LJN LAW JOURNAL NEWSLETTERS

The Corporate Counselor®

An ALM Publication

Volume 29, Number 6 • September 2014

Employees Can Decline Qualifying Leave Under the FMLA

By Jen L. Cornell

Congress enacted the Family Medical Leave Act (FMLA) to allow employees to take necessary leave from their jobs for their own or a family member's serious health condition. Congress's intent was to help employees to "balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interest in preserving family integrity … in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601.

The balance struck was that certain employees (those who have worked for 12 months and at least 1,250 hours) of certain employers (those with 50 or more employees) could take up to 12 weeks of unpaid leave in a year to care for either themselves or a family member with a serious medical condition. The year can be calculated on a rolling basis, or a fixed year, such as a calendar year, the fiscal year, or an employee's anniversary date. 29 C.F.R. § 825.200(b).

As "remedial legislation," courts often rule on the employee side of the scale when interpreting the law's provisions. *See, e.g., Nevada Dep't of Human Res. v. Hibbs*, 538 U.S.

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Avoiding FCPA Liability by Tightening Internal Controls

Considerations for Institutional Investors and Corporate Counsel

By H. David Kotz and Susan M. Mangiero

In early May of this year, Avon Products, Inc. (Avon) announced that it expected to pay $135 million to end long-standing federal probes of alleged violations of Foreign Corrupt Practices Act (FCPA) provisions relating to books and records, and internal controls. According to its securities filing, the settlement requires the global beauty product company to pay $68 million to the U.S. Department of Justice (DOJ) and $67 million to the U.S. Securities and Exchange Commission (SEC). While this amount is larger than an earlier proposed $12 million settlement, it pales in comparison to the estimated $340 million already spent for an internal investigation and legal fees. Additional costs may arise, depending on the findings of a compliance monitor, who will be installed for at least 18 months.

Avon is not alone in paying big money to settle FCPA allegations with various federal regulatory organizations. This is just another example of a company paying out significant amounts to the DOJ and SEC as part of an FCPA settlement that arose out of lack of internal controls. In April 2014, Hewlett-Packard Company agreed to pay $108 million in fines, penalties, and disgorgements in an FCPA settlement regarding its subsidiaries in three countries allegedly making improper payments to government officials to obtain or retain lucrative public contracts. In January 2014, Alcoa agreed to pay $384 million to settle alleged violations of the FCPA relating to its subsidiaries purportedly paying bribes to government officials in Bahrain to maintain a key source of business.

Anyone expecting a diminution of activity is in for a rude surprise. In 2010, the SEC announced the creation of a specialized unit to police FCPA violations. In 2014 alone, the DOJ has initiated a number of new enforcement inquiries. Concern about illegal payments of bribes to non-U.S. government officials by

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businesses and fraudulent reporting practices is taking center stage in mergers and acquisitions as well. The last thing a buyer wants is to inherit an expensive FCPA problem that did not show up as part of deal due diligence.

The price tag of non-compliance can be significant. Figure 1 on page 10 summarizes some recent FCPA settlements. One thing is clear: The amounts of money are large. They are even bigger when related expenses are considered to include in-house analyses, litigation defense, and rehabilitation monies for things such as employee training, improved monitoring systems, and the hiring of a specialized compliance officer to address business development protocols with foreign vendors.

Company insiders and corporate counsel are not the only parties tasked with taking action to avoid FCPA non-compliance problems and to correct deficiencies should any occur. As will be discussed in a later section, institutional investors likewise have a need to know whether a company in which they plan to invest or have already invested is exposed to potentially expensive FCPA liabilities that could destroy shareholder value.

FCPA Action Steps

Institutional investors such as pension funds, endowments, foundations, and sovereign wealth funds need to understand the nature of this federal law and what companies should do to stay out of trouble. This section addresses the core elements of the FCPA and offers action steps for any organization that does business outside the United States.

The FCPA has two main provisions, known generally as the “anti-bribery” and “books and records” provisions. The anti-bribery provisions prohibit improper payments of money or “anything of value” to a “foreign official” in order to “obtain or retain business.” The books and records provisions require issuers of securities to maintain accurate books and records and ensure that internal accounting controls are in place.

On Nov. 14, 2012, the DOJ and SEC jointly released FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act, available at http://1.usa.gov/1uPxdfB. This Guidance provides valuable information concerning how the government interprets the FCPA.

Tightening up internal controls and putting in place an effective compliance program are crucial for lessening or even eliminating FCPA exposure. The primary elements of an effective compliance programs are as follows:

Establishing Written Policies And Procedures

Standards must be put into place in the form of written policies and procedures, such as a code of conduct, to detect and prevent unethical or criminal behavior. The FCPA Guidance also indicates that companies should update compliance policies in light of the constant evolution of a company’s business changes over time, as well as changes in the environments in which it operates.

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The Corporate Counselor®

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The Corporate Counselor® (ISSN 0888-5877) is published by Law Journal Newsletters, a division of ALM.

Telephone: (877)256-2472
Editorial e-mail: wampolsk@alm.com
Circulation e-mail: customercare@alm.com
Reprints: www.almreprints.com

The Corporate Counselor P0000-233
Periodicals Postage Pending at Philadelphia, PA
POSTMASTER: Send address changes to:
ALM
120 Broadway, New York, NY 10271
Published Monthly by:
Law Journal Newsletters
1617 JFK Boulevard, Suite 1750, Philadelphia, PA 19103
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Post-Employment Retaliation

The 'Gift' That Keeps on Giving?

By Adam Augustine Carter and R. Scott Oswald

A long-time employee with a track record of success witnesses and discloses what she believes to be unlawful activity at her company, ABC Corp. Her relationship with management sours and, after a brief attempt at dispute resolution paid for by the company, she is soon after "down-sized" in a reduction in force (RIF).

Ready to move on, the employee begins applying for new positions, but cannot gain any traction. She learns that, in addition to informing potential employers about the RIF, ABC Corp. has falsely criticized the employee's performance. The employee later learns that her security clearance is in jeopardy because ABC provided misleading information to the Department of Defense (DOD). Next, the employee receives a 1099 in the mail in which ABC attributes to her as earned income the costs of the pre-RIF attempt at dispute resolution. Finally, ABC serves the employee with a multi-count complaint alleging violation of trade secrets, conversion, tortious interference, and other baseless causes of action.

