MILLER JOHNSON Attorneys

Protecting Yourself With Thorough Employment Agreements

- *Patrick Edsenga*
- *John Koryto*
- *Mike Stroster*

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Today's Topics

- Contractual commitments that belong in an employment handbook
- Updated employment applications and offer letters
- Employment contracts
- Confidentiality agreements
- Non-compete and non-solicitation agreements

Employee Handbooks

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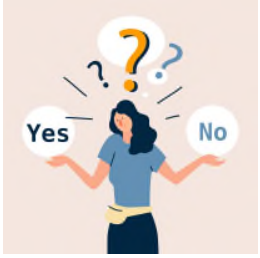
Employee Handbook – Yes or No?

- Should we have an employee handbook?
- What if we don't?
  - Employees are not on notice of expectations and requirements
  - Employer loses the advantage of establishing:
    - Employees' legal obligations
    - Limits on employer's legal obligations

Should We Have An Employee Handbook?

- What if we don't?
  - No clearly established at will status: Risk of claims based on alleged oral promises by any manager
  - Risk of inconsistent treatment can contribute to claims of discrimination
  - No "remedial action" defense to harassment claims



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What If We Don't Have An Employee Handbook?

- Where else will you put the various notices you're required to provide to employees? For example:
  - Family & Medical Leave Act policy
  - Fair Labor Standards Act "safe harbor" policy
  - EEO policy
  - SSN privacy policy – required by Michigan law
  - Policy to comply with Michigan Paid Medical Leave Act

Handbook Structure

1. Contractual Provisions
   - Employee is legally bound by these terms
   - These terms require the employee's agreement
2. Non-contractual policy statements
   - Employer is bound by what it publishes but can make changes without employees' agreement.
   - Employee is subject to policies that are published in a manner reasonably calculated to put the employee on notice

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Contractual Terms

- What terms need to be contractual?
- Stated in an "Employee's Acknowledgment and Agreement"
  - Must be signed by each employee
  - Should be maintained in employees' personnel files.
- Acknowledging receipt of handbook
  - Employment is subject to the handbook
  - Employee is responsible to be familiar with the handbook
- At-will employment statement

Contractual Terms: Extinguish Previous Promises And Agreements

- Important for maintaining at-will status
- But: Beware that you don't extinguish agreements that you want to keep, like:
  - Confidentiality Agreements
  - Noncompete Agreements
  - Intellectual Property Agreements
  - Loan and Payroll Deduction Agreements

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Agreements & Ownership of Work Product & Intellectual Property

- Limit new promises and agreements
  - Define who has authority to make an agreement that deviates from the handbook
  - Require any such agreement to be in writing and signed by both parties
- Establish ownership of work product and intellectual property
  - Inventions, patents, improvements
  - Creative works: written work, designs, photos
  - Employee's work product related to employment

Contractual Terms

- Protect confidential and proprietary information from use and disclosure
- Require return of Company property
  - At end of employment or upon demand
- Authorization to deduct from final paycheck
  - For any amounts owed to the employer
- Non-competition agreement
  - Is a handbook signature page the best place for this?

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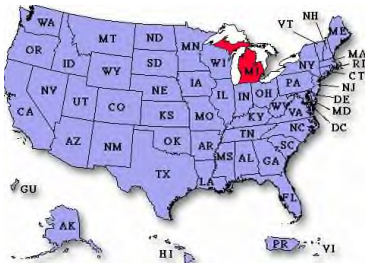
Contractual Terms (Cont.)

- Shortened limitations period for employment claims
  - Six months is enforceable in Michigan
- Jury trial waiver
  - Largely untested in Michigan courts, but still a good idea
- Agreement to arbitrate employment disputes, with a "class action waiver"?
  - Arbitration agreements seem to be popular
  - But arbitration has significant disadvantages, and this strategy should not be undertaken lightly

Forum Selection & Choice of Law

- Forum selection
  - Where suits must be brought
- Choice of law
  - For employees outside Michigan, should Michigan law govern?
  - Some states still might apply their own law



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Should Our Handbook Say?

"Nothing in this handbook is a contract of any kind."

Mandatory Handbook Contents

General	Work Hours
▪ Coverage ▪ EEO ▪ Harassment ▪ Complaint procedure ▪ Disabilities ▪ At-will employment ▪ SSN privacy policy	▪ Job Status (FT, PT, temp., etc.) ▪ FLSA statuses ▪ Work schedules and shifts ▪ Recording hours worked ▪ FLSA workweek ▪ Pay periods and pay days ▪ FLSA safe harbor ▪ Overtime

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Mandatory Contents (Cont.)

Employee Responsibilities	Benefits
▪ Attendance and punctuality ▪ Rules of conduct ▪ Termination of employment ▪ Prohibited substances ▪ Workplace violence and weapons ▪ Computers / electronic communications ▪ Social media ▪ Solicitation and distribution	▪ Holidays ▪ PTO / vacation ▪ Paid sick leave ▪ Jury duty ▪ List of benefits ▪ Workers' comp ▪ Unemployment

Mandatory Contents (Cont.)

Leaves	Acknowledgement & Agreement
▪ FMLA ▪ Non-FMLA medical leave ▪ Personal ▪ Military ▪ Bereavement	▪ Authority to contract ▪ At-will employment ▪ Contractual limitations ▪ Reimbursement / authorization for deduction ▪ Confidentiality ▪ Signature ▪ IN A SEPARATE DOCUMENT ▪ Place in personnel file

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Recommended Policies

- Anti-nepotism
- Conflicts of interest
- Emergency closings / procedures
- Tobacco (may be required by state/local law)
- Dress code
- Use of company equipment or property
- Corrective action – expectations and progressive discipline
  - Preserve discretion even if following corrective action
- Allowances (tools, tuition, clothing, cars, phones, business expenses, etc.)

