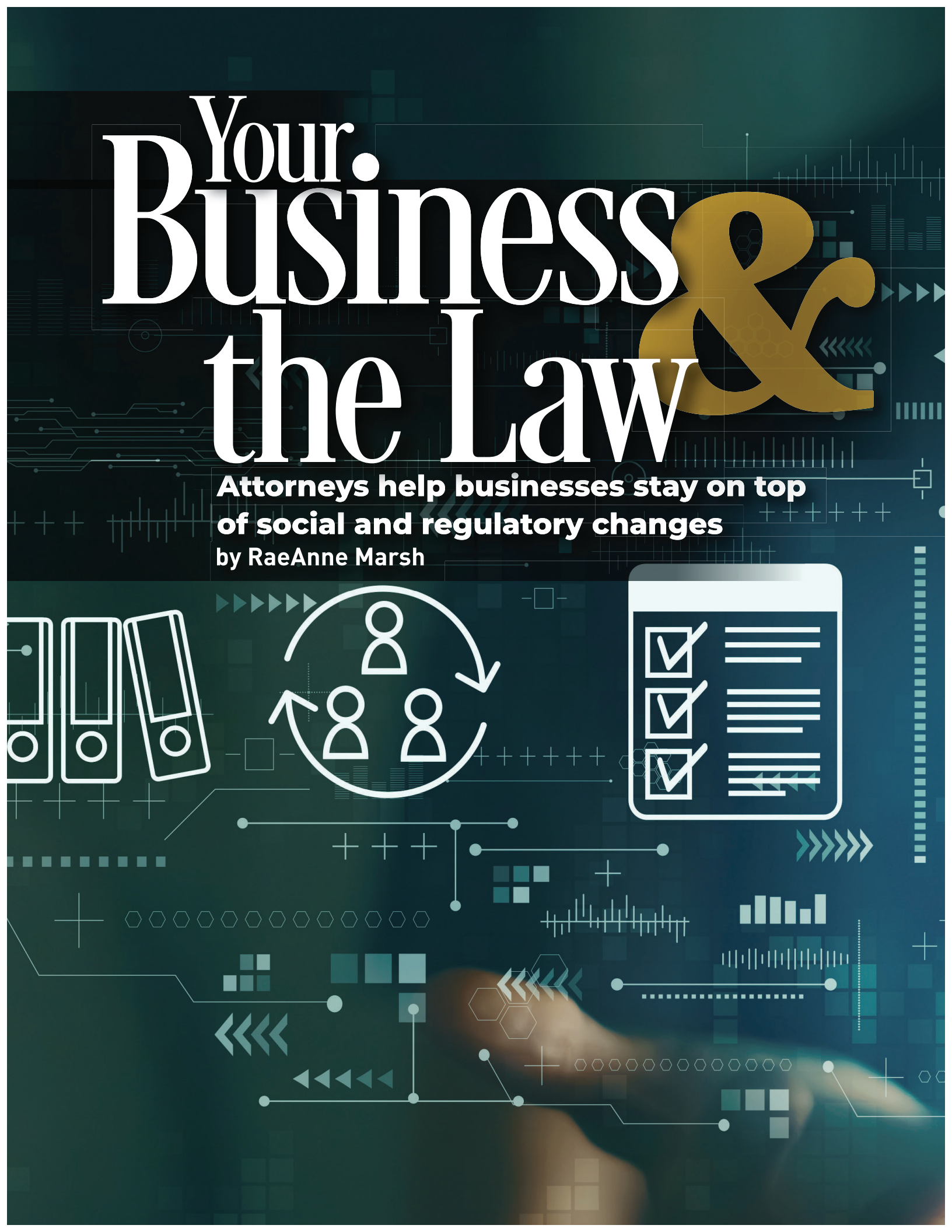
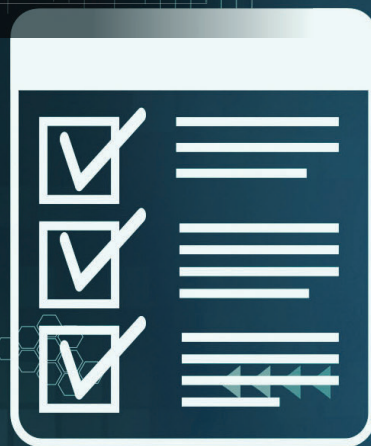
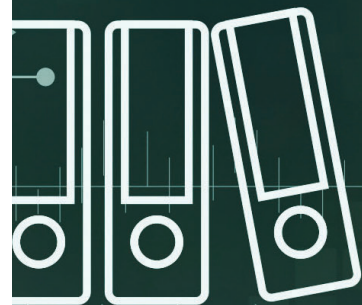


