

TIPS AND TRAPS IN EMPLOYMENT CONTRACTS

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I. INTRODUCTION

In the first part of this three-part “HR Toolkit” series, Sheryl Willert and Jo Vestal advised that employee handbooks should generally include a disclaimer:

NOTHING CONTAINED IN THIS HANDBOOK CREATES A CONTRACT.

The obvious consequence of that sound advice is that your employee may be unable to enforce the terms of the employee handbook as a contract. However, some employers find themselves in the opposite situation. After having included a disclaimer declaring that the handbook is not a contract, employers find themselves wishing to enforce the employee handbook as a contract against the employee. An employer will not be permitted to do so: “An employee handbook which states on its face that it ‘is not intended to constitute or create, nor is it to be construed to constitute or create, the terms of an employment contract’ cannot be a promise or a commitment to future behavior.” Bianco v. H.F. Ahmanson & Co., 897 F. Supp. 433, 439-440 (C.D. Cal. 1995) (citations omitted); Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1131-1132 (7th Cir. 1997) (arbitration clause unenforceable due to “not a contract” language in manual); Heurtebise v. Reliable Business Computers, Inc., 452 Mich. 405, 550 N.W.2d 243, 247 (1996).

Therefore, it is of critical importance that a business wishing to protect its interests by contract present the employee with a contract or contracts that are separate and independent of the employee handbook. In this second part of the “HR Toolkit Series,” we will review common contracts used by employers to protect their interests and provide general contract drafting advice. Establishing a well-drafted contract catered to the specific needs of your business will secure your company’s interests without unintentionally expanding employees’ contractual rights.

II. COVENANTS NOT TO COMPETE AND NON-SOLICITATION AGREEMENTS

A. Covenants Not to Compete

During the employment relationship, employers are protected by the employee's duty of loyalty. Washington common law provides that a current employee shall not solicit customers for a rival business or otherwise act in any manner to compete with her employer's business. Kiebertz & Assoc., 68 Wn. App. 260, 265, 842 P.2d 985 (1992). This prohibition against competition during the term of employment exists independent of any employment contract. However, protection during the employment relationship is often insufficient, as, in the absence of a contract to the contrary, employers are left exposed upon the employee's departure. After the termination of employment, an employee is generally free to solicit and engage in business with customers of her former employer. National School Studios, Inc. v. Superior School Photo Service, Inc., 40 Wn.2d. 263, 271, 242 P.2d 263 (1952). In fact, unless the employees are contractually bound to the contrary, a former employee may even solicit those customers of whom she "gained knowledge. . . while in the employer's service." Id. "As a general rule, an employee who has not signed an agreement not to compete is free, upon leaving employment, to engage in competitive employment. In so doing, the former employee may freely use general knowledge, skills, and experience acquired under his or her former employer." Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 437, 971 P.2d 936 (1999). Therefore, without a covenant not to compete, a former employee, who is in the best position to know her employer's clients, needs, products and other competitive information, may compete without restriction.

1. Reasonableness

Recognizing that non-competes are restraints on trade, Washington courts will not enforce them unless they are reasonable in their restrictions. Employers who have overreached in their restrictions will find that they have wasted monetary consideration on a worthless

contract. In evaluating the reasonableness of a covenant not to compete, courts consider: (1) whether the non-compete is necessary to protect the employer's business or goodwill; (2) whether it imposes on the employee any greater restraint than is reasonably necessary; and (3) whether the injury to the public as a result of the loss of the employee's services and skills requires non-enforcement. Knight, Vale & Gregory v. McDaniel, 37 Wn. App. 366, 368, 680 P.2d 448 (1984). The content of a covenant not to compete will vary widely depending upon each employer and employees' circumstances.

a. Necessary to Protect Employer's Interest

First and foremost, the employer must have a legitimate, protectible interest that the covenant is designed to protect. It is insufficient to simply wish there is no post-employment competition. There must be something of issue that the employer seeks to protect—the business's crown jewels such as formulas, designs, financial information, customer lists, customer relationships, and methods of doing business.

