Lurid Lawsuit's Quiet End Leaves Silicon Valley Start-Up Barely Dented

The executives of some Silicon Valley companies have been forced out of their corporate positions because of sexual improprieties between themselves and employees, but one company has weathered a similar ordeal with little apparent repercussion.

The New York Times discusses the case of Upload, an entertainment and news hub for the VR industry. When the former digital media manager sued the company after she was fired, allegedly because she complained about the hostile atmosphere, the company at first denied the allegations. Then, as the *Times*' story about the suit neared publication, Upload's CEO and president issued a statement saying, "We let you down and we are sorry."

The Silicon Valley story took a turn. As reporter **David Streitfeld** writes:

> In contrast to the venture capitalists who were knocked off their perches this summer by harassment complaints, Upload was scarcely dented by the publicity surrounding [the] suit. [The CEO and president] were not forced to resign. Investors did not pull their money. The company's events continued, if in terms that were a bit more muted.

Read the *NYT* article.

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Google Sued by Women Workers Claiming Gender Discrimination

Bloomberg Law **reports** that Google Inc. was accused in a class action of systematically paying male employees more than females, adding the internet giant to a growing list of technology companies sued for gender discrimination.

“Three women who worked at Google in recent years sued in San Francisco Superior Court alleging that the company pays women less than men for equal or similar work,” according to reporter **Erik Larson**. “They also say it puts them on career paths with lower pay ceilings, according to a copy of a complaint provided by their lawyer. The filing couldn’t be immediately verified in court records.”

Some other tech companies, including Microsoft Corp. and Twitter Inc., have been targets of similar litigation claiming men are favored for advancement.

Read the Bloomberg article.

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Sex Scandal Simmered for Years Before Silicon Valley CEO's Swift Fall

After weeks of growing scrutiny of alleged sex-related improprieties involving Social Finance CEO Mike Cagney, the start-up said he would leave as chief executive by the end of the year and that he would step down immediately as chairman, reports ***The New York Times***.

"Although many of the issues at other firms stemmed from the actions of midlevel executives or investors, Mr. Cagney personally faces questions about his role," write reporters **Nathaniel Popper** and **Katie Benner**. "His conduct was described by more than 30 current and former employees, most of whom asked to remain anonymous for fear of retribution."

Cagney's position with the company had become delicate after a sexual harassment suit was filed against him by a former employee.

Cagney denied any improprieties.

Read the *NYT* article.

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Which Biglaw Firms Are Doing Right By Their Staff?

Above the Law follows up on an earlier report on the disparity of benefits offered to staff members of big law firms, compared to those offered to lawyers, this time with a **focus on family leave**.

“There’s a reason, grounded in scarcity and specialization, to pay attorneys more than the staff,” writes **Joe Patrice**. “But there’s not much reason why an attorney needs more time to bond with a newborn than someone in human resources would. Perhaps the firm knows that its associates are so socially dysfunctional they need an extra several weeks to seem human? That’s certainly a colorable argument.”

The article points out that some firms avoid the attorney-staff disparity by making benefits equal.

Read the Above the Law article.

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The Questionable Non-Compete: How to Hire Someone but Avoid

a Tortious Interference Claim

A post on the website of Nilan Johnson Lewis addresses a question about hiring: What specific steps should you take to set up your best defense to a claim that your company interfered with a new hire's non-compete agreement with her current employer?

The article defines tortious interference and then discusses five considerations: selecting counsel, proving reasonable reliance, selecting the witnesses, proving the advice happened, and proving the substance of advice.

"By taking these actions with future litigation squarely in mind, your company can create the best evidence to support a justification defense when hiring a new employee with a questionable non-compete," the article concludes.

Read the article.

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Law Firm Sex-Bias Cases Will

Turn on Key Question: Can Partners Be Employees?

Alison Frankel reports for Reuters that briefing wrapped up this week on Proskauer's motion to end a sex bias suit by an anonymous partner in its Washington, D.C., office.

She writes that Proskauer's motion for summary judgment, the woman simply can't sue the firm under federal and state anti-discrimination laws because those laws protect employees and she's an equity partner – not an employee.

"The woman, who is represented by Sanford Heisler Sharp, tells a different story in her brief opposing summary judgment," Frankel writes. "According to her, Proskauer's rank-and-file partners have effectively no control over the firm. All important decisions about hiring, firing, governance and compensation are delegated to Proskauer's seven-member executive committee, which she depicts as the power center of the firm."

