

Pick Your Headache: Non-Competes, Marijuana, or Interoffice Romances

October 22, 2019: Andrew Pearce & Lauren Black

TODAY'S AGENDA

- Don't Hire a Lawsuit – the “Employee Acknowledgment” Letter
- If You Are Going to Fight, Fight Early
- Do Your Due Diligence
- Marijuana Policies
- Interoffice Romance Policies

Don't Hire a Lawsuit: The “Employee Acknowledgment” Letter

The “Employee Acknowledgment” Letter

[Company Letterhead]

Employee Name
Address

Re: Employee Acknowledgment

Dear _____:

We are pleased to offer you the opportunity to work for **Company A** as set forth in the Offer Letter accompanying this Employee Acknowledgement. We understand that during your previous employment, you were asked by **Company B** to sign and did sign a **Non-Competition & Confidentiality Agreement** containing certain confidentiality, non-competition, and non-solicitation obligations. While there may very well be grounds to contest the enforceability of those provisions, we are requiring that you sign this Employee Acknowledgement before starting your employment with us.

The “Employee Acknowledgment” Letter

We are pleased to offer you the opportunity to work for **Company A** as set forth in the Offer Letter accompanying this Employee Acknowledgement. We understand that during your previous employment, you were asked by **Company B** to sign and did sign a **Non-Competition & Confidentiality Agreement** containing certain confidentiality, non-competition, and non-solicitation obligations. While there may very well be grounds to contest the enforceability of those provisions, we are requiring that you sign this Employee Acknowledgement before starting your employment with us.

Accordingly, in connection with and prior to commencing your employment with us, you agree and affirm the following:

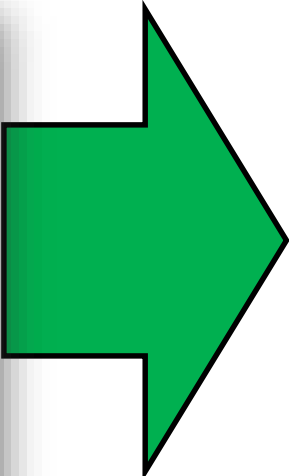
1. You have not taken and do not have in your possession any non-public information acquired from **Company B** or any other prior employer, whether or not such information was formally designated as trade secrets, proprietary, confidential or private.
2. To the extent you have any non-public information as described above in No. 1, you should immediately deliver such information to **Company B** or such other prior employer. This would include information that may exist or reside on a laptop, tablet, iPad, external storage device, personal email account, and/or cloud based storage system.
3. You were not asked by us and will not bring to **Company A** any non-public information as described above in No. 1.
4. You will not rely upon, use, or disclose during your employment with **Company A** any non-public information as described above in No. 1, but you may use the general skills, knowledge and expertise you have developed over the time you have worked in this industry.
5. You will not solicit, request, entice or induce any employee of **Company B** to terminate his or her employment with **Company B** where such employee is someone with whom you interacted during the last twelve (12) months of your employment with **Company B**.
6. You will not solicit or accept business from, or provide products or services to, those customers or vendors of **Company B** with whom you dealt during the last twelve (12) months of your employment with **Company B** or about whom you had confidential information, where such business, products, or services is competitive to the business you did with such customers or vendors on behalf of **Company B**.
7. You will not induce any customer or vendor or supplier with whom you dealt during the last twelve (12) months of your employment with **Company B** or about whom you had confidential information to cease doing business with **Company B** or to diminish their business relationship with **Company B**.

The “Employee Acknowledgment” Letter

We are pleased to offer you the opportunity to work for **Company A** as set forth in the Offer Letter accompanying this Employee Acknowledgement. We understand that during your previous employment, you were asked by **Company B** to sign and did sign a **Non-Competition & Confidentiality Agreement** containing certain confidentiality, non-competition, and non-solicitation obligations. While there may very well be grounds to contest the enforceability of those provisions, we are requiring that you sign this Employee Acknowledgement before starting your employment with us.

