DEVRY SMITH FRANK *LLP*

Lawyers & Mediators

HR EMPLOYMENT SEMINAR

May 28, 2013

DEVRY SMITH FRANK *LLP*

Lawyers & Mediators

HOW TO AVOID CONSTRUCTIVE DISMISSAL CLAIMS

L. Viet Nguyen

Constructive Dismissal Claims

Constructive Dismissal

- Determined by common law
- A unilateral, fundamental and substantial change to an employee's contract of employment
- A change that violates the contract's terms

Constructive Dimissal Claims

Employment Standards Act, s. 2000

- Constructive dismissal constitutes termination of employment per s. 56(1)(b)
- Constructive dismissal constitutes severance of employment per s. 63(1)(b)
- Resignation required by employee

Constructive Dismissal Claims

Analyzing Constructive Dismissal Claims

- Terms of the employment contract
- Whether change by employer is a fundamental change
- Whether treatment by employer makes continued employment "intolerable"

Constructive Dismissal Claims

Changes in Terms of Employment Contract

- Remuneration, including salary, bonuses and benefits
- Job duties, demotion
- Hours of work, location

Constructive Dismissal Claims

Repudiation of Employment Contract

- Treatment of employee
- Criticism, bullying, discrimination
- Hostile and embarrassing work environment
- "Viewed objectively, employment in such an environment no longer possible"

Constructive Dismissal Claims

Strategies

- All employment contracts in writing with clearly defined terms
- Clearly established policies for investigation of workplace complaints
- Written progress reports, investigation reports and timely responses
- Keep counsel involved and informed from an early stage

Constructive Dismissal Claims

Defences to Constructive Dismissal Claims

- Consent, agreement of employee to change in contract
- Change as part of a larger organizational restructuring
- Justifying constructive dismissal as being with cause
- Providing adequate notice of termination

DEVRY SMITH FRANK *LLP*

Lawyers & Mediators

HR EMPLOYMENT SEMINAR

May 28, 2013

DEVRY SMITH FRANK *LLP*
Lawyers & Mediators

Employee vs. Independent Contractor: Implications for Employers

Alexandra Tratnik

Employment Status

Employee → contract *of* service

Independent contractor → contract *for* service

ASK: Whether the person who has been engaged to perform the services is performing them as a person in business on his or her own account (*671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983)

Employee or Independent Contractor?

4-Part Test:

- Level of control
- Ownership of equipment
- Opportunity for profit
- Risk of financial loss

*No single factor is determinative; the total relationship of the parties must be considered

See: *Wiebe Door Services Ltd. v. MNR*, 87 DTC 5025 (FCA) and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*

Important Considerations

- Employment status is not static

- Written contract outlining employment status is <u>not</u> determinative

Risks of Improper Classification

- Tax implications
  - Income taxes, CPP contributions, EI premiums, interest, penalties, legal fees
- Workplace Safety and Insurance
  - Breaches of *Workplace Safety and Insurance Act*

Risks of
Improper Classification

- Wrongful dismissal claims
  - Notice requirements under the *ESA* and the common law
- Employer's *ESA* obligations
  - Overtime pay, vacation pay, pregnancy and parental leave, minimum notice requirements, severance pay

Minimize Risk

- Assessment of the position to be filled
- Well drafted contract that confirms and clarifies the nature of the company's relationship with the worker
- Contracts with indemnity provisions
- Monitor worker's position regularly to ensure ongoing consistency with intended classification
- Seek legal advice to help minimize the risk of the worker being found to be an employee

DEVRY SMITH FRANK *LLP*

Lawyers & Mediators

HR EMPLOYMENT SEMINAR

May 28, 2013

DEVRY SMITH FRANK *LLP*
Lawyers & Mediators

WSIB Claims

An Overview & Tips for Employers

By: Marty Rabinovitch & Michelle Farb

Workplace Safety Insurance Act, 1997 ("WSIA")

- **Provincial legislation**
- **Purposes of the WSIA (S.1)**
  - To promote health and safety in the workplace
  - To facilitate the return to work and recovery of workers who sustain personal injury arising out of and in the course of employment or who suffer from an occupational disease
  - To facilitate the re-entry into the labour market of workers and spouses of deceased workers
  - To provide compensation and other benefits to workers and to the survivors of deceased workers

Key Definitions
S. 2(1) WSIA

"Worker" a person who has entered into or is employed under a contract of service or apprenticeship.