In the contract, the employer should identify its legally protectible interest in clear and concise language so that the employee and the court understand why the restriction is sought. One consideration often overlooked in non-competes is when a business prospect becomes the property of the employer, rather than the employee. If the employer considers certain prospective customers to be its own proprietary information, the employer should carefully define when a customer lead ripens into a customer. In addition, where employees are hired with existing books of business, the employer should specify that said books of business become the property of the employer upon hiring and that the employee, upon departure, will not be entitled to further solicitation of that book of business. Specifically setting forth the interest to be protected and requiring the employee to acknowledge that interest may serve the employer well

in any ensuing litigation, allowing the court to see that the parties specifically recognized the need for the covenant.

b. Scope of Restraint

Even if there is a valid protectible interest, the employer cannot restrict the employee forever and wherever she may go in the world. The scope of the restraint must be reasonable. At a minimum, the restraint placed on the employee should be narrowed by time and area restrictions to ensure enforceability. Sheppard v. Blackstock Lumber Co., 85 Wn.2d 929, 933 (1975) (prohibition of any employment in Seattle found unenforceable). While the reasonableness of an agreement's temporal and geographic scope is fact-specific, it is noteworthy that, in various circumstances, Washington courts have upheld time restrictions between one to five years in length. Perry v. Moran, 109 Wn.2d 691, 703-04, 748 P.2d 224 (1987); Armstrong v. Taco Time Int'l, Inc., 30 Wn. App. 538, 544, 635 P.2d 1114 (1981); Knight, Vale & Gregory, 37 Wn. App. at 369. In other words, courts engage in a case-by-case analysis of whether the non-compete is reasonable and thus enforceable. There is no bright-line rule on enforceability except that you can anticipate a fight when attempting to enforce these agreements on a motion for temporary restraining order. With that in mind, a prudent employer will ensure the non-compete identifies the protectible interest, is reasonable in scope, and is supported with consideration. Starting with those steps best assures enforceability later when the employment relationship has turned sour.

c. Harm to Public

On rare occasions, the employee with whom you contract may be such a unique specialist that restricting her ability to perform work in the given area would deprive the public of any competent specialists. Under those circumstances, courts may strike down covenants not to compete in an effort to avoid harm to the public. However, a former employee attempting to

defeat a non-compete by this exception must demonstrate her services are indispensable. See Wood v. May, 73 Wn.2d 307, 310, 438 P.2d 587 (1968) (horseshoer's services not indispensable where 3000 horses and 8 other horseshoers in county); Knight 37 Wn. App. at 371 (restriction against accountant will not harm public as public may use other accountants).

2. Consideration

No contract, including a non-compete, is enforceable without consideration. King v. Riveland, 125 Wn.2d 500, 505, 886 P.2d 160 (1994). "Consideration is any act, forbearance, creation, modification or destruction of a legal relationship, or a return promise in exchange." Id. In other words, before you can restrict an employee from competing with your business, the employee must receive something in exchange for the restriction. An employer cannot unilaterally impose such restrictions.

The creation of a new employment relationship constitutes consideration, but the mere continuation of an employment relationship does not. Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 834, 100 P.3d 791 (2004). Therefore, employers wishing to protect their business with non-competes should require new employees to execute the agreement before the first day of employment. Recently, a Washington federal district court suggested that employers may have at least an inch of wiggle room. In Northwest Mobile Services, LLC v. Schryver Med. Sales & Marketing, Inc., 2006 U.S. Dist LEXIS 44075, *5 (W.D. Wash. 2006), the district court rejected the employee's argument that a non-compete was void for lack of consideration where he had executed the agreement on his sixth day of employment. The district court reasoned that employees commonly finalize paperwork during the first week after employment in consideration for their new employment relationship. However, employers are advised not to leave it up to the court to make such a favorable determination. It is far more prudent to ensure non-competes are executed prior to the beginning of employment.

