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Employment Law • Minneapolis, MN

Workplace News *Employment Law Litigation and Proactive Conflict Resolution Services for the Workplace* **Fall/Winter 2007**

Employment Agreement Issue

Inside

Restrictive Covenants:
Should their obligations be viewed lightly?

Increasingly, employees are being asked to sign **non-compete, non-solicitation, and confidentiality agreements** at the beginning, middle or end of the employment relationship. Individuals who are asked to sign these agreements should not take his or her obligations lightly. These agreements restrict an employee's ability to obtain new employment in the event s/he is terminated or wishes to resign.

For an employer to enforce these types of agreements, the employer must have the individual sign the agreement before he or she starts working; or, if the employee has already begun working, provide additional consideration. An employer cannot merely assert that if the individual wants to remain employed he or she must sign the agreement. In Minnesota, continued employment does not suffice as "additional consideration." Additional consideration must be something of value the employee is not already entitled to, such as a monetary payment or stock options.

Many employees who are terminated or leave their employment believe that their former employer will not sue them for violating these agreements. This is not the case.

Many employees who are terminated or leave their employment believe that their former employer will not sue them for violating these agreements. This is not the case. The recent example of *Star Tribune* Publisher Par Ridder is a cautionary tale. Upon resigning from his employment at the *Pioneer Press*, he copied computer files containing confidential business information and took with him his laptop which contained proprietary information including budgets, custom advertising rates, and reports on company expenses. While Ridder argued he never used the information for any commercial advantage, Ramsey County District Judge David Higgs found that Ridder violated both the Minnesota law against misappropriation of trade secrets and his common law duty of loyalty to the *Pioneer Press*. In this case, Judge Higgs also ruled against a second executive, Jennifer Parratt, who Ridder had hired away from the *Pioneer Press*, saying that she had violated a valid non-compete agreement when she went to work for the *Star Tribune*. The court ordered her to refrain from working at the Star Tribune for a year, the length of her non-compete agreement.

As the Ridder case demonstrates, even if an individual did not sign a specific confidentiality agreement, s/he can still be liable under the common law duty of loyalty. Moreover, an employee who leaves his or her employment, either through termination or voluntary resignation, should make sure not to take anything that the employer could argue belongs to them, such as documents, computer files, business contact information, and laptops.

In general, these agreements will be upheld by the courts as long as they are reasonable in their temporal and geographic scope. Courts will look at a variety of factors in determining whether such agreements are reasonable. ■

Checklist For Reviewing Severance Agreements

Bertelson Law Office now offers mediation services. For many, early intervention in a legal conflict protects both a client's dignity and pocketbook. Beth Bertelson can help to resolve disputes, providing control and closure on a difficult situation by avoiding the time and expense of a trial situation.

At **Bertelson Law Offices**, we understand employment disputes. With 17 years of expertise in employment law litigation, Beth will partner with you to resolve conflicts early. As an independent service, we provide the perspective necessary to tackle the most difficult and systemic issues.

Workplace News is only a general summary of the topics discussed here and is not a substitute for legal advice.

Reductions in Force, Reorganizations, and Downsizing—whatever the label—hit employees hard when these corporate decisions affect them personally. When individuals approach an attorney with a severance agreement for review, many assume the language is standard and that all legal requirements were considered. This is often not the case. Additionally, each individual's circumstances are different making the

☑ Checklist

☑ Evaluate Contributions and Claims

Spend enough time with the individual to allow a good understanding of: the reason(s) the employer gave for the termination; the employee's contributions and performance; and the situation to ascertain if it is consistent with the employer's reasoning. The presentation of a severance agreement provides a good opportunity to approach the employer and hear its perspective on the termination. You can then evaluate with the employee whether such things as age, disability, gender, harassment, reporting illegal activity, or the taking of leave time had an impact on the employer's decision.

