Oregon Business Lawyer

Oregon State Bar Business Law Section Newsletter • June 2021

Business Law Section Executive Committee

Chair Jeffrey S. Tarr

Chair-Elect
Kara E. Tatman

Past Chair
Genevieve A. Kiley

Secretary
William J. Goodling

Treasurer
Anne E. Arathoon

Members-at-Large
James K. Hein
Brian Jolly
Benjamin M. Kearney
Matthew Larson
Emily M. Maass
Jennifer E. Nicholls
David G. Post
Charmin B. Shiely
Tyler J. Volm
Michael D. Walker

Newsletter Subcommittee

Chair: Jeffrey S. Tarr

Adam Adkin
Jay D. Brody
Timothy B. Crippen
Stephanie Davidson
James K. Hein
David J. Malcolm
Wendy Beth Oliver
Scott T. Rennie
Michael D. Walker
Meghan WIlliams

Newsletter Editor
Carole Barkley

Employer-Mandated COVID-19 Vaccine

By Tim Resch & Colleen Muñoz, Samuels Yoelin Kantor LLP

In general, employers may require that their employees receive a COVID-19 vaccine. Very recent guidance (as of May 28, 2021) from the U.S. Equal Employment Opportunity Commission (EEOC) provides additional confirmation that employers may require that employees obtain the vaccine—with some important exceptions discussed in this article.

Under a unique Oregon law, some employees are exempt from mandatory vaccinations. Such employees include health care professionals and first responders, and those employees whose contracts explicitly prohibit vaccine mandates. Additionally, employers must consider Oregon's disabilities accommodation law and conditions of employment on the basis of a sincerely held religious belief and practice. See ORS 659A.112 and OAR 839-005-0010(3); see also ORS 659A.139.

As a practical matter, employers should consider the nature of their workplace when determining how to proceed with a mandatory vaccination policy. Employers whose staff must come in contact with high-risk populations will have a better argument for mandating a vaccine. Employers should also weigh the cost that a mandatory vaccination policy could have on employee retention and morale.

Making reasoned and rational decisions and documenting the basis for the policy will help mitigate potential risk, at least while the vaccines are subject to the Emergency Use Authorization (EUA). The EEOC, in its May 28, 2021 Technical Assistance Q&A sidestepped any discussion of EUA issues, stating "[i]t is beyond the EEOC's jurisdiction to discuss the legal implications of EUA or the FDA approach." See *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (Section K), U.S. Equal Employment opportunity Commission (May 28, 2021). The EEOC did squarely answer the question in the affirmative—subject to the considerations discussed below—about whether employers could require employees who physically enter their workplace be vaccinated for COVID-19.

Employer's ability to mandate COVID-19 vaccines

Generally, Oregon employers may require their employees receive a COVID-19 vaccine, with some exceptions. Some employees are statutorily or contractually exempt from such a mandate. Additionally, employers must consider employment discrimination laws.

Exemption for health care workers and first responders

Unless otherwise required under federal, state, or local law, certain types of Oregon employees are exempt from being required to be vaccinated as a condition of their continued employment. ORS 433.416(2)–(3). The exemption applies to employers who employ persons licensed or certified to provide health care, health care facility employees, firefighters, law enforcement officers, corrections officers, and parole or probation officers. ORS 433.407(3).

Continued on page 2

In this Issue

Articles

Employer-mandated COVID vaccine 1
Limitations of liability 4
Personal information 6
Assignment 10

Business Law Section News 3

Job Postings 11

Employer-mandated vaccine *Continued from page 1*

Tim Resch and Colleen Muñoz are attorneys with Samuels Yoelin Kantor LLP. Their practices focus on management-side employment counselling and litigation.

Under Oregon law, since a preventive immunization for infectious disease is available and medically appropriate, the employers for those exempt employees must provide the vaccine for their workers, and the vaccine must be provided at no cost to the employee. ORS 433.416.

Contractual prohibitions

Some employment contracts—such as in collective bargaining agreements—contain contractual limitations or prohibitions against mandatory vaccines. In advance of implementing a COVID-19 vaccine mandate, employers should consult their employment contracts to ensure that a vaccine mandate will not run afoul of any provisional limitations.

Employees with disabilities and/or a sincerely held religious practice or belief

If an employee indicates that he or she is unable to receive a COVID-19 vaccine due to a disability or a sincerely held religious practice or belief, the employer must determine whether the unvaccinated individual will pose a direct threat to the health or safety of other individuals in the workplace. OAR 839-006-0244; see also 29 C.F.R. §§ 1630.1 & 1630.2(r). If the direct threat cannot be reduced to an acceptable level absent undue hardship, the employer can exclude the employee from physically entering the workplace.

What is considered a "direct threat"?

Within the scope of the COVID-19 pandemic, the direct threat is the potential danger that an unvaccinated employee will expose others at the workplace to the virus. On March 21, 2020, the EEOC confirmed that the COVID-19 pandemic meets the direct threat standard. See *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*. Accordingly, if the direct threat of exposing individuals at the workplace to the virus cannot be eliminated absent undue hardship, the employer may exclude the employee from physically entering the workplace.

Note that the standard for establishing an undue hardship is different for employees with a sincerely held religious practice or belief. See ORS 659A.121; see also OAR 839-005-0140(2).

Employers should be wary of escalating to termination for an employee who cannot receive a vaccine. The recent EEOC guidance discusses exclusion from the workplace during the pandemic and is silent about termination where an employee refuses a vaccination.