Non-competes created or modified after the employee has been hired will be enforceable only if they are supported by “independent consideration,” not merely continued employment. Labriolla, 152 Wn.2d at 834. Independent consideration may take the form of increase wages, a promotion, a bonus, a move from at-will to term employment, or new privileges, such as training or access to confidential information. Id. Although courts do not generally examine the sufficiency or amount of consideration, prudent employers will pay the employee something substantial to avoid enforcement problems as non-competes are considered restraints of trade. Some employers also seek non-competes upon termination as part of a severance agreement, in which case the employee’s severance package may serve as consideration for the agreement not to compete. See Seabury & Smith, Inc. v. Payne Financial Group, Inc., 393 F. Supp.2d 1057 (E.D. Wash. 2005). To ensure there are no doubts regarding the existence of independent consideration, employers should include within the agreement a statement in which both the employer and employee specifically acknowledge exactly what benefits constitute the independent consideration.

3. Enforcement

a. Blue Pencil

In Washington, where the terms of a covenant not to compete are deemed unreasonable, courts will modify or “blue pencil” the unreasonable terms of the covenant and enforce the remainder. Wood, 73 Wn.2d at 312-314; Armstrong, 30 Wn. App. at 544-45; Central Credit Collection Control Corp. v. Grayson, 7 Wn. App. 56, 60-61, 499 P.2d 57 (1972). That means courts can re-write non-competes to make them narrower in scope. Courts, however, will not add terms to non-competes to make them enforceable. Thus, the non-compete should identify the employer’s protectible interest, the geographic and time restriction and consideration. You should be cognizant that many other state courts will not modify unreasonable no-competes and

will instead declare them void and unenforceable. You could end up in litigation in another state as employees do move around the country in today's business climate, forcing you to enforce these agreements elsewhere. That possibility makes it essential that you ensure that the essential elements of the non-compete are present—i.e. consideration, protectible interest and reasonable geographic and time restriction.¹

4. Enforcement Against Employee

Damages recoverable for a breach of a covenant not to compete include compensatory damages as well as liquidated damages, if set forth in the agreement. Perry, 111 Wn.2d at 887. An employer may also seek an injunction prohibiting competition during the restrictive period in addition to money damages. Riverview Floral v. Watkins, 51 Wn. App. 658, 663, 764 P.2d 1055 (1988). Compensatory damages are designed to make the employer whole and include such injuries as lost profits. Generally, that means you may recover only the lost profit and not the total sale value when you sue the former employee for breach of the non-compete. Such limits mean that you must actually prove harm if you intend to have a viable claim and you will be forced in discovery to “open your books” to prove that the former employee caused you to suffer damages or lost profits. For those reasons, many employers opt for injunctive relief and liquidated damages.

A liquidated damages clause is one in which the contracting parties set forth a certain remedy as the sole remedy in the event of breach. Washington courts favor the enforcement of liquidated damages clauses where the amount fixed is a reasonable forecast of just compensation for the harm caused by the breach and the harm is such that it is impossible or very difficult to ascertain. Perry, 111 Wn.2d at 887; McDaniel, 37 Wn. App. at 453. Liquidated damages

¹ The possibility of litigation in another state also makes consideration of a choice of law clause prudent, as discussed below.

clauses serve as a powerful tool for enforcing the non-compete. If the employee knows what she may have to disgorge in the event of prohibited competition, she may think twice before violating her non-compete.

5. Wielding Covenant Against Competitors: Tortious Interference

As former employees are often judgment proof, non-competes can effectively be useless in protecting your business. The competitor, however, is not always judgment proof. Where a competitor is on notice of your covenant not to compete with an ex-employee but, nonetheless, hires the ex-employee in violation of the covenant, you may have an action against the competitor for tortious interference. Goodyear Tire & Rubber Co. v. Whiteman Tires, Inc., 86 Wn. App. 732, 746, 935 P.2d 628 (1997). To establish a claim for tortious interference, the former-employer must demonstrate: (1) the existence of a valid contractual relationship or business expectancy; (2) that the competitor had knowledge of the expectancy; (3) that the competitor intentionally interfered or caused a breach of contract; (4) that the competitor interfered for an improper purpose; and (5) that the former-employer suffered damages as a result. Seabury & Smith, Inc., 393 F. Supp. 2d at 1064. The “improper purpose” element is conclusively established as a matter of law where the interference is in violation of a non-compete agreement. Id.

The former employer may also have an action against the new employer for civil conspiracy. Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, 114 Wn. App. 151, 160, 52 P.2d 30 (2002). To establish a civil conspiracy, a plaintiff must prove, by clear, cogent and convincing evidence, that “(1) there is an agreement to accomplish two or more persons; (2) to accomplish some purpose, not itself unlawful, by unlawful means.” Sterling Business Forms, Inc. v. Thorpe, 82 Wn. App. 445, 451, 918 P.2d 531 (1996). Liability of conspirators is joint and several, so each defendant is liable for all acts committed by any of the

other parties, either before or after their entrance, in furtherance of the common design. Id. at 454.

6. Fallout From Enforcement.

As with any litigation, an action to enforce the terms of a covenant not to compete may interfere with the employer's business. The employer's managers and other employees may well lose time testifying and otherwise assisting with the litigation. Even the employer's customers may be dragged into the litigation as third party witnesses, which sometimes sours the employer's relationship with those customers. Such litigation is costly in time, resources, and of course attorneys fees and costs. A loss of customers or critical skills to a competitor may cause irreparable harm. On the other hand, enforcement of these non-competes may be critical to the survival or viability of the business. Before taking action to litigate on a covenant not to compete, carefully consult with an attorney to determine not only your likelihood of success, but also whether other, less disruptive avenues may exist to achieve your desired result.

B. Non-Solicitation Agreements

Non-solicitation agreements are a similar method to protect the employer's business after termination, but in a more calculated fashion. Unlike non-competes which proscribe competition generally in a geographic region, non-solicitation agreement prohibit the former employee from soliciting the former employer's customers. Because the scope of the competitive activity restrained is significantly narrower than a non-compete, its appears courts may be more likely to enforce a non-solicitation agreements. Non-solicitation agreements may be crafted so as to prohibit a former employee from hiring away other employees for a certain period of time.

III. PROTECTING INTELLECTUAL PROPERTY

A. Protection of Employer's Confidential Information

1. Uniform Trade Secrets Act

A non-compete is not the only avenue to protect your business from former employees. Even in the absence of a contract specifically protecting the employer's confidential information, the Uniform Trade Secrets Act ("UTSA") protects an employer's secrets after termination. In other words, a former employee cannot steal the formula to Coke and defend on the basis that he or she had no contractual restriction. Nonetheless, not everything is a trade secret and that definition is where most of the litigation will be fought. The employer's protection will be limited to those things which fit the UTSA's definition of "Trade Secret":

A trade secret is information that:

- (a) Derives ***independent economic value***, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its ***secrecy***.

RCW 19.108.010(4) (emphasis added). Each critical element is discussed below.

a. Independent Economic Value

First, to be a trade secret, the item to be protected must have independent economic value, meaning it must: (1) derive independent economic value by virtue of not being generally known and (2) not be readily ascertainable by proper means. Thus, if an item is commonly known within the industry or by the public, it is not protectible. However, the fact that some elements of the ideas may be found in the public domain is not fatal to a claim of UTSA protection. Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 50, 738 P.2d 665 (1987).

Even if the information is otherwise unknown, it will still not be protected if it could be determined by proper means, such as reverse engineering. For instance, in Buffets v. Klinke,

Buffets claimed its recipes for barbeque chicken and macaroni and cheese enjoyed independent economic value because they were not generally known, and that Buffets enjoyed a competitive advantage as a result. Id., 73 F.3d 965, 968-69 (9th Cir. 1995). But the Ninth Circuit found that the recipes for such general “American fare” could be ascertained by reverse engineering, and that whatever competitive advantage Buffets had over its competitors was not dependent upon any unique recipe. Id. Therefore, the recipe was not subject to UTSA protection.

b. Reasonable Efforts to Maintain Secrecy

An employer claiming UTSA protection must demonstrate it has taken reasonable efforts to ensure secrecy. Precision Moulding & Frame, Inc. v. Simpson Door Co., 77 Wn. App. 20, 27, 888 P.2d 1239 (1995); Machen, Inc. v. Aircraft Design, Inc., 65 Wn. App. 319, 325, 329, 828 P.2d 73 (1992). “Public disclosure of information through display, trade journal publications, advertising, or other carelessness can preclude protection.” Machen, 65 Wn. App. at 325. Employers are advised to carefully draw out a plan to protect information they consider to be trade secrets. Document the efforts you make to protect such information and also document expenses incurred in creating and securing the information. “[O]ne of the key factors used by the courts” to determine whether a particular item constitutes a trade secret “is the effort and expense that was expended in developing the information.” Ed Nowgroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 438, 971 P.2d 936 (1999). For examples of ways to protect your trade secrets, refer to “Avoiding Disclosure of Trade Secrets,” set forth below.

