Job applicants and preemployment agreements: what employment counselors need to know

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U.S. society is becoming increasingly litigious. Nowhere is this more evident than in the employment process, where preemployment agreements for job applicants are becoming more common. Preemployment agreements require applicants to accept certain terms or provisions before they are offered a position. In this article, the authors describe types of preemployment contracts and legal issues associated with them and present attorney-selected sample cases to assist employment counselors to better prepare their clients for addressing this legal phenomenon.

Employment counselors' clients are confronted with many legal issues as they seek employment. In recent years, there has been an increase in the number of companies and organizations that use preemployment agreements, which require job applicants to sign contracts promising to engage in or refrain from certain behaviors in order to be considered for employment. Once reserved for the highest ranking executives, these agreements are being required more frequently of other applicants and employees, from decision makers through middle managers to rank-and-file employees, especially those in high-tech occupations (Flynn, 1999). A possible reason for this trend is the economic shift from manufacturing to service in the United States (United States Department of State, 2002). Another possible factor contributing to the increased usage of preemployment agreements is that more organizations realize that their most valuable resource is trained and skilled employees and the information they possess (Pfeffer, 1994). As a means of protecting that information, more firms are turning to employment agreements for self-protection.

To better help counselors understand the preemployment contract phenomenon and to assist clients regarding possible postemployment ramifications, we discuss

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general considerations of preemployment agreements and their place within the context of contract law. Also presented are five frequently recognized preemployment concepts: training expense reimbursement, nondisclosure of business information and trade secrets, noncompetition by the employee, mandatory dispute resolution, and nonsolicitation. Next, we explore the implications of preemployment agreements for employees.

PREEMPLOYMENT AGREEMENTS—GENERAL LEGAL CONSIDERATIONS

Employment agreements between employers and employees explain various aspects of employment relationships (Legal Q & A, 1997). Agreements vary from industry to industry, employer to employer, and from applicant to applicant. Agreements may regulate a single aspect of employment (e.g., when the employee is entitled to pay increases or under what circumstances the employee may be terminated) or may cover the entire employment relationship (Hansen, 2000). Agreements may be presented in the form of formal written contracts, in an employee handbook, or through other means. Some employers have incorporated such agreements into employment applications (*Circuit City Stores, Inc. v. Adams,* 2001), where simply signing the application form may constitute a preemployment contract. Although more common to some industries than to others (e.g., high tech), the use of such agreements may be found in other sectors of business and industry, including security, retail, restaurants and hotels, health care, and broadcasting (Equal Employment Opportunity Commission [EEOC], 1997). Irrespective of the business, the legal force behind all preemployment agreements falls within the legal theory of contracts.

Preemployment agreements are contracts governed by basic common law contract principles. Even though each state has enacted legislation that affects various and specific employment contract principles, basic common law contract theory still applies. In general, all states recognize contracts and require an offer, an acceptance, and consideration ("The Restatement [Second] of Contracts," 1981). Regarding employment contracts, this means that the employer offers the applicant a job or considers offering a job (the offer) and the applicant agrees to take the position (the acceptance). The signing of the preemployment contract is the formal acceptance, which consummates the agreement between parties. The other essential element is consideration, which is the requirement that some benefit be exchanged between the contracting parties. The element of contractual consideration is established when the employer is able to evaluate the applicant for employment and when the applicant is considered for employment. The signing of the document is merely the acknowledgement of the mutual benefit (Keller, 2000).

In many contracts, there is some degree of negotiation between the signing parties regarding terms, conditions, and performance. In preemployment agreements, however, there is generally little or no negotiation. Employers write contracts, and applicants sign them, or they do not. Employers typically reject changes that are proposed by applicants unless the applicants or their skills are in great demand. In fact, if applicants request too many changes, employers may not hire such potential troublemakers. In the absence of an essential skill or acute economic necessity, employees are frequently placed in a "take it or leave it" situation.

