

GC Cheat Sheet: The Hottest Corporate News Of The Week

By **Michele Gorman**

Law360 (September 21, 2018, 3:38 PM EDT) -- New survey results showed that the hurdles faced by legal operations professionals are changing as the role increases in popularity, a top Mitsubishi attorney claimed the company illegally refused to promote her to general counsel because of her gender, and six companies set price ranges on initial public offerings estimated to raise \$465 million combined.

These are some of the stories in corporate legal news you may have missed in the past week.

Shifting Challenges of Legal Ops Function

While the responsibilities for legal operations professionals haven't significantly changed in the past decade, the challenges they face have substantially shifted because of the role's increasing popularity, according to a survey published Thursday.

The Blickstein Group Inc. in collaboration with Consilio LLC designed its 10th Law Department Operations Survey to explore the growth of the legal ops function throughout the past decade.

Their first survey in 2008 found the main three hurdles faced by legal ops leaders, or LDO professionals, were identifying opportunities for business improvement and cost savings, showing the value of their position to the corporation, and obtaining funding to work on projects within the department.

Now, gaining attorney respect is much less of a problem, so the challenges have changed. For example, proving value to the company isn't included in the top seven obstacles identified by the 128 law departments that took the most recent survey conducted in August and September 2017.

Student Loan 401(k) Matches Could Still Prompt IRS Fury

The Internal Revenue Service made waves recently by clarifying that a 401(k) plan sponsor may provide matching employer contributions based on employees' student loan repayments, but such programs could still run afoul of regulations if they discriminate in favor of highly compensated employees.

The private letter ruling, PLR-131066-17, was released in August and said offering student loan repayment nonelective contributions would not violate the "contingent benefit" prohibition of the tax code, which says a 401(k) plan may not condition any other benefit upon the worker's participation or nonparticipation in the benefit plan. Such a contribution must be given based on the elective deferrals made by all eligible participants.

However, the ruling did not address nondiscrimination testing, which is a separate requirement that says in order for a benefit plan to receive tax-favored status, the plan must not discriminate in favor of highly paid workers and other key employees as it relates to benefits, contributions or eligibility. If a plan fails nondiscrimination testing, then a benefits plan fails to be compliant, which puts workers and employers at risk of receiving IRS penalties.

Brian Dougherty, a partner at Morgan Lewis & Bockius LLP, told Law360 he thought the private letter ruling's conclusion that the plan did not violate the contingent benefit test was pretty straightforward, but the real significance fell on an area that was independent of the IRS ruling itself.

"The real issue here is whether the structure satisfies the applicable nondiscrimination requirements and what impact it may have," Dougherty said. "You have to design this very carefully."

How In-House Counsel Can Fight Cyberthreats

In-house counsel can play a pivotal role in helping their businesses prepare for possible data breaches as companies of all sizes across industries seek to maintain security amid unprecedented challenges from cyberattacks.

The general counsel is responsible for ensuring the right legal resources are deployed to address risks, but other members of the legal department must also have a strong grasp in basic privacy and security law. Experts cite the increasingly relevant adage that "it's not if, but when" a company will be the victim of a cyberattack.

"Everyone assumes that this is someone else's job. Well, security is everybody's job, and everybody includes in-house legal, which is really well-situated to ensure that all aspects of security and breach response readiness are being addressed by someone," said Peter Sloan, managing attorney at Information Governance Group LLC, who counsels clients on data security compliance.

In another development, the White House warned Thursday that it would authorize offensive cybersecurity operations and "modernize" federal computer crime laws as part of a new national cybersecurity strategy.

The Trump administration's plan also includes a call to form an international set of cybersecurity norms it plans to enforce by launching an International Cyber Deterrence Initiative, as well as increased cybersecurity measures for federal contractors. Its release comes two days after the U.S. Department of Defense warned of the increased use of offensive cyberattacks as part of its own cybersecurity plan.

Ex-Mitsubishi Lawyer Alleges Sex Bias Led to Her Ouster

A Mitsubishi Chemical Corp. unit illegally refused to promote one of its top attorneys to general counsel because of her gender and fired her under false pretenses after she complained about the conglomerate's discriminatory treatment of women, according to a suit in New York federal court.

Plaintiff Jennifer S. Fischman, who worked as an in-house lawyer at Mitsubishi Chemical Holdings America Inc. for about a decade, alleged that the company violated Title VII by not promoting her to the job of general counsel and chief compliance officer on a permanent basis because of her gender and later concocted a reason to fire her after she had been demoted, according to the suit filed Sept. 7

Fischman also claimed that the company selected a male attorney, Nicolas Oliva, to fill the role she didn't get despite him being both less qualified and less experienced than she was. Fischman also alleged that a top company executive had it out for her because she oversaw an investigation into certain of his alleged misdeeds.

"While the glass ceiling may have some cracks in it, we as a society need to break through completely," counsel for Fischman, Sara Wyn Kane of Valli Kane & Vagnini LLP, said in a statement Wednesday. "After passing over Ms. Fischman for the top spot, the company unjustifiably retaliated and terminated this longtime senior employee, who earned high marks year after year for her stellar performance, after she spoke out against the wrongful discrimination against herself and other female employees."