From the perspective of employee counsel, it is important to understand how to proceed given this hypothetical but plausible scenario. The kitchen-sink approach is available — allege everything and fight for each claim to the bitter end. But that is a costly proposition for the client and time consuming for the attorney. The better approach, in our estimation, is to focus your efforts on only those claims, and identify only those acts by the employer, that a court is likely to find "adverse actions" under the applicable statute. In addition to saving you time and your client money, this strategy will ultimately help to establish your credibility with the court.

And management counsel needs to be able to advise its client (here, ABC Corp.) on those actions that it can and cannot properly take with respect to its former employee. As management counsel, you would hope that ABC comes to you before it speaks with prospective employers and the DOD about the former employee, issues her a 1099, or files a complaint against her. Understanding how courts are likely to view those and other post-employment acts will enable you to protect your client from possible liability in its treatment of its former employees.

In this article, we discuss the ways in which courts have traditionally examined post-employment retaliation claims and provide insight into how a court (or board) is likely to rule when an employee brings claims under two of the most widely utilized whistleblower protection statutes — the Sarbanes Oxley Act (SOX) and the False Claims Act (FCA). This article does not address claims of defamation or other common law causes of action. Rather, it focuses solely on a plaintiff's ability to bring claims of retaliation under these, and other, whistleblower and anti-retaliation statutes.

The Framework for Analyzing Post-Employment Retaliation Claims

Under almost any anti-retaliation statute, an employee must demonstrate that: 1) she made a protected disclosure; 2) she suffered an adverse employment action; and 3) there was some impermissible causal connection between her disclosure and the adverse employment action. Analyzing post-separation retaliation claims really focuses on the second prong of the anti-retaliation framework. One must understand the circumstances under which a post-separation act by an employer will be deemed an adverse employment action.

Courts look at the plain language of the statute to determine whether a statute protects against post-employment acts of retaliation. As a starting point, look at the statutory definition of "employee." Statutes that expressly cover "present or former" employees are more likely to protect against post-employment retaliation. *See, e.g.*, 20 C.F.R. § 1980.101 (regulations discussing the implementation of SOX).

Second, examine the scope of the discriminatory acts identified by the statute. For example, a statute may limit coverage to discrimination with respect to "compensation, terms, conditions, or privileges of employment." *See, e.g.*, 42 U.S.C. § 2000e-2. Other statutes have a broader scope. *See, e.g.*, 42 U.S.C. § 12203 (providing "No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter … "). As discussed more fully below, such language is not necessarily dispositive as to whether post-employment acts of retaliation are covered by a statute, but it provides a starting point for the analysis.

Burlington Northern Provides the Framework for Analyzing Adverse Actions

Before discussing post-employment adverse actions as they relate to whistleblowers, it is important to recognize the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). There, the Court determined the breadth of adverse actions under Title VII's discrimination and anti-retaliation provisions. The Court first noted that the language of Title VII's anti-discrimination provision includes the phrase, "compensation, terms conditions, or privileges of employment," and that such language "explicitly limit[s] the scope of that provision to actions

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that affect employment or alter the conditions of the workplace." *Id.* at 62. But it found that unlike the anti-discrimination provision, Title VII's anti-retaliation provision has no such limiting language. *See* 42 U.S.C. § 2000e-3 (providing, "It shall be an unlawful employment practice for an employer to discriminate against any of his employees … because he has opposed any practice made an unlawful employment practice by this subchapter…"). Because of the lack of limiting language, the Court held that the scope of Title VII's anti-retaliation provision "extends beyond work-place related or employment-related retaliatory acts." *Burlington Northern*, 548 U.S. at 67.

But the Court did impose a materiality requirement on claims of retaliation under the act. To be actionable, the retaliatory conduct must be such that "it might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68. This decision — in combination with the opinion in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) in which the Supreme Court held that post-employment acts of retaliation are actionable under Title VII — indicates how courts are likely to analyze plaintiffs' post-separation claims.

The Evolution of Post-Separation Retaliation Under SOX

SOX provides that no employer may "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment" because that employee has engaged in SOX-protected activity or conduct. *See* 18 U.S.C. §1514A(a); *see also* 29 C.F.R. § 1980.102(a) (for implementing regulations). The implementing regulations define an employee as "an individual presently or formerly working for a company … or an individual whose employment could be affected by a company." 20 C.F.R. § 1980.101.

For many years, the Administrative Review Board (the ARB) held that post-employment retaliation was not actionable under SOX. For example, in *Harvey v. Home Depot U.S.A., Inc.*, the ARB found that allegations of post-employment retaliation were "not [] adverse personnel action[s] that affected the terms and conditions of [complainant's] employment with that employer." ARB Nos. 04-114, 04-115 slip op. (ARB June 2, 2006) (SOX). The ARB reasoned that, because the employee no longer worked for the employer at the time of the alleged harassment, the actions could not have affected the "terms and conditions" of the employee's employment. *Id.* Likewise, in *Farnham v. Int'l Mfg.*, where an employer brought a post-termination suit against a former employee, the ARB found that bringing the suit did not affect the "terms and conditions" of the employee's employment. ARB No. 07-095 slip op. (ARB Feb. 6, 2009) (SOX).

In 2010, the ARB started to take a more employee-friendly approach in analyzing what constitutes a post-employment adverse action. For example, in *Rowland v. Prudential Equity Grp.*, ARB No. 08-108 slip op. (ARB Jan 13, 2010) (SOX), the ARB, relying heavily upon the Supreme Court's reasoning in *Burlington Northern*, held that the anti-retaliation provision in SOX embraced as an adverse action a former employer's filing suit against an ex-employee to enforce an arbitration award. But the ARB still tied the action back to the "terms and conditions" of the complainant's employment, as the former employer's agreement to pay arbitration costs was an "employment benefit." *Id.* at 9-10. Because the payment of those costs was an employment benefit received by the employee during the course of her employment, the employer's suit to force her to pay those costs was, indeed, an adverse employment action under SOX. *Id.* at 10.

