Chapter 1

Law, Value Creation, and Risk Management

A MANAGER'S DILEMMA: PUTTING IT INTO PRACTICE

JPMorgan and Its Hiring Practices in China: Networking or Bribery?

***Issue Presented:*Assume that you are the new manager of JPMorgan'sChina operations. Would you continue the Sons and Daughters program? Why or why not?**

Whenever engaging in international business development, managers are expected to exercise their responsibilities according to the laws and practices of the countries where they conduct business. However, a manager should also consider the ethical standards in the home country, where the firm is headquartered and where the board of directors will review his or her performance, as well as what the shareholders would consider ethically acceptable.

The manager must comply with the U.S. Foreign Corrupt Practices Act, which is discussed in Chapter 24. The manager should consult with qualified counsel to ensure that the firm's hiring practices fall within the scope of both U.S. and Chinese law. Hiring the children of government officials is common in China, particularly in the banking industry, and that business practice must be carefully weighed against American expectations of ethical business conduct. Even though it might be difficult to establish that hiring a particular individual resulted in business with a government official who was related to that individual, U.S. regulators are increasing their investigations in this arena. For example, it would likely be easier to prove a violation of the FCPA where "hard" evidence, such as invoices or receipts, showed that lavish dinners or gifts had been given to government officials and that business contracts with those officials subsequently arose. This situation involves the benefit of human relationships, something that is difficult to measure. As such, all aspects of the firm's hiring practices could potentially be scrutinized by government regulators both in the United States and China, including its recruitment strategies, the performance evaluations of the individuals hired, and e-mail correspondence with the government officials. The managershould also review the firm's code of conduct and take full advantage of any ombudsperson available. Although some firms apply different ethical standards depending on the country in which they are doing business, others (such as General Electric) have uniform global standards they apply to all their operations. Finally, while often difficult in practice, the manager should not sacrifice her personal integrity.

QUESTIONS AND CASE PROBLEMS

Question 1.1

***Issues Presented:* What public policies are furthered by this law? To what extent are there conflicts among the policies served and how will they affect the way the law in this area is interpreted, applied, and changed?**

The laws and regulations applicable to U.S. business in the early twenty-first century further four primary public objectives: promoting economic growth, protecting workers, promoting consumer welfare, and promoting public welfare. Other major economic powers tend to have laws that further these same objectives, albeit with varying degrees of emphasis on the different objectives and varying ways of furthering them. Indeed, much of the current debate on what constitutes good corporate governance turns on how much weight each country gives to the interests of shareholders, debtholders, employees, customers, and suppliers and to the protection of the environment.

Sometimes those objectives may conflict. For example, intellectual property protection may promote economic growth by giving incentives to innovate but may also create barriers to entry and increase the likelihood of monopoly pricing, to the detriment of consumers.

Question 1.2

Issue Presented: **What effect does this body of law or legal tool have on the competitive environment and the firm's resources?**

Law helps shape the competitive environment and affects each of the five forces that determine the attractiveness of an industry (buyer power, supplier power, the competitive threat posed by current rivals, the availability of substitutes, and the threat of new entrants). Law also affects the allocation, marshaling, value, and distinctiveness of the firm's resources. Under the resource-based view (RBV) of the firm, a firm's resources can be a source of sustained competitive advantage if they are valuable, rare, and imperfectly imitable by competitors and have no strategically equivalent substitutes. Conversely, failure to integrate law into the development of strategy and of action plans can place a firm at a competitive disadvantage and imperil its economic viability.

Question 1.3

Issue Presented: **Where does this body of law or legal tool fit in the value chain?**

Each activity in the value chain has legal aspects. From a firm's choice of business entity to the warranties it offers and the contracts it negotiates, law pervades the activities of the firm, affecting both its internal organization and its external relationships with customers, suppliers, and competitors.

Question 1.4

Issue Presented:**How can managers responsibly help shape this aspect of the legal environment?**

Managers can responsibly help shape this aspect of the legal environment by promoting economic growth, protecting workers, promoting consumer welfare, and promoting public welfare. They can also lobby for stricter laws that raise ethical standards rather than lower them. For example, rather than try to water down the U.S. ban on bribes, a group of firms created Transparency International and fought for international conventions to ban bribery. (This is discussed further in Chapter 2.)

