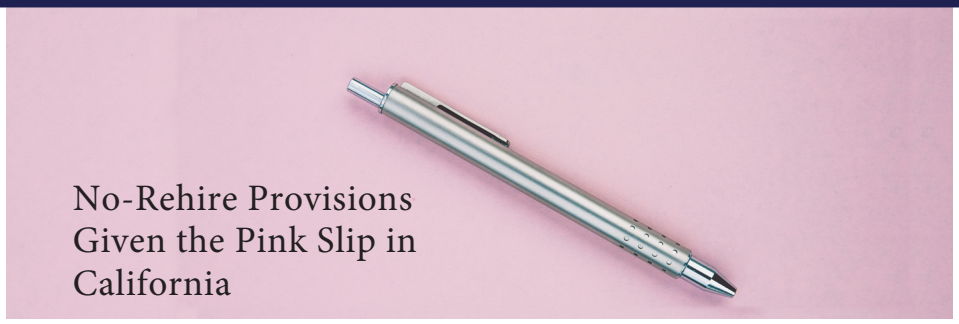
THE MONITOR

A Quarterly Publication by Johnson Fistel, LLP • Winter 2020



No-Rehire Provisions Given the Pink Slip in California

Effective January 1, 2020, California's AB 749 bill largely outlaws the inclusion of "no-rehire" provisions in employer-employee settlement agreements. "No rehire" provisions—often a boilerplate component of agreements settling threatened claims or lawsuits between employers and employees—forecloses an employee from ever again applying for a job with the company (including ancillary divisions, parent companies, subsidiaries, and affiliate entities). While the language of these provisions can give employers varying degrees of latitude, in certain cases, "no rehire" clauses can go so far as to allow employers to summarily terminate an employee who is inadvertently hired by the company or its subsidiary.

But AB 749, formally codified as California Code of Civil Procedure section 1002.5, voids any such provision that remains in a settlement agreement created on or after the first of the year. For victims of harassment or discrimination, this means less restraint on employment opportunity. For employers, the bill might present a troubling paradox: an employee settling claims of retaliation by an employer could theoretically apply for rehire at the company, and allege that any decision not to rehire was retaliatory.

There are exceptions. AB 749 does not require employers to continue to employ or rehire an employee if there is a legitimate, non-discriminatory or non-retaliatory reason for terminating the employment relationship in the first instance. And if an employee is unsuitable for the job or the employer has made a prior good faith determination that the employee has engaged in sexual harassment or assault, AB 749 will not spare an employee from being denied rehire.

Johnson Fistel has counseled both employers and employees facing or asserting sexual harassment allegations. Please contact us for a free consultation and case evaluation. You may contact us at the contact details on the back page of this Newsletter or on our website.

In This Issue

Attorney Insights

News & Events

Firm Information

Delaware Chancery Court Rules in Favor of Stockholders Seeking Books and Records

In what some have called a major setback for Delaware companies and a significant victory for stockholders, on January 13, 2020, Vice Chancellor J. Travis Laster of the Delaware Court of Chancery rejected company efforts to establish a heightened showing by stockholders seeking books and records pursuant to Section 220 of the Delaware General Corporation Law in *Lebanon County Employees' Retirement Fund v. AmerisourceBergen Corporation*, C.A. No. 2019-0527-JTL.

In *AmerisourceBergen*, Vice Chancellor Laster ordered that stockholders be permitted to inspect certain company books and records, finding the company's argument that stockholders must present evidence of a credible basis of wrongdoing too "onerous" a burden. In reaching his decision, Vice Chancellor Laster clarified that the "Delaware Supreme Court has not required a stockholder seeking books and records to introduce evidence from which the court infer the existence of an actionable claim" against the company's board of directors. Rather, stockholders must only "establish, by a preponderance of the evidence, that there is a credible basis to infer possible corporate wrongdoing or mismanagement." Vice Chancellor Laster underscored that the "credible basis" standard is the "lowest burden of proof," which can be satisfied through the existence of ongoing investigations and lawsuits, particularly by government agencies.

Vice Chancellor Laster also declined to adopt the company's position that stockholders must specify how they will use the books and records obtained from the investigation, stating "[a] responsible stockholder cannot identify all of the potential uses for books and records before knowing what the books and records reveal." In so ruling, he also rejected several recent cases interpreting Section 220 as requiring stockholders to state a "reason" for their proper purpose in the demand as "beyond what Section 220 and Delaware Supreme Court precedent require."

