Biglaw Firm Lays Off Associates, Staff and Partners

Labor and employment law firm Seyfarth Shaw has conducted a round of layoffs that affect both attorneys and staff, according to reports from **Above the Law** and **Bloomberg Law**.

"One source who was briefed on the layoffs said the downsizing affects 40 lawyers, including associates and counsel, as well as 27 staff members," reports Bloomberg's **Casey Sullivan**. "The cuts at least affect the firm's New York City and Washington, D.C. office, according to the source."

A Bloomberg source attributed the downsizing to a slow real estate practice, and said layoffs were mainly for "low billable associates," but noted that some counsel and senior counsel were laid off in the firm's employee benefits department.

Read the Above the Law article.

Read the Bloomberg article.

Congressman Targets Assistant General Counsel Over Political Activism

The assistant general counsel of a New Jersey-based bank company says she found herself in a touchy situation after a U.S. Congressman complained to her employer about her activism that targeted the lawmaker.

WNYC describes what happened:

> The most powerful congressman in New Jersey, Rep. Rodney Frelinghuysen, wrote a fundraising letter in March to a board member of a local bank, warning him that a member of an activist group opposing the Republican worked at his bank.
>
> The employee was questioned and criticized for her involvement in NJ 11th for Change, a group that formed after the election of Donald Trump and has been pressuring Frelinghuysen to meet with constituents in his district and oppose the Trump agenda.
>
> "Needless to say, that did cause some issues at work that were difficult to overcome," said Saily Avelenda of West Caldwell, New Jersey, who was a senior vice president and assistant general counsel at the bank before she resigned. She says the pressure she received over her political involvement was one of several reasons she decided to leave.

Read the WNYC article.

Fear of Career Damage Led Woman to Sue Proskauer Anonymously

Bloomberg Law **is reporting** that Proskauer Rose has become the latest Big Law firm to be hit with a gender discrimination lawsuit by a female partner.

The plaintiff brought the case against her employer under a pseudonym.

"According to the redacted complaint filed Friday, the plaintiff, an unnamed partner in Proskauer's Washington, D.C. office, was objectified by male partners who made inappropriate comments about her physical appearance, paid less than male partners who were similarly or less productive than she was, and excluded from projects and client development activities once she began complaining," writes reporter **Stephanie Russell-Kraft**.

The defendant responded by saying the suit is "groundless" and "meritless."

Read the Bloomberg article.

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Speaking Out About Employer's Personal Views Results in Termination

Unhappy with his boss and former friend's close association with the Trump administration, David Magerman aired his concerns about Renaissance Technologies President Robert Mercer in a February interview with the *Wall Street Journal*, according to a post on the website of **Androvett Legal Media**.

Although the hedge fund's legal department had assured the research scientist that his interview would not violate company policy, Magerman was fired shortly after publication of the article, which labeled Mercer a racist.

The former partner is now fighting back with a wrongful termination lawsuit, which should serve as a cautionary tale for all companies, says Dallas labor and employment attorney **Leiza Dolghih** of Godwin Bowman & Martinez.

> *"It is important for a company to establish and enforce clear rules on media interaction, particularly in situations such as this where you have high profile leadership or there is a potential for controversy. Here you had an employee who claimed that the Chief Compliance Officer orally told him that his interview was authorized," she says. "No matter how respected he may have been at the firm, Magerman was known to have divergent views that were likely to be explored during the course of the interview. Even in instances where an employee is allowed to talk with the media, you cannot give them blanket assurances about repercussions."*

Littler Survey Reveals Employers Caught in a Tangled Web of Federal, State and Local Laws

The Littler law firm has released the results of its sixth annual survey, completed by 1,229 in-house counsel, human resources professionals and C-suite executives. The Littler Annual Employer Survey, 2017 reveals that the change occurring in Washington, D.C., and in local governments – combined with technological advances and shifts in how work is performed – is creating an unprecedented level of uncertainty in the workplace.