Question 1.5

Issue Presented:**How could the managers in this case have avoided the litigation that ensued?**

At its core, legal astuteness is the ability of the manager to communicate with counsel and to work together to solve complex problems. For example, legally astute managers can (1) negotiate contracts as complements to trust building and other relational governance techniques to define and strengthen relationships and reduce transaction costs, (2) protect and enhance the realizable value of the firm's resources, (3) create options through contracts and other legal tools, and (4) convert regulatory constraints into opportunities. Court cases are akin to autopsy reports on transactions gone bad. When reading cases, students should be encouraged to ask how the managers involved could have avoided the dispute or resolved it without resort to litigation.

Question 1.6

Issue Presented: **What are the "moral aspects of choice" implicated by the conduct at issue?**

The systems approach to business and society recognizes that "business decisions consist of continuous, interrelated economic and moral components" and that "moral aspects of choice" are the "final component of strategy." It also builds on stakeholder theory's insight that firms have relationships with many constituent groups, which both affect and are affected by the actions of the firm.

Question 1.7

Issues Presented: **Does this conduct meet societal expectations? If not, what new laws would be likely to result if a substantial number of firms acted this way?**

Legally astute management teams appreciate the importance of meeting society's expectations of appropriate behavior and of treating stakeholders fairly. They accept responsibility for managing the legal dimensions of business and recognize that it is the job of the general manager, not the lawyer, to decide which allocation of resources and rewards makes the most business sense. Complying with the law is just the baseline for determining what course of action to follow. As Ben Heineman, former general counsel of General Electric, put it: "If the first question is, 'What is legal?' than the last should be 'What is right?'" The Foreign Corrupt Practices Act, the Sarbanes-Oxley Act, and the calls for further regulation in the wake of the subprime mortgage crisis are just several examples of how society responds to ethical behavior.

Question 1.8

Issues Presented:**Did the manager in this situation exemplify the four components of legal astuteness? If not, what could the manager have done differently?**

The four components of legal astuteness are: (1) a set of value-laden attitudes about the importance of law to the firm's success, (2) a proactive approach to regulation, (3) the ability to exercise informed judgment when managing the legal aspects of business, and (4) context-specific knowledge of the law and the appropriate use of legal tools. Legally astute managers recognize that compliance failures are what Max Bazerman and Michael Watkins call "predictable surprises" and constantly evaluate their products, processes, and business relationships to manage the risk of legal liability.

Chapter 2

Ethics and the Law

A MANAGER'S DILEMMA: PUTTING IT INTO PRACTICE

Is Tax Avoidance Ethical?

Issue Presented: **Are there any factors a company should consider before structuring its business to avoid U.S. taxes by shifting revenue to overseas subsidiaries located in jurisdictions with lower tax rates?**

Structuring a business to avoid U.S. taxes, including by shifting revenue overseas, is viewed by some as "smart business" in that it ultimately leads to higher profits for shareholders. Others see it as unpatriotic, even though tax avoidance is legal. In September 2014, the U.S. Department of the Treasury and the Internal Revenue Service issued regulations to "rein in" corporate tax inversions, whereby a U.S. multinational corporation restructures itself so that the U.S. parent company is replaced by a foreign parent to avoid the higher U.S. tax rates. To benefit from the inversion, the companies must meet certain requirements involving the amount of business activity in the home country of the new foreign parent and the shareholder ownership of the new foreign parent. The new rules, among other provisions, eliminate certain methods inverted companies used to access overseas earnings without paying U.S. tax; as a result, inversions may not make economic sense for future mergers. Press Release, U.S. Dep't of the Treasury, Fact Sheet: Treasury Actions to Rein in Corporate Tax Inversions (Sept. 22, 2014).