Finally, Vice Chancellor Laster rejected the company's argument that Delaware precedent established a "bright-line" rule prohibiting stockholders from obtaining discovery into how a company maintains its books and records, stating such an approach "would run contrary to Delaware's case-by-case approach to Section 220 proceedings" and allowed the demanding stockholders to conduct a Rule 30(b)(6) deposition to determine the scope of documents available. Vice Chancellor Laster made clear that "[j]ust as a defendant can serve interrogatories and depose a plaintiff about its proper purpose, so too can a plaintiff serve interrogatories or notice a Rule 30(b)(6) deposition to understand what books and records exist and who has them."

Companies or investors with questions or concerns regarding the *AmerisourceBergen* opinion, or about their rights, should contact the attorneys at Johnson Fistel to determine how we may help assess and secure your legal rights. You may contact us at the contact details on the back page of this Newsletter or on our website.

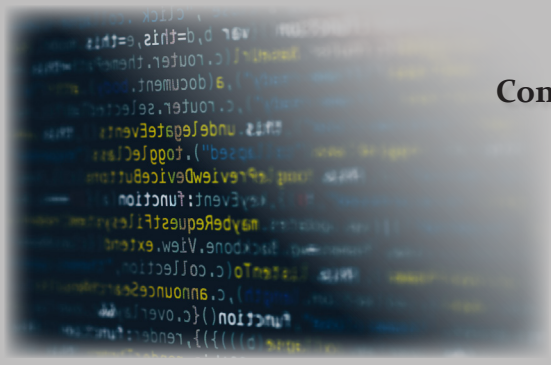
Portfolio Monitor

Johnson Fistel recognizes that there are inherent risks when investing in the stock market. But the risks that an investor assumes do not, and should not, include the risk that the company or its officers and directors will make false and misleading statements to artificially inflate the company's stock price or sell their own stock based on insider information.

Our Portfolio Monitor is designed to alert institutional and individual investors when one of their investments may be affected by securities fraud, corporate waste, or other wrongdoing. Our Portfolio Monitor is available to both U.S. and foreign investors. There are no minimum portfolio requirements or costs to participate.

In-House Monitoring

Confidential Data Protection



Complimentary Service

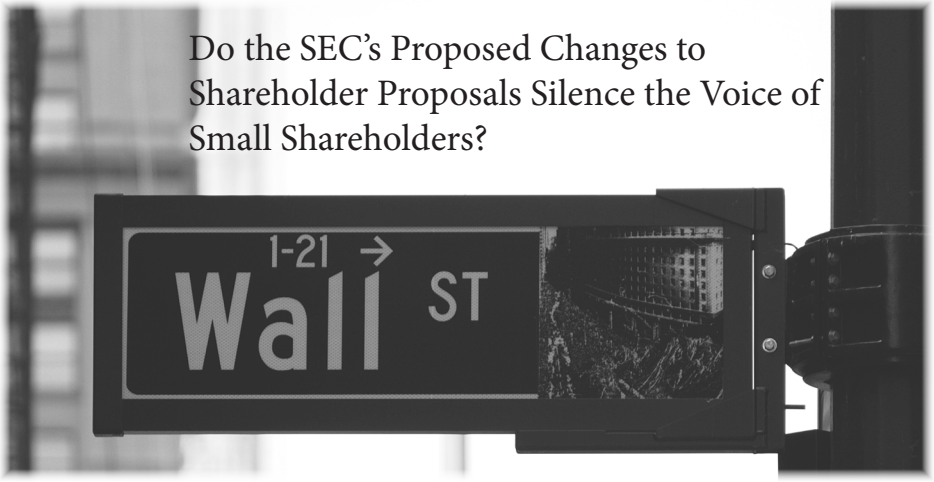
For more information call 619.230.0063
Click the link to learn more:
https://www.JohnsonFistel.com/stockmonitor-free-portfolio-monitoring/

Upcoming Lead Plaintiff Deadlines

Johnson Fistel is investigating many potential cases arising under the federal securities laws. If you would like more information, or if you wish to participate in an action, please contact us as soon as possible to ensure that your rights are fully protected. Listed below are matters that the firm is investigating and the applicable deadlines for filing a motion with the court to be appointed as a "lead plaintiff" under the Private Securities Litigation Reform Act of 1995.

Company	Deadline
Forescout Technologies, Inc.	03/02/2020
Mohawk Industries, Inc.	03/03/2020
500.com	03/16/2020
Portola Pharmaceuticals Inc.	03/16/2020
Geron Corporation	03/23/2020
Qudian Inc.	03/23/2020
Opera Limited	03/24/2020
Westpac Banking Corporation	03/30/2020
Beyond Meat, Inc.	03/30/2020

Do the SEC's Proposed Changes to Shareholder Proposals Silence the Voice of Small Shareholders?



