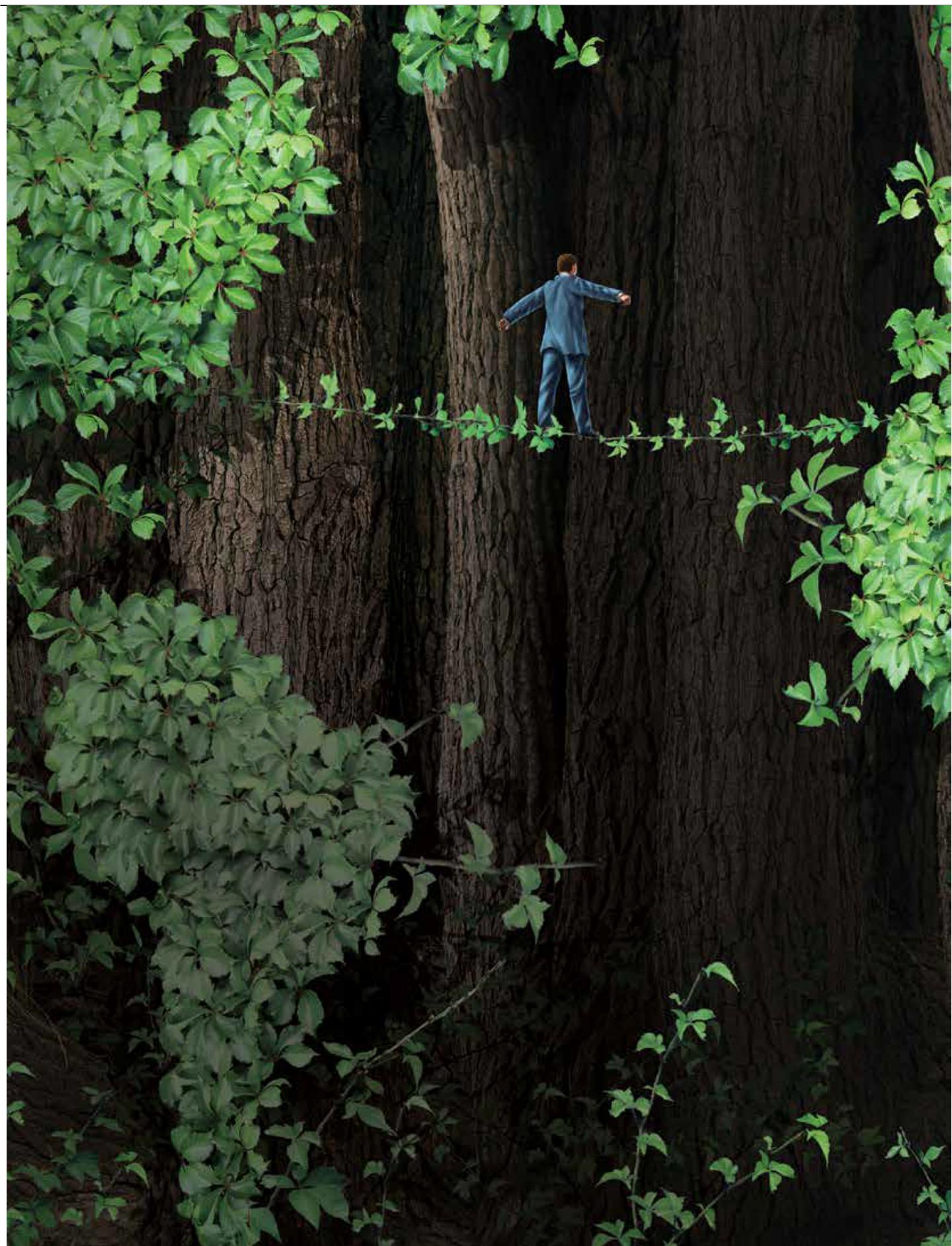