Ireland is a popular inversion site. More than fifty years ago, it adopted an "active tax policy" to attract foreign direct investment; it has modified the policy since to ensure it remains attractive. Nine of the ten leading pharmaceutical companies operate in Ireland, as well as Google, Facebook, and Twitter. Vanessa Houlder, Vincent Boland & James Politi, *Tax Avoidance: The Irish Inversion*, FIN. TIMES (Apr. 29, 2014). A partner in an Irish law firm said that inversions are an attractive process for shareholders that give a "real boost" to earnings per share, retained earnings and cash flow, with significant implications for acquisition premiums by "bridging valuation gaps for sellers" and in some cases exceeding sellers' expectations. *Id.*

The economic benefits of structuring a business to take advantage of foreign tax rates include the obvious cash flow savings resulting from the reduced foreign tax rate. One could argue that the benefits of that tax savings could be put to use by making new fixed asset purchases (machinery and equipment); spending more on research and development; paying employees better wages, particularly if many employees receive only the minimum wage; reducing employee contributions for health insurance; reducing an underfunded pension plan's liability; accelerating payments on debt (assuming there are no prepayment penalties); or paying shareholders a larger dividend. Although the economic benefits to structuring a business to take advantage of foreign tax rates are numerous, there are non-economic considerations. Patriotism is one of them. Not paying taxes in the United States means less tax revenue for the country, ultimately resulting in taxing others to make up for the shortfall or a reduction in government services. This burden may fall on those least able to pay the additional taxes, such as small business owners, thereby stifling them in their new ventures. Large corporations are generally viewed as less than sympathetic to the financial realities of the working class, and that reputation is furthered when the salaries, bonus, and compensation packages of top executives are publicized. Saving on taxes therefore may merely mean, to many, that the executives are the only ones reaping the benefits. While an important objective of most corporations is to earn a profit, and not to improve the living conditions of the truly needy, structuring a business overseas to avoid taxes, particularly when done in combination with outsourcing certain functions, may be seen by some individuals as supporting foreign governments when there is plenty to take care of "at home." Overtime, there can be a political backlash against big corporations if they are widely perceived as not being responsive to the needs of the populace.

Questions and Case Problems

Question 2.1

Issue Presented: **Is it unethical for a small company to change its operating policies when a natural disaster strikes to take advantage of the increased business?**

Many companies do reap a financial benefit from the increased business a natural disaster causes, particularly small local construction and clean-up firms. The point at which ethical behavior becomes unethical is, however, sometimes hard to determine. Door-to-door solicitation and discounts for customer referrals are common business practices and generally are not unscrupulous. Sales tactics that leave traumatized disaster victims with little time to make a rational decision can be unethical, especially when customers are left with the impression that if they do not accept the offered services, there will not be another opportunity to do so within a reasonable amount of time.

On the other hand, local construction and clean-up companies often operate in a "feast or famine" environment and need to take advantage of business opportunities to survive, regardless of their source. Accepting jobs on a cash-only basis may seem harsh, but the company may not have a line of credit on which to draw, and banking facilities may be off-line. Arriving with supplies leftover from a previous job might seem coercive to a homeowner, but it couldbe the most practical way for the construction company to use all available resources. On-the-spot hiring decisions sound harsh in theory, but small business operators realize that if they walk away from a potential customer, the customer is unlikely, or may be unable, to later commit. Asking for the entire amount of payment before a job is completed can appear overly harsh, even in a disaster situation, but it may not be economically feasible for a contractor to wait for insurance payments. Thus, it may be preferable to just require a substantial up-front payment.

Raising prices during a disaster is not always unethical—sometimes higher prices provide an incentive for others to send resources quickly to disaster-stricken areas, and higher prices can function as an incentive to overuse scarce resources. Regardless, charging twice the normal rate for a particular job when a disaster strikes does seem unethical. Contractors realize that victims may not be thinking rationally and will agree to any price just so the work gets done, and some contractors may capitalize on that. However, contractors may themselves be subject to higher prices by suppliers and must pass that cost on to their customers.

There is no formula to determine when behavior is ethical. The managers of all businesses, large and small, should review their firms'practices, even during times of disaster, to ensure they are not being unscrupulous. While it might result in the loss of some immediate revenue, customers who are treated fairly may very well use those contractors again.

[*See* Richard Mize, *Natural Disasters Attract Scammers*, DAILY OKLAHOMAN, May 25, 2013, at 5E; *see also* Chris MacDonald, *Post-Hurricane-Irene Business Ethics Roundup*, Aug. 29, 2011, http://www.businessethicsblog.com/2011/08/29/post-hurricane-irene-business-ethics-roundup.]