The shareholder-proposal process facilitates engagement between shareholders and the companies they own. A shareholder proposal is a shareholder's recommendation or requirement that a company and/or its board of directors take certain action. Examples of shareholder proposals include proposals that the company adopt policies that address issues related to climate change, diversity in the workplace, and executive pay, among other things.

On November 5, 2019, the United States Securities and Exchange Commission (the "SEC") voted to propose amendments "to modernize" the rules that govern the process for which shareholders can include proposals in a public company's annual proxy statement. In general, if a shareholder has continuously held at least $2,000 in market value, or one percent of the company's stock for a year, the shareholder is entitled to submit a shareholder proposal, which will be voted on by the company's shareholders at an annual shareholders' meeting. Also, a shareholder may submit no more than one proposal to a company for a particular shareholders' meeting. Often times, a shareholder proposal will be voted on more than once, i.e. resubmissions, and for example, between 2011 and 2018, one-third of the proposals voted on over this period went to a vote two or more times at the same company. However, to be eligible for resubmission, the proposal must receive at least three percent of the total number of votes cast in the proposals first shareholder vote; six percent of the number of votes cast in the second vote; and ten percent of the votes cast if the proposal is voted on three or more times in the last five years. If a proposal does not meet these threshold requirements, then the board of directors can exclude the proposal from the shareholder vote.

In its attempt to "modernize" the rules governing shareholder proposals, the SEC proposed an amendment where in order to submit a shareholder proposal, a shareholder must have continuously held at least either: (i) $2,000 of the company's securities entitled to vote on the proposal for at least three years; (ii) $15,000 of the company's secu-

(Continued on page 5)

(Continued from page 4)

rities entitled to vote on the proposal for at least two years; or (iii) $25,000 of the company's securities entitled to vote on the proposal for at least one year. Moreover, another proposed amendment, according to the SEC, is aimed at limiting resubmissions of shareholder proposals. Now, instead of requiring resubmissions to meet the three, six, and ten percent thresholds to be eligible for resubmission, mentioned above, the SEC proposed amendment would raise these thresholds to five, fifteen, and twenty-five percent, respectively. Additionally, notwithstanding the threshold requirements, if a proposal has been previously voted on three or more times in the last five years, the board can exclude the proposal from a shareholder vote, if the proposal: (i) received less than fifty percent of the votes cast; and (ii) experienced a decline in shareholder support of ten percent or more compared to the immediately preceding vote. The sixty-day public comment period ended on February 3, 2020.

Many have come out against these proposed amendments and accused the SEC of silencing the very fabric of the public markets and those who the agency has sworn to protect: main street investors. In an article published in Bloomberg Law by Lisa Woll, the CEO of US SIF, which is a leading voice advancing sustainable, responsible, and impact investing across all asset classes, Woll claims that the SEC, "despite its mandate to protect investors, has proposed a new rule that would muffle the voices of investors who seek to encourage publicly traded companies to operate in a responsible and sustainable manner." Woll explains that these amendments, in some cases, would result in a "massive 1200% increase in the stock ownership required for a shareholder to be eligible to submit a proposal," and "[t]aken together, these measures will make it much harder for investors—especially retail 'Main Street' investors as SEC Chairman Jay Clayton refers to them—to get important issues on publicly traded companies' annual meeting agendas." In another article, published by the Financial Times by Fiona Reynolds, the chief executive of Principles for Responsible Investment, Reynolds stated "[i]nvestor protection is a vital part of the SEC's mission. But this proposed rule would severely undercut the ability of shareholders to hold management accountable on these critical issues. PRI's economic analysis found the changes would have a disproportionate effect on small and midsized investors. It would in effect lock them out of the proxy process and require them to persuade larger investors for their proposals to succeed."

It is clear that investors face a grave risk of losing their ability to shape the companies they own through the shareholder-proposal process. However, not all hope is lost. There are other tools available to a shareholder that can effectuate important corporate change and promote corporate accountability. Specifically, a shareholder can file a shareholder derivative action on behalf of the company against its directors and officers for these individuals' mismanagement of the company, wasting of its assets, and fraud, among other things. Through a shareholder derivative action, a shareholder can enable the company to adopt important corporate reforms as well as hold those officers and directors who caused the company harm accountable.