Finally, in *Menendez v. Halliburton, Inc.*, ARB Nos. 09-002, 09-003 slip op. (ARB Sept. 13, 2011) (SOX), the ARB held that "'terms and conditions of employment' are not significant limiting words and should be *construed broadly* within the remedial context of [SOX]." *Id.* (emphasis added). The ARB went on to discuss the "very different language" in SOX and the comparable provisions of Title VII. It ultimately, held that "an adverse action is simply something unfavorable to an employee, not necessarily retaliatory or illegal," and is not limited to "economic or employment related actions." *Id.*

Despite the ARB's limiting decisions in *Harvey v. Home Depot U.S.A., Inc.* and *Farnham v. Int'l Mfg.*, the ARB, for a long time, did find blacklisting an adverse employment action under SOX. *See, e.g.*, *Egenrieder v. Metro. Edison/G.P.U.* 1985-ERA-23 (Sec'y Apr. 20, 1987). The ARB's recent trend toward a more expansive understanding of adverse actions under SOX, particularly as it relates to post-employment retaliation, squares well with its precedent related to blacklisting.

The ARB's current jurisprudence is summed up in a 2013 opinion from the Office of Administrative Law Judges (OALJ). In *Fernandez v. Navistar International Corp.*, 2011-SOX-31 (Jan. 28, 2013), the OALJ found that: 1) "alleged adverse action[s] need not be 'employment related' to support a cognizable claim under SOX"; and 2) "post-employment adverse actions are within the scope of 'adverse actions' under SOX."

The FCA and Its More Employer-Friendly View of Retaliation

The anti-retaliation provision of the False Claims Act provides that:

> Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any manner discriminated against *in the terms and conditions of employment* because of lawful acts done by the employee ... in furtherance of an action under this section or other efforts to

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Using Social Media Content to Defend Employment-Related Lawsuits

By Jessica Neufeld and David S. Weber

For much of America, exposure to some type of social media is a part of everyday life. Fifty-seven percent of all American adults use Facebook — the most preferred social networking site (or SNS) — and 52% of Internet users who do not use Facebook live with someone who does. Sixty-four percent of Facebook users visit the site on a daily basis. (6 New Facts About Facebook, Feb. 3, 2014, http://tinyurl.com/kv8vyop. Pew Research Center, Social Media Update 2013, Dec. 30, 2013, http://tinyurl.com/ngkvy98).

Reasons for such use include viewing photos or videos, sharing things with many people at once, receiving support from people in their network, getting feedback on content they have posted, and keeping up with news and current events. (Pew Research Center's Internet Project Survey, Aug. 7-Sept. 16, 2013, http://tinyurl.com/kv8vyop).

Because social media is a major vehicle for interacting with the world and exchanging information, it is no surprise that such a ubiquitous aspect of American culture would contain information relevant to litigation. It is therefore important that attorneys be able to recognize when and how social media content may provide valuable evidence in a case. Indeed, the Model Rules of Professional Responsibility suggest it is an attorney's obligation to become familiar with social media technology and the benefits and risks of its use. *See* Model Rules of Prof'l Conduct Rule 1.1 cmt. This article looks at how to request social media content in discovery as well how best to preserve and collect such content in the context of employment litigation.

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What Is Social Media?

As pervasive as the phrase "Social Media" is, it is not an easy term to define. Social Media formats, or platforms, are varied (blogs, Twitter, Facebook, Google+) and evolving (from Friendster to Instagram), with new forms emerging every day (Snapchat). The Sedona Conference Primer on Social Media identifies some typical characteristics of Social Media content that are useful in thinking about its potential application in litigation:

1. Social media is Internet-based; participants access the content through the Web.
2. Social media content is shared; either among a designated group (*e.g.*, via subscription or via the preference of the content supplier) or with the entire Web.
3. Social media content is interactive; viewers can participate in the content by commenting on it or sharing it with others.
4. Social media content tends towards the personal.
5. Social media content is typically informal, conversational, candid, unstructured, and often unedited.

The Sedona Conference, The Sedona Conference Primer on Social Media, 1 (2012).

Formats of social media can include text, graphics, audio, or video. From the above descriptions, it is easy to see how social media might be a treasure trove of evidence of a party's state of mind, or impeachment evidence. However, the varied nature of the forms of social media content, and the fluid manner in which it changes as users add, revise, and share content, presents complex challenges in the context of discovery.

Is Social Media Discoverable?

Social media content is discoverable under the Federal Rules of Civil Procedure. Broadly speaking, the federal rules provide that "any matter, not privileged, that is relevant to the claim or defense of any party" is discoverable. Fed. R. Civ. P. 26(b)(1); *Robinson v. Jones Lang LaSalle Americas*, No. 3:12-cv-00127-PK, 2012 WL 3763545, at *1 (D. Or. Aug 29, 2012). The rules further provide that a party can request "electronically stored information — including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations — stored *in any medium* from which information can be obtained." Fed. R. Civ. P. 34(a)(1)(A) (emphasis added). As one court put it, "[t]he fact that [relevant information] exists in cyberspace on an electronic device is a logistical and, perhaps, financial problem, but not a circumstance that removes the information from accessibility by a party opponent in litigation." *EEOC. v. Orig. Honeybaked Ham Co. of Georgia, Inc.*, No. 11-cv-02560, 2012 WL 5430974, at *1 (D. Colo. Nov. 7, 2012). Thus, when relevant to a claim or defense, social media content must be produced. *EEOC v. Simply Storage Management, LLC*, 270 F.R.D. 430, 434 (S.D. Ind. 2010). Indeed, social media content is frequently requested in discovery and used in a wide range of cases including criminal law, personal injury law, family law, and employment law.