Mandating emergency use authorization for COVID-19 vaccines

The Food and Drug Administration (FDA) has authorized three COVID-19 vaccines for emergency use: Pfizer-BioNTech, Moderna, and Johnson & Johnson/Jansen. Until the vaccines receive full FDA approval, an employer's ability to require their employees to receive an EUA COVID-19 vaccine as a condition of employment is based on ambiguous statutory authority that has not yet been interpreted by the courts.

Pursuant to federal law, all EUA vaccine recipients must be provided with an information fact sheet informing them "of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks." 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III).

Ambiguity revolves around the phrase "of the consequences, if any, of refusing administration of the product," in connection with COVID-19 vaccines. In a recent federal case in New Mexico (*Legarrettta v. Macias*, No. 21-CV-179 MV/GBW), an employee brought an action against his employer for issuing a mandatory COVID-19 directive requiring first responders to receive a COVID-19 vaccination as a condition of ongoing employment. The plaintiff argued that the vaccine mandate was a violation of 21 U.S.C. § 360bbb-3.

The court's analysis did not evaluate the merits of the case and instead made a procedural ruling based on the plaintiff's compliance with the notice provisions in seeking a temporary restraining order. Thus, it remains unclear how a court would interpret the "consequences" for an individual who refuses to receive the vaccine in opposition to a vaccine mandate.

One plausible interpretation is that while individuals have the option to accept or refuse administration of an EUA vaccine, a refusal may come with not only adverse medical consequences, but also an adverse employment decision or legal consequences.

One potential risk for employers who elect to terminate an employee who refuses a vaccine is a common-law wrongful termination claim. An employee could claim that the EUA

Continued on page 3

Employer-mandated vaccine *Continued from page 2*

statute provides him or her a right to refuse a vaccine, and termination for asserting a protected right constitutes wrongful termination. See *Nees v. Hock*, 272 Or. 210, 218 (1975) (recognizing that "there can be circumstances in which an employer discharges an employee for such a socially undesirable motive that the employer must respond in damages for any injury done").

Employers should be mindful of this risk and proceed accordingly. Rather than discharge an employee, an employer could explore continued work-from-home alternatives, or place the employee on unpaid leave until he or she obtains a vaccination.

Alternative options in lieu of a COVID-19 vaccine mandate

Rather than implement a COVID-19 vaccine mandate, employers may choose to offer incentives to their employees to receive a COVID-19 vaccine. Alternative options may include a one-time bonus for becoming vaccinated or adding the COVID-19 vaccine as part of the company's wellness program.

However, employers must remain cautious about the types of incentives offered. Oregon's pay equity law requires equal pay for comparable work. See ORS 652.210–652.235; see also OAR 839-008-0000. Consequently, paying vaccinated employees at a higher rate than those not vaccinated could create liability for an employer.

To sum up

Employers should be mindful of their employees and the nature of their business. While the ability to mandate the receipt of a COVID-19 vaccination is available, there are several nuances to the legislation. Additionally, absent case law, it is unclear how a court will rule on such a mandate involving EUA vaccines. Before choosing to initiate a COVID-19 vaccine mandate, employers should consider the potential effect on employee morale and possible alternatives for employees with justified refusal to get vaccinated. ◆

Business Law Section seeks nominations for James B. Castles Leadership Award

The James B. Castles Leadership Award was established in 1998 to recognize an Oregon lawyer for excellence in the practice of business law, professionalism among fellow business lawyers, and outstanding community leadership. It is the highest recognition that the Business Law Section can bestow on one of its members.

James B. Castles began his career as an Oregon business lawyer advising Tektronix, Inc. founders Jack Murdock and Howard Vollum in the start-up phases of their business. He subsequently became the founding General Counsel of Tektronix and a long-time director of the company. Mr. Castles was also well known for his philanthropic support of northwest organizations, and served as a founding trustee of the M. J. Murdock Charitable Trust.

Previous recipients of the award include Otto B. Frohnmayer, Henry H. Hewitt, Brian Booth, Andrew J. Morrow, Jr., Donald L. Krahmer, Jr., Neva Campbell, Robert Art, MardiLyn Saathoff, John Jaqua, Ruth Beyer, Brent Bullock, Carmen Calzacorta, Kenneth D. Stephens, Jeffrey C. Wolfstone, John M. McGuigan, and Ronald Greenman.

To be considered for the award, the nominee must be a licensed (or retired) member of the Oregon State Bar, recognized for excellence and professionalism. A significant portion of the nominee's career must have involved the practice or teaching of business law, and the nominee must have shown outstanding community leadership in one or more of the following areas:

- Activities supporting other members of the Oregon State Bar in the practice of business law, such as serving on committees or task forces of the Business Law Section or other business law related committees or task forces, serving on the Board of Governors, writing business law related articles or treatises, teaching CLEs, and other similar activities
- Civic leadership, such as serving on public boards or commissions, as a member of federal, state, regional, county, or local government, or as an employee of the Department of Justice or a state agency, or otherwise having been elected or appointed to public office
- Business or nonprofit leadership in community affairs or economic development, such as serving with one or more nonprofit organizations engaged in community development, economic development, or charitable activities

If you would like to nominate an Oregon business lawyer for the James B. Castles Leadership Award, please e-mail the name of the nominee, together with the pertinent details regarding the nominee's qualifications for the award, to Genevieve AuYeung Kiley at genny@emergelawgroup.com.