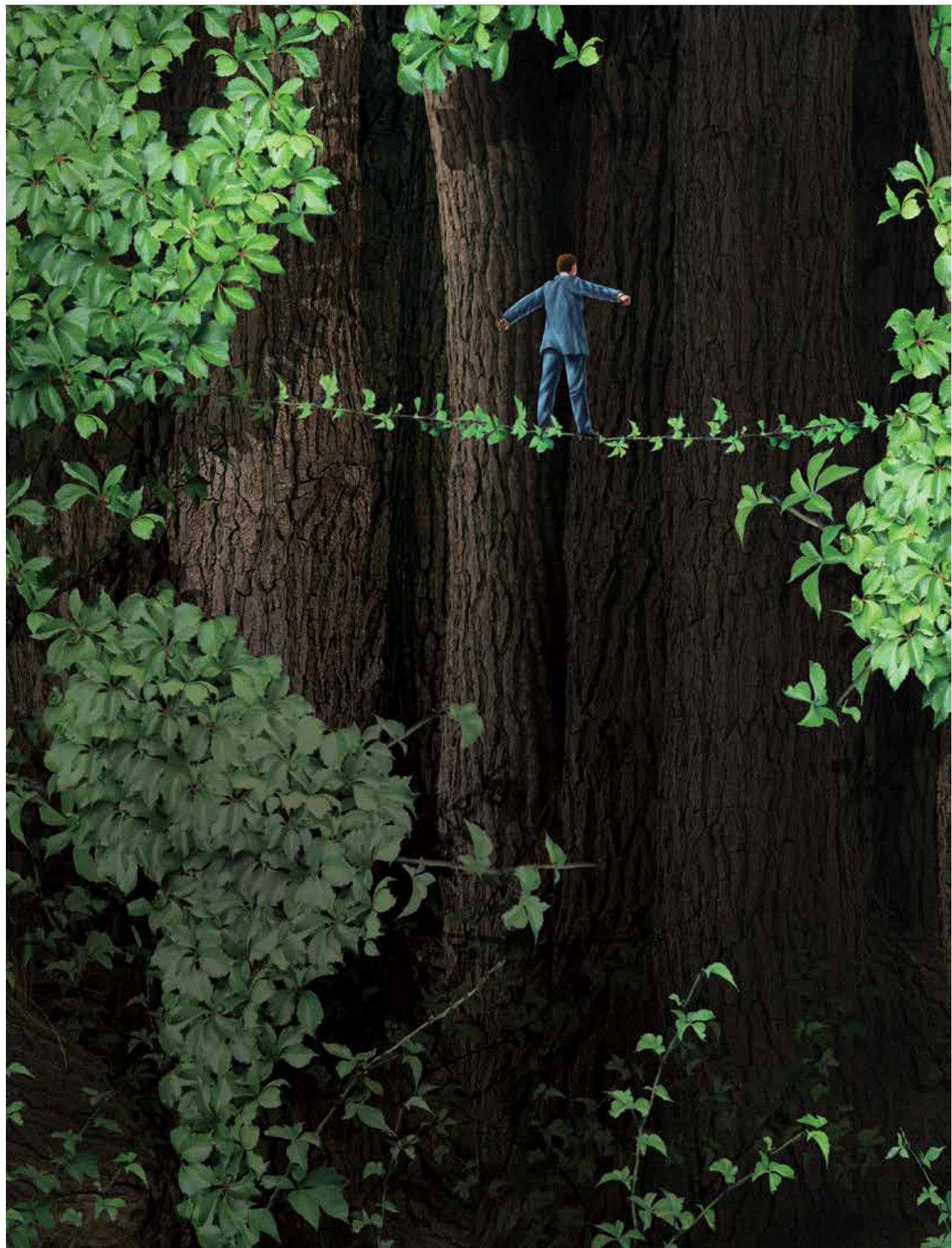