Accordingly, in connection with and prior to commencing your employment with us, you agree and affirm the following:

1. You have not taken and do not have in your possession any non-public information acquired from **Company B** or any other prior employer, whether or not such information was formally designated as trade secrets, proprietary, confidential or private.
2. To the extent you have any non-public information as described above in No. 1, you should immediately deliver such information to **Company B** or such other prior employer. This would include information that may exist or reside on a laptop, tablet, iPad, external storage device, personal email account, and/or cloud based storage system.
3. You were not asked by us and will not bring to **Company A** any non-public information as described above in No. 1.
4. You will not rely upon, use, or disclose during your employment with **Company A** any non-public information as described above in No. 1, but you may use the general skills, knowledge and expertise you have developed over the time you have worked in this industry.
5. You will not solicit, request, entice or induce any employee of **Company B** to terminate his or her employment with **Company B** where such employee is someone with whom you interacted during the last twelve (12) months of your employment with **Company B**.
6. You will not solicit or accept business from, or provide products or services to, those customers or vendors of **Company B** with whom you dealt during the last twelve (12) months of your employment with **Company B** or about whom you had confidential information, where such business, products, or services is competitive to the business you did with such customers or vendors on behalf of **Company B**.
7. You will not induce any customer or vendor or supplier with whom you dealt during the last twelve (12) months of your employment with **Company B** or about whom you had confidential information to cease doing business with **Company B** or to diminish their business relationship with **Company B**.



Applicable
to all new
employees



Tailored to a
new
employee's
prior
agreements

The “Employee Acknowledgment” Letter

Finally, we recognize that the Non-Competition & Confidentiality Agreement contains provisions that purport to prevent or severely restrict you from working for twelve months anywhere in the United States. However, the language of the agreement does not provide a clear statement as to what you are restricted from doing or for whom you are restricted from doing work. Nevertheless, we are instructing you to not compete with **Company B** for business from any customer you sold to or attempted to sell to during the one year period preceding the date your employment with **Company B** ended where such business would be competitive to the business you did with such customers on behalf of **Company B**. This restriction will also remain in place for a period of [REDACTED] ([REDACTED]) year from the date your employment with **Company B** ended. If you are contacted by any of the customers or prospects described above during this period of time, you should inform that customer that you are under an agreement that prevents you from soliciting the customer’s business.

Please know that [REDACTED] will not ask you to perform any work that would violate any of the above representations and restrictions. To the extent you feel this has occurred, you should immediately report this to me.

If you have any further questions regarding the content of this letter, I will be happy to discuss them with you. By signing this letter, you are affirming the above representations and agreeing to the restrictions being placed on you in connection with your work for **Company A**.

[Company name]

[Individual’s name]

[Title]

I have read, understand, and agree to the terms and conditions of employment set forth above.

Employee Name (signature)

Date

Advantages

- Avoids or mitigates potential claims by a prior employer for tortious interference with the new employee's post-employment obligations to his/her prior employer
- Provides a basis to terminate the new employee if he/she does not abide by the terms of the Employee Acknowledgment
- Gives direction to both the new employee and his/her supervisor(s) regarding the scope of (and possible restrictions on) the new employee's job duties and responsibilities

If You Are Going to Fight, Fight Early

A Good Offense is better than a Good Defense

I represent **New Employer**. The purpose of this letter is to give notice to **Old Employer** of **New Employer's** offer of employment to **New Employee**, as required pursuant to Article 8 of **New Employee's** Employment Agreement, dated January 1, 2015. Specifically, **New Employer** is extending an offer to **New Employee** to lead its [REDACTED] business with an anticipated start date of January 15, 2019.

Please let me know on or before **Monday, December 17th**, whether **Old Employer** believes any issue exists that would prevent **New Employee** from accepting this offer. To that end, **New Employer** believes that no such issue exists for numerous reasons.

First, it is our understanding that **Old Employer** allowed **John Doe # 1** and **John Doe # 2**, both of whom had employment agreements with **Old Employer** containing restrictive covenants similar to those in **New Employee's** employment agreement, to leave **Old Employer** and accept employment with [REDACTED] and [REDACTED], respectively, who are each competitors and/or customers of **Old Employer**.

Second, it is our understanding that **Old Employer** does not sell, market, or offer to sell any products or services in the [REDACTED] market. As such, **New Employee's** employment with **New Employer** would not implicate or otherwise violate the restrictive covenants in **New Employee's** employment agreement.

Given the above, we trust that **New Employee** may accept the offer of employment from **New Employer** without objection from **Old Employer**. However, to the extent **Old Employer** disagrees, please contact me at your convenience so that we may discuss.

