TEN WORKPLACE AGREEMENTS THAT BUSINESSES OPERATING IN THE UNITED STATES SHOULD CONSIDER TO PROTECT THEMSELVES

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In their efforts to protect themselves, most employers follow the advice to "GET IT IN WRITING." Yet, many companies are simply unsure what it is that needs to be written down. Even more frustrating is when employers discover that the written document they prepared does not accomplish the intended goal or, even worse, undermines their position in litigation.

This article outlines the benefits of 10 different workplace agreements that an employer located in the United States should consider using in its business, as well as the types of provisions that the agreements should contain. A properly drafted agreement can protect your business and help avoid the misunderstandings and ambiguities that lead to employment-related lawsuits.

Workplace Agreement Summary

1. Employment Agreement	Establishes the terms and conditions of an employee's employment.
2. Independent Contractor Agreement	Establishes a relationship in which an individual or business (independent contractor) will perform specific services for your company without becoming one of your employees.
3. Relocation Agreement	Establishes the terms and conditions of an employee's relocation to a new residence as part of an offer of employment and/or continued employment with your company.
4. Consent Agreement	Contains an employee's authorization allowing your company to take actions that could otherwise be considered an invasion of the employee's privacy.
5. Non-Compete Agreement	Restricts an employee from accepting a job with a competitor of your company.
6. Confidentiality Agreement	Prohibits an employee from disclosing information about your company to a competitor or other third-party.
7. No-Solicitation Agreement	Prohibits an employee who resigns or is terminated from soliciting your employees and/or clients.
8. Arbitration Agreement	Requires an employee to resolve workplace disputes with your company through arbitration, as opposed to filing a lawsuit in state or federal court.
9. Last Chance Agreement	Contains an employee's acknowledgement that he/she has engaged in prior misconduct and that any future misconduct, no matter how minor, will result in his/her immediate discharge from your company.
10. Separation Agreement	Establishes the terms and conditions of an employee's separation of employment from your company and will usually contain the employee's agreement to waive all claims he/she may have against your company.

By taking the time to familiarize yourself with the types of workplace agreements that actually exist, as well as what they contain, you are well on your way to insulating your company from economically disastrous consequences. Indeed, as you review the various types of agreements, begin thinking about how you can utilize them in your own business.

TEN WORKPLACE AGREEMENTS THAT BUSINESSES OPERATING IN THE *UNITED STATES* *SHOULD CONSIDER TO PROTECT THEMSELVES*

1. **Employment Agreement - Establishes the terms and conditions of an employee's employment with your company.**

An employment agreement is typically entered into when a company first hires a person. The agreement specifies the employee's compensation (wages and benefits), as well as his/her job duties and responsibilities to the company.

The agreement may also reiterate the at-will nature of the individual's employment. This type of provision confirms that the employee can be discharged for any reason, with or without notice, so long as the reason is not unlawful. Conversely, some employers may include a provision in the agreement indicating that the individual's employment with the company will be for a fixed number of months or years, and specify what kinds of behavior will cause the employee to be fired prior to expiration of the agreement. By placing their goals in writing, the parties can minimize the possibility of a future dispute as to what they each expected from the other.

Example: Four Star Auto Supplies has decided to offer Ms. Smith a job as a Sales Manager and it prepared an employment agreement for her to sign. The document sets forth her salary, as well as her commission schedule. Also, the agreement establishes Ms. Smith's hours of work and her health and vacation benefits. More importantly, the employment agreement obligates Ms. Smith to increase the Sales Department's revenue by 5% over the next 12 months and states that failure to meet this goal will result in her discharge.