Question 2.2

Issues Presented:**How should a female employee respond to her male boss's insinuation that he is inviting her to a client meeting for her sex appeal rather than her intelligence and knowledge? Does this constitute illegal sex discrimination? How should the head of human resources respond?**

Allen Scot, Christine Bancroft's boss, is clearly acting unethically by telling Christine that he wants her to attend a client meeting for her sex appeal rather than her intelligence and knowledge of advertising. His behavior, while disrespectful, probably is not sufficiently severe or pervasive to constitute actionable hostile environment sexual discrimination, however. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and the discussion of other hostile environment cases in Chapter 13. If, however, Scot persists in treating Christine as "eye candy," then that may be illegal sexual stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded in part by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). In that case, Ann Hopkins was denied partnership in Price Waterhouse and was told that she needed to dress more femininely, have her hair styled, and wear more jewelry. The U.S. Supreme Court ruled that sexual stereotyping violated Title VII.

This situation puts Christine Bancroft in the unfortunate position of having to decide how to react to her boss's behavior. If her boss knew how badly she wanted to work with clients, maybe he was giving her the opportunity she seemed to want at any cost. There is no doubt that this would be a good, first opportunity for her to interact with a client. She might be inclined to go to the meeting and use the opportunity to advance her career and learn from her bosses. However, Christine cannot help but feel uncomfortable about being treated as "eye candy" for a client. Nonetheless, she risks jeopardizing her position at the company or losing her boss's favor if she complains.

Christine must, however, consider the long-term ramifications of condoning such unethical behavior. If she knows her boss will behave like that to her, then he most certainly will act the same way toward other female employees. If she can prevent other female employees from experiencing such offensive behavior, she should probably report his behavior to HR. Furthermore, there is a slippery slope argument here: if Christine shows her boss that she is willing to accept this small, disrespectful situation is she inadvertently giving him the okay to make further improper suggestions? He is not asking for sexual favors in return for a promotion this time, but if he gets away with this behavior, will he be more likely to use female employees in even more degrading ways in the future?

Christine has worked too hard to get her Northwestern MBA degree and her position at Scot Wayne More to be degraded and used for her looks. If Christine does not stand up for herself this time, it is likely that her boss will never respect her for her intelligence and knowledge about advertising.

If Christine feels comfortable talking to her boss about this matter, she could go to him directly and tell him how she feels. She can tell him that she is not comfortable going to a businessmeeting if her good looks are the only attribute she brings to the table. She can offer to do whatever preparation might be required so she can be a valuable part of the meeting. She can ask her boss to treat her with more respect in the future and let him know that she will report any similar suggestions to HR. Unfortunately, there is a risk that she could lose her boss's favor if she complains. To help protect against this, she might seek out the manager who interviewed her for the position and ask him or her how to handle it. This may give her "air cover" in the event her boss starts complaining about the quality of her work.

Alternatively, Christine could report the incident to HR, and perhaps ask to remain anonymous if that will ease her mind about reporting her boss. HR can advise her on the best course of action, encourage her to report future problems, and talk to her boss in her place. If Christine's boss makes any more comments like this one, she will have established a pattern of behavior on the record by reporting this incident. HR should certainly speak with her boss and remind him that this behavior is inappropriate and that it is illegal to retaliate against Christine for complaining. (This is discussed further in Chapter

13.) If it has not already been done, HR should rewrite the company's compliance manual to prohibit these types of remarks about an employee's clothing or looks. If this is already part of company policy, then Scot's conduct is all the more reprehensible.

As a beautiful woman, Christine should also recognize her obligation to act responsibly and professionally as well. If she does not want to be treated this way, and wants to be respected by her co-workers, she should be certain to dress and act professionally. It would be unethical on her part to flirt with male employees or wear enticing clothing to benefit herself at work. She may want to reconsider wearing overly sexy little black dresses to any company-sponsored functions, knowing that this type of situation could result.