The deadline for nominations is September 7, 2021. Nominations will be reviewed by past chairs of the Business Law Section, who may then recommend a candidate for the award to the Executive Committee. The 2021 James B. Castles Leadership Award will be presented during the Business Law Section's annual meeting in November. ◆

Contractual Limitations of Liability

By Trinity Madrid, Davis Wright Tremaine LLP

Trinity Madrid is a member of the litigation practice group at Davis Wright Tremaine. Before joining the firm, he served as an in-house court-certified law clerk for a nationwide insurance carrier, where he defended individuals and businesses in a variety of cases, including contract disputes, Strategic Lawsuits Against Public Participation, defamation, trade secrets, products liability, and appellate matters.

Limitation of liability clauses in contracts are useful risk-allocating tools that businesses use to shift or limit their risks in commercial relationships. When advising clients during contract negotiations, it is essential always to be aware of the potential liability your clients could face in the future and methods to limit their exposure. Successfully negotiating a clause that limits liability can be just as important as negotiating other key provisions, such as those related to price, force majeure, and termination.

This article discusses limitation of liability clauses that can be included in commercial contracts between businesses to limit and allocate risks, and the importance and key components of a limitation of liability clause. However, it does not discuss limitation of liability provisions typically found in contracts between businesses and consumers, such as those that purport to release a business from liability for activities in which a consumer willingly participates.

Types of limitation of liability clauses and examples

Two types of limitation of liability clauses are typically included in commercial contracts. The first is a contractual provision that limits liability of one or both parties to only certain types of damages. In general, this limitation of liability disclaims any liability for consequential damages, and therefore only permits recovery of direct damages. Consequential damages, also known as special damages, are those that do not flow directly from a breach of an agreement, but are an indirect consequence of the breach.

Consequential damages can include lost profits, lost opportunities, loss of use, damages incurred by third parties, personal injury, attorneys' fees, and interest. In Oregon, consequential damages are recoverable if they were reasonably foreseeable to the parties at the time of contracting. *Welch v. U. S. Bancorp Realty & Mortgage Trust*, 286 Or. 673, 703, 596 P.2d 947, 963 (1979). It should be noted that the term "consequential damages" is sometimes used to refer to other types of damages, such as indirect, punitive, exemplary, and enhanced damages. Accordingly, in drafting a limitation of liability clause that aims to disclaim all damages other than direct damages, you should specifically enumerate the types of damages your client intends to disclaim.

The second type of limitation of liability is a provision that sets a cap on the amount that may be recovered in the event of a dispute arising from or related to the agreement. There are different approaches to setting a liability cap. For instance, the parties can agree to set a fixed dollar amount, an amount that is reflective of the amount payable under the contract, a cap that limits damages to the amount of applicable insurance, or a combination of these.

Selecting the right approach is important. For example, if you choose to set a fixed dollar amount, the dollar amount could be more than the value of the agreement. On the other hand, if you choose to set an amount based on the contract price, the value of the contract could be higher than if you had set a fixed dollar amount.

Commercial contracts typically contain both types of limitation of liability clauses. The parties define the scope of the clause, and can therefore draft the clause in such a way that it applies to the contract as a whole, specific terms of the contract, or to subsequent individual transactions (e.g., purchase orders made in the future under the contract).

Below is an example of a clause that disclaims liability for consequential and related damages. As noted above, it is a good practice to specifically enumerate the damages your client intends to disclaim, which is reflected in this example:

> "IN NO EVENT SHALL SELLER OR ANY OF ITS REPRESENTATIVES BE LIABLE UNDER THIS AGREEMENT TO BUYER FOR CONSEQUENTIAL, INDIRECT, INCIDENTAL, SPECIAL, EXEMPLARY, PUNITIVE, OR ENHANCED DAMAGES, OR LOST PROFITS OR REVENUES, OR DIMINUTION IN VALUE, ARISING OUT OF, RELATING TO, OR IN CONNECTION WITH ANY BREACH OF THIS AGREEMENT, REGARDLESS OF (A) WHETHER SUCH DAMAGES WERE FORESEEABLE, AND (B) THE LEGAL OR EQUITABLE THEORY (CONTRACT, TORT, OR OTHERWISE) UPON WHICH THE CLAIM IS BASED."

Following is an example of a clause that sets a cap of the amount of liability using an approach that includes a fixed cap and a cap based on the amount payable under the contract.

Continued on page 5

Liability clauses *Continued from page 5*

"IN NO EVENT SHALL SELLER'S AGGREGATE LIABILITY ARISING OUT OF OR RELATED TO THIS AGREEMENT, WHETHER ARISING OUT OF OR RELATED TO BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE) OR OTHERWISE, EXCEED THE TOTAL OF THE AMOUNTS PAYABLE TO SELLER PURSUANT TO THIS AGREEMENT OR $XXXX.XX, WHICHEVER IS LESS."

The importance of limitation of liability clauses

There is a good reason that virtually every commercial contract contains a limitation of liability clause. In the event of a dispute, contract law generally allows for recovery of all damages, including direct and indirect damages. Without a limitation of liability clause, your client could face crippling damages awards, especially where punitive damages may be available. A limitation of liability clause also allows a risk-averse client to customize the risk they are willing to undertake in a transaction, such that the risk is proportionate to the benefits of the transaction.