Because preemployment contracts are no different than any other type of contract, certain duties and obligations are placed on the parties to the agreement. One of the most important is the "duty to read" (Arnold, 1994, p. 110). Generally, applicants for employment pay little attention to the terms of agreement in preemployment contracts. According to Keller (2000), because most job seekers do not read contracts, they certainly do not take them to lawyers, negotiate, or question employment clauses within these contracts. For the job seeker, signing the preemployment agreement is considered no different than signing forms authorizing the withholding of taxes and social security from wages and salary or any other agreements for future benefits, such as life insurance and health benefits. Employees who choose not to sign preemployment agreements likely will not be considered or hired. Applicants' needs for employment are usually immediate, and any possible negative consequences of a signed contract are unimagined or considered distant or inconsequential.

A party to a contract is bound by the terms, conditions, and covenants contained in the written or printed form, irrespective of whether the party read the document. The Supreme Court affirmed more than 100 years ago that contract signatories are responsible for its provisions, whether they read it or not (*Marsh v. First USA Bank,* 2000).

Legal advisers are the logical professionals to help applicants understand the details of the legal issues and ramifications involved in signing preemployment agreements. Yet, employment counselors can be instrumental in encouraging and even urging clients to seek such consultations. Very often, a client will only seek legal consultation if he or she is encouraged to do so by someone else. In fact, many knowledgeable counselors themselves have put their signatures on the dotted line without adequate understanding of the legal ramifications, only to be unpleasantly surprised later. Sometimes, the delight or relief of being offered a job overrides an individual's rational consideration of the level of his or her committment. Thus, an understanding of basic contracts is not enough. Counselors and their clients can benefit from more specific knowledge of the problems involved with preemployment agreements.

PREEMPLOYMENT AGREEMENT PROBLEMS

Even though preemployment agreements are recognized by the courts and supported by extensive legal theory, certain difficulties can arise that could result in a provision or the entire agreement being declared unenforceable or void. The main areas being litigated are (a) adhesion contracts; (b) overly broad, restrictive provisions; and/or (c) agreements or clauses that violate public policy.

Adhesion Contracts

Contracts that are entered into without "arm's length" negotiations or where one party has all the bargaining authority are referred to as adhesion contracts (*Marsh v.*

First USA Bank, 2000). Adhesion contracts are used and accepted as commonplace in business and other economic sectors. In today's business society, preprinted contract forms are used and available at any office supply store, in libraries, and on the Web and cover a variety of business topics. Employment contracts are no different. Many are preprinted and contained in the employment application, or the terms of the employment agreement appear in an employees' handbook. Modifying a preprinted form is improbable if not impossible.

Overly Broad, Restrictive Provisions

Another means of contesting preemployment agreements is determining whether the contract is excessively broad and infringes upon employees' ability to earn an income. The court in *Labor Ready, Inc. v. Williams Staffing, LLC* (2001) provided additional guidelines that should be considered when enforcing employment restrictions. These were as follows: Are the restrictions necessary for the protection of the employer's business and goodwill? Do the restrictions impose any greater restraint on former employees than is reasonably necessary to protect the employer? and Is the degree of injury to the public such that loss of services and skills of former employees warrant nonenforcement of the covenant (contract)? On a case by case basis, the court must evaluate whether the contract language is limited or overly broad. The more limited the restrictions, the more likely it is that the courts will enforce the agreement; conversely, restrictions that are overly broad and do not protect some of the employer's interests will likely not be enforced by the courts (*Labor Ready, Inc. v. Williams*, 2001).

Public Policy Violations

A third mechanism for disputing preemployment agreements (or provisions within) is based on the violation of statutes or public policy. At both the federal and state levels, there are numerous employment-related laws and regulations that place restrictions on the employer–employee relationship. In the context of preemployment agreements, these statutes prohibit the employer from implementing certain contract restrictions (e.g., California does not permit noncompete agreements).

Courts will enforce contract clauses that protect the proprietary rights of employers against employees. Traditionally, the employer, alleging misuse of a trade secret, will seek an order enjoining the former employee and/or successor employer from using the trade secrets. The owner of the trade secrets can also seek monetary damages, but many times the monetary damages cannot compensate the employer's business for the irreparable, long-term harm to the business. Courts have generally been very protective of trade secrets. For example, the Georgia Trade Secrets Act of 1990 (Georgia Code Annotated) protected trade secrets in written agreements even where there was no stated duration of the agreement or geographical limitation on the restrictions.