2. **Independent Contractor Agreement – Establishes a relationship in which an individual or business (independent contractor) will perform services for your company, without becoming one of your employees.**

Under an independent contractor agreement, you can arrange for the independent contractor to perform services for your business, without having to hire the independent contractor (or its workers) as an employee. The benefit of this relationship is that your company can avoid many of the liabilities it would ordinarily face if you were to hire the contracting entity as an employee. For example, in an independent contractor relationship, you are typically not required to withhold taxes, or provide unemployment insurance or workers' compensation coverage for the independent contractor or its employees. Also, an independent contractor relationship may shield you from liability under various state and federal employment laws that only apply to employees of an employer.

To qualify as an independent contractor, the contracting individual or business must retain the authority to determine what work needs to be performed and, more importantly, how it should be performed. While there are several different tests for determining who qualifies as an independent contractor, control over the direction and performance of the service is the key factor. Therefore, to receive the benefits of this type of arrangement, you are going to give up some of the control you usually have over your employees. Nevertheless, by placing the independent contractor's relationship with your company in writing, you will be in a better position to argue that your company is exempt from many of the liabilities that accompany an employer-employee arrangement.

Example: XYZ Building Management enters into an independent contractor agreement with Ready Cleaning Services stating that Ready Cleaning Services will clean XYZ's facility for $500 per month. Under the agreement, Ready Cleaning Services is responsible for hiring the necessary personnel to clean the facility, and it will pay all of the expenses in its employer-employee relationships (e.g. wages, taxes, unemployment and workers compensation insurance). Furthermore, Ready Cleaning Services retains the

exclusive right to determine when and how its employees will clean the facility. XYZ Building Management has reduced its liability to Ready Cleaning Services' personnel and can rely upon the agreement to support its position that it is not the legal employer of Ready Cleaning Services' employees.

3. **<u>Relocation Agreement</u> - Establishes the terms and conditions of an employee's relocation to a new residence as part of an offer of employment and/or continued employment with your company.**

Companies that recruit employees from distant areas or open offices in new geographic areas should consider using relocation agreements to set forth the terms and conditions of an employee's relocation to a new work area. The agreement will establish whether the employee is going to be reimbursed for any expenses associated with his/her relocation, and it will reiterate the time periods in which the employee must complete the move. If properly drafted, a relocation agreement can alleviate the ambiguities and uncertainties that are often caused by such transitions.

Example: Big Wheels Trucking, a New York based company, offers Ms. Smith a job as the new Director of Human Resources. Ms. Smith is currently living in California and must now move to New York for the position. Big Wheels and Ms. Smith sign a relocation agreement which provides that Ms. Smith will report for her new job by January 1, and she will receive a $500 stipend to be applied to any expenses she incurs during the move. Furthermore, the relocation agreement makes it clear that Big Wheels Trucking is not responsible for any damage to Ms. Smith's property or for any injuries she may sustain during the move.

4. **<u>Consent Agreement</u> - Contains an employee's authorization allowing your company to take actions that could otherwise be considered an invasion of the employee's privacy.**

Ensuring a safe and productive job environment means that your company must monitor the activities of your workforce, while simultaneously balancing the employees' privacy rights. Naturally, there may be occasions when you need to search company property, as well as employees and their personal property. To reduce the risk of an employee claiming that you "invaded his/her privacy," your company can enter into a consent agreement with the employee that authorizes you to conduct various searches.

For example, the agreement will state that the employee acknowledges that your company is authorized to: conduct drug testing; search the employee's desk, locker, pocketbook and briefcase; monitor his/her e-mails; and photograph or tape record his/her activities. These types of agreements reduce your employees' expectations of privacy, as well as the possibility of them feeling that your company violated their privacy during a search. Consent agreements also place employees on notice that you will be monitoring them and, as a result, reduces the likelihood that they will engage in workplace misconduct.

Example: During a search of its employees' e-mails, Good Guys Insurance Company discovers that Ms. Smith has been sending sexually explicit e-mails to a co-worker and it terminates her employment. Unfortunately, Ms. Smith writes a letter to Good Guys stating that it invaded her privacy by reading her e-mails, and that she is considering whether to file a lawsuit against the company. Good Guys can try to avoid litigation by reminding Ms. Smith of the consent agreement she signed, which authorized the company to search her e-mails. Also, the company will be able to defend any lawsuit filed by Ms. Smith on the grounds that she gave it permission to search her e-mails.

