



TRICKS AND TRAPS

At the start of the relationship...

- If using a standard form of contract, make sure that the contract is suitable for that particular employee.
- Look particularly at any post-termination restrictions. If the employee is at a junior level, a noncompete is unlikely to be appropriate. Consider the time period applicable to post-termination restrictions for each employee. The longest period that a Court is likely to uphold is 12 months for the most senior employee unless there are exceptional circumstances. For mid-level employees three to six months is more usual. Ensure the covenants are been drafted for that employee's specific role/clients and only covers them and their direct reports.
- Consider any particular duties that may be required of that employee. You should include fiduciary style obligations in more senior contracts, e.g. a duty to promote and protect the best interests of the company at all times, not to directly or indirectly take business opportunities away from the company, and to report matters of interest to the company.
- Consider what benefits you want to offer the employee. Do you want them to be contractual benefits? If so, refer to them in the contract but with enough flexibility to allow them to be changed should the company's requirements change. If they are not to be contractual benefits, do not refer to them in the contract, and include an entire agreement clause.
- Consider the definition in the contract of confidential information. Make sure it is appropriate to the company's business and clearly set out in the contract. Make sure that the company retains a proprietary right over its confidential information, work done and communications made in the course of its business, even if that work is done on portable or home electronic devices.
- Consider the termination provisions in the contract. Include a garden leave and carefully drafted pay in lieu clause that becomes effective once notice has been given in reliance upon it, rather than when payment has been made.
- Finally, make sure the contract is signed and returned before the employee starts work.

As the relationship progresses...

- On promotion, review the employee's terms and conditions of employment. Particularly, consider the post-termination restrictions and make sure that they give the company adequate protection should the employee leave.
- If the employee is to be subject to more onerous terms, make sure the employee accepts these. Either put them into a new contract, and make the promotion conditional upon this being signed and returned to you or get the employee to confirm their consent specifically to these obligations in the promotion letter.

When the relationship comes to an end...

- Make sure that you terminate in accordance with the contract and confirm it in writing. The termination letter should be sent by someone with appropriate authority, set out the grounds for the termination and the effective termination date. If relying on a PILON clause, make sure that you follow the terms of the clause.
- Make sure that the employee is aware of post-termination restrictions. It is often advisable to write to the employee before they leave, setting out the post-termination restrictions.

As a general note keep your contracts up-to-date. It is worthwhile carrying out an annual review of your employment contracts. If amendments are done on an annual basis, they are more likely to be minor and fall under a general right to amend.

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