

[Securities Regulation Daily Wrap Up, EXECUTIVE COMPENSATION—Speakers at the 2020 Garrett and Corporate Counsel Virtual Institute addressed key employment law issues, \(Sept. 28, 2020\)](#)

Securities Regulation Daily

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By [Mark S. Nelson, J.D.](#)

Diversity and inclusion garnered significant attention on multiple panels, while paying employees and executives during the COVID-19 era also drew attention.

This year's Northwestern Pritzker School of Law spring programs on corporate and securities law, delayed due to the COVID-19 pandemic, featured online panel discussions held over a three-day period in late September during which diversity and inclusion and companies' pay practices during the COVID-19 pandemic were omnipresent topics. The panel discussions occurred at the [2020 Garrett and Corporate Counsel Virtual Institute](#), a combination of the 40th Annual Ray Garrett Jr. Corporate & Securities Law Institute and the 59th Annual Corporate Counsel Institute, both hosted by Northwestern Pritzker School of Law. The discussion below is organized topically such that commentary on each topic has been drawn from multiple panels, thus demonstrating how a few important topics permeated discussions on subject matter as varied as racial inequality, employment law, COVID-19, data analysis, and executive compensation.

Diversity and inclusion. Shannon P. Bartlett (she/her), associate dean, Inclusion & Engagement, Northwestern Pritzker School of Law, speaking on a panel titled "Moving from Diversity Talk to Action: How Law Firms and Legal Departments Can Address Systemic Racism," observed generally that studies have shown how random problem solvers often outperform a group of pre-selected problem solvers. She suggested that studies of this type are strong indicators that diversity is important in improving workplace performance.

Bartlett also addressed the question of how persons with diverse backgrounds come to the attention of companies' human resources departments. According to Bartlett, referral networks can overshadow the more traditional pipeline of job candidates, although sometimes the pipeline itself is the problem.

Bartlett noted the recent [apology](#) issued by Wells Fargo CEO Charlie Scharf, who had suggested that the reason the company had not hired more persons of color was that the talent pool from which the bank draws did not contain enough qualified persons. Said Scharf: "I apologize for making an insensitive comment reflecting my own unconscious bias. There are many talented diverse individuals working at Wells Fargo and throughout the financial services industry and I never meant to imply otherwise. I've worked in the financial services industry for many years, and it's clear to me that, across the industry, we have not done enough to improve diversity, especially at senior leadership levels. And there is no question Wells Fargo has to make meaningful progress to increase diverse representation. As I said in June, *I have committed that this time must be different.*" Scharf's comments also had drawn [criticism](#) from Democratic leaders in Congress, where legislation seeking to improve public companies' diversity has been passed by the House (see, e.g., [H.R. 5084](#) and [S. 360](#)).

Bartlett commented that in situations in which a company's jobs pipeline seems not to be achieving diversity goals, it is important to understand why that pipeline is missing qualified applicants.

Another panel titled "Updates in Employment Law" addressed both diversity and inclusion and COVID-19-related compensation issues (the latter topic is discussed below). Ami N. Wynne of Morgan, Lewis & Bockius LLP noted that many companies spoke out about their commitment to combating racial injustice after the police-involved killing of George Floyd although, just as with the #metoo movement, some companies still were caught flat-footed by complaints posted on social media by employees, customers, and suppliers. Wynne said companies should view diversity and inclusion as an issue with both qualitative and quantitative aspects. For example,

on the qualitative side, companies should know their current culture and what culture they want to achieve. Companies also need to mull how effective annual culture surveys are, especially when employees may view these surveys negatively.

With respect to quantitative issues, Wynne said that if a company discloses workforce demographics, it should know what that data will show and what it means. She added that authenticity is important. Wynne further noted that companies might, to get a better grasp on their demographics, do some internal analyses of their demographics aided by the attorney-client privilege. When companies do publish demographic data, they can try to put the data in context by stating aspiration goals, offering a company narrative, or comparing their demographics to competitors' demographics.

Wynne also noted the federal government's recent order to agencies to not do certain types of racial trainings. Specifically, President Trump [announced](#) an [executive order](#) rejecting what it termed "ideology [] rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans." The executive order applies to the U.S. military, federal agencies, and federal contractors.

Wynne, however, said such trainings are a pillar in the private sector regarding diversity and inclusion. She said in the post-George Floyd era it was likely that companies would "double down" and expand their trainings from discrimination and implicit bias to add cultural conversations that include critical race theories.

Marissa Ingley, chief counsel, Labor & Employment Law, Archer Daniels Midland, offered three tips for starting a company's diversity and inclusion program: (1) determine what needs and areas of weakness should be addressed and ensure the program is "authentic;" (2) be patient because diversity and inclusion is often a "work-in-progress" and requires the temperament to run a "marathon" instead of a "sprint;" and (3) focus on compliance training. She said that ADM emphasizes unconscious bias, having someone take the contrarian view, and keeping their program fresh.