Enforceability of limitation of liability clauses in Oregon

In Oregon, limitation of liability clauses will be upheld when they are part of the bargain between businesses dealing at arm's length in commercial settings. See *Atlas Mutual Insurance Co. v. Moore Dry Kiln Co.*, 38 Or. App. 111, 114, 589 P.2d 1134, 1136 (1979) (citing *K-Lines, Inc. v. Roberts Motor Co*., 273 Or. 242, 541 P.2d 1378 (1975). The Uniform Commercial Code (UCC), codified at ORS 71.1010–72.7250, also permits limitations of liability in contracts subject to the UCC. In order to be enforceable, however, the clause must be bargained for, brought to the attention of the party sought to be bound, or conspicuous. *Atlas Mutual Insurance Co*., 38 Or. App. at 114. The UCC defines conspicuous as a term "displayed or presented [such] that a reasonable person against which it is to operate ought to have noticed it." ORS 71.2010.

The UCC further provides that conspicuous terms include headings and body text in all capitals or contrasting type, font, or color, or set off by symbols or other marks that draw attention to the language. A limitation of liability clause must also be written so that it clearly and unequivocally expresses an intent to limit liability in the way it is intended. See *Estey v. MacKenzie Eng'g Inc*., 324 Or. 372, 376-79 927 P.2d 86, 88 (1996). Any ambiguities in the limitation of liability clause will be construed against the party who drafted it. Even in cases where the limitation of liability would be otherwise enforceable, a court may decline to enforce the clause if it is unconscionable or against public policy, which generally includes clauses that purport to cover conduct amounting to gross negligence or fraud. See ORS 72.7190; *Atlas Mutual Insurance Co.*, 38 Or. App. at 115; *K-Lines, Inc*., 273 Or. at 250-54.

Practice tips

Understand the risks of the transaction. When considering a limitation of liability, first determine the potential liability your client could face and the likelihood of that potential liability. To do so, consider your client's and the other party's obligations under the agreement, and whether there is a risk that either party may not perform its obligations. History and reputation of the parties, the nature of goods or services under the contract, and potential third-party involvement are useful data points in conducting this analysis.

Customize the clause. Each agreement should be customized to the risks associated with the agreement, especially when setting a maximum liability cap. Consider a hybrid approach that sets maximum liability as the lesser of the amounts payable under the contract or a fixed dollar amount. This provides your client with a precise dollar amount for which they would be liable (the fixed amount), while ensuring that they will not be liable for more than the amounts payable under the contract.

Be specific. Tailor the limitation of liability clause to the transaction and your client's needs based on the appropriate level of risk. Be sure to enumerate the specific damages or remedies your client intends to disclaim to ensure there are no ambiguities. For example, a limitation of liability that simply disclaims "consequential damages" may be interpreted as not disclaiming other types of related damages. In addition, be specific as to the types of claims to which the limitation of liability is meant to apply, such as contract, tort, or otherwise. Remember, the provision will be construed against its drafter.

Be conspicuous. Use capital letters, bold typeface, different colors, or other signals and marks to draw attention to the clause to avoid any future claims that the other party was not made aware of the provision or claims of unconscionability. Do not bury the provision in the agreement for the same reasons.

Be aware of interplay with indemnification and insurance. If a contract includes indemnification and/or insurance provisions, draft the provisions to ensure they are consistent with the limitation of liability clause. Based on your client's position in a transaction, consider whether to include or carve out indemnification claims. If you represent the indemnifying party, you should strive to include indemnification claims in the limitation of liability clause. On the other hand, if you represent the indemnified party, you should negotiate a carve-out in the limitation of liability for indemnification claims. Additionally, if the limitation of liability is tied to insurance coverage, make sure that the specific claims enumerated in the limitation of liability are actually covered by insurance. So that the insured party does not face liability if the insurer denies coverage, a limitation of liability tied to insurance can be drafted to limit liability to amounts actually paid by insurance.

To conclude

Keep in mind that the examples presented here are intended to keep this article brief. Other limitation of liability clauses found in commercial contracts will likely include more explicit limitations. An effective limitation of liability clause should be tailored to the needs of your client, the way in which they intend to allocate risks, the aggregate amount of liability with which they are comfortable, and the specific damages they intend to disclaim. ◆

Contracts That Involve Personal Information—a Refresher for Oregon Practitioners

By: Brian T. Sniffen, Wildwood Law Group LLC

Brian Sniffen is an attorney with Wildwood Law Group in Portland. He represents businesses of all sizes with trademark, copyright, and privacy issues—often in the context of contracts and other transactions. He was a litigator for several years early in his career, and that experience helps inform his approach to business matters.

It has been several years since the European Union's (EU) General Data Protection Regulation (GDPR) went into effect. As you may recall, the GDPR received extensive press coverage—largely because of how different its requirements regarding personal information were compared to typical requirements facing United States (US) businesses, and its potentially massive noncompliance penalties.

What has changed since then? What remains the same? This article provides a status update and suggests how Oregon business attorneys should evaluate the applicability of privacy laws. If such laws are triggered, this article also provides a summary of contractual provisions to consider. One key takeaway is that, due to the expanding definition of "personal information," it is now easier to trigger a privacy law's application.

Note: This is an article, not a treatise. I am therefore unable to provide a summary of everything required to comply with the laws referenced below. If you have questions after reading this, please reach out. I (clearly) love talking about this stuff.

Background: GDPR

On May 25, 2018, the GDPR went into effect. At its core, the GDPR seeks to protect individuals' personal information by giving them certain rights vis-à-vis their information and requiring businesses that process that information to comply with specific rules.

