Pitfalls in employment documents

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New year, new opportunities. A new year is a good time to review employment documents and update them as needed, especially if a wave of new hires is anticipated. Special attention should be paid to issues that commonly arise.

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Restrictive Covenants

Restrictive covenants — non-competes, non-solicits and, to a lesser extent, non-hires and non-disparages — remain an ongoing area of concern. Broadly, non-compete agreements are generally disfavored as they are against public policy at both the federal and state levels. Non-competes are heavily dependent on state law, and in certain states that ban non-competes in most situations, state law may also void other restrictive covenants that operate like a non-compete (if it walks like a duck…) and prohibit forum shopping to get a better result. For states that allow non-compete agreements, courts will test whether the restrictions are limited in time and scope. Courts may also test if there was consideration given in exchange for signing the non-compete and/or if the restrictions protect a business interest. Finally, courts will usually not enforce a non-compete signed by a lower-wage employee. Employers should carefully examine non-competes and see whether their objectives can be met using other means that may survive a court challenge.

Cause

Firing an employee is generally for cause or without cause. Traditionally, "cause" involves willful misconduct, gross negligence, committing a crime, embezzling or breaching written agreements/policies. Habitual use of alcohol/illegal drugs and engaging in sexual harassment have also become commonplace. Recently, we have seen employers trying to expand the definition of cause to include off-market and vague terms such as acting without express authority, willfully withholding information from the company, insubordination or failing to fulfill a work schedule. Employers who unreasonably broaden the cause definition may think they are escaping a severance payment but may end up defending a wrongful termination lawsuit.

Document Mismatch

Employers should ensure that documents dealing with similar issues are roughly equivalent. If an employer issues 5,000 stock options to an employee but only has 1,500 shares outstanding, that is a serious problem. This mismatch issue may arise in partnership agreements (versus employment agreements) or collective bargaining agreements (versus offer letters). The employment relationship should be consistent across all relevant documents to limit ambiguities and confusion.

Worker Classification

The IRS, the U.S. Department of Labor and courts have developed multi-factor tests to determine who is an employee and who is an independent contractor (sometimes referred to as a consultant). At its core, someone who performs services essential to the employer and is under the employer's control is likely an employee; by contrast, someone in business for himself/herself but who counts the employer as a client is likely an independent contractor. An in-house quality control inspector at a manufacturing plant is an employee; a gardener who cuts the grass at the manufacturing plant is an independent contractor (a vendor, in other words).

Conclusion

Employees are often the most valuable asset of employers. Employers should use the new year to infuse clarity and fairness into the employer-employee relationship. A few tweaks can go a long way.

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