

# Riding the Rapids: Staying Afloat in the Legal Waters

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**Five Ward and Smith attorneys delivered keen guidance on a host of matters pertinent to in-house counsel and company preparation for the imminent economic climate.**

As part of the firm's 2022 In-House Counsel Seminar, these legal professionals engaged with topics such as:

- Potential changes resulting from the midterm elections
- Legal issues with remote workers
- Securities laws
- Insurance claim issues relevant to insured corporations/entities
- Implications of workplace DEI policies

## General Assembly Updates

Whitney Campbell Christensen, a government relations attorney with over ten years of experience representing clients before the North Carolina General Assembly, reviewed General Assembly activities from 2022, an analysis of the midterm elections, and projections for 2023.

“The focus of this year’s short session was to enact a budget for the state of North Carolina. Legislators had to grapple with a \$6 billion revenue surplus, which sounds like a really good problem to have,” said Christensen. “But that’s significantly more surplus than they’ve had in prior budget cycles, so it was a bit of a struggle for them to decide how to spend it.”

A decision was made to save a majority of the surplus, as well as allocate \$1 billion to an inflationary reserve fund. The passage of the fiscal year 2022-2023 budget also included:

- \$27.9 billion in spending
- 5 percent state employee raises, on average
- 2 percent teacher pay raises, on average
- No corporate or personal tax cuts

The turnout of eligible voters for the NC 2022 midterm elections was 51 percent. “This wasn’t a landmark participation result,” noted Christensen. “Leading up to it, there was a lot of talk from both sides about potential catalysts for voter turnout, such as inflation and President Biden’s approval rating, but ultimately the record turnout projections didn’t materialize.”

For years, political scientists theorized that high levels of unemployment would elicit higher levels of voter turnout than high levels of inflation. “That theory really bore out in these election results because voter turnout was fairly unimpressive,” commented Christensen.

Interestingly, this was the first election in which unaffiliated voters were the largest voter group. “Typically, unaffiliated voters here in North Carolina are more likely to vote Republican than they are Democrat,” said Christensen.

In the North Carolina House of Representatives in 2023, the Republicans will hold a simple majority instead of a supermajority. In the Senate, they will have a supermajority. This makes attendance a priority for Democrats.

“If a few Democrats are out, Republicans could easily override a Cooper veto,” Christensen explained. “And since the Republicans have a supermajority in the Senate, all the politics will essentially play out in the House. The main thing we’ll be watching is Governor Cooper’s veto power.”

In terms of what to expect from the General Assembly long session for 2023, which officially begins in January, Christensen mentioned the following:

- Two-year state budget
- Abortion and reproductive rights
- Building code overhaul
- Medicaid expansion
- Congressional redistricting
- Bills vetoed since 2019 likely reintroduced (47)

“Obviously, I don’t have a crystal ball. But I work with these folks daily, so I have a pretty good idea of what we can expect to see this session,” concluded Christensen.

## **Working Remotely**

Richard Crow, a business and tax attorney, shed light on potential liability issues arising from allowing employees to work remotely. Crow described an article he read showing the lengths remote employees had gone to in an effort to mislead employers about the physical locations in which they were working.

“The employers had no idea they were in Thailand, Mallorca...Seattle or California. What the article didn’t address were the risks these wayward employees placed on their employers,” said Crow.

Companies have to qualify to do business in another state. There is an application process for qualification, and businesses that fail to register could be subject to penalties. “If you don’t know you have an employee there, it obviously makes it a little difficult to register,” laughed Crow.

Some business owners may wonder what the potential harm could be from not registering. “I don’t think North Carolina is going to be overly punitive in this respect, but some of the states take different approaches,” noted Crow.

A few of the potential risks for businesses that fail to register in a state where they are transacting business include:

- Cannot maintain litigation, i.e., file lawsuits
- Monetary penalties

- Voiding of contracts from a period when the business was supposed to be registered
- Tax obligations, payroll, and unemployment insurance withholdings

“Every state right now is heavily focused on tax collection. They’ve become very aggressive, enacting new legislation that attempts to skirt the physical presence rule, which basically says you have to have enough presence in my state to create enough nexus to allow us to tax you,” mentioned Crow.

Wage and hour laws that apply to employees can vary significantly from state to state. “Along the same lines, the enforcement of restrictive covenants varies significantly,” added Crow. “In Wisconsin, for example, where they’re illegal by statute, they will void the entire agreement if one is in there.”

Understanding that it is impossible to know where a remote employee may be working from 100 percent of the time, Crow advocated for adopting a policy stating where remote employees are permitted to work, the terms for remote work, and permissible physical locations. “That way, you at least have some defense in the event of a negative outcome resulting from a rogue employee.”

## **Securities Laws**

B.T. Atkinson, a corporate attorney with three decades of experience navigating corporate, securities, and regulatory matters pertaining to financial services, began by stating that many business leaders currently have an increased interest in raising capital. “Whether its inflation or the idea that a recession is here or on the way, there’s a lot of anxiety out there. Many businesses were already facing constrained levels of capital. This has added to the interest in raising more to help weather the coming storm,” said Atkinson.

Generally, state and Federal laws concerning the raising of capital have relaxed somewhat. However, fines and attorney fees could potentially result from the improper selling of securities. “When you sell a security, it has to be registered with the Federal government and the state you are selling the securities in, or you have to find an exemption,” noted Atkinson.

Laws can vary from state to state, creating a challenge for business owners seeking to raise capital. “Business owners should also be wary of any so-called ‘consultants’ approaching them stating they want to help raise capital. Of course, they’ll want a commission to help you find investors, and, in many cases, after a few questions, you may find out they are not a registered broker-dealer,” Atkinson commented.

