreement, this should also be referenced in the initial offer.

5. Employment Relationship Basics

Employers often speak of working with contractors, and your interest should be piqued whenever the use of independent contractors is mentioned. Misclassifying a worker as an independent contractor can potentially lead to an expensive wage claim down the line.

The analysis of whether a worker is an employee or independent contractor is a fact-specific inquiry, but the answer in close cases is nearly always that the worker is not an independent contractor. In determining whether an employee is an independent contractor, courts consider (among other factors): (1) the nature and degree of control the employer has in terms of supervision, work location, work hours, and how work is to be completed; and (2) whether the worker has an independently established business.

If the employer has a high degree of control over the worker or the worker does not have an independent business that is separate from the employer, the worker is most likely not an independent contractor.

6. Exempt v. Non-exempt Employees

Be cautious about clients who tell you that they do not pay overtime, or that someone is not entitled to overtime simply because he or she is paid a salary. Employees are only exempt from overtime under wage and hour law if certain requirements are met—and being paid a salary, as opposed to an hourly wage, is only one of them.

Exempt employees must also make at least \$455 a week (although the Department of Labor recently proposed a rule that would increase the minimum to \$679 a week), and perform certain duties. The "duties test" is where many employers go wrong. Most truly exempt employees will fall into one of three "duties" categories: professional (e.g., doctor, lawyer, dentist), executive (supervises two or more full-time employees and has the effective or actual ability to hire and fire), or administrative (performs work related to management of the business and primary duties include exercising independent judgment on matters of significance).

The administrative exemption, in particular, is a thorny and often-litigated area of employment law. As with all things wage and hour-related (more on that below), misclassifying an employee as exempt is a costly yet common error, and can be avoided through periodic review of positions and duties to ensure employees are being properly compensated.

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Wage and hour laws are notoriously unforgiving, and the costs associated with a violation can add up quickly.

7. Paying Employees

If a client calls and tells you the company received a demand letter or complaint about wages, make sure to connect it with an employment attorney right away. Wage and hour laws are notoriously unforgiving, and the costs associated with a violation can add up quickly.

It is not just about minimum wage, either (which now changes on an annual basis in Oregon). Employers must also comply with laws that address breaks and meal periods, the timing of final paychecks, and overtime (including special requirements for “manufacturing” employees—a term that is broadly construed).

Furthermore, it is an employer’s responsibility to track hours worked. As part of this duty, employers should seek guidance when necessary regarding whether time spent changing into special work clothes, traveling, or performing other “preparatory tasks” is compensable.

8. Sick Leave, Vacation, and Time Off

Questions regarding leave are among the hardest to answer because this is one of the most technical areas of employment law. An employment attorney should be involved with leave issues as early as possible. A simple question about leave may involve the intersection of the Family Medical Leave Act (FMLA), the Oregon Family Leave Act (OFLA), the Oregon Sick Time Law (OSL), and in some instances, the Americans with Disabilities Act (ADA) and state disability laws.

Although the laws and regulations are complicated, one essential feature to keep in mind about these laws is that they apply only to employers of certain sizes. FMLA applies to employers with 50 or more employees, OFLA applies to employers with 25 or more employees, and OSL applies to all employers (although the leave need only be paid if the employer has more than six employees in Portland, or more than ten employees elsewhere in Oregon).

Federal disability laws apply to employers that have 15 or more employees, while state disability laws kick in for those with six or more employees.

9. Employee Marijuana Use

Many employers wonder whether they may order a drug test for marijuana use, since recreational marijuana is legal under Oregon law. Currently, employers may drug test and ban marijuana use by their Oregon employees.

There is, however, a proposed bill (SB 379) that would prevent employment decisions based on off-duty marijuana use. The proposal would allow employers to address employees who are impaired at work, but because there is currently no drug test that will identify current intoxication (as opposed to use the night before), it is unclear how this will work as a practical matter.

10. Important Questions to Ask Your Clients

1. When did you last review your employee handbook? Employers should have an attorney regularly review their employee policies and procedures to make sure they are up to date. Legal protections for employees are only growing (e.g., the requirement for most Oregon employers to provide paid sick leave), and handbooks should reflect the current state of the law.
2. How many employees do you have? New laws apply to businesses as they grow. As noted above, companies with six or more employees in any location must comply with Oregon disability laws, and those with 25 or more employees in Oregon are subject to OFLA. Employers should be mindful of their employee count and plan in advance to ensure they are prepared to comply with any soon-to-be-applicable laws on the horizon.
3. In what states do your employees work? As a business expands to new locations (permanently or temporarily), new employment-related laws and requirements are likely to apply. It is crucial for employers to ensure compliance in each jurisdiction where they operate. ♦

Idaho case spotlights issues with interstate transport of hemp

By Kristie N. Cromwell, Demland & Cromwell LLC



Kristie Cromwell is a partner at Demland & Cromwell LLC. Her practice centers around helping businesses navigate dynamic rules and regulations in the emerging recreational cannabis industry. She takes pride in her work and close relationships with clients and feels inexorably connected to the success of their businesses. Kristie brings her background in business to a full spectrum of entrepreneurs, from those new to operating their own company to those well versed in business but new to the Oregon cannabis market.

