New Protections for Employers Giving References to Prospective Employers

Legal Alert
May 21, 2004

Garvey Schubert Barer Legal Update, May 21, 2004.

Summary of the New Law

A new bill recently signed into law by Christine Gregoire enhances the protection of employers who disclose information about a current or former employee to a prospective employer or employment agency. Under this new law, employers are presumed to be acting in good faith and are immune from civil liability for disclosing information relating to:

The employee's ability to perform his or her job;

The employee's diligence, skill, or reliability in carrying out job duties; or

Illegal or wrongful acts committed by the employee when related to job duties.

An employee can overcome this presumption of good faith only if the employee can show by *clear and convincing evidence* that the employer gave knowingly false or deliberately misleading information to the prospective employer, or if the employer gave the information with reckless disregard for the truth. This is a heavy burden for plaintiffs to meet.

The law also contains new record keeping requirements. It provides that employers *should* retain a written record of the identity of the person or entity to which information is disclosed pursuant to this law for at least two years from the date of disclosure. This record *must* be kept as part of the employee's personnel file, and employees and former employees have the right to inspect the record "upon request." This law will become effective on July 23, 2005.

What the New Law Means for Your Company:

You can be less worried about providing certain information about an employee. Out of an abundance of caution, many employers limit information provided on former employees to dates of employment, title and salary. This new law provides more protection to an employer who wishes to say more. You can say in good faith, for example, that the employee was not competent in performing the duties required by the job.

The law's protections are limited. This new law probably does not mean, however, that you can give *any* information out about an employee as long as you think that the information is true. For example, it is not clear that you will be protected under this new law if you give information about an employee's personality or behaviors - such as whether they can get along with co-workers and supervisors, or whether they engage in misconduct that does not rise to

the level of being "illegal" or "wrongful" under the law. Therefore, until the courts have weighed in on this issue, the safer course would be to stick to a narrow interpretation of the new law, and provide information only about the employee's job performance as it relates to the duties of his or her job.

You have new record keeping duties. While the law provides protections, it also creates new record keeping duties. We recommend that you create and retain a record of any references given for at least two years, whether you take advantage of protections provided by this law or not.

Are Your Non-Compete Agreements Enforceable?

There has been significant recent activity regarding the validity of non-compete agreements. A new Washington law, for example, substantially limits the ability of employers in the broadcasting industry to enforce these agreements. It provides that if such an employer lays off an employee or otherwise terminates the employee without cause, then any non-competition agreement that employee signed with the employer is "void and unenforceable." This prospective law applies only to non-competition agreements entered into after December 31, 2005, and it does not apply to sales or "management" employees. It is too early to tell whether this concept may spread to other industries.

Several months ago, the Washington Supreme Court rendered a decision affecting all employers in the state. As many of you are probably aware, the court in Labriola v. Pollard Group, 152 Wn.2d 828 (2004) "clarified" the rules concerning the consideration (i.e., exchange of benefits) required to support an enforceable non-competition agreement. We strongly recommend that you make sure that all your existing non-competition pledges are supported by adequate consideration as set forth in this case. The consideration required differs on whether the employee is a new or existing employee.

At the beginning of employment: You do not need to provide prospective employees with anything other than the employment opportunity in order, from a consideration perspective, to have a binding and enforceable agreement. However, you do need to inform the employee that signing a non-compete is part of the job offer. You cannot surprise them with it after they have accepted the job and still expect it to be enforced. So, as long as the non-competition covenant is an express condition of employment when you make the job offer and the covenant is executed on or before the first day of employment, the job offer itself should constitute sufficient consideration for the non-competition pledge.

After employment has started: If you want an existing employee to sign a non-competition agreement, you must provide that employee with something of unquestionable value. For example, you cannot support the agreement with training, or with a salary raise, bonus or stock grant that the employee would have received anyway. Continued at-will employment or basic

employee training (particularly if provided to an already experienced employee), standing alone, will not support a non-compete agreement as consideration. Independent consideration may include such things as increased wages, a promotion, a bonus or a fixed term of employment. The employee must receive something more than what the employee otherwise was entitled to receive. If you fail to provide that additional value as consideration, the Washington court will not enforce your agreement.