Companies should also be aware of the implications of providing employees with a chance to receive equity and/or purchase stock. “You need to have a more robust shareholders agreement or operating agreement if you’re an LLC,” Atkinson explained. “Also, if it’s a purchase plan and you are actually selling securities to the employees, then the same issues with regard to raising capital would apply.”

Numerous disclosures would also need to be made. “It’s complicated, but there’s a pathway to make it happen. Just in the past year, we have helped several companies, including a real estate developer that wanted to allow the employees to participate on a project-by-project basis,” Atkinson said.

A recent development on the public-facing side of securities laws pertains to new pay-versus-performance disclosures for executives. “It’s all enormously complicated, but the intent is to show the correlation between a company’s performance and the executives’ compensation,” added Atkinson.

Environmental, Social, and Governance (ESG) continues to be a focus for the SEC. “There are no specific disclosure requirements for ESG, but if you’re going to talk about it, whether it’s in your securities filings, proxy statements, press releases, or ads, you want to make sure you’re consistent,” noted Atkinson.

Finally, Atkinson advised business owners to be aware that substantial penalties can result from not disclosing related party transactions on a company's proxy statement.

## **Policy Holder Disputes**

Amy Wooten, a litigation attorney whose practice focuses on complex commercial disputes, fiduciary duty claims, unfair and deceptive trade practices claims, and community association matters, shared insights on insurance policy issues, including claims, payments, and liability coverage. "Insurance is an area of the law that is fraught with the potential for high stakes issues to arise, whether it's in a first-party claim context or a third-party claim context," noted Wooten.

First-party claims arise when a corporation/entity is the named insured on a policy and, as a result of some adverse event, such as fire, loss, or hurricane, has damage like to its property and initiates a claim against its insurance company. "Navigating coverage issues can be particularly complex. This occurs when a carrier tries to deny a claim based on some exclusion," explained Wooten.

Some carriers may even try to stall a claim "to the point that statute of limitations concerns become a real issue for clients," said Wooten.

Third-party coverage issues essentially refer to liability coverage, such as when a corporation/entity is the named insured, and an event occurs as a result of alleged negligence by the company or one of its employees, which causes damages to another corporation and/or individual. By issuing a liability insurance policy, the carrier agrees to undertake two obligations when a claim is covered:

- Defend - carrier is required to *defend* the entire lawsuit if even one of the claims in the lawsuit is covered by the policy, but counterclaims and cross-claims the corporation may need/want to bring are often not covered claims
- Indemnify - pay the claim

Coverage exclusions can be extremely broad. "Sometimes, when I'm reviewing a policy, it can look like there's no coverage at all. In this case, it's important to actually call your carrier," noted Wooten.

"The reality is that, unfortunately, at some point, everyone will likely have to deal with a claim or insurance issue. In fact, there's been such a need for it over the years that we are now in the process of forming a Business Policyholder Coverage and Recovery Practice Group."

## **Diversity, Equity, and Inclusion**

Xavier D. Lightfoot, an employment and personal injury attorney, initiated the discussion by stating that Diversity, Equity, and Inclusion (DEI) gained prevalence in 2020 with the social justice movement. "We had a lot of clients ask if we work in this space," said Lightfoot, "so, I got certified in DEI from Cornell, and we started educating ourselves on these issues."

"Usually, it turned up with some sort of litigation," noted Lightfoot, who previously served as chair of the DEI committee at the North Carolina Society of Human Resource Management. "We decided to focus on finding ways to get in front of these issues to help our clients be proactive and avoid some of the potential negative outcomes."

Aside from the fact that many employees simply demand it, there is a business case for having a DEI strategy. Organizations that are more diverse and inclusive tend to outperform their competitors. "It's important to note that if you don't have a sound DEI strategy, you're going to miss out on opportunities for

growth, innovation, and quality talent,” Lightfoot explained.

When employees have a platform, a space to collaborate and work in an environment where they feel their contributions will be welcomed and valued, they tend to perform better. “Making that the foundation of your culture is a good idea. Having unconscious bias training and/or inclusion training could be a starting point, but it might be better to survey the room and figure out what the employees who are representing your company would say about the culture when they are away from the workplace,” advised Lightfoot.

The next step would be to engender buy-in from executives. “Help the leaders within your organization understand the many advantages to having a DEI strategy, such as attracting and retaining quality talent, cultivating a workplace for greater innovation because you have various diverse perspectives at the table, providing better products to your customers, and having a workplace that more accurately represents what your communities look like,” noted Lightfoot.

“Implementing a successful DEI strategy may be difficult to achieve sometimes, but if the foundation for your strategy is rooted in treating people with kindness, respecting their wishes, and following the Golden Rule, then creating buy-in should be fairly easy,” added Lightfoot.

Building the necessary infrastructure starts with education. The next step is to implement equitable systems, internally and externally. This involves evaluating personnel policies to identify equity gaps. Engaging with every member of the organization on every level is also essential.

Finally, some companies may be subject to certain federal requirements that will impact their DEI strategy. “For example, federal contractors with 50 or more employees that surpass a certain dollar threshold should be aware that they are required to have a written affirmative action plan that includes maintaining additional personnel and employment records; setting certain recruitment and placement goals; and reporting data on the contractor's demographic breakdown of applicants and employees, among other requirements,” advised Lightfoot. He concluded by stating, “One of my favorite quotes is from Vince Lombardi, who said, ‘Perfection is not attainable, but if we chase perfection, we can catch Excellence.’ I am not sure I know of any perfect organizations, but I can tell you that if your organization approaches its DEI strategy relentlessly with a goal of achieving perfection, you’re going to catch excellence.”

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