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Tech Industry Bulletin

March/April 2015

From the Editor:

Welcome to our bi-monthly bulletin, which covers a variety of topics of interest to technology companies. Please feel free to pass the bulletin along to anyone who may be interested in the subject matter. This past February, Buchalter Nemer was pleased to be a sponsor of Start-up Grind 2015 in Redwood City. The link is: http://startupgrind.com/event/startup-grind-silicon-valley-presents-startup-grind-2015/. The firm's sponsorship funded scholarships for ten technology companies to attend this excellent event. We are delighted to be a resource for tech companies, and hope that this information is helpful. Enjoy!

- Michael Westheimer

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Corporate: Negotiating Strategies for the Sale of Technology Companies

By: Vicki Dallas

The number of mergers and acquisitions of private technology companies continue to increase. Established companies often have inadequate in-house development resources, a large pile of cash, and a need to prove to their shareholders that they have potential for future growth. A target company (Target) may never fully understand all of the dynamics of what makes it attractive to a potential acquirer (Acquirer), but there are tools Target should implement to improve its chances of a successful sale.

Identify the strategic reason for the acquisition

Target may want access to complementary products and markets, improved distribution capacity and customer base, access to capital without further dilution to founders and investors, an established infrastructure to accelerate growth, as well as liquidity for founders and investors. An Acquirer is more likely to make an acquisition to gain creative, technical or management talent, acquire key technology, distribution channels or sources of supply; and/or expand or add new product lines. Often, an Acquirer will make an acquisition to get to market more quickly, or to eliminate a competitor.

Identify the attributes of Target that are most valuable and initiate internal due diligence

Having proprietary technology is always a competitive advantage, particularly when such technology is a market leader in a fast growing market segment. Initiating legal and financial due diligence prior to going to market is extremely important so that any problems/issues can be identified and remedied prior to Acquirer commencing its own extensive due diligence.

Due diligence checklists prepared by an Acquirer generally include legal and business matters. The purpose of collecting information from the due diligence process is to address the strengths and weaknesses of Target, enabling an Acquirer to determine "fit" between Target and Acquirer, and to validate the valuation and allocate risks inherent in the transaction.

Internal due diligence should include the preparation of a comprehensive list of all IP assets, including patents, patent applications, trademarks, service marks (registered and unregistered), fictitious name filings, internet domain names, software and databases, registered and unregistered copyrights, trade secrets, proprietary know-how, technology or processes, and rights of publicity, each for federal, state and foreign jurisdictions. All IP should be reviewed for filing dates, renewal periods, security interests, validity, enforceability, and freedom to use. Anti-assignment clauses in IP licenses and other contracts that may be triggered on a change in control should be addressed and the process for obtaining any requisite consents should be clarified. Invention assignment and confidentiality agreements need to be reviewed for all employees and consultants that have contributed to the development of the IP. License agreements (which may affect field of use and other restrictions) and other IP-related agreements also need to be reviewed, including research and development agreements, joint venture or other strategic partnership arrangements, co-marketing agreements, manufacturing, supply, distribution agreements, and covenants not to sue.

Identify the most advantageous deal structure for Target

The typical forms for structuring acquisitions are stock sales, asset sales or mergers. Transactions can be taxable, or all or partially tax-free depending upon structure. It is important to check with tax and legal advisors to determine the best form for the structure of the deal before approaching an Acquirer, so that Target is best equipped to evaluate competing offers.

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Identify negotiating strategies
Acquirer will negotiate for broad representations and warranties regarding the disclosure of transferred IP, the sufficiency of IP assets, IP ownership, validity and enforceability, non-infringement, and level of protection of trade secrets and confidential information, with limited materiality qualifications and limited knowledge qualifiers. Joint and several liability for representations and warranties will be requested, with low caps and baskets for indemnity provisions, and indemnification beyond the applicable escrow or holdback amounts. Target should attempt to narrow all of these by arguing for more limited or narrow representations which are knowledge based with materiality qualifiers, and incorporating limitations on the survivability of the representations and warranties. Target should negotiate for a maximum liability cap for indemnifications claims, baskets (minimum claims which must be met before Acquirer can make any claim), and deductibles (where the Acquirer can only make claims above a certain threshold amount).