Advantages

- Provides a much faster and far less expensive means of seeking guidance from a court at or near the time of hiring a new employee if/when an old employer wants to threaten litigation, including the possibility of injunctive relief
- Avoids the likelihood of protracted – and very expensive – electronic discovery efforts and also limits potential damages
- Creates an opportunity to recover attorneys' fees under §15.51 of the Texas Business and Commerce Code (Procedures and Remedies in Actions to Enforce Covenants Not to Compete)

Texas Business and Commerce Code § 15.51

Procedures and Remedies in Actions to Enforce Covenants Not to Compete:

If the primary purpose of the agreement to which the covenant is ancillary is to obligate the promisor to render personal services, the promisor establishes that the promisee knew at the time of the execution of the agreement that the covenant did not contain limitations as to time, geographical area, and scope of activity to be restrained that were reasonable and the limitations imposed a greater restraint than necessary to protect the goodwill or other business interest of the promisee, and **the promisee sought to enforce the covenant to a greater extent than was necessary to protect the goodwill or other business interest of the promisee**, the **court may award the promisor the costs, including reasonable attorney's fees, actually and reasonably incurred by the promisor in defending the action to enforce the covenant.**

Do Your Due Diligence

When hiring a new employee, consider:

- Including a contractual right to review and remove company information from an employee's personal devices at the time of his/her separation from the company
- Expressly addressing ownership of customer contact information stored in an employee's outlook or phone contacts
- Adding post-employment contractual obligations that are not subject to § 15.50, such as:
 - A contractual obligation to return company property (regardless of whether such information is confidential), or
 - A severance agreement containing a non-compete

Employee Severance Agreement with General Release of Claims and Covenant not to Compete

ARTICLE B. NON-COMPETITION, NON-SOLICITATION, AND CONFIDENTIALITY AGREEMENT

1. Agreement of Non-Competition, Non-Solicitation and Confidentiality.

a. Upon execution of this Agreement, Company and Employee agree that Employee shall receive the aggregate sum of [REDACTED] (\$ [REDACTED]), payable over the period of 24 months, in bi-weekly installments, for which an IRS Form 1099 shall issue as appropriate for the applicable tax year (the "Additional Compensation"), **but only if Employee adheres to the terms and conditions of this Article B.** Payments described in Exhibit A.

b. Payments under this Article B shall commence on the first bi-monthly payroll date of the Company that follows the expiration of the seven (7) day revocation period described in Article C, below, and shall continue for twenty-four (24) months thereafter. In no event shall any payment under this Article B be accelerated or deferred by the Company or the Employee.

Employee Severance Agreement with General Release of Claims and Covenant not to Compete

2. Remedies.

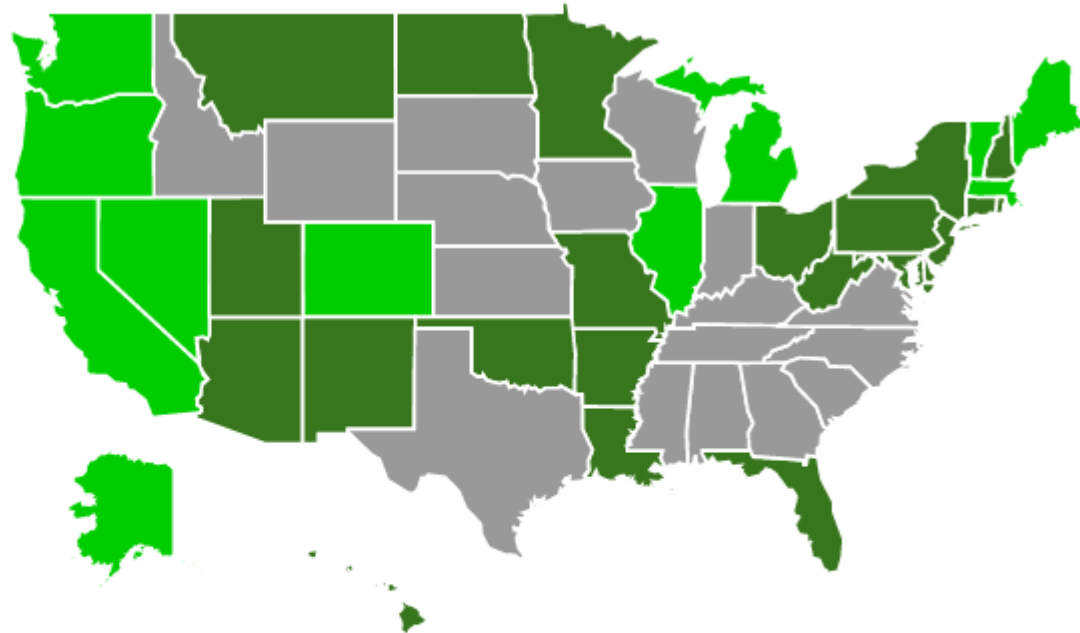
a. In the event of a breach of any provision of this Agreement, either party may institute an action specifically to enforce any term or terms of this Agreement to seek any damages for breach. Should any provision of this Agreement be declared illegal or unenforceable by any court of competent jurisdiction and cannot be modified to be enforceable, excluding the general release language, such provision shall immediately become null and void, leaving the remainder of this Agreement in full force and effect.