Johnson Fistel, LLP has a long history of bringing successful shareholder derivative actions on behalf of its clients and has obtained tremendous remedies, which include, but are not limited to, securing settlements where the companies: (i) have received millions of dollars in compensation for certain officers and directors' misconduct; (ii) appointed new independent members of the board of directors; (iii) adopted significant corporate governance reforms, which enhanced reporting and oversight at the board, officer, and employee level; (iv) and formed new committees of the board of directors.

Companies or investors with questions or concerns regarding the shareholder proposal process, the filing of a shareholder derivative action, or about their rights, are encouraged to contact the attorneys at Johnson Fistel for a free consultation. You may contact us at the contact details on the back page of this Newsletter or on our website.

JF JOHNSON FISTEL

Johnson Fistel was founded on the following five core values: trust, hard work, determination, integrity, and excellence in everything we do. Our interests are aligned with those of our clients — their success determines our own. We embrace and embody those ideals in everything we do. Whether we're pursuing damages for or against a billion-dollar corporation or we're challenging a small transaction, Johnson Fistel devotes the necessary resources to secure the best result possible.

We believe we are only as good as our people, and Johnson Fistel recruits only the best, brightest, and most determined candidates possible. Our lawyers include those who started their training by working for esteemed judges in both state and federal courts, and have also worked at the largest law firms in the world. We pride ourselves on providing the same level of service with a greater level of efficiency. As a result, we have developed the reputation for delivering big-firm results with the efficiency and personal touch of a small firm.

Locations

California Office

655 West Broadway, Suite 1400
San Diego, California 92101
T: 619.230.0063
F: 619.255.1856

Georgia Office

40 Powder Springs Street
Marietta, Georgia 30064
T: 470.632.6000
F: 770.200.3101

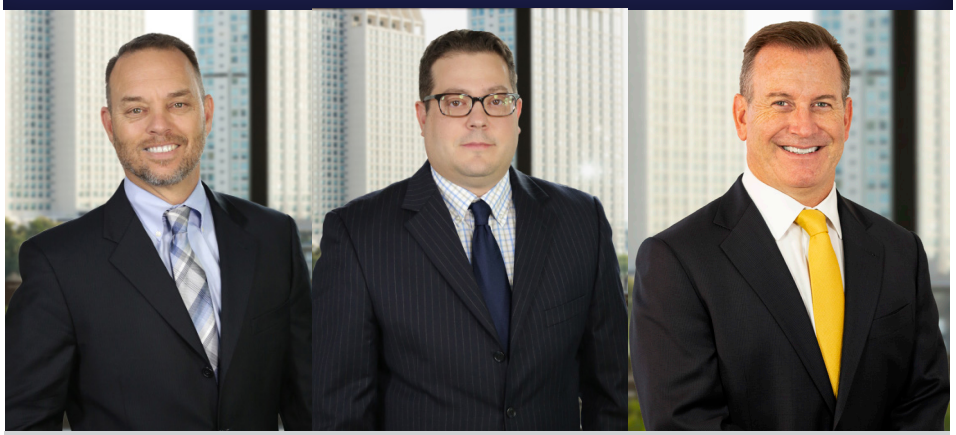
New York Office

1700 Broadway, 41st Floor
New York, New York 10019
T: 212.292.5690
F: 212.292.5680

Contact Us:
ContactUs@JohnsonFistel.com

Visit Us:
http://www.JohnsonFistel.com

Partners



Frank J. Johnson | Michael I. Fistel | Brett M. Middleton

Associates & Counsel

Reed Baker

Mary Ellen Conner

Tiffany Johnson

Richard A. Nervig

Kristen L. O'Connor

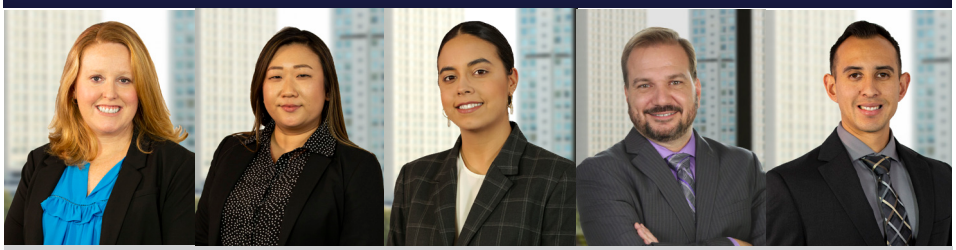
Chase M. Stern

William W. Stone

Ralph M. Stone

Adam J. Sunstrom

Paralegals



Ashley Lane | Serena Lee | Luz Lopez | Matthew Ostman | Estevan Vasquez