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ACC America
Association of Corporate Counsel
Baltimore Chapter (Serving the Baltimore Metropolitan Area)

# FOCUS

## President's Message

***Lynne Kane-Van Reenan***

By the time you read this newsletter, it will be early December. Finally, my silly, bundled-up winter mug shot will make some sense. It's hard to believe that 2010 is drawing to a close.

On October 13, our chapter held an evening social event sponsored by our 2010 Premiere Sponsor — Miles & Stockbridge. The event was very well attended, and everyone thoroughly enjoyed the scenic Silo Point and delicious food provided by Miguel's Cocina y Cantina. A great many thanks to Tim Hodge, partner at Miles & Stockbridge, who has put forth tremendous efforts and energy in championing our chapter. Also, thanks to Farah Esmail for planning a successful and lovely event.

The chapter met on November 10 to elect the new officers. The new slate of officers, which will take effect in January 2011, will be President Michael Sawicki, Prometric; President Elect and Treasurer Farah Esmail, Connections Academy; and Secretary Melisse Ader-Duncan, AAI. Please join me in congratulating and welcoming our new officers.

Also on November 10, our chapter sponsored a career development event. Speakers Jane Roberts and Jeff Lowe from Major, Lindsay and Africa provided the membership with a wealth of information on the current state of the legal market, as well as information on what the future may hold.

This newsletter will be my last. In January 2011, Mike Sawicki will take over the reins as the new chapter president. I would like to thank my fellow board members for all of their support this past year. Collectively, they all made the job of chapter president a lot easier. A special thanks to Stacey Stepek, our chapter administrator, for her tremendous efforts in undertaking lunch programs logistics, Golf/Spa coordination, chapter filings, board meetings and just about everything else. Stacey is truly the MVP of the chapter. I'd also like to thank Melisse Ader-Duncan for her hard work on the newsletter, Farah Esmail for her creativity in planning the chapter social events down to the last detail, Raissa Kirk for her coordination as membership chair, Ward Classen for his planning oversight on the Golf/Spa Event, Aaron Marshall for his efforts in planning the chapter's Community Service Day, Andy Lapayowker for his web-mastering efforts and photography, Maureen Dry for planning a very informative career development program, and all the other board members for their advice, guidance and support. Last but not least, my year as president would have been a bumpy one without the help and assistance of Chris Rahl (Mike, I pledge to you the same level of support for your upcoming year as President). Thank you to all.

One more final thank you to our 2010 sponsors for making our programs possible and successful:

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# The Bounty Boondoggle: Dealing A Devastating Blow To Corporate Compliance

***Susan Hackett, Senior Vice President and General Counsel, ACC***
***hackett@acc.com***

Like many of you, I attend all kinds of corporate counsel meetings — industry legal group meetings, CLE sessions, ACC networking and education events through our chapters and committees. At these gatherings, we hear about the myriad laws, regulations, rulemakings, litigation and management issues that impact and challenge us in our work everyday. At ACC, I also think about how this growing tsunami of issues impacts our members in more than 70 countries. Given the noise and number of issues competing for corporate counsel's attention, it can be hard to discern the truly momentous "global" issues from the more mundane and routine requirements.

But at this point in time, I have to say — *never* have I seen a single issue generate such singular commonality of concern and negative response as the whistleblower/bounty hunter provisions in the US Congress' new financial reform law, otherwise known as Dodd-Frank [*http://financial-reform.weil.com/wp-content/uploads/2010/07/Dodd-Frank-House-and-Senate-Final.pdf*].

Dodd-Frank was intended to address the maladies stemming from the financial implosions of 2008 and 2009. While most of the provisions were aimed at financial service issues, the legislation was amended in the final hours of passage to include a broader provision (Section 922) authorizing the Securities and Exchange Commission to expand its whistleblower/bounty program to better encourage the submission of useful information about the violation of securities laws.

