An Employer's Primer to Mitigating Risks When Entering Into Contracts

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All employers will likely enter into at least one written contract with a third party, whether for services, equipment, and/or agreements with their own employees (e.g., confidentiality agreements, non-competition agreements, and/or non-solicitation agreements). Though verbal contracts are enforceable in many contexts, a written agreement allows the parties to create or expand their relationships, to detail the parties' obligations under the contract, and to reduce their agreement to an enforceable legal document.

Whether drafting their own agreements or analyzing agreements proffered by third parties, employers should carefully review every term of the agreement to ensure it sufficiently memorializes the parties' agreement and does not create any unnecessary risks. All too often, parties intending to execute a contract may have had a preexisting business relationship without issues or are otherwise optimistic that the relationship will continue without trouble. Based on a potentially incorrect sense of security, an employer may be inclined to "rubber stamp" an agreement without the requisite analysis and negotiation. Unfortunately, an employer that is later forced to enforce a breach of the agreement may realize that the agreement did not properly reflect the employer's understanding of the parties' relationship and, even worse, may contain terms that are blatantly unfavorable to the employer.

Under Massachusetts law, except for certain wrongful acts that are beyond the scope of this article, a party that executes a written contract is presumed to know the contents of the agreement and to have agreed to be bound by the same. This is especially true concerning a contract between sophisticated businesses. Thus, employers should analyze the proposed contract to identify any potential issues and attempt to resolve such issues before signing an agreement.

Though employers should consider consulting with an experienced attorney for advice about a specific contract or business relationship, the following are some contractual clauses that should be carefully evaluated if they are spotted in a contract:

1. Indemnification Clauses: Generally, such clauses require a party to release another party from liability and/or to reimburse another party if it is held liable for breaching the contract. Indemnification clauses may result in an unwanted allocation of risk and significant expense. Accordingly, parties may want to consider limiting (e.g., by agreeing to hold another party harmless only for certain actions) and/or eliminating such provisions.
2. Statute of Limitations Reduction Clause: A statute of limitations refers to the time frame in which a lawsuit/administrative action can be filed concerning breach of contract and/or other claims. In Massachusetts, an aggrieved party generally has six (6) years to bring an action to enforce a breach of contract. Under certain circumstances, however, parties can reduce such limitations periods by way of contract. Consequently, employers should make sure that they are comfortable with any clause purporting to reduce any statute of limitations period.
3. Arbitration Clause: An arbitration clause is a dispute-resolution clause that generally requires any legal disputes arising out of and/or relating to the contract to be resolved by binding arbitration rather than litigation. Parties often believe that arbitration is a faster, cheaper way to solve contract-related disputes, and courts routinely uphold arbitration clauses. As there are potential benefits and pitfalls to both arbitration and litigation, parties should carefully examine such clauses.
4. Notice and Cure Period: These clauses often allow the alleged breaching party to cure a purported violation before the non-breaching party proceeds to arbitration and/or litigation. Such clauses can be an effective method to identify and resolve disputes before initiating costly enforcement actions.
5. Attorneys' Fees Clause: Generally, absent an agreement or statutory authority, parties are responsible for paying for their own attorneys' fees. These provisions, however, often allow the non-breaching party to recover its reasonable attorneys' fees and costs from the breaching party. Given the considerable expense often associated with litigation, these clauses should be carefully negotiated.
6. Liquidated Damages Clause: Generally, liquidated damages set forth a predetermined amount that will be owed if a party fails to perform under the contract. These damages should be carefully examined, as they are often subject to judicial scrutiny.

Provided that a contract does not violate any applicable laws, and includes the minimum terms necessary to render a contract enforceable, parties generally have wide latitude to draft contracts as they see fit. Though there is likely no way for employers to eliminate every risk when entering into a contract, all employers benefit from understanding that they will likely be held to the agreements they execute and should thus carefully review any agreement before signing.

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