Ask a cannabis or hemp attorney “Can Oregon companies sell hemp products across state lines?” and you will receive a typical “it depends” response. I suspect lawyers often use that phrase as a cover for “I am going to talk my way out of having to answer your question.” However, for the new federal hemp industry, an “it depends” answer may actually be appropriate, given the current status and legal ramifications of Idaho’s ongoing hemp seizure battle in *Big Sky Scientific LLC v. Idaho State Police*, No. 1:19-cv-00040-REB, 2019 WL 438336 (D. Idaho 2019).

The facts: Colorado-based hemp processor, Big Sky Scientific LLC, purchased 13,000 pounds of hemp from an Oregon-registered industrial hemp grower in Hubbard, Oregon. Big Sky arranged for the purchased hemp to be shipped by truck in multiple loads to Big Sky’s processor in Aurora, Colorado, traveling through Idaho. The truck drivers carried bills of lading indicating the cargo was hemp. However, on January 24, 2019, Idaho State Police seized all the contents of one of the trucks (totaling nearly 6,700 pounds of hemp) as well as the truck itself, and arrested the truck driver for marijuana trafficking (a charge that carries a minimum five-year prison sentence). On February 1, 2019, Big Sky filed this legal action in Idaho and immediately sought a declaratory judgment, and an emergency temporary restraining order and preliminary injunction, to enjoin Idaho from enforcing the Idaho Controlled Substances Act against hemp in interstate transport and to order the defendants to return Big Sky’s seized property immediately. The following day, the Idaho magistrate judge denied Big Sky’s emergency motion after reviewing the record, which at that time was limited to the parties’ back-and-forth correspondence and was not yet fully developed.

Very brief legal background: under the 2014 Farm Bill (the Agricultural Act of 2014, Pub. L. No. 113-79), Congress authorized state departments of agriculture and institutions of higher education to establish pilot programs to study the domestic growth, cultivation, and marketing of hemp; the Oregon Department of Agriculture has established such a program under which it registers industrial hemp growers.

Under the 2018 Farm Bill (the Agricultural Improvement Act of 2018, Pub. L. No. 115-334), the federal government removed hemp from federal controlled substance schedules; added hemp to the list of agricultural commodities; and, most pertinent, under Subtitle G, instructed the USDA to develop a regulatory framework for producing hemp and for allowing states to implement their own production plans. The 2018 bill expressly states that no preemption is intended of any law of a state or Indian tribe that “[more stringently] regulates the production of hemp.” Thus, even under the 2018 Farm Bill, states may continue to ban the production and sale of hemp within their respective borders. Idaho imposes such a ban under the Idaho Controlled Substances Act, which regards hemp as equal to marijuana regardless of the concentration of delta-9 THC (tetrahydrocannabinol, the psychoactive component of the plant *Cannabis sativa* L.). It was under this state law prohibition that Idaho seized Big Sky’s hemp.

The problem is, the hemp seized by Idaho had been neither produced nor sold in Idaho. Rather, it had simply been passing through the state’s jurisdiction. This brings us to the heart of the argument: Was Idaho’s seizure an interference with interstate commerce, in violation of the 2018 Farm Bill and Supremacy Clause of the U.S. Constitution? So far, the dispute has primarily centered on Section 10114 of the 2018 Farm Bill, which addresses industrial hemp in interstate commerce:

- (a) **RULE OF CONSTRUCTION.** Nothing in this title or an amendment made by this title prohibits the interstate commerce of hemp (as defined in section 297A of the Agricultural Marketing Act of 1946 (as added by section 10113)) or hemp products.
- (b) **TRANSPORTATION OF HEMP AND HEMP PRODUCTS.** No state or Indian Tribe shall prohibit the transportation or shipment of hemp or hemp products *produced in accordance with subtitle G* of the Agricultural Marketing Act of 1946 (as added by section 10113) through the State or the territory of the Indian Tribe, as applicable. (emphasis added)

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In denying Big Sky's emergency motion, the district court held that injunctive relief was not warranted for two reasons under the 2018 Farm Bill: (1) the seized product may not have constituted "hemp"; and (2) the pending status of the regulatory framework required in order for hemp to be protected while in interstate commerce.

