Hiring: 5 MAKING THE OFFER Steps

The interviews are completed, the proper people have been consulted, and now is the time to extend the employment offer. Just call the person, offer the job, and he/she accepts and done, right? Not exactly because several steps have been missed.

Step 1: Non-Compete agreement. In this increasingly competitive global economy, more employees are within the scope of those who could potentially be required to sign a non-compete agreement. In general terms, a non-compete agreement takes effect when the employment ends to restrict the former employee from working for other employers, i.e. competitors. The concept is that the employee has gained valuable knowledge and contacts through his/her employment and should not be allowed to use that against his/her former employer. Historically, non-compete agreements were typical for salespeople, doctors, dentists, and chiropractors and limited the geographic area in which they could work, post-termination. However, the scope of potential employees has now expanded, and geographic restrictions are not meeting former employers' needs for protection.

The decision to require a non-compete agreement as a term of employment must be made pre-offer because the agreement must be signed before the employee starts work or be supported by additional consideration. A good way to determine whether the employee you're hiring should sign a non-compete agreement is to ask yourself this question: If I learned [the new employee] went to work for [my competitor] after working for me, would I experience an identifiable, negative, financial impact on the [specific] aspect of my business? If the answer is yes, a non-compete agreement is probably a good idea. If you're going to require a non-compete agreement, include it as a term of the initial offer, provide the written agreement to the chosen candidate with the offer letter, and be sure it's signed before the first day of employment. Non-compete agreements should be specifically tailored to the particular job and the scope of protection needed.

Generalized non-compete agreements, i.e. those that can be downloaded from the internet, are typically inadequate to properly balance the employer's need for protection with the employee's right to earn a living. Minnesota Courts do not enforce non-compete agreements that are not properly formed or properly limited in scope.

Step 2: Other provisions. In addition to non-compete agreements, there are several other provisions that should prudently be part of the initial employment offer:

Non-solicitation agreement. This type of agreement is a kin to the non-compete agreement because it takes effect when the employment ends. The non-solicitation agreement prevents the former employee from soliciting the employer's employees, customers, clients, vendors, etc. Without this type of agreement, the principle of free enterprise makes the employer's relationships subject to acquisition by the former employee and/or the employer's competitors. Like a non-compete agreement, a good way to determine if a non-solicitation agreement should be an employment term is to ask yourself this question: If I learned [the new employee] hired my employee(s) or sought to do business with my customer(s)/client(s) or purchased products from my vendors, would I lose a business advantage or experience an

identifiable, negative, financial impact on my business? If the answer is yes, then a non-solicitation agreement is a good idea. Non-solicitation agreements should be tailored to meet the specific relationships the employer seeks to protect.

Confidentiality/Trade Secrets provision. Minnesota's Uniform Trade Secret Act (Minn. Stat. § 325C *et seq*.) provides injunctive relief and damages for the misappropriation of "trade secrets." In addition, employees owe their employer a fiduciary duty of confidentiality. Difficulties arise, however, in connection with the practical application of the law and duty. For the Act's provisions to apply to a particular body of information, the information must be meet the statutory requirements of a "trade secret." One of those requirements is that employer made reasonable efforts to maintain the secrecy of the information. One effort an employer makes to maintain secrecy is requiring its employees sign confidentiality/trade secrets provisions agreeing to maintain the confidentiality of the information described therein. So the discussion comes full circle because to obtain the protection of the Act, the employer should have its employees sign provisions agreeing to maintain the confidentiality of the information the employer deems a "trade secret" or confidential. Not every piece of information the employer thinks is confidential qualifies as a trade secret under the Act, but provisions signed by employees that specifically describe a body of information deemed confidential certainly help an employer's argument for protection later. Moreover, these express provisions may deter former employees from disclosure of potential trade secrets, post-employment. Remember, even a successful lawsuit for injunction/damages pursuant to the Act does not cure the detrimental effects of disclosure of confidential/trade secret information. One cannot "un-ring the bell."