The GDPR imposed extensive changes upon many US-based businesses because it applied beyond the EU's borders (i.e., to businesses that offer goods or services to people in the EU regardless of where the business is located), and it introduced to those businesses a very broad definition of personal information with several new requirements. These included (among others):

- **Transparency.** EU data subjects are entitled to transparency regarding the collection and use of their personal information. Many businesses address this requirement by regularly updating the privacy policy on their website and/or mobile application.
- **Data subject rights**. Businesses must recognize and honor the rights of people in the EU regarding their personal information (broadly defined)—such as the right to object to further processing, and the right to request deletion of that information.
- P**rompt breach notification.** The GDPR requires that businesses report certain personal information breaches to data-protection authorities within 72 hours.
- **Contractual provisions.** The GDPR requires contracts with service providers that process personal information on a business's behalf (e.g., cloud-storage providers, website hosts, contact-management systems, and analytics providers). Further, the GDPR mandates certain clauses for those contracts.
- **International data transfers.** Businesses covered by the GDPR's scope must ensure that adequate data-security protections are in place before transmitting personal information from the EU to the US. This is often achieved by using EU-approved standard contractual clauses. (The EU has not deemed the data-protection standards of the US to be "adequate." Until it does so, alternative mechanisms for achieving adequacy—such as EU-approved clauses —are required for EU-to-US data transfers.)

The GDPR captured the world's attention by setting potential noncompliance penalties at the greater of €20 million or 4% of annual global revenue. (It appears Google holds the current record for the highest GDPR penalty, €50 million, which seems like a large sum until you compare it to Google's global annual revenue of more than US $150 billion.)

Background: personal information

As mentioned above, the GDPR introduced many US businesses to a much broader definition of personal information than they were accustomed to. So how is it defined? The GDPR defines personal information (it uses the phrase "personal data") as "any information relating to an identified or identifiable person." This includes the obvious—such as name, phone number, and email address—and may also include less-obvious data points such as IP address, mobile device ID, and location data.

The latter data points were routinely collected by US businesses without much thought—such as through the operation of their websites or mobile applications. (The GDPR also imposes requirements for "special categories of personal data," including racial or ethnic

Continued on page 7

origin, political opinions, religious beliefs, union membership, genetic data, biometric data, health data, and data concerning a person's sex life or sexual orientation; but those are beyond the scope of this article.) As a result, the GDPR required many US businesses to take a much harder look at their personal-information processing activities.

Another significant shift brought about by the GDPR (and the California Consumer Privacy Act, discussed below) is that it requires compliance with its onerous terms even if the only personal information processed is seemingly innocuous (at least by US standards). Before the GDPR, many US-based businesses reserved special treatment and security only for sensitive personal information—such as Social Security numbers, driver's license number, passport numbers, login credentials (e.g., username and password), and health and financial information. In other words, contracts that deal with consumer names, phone numbers, email addresses, IP addresses, mobile device IDs, and location data likely implicate privacy laws.

Today: GDPR

The GDPR remains the law of the land in the EU.[1] It still applies to businesses offering goods or services to people in the EU, regardless of the size of the business[2] or its headquarters location. So it is still in play for Oregon-based businesses that offer goods or services to people in the EU.

The GDPR also continues to influence legislation worldwide. Other countries, such as Brazil, have instituted laws with similar features, and we should expect the trend to continue.

Today: California

On January 1, 2020, the California Consumer Privacy Act (CCPA) went into effect. Next to the GDPR, the CCPA is the privacy law that seems to get the most press coverage—likely because of the size of the California economy and the CCPA's extraterritorial application. Like the GDPR, the CCPA aims to provide California consumers with more control over their personal information by providing them with certain rights, including the right to request deletion of their personal information and opt out of sales of their personal information. Also like the GDPR, the CCPA applies to businesses located outside of California. Unlike the GDPR, however, it applies to a smaller subset of businesses. Specifically, it applies only to for-profit businesses that do business with California consumers and meet one or more of the following three criteria:

- Have global gross annual revenue of over $25 million
- Buy, receive, or sell the personal information of 50,000 or more California residents
- Derive 50% or more of their annual revenue from selling California residents' personal information

So far, so good. But then we get to the CCPA's definition of personal information. It is even broader than the GDPR's definition. The CCPA personal-information definition includes information that identifies, relates to, or could reasonably be linked to a person or their household. So the number of businesses falling within the "buy, receive, or sell the personal information of 50,000 or more California residents" category could actually be quite high. For example, a website or mobile application that collects IP addresses or mobile device IDs would need to average just 137 visitors from California per day to surpass the 50,000 mark.

If the CCPA applies, a business must disclose its privacy practices in a transparent manner and explain a consumer's rights under the CCPA—including how to exercise those rights. Most companies do this through a detailed Privacy Policy on their website or mobile application that sets forth (among other things) the categories of personal information to be collected and the purpose for collection and use. Accuracy and transparency are key: if, for example, a particular collection or use of personal information is not disclosed in a business's Privacy Policy, the business is likely prohibited from collecting or using the personal information in that way. Businesses should also be prepared to respond to requests from California residents to exercise their rights under the CCPA.

In another nod to the GDPR, businesses subject to the CCPA must:

- Enter into contracts with their service providers that prohibit those providers from retaining, using, or disclosing personal information for any purpose other than the specific purpose of performing the services stated in the contract; and
- If they receive a consumer request for deletion, direct their service providers to delete such information.