c. Intangibles

The UTSA protects not only the expression of an idea, but even “the author's very ideas if they possess *some novelty* and are undisclosed or disclosed only on the basis of confidentiality.” Klinke, 73 F.3d at 968. Accordingly, the ideas or information protected need not be reduced to a written form. As the Washington Supreme Court confirmed in Rucker, even memorized

information intangible in form is protectible under the UTSA. Id., 137 Wn.2d at 449-450 (Trade secret may be protectible regardless of whether “the information is stored on a CD, a blueprint, a film, a recording, a hard paper copy, or memorized by the employee. . .”).

d. Misappropriation

Before an employee’s post-termination use of a trade secret becomes actionable, the employer must be able to demonstrate the employee “misappropriated” the trade secret. Misappropriation in this context is the “disclosure or use of a trade secret. . . without express or implied consent. . . .” RCW 19.108.010(2). Where the alleged trade secret is a customer list, the employer must show the employee actively solicited the customers, rather than simply announcing a change of employment. See Rucker, 137 Wn.2d at 440.

e. Relief

An employer harmed by violation of the UTSA may bring action for damages caused by the misappropriation, which may include the value of lost business opportunities, lost profits, or future profits, unjust enrichment damages, punitive damages and attorneys fees. Boeing Corp., 108 Wn.2d at 45; Eagle Group v. Pullen, 114 Wn. App. 409, 420-21, 58 P.2d 292 (2002); Rucker, 137 Wn.2d at 359-60. Punitive damages and attorneys fees are appropriate only where the misappropriation was willful and malicious. RCW 19.108.030(2).

In addition, the employer may seek an injunction to put an end to the offending disclosures. Boeing, 108 Wn.2d at 62. Some courts have suggested that injunctive relief is appropriate where the employer is able to establish that the former employee’s use of its trade secrets during her employment with the new employer is inevitable. Uncle B’s Bakery, Inc. v. O’Rourke, 920 F. Supp. 1405, 1433 n. 17 (N.D. Iowa 1996); PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995). While no published Washington cases address this so called “inevitable discovery” doctrine, an unpublished case from the Washington Court of Appeals

suggests the doctrine may find favor in Washington. In Solutech Corp. v. Agnew, 1997 Wn. App. LEXIS 2130, *22 (1997) (UNPUBLISHED), the Washington Court of Appeals relied upon the Seventh Circuit's use of the inevitable discovery doctrine in Redmond to affirm an injunction against a former employee's manufacture of certain edible waxes. The court reasoned that in "some situations a broad injunction for a limited period is the only effective remedy to a threatened trade secrets violation." Id. (quoting Ackerman v. Kimball Int'l, Inc., 652 N.E.2d 507, 511 (Ind. 1955)).

2. Non-Disclosure and Confidentiality Agreements

Despite the statutory protection of the UTSA, many employers find a specific contract helpful to protect their sensitive information. Where employers make use of such contracts, they should bear in mind that the same consideration concerns set forth above with regard to non-compete agreements apply to non-disclosure agreements. In order for the agreement to be enforceable the employer must provide either new employment or some independent form of consideration. King v. Riveland, 125 Wn.2d 500, 505-06, 886 P.2d 160 (1994) ("The Confidentiality Statement was not an agreement characterized by mutually agreed-upon conditions entered into voluntarily by both parties."); See also Machen, Inc., 65 Wn. App. at 32; Spacelabs Med, Inc. v. Farah, 1999 Wn. App. LEXIS 487 (1999) (UNPUBLISHED). In addition, the employer should take care to only contract for the protection of information which is truly confidential, as the agreement may otherwise be deemed unenforceable.