Generally, discovery requests should be directed to the opposing party. Requests to social media providers may be necessary to obtain the content in a preferred format, or to obtain the content's corresponding metadata (discussed further below). However, the federal Electronic Communications Privacy Act and Stored Communications Act, which have been interpreted to include social media content, present major

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obstacles to obtaining private social media content from a third-party provider without prior consent from the user or subscriber. *See* 18 U.S.C § 2510 et. seq.; 18 U.S.C § 2701 et. seq.; *see also Viacom International Inc. v. YouTube Inc.*, 253 F.R.D. 256, 264-64 (S.D.N.Y 2008) (denying motion to compel private YouTube videos, but compelling YouTube to produce related non-content data such as the number of times each video has been viewed). The boundaries of these statutes (and their state-level equivalents), as well as the case law interpreting them, should be carefully studied before a third-party subpoena is issued to a provider.

Ensuring Preservation

First and foremost, in litigation, Internet-based electronic information such as social media content needs to be treated in a more immediate manner than data found on hardware (*i.e.*, an individual desktop computer). Content found on social networking sites such as Facebook and LinkedIn rapidly changes as information is added and subtracted. Prolific social media users will typically post several times a day, thus altering information already on the website. Further, social networking sites typically retain discarded data for very short periods of time, if at all. All of these factors mean that social media evidence can disappear quickly.

Communicate early with opposing counsel regarding your desire to obtain social media content and their client's obligation to preserve it. Though an agreement with opposing counsel regarding this type of discovery is preferable, such consultation is not always possible or practical. It is important to establish the obligation to preserve social media content via a preservation hold notice while you proceed with other steps necessary to obtaining it. Along these lines, consider sending a preservation letter to the third-party social media provider. Though the provider does not necessarily have a duty to preserve, communicating with it regarding preservation (including offering to pay the related costs) may be your best bet for saving the desired content while you work on getting the employee's consent or a court order.

The Scope of Discoverable Social Media Content

As with all discovery, the request for social media content must be properly limited to relevant content. *Mackelprang v. Fidelity Nat'l Title Agency of Nev., Inc.*, No. 2:06-cv-00788, 2007 WL 119149, at *8 (D. Nev. Jan. 9, 2007). For example, in *Mackelprang*, the court denied the employer's motion to compel all private MySpace communications for a particular account where the employer had no information regarding with whom the plaintiff was communicating or what the content of the messages was, and therefore no way to show that its request was relevant. *Id.* at *2. However, the court indicated that a discovery request for social media communications specifically regarding allegations in the lawsuit, or which discussed the plaintiff's alleged emotional distress, would have been appropriate. *Id* at *8.

With regard to employees' claims for emotional distress damages, some courts have taken quite a broad view of what is relevant. In *Simply Storage Management*, the EEOC brought a Title VII action against Simply Storage, alleging sexual discrimination on behalf of a group of employees, and asserting emotional distress damages. 270 F.R.D. at 432. The employer requested electronic copies of "complete profiles on Facebook and MySpace … and all status updates, messages, wall comments, causes joined, groups joined, activity streams, blog entries, details, blurbs, comments, and applications" over a three-year period. *Id.*

The EEOC argued that the production of social media content should be limited to content that directly addressed or commented on matters alleged in the complaint. *Id.* at 434. On the basis that this request was targeted at two claimants who alleged severe and not "garden-variety" emotional distress, the court merely narrowed the scope of the request from all the requested content to content that "reveal[s], refer[s], or relate[s] to any emotion, feeling or mental state, as well as communications that reveal, refer, or relate to events that could reasonably be expected to produce a significant emotion, feeling, or mental state." *Id.* at 436, 437.

Subsequent cases have upheld similarly worded requests that relate to only "garden-variety" emotional distress claims thereby broadening discovery of social media content for these types of claims. *See, e.g., Robinson*, 2012 WL 3763545, at *2; *Holter v. Wells Fargo and Co.*, 281 F.R.D. 340, 344 (D. Minn. 2011); *Original Honeybaked Ham,* 2012 WL 5430974, at *3; *but see contra, Ghiacchetto v. Patchogue-Medford Union Free Sch. Dist.*, 293 F.R.D. 112, 116 (E.D. N.Y. 2013) (stating that routine status updates are not relevant to a "garden-variety" emotional distress claim, and limiting a request for any posting regarding the plaintiff's emotional or psychological well-being to any reference to emotional distress suffered in connection with the events in the complaint).

Courts have also granted requests for social media content that reflects communications among employees. For example, requests for production of any SNS communications "between Plaintiff and any current or former employees, or which in any way refer … to her employment or this lawsuit" have generally been approved by the courts. *See, e.g., Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 572 (C.D. Cal. 2012); *accord Robinson* 2012 WL 3763545, at *2; *Coates v. Mystic Blue Cruises, Inc.*, No. 11 C 1986, 2012 WL 3860036, at *1 (N.D. Ill. Aug. 9, 2012).

At least one court compelled production of social media content that would not otherwise have been relevant for the purpose of potential impeachment. *Coates*, 2012 WL 3860036, at *2. In *Coates*, the court required the employee plaintiff to produce all social media communications between herself and other coworkers on this basis. *Id.* at *1.

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Privacy Concerns

Generally, where privacy or confidentiality concerns have been raised in an attempt to limit or deny access to social media content, courts have responded that the information is still discoverable and privacy concerns should be dealt with through a protective order. *See, e.g., Simply Storage*, 270 F.R.D. at 434.

Social Media Collection And Production

Frequently, static screenshots — pictures of the computer screen as it looks to the common user — are offered in discovery as the best evidence of social media content. However, this is a limited way of viewing such information, as all you can glean from screenshots is what appears on the standard user interface at a single moment in time. This may be insufficient to get the proper context of the content sought in discovery. It can also be difficult to authenticate. Metadata — information typically found underneath the user interface where the code resides, such as authorship, time of posting, recipients of a post or message, and location of postings — can help provide that context. As such, specifically requesting the metadata of the social media content can be crucial to recognizing its value to your case.

All this data (*i.e.*, what the standard user sees when he or she visits a SNS as well as the underlying metadata) can be collected via forensic imaging, which provides the requestor with the full user experience as well as the ability to search the metadata. Further, when social media is collected with a proper chain of custody and all associated metadata is preserved, authenticity can be easier to establish.

