

Brisk Briefings: Quick Hitter Legal Updates

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At their recent Construction Conversations and Closely Held Business Briefing event, several Ward and Smith attorneys provided an overview of privacy and data security, rules associated with name, image and likeness use for NCAA athletes, tax law changes, and the value of

trademarks.

Seize the Data: Privacy and Data Security

The seminar was initiated by Angela Doughty, a Certified Information Privacy Professional and a North Carolina State Bar Board Specialist in Trademark Law. Doughty also serves as Director of Legal Innovation at Ward and Smith.

Historically, unless operating within federally regulated industries such as healthcare and educational institutions, the collection of personally identifiable data by U.S. companies carried little, to no, business risk. Many non-regulated business entities collect and store a significant volume of customer data, and the practices around the collection and safeguarding of that data, if any, are often haphazard.

In light of recent state regulations and consumer expectations, “this creates potentially costly risks for U.S. businesses, both from a financial and public relations perspective,” said Doughty. Doughty continued, “as started by California, and followed by Virginia, Colorado, and Utah, the trend is continuing for states to enact their own versions of privacy and data regulations – resulting in a patchwork nightmare of regulations in which businesses are expected to comply.” Understanding privacy and data security regulations are more important than in previous years, and the complexity of differing state laws makes the simplicity of the proposed federal American Privacy Data Security Act an attractive alternative.

We know U.S. privacy and data security laws are here to stay, and Doughty works with clients to proactively prepare for these regulations and minimize their data risks. While the details of the regulations are undecided, Doughty advises clients to start now by implementing policies and procedures to address the most common privacy principles, such as:

- Notice and Choice

- Security and Confidentiality
- Accuracy and Access
- Use Limitations and Accountability

The only way to eliminate risk and avoid dealing with the patchwork nightmare is to stop collecting information. Doughty understands that is an untenable solution and so instead recommends businesses minimize their risk by evaluating the business need and value of its information and information policies. To simplify compliance, instead of waiting for the regulations, businesses should be proactive and begin assessing their data collection processes now with the goal of gradually implementing new policies and procedures around the common privacy principles and its business goals.

When it comes to data retention and deletion, Doughty recommends all businesses routinely, maybe every six months to a year, review and delete unnecessary data and move any data that must be retained to secured cloud-based storage or an offline server. "Deleting the data completely or storing it outside the business network minimizes the amount of information a bad actor could access in a breach, thereby minimizing risk and exposure in the face of a security incident," explained Doughty.

Other strategies for businesses to prepare for incoming regulations include:

- Assessing service provider contracts – could be effective for shifting liability
- Data transfers – train employees on best practices for sharing confidential information
- Response planning – always use the phone, copy the attorney if in writing to capitalize on attorney/client privilege

"Small failures can have a significant impact," concluded Doughty. "The best thing to do today is to start assessing data to be deleted or retained, implementing transparent notices, and ensure the security and confidentiality of the data entrusted to you by your customers."

Name, Image, and Likeness

Erica Rogers, an intellectual property attorney, shed light on a recent change that allows collegiate athletes to license their name, image, and likeness rights for financial gain:

- A Supreme Court ruling in 2021 stated the NCAA violated the Sherman Act by limiting non-cash education-related benefits to student-athletes;
- Athletes are now able to commercialize their name, image, and likeness (NIL); and
- The NIL market has since exploded.

Similar to data protection, a patchwork of laws, regulations, and policies now exists. "There is development in Congress right now for a federal law," said Rogers, "so hopefully there will be more uniform guidance in the future."

Currently, Rogers is helping clients navigate the rules by identifying state regulations, executive orders, and NCAA guidance. "The main areas we're looking at are activities that are out of bounds when it comes to these contracts," Rogers explained.

Generally, recruiting actions are prohibited from these types of deals. Also, endorsement deals for NCAA athletes are not allowed to be performance-based.

