

## Nuts and Bolts of Contracting in the Allied Health Industry

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### I. CONTRACTS IN GENERAL

#### What is a Contract?

- A contract is a promise or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

#### Laws Governing Contracts

- Generally, contracts are governed by state common law and statute, which results in laws that can differ from state to state.
  - However, federal laws should also be examined to ensure that the contract will be enforceable.

#### Creation of a Contract

- Mutual assent (i.e., offer and acceptance)
- Consideration or a substitute
- No defenses

#### Mutual Assent Defined

- **Offer** – promise, undertaking, or commitment with definite and certain terms communicated to the offeree
- **Acceptance** – of the offer before the offer is revoked or rejected

### Consideration Defined

- Bargained for exchange of something
  - Generally, exchanged promises (i.e., Employee agrees to work for employer, if employer promises to pay employee \$)
- Substitute for consideration, such as promissory estoppel or detrimental reliance
  - Begins performance

### Defenses to Formation of Contract Defined

- Mistake (e.g., mistake as to the terms of the contract)
- Lack of Capacity (e.g., mentally incompetent, intoxicated, duress, minor)
- Illegality (e.g., contract for prostitution services)
- Statute of Frauds (e.g., contract that is not to be performed in one year)

## II. EMPLOYMENT CONTRACTS

### At-Will Employment

- If there is no employment contract, most states presume that parties have entered into an at-will employment relationship. Generally in an at-will relationship, either party may terminate the relationship upon reasonable notice. An employer generally may not terminate an employee in a manner that violates public policy. An employee is no longer an at-will employee if there is a contract between the employee and employer.

### When is an Employment Agreement Useful?

- A variety of reasons motivate both employers and employees to seek a formal employment agreement. Although both parties often give up certain rights when entering into such an agreement, the agreement can be mutually beneficial in a way that offsets the loss of those rights.

### Benefits Of Having an Employment Contract

- Security
- Recruiting Incentive
- Defined Performance Expectations
- Defined Compensation Expectations

### Provisions to Consider Including in an Employment Contract

- **Duration** – Define the expected duration of the employment relationship.
  - Duration should be either a definite period of time or until one of the parties exercises one of the grounds for termination laid out in the contract.

### Provisions to Consider Including in an Employment Contract

- **Position and Title** – Clarify the position that is being accepted.

### Protective Provisions to Consider Including in an Employment Contract

- **Compensation** – Identify the base salary and whether the parties intend for the salary to be adjusted with any frequency or according to reviews (also include information regarding bonuses, profit-sharing, incentive compensation, stock options, commission, etc.).

### Protective Provisions to Consider Including in an Employment Contract

- **Duties and Responsibilities** – Include a section on duties (remaining loyal to company, not undertaking acts that injure the company, and similar obligations) and specify expectations. If the agreement references a job description, attach it.

### Protective Provisions to Consider Including in an Employment Contract

- **Termination** – Identify grounds for termination of the agreement (not limited to “only for just cause”).
  - refusal to follow instruction.

### Protective Provisions to Consider Including in an Employment Contract

- **Fringe Benefits** – If not set forth in benefit plan, clearly spell out in the employment agreement.

## Protective Provisions to Consider Including in an Employment Contract

- **Non-compete and Non-solicitation** – agreements that restrict former employees from competing against or soliciting clients of their former employer

These provisions/agreements will be discussed in greater detail later in the seminar

## Protective Provisions to Consider Including in an Employment Contract

- **Confidentiality and Trade Secret Protection** - protection from former employees using their former employer's confidential information or trade secrets

## Protective Provisions to Consider Including in an Employment Contract

- **Assignment of Patent, Invention, or Copyright Rights** – If anticipated that an employee may develop an invention which the employer will want to claim as its property, this clause will be necessary.

## Protective Provisions to Consider Including in an Employment Contract

- **Arbitration** – Used as a means of preventing employers from incurring significant expenses in employment litigation. Be careful to spell out the parameters of the arbitration or it may provide only little cost savings and less favorable results.