Every social media platform is different and custom-built for its intended use. Sites like Facebook, Twitter, and Instagram are primarily used to post photographs, messages, or to hold online conversations. Online storage sites such as DropBox or GoogleDrive are frequently used by employees to temporarily store documents for use at home. Networking sites like LinkedIn can be used to communicate with prospective employers. Knowledge of how the sites are structured is imperative because the collection/preservation for each site requires its own methodology. Thus, when looking for more content than static screenshots, you may want to ensure, either via agreement or court order, that the opposing party collects the requested social media content in a forensically sound and defensible manner.

There are a number of tools and methods available to conduct these types of collections. Tools such as Internet Evidence Finder and Cellibrite can be used to "mine" social media data found on myriad electronic sources. For instance, Internet Evidence Finder enables the recovery of data from social networking communications, instant messenger chats, cloud-based artifacts, file sharing apps, pictures and videos. Cellebrite enables the extraction and analysis of data created on mobile devices, including social media posts. As previously noted, by using a forensically sound methodology, the reviewer can glean everything about the social media content — from the names of all the recipients of a post, to any comments made to the post, to when the post was last updated. The right tool in the right hands will allow the reviewer of the information to get the full user experience — how the website is navigated, the hidden metadata fields that can help reveal authorship and file sharing, and so forth.

Conclusion

Social media has become a major form of communication for most Americans. As such, employers should consider it a source of potentially relevant evidence when defending a case brought by an employee. Such content, when requested from the employee/social media subscriber, is generally discoverable when properly tailored. Third-party requests to the social media provider, when necessary, should only be made after a careful review of applicable privacy laws. Requiring that the collection of social media content enable its review in a dynamic format which, provides essential context to the evidence and also ensures admissibility, is key to utilizing such content to its full potential in litigation.

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FMLA

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721, 735 (2003) (finding a history of gender-based discrimination in the administration of leave benefits justified the enactment of the FMLA as a prophylactic law). The Department of Labor (DOL) promulgated guidelines to assist employers in the implementation of the FMLA. Similar to courts' employee-friendly interpretations, the DOL placed certain burdens on employers. One of those burdens was that an employer has the responsibility to designate leave as FMLA leave and provide employees with notice of their rights under the law, once it has "acquired knowledge that the leave is being taken for a FMLA qualifying reason." 29 C.F.R. § 825.301. In other words, it is the employer's responsibility to know that leave was protected under the FMLA, not an employee's obligation to request the protection of the law.

Employer Benefits

While titled "Employer Responsibilities," this regulation provides an employer with certain benefits, as well. For example, an employee is only entitled to 12 weeks of leave in a 12-month period, and categorizing leave as FMLA at the onset allows the clock to start running. Furthermore, an employer can also tell employees that they must take

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any accrued paid leave concurrent with FMLA leave, thus preventing employees from doubling up — taking all paid leave, and then requesting FMLA leave subsequently. *See* 29 C.F.R. 825.300(c).

Escriba

A recent Ninth Circuit decision, however, has cast some doubt on the obligation of an employer to designate known FMLA-qualifying leave pursuant to this regulation. In *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236 (9th Cir. 2014), the court held that an employee could decline the designation of leave as FMLA leave, despite the fact that the employee was taking leave for an FMLA-qualifying reason, of which the employer was fully aware. In *Escriba*, the employee requested two weeks of leave to care for her ailing father, asking only for vacation time. The employer questioned her extensively on whether she wanted vacation leave or some other type of leave, such as FMLA leave. When the employee insisted on only vacation, the employer granted her two weeks of vacation and did not designate it as FMLA leave. It did inform her that if she needed additional time, she would have to send a doctor's note to human resources. When she failed to return to work after the two weeks without requesting any additional time, the employer terminated her for violation of its attendance policy.

The employee filed suit, alleging interference with her FMLA rights based on the employer's failure to designate the leave as FMLA leave and provide her the requisite FMLA notices. A jury held that she had waived her right to leave under the FMLA, and thus her termination did not interfere with her FMLA rights. The district court and the Ninth Circuit affirmed the verdict.

Other Court Decisions

The Ninth Circuit is not the only court to hold that an employee can deny leave be designated as FMLA leave, despite DOL regulations that state an employee cannot waive rights under the FMLA. *See* 29 C.F.R. § 825.220(d). The Seventh Circuit in *Ridings v. Riverside Medical Center*, 537 F.3d 755, 769 n.3 (7th Cir. 2008), noted as *dicta* that an employee could waive FMLA leave, when it found no FMLA interference in the termination of an employee for violation of the employer's attendance policy after the employee refused to submit the requisite paperwork requesting intermittent leave.

The Drawbacks of Waiving FMLA Rights

While the employer prevailed in both these cases against the individual employees, employers should not allow employees to waive their rights under the FMLA for several reasons. First, if an employee is allowed to waive the FMLA, then the requirement that an employee take FMLA leave concurrent with paid leave becomes optional. For example, an employee could exhaust all accrued paid time off for an FMLA qualifying reason, while waiving FMLA leave. The employee could then insist on taking 12 more weeks of FMLA leave. DOL regulations do not allow retroactive designation of FMLA leave in a manner that hurts an employee, so the request for FMLA leave after exhaustion of paid leave could expose an employer to some litigation risk. *See* 29 C.F.R. § 825.301(d). If your company uses a fixed year to determine when FMLA leave resets, an employee could stack not only their paid time off and one year's worth of FMLA, but add on another 12 weeks of FMLA once the year has turned over.

> ***[C]ourts have been fairly consistent that "forcing" employees to take FMLA leave is not interference with their rights under the law …***

Second, because many states have developed their own FMLA laws that run concurrent with the federal leave, failure to designate FMLA qualifying leave as such could open the door for employees to argue that they are entitled to additional state FMLA leave, which might be longer than 12 weeks, on top of other leave for which they have waived FMLA coverage. Connecticut's state leave law, for example, allows an employee 16 weeks of leave in a 24-month period. Conn. Gen. Stat. Ann. § 31-51ll.