## **How In-house Counsel Can Help Their Organizations Navigate Global Uncertainty**

**Employment and Labor**





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## CHEAT SHEET

- **Be informed.** As in-house counsel are often the first people consulted to assess risks, stay abreast of international issues that can impact the business.
- **Dedicate a team.** Identify and create a core team to provide ongoing assessments of important topics, such as tariffs, trade agreements, immigration policies, etc.
- **Engage outside counsel.** Fill gaps in your knowledge or expertise by seeking help from law or consulting firms.
- **Avoid silos.** Share analyses and information with all stakeholders to encourage decisive action.

“It just seems like everything is in flux.”

This is a consistent theme we are hearing from legal and business leaders around the globe. The international framework they have relied on to conduct business for years is shifting, with every month bringing new headlines that add to the uncertainty over tariffs, immigration, Brexit — you name it.

In fact, some top legal officers who have worked in international business for decades say they have never dealt with this much uncertainty over multilateral agreements.

“No, never. And it’s basically just because of the trade battles between the United States and the world,” says the general counsel of a large manufacturer with operations in North and South America who requested anonymity. “The level of uncertainty is almost on an hourly basis. Even if US law doesn’t change immediately, the potential and the reaction from foreign countries creates uncertainty over how it’s going to be tomorrow and how that’s going to impact the decisions that you make today.”

Our training as lawyers to synthesize complexity puts us in position to create 30,000-foot summaries that help organizations know the basics, raise critical questions, and lay out the next steps.

How do legal departments navigate this reality? What are the best ways for in-house counsel to stay abreast of shifting policies, diagnose potential risks, and help their organizations set a course through murky waters? These are questions that not only multinational corporations are struggling with, but also smaller businesses and nonprofits. Everyone is turning to their lawyers to help make sense of the changing landscape.

Based on our experience advising a multibillion-dollar global manufacturer in the auto industry, as well as a wide variety of international companies with US operations, there is a roadmap that legal departments can follow to put their organizations in a strong position to deal with uncertainty. These tips apply to navigating virtually any type of uncertainty, although we will also tackle some of the specific policy concerns that businesses have raised regarding tariffs, immigration, and free trade in North America.

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## **Serve as the tip of the spear**

The reality is that in-house attorneys are often the first people asked questions about risks, whether they are related to international trade agreements or a myriad of other topics. For this reason, it is critical that in-house lawyers take ownership to stay on top of the issues that impact their organizations. Although it is not possible to have expertise on every subject in question, the in-house team can play an important role in quickly assessing the issue and bringing in outside counsel to help where necessary. Our training as lawyers to synthesize complexity puts us in position to create 30,000-foot summaries that help organizations know the basics, raise critical questions, and lay out the next steps.

In this way, legal departments can serve as the tip of the spear. In-house counsel can be both the catalyst for raising an issue and the ones who drive it forward, ensuring it gets the attention it requires. The key is making the issue understandable, boiling it down into a few PowerPoint slides or a short memo that, for example, lays out the highlights of a bilateral trade deal and the five things the organization really needs to consider in light of it. This is not to say that legal departments will have all the answers, but because in-house attorneys work across business units, what they often do have is the best perspective on who the internal experts would be to bring critical questions to the forefront. They also often know the key players who need to come together for the next steps.

## **Bring together a core team**

Legal departments can play a leading role in identifying and creating a core team to provide ongoing assessments of tariffs, trade agreements, immigration policies, or any other area of importance to a business. A manufacturer tracking the potential impacts of tariffs, for example, could bring together a group of internal experts on sales, finance, taxes, customs, and logistics. If the focus is immigration, then the core team may instead include human resources specialists for expat issues, accountants or tax advisors, external immigration counsel, and the leaders of functions whose employees are impacted.

Once the core group has been identified, it is easier to bring it together quickly to act when big developments occur. It is also important to schedule regular meetings so that the core team remains vigilant, communicates openly, and gets the issues the attention they deserve within their respective units on a timely and efficient basis.

## **Provide neutral analysis**

The mission statement of a legal department is generally to protect the company. That puts in-house counsel in a unique position within their organizations because they are above the fray between various business units or functions — they serve in staff positions that are focused on the entire enterprise.