This hypothetical is adapted from an example provided in Joseph L. Badaracco, *Defining Moments: When Managers Must Choose Between Right and Right* (1997), that involved race, rather than gender. A young African American investment banker named Lewis was invited to a client meeting simply because of his skin color, and felt awkward about the situation. Lewis was so conflicted that he made a list of pros and cons about whether or not to attend the meeting. For example "opportunity" was a major pro, but "phony" was on the list of cons. An excerpt from his thinking on the matter: "Now his firm was singling him out solely for his skin color, not for his talent. Lewis believed companies and clients should base decisions on performance, competence, and character, not on games of mix and match based on race, gender, and religion. Was including him as a token black really all that different from excluding him because he was black?" *Id*. at 12-13. Professor Badaracco further points out that this is not simply a case of deciding the right thing to do: "The challenge is deciding *which right thing to do*. Lewis has to choose between right and right, on a complex issue of personal integrity. His question was not *whether* to be ethical, it was *how* to be ethical." *Id*. at 13-14. Lewis resolved his dilemma by asking to be part of the presentation to the clients, and therefore enabling himself to feel that he was at the meeting for a reason related to his talent and not just his skin color.

<u>Question 2.3</u>

Issue Presented: **Is it ever ethical for an employee of a company to accept gifts from an individual or firm that does business or wishes to do business with that company? If so, under what circumstances?**

Zandra Quartney should decline the tickets to the Super Bowl offered to her by the makers of Brand One. Quartney is ethically obliged to decline any gift if her business judgment might be affected by such a gift, or if there would even be the appearance that her judgment might be affected. Even small gestures, such as dinner, should be accepted only if there are no strings attached. Given that Quartney is an ardent football fan, it is clear that she would greatly value tickets to the Super Bowl. In addition, there is a strong likelihood that her favorite team, the Steelers, will be there. Given the fact that Quartney must decide whether to cut Brand One'sboots or one of Brand One's competitors from her retail chain's line of shoes, accepting such a valued gift might in fact cloud her judgment. It would most definitely create a suspicion of unfairness. This is particularly true given that the brands are equally profitable and there is no easy way to decide which brand to cut. Even if Quartney were to accept the tickets and then decide to cut Brand One simply so that no one could accuse her of favoritism, this would be unethical. Quartney must make the decision based purely on what is best for her company. As a responsible manager, Quartney's first instinct should be to decline the tickets as politely as possible.

There is sometimes a fine line between business gifts and bribes. A bribe implies a clear-cut intention to win someone's favor. To decide whether the tickets are an out-and-out bribe, we would have to know more about the specific motivations of and information possessed by Brand One. If Brand One often showers significant gifts upon individuals who can make decisions favorable to the company, then it may be fair to say that Brand One in fact uses gifts to get favors. Such a policy would constitute a form of bribery.

It should not make any difference whether the person who offered the tickets to Quartney is a family member or a close friend. Quartney is ethically obligated to decline the tickets, given her position of power with respect to Brand One. In fact, if the representative of Brand One is a relative or friend, Quartney may have an even greater obligation to decline the tickets. Friendship and family ties should be kept separate from business relations and business decisions. Quartney's company has an ethical obligation to treat its suppliers fairly, and requirethem to compete on genuine competitive issues, not on having personal connections with the company's buyer, or showering the buyer with gifts.

Question 2.4

***Issue Presented:* Is it ethical for an employee of a company to accept a gift from a firm whose brand she plans to cut from her company's line of products?**

Under no circumstances should Quartney accept the tickets to the Super Bowl. Even if Brand One is clearly the line that she should cut, it is simply bad business and bad ethics to accept highly valued gifts from a business partner. The more Quartney values the tickets, the stronger the obligation to decline them. Quartney should not pay face value for the tickets. Why risk any perception of favoritism or even just the general perception that the company's buyer is offered valued gifts by her suppliers? Note that Quartney has an easy solution in this particular case—there is always an active, legal Super Bowl tickets market for those willing to pay the going price. Quartney will most likely have to pay far more than face value, however.

Quartney's actions should be the same even if she were sure no one would find out about the gift.Just because an action is not publicly knowndoes not mean it is ethical.

Question 2.5

***Issue Presented:* Is it ethical for a consultant to gather information from a company without revealing her association with its direct competitor?**

Viloudaki clearly cannot lie about her employer when gathering data; to do so would be fraud. She also should not solicit trade secrets or encourage others to violate any nondisclosure agreements; otherwise, she might violate the Uniform Trade Secrets Act or be liable for intentional interference with a contract.

