



EBEC EXPO2024

Proskauer's Perspective
on Employee Benefits,
Executive Compensation
and ERISA Litigation

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On-Boarding and Off-Boarding in the C-Suite

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Agenda

- **On-Boarding**
 - Recruiting & Hiring: General Rules & Best Practices
 - Preparation for Litigation // Mitigating Potential Litigation by Former Employer
 - Ground Rules
 - Offer Letter
 - On-Boarding Checklist
 - Offer Letter / Employment Agreement: Key Terms
 - Term / Exclusivity
 - Termination / Severance
 - Restrictive Covenants
 - Dispute Resolution / Arbitration
 - Disclosure & Communications
- **Off-Boarding**
 - Disclosure & Communications
 - Releases; Transition & Consulting
 - “Bad Actors”
 - Adherence to Continuing Obligations
- **Recent Developments: FTC Final Non-Compete Rule Toplines**

On-Boarding – Recruiting and Hiring

- General Rules / Best Practices

- Recruiting should always be done on a one-on-one basis. Do NOT meet with candidates in a group setting.
- Do NOT meet a candidate at his/her place of business or at any office or other location of their current employer.
- Discussions with a candidate should always focus on the positive strengths of what the recruiting company can offer (i.e., strong leadership, great product, benefits and compensation, exciting opportunity to be part of a growing company, etc.).
- Negative remarks concerning the candidate's current employer should always be avoided.

On-Boarding – Recruiting and Hiring (Cont.)

- Recruiting company is interested in the candidate because of the candidate's general knowledge, skills and experience, and NOT because she/he possesses non-public information belonging to another company or can help recruit others to join recruiting company and NOT because of his/her relationship with specific customers.
- Candidate cannot do anything on behalf of recruiting company until the candidate ends his/her current employment. So, candidate should not say anything to customers or other employees.

On-Boarding – Recruiting and Hiring (Cont.)

- Candidate cannot be involved in the recruitment process for other employees.
 - You cannot ask or permit the candidate to contact any co-workers to see if they may also be interested in joining recruiting company.
 - You cannot ask or permit the candidate to provide a list of co-workers and/or their contact information.
 - You cannot ask or permit the candidate to be present if you contact a co-worker.
 - You cannot ask the candidate for his/her evaluation, assessment or opinion of a co-worker's performance or production.
 - You cannot show the candidate a list of his/her co-workers and ask which ones are worth contacting.

PREPARATION FOR LITIGATION – Mitigating Potential Litigation by Former Employer

- GOAL – Refute notion that hiring decisions made to steal confidential information from competitor
- RESULT – 3 Documents Used for Each and Every Hire:
 1. Ground Rules at Time of Interview
 2. Offer Letter
 3. On-Boarding Checklist

“Ground Rules”

Communicate to the employee being onboarded that in order to be sure that they are complying with their ongoing duties to your current employer, the only way we can have any further conversations is if they agree to abide by the following Ground Rules. This can be incorporated into the offer letter:

1. **Keep confidential all confidential and proprietary information of your current employer.** You are not to discuss with us (or its employees or consultants), nor use for _____ nor disclose to _____, in any fashion, any non-public data and/or property belonging to your current or prior employer(s). In particular, you are not to provide to _____ any documents or information of your current employer. This includes, but is not limited to, confidential or proprietary information or trade secrets of your current employer.

“Ground Rules” (Cont.)

2. You currently have no affiliation with _____ and no authority to act on its behalf. Further, you have ongoing duties to your current employer, and as such, you should not, you may not and you must not solicit on behalf of _____ any:
- a) Employee (or consultant or independent contractor) of your current employer to join or otherwise seek an opportunity with _____; nor
 - b) Customer or client of your current employer to transfer its business to _____.

Offer Letter Key Terms

In addition, by your acceptance of this offer, you acknowledge and agree to the following:

1. You have not taken any documents, information (whether hard copy or electronic) or any other property belonging to Prior Employer that you are prohibited from taking and will not do so; and
2. You have kept and will keep in confidence proprietary information, knowledge or data acquired by you in confidence during your employment there and you will not disclose to the Company or induce the Company to use any confidential or proprietary information belonging to Prior Employer.

On-Boarding Checklist

Upon resigning, you should box up and ship back to your (now) former employer ALL of your former employer's possessions, INCLUDING:

- ☐ Cell phone
- ☐ Laptop with printers, cases and accessories
- ☐ Other electronic devices, all flash/USB drives, cables, cords, software and back-up discs.
- ☐ All samples, all products, all product packaging, marketing and promotional materials
- ☐ All employee manuals and SOPs
- ☐ All customer lists, salesperson and territory rankings and
- ☐ All other written information, all business information and all employer-owned property of any form

On-Boarding Checklist (Cont.)

When you prepare these items for shipment:

- ☐ Do NOT erase any hard-drives nor return any electronic devices to “Factory settings”
- ☐ _____ encourages you NOT to delete any information at all from your (former) employer’s devices; however, if you feel you must, you may (i) delete personal photos, (ii) personal financial information (e.g., your tax returns), and (iii) you may de-link any personal email accounts from the device
- ☐ Do NOT copy anything (paperwork or otherwise) that you are returning -- the point is to make sure that anything that belongs to your former employer has been returned and you have not retained any of that information, including any and all copies of that information
- ☐ Do not delete or copy ANY emails (even personal ones) from your employer’s email account
- ☐ Do not delete or copy ANY contact information from any device (even if the information relates to your personal friends)

Offer Letter / Employment Agreement: Key Terms

- At a high level, these can be comprised of one or more of the following:
 - Term*; Position; Duties; Exclusivity*
 - Base Salary
 - Bonus (Discretionary; Formulaic)
 - Incentive Equity
 - Benefits; Fringe Benefits
 - Termination Provisions*; Severance*
 - Restrictive Covenants*
 - Dispute Resolution/Arbitration*
- A discussion of economic terms is outside of the scope of today's session. Rather we will focus on the starred items above

Offer Letter / Employment Agreement: Key Terms (Cont.)