3. Avoiding Disclosure of Trade Secrets

Avoiding disclosure of trade secrets is not only good business, it plays a large role in the court's determination of whether the information is protected by law. While the nature of protection will vary depending upon the type of information, employers may find the following methods of securing their secrets helpful:

- Clearly identify the company's trade secrets.
 - Stamp trade secret documents "Confidential" or "Trade Secret."
 - Visibly label areas of the workplace that contain trade secrets with signs or labels indicating the same.
- Physically lock the areas in the company where trade secrets reside.
- Limit access to trade secrets to only those employees who "need to know" the trade secrets, and maintain detailed records of who has access to the trade secrets and when they have access to such information.
- Use computer security measures to protect electronic confidential information.
 - Implement restrictive security codes and passwords.
 - Limit remote access to information stored in computer files.
 - Consider installing auto-callback functions.
 - Maintain Firewalls between the computer system and the Internet.
 - Examine the computer hard drives and systems of any leaving employee. Look for deleted information or copied information.
- Have systems in place to retain control over documents that contain trade secret information.
 - Keep document control logs to protect sensitive documents.
 - Where multiple copies of a document that contains trade secrets exist, number the copies and prohibit any further copying of the document.
 - Utilize consistent document control policies that consider which documents to retain and which documents to destroy.
- Follow proper discharge procedures when employees leave the company:
 - Always conduct exit interviews with departing employees.
 - Remind exiting employees what information is considered trade secret information by the company.
 - Collect from departing employees all confidential documents, security passes, keys, and property of the employer, and in connection with this task, have the employee sign a certification that all confidential and trade secret material has been returned.
 - Remind exiting employees of their contractual and common law obligations to continue to hold the companies trade secret information secret.

- Keep records of items returned by departing employees and matters discussed with them.
 - Obtain details about the departing employees' new employment.
 - Determine whether a departing employee's responsibilities in his or her new position may be so similar to his or her responsibilities with the company, that the new position is likely to threaten the inevitable or probable disclosure of the company's trade secrets.
 - Require departing employees to execute an exit letter or affidavit in which the employees acknowledge their obligations not to disclose the company's trade secrets or recruit the employees remaining behind.
- Require third parties to execute confidentiality agreements before they receive confidential information.

B. Assignment of Invention Agreements

An employer may require its employees to sign an "Assignment of Inventions Agreement," providing that the employer shall take ownership of all inventions developed on the employer's trade secret information, equipment, supplies, facilities, or time. RCW 49.44.140. An employer using an Assignment of Inventions Agreement should include within that agreement a requirement that, at the inception of employment and periodically thereafter, the employee must disclose all inventions being developed by the employee in order to allow the employer to determine whether it is subject to the Assignment of Inventions Agreement. RCW 49.44.150.

Washington law requires that any Assignment of Invention Agreement must provide a clause "parroting" the exact language of RCW 49.44.140(3) which is as follows:

[T]he agreement does not apply to an invention for which no equipment, supplies, facility, or trade secret information of the employer was used and which was developed entirely on the employee's own time, unless (a) the invention relates (i) directly to the business of the employer, or (ii) to the employer's actual or demonstrably anticipated research or development, or (b) the invention results from any work preformed [performed] by the employee for the employer.

Id. Any agreement which fails to include that exclusion in writing will be unenforceable.

Furthermore, an employer may not, as a matter of law, terminate or refuse to hire an employee

who refuses to sign an agreement which purports to create in the employer an ownership interest for inventions excluded by RCW 49.44.140(3). RCW 49.44.140(2).

IV. ARBITRATION AGREEMENTS

One modern myth of employment law is that employers should always include an arbitration clause because arbitration is less expensive than litigation. In actual practice, arbitration is often just as expensive and burdensome as litigation, and deprives the employer of some important benefits of litigation. The discovery process is significantly pared down in arbitration, making it more difficult for the employee to assess, prosecute and defend claims. In addition, the rules set forth by the arbitrator often do not allow for dispositive motions. As a result, an employer defending an arbitration claim may be without the critical, cost-saving feature of litigation: the motion for summary judgment.

