

THE ART OF SAYING GOODBYE: HANDLING EMPLOYEE DEPARTURES IN A TOUGH ECONOMY

By John J. Steffenhagen, Esq.

The economic downturn placed the importance of employee retention – and a nearly unprecedented number of departures – into stark perspective: jobless claims skyrocketed, the Equal Employment Opportunity Commission noted a dramatic increase in discrimination claims and some departed employees weighed the risk and found it preferable to obtain employment (any employment), rather than comply with non-compete or confidentiality agreements. While it may be too early to announce a rebound in the economy, it is never too early to realistically assess and take stock of the “best practices” that can serve to protect employers through good times and bad.

START ON THE RIGHT FOOT: EXPECT THE BEST AND PREPARE FOR THE WORST

Each employment relationship likely starts under the common presumption and hope that both sides expect the best. However, the start of employment serves as an employer’s first – and often best – opportunity to protect its interests for the long term. Several pragmatic, realistic tools can help employers obtain that goal.

Confirmation of At-Will Employment: The vast majority

of employees in Minnesota are “at-will.” “At-will” employment means that an employer may terminate the relationship at any time, with or without notice and with or without cause. Employers can enhance this substantial protection through simple, cost-effective means. At the outset, a well-drafted employee handbook can confirm at-will employment and leave no doubt for either side – as well as any court called upon to decide a dispute. Similarly, a good employee handbook can also anticipate and head off claims that an employee has a contract of employment for a specific duration or monetary amount. Coupled with an employee’s verification of receipt of the employee handbook, employers may thus start with the practice of doing the right thing, right from the start.

Non-Compete Agreements: Non-compete agreements are no longer looked upon with disfavor by Minnesota courts. Instead, such agreements have become a common fact of business life, from corporate board rooms to work-from-home employees. A non-compete agreement provides restrictions upon a departed employee’s ability to join a competitor, solicit the company’s customers, divert employees, or some reasonable combination of all those facets. Minnesota courts will uphold non-compete agreements if the restrictions are reasonably tailored to protect an employer’s legitimate business interests. Once again, careful planning is critical: courts quite often invalidate non-compete agreements that are an “after-thought” or presented to employees after the employment relationship has already been cemented and commenced. Similarly, “cookie cutter,” or one-size-fits-all non-compete agreements will come under intense scrutiny by courts. Put simply, the key is to carefully balance a company’s needs and the nature of its market against a departed employee’s right

to earn a livelihood.

Confidentiality Agreements. Confidential information is often the lifeblood of a business, whether it be customer lists, marketing strategies, margins, or a proprietary product. The Minnesota legislature has provided substantial protection to those “trade secrets” through the Uniform Trade Secrets Act. Companies can take additional steps to protect and define such information through confidentiality agreements with employees. If such an agreement is correctly drafted and documented, companies can contractually protect information that would not otherwise be considered a “trade secret” under the Uniform Trade Secrets Act.

STAYING THE COURSE: CONSISTENCY DURING THE EMPLOYMENT RELATIONSHIP

A particularly enlightened client once noted a common question posed by colleagues in the industry: why employees tended or seemed to be less loyal than in the past. To its credit, the client did not seek answers in demographics or the psychology of the “Gen X” population. Rather, the client simply asked, in turn, whether employers have exhibited a similar erosion of loyalty to their respective work forces. In other words, the keys to employee retention and risk

avoidance may have less to do with the technical aspects of the law, rather than an over-riding sense that an employer is fair, consistent, and concerned.

Nevertheless, several straightforward steps may help an employer achieve those ends. For example, a well-written employee handbook can effectively set real-world, plainly written expectations of conduct. Similarly, regular and written performance appraisals can acknowledge the tasks that an employee does consistently well, identify any areas that need improvement, and document an employee’s performance. Such communication cannot only help an employee to better perform the essential functions of the job, but also document potential performance issues and thus head-off claims that a termination was generated by something other than the fact that an employee could not perform up to expectations.

Even without an employee manual, confidentiality agreement, or non-compete agreement, all employees owe a duty of loyalty to their employer. A duty of loyalty requires that an employee act in the best interests of an employer – including refraining from competition – during the relationship. While employees may use their off-hours to *prepare* to enter into competition (such as incorporating, securing lending or obtaining financing), they cannot take concrete steps to compete against the employer while still employed.