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**Attorneys help businesses stay on top
of social and regulatory changes**

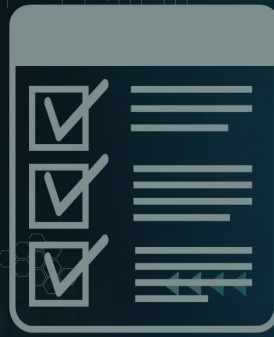
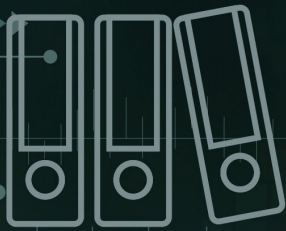
by RaeAnne Marsh





The upheaval of the past couple of years has required businesses to adapt and adopt a lot of change to survive. Some of this comes from social pressures as attitudes and habits change, and some comes from new regulatory guidelines and requirements. Attorneys bring businesses expertise to help them navigate the changing landscape and, where needed, can be the anchor that keeps them from getting pulled off their moorings and into trouble.

For this cover story, *In Business Magazine* reached out to some of the law firms that serve our community for their legal perspective on key topics impacting business. These are only a few of the practice areas in which they offer specialized knowledge and expertise; our 2022 Legal Guide for Business Owners in this June edition contains a listing of local firms and their practice specialties.



Need to Know: Workforce

Addressing workforce issues, attorney Laurent Badoux, a shareholder at Buchalter, suggests, “Let’s set aside the law for a second,” and starts his discussion with an overview of the situation. “We are still in the middle of what has been labeled the ‘great resignation.’ We like to use labels when something strikes us as an unusual occurrence, but we should be clear that the pandemic likely only exacerbated trends already years in the making, which means this great resignation trend is not the advent of a new trend as much as the wider recognition of a change long in the making.

“What I have seen consistently, from what my clients, anecdotally, have shared, is a re-alignment of priorities by employees. They are approaching their work with more demand for what matters most, which often translates to either greater ability to work remotely or flexibility in scheduling. Obviously, that does not work in all environments, and it is leaving some of our clients in retail, hospitality and service industry often short-staffed, but it has become crucial to evaluate the feasibility of remote work whenever it becomes possible to perform work that way.”

Badoux points out that unemployment is still at a historically low level. There may have been a “great resignation,” but a very large segment of those that make up this *great resignation* have found other ways to earn a living. Practically speaking, a large segment of the workforce has shown itself willing to leave without a landing spot lined up — which also created a rash of applicants for new positions who are not particularly well-suited or motivated for the job on offer. “Many clients have told me stories of blown off interviews without worry for repercussions, or failure to show on site if hired,” he says.

“What this suggests anecdotally, if not empirically, is that the paradigm shifted to a workplace culture based on affinity. This is not to say that affinity (being an employer of choice) is a new factor, but, in the current employment climate, it may arguably be the biggest differentiator from a recruitment and retention perspective.” He suggests employers focus on identifying, advertising and nurturing the key feature(s) of the workplace that will enable them to stand out and attract enough positive attention from adequately motivated and qualified workers.

Badoux calls out a few issues exacerbated during the current workplace outlook that employers are facing:

- Should an employer alter the level or the amount of customer interactions if the employer is short on staff (reduced hours, longer wait times, etc.), and is there a way to measure the impact of such modifications on existing employees?
- How much does an employer need to adjust company culture to entice the right employees?

- If an employer offered remote work options during pandemic restrictions (or are still offering them for some employees), what legal grounds exist to reject a request for a remote work arrangement?
- If an employer is affirmatively trying to recruit like-minded individuals, what systemic processes is that employer using to ensure these efforts do not lead to a lack of inclusion and diversity in the workforce?
- What metrics should an employer use to measure the output of employees in a hybrid workforce, and is the employer evaluating whether the use of a hybrid workforce creates new issues of potential implicit bias?