Lastly, another panel titled "What Lawyers Need to Understand About Data" examined many general data analysis issues but also briefly looked at human resources data used to study whether a company discriminates in employment. First, Shaila Ruparel, Associate General Counsel, II-VI Inc., observed that while data has some intrinsic value, its true value derives from how it is used. Andrew Cripe, shareholder and chair of the Employment Advice and Investigations group at Polsinelli PC, agreed that data is "only as good what it was built for" and went on to suggest a human resources example. According to Cripe, human resources data is generally set up only to process payroll and benefits, but beyond these purposes it is often a "dumpster fire." For example, human resources data could be used to study whether a company has gender pay equity issues but, unless data has been "leveled," it can be difficult to discern which employees perform similar work.

COVID-19 and workplace health. The COVID-19 pandemic appeared during several employment law panels. Companies already face issues of how to monitor employees for illness to reduce the transmission of COVID-19 in the workplace while maintaining a safe environment for those employees who must be in the workplace rather than working from home. Still other companies plan for the day when those who are working from home begin to resume in-person work.

Dr. Janna Kerins, medical director, Environmental Health, Chicago Department of Public Health, explained the basics of epidemiology on a panel titled "Post-COVID-19: Front-end Planning for a Crisis – What Do We Know Now?" Dr. Kerins defined "outbreak" as a sudden increase in disease above what is normally expected in some population. An outbreak could involve just two or more confirmed or probable cases within 14 days, the incubation period for the virus that causes COVID-19.

Dr. Kerins said outbreak notification typically involves case investigation, an employer report, or a complaint, although these steps vary by state and locality. Public health authorities and companies should focus on modifiable risk factors that can be changed to reduce risk of disease transmission. She also said contract tracing is important in the workplace and could emphasize: (1) when employees' symptoms started; (2) whether

employees had close contacts with infected persons such as through work, car pools, or work-adjacent activities; and (3) when an employee last was at work or when an employee was last tested for infection.

Speaking on that same panel, Kathryn Montgomery Moran, principal, at Jackson Lewis P.C., observed that COVID-19 requires companies to focus on business continuity and that for the first time in a long time businesses had seen "extremely rapid" legal change. She also noted that COVID-19-related legislation contains many employment provisions that have deadlines. For example, she explained that the [Families First Coronavirus Response Act](#) (FFCRA) (see Section 3101, et. seq.) added a new Family and Medical Leave Act category that was due to sunset on December 31, 2020, unless additional legislation extends the provision. It is also important to check the [Coronavirus Aid, Relief, and Economic Security \(CARES\) Act](#) for adjustments to FFCRA provisions.

Once again, the "What Lawyers Need to Understand About Data" panel noted several important things to know about data companies may be collecting on employees' COVID-19 status. For example, companies typically will take an employee's temperature and ask them questions about their current health before allowing them to enter an office building. Polsinelli PC's Cripe observed that some companies had retained this data, even though it was intended for a one-off "go, no go" type of use. As a result, those companies collected "medical information" for purposes of OSHA regulations that must be maintained according to OSHA standards. Cripe suggested that companies in the COVID-19 context not collect such data, especially on employees, that they do not actually need.

Cripe would return to the topic of COVID-19 toward the end of the data panel discussion. Here, Cripe reminded listeners that an employer cannot tell other employees of an employee's health status because of privacy concerns. Cripe explained that clients may then ask how are they supposed to stop COVID-19 in the workplace if they cannot identify sick employees? He said carefully designed contact tracing can help to minimize privacy issues but that a better approach may be to avoid uncertainties in the first place by embracing remote working or having employees keep track of their contacts in advance of any illness.

Executive compensation and COVID-19. The "Updates in Employment Law" panel, in addition to discussing diversity and inclusion, addressed issues that can affect how executives and other employees are paid during the COVID-19 pandemic. Michelle L.C. Carpenter, Latham & Watkins LLP, for example, said that early 2020 or multi-year bonus pools may no longer work in light of the pandemic. Instead, she suggested that some companies may set up discretionary bonus programs, modify performance goals (something she said was more popular earlier in 2020), or shift performance measures from metrics focused on financials to ones focused on operational goals.

Carpenter also noted several additional topics for companies to consider. For one, the Tax Cuts and Jobs Act of 2017 amended Internal Revenue Code Section 162(m) but grandfathered certain compensation arrangements; as a result, a company should consult its tax advisers about whether changed plan terms could remove the company's plan from the grandfather provision. Second, shareholder-approved equity plans should be checked for terms regarding the following: (1) share limits; (2) limits on awards to an individual employee within a calendar year; and (3) vesting schedules. More generally, if a company seeks to modify financial goals related to compensation plans, it should consult its accounting advisers to avoid any possible accounting charges.

Securities law disclosures. Although not mentioned in the several relevant panel discussions, the SEC recently issued Compliance and Disclosure Interpretations (C&DIs) regarding executive compensation disclosures and COVID-19. New C&DI [Question 219.05](#) addresses issues regarding executive compensation disclosures under Items 402(a) and (c) of Regulation S-K. Item 402(c)(2)(ix)(A) requires disclosure of perquisites and other personal benefits, the aggregate amount of which is \$10,000 or more. The C&DI further address executives who are named executive officers under Item 402(a)(3)(iii) and (iv), that is, subject to some qualifications, the three highest paid executives (other than the PEO and PFO) plus up to two more individuals who would have been subject disclosure but who were not serving as executive officers.