- Term
 - Can be fixed term, fixed term with automatic renewals or “evergreen”
 - Fixed term contract generally cannot be terminated (i.e., no quit/firing) prior to expiration without potentially triggering breach of contract claims
- Exclusivity
 - Generally, during employment, the employee provides full-time services exclusively for the employer
 - Limited carve-outs for civic/charitable/community activities, personal financial planning, and in all cases, this cannot materially interfere with duties
 - More specific carve-outs (e.g., for-profit board service, remunerated activities) generally subject to board approval in advance and typically are limited in scope
- Effect of exclusivity requirement together with a fixed term contract

Offer Letter / Employment Agreement: Key Terms (Cont.)

- Termination Provisions
 - Non-fixed term contracts
 - “Cause” definitions
 - Notice and cure
 - Materiality, intent and knowledge qualifiers
 - Company policy clauses
 - Business-specific
 - “Good Reason” definitions
 - Leaving space for across-the-board compensation adjustments
 - Reporting lines and duties / responsibilities
 - Potential future transactions
- Severance
 - Release requirements
 - Payments over time / lump sum, “stick” to covenant enforceability

Offer Letter / Employment Agreement: Key Terms (Cont.)

- Restrictive Covenants
 - Non-Compete
 - Consistent challenges at state and now federal levels
 - Competitive business
 - Restricted area
 - Duration
 - Non-Solicitation
 - Customer/Client/Supplier/etc.
 - Employee
 - Duration
 - Confidentiality, Intellectual Property
 - Carve-outs: DTSA, NLRB, whistleblower, other state-specific carve-outs
 - Post-Employment Cooperation
 - Non-Disparagement
 - Considerations around mutuality
 - State-specific carve-outs

Offer Letter / Employment Agreement: Key Terms (Cont.)

- Dispute Resolution / Arbitration
 - Governing Law
 - Venue
 - Arbitration
 - Legal fees
 - Damages / treatment of payments / clawbacks

On-Boarding: Disclosure & Communications

- Transition Planning
 - Sudden departures v. planned departures
- Private Company
 - Internal company communications
 - External communications
- Public Company
 - Generally same as private company, plus
 - Form 8-K triggering events – timing of announcement, press release
 - Filing of agreements, exhibits

Off-Boarding: Disclosure & Communications

- Private Company
 - Aligning communications in transition
 - “Passion Project”
 - Internal communications
 - Talking points
 - “Ground Rules”
 - Organizational considerations
 - Retention Awards
- Public Company
 - Generally same as private company, plus
 - Form 8-K triggering events – timing of announcement, press release
 - Recent developments in SEC, listing standards, proxy advisory spaces
 - Transitions / Executive Chair roles
 - Post-termination matters
 - Filing of agreements, exhibits

Off-Boarding: Releases, Transition & Consulting

- Governance
- Garden leave
- Administrative and other leaves
- Impact on continued participation on health / welfare (including COBRA) and pension plans

Off-Boarding: Releases, Transition & Consulting (Cont.)

- Release Agreements
 - Double release – pre and post transition / consulting period
 - Release agreement at beginning of transition / consulting period
 - Separation / severance agreement and release at end of period
 - Simple release agreement at conclusion
 - Provide within twenty-one (21) day period prior to last day
 - Risk – executive refuses to sign
 - Settlement / Severance Agreement and Reaffirmation

Off-Boarding: “Bad Actors”

- Clawbacks
 - Enable companies to recover incentive pay under certain circumstances:
 - If learn after executive leaves they engaged in unethical or illegal conduct that impacted the financial or reputational position of the company
 - If executive violates any continuing obligation he/she may have – confidential information, non-compete, non-disparagement, etc.
 - SEC – broad clawback rule requires mandatory clawback of awarded incentive compensation if the company has to submit an accounting restatement correcting an error in previously issued financial statements that resulted in a material misstatement
 - Even if there is no misconduct or failure of oversight on the part of the executive

Off-Boarding: Adherence to Continuing Obligations

- Steps employers should take to ensure that the executive adheres to the continuing obligations owed to the employer
 1. Cut executive off from internal system
 2. IT review of activity:
 - a) Downloads of confidential material
 - b) Correspondence with current employees
 - c) Correspondence with new employer
 3. Exit interview – reminder of continuing obligations
 4. Letter to executive confirming continuing obligations
 - a) Copy new employer?
 5. Evidence of violations / misconduct

Recent Developments: FTC Final Non-Compete Rule Toplines

- New noncompetes banned for all workers as of the effective date
- Existing non-competes permitted for “Senior Executives,” but no future non-competes (change from proposal)
 - “Senior Executive” -- \$151,164 annual compensation and in a policy making position
 - Unenforceable for all other workers after the effective date (but formal rescission not required)
- Employers must provide notice, model language provided
 - Exception
 - Sale of ownership stake in a business entity
- 120-day effective date
- Legal Challenges

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Proskauer's Perspective on Employee Benefits, Executive Compensation and ERISA Litigation

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