"Employer" means every person having in his, her or its service under a contract of service or apprenticeship another person engaged in work.

"Independent Operator" – S. 12.1

(a) An individual who,

(i) does not employ any workers,

(ii) reports himself or herself as self-employed for the purposes of an Act or regulation of Ontario, Canada or another province or territory of Canada, and

(iii) is retained as a contractor or subcontractor by more than one person during the time period set out in a Board policy, or

(b) An individual who is an executive officer of a corporation that,

(i) does not employ any workers other than the individual, and

(ii) is retained as a contractor or subcontractor by more than one person during the time period set out in a Board policy

“Accident”

Includes:

- A wilful and intentional act, not being the act of the worker,
- A chance event occasioned by a physical or natural cause, and
- Disablement arising out of and in the course of employment

Employer Coverage

- **Schedule 1 Employer**
  - Includes industries where workplace injuries are more likely
  - Examples include: forestry, mining, and manufacturing
  - Workplace insurance coverage is compulsory for any business or industry named in Schedule 1, Regulation 175/98. Employers included in Schedule 1 must contribute to the insurance fund
  - Through contribution to the insurance fund, a schedule 1 employer is protected by a system of collective liability
- **Schedule 2 Employer**
  - Examples include: railways, telephone companies, and school boards
  - Schedule 2 employers are compulsorily covered through a system of individual liability. These employers must individually pay the total costs of benefits for their injured employees
  - The WSIB charges these schedule 2 employers for the cost of administering claims

Employer Coverage

- **Construction Industry**
  - As of January 1, 2013, nearly everyone in construction industry requires WSIB coverage. Not just workers but business owners too.
  - For more information see BeRegisteredBeReady.ca
- **Not covered by WSIA**
  - Law firms
  - Travel agencies
  - Health clubs
  - Banks
  - Insurance companies

"An Accident in the Course of Employment"

For Coverage Purposes

A personal injury by accident occurs in the **course of employment** if the surrounding circumstances relating to ***place, time,*** **and** ***activity*** indicate that the accident was work-related

Relevant Legislation

Workplace Safety and Insurance Act, 1997

S.O. 1997, CHAPTER 16

SCHEDULE A

Insured injuries

- 13. (1) A worker who sustains a personal injury by accident arising out of and in the course of his or her employment is entitled to benefits under the insurance plan.

"Workplace"

For Coverage Purposes

If a worker has a fixed **workplace**, a personal injury by accident **occurring on the premises of the workplace generally will have occurred in the course of employment.** A personal injury by accident occurring off those premises generally will not have occurred in the course of employment.

If a worker with a fixed **workplace** was injured **while absent from the workplace on behalf of the employer** or if a worker is **normally expected to work away from a fixed workplace, a personal injury by accident generally will have occurred in the course of employment** if it occurred in a **place where the worker might reasonably have been expected to be while engaged in work-related activities.**

"Work Time"

For Coverage Purposes

If a worker has **fixed working hours, a personal injury by accident generally will have occurred in the course of employment if it occurred during those hours or during a reasonable period before starting or after finishing work.**

If a worker **does not have fixed working hours** or if the **accident occurred outside the worker's fixed working hours**, the criteria of **place and activity are applied** to determine whether the personal injury by accident occurred in the course of employment

"Work Activity"

For Coverage Purposes

If a personal injury by accident **occurred while the worker was engaged in the performance of a work-related duty** or in an **activity reasonably incidental to (related to) the employment**, the personal injury by accident generally will have **occurred in the course of employment**.

If a worker was engaged in an activity to **satisfy a personal need, the worker may have been engaged in an activity that was incidental to the employment**. Similarly, engaging in a **brief interlude of personal activity does not always mean that the worker was not in the course of employment**.

"Work Activity"

For Coverage Purposes

In determining whether a personal activity occurred in the course of employment, the decision-maker should consider factors such as

- the duration of the activity
- the nature of the activity, and
- the extent to which it deviated from the worker's regular employment activities.

In determining whether an activity was incidental to the employment, the decision-maker should take into consideration

- the nature of the work
- the nature of the work environment, and
- the customs and practices of the particular workplace.