Further, an employee could seek additional state leave based on different definitions in state laws of who is a family member for the purposes of the leave. *Compare* 29 C.F.R. § 825.122 (defining parent, spouse, son and daughter for FMLA) with*, e.g.*, Haw. Rev. Stat. § 398-1 (defining "parent" to include grandparents and grandparents-in-law). While state laws currently allow employers to run state and federal leave concurrently, a failure to "start the clock" on qualifying FMLA leave could expose an employer to litigation risk if it attempts to retroactively count leave towards any number of available leaves for an employee.

Third, courts have been fairly consistent that "forcing" employees to take FMLA leave is not interference with their rights under the law, unless it is clear that the leave was not FMLA-qualifying, and the employee is later denied further leave. *See, e.g., Wysong v. Dow Chem. Co.*, 503 F.3d 441, 449 (6th Cir. 2007) (finding that if an employer forces an employee to take FMLA leave, "the employee's [interference] claim ripens only when and if the employee seeks FMLA leave at a later date, and such leave is not available because the employee was *wrongfully* forced to use FMLA leave in the past." (emphasis added)). As a result, an employer can insist on designating leave as FMLA if it has

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FCPA Liability

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Establishing Compliance Officers

Specific duties should be assigned to individuals within all levels of the entity with authority for the compliance and ethics programs. The FCPA Guidance stresses the importance of commitment from senior management, noting that compliance begins with the board of directors and senior executives setting the proper tone for the rest of the company.

Establishing Risk Assessment And Internal Audit Procedures

Actions must be taken to assess the risk of improper conduct and to establish procedures for internal examination of an entity's environment to evaluate internal controls, policies, and guidelines, and to ensure that these policies work in an effective manner.

Establishing Continual Training Programs for Employees and Third Parties

All levels of the organization must be trained on its standards, procedures, and other aspects of the compliance and ethics programs.

Establishing Whistleblower Programs

Mechanisms must be put in place to allow employees to confidentially report potential violations or infractions.

Taking the Appropriate Response

Entities must conduct comprehensive and fair internal investigations of allegations of misconduct, and take disciplinary actions against those found to be in violation of company codes and ethical standards. Particular attention should be paid to ensuring that controls are in place in the areas of the greatest exposure. For example, the following accounting controls must be established and tested to ensure that they work efficiently:

Accounts Payable

Controls should be set up to ensure that invoices are legitimate, and supporting documentation corresponds to the amount in the invoices.

Payroll

Responsibilities in this area must be segregated, and the payroll register should be matched with supporting documentation.

Reimbursement of Expenses

Reimbursement should require appropriate approvals and backup documentation.

Petty Cash

Petty cash should be disbursed appropriately, and restrictions should exist on the nature and amount of items that can be paid from petty cash.

Accounts Receivable

Ledgers should be reconciled, and write-offs approved.

Bank Accounts

Bank accounts should be identified, and efforts should be made to verify who is authorized to sign checks.

In addition to accounting controls, the following areas should be closely monitored:

Relationships with Third Parties

Controls must be instituted over the selection and performance of vendors. The Guidance also stresses comprehensive, risk-based due diligence on third parties and transactions.

Gift-Giving

The FCPA's anti-bribery provisions prohibit individuals and businesses from bribing foreign government officials with the "payment of money or anything of value." Accordingly, policies must be established to ensure that gifts are not given for improper purposes.

Charitable Donations

The Guide makes clear that "legitimate charitable giving does not violate the FCPA." But companies "cannot use the pretense of charitable contributions as a way to funnel bribes to government officials." Therefore, processes must be put into place to confirm that donations are legitimate, and not bribes in disguise.

Political Contributions

Controls must ensure that those who receive political contributions are not in a position to benefit the entity in an improper manner.

The Role of Corporate Counsel

The foregoing list is not exhaustive. Facts and circumstances will determine the extent to which a global business must augment its staff, compliance infrastructure, and reporting mechanisms. Corporate counsel can play a vital role in multiple ways. A company's legal officers can mandate FCPA training to be offered on a multidisciplinary and multi-country basis. They can urge the creation of a report card system and the subsequent engagement of an independent party to periodically review the company's success rate in adhering to its FCPA-compliant policies and procedures. In-house counsel can run a mock audit as an offensive mechanism to forestall any regulatory enforcement and/or civil litigation. Good results could be used to negotiate a "safe driver's discount" from underwriters of directors and officers liability insurance. The list goes on.

Institutional Investors As Corporate Watchdogs

As with any other alleged or proven corporate breach of duty to obey the law, shareholders are the ultimate check writers. Their portfolio returns are lowered if one or more of the companies in which they have invested has an FCPA problem. However, economic drains are only one of several motivations for seeking redress. Advancing good governance is another factor. As laid out in the Investor Statement in Support of the U.S. Foreign Corrupt Practices Act, signers that include the then-chief operating officer of the International Corporate Governance Network are aware that "poor control of corruption and bribery can be an indicator of future risk at global corporations and can thereby negatively impact long-term shareholder value." *See* FCPA Investor Letter for Circulation, June 28, 2012, ICGN.org. Available at http://bit.ly/1oK0EdG.

This focus on FCPA compliance comes none too soon, inasmuch as institutions allocate significant amounts of money to offshore investments, including those in emerging market countries where transparency of process may be limited. *See* Robert Stowe England, Investors Poised to Boost Emerging Markets Debt, Despite Jitters. *Institutional*

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Investor (Feb. 25, 2014), available at http://tinyurl.com/kxslevw.

The need to conduct a comprehensive investment due diligence by institutional investors or their consultants or advisers is a familiar concept with respect to selecting, maintaining, or shrinking a position in a corporate-issued stock or bond. Surprising, however, is a dearth of evidence that rigorous FCPA inquiries are being made as part of a request for proposal (RFP) and/or regular reviews of a service provider with worldwide reach. If true, this is not a good thing. Any time an investor or its agent makes a decision based on less than full information, there is a chance that the outcome will be suboptimal in terms of the tradeoff between risk and expected performance. When this occurs, a trustee or other type of investment fiduciary may be accused of breaching his or her duties to be prudent and exercise care and diligence.