Read the Reuters article.

On-Demand: Recent

Developments in Employee Whistleblower Litigation

Jackson Lewis has posted an **on-demand webinar** exploring recent developments and important decisions in whistleblower litigation under the Sarbanes-Oxley Act and the Dodd-Frank Act.

Presenters are **Richard J. Cino** and **Joseph C. Toris**.

Topics for the free webinar include:

- The expansion of the definition of a whistleblower;
- The weakening of the standard of proof in employee whistleblower cases;
- The necessity for an effective policy and a thorough and prompt investigation.

Watch the on-demand webinar.

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Federal Employee Overtime Policies in Flux

Potentially significant policy changes are on the horizon regarding federal rules that determine how and whether workers are entitled to overtime pay, according to a post on the website of **Androvett Legal Media & Marketing**. Businesses

hoping to avoid overtime obligations for hourly workers must jump through three hoops in most cases. One of those hoops is to pay at least the minimum salary set by the U.S. Department of Labor.

Last year, the Labor Department under the Obama administration more than doubled the minimum salary threshold that is exempt from overtime, raising it from $23,600 to $47,476. But the salary increase proposal was stiff-armed by a Texas federal judge's injunction before the change could take effect. While not endorsing the Obama-era regulations, newly appointed Labor Secretary Alexander Acosta mused in recent congressional testimony that the current salary threshold is too low and should be raised to "somewhere around $33,000."

"The DOL is now seeking comment on how the overtime exemptions should be determined, as well as issues including whether salary levels should be allowed flexibility based on various factors, such as size of employer or region of employment," says employment attorney **Audrey Mross** of Dallas-based **Munck Wilson Mandala**.

"There's a lot on the line for employers who could be affected by these changes," she said. "More than anything, employers are seeking consistency in order to plan for the future. This information-gathering phase provides parties a chance to be heard. If the salary threshold for exemption does increase, employers will be making hard decisions about whether to raise affected worker pay to maintain overtime exemptions or closely monitor worker hours, or otherwise be prepared to start paying overtime."

Confusion Between ‘FMLA’ and ‘Maternity Leave’ Sends Employer to Trial

HR Dive reports on a federal case in which an employee’s Family and Medical Leave Act suit will go to trial over how she was fired after confusion about how much leave she had available.

Reporter **Kate Tornone** explains: “The employer’s handbook had two separate sections: one discussed employees’ entitlements to 12 weeks of unpaid FMLA leave, while the other offered workers eight weeks of paid maternity leave, with the option to take four more weeks unpaid.”

The company fired the employee when she didn’t return to work after 12 weeks absence.

Read the HR Dive article.

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Google CEO Cancels Company Town Hall on Gender Dispute After Employee Questions Leak

The Associated Press reports that Google's CEO canceled an internal town hall meant to address gender discrimination after employee questions for management began to leak online from the company's internal messaging service.

"Sundar Pichai said in an email to staff that several Google employees became fearful for their safety and grew concerned about being outed for speaking up at the town hall," writes technology writer Ryan Nakashima.

Employees had used an internal system to submit questions for executives to address, but some of those questions leaked and were published online.

Read the *LA Times* article.

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By Firing Engineer, Google

Shows What You Can Say – And What You Can't – At Work

When a Google employee wrote in a memo that women are not as qualified as men to be software engineers, he learned the hard way that free speech protections only go so far, writes **Tracey Lien** for ***The Los Angeles Times***.

"One thing many misunderstand about the 1st Amendment is that it only protects the public's right to free speech from government censorship – meaning it doesn't apply to the relationship between private employers and employees," Lien points out.

In her article, she discusses what protections employees have, what Google's case entails, Google's options, and how things might have been different.

Read the *LA Times* article.

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Making Sure Your At-Will Employees Remain At-Will

Employers must ensure that their supervisors do not unwittingly modify the at-will relationship with employees,

warns **Pullman & Comley**.

“Statements such as ‘you’ll have a long career here’ or ‘you’ll be taken care of’ may be interpreted by an employee to mean that an implied contract of employment has been formed,” writes **Margaret Bartiromo**. “Connecticut courts recognize a claim for wrongful termination based on an implied employment contract if the employee can prove that the employer agreed, by words or action, not to terminate the employee without just cause and that the parties agreed on definite terms (such as compensation and fringe benefits) that are supported by consideration (such as a bonus or pay raise).”

