Corporate Counsel

There’s a Legal Role to Play When the CEO Passes Away

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On Tuesday, Subway, the fast food chain known for its sandwiches, had sad news to share. The co-founder and CEO of the company, Fred DeLuca, had passed away, leaving his sister, Suzanne Greco, to run the company, at least for the time being.

[According to his New York Times obituary](http://www.nytimes.com/2015/09/16/business/fred-deluca-co-founder-of-subway-sandwich-chain-dies-at-67.html), DeLuca, who started Subway with a single restaurant in Connecticut in 1965 and expanded it to a franchise with more than 44,000 stores in 110 countries, was a real force within the business. He is said to have maintained a strong role in company operations, signing checks personally and often driving around the country in an old car to different restaurants to sample the food and speak to Subway franchisees and customers.

The Subway announcement raises a question that’s integral for businesses and general counsel: What should be done when a CEO is gone and a new leader is necessary, especially when the leader was such a driving force behind the company? It’s rarely easy, but companies can start by having a robust succession plan, as well as an idea of how they want to handle the process of negotiating a contract with the new executive.

Although finding and hiring the new CEO might sound like more of a job for human resources and the board of directors, there’s a role for general counsel to play. “I would think that the general counsel could be a quarterback of the process,” Sarah Rebosa, a partner at Cullen and Dykman said. “A lot of the decisions are made at the board level or in connection with the board, but the general counsel is the one very often on the ground with day-to-day operations and they could coordinate or at least facilitate the process.”

If the GC also happens to be the corporate secretary, giving them a very direct connection to the board, than there’s all the more reason for them to step up.

What’s important for general counsel and their colleagues is to ensure that there is in fact a succession plan at the company. A recent survey released by the Rock Center for Corporate Governance at Stanford University and the Institute of Executive Development shows that many companies don’t do planning as well as they could.

When asked how many people internally could step in if the CEO left tomorrow, [39 percent said zero](http://https/www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-survey-2014-senior-executive-succession.pdf), more than any other answer. Most respondents said they only took a look at the succession plan once a year, and a full 13 percent admitted that they only review their company plans in the event of retirement or emergency.

Rebosa explained that the elements of a succession plan are apt to change depending on the size and ownership structure of the company. For a smaller, closely held family company, for instance, there are internal considerations like who in the family owns which shares and which family members are on the board. In contrast, for a public company, there are outside shareholders’ needs and desires to worry about when picking a new leader.

At least for companies that are not family owned and run, Rebosa said that it’s helpful to search for the new CEO outside the company, but not exclusively. “If you only look outside, you risk alienating your current employees, which could be detrimental, depending on who you potentially alienate,” she said, advising a “contemporaneous” approach that combines an internal and external search.

The authors of the Stanford report suggested that companies—at least those that are not family owned and operated—follow some common sense advice when growing internal talent. They recommend treating succession as a continuous process that doesn’t just start when a CEO is on their way out, assigning mentors to make the talent development process better and more objective, and judging potential new execs not just on current business skills needed to be the big boss, but on skills that will be needed to fill the CEO seat down the road.

Unfortunately for general counsel and their colleagues, once the selection process is over, another obstacle still lies ahead—negotiating the employment contract. “The reality is, I’ve seen many different types of contracts,” Robert Fisher, a partner at Foley Hoag and deputy chair of the firm’s labor and employment law department said. “I have some clients that take the position that every employment contract should be at-will, there are no extra contractual benefits and no promised eventual benefits. I have others that have very specific periods of time that they agree to employ people and have very specific severance provisions.” Then, he added there are many that fall somewhere in between those two ends of the spectrum.

It’s most important, according to Fisher, that whatever benefits companies want to provide top executives at termination of the relationship, they are spelled out as well as possible at the beginning. “I’ve seen a lot of unnecessary fights about that, mostly because the language isn’t clear,” Fisher said. “It wasn’t spelled out as much as it should have been exactly what the company is willing to pay, or it was never addressed at all and parties have very different ideas about the nature of the relationship.”

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