



The GSH

60-Second Memo

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Don't be Foiled by Your Own Contract: The Importance of Carefully Drafting Cause Provisions in Employment Contracts

By Warren E. Buliox, Esq.

Imagine you hit the jackpot, figuratively speaking. After a grueling recruitment campaign, you have managed to find the one person who is a perfect fit for one of the most highly regarded executive-level positions in your company - a position left vacant by the previous position-holder amidst allegations of fraud. This woman, Ms. Berry, comes with it all. She has years of experience in executive-level positions at Fortune 500 companies and has a track record of doubling, and in some cases tripling, sales for most of the companies she has worked for.

Understandably, she is in high demand and has been approached by several companies. Fortunate for you, though, she is very interested in your company and after a few meetings decides to come aboard. In order to limit (to the extent possible) her ability to leave and in order to define other conditions of the employment relationship, you offer her an employment contract, which she agrees to sign. Under the terms of the contract, she agrees to work for you for at least three years, and you agree not to terminate her employment except for "cause," which is defined in the contract as "insubordination, poor performance, a conviction for a felony crime, or the commission of an act of fraud." The last two events allowing termination for "cause" are especially important to you given that the position Ms. Berry will assume is a high-profile position and that the previous position-holder left amidst allegations of fraud, which proved to be quite an embarrassment for the company.

A year into Ms. Berry's employment, things are going great. You are reaching markets you only previously dreamed of and sales for the year have almost doubled. And then, when things could not be better, Ms. Berry walks into your office and tells you that she was recently arrested and charged with felony possession of THC (marijuana) and a controlled substance (prescription medication). She goes on to tell you that the marijuana, which she occasionally uses, was hers and that the controlled substance was medication prescribed to her mother, which she (Ms. Berry) uses on occasion to combat the headaches she gets after working long hours. While you scramble internally to figure out what to do next, word of Ms. Berry's charges reaches the media, and you begin to receive phone calls and pressure from the public (including major clients of the company) to terminate Ms. Berry's employment.

Under the circumstances, what should your next steps be? Are your options limited by the employment contract? And if so, was the contract a bad idea from the start? Given that the contract allows you to terminate for felony convictions, are you completely out of options if Ms. Berry's charges are plead down to misdemeanors?

Employment contracts are generally not a bad idea, if drafted properly. They give employees extra job security and employers a tool in which to set contractually based standards on employment, such as, but not limited to, setting the duration of employment for highly skilled and sought-after talent. While there are many advantages to entering into an employment contract, there are also several drawbacks. These drawbacks are often amplified in poorly drafted contracts.

By default, employment is presumed to be at-will and can be terminated at any time and for any legal reason, or for no reason at all. Generally, this presumption can only be rebutted by a clear statement of the parties' intention to do so. Most employment contracts, by their very nature, alter this at-will nature of employment and place limits on both the employee's and employer's ability to end the employment relationship. For employers, the limitation on the ability to terminate is often where the greatest drawbacks to employment contracts are found. For instance, many employment contracts allow for the discharge of an employee for cause, which is often defined as poor performance and insubordination. If business needs change and make the employee's position no longer necessary, the employer is not free to terminate the employment relationship without breaching the contract or the covenant to act in good faith and fair dealings. For this reason, contracts should be drafted to give employers sufficient latitude to terminate.

In Ms. Berry's case, this was not done, making it difficult, and potentially impossible, to terminate her under the circumstances without being in breach. With Ms. Berry, the only immediate option you have is to wait and see whether her felony charge will result in a conviction. If it does not or if she pleads down to a misdemeanor, you are out of options. This is unfortunate because without the employment contract you may have been able to terminate her employment the moment you learned of her conduct.

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So what could have been done differently? Again, employment contracts should be drafted with an eye towards giving employers sufficient latitude to terminate. One way to do this would be to include general catch-all provisions in the section of the contract that discusses what constitutes "cause" to terminate. An example of this would be including, as an event of cause to terminate, conduct that is "unbefitting of a company representative," or words to that effect. Another option would be to broadly define, where necessary, events of cause to terminate. For example, and as relevant to Ms. Berry's circumstance, instead of using the words "felony conviction" or even "fraud" as events of cause to terminate, simply including the commission of "illegal acts" as an event for cause to terminate will capture both felony and misdemeanor convictions, as well as different types of crimes (fraud, embezzlement, etc.). Please note, however, that some jurisdictions expressly prohibit discrimination on the basis of arrest or conviction records. Generally, in these jurisdictions, the arrest or conviction must be substantially related to the position at issue before an adverse employment action can be taken against the applicant or employee. Language in your employment contract should not run counter to this if you are located in one of these jurisdictions.

Another possible idea may be to work into the contract conditions outside of the employee's control that allow the employer to terminate the employment relationship. An example of such a condition could be quantifiable changes in business needs or conditions, such as the loss of significant business, the closure of a department or group, or significant changes in the upper management or the direction of the company.

At the end of the day, what goes into an employment contract to give you more flexibility to terminate employees will be based on individual needs and circumstances. Note, though, that the more control/flexibility you ask for, the more money and benefits the prospective employee may demand. If you are looking into entering into an employment contract, contact a lawyer to make sure the agreement is drafted properly. While there is much good that can come out of employment contracts, greater pain and headaches can ensue if you enter into a contract that is not carefully prepared.

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