First, the district court questioned whether the product seized was in fact industrial hemp under the 2018 Farm Bill definition. Two separate state-accredited laboratories had already certified that the hemp contained well below the legally defined 0.3 percent delta-9 THC concentration level, but the court stated that the Oregon lab's results neglected to show all relevant information regarding batch number, batch size, and harvest/production date. The Court also noted that the testing date was three months prior to the seizure, and that signed invoices outlining the total quantity shipped were not in the court's records.

Second, the court determined that the seized hemp was not entitled to the interstate commerce protections of Section 10114(b) of the 2018 Farm Bill. Since Subsection(b) provides that states cannot prohibit the interstate commerce of hemp produced in accordance with Subtitle G, the court reasoned that states may limit or impede any hemp in interstate commerce that has been produced *not* in accordance with Subtitle G. And the kicker: no currently existing hemp can benefit from the interstate commerce protections of Section 10114(b) because the federal regulatory framework under Subtitle G has not yet been implemented. In its decision, the Court stated: "the hemp that was seized in Idaho could not possibly meet that [produced in accordance with Subtitle G] standard because no 'plans' to regulate the production of industrial hemp under the 2018 Farm Act have either been approved (by the federal government as to Oregon, as pertinent here) or created and promulgated by the [USDA] . . ." Therefore, because Big Sky could not establish that its seized hemp had been produced in compliance with Subtitle G, the Court could not conclude on the record that Big Sky had a likelihood of success on the merits of its underlying claims sufficient for the Court to grant the preliminary injunction.

The court could have nevertheless issued a preliminary injunction upon a determination that the costs of refusing to grant the injunction outweigh the benefits. However, the court made short order of this sliding-scale analysis, and simply stated that Big Sky took a gamble and lost. It is worth noting that the court, in dicta, suggested that upon further development of the record, the answer might change and that in the meantime Idaho should consider taking affirmative steps to preserve the value of the hemp in its possession. I hope Idaho heeded the advice.

Big Sky has appealed the decision to the Ninth Circuit, which will decide whether the district court abused its discretion in refusing to grant Big Sky its preliminary injunction. First, Big Sky asserts that under authority of the Commerce Clause and the 2018 Farm Bill, Congress has preempted the Idaho Controlled Substances Act insofar as it erects a barrier against the interstate transport of hemp. The district court interpreted Section 10114(b) to mean that states may limit or impede any hemp in interstate commerce that had been produced not in accordance with Subtitle G. But Big Sky argues that the court's interpretation fails to give proper meaning to Subsection (b) when read with Subsection (a)'s express rule of construction: "[n]othing in this title or an amendment made by this title prohibits the interstate commerce of hemp ... or hemp products." According to Big Sky, the district court reads Subsection (b) as granting states the power to do exactly what Subsection(a) forbids: to limit or impede hemp while it's in interstate commerce. Big Sky counters that Subsection(b) simply serves to clarify that states "that choose to limit hemp production under Subtitle G cannot also limit a key component of the interstate commerce of hemp, its transportation."

Personally, I am not persuaded by Big Sky's proposed interpretation. I am not convinced that by stating, "nothing in this title prohibits the interstate commerce of hemp," Congress actually meant, "nothing shall prohibit the interstate commerce of hemp." Subsection (b) does preempt a state's power to prohibit the interstate commerce of hemp, but only federally legal hemp, which means hemp "produced in accordance with Subtitle G." Under Big Sky's reading, this language is rendered all but useless.

Luckily, Big Sky has a better alternative argument: that the seized hemp was in fact produced in accordance with Subtitle G, because it was produced under the 2014 Farm Bill. Sky asserts that Subtitle G allows hemp production under a federal plan, state plans, and under other federal laws, and that the 2014 Farm Bill is one such other federal law. Not only does the 2014 Farm Bill allow the commercial production of industrial hemp, but Congress deliberately expanded hemp production under the 2014 legislation when it passed the 2018 Farm Bill. Since Big Sky's seized hemp was lawfully produced in accordance with the 2014 Farm Bill, it is now up to the Ninth Circuit to determine whether the hemp was therefore also produced in accordance with Subtitle G of the 2018 Farm Bill and thus entitled to the interstate commerce protections of Section 10114(b).