Inventions agreement. *Merriam-Webster* defines invention as a "finding, discovery." If an employee invents something during his/her employment, who is the owner of the invention? From the employer's perspective, it should be the owner because it provided the resources (i.e. paid the employee's salary/wages, provided the supplies/tools, supplied the knowledge/work environment) that generated the invention. From the employee's perspective, he/she is the owner because it was his/her idea and usually will claim that he/she worked on it at home. Courts wrestling with this decision give at least some weight to an invention agreement that expressly states the employer is the owner of all inventions. In addition, an employee may be deterred from using an invention, post-termination, if an appropriate inventions agreement has been signed. Here again, specificity in drafting the agreement makes it more likely that it will be enforced.

Payroll Deductions provision. Minn. Stat. § 181.79 prohibits employers from making any deductions from an employee's paycheck without the employee's written authorization for deduction of a specified amount. If you're going to make payroll deductions for insurance premiums, health care plans, pension plans, 401k plans, union dues, etc., you'll need to have written authorization from the employee for the specified amounts. It's best to handle this with the initial employee paperwork so it doesn't get forgotten.

Step 3: Drug Testing. As an employer, if you want to administer drug testing to the chosen candidate, you must comply with all statutory requirements. Minn. Stat. §§ 181.950-181.954. At a minimum, the employer must (1) have an established drug testing policy and give the

candidate a copy of it; (2) obtain the candidate's written informed consent for the testing; (3) make the candidate a contingent job offer before testing; (4) require the same testing of all job candidates; (5) use a properly licensed, accredited or certified testing laboratory as defined in Minn. Stat. § 181.953; (6) inform the candidate if the result is positive; and (7) provide a confirmatory retest to verify a positive result before a job offer can be withdrawn. If drug testing is important to your business, then you'll need to plan ahead to establish these procedures early on in the process (i.e. in the pre-planning stages) to avoid scrambling around at the last minute. You'll need to have a drug-testing policy in place, have a consent form for the candidate to sign, and have identified a professional testing facility to conduct the testing. Once you receive the results, confidentiality is key—distribution of the information must be limited to those people who have a "need to know." In the event of a positive result, notify the candidate promptly and inform him or her of the confirmatory retest options. If the candidate waives the option, it must be in writing. Do not withdraw the contingent job offer until all the procedural requirements are completed.

Step 4: Exempt v. Non-exempt—Are you sure? The Fair Labor Standards Act (FLSA) requires employers to pay non-exempt employees hourly for their work and time and a half for overtime. The FLSA defines "non-exempt" as "blue-collar" workers who perform work involving repetitive operations with their hands, physical skill and energy; police officers, firefighters, paramedics, EMTs, and similar public safety employees. Difficulties arise with the proper characterization of employees as exempt or non-exempt, leading to substantial litigation. While there is no "one-size-fits-all" application, some guidance is available. The analysis starts with the notion that all employees are non-exempt and proceeds with a determination of whether the exceptions apply. To be exempt, the employee must receive compensation of at least $455 per week or earn at least $100,000 annually and perform primary duties that meet one of the following "duties tests": administrative, executive, professional, computer professional, or outside sales. "Primary duty" means the principle, main, or most important duty the employee performs.

> Administrative: This exemption applies when the employee's primary duty is the performance of office or non-manual work that (1) is directly related to management or general business operations and (2) involves the exercise of discretion and independent judgment on matters of significance.
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> (1) The work must be directly related to running the business/department and includes, for example, work in the areas of tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, advertising, marketing, research, safety, personnel management, human resources, external relations, computer network and/or administration, legal and regulatory compliance.
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> (2) In order to determine whether the employee exercises discretion and independent judgment, the following factors are considered: authority to formulate, interpret or implement management policies or operating practices, carries out major assignments in conducting business operations, performs work that affects business operations to a substantial degree, authority to

commit the employer in matters having significant financial impact, authority to deviate from established policies or practices without prior approval, authority to negotiate and bind the employer on significant matters, provides consultation or expert advice to management, involved in long- or short-term planning of business objectives, investigates and resolves matters of significance, represents the employer in handling complaints or disputes.