Talking with low-level employees would be legal if done in accordance with these strictures. Its ethical character is a closer call. On the one hand, competitors should train their employees not to disclose sensitive data. On the other, taking advantage of low-level employees' ignorance seems questionable. Ideally, she would figure out a way to get permission from the higher level managers, perhaps by offering to share some of the results of the study. In any event, if she personally views the calls as unethical, she should not make them. Instead, she should talk with other consultants and managers in the firm and try to persuade them that she is right or let them persuade her that they are. She might also promote an industry code of conduct that sets high ethical standards, as Chartered Financial Analysts have done.

Question 2.6

***Issue Presented:* May an employee accept an expensive prize as a result of participation in a company-sponsored event?**

Although Wu was clearly meant to be the recipient of the prize under the terms of the contest, she has an ethical obligation to inform her supervisor about the prize and offer it to her employer. The gift is extremely valuable, and she went to the event as a company representative, not as an individual. The company may or may not allow her to keep the television. Wu should also consider how her supervisor and others would react to hearing about the television gift if she does not tell them herself. Wu should avoid the appearance of impropriety. In grey matters like this one, it is always best to err on the side of caution and act as ethically as possible. The television really belongs to the company, since the company sent Wu and could have chosen to send someone else just as easily. If Wu were a manager receiving the television (or a similar benefit) as a result of her affiliation with the company, she would have a fiduciary duty, and not just an ethical obligation, to inform the company.

The company should provide in the code of conduct or in the employment contract that gifts or prizes over a certain value received as a result of company affiliation must be reported to the appropriate authorities and offered to the company. This type of policy would have the additional value of discouraging employees from accepting gifts or bribes in general.

If Wu's manager finds out about the prize from a source other than Wu, she should confront Wu. She should explain to Wu that because she received the gift as a result of a company-sponsored event, she should have informed the company and offered the television to it.

Question 2.7

Issues Presented: **(a) Would it be ethical (or legal) to send a "friend" or "follow" request to a subordinate employee for the sole purpose of getting access to that person's "private" page? (b) Would it be ethical (or legal) to ask applicants to open their pages during a job interview? (c) If a manger finds information on a social networking site that may warrant disciplinary action, such as abusive comments about fellow employees or threats against the safety of the workplace, should the manager act on it in his or her managerial capacity? May an employee use a smart phone to secretly record a performance evaluation?**

(a) An employer or manager certainly has the right to "friend" employees. Accepting an employer's "friend" request, may have some unintended consequences, however.

The Genetic Information Nondiscrimination Act of 2008 (GINA) protects job applicants and employees against discrimination based on their genetic information. However, GINA includes an inadvertent acquisition exception to the general prohibition when a "manager, supervisor, union representative, or employment agency representative inadvertently learns genetic information from a social media platform which he or she was given permission to access by the creator of the profile at issue."Therefore if the employer is a "friend" or a contact of the candidate or employee, the employer may legally acquire genetic information on a social networking site as long as the employer did not make the friend request for the purpose of obtaining genetic information.

Becoming a friend just to "spy" on one's employees may be legal, but it raises ethics issues. Consider, for example, that an attorney may not "friend" somebody just to learn more about that particular person. Both the New York State Bar Association Committee on Professional Ethics and the Philadelphia Bar Association's Professional Guidance Committee recently issued opinions stating that such conduct would constitute deception.*See*Marie-Andrée Weiss, *The Use of Social Media Sites Data by Business Organizations in Their Relationship with Employees*, 15(2) J. INTERNET L. 16 (2011).

(b) Asking an applicant to open a personal social network page strikes many as a violation of privacy. Although certain states protect private employees from privacy violations, the U.S. Constitution only protects against violations by state actors, such as a government employer. Even if asking applicants to open their social network pages does not violate constitutional guarantees of privacy, it may cause ill will. At least six states, including California, Illinois and Utah, have enacted laws prohibiting employers from requiring job applicants to provide access to social media accounts that are password protected.