“From a legal perspective, employers that try to be proactive in changing key elements of the workplace must analyze not only why they are making the changes but also what impact those changes may have, especially vis-à-vis members of protected class,” Badoux says. He offers the following examples of how this analysis could unfold:

- Are changes in compensation impacting women or individuals of color more significantly than others?
- Do pay discrepancies based upon geographic location still make sense if an employer is measuring the value of input without regards for where the work is performed?
- Are minority groups within an employer’s workforce less likely to return to work than others, and why?
- Might managers provide greater recognition of employees that are coming to work in person more often, and would doing so result in less favorably rating the work of individuals in a protected category that elect to work from home more?
- Is the ability to work for home more readily available to a subset of the workforce based upon geographic or economic factors, and does that have a disparate impact on a particular subset of the workforce?

“In short,” Badoux says, “whatever an employer decides to do in respect to a hybrid workforce, that employer should evaluate all the ramifications of its policy and implement checks and balances to alleviate risks of unfairness, increased disparity and implicit bias.”

Don Johnsen, a labor and employment partner at Gallagher & Kennedy, points out the explosion in remote work can have significant consequences for employers in terms of potential liability for minimum wage and overtime compensation. “The more work that hourly or other nonexempt employees do remotely, the tougher it is for employers to accurately track — and properly pay for — those employees’ ‘hours worked,’ as required under federal and state law,” he says. For example,



a nonexempt employee who works remotely might easily come forward at any given time with his or her own documentation of supposed “hours worked” that the employer did not record and make a demand for thousands of dollars in supposed overtime compensation. “Even worse,” Johnsen says, “the damages can be doubled under federal law or even trebled under Arizona statute.”

With employers facing such potential, Johnsen suggests those who make significant use of remote workers closely review their processes for recording time and update those procedures and policies to reduce the risk of significant uncaptured remote time. “Employers should consider implementing web and devicebased timekeeping systems that employees can access remotely (as opposed to time clocks and similar devices accessible only at the employer’s physical location),” he says. Additionally, “employers also should consider integrating access to their remote work platform with their timekeeping system, enabling the timekeeping system to automatically record such access. Employers also can consider mandating that remote workers periodically affirm in writing that they have not

worked any time that they have not accurately recorded on the employer’s timekeeping system.”

Issues of healthcare and COVID safety have dimmed but still need to be addressed. Says Johnsen, “Thankfully, the widespread availability and use of vaccines appear to have had much of the desired effect; the number of persons experiencing severe symptoms and requiring hospitalization continues to decrease. But employers still need to be cognizant of their continuing obligations when an employee tests positive for the virus.” He notes the CDC still recommends any person who tests positive be quarantined for at least five days and until free of symptoms, and employers should ensure that employees who test positive comply with those recommendations.

“Most of the federal vaccine mandates issued in 2021 have been withdrawn or suspended, so most employers are not legally obligated to mandate vaccines,” Johnsen says. He notes employers who wish to be more cautious and impose vaccine requirements of their own may do so — provided that they properly assess any religion or disabilitybased objections that employees may assert.



Need to Know:

Our Workforce Future

“The current workforce outlook is uncertain,” says Buchalter’s Badoux. A number of companies, particularly in the technology sector, are needing to right-size their workforce, having either hired too many in anticipation of upcoming growth or elevated payroll levels from prior commitments that are no longer in step with shrinking profit margins as inflation lingers. He believes this partial reversal of the great resignation may lead to employees entering new fields in greater numbers, a sort of great realignment, and suggests businesses be open to new hires without industry experience and have internal training programs in place. “In fact,” he says, “businesses that make hiring non-traditional candidates a feature of their recruitment strategy might find themselves in a better position to maintain staffing (and service) levels for their client base.”

Badoux observes that in times of uncertainty, workers worry about their career, their industry, their pay, their buying power and their overall safety. “Combine that with an administration far more sympathetic to unions (and generally to all forms of organizing) than its predecessor, and the time is fertile for unions to expand into new areas and to expand their presence in others. Employers who wish to ensure they are not a target for union organizing should implement internal systems to respond to employee issues, particularly in terms of lack of engagement and feelings of unfairness or disparity or treatment or opportunity, and build an internal quick response team.”