## Protective Provisions to Consider Including in an Employment Contract

- **Boilerplate language** – also be sure to include the following topics:  
Notice, Severability, Waiver, Governing Law, Forum Selection Clause, and Integration Clause

## III. NONCOMPETE AGREEMENTS

## Non-compete Agreements

- **Defined** - agreements that restrict former employees from competing against or soliciting clients of their former employer

## Purpose of Non-Compete Agreements

- When an employee leaves and joins a competitor, the risk of loss to the former employer is high
- These agreements generally prohibit the employee from competing with the employer during employment or after termination of employment

## Not Necessary for Every Employee So, who should sign one?

- Employees involved in research or product development
- Employees involved in the design, fabrication, engineering and manufacturing process

## Not Necessary for Every Employee So, who should sign one?

- Employees who service products made and sold by your company
- Sales and service employees who have regular contact with customers or sensitive customer information

## Who Should Sign One? Continued...

- Employees with access to sensitive business information or trade secrets
- Employees who have sufficient information about your business that would allow them to start a competing business

## General factors determining enforceability of Non-compete Agreements

Although state laws vary on the particulars, most state courts look to the same general factors:

- Consideration
- Legitimate business interest of the employer
- Geographic scope
- Duration
- Hardship on the employee
- Effect on the public interest

Courts apply these factors on a case-by-case basis, with results often turning on factual nuances.

## General factors determining enforceability of Non-compete Agreements

### CONSIDERATION

- Consideration must be identified as precisely as possible:
  - In most instances, "continued employment" supplies sufficient consideration for the agreement.
  - However, some courts have determined that continued employment is not sufficient consideration. So when seeking an employee's agreement to enter into a non-compete during the employment relationship employers should use monetary compensation, continuing benefits, or anything the employee would not otherwise be entitled to as consideration.
- Consideration must be mutual (e.g., Employer is giving employee a job/payment for services and employee is performing work for employer)

## General factors determining enforceability of Non-compete Agreements

### LEGITIMATE BUSINESS INTEREST

- The employer seeking enforcement of a non-compete agreement must show the existence of one or more legitimate business interests
- Any non-compete agreement not supported by a legitimate business interest is unlawful and is void and unenforceable
- Simply not wanting to compete with an ex-employee is not a sufficiently legitimate business interest

## General factors determining enforceability of Non-compete Agreements

### Examples of Legitimate Business Interests:

- Trade secrets
- Valuable confidential business or professional information that otherwise does not qualify as a trade secret
- Substantial relationships with specific prospective or existing customers, patients, or clients

## General factors determining enforceability of Non-compete Agreements

### Examples of Legitimate Business Interests (continued):

- Customer, patient, or client good will associated with:
  - An ongoing business or professional practice, by way of trade name, trademark, service mark, or "trade dress"; a specific geographic location; a specific marketing or trade area
- *Extraordinary* or specialized training
  - Must be "above and beyond" that which is normal in the industry

**Remember: A non-compete agreement WILL NOT be enforced without proof of a protectable business interest**

## General factors determining enforceability of Non-compete Agreements

### GEOGRAPHICAL SCOPE

- The reasonableness of a territorial restriction on an ex-employee's competitive activities will vary widely with the circumstances.
- Geographic restrictions must be no greater than necessary to protect the employer's legitimate business interest.
  - In Mississippi, a distance of 50 miles from the employee's former place of work has been held reasonable in one case and unreasonable in another due to varying circumstances with respect to harm to the employer weighed against harm to the employee.

## General factors determining enforceability of Non-compete Agreements

### DURATION

- Also can be no greater than necessary to protect the employer's legitimate business interest.
  - Hint: There is a question of when non-compete provisions actually begin. Thus, it is best to expressly state that they only apply during the term of the employment and for a specified period of time thereafter.
- One and two year restrictions are fairly commonly upheld, though again, *it depends on the circumstances*. Arkansas courts, for instance, have consistently invalidated covenants extending beyond two years from the end of employment.

## General factors determining enforceability of Non-compete Agreements

### UNDUE HARDSHIP ON EMPLOYEE

- This aspect of the enforcement analysis looks to the employee as a person.
  - The courts will evaluate the employee's educational background, employment background, his future ability to learn new or existing skills without violation of the agreement, and the societal need for the services offered by the employee v. needs of the employer to protect its legitimate business interests.

## General factors determining enforceability of Non-compete Agreements

### PUBLIC POLICY

- Courts also determine whether there would be harm to the public.

## General factors determining enforceability of Non-compete Agreements

### PUBLIC POLICY (continued)

- Some states, like California, find that non-compete agreements are unenforceable as against public policy.
- Other states will only find that an agreement is "against public policy" if enforcement would set up a virtual monopoly in an area or industry.

## Enforceability of a Non-Compete Agreement What are courts looking at?

- In addition to abiding by the main guidelines already outlined, courts will look at several other factors:
  - Whether the employer seeking enforcement of the agreement is still in the same line of business or whether it is still in business in the geographical area covered under the non-compete

## Enforceability of a Non-Compete Agreement What are courts looking at? (continued)

- Whether the agreement only restricts a former employee from working in his or her chosen field
- Will consider all other pertinent legal and equitable defenses
- Whether the employer has enforced non-compete agreements against other employees

### When looking at Language Courts May...

- **Blue Penciling** – Some states allow a court to change or omit an unreasonable and unenforceable provisions of a non-compete agreement so as to render it enforceable, some states do not, which can cause the agreement to be found unenforceable.
  - A savings clause should be in the agreement. It should allow severance of provisions that are unenforceable and blue penciling/reformation of the provisions.

