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GETTING IT “WRITE”

HOW AND WHEN TO PUT IT IN
WRITING AS AN EMPLOYER

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When Should You “Get It In Writing?”

- Always?
- Never?
- Or it depends?



And the Lawyer Says:

- It depends.
- The key is to be consistent and clear.
- Be prepared to live with whatever is in writing and have some way to track receipt.



HIRING

- Choices:
 - Offer Letter.
 - Employment Agreement.
 - Nothing at all – i.e. straight up at-will.



HIRING

- Nothing
 - The at-will employment relationship favors the employer – you may terminate for no reason or any reason at any time*. (*as long as you do not break the law)
 - Certainly, there is an argument that it pays to leave well enough along.
 - If you have a straight-forward hire and a good handbook/manual/policies (“HMP”), no offer letter is fine.



HIRING

- Offer Letter
 - Important if you have weak or non-existent HMP.
 - Can be used to clarify issues raised during the recruitment process and set expectations from both parties.
 - Typically not for a term and should contain affirmation of at-will status.



HIRING

■ Offer Letter

– Typical Provisions:

- Salary and benefits (including leave).
- Job description.
- Reporting requirements (who, when, where, including any telecommuting allowance).
- Conditional offer if final screening yet to be performed.
- Indemnification for existing restrictive covenants.
- Confidentiality and property return/ownership
- Incorporation by reference of HMP.
- Should be signed and returned.



HIRING

- Employment Contract
 - Typically at odds with the at-will concept, and it should be drafted as such.
 - Used as a recruitment and retention tool.
 - Used to protect highly sensitive and proprietary information through the use of restrictive covenants.
 - Normally recommended only for executives, professionals or confidential (i.e., IT) positions.



HIRING

■ Employment Contract

– Typical provisions:

- Term
- Pay and benefits – including bonus, profit sharing, expenses, training, club dues, retirement, health, leave
- Scope of employment and reporting requirements
- Termination:
 - Without cause (severance)
 - With cause (without severance)
- Indemnification and Cooperation
- D&O Insurance



HIRING

- Employment Contract
 - Typical provisions (cont.)
 - Change in Control
 - Non-disparagement
 - Restrictive Covenants (see *infra*)
 - Integration
 - Assignment (clear description of parties)
 - Jurisdiction and choice of law
 - Attorney's fees and costs of enforcement
 - Severability



DURING EMPLOYMENT

- HMP
 - Should an employer have a handbook/manual, or just a set of policies?
 - Form over substance, as long as all policies are given to employees and are applied uniformly and consistently.



DURING EMPLOYMENT

■ HMP

– Typical Provisions:

- EEO policy
- Anti-Harassment Policy
- Affirmative Action Policy (for government contractors)
- Open Door/Reporting policy, with anti-retaliation commitment
- Computer usage, internet and social media policy
- Confidentiality and other restrictive covenants
- Company property designation and return policy



DURING EMPLOYMENT

■ HMP

- Typical Provisions (cont.):
 - Payday information, including prohibition on unauthorized overtime
 - Leave information, including holiday, vacation, sick and personal days, long with clear explanation of FLMA and military leave
 - Safety section – workplace violence, drug testing
 - Health information, benefits (COBRA) and EAP
 - Contract disclaimer – affirmation of at-will status
- Should have sign and return procedure



DURING EMPLOYMENT

- Are you required to discipline in writing?
- Are you required to give written performance evaluations?
- No, but be consistent.



SLIGHT DIGRESSION ON RESTRICTIVE COVENANTS

- Restrictive covenants such as confidentiality provisions, non-compete agreements and non-solicit agreements need to be:
 - in writing
 - signed by both parties, and
 - supported by sufficient consideration
- Should be initiated at beginning of employment – must be supported by alternate consideration is after that point.



Every Employer Has...

- Protectable clients
- Protectable information
- Protectable human capital



Every Employer Has...

- Customer identity and goodwill
- Customer information
- Sales data
- Profitability
- Financial projections



Every Employer Has...