Planning for the acquisition process up front will enable Target to be proactive in its negotiations with Acquirer. It will also pave the way for a smoother acquisition process resulting in a successful closing that meets the objectives of Target's shareholders.

Vicki Dallas is an attorney in the firm's Corporate Practice Group in the Orange County office. She can be reached at 949.224.6438 or vdallas@buchalter.com.

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Intellectual Property: Crowdfunding and Confidentiality for Tech Start-Ups

By: Gregory Perleberg

I recently attended Launch Festival 2015 (www.launchfestival.com) in San Francisco and Angel Launch's LaunchFEST Mixer: Doing Deals with Silicon Valley—Attracting Funding, Angels, and Tech Trends (www.angellaunch.com) in downtown Los Angeles. The events were very different in terms of size and scope, but each showcased new technologies with an eye toward connecting business owners with investors looking to fund start-ups. As expected, there was a lot of chatter about the importance of intellectual property, such as whether or not software apps are patentable, the importance of branding, etc. (at each of the events, investors definitely tended to gravitate towards companies with strong, and protectable IP portfolios). But, the big topic of conversation with start-up owners was how to lure-in and legally raise money as a start-up business.

Crowdfunding: Fact or Fiction

Finding suitable financing for a start-up tech venture can be difficult, and that is perhaps why many companies turn to private funding sources for their new venture. When private funds are sought, federal and state securities laws must be complied with (the Securities and Exchange Commission (SEC), directly and through its oversight of the NASD and the various Exchanges, is the main enforcer of the nation's securities laws, and each individual state has its own securities laws and rules – these state rules are known as "Blue Sky Laws"). The definition of a "security" is very broad and is not limited to shares of stock. It includes partnership and limited liability company (LLC) interests, promissory notes and many other financing instruments. Securities must either be "registered" or "exempt" from the registration requirements of state and federal laws, and certain written disclosures and information must be made, or made available, to investors so they can have the appropriate information to make an investment decision.

Whenever possible, focus on "accredited investors," which are essentially those persons who have one million dollar net worth excluding their house. The disclosure requirements are the least for these sophisticated investors. Even if you have an exemption from registration, liability for any fraud by the issuer still remains. While new technology and social networks may make raising capital easier, securities laws still prohibit certain activities in order to protect unsophisticated investors. So, if you are trying to raise funds via postings on social media websites such as Facebook, Twitter or LinkedIn, only approach friends and connections with whom you have "substantive, pre-existing relationship." The consequences for not complying with federal and state securities laws are severe and can include administrative, civil and criminal penalties.

In 2012, President Obama signed the Jumpstart Our Business Start-ups Act, otherwise known as the JOBS Act. The law purported to open up the capital markets and create jobs by loosening regulations on initial public offerings and allowing for "crowdfunding." Approximately three years later, the SEC still has not published the final rules, and it may be well into 2016 or beyond before we have crowdfunding under the JOBS Act. In the interim, a number of services (often times referred to as "collaborative funding via the web") exist to help raise money, each subject to their own separate terms and conditions. A number of the more popular services

include: CROWDFUNDER, CROWDRISE, GOFUNDME, INDIEGOGO, INVESTEDIN, KICKSTARTER, PATREON, ROCKETHUB, SOMOLEND, and TEESPRING.

Top Secrets for Protecting Trade Secrets

Both recent tech events featured great presentations, product demonstrations, fun giveaways, and plenty of meet and greet opportunities. The conversations were rich with entrepreneurial spirit and innovation, but there were also questions and answers about product development, market opportunity, investor strategies, and the like—often within the earshot of others, including potential competitors.

Trade secrets have moved from the background into the foreground of business legal issues (considered the fourth prong of IP—but, unlike other IP which requires public disclosure to protect/enforce, trade secret law requires precisely the opposite – no public disclosure). For many clients, trade secrets are their greatest asset. Unlike patents, copyrights, etc., which are governed exclusively by federal statutes, regulations and case law, trade secrets are regulated by state law. Unlike other IP, there is also no formal requirement related to "novelty" or "tangibility." No federal legislation directly addresses trade secret protection.