A release from the firm continues:

A Complex Patchwork of State and Local Laws, Deep Uncertainty at Federal Level

The vast majority of employers expect the Trump administration to prioritize reforming healthcare and employee benefits law (89 percent) and immigration policies (85 percent) in 2017. However, for most regulatory issues, the percentage of respondents who anticipate an impact on their workplace over the next year remains relatively unchanged from last year's survey. That includes the Affordable Care Act (85 percent in 2016 to 83 percent in 2017) and enforcement by the Equal Employment Opportunity Commission (78 percent to 76 percent), National Labor Relations Board (56 percent to 55 percent) and Department of Labor (82 percent to 81 percent). Immigration

reform was the exception as 63 percent said they expect an impact in 2017, up from 40 percent in 2016.

“With the profound changes in Washington, D.C., it may be initially surprising that respondents do not anticipate more of a near-term impact on their businesses,” said Michael Lotito, co-chair of Littler’s Workplace Policy Institute. “However, given the general climate of uncertainty and delays in appointments to government agencies, employers likely expect it to take time before they start to see how the president’s agenda is carried out and personally feel an impact in their workplaces.”

The host of new or amended labor and employment requirements at the state and local levels is creating compliance challenges for the majority of respondents (79 percent). In an effort to keep up, employers are updating their policies, handbooks and HR procedures (85 percent); providing additional employee training (54 percent); and conducting internal audits (50 percent).

“As states and municipalities continue to propose and enact a dizzying array of rules and regulations, it is no wonder employers are struggling with the increasingly fragmented landscape,” said Lotito. “With the Trump administration working to reduce federal regulations, employers can expect a growing patchwork of employment regulations as states and municipalities look to fill a perceived void at the federal level.”

Of the array of changes at the state and local levels, respondents have been most impacted by paid leave mandates (59 percent), background check restrictions (48 percent) and minimum wage increases (47 percent).

Uncertainty Surrounding Healthcare Reform

Even though survey responses were collected before Republicans withdrew the American Health Care Act in late March, more than

a quarter (27 percent) were already uncertain about the impact of repealing the ACA's employer mandate. And another 28 percent said they did not anticipate an impact at all.

"Employers face even more questions about the future of the ACA, as well as the extent to which the administrative process can and will be used to change aspects of the law, than when they responded to our survey," said Ilyse Schuman, co-chair of Littler's Workplace Policy Institute. "In this environment, employers can continue to expect a certain level of uncertainty surrounding employer-sponsored health coverage in the months ahead."

Only 4 percent of respondents anticipate dropping coverage for some full-time employees if they are relieved of the ACA's employer mandate, but 18 percent said they would allow more employees to work more than 30 hours a week.

"The responses indicate that employers are committed to providing health insurance for their full-time employees," said Steven Friedman, co-chair of Littler's Employee Benefits Practice. "However, they also suggest that a repeal of the mandate would give employers more flexibility to set work schedules based on the needs of their businesses, without fear of triggering a requirement to provide health insurance."

EEOC Expected to Prioritize Hiring Practices, LGBTQ Rights and Pay Equity

Hiring practices – including the consideration of criminal or credit histories in the hiring process and pre-employment testing or screening practices – was the area where most respondents (51 percent) expected an increase in EEOC workplace discrimination claims over the next year, closely followed by LGBTQ rights (46 percent) and equal pay (46 percent).

"The transitions in Washington, D.C., appear to have curtailed employers' expectations for EEOC enforcement activity around

LGBTQ rights and equal pay, which rose sharply in the 2016 survey, when 74 percent and 61 percent of respondents, respectively, expected increased enforcement around those issues," said Barry Hartstein, co-chair of Littler's EEO & Diversity Practice. "Nonetheless employers continue to expect substantial enforcement over the next year as pay equity and discrimination based on sexual orientation remain priorities not only for the EEOC, but for the courts, state and local governments, the plaintiffs' bar and the general public."

FMLA Leave Presents Headaches

Among the employee requests that are most difficult to accommodate, leaves of absences under the Family and Medical Leave Act emerged as the presenting the greatest challenges. The majority of respondents indicated difficulty with managing intermittent FMLA leave (65 percent) and leaves that extend beyond FMLA requirements (55 percent), followed by remote or work-from-home arrangements (37 percent) and modified or reduced schedules (36 percent).

