Davis Brown Employment and Labor Law Blog

Where Did We Go Wrong? Planning for issues in employment agreements – February 20, 2019

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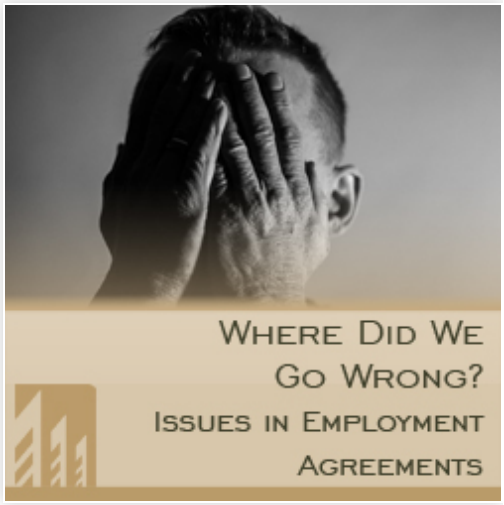

When drafting executive agreements, it is easy to focus almost exclusively on benefits and wages, the popular areas, without properly addressing some of the legal concerns that have grown over the last several years. Areas to assess include the following:

How old is your template?

If you are using one from the 1990s it is probably no longer appropriate, either for the structure of your company or existing law in your jurisdiction. Further, an Agreement should be treated as an agreement, with all of the appropriate "boiler plate" language whether you think its boring or not, to avoid later problems and enforcement. Too many agreements don't cover the basics, like enforcement and leaves certain areas to guesswork. Further, a template for C Suite positions is not the same as the template or agreements that you might use for front line employees. When it comes to employment agreements, one size definitely does not fit all.

Determine what benefits we are actually talking about

Will the executive receive benefits which are substantially different than those provided to other employees? If so, be careful about referring to employee benefits or benefits "as set forth in the handbook" as all of those can be in direct contradiction with alternate terms in the contract. While the contract, as a specific document, would normally control, if for some reason the handbook provides a longer or better benefit than the contract the employee is likely to argue for that greater benefit. One problematic term is that insurance coverage will continue well beyond any date of termination. This can be highly problematic, not only under the COBRA regulations, but also directly with your insurance carrier and how your insurance contract is structured. You need to know your existing policies, your anticipated policy development and plan for potential legal changes. In the event that either the contract or law for any benefit changes, you should already have a statement that such benefits would no longer be provided.

Termination

It is typical for termination for cause to be fairly well set out in agreements and your agreement may even provide for a loss of bonus or recouping expenses if there is a for cause termination. Particularly given the #metoo movement and the issues that it has highlighted, companies are adding specific defined clauses that include sexual harassment or other forms of harassment. A company needs to think broadly about the things that can go wrong in its industry when defining "for cause," rather than relying on a simple boiler plate which may or may not fit the need.

Employers must also be careful about promising confidentiality relating to termination. Law is developing in several states that would require disclosure of such claims and reasons for termination. Public employment contracts may be subject to strict open record rules as may terminations.

Executives may also argue for a company to delete the Termination Without Cause section on the grounds that "for cause" is sufficiently broad to address any of the issues that may arise. However, many companies may choose to simply terminate without cause on a certain period of notice rather than having to go through the potential legal issues in defining cause. As such, some form of without cause termination should be included. It is frequently linked to a bonus or some form of severance payments if the executive is terminated without cause.

Disability

It can be difficult to determine how far a disability will affect an executive's ability to perform the essential functions of his/her job. Contracts which rely on an insurance company's determination of disability can be very unwieldy and insurance may define disability in a completely different way than would be defined under the ADA/ADAAA. Companies also need to keep in mind the FMLA and its 12 week leave provision. While there is an FMLA exemption for key employees, the need for FMLA, even if a key employee exemption is used, may still trigger coverage of the ADA/ADAAA. Jurisdictions vary on time away from work as an accommodation as well as other "reasonable accommodations."

Bonuses

If your company has various bonuses, performance-based bonuses, timeline bonuses or similar items, proration of bonuses should also be addressed in the event of an early termination of the contract.

Renewal

Sometimes simply choosing not to renew the contract is your best form of ending the contract and can avoid both costs and drama for the company. However, evergreen clauses, where the contract automatically renews absent a certain kind of notice can create tracking issues. If you have an evergreen clause make sure you know when it expires and when any notice must be given due to the non-renewal of the contract.

Restrictive Covenants

Remember in Iowa, while non-compete agreements, non-solicitation agreements, confidentiality agreements, and non-disparagement provisions are all allowed, they must be carefully drawn to meet geographical expectations and to identify the areas covered. While non-competes, confidentiality, and work-for-hire agreements can all be part of a separate agreement, each agreement needs to dovetail in order to ensure consistent enforcement of all agreements and avoid confusion. Particularly in items like trade secrets and confidentiality agreements which relate to the identifiable property of the employer, you must also be careful to update those agreements and include the most recent federal requirements in order to insure full applicability.

A final pitfall which is more like a chasm

The 409A issues which relate to the payment of severance and similar items can be particularly troublesome for employers in drafting and enforcing contracts. Those will be addressed in the next post.