Courts are sometimes required to determine public policy in the absence of statutes. As such, there appears to be an inconsistent interpretation of public policy among states. Such is the case when dealing with the restrictive covenant "not to compete" (enforceable by way of an injunction), which is dependent upon whether the covenant is reasonable in time and geographic area (*Reed, Roberts Associates, Inc. v. Strauman*, 1976). The *Reed, Roberts Associates, Inc. v. Strauman* case showed that the courts must weigh the need to protect the employer's legitimate business interests against the employee's possible loss of livelihood. Courts require a showing that a legitimate business interest is being protected by the covenant not to compete, that the business interest will suffer irreparable harm if the covenant is not enforced, and that the covenant is reasonable regarding time limits for enforcement and reasonable in the location where the not-to-compete clause is to be enforced. There are a variety of preemployment agreements. Following are descriptions of each kind of agreement and how they typically have been adjudicated.

CATEGORIES OF PREEMPLOYMENT AGREEMENTS

There are five key provisions that most frequently are a part of preemployment agreements and employment contracts. These provisions address the concepts of training expense reimbursement, nondisclosure of business information and trade secrets, noncompetition by the employee, mandatory dispute resolution, and nonsolicitation. These categories are based on available research that addresses preemployment agreements. The use of these provisions depends on the nature of the business and the interests that the employer wishes to protect; thus, not every employment application or contract contains all of these provisions.

Training Expense Reimbursement

Knowledge of specific business operation(s) and/or a specialty or highly technical knowledge that is only known by an employee of that business makes that employee very attractive to competitors. Hiring a person with business and technical knowledge saves the new employer the time and expense of training, and the new employee may provide the new employer with the ancillary benefit of some unique knowledge that was acquired from the previous employer. Many employers, therefore, use trade-secret protection measures, which are designed very much like noncompete agreements, to protect their business (*Keener v. Convergys Corp.*, 2002).

Many preemployment agreements provide for recoupment, in whole or in part, of training expenses from an employee if the employee does not remain with the organization for a designated time period after completion of the training. These requirements are most typically enforced if the employee is developing a new or updated skill. At one time, employers could invest in employees' futures, by funding their training and education, with confidence that they were also investing in their companies' futures. But because the workforce has become more mobile, growing numbers of employers find that training and development activities may represent investments in employees' marketability (Oleska, 2001). This is particularly telling when one considers the trend of employees working shorter periods for an employer. The Department of Labor reported that as of January 2002, the median number of years employees work for their present employers is 3.7 years (United States Department of Labor, 2002).

In some instances, employers try to protect training investments by requiring that applicants and/or employees sign personal loan agreements or promissory notes (payable to the employer), which provide that the employees repay the loan (i.e., the cost of the training) if they do not work for the employer for a specific period of time. The notes or loans contain specific contract language that cancels the indebtedness if the employee works for a specific period of time. Conversely, if the employee fails to meet the requisite time requirement, the notes become due and payable immediately.

Recovery of training expenses is generally addressed in a preemployment contract in the form of a damage formula or liquidated damage provision. Several recent legal cases show how some courts have treated the issue of recouping training costs. In the recently decided case of *Heder v. City of Two Rivers*, the plaintiff was a firefighter for the City of Two Rivers, Wisconsin, who was paid overtime wages while receiving paramedic training required by the city (*Heder v. City of Two Rivers*, 2001). Under the collective bargaining agreement between the city and Heder's union, the city paid the employee a "paramedic premium" equal to 3% of his base salary after he had completed his training. The terms of this agreement referred to these payments as a stipend rather than as an increase in the employee's base salary. The agreement further required the employee to repay an amount equal to the cost of tuition and books if leaving the job within the first 3 years after completing the paramedic training. The agreement also contained a "liquidated damages" clause, which provided for the repayment of the amount equal to all overtime received because of paramedic training and all stipends received for having completed the training.