Although the definition varies from state to state, trade secrets include "information" that is generally not known and is "not readily ascertainable" through proper means (and generally must be protected and have economic value):

- formulas, methods of treating chemicals of foods, methods of doing business, customer lists, special customer needs, credit ratings, blueprints, architectural plans, tables of data, information on manufacturing techniques, designs, marketing analyses and plans, computer software, marketing plans, business plans.
- Information not readily available by proper means – others must not be able to obtain otherwise secret information simply by examining a product or information available to the public.
- Information must be protected – a plaintiff must take reasonable steps to protect the secrecy of the information. Secrecy efforts do not have to be perfect. They do not require extreme measures (e.g., recipes for Coca-Cola, Big Mac secret sauce, KFC Original Recipe, Angostura Bitters).
- Information must derive economic value from secrecy.

Here are a few tips related to confidentiality:

- Confidential information should never be disclosed without an appropriate written agreement (including non-circumvention obligations), which can provide for either one-way or mutual disclosures.
- Patent applications, assuming publication was not requested, should remain secret unless and until the applicable patent issues.
- Review presentations, publications, etc., for inadvertent disclosures.
- Unsolicited ideas—companies receive these all the time—consider a responsive letter to turn unsolicited ideas into solicited ones to protect from the uncertainties associated with this area of law.
- Restrict access to confidential information, and apply labeling (e.g., Confidential & Proprietary"), and physical security and technical safeguards.
- Employee education programs—emphasizing the importance of trade secrets.
- Document and data handling policies, and memorialize trade secret protection plan.

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- Termination procedures and wind-down processes (send follow-up reminder related to non-disclosure agreements and specific duty to not disclose.

Trade secret status may be lost forever by any disclosure of the secret. Many companies refuse signing confidentiality agreements—or significantly modify them (e.g., disclaimer or caps related to liability, to avoid the risks associated with disclosure (including inadvertent and negligent disclosures) by employees or contractors). Many clients consider utilizing patent rights where feasible. It is important to note the following:

- There is no affirmative protection against the use of the same IP that is independently derived or reverse engineered by a competitor.
- If a trade secret is published in such a way that it may be "translated into practical application," then it will not be protected as a trade secret.
- If the information can be obtained by starting with a publicly available product and working backwards, the information will not be protected as a trade secret (reverse engineering). In such cases, it is advisable to get a patent (providing twenty years of monopolistic protection). On the other hand, if, for instance, the method of manufacturing cannot be determined from examination, the best way to protect the IP may be to treat it as a trade secret.
- If the trade secret information is used or displayed in public, it is not a trade secret.
- If an independent inventor acquires the same information and discloses it to the public, trade secret status is lost for all who possessed the information.

The famous humorist and writer Will Rogers once said, "Letting the cat out of the bag is a whole lot easier than putting it back in." This idiom is especially applicable in the area of trade secrets. Using confidentially agreements may not put the cat bag in the bag, but they do provide a roadmap for disputes and damages in the event of misappropriation.

Conclusion

Before seeking financing for your new venture, be sure to consult with an attorney who is qualified to handle securities matters. This includes loans from friends and family, and offering ownership interests in your newly formed business venture. Choose your business partners carefully, and understand the ramifications of soliciting, taking-in and spending investor monies. When disclosing information about your company and its products, be mindful of situations where confidentiality may be lost, potentially devaluing, and consider protections available to you under copyright, patent and trademark laws. In many cases, to recover damages, registration may be required, but must also be balanced against the potentially long term protection available under trade secret laws. The ever-changing legal requirements for properly launching a new technology venture are numerous and complex, and if not careful, they can become a distraction, both time-wise and financially, and pull you away from core business operations if not handled properly. Again, working with an attorney knowledgeable in these areas is essential, and allows you to focus on launching and growing your business.

Gregory Perleberg is an attorney in the firm's Intellectual Property and Corporate Practice Groups in the Los Angeles office. He can be reached at 213.891.5106 or gperleberg@buchalter.com.

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Real Estate: An Introduction to Leasing For Start-Ups

By: Manuel Fishman

Now that you have decided to rent "real" space and pay rent to a landlord in an office building, what are the basic terms you need to know about? Whether you are doing "desk sharing" or a more formal lease, focus on five things.

(1) Letter of intent. This document is exchanged up front, and sets out the general terms to be contained in the formal lease to make sure everyone is on the same page before the lease gets drafted. It is usually prepared by a broker and it should say that is a non-binding expression of interest, and not a binding contract. Bottom line, make sure what is in there is what you want from a business perspective (like rent, build-out, security deposit, access, voice data needs, kitchen, and pets/bicycles).

(2) Leases are based on allocating the risk that something may occur in the leased space or the building to one party (usually the tenant), and insurance backs up your ability to respond to that risk. Get an insurance agent to review the insurance requirements quickly. Landlords usually require between $3MM and $5MM in insurance coverage. Leases have a long provision where the Tenant indemnifies the Landlord (in essence assumes the risk of something occurring whether or not caused by the Tenant). As you grow, that provision may be negotiated—but for a start-up "it is what it is"—so insurance is critical.

(3) If you are sharing space or intend to share space with others, discuss that up front with the landlord (the legal term is "assignment and subletting"). Landlords get very particular about that. If you are expecting to raise new rounds of financings and the board of directors is going to change control from founders to outsiders, discuss that as well.

(4) Avoid personal guaranties. Obviously, you can only avoid putting your on credit on the line if you sign the lease in the name of an entity, so get the entity formed. Review it with your lawyer.

(5) Understand how the space will be built out, including electrical and HVAC. Whatever the build out, have the landlord do the work (at Landlord's cost). As a start-up it is better to have the Landlord take on the risk of construction delays and compliance with laws—you are not in the business of construction and don't need to pay people to be your advisors—landlords have that expertise.

Rent in commercial leases usually has three components, and you should get familiar with these as they go directly to the bottom line (get a pro forma from the Landlord):

(a) Base rent—this is what you would think, the base rent for occupying the leased space.

(b) Additional rent that is based on a share of expenses incurred by Landlord in owning and managing the building. There is often a "base year" for these expenses, and you pay your share of increases the expenses over the base year.

(c) Additional rent that the Tenant pays for in its entirety. For example, this can be separately metered electrical, separate janitorial, certain excess utility charges, and certain taxes on your personal property.

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Bottom line, keep the term short, have the lease reviewed by a lawyer, and, for start-ups, see if you can get a sublease to limit up-front costs. To paraphrase the song—you can't always get what you want, but sometimes you can get what you need—if you plan.

Manuel Fishman is an attorney in the firm's Real Estate Practice Group in the San Francisco office. He can be reached at 415.227.3504 or mfishman@buchalter.com.

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Insolvency: What Every Technology Company Needs to Know About Claims Against Bankrupt Customers And Business Partners

By: Shawn Christianson, Valerie Bantner Peo and Ivo Keller

Every year, otherwise successful technology companies lose untold sums of money and valuable intellectual property rights because they do not act when a customer or business partner files for bankruptcy protection. Far less effort is usually required to preserve these rights than what may be involved in a major piece of litigation; but, in almost every case, the company must take active and timely steps to ensure that its interests are protected. The following is the first part of a brief, three-part overview of the measures that technology companies can take, and the procedures they should be aware of, to protect their rights in this area of law. This section will focus on claims which creditors can assert against the estate of a bankrupt customer or business partner.

Many people who are not bankruptcy lawyers know that the Bankruptcy Code imposes an "automatic stay," which prohibits most creditors from attempting to collect their debts from the bankrupt person or company after a bankruptcy petition is filed. This may explain the initial reaction of technology companies faced with an unpaid invoice owed by a customer that has filed for bankruptcy, which is often simply to write off the debt and move on. However, that response leaves money on the table and, depending on the nature of the agreement with the bankrupt customer, may result in the company losing valuable intellectual property rights.

Claims for past-due amounts owed by the bankrupt customer or business partner are asserted by filing a "proof of claim" in the bankruptcy case. The process of preparing and filing a proof of claim is relatively simple, and can be accomplished at minimal cost. Once filed, the proof of claim is entitled to the presumption of accuracy, meaning that, unless someone objects, the company asserting the claim is entitled to a pro-rata distribution from the assets of the bankruptcy estate earmarked for general claims. In short, preparing a relatively simple proof of claim will generally result in at least some payment to the creditor technology company.