"Nothing is more disruptive to the operation of a business than unpredictability. When employees are repeatedly and unexpectedly off work, employers have to scramble to cover their responsibilities and manage potential resentment from employees who are inevitably asked to do more," said Hartstein. "The increasingly common practice of requesting flexible work arrangements is also creating a whole new layer of legal and practical challenges for employers."

Data Privacy and Breach Prevention Top of Mind

As the volume of data breaches originating with employees continues to grow, 63 percent of respondents said their HR and IT departments are collaborating on information security policies. Just over half (51 percent) said they were providing additional training to employees, and a smaller percentage said they were utilizing cyber-incident response plans (29

percent) and updating employee contracts to cover confidentiality obligations (23 percent).

“It is encouraging to see HR collaborating with IT to reduce the risk of data breaches that originate with employees. Information security policies prepared only by IT often focus on technical safeguards, whereas involving HR in the process helps to address the human elements of information security,” said Philip Gordon, co-chair of Littler’s Privacy and Background Checks Practice. “However, our results suggest that employers can take additional steps to guard against and prepare for employee-initiated data breaches, including ensuring all employees are trained on policies and know how to recognize and then report a security incident.”

Among respondents from large-cap organizations, the majority (56 percent) said global data privacy was a key area of concern in doing business outside of the U.S. “This concern likely stems from the significant restrictions on sharing personal data of employees in Europe and in the many countries that impose stricter rules than the U.S.,” noted Philip Berkowitz, U.S. co-chair of Littler’s International Employment Law Practice.

The survey results were released at Littler’s 34th annual Executive Employer Conference held May 10-12, 2017, in Phoenix, Arizona, and attended by many of the employers who completed the survey.

Click here for The Littler® Annual Employer Survey 2017 Report

Click here to view the survey infographic

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The Burden Of Keeping In-House Secrets

In-house lawyers often are brought into a myriad of issues they may wish they had been left out of, points out **Stephen R. Williams** in a post on **Above the Law**.

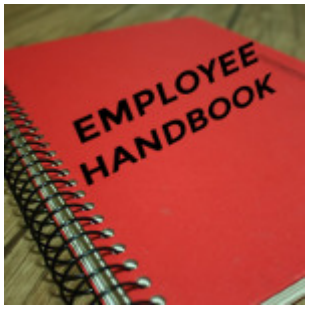
He illustrates his point by describing a case he encountered in his role as in-house counsel with a multi-facility hospital network. An executive approached him and revealed that a well-known and well-liked employee was about to be fired.

"After asking a couple rather high-level and routine HR questions, I blessed the dismissal and took my leave only to bump into the employee in question a few steps down the hallway," writes Williams. "While I was not bound by any form of attorney-client privilege at that point, I knew there was absolutely no way I could tell that employee they had better reconsider their summer vacation plans."

He tells how he dealt with the situation during the next three weeks. He also discusses dealing with standard office gossip in an HR context.

Read the Above the Law article.

How Policies Can Defeat a Breach of Contract Claim



Employees often seek to use an employer's handbook, code of conduct, or policies as the basis for a breach of contract claim, writes John J. Buckley in a blog on the site of Norris McLaughlin & Marcus.

He describes a recent case in which a company was sued after an employee discovered he had been the victim of identify theft. It was suspected that the compromise came after another employee gave away some of the de-commissioned company computers.

The plaintiff claimed that the company breached its contract to secure the personal information that he submitted in his job application. But the federal district court. The court found that no contractual promise was made in the company's policies because those policies "existed for the purpose of protecting the company from harm," not to benefit employees.

Read the article.

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Creating Material Wealth for Business Owners & Labor with ESOPs

Bloomberg BNA, PKF O'Connor Davies LLP, Prairie Capital Advisors, and Sadis & Goldberg LLP will present an **exclusive live event** on using employee stock ownership plans (ESOPs) to support growth and ownership transition strategies.