After he completed paramedic training but before 3 years had passed, Heder resigned and went to work as a firefighter for another city. Claiming that the agreement between the city and Heder's union entitled it to recover the costs associated with Heder's paramedic education, the city withheld all wages (including unpaid vacation) owed Heder during his final 3 weeks of work. Heder sued, claiming that federal wage and hour laws barred the city from recouping already paid overtime and already paid stipend payments.

The court did not reject the concept of recoupment of the training expenses from Heder, but the court did conclude that there were three basic flaws with the city's training repayment agreement. First, the court flatly rejected the section of the training agreement stating that paramedic premiums or "stipends" were not part of Heder's base salary. The court pointed out that under the Fair Labor Standards Act (FLSA), any nondiscretionary payments made to an employee, regardless of how they are labeled, are part of the employee's wages and not subject to any right of offset (*Heder v. City of Two Rivers*, 2001). Second, the court concluded that the city clearly violated the FLSA's minimum wage requirements by withholding all of Heder's salary for his last 3 weeks of work. Third, the court was concerned about the absence of any proportionate reduction in the amount Heder owed. The court spent most of the decision addressing the definition of wages and discussing the right of offset by an employer against an employee under the FLSA provisions.

The Heder decision makes it clear that a preemployment agreement that provides for reimbursement of training expenses is enforceable. If the agreement is breached by the employee, the employer must seek collection separate and apart from any obligation still owed under the employment agreement. Again, the most important message Heder offers is that training reimbursement agreements are legal and, under most conditions, are here to stay.

More recently, Florida, Louisiana, and Colorado enacted statutes in an attempt to protect employers' investments in employee training expenses; this concept may expand to other states, particularly in difficult economic times (Lester, 2001). It appears that the main thrust of these statutes is to make enforceable "restrictive covenants" to reimburse training expenses, if they are contained in employment contracts. Conversely, Connecticut (Connecticut General Statutes, Annotated) and Michigan (*Sands Appliance Services, Inc. v. Wilson*, 2000) have banned repayment agreements for employee training. Other states have not had to resort to legislative enactments to address recoupment of training expenses and have accepted the concept as merely a contractual term and condition. In the case of *Labor Ready, Inc. v. Williams Staffing, LLC* (2001), the employer was a manual labor staffing agency. Former employees signed employment contracts with various restrictive covenants, including the restriction not to share how the employees and staff were being trained (*Labor Ready Inc., v. Williams Staffing*, 2001). The staffing employees eventually left Labor Ready to work for a competitor. The Court found that under Washington law, restrictive contractual covenants may be used to protect an employer's investment in employee training.

Nondisclosure of Business Information and Trade Secrets

A second preemployment provision addresses nondisclosure covenants or agreements. This agreement prohibits former employees from disclosing any proprietary business information to new employers. The Uniform Trade Secrets Act (UTSA), written by the National Conference of Commissioners on Uniform State Laws in 1985, was a draft for trade secrets legislation, which could be adopted by state legislators (National Conference of Commissioners on Uniform Law [NCCUL], 1985). To date, 42 states have adopted the act and have modified it to varying degrees. The UTSA provides a formal definition of trade secrets (NCCUL, 1985) and prohibits the disclosure of certain trade secrets. Trade secrets are generally not known by the firm's competitors and cannot be readily discovered by them through legitimate means. The company has a reasonable expectation to protect its secrets. Employers have a right to protect trade secrets and proprietary information; however, asking former employees to refrain from disclosing information does not prevent employees from finding work, nor does it limit employees' statutory rights or protections. When trade secrets are involved in a business's operations, whether technical or managerial, they often represent the competitive edge required to compete with other similar businesses.

