

**Foley & Lardner LLP - National Directors Institute**  
**“The Role and Risks of the Board in Talent Management”**

**November 15, 2019**

**The Westin Chicago River North, Chicago, Illinois**

I. Imperative of Talent Development and Board Role in Overseeing

- *Attracting and Retaining Talent is often one of top challenges and highest priorities for companies around the globe. Talent Development is imperative to long term corporate health, and the Board has a key role in overseeing talent development and retention strategies.*
- *Talent development and retention is a #1 strategic challenge facing many companies:*
  - *The U.S. has a very low unemployment rate, and a huge demand for employees.*
  - *A Board’s role in overseeing talent programs is to ensure corporate talent objectives are being addressed (not just at senior management level); delegating to CEO or other officers is not enough.*
- *Economic Development Incentives for Talent Development:*
  - *Talent development is a key element of the Economic Development and Incentive Strategies of many States and municipalities.*
  - *Talent mapping is a key “tool of the trade” of economic development agencies and companies.*
  - *Boards should look to maximize state and local economic development incentives as a key part of any comprehensive talent strategy.*

II. Legal Duties of Board and Legal Risks

- *In 1996, the Delaware Chancery Court established that a Board has certain duties and obligations to stakeholders.*
  - *In a landmark decision called Caremark, the Court established that a Board shall “attempt in good faith to assure that a corporate compliance information and reporting system, which the [B]oard concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.”*
  - *These duties became known as “Caremark Duties”*
- *Under the general duty of Board oversight under Caremark Duties:*

- *The Board has general Caremark Duties to oversee compliance programs. Overseeing adherence to employment laws and policies is part of proper exercise of that duty.*
- *Focus on this duty greatly enhanced following “Me Too” revelations and currently back in focus (e.g. NBC case)*
- *The recent Delaware case of Marchand is thought to expand Caremark Duties by requiring active Board oversight of corporate compliance programs in all areas of business.*
- *When and how can the Board and/ or individual Board members step over the line into management’s terrain and be held liable for employment liability issues?*
- *Consider, how do these duties of oversight differ in other parts of the world, and what liability issues are Boards thinking about in other parts of the world.*
  - *Diversity and inclusion is a big topic in companies in the EU right now, and has risen to the Board level*
  - *Corporate culture is also growing in prominence as a focus for employers*

V. The Changing Role of the Corporation - Business Roundtable: Statement on the Purpose of a Corporation

- *Companies universally share five main commitments to all stakeholders:*
  - *Delivering value to customers*
  - *Investing in Employees*
  - *Dealing fairly and ethically with suppliers*
  - *Supporting the communities in which we work*
  - *Generating long-term value for shareholders*
- *Consider how you balance these commitments to various stakeholders and how you determine the best path forward, taking into considerations of all stakeholders interests and how some interests might conflict.*
  - *How do you identify some of the lesser known stakeholders? How do you identify their interests?*
  - *How do you identify stakeholder’s needs and concerns? How do you communicate with them? How do you provide them with access to the Board and your representatives?*
  - *How do you identify the value you are providing to each stakeholder? How do you determine the timeframe in which long and short-term value is identified and appreciated by each stakeholder?*