Case Examples

NOT "In the Course of Employment"

- Accident occurred when worker was driving home from work location; after overtime shift completed (Decision 1586/05, 2005 ONWSIAT 2281)
- Accident occurred after regular working hours on worker's way to grocery shop and deliver a file, which was a favour on a volunteer basis (Decision 437/00, 2004 ONWSIAT 857)
- Accident occurred while driving to work in worker's own car (Decision 1290/98I2, 2003 ONWSIAT 1749)

“In the Course of Employment”

- Accident occurred while dancing as part of a social evening at a hotel paid by employer (Decision 298/92, 1992 ONWSIAT 5734)
- On a business trip, a light fixture fell on a worker during intercourse in a hotel room. (Comcare v. PVYW) – Australian case

Employer Obligations

When an accident occurs

- Provide first aid
- Immediately arrange transport and medical treatment for injured worker
- Pay worker's wages for the full day (S. 24)
- Investigate and report the accident to WSIB
- Assist with work reintegration
  - Employers have a duty to collaborate and cooperate with worker upon returning to work after an accident and help find suitable work
    - Accommodate until undue hardship (S.41(6) WSIA)
  - If the employer is unable or unwilling to find suitable work, the WSIB will consider training the worker to perform a suitable occupation

Benefits Available

To an injured worker

- **Loss of Earnings (LOE)-** coverage for lost time from work resulting from a work-related illness (85% Net Average Earnings)
- **Non-Economic Loss (NEL)-** compensation for physical, functional & psychological permanent impairment
- **Loss of Retirement Income (LRI)-** If under 64 & have received LOE for 12 continuous months; % of LOE benefits set aside to be paid at 65
- **Health Care Benefits-** prescription drugs, transportation costs
- **Survivor Benefits-** available to worker's survivors in fatal accident

Tips for Employers

Maintaining low premiums & Claims Management

- About 95% of premiums paid by employers are experience-rated. Those who have safe workplaces and effective return-to-work programs can reduce their annual premiums paid
- **Prevention**
  - Report accidents when they occur
  - Training programs
    - First aid training to workers
    - Certificate training to be members of a workplace Joint Health and Safety Committee (JHSC), which is a law under the Occupational Health & Safety Act.
  - Effective communication with workers and WSIB
  - Prevent heat stress, violence, slips, trips and falls

WSIB Resources

- Incentive programs to employers
  - **New Experiential Experience Rating (NEER)-** a rate-group based program that applies to firms that operate in at least one non-construction group. The firm can earn either lump sum refunds or surcharges based on your individual accident performance.
  - **Safe Communities Incentive Program (SCIP)-** a two-part health and safety incentive program for small businesses. Firms that meet the program requirements can receive rebates on their WSIB premiums.
- Health and safety association partners- health clinics, safe workplace associations

www.devrylaw.ca

DEVRY SMITH FRANK *LLP*

Lawyers & Mediators

HR EMPLOYMENT SEMINAR

May 28, 2013

DEVRY SMITH FRANK *LLP*
Lawyers & Mediators

Holiday Pay, Vacation Pay, and Leaves of Absence

Carrie Kennedy

HOLIDAY PAY

"Public Holidays" are often referred to as "statutory holidays".

There are 9 Public Holidays in Ontario: New Year's Day, Family Day, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Christmas Day, and Boxing Day

HOLIDAY PAY

Part 10 of the Employment Standards Act, 2002

- sections 24 to 32

Key points:

- Employer must pay Holiday Pay or Premium Pay for Public Holidays

HOLIDAY PAY

- Holiday pay is:
  - regular wages and vacation pay payable to the employee in the 4 work weeks before the work week in which the public holiday occurs, divided by 20, OR
  - A calculation of some other amount, if prescribed
- Premium Pay is:
  - 1.5 times an employee's regular rage (paid for actual hours worked, not the usual hours worked)

HOLIDAY PAY

- If the employee works on a Public Holiday, then the employee is entitled to either:
  - A different day off plus Public Holiday pay (regular wage) OR
  - Public Holiday pay (regular wage) plus premium pay (1.5 regular wage)

If an alternate day off is selected, it should be taken within 3 months of the Public Holiday or up to 12 months upon agreement (employer and employee should agree on the date)

HOLIDAY PAY

- A Public Holiday is not a vacation day
- If an employee is on a leave of absence or on a layoff on a Public Holiday, the employee is entitled to holiday pay for the day
- If employment ends before a day that has been substituted for a Public Holiday, the employer must pay the employee public holiday pay for that day

VACATION WITH PAY

Part 11 of the Employment Standards Act, 2002

- sections 33 to 41.1

The Act distinguishes between vacation *time* and vacation *pay*.