Nonetheless, for some employers, particularly large employers, arbitration may prove more manageable. An arbitration agreement may be a separate, independent agreement requiring an employee to submit all employment-related disputes to arbitration, or may be included as a clause of other employment agreements, such as Assignment of Invention Agreements, to provide that any disputes with regard to the specific contract shall be determined in arbitration. While Washington courts favor arbitration and, therefore, presume employment disputes are arbitrable, employers must beware of pitfalls which routinely inhibit employers' efforts to send disputes to arbitration. First, where executed as an independent agreement, arbitration agreements must be supported by consideration, as discussed above. In addition, the terms of arbitration agreements must not be procedurally or substantively unconscionable. A contract is procedurally unconscionable where a party in an unequal bargaining position is compelled to execute the agreement with no opportunity to independently evaluate the agreement. Alder v. Fred Lind Manor, 153 Wn.2d 331 (2004); Zuver v. Airtouch Communications, 153 Wn.2d 293

(2004). To avoid claims of procedural unconscionability, employers should always give their employees and prospective employees 1-2 weeks to review an arbitration agreement before requiring execution. See id. A contract is substantively unconscionable where the agreement is overly harsh or one-sided. Id. To avoid claims of substantive unconscionability, employers should consult an attorney to ensure that the terms of its contract are consistent with Washington law and do not give the employer substantially superior rights than the employee. Id. If, after careful consideration you decide arbitration is the best choice for your business, attention to these factors will help ensure your arbitration agreement is enforceable.

V. GENERAL CONSIDERATIONS FOR CONTRACTS

A. Choice of Law and Venue

Choice of law and venue clauses provide the employer with advanced knowledge of exactly which law and what court will control employment disputes. Washington courts will enforce forum selection clauses where they are not unfair or unreasonable. Dix v. ICT Group, Inc., 125 Wn. App. 929, 934, 106 P.3d 844 (2005) (citing Exum v. Vantage Press, Inc., 17 Wn. App. 477, 479, 563 P.2d 1314 (1977)); Parrot Mechanical v. Rude, 118 Wn. App. 859, 864, 78 P.3d 1026 (2003). Washington employers who select Washington law and Washington courts enjoy several benefits. First, employers are certain to avail themselves of favorable Washington laws discussed above, such as Washington's "blue pencil" doctrine in enforcement of non-compete agreements. See, e.g., National Flood Services, Inc. v. Fiserv, Inc., 2006 U.S. Dist. LEXIS 39290, *23 (W.D. Wash. 2006) (applying less favorable Montana law in absence of choice of law clause). Perhaps more importantly, employers are able to operate knowing that the same, generally consistent laws will apply to their employment relationships, even as their employees and businesses expand across the nation and around the world.

B. Illusory Promises

In drafting employment agreements, employers often attempt to bind employees to the terms of the contract while leaving the employer itself room to escape enforcement. However, it is well established that where one party retains the right to unilaterally alter the terms of an agreement, that party's promise is "illusory," and the agreement is unenforceable as a matter of law. As the Washington Court of Appeals has explained:

An illusory promise is one that is so indefinite that it cannot be enforced, or by its terms makes performance optional or entirely discretionary on the part of the promisor. Generally **an agreement that reserves the right for one party to cancel at his or her pleasure cannot create a contract.** Further, the illusory promise is insufficient consideration to support enforcement of a return promise.

Lane v. Wahl, 101 Wn. App. 878, 882-83, 6 P.3d 621 (2000) (emphasis added) (citing King County v. Taxpayers of King County, 133 Wash.2d 584, 600, 949 P.2d 1260 (1997); Mithen v. Board of Trustees of Central Wash. State College, 23 Wash. App. 925, 932, 599 P.2d 8 (1979); 1 S. Williston, Contracts § 105, at 418 (3d ed. 1957); Sandeman v. Sayres, 50 Wash.2d 539, 541, 314 P.2d 428 (1957)). Employers must take care to ensure that their contracts do not completely absolve themselves of any contractual liability. Doing so may well render the employment contract unenforceable against the employee, as well as the employer.

VI. CONCLUSION

Carefully drafting employment agreements tailored to meet your company's specific needs will protect your company from threats posed by employees, former employees and competitors. Before setting your contracts in stone, be certain to consult an attorney to ensure you have covered your bases. The Labor and Employment attorneys at Williams, Kastner & Gibbs would welcome any opportunity to assist you.