### Enforceability of a Non-Compete Agreement: Advice on Termination

- Make sure to strictly follow the employment agreement and the company's established practices and policies regarding employee terminations, particularly those concerning notice and severance benefits

### Enforceability of a Non-Compete Agreement: Advice on Termination

- Failure to do so will give the former employee a potent argument during any subsequent litigation to enforce the non-compete agreement
- Remind employees of their obligations under the non-compete agreement

### Possible Employee Counterclaims Before bringing an action to enforce a non-compete agreement, consider potential employee counterclaims...

- Antitrust violations
- Unfair business practices
- Tortious interference
- Breach of contract by the former employer
- Wage and hour, or other employment claims
- Defamation

### What should the agreement say? General Example Language

- Employee agrees that during Employee's employment with Employer, and for a period of two (2) years from and after the termination, for any reason or no reason, with or without notice or cause, of Employee's employment with Employer, Employee shall not in any way compete against Employer, or accept employment or establish any business relationship (including a consulting relationship), direct or indirect, with any business entity in competition with Employer or which plans to be in competition with Employer.

### What should the agreement say? General Example Language Continued...

- During his or her employment with the Employer and for a period of two (2) years following the end of his employment or association with the Employer, the Employee shall not be employed by, work for, or consult for any person or entity, whether or not a competitor of the Employer, in a position in which his or her duties and responsibilities would inherently and inevitably involve the use or disclosure of trade secrets or other confidential business information of the Employer.



### What should the agreement say? Consider including...

#### Non-solicitation Clause

- Taking away the employers present employees can be as harmful as taking customers.
- Non-solicitation of customers and other employees for some period of time may be more enforceable than a non competition provision, because the former employer is not completely prohibiting its former employee from competing.

### Should I hire an Employee with a Non-compete Agreement?

- Ask Questions:
  - Is there a present contract?
  - Determine whether it is an “at will” or definite term contract.
  - Does it have a non-compete provision and/or non-solicitation provision?
  - Does her present or former employer know she is looking for work with your company?
  - Ask if employee has a copy of the agreement

### Should I hire an Employee with a Non-compete Agreement?

- Talk to your counsel
  - Have company’s counsel review the agreement before you talk further with the employee.
  - Ensure that you know the nuances of the state laws that govern that agreement.
  - Does the agreement prohibit the employee from being hired by your company or just from competing with the former employer?

### Should I hire an Employee with a Non-compete Agreement?

- Can you hire her even with the contract?
  - Is there a way to hire the employee without forcing her to violate the contract?
  - Is the employee worth considering paying the former employer to “buy out” the employee’s contract?

## IV. INDEPENDENT CONTRACTORS

## V. EMPLOYEES

### How Do I Effectively Retain and Contract With Independent Contractors?

- It is important to correctly classify a worker as an independent contractor or as an employee

## How Do I Effectively Retain and Contract With Independent Contractors?

- IRS GUIDANCE
  - In 1987 the IRS provided taxpayers with guidance as to the determination of whether an individual is an employee or an independent contractor.
  - (1) Instruction, (2) Training, (3) Integration, (4) Services rendered personally, (5) Hiring, supervising, and paying assistants, (6) Continuing relationship, (7) Set hours of work, (8) Full time required, (9) Doing work on employer's premises, (10) Order or sequence set, (11) Oral or written reports, (12) Payment by hour, week, month, (13) Payment of business and or traveling expenses, (14) Furnishing of tools and materials, (15) Significant investment, (16) Realization of profit or loss, (17) Working for more than one business at a time, (18) Making services available to general public, (19) Firm's right to discharge, and (20) Worker's right to terminate.

## How Do I Effectively Retain and Contract With Independent Contractors?

- EEOC STANDARD
  - Not surprisingly, the EEOC, the agency with enforcement authority for the federal antidiscrimination laws, has taken an extremely broad view toward the subject. To determine the nature of the working relationship the EEOC asks:
    - Does a contract describing the work relationship between the charging party and respondent exist?
    - How is the charging party paid and who determines his or her rate of pay?
    - Does the charging party report to an office provided by the company?
    - Does the company withhold social security or other taxes from the charging party's compensation?
    - Does the company provide medical insurance for temporary or long-term disabilities?

