August 11, 2014

Five Documents That Financial Services Employers Should Revisit Now

With summer here, including its long days and blazing heat, many thoughts may turn to beaches, sunshine, and lazy afternoons. The summer may also be a good time for employers—especially those in the financial services sector—to take stock of some of their more important employment documents. In light of recent developments, this month's *Take 5* discusses five employment documents worth checking:

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1. **Separation Agreements**
2. **Promissory Notes**
3. **Non-Solicitation Agreements**
4. **Arbitration Agreements**
5. **Reasonable Accommodation Policies**

1. Separation Agreements

In pursuit of its Strategic Enforcement Plan, the Equal Employment Opportunity Commission ("EEOC" or "Agency") recently filed lawsuits to challenge separation agreements containing provisions that are widely used by employers in the financial services industry. The following provisions have garnered close scrutiny by the EEOC through its recent well-publicized lawsuits:

- **Covenants Not to Sue:** Such covenants generally require that an employee agree not to sue or institute any complaint or action pertaining to his or her employment or termination therefrom in any forum, including, but not limited to, an administrative agency. The EEOC's position is that, as a matter of public policy, employees cannot waive their right to file a charge of discrimination with the EEOC or the equivalent state or local fair employment

practices agencies ("FEPAs"). In this vein, the EEOC is concerned about provisions that may be interpreted as waiving such rights.

- **Non-Disparagement Clauses:** These clauses generally include an assertion that the employee will not make statements that disparage the business or reputation of the employer. The EEOC contends that such clauses are contrary to public policy, as they will lead employees to believe that participating in an EEOC investigation or testifying in a proceeding in which they will be critical of the employer would breach the terms of their severance agreement.

- **Non-Disclosure of Confidential Information Provisions:** Generally, the confidentiality provisions that the EEOC has challenged are those requiring employees not to disclose information pertaining to the company's personnel (including the skills, abilities, and duties of the company's employees), wages, benefit structures, succession plans, and information concerning affirmative action plans or planning. The EEOC maintains that employees must be able to share such information in connection with filing or testifying about a charge of discrimination, and such provisions could impede their ability to do so.

- **Cooperation Clauses:** These clauses generally require departing employees to, among other things, notify their employer upon receiving a subpoena, deposition notice, interview request, or other inquiry regarding proceedings, such as administrative investigations. According to the EEOC, such clauses will not allow, or could negatively impact the ability of, departing employees to cooperate with the Agency in an investigation or testify in connection with proceedings at the EEOC and FEPAs.

- **General Release Provisions:** These provisions often include releases of "charges" as well as claims or complaints of unlawful discrimination of any kind. The EEOC's position is that release language should expressly state that the release does not prevent the employee from filing charges with the EEOC or FEPAs.

While there is considerable reason to question whether the EEOC will ultimately succeed in its challenges to employers' use of standard form separation agreement provisions, employers should review their separation agreements to determine which sections may be similar to the provisions being scrutinized by the EEOC and, to the extent that their separation agreements contain the same or similar sections to those identified by the EEOC as problematic, determine whether those sections should be eliminated, clarified, or otherwise revised. Employers may want to consider adding a clear disclaimer to the agreement (or various disclaimers in connection with each applicable provision) in order to specifically inform employees that nothing in the agreement (or that particular provision) prohibits employees from filing charges with the EEOC or a FEPA. While doing so may help protect employers from EEOC challenges, be mindful, however, that the EEOC has also challenged the sufficiency

of including one such disclaimer in a five-page, single-spaced agreement without specifically referencing the clauses to which it pertains.

2. Promissory Notes

More than anywhere else, employers in the financial services industry provide advance payments to employees. In order to protect themselves in case of an employee resignation, the termination of an employee, or violation of an employee or former employee of a restrictive covenant, many employers require employees to sign promissory notes providing that amounts that have not been repaid or otherwise forgiven are owing and due upon an employee's termination of employment. While employers generally wish to retain their rights to recoup money from terminating employees pursuant to the terms of existing promissory notes, they must take care when doing so. State laws, such as New York's Labor Law, have specific requirements about making deductions from paychecks as a way to recoup money owed to employers.

Pursuant to Section 193 of the New York Labor Law and the New York State Department of Labor's regulations, ***prior** to* the loan or advance being granted to the employee, the employee must sign and return a promissory note (or other written authorization) to the employer. The promissory note (or other document) must contain the following information to recoup a loan or advance through a wage deduction:

- **The Amount, Timing, and Duration of Loan or Advance.** In addition to the amount of the loan, the employer and employee must agree to the timing and duration of the repayment.

- **The Amount of Deduction or Repayment.** The promissory note/authorization must indicate the amount to be deducted to repay the loan or advance in total and per wage payment. Repayments of loans or advances may be recovered through wage deduction or by separate transaction (i.e., the employee writes the employer a check), as long as the procedures described herein are followed.

- **Dates of Deduction or Repayment.** The promissory note/authorization must include the dates when each deduction will be taken or repayment made. The employer may recover the loan or advance by wage deduction no more frequently than once each pay period.

- **The Dispute Procedure.** Notice must be provided to the employee that he or she may contest any deduction that is not made in accordance with the terms of the promissory note/authorization, such as the amount and frequency of the deduction, through the employer's dispute procedure. The dispute procedure, which must be communicated to the employee in the promissory note/authorization form, is as follows:

- The employee must submit an e-mail to a particular employer representative, stating his or her objection to the deduction.

- The employer must reply, in writing, to the employee's objection as soon as practical. Such reply must include: (i) a statement addressing the issues raised by the employee's objection, (ii) a clear statement indicating the employer's position with regard to the deduction (including whether the employer agrees or disagrees), and (iii) a reason why the employer agrees or disagrees.

- If the employee avails himself or herself of the dispute procedure, the employer must cease deductions until the employer provides the reply to the employee and any appropriate adjustments have been made. Further, any delay in repayment caused by the dispute procedure will extend the authorized time frame within which the employer may recover the loan or advance through deductions.

- If an employer does not provide a dispute procedure, the New York State Department of Labor will presume that the contested deduction was impermissible.

Once a loan or advance is given, through a promissory note or other written authorization, no further loans or advances may be given or deducted until any existing loan or advance has been repaid in full.

Employers should be aware, however, that simply including the above-noted sections may not be enough to pass muster in New York. This is because standard promissory note terms, such as provisions for interest or attorneys' fees, may be problematic for employers seeking to deduct amounts from wages. In its Deductions from Wages Regulations, the New York State Department of Labor specifically provides that "[a]ny provision of money which is accompanied by interest, fee(s) or a repayment amount consisting of anything other than the strict amount provided, is not an advance, and may not be reclaimed through the deduction of wages." Therefore, a promissory note that includes provisions for interest or fees, as most notes commonly do, may not be relied upon to make wage deductions lawfully in New York. Rather, the employer must attempt to recoup the monies in another manner, such as through an independent action or proceeding.

3. Non-Solicitation Agreements

Financial services companies are continuously looking for ways to protect their assets, particularly their coveted client relationships. Properly drafting contractual provisions, including client non-solicitation provisions, is one key way to protect such relationships. Earlier this year, the New York Appellate Division issued a decision that helped shed light on the current state of New York law when it comes to drafting non-solicitation provisions. In the case, which we discussed earlier, the court found initially enforceable two non-solicitation provisions. One of the provisions restricted

direct or indirect communications with clients or prospective clients of the employer with whom the employee "had personal contact … while employed by" the employer. The other provision restricted communications with "clients or customers of [the employer] or pursu[ing] business relationships developed while employed by [the employer]." Both non-solicitation provisions contained lists of carved-out clients (presumably, clients with whom the individuals had pre-existing relationships).