In addition, where a customer or business partner that has filed for bankruptcy protection continues to operate, technology companies that provide products and services *after* the bankruptcy case is filed often are entitled to payment for the value of those services—before most other creditors are paid. It is therefore critical to keep track of the timing of all products and services provided to a customer in bankruptcy. The process for filing such a post-bankruptcy petition (or "administrative") claim is more complicated than the proof of claim procedure discussed above, but often results in a recovery that far outweighs the cost.

On the other hand, failing to file a claim will frequently result in the right to payment being permanently barred. Similarly, a technology company may be foreclosed from asserting certain rights after the bankruptcy case is closed if it fails to assert them in the bankruptcy case. For example, failing to assert a claim for infringement of intellectual property rights that occurred prior to the bankruptcy filing may bar the later assertion of that claim. The technology company also may be barred from asserting an infringement claim against any successor to the bankrupt company, such as an entity that purchased all or part of the bankrupt company's assets through the bankruptcy case.

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In other words, by timely filing all relevant claims in the bankruptcy case, the technology company not only preserves its right to payment from the bankruptcy estate, but also takes a crucial step in protecting its intellectual property rights.

Shawn Christianson is an attorney in the firm's Insolvency and Financial Solutions Practice Group in the San Francisco office. She can be reached at 415.227.0900 or schristianson@buchalter.com.

Valerie Bantner Peo is an attorney in the firm's Insolvency and Financial Solutions Practice Group in the San Francisco office. She can be reached at 415.227.3533 or vbantnerpeo@buchalter.com.

Ivo Keller is an attorney in the firm's Insolvency and Financial Solutions Practice Group in the San Francisco office. He can be reached at 415.227.3557 or ikeller@buchalter.com.

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Tax: Tax Considerations for Technology Licenses

By: Raj Tanden

The parties to licenses of technology should consider tax issues with such licenses. The following is a summary of some of the tax implications that may arise with regard to technology licenses.

Withholding Taxes. Where a license crosses an international border, withholding taxes may apply to any royalties payable. Under the Internal Revenue Code, in general, royalties payable by U.S. persons to a foreign resident will be subject to U.S. federal income tax withholding at a 30% rate. However, an income tax treaty between the United States and the foreign resident's jurisdiction may reduce, or even eliminate, the withholding tax rate. If you are a recipient of royalties subject to withholding taxes, you should consider: (a) whether you qualify for a reduced rate of withholding under an income tax treaty; and (b) whether the payor of the royalties should "gross-up" the royalty payments to cover any withholding taxes. Under a "gross-up," the recipient will receive the full amount of the royalty after withholding of any applicable taxes. For example, assume a recipient is entitled to a royalty of a $100 and the withholding tax rate is 30%. Under a "gross-up," the payor would pay a gross royalty of approximately $143. The payor would withhold $43 for the 30% withholding taxes such that the recipient would receive $100 after withholding.

Is it a Royalty? Sometimes, a royalty is structured as a share of future profits from the use of the technology, intellectual property, etc. For example, the recipient may receive a 20% share of profits for the next five or ten years. While structured as a royalty, such an arrangement may be treated as a "continuing interest" in the business by the licensor for U.S. federal income tax purposes. The tax treatment of a "continuing interest" may be very different than a royalty. For example, if the recipient is foreign, it may now realize "effectively connected income" from the United States which may result in significant adverse U.S. federal income tax consequences to the recipient. Also, while a royalty generally is treated as "ordinary income," income from a continuing interest may be treated as capital gains. In general, there are no hard and fast rules for determining when a share of profits will be treated as a royalty or continuing interest for U.S. federal income tax purposes and it may be possible to structure a transaction in a manner to obtain the desired result.

License as Property. On occasion, a party wishes to transfer a non-exclusive license to a corporation or partnership in exchange for an interest in that corporation or partnership. In order for such an exchange to be tax-free, among other things, the license must be treated as "property" for U.S. federal income tax purposes. However, the IRS maintains that a non-exclusive license is not property for this purpose. Nonetheless, the courts have been far more generous in such determinations. Accordingly, a taxpayer transferring such a license may be comfortable treating the license as property, despite the IRS' position.