## How Do I Effectively Retain and Contract With Independent Contractors?

- NATIONAL LABOR RELATIONS BOARD STANDARD
  - The NLRA is the primary federal statute governing union-management relations.
    - If a worker is determined to be an employee, he or she is entitled to all the Act's protections including the right to join a union and be free from retaliation.
    - The standard applied by the NLRA to distinguish an employee from an independent contractor is the common law right to control test.
      - The test applies a totality of circumstances approach, which requires the balancing of various factors, with no one factor being determinative.

## How Do I Effectively Retain and Contract With Independent Contractors?

- PRACTICALLY SPEAKING...
  - The bottom line for the Independent Contractor test is control.
  - Language is important.
    - Use the word engage, not employ.
  - Non-compete clauses are generally not allowed in Independent Contractor Agreements
    - Can include non-solicitation and confidentiality clauses.
    - Need additional consideration for employees.

## V. SEVERANCE AGREEMENTS

### Severance Agreement are GOOD...

- The Supreme Court has emphasized that Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims.

### What Can be Waived?

- Federal Law Claims are Generally Waivable
- State Law Claims are Generally Waivable
- Unknown Claims are Generally Waivable

### What Cannot Be Waived?

- Future Claims are not waivable as a matter of law; a release may extend only to present and past claims
- Fair Labor Standards Act – Claims under the FLSA generally may not be waivable without court or US Department of Labor Approval

### What Cannot Be Waived? (Continued)

- Workers' Compensation Claims – Workers' Compensation laws vary from state to state. In many states, a separate release, approved by workers' compensation authorities is required.
- Unemployment Compensation Claims – Although unemployment compensation laws vary from state to state, an employee generally cannot waive a statutory right to file a claim for unemployment benefits.

### What Cannot Be Waived? (Continued)

- Waiver of Claims Through Collective Bargaining – Unions may not waive an employee's ADEA or Title VII rights through collective bargaining.
- Right to File a Charge of Discrimination with the EEOC

### When is There an Enforceable Waiver?

- Consideration – Adequate consideration must be offered to the employee in exchange for a valid release. This means something of value beyond that to which she already is entitled.
- Knowing and Voluntary – To determine whether a release by an employee was knowing and voluntary, most courts consider the totality of the circumstances, looking beyond the language of the release to consider all the relevant factors.

### When is there not an Enforceable Waiver? (Continued)

- Duress – Courts have found duress where:
  - Only given 30 minutes to consider release
  - Only given 20 hours to consider release
  - Only given 24 hours to consider release

### When is there not an Enforceable Waiver? (Continued)

- Fraudulent Inducement – a release may be set aside if an employee can show that she was induced by fraud into signing the release.
- Mutual Mistake – a release may be voided if the employee can show the parties signed the release on a mutual mistake; an unilateral mistake is not sufficient.

### What should the severance agreement say?

- Who the release is between:
  - THIS SEVERANCE AND GENERAL RELEASE AGREEMENT (“Agreement”) is made between Homer Simpson (“Employee”) and Nuclear, Inc., its owners, subsidiaries and affiliates, and its directors, officers, employees, attorneys, agents, and successors (collectively “Widgets”) as of \_\_\_\_\_ (the “Effective Date”).

### What should the severance agreement say? (continued)

- If termination is because of business reasons (i.e., a layoff, moving locations), consider including the reason.
- State the last date of employment.

### What should the severance agreement say? (continued)

- If the employee will continue working for a period of time after signing the agreement, state what is expected:
  - Employee agrees that, until the End Date: (1) he will perform all the duties customarily associated with his position; (2) he will devote his work hours exclusively to the business of Nuclear; (3) he will spend two (2) weeks, to be chosen in Nuclear’s discretion, in Winston-Salem, North Carolina attending to the business of Nuclear and/or training new employees hired by Nuclear; and (4) he will perform any other work-related tasks assigned to him by Nuclear.

### What should the severance agreement say? (continued)

- The amount of money and/or benefits the employee is already entitled to.
- The additional amount of money and/or benefits the company will give the employee for signing the agreement.
- What will happen if the employee fails to fulfill his obligations under the severance agreement.

### What should the severance agreement say? (continued)

- A statement of what the employee is releasing the company of:
  - In consideration of the payments and covenants described herein, Employee, for himself and for his heirs, legal representatives, and assigns hereby unconditionally and absolutely releases, remises, acquits and forever discharges Nuclear and all of its heirs, executors, administrators, legal and personal representatives; former and/or current partners, officers, directors, employees, shareholders, managers, agents, attorneys, predecessors, successors, assigns, trustees, purchasers, principals, and privies; past, present, and future parent, subsidiary, and affiliated companies (both direct and indirect), franchises, divisions, related trade names, and affiliated entities of any kind; insurers; and any person or entity who may be jointly liable with Nuclear or any of the aforesaid persons or entities (collectively the “Released Parties”) ...