To be enforceable in New York, a restraint, such as a non-solicitation restriction, must: (i) be no greater than is required for the protection of the legitimate interest of the employer, (ii) not impose undue hardship on the employee, and (iii) not be injurious to the public. In applying this test, courts have rejected non-solicitation provisions deemed to be overly broad. In one case involving a hedge fund, the court struck down a non-solicitation provision that would have prohibited the former employee from dealing with any customer of the fund, whether or not the individual had a relationship with that client while employed with the employer. In doing so, the court cited the First Department's holding that a "noncompete is unreasonable if it aims to prevent [an individual] from dealing with former employer's entire client base, including clients that were not serviced by [the individual] during his employment." Likewise, in another recent case involving an insurance company, a non-solicitation provision prohibiting the solicitation of existing customers as of the date of the employee's termination was deemed unenforceable. The court questioned whether the insurance company had a legitimate protectable interest as the "names and personal data regarding potential insurance clients [which were] likely available from numerous publically available sources, including the Internet."

Accordingly, when drafting customer non-solicitation provisions, employers should do the following:

- **Draft a Narrowly Tailored Restriction.** While geographic limitations do not generally apply to customer non-solicitation provisions, employers should include an appropriate temporal restriction. An employer should carefully consider the amount of time needed to protect its interests. Including extensive restrictive covenants that cannot be justified by business reasons should be avoided.

- **Reasonably Define "Customers."** A non-solicitation provision should include a definition or description of which customers the individual is barred from soliciting. Courts may consider whether the non-solicitation provision covers customers with whom the individual had preexisting relationships (that were not developed while the individual was employed with the employer) and whether the provision extends to customers whom the individual either had no dealings with during his or her employment or had confidential information about in connection with his or her employment.

- **Be Able to Articulate the Legitimate Business Reasons for the Restriction.** Employers should not only be able to articulate the legitimate business reasons for the restrictive covenant, such as the protection of

confidential information and/or the protection of customer relationships, but should also consider reciting such reasons in the agreement itself.

- **Consider Appropriate Conflict-of-Laws Provision.** Courts will not simply apply a contract's choice-of-law provision when there is no reasonable basis to do so. Employers should consider the appropriate law to apply to the agreement to avoid unnecessary disputes in the future.

- **Include a Severability Clause.** Many courts, including those in New York, deeming one or more aspects of a restrictive covenant unenforceable, have the ability to sever the unenforceable provisions and/or "blue pencil" (modify) such provisions to cure the defect(s). Employers should specifically set forth the court's ability to do so in their restrictive covenant agreement.

4. Arbitration Agreements

Many employers include predispute arbitration agreements as stand-alone covenants or as part of their employment agreements. Under these arbitration agreements, any disputes that may arise between the parties are resolved through mandatory arbitration rather than in the courts. A recent case serves as a reminder for financial services employers to make sure they carefully draft arbitration agreements.

The Dodd Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") amended the Sarbanes-Oxley Act ("SOX") to, among other things, prohibit agreements requiring predispute arbitration of SOX claims (*see* 18 U.S.C. § 1514A(e)(2)). The amendment states that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." (18 U.S.C. § 1514A(e)(2)). This broad language caused concern among employers that the prohibition meant that the *entire* arbitration agreement could be invalidated with respect to *all* types of claims if SOX claims were not expressly carved out, but the U.S. Court of Appeals for the Fourth Circuit recently joined the Fifth Circuit in interpreting this prohibition narrowly.

In the Fourth Circuit case, *Santoro v. Accenture Federal Services, LLC*, the plaintiff, Santoro, filed a complaint against Accenture alleging claims under several federal statutes but did not raise any whistleblower retaliation claims under Dodd-Frank or SOX. Accenture moved to compel arbitration pursuant to an arbitration clause in Santoro's employment contract. Santoro argued that the entire arbitration agreement was invalid under Dodd-Frank because it did not have a carve-out for whistleblower retaliation claims and, thus, could generally be interpreted as requiring arbitration of such claims. The court held that Dodd-Frank's statutory prohibitions against predispute arbitration agreements apply *only* to the extent that such agreements waive or limit judicial resolution of whistleblower retaliation claims. Accordingly, the court upheld Santoro's arbitration agreement because Accenture was not seeking to compel him to arbitrate any whistleblower claims. More generally, the court found

that when there are no whistleblower causes of action, Dodd-Frank does not invalidate an enforceable arbitration agreement. While this case represents a positive outcome for employers, it should also serve as a warning bell. Companies preparing arbitration agreements should carefully consider what statutes are included or excluded. There are current ambiguities subject to clarification—whether by Congress or the courts—and until they are clarified, a case-by-case analysis will be necessary to determine the extent, if any, that mandatory arbitration agreements will be enforceable with respect to whistleblower retaliation claims under these statutes.

