page 2
Two mistakes companies make with non-compete agreements
49-year-old replaced by 42-year-old can sue
Business cannot ask for 'inexperienced' job applicants
page 3
Company sued for breaking oral promise not to fire someone
page 4
Employers can be tripped up when requiring arbitration

Legal Matters®
Employment Law
spring 2016

Workers with substance abuse issues benefit from 'last chance agreements'

Substance abuse is a rapidly growing workplace issue, especially given the recent opioid epidemic. Many employers are scratching their heads wondering what they can do, and many employees affected by the problem are wondering if there is a way to save their jobs.

Of course, substance abuse is a major problem in the workplace, since it can lead to absenteeism, lost productivity, increased health care costs, and in the worst cases, accidents, injuries and even violence.

On the other hand, many companies want to be compassionate to good workers who are facing up to their problems and seeking treatment. In addition, drug and alcohol addiction are considered "disabilities" under the federal Americans with Disabilities Act, as well as many state laws, which means that firing someone simply because of an addiction may be illegal.

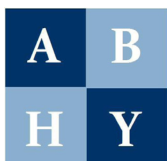
©thinkstockphotos.com

Increasingly, businesses are dealing with the problem with a "last chance agreement," or LCA. This is basically a written understanding in which a worker agrees to go to treatment and follow a program of recovery – and acknowledges that the company can fire him or her immediately if there's a slip-up.

If you're thinking of asking an employee to sign an LCA – or signing one yourself – you probably want to talk to an attorney first, because there are a lot of issues to consider. For instance:

- ► Who will pay for the employee's treatment? Will it be covered by the employee's health insurance at work?
- ► If the employee will miss work due to treatment, will this be considered family and medical leave, sick leave, vacation, personal leave, or some combination?
- ► Can the company monitor the employee's participation in the

continued on page 3



ALLRED, BACON, HALFHILL & YOUNG, PC
11350 Random Hills Road, Suite 700 | Fairfax, VA 22030
(703) 352-1300 | admin@abhylaw.com | www.abhylaw.com

Two mistakes companies make with non-compete agreements

©thinkstockphotos.com

A lot of companies require their employees to sign non-compete agreements (where the employee agrees not to work for a competitor for a certain amount of time after leaving the company), non-solicitation agreements (where the employee agrees not to seek business from the company's customers after leaving), or confidentiality agreements (where the employee agrees not to divulge the company's proprietary information to anyone).

But two recent cases show that companies can make mistakes with these agreements that render them legally invalid.

In one case, an Illinois insurance company made a broker sign a non-compete agreement barring him from working for a competitor anywhere in the country for 28 months after leaving his job. The agreement also barred the broker – who sold malpractice insurance to lawyers – from selling *any* kind of professional liability insurance after he left.

The broker eventually resigned and started working for another company, and his ex-employer sued to enforce the agreement.

But the Illinois Appeals Court refused to enforce it, saying that the provisions in the agreement were so broad as to be unreasonable.

Specifically, the court said the agreement didn't need to cover all 50 states in order for the company to protect itself from threats to its business interests. The court also found that there was no good reason to keep the employee from selling all kinds of professional liability insurance, when he had only sold one kind for the company. Finally, it said 28 months was way too long to restrict the employee's ability to work, since he had only spent 20 months working for the company before he left.

The company then asked the court to modify the agreement, by limiting its terms to something more reasonable. But the court refused, and threw out the agreement altogether.

In essence, the court said the company lost its right to place restrictions on the employee by overreaching – and modifying the agreement would only encourage other companies to overreach, because they would know that there was no real punishment if they went too far.

In the second case, a Massachusetts salesman joined a company in 2005 and signed an employment agreement laying out his responsibilities and salary structure. At the same time, he signed separate non-compete and confidentiality agreements.

In 2012, the employee was promoted to district sales manager and signed a revised employment agreement laying out his new salary and responsibilities. The new agreement said that it contained "the terms of your employment," and didn't make any reference to the non-compete or confidentiality agreements.

Later, a dispute arose and the company accused the salesman of violating the confidentiality agreement.

But a federal judge sided with the salesman, and said that the non-compete and confidentiality agreements were no longer any good.

Since the 2012 employment agreement said it contained "*the* terms of your employment," and didn't refer to the non-compete or confidentiality agreements, it overrode those agreements and the employee was no longer bound by them, the judge ruled.

We welcome your referrals.

We value all our clients. And while we're a busy firm, we welcome all referrals. If you refer someone to us, we promise to answer their questions and provide them with first-rate, attentive service. And if you've already referred someone to our firm, thank you!

49-year-old replaced by 42-year-old can sue

Salesman Robert Liebman was fired at age 49 after working for the Metropolitan Life Insurance Company for 27 years. He sued under the federal age discrimination law, which prohibits discrimination against workers over age 40.

MetLife argued that Liebman's firing couldn't possibly be discrimination because it replaced him with someone who was 42 years old, and thus was also protected by the law.

But a federal appeals court in Atlanta said it didn't matter that Liebman's replacement was also over 40. As long as his replacement was "substantially younger," Liebman could sue and have a jury decide if he was discriminated against.

Business cannot ask for 'inexperienced' job applicants

A medical device company in Illinois posted an ad for a job in its legal department, saying it would only consider candidates who had no more than seven years of relevant legal experience.

It got a resume from 59-year-old Dale Kleber, who had previously served as general counsel of a Fortune 500 company, CEO of a national trade organization, and interim CEO of a different medical device business. The company didn't even give Kleber an interview, and hired a 29-year-old instead.