- Business plans
- Marketing strategies
- Recruitment efforts and data
- Trade secret information
- Other confidential and proprietary information



- Your current employees are necessarily exposed to much, if not all, of this protectable data.
- Effective restrictive covenants can help to protect this information and data.



- Most employers also have a desire to retain key employees, prevent them from moving on to competitors and prevent them from stealing clients.
- Don't let your workplace become the Wild, Wild West, or worse, The Office:





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- Effective restrictive covenants can protect you from unfair competition and loss of key employees.
- These protections are essential to remain competitive given today's transient workforce.
- However, the law generally *disfavors* restrictive covenants as restraints of trade.



In general, enforceable restrictive covenants have the following characteristics:

- They are geographically reasonable;
- They are temporary;
- They are supported by valid consideration;
- They are in the public's interest;
- They are limited to protecting the confidential and proprietary information of the employer; and
- They are not designed to prevent a former employee from making a living.



Non-competition Clause

- Generally prevents your employee from leaving you and starting a competing business or joining another employer that directly competes with you
- Must be reasonable in duration and geography
- Best if directly related to services performed by former employee



What is a reasonable duration or geographic scope for a non-compete?

- Depends on the nature and scope of the business
- Need to fall back on “reasonableness” and assess the facts of each individual employment scenario
- Longer non-competes must generally be of smaller geographic scope



What is valid consideration?

- Initial employment
- Continued employment
- Changes in conditions of employment



The Bottom Line

Non-competes should be reasonably tailored to protect you from unfair competition by a former employee, NOT to penalize that former employee.



Non-solicitation Clauses

- Designed to protect your contacts as well as your current employees
- Must also be reasonable in geographic scope and duration
- Geographic scope often replaced by a well-written client restriction



Confidential Information Clause

- Designed to protect the information that your competitors should not see
- You must accurately and defensibly define “confidential information” and designate any legal trade secrets
- You must make reasonable efforts to protect this information and keep it confidential
- Duration and geography not factors



Enforcement Provisions

- Injunctive relief
 - Get property back
 - Stop competition
 - Stop employee raiding
 - Stop unfair competition
- Liquidated damages
- Costs and attorneys' fees
- Forum selection



DISTRICT OF COLUMBIA

- DC permits restrictive covenants to be based on initial employment, continued employment or retention of job
- DC has not formally adopted a “blue pencil” rule, but has enforced part of an agreement while striking offensive language in a number of cases
- Thought to enforce covenant not to compete if employer terminates employee



MARYLAND

- MD also permits restrictive covenants to be based on initial employment, continued employment or retention of job
- Though unsettled, MD appears to approve of both true “blue-penciling” and striking offensive language
- MD injunction standard is high
- Cannot get injunction and liquidated damages



VIRGINIA

- Consideration is an unsettled area of law in VA; it is clear that continued employment is *not* sufficient
- Ambiguous scope, term or geography will be struck
- No modification or “blue-penciling”
- High injunction standard
- Watch strong covenant of good faith and fair dealing



Overly Broad or Poorly Drafted Restrictive Covenants are Problematic

- Likely to lose in court
- Will lose time and money attempting to enforce
- Will not be an effective deterrent
- One loss or poor settlement will lead to more violations



FIRING

- Separation and Release Agreement
 - Necessary in some circumstances
 - Troublesome termination
 - Protected category
 - High salary
 - High profile
 - Employer must be prepared to “buy” release



FIRING

- Separation and Release Agreement
 - Typical provisions:
 - Date of termination - mutual parting, with non-disparagement
 - Severance with specific terms (withhold taxes)
 - General Release (for all entities), with promise not to sue
 - OWBPA language, consult a lawyer, 21 days to consider, 7 days to revoke ADEA release
 - Survival of Restrictive Covenants



FIRING

- Separation and Release Agreement
 - Typical provisions (cont.):
 - Integration
 - Confidentiality
 - Jurisdiction and choice of law
 - Attorney's fees and costs of enforcement
 - Return of company property
 - Breach of any term is a material breach and remedy
 - Severability



QUESTIONS?

