

Claremont Management Group Presents Your Best Employment Strategies for 2012 February 10, 2012

By

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1. ***Marsh USA Inc. and Marsh & McLennan Cos. v. Rex Cook***, Supreme Court of Texas, 06/24/11, 6-3 Decision in favor of Marsh.

One of the largest insurance brokers in the United States sues a director level employee when he joins a competing brokerage company. His employment agreement prohibited him from working for a competitor and soliciting clients of the company in exchange for providing him stock options.

Texas Business and Commerce Code generally limits non-competes in terms of geographical scope, time and scope of activity and it must be part of an otherwise enforceable employment agreement. Terms must be reasonably related to protecting the business interests of the employer.

Consideration is required for enforceability, and generally, it had to be related to give rise to the interest in restraining competition. Cash was originally thought to be sufficient, but the courts later ruled that provision of confidential information and trade secrets was the only type of consideration that was adequate. Later cases held it could be a "promise" to provide such information.

In the *Marsh* case, TXSPCT rules that the interest to be protected must only be reasonably related to the consideration provided. That granting a senior executive stock options was a reasonable way to protect the goodwill of the company, something that could be protected.

General Rules as a Result:

- (1) Only have non-competes for employees who are in key management, engineering or sales positions.
- (2) Only use documents approved by counsel and which are limited in time, geographic scope and scope of activity.
- (3) Tie the consideration to the interests to be protected by the agreement. In this case, stock options to a senior executive were held to be sufficient consideration.
- (4) Be consistent in enforcement.

2. Unemployment Issues:

- a. More employees are being granted unemployment benefits at the first level of claims, even when the employer timely responds and either the employee abandoned their job or were fired for misconduct associated with work.
- b. Now, more than ever, make sure files are documented and progressive discipline is followed. Collect evidence, including text and voicemail messages. If the situation has witnesses, make sure you get witness statements. File should contain a termination letter or termination report. This should be a carefully constructed document. Be consistent! Reasons for termination should be same from day before the termination through the day of the last appeal
- c. Do not be discouraged if you lose first round. Make sure to timely appeal each adverse decision that you feel is incorrect. Timeframes are tight for this.
- d. Make sure all your live witnesses are available for the appeals telephone hearing. If producing additional documents, provide copies to the claimant and the VEC in advance. My clients are winning most of the appeals, but diligence is required and we do not win every single one of them.

3. Independent Contractors (Repeated from August):

- a. Crack down at all levels
- b. Watch for unemployment claims by ICs
- c. Approach:
 - (1) Evaluate the position from the beginning
 - (2) Have clear understanding
 - (3) Use lawyer-approved ICA for each IC
 - (4) Monitor what is happening with each IC

4. EEOC:

- a. Not as many claims during the long recession as expected, but there does seem to be an increase over the last year.
- b. See above for rules above on terminating/disciplining employees. Still applies here.
- c. There is supposed to be an increased emphasis on age discrimination, but I have not seen it yet, other than one case.
- d. There are still hungry plaintiff attorneys out there willing to take on even very questionable cases. Stay on your guard. Regard every termination as a potential EEO claim.