With COVID-19 and its variants (aka SARS-CoV-2) not yet a thing of the

past, as recent outbreaks in China and North Korea demonstrate (and to a smaller extent rising infection numbers in the U.S.), Badoux believes it remains important to keep a quick response team in place to address potentially changing needs of the workplace and respond to directives from governmental agencies. “Employers would be well-served to identify a quick response team to address any emergencies and contingencies affecting the workplace,” he says, and notes that if businesses relied on an ad hoc creation for the group that assumes responsibility for changing policies to respond to CDC guidelines and state mandates, they should replace that with a pre-selected team. “Quick response to issues that matter to employees, including their safety, matters more than ever.”

Aside from the virus, employers must keep vigilant in regard to employee health and wellness, says Badoux. “Especially because the pandemic (and perhaps also a remote work setup) seems to have made workers more sedentary than ever.” Observing that health and wellness issues are a significant driver of employee happiness and retention, Badoux points out that, pragmatically, employees who are not as healthy or well — physically, emotionally *and* financially — make for a costlier workforce for the employers who shoulder the vast majority of employee healthcare insurance costs. Conversely, he notes, “Data suggest that having internal processes that assess and help improve employee wellness inherently results in a more productive and stable workforce.”



Need to Know: Real Estate

Even disparate fields are interconnected, and real estate is being impacted by changes in the workforce (such as remote work and hybrid offices) and consumer habits (such as the growth of online shopping).

"The most obvious impact has been in the office market, which has not only impacted both existing real estate values in that sector but also created uncertainty as to the overall demand," says Jason Morris, land use attorney and founding partner of Withey Morris. As businesses are still trying to get their heads around what office needs are going to look like in the coming years and as leases are expiring that were entered into pre-COVID, Morris has found a significant amount of rethinking occurring. "Evidence of that rethinking is clear, with new, more flexible lease terminology and the creation of more flexible option terms by landlords," he says.

Says Jeff Pitcher, a director in the real estate practice group at Fenmore, "The larger real estate loans, construction loans and purchase and sale transactions my clients are working on involve apartments, warehouse and industrial developments, including one existing development that is being transitioned from office to apartments."

Pitcher notes a shift in how people and companies are evaluating their space needs, employee retention and how they interact with customers. "Our commercial real estate clients are telling us that their employees now have much more leverage over how and where they want to work, and this has caused the employers to change their in-office work policies. They also point out that retention is key as it is difficult to replace employees and, if they must be replaced, those new hires often come at a significantly greater salaries or hourly wages."

Noting that, on the consumer habits front, the increase in online spending has exacerbated the need for related warehousing and distribution, Morris says, "That demand in the industrial sector has also been bolstered by the more recent thought processing surrounding supply chain management and the amount of inventories necessary to guard against supply chain disruption."

In fact, says Pitcher, "Direct shipping from large distribution centers is here to stay as well as companies leasing light industrial space in submarkets that are further away from the big box submarkets located in SW Phoenix. We will see retailers taking smaller space as they reduce their footprint to adapt the shopper's new way of shopping."

Says Morris, "We're seeing a lot of new designs in both sectors for these reasons. Offices are now more efficient and may be designed around a remote workforce that doesn't include permanent offices for each employee and industrial buildings are being designed at a greater scale, requiring more land and additional rezoning."

Regarding property-related responsibilities of owners or developers, Pitcher says, "Our commercial real estate clients say they are creating new live, work and play environments and offering many amenities as more tenants are now working from home." Not only are tech packages, dog parks, dog washing areas and valet service part of the new normal, but many owners are emphasizing sustainability as environmental awareness is on everyone's minds. Pitcher cites as example the many businesses now installing EV chargers at their warehouses, apartments, retail centers and office buildings.

At the same time, Pitcher reports seeing many commercial tenants giving space back to landlords at the time of lease renewal because of the need to accommodate a hybrid workforce.