The following are just some tax issues that may arise in tech transactions, such as licenses. The parties to such a transaction should consult with competent tax advisors to ensure that desired tax outcomes are obtained and no one falls into a trap for the unwary.

Raj Tanden is an attorney in the firm's Corporate and Tax Practice Groups in the Los Angeles office. He can be reached at 213.891.5104 or rtanden@buchalter.com.

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Bank and Finance: The Equity Cure Provision—Saving Debt with Equity

By: Bukola Mabadeje

For many sponsor backed borrowers, and this would include technology companies which have raised at least one round of financing, the equity cure provides a lifeline which isn't necessarily available to traditional borrowers. The equity cure is a provision in loan documents which permits the borrower to receive into the company, equity capital in most cases, or subordinated intercompany debt in other instances and to apply the proceeds in such a way as to bolster certain financial metrics, with the result that the borrower is able to stave off a loan default. The provision gives the borrower one more alternative where it would otherwise have been forced to seek a loan modification, waiver, forbearance, or worse, acceleration of the debt.

The cash infusion from the issue of equity enables the borrower boost its cash flow or EBITDA in order to meet financial covenants such as the operating cash flow ratio, debt service coverage ratio, or leverage ratio. These financial covenants which are a key component of cash flow loans provide the lender with periodic snapshots of the borrower's overall financial condition—a must where the lender looks to the borrower's available cash flow for debt servicing and eventual payoff of the debt. For the lender, in addition to injecting the company with much needed cash, the equity cure signals the sponsor company's commitment to the growth of the borrower. Nonetheless, the lender is also keen to ensure that the equity cure isn't misused by the borrower and the sponsor, and so strict conditions are imposed including:

(a) Type of equity—Some equity cure provisions go as far as prescribing the exact type of equity that may be issued by the borrower in obtaining equity proceeds. Most common is the use of common stock as the applicable equity security. Where the borrower is able to negotiate the use of preferred stock, the lender would usually dictate the characteristics of such stock including by providing that any negotiated features of such stock e.g. convertibility, preferential dividends, redemption, maturity etc. are not triggered until a given period after maturity of the loan. This is to ensure that the lender's payment priority is not accidentally tripped by equity which has the elements of debt.

(b) Source of capital—The equity proceeds may come through equity issued directly by the borrower, or may be the proceeds of a capital call carried out by the sponsor, which is then contributed to the borrower. In transactions where the borrower is comprised of a group of related entities, the equity cure provision could limit the equity proceeds to funds provided from outside the loan party group in order to prevent an incidence of round tripping where there is technically no new injection of funds, but simply book entries which have no positive effect on the borrower's financial position.

(c) Timing of injection—The equity capital is required to be received by the company within a cutoff period, which usually matches up with any applicable cure period for the delivery of financial statements under the loan agreement. Such period ranges from 10 to 30 days, with the borrower of course bargaining for more, rather than less time. The lender's interest is to ensure that the funds are received timely enough to meet the covenant requirement. This however does not prevent the borrower from receiving and applying the equity proceeds prior to the applicable compliance test date.

(d) Equity amount—While some lenders limit the amount of equity proceeds to the amount required to cure the default, other lenders only provide that the proceeds should at a minimum, cover the aggregate amount necessary to cure such event of default for such period, in essence permitting the borrower to accept more cash than is actually required to cure the default. The lender would

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of course prefer to limit the size of the equity cure to the amount required to cure the default such that the borrower does not use the equity cure as a backdoor route to funding the company in such a way as to prevent the lender from applying its default remedies. On the other hand, the borrower would negotiate to freely determine how much equity capital to inject.

(e) Prescribed limits—In addition to capping the dollar amount of the equity cure, the lender could also limit the frequency of the use of equity cure to a prescribed number of times during the term of the loan, or prevent its use for successive test periods. Similar to the cap on the amount of the equity capital which may be received, this is also to forestall a situation where the borrower uses the equity cure as a prop for its nonperforming business.

(f) Application of proceeds—The cash received must actually be put to use by the company in a way that improves its financial condition and not solely a book entry that serves no purpose. For this reason, one of the most negotiated aspects of the equity cure provision is the application of the proceeds. The borrower would usually prefer to apply the proceeds to cash flow and EBITDA, while the lender's preference is to reduce the amount of the loan by prepaying the loan with the equity proceeds. In any case, even where the proceeds are applied to EBITDA, such proceeds may wind up being applied to reduce the loan where the loan agreement contains excess cash flow provisions.

