# ASSOCIATION EXECUTIVE 411

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# C-SUITE EXECUTIVES AND ANTITRUST COMPLIANCE

BY STEVEN JOHN FELLMAN, ESQ.

In September 2015, Sally Yates, the Deputy Attorney General for the U.S. Department of Justice ("DOJ") issued a policy memorandum providing that DOJ attorneys should not accept settlements where corporate defendants agree to plead guilty provided that no corporate officers are charged with violation of the law. The "Yates Memorandum" argued that effective legal enforcement required that corporate executives responsible for violating the law be held personally responsible and should not be permitted to hide behind a corporate guilty plea. Recently, the DOJ Antitrust Division announced that, in antitrust cases, the DOJ would consider the scope and effectiveness of corporate antitrust compliance policies when making recommendations regarding sanctions to recommend in antitrust settlements.

For C-suite executives these statements of policy emphasize the need for a clear, publicized, and enforced corporate antitrust compliance program. It is the responsibility of officers and directors of both for-profit and non-profit corporations to adopt a culture of antitrust compliance encouraging a "see something, say something" attitude throughout the company. Many companies and associations adopt a *pro forma* antitrust compliance program that does not address the unique antitrust issues faced by the organization. Other companies and associations hire counsel to draft a meaningful antitrust compliance policy but then put the policy in a drawer where it lies dormant and ineffective. Such conduct increases the potential for personal antitrust liability as it shows that corporate leaders are aware of potential antitrust issues but choose to ignore the risks.

Every company or association should have a top-level corporate officer who is responsible for legal compliance. That officer, with the active and visible support of the organization's CEO and Board of Directors, should preach antitrust compliance and make sure that all relevant employees understand the basic antitrust laws and the areas of exposure presented by the organization's programs and operations. New employees should be given antitrust compliance training promptly. All current employees should receive antitrust training at least annually as part of the organization's continuing education program. In organizations where there is significant risk of antitrust exposure, key employees should be given a hard copy of the antitrust compliance program as well as the whistle blower protection program and be required to sign a statement indicating that they have read the program; understand the program; and agree to abide by its terms.

The antitrust laws are designed to promote competition and to protect consumers. These laws protect the public, businesses, and professional organizations. Individuals and organizations that violate the antitrust laws face fines, civil penalties, as well as possible criminal penalties. Antitrust violations can also lead to expensive treble damages class action awards.

C-suite executives should remember that engaging in, or allowing others to engage in, anticompetitive behavior such as price fixing, bid rigging, territorial or customer allocations, or some types of boycotts can lead to corporate and personal criminal liability. Corporate officers convicted of criminal antitrust violations face significant jail sentences in addition to substantial fines.

# EXECUTIVE CONTRACTS: THINK NEXT JOB

BY RICHARