



Board Oversight of Human Capital Risk—Is it Time to Appoint a Chief Covid Officer?

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The coronavirus pandemic has brought many board responsibilities into sharp relief but the board’s responsibility to ensure that management appropriately address and respond to human capital risks takes on particular emphasis. While the responsibility to manage risk in general is inarguable, the unique risks to business performance that a worldwide pandemic poses to human capital calls for consideration of an appointment of a board-designated member of management with direct reporting responsibility to the board in whom responsibility is vested for pandemic-related compliance matters. A “Chief Covid Officer,” responsible for ensuring corporate compliance with applicable health and welfare obligations and the resulting safety of employees and consumers, is both an appropriate and desirable method to manage the multi-faceted risk the pandemic poses to corporate entities. While there are several roles that could fill these responsibilities—Chief Human Resources Officer, Chief Legal Officer/General Counsel, Chief Operating Officer or even Chief Compliance Officer—the key consideration for the board is identifying the individual with the right training, know-how and good sense to manage the complex and multi-dimensional risk the pandemic poses to the organization. This article focuses on the board’s responsibilities to fulfill its responsibilities to oversee management, and how those responsibilities should or could be carried out.

Fundamentals of Board Oversight for Compliance Issues

The Delaware Chancery Court’s *In re Caremark* decision drives most discussions about a board’s oversight responsibilities. In brief, the 1996 *Caremark* decision has been widely held to articulate the conditions for director oversight liability—when directors of a Delaware corporation are exculpated from liability for breach of the duty of care, they may nonetheless be held liable on a breach of loyalty theory for a bad-faith failure to implement and oversee the corporation’s information systems and controls.¹ *Caremark* has been revisited in recent Delaware decisions *Marchand v. Barnhill* and *In re Clovis Oncology*. Particularly relevant to current events, *Marchand* arose from the 2015 outbreak of listeria at Blue Bell Creameries, one of the nation’s largest ice cream manufacturers. The Delaware Supreme Court warned the *Marchand* directors that as part of their duty of loyalty, they were obligated to “make a good faith effort to implement an oversight system and then monitor it.”² In *Marchand*, the Delaware Supreme Court found that the stockholder’s complaint pleaded “particularized facts that support a reasonable inference that the Blue Bell board failed to implement any system to monitor Blue Bell’s food safety performance or

¹ See *In re Caremark Intern. Inc. Deriv. Lit.*, 698 A. 2d 959 (Del. Ch. 1996).

² *Marchand v. Barnhill*, C.A. No.2017-0586-JRS (Del. Ch. 2018), rev’d, No. 533, 2018, at *30 (Del. 2019).

compliance.”³ Several months later, the Delaware Chancery Court denied a motion to dismiss a *Caremark* claim in *Clovis Oncology*, where the company’s board had received reports that the company’s ongoing clinical trial results were inflated because they included unverified results. The court was satisfied that the plaintiffs had well-pled that the board “consciously ignored red flags that revealed a missions critical failure to comply with the [trial] protocol and associated FDA regulations” and that such “failure of oversight caused monetary and reputational harm to the Company is sufficient to provide a causal nexus between the breach of fiduciary duty and the corporate trauma.”⁴

Managing a Known Risk to Employee Health and Executive Succession

Generally, such decisions underline the importance of the board properly and fully exercising their oversight of risk. In these rapidly evolving times, the board has a critical role in managing externally posed corporate risks, and appropriately to prepare for and manage those risks. That risk management and oversight role would include risks to the organization related to Covid-19 ranging from those related to employee health—including the health of members of the executive team to ensure business continuity, to possible supply chain disruption, and to ensure compliance with rapidly changing government advice or regulation. As boards continue to address this crisis they should prepare for the risk that *Caremark* claims pose, and build their compliance and oversight program to ensure that they are well-positioned to defend these claims.

Designating a Chief Covid Officer as a Risk Mitigation Measure

Successful human capital risk management hinges upon the skill, capabilities and experience of the individual in whom such trust is reposed. It would appear, then, that a natural place to manage risk starts with the choice and designation of a member of management—a Chief Covid Officer—who possesses the right qualifications to carry out this responsibility and has the good sense and judgment to interface appropriately with the board (or a committee of the board depending on how risk management is allocated pursuant to each entity’s bylaws and culture).⁵

The cascade of legislative developments that followed on the heels of the coronavirus pandemic demands a centralization of the compliance function relating to safety in the workplace. The Occupational Safety and Health Administration, the Federal agency responsible for regulating safety in the workplace, has co-regulated in some instances with the Centers for Disease Control regarding Covid-19 related matters⁶ as well as issuing its own Covid-19-related safety-guidance⁷ and management of Covid-19 related workplace complaints.⁸ These Federal agencies have counterparts in each of the 50 states and thousands of locally-driven municipal legislative bodies that will undoubtedly generate even more legislative and regulatory guidance as additional pandemic-related developments occur. It is critical then to identify the right individual who has the

³ *Marchand v. Barnhill*, C.A. No.2017-0586-JRS (Del. Ch. 2018), rev’d, No. 533, 2018, at *4 (Del. 2019).

⁴ *In re Clovis Oncology, Inc. Deriv. Lit.*, C.A. No. 2017-0222-JRS, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019).

⁵ If a Board appoints a special committee to manage COVID-19 risk, the designated officer could report to that committee. For a discussion of this issue on this Forum see S. Haas and A. Goolsby, Hunton Andrews Kurth LLP, “A Special Committee to Oversee the Corporation’s Response to the Pandemic” (April 22, 2020).

⁶ <https://corpgov.law.harvard.edu/2020/04/21/a-special-committee-to-oversee-the-corporations-response-to-the-pandemic/>
⁶ <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/meat-poultry-processing-workers-employers.html>

⁷ <https://www.osha.gov/memos/2020-04-24/enforcement-guidance-decontamination-filtering-facepiece-respirators-healthcare>

⁸ <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>

know-how to access and implement safety regulations and undertake the relevant additional training to keep current with rapid developments. Moreover, it is equally vital that the Covid officer be well versed in privacy, employee medical testing and employment recordkeeping. Many Covid-19-related safety measures, such as taking employee temperatures, tracking symptoms, and contact tracing for those who may have been exposed to individuals with an active infection, will require deep familiarity with Federal and state regulations governing workplace privacy, health and employment issues.

While many Chief Human Resource Officers possess the skills necessary to carry out Covid-19-related duties, other management employees may also possess such expertise, such as the Chief Legal Officer or General Counsel, a Chief Compliance Officer or even Chief Operating or Chief Financial Officers. The title is less important than the individual's assumption of responsibilities necessary to implement pandemic-related workplace measures, the ability to learn and respond to rapidly moving legislative developments and the good judgment to recognize how those criteria fit within each corporation's culture. We employ the term "Chief Covid Officer" only to highlight the importance of identifying the most appropriate member of management who will bear responsibility for these measures and who will ensure the right lines (and frequency) of communication with the appropriate board member or committee overseeing these risk issues. While the current pandemic may represent the cessation of the ordinary, good judgment, communication and training will still represent the appropriate measure of corporate hygiene that shareholders will demand and expect.