GDPR Fines Could Be Uninsurable, Broker Cautions

A leading international insurance broker cast doubt Tuesday over whether the industry stands to reap new business from offering insurance against fines that firms must pay under Europe's sweeping data protection regime.

Marsh Ltd. said in a report that policyholders "should assume nothing" about whether their insurance policy would cover penalties under the General Data Protection Regulation. The news could come as a blow to industry hopes for a new revenue stream arising from efforts by firms to insure themselves against GDPR compliance breaches.

"The insurability of a fine ... is more of a gray area than a black or white certainty, with varying degrees of uncertainty depending on the geography and relevant insurers," Marsh said in a seven-page report. "Don't assume fines and other costs will or won't be covered."

Companies risk fines of up to £17 million (\$22.3 million) or 4 percent of global turnover, whichever is higher, if they breach the European Union's formidable data regime. Cyber insurers have been hoping to sell cover against fines for information breaches ever since the regime went live on May 25.

Six Cos. Introduce IPOs Totaling \$465M Led by Biotech Firms

Six companies — four biotechnology firms, a medical device company and a Maryland bank — set price ranges on initial public offerings estimated to raise \$465 million combined, adding to a growing lineup of issuers expected to price IPOs in the coming days.

All companies disclosed their plans with regulators Sept. 17 and 18, enabling them to launch marketing roadshows in which they will pitch their offerings to investors. The IPOs are set to price during the week of Sept. 24, according to research firm Renaissance Capital.

Urovant Sciences Ltd. was the largest of four biotechnology firms to launch plans, setting terms on an IPO that would raise \$150 million if shares price at the midpoint of their range. The company told regulators that it plans to offer 10 million shares priced between \$14 and \$16.

Irvine, California-based Urovant, which is developing therapies for urologic diseases, said most proceeds would fund clinical trials for a lead product being designed to treat overactive bladder. Urovant hopes to submit a new drug application to the U.S. Food and Drug Administration in 2020.

A Look Back at Lehman's Decade in Bankruptcy

Ten years after filing the largest bankruptcy in history, Lehman Brothers is still returning money to creditors as a staff of about 80 administers what remains of the investment bank that collapsed with over \$600 billion in assets.

Lehman's Chapter 11 case began with unprecedented speed as the bank rushed to sell the majority of its business just days after the Sept. 15, 2008, filing. Its trip through bankruptcy, however, has been a slow crawl as the estate meticulously works through over \$1.2 trillion in claims filed against Lehman's U.S.-based companies, alone.

Here, Law360 recaps Lehman's decade in bankruptcy and the lessons it taught.

New Commissioner Could Bolster Clayton's SEC Agenda

The arrival of Commissioner Elad Roisman to fill the U.S. Securities and Exchange Commission's lone vacancy likely helps Chairman Jay Clayton's agenda on certain deregulatory items, experts said, and could provide a critical voice to cryptocurrency matters facing the SEC.

Roisman, a former Milbank Tweed Hadley & McCloy LLP corporate and securities law attorney, was sworn in as the agency's fifth commissioner this month, bringing the agency to full strength, which so far has been a rarity under Clayton's young tenure.

The SEC was operating at four commissioners since the July departure of Republican Michael Piwowar, a setup that enables two like-minded commissioners to stall action. The commission functioned for all of last year with no more than three members at one time, a more tenuous situation in which the absence of one member can prevent a quorum.

With five members, no one or two members can gridlock the commission, giving the chairman more latitude to set the SEC's agenda.

Tips to Help Employers Cope With Natural Disasters

The battering that Hurricane Florence dealt to the southeastern United States should serve as a fresh reminder to employers that advance planning is an important aspect of dealing with the chaos that nature can cause, experts say.

Although Florence is the latest hurricane to affect the U.S., it's just one type of natural disaster that can cause both near-term and long-term complications for businesses and their workers.

"Employers have to be mindful about the human impact of these types of events," said Hal Shillingstad of Ogletree Deakins Nash Smoak & Stewart PC. "As a company, particularly when there's a significant event such as this, the employers that are supportive, reasonable and understanding of [their] workforce during these critical times ... can really put them in a positive light both with their customers and vendors ... and also with their employees in helping them navigate the chaotic event by those who are acutely impacted by these natural disasters."

Here are five things employers should keep in mind when dealing with a natural disaster.

Q&A: 15 Minutes With Robinhood Markets' General Counsel

Archit Shah earned a degree in computer science and engineering from the Massachusetts Institute of Technology without any idea that he would later apply to and graduate from Harvard Law School.

Now, he's able to draw on both degrees as the general counsel of Menlo Park, California-based financial services company Robinhood Markets Inc., which offers stock, option and cryptocurrency trades without fees.

"On a daily basis, I get to apply my background in software as I work with the engineering teams here, as I work with the product teams here, to understand what they're building, how they're building it, and to provide good legal advice," he recently told Law360. "It's absolutely helpful to me to have that background so that I can communicate easily with all of the different teams."

Shah recently explained to Law360 how he came to realize he wanted to study law and the characteristics he looks for in potential in-house candidates.

--Additional reporting by Amy Lee Rosen, Ben Kochman, Vin Gurrieri, William Shaw, Tom Zanki and Alex Wolf. Editing by Orlando Lorenzo.