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Avoiding Common Errors in Employment Documents: A Checklist

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In the fast-paced world of employment law, where scandals and ground-breaking lawsuits are front page news, more mundane requirements for documentation that employers provide to candidates and employees can fall through the cracks. While these requirements may not be as sensational as the latest sexual harassment allegations or the potential repeal or scaling back of the Dodd-Frank Act, overlooking them can expose employers to potentially devastating liability. Below is a checklist of fundamental provisions and best practice tips with regard to standard documents maintained by employers that are frequently omitted or neglected by even the most sophisticated employers. This checklist concerns important employment law issues under New York and Federal law. To the extent an employer has employees in jurisdictions other than New York, it is imperative to consult local counsel regarding these issues.

I. EMPLOYMENT CONTRACTS/ OFFER LETTERS

- Overtime

While often required by law (see New York State Wage Theft



Checklist

Prevention Act), even where it is not mandatory, it is the best practice to clearly delineate in an offer letter or contract whether an employee's position is eligible for overtime pay.

- Arbitration

Determine whether to include an arbitration provision and, if so, make sure the clause expressly includes discrimination claims, and consider

whether to include a class action waiver.

- Confidentiality

Omit language forbidding employees from disclosing compensation information, as such prohibitions are against the law in a growing number of jurisdictions, including New York, and are disfavored by the NLRB. In addition,

include a carve-out that permits employees to report possible violations of law to, and participate in investigations by, government authorities or self-regulatory organizations. See II below.

- DTSA

Include the Defend Trade Secrets Act's (DTSA) "immunity notice" in connection with nondisclosure provisions to ensure availability of the company's remedies of double damages and attorneys' fees for potential claims under the DTSA.

- Bonuses

Include clear language stating that bonuses are discretionary and that the individual must be employed on bonus payday to be eligible to receive a bonus.

II. SEPARATION/SEVERANCE AGREEMENTS

- Carve Outs

Ensure that nondisclosure agreements include carve-out provisions that permit the individual to report possible violations of law to, and participate in investigations by, governmental authorities or self-regulatory organizations such as the SEC, OSHA, FINRA and the EEOC.

- Rehiring

Consider including a provision stating that the individual will not apply for employment with the company and/or the company will not rehire the individual, keeping in mind those provisions are generally disfavored by the EEOC.

- Continuing Obligations/Company Property

Reference continuing post-employment obligations, such as

noncompetition, nonsolicitation, and confidentiality, and attach documents previously executed by the former employee. Direct former employees to return all company information and property, and to affirm that they have retained no electronic versions of such material, whether on email accounts, hard drives, cloud storage or otherwise.

- DTSA

See I above.

III. EMPLOYEE HANDBOOKS/POLICIES

- Paid Family Leave

Be aware of the requirements of the New York Paid Family Leave Act, which is effective Jan. 1, 2018. Final regulations were adopted on July 19, specifying mandatory information for employers to provide to employees in their policies.

- New York City Sick Leave

New York City employers must ensure compliance with the Earned Sick Time Act, which mandates specific information be contained in employer policies and notice be provided to employees.

- Recording

Consider removing broad policies prohibiting employees from taping conversations in the workplace, in light of the Second Circuit's decision affirming the NLRB's prohibition of such policies.

- Leave

Ensure that leave related to the birth, adoption, or placement of a child for foster care, separate and apart from disability leave, does not differ by gender.

- Bonuses

See I above.

- Company Property

See II above.

IV. HIRING PROCESS

- Salary History

Several jurisdictions, including New York City as of Oct. 31, are following the trend of prohibiting inquiry about an applicant's salary history. In these jurisdictions, remove all requests for salary history in applications and elsewhere and train recruiters and managers on appropriate interview questions to ask regarding compensation.

- Criminal and Credit History

A growing number of jurisdictions, including New York City, prohibit questions regarding criminal history on applications or during the interview process before a conditional offer is made, except in narrow circumstances. In addition, many jurisdictions, including New York City, prohibit checking or inquiring about the credit history of applicants and employees, with limited exceptions.

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