She added that employee handbooks should state that the at-will arrangement can only be altered in a writing signed by the employee and an authorized officer of the company.

Read the article.

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Work for Us – Or Else: The Rise of Noncompete Contracts

Some companies have taken the idea of demanding loyalty through noncompetition agreements a bit too far, writes **Alan Greenblatt** in ***Governing***.

“They are forcing workers at all levels of the business to sign noncompete agreements, barring them from leaving to join

another company in the same field for a specified period of years. Those contracts may be defensible for the head of research at a pharmaceutical company, or even a top-flight software engineer, but sandwich makers, yoga instructors and summer camp counselors have also been prevented from jumping to competitors," according to Greenblatt.

He quotes Evan Starr, a management professor at the University of Maryland: "If only CEOs were signing these, I don't think anybody would care about it."

Read the article.

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How to Manage Non-Disclosure Agreements

Aliya Ramji, director of legal and business strategy for Figure 1 Inc., responds to a question from a corporate lawyer who asks about the most important parts of a non-disclosure agreements.

Writing in the **ACC Docket**, she explains that she uses two strategies to keep up with the volume of NDAs.

The first is to draft a template NDA for the business unit. Then, in order to better facilitate the review process, she develops negotiation parameters for the business units.

In the article, she discusses some key elements to include, including identification of the parties, defining the confidential information, the purpose of the disclosure, what is excluded, and the term.

Read the article.

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Compliance Training: Effective Enough to Avoid the Headlines?

NAVEX Global has produced a new ethics and compliance benchmark report that provides key statistics to measure and prove the value of educating employees on the right topics.

The report **can be downloaded** from the company's website.

Most companies are using compliance training to teach employees about respect, ethical behavior and legal requirements. Yet companies continue to make headlines for bad employee behavior, NAVEX Global says on its website.

In the 2017 Ethics & Compliance Training Benchmark, NAVEX Global collaborated with an independent research firm to

deliver data that answers questions like:

- What are the typical employment law training courses provided?
- What issues threaten training effectiveness?
- How are organizations aligning training with risk?
- How often, and on what topics, are boards training on?

The report also gives guidance on rigorous methods to use such as maximizing data from hotlines, measuring changes to behavior and more.

Download the report.

Once Again, Trump DOJ Busts Convention, Splits Government in High-Profile Employment Case

The case of Donald Zarda, a skydiver who claimed his employer, Altitude, violated Title VII when it fired him after finding out he was gay, illustrates how the U.S. Department of Justice and the Equal Opportunity Commission can sometimes operate at cross purposes in litigation.

According to a **Reuters report**, the EEOC, an independent

federal agency, is representing Zarda's estate against the former employer. At the same time, the DOJ has filed its own amicus brief, explicitly disavowing the EEOC's stance.

Alison Frankel writes that the brief "argued primarily that the EEOC and the 7th Circuit, which adopted the agency's reasoning in its en banc opinion last April in *Hively v. Ivy Tech Community College*, disregarded the actual language of the statute and misread Supreme Court precedent on interpreting that language. According to the Justice Department, it's up to Congress, not the courts, to legislate protection for gay and lesbian employees, and Congress has steadfastly refused to do so."

Read the Reuters article.

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Non-Competition Agreements: Ensuring Enforceability

A non-competition agreement raises state-law public policy concerns. As a result, states often restrict the scope of non-competition agreements before they will enforce them, warns **Mark Koogler** in Porter Wright Morris & Arthur's **Federal Securities Law Source**.

"Most jurisdictions disfavor non-competition agreements as a

matter of public policy because they view such agreements as a restraint of trade," writes Koogler. "Broader language places a heavier burden on the employer to justify the restrictions whereas narrowly tailoring the language of a non-competition agreement reduces the risk that a court will construe the agreement to unnecessarily restrain trade."

Koogler writes about the importance of balancing the interests of the employer and employee.

Read the article.

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Tip #1 for Drafting Executive Employment Agreements: Define "Cause" Broadly

Image by NY Photographic

Executives and other high-level employees often negotiate a

contractual provision requiring the payment of severance if terminated without "Cause" prior to the expiration of a term agreement, points out **Bill Wortel** in Bryan Cave's **At Work blog**.

