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Preparing to avoid employment agreement blunders, part 2

by Jodi R. Bohr
Tiffany & Bosco, P.A.

Last month's "Work On It" addressed how simple grammatical errors in employment agreements could be costly to employers (see "Preparing to avoid employment agreement blunders, part 1" on pg. 3 of our April issue). It also stressed that employment agreements are not one-size-fits-all documents and that policies should be properly communicated to employees in a handbook, not an employment agreement. Now that the broad strokes of employment agreements have been covered, we delve into the types of provisions that may be included in an agreement and the considerations to be made when including those provisions.

Does it change at-will-employment status?

An employment agreement can expressly provide that the employment relationship remains "at will," or it can define a specific term. In Arizona, most employment agreements include a provision retaining the at-will-employment relationship. If an exception is made, it is generally for C-level executives, for whom the agreement will define a term of years.

If an employment agreement modifies the at-will relationship, the employer must consider whether the contract is renewable and whether renewal happens automatically (meaning an action must be taken by a certain date to stop renewal) or only upon further agreement by the parties.

How do I end a specific term?

Believe it or not, I have read a contract that could not be terminated by either party, absent the expiration of the term, without the terminating party being in breach. An employment agreement with a set term of years should still provide a mechanism for early termination. The mechanism can simply require the terminating party to give the other party a certain amount of notice (e.g., 30 days, 60 days, or six months) of the termination. When determining the notice period, consider how long 30 days can feel if the parties are at odds. You may want to consider including a pay-in-lieu-of-notice provision that allows you to simply pay the employee for the time you would be required to give notice so the action is contemplated by the agreement.

Should I include termination-for-cause provisions?

If an employment agreement provides that an employee will be paid a severance upon early termination, it should differentiate between termination without cause and termination with cause. The "cause" termination provision should provide the employer sufficient latitude in determining what is cause for termination and be broad enough to cover all avenues of misconduct and performance deficiencies. Generally, opportunity-to-cure provisions invite dispute over whether an employee was properly notified before invocation of a termination-for-cause clause. Those provisions should be avoided because failure to comply could result in a costly breach.

Will covenants be enforceable?

One of the most common reasons to have an employment agreement is to restrict an employee's postemployment conduct. The proper drafting of the provision is essential since Arizona courts will not enforce a confidentiality, nonsolicitation, or noncompetition covenant if it is broader than necessary to protect the employer. Courts engage in fact-intensive inquiries to make that determination,

so employers should consider employees' role when determining the extent and breadth of postemployment restrictions.

Takeaway

You should require certain high-level employees to enter into employment contracts as a condition of new or continued employment. You shouldn't cobble together a form employment agreement from samples found on the Internet. Often, those provisions fail to address the specific needs of the company or fail to include key provisions (see my example of the agreement without a termination provision). Finally, consult with experienced counsel to assist with the drafting of the agreement and provide advice on the implication of various provisions so that you understand the pros and cons of implementing or omitting various provisions.

Jodi R. Bohr is an attorney with Tiffany & Bosco, P.A. and a contributor to Arizona Employment Law Letter. She practices employment and labor law, with an emphasis on litigation, class actions, and HR matters, and is a frequent speaker on a wide range of employment law topics. She may be reached at jrb@tblaw.com or 602-255-6082.