Pending the appeal, we wait to learn whether the 2018 Farm Bill protects hemp in interstate transport in all cases, or only in those cases where that hemp has been produced in accordance with Subtitle G; and whether hemp produced under the 2014 Farm Bill currently qualifies for this protection, even though the USDA has not yet promulgated regulations under Subtitle G. ♦

Business Law Section News

Subcommittee Reports

Continuing Legal Education

The next Business Law Section CLE program, “Understanding and Preparing for the California Consumer Privacy Act,” will take place Thursday, June 20, 2019, from 8:00 to 9:00 a.m. (Breakfast will be served.) Parna Mehrbani of Tonkon Torp and Emily Maass of Lane Powell will discuss the CCPA—who it covers (spoiler alert: it could affect your Oregon-based clients!), what it requires, and the rights of data subjects, including recently adopted and pending amendments, an update on the California Attorney General’s rulemaking process, and what to expect leading up to the CCPA taking effect and becoming enforceable in 2020. The program will be live in Portland (Perkins Coie) and webcast in Bend (Karnopp Petersen). Watch for the Bar’s upcoming announcement email for more information, including registration.

Thanks to Melissa Healy and Alisha Kormondy of Stoel Rives for presenting their informative CLE “Employment Law: What Corporate Lawyers Need to Know” on April 3, and for expanding that knowledge through their article in this newsletter.

SAVE THE DATE. Mark your calendars for the Business Law Section’s annual meeting and full-day CLE event on Friday, November 8, 2019, at the Multnomah Athletic Club.

Do you have ideas for a business law CLE program? Please contact CLE subcommittee chair Kara Tatman at ktatman@perkinscoie.com.

New Business Lawyers

The New Business Lawyers subcommittee will host a picnic later this summer for law students and members of the Bar and their families and friends. Details will be posted on the Section’s website: <https://business-law.osbar.org/blsevents>.

The subcommittee meets monthly and its members participate in working groups that focus on education, social events, law schools, and newsletter participation. If you would like to be involved with the subcommittee or its activities, please reach out to the subcommittee’s chair, Will Goodling of Stoel Rives LLP, at (503) 294-9501 or william.goodling@stoel.com.



On March 14, the New Business Lawyers subcommittee hosted a social event with law students interested in pursuing a business law career.



Share Your Experience

In 2011, the Oregon Supreme Court instituted the New Lawyer Mentoring Program. All new OSB members are required to complete the program in their first 12–18 months as members. The Bar is currently seeking to match 17 new lawyers who have requested a business law practitioner as a mentor.

Serving as a mentor is a wonderful opportunity to welcome our newest colleagues to the profession and to provide guidance toward successful, rewarding careers.

To serve as a mentor, an attorney must be a member of the OSB in good standing, have at least five years’ experience in the practice of law, have a reputation for competence and ethical and professional conduct, have no current disciplinary prosecutions pending, and be appointed by the Oregon Supreme Court.

The typical time commitment is a monthly 90-minute meeting for 12–18 months. At the completion of the program, the mentor receives eight CLE credits, including two ethics credits.

For a quick “At-a-Glance” summary of the program, click here: <http://www.osbar.org/docs/NLMP/NLMPAtAGlance.pdf>

For more complete information and to enroll as a mentor, click here: <https://www.osbar.org/nlmp/index.html>

Please email questions to mentoring@osbar.org or reach the program coordinator, Cathy Petrecca, at (503) 431-6355. ♦



Business Law
Section

The mission of the Oregon State Bar Business Law Section is to provide excellent service to the diverse group of business-law practitioners throughout the State of Oregon by providing regular, timely, and useful information about the practice of

business law, promoting good business lawyering and professionalism, fostering communication and networking among our members, advocating improvement of business law, and supporting Oregon’s business infrastructure and business community.

Articles in this newsletter are for informational purposes only, and not for the purpose of providing legal advice. The opinions expressed in this newsletter are the opinions of the individual authors and may not reflect the opinions of the Oregon State Bar Business Law Section or any attorney other than the author.

Upcoming Events

CLE Programs

Understanding and Preparing for the California Consumer Privacy Act

Thursday, June 20, 2019/7:30–9:00 a.m.

Perkins Coie (Live)

1120 NW Couch Street, 10th floor, Portland

Karnopp Petersen (Webinar)

360 SW Bond St. #400, Bend

Many Oregon businesses will soon be subject to regulatory compliance obligations and risks arising from the broad California Consumer Privacy Act. Parna Mehrbani of Tonkon Torp and Emily Maass of Lane Powell will discuss the CCPA—who it covers, what it requires, and the rights of data subjects, including recently adopted and pending amendments, an update on the California Attorney General’s rule-making process, and what to expect leading up to the CCPA taking effect and becoming enforceable in 2020.