Kleber sued for age discrimination, arguing that the company was attempting to weed out older workers.

The result? A federal judge allowed the case to go forward. The judge said it wasn't age discrimination to refuse to interview an overqualified applicant, but a jury should decide whether the company's cap on years of experience was an effort to avoid older candidates in general.

Workers with substance abuse issues benefit from 'last chance agreements'

continued from page 1

treatment program? After the employee returns to work, can the company perform unannounced drug tests? How often and for how long?

► Does the company have a right to receive medical information from the employee's doctors? If so, what must the employee do to waive his or her medical privacy rights? What happens if the employee's substance-abuse treatment overlaps with treatment for some other, private medical problem?

A big issue with LCAs is that it might be illegal for a company to ask an employee to sign one unless it can document that the employee's substance abuse problem has actually created problems at work.

For example, Anthony DePalma, an assistant fire chief in Lima, Ohio, became addicted to pain medications following his treatment for kidney stones. The painkiller addiction grew into a heroin addiction, and DePalma took responsibility and voluntarily checked into a rehab center. While he was in rehab, he got a visit from the fire chief, who told him he'd have to sign an LCA to avoid being fired.

DePalma brought a disability discrimination lawsuit against the city, arguing that the LCA was a form of punishment based solely on his illness. And an Ohio appeals court agreed with him.

According to the court, the fact that DePalma had no prior work violations or performance issues indicated that he was being punished merely for his status as a recovering addict, rather than for any bad workplace behavior – which is illegal.

On the other hand, a federal appeals court in Philadelphia decided that a freight company had a right to force a driver to sign an LCA after he took medical leave to go to an alcohol rehab program. The LCA prohibited the driver from consuming any alcohol as long as he worked there. The driver relapsed within a month and sought additional treatment, at which point the company fired him. According to the court, this was okay because a driver who consumes alcohol at work could pose a serious risk of injury.

Most employers will want an LCA to specify that the agreement doesn't change the fact that the employee is "at will." For instance, an Oklahoma employee who was accused of sexually harassing his secretary signed an LCA saying he could be fired immediately for any further substance abuse or sexual misbehavior. The employee was later fired after more facts came out about his previous misbehavior. The employee argued that under the LCA, he was no longer "at will," and could be fired only for *subsequent* misbehavior.

A federal appeals court eventually sided with the employer, but the lawsuit could probably have been avoided if the LCA had been clearer.

An employer also has to be consistent about enforcing LCAs. If a company fires one worker after the first "slip," but chooses to forgive another worker, the first worker could claim that his or her firing was illegal discrimination.

©thinkstockphotos.com

Company sued for breaking oral promise not to fire someone

Denise Parker was an administrator at a nonprofit youth leadership organization for nearly 40 years, receiving consistently strong performance reviews.

But when the organization hired a new CEO, his management style lowered morale and made many employees worried about losing their jobs. Parker herself received a vague warning that there were people "lined up in the street" waiting to take her job.

The staff put together a committee to take their concerns to the organization's board of directors. Parker was voted onto the committee, and at a meeting, the board asked her to discuss the warning she had been given. She was nervous about doing so because she was afraid the CEO would be angry. But a board member told her she needed to answer the question, and that she couldn't be fired for doing so.

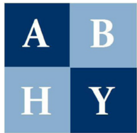
Parker described what happened – and two weeks later, the CEO fired her for being negative at the board meeting.

Parker sued, and a jury awarded her nearly $200,000 in lost wages, along with another $400,000 to punish the employer for its egregious behavior.

Even though the board never told Parker *in writing* that she couldn't be fired for saying what happened, its oral promise was binding, and she couldn't legally be fired as a result.

©thinkstockphotos.com

This newsletter is designed to keep you up-to-date with changes in the law. For help with these or any other legal issues, please call our firm today. The information in this newsletter is intended solely for your information. It does not constitute legal advice, and it should not be relied on without a discussion of your specific situation with an attorney.



ALLRED, BACON,
HALFHILL & YOUNG, PC

11350 Random Hills Road, Suite 700 | Fairfax, VA 22030
(703) 352-1300 | admin@abhylaw.com | www.abhylaw.com

Employers can be tripped up when requiring arbitration

A growing number of employers are requiring employees to sign arbitration agreements, saying that any future employment disputes must be resolved by arbitration rather than going to court.

Arbitration has a lot of advantages for businesses – it can be quicker and cheaper to resolve than a lawsuit, and the details of any disagreements don't become a matter of public record.

However, if companies require employees to sign these agreements without thinking them through carefully, they can backfire.

For instance, a communications company in North Carolina included an arbitration agreement in its employee handbook. The company also required employees to sign a form acknowledging that they had received the handbook.

However, the company included a statement on the form saying that the handbook contained "guidelines" only, and didn't create any binding or enforceable obligations. (It was concerned to make sure the employees remained "at will" and couldn't claim any legal rights to a job based on the handbook procedures.)

But that meant – you guessed it – the arbitration agreement wasn't enforceable either. When a worker brought a wage-and-hour lawsuit and the company tried to force it into arbitration, a federal appeals court said the case could go to court instead.

In another case, a software company called TIBCO required its employees to sign both an arbitration agreement and a non-compete agreement.

When an employee left to work for a competitor, TIBCO filed a lawsuit and asked for an emergency injunction so it could immediately stop the employee from competing against it.

But the court said – again, you guessed it – it couldn't issue an injunction because, under the terms of the company's own agreement, the dispute had to go to arbitration.

The bottom line is that employers who want an arbitration agreement should make it separate from their employee handbook, and should include an exception for any non-compete provisions.