

U.S. BOARD OVERSIGHT OF "CULTURE SHOCK" AS EMPLOYEES RETURN TO RADICALLY DIFFERENT WORKPLACES

May 01, 2020

As states slowly move to reopen their economies, many returning employees will be shocked by the radical changes in their workplaces. Collaborative spaces, ping pong tables and community break rooms, among other areas, will be transformed or closed for social distancing. Employers will monitor and collect employee health information as never before. Some employers already have announced they are exploring contact tracing and testing apps and wearable wristbands to alert employees if they are within six feet of each other or have come into close proximity with someone who has tested positive for COVID-19.

Directors will play a crucial role in overseeing these pandemic-related corporate culture and privacy challenges, far beyond typical oversight of operations and finance. Directors have duties of care and loyalty to make well-informed decisions and act in the best interest of company stockholders. To fulfill those duties and protect themselves under the business judgement rule, directors should require management to provide appropriate and timely reports so they can monitor and consider up-to-date information in order to provide strategic direction and oversight in the rapidly-changing COVID-19 environment.

While there is always tension and management sensitivity about possible board over-reach into day-to-day operations, management and directors may need to work together more closely than in the past so that directors are fully informed in order to monitor management's real-time decisions to re-open while fulfilling their oversight duties.

Conflicts in workplace protocols are likely, as management and directors grapple to balance risks and uncertainties with employee and customer privacy and comradery. Key culture and privacy questions that boards should consider and discuss with management and outside advisors include:

- How will corporate culture be promoted and monitored? People will be people and efforts to address the #MeToo environment must continue despite the pandemic. Continue to communicate the importance of an equal opportunity workplace, especially during this time when employees may be more likely to discuss health and wellness issues. There may be an

increase in requests for disability accommodations, as well as requests to accommodate childcare needs. Communicate the importance of tolerance as appropriate.

- What steps are being taken to provide for worker health and safety? For example, changes will likely be required to provide for social distancing, temperature checks, vigilant cleaning efforts and break room management, among other things. Stress the importance of remaining agile in this shifting corporate environment and reassure management that these measures are meant to be a temporary phase as workplaces return to normal.
- What plans are in place if employees test positive for COVID-19? Ensure someone has been designated to track and address potential workplace exposure. Establishing one point-of-contact will help ensure any issues are handled in a consistent manner. Consider what approach toward potential privacy issues (e.g. contact tracing) is appropriate for your corporate culture. To what extent is the board willing to tolerate measures that may be seen as extreme to employees?
- What are management's plans to address customer health and safety? Consider potential liability issues that could arise relating to COVID-19 and prepare accordingly. Ensure the company is in compliance with state, city and industry specific guidelines in place to protect customers and consider delivering messaging around your protective measures.
- How will management comply with conflicting federal, state and local guidelines for reopening business and worker safety? There is no shortage of guidance coming toward workplaces as they plan to reopen. In addition to the CDC workplace guidelines (many of which are industry specific) and OSHA guidelines, states will issue business requirements when they reopen economies, as will many state and local health departments. Corporate counsel should be tracking these changes, with assistance from outside counsel when necessary, to make sure no critical health and safety requirements are missed.

Employees, particularly millennials, may struggle to adapt to a completely different work experience, as COVID-19 erases years of progress toward collaborative work environments. These challenging times require that management and boards work closely to ensure that directors have timely and adequate information and transparent reporting systems in order to properly carry out their fiduciary and oversight duties as businesses begin to reopen.

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MEET THE TEAM



Sara E. O'Keefe

Kansas City

sara.okeefe@bclplaw.com

[+1 816 374 3289](tel:+18163743289)



R. Randall Wang

St. Louis

randy.wang@bclplaw.com

[+1 314 259 2149](tel:+13142592149)

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