"Too often, employers limit the definition of Cause to intentional misconduct that harms the company, criminal behavior, or the executive's death. Such a narrow definition ties the employer's hands when an executive is not making a good-faith effort to perform well or is performing very poorly despite reasonable efforts," Wortel writes.

He advises that the agreement should include a definition of cause that provides the company with flexibility to terminate an executive for legitimate, non-discriminatory business reasons.

Read the article.

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Labor & Employment PAGA Attorney Joins Blank Rome in Los Angeles

Blank Rome LLP announces that Laura Reathaford has joined the firm as a partner in the Labor and Employment group in the Los Angeles office. She joins from Venable LLP.

In a news release, the firm said Reathaford focuses her practice on management-side employment litigation, with special emphasis on representative actions under the Private Attorney General Act (PAGA) and other wage and hour collective and class actions. PAGA allows aggrieved employees to file lawsuits to recover civil penalties on behalf of themselves, other employees, and the State of California for Labor Code violations. The act represents a significant threat to California employers and is in a constant state of change, requiring the most experienced, creative defense counsel.

“We are very excited to welcome Laura to the Firm,” said Alan J. Hoffman, Blank Rome’s Chairman and Managing Partner. “Laura is well known to our labor and employment team for her leadership in the defense of wage and hour claims, especially claims brought under PAGA. She brings considerable strength to this essential labor and employment capability in California, and adds equally considerable strength more broadly across the spectrum of defense-side labor and employment law for our clients across the country.”

The release continues:

> Reathaford is a distinguished litigator across the full range of employment disputes, including claims for wrongful termination, sexual harassment, unpaid wages, discrimination, and union grievances. She is also an experienced trial attorney having achieved favorable judgments in numerous PAGA actions, as well as FLSA actions and in single plaintiff retaliation matters. In addition to high-stakes litigation, Reathaford counsels clients on termination issues, employee handbooks, leave and disability rules, and California and federal wage and hour laws. She represents the management of public and private businesses in the manufacturing and grocery industries, as well as in banking, healthcare, and telecommunications, both in California and nationwide.

“Still a relatively new law, PAGA is constantly evolving and our clients in California need the most experienced counsel to respond creatively and effectively to a rapidly increasing number of claims,” said Scott F. Cooper, Partner and Co-Chair of the Firm’s Labor and Employment practice. “Just recently, the California Supreme Court approved class-action like discovery of employee contact information in representative PAGA cases. Laura has been ahead of the curve on PAGA since the beginning. And as we field a growing number of calls from clients regarding PAGA, they will quickly see the benefits of having Laura join our team.”

“The labor and employment group at Blank Rome offers clients an exceptional depth and breadth of talent that I am excited to join and help grow,” said Reathaford. “I also look forward to once again collaborating with Partner Howard M. Knee, with whom I have worked before, as well as contributing high-level client service and legal practice to the Firm as it continues to expand both locally and nationally.”

“Laura will be a tremendous resource to the Firm’s ongoing commitment to diversity and inclusion, particularly with regards to our Women’s Forum,” adds Brooke T. Iley, Partner and Co-Chair of the Firm’s Labor and Employment practice. “Her previous role and experience in leading women’s diversity initiatives at Venable will be instrumental in advancing not only Blank Rome’s affinity groups, but also our firm’s efforts in diversifying the legal profession at large. I am excited for the new insights that she will bring to the table, which will greatly benefit both our clients and Firm.”

Reathaford earned her J.D. from Dalhousie University in Halifax, Nova Scotia, and B.Comm. from the University of Alberta.

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Want to Peek at Your Employee's Email? Be Careful

Clarence Webster III, writing in Bradley Arant Boult Cummings' **Labor & Employment Insights**, asks and answers the question: Can you look at an employee's personal email account if you access it on company equipment?

"A recent opinion from the federal District Court of Maryland should at least make you think twice before doing that," he warns. "In *Levin, et al. v. ImpactOffice*, the court denied a company's motion to dismiss a former employee's Stored Communication Act (SCA) claim, which arose out of just such a scenario. The court found that former employee Melissa Edwards could proceed with her claim because the accessed emails were retained on Gmail's servers 'for purposes of backup protection.'"

Webster discusses the facts of the case and concludes that employers should be wary of accessing an employee's web-based email account without permission.

Read the article.

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