5. Reasonable Accommodation Policies

As companies know, the Americans with Disabilities Act ("ADA"), like its state and local law counterparts, requires employers to provide reasonable accommodations for qualified individuals with disabilities, unless doing so presents an undue hardship for the employer. To gain the protection of the ADA, a qualified disabled employee must be able to perform the essential functions of the job with or without a reasonable accommodation. Employers faced with requests for reasonable accommodations know that such requests are often complicated, particularly given the need to engage in an "interactive process" with the requesting employee. The complexity of the process is likely responsible for the increase in the number of disability discrimination charges filed with the EEOC, which is responsible for enforcing the ADA (including claims of failure to reasonably accommodate). Indeed, between 2008 and 2013, such charges increased by almost 8 percent.

While the law regarding what is considered a "reasonable accommodation" is complex and seemingly constantly changing, financial services employers can take steps to help ensure that they have appropriate procedures in place. A written reasonable accommodation policy can be the first step in that process.

Although the law does not generally require employers to maintain a reasonable accommodation policy, doing so is recommended by the EEOC. Also, a reasonable accommodation policy can be beneficial to employers for several reasons: (i) it helps reinforce and document an employer's commitment to complying with the law; (ii) it provides employees with clear information about the procedures for requesting an accommodation; (iii) it helps to guide managers and human resource personnel in following proper procedures for providing prompt, effective, and consistent accommodations; and (iv) it increases consistency in considering and granting reasonable accommodations.

When crafting a reasonable accommodation policy, employers should consider the following:

- Including a statement that the employer complies with the ADA, as well as applicable state and local laws, and will provide reasonable accommodations to qualified applicants and employees with disabilities, except where such an accommodation would create an undue hardship.

- Adding an affirmation that the employer will ensure that qualified individuals with disabilities are treated in a nondiscriminatory manner in the pre-employment process and that employees with disabilities are treated in a nondiscriminatory manner in all terms, conditions, and privileges of employment.

- Drafting an explanation of the procedure for seeking a reasonable accommodation, including the fact that the process will involve a prompt and interactive process.

- Identifying the person to contact regarding any questions about the process.

- Providing a form to submit for individuals seeking reasonable accommodations and encouraging individuals to use the form. In the form, the individual should identify the type of accommodation requested, an explanation of the limitation for which the accommodation is needed, and a description of the way in which the accommodation will permit the individual to perform the essential function of the job.

- Providing notification that medical documentation of the disability may be required.

- Ensuring that the types of accommodation offered are comprehensive, as the EEOC's interpretation of what is considered a "reasonable" accommodation is constantly expanding. It is not necessary to list the types of reasonable accommodation that may be provided, as the circumstances vary for each employee.

Putting in place a procedure as well as a policy for seeking reasonable accommodations is more important than ever. The EEOC's recently released enforcement guidance on pregnancy discrimination and related issues highlight the notion that impairments that arise because of pregnancy could qualify as disabilities leading to the need for reasonable accommodation. The EEOC's focus on reasonable accommodations, especially for pregnancy-related disabilities, is yet another reason for employers, including those in the financial services industry, to have a written procedure.

Along these lines, employers should be aware that several jurisdictions, including New York City, have mandated that employers accommodate an employee's pregnancy, even if the employee is not disabled due to the pregnancy. Further, pursuant to federal and many state and local laws, employers are required to make reasonable accommodations for employees' and applicants' sincerely held religious beliefs. As such, employers should consider including accommodation of pregnancy and sincerely held religious beliefs in their reasonable accommodation policies, where such accommodations are required by applicable law.

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