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SALESPERSONS' RIGHTS

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I. THE EMPLOYMENT RELATIONSHIP

A. EMPLOYMENT AT WILL

1. Employees in New York State are employed at the will of their employers.

2. In New York State, "absent an agreement establishing a fixed duration, an employment relationship is presumed to be hiring at will, terminable at any time by either party". *See Sabetay v. Sterling Drug, Inc.*, 69 N.Y.2d 329 (1987).

3. Accordingly, there is no "pure" wrongful discharge claims. An individual with a positive work performance may be terminated without cause.

4. There are statutory exceptions to employment at will. For example, an employer may not terminate an employee because of that employee's race (Title VII).

B. THE EMPLOYMENT CONTRACT

1. Employees may enter into contracts which explicitly set forth the terms of their employment.

2. The contract may include the duration of employment, hours expected of the employee, salary, fringe benefits, health benefits and limitations on termination.

3. Employees may also argue that an implied contract exists even though there is no written term of employment. An often litigated issue involving implied contracts is the employer's right to terminate the employee at will.

4. The employment at will presumption may be rebutted if the employee demonstrates some limitation, by implication, on the employer's right to discharge.

5. Oral representations and assurances have been found to be sufficient to form a contract to employ a person until discharged for cause. *See Ohanian v. Avis Rent-a-Car*, 779 F.2d 101 (2d Cir. 1985) where

the employee was assured that if he accepted transfer, the only way he would lose his job is if he "screwed up badly".

6. Generally, a personnel manual will not restrict an employer's option to discharge unless there is a clear provision limiting the employer's right to terminate.

7. Along those lines, most employers are careful to explicitly state in any employment manual or related materials provided to the employee that employment is "at will".

II. NON-COMPETE AGREEMENTS

1. In New York State, covenants not to compete are disfavored by the courts but will be enforced where the restrictions are reasonably limited in scope (geographically and duration) and the enforcement is necessary to protect the employer's interests *See Geritrex Corp. v. DermaRite Industries LLC*, 910 F.Supp. 955, 959 (S.D.N.Y. 1996).

2. Courts have found that the former employer has a protectable interest in the good will of its business. Further, with respect to customer lists, courts have determined that where the customers are not readily ascertainable but must be cultivated with great effort and secured through the expenditure of considerable time and money, the names of those customers are protectable trade secrets.

3. However, a former employee was not enjoined from soliciting his former employer's customers where the names and addresses of potential customers were readily distinguishable through public sources.

4. Moreover, information concerning customer preferences and ordering patterns cannot be deemed a trade secret if such information "could be easily recalled by the former employee or obtained by contacting those customers directly."

5. Protectable good will may be based on relationships with long-term clients as well as former clients.

6. There is no concrete formula regarding what time and geographic restrictions are reasonable. The following time and geographic restrictions have been found to be <u>reasonable</u>:

   a. Three-year restriction on the practice of veterinary medicine within 35 miles of the former employer's clinic;

b. Security brokerage firm's one-year non-solicitation provision against former financial advisors, limited to the city in which the financial advisors had worked;

c. Two-year non-competition non-disclosure covenant barring a former building supply sales representative from competing for existing customer relationships;

d. Insurance agent's one-year 25-mile non-competition covenant;

e. State-wide covenant not to compete with 6-month duration for senior vice president in charge of major sales accounts;

The following geographic and time restrictions have been found to be unreasonable:

a. Covenant purporting to bar paper products salespeople from competing within a 100-mile radius of New York City or any of the former employer's other marketing areas;

b. Non-competition provision unlimited as to time, place and scope; and

c. Covenant in which an employee promised not to compete with the employer for a two-year period after termination within any territory through which he had been assigned within the last two years of his employment; held unenforceable because it was unrestricted by any limitations key to uniqueness, trade secrets, confidentiality or even competitive unfairness.

7. Courts have found that restrictive covenants that are client based and contain no geographic limitations are reasonable. Specifically, in *Mallory Factor Inc. v. Schwartz*, 146 A.D.2d 465 (1st Dept. 1989) an 18-month restrictive covenant without geographic limitation which restricted an employee from working on any account that the employer company had been involved was upheld.

8. If the employer believes that the former employer is violating the restrictive covenant, that employer may move for a preliminary injunction enforcing the covenant not to compete. In order to obtain such an injunction, the former employer must establish "the likelihood of success on the merits, irreparable harm absent the granting of the injunction, and that the balance of the equities is in the former employer's favor". *See Ellen C. Hair Designers, Inc. v.*

Balestrieri, 277 A.D.2d 427 (2d Dept. 2000).

9. However, the denial of the motion for a preliminary injunction enforcing a restrictive covenant does not preclude an employer from seeking relief in the form of a permanent injunction. The preliminary injunction simply provides the employer with the potential for immediate relief.

10. A showing of irreparable harm is considered the most important requirement with regard to granting of a preliminary injunction. Courts have found that where the only injury alleged is the loss of sales, such allegation is not sufficient to establish irreparable harm. This is because courts can determine quantifiable losses for which the former employer could be later compensated with monetary damages. However, some courts have gone the other way. Specifically, *see Albany Med. College v. Lobel*, 296 A.D.2d 701 (3rd Dept. 2002) (medical practice's loss of patients and revenue supported a finding of irreparable harm).

11. The nature of the employee's separation from employment may impact the enforceability of the restrictive covenant. Courts have found that a reasonably limited covenant not to compete may be unenforceable when the employer breaches the underlying employment agreement. *Cornell v. T.V. Dev. Corp.*, 17 N.Y.2d 69 (1966). Further, it has been found that an employee's otherwise enforceable restrictive covenant is unenforceable if the employer has been terminated involuntarily. Under New York Law:

> An employer should not be able to use a non-compete agreement offensively by terminating an employee without cause and then using the agreement both to deny the employer-earned compensation or benefits, and to prevent him from engaging in his chosen livelihood.

Cray v. Nationwide Mutual Insurance Company, 136 F.Supp 2d 171 (W.D.N.Y. 2001).

12. Where the employer establishes cause/reason for the termination, restrictive covenants have been found to be enforceable. However, a discharge stemming from the employer's poor financial condition does not constitute termination for cause.

13. If successful in enforcing the restrictive covenant, the employer may be able to recover any profits it was deprived by reason of the former employer's improper competition. The employer may also be able to obtain liquidated damages so long as the liquidated damage clause contained in the contract is not so disproportionate to

constitute an unenforceable penalty. For example, a $50,000 liquidated damages penalty clause was found to be enforceable where the former employee was generating approximately $150,000 in revenue for the time period in question.

14. Of course, as part of any court judgment, the employer may also be entitled to injunctive relief prohibiting the employee from working in violation of the covenant. The employer is only entitled to such a relief until the date the covenant expires.

III. SEVERANCE

1. Absent a binding contract stating otherwise, an employer in New York State is not obligated to provide an employee severance benefits upon separation.

2. There is no formula for what is reasonable in terms of severance benefits.

3. The value of severance benefits for the employer generally involves the promotion of amicable separation from employment as well as the signing of a release whereby the employee agrees not to pursue any cause of action/claim against the employer for prior acts.

4. Severance benefits are often subject to negotiation. The employer is generally agreeable to increases in the benefits where there is the potential for a claim against the former employer in connection with the termination.