☑ Review Unemployment Compensation Possibilities

Determine if the amount of compensation being offered is lower than the amount of unemployment insurance benefits the employee could be entitled to receive. Under Minnesota's unemployment insurance benefit law, an individual who has lost his job through no fault of his/her own is generally entitled to six months of payments equal to half of their salary. Therefore, if an employer only offers an employee 8 weeks (2 months) of severance pay the individual should consider the trade offs, such as agreeing to not compete and waiving all possible claims, because s/he may be eligible to receive the equivalent of 3 months of full-time salary in unemployment insurance benefits. In general, the unemployment office deducts wage related payments an individual receives from his amount of unemployment insurance benefits.

☑ Evaluate Long-Term Disability Claims

Inquire whether the individual suffers from a health condition that may entitle him or her to long-term disability benefits. If so, s/he needs to make sure that if s/he decides to sign the agreement, s/he does not agree to release any claims under ERISA. In general, a company's long-term disability policy allows a disabled individual to continue receiving long-term disability benefits, which are approximately $^2/_3$ of the individual's salary, for two years or longer. This amount can add up to significantly more than the offered severance amount.

Make sure the individual has brought all benefit documents to your office. Many policies require an applicant for long-term disability to be an employee at the time of application. Signing an agreement that ends employment may foreclose an opportunity to get long-term disability.

☑ Review Restrictive Covenants

Determine whether the severance agreement contains a non-compete or non-solicitation provision. If an employee did not sign these types of agreements either prior to, or during employment, an employer will often put these conditions into the severance agreement. Arguably, there is no consideration for these provisions since the amount being offered to the employee is consideration for him or her agreeing to release his or her claims. However, an employee should be aware that a court will likely side with the employer and agree that any amount paid to the employee as part of the severance agreement was also consideration for these provisions. Also,

reviewing attorney's job crucial. Below is a non-inclusive list of important issues to consider when reviewing a severance agreement:

review whether the non-compete/non-solicitation provision is overly broad in terms of time period or geographic scope.

☑ Tender-Back Provisions

Determine whether the agreement requires the individual to tender back any compensation s/he receives or stop payment of compensation if s/he obtains new employment. If so, s/he may wish to argue that the amount of compensation being offered is for the release of claims. If s/he is required to tender back compensation or if payment of compensation stops, it's arguable there is not adequate consideration for his or her release of claims.

☑ Review For Unlawful Provisions

Review the agreement to see if it requires the individual to waive any rights to file a charge of discrimination with the EEOC or other state agency. Such a provision violates EEOC regulations.

Review whether the agreement requires the individual to waive his or her rights to any unpaid compensation, such as overtime, unemployment insurance, and/or workers compensation. The FLSA prohibits an individual from releasing wage claims prior to starting a lawsuit without either court approval or approval from the Department of Labor. Minnesota statutes governing unemployment insurance and worker's compensation also prohibit an employee from releasing claims for unemployment insurance benefits and worker's compensation benefits. ■

Collecting Unemployment Insurance Benefits in Minnesota

In Minnesota, unemployment insurance benefits are administered by the Minnesota Department of Employment and Economic Development (MDEED). Minnesota Statute Chapter 268 governs this process. Unemployment insurance benefits are available for individuals who lose their employment through no fault of their own. Additionally, if an employee resigns because s/he believes s/he is being subjected to illegal harassment, discrimination, unsafe or hazardous working conditions, or substantial reduction in hours or pay, s/he may be eligible for unemployment insurance benefits.

An individual who has been terminated should apply for unemployment insurance benefits as soon as possible because the time limitation in which to receive benefits begins when an employee is terminated. An individual can apply for unemployment insurance benefits online at www.uimn.org or by phone at 651-296-3711.