Vacation Time: Employer must give employee at least 2 weeks vacation after each year of work that he or she completes

Vacation Pay: Vacation pay is equivalent to at least 4% of gross wages earned during the year

VACATION WITH PAY

Key Points:

- Employee must be allowed to take the vacation time as one 2-week period or two 1-week periods or, on the employee's written request, shorter periods agreed to by the employer
- Earned vacation should be taken within 10 months
- Vacation pay should be paid either in a lump sum prior to the vacation period or, on agreement, as it is earned

VACATION WITH PAY

- If an employer approves, an employee may forego taking vacation time, but an employer may not forego paying vacation pay
- If employment ends and there is outstanding vacation entitlement, the employer must pay all accrued and unpaid vacation pay not later than 7 days after the end of the employment, or the next pay date, whichever is later
- In dismissal cases, Ontario courts are generally of the opinion that it is unjust for an employer to pay vacation pay during the notice period

LEAVES OF ABSENCE

Part 14 of the Employment Standards Act, 2002

- sections 45 to 53
- Includes: pregnancy leave, parental leave, family medical leave, organ donor leave, personal emergency leave, emergency leave for declared emergencies, reservist leave

LEAVES OF ABSENCE

Pregnancy Leave

- If a pregnant employee has worked for 13 weeks, she is entitled to a pregnancy leave of absence without pay
- Leave may begin:
  - **no earlier than** of 17 weeks before the due date or the day on which she gives birth to a live baby; or
  - **no later than** the earlier of her due date or the date on which she gives birth

*a woman who is "overdue" therefore, will be required to begin pregnancy leave on her due date, even if she has not yet given birth

LEAVES OF ABSENCE

Pregnancy Leave

- Pregnancy leave ends:
  - If she is entitled to **parental leave,** 17 weeks after the pregnancy leave began, or
  - If she is not entitled to **parental leave,** the later of:
    - 17 weeks after the pregnancy leave began and
    - 6 weeks after the birth, still-birth, or miscarriage

LEAVES OF ABSENCE

Pregnancy Leave

- It is an employee's right to decide whether she will take pregnancy leave and when it will begin (subject to the limits in the Act)
- An employee must give 2 weeks written notice of her intention to take pregnancy leave
- If the employer requests it, the employee must give a medical certificate stating the due date

LEAVES OF ABSENCE

Pregnancy Leave

- An employee may end her leave early by giving written notice of at least 4 weeks before the day she wishes to end her leave
- An employee who does not intend to return to employment is required to give her employer at least 4 weeks written notice

LEAVES OF ABSENCE

Parental Leave

- Must have been employed for at least 13 weeks
- Must be the parent of a child – includes natural and adoptive parents and applies to both mothers and fathers
- Leave may begin:
  - No later than 52 weeks after the day the child is born or comes into the employee's custody, care, and control for the first time
  - When pregnancy leave ends

LEAVES OF ABSENCE

Parental Leave

- Leave ends:
  - 35 weeks, if pregnancy leave was taken, or
  - 37 weeks, otherwise
- Notice: give 2 weeks written notice before taking leave
- An employee must give 4 weeks written notice to end leave early
- An employee on parental leave must give an employer at least 4 week's written notice to terminate his or employment before the leave expires or when it expires

LEAVES OF ABSENCE

Family Medical Leave

- An employee is entitled to an unpaid leave of absence of up to 8 weeks to provide care and support to:
  - a spouse
  - parent, step-parent, foster parent of the employee
  - child, step-child, foster child of the employee or his or her spouse
  - any individual prescribed as a family member for the purposes of this section of the Act (regulations set out a list of prescribed family members)

LEAVES OF ABSENCE

Family Medical Leave

- Leave is to provide care or support if a qualified health practitioner issues a certificate stating that the individual has serious medical conditions with a significant risk of death occurring within a period of 26 weeks or shorter
- Leave ends on the earlier of:
  - the last day of the week in which the individual being cared for dies; or
  - the last day of the week in which the 8 week period ends

LEAVES OF ABSENCE

DSF

<u>Family Medical Leave</u>

- Leave is taken under this section in periods of entire weeks
- An employee shall advise the employer in writing of the intention to take this leave
- If requested by the employer, the employee shall provide the employer with a copy of certificate stating that the individual has serious medical conditions with a significant risk of death occurring within a period of 26 weeks or shorter