Bukola Mabadeje is an attorney in the firm's Bank and Finance Practice Group in the San Francisco office. She can be reached at 415.227.3510 or bmabadeje@buchalter.com.

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Labor/Employment: Complying with the New Paid Sick Leave Laws

By: Michael Westheimer

Technology companies should be aware that a growing number of jurisdictions in California are requiring companies to provide paid sick leave to their employees. These laws are applicable to companies of all sizes that have employees working in the particular jurisdictions. The following is an overview of various paid sick leave laws within California.

- San Francisco has a paid sick leave ordinance that has been in place since 2007.
- Oakland recently enacted a paid sick leave ordinance that took effect on March 2, 2015.
- California recently passed a statewide paid sick leave statute that will take effect on July 1, 2015. All companies with employees in California must comply with the statewide law. Companies with employees in San Francisco or Oakland must comply with *both* the statewide law and the local ordinance.

San Francisco and Oakland Paid Sick Leave Ordinances

The San Francisco and Oakland ordinances are very similar. Each ordinance requires employers to provide employees with one hour of paid sick leave for every 30 hours worked within the city's geographic boundaries. Unused sick leave carries over from year to year, but accrual can be capped at 72 hours. A lower accrual cap of 40 hours can be applied for small businesses with less than ten workers.

Under the San Francisco ordinance, employees begin to accrue on February 5, 2007 or 90 days after the first day of employment, whichever is later, and employees can start using paid sick leave immediately upon accrual. Under the Oakland ordinance, employees begin to accrue sick leave on March 2, 2015 or on the first day of employment, whichever is later, and can start using paid sick leave after 90 days of employment.

Paid sick leave can be used for the employee's own illness, injury or medical treatment, or to care for family members who are ill, injured or need medical treatment. Employees who do not have a spouse or domestic partner can designate another person for whom they may use paid sick leave. Unused sick leave does not have to be cashed out at the end of the employment.

California Statewide Paid Sick Leave Statute

The California statewide paid sick leave statute will take effect on July 1, 2015, and similarly requires employers to provide employees with one hour of paid sick leave for every 30 hours worked. Unused sick leave carries over from year to year, but accrual can be capped at 48 hours. In addition, an employee's use of paid sick leave can be capped at 24 hours per year.

The California statute also provides an alternative: employers can provide three days (24 hours) of paid sick leave for immediate use at the start of each year, in which case any unused leave does not carry over to the next year.

Employees begin to accrue paid sick leave under the California statute on July 1, 2015 or the first day of employment, whichever is later, and can start using paid sick leave on the 90th day of employment.

As with the local ordinances, employees can use paid sick leave for themselves or for family members. The statewide statute also permits other uses for victims of domestic violence, sexual assault or stalking. However, the statewide statute does not provide for designation of another person if the employee does not have a spouse or domestic partner. As with the local ordinances, unused sick leave does not have to be cashed out at the end of employment.

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The California statute imposes additional requirements that are not present in the local ordinances:

- Employers must notify employees of the amount of their available paid sick leave with each paycheck, such as on the employee's paystub.
- Employers also must provide information about paid sick leave to employees on wage notices that are to be given to non-exempt employees at the start of employment.

Generally Applicable Provisions

Employers with paid time off (PTO) or vacation policies that meet all requirements of applicable paid sick leave laws do not need to do anything further. However, such policies also must comply with requirements that apply to PTO or vacation policies, such as cash-out of unused leave at the end of employment.

The paid sick leave laws all generally require employees to post notices in the work place, and to maintain records of employee accrual and use of paid sick leave.

Paid sick leave laws are just one example of how the landscape of employer regulations is constantly evolving. As new or modified employment laws emerge at the federal, state and local levels, companies should confirm their policies and practices are up to date.

Michael Westheimer is an attorney in the firm's Labor and Employment Practice Group in the San Francisco office. He can be reached at 415.227.3530 or mwestheimer@buchalter.com.

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Tech Industry Bulletin

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