The neutrality that results from that position can be extremely useful when it's necessary to drive uncomfortable questions or raise tricky issues that impact every function — but which may also impact certain functions more than others. This neutrality gives in-house counsel a lot of credibility in those situations because they bring a broad perspective to the table, rather than a single perspective focused on sales, logistics, marketing, or any other isolated group.

Providing that type of candid, neutral analysis is especially important when navigating uncertainty.

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This is true both within the legal department itself and in conversations with other functions and upper management. Your job is to lay out the issue exactly as it is, highlighting the uncertainty and explaining the risks that stem from it. You are also there to ask probing questions. Is it worth the risk to keep our strategy the same, or should we look for alternatives with lower risk profiles?

In-house counsel must also recognize the limits to their role in the decision-making process. You can provide recommendations and ensure that executives and managers are better informed when they make the call. But the ultimate decision usually comes from above, and it is then your job to help carry it forward.

## **Know when you need outside help**

It is also essential to provide a candid assessment of where your own expertise is lacking. Be honest about the gaps in both the legal department and the broader organization and seek outside help in those areas before an issue becomes a problem.

Law firms and consulting firms are often the first places in-house counsel turn, and for good reason. They can be critical members of the team and provide the depth needed on complex, niche issues like trade barriers and visa policies. If the trade disputes continue and become more systemic, many legal departments, even at larger corporations, will need to seek outside assistance. There are global manufacturers that choose not to alter their supply chains or relocate staff or production without some sort of external expertise.

Of course, there is a cost impact to seeking outside help, and it is the daily struggle of in-house counsel to mitigate that impact. With critical business issues though, especially those that are the subject of persistent news coverage, it can be easier to sell the value of seeking outside help within your organization. The core, cross-functional team you have assembled to address the uncertainty can also help with this. When all of the internal experts recognize they do not have the answer, that creates a strong argument for finding outside help.

Beyond providing expertise that a business may lack, outside counsel can also bring different perspectives to an issue. This is particularly true for outside counsel with whom legal departments have built a partnership — they are more likely to understand your business and help identify blind spots.

## **Avoid making decisions in a silo**

After turning to external resources, in-house counsel generally should again not make the decision but rather ensure that the analysis makes it back to the core team and other key personnel internally. In fact, the importance of keeping everyone on the same page applies to every facet of navigating uncertainty. When people go down a path they think is best without taking into consideration the other functions, bad decisions result.

Serving as the driver for collaboration across functions is another area where in-house lawyers are in a prime position to help guide the company through potential risk. One of the fundamental benefits that the in-house team should utilize is the direct access to various functions, including the working relationships they have with many people across those functions. When you need to bring up important topics that may not seem like a day-to-day concern within each business unit, those relationships pay off — people across the silos will listen to you.

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The in-house team can also serve as an excellent incubator for ideas that impact a variety of business units. The demands of individual business roles can crowd out time for dealing with what can seem like esoteric legal questions. On the other hand, analyzing those types of questions is part of what in-house attorneys are paid to do. This allows the in-house team to, once again, serve as the tip of the spear, providing the initial assessment and then bringing the key players together from across silos to discuss next steps.

In-house teams need to aggressively pursue open communication across their organizations. This will put them in the best position to quickly — and successfully — adapt to changing legal landscapes.

Breaking down silos and preventing them from being an excuse not to act is especially important amid accelerating uncertainty. In-house teams need to aggressively pursue open communication across their organizations. This will put them in the best position to quickly — and successfully — adapt to changing legal landscapes.

## **Find new ways to stay informed**

It used to be that taking continuing legal education (CLE) courses a few times a year was a sufficient plan for professional development and keeping yourself up to date on current legal challenges. In today's news cycle, the direction of the international framework can change weekly. It is imperative that in-house attorneys also find other ways to stay informed.

Make no mistake: CLEs are still great tools. But in-house attorneys also need rapid-response sources of information. Those can include a wide spectrum of news sources, industry-specific newsletters, trade magazines, and even podcasts. The upside to today's media landscape is there have never been more — and more convenient — ways to consume news. By seeking analysis from a variety of sources, you will better position yourself to serve as a catalyst in assessing changes that impact your organization.