Other trends in real estate come out of our rapid population growth. "Phoenix is under-supplied in multifamily developments and for-sale housing due to its population growth that has occurred at a much faster pace than ever expected," Pitcher says. The extreme demand has caused apartment rents to become unaffordable and home prices to skyrocket. Lead time due to material and staffing shortages along with inflation has significantly increased the cost of building any type of building or home. Pitcher believes workforce housing will be an issue as home and rental prices continue to rise and the population of western tax-friendly states increases.

In fact, Morris sees the attempt to fill the residential housing gap to both supply housing for a booming population and also to ease the sharp increases in housing costs as the most prominent trend locally. "As a result of this trend, we're seeing new trends emerge in residential housing, such as the prominence of single-family rental products, which are also known as build-to-rent or horizontal apartments. These are typically single-story rental units with a small outdoor private space."

And then there's the countervailing force as neighborhood activism and political activism by those opposing development is starting to reach the courts as it has done in California for the past decade. "Unfortunately," Morris says, "the trend will likely be more lawsuits fighting developments, even outside traditional entitlement processes."

Morris notes that purchase and sale contracts for property are increasingly tightly negotiated as property owners desire quick closings in this competitive environment while developers are concerned about the risk of entitlement and construction cost inflation. "The current trends we're seeing in real estate involve the race against increasing interest rates with lots of deals contingent upon completion." Developers don't want to lose their financing and are under increasing pressure to get deals done because they don't want to go back to the bank and reapply. The combination of this with the rising costs of building materials is having an impact on the velocity of transactions and development. "These," Morris says, "are top of mind for developers right now."



Need to Know:

Intellectual Property

Businesses may be unaware of or overlooking the fact that, generally speaking, a business does not necessarily own newly developed IP, whether it's software, invented devices, logos, trademarks, website designs, et cetera, simply because the business paid for it, notes Susan Stone Rosenfield, a director in the intellectual practice group at Fennemore who chairs the firm's intellectual property and IP litigation property practice group. She notes a business should not assume that payment for IP renders the business the owner of it, let alone the sole owner of it. "This is why it's important to consult with a highly skilled IP attorney," she adds.

As Jennifer Van Kirk, an IP partner at Lewis Roca, puts it, "Businesses should think about their IP from the very beginning." She notes it is easier and cheaper for businesses to be proactive in capturing IP rights by, for example, making sure they have appropriate contracts in place with employees and consultants, than to be reactive later and try to claw back rights. A classic case she shares is a business hiring a website developer to build its website but not putting in place a written agreement clarifying who owns the rights. "Under copyright law, the author of the website — usually the website developer, not the business — owns the copyright in the website content," she says. "This situation can get messy for the business if its relationship with the website developer later sours, because, without a written assignment, the website developer owns the content and can pull it."

Another example she shares concerns the naming of a business, noting that, again, it is easier and cheaper (and far less of a hassle) to conduct due diligence up front regarding a business' chosen name than to simply start using a name and hope for the best. "We've seen many companies be forced to change their name after they've invested time and money into the name because it turns out someone else already owns the exclusive right to use that name in our client's field," Van Kirk says. "Conducting a trademark search up front avoids wasting resources on a name the business cannot legally use."

And Rosenfield points out that, depending upon the state, employers may not automatically have legal right to employees' inventions even if those were developed during the scope of employment *and* related to the work performed during employment. "Therefore, employers should have written agreements with employees and contractors to secure ownership and secrecy of the business' confidential information and intellectual property rights." For example, business should require a new employee to sign documents pursuant to which the employee acknowledges that they are required to disclose inventions to the employer, and whereby the employee assigns future inventions and other IP to the company. She cautions that specific language must be used in the documents, or it may not be effective.

"Keep in mind that there may be state-specific laws having a significant effect upon a company's ownership of IP created by an employee," Rosenfield adds. For example, certain state laws may prohibit an

assignment of future inventions made on the employee's time and without using property of the employer unless the work leading to the invention was performed for the employer and relates to the employer's business.

Regarding trade secrets, Rosenfield cautions employers to protect them by limiting access to only those employees who need to know the trade secrets to perform their job.