In a nutshell, under this provision, a provider of "original information" about securities law violations (broadly writ) can now be awarded between 10 percent and 30 percent of a large settlement or verdict. Moreover, whistleblowers — who believe that they have suffered retaliation for contributing information to the SEC — can bring cases against their employers. And while the general concept of whistleblower bounty provisions is not new, this one is particularly pernicious to the efforts of in-house lawyers as it could upend the compliance and reporting systems they have worked hard to create in order to provide avenues and protections for whistleblowers within the corporate structure, and upon which they rely in order to help the company effectively police and remedy its own behaviors.

ACC members are the strongest supporters and facilitators of internal reporting and employee whistleblower protections. Indeed, it is in-house counsel who have envisioned, championed, implemented, managed, and assured that such systems are vibrant and offer robust mechanisms by which companies can assure better compliance and maintain a healthy ethical culture. It is key to note in reviewing the provisions of Dodd-Frank, that we have premised all of our efforts to date on the very internal corporate reporting mechanisms which this law threatens to gut: if employees are financially incented by the promise of large amounts of money to go *outside* to report potential violations — rather than to communicate these concerns through established internal company channels — then the employer will be *the last* to know about problems it could have investigated and addressed immediately. Even more ironically, the company will be held liable for addressing failures, losses or problems they could have prevented.

Internal reporting systems, the focus of so much time and investment by in-house lawyers, **must** be given an opportunity to identify and resolve problems first, or sophisticated compliance programs will be toothless. How else will companies uncover their problems if their employees have no incentive to report concerns and companies can't make it a condition of continued employment that they report and contribute to internal investigations? Isn't it the *job* of every employee to act responsibly within the entity to promote its appropriate behavior?

In recent years, government has passed laws and enacted policies that require companies to create effective internal compliance and reporting programs — in recognition that such programs lead to more legally compliant companies. In fact, it is the standard by which companies are judged in the event that there is a failure and the company would like to demonstrate that they did everything possible to prevent rogue actors from succeeding (see, e.g., Chapter 8 of the US Sentencing Guidelines and the many cases resolved either through settlement with the government or in the courts).

So, it will be interesting to see in the coming weeks, as the SEC, under its authorization in Dodd-Frank, now turns its attention to the language implementing Dodd-Frank and particularly, Section 922's whistleblower provisions. If you were able to listen to the SEC webcast featuring SEC leaders discussing the rule-making process [*http://sec.gov/news/openmeetings/2010/spch110310mls-whistleblowers.asx* for the webcast, and *http://sec.gov/news/press/2010/2010-213.htm* for the press release], and then read the proposed rule issued by the SEC staff for comments a few hours later on the same day — November 3, 2010 [*http://www.sec.gov/rules/proposed/2010/34-63237.pdf*], you will have noticed a clear and unfortunate disconnect. At this stage, it seems that officials are willing to establish two inherently contradictory tracks — one placing value on compa-

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nies owning their own internal reporting process, and the other on a newer and more problematic inclination to address failures by incenting employees to come to the government with their concerns first, and not voice their concerns through internal mechanisms.

As these regulations unfold, ACC will actively represent our members in the comment process. **Our comments are due to the SEC on Friday, December 17, 2010. We will be asking ACC leaders to co-sign our comment letter to the Commission not only to reiterate our ongoing support for the integrity and viability of internal reporting processes, but also to clarify the importance of encouraging employees to step forward internally without fear of retaliation.**

Here are some issues for you to consider:

- The government cannot possibly police all corporate misconduct; therefore continued self-policing and reporting is essential. And while Dodd-Frank applies to public companies, just as Sarbox set the standard for reasonable behaviors and responses, so too will these provisions' impact bleed into the standards by which every companies reporting mechanisms are judged.
- The SEC has no practical means by which to investigate the countless claims they will now receive from employees hoping for a huge financial windfall. Anyone familiar with sophisticated in-house corporate whistleblowing systems can tell you that the vast majority of the numerous reports into their systems are not in fact flags of serious corporate misconduct. They are often rather mistaken or uninformed employee reporting, imagined conspiracies, or personnel matters that do not uncover fraud or larger misconduct. And, those few reports that do give vital notice of percolating problems will be difficult to distinguish or weigh without context, given that the SEC staff won't know what they're looking for without intimate knowledge of the company and industry from which the report emanates. In its proposed rule, the SEC has suggested that they will send complaints back to the company for evaluation and investigation, while the Commission opens a matter to investigate each and every one. One can only imagine the chaos this will create in compliance matters.
- Dodd-Frank contains multiple whistleblower provisions: the aforementioned one involving the SEC and bounty awards; a parallel program to be managed by the Commodity Futures Trading Commission; and a final one that the newly-created Consumer Protection Financial Bureau will initiate when it is up and running next summer. Each of these whistleblower bounty provisions was modeled on similar language in the False Claims Act. In its proposed rule, the SEC draws heavily on caselaw interpreting the FCA and companies seeking best practices would do well to rely on that caselaw as well. One long-term thought for the in-house counsel bar is whether there should be rationalization of all these various whistleblower programs so that they work hand-in-hand.

Finally, it is important to point out that there are other perverse implications of this rule:

- It is conceivable that it not only incents employees to report outside the company first, but to wait until a problem festers sufficiently that the likelihood of a higher penalty or award because of increased culpability and damage goes up, increasing the whistleblower's take.
- What about the impact on corporate personnel manuals and policies that universally state that not cooperating in an internal investigation could lead to dismissal, or that employees will be dismissed for engaging in or not reporting on fraudulent behavior? Given the anti-retaliation language of the bill, the employee who's reporting may not be disciplined for the underlying problems they've contributed to or facilitated. The bill suggests that payments should not be made to those who perpetrate the crime, but specifically notes that some involvement in the fraud doesn't necessarily prevent the whistleblower from collecting. The proposed rule attempts to remedy this by preventing wrongdoers from collecting bounties on any portion of the verdict caused by their misconduct.
- What about the rules of ethics? The proposal authorizes the SEC staff to communicate directly with whistleblowers who are directors, officers, members, agents or employees of an entity that has counsel, without first seeking the consent of the entity's counsel. The rule attempts to create an exemption under state bar ethics rules forbidding lawyers from communicating directly with represented persons by permitting the SEC's lawyers to communicate with a whistleblower under these circumstances. The rules of professional responsibility should apply to all lawyers, not just those in the private sector.

Going forward, in response to the SEC's recently announced comment process and to prepare our letter, ACC's advocacy team will:

*Engage with in-house counsel working on this issue through the Association.* You are the infantry on the ground overseeing internal compliance and investigations. Your input will enable us to propose better solutions, while also better educating the SEC about the multiple minefields inherent in permitting whistleblowers to have the option of an end-run around internal reporting systems.

*Coordinate with other like-minded groups.* ACC will work with trade associations and outside counsel-leading client groups in an effort to ensure that we stay apprised of the latest developments and strategies.

We hope you will join us. Contact me at *hackett@acc.com*, or ACC's new staff director on advocacy issues, Associate General Counsel Amar Sarwal at *sarwal@acc.com*, if you are interested in signing on or have thoughts/comments to share with us to help us better fulfill our role as the Voice of the In-House Bar on this important topic.

# The Affordable Care Act and Employers: Large Employer Mandates, Employee Protections & Future Regulations

***By Carla N. Murphy and Kathleen A. McGinley***

The Patient Protection and Affordable Care Act, as modified by the Reconciliation Act, (collectively "the Act") imposes new responsibilities on employers of all sizes immediately and progressively through 2014. While your insurance provider will address the majority of these changes, there are a few immediate business requirements for large employers, as well as employee protections, and information regarding future regulations and standard forms that deserve employers' attention.