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“The thing to keep in mind is these collectives have to be separated from the institutions to comply with NCAA guidelines,” noted Rogers. Other guidelines that businesses should be aware of when negotiating deals with student-athletes include:

- FTC endorsement guides (disclosure of ads);
- Intellectual property rights (including those of the school);
- Fee structures; and
- Morals clauses (i.e. loss of reputation).

“This is an exciting area to navigate because it’s creating opportunities for student-athletes that historically didn’t exist,” concluded Rogers.

Tax Law Update

Richard Crow, a business and tax attorney, provided detail on tax law changes resulting from the Inflation Reduction Act. “These updates may not have an impact on most of us, but it has the potential to be a slippery slope issue if the powers that be decide this is an attractive option,” said Crow.

One is the 15 percent alternative minimum tax imposed on large C-corps with \$1 billion or more in annual net profits, for three years. Another pertains to a one percent excise tax on stock buybacks. The exception is that it only covers publicly traded companies, which are able to reduce that by the fair market value of the stock that has been issued that year.

“The feds are looking to collect more and offset some of their spending by hitting some of these high net worth organizations,” said Crow. A component of this involves a limitation on deductions for business losses on pass-through entities.

An update that has received significant attention is the \$80 billion in increased funding the IRS is set to receive over the next 10 years. This will allow the IRS to:

- Hire 87,000 new employees over the next 10 years;
- Modernize technology and increase training for complex enforcement activities;
- Increase tax reporting transactions;
- Overhaul outdated technology; and
- Regulate paid tax preparers and increase penalties for committing or abetting tax evasion.

Additional updates include requiring brokers to report transactions involving digital currencies and the early termination of the employee retention tax credit. In North Carolina, a number of changes have resulted from the 2021 Appropriations Act:

- Reduces corporate income tax to zero percent by 2030;
- Replaces the 3-factor franchise tax with 1 factor (taxpayer’s NC apportioned net worth);
- Establishes elective tax on pass-through entities; and
- Reduces individual income tax rate from 5.25 percent to 3.99 percent.

“These are mostly very taxpayer-friendly provisions,” added Crow.

Trademarks: An Overlooked Asset

Mayukh Sircar, an attorney with Ward and Smith's Intellectual Property section, shared insights on the uses and protections offered by trademarks, a source identifier that helps consumers identify and distinguish between the goods and services of different entities. "Trademarks can be an effective marketing tool because they serve as an indicator of quality and consistency, as well as a means of protection against imitators," noted Sircar.

Trademark rights arise from use, not registration. Non-registered trademarks are identified with the 'TM' designation and registered trademarks are identified with the ® designation. Those who use a trademark without registering it limit the amount of protection they receive to the geographic area of business and/or advertising, the scope of which may vary based on the industry or type of business.

Those who register a trademark can prevent anyone else from using it nationwide. It is worth noting that a trademark is not just limited to a name. It can also include a phrase, symbol, slogan, product or packaging, sound, color, or smell—even the design of a business establishment.

"In some cases of infringement, a trademark registration can allow the owner to collect statutory treble damages," Sircar explained.

The reputation and goodwill of a company are associated with its trademark, so trademarks can be an important business asset. Trademarks can have a significant positive or negative impact on mergers and acquisitions, sale of a company, or licensing a product, and registering a trademark can be an effective strategy for minimizing risk.

Registering a trademark can also help to protect a brand. To shed light on the issue, Sircar provided the example of a business, Company A, which is using an unregistered trademark. If Company A was interested in expanding into an area where another business, Company B, was already using the same trademark, but it was registered, Company A would have to rebrand its business or limit the geographic expansion.

"Having to rebrand can be very expensive because of having to create all new marketing, which can, of course, impact your customer retention," Sircar noted. Finding unauthorized users and preventing other entities from using a similar mark are effective means of protecting a trademark and are often required to retain a trademark registration, as it shows a commitment to maintaining exclusive usage granted by such registration.

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