### What should the severance agreement say? (continued)

...from any and all claims, charges, suits, debts, dues, demands, grievances, sums of money, rights, damages, liabilities, proceedings, actions, and causes of action of any kind, nature, or character (whether known or unknown, whether suspected or unsuspected, and whether at law, in equity, or otherwise), which relate to and/or arise out of any fact or event whatsoever from the beginning of time to and including the End Date of this Agreement ...

### What should the severance agreement say? (continued)

...The foregoing release includes, but is not limited to, all claims and causes of action relating to Employee's hiring, employment, and/or termination from employment; all claims, personal remedies, or rights arising under Title VII of the Civil Rights Act of 1964; the Civil Rights Act of 1991; the Americans with Disabilities Act of 1990, as amended; the Rehabilitation Act of 1973, as amended; any state wage laws; the Virginia Human Rights Act and/or the Human Rights Code of the County of Arlington; any federal, state, or local handicap, disability, or discrimination related act, regulation, ordinance, statute, or executive order; and any ordinance or statute promulgated by any city, county, municipality, state subdivision, or federal governmental subdivision . . .

### What should the severance agreement say? (continued)

...Furthermore, this release also includes, but is not limited to, the following: (1) claims for retaliatory or wrongful discharge of any kind; (2) claims for unpaid or withheld wages, benefits, bonuses, and/or other compensation or benefits of any kind; (3) claims for intentional or negligent infliction of emotional or mental distress or for outrageous conduct; (4) claims for breach of duty, libel, slander, or tortious conduct of any kind; (5) claims for interference with business relationships, contractual relationships, or employment relationships of any kind; (6) claims for breach of an implied covenant of good faith and fair dealing; (7) claims for interference with and/or breach of contract (whether express or implied, in fact or in law, oral or written); (8) claims for attorneys' fees, costs, or expenses; (9) claims for discrimination based on sex, age, religion, race, color, creed, handicap, disability, citizenship, national origin, and/or any other factor prohibited by federal, state, or local law; (10) claims based upon the creation, maintenance, or submission to a hostile or offensive work environment; (11) claims for constructive discharge; (12) claims of retaliation; and/or (12) any and all claims which Employee ever had or has arising as a result of or connected in any way with his employment with and/or his subsequent separation from employment with Nuclear. Employee hereby expressly understands and agrees that this Agreement shall extend and apply to all unknown, unsuspected and unanticipated injuries and damages as well as those that are now known. It is agreed and understood by the parties that this is a full and final GENERAL RELEASE.

### What should the severance agreement say? (continued)

Basically everything that COULD be applicable.

### What should the severance agreement say? (continued)

- Statement that nothing in the Agreement shall be construed to prohibit employee from filing a charge with the EEOC, participating in any investigation or proceeding conducted by the EEOC, or filing a charge of claim not waivable by law.

### What should the severance agreement say? (continued)

- Provision about whether or not employee agrees to not to disclose confidential information.
- Provision about whether or not employee agrees to continue to abide by an already existing agreement (i.e., non-compete or non-solicitation agreement).

### What should the severance agreement say? (continued)

- Provision stating that employee was given the opportunity before signing to consult attorney.
- Provision stating that the employee acknowledges and understands what he is waiving
- What state law will govern

### What should the severance agreement say? (continued)

As you can see, severance agreement are complex. The provisions that are mentioned here, are just general suggestions. It is best to consult an attorney before having an employee sign a severance agreement.

## VI. BREACH AND REMEDIES

### When does a breach of contract occur?

- If:
  - The employer/employee is under an absolute duty of performance; and
  - This duty has not been discharged, then this failure to perform in accordance with the contractual terms may be held to be a breach of contract.

### Remedies for Breach

- If an employment contract is breached by the **employer**, the measure of damages is the full contract price (less wages actually earned elsewhere after the breach)
- If breach by the **employee**, the measure is whatever it costs to replace the employee and the damages such breach causes the employer to suffer. The modern view allows the employee to offset any monies due from work done to date.

### Remedies for Breach

- **Duty to mitigate** – the non-breaching party has a duty to mitigate damages. If she does not do so, her damages will be reduced by the amount that might have been avoided by mitigating. In employment contracts, the employee is under a duty to use reasonable diligence to find a like position.

## THANK YOU

*Presented by:*

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