Large Business Requirements: Under the Act, a large business is generally one with 50 or more full-time or full-time equivalent employees. The Act amended the Fair Labor Standards Act to immediately require large business employers to provide all non-exempt employees "reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk." In addition to break time, employers must provide nursing mothers "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public." Nursing mothers do not have to be compensated during these breaks, unless the employee uses compensated break time otherwise offered by the employer.

The Act also requires employers with 200 or more employees to automatically enroll new employees in the business's health care plan, though employees can opt-out of coverage. This provision was effective March 23, 2010, but will most likely be enforced when the Department of Labor releases regulations interpreting it, though no deadline for release has been set.

Additional provisions effective for plan years beginning on or after December 31, 2013, will encourage large employers to offer affordable health care by means of imposing penalties and/or contributions to cover the cost of care for certain employees receiving health care tax credits.

Employee Protections: Employers should be cognizant of the fact that the Act provides whistleblower-like protections to employees by prohibiting employers from discharging or discriminating against an employee who receives a federal health care tax credit or subsidy, or who complains to the employer, federal government or state attorney general that the employer is violating, or the employee believes the employer is violating, Title I of the Act. Likewise, an employee who assists, participates or testifies in an investigation about a possible violation is protected from retaliation and discrimination. Title I covers many topics, such as denial of coverage based on preexisting conditions; therefore, a broad range of disclosures are protected.

Future Regulations & Standard Forms: Finally, as the Act imposes progressive requirements to 2014, which may be repealed and/or altered because of the possibility of an administration change in 2012 and the upcoming congressional elections, it is crucial to remain up to date not only on the Act's changes to your plan, but changes to the Act. It also is important to recognize that many of the changes imposed by the Act are general and require agency regulations to address specific points. The Departments of Health and Human Services, Labor and Treasury will be gradually issuing new regulations governing and explaining the Act. The Department of Health and Human Service's website (*www.healthcare.gov/index.html*) which provides access to the Act's regulations, fact sheets on the Act and explanations of new regulations to come. Standard forms will also be issued by the Departments to assist employers in this transition.

**Carla N. Murphy**

**Kathleen A. McGinley**

Bearing in mind the length of the Act and its ammendments, we have prepared a more detailed, but concise explanation of the Act's sections on our website (*www.ober.com*) to help employers begin to deal with these new requirements.

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**Mergermarket* (January 2010 – June 2010)

# Communicating Clearly: Using the "F***" Word

***By Ronald W. Taylor, partner, Venable LLP and Scott H. Dunham, partner, O'Melveny and Myers***

It is an old saw that Human Resource administrators spend 90 percent of their time on the 10 percent of their workforce that deserves that time the least. That 10 percent, unfortunately, often proves the truth of another old saw: No good deed goes unpunished. If the issues posed by that pernicious portion of the population cannot be solved completely, HR administrators can at least help their cause by using the "F***" word when appropriate.

We don't know what the readers of this piece may have thought, but the "F***" word to which we are referring is "fire." All too often, HR administrators and supervisors create problems because they do not communicate clearly what they mean. This is perhaps understandable. Many administrators, and certainly many supervisors, are nice folks who are confrontation averse. This is not surprising, for it can be difficult to tell an individual that one likes, and who has been employed by the firm for many years, that he or she is not performing satisfactorily. All too often, therefore, the frustration experienced by the administrator or supervisor is diluted in communications with the offending employee so as not to hurt his feelings. Sometimes the effort to be humane borders on an outright fib, as is the case when an employee who is being let go for performance reasons is told that it is due to economic conditions. This is not a white lie, and the want ad advertising the employee's replacement the following week shines the light of its spuriousness.