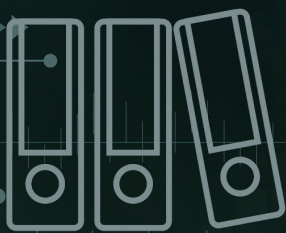
Patents are another matter, and obtaining one tends to be a costly endeavor. "Furthermore," Rosenfield says, "even if a company has a patent, it does not necessarily follow that the company is free to make, use, sell, et cetera, the patented method or product, because there may be other patents owned by other parties that the company would infringe, unless it obtains a license to those other patents."

Although guarding trade secrets is generally the focus of IP concerns, we have begun to hear more and more about cooperation among competitors and sharing of information. However, where it comes to operational issues as it relates to sharing IP with symbiotic business, Rosenfield says, "There should be clear understanding between the businesses as to whether and how and to whom confidential information (CI) and inventions and other IP may be disclosed, both within the business receiving the CI and IP and outside the receiving business." She notes this protection of technology and putting bounds upon disclosure and sharing may be unfamiliar and/or uncomfortable to those in the health and medical fields although disclosure to and collaboration with other practitioners (and potential inventors) to advance medical science and patient care is quite common.

For businesses that share their intellectual property, "The devil is in the details," Rosenfield says. She cautions the involved businesses to do their best to clearly outline in advance in a written agreement the following points:

- The knowledge and technology (and its related IP) each business is bringing to the table.
- Which party owns and which is permitted or required to file a patent application for new technology and improvements on existing technology. "This can be tricky, but it's imperative that these discussions take place before issues arise," Rosenfield says.
- Whether developments may be published, whether it requires agreement of the parties to do so and whether they must give notice prior to publishing to permit sufficient time for a patent application to be filed.

Trademarks are another important matter. "If a business permits another business to use the first business's trademark, there should be a written license agreement regarding this," Rosenfield says, cautioning that the first business needs to retain control over not only how and where the trademark is used, but also the quality of the products or services offered under the trademark by the second business.



Need to Know: Drug Testing

“Arizona law distinguishes recreational from medical marijuana,” says Gary Smith, a partner at Guidant Law Firm. But in terms of business policies and responsibilities, the distinction offers no clear line of demarcation. Smith explains that, under Arizona’s recreational marijuana laws, employers are free to restrict, regulate and prohibit marijuana both in the workplace and in their workforce. And employers may continue to drug test and terminate employment for employee off-hours use.

“While Proposition 207 generally legalized marijuana for private recreational use in Arizona, the law did not change employers’ rights to regulate their workplaces,” says Gallagher & Kennedy’s Johnsen. Employers still have the right to prohibit the use or even mere possession of marijuana in the workplace, even though marijuana might be legal to possess and use *outside* the workplace, he explains. And employers also have the right to conduct workplace drug and alcohol testing, including testing for marijuana, and discipline employees for violations of their policies concerning drugs and alcohol.

“Nor did Prop 207 alter any of the principles of ‘employment at will.’ An employee who tests positive for marijuana in violation of the employer’s

policies is still subject to discipline or termination, even though his or her recreational use of the drug outside the workplace might have been legal under Prop 207,” Johnsen says.

Clarifying a specific point, Smith notes that in the case of medical card holders, employers are still free to prohibit use while on the job. “However,” he says, “employers may not discharge employees for having a medical card or for using off-hours.”

Smith suggests companies that have not revisited their drug policies in a while should do so, noting that the widespread availability and popularity of cannabis makes it more probable that every employer will have encounters with cannabis and need to address them. “These considerations also extend to discussions with your insurance broker to make certain your company insurance policies cover the business should cannabis be involved in a casualty event,” Smith says, observing, “The ability to procure insurance may likewise dictate the content of company drug policy.” Whatever that policy might be, Smith suggests best practices are to apply it in a fair and consistent manner.




Need to Know: Cybersecurity

“Businesses should know that for every new cybersecurity technology that’s implemented, hackers are actively looking for ways to circumvent it,” says Omar Abdallah, an attorney at Rose Law Group, noting, “It’s only a matter of time until they’re successful.” For that reason, he says business leaders need to always be diligent and up to date on common and new security risks. “This is particularly important now, as many businesses’ work models have changed with remote or hybrid work models.” For remote workers, he suggests businesses consider implementing multiple layers of defense that include procedures and policies, data loss prevention software, multi-factor authentication and other risk-management approaches. “And certainly,” he says, “all employees should be regularly informed of the most current security best practices.”

