Re-using Form Employment Agreements? [Have Your Lawyer] Look Before You Leap!

Insights
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Allow me to begin this missive by painting a picture all too familiar to many HR professionals: The line of business that you support just recruited a key new team from the competition and they are set to begin soon. Consequently, the line of business is scrambling to finalize the financial details and wishes to have the new team's on-boarding paperwork ready to go right away, as in yesterday. The pressure is on – you need to prepare, among other things, employment agreements for each of the new hires. Then, all of a sudden, you remember that a year or so ago, your outside employment counsel provided you with a solid employment agreement for a position similar to the new hires' roles, it even contains what the line of business considers the necessary restrictive covenants (i.e., covenants not to compete, solicit, etc. upon termination of employment). Time is of the essence, the temptation is strong, where's the harm in simply reworking a pre-existing template?

Sound familiar? No doubt. Whether it's a rush to onboard a new employee or an interest in avoiding unnecessary legal spend, the temptation to re-use a form employment agreement rather than asking for an update from outside counsel can be quite compelling. However, as Benjamin Franklin once said, "an ounce of prevention is worth a pound of cure." That is, a quick call with your trusted employment counsel may help you avoid otherwise unforeseen pitfalls in the diverse and ever-changing landscape of employment agreement enforceability.

Indeed, the law surrounding employment agreements, and most particularly, employee restrictive covenants, is in a near-constant state of judicial review. For example, in Pennsylvania, trial courts have generally held that an employer must offer an employee some sort of consideration, such as an offer of initial employment or a promotion, in exchange for the execution of a restrictive covenant. However, in 2015, the Pennsylvania Supreme Court took up the case of *Socko v. Mid-Atlantic Systems of CPA, Inc.*, to determine whether under the antiquated and rarely evoked Pennsylvania Uniform Written Obligations Act ("UWOA"), a covenant not to compete is enforceable absent any consideration at all, simply because the subject contract contained the talismanic language: "the signer intends to be legally bound." In 2014, the Superior Court (Pennsylvania's intermediate appellate court) in Socko upheld a trial court's decision that covenants not to compete are invalid in the absence of consideration, even where the employee expressly agrees to such contractual language. Then, in November 2015, the Pennsylvania Supreme Court agreed with the Superior Court, providing, for the first time, mandatory precedent for trial courts to follow on this issue.

Moreover, not only are intra-state laws in constant flux but few areas of law also differ as greatly from state to state as do the laws controlling the enforceability of employee restrictive covenants. For example, in Pennsylvania, the continuation of pre-existing employment is generally not sufficient consideration for a covenant not to compete but it is in New Jersey, and in California, covenants not to compete are almost entirely prohibited by statute. Similarly, different states have different rules regarding to what extent you can restrain a former employee, based on the function that he or she served for your company. In other words, the restrictive covenants that are enforceable against your President of Sales may not be enforceable against his lower-level reports.

So, although your form employment agreement is a tempting shortcut, there are a number of considerations such as (i) whether the agreement is current and; (ii) the position, responsibilities, and location of the particular employee, which must be addressed to ensure that an employment agreement is appropriate and enforceable. As such, HR Professionals are well advised to obtain their employment counsel's buy-in before using a form employment agreement. Indeed, ol' Ben's adage rings true – a quick dose of information from your employment counsel may help your company avoid a serious headache down the road.

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