Leaving aside the terrible tenth (there are ways, of course, to deal with them), our experience suggests that most employees want to do a good job, and in many cases, believe mistakenly that they are doing fine. Often, this false perception is a result of the failure of a supervisor to communicate clearly or honestly with the individual. What happens in those cases is that the employee (maybe with consoling by family or significant others) is convinced that whatever it was could not have been that bad because the "F***" word was not used by the supervisor. Although the individual appreciates that things at work may not be perfect, the employee does not truly understand that his job is in jeopardy. Think about it — how many times has an employee expressed true surprise in response to discipline or discharge, contending that he had never been warned. Admittedly, this situation occurs sometimes because an employee did not want to hear the message, but far too frequently it occurs because what the supervisor thought he said is not what was communicated, and not what the employee heard.

**Ronald W. Taylor**

Our point in stressing use of the "F***" word (or T********* word for "terminate" if one prefers) is not to suggest that supervisors and administrators stop being nice folks or that they be rude or disrespectful; rather, it is intended to remind them of the importance — and fundamental fairness — of communicating clearly and effectively. If someone is doing something that makes you want to fire them, tell them that, and not that their behavior or work does not necessarily reflect the employee's fullest potential or ability — or similarly vague remarks. To be vague and oblique is not fair to the employee or to the firm that has invested training, time and wages in the individual.

As management employment lawyers, we are expected to help solve complicated legal questions and defend management actions. Often, many (though certainly not all) difficult legal issues could have been avoided by adherence to a few easy tenets. For instance, lawyers often say that irrespective of the technical legal burdens of proof, juries basically are interested in whether the employee was treated fairly. Certainly, co-workers are keenly interested in the answer to that question, because if they see a co-worker being treated cavalierly, can they expect any different treatment themselves? Such concern may affect employee morale and productivity, because no one can be sure he will not be arbitrarily disciplined or discharged. People act on their perception of reality, not necessarily on reality itself. Consequently, we frequently challenge administrators and supervisors who are pushing to discharge someone to consider whether they would think they were being treated fairly if the positions were reversed. If the answer to that question is no, the administrator or supervisor should consider whether the planned action is appropriate.

One way to make sure the answer to that query is in the affirmative is to follow a simple prescription in creating and administering employment policies. That prescription has five simple components: (1) tell an employee what is expected of him or her and what the rules are; (2) tell the employee how his performance is not meeting those expectations and/or rules; (3) tell the employee what the consequences are for failing to meet expectations and breaking the rules; (4) give the employee a reasonable opportunity to improve his performance; and (5) apply the rules and consequences evenhandedly. If an administrator follows this simple prescription, his actions are likely to be perceived as fair by co-workers, courts, juries and administrative agencies, and even employees in that terrible tenth will be hard pressed to find a receptive audience for their grievances. That is because it is fair (and generally legal) to enforce clearly communicated rules and standards in a nondiscriminatory, i.e., even-handed manner. All it requires to create fairness, and more importantly, the perception of