## **Putting it into practice**

### **US and Chinese tariffs**

The roadmap we have laid out above can apply directly to legal departments helping their businesses navigate trade disputes, including between the United States and China. The on-again, off-again fight between the world's two largest economies has been challenging for any business to plan for.

To help steer this conversation, inhouse counsel should identify the core internal experts to be part of the cross-functional team described above, set a regular meeting schedule, and work collaboratively across the organization to keep everyone on the same page as major developments occur.

For a manufacturer, closely monitoring the list of products on which countries are imposing — or considering imposing — tariffs is a critical task for that core team. But that may not be as simple as it sounds.

“You could do the best that you can to search that list and define what you know your company deals with as far as raw materials and/or finished products,” says the trade and government relations

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director of a global manufacturer who requested anonymity. “But then you also need to know that you might just be a component of some other, bigger item, which means your customer may be impacted whether or not your product is on the list. No matter what, it might mean the customer needs to adjust his strategy on what he’s buying from you.”

Because of that complexity, this is an area where outside expertise can be extremely valuable, whether such expertise comes from attorneys, consultants, or trade organizations. Although some trade organizations have been reluctant to take a strong position on the tariffs, as their members consist of both winners and losers depending on the tariff, the organizations are often a good source of up-to-date analysis and background information.

## **Business immigration**

Immigration is another area where, for any multinational corporation, there is a great deal of uncertainty. Many multinational businesses have traditionally used L and E visas to bring employees to the United States on a temporary basis. However, under the Trump administration, the level of scrutiny has gotten much, much higher and the processing times have gotten much, much longer.

The evolving review standards have created significant uncertainty with respect to planning personnel needs. One of but many examples we have seen involves a manager at a midsize business who filed what should have been a straightforward extension for an L visa, which had already been approved twice before. The only thing that had changed was that the company had grown. Nevertheless, US Citizenship and Immigration Services (USCIS) requested additional evidence. The manager then submitted much more information than had been necessary even a year earlier, and USCIS still denied the extension.

That example is indicative of the increase in requests for evidence and denials that businesses regardless of size or industry are experiencing with their immigration cases. Over the past two years, USCIS announced several policy changes, including making it even easier to reject applications without requesting more evidence in the first place and abolishing deference given to prior adjudications, which is what came into play for the manager’s extension.

Amid this climate, in-house counsel once again need to serve as the tip of the spear, helping their businesses understand and adapt to the changing interpretation of US immigration policies. Providing neutral, candid analysis is key in this area: You need to set expectations that the traditional timeline for transferring an employee to the United States no longer applies. For most nonimmigrant visa categories, the earliest you can apply is six months before the proposed work date, but planning should start even earlier. Being prepared and diligent as early as possible gives you the best possible shot of getting through the process on time.

In addition to our general tips above, there are specific things legal departments can do to put their companies in a good position to meet their immigration needs. With L visas, for example, there has been increasing pushback from USCIS on whether employees fit into the required categories: executive, manager, or specialized knowledge employee. Multinational businesses often rely on those types of employees to help with the process of opening a new facility or expanding US operations.

Partnering with outside counsel who have been helping businesses navigate that pushback can be invaluable. Some have developed checklists based on the evolving questions USCIS asks in its requests for evidence. Examples for L-1A Executive/Manager applications include:

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- If the beneficiary does not have direct reports, please explain how the beneficiary manages the function or component over which he or she has authority. Describe how that function is “essential” (i.e., “core”) to the organization.
- How is the beneficiary relieved from performing non-managerial tasks?
- What sort of discretion does the beneficiary have to make decisions regarding the department or division over which he or she has responsibility?

Examples for L-1B Specialized Knowledge applications include:

- State the minimum time required to obtain this knowledge, including training and actual experience accrued after the completion of training.
- Provide details on what assignments you have done that significantly enhanced the petitioning organization’s productivity, competitiveness, image, or financial position.