There are three requirements regarding the misappropriation of a trade secret: (a) An actual trade secret exists, (b) a third party acquires that secret as a result of a confidential relationship, and (c) there has been unauthorized use or disclosure of said secret (*Basic Chemical, Inc. v. Benson*, 1977). Customer lists that are essential to the well-being of a business are an example of a trade secret. Customer lists may be developed over long periods of time, including times that particular employees are working at a business. The lists are considered to be owned by the company and cannot be taken or used by the departing employee. These lists are also considered confidential and as such give the company a proprietary interest in protecting the list from disclosure. Companies have successfully gone to court to stop former employees from using proprietary customer lists (*Lemmon v. Hendrickson*, 1997; *Merrill Lynch v. Evans*, 2000).

Confidential information does not include general knowledge and skills obtained through employer training or work experience (*Follmer, Rudzewicz, & Co., P.C. v. Kosco*, 1984). Because the purpose of trade secret laws is to encourage innovation and development of business, the protection of the trade secret should not extend beyond the limits needed to protect genuine trade secrets (*American Can Company v. Mansukhani*, 1984). A nondisclosure provision will provide only limited protection from former employees' disclosures of general business information obtained from employment. The courts will only render decisions ensuring that a company's "trade secrets" are not disclosed.

Noncompetition by the Employee

A third preemployment situation deals with competition. A growing number of employers exercise control beyond the office or other work setting by requiring that employees sign noncompete agreements promising that they will not work for direct competitors or start competing businesses. In an atmosphere of increasing employee mobility, the use of such contracts by many businesses is on the rise, as is litigation over them. It is not clear how many workers have signed employment contracts limiting their ability to change jobs, but the number is large and it is rising, according to attorneys and employers. These agreements have become commonplace among technology workers, stockbrokers, and salespersons (Legal Q & A, 1997). For many start-up and technology-based firms, the secrets such agreements are designed to protect are among these businesses' most valuable assets (Hoffman, 2000). However, noncompete provisions in contracts appear to be surfacing in previously unexpected job situations. Starbucks prints warnings on its employment applications that employees who are trained as "Frappuccino makers" may have to sign noncompete agreements (Lowery, n.d.). Additionally, security firms are demanding that noncompetition agreements be executed by security guards (Lowery, n.d.).

Service-related employment situations create a different problem because the relationship is generally between the individual employee and the customer who directly performs the service, rather than between the customer and the employer. One San Francisco body-piercing shop insisted that its piercers sign noncompete agreements (Knight, 2003). Again, the customer relationship is normally with the artist, not the shop employing the artist. These concerns and attempts to control the future are more understandable and more difficult to enforce when workers have access to sensitive business information.

One of the greatest misconceptions regarding noncompetition clauses is that courts routinely enforce noncompetition agreements. However, even the most carefully drafted provision that prohibits "competition" with a former employer may not always be enforceable (Frank & Branch, 2001). Traditionally, covenants not to compete have been sparingly enforced because of the common law aversion to limiting a person's ability to earn a living and because they prohibit legitimate competition. Employers tend to seek to protect themselves from former employees through contracts that are broader than necessary to protect themselves from "unfair" competition (Lowery, n.d.).

In the case *Uncle B's Bakery, Inc. v. O'Rourke* (1996), the court looked at great length at what is reasonably necessary for the protection of the employer's business. One area that the courts frequently examine in a noncompetition case is how long the competitive activity is prohibited. There generally must be some recognizable relationship between the time restrictions and the adverse effect the competition will have on the business. If the period of time is excessive, the courts will refuse to enforce the contractual provision. The Iowa Federal Court has found that the maximum enforceable time period is 5 years (*Uncle B's Bakery, Inc. v. O'Rourke,* 1996).

In general, employers in the United States do not have a right to protect themselves from all competition. The only protection they can obtain is against "unfair" competition (Frank & Branch, 2001). Noncompetition covenants will not be enforced if they are found to be unreasonable. As stated previously in this article, the covenant may be held to be unreasonable because it lasts for too long, covers too wide a geographic area, or is too broad in the types of business it prohibits (Carlson, 1996). Courts look at the necessity for a noncompete clause to protect employers' businesses and the reasonableness of the restrictions to employees. Enforcement of noncompete agreements also differs from state to state. In California, one of the few states that statutorily bars noncompete agreements, employers have to rely on other means, such as nondisclosure agreements, to protect their confidential information if competitors hire away employees (Leonard, 2001).