5. **<u>Non-Compete Agreement</u> - Restricts an employee from accepting a job with a competitor of your company.**

Most businesses invest substantial time and money in training their employees to better serve clients and customers. The danger is that these same employees could use their skills and knowledge to benefit a competitor and economically undermine the company.

With a non-compete agreement, you can prohibit an employee from working for a specific competitor, or even from working for all companies in a particular industry. This restriction will be in effect during the individual's employment, as well as for a reasonable period of time after his/her termination from your company. In order for a non-compete agreement to be enforceable against an employee, it must be reasonable in its restrictions so that the agreement is no more restrictive than necessary. Put simply, you cannot prevent a worker from accepting a job with another employer when doing so will not substantially harm your business. Also, the agreement must not restrain the employee for an unreasonably long time period. Naturally, a determination of what qualifies as reasonable depends on the precise factual circumstances. Nevertheless, non-compete agreements are widely recognized as extremely useful tools.

Example: Ms. Smith was hired as the Director of Marketing for Cool Graphics, Inc. Her primary job responsibility is to establish business relationships with prospective customers in an effort to increase revenue. At the start of her employment, Ms. Smith signed a non-compete agreement that prohibits her from working for XYZ Graphics (a competitor of Cool Graphics) during her employment and for a period of one (1) year after her termination of employment from Cool Graphics. If Ms. Smith violates this restriction and accepts a job with XYZ during the year following her termination with Cool Graphics, Cool Graphics can sue Ms. Smith for damages and it can try to get a restraining order that prohibits her from continuing to work at XYZ.

6. <u>Confidentiality Agreement</u> - Prohibits an employee from disclosing information about your company to a competitor or other third-party.

In the day-to-day course of your operations, you must often provide employees with confidential information about the business which, if disclosed, could harm your company. Although the exact nature of confidential information varies from job to job, it generally encompasses information on past, present or prospective customers, clients, suppliers, products, profits and revenue-generating programs, that is not publicly or generally known. In a confidentiality agreement, your employee acknowledges your lawful right to protect the company's confidential information. Additionally, the employee agrees that he/she will not disclose confidential information to a particular employer or entity, unless you advise him/her otherwise.

Example: Ms. Smith is hired as a scientist for ABC Pharmaceuticals and the company is going to give her access to its latest over-the-counter drug formulas, which ABC developed at considerable expense. As a condition of her employment with ABC, the company makes her sign a confidentiality agreement in which she agrees that ABC's formulas constitute confidential information. Additionally, the agreement prohibits her from revealing the formulas to any competitors of the business. Even if Ms. Smith resigns and goes to work for a competitor, she is prohibited from disclosing or utilizing ABC's confidential information.

7. <u>No-Solicitation Agreement</u> - Prohibits an employee who resigns or is terminated from soliciting your employees and/or clients.

To prevent your employees from setting up a competing company and luring away your current employees and customers, you should enter into no-solicitation agreements to protect your business. Put simply, a no-solicitation agreement prohibits a former employee from soliciting, either directly or indirectly, your employees and customers, for a reasonable period of time. These agreements can be entered into

when the employee begins his/her employment, or as part of a separation agreement when an individual leaves your company (discussed below in Number 10).

Example: Ms. Smith is an architect for ABC Construction, but she decides to resign and open up her own competing business. Pursuant to the no-solicitation agreement she entered into with ABC Construction when she was first hired, Ms. Smith is prohibited from directly or indirectly soliciting, inducing or otherwise encouraging any employee or customer, for a period of 2 years following her separation of employment, to leave ABC and come to her business.