By addressing these likely questions from USCIS in the initial application, petitioners can prevent some of the back-and-forth that drags out the process. Businesses need to provide as much detail as possible to achieve the higher level of proof now required.

That is also true for E visas, which apply to temporary workers from countries that have a commerce treaty with the United States. Unlike the L application, E applications are done by the applicant directly at a US Consulate in his or her home country. Consulates are also becoming somewhat stricter in how they review cases, so it is very important that the person can explain exactly why they are applying under that category and how they qualify. These interviews can last as little as five to 10 minutes, and that can be all it takes to blow the whole case.

In addition to the standard L or E visa options, it can be helpful to review more critically than ever before if there are alternative categories available that may better fit the needs and timelines. For example, the L Blanket process, a B1 in lieu of H-1B, a TN, or H-3, could be considered. Each has its own advantages and disadvantages, and working through all strategies can be helpful in these unpredictable times.

Another thing to keep in mind amid our globalized business environment is how mergers and acquisitions impact temporary work visas. Foreign national employees can lose their legal status as a result of certain corporate changes. With L visas, ownership changes may at a minimum require amended applications and, in the case of a foreign company becoming a self-standing US company, may result in no longer qualifying for the L at all if the US company has no other operations abroad. E cases are based on the ultimate nationality of the parent company. We have seen a trend of Chinese companies buying majority positions in European companies, and since China does not have an applicable treaty with the United States, the European workers previously under an E visa no longer qualify to stay in the United States without pursuing an alternative visa category.

## **North American trade**

Free trade in North America is an area where uncertainty has diminished but not gone away entirely. After months of threats made by the United States to pull out of the North American Free Trade Agreement (NAFTA), the three partners agreed to the United States-Mexico-Canada Agreement (USMCA). The immigration aspects of the new deal are virtually the same as in NAFTA. But there are other changes that will impact car manufacturers and other businesses across the continent.

The automotive industry in particular had thrived off of NAFTA and the stability it created for more

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than 20 years. The treaty made the sourcing and manufacturing of vehicles almost seamless across two North American borders. Although USMCA is a much better outcome than a reality without any agreement, it will cause some disruptions as companies adjust to new labor, wage, and content production rules.

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Exactly how those will be implemented by the three countries is still an open question. (Only Mexico had ratified it by the date this article went to print.) During this period, in-house lawyers should assemble a core, cross-functional team to monitor the progress of the deal and analyze the potential impact of its rules. The other tips from above apply equally here, including finding new ways to stay up-to-date and avoiding decision-making in a silo. Evaluating the new requirements will be a major project for any company, as they will need to look at all of their production across North America and identify the costs and benefits of the new deal.

## Conclusion

For in-house counsel, it appears that we are in the beginning of a new normal in international relations. Increasing tariffs, shifting free trade alliances, and tightening immigration policies mean that businesses face a broad scope of uncertainty that can impact their bottom line.

Legal departments have a unique skillset to help their organizations navigate this reality. By serving as the tip of the spear, staying on top of the issues, and bringing together key players, in-house counsel can provide immense value. In essence, they can strengthen the backbone of their company's entire decision-making process, helping to ensure that executives and managers have the information they need to make the best decisions.

In this era of predictable unpredictability, the importance of the legal department will only grow as both a catalyst in raising issues and in driving forward solutions.

## ACC EXTRAS ON... Employee engagement

### ***ACC Docket***

Keep the Energy Up with an In-house Rotation (Nov. 2018).