A noncompete agreement may also be found to be unreasonable because the information revealed to workers is not particularly sensitive. Thus, the restriction does not serve a valid business purpose. Judges are more likely to enforce restrictive agreements against high-level managers who are provided inside information, based on the theory that such former employees are in a position to do genuine harm to the business (Clark, 2000). Geographical restrictions or limitations may also be found unreasonable if the defined area of prohibited conduct is "vague" or "excessively large" (*Uncle B's Bakery, Inc. v. O'Rourke,* 1996). The zone or area of noncompetition must be identifiable, and the size of the zone must relate to the employer's business and its competition.

Mandatory Dispute Resolution

A fourth provision that job applicants are more frequently being asked to sign in preemployment contracts is mandatory dispute resolution. To combat uncertain results and costly litigation, employers increasingly are requiring new hires to submit disagreements with the company to arbitration. Under these arrangements, new employees agree to forego the filing of any lawsuit(s) and submit to binding arbitration any disputes arising from, or related to, their employment. About 6 million employees currently are covered by arbitration agreements (Lane, 2002).

The use of mandatory arbitration offers significant advantages to both employers and employees. In most cases, mandatory arbitration is less expensive than court litigation (Cavenagh, 2000). Unlike lawsuits, where there is extensive pretrial discovery, including depositions, interrogatories, and document production demands, arbitration proceedings are generally restricted to a limited number of depositions and document exchanges. The court practice of filing numerous motions, often in formal fashion, is discouraged in arbitration proceedings, which tend to be more informal (Fisher, 2000). Arbitration follows a more relaxed application toward evidence rules by allowing evidence in a form, such as an affidavit, that a trial court would exclude.

Arbitration is generally more expeditious than litigation. While lawsuits may take years to reach the courtroom, arbitration arrangements are often completed in less than a year. Additionally, while court cases are a matter of public record, arbitration is more private and confidential. Many courts have taken the posture of favoring the contract that establishes a process to resolve disputes themselves, rather than seeking judicial resolution (*Gilmer v. Interstate/Johnson Lane Corp.*, 1981). Employers favor arbitration because the case is decided by a professional arbitrator who, unlike a jury, is generally well versed in the law, less likely to be swayed by sympathy, and better able to appreciate a company's legitimate business concerns and objectives (Goldberg, 1999). Employees generally favor arbitration because of the reduced costs and time involvement. Both parties favor compulsory arbitration because of the finality of the decision of the arbitrator. The parties have contractually agreed prior to the arbitration that the arbitrator's decision and award will be final and binding, and such a decision is seldom appealed because of the limited grounds for appeal.

Companies that consistently use arbitration to resolve disputes concerning their businesses tend to have an advantage over employees. James Johnson, an employment law specialist, says there is a built-in bias for arbitrators to rule in favor of companies because of the possibility of lucrative return business. In other words, a given plaintiff employee is not likely to ever deal with the arbitrator again, but companies are if they receive favorable rulings (see Keller, 2000). Even with this bias, mandatory arbitration can still provide benefits to employees. Many times a business will agree to pay a greater portion of the total costs of settlement if a case goes to arbitration. J. C. Penney Company, for example, pays 95% of the total costs of arbitration (Weimer & Anderson, 1998). Also, there seems to be a tendency for arbitrators to "split the baby" by giving plaintiffs more than they might have received in court (Chung, 2001).

In March 2001, the U.S. Supreme Court reinforced an employer's right to require mandatory arbitration of disputes with its workers. The Supreme Court in *Circuit City Stores, Inc. v. Adams* (2001) held in a 5 to 4 decision that employment and preemployment agreements containing arbitration provisions are enforceable under federal law. In that case, the employee had signed a preemployment agreement, in part agreeing to submit all employment disputes to binding arbitration. Employers and employees, therefore, have a reliable alternative to courtroom litigation as a means to redress employee complaints. The decision gave broad protections to arbitration agreements and provided the parties with good reasons to consider instituting mandatory arbitration programs. Indeed, after the *Circuit City* decision, the number of companies with compulsory arbitration clauses in their employment contracts nearly doubled (Lane, 2002).