The event will be Thursday, June 1, 2017, 3-5:15 p.m., with a reception to follow. The location will be at Bloomberg LP, 120 Park Ave., New York, NY 10017.

On its website, Bloomberg says this program will explore all of the ways in which a business can utilize ESOPs to create favorable conditions for financing, allow for acquisitions, attract top talent, and generate wealth for both owners and employees.

ESOPs are commonly used by an owner seeking to retire, however, in today's business market of successful start-ups, there's an opportunity to consider them earlier in the lifecycle of the company. ESOPs, when done properly, may position the company for financing, allow for acquisitions, help attract and retain top talent in a competitive environment, and create wealth for owners and employees.

Register for the event.

House Republicans Just Voted to Change Overtime Rules for Workers

Image by NY Photographic

The U.S. House of Representatives voted to pass a bill that Republicans have promoted since the Newt Gingrich era, one that would allow private-sector employees to exchange overtime pay for "compensatory time" off, electing to accrue extra hours off rather than extra pay in their wallets, ***The Washington Post*** reports. The bill passed 229 to 197, largely along party lines.

"Under the proposed changes, eligible employees – if their employer decides to offer the option – would be able to voluntarily choose to receive comp time they can bank and use at a future date in lieu of immediate overtime pay in their paychecks," reporter **Jena McGregor** explains. "If they change their minds and want the pay after all, employees would have the option of 'cashing out,' with the employer required to pay the overtime within 30 days.

Some opponents of the legislation say they worry that employers will feel pressured to choose comp time.

Read the *Washington Post* article.

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Fox News Scandal Puts General Counsel in the Crosshairs

The top lawyer at Fox News finds herself the subject of speculation about whether she may be following the company's former president out the door in the wake of complaints of sexual harassment or racial discrimination at the network.

Financial Times reports that Dianne Brandi, executive vice president of legal and business affairs, is named in three lawsuits that the network is contesting.

In one of the suits, Andrea Tantaros, a Fox News host, filed a suit against the company and Brandi, alleging that Brandi failed to investigate allegations of misconduct. Fox News and Brandi have denied the allegations in all the suits.

The Washington Post reports that Brandi was one of the senior executives "who engaged in a concerted effort to silence Tantaros by threats, humiliation, and retaliation."

Hollywood Reporter has **a story** saying that Brandi is particularly vulnerable if more heads roll at Fox News.

Read *The Washington Post* article.

Read the *Financial Times* article.

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BigLaw Headhunter's Sexist Rant Leads to Apology, Leave of Absence

Harrison Barnes, managing director at BCG Attorney Search, recently posted an article advising law job applicants how to deal with not hearing back after an interview.

But, as **Joe Patrice** of **Above the Law** explains, Barnes somehow managed to describe "most legal recruiters" as women who "are quite attractive and fit," as well as "a little ditzy and [who do] not have the other sorts of qualifications that would make them qualified for the job."

The passages, now deleted from the company's website, continued:

> "Not only do they sometimes have more beauty and fewer brains, but they also may have more beauty and less interest in people, less ability to connect with people, and similar negative characteristics. This means they expect people to treat them as if they are special and sometimes are more

focused on themselves than their jobs.

> "It is not uncommon for recruiting coordinators to use their workspaces as a hunting ground for mates—and it works."

After the inevitable uproar, Barnes announced that he was sorry and would be taking an extended leave of absence from BCG Attorney Search.

Read the Above the Law article.

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Restrictive Covenants Can Swing Both Ways: A 3-Step Plan To Avoiding Legal Risks When Onboarding New Employees

Employers have been using restrictive covenant agreements – contracts that contain non-compete, customer non-solicitation, employee non-solicitation, or non-disclosure of confidential information – with increasing frequency in recent times, writes **Michael Elkon** with **Fisher Phillips**.

“Increased media attention on the practice of forcing lower-level employees to sign non-compete covenants, combined with the widely publicized report on non-compete restrictions issued by the Obama White House in its waning days, has led to an increase in the number of reported cases. Further, several states are passing new laws or considering changes to existing laws on the subject,” he explains.