b. Employee acknowledges and agrees that the Company may cease making any payment of Additional Compensation to Employee under Article B of this Agreement in the event Employee breaches any term or condition of Article B. Further, Employee acknowledges and agrees the Company is entitled to bring litigation to recoup any payment made under Article B, plus interest accruing at the rate of 5.5% per annum, in the event the Company discovers, after payments are made, that Employee has breached the terms and conditions of Article B under this Agreement.

c. In the event of litigation arising under this Agreement, the prevailing party shall be entitled to an award of the party's reasonable attorneys' fees and all costs of litigation.

Marijuana Policies: Weeding Out the Issues

State Scoreboard



Marijuana Legalization Status

- Medical marijuana broadly legalized
- Marijuana legalized for recreational use
- No broad laws legalizing marijuana

Source: <https://www.governing.com/gov-data/safety-justice/state-marijuana-laws-map-medical-recreational.html> (as of 6/25/19)

What about Texas? The Compassionate Use Act

The Patient:

A physician may prescribe low-THC cannabis to a patient if:

- the patient is a permanent resident of the state; and
- the physician certifies to the department that:
 - the patient is diagnosed with:
 - epilepsy;
 - **a seizure disorder;**
 - **multiple sclerosis;**
 - **spasticity;**
 - **amyotrophic lateral sclerosis;**
 - **autism;**
 - **terminal cancer; or**
 - **an incurable neurodegenerative disease;** and
 - the physician determines the risk of the medical use of low-THC cannabis by the patient is reasonable in light of the potential benefit for the patient.

The Compassionate Use Act was amended in 2019 to add these conditions

What about Texas? The Compassionate Use Act

The Physician:

A physician is qualified to prescribe low-THC cannabis with respect to a patient's particular medical condition if the physician:

- is board certified in a medical specialty relevant to the treatment of the patient's particular medical condition; and
- dedicates a significant portion of clinical practice to the evaluation and treatment of the patient's particular medical condition.

However, the Compassionate Use Act does not contain any employment protection for qualified patients that would restrict an employer's ability to discipline or terminate an employee who tests positive for marijuana.

Reasonable Accommodation under the ADA?

Does an employer have to allow for the use of medicinal marijuana to comply with the reasonable accommodation requirements of the ADA?

- Most people who have a prescription for medical marijuana have a disability that is protected under the ADA.
 - Cancer;
 - Glaucoma;
 - HIV;
 - Hepatitis C;
 - Crohn's disease;
 - Alzheimer's.

Reasonable Accommodation under the ADA?

The ADA does not require that an employer accommodate by allowing use of medicinal marijuana.

- Courts that have directly addressed whether the ADA itself requires permission to use medical marijuana as a reasonable accommodation have all found that the ADA does not mandate that employer allow for the use of an illegal substance as a reasonable accommodation for a disability.
- Because even medicinal marijuana is an illegal substance under the Controlled Substances Act, accommodation is not required under the ADA.

What About the States?

If it is not a required accommodation under the ADA, what do state disability discrimination laws say?

- 33 states and the District of Columbia have medicinal marijuana statutes;
- Most state statutes regarding medicinal marijuana do not address whether allowing medicinal marijuana use must be considered as a reasonable accommodation;
- Because most state disability discrimination and accommodation statutes are modeled after the ADA, most state statutes do not require accommodation for medicinal marijuana;
- Some of the statutes provide protections to medicinal marijuana card holders and protections from adverse employment action.