Further legal guidelines for mandatory dispute resolution appear to be developing, although not always in a predictable or consistent manner. On January 15, 2002, the Supreme Court ruled in *EEOC v. Waffle House, Inc.* that a federal agency can file lawsuits on behalf of employees who have claims under the Americans With Disabilities Act of 1990, irrespective of a signed employment contract that provides for binding arbitration of all employment disputes (*EEOC v. Waffle House*, 2002). The court distinguished between the "causes of action" of the employee and the causes of action of the EEOC. The employee can contract away the settlement of his or her cause of action in an employment agreement, but this (contractual waiver) is not binding on the EEOC because of the public policy consideration. The decision reinforced the power of the EEOC to file suit in cases of public interest and somewhat limits the power of business to keep workplace disputes out of court. The EEOC saw this as a victory for their long-held belief that such agreements are inconsistent with civil rights laws (EEOC Notice, 1997). The Supreme Court basically held that a claim under the statute was enforceable by both the employee and the EEOC, and the waiver of the employee's claims to file suit in federal court does not preclude the EEOC from filing suit. The legal causes of action are separate and exclusive of one another, even though they are derived from the same statute (*EEOC v. Waffle House*, 2002).

The decisions in the above two court cases underscore the often-conflicting principles in the treatment of mandatory arbitration on employment disputes by the courts. On the one hand, the use of arbitration and alternative dispute resolution mechanisms is encouraged as a matter of public policy. On the other hand, some courts and legal commentators caution that mandatory arbitration may erode employees' statutory rights or the authority of agencies to enforce those rights. However, the EEOC decided to file or join a lawsuit in only 402 of the 79,896 charges of job discrimination it considered in the year 2000 (Lane, 2002). Furthermore, the EEOC only filed 430 cases in the year 2001 and 364 in 2002 (EEOC Litigation Statistics, 2003), thus suggesting that the chances of litigation with the EEOC are remote.

The employer must consider that it is very rare for a court to reconsider or overturn an arbitrator's award. The burden of proof required for overturning the award is very high. The appealing party has the burden of showing by clear and convincing evidence that the arbitrator acted in an "arbitrary and capricious" manner (Schmitz, 2002). The courts generally look to whether there is any evidence to support the arbitrator's decision, not whether it may have been the best evidence. The finding of any evidence that supports the findings of fact by the arbitrator is generally enough to uphold the arbitrator's award.

Nonsolicitation

A final preemployment agreement addresses the issue of "nonsolicitation" clauses. Employees, particularly those in service businesses, inevitably develop special relationships with the business clients and customers. Nonsolicitation agreements are provisions in which employees agree not to solicit the present or past employer's clients and customers for their own benefit or for that of a new employer. Nonsolicitation agreements may be part of a larger employment agreement, a noncompete provision, or a nondisclosure clause within an employment contract. Nonsolicitation provisions are one of the vehicles used to avoid restrictive state laws (e.g., California) that prohibit noncompetition clauses; therefore, a nonsolicitation clause or agreement may be the only way to discourage employees from going to work for competitors, opening a competing business, or from contacting the customers or clients of the former employer for the benefit of a subsequent employer.

There are limits to the application of nonsolicitation agreements, however. As with noncompetition clauses, courts are less willing to enforce nonsolicitation agreements that severely limit employees' ability to earn a living or unfairly limit legitimate competition (Carlson, 1996). Generally, courts look at organizations' and employees' circumstances to judge whether nonsolicitation agreements are fair. The key is the "reasonableness" of the nonsolicitation agreement. If a judge believes the agreement is overreaching or too broad, the court may refuse to enforce the provision. Judges want to see justification for restraint on the employee's ability to pursue a career. A valid business interest is one of those justifications. Valid business interests may include protecting a customer list an organization has spent years developing. On the other hand, if the customer list is not unique and could be compiled simply by looking in the Yellow Pages, a court would likely not enforce a nonsolicitation agreement against a former employee. Other valid business interests include trade secrets, production formulas, and specific business processes. In general, nonsolicitation agreements do not and cannot prevent a client or customer from voluntarily moving to a competitor. If customers want to take their business to a given competitor and have not been improperly solicited by a former employee, a nonsolicitation agreement probably would not be enforced (Carlson, 1996).