LEAVES OF ABSENCE

Family Medical Leave

- Two or more employees may take leave under this section in respect of a particular individual, but the time specified must be shared
- If the individual does not die, an employee may take another leave with respect to that individual
- The rights to family medical leave are in addition to personal emergency leave

LEAVES OF ABSENCE

Organ Donor Leave

- An employee who has been employed for at least 13 weeks and undergoes surgery for the purposes of organ donation is entitled to a leave of absence without pay
- The employer may require an employee to provide a certificate from a qualified medical practitioner confirming that the employee has undergone or will undergo surgery for the purpose of organ donation

LEAVES OF ABSENCE

Organ Donor Leave

- Leave is for a period of up to 13 weeks
- Leave may be extended for not more than 13 weeks if a legally qualified medical practitioner issues a certificate stating that the employee is not yet able to perform his or her duties
- Employee may take leave by giving 2 weeks written notice
- Employee may end leave early by giving employer 2 weeks written notice

LEAVES OF ABSENCE

Organ Donor Leave

- Leave begins on the date of surgery or earlier if provided for by a medical practitioner
- The employee may end leave early
- The rights to organ donor leave are in addition to personal emergency leave

LEAVES OF ABSENCE

Personal Emergency Leave

- If an employer employs 50 or more employees, its employees are entitled to a leave of absence without pay for any of:
  - Personal illness, injury, or medical emergency
  - Death, illness, injury, or medical emergency of certain individuals
  - An urgent matter that concerns certain individuals

LEAVES OF ABSENCE

Personal Emergency Leave

- The "certain individuals" (my term), include:
  - Employee's spouse
  - Parent, step-parent, or foster parent of employee or his or her spouse
  - Child, step-child, or foster child of employee or his or her spouse
  - Grandparent, step-grandparent, grand-child, or step-grandchild of employee or his or her spouse
  - Spouse of a child of the employee
  - Brother or sister of employee
  - Relative of the employee who is dependant on the employee for care or assistance

LEAVES OF ABSENCE

Personal Emergency Leave

- Entitlement is a total of 10 days each calendar year (which includes part-days taken)
- An employer may require the employee to provide evidence reasonable in the circumstances that the employee is entitled to leave

LEAVES OF ABSENCE

Emergency Leave, Declared Emergencies

- Employee may take a leave of absence without pay if an emergency is declared under the *Emergency Management and Civil Protection Act*, and:
  - Orders under that act or the *Health Protection and Promotion Act* apply to him or her
  - Because he or she is needed o provide care or assistance to certain individuals (as defined in the section, which are similar to other sections)
  - Because of other reasons that might be prescribed
- Employer may require employee to provide evidence that employee is entitled to leave

LEAVES OF ABSENCE

Reservist Leave

- An employee is entitled to leave without pay if the employee is a reservist and will not be performing the duties of his or her position because:
  - The employee is deployed to a Canadian Forces operation outside of Canada
  - The employee is deployed to a Canadian Forces operation inside of Canada that is or will be providing assistance in dealing with an emergency or with its aftermath
  - The prescribed circumstances apply
- Entitlement under this section begins after the employee has been employed for at least the prescribed period or 6 consecutive months

LEAVES OF ABSENCE

General Provisions Concerning Leaves

- During leave, employee continues to participate in pension plans, life insurance plans, accidental death plans, extended health plans, dental plans, and any prescribed type of benefit plan (and the employer shall continue to make its contributions to these plans unless the employee advises the employer in writing that he or she does not intend to pay his or her contributions)
- The period of leave is included in calculating the employee's length of employment, service, or seniority in determining rights under an employment contract

LEAVES OF ABSENCE

General Provisions Concerning Leaves

- Once the leave ends, employers *must* reinstate an employee to the position the employee most recently held with the employer, if it still exists, or to a comparable position if it does not
- However, if here were reasons to dismiss an employee that are completely unrelated to the leave, reinstatement will not be required

DEVRY SMITH FRANK *LLP*
Lawyers & Mediators

HR EMPLOYMENT SEMINAR

May 28, 2013

DEVRY SMITH FRANK *LLP*

Lawyers & Mediators

Employer's Rights and the Fiduciary Employee

Justin Winch

FIDUCIARY LAW: THE BASICS

A fiduciary duty may exist where the following factors are present:

1) the fiduciary undertakes to act in the best interests of the beneficiary;

(2) the fiduciary has the power to affect the legal or substantial interests of the beneficiary; and

(3) as a result, the beneficiary is vulnerable to the fiduciary

The Courts will consider…

Some of the factors that the courts have considered in determining whether there is a fiduciary duty are:

(a) the employee's ability to exercise discretionary power;

(b) the authority delegated to the employee to affect the employer's legal and economic interests;

(c) the degree of trust placed in the employee; and

(d) the extent to which the employment relationship renders the employer vulnerable to the employee.