He describes three basic steps a company can take to reduce the chances of a lawsuit from a competitor, or at least put the company in a favorable position if litigation is threatened.

These include “Ask questions on the front end,” “Structure the job on the front end to ensure compliance,” and “Emphasize the importance of purging all former employer materials.”

Read the article.

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Bad Judgment on Social Media May Lead to Job Offer Withdrawals

Plano, Texas attorney Jason Van Dyke was all set to begin a new chapter of his legal career as an assistant district attorney in Victoria County. So he was startled to receive notice that the District Attorney's office had rescinded its job offer with no explanation. Van Dyke speculates the reversal could be related to media coverage of a Twitter exchange he had involving a case he was working on in 2014. He has since filed suit seeking answers from Victoria County.

In a post on the website of **Androvett Legal Media & Marketing**, Rhonda Reddick quotes Dallas labor and employment attorney **Leiza Dolghih** of **Godwin Bowman & Martinez**, who says this is a cautionary tale for both employers and job-seekers.

The post continues:

> "Many employers these days Google prospective hires and look them up on social media for any evidence of red flags that indicate that the applicant may be violent, unethical, unstable or simply have bad judgment. These behind-the-scenes, informal background checks often result in rejection, or even withdrawal, of a job offer," she says.
>
> While a Texas employer may reject a prospective candidate for a myriad of reasons, including social media activity, a prospective employee cannot be rejected on the basis of race, gender, religion, age or other protective categories – information that can often be gleaned from social media. If a candidate can show that a job rejection was based on information protected under employment law, there could be basis for a claim of discrimination.
>
> "However, in this case, if the employer discovered what they considered unsavory comments, or possible evidence of poor judgment or lack of self-control, after offering Mr. Van Dyke a job, the withdrawal of that offer based on the newly

discovered information, would be acceptable," says Ms. Dolghih. "While everyone has the right to speak their mind freely, that speech may result in rather harsh consequences in terms of employment."

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Fox News Hit With Suit Alleging Racial Discrimination and 'Plantation-Style Management'

An expanded lawsuit filed Tuesday accuses Fox News Channel of racial discrimination "that appears more akin to Plantation-style management than a modern-day work environment," reports the **Associated Press**.

Eight former and current Fox employees joined an existing case involving three former Fox workers who have accused a since-fired Fox financial executive of bias. It also expands the case to include Dianne Brandi, Fox's chief counsel.

Fox News has denied the allegations.

"One plaintiff, on-air personality Kelly Wright, who's black, said he'd been effectively sidelined and asked to perform the role of a Jim Crow, an insulting slang term to refer to a black man, according to the lawsuit. Wright said [Bill]

O’Reilly, who’s white, refused to show a piece Wright had prepared after racial protests in Ferguson, Missouri, because they showed blacks in too positive a light,” writes AP reporter David Bauder.

Read the AP article.

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The SEC Doesn’t Like Your Employment Agreements

For the past two years, there’s been a new player in the world of employee whistleblower enforcement, writes **Evan Gibbs** for **Above the Law**.

In 2015, the Securities and Exchange Commission issued its first administrative order finding that a company violated SEC rules based on language in an employment agreement.

“In the first and only case of 2017, the SEC fined another company $340,000 because its standard severance agreement previously contained a provision in which employees waived recovery of incentive payments from the SEC,” Gibbs writes. “The company received the six-figure fine despite having removed the offending provision on its own in March 2016 as part of the company’s regular review process *prior* to being

contacted by the SEC.third parties unless compelled to do so by law and after notice to the company."

Read the article.

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Law Firm Expels Female Partner Who Filed Discrimination Suit

Partners at the law firm Chadbourne & Parke, in an unusual public gesture, voted on Thursday to expel from its ranks a female partner who filed a gender discrimination and pay inequity lawsuit against the firm last year, according to a ***New York Times*** report.

Campbell argued her case before the partners of the firm, but in a poll of the partnership conducted by telephone, she cast the only vote against expulsion. About 70 partners voted to expel her from the firm, Chadbourne said in a statement.