So it is a good idea to build mandatory cooperation into contracts falling under the CCPA. But the CCPA is otherwise not as prescriptive as the GDPR when it comes to the required contractual terms.

Finally, if a company subject to the CCPA sells personal information of California consumers, it must comply with several other requirements, including providing notice to consumers that it might sell their information and a right to opt out of such sales through a clear and conspicuous link on its website or mobile application that states DO NOT SELL MY PERSONAL INFORMATION.

Though many companies do not sell consumer data in the traditional sense of the word "sell," the CCPA defines sell much more broadly to include "selling, renting, releasing, disclosing, disseminating, making available, transferring, or otherwise communicating orally, in writing, or by electronic or other means,

Continued on page 8

 Continued from page 7

a consumer's personal information … for monetary or other valuable consideration." For that reason, some companies include language in their subcontractor agreements stating that the company "is not receiving any monetary or other valuable consideration" from the subcontractor in exchange for access to the personal information.

California provides a private right of action for data breaches, but not for CCPA noncompliance. That is the domain of the state Attorney General. The Attorney General may seek injunctive relief against alleged CCPA violators, and penalties ranging from $2,500 to $7,500 per violation.

Today: Oregon

Oregon has not (yet) implemented a GDPR- or CCPA-like regime, but it is otherwise ahead of the curve when it comes to consumer-friendly privacy legislation. For example, it requires that businesses and service providers implement reasonable safeguards to protect personal information and specifies safeguards they can employ to satisfy this requirement. See ORS 646A.622. One safeguard is "[s]electing service providers that are capable of maintaining appropriate safeguards and practices, and requiring the service providers by contract to maintain the safeguards and practices." ORS 646A.622(2)(d)(A)(v). Oregon relaxes the requirements for statutorily defined "small businesses" (currently defined as one with 100 or fewer employees) if the small business is still using safeguards "appropriate for the size and complexity of the small business, the nature and scope of the small business's activities, and the sensitivity of the personal information the small business collects from or about consumers." ORS 646A.622(5) .

Finally, if you have a contract with a service provider, the service provider is required by statute to notify you of a data breach (defined below) within 10 days of discovery. ORS 646A.604(2). This requirement is absent from most other state laws.

Today: state laws generally

All states in the US have a data-breach notification statute, but they differ significantly in terms of what triggers a notification obligation and, if notification is required, what the notification must contain and how soon it must be provided after the breach is discovered. For example, a "breach" occurs under Oregon law only if specific types of data are involved. These include Social Security number, driver license number or state ID card number, passport number, financial account number in combination with a security or access code, biometric data, health insurance number, medical or mental health information, and account log-in information. ORS 646A.6021. Many other states omit biometric data as a breach trigger.

To further complicate matters, the breach-notification law that applies will often be determined by the residence of the victim(s). So if an Oregon company has a breach with 35 victims from ten different states, it will likely need to determine what is required (and when) under ten different state laws. For example, a notification required under Oregon law must generally be provided within 45 days. ORS 646A.604(3). But Idaho has no specific deadline. Notice must be provided "as soon as possible." Idaho Code § 28-51-105.

It is also worth noting that other states have passed, or are in the process of passing, comprehensive privacy legislation that would, like the CCPA and GDPR, expand consumers' rights and businesses' obligations. We should expect more laws like CCPA and GDPR in the near future.

Tips for the Oregon business attorney

With this busy privacy landscape, it may not be realistic for the average business attorney to help his or her clients achieve full compliance. I know the feeling: I assist clients with privacy, intellectual property, and business matters—and happily refer tax, employment, and criminal matters to others.

But our ability to at least spot potential issues is critical for our clients. Sometimes flagging an issue is half the battle. In the privacy context, you might flag the potential application of the GDPR and its contractual obligations. I therefore conclude this article with an issue-spotting summary.

At a minimum, your Oregon-based clients will be subject to Oregon law. So make sure they comply with the above-referenced Oregon statutory requirements and, if applicable, breach notification obligations. For example, agreements with subcontractors may need to be amended to ensure they spell out required safeguards.

Determine whether the CCPA is triggered

It will be triggered if your client does business with California consumers and one of the three criteria set forth above is met. By way of example, a successful Oregon-based direct-to-consumer company (selling anything from beer to barre classes, camper vans to cardigans) might be subject to the CCPA. If the CCPA is triggered, it is time to take a hard look at your client's vendor contracts and privacy policy.

Determine whether the GDPR is triggered

It will be triggered if your client offers goods or services to people in the EU. (The example business provided above for the CCPA also works for the GDPR.) If it is triggered, and the client took steps to comply in 2018, it may be compliant. Or the company may not have kept up with its compliance tasks.

Continued on page 9

Personal information *Continued from page 8*

You should ask the client to review its privacy policy: are the disclosures regarding its personal information collection, use, and disclosure practices still accurate? You can also ask the client if it has entered into any new service-provider contracts since 2018. Those may require review to ensure they comply with GDPR requirements.

If the client is new to GDPR compliance, it will likely need to add certain disclosures to its privacy policy and amend its subcontractor contracts to ensure that GDPR-mandated provisions are in place and that it can lawfully transmit personal information from the EU, such as through the use of the EU-approved Standard Contractual Clauses.