Moreover, a failure to gauge the FCPA liability exposure of companies that issue securities that institutional investors purchase is inconsistent with various "pay-to-play" laws. Besides the SEC's adoption of new rules in the municipal securities area, numerous states have established prohibitions against bribes or seemingly less overt economic incentives that could inappropriately sway public officials. The goal is to avoid further scandals where government executives are induced to let money managers handle a slice of the roughly $2.5 trillion in public pension fund assets. *See* Rebecca A. Sielman, Milliman 2013 Public Pension Funding Study (November 2013), available at http://tinyurl.com/k4syxbk.

The headlines are replete with independence trouble spots, and "pay to play" is no exception. In 2013, New York Department of Financial Services Superintendent Benjamin Lawsky sent subpoenas to various consulting and asset management firms that handle state and city pension business to better assess "controls to prevent conflicts of interest … " *See* Mary Williams Walsh, New York Is Investigating Advisers to Pension Funds. *New York Times Dealbook* (Nov. 5, 2013), http://tinyurl.com/k9dydec.

In 2011, it was reported that the SEC had begun investigations as to whether banks, private equity funds, and other types of financial organizations were in compliance with the FCPA as they sought to raise capital and/or manage assets belonging to sovereign wealth funds. *See* Peter Lattman and Michael J. De La Merced, S.E.C. Looking into Deals with Sovereign Funds. *New York Times Dealbook* (Jan. 13, 2011), http://tinyurl.com/4sfkum9.

Figure 1: Recent FCPA Settlements

Company	Amount ($ Millions)	Date of Settlement
Hewlett-Packard Company	108	April 9, 2014
Alcoa Inc.	384	Jan. 9, 2014
Archer-Daniels-Midland Company	36	Dec. 20, 2013
Weatherford International	250	Nov. 26, 2013
Diebold, Inc.	48	Oct. 22, 2013
Total S.A.	398	May 29, 2013
Eli Lilly and Company	29	Dec. 20, 2012
Tyco International	26	Sept. 24, 2012
Pfizer Inc.	45	Aug. 7, 2012

Source: http://usa.gov/1l3uajP

Even if an institutional investor has satisfied its need to know about FCPA procedures ahead of investing in a particular company, problems could nevertheless arise. When that occurs, an institutional investor is likely to sue in order to be made whole. Indeed, some pundits suggest that these institutional stewards of other people's money have a fiduciary duty to take legal action. Consider the case of Wal-Mart Stores Inc. (Wal-Mart). Following the news about a bribery faux pas in Mexico, civil litigation ensued. *See* Mark Friedman, Wal-Mart's Costs Connected to Mexican Bribery Case Reach $400M. *Arkansas Business* (Dec. 9, 2013), http://tinyurl.com/q5cwysa.

Several pension plans, including the $183.8 billion California State Teachers' Retirement System (CalSTRS), were named as lead plaintiffs. *See* CalSTRS, Investments Overview (2014), available at http://bit.ly/1uSzEy7. In late 2013, Wal-Mart shareholders were told that the company "expects to spend between $75 million and $80 million in FCPA and compliance-related expenses in its fourth quarter alone." *See* Jacyln Jaeger, Court: Shareholder Lawsuit Against Walmart Can Proceed. *Compliance Week* (Dec. 27, 2013), http://tinyurl.com/lhmnhgu.

In the Wal-mart Global Compliance Report, investors were informed that anti-corruption training was provided to in excess of 100,000 individuals between year-end 2011 and the beginning of 2014. *See* Walmart, Global Compliance Program Report on Fiscal Year 2014 (2014), http://tinyurl.com/lpqkh23.

Conclusion

A company with foreign dealings has a choice. It can implement a robust FCPA compliance infrastructure and follow its rules accordingly, or it can count on being lucky. Corporate counsel has a vital role to play in guiding its internal clients to understand what is expected, advising on pitfalls to avoid, and recommending action steps such as training and compliance benchmarking by independent outside experts.

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Retaliation

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> stop 1 or more violations of this subchapter.

31 U.S.C. § 3730(h) (emphasis added).

Relying on the Supreme Court's holding in *Burlington Northern*, many federal district courts have found that the "in the terms and conditions of employment" language limits the scope of adverse actions to those within the workplace that directly affect employment.

For example, in *United States ex rel. Head v. Kane Co.*, 798 F. Supp. 2d 186 (D.D.C. 2011), the U.S. District Court for the District of Columbia analyzed whether Kane's filing of allegedly frivolous counterclaims and its allegedly defamatory statements, each occurring after Head's termination, were adverse actions under the FCA. The district court concluded that, "Section 3730(h) does not apply to retaliatory actions Defendant Kane Company allegedly took against Relator after his employment with the Company ended and which did not involve 'the terms and conditions of [his] employment.'" *Id*. at 208.

The *Head* opinion leaves open the possibility for claims of post-employment retaliation under the FCA where the acts by the employer can be tied back to the terms and condition of an employee's employment. But the body of case law developing across the circuits is even less generous to employees. In *Master v. LHC Grp. Inc.*, CIV.A. 07-1117, 2013 WL 786357 (W.D. La. Mar. 1, 2013), the District Court for the Western District of Louisiana reviewed the various district court decisions dealing with post-separation retaliation under the FCA and concluded that not a single court had allowed such post-employment acts within the embrace of the anti-retaliation provisions of the FCA. *Id*. at 7 (stating, "It appears that all courts to have addressed this issue have similarly held that § 3730 does not provide a remedy for post-employment retaliation."). Importantly, no court of appeals in any circuit has explicitly ruled that the FCA does not embrace post-separation retaliation.

Conclusion and Takeaways

This discussion demonstrates that post-separation retaliation is more likely to be considered an adverse action by the Administrative Review Board in SOX cases than by a district court in FCA cases. A perhaps overly simplistic conclusion is that plaintiff's counsel, where an employee has experienced some post-employment retaliation, should only proceed under SOX and through the administrative process. Conversely, if an employee's only recourse is the FCA's anti-retaliation provision, management counsel could advise its clients to take an aggressive posture toward former employees. Indeed, under the current holdings from the district courts, none of the actions taken by ABC Corp. in the introductory hypothetical, each of which occurred after the employee's separation, are adverse actions under the FCA.