More Recommended Policies

- Details about benefit plans
- Media relations
- Parking
- Personnel files
- Training
- Tuition reimbursement
- Uniforms

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Employment Application

Bare Bones Requirements

- EEO statement / direction for accommodation
- Date of application / period of consideration
- Position applied for
- Authorized to work
- Education (no years)
- Employment experience
- References
- Certification and Agreement

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Other Things to Consider

- Employment History: Pay or salary information
- Criminal history and convictions
  - Previous convictions and explanations
  - Pending charges
- Drug testing information or requirement
- Valid only for a certain period of time and then must reapply
  - Why? "Salting"

Things to Avoid

- Birth dates / dates associated with education
- Maiden name
- Social Security Numbers
- Citizenship
- Specific reasons for military discharge
- Attendance history or concerns

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Certification and Agreement

1. Definitions
2. Certification of Truthfulness
3. Authorization for Employment / Educational Information
4. [optional] Drug Testing Notice
5. At-Will Statement
6. Authorization to Work
7. Limitation on Claims
8. Need for Accommodation (Michigan)
9. [optional] Background Checks
10. Consideration for Employment

Offer Letters

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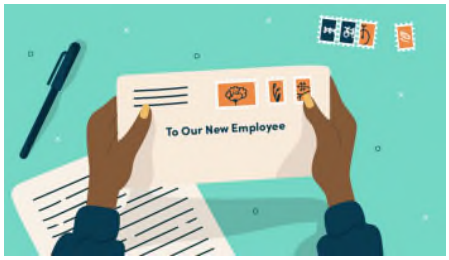
Offer Letters

- Confirmation of at-will employment
- FLSA status (or explanation of method of compensation and eligibility for overtime)
- Disclaimer that the offer letter is not a contract for any set compensation, benefits, or term of employment



Employment Contracts

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Employment Contracts

- A binding agreement between the employer and employee
  - Can be enforced in court or in alternative dispute resolution
- Parties are bound by the language in the agreement, even if they discussed other terms
- Can be used for at-will employment

Necessary Terms

- Identify the parties
- Term of agreement
- Identify the position
- Duty of loyalty
- Compensation
- Termination
- Severance (if any)
- Return of property
- Protective covenants
- Noncompete
- Nonsolicit
- Confidentiality

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- Severability
- Attorney fees
- Injunctive relief
- Governing law
  - Choice of law
  - Venue
- Signed, written amendments only
- Entire Agreement

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Confidentiality Agreements

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Confidentiality Agreements

- Absolutely critically important
  - In the course of her employment, Employee will have access to Confidential Information (as defined below) of the Employer and its affiliates, subsidiaries, vendors, and customers.
  - Employee agrees to maintain the strict confidentiality of all Confidential Information during the term of this Agreement and forever after.
  - Unlike trade secrets, you get to define what is "Confidential Information"
    - "Confidential Information" means all information and materials of the Employer, and all information and materials received by the Employer from third parties, which are not generally publicly available and all other information and materials which are of a proprietary or confidential nature, even if they are not marked as such. This provision will survive the termination of this Agreement indefinitely.

Confidentiality Agreements

- Employee recognizes and agrees that all copyrights, trademarks, patents, and other intellectual property rights to works or marks arising in, from or in connection with the Employee's employment by the Company, and that are within the scope of the Employee's employment by the Company, are the sole and exclusive property of the Company.
- Return of property
- Remedies

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Noncompete and Nonsolicitation Agreements

Noncompete / Nonsolicit

- Very important – very frustrating
- Protection against unfair competition
- Voluntary compliance is the very best outcome
- Courts are more likely to enforce a nonsolicit.
- Courts do not like to enforce noncompete agreements, but they will if:
  - You have a good agreement
  - It is reasonable in term and scope
  - You have good facts
- Enforcement requires a significant investment of time, money and effort.

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How Can I Make The Process Less Frustrating?

- Don't overreach.
- Make sure you have a clause that says the employee will pay the company's attorney fees if the company prevails
  - Does not need to run both ways
  - Non-competes only for those employees where you need it
  - Very effective tool in litigation
- Manage your own expectations
  - A lot depends on the specific judge and their view of non-competes.
  - Recovering money from an employee is difficult.
  - Proving damages is difficult.
  - The goal is to stop unfair competition and protect your business.
  - Legal action may lead to others complying voluntarily

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Your Questions

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Your Questions

- Do you recommend arbitration agreements?
- How do you make sure there is no conflicting language in the agreements?
- Is it important to have agreements tailored to the states where employees reside?
- Any tips for getting old/crusty language out of the agreements?
- Are non-compete agreements as effective as they were several years ago?
- Risks of having an electronic acknowledgement (checkbox) as opposed to electronic signatures?

Your Questions (Cont.)

- If a salary is listed in the EA is an amendment needed annually for a raise? If the employee is paid a draw against commissions, is an amendment necessary for any adjustment to the draw?
- Should we have a common offer letter to all new employees?
- Should we always have someone sign a separation agreement (if we can)?
- Are employment agreements still valid if the employer is sold?

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MILLER JOHNSON Attorneys

Patrick Edsenga
616.831.1713
edsengap@millerjohnson.com

John Koryto
269.226.2979
korytoj@millerjohnson.com

Mike Stroster
616.831.1780
strosterm@millerjohnson.com

DETROIT
409 E. Jefferson Ave
Fifth Floor
Detroit, MI 48226

GRAND RAPIDS
45 Ottawa Ave SW
Suite 1100
Grand Rapids, MI 49503

KALAMAZOO
100 W Michigan Ave
Suite 200
Kalamazoo, MI 49007

millerjohnson.com

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