"On Monday, a federal district judge in Manhattan rebuffed her effort to block the vote, which her lawyers argued was retaliation for her lawsuit, which seeks $100 million and claims that the firm paid female partners less than their male counterparts and denied them advancement opportunities," reports **Elizabeth Olson**. "Two other female partners have joined the lawsuit since it was filed in August in Federal

District Court in Manhattan."

Read the *NYT* article.

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Is American Retail at a Historic Tipping Point?

E-commerce players, led by the industry giant Amazon, have made it so easy and fast for people to shop online that traditional retailers, shackled by fading real estate and a culture of selling in stores, are struggling to compete, reports ***The New York Times***.

Reporter **Michael Corkery** says the shift has been building gradually for years. But economists, retail workers and real estate investors say it appears that it has sped up in recent months.

"Between 2010 and 2014, e-commerce grew by an average of $30 billion annually. Over the past three years, average annual growth has increased to $40 billion," writes Corkery.

While the retail industry has always had its ups and downs, but even to many experienced retail workers, who are used to losing their jobs based on the seasons, this downturn feels different, the *Times* reports.

Read the *NYT* article.

Neal Gerber Eisenberg Adds Partner to Employee Benefits & Executive Compensation

Linda Hoseman has joined Chicago-based **Neal Gerber Eisenberg** as a partner in the firm'sEmployee Benefits & Executive Compensation practice group.

Hoseman works with employee benefit matters, including designing and administering qualified retirement benefit plans and welfare benefit plans, the firm said in a release. She works with compliance issues and manages ERISA aspects and reviews of corporate, private equity, and other transactions.

"The addition of Linda to our practice group is great news for our firm and for our clients," said Patricia S. Cain, chair of the firm's Employee Benefits & Executive Compensation group. "I'm very confident that our clients will come to rely on Linda's breadth of experience handling the complex employee benefit issues that arise in designing and administering retirement plans and health and welfare plans."

"Linda is a wonderful addition and evidence of our commitment to adding depth with exceptional talent seeking an inclusive, collaborative and industrious culture," Managing Partner Scott J. Fisher noted. "Her ability to design client-centered solutions while always keeping the client's business

imperatives foremost makes her a terrific asset."

After graduating from Tulane University School of Law in 1989, Hoseman obtained an LLM in Taxation from NYU School of Law in 1994. She has also worked as an adjunct faculty instructor at John Marshall Law School. Most recently, she was a partner with Thompson Coburn LLP.

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Recent Developments on Sufficient Consideration for Employee Non-Compete Agreements

A blog posting by **Sheppard, Mullin, Richter & Hampton** discusses the varying state laws regarding sufficient consideration for non-compete agreements signed at both the outset and during employment as well as other recent attacks on non-competes and restrictive covenants generally.

"Like other contracts, non-compete and restrictive covenant agreements must be supported by adequate and sufficient consideration at the time of execution. However, what constitutes adequate consideration for a restrictive covenant, especially a non-compete provision, varies from state to state," write **Mikela Sutrina** and **Kevin Cloutier**.

Although some states will consider continued employment at the outset of the employment relationship sufficient consideration

for an at-will non-compete, some states – for example, North Carolina, Montana, South Carolina, Oregon, Texas, Washington, and Wyoming – have expressly held that continued employment is insufficient consideration to support a non-compete entered into midstream of employment, the authors explain.

Read the article.

Settlement Agreements: No 'One Size Fits All' Approach

Stephen Ravenscroft and **Sarah Taylor** of **White & Case** cite recent case law to discuss the importance of using clear wording when drawing up a settlement agreement.

"Settlement agreements are a very useful tool for an employer," they explain. "They normally draw a line under the employment relationship and provide certainty that an employee will not bring any employment- related claims. Such an agreement is often used to reach a full and final settlement of any claims which the employee has or may have arising out of the employment and its termination, subject to certain exceptions such as claims for personal injury or accrued pension rights."

They warn, however, that employers must be aware that there is no “standard” settlement agreement.

Read the article.