Executive Compensation National Institute Employment Agreements

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Rising Impact of #MeToo Movement

- Growing list of companies with current or former CEOs and senior executives alleged to have acted inappropriately
- CEOs and other senior executives have been terminated
- Companies facing the issue squarely in public disclosure
- Impacting how contracts are being drafted

Executives in the #MeToo Crosshairs

- CBS/Moonves
- Wynn Resorts/Wynn
- The Weinstein Company/Weinstein
- Barnes & Noble/Parneros
- Rambus/Black
- Avid Technologies/Hernandez
- Uber/multiple
- Google/multiple
- American Apparel/Charney
- Intel/Krzanich
- Priceline/Huston

Standard “Cause” Triggering Events

- Willful misconduct or gross negligence
- Failure to perform
- Failure to follow lawful directions
- Conviction of a felony or crime of moral turpitude
- Fraud, embezzlement, misappropriation

New Triggering Events added to “Cause” Definition

- Breach of fiduciary duty
- Dishonesty
- Violation of corporate policies, procedures or code of ethics
- Sexual harassment or discrimination
- Habitual drug or alcohol use

Executive Protection against Overly Sensitive Cause Triggers

- Willful or intentional act
- Not willful if acting in best interests of company/shareholders
- Materiality
- Direct impact on employer-reputational or economic harm
- Cure opportunity (where possible of cure)
- Procedural due process-hearing before Board with counsel (if elected)

SEC Disclosure Requirements

- Investigation of executive does not require disclosure
- Disclosure is required where:
  - Termination
  - Temporary leave of absence/reassignment of duties
  - End of leave/reinstatement of duties
  - Up to four 8-Ks
- Reason for event does not have to be disclosed
- Historically, no reason given
- Trending towards factual disclosure

Nondisclosure Agreements (“NDAs”)

- Argument- NDAs perpetuate harassment and other bad behavior
- Many states bar or limit use of NDAs
- Mandatory arbitration now barred by NY as a condition to enforcing contractor obtaining remedies
- NDAs still effective for business-related confidential information
- Federal law- bipartisan bill introduced to ban NDAs for claims of sexual harassment

State Law Changes as to NDAs

- 16 states (including Arizona, Maryland, New York, Tennessee, Vermont and Washington) have enacted or have laws pending banning or limiting use of NDAs and language which requires waiver of whistleblower awards
- New York for example prohibits ““any clause or provision . . . which requires as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to mandatory arbitration to resolve any allegation or claim of an unlawful discriminatory practice of sexual harassment.”
- Still can be used to safeguard confidential information
- Arguably targeted at protecting abusers from public disclosure

NDAs- the Federal Angle

- A bipartisan bill was introduced in Congress in July, 2018 to ban NDAs for claims of sexual harassment.
- State law may conflict with the Federal Arbitration Act
- The FAA's "liberal federal policy favoring arbitration," AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011), requires the enforcement of arbitration agreements "save upon grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.
- USSCT ruling in Epic Systems Corp. v. Lewis implicates a broader debate about the efficacy of arbitration agreement.
- State law carve outs for "except where inconsistent with federal law" (NY) may swallow the rule.

Restrictive Covenant Changes

- Enormous change in this area in the recent past
- Massachusetts leads the way with long-awaited statutory change
  - Applies to all noncompetition agreements entered into on or after October 1, 2018
  - Generally limits post-employment noncompetition periods to a maximum duration of 12 months
  - 24 months permitted for breach of fiduciary duty or unlawful taking of property
  - Absent agreement to the contrary, employers must pay employee 50% of the former employee's base salary during the period of restriction (so-called "garden leave clause")
  - A noncompete is not permitted against former employee whose employment is terminated without cause by the company unless entered into in connection with leaving the company
  - New procedural requirements to follow for enforceability

Restrictive Covenant Changes

- CA Labor Code 925 (effective 1-1-17) affects choice of law and venue provisions for CA based workers.
- Legal changes in Illinois (low wage workers) and Nevada (must offer “valuable consideration” if noncompetition agreement is sought) are significant state law changes.
- Colorado (physicians), New Mexico (nurse practitioners and midwives), Oregon (home health care workers) Utah (broadcasting industry) have effectuated statutory changes for certain industries.
- Manitowoc Co., Inc. v. Lanning (Wisconsin 2018) (holding non-solicitation of employees provisions fall under Wis. Stat. § 103.465, the statute governing non-compete agreements between employers and employees)
- Farm Bureau Life Insurance Co. v. Dolly (S.D. 2018)(holding agreement not to sell to existing customers was neither an agreement not to solicit, nor an agreement to refrain from the business altogether and was therefore invalid under SDCL 53-9-12) .