THE FINAL STEP IN RISK AVOIDANCE: CORRECTLY HANDLING EMPLOYEE TERMINATIONS

If an employer has followed “best practices” from the

start of the employment relationship, the risk of suit or unpleasant accusations and recriminations can be effectively decreased. The final steps may, however, be among the most important:

- *Promptly pay a departed employee.* Minnesota law imposes very specific requirements regarding the timing of final payment of compensation – and backs those timelines with significant penalties, including the potential payment of a departed employee’s attorneys’ fees. For example, employers are required to pay earned and unpaid wages within 24 hours after terminating an employee. If the same employee quits, payment will be due on the next regularly scheduled pay date; if that pay date is less than five days after the employee’s resignation, payment may be delayed to the following pay date. If an employee is a commissioned salesperson, different time frames apply.
- *Written reasons for termination.* Normally, at-will employment means that an employer need not give specific reasons for the termination of the employment. However, Minnesota law provides that a departed employee may request those reasons in writing within fifteen working days following the termination of employment. If the request is timely made, the employer must provide the truthful reasons for termination in writing within ten working days. The employer’s response should not be past-hearted in that regard. While the written, truthful reasons for termination are protected against defamation claims, rest assured that reasons will be carefully scrutinized by the employee or an employer if any litigation is contemplated.
- *Enforcement of Non-compete and Confidentiality Agreements.* Employers who utilize non-compete and confidentiality

agreements should carefully assess whether they apply to a departed employee. The decision or failure to do so can have important, long-term ramifications. For example, the failure to pursue enforcement of those agreements may lead to arguments down the road that the employer engages in selective enforcement and that no legitimate reason thus exists for the agreements in the first place. While pursuing enforcement – and winning – may set an important precedent, the converse is similarly true: a court’s refusal to enforce an agreement may set an precedent for other employees.

- *Exit Interviews.* Not every employment termination leads to hard feelings, much less a lawsuit. Accordingly, an exit interview presents an excellent opportunity for an employer to listen carefully to the observations of a soon-to-be former employee and consider (or reconsider) what the employer is both doing right and could improve.

No matter how well-intentioned and correctly implemented, no steps are sufficient to truly “immunize” any employer against the risk of litigation. At the same time, attention to simple, straightforward best practices routinely pays off in the long run, particularly when utilized from the start and with common sense legal counsel. ☐

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Thanking our Veterans – Understanding the Uniformed Services Employment and Reemployment Rights Act

By Mark E. Rath, Esq.

Although the Uniformed Services Employment and Reemployment Rights Act (USERRA) has existed since 1994, its relevance is particularly salient these days. Under the Act, returning military personnel are afforded particular rights and employers are required to notify employees of their rights under the act. The provisions of the act are contained under United States Code, Title 38, Sections 4301 through 4333. Without addressing every provision of the law, which is beyond the scope of this article, generally speaking, USERRA protects the job rights of individuals who leave employment positions to participate in military service. Significantly, it also prohibits employers from discriminating against past and present members of the uniformed services and it makes continued health insurance benefits available.

USERRA applies to persons who perform duty, voluntarily or involuntarily, in the "uniformed services," which include the Army, Navy, Marine Corps, Air Force, Coast Guard, National Guard, and Public Health Service commissioned corps, as well as the reserve components of each of these services.

Under USERRA, individuals that undertake military service have a right to be re-employed at their civilian job if they leave that job to perform service in the uniformed service, provided the following criteria are met: (1) they

ensure that their employer received advance written or verbal notice of their service; (2) they have five years or less of cumulative service in the uniformed services while with that particular employer; (3) they return to work or apply for re-employment in a timely manner after conclusion of service; and (4) they have not been separated from service with a disqualifying discharge or under other than honorable conditions. If eligible for re-employment, qualifying individuals must be restored to the job and benefits they would have attained if they had not been absent due to military service or, in some cases, a comparable job.

USERRA also provides a right to be free from discrimination and retaliation for those past or present uniformed service members, those who have applied for membership in the uniformed service, or those who are obligated to serve in the uniformed service. Under the act, an employer may not deny initial employment, re-employment, retention in employment, promotion, or any benefit of employment based on that status.

USERRA also protects health insurance benefits. If a person leaves his or her job to perform military service, he or she has the right to elect to continue his or her existing employer-based health plan coverage for that person and their dependents for up to 24 months, similar to COBRA, with the employer having the right to require the employee to pay up to 102% of the full insurance premium for coverage. If continued coverage is not elected, a person has the right to be reinstated in his or her employer's health plan upon re-employment, generally without any waiting periods or exclusions, except for service-connected illnesses or injuries.



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