Consider whether other contractual provisions are a good fit in light of exposure to the above-referenced privacy laws.
Following are a few examples:

- **Definitions:** How will you define personal information? Is the definition consistent with applicable law?
- **Ownership:** Is it clear who owns the personal information at issue and who has the right to dictate how it will be handled?
- **Use limitations:** Is it clear that the subcontractor may use personal information only for the purpose set forth in the contract? Do you want to add language that the business is not receiving any monetary or other valuable consideration from the subcontractor?
- **Access limitations:** Who is authorized to access personal information? Only subcontractor employees who are involved with providing services, or may it be shared with the subcontractor's subcontractors? Is the subcontractor required to pass through its privacy-related obligations to its subcontractors (and will it be responsible for any actions or omissions of its subcontractors)?
- **Warranties:** Should the subcontractor warrant that it will comply with applicable laws (including privacy laws) in connection with the performance of its obligations?
- **Training:** Do you want assurances that a subcontractor will engage in regular privacy-related trainings?
- **Security:** Do you want to insist on a certain level of security or a particular security framework? Do you want the right to audit those security practices?
- **Indemnification:** Should the subcontractor indemnify and defend its customer for its violations of privacy laws or data-security incidents?
- **Limitation of liability:** Is the current liability limitation adequate? Should there be a separate cap for privacy-related claims?
- **Insurance:** Should the subcontractor be required to carry insurance covering privacy claims?
- **Exclusion of damages:** Should certain exclusions be deleted?
- **Breach notification and handling of incident response:** Should a subcontractor be required to report a breach to its customer within a certain number of days? Who will handle required notifications to consumers and regulators?
- **Consumer request notifications:** Should a subcontractor be required to inform the company in a timely manner if it receives a request from a consumer (e.g., if a consumer contacts the subcontractor instead of the company)?
- **Return, transfer, or destruction:** If the relationship ends, can the company instruct the subcontractor to return, transfer (e.g., to a new service provider), or securely destroy personal information?

Another best practice is to regularly revisit your client's online disclosures, such as those made in its privacy policy and terms of use, because they are easily accessible by regulators and can quickly become outdated. For example, many businesses updated their online terms in anticipation of the GDPR's implementation in 2018 but have not updated them since. It is quite likely that their websites and mobile applications now collect different types of personal information in different ways from those in 2018. In addition, the CCPA requires companies to review their privacy policies at least once a year.

Finally, evaluate whether there is a sector-specific privacy or security regime in play, such as FERPA (education records), GLBA (financial information), or HIPAA (health information).[3] If so, that may have an impact on how (or whether) you are required to comply with state-specific laws.

Good luck out there! ◆

Endnotes

1. More accurately, the GDPR has since expanded to the European Economic Area, which comprises all EU member states and Iceland, Liechtenstein, and Norway. But I use "EU" throughout this article to avoid confusion.
2. A business with fewer than 250 employees is excused from the GDPR requirement to keep a record of its processing activities, but all other GDPR obligations apply.
3. I mention these in passing because many clients are aware of these relatively long-standing federal regimes.

Assignment Clauses

By: Lee Gilgan and Tim Crippen, Black Helterline LLP

Lee Gilgan is a business lawyer at Black Helterline, representing closely held businesses across various industries.

Tim Crippen is a business lawyer at Black Helterline who represents family and closely held businesses with a focus on mergers and acquisitions, contract matters, and trademarks.

This article is the second in a series on miscellaneous contract provisions of common business, commercial, and real-estate agreements. When disputes arise, these overlooked provisions can determine the fate of a transaction. If not closely examined in the context of every agreement, they can provide grounds for litigation or threats of litigation.

The assignment clause is common end-of-contract boilerplate but should be drafted and interpreted carefully. In absence of a contractual prohibition or restriction on assignment, most jurisdictions permit a contract to be assigned or duty to be delegated. (See U.C.C. § 2-210 (amended 2003) ; ORS 72.2100; and the publication *Restatement (Second) of Contracts*, §§ 317-328, in each case describing limitations on this general rule.) Parties to a contract and their respective lawyers should consider what, if any, restrictions they wish to place on the parties' ability to assign and draft accordingly.

Many lawyers who handle mergers and acquisitions have encountered an asset sale where the seller has many—if not hundreds—of vendor, customer, or lease contracts that the buyer wants to assume. If the contracts restrict assignment, or prohibit a change of control of the seller, the parties can spend substantial time and money obtaining these third-party consents. Pursuing so many third-party consents may present additional risk that a transaction becomes public knowledge before the buyer and seller desire. Perhaps more important, if a lease or customer or vendor relationship is critical to the buyer's success post closing, the requirement to obtain such third-party's consent can give the third party undue leverage or put the transaction at risk. Lawyers who negotiate contracts for clients who are expecting a sale or change of control transaction would do well to draft in anticipation of these issues.

Of course, parties have good reason not to want assignments or changes of control to be permitted without restriction. In an independent contractor agreement, for example, a customer may wish to restrict who will provide services. Likewise, in a private loan transaction, such as between family members, the borrower may want to restrict to whom the lender can assign the payee's interest.