What are the takeaways?

- If you have an employee with a medicinal marijuana prescription, the employer likely does not have to accommodate by allowing for use of medicinal marijuana.
- But, the employer should be careful before terminating or taking adverse action because state statutes may provide protections.
- Likely that even more change is ahead with medical marijuana becoming more socially acceptable.

Interoffice Romance Policies

Consensual Romance in the Workplace Agreement

1. Equal Employment Opportunity Workplace. The undersigned recognize and agree that it is [REDACTED]'s policy to provide an equal opportunity in hiring, employment, promotion, compensation, and all other employment-related decisions without regard to race, color, religion, sex, gender identity and gender expression, pregnancy, national origin, ancestry, citizenship, age, marital status, physical disability, mental disability, medical condition, sexual orientation, genetic information or characteristics, or any other characteristic protected by state or federal law relating to discrimination in employment. The undersigned understand that [REDACTED] does not tolerate unwelcome or offensive conduct or conduct that creates a hostile work environment that is in any way based on or related to a person having any of the characteristics described above.

The undersigned agree that each has received, read and understand [REDACTED]'s EEO policy and agree to adhere to all of its terms. ____ [Initial]

2. All Forms of Sexual Harassment Prohibited. The undersigned also recognize and agree that [REDACTED] does not tolerate sexual harassment, a form of unlawful discrimination. Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- submission to such conduct is made, explicitly or implicitly, a condition of an individual's employment or advancement;
- submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or
- such unreasonable conduct interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment.

The undersigned agree that each has received, read and understand [REDACTED]'s Policy Against Sexual Harassment and agree to adhere to all of its terms and agree that neither has been subject to Sexual Harassment as of the date below. ____ [Initial]

For better or worse, the Employees are affirmatively agreeing that:

3. Consensual Relationship. We, the undersigned employees, have entered into a personal relationship with each other. We agree as follows:

- Our relationship is entirely voluntary and consensual.
- Our relationship will not have a negative impact on our work.
- We will not engage in any public displays of affection or other behavior that might create a hostile work environment for others or that might make others uncomfortable.
- We understand that there is a possibility in the future that one or both of us may need to transfer to another location or that certain business functions may need to be altered to remove any conflicts of interest in our working environment. If a transfer or change in business functions will not remove the conflict of interest, we understand that one of us may have to resign or be demoted to remove the conflict of interest. We further understand that [REDACTED] will first ask us to choose which of us will be subject to a transfer, demotion or resignation. If we fail to choose, [REDACTED] will be forced to choose for us. We understand that [REDACTED] will make such a decision without regard to any protected class characteristic and in compliance with [REDACTED]

For better or worse, the Employees are affirmatively agreeing that:

██████ EEO policy and the policy related to personal relationships from the Employee Handbook.

- We will act professionally toward each other at all times, even after the relationship has ended.
- We will not participate in any company decision-making processes that could affect each other's pay, promotional opportunities, performance reviews, hours, shifts or career, while in this relationship and after the relationship ends, if applicable.
- We agree that, if the relationship ends, we will inform ██████ immediately.
- We further agree that we will notify Human Resources if we believe it is necessary to protect our rights after the relationship ends or if the Policy Against Sexual Harassment is violated at any time.
- We each agree that, if the relationship ends, we will respect the other person's decision to end the relationship and will not retaliate against the other person, engage in any unprofessional or inappropriate efforts to resume the relationship, or engage in any other conduct toward the other person that could violate the Policy Against Sexual Harassment.
- We each agree that by signing below we are expressly waiving any right to pursue a claim of sexual harassment, or any other claim based on this personal relationship or any event occurring related to the relationship prior to the signing of this agreement, against ██████, ██████, and all of its past, present and future parents (including, but not limited to ██████, ██████), subsidiaries and affiliates and their employees, officers, directors, agents, insurers and legal counsel.
- We each agree that we have been informed that we have the right to have this agreement reviewed by legal counsel.

Questions?

Answer: It depends.

Andrew Pearce

apearce@boyarmiller.com

832.615.4263

Lauren Black

lblack@boyarmiller.com

832.615.4295

BoyarMiller

713.850.7766

boyarmiller.com