When applying for unemployment insurance, it is important that the applicant answer the questions carefully. For example, MDEED will ask the applicant whether s/he has received any severance payment from his or her employer. It is important for the applicant to say "no" to this question if s/he has not actually received this payment - - either because s/he has not signed the separation agreement or has not yet determined whether s/he will sign the agreement. If s/he checks "yes," his or her application will be held up until s/he provides MDEED with the amount of the severance payment. If the applicant determines not to sign an offered separation agreement and therefore, never receives a payment from the employer, it can be difficult to straighten this out with MDEED. It is important to note that some payments an employer makes to a former employee are settlement for his or her potential claims and are not wages. These payments should not be deducted by MDEED. If the employee later receives wages, this amount should be reported to MDEED. The amount of these wages

continued

What clients have said about Bertelson Law Office

"Beth [Bertelson] has the ability to assess a situation, consider the options, and then team with you to strategize toward a solution."

"The entire process was handled with a degree of expertise that I greatly appreciated."

"I would recommend (and have recommended) Bertelson Law Office to others!"

We will be honored to work with you or your referrals.

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will be deducted from the amount of the unemployment insurance payment.

After an individual has applied for benefits, MDEED will notify the former employer. In some instances, the employer will argue that the individual should not be eligible for benefits because of misconduct or resignation. MDEED may then deny the applicant benefits. In such instances, the applicant has a right to appeal that decision and should do so within the amount of time specified by MDEED. At the appeal stage, an unemployment law judge will hold a telephone hearing with the applicant and the employer to determine whether the applicant is entitled to benefits. While the hearing process is designed to not require the applicant to be represented by an attorney, the applicant may wish to do so.

MDEED's website, www.uimn.org provides helpful information about receiving unemployment insurance benefits and the appeals process. ■

The OWBPA: Its Strict Requirements For Employers

In 1990, Congress amended the Age Discrimination in Employment Act (ADEA) by passing the Older Workers Benefit Protection Act (OWBPA). The OWBPA provides that a release of age discrimination claims under the ADEA is not valid unless the waiver is "knowing and voluntary." The OWBPA requires strict compliance. An employer who terminates employees in a group termination, defined as two or more employees, and who offers these employees additional consideration for signing a waiver of age discrimination claims, must provide these employees with information that includes, but is not limited to:

- class, unit, or group of individuals covered by the employment termination program ("the decisional unit"—e.g. who the employer considered for termination);
- eligibility factors for the program (e.g. selection criteria such as seniority, performance, job skills; not eligibility for and amount of severance);
- time limits applicable to the program;
- job titles and ages of individuals eligible or selected for the program; and
- job titles and ages of all individuals in the same job classification or organizational unit who are not selected for the program. 29 U.S.C. § 626(f)(1)(H).

In our experience, employees terminated in a group often do not receive these required disclosures or the disclosures are inadequate. For example, the employer may provide job titles that are not the working titles that employees actually used. Or an employer might not provide the proper decisional unit or eligibility factors. In those instances, it is important that the terminated employee get this information to make an informed decision about whether s/he wants to sign the severance agreement and waive his or her potential age discrimination claims.

In general, when analyzing whether age played a role in the terminations, courts will look at, among other factors, statistics, whether there is a pattern and practice of discrimination, ageist statements, and the retention or hiring of younger employees to do the work that had been performed by older employees.

Additionally, employers may include items in the agreement that violate the OWBPA. For example, there may be a provision which states that the employee is waiving his or her right to file a charge with the EEOC or other government agency. The OWBPA prohibits employers from taking any action that restricts an individual from waiving his or her right to file a charge or participate in an EEOC investigation. You should be aware that your client, even if s/he signs such an agreement, can still file a charge of discrimination with the EEOC. ■

Did You Know . . . ?

Workplace discrimination is still prevalent. In a nationwide poll of 331 executives, 81% said they had witnessed workplace discrimination and 77% said discrimination typically comes from the top down.

—Inc.com. (March 1, 2007)

The United States is the only industrialized nation that does not guarantee paid sick days for all workers.

—Stateline.org. (January 4, 2007)

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