The Oregon State Bar publication, *Advising Oregon Businesses, Form 98*, provides the following as a sample assignment clause (with comment): *"Assignment. Neither this Agreement nor any of the rights, interests, or obligations under this Agreement may be assigned by any party without the prior written consent of the other parties, [which consent will not be unreasonably withheld]. Note: Consider whether the party you are representing is a candidate for acquisition, in which case consent requirements should be limited to the extent they would impede the acquisition process."*

This clause provides that neither the agreement nor any of the rights, interests, or obligations may be assigned. A prohibition only on assignment of "the contract" may be interpreted to limit only delegation of performance by the assignor. See *Restatement (Second) of Contracts*, § 322. Arguably, a prohibition on assignment of "the contract" might not prohibit assignment of the right to receive payment thereunder, for example. Adding "rights, interests, or obligations" is important if the parties want a tighter set of restrictions.

Garner's Guidelines for Drafting & Editing Contracts, by Brian A. Garner, provides two examples of assignment clauses:

- ***No Assignment.** Neither party may assign this Agreement without the other party's prior written consent, which must not be unreasonably withheld. A party's entering into contracts with subcontractors is not considered an assignment;" (Id.* at 110*) and*
- ***No Assignment.** Neither party may assign this Agreement, or delegate its performance, without the other party's prior written consent, which must not be unreasonably withheld. (Id.* at 112*).*

Note that these examples do not contain the "rights, interests, or obligations" language, but the second example does prohibit a party from delegating its performance, which may provide a similar result.

Assignment clauses need not be reciprocal. A client that utilizes the same contract for multiple vendors or customers may wish to have assignment clauses drafted so that the client's right to assignment is unrestricted. Context will sometimes dictate that forward-thinking attorneys strategically draft assignment clauses to create ease for future mergers and acquisitions.

The first *Garner's* example contains a qualifier: subcontracting is not considered an assignment. Similarly, parties planning for merger or acquisition transactions may wish to provide similar qualifiers. For example, the parties might agree that a change of control or a sale of substantially all of the assets of a party is not an assignment. However, in situations where the agreement will permit assignment, drafters should consider whether the agreement should require an assigning party to give notice to the other party or parties. Finally, consider whether an assignment without consent should be void, or whether it should merely make the assignor susceptible to a claim for damages for breach. (See *Pacific First Bank v. New Morgan Park Corp.*, 122 Or. App. 401 (1993) (aff'd July 21, 1994) for a discussion of whether an assignment without consent is a material breach.) ◆

Job Postings

Sussman Shank LLP

Sussman Shank LLP, a mid-sized, full-service law firm in Portland, ranked one of the 100 Best Companies to Work For in Oregon.

Employment Attorney

The firm has an immediate opening in its Litigation Practice Group for an Employment Law attorney with 8+ years of experience. Candidate must be able to provide advice and guidance to employers of all sizes in multiple industries with respect to the following:

- Employee discipline and termination
- The Family Medical Leave Act, Oregon Family Leave Act and Washington Paid Family and Medical Leave Act
- Federal and Oregon disability laws (ADA and Oregon equivalent)
- Oregon and Washington sick-leave laws
- Employee handbooks, policies, and appropriate and effective employee documentation
- Harassment and discrimination investigations
- Wage and hour issues
- Employee classification (exempt/non-exempt, employee/contractor)
- Severance and separation agreements
- Workers compensation discrimination
- Retaliation, whistle-blowing and wrongful termination
- Issues related to competition and solicitation
- Trade secret protection and confidentiality
- Work for hire and protection of intellectual property
- Executive compensation
- Employment agreements

The successful candidate should also have experience in all aspects of litigation and administrative charge work, including preparing position statements, evaluating claims, negotiating private settlements, handling mediation, taking depositions, engaging in motion practice, and preparing for and taking cases to arbitration and trial (with assistance from members of our litigation group).

Business Transaction Attorney

We have an immediate opening in our business practice group for an attorney with 6 to 15 years of experience to handle a broad range of business transactions (e.g., mergers and acquisitions, sales and purchases of real estate and business operations), real and personal property-based financing, business formations, and general corporate work. IP, tax, securities, land use, or environmental law experience a plus.

The position requires strong academic credentials and excellent written and oral communication skills. An ideal candidate has the capacity for and shows dedication to business and practice development.

To apply for either position

Please address cover letters and resumes to our Chief Operating Officer, Steven T. Seguin, at sseguin@sussmanshank.com.

Competitive Benefits and Compensation.
EQUAL OPPORTUNITY EMPLOYER.
Visit Sussman Shank's website for information on the firm and its attorneys at www.sussmanshank.com.

Smith, Davison & Brasier, PC

Estate Planning and Business Attorney

Smith, Davison & Brasier, PC is an established Corvallis law firm with decades of combined experience among our attorneys in the areas of estate planning, business, probate and trust administration, tax, and real estate. We take pride in being a collegial and supportive law firm, which enables us to provide the highest quality of service to our clients. We are seeking an attorney with a minimum of three years of private law firm experience, who will be capable of immediately taking on responsibility for representing clients in one or more of our areas of practice, while also being able to work as part of a team with the other attorneys in the firm. A successful candidate must have excellent communication and writing skills, a strong commitment to providing high quality client service, and a desire to practice law in Corvallis, Oregon.

Interested candidates should submit a cover letter, resume and a writing sample in confidence to: kristis@smithlaworegon.com.

Buckley Law P.C.

Business Attorney

Buckley Law is a *Top 100 Workplaces in Orego*n firm with a collaborative and talented team focused on client service.

Whether you have a developed book of business or not, we would like to talk with you to see if you might be a good fit with us! Please contact Gina at gch@buckley-law.com or 503.620.8900 for more information.

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. Comments can be sent to the editor at carole424@aol.com.