Coppersmith Brockelman partner Scott Bennett emphasizes that the vast majority of cyberattacks are not sophisticated hacks, but the result of ordinary human error such as an employee clicking on a link in a phishing email, or someone losing an unencrypted thumb drive or laptop. Thus, he

notes, the biggest cybersecurity risk for most businesses is their employees — which makes it critical for businesses to provide training and ongoing education to their employees about common cybersecurity risks and how to avoid them.

A particular type of cybersecurity risk is ransomware, a huge problem right now for all types of businesses, according to Bennet, who cites an annual data breach report published by Verizon reporting the number of ransomware attacks doubled from 2020 to 2021. “Ransomware locks down a business’s data and/or computer systems, holding them hostage until the business pays a ransom, usually in Bitcoin because it is not traceable. Just a few years ago, ransom demands were relatively small, perhaps \$10,000 to \$20,000. But ransomware groups have gotten much more sophisticated, and greedier,” he explains. “Now, they will access a business’s computer systems and review its financials and insurance coverage to figure out the maximum amount a business can afford to pay, then demand that amount.”



To prevent ransomware attacks, Bennett suggests businesses educate their employees about phishing emails and social engineering. Cautioning that phishing emails often pretend to be from a supervisor or company executive and try to create a sense of urgency, he points out that employees need to know that if anything seems unusual or off about an email or request, they should verify the email or request is legitimate before taking any action. "And they should verify a request through a *different* means of communication," he notes. For example, if an employee receives an email that seems suspicious, the employee should not respond to that email but should reach out to the purported sender in person or by phone. "Businesses should also configure their email systems so they clearly indicate that an email is from someone outside the business. That helps

warn employees that an email that looks like it is from a supervisor is actually from a third party."

Bennett suggests another important and straightforward way to reduce the risk of a ransomware attack: Require employees to use strong passwords (a combination of upper- and lower-case letters, numbers and symbols), and to never use the same password for both a work and personal account, or any two accounts. Bennett believes the best practice is to use a password-management program such as LastPass or Dashlane that generates a strong and unique password for each account.

"Educating employees about ransomware and cybersecurity needs to happen on an ongoing basis, Bennett says, "and not just as part of employees' onboarding."



Need to Know:

Environmental Issues

Environmental concern is on the upswing, according to Court Rich, co-founder, senior partner and director renewable energy and regulatory law departments at Rose Law Group. He has experienced increased interest by businesses regarding what they can and should do to reduce their impact on the environment. Observing that some do it because they have a genuine desire to be better stewards of our environment and others do it because their customers are increasingly demanding they do it, he notes that many business owners are not aware that many of the steps a business can take to lower its impact on the environment can actually double as smart business decisions that are not just additive to the bottom line.

"For example," he says, "investments in certain energy-efficiency upgrades or rooftop solar and battery backup can have a quick payback for some businesses, thereby lowering their impact on the environment while saving them money. Also, solar investments can come with significant tax credits that can be monetized to benefit the business."

Businesses also have a lot of questions about how they can transition to 100% clean energy and what that really means. "We spend a lot of time talking with businesses about what their goals are with clean energy before advising them on how to proceed," Rich says. "Some, for instance, want to try to match their energy usage in every hour of the day with clean energy produced at that same hour. This can be complicated and can involve negotiations with local utilities that don't always have the options you need. Others that are less concerned about matching clean energy hour by hour have more options for clean energy credits that can allow them to make the claim that they are powered by renewables."

Rich emphasizes the importance of businesses understanding their own goals and what, exactly, they are trying to accomplish. "If it's important to the business to be able to make claims that it is run on renewable energy, it needs to make sure it goes through the correct process for acquiring and retiring renewable energy certificates," he says, explaining that, if done the wrong way, a business can get in trouble under federal law for making false claims.

He cautions businesses that want to adopt rooftop solar to make sure they are using an experienced company that can help them estimate the impacts on their electric bills accurately. "I get a lot of calls from business owners about this issue," Rich says, "and some installers may not fully understand how utility rates impact the savings you can recognize from a solar system."

"The bottom line is there are numerous issues to consider, many of which are not at all obvious, and it's important to find experienced people who can help you achieve your environmental goals."

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