That being said, a more nuanced takeaway is that both management and employee counsel must closely examine the applicable statutory language and the nature of the purported adverse action to determine how a court (or the ARB) will treat a particular post-employment act by the employer. If the operative statute contains limiting language such as "in the terms and conditions of employment," management counsel may safely bet that a court will not find post-employment actions by the employer are covered. But, again, one should note that, at least in the FCA context, the Supreme Court and the courts of appeal have not yet determined the scope of post-employment actions that may violate the statute's anti-retaliation provisions. Particularly egregious acts of retaliation may result in a court (like the ARB with SOX) changing course to allow for a more expansive reading of the FCA's anti-retaliation provision. For this reason, counsel should advise its corporate clients to avoid acts that could be viewed as retaliatory, even when it is unlikely that the would-be plaintiff (or complainant) could avail himself of the more employee-friendly administrative process before the OALJ and ARB.

Plaintiff's counsel should recognize that the ARB is trending toward a more expansive view of adverse actions under SOX — a view that is likely to embrace post-separation retaliation. That being said, plaintiff's counsel can avoid potential pitfalls by tying a retaliatory act back to the "terms and conditions" of their client's employment. And management counsel will try to distance the adverse action from the "terms and conditions" of the employment relationship.

If nothing else, it is important to recognize that post-separation retaliation claims are viewed differently depending upon the operative statute. Management counsel should carefully examine all of the potential causes of action a departing employee may have and determine the extent to which any acts by the ex-employer may be deemed "adverse actions" in a claim of post-employment retaliation. Counsel should advise their corporate clients to refrain from any acts until the company's exposure is analyzed; without that analysis, you may hand your counterpart on the plaintiff's side the gift of a viable claim.

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External attorneys, general counsel, and chief compliance officers for asset managers and institutional investors can similarly advise their respective clients to do whatever it takes to minimize the risks of violating FCPA or failing to carry out comprehensive due diligence of companies with which it deals. FCPA enforcement is not going away, global business transactions are on the rise, and the costs of bad practices are far from trivial.

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FMLA

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reason to believe it qualifies, and then can retroactively remove the designation (to the benefit of the employee) if it turns out the leave was not qualifying. The bell can be "unrung," but only if it benefits the employee.

Fourth, it is easier for employers to designate leave as FMLA leave without engaging in an employee-specific inquiry as to whether an employee wants to use FMLA. This type of interactive process (while required for employees with disabilities under the Americans with Disabilities Act) is not required under the FMLA (unless there is a dispute as to whether any leave is FMLA qualifying, *see* 29 C.F.R. § 825.301(c)), and could be burdensome for larger employers with numerous employees. Further, since courts have held that the notice obligations of the FMLA are imperative once an employer learns of an employee's need to take leave, *see, e.g., Reed v. Buckeye Fire Equip.*, 241 F. App'x 917, 925 n.5 (4th Cir. 2007), the safer course of action is to designate and notice the leave, rather than attempt to divine the intent of an employee.

Conclusion

While the individual employer in *Escriba* prevailed, following the principles of *Escriba* will not serve employers well in the future. If you have reason to believe an employee needs leave for an FMLA-qualifying reason, start the clock, designate the leave, and provide the employee with the requisite notice (including that such leave must run concurrent with paid leave). In the event that an employee disputes this decision, you can retroactively remove the designation, since it will be to the benefit of the employee. And regardless, the employee will only have a claim if you subsequently deny him or her FMLA leave.

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Ninth Circuit Takes Tough Stance on Loss Causation

By Cheryl Miller

A company's announcement of an internal investigation may trigger a bad stock market reaction but, by itself, it's not enough to establish loss causation in a securities class action, the U.S. Court of Appeals for the Ninth Circuit held on Aug 7, 2014.

A three-judge panel affirmed U.S. District Judge Maxine Chesney's 2011 dismissal of a shareholders' suit targeting Immersion Corp. and five company executives. In *Loos v. Immersion*, filed in the U.S. District Court for the Northern District of California, plaintiffs argued that the San Jose, CA, tech company effectively revealed it had "cooked the books" in a 2009 press release announcing it was reviewing previous years' revenue calculations. Immersion's stock price dropped 23% on the news.

But the district and appellate courts found that the company's announcement, and subsequent recasting of past years' earnings, reflected poor financial health, not proof corporate executives had acted fraudulently.

"The announcement of an investigation does not 'reveal' fraudulent practices to the market," U.S. District Judge Thomas Rice of the Eastern District of Washington wrote for the unanimous panel. Rice was sitting by designation.

"While the disclosure of an investigation is certainly an ominous event, it simply puts investors on notice of a potential future disclosure of fraudulent conduct," Rice continued. "Consequently, any decline in a corporation's share price following the announcement of an investigation can only be attributed to market speculation about whether fraud has occurred."

That speculation alone cannot form the basis for a viable loss causation claim, Rice concluded.

The decision is a win for Immersion's legal team at Fenwick & West. Plaintiffs were represented by the New York firm of Brower Piven and attorneys from the San Francisco office of Robbins Geller Rudman & Dowd.

Immersion creates and licenses "haptics" technology, which produces vibrations, resistance and other tactile cues in electronics. After experiencing several years of poor financial results, the company reported four profitable quarters in 2007 and touted expected growth of its medical technology sales in China.

Net losses returned in 2008, however, and the news worsened when Immersion announced the internal investigation in July 2009. One month later the company advised investors that its past financial statements "should no longer be relied upon." In 2010, Immersion reported to the Securities and Exchange Commission that it had recorded sales revenue in its medical line before the money had materialized. As a result, the company restated its earnings for 2006, 2007, 2008 and the first quarter of 2009.

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Cheryl Miller is a reporter for *The Recorder*, an ALM sister publication of this newsletter in which this article also appeared.