


Making Employee Agreements Stick: Using Contract Law To Protect Your Company





Hiring Document Tips

- **Written contracts?** Consider having managers sign employment agreements
- **Integration clause?**
 - Prevents employees from claiming breach of contract based on unauthorized or collateral promises
 - Particularly important to use when hiring from outside the San Diego area

Three Clauses to Consider in Hiring Letters

- **At-Will Termination:** “I understand and agree that pursuant to company policy my employment with the company is employment at-will, which means that either the company or I can terminate employment at any time, for any lawful reason, with or without notice or cause.”
- **Merger (and Anti-Labor Code 970):** “I affirm that no representations or inducements, other than as stated in this letter, have been made to me about the length, terms or compensation for my services.”
- **Integration:** “I agree that this letter agreement contains all the material terms governing my employment with the company, and that its terms may be modified only by a further written agreement signed or approved in writing by me and the President of the company.”

Executive Agreements in the #MeToo Era

- Always have:
 - Integration clauses
 - Anti-Labor Code 970 clauses
 - Choice of law
 - Arbitration
 - Clear termination provisions
- Special liability issues:
 - Employee warranties
 - Morality/brand damage clauses
 - Change in Control provisions – triggers, cause, right to cure



Special Liability Issues in Executive Contracts

- **Warranties**
 - “Other than anything disclosed in writing to the Company during the recruitment process, Executive warrants and represents that [he/she] has not been the subject of any written complaint alleging sexual harassment, abusive conduct, fraud or breach of ethics in connection with any prior employment.”
- **Brand damage**
 - “Executive understands that any conduct of a personal nature that causes, in the judgment of the [President, CEO, Board] damage or potential damage to the brand or goodwill of the Company will be cause for [define].”
- **Triggers and cure**
 - In any cure provision in a COC agreement, except any cause which, in the judgment of the Company, cannot effectively be cured.

Handbooks and Policies



Which Policies Should Be Contractual?

- Non-discrimination and anti-harassment
 - Obligation to refrain, report, and cooperate
 - Conflict of interest/relationship management
 - Social media
- Confidentiality
- Data security/devices
- Non-solicitation



The ABC Test

- A worker is presumed to be an employee unless the company can show the worker meets all three parts of the ABC test.



The ABC Test



Part A:

- The worker is free from control and direction of the hirer in connection with the performance of the work, both under the contract and in fact; and

The ABC Test

Part B:

The worker performs tasks that are outside the usual course of the hiring party's business; and



The ABC Test

Part C:

The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring business.



A Bone to Business: AB 5 Potential Exemptions

- **Exempt**: Licensed insurance agents, certain licensed health care professionals, registered securities broker-dealers or investment advisers, direct sales salespersons, real estate licensees, and others.
- **Partially or potentially exempt**: Those performing work under a contract for professional services, businesses to business relationships, and certain construction subcontracts.
- **Examples of “professional services”**: Marketing, HR advising, travel, graphic design, tax preparation, photography, payment processing, and grant writing. Others?

Steps to Minimize Risk



- When in doubt...
- ✓ **Classify the worker as a part-time, on-call employee, or**
- ✓ Hire the worker through a temporary services agency
 - *See Curry v. Equilon Enterprises, LLC* (Cal. Ct. App.)

Steps to Minimize Risk

- If you decide to continue independent contractor relationship:
- ✓ Structure working relationships to minimize potential claims
- ✓ Work with vendors that have business tax ID numbers
- ✓ Have indemnification clauses
- ✓ Ensure consistency



Rethinking Exit Agreements

- Under the ABC test, it would appear nearly impossible to lawfully retain a former employee on a consultant basis



Rethinking Exit Agreements

- Get representations and warranties corresponding to the ABC factors
- Indemnity language
- On-call tasks for discrete assignments



Release Agreements

- Confidentiality clauses – what are you really fighting for?
- Non-disparagement
- Non-solicits – *AMN Healthcare v. Aya Healthcare*
- Integration clause carve-outs
- Watch out for templates

Sample Language

Non-Disparagement:

“[EMPLOYEE] agrees not to disparage, defame, or otherwise detrimentally comment upon the Releasees, including their business practices or products, in any manner. Employee acknowledges that such comment shall cause irreparable harm to [EMPLOYER]. Nothing in this Agreement shall be construed to prevent Employee from responding truthfully and completely to any lawfully issued court order or subpoena, or from communicating with a government regulatory enforcement agency concerning the Employer or its practices, or any other issue related to law enforcement. Further, nothing in this Agreement is intended to suppress or limit Employee’s right to testify in any administrative, legislative or judicial forum about alleged criminal conduct or sexual harassment, or to prevent the disclosure of factual information related to claims filed in a civil or administrative action regarding sexual assault, sexual harassment or other forms of sex-based workplace harassment, discrimination or retaliation, to the extent such communications are expressly protected under California law.”

Sample Language

Integration Clause Carve-Out:

“With the exception of [IDENTIFY DOCUMENTS], which remain in effect, the parties declare and represent that no promise, inducement or agreement not herein discussed has been made between the parties, and that this Agreement contains the entire expression of agreement between the parties on the subjects addressed herein.”

Benefits of Arbitration

- Efficient
- Confidential
- Mitigates exposure to class and collective actions
- Avoids unpredictability of juries



Class Waiver

“The arbitrator shall not have the authority to hear any claim brought by another person, or any class action, collective action or representative action.”

Drawbacks of Arbitration

- Employer pays arbitrator fees
- Arbitrator less likely to grant dispositive motion
- Arbitrator incentive to “split the baby”
- Limited appellate rights
- PAGA claims excluded
- Employer likewise bound to arbitration for claims against employees (e.g. trade secret theft)



Other Considerations

- Does your business have a high volume of employment litigation?
- How many employees do you have?
- Do you have a large number of non-exempt employees who are subject to meal and rest period and OT requirements?



Arbitration Agreements

- Consider forum – AAA, Judicate West, JAMS, ADR, etc.
- No out of state choice of law/venue clauses
- OFCCP restriction



Questions?

Rich Paul

rpaul@paulplevin.com

Joanne Alnajjar Buser

jbuser@paulplevin.com