The C&DI begins by reaffirming that SEC [Release No. 33-8732A](#) applies to the determination of benefits and perquisites. As result, an item is not a benefit or perquisite if it is integrally and directly related to job

performance, an evaluation that depends on the particular facts and circumstances. However, an item is a benefit or perquisite if it confers a benefit that has a personal aspect, unless the item is generally available on a non-discriminatory basis to all employees. With respect to COVID-19, the C&DI explained in detail how these principles might apply:

"In some cases, an item considered a perquisite or personal benefit when provided in the past may not be considered as such when provided as a result of COVID-19. For example, enhanced technology needed to make the NEO's home his or her primary workplace upon imposition of local stay-at-home orders would generally not be a perquisite or personal benefit because of the integral and direct relationship to the performance of the executive's duties. On the other hand, items such as new health-related or personal transportation benefits provided to address new risks arising because of COVID-19, if they are not integrally and directly related to the performance of the executive's duties, may be perquisites or personal benefits even if the company would not have provided the benefit but for the COVID-19 pandemic, unless they are generally available to all employees."

Waiver of salary. Early in the pandemic, many companies imposed salary cuts or allowed executives and other employees to waive their salaries. However, Carpenter said salary waivers can raise a number of issues. For example, she said waivers should focus on executives rather than rank-and-file employees. She also noted that employment contracts must be reviewed for provisions that establish a fixed base salary, target bonuses, and the right to terminate for good reason.

Carpenter further noted that severance paid to departing employees should be based on the employee's original salary before a waiver instead of their salary resulting from a waiver. The severance issue would be especially important for lower-level managers who choose to waive their salaries (likely to a lesser extent than higher up executives) to show their solidarity with the employee base.

With respect to waving bonuses, Carpenter said companies should plan ahead because if a bonus is waived after it has been approved and earned, the IRS could take the view that the bonus was constructively received by the employee and, thus, it would be taxable. Moreover, Carpenter said a company must be aware of applicable minimum wage laws; she suggested that companies obey minimum wage laws and, if desired, allow waiver of any salary above that amount.

Payroll tax deferral. The employment panel also discussed the Trump Administration's recent announcement via [presidential memorandum](#) that some employees will be able to defer payment of payroll taxes and the Treasury Department's [announcement](#) of related IRS guidance (See [Notice 2020-65](#)). On a related matter, the Treasury Department also has [stated](#) that the payroll tax deferral program should not impact the social security trust funds due to the temporary nature of the deferral program and the need for payroll taxes to be repaid.

The payroll tax deferral applies to wages paid during any bi-weekly (or equivalent) pay period of less than \$4,000 during the period September 1, 2020 to December 31, 2020. The IRS guidance states that repayment of payroll taxes must occur between January 1, 2021 and April 30, 2021; otherwise, on May 1, 2021, a taxpayer will be subject to interest, penalties, and other additions to tax.

According to Carpenter, the deferral applies to the employee portion, not the employer portion, of the tax. She said employers must decide to make the deferral available to employees as well as whether the deferral is mandatory or elective. Carpenter noted that if an employer makes the deferral mandatory, it would be hard to repay amounts in early 2021 and that it would be especially difficult to get repayment from an employee who has left the company. ADM's Ingley said many employers are likely not to participate in the payroll tax deferral program because of its administrative burdens, especially regarding the need for companies to get employees to repay deferred amounts. Ingley added that whatever decision a company makes about participation in the deferral program, it should clearly communicate that decision to its employees.

COVID-19 lawsuit trends. Jeffrey Webb of Paul Hastings LLP, moderator of the "Updates in Employment Law" panel, warned of a possible increase in COVID-19-related employment lawsuits. He said the number one litigated claim is for retaliation against employees who raise COVID-19 workplace safety concerns. Other types

of claims include: (1) those for job loss where the employee belonged to a protected category; (2) WARN Act cases regarding layoffs and furloughs; (3) cases when an employee was fired because they were believed to have COVID-19 or when an employee refused to go to their workplace because of COVID-19 worries; and (4) cases that involve mask wearing, especially when it would be important for an employee to be able to read lips.

Lastly, Polsinelli's Cripe, speaking separately on the "What Lawyers Need to Understand About Data" panel, noted that cases alleging that an employee spread COVID-19 outside the workplace potentially could expose companies to significant tort liability. Following the conclusion of the 2020 Garrett and Corporate Counsel Virtual Institute, Reuters published an article spotlighting some of the first "take home" COVID-19 lawsuits in which it is alleged that employees brought COVID-19 home to family members who then also became sick. Sources cited in the Reuters article suggested that 7 percent to 9 percent of total U.S. deaths from COVID-19 (which recently surpassed 200,000) may be from take-home infections and that take home lawsuits would likely rely on theories that could avoid recovery limits imposed on employees by workers compensation laws.

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Companies: Wells Fargo; Archer Daniels Midland; II-VI Inc.

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