8. <u>Arbitration Agreement</u> - Requires an employee to resolve work-place disputes with your company through arbitration, as opposed to filing a lawsuit in state or federal court.

Litigating employment claims in state and federal court is expensive and time-consuming. To avoid the burdens and financial liabilities of litigation, you can enter into an arbitration agreement with an employee when he/she is first hired, or when an employee has filed a lawsuit against the company or is threatening to sue. An arbitration agreement requires the employee to resolve his/her employment dispute before a mutually selected arbitrator, as opposed to going to court to litigate the case. The arbitrator will listen to witness testimony and consider documentary evidence. Significantly, arbitration removes the threat of a "runaway jury" that simply distrusts employers. Also, arbitration hearings usually only last one or two days and can be initiated almost immediately, versus court proceedings which can span over a decade. Arbitration is certainly a faster and less expensive way to resolve employment-related claims.

Example: Ms. Smith was fired from Quality Computer Company roughly two (2) months ago and she has now filed a lawsuit in state court alleging that she was unlawfully terminated on the basis of her race. Quality Computer can go to court and seek dismissal of Ms. Smith's lawsuit given that she signed an arbitration agreement at the beginning of her employment that obligates her to submit any and all claims of discrimination she may have against the company to arbitration. While Quality Computer Company will still have to defend itself against Ms. Smith's allegations at arbitration, it will avoid the burden of litigating the claims in court and spending substantial amounts of time and money.

9. <u>Last Chance Agreement</u> - Contains an employee's acknowledgment that he/she has engaged in prior misconduct and that any future misconduct, no matter how minor, will result in his/her immediate discharge from your company.

It's a common scenario - the employer has a worker with a lengthy disciplinary history, yet it decides that it will give the individual one last chance to shape up. Last chance agreements are the most underutilized tool that employers can use to properly document an employee's disciplinary history and to prepare its defense in the event the employee sues the company after being fired. In a last chance agreement, your company can get a troublemaker to acknowledge that his/her prior misconduct and poor performance warrants immediate termination, but the company is giving him/her one last chance to act appropriately. Furthermore, the agreement contains the employee's admission that his/her next violation of your company's work rules (no matter how minor) will result in immediate termination.

Example: Ms. Smith has become increasingly insubordinate in her secretarial job with Steady Accountants, LLC. In order to place Ms. Smith on notice that any further insubordination will result in her termination, Steady Accountants asks her to sign a last chance agreement. The agreement contains Ms. Smith's acknowledgment that she could have lawfully been fired for her previous insubordination and that any further disciplinary problems will result in her immediate dismissal.

10. <u>Separation Agreement</u> - Establishes the terms and conditions of an employee's separation of employment from your company and will usually contain the employee's agreement to waive all claims he/she may have against your company.

Regardless of whether an individual leaves your company voluntarily or involuntarily, you should enter into a separation agreement indicating the reason for the employee's departure, as well as whether you will provide severance payments or contest his/her right to receive employment insurance. More importantly, your separation agreement should contain a provision in which the departing employee agrees to release certain claims that he/she may have against your company. A release of claims means that the employee will waive any right that he/she may have to file a lawsuit against your company.

Example: CDE Telephone Corporation decides to layoff field technician Mary Smith due to a decline in business. Although this termination decision is based on legitimate business reasons (a slowdown in the economy), CDE Telephone is concerned about the expense in having to defend its decision if Ms. Smith files a lawsuit against the company. Therefore, CDE Telephone agrees to give Ms. Smith two weeks severance pay in exchange for her signing a separation agreement. The separation agreement contains a provision that releases CDE from any and all liability to Ms. Smith and prohibits her from filing a lawsuit against the company in court.

Conclusion

While no contract can guarantee success in a litigation, a properly drafted workplace agreement will certainly better your chances. This guide simply provides a brief glimpse into workplace agreements, and their usefulness must be analyzed on a case-by-case basis, with each agreement individually tailored to comply with the appropriate federal and state laws.

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