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When Do You Need a Written Employment Agreement?

Problem:

Common wisdom is to "get it in writing" when it comes to executive employment agreements. But is this always true? Generally speaking, companies write employment agreements to accomplish the four "Rs" – recruit, reward, retain, and restrain executives. In particular, with regard to restraining employees – non-compete, non-solicit, no-hire, non-disclosure of confidential information, and non-disparagement covenants – it is much easier for a company to enforce an agreement signed by both parties than to rely on common law principles. But incomplete, unclear or ambiguous written agreements can be of less value to a company than even an agreement based solely on a handshake. Even "at-will" employment relationships can be jeopardized by a poorly written agreement.

Should a company and its executives have written employment agreements?

Solution:

From a company's perspective, there should be written employment agreements where (i) industry custom or market demand for the executive requires an agreement; (ii) employment terms, in particular with regard to compensation, are complicated or subject to such potential misinterpretation that a writing would benefit the company; (iii) the company wants contractual non-compete and non-solicit protection, enforceable by injunction, or ownership over intellectual property (these protections can also be obtained in separate stand-alone agreements); (iv) the company wants to convince present or potential investors that its executives are "locked up" and part of a stable management team or (v) in jurisdictions where "at-will" employment is not the law, the company wants to limit its exposure upon termination of employment.

From the executives' perspective, there should be written employment agreements if the executives wants to guard against the company taking undue advantage when business needs change. Among the provisions an executive might seek are: i) non-forfeiture of incentive and deferred compensation provisions, ii) limited and well-defined reasons for early termination of the employment agreement, iii) a "good reason" resignation provision, iv) severance pay on a termination without cause or a resignation for good reason, v) fair post-termination obligations, and vi) a favorable definition of change of control with severance pay if the executive chooses to leave the company. To successfully negotiate these protections, an executive must learn what limiting language is customary or at least acceptable, particularly with regard to terms and conditions outside the executive's control, and benefit and compensation plan forfeitures and clawbacks. Whether the agreement is "at will" or for a set term, the consequences of a break-up of the employment relationship should not be left for negotiations when the employment ends.