When a fiduciary obligation is imposed, what does it mean?

The Supreme Court of Canada described the essence of the obligation as requiring a fiduciary to act with loyalty, good faith and to avoid any conflict of duty and self-interest. This is a significant and exacting duty.

FIDUCIARY OBLIGATIONS AND EMPLOYEES WHO COMMIT FRAUD

1) Not just for Senior Level employees
2) Courts have not hesitated to impose fiduciary duties on lower lever employees, especially in situations where employees have responsibility for handling the employer's funds and have shown themselves to be faithless

Case Study

In Navrab Investments Inc. v. Vaidyan, the employee was the manager of the employer food store. The store manager had stolen a total of $78,000 from the employer's cash register.

- The employee attempted to file for bankruptcy to relieve himself of his liability to repay funds.

1. There is a general rule that a discharged bankrupt is not liable for debts or liabilities incurred prior to his or her assignment into bankruptcy.
2. However, there is an exception where the debt or liability was incurred as consequence of engaging in wrongdoing while acting in a fiduciary capacity

Enbridge Gas Distribution Inc. v. Marinacccio

- employee had devised a scheme to defraud his employer by hiring contractors and approving invoices with no intention of having the work completed. Rather, the employee would divide the payments with partners who would pose as contractors for the projects. By the time the scheme was discovered, the employee had defrauded his employer of $6.5 million.

In imposing fiduciary obligations, the Court concluded that the employee's very ability to perpetrate such a large scale fraud over an extensive period of time was evidence that he occupied a fiduciary position

WHAT OBLIGATIONS DO EMPLOYEES OWE THEIR FORMER EMPLOYER?

- Fiduciary obligations do not have to be written within an employment agreement. They're implied through the common law. Fiduciary duties are usually less restrictive than non-competition.

1. Fidelity

2. Competition

3. Confidentiality

4. Reasonable Notice

A fiduciary can be restricted from…

- taking the customer list or soliciting their former employer's clients.
- A fiduciary obligation prevents an employee from divulging trade secrets.
- The former employee can't take advantage of, for instance, maturing business opportunities.
- Prevented from making unfair use of information acquired during employment

The GasTops Case

- Recent ruling of the Ontario Court of Appeal.
- Defendants were senior employees of the plaintiff. They all resigned from their employment at same time giving two weeks' notice.
- Started a new company to pursue the business opportunities of their former employer, GasTOPS. According to expert evidence before the Court, the lost and forgone profit to GasTOPS was valued at approximately 13 million dollars over a ten-year period.

The GasTops Case

- The Court found the notice of resignation was inadequate. Further, the defendants had competed unfairly by misappropriating and using confidential information comprising confidential business plans, information about particular customer needs, and confidential technical information. The trial took 295 days and over 7 years to conclude.

The Takeaway

- We recommend that organizations review and ensure that key employees are covered by employment agreements containing well drafted restrictive covenants and prohibitions against use of confidential information.

What to Do?

- Prudent employers insist that their employees sign agreements to deal with these issues. Wherever possible, the agreement should be signed before the employee starts work. In Particular:

(a) The employment contracts of senior or key employees should set forth their fiduciary obligations.

(b) All employees should sign stand alone confidentiality and trade secrets agreements.

(c) All employment contracts should specify the amount of resignation notice.

What to Do?

(d) Sales and senior employees should sign stand alone non-competition or non-solicitation agreements. These agreements are inherently vulnerable to attack as being ambiguous or overbroad. Therefore it is important that these agreements be drafted with care, and they should focus on the most important concerns. Paradoxically the broadest agreements offer the least protection, as they clearly will not be enforced.

Thank you!

DEVRY SMITH FRANK *LLP*
Lawyers & Mediators

HR EMPLOYMENT SEMINAR

May 28, 2013