(c) Under these circumstances, *not* firing an abusive employee may place the employer at risk of being found that he or she negligently retained an employee. In *Blakey v. Continental Airlines*, 751 A.2d 538 (N.J. 2000), the New Jersey Supreme Court found that an employer has the duty to remedy a pattern of retaliatory harassment directed at an employee using a work-related forum, if the employer has notice of it. The*Blakey* employee had filed a charge of sexual discrimination and retaliation in violation of Title VII of the Civil Rights Act, alleging that co-workers posted defamatory messages accessible to employees on an online bulletin board, which pilots and crew had to use to learn their flight schedules. Employees were charged a monthly fee by the ISP for Internet access to the board, and part of this fee was paid back to the employer. Plaintiff alleged she gave notice to the employer by forwarding copies of the messages, but the court found that the record was inadequate to determine if the bulletin board was indeed connected with the workplace. It could therefore be difficult for an employee to prove that a social media site is a “work-related” forum, unless the employer creates a group, uses the site as a corporate tool, and actively participates in it himself.

The legality of an employee using a smart phone to secretly record a performance evaluation generally depends on state law. The majority of states have “single-party” consent laws meaning that an individual can make a recording of a conversation in which he or she participates without obtaining the other party’s consent. A minority of states require that all parties be aware the conversation is being recorded. Many corporations have implemented policies prohibiting employees from making unauthorized audio or video recordings;making such unauthorized recordings can result in termination. At the same time, a number of private employers have adopted policies, which state law often requires them to post in a conspicuous place, in which they state that employees have no reasonable expectation of privacy and that the employer has the right to secretly record employees’ key strokes and conversations and to use hidden cameras without cause. The U.S. Constitution limits the ability of public employers to invade public employees’ privacy right s in this way, and certain state constitutions protect even private employees.

Question 2.8

Issues Presented: **What ethical and business issues should a corporation’s CEO and board of directors consider when setting the salaries for the different types of workers it employs? Should the government play a role in establishing a minimum wage? Should the SEC require disclosure of the ratio of CEO pay to that of the average worker?**

This question asks whether a corporation has an ethical obligation to pay a living wage. In an article published in *The Standard* in 2000, “Silicon Valley’s Dirty Side,” author Gary Rivlin noted that in 1999 Cisco Systems CEO John Chambers was compensated at a rate (including options he exercised) that was 7,176 times what was paid to janitor Guadalupe Herrera (who earned less than $17,000 a year). The disparity between CEO compensation and average worker compensation continues to be wide (although not in the proportion noted at Cisco Systems). A June 2014 press release issued by the Economic Policy Institute reported that the average compensation of a CEO in 2013 was $15.2 million (including exercised stock options), or 296 times the amount an average worker was paid.

Clearly, a corporation is not legally required to pay its employees more than the legally mandated minimum wage.A number of companies, however, such as Costco and Gap, do pay their employees more than the minimum wage.Whether the impetus to do so is from a public relations standpoint or in the hope that a higher wage will attract more qualified employees, the workers benefit.

Federal legislation to raise the minimum wage has been unsuccessful. The Federal Minimum Wage Act of 2013 would have raised the minimum wage to $10.10 per hour by 2015 if it had passed. A number of states have enacted laws providing for increased minimum wages. For example, the minimum wage in the state of Washington was $9.32 per hour as of January 1, 2014, well in excess of the national rate of $7.25.

The Dodd-Frank Act authorized the SEC to implement various rules regarding the compensation of CEOs of publicly held corporations. Final rules were implemented requiring a shareholder vote on executive compensation (say-on-pay), but the vote is advisory only. The SEC proposed a rule requiring the disclosure of the ratio of the median annual total compensation of all employees other than the CEO to the annual total compensation of the CEO, but that rule had not been finalized as of October 2014.

The board of directors (which sets executive and other compensation) should strive to create a pay structure that permits the firm to attract top talent while ensuring that those at the bottom can make ends meet (per Rawles's veil of ignorance). In addition, even if the board looks just at the bottom line, research by Harvard Business School Professor Jay Lorsch demonstrates that large gaps in pay disrupt firm productivity. *See* Jay W. Lorsch, *CEO Pay: How Much Is Enough?*,HARV. BUS. REV., July-Aug. 1992, at 136.