Executive: The executive exemption applies when the employee's primary duty involves (1) the management of an enterprise/department, (2) the customary or regular supervision at least two full-time employees or the equivalent (i.e. part-time employees who combine for 80 hours per week); and (3) authority to hire and fire or make significant recommendations of such. "Management" includes interviewing, selecting and training employees; setting and adjusting employees' pay; directing the employees' work; evaluating employees' performance or production for purpose of recommending promotion or other changes in status; handling employee complaints; disciplining employees; planning the work; determining the techniques to be use to complete the work; determining the type of product to be used, purchased, stocked, and sold; providing for the safety of employees and property; planning and controlling the budget; and monitoring or implementing compliance measures.

Professional: To qualify for the learned professional exemption, the employee's primary duty must be the performance of work requiring advanced knowledge, which is defined as work which is predominately intellectual in nature and requires consistent exercise of discretion and judgment. The advanced knowledge must be in a field of science or learning and be customarily acquired by a prolonged course of specialized intellectual instruction. Typically, physicians, lawyers, and teachers meet the learned professional exemption.

Computer Professionals: To be exempt as a computer professional, the employee must perform a primary duty of one (or more) of the following: (i) application of systems analysis techniques and procedures, including consultation with users to identify proper equipment and systems to meet users' requirements; (ii) design, development, analysis, creation, testing or modification of computer systems or programs to meet functional requirements of users; (iii) design, development, analysis, creation, testing or modification of computer programs related to machine operations; or (iv) combination of the above-described duties requiring the same level of skill. If the computer professional meets that duties test, then if the employee earns at least $27.63 per hour, the "at least $455 per week," requirement is not applicable.

Outside Sales: To qualify for the outside sales exemption, (1) the employee's primary duty must be making sales or obtaining orders or contracts for products or services for which consideration will be paid by the customer; and (2) the employee must be customarily and regularly engaged away from the employer's place of business. The $455 per week requirement does not apply.

So if you are now unsure whether your employee is exempt or not, then you're in good company with judges and attorneys who argue about the applicability of these tests to particular jobs or groups of jobs. If you are unsure, you can treat the employee as non-exempt (the FLSA does not

require any employee be exempt; remember that is the exception) and/or consult an attorney if you want a legal opinion.

Step 5: Employee or Independent Contractor? Some positions that have traditionally been treated as "employee" may be appropriate for treatment as "independent contractor." If the worker does meet the factors required for independent contractor status, a cost savings can be realized. Caution must be exercised however because mischaracterizing a worker as an independent contractor when he should be an employee can have financial ramifications for tax, worker's compensation, FLSA, and insurance purposes, and other potential legal concerns. The idea here is that the prudent employer considers the employee/independent contractor analysis and makes an informed decision, rather than "just do what we've always done."

While there are some variations between federal and state law, generally courts consider the following factors to determine whether a worker is an employee or independent contractor: (1) the right to control the manner and means of performance, including the discretion of when and how long to work; (2) the level of specialized skill required; (3) the source of the materials or tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) the assignment of work tasks; (7) the method of payment; (8) whether the worker employs employees; (9) whether the work is part of the worker's regular business; (10) whether the worker is a business entity; (11) whether traditional "employee benefits" are provided; and (12) the parties' tax treatment of compensation paid. If these factors weigh on the side of the worker, the relationship is more likely to be upheld as an independent contractor. Having a written agreement with an independent contractor is an important safeguard, although not a guarantee to court approval of the independent contractor relationship.

After completing these 5 steps, you're ready to assemble the job offer packet. Dotting the "i"s and crossing the "t"s before the employee ever works for you can avoid future problems.