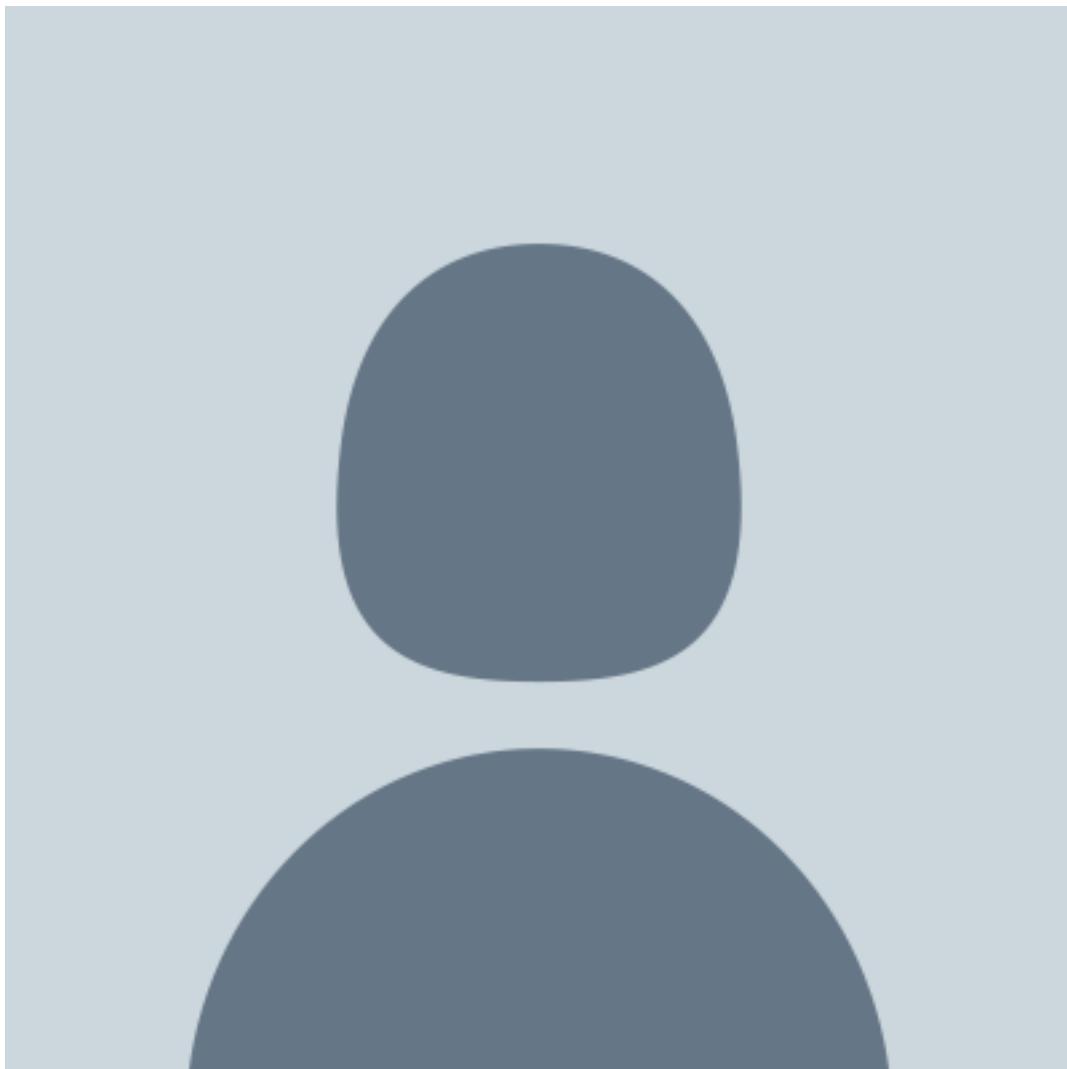
How to Conduct and Use a Performance Evaluation to Boost Your Department (June 2017).

### ***Sample Forms, Policies, and Contracts***

[Employee Engagement - Internal Resource Management \(June 2018\).](#)

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Vince Pearson



Corporate Counsel

Draexlmaier Automotive of America

Vince Pearson serves as corporate counsel for Draexlmaier Automotive of America, where he has engaged in the private and governmental legal sectors throughout the United States and Germany for more than a decade.

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Elizabeth Gibbes



Elizabeth Gibbes leads Parker Poe's International Business Practice, helping to coordinate how the firm serves clients around the world. Gibbes counsels a variety of companies on immigration and corporate matters, serving as outside "general counsel" or assisting with specific legal issues as they arise.