JOB CANDIDATE CONSIDERATIONS

Job candidates should understand that although they are often thought to protect employers only, preemployment agreements may also protect employees. Contracts can benefit both parties by clarifying relationships between the employer and the employee. As in any contract violation, the contract may be enforced in court. In addition, employees do not need an agent to negotiate on their behalf, but they do need to carefully and fully read and understand the contract before they sign it. Negotiating points need to be thought out and anticipated regarding the conditions of the agreement. Contract clauses can include duration of the contract, bonuses, salary, vacation, education and training, stock options, and health benefits. A prospective employee may consider asking for a clause specifying how employment can be terminated. The latter point can be particularly beneficial for potential employees because it requires that employers have just or good cause to terminate (Karpeles, 1998). Many states are "employment-at-will," which means that the employer can terminate an employee for a reason or for no reason, as long as the employer does not violate a state or federal law (*Pine River State Bank v. Mettille*, 1983). "Just cause" agreements generally specify that contracted employees can only be terminated for specific reasons, such as a breach of an essential term of the contract or not attaining production or sales goals.

It is critical that applicants read and understand everything contained in the preemployment document. If they do not, applicants could be signing away important rights that might affect their livelihood and long-term well-being. Even if they enter into contracts without reading the provisions, applicants are still bound to the contractual terms (Arnold, 1994). Applicants should ask questions, including the following: What are the penalties if one leaves before the contract ends? Is this a just-cause or employment-at-will clause? What are the conditions of termination? What are the severance pay and benefits if the company terminates the employee without cause? If the company merges, would the employee be guaranteed a severance package? If the company wants to relocate, will the employee be compensated for moving? and When does the contract expire or is it automatically renewable?

It is clear that preemployment contracts cannot waive certain employment rights that are established under federal or state law. For example, if employers are required to pay workers overtime, based on the Fair Labor Standards Act, employees cannot be required to sign contracts waiving these rights (Fair Labor Standards Act of 1938). Even if employees have contracts, employers are still subject to most laws regulating wages, prohibiting discrimination and sexual harassment, requiring accommodations based on disabilities, imposing health and safety standards, and providing medical and family leave time and worker's compensation and unemployment benefits.

Applicants may be excited about working for a company and sign a contract, thinking that everything will work itself out. This is not always true, and the employee may have to work under the conditions of the contract. For this reason, it is important for applicants not to be intimidated into signing employment contracts quickly (Kaplan, 1997). It is often very beneficial to have an attorney review such documents and explain anything that is unclear. Considering that companies usually have their attorneys draft or review such agreements, potential employees should not sign legally binding contracts without first seeking legal counsel.

Just how good a contract can be negotiated depends largely on how desirable the employer considers the individual to be and his or her attendant skills. The key for employees is determining how much leverage, if any, they have. Employees must determine whether their knowledge and skills are unique and in demand. Ultimately, potential employees make decisions regarding whether to accept employment and under what conditions. However, employment counselors can facilitate the understanding an individual has of preemployment agreements, which will aid in the person's decision making and understanding of both the short- and long-term effects of such agreements.

CONCLUSION

Vocational counselors perform their career roles and functions in an increasingly litigious environment. As such, it behooves them to become increasingly aware of the many legal issues clients face. The preemployment contract is a legal phenomenon that is increasingly being encountered by vocational clients and one that counselors should know about. In this article, we have provided counselors with a basic understanding of attendant legal considerations. However, it must be stressed that there is no substitute for obtaining specific expert legal advice when encountering any legal question. Although we have presented general legal information, only an appropriate attorney consultation can address specific considerations.

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