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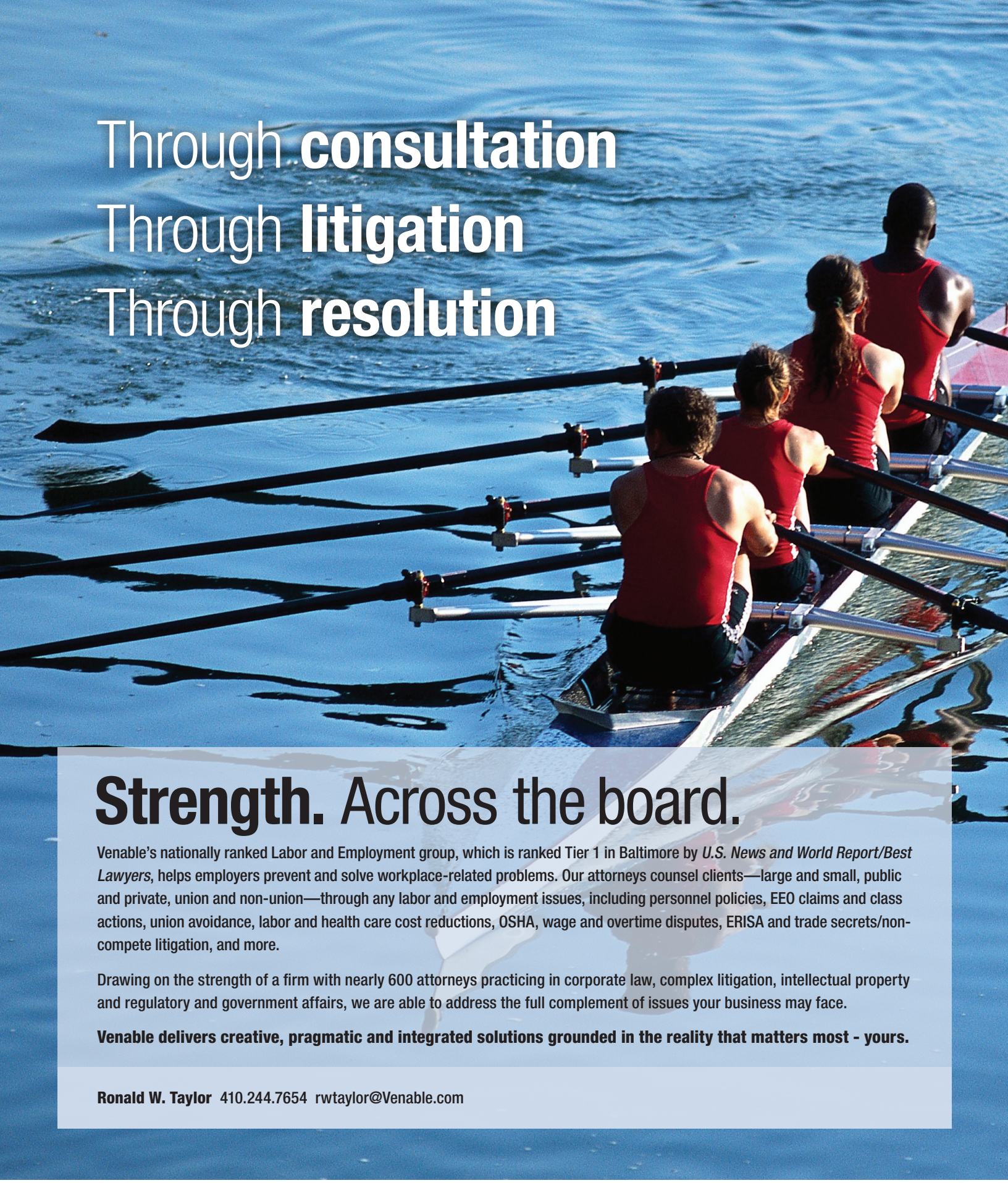


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On a sad note, one of our board members, Fiona Mensah, will be resigning her position at the end of this year. Fiona and her family will be settling in the Chicago area. We wish Fiona and her family the best of luck.

As always, we welcome feedback about what we can do to make the chapter better. The primary objective of our chapter's board is to serve the membership. The work we do is designed to help our members expand their practice skills and professional network. In that regard, if you have an idea that you would like the board to implement, please feel free to call or email me or any of our other board members. Our contact information is listed at the end of this newsletter. For future event information or to obtain copies of presentations from past lunch programs, visit our chapter website at *www.accbaltimore.com*.

Best wishes for a safe and happy holiday season.

Lynne Kane-Van Reenan

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fairness is the resolve to communicate clearly, and to use the "F***" word when that is what you really mean.

*Ronald W. Taylor is Co-Chair of Venable LLP's Labor & Employment Practice Group. He has over 25 years of experience representing management in all aspects of labor relations and employment law and has written and lectured extensively on employment practices and discrimination. He has been consistently recognized as one of the leading labor and employment lawyers by Best Lawyers of America and Chambers USA, and has also been selected as a Maryland SuperLawyer in the area. Ron is also a Fellow in the prestigious College of Labor and Employment Lawyers.*

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## Welcome New Members

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