Register at: [https://email.perkinscoie.com/9/1486/landing-pages/rsvp-\(blank\).asp?sid=048c5cf0-7f58-461e-a62e-2560cad8317b](https://email.perkinscoie.com/9/1486/landing-pages/rsvp-(blank).asp?sid=048c5cf0-7f58-461e-a62e-2560cad8317b)

Investigating Sexual Harassment and Other Misconduct

Thursday, June 27, 2019/9:00 a.m.–4:00 p.m.

Oregon State Bar Center, Tigard

Also available as live webcast

<https://www.osbar.org>

Business Law Section annual CLE program

Friday, November 8, 2019/all day

Multnomah Athletic Club, Portland

Social Events

New Business Lawyers Picnic

Summer date to be determined.

Details will be posted on the website: <https://businesslaw.osbar.org/blsevents>

Oregon Minority Lawyers Association Summer Auction

Thursday, August 1, 2019/5:30–7:00 p.m.

Lagunitas Brewing, Portland

<https://www.omlalawyers.com>

Job Postings

Brix Law LLP is seeking a Lateral Partner/Senior Associate and a Junior Associate or experienced paralegal to join our Bend office. We are a specialized law firm with offices in Portland and Bend focused on real estate, corporate and land use transactions, looking for the right person to join us. Our firm culture is business-minded, responsive, and practical in our approach to our clients’ needs, whether working on complex, sophisticated transactions or more routine matters. Our strength lies in teamwork, providing legal advice to capture the entirety of our clients’ land use, real estate, and corporate transactional needs. If you have experience in one of these areas, are able to work hard and play hard, then we might be the right firm for you. We also value responsiveness, attention to detail, excellent analytical and critical thinking skills, written communication skills consistent with that of a top-tier law firm, a good work ethic, and a sense of humor. Please send cover letter and resume to Holly Gullickson at hgullickson@brixlaw.com. All inquiries will remain confidential.

Tomasi Salyer Martin PC is an 8-lawyer, dynamic law firm in downtown Portland, with a strong commitment to providing excellent services to our financial institution, business, and land use clients, while enjoying a balanced life in the Pacific Northwest. We seek a transactional attorney with at least five years of experience drafting corporate and business documents to primarily support our finance law practice. An attorney with experience drafting loan documents for lenders is a plus, but we are willing to mentor someone with significant transactional experience. We strongly value congeniality and teamwork among all our employees, and strive to think “outside the box” in our business model. We have been a majority women-owned firm since we opened our doors in June 2012, and support diversity in our hiring discussions. Interested applicants should send their resume and cover letter to jcharles@tomasilegal.com.

Rose Law Firm is a 7+ attorney business-focused law firm in Lake Oswego. We seek an attorney with 15+ years of experience in handling complex corporate/commercial transactions and associated client engagements—including file and team management. Position is ideal for someone wanting to transition away from the billable hour demands of a larger firm but still interested in maintaining a sophisticated practice and collaborating with a team of like-minded professionals. If you bring a partial book of business, that is great, but not necessary. This position requires someone with: (a) strong experience and an exceptional substantive corporate law/M&A skillset; and (b) a desire to contribute to helping Rose Law thrive and expand. We offer competitive wages and benefits (health, dental, vision, life, 401(k)) and can be flexible with billable hour goals (between 1,200 – 1,800). Culture is very important: we take our work seriously, but do not take ourselves too seriously—large egos don’t function well here. To apply, send cover letter, resume, and references to Crystal Hutchens, chutchens@rose-law.com. For more details, please review: <https://www.rose-law.com/careers>

Cosgrave Vergeer Kester LLP has an opening for an associate to join our business practice group. Work assignments may include real estate transactions (buying, selling, leasing, and finance), contract preparation and review, entity formation, and related business advice and counsel. At least three years of relevant experience is required. Solid academic record, strong client communication skills, outstanding analytical and writing skills, and Oregon Bar membership are required. This is an excellent opportunity to join a well-established firm with strong roots in the Northwest. With more than 25 attorneys, the firm is known for its exceptional client service and highly effective advocacy in both the courtroom and the boardroom. Cosgrave’s clients range from individuals and small business owners to national and international corporations. We offer a unique opportunity to develop professionally in a collegial working environment among many of the best trial, appellate and business lawyers in Oregon. We welcome and value attorneys with an entrepreneurial spirit and an interest in growing our business. Cosgrave is an equal opportunity employer. We welcome all applicants and strive to provide a workplace in which all employees feel included, respected, and valued. Qualified applicants should submit a cover letter, resume, writing sample (5–7 pages), and law school transcript to humanresources@cosgravelaw.com. Applications must include all documents for consideration. All inquiries will be handled confidentially.