The Broker Protocol

- In 2004, Merrill Lynch, Morgan Stanley, Smith Barney, and UBS signed the “Protocol for Broker Recruiting”.
- The Protocol was and is a “cease fire” and limited forbearance agreement among member firms.
- Approximately 1,800 members as of today.
- Protocol entails a limitation of liability for taking information or solicitation if departing brokers take only “client name, address, phone number, email address, and account title of the clients that they serviced while at the firm. (“Client Information”).

Broker Protocol Changes

- Morgan Stanley and UBS exit the protocol in late 2017.
- Lawsuits against brokers increased markedly in 2017-2018.
- Focus has been confidential information and customer solicitation.
- Morgan Stanley v. Fitzgerald, No. 17-12866 (D.N.J. Dec. 2017) (PI granted precluding soliciting customers: court rejected argument that injunction was inappropriate because information taken was acceptable under Broker Protocol)
- Morgan Stanley v. Glazer, No. 17-9107 (N.D. Ill. Dec. 21, 2017) (TRO granted when departing brokers took client lists)
- Morgan Stanley v. O'Neill, (E.D. Michigan, Feb 26, 2018)(where no documentary evidence that O'Neill had taken customer information, Morgan Stanley w/d TRO request)
- Morgan Stanley v. Rumley, (D. Indiana January 2018) (MS seeks to enforce employment contract signed in 2001 as a trainee).

Broker Protocol

- In drafting agreements, be aware that going to non-protocol shops requires careful drafting.
- HA&W Capital Partners, LLC v. Bhandari, (June 27, 2018, Court of Appeals of Georgia): "Unambiguous language of the protocol does not invalidate the notice provisions at issue."

Misclassification Issues

- Still a significant issue in the law
  - Increasingly relevant in the “gig economy” era

  - Three major cases this year
    - Lawson v. GrubHub, N.D. Cal., No. 15-CV-05128 (Feb. 8, 2018)
      - First trial court decision on gig economy misclassification won by Grub hub

    - Razak v. Uber, E.D. Pa., 2:16-cv-00573-MMB (April 11, 2018)
    - First summary judgment decision on misclassification; won by Uber

    - O’Connor v. Uber, 9th Circuit, 3:13-cv-03826-EMC (September 25, 2018)
      - Reversing class certification on misclassification

Ban the Box Laws/Flexible Scheduling

- Ban the Box and Flexible Scheduling are latest trends in state and local law affecting hiring and management of the workforce.
- 11 states now mandate removal of conviction history from job applicants
- Washington becomes most recent state with Fair Chance Act
- 17 cities also extend fair chance hiring laws.
- Predictive Scheduling laws require temporary scheduling changes for certain specified events.
  - Oregon Fair Work Week Act (July 1, 2018) is first state law.
  - New York City's Temporary Scheduling Law now applicable in 2018 as well.

IRC 162(m) Changes

- Repeals exceptions allowing deduction of:
  - Qualified performance-based compensation
  - Post-employment compensation to covered employees
- Expands classes of companies covered
- Expands “covered employees” to include:
  - CFOs
  - Anyone previously classified as a “covered employee”
  - Principal executive officer or principal financial officer at any time during the year
- Grandfathering exception for arrangements in effect on 11/2/17 and not modified thereafter

Impact of IRC 162(m) Change

- Pre 11/3/17 grants of options/SARs are generally grandfathered
- Employers need to consider whether any plan design change or other modification causes loss of grandfathering
- Persevered discretion to reduce payments viewed as means written binding contract
- State law must be considered given specific facts
- Past practice or communications to employees may give rise to implied contract rights
- Will loss of deductibility impact compensation philosophy?
- Has direct impact on change in control transactions
  - Covered employee status may carry over to acquiring entity
- Loss of deductions may impact deal pricing

162(q) /Sexual Harassment Exception

- Elimination of deduction for ordinary and necessary expenses related to settlement or payment subject to NDA if covering:
  - Sexual harassment
  - Sexual abuse
- 162(q) applies to settlements paid after 12/22/17
- Does not define what “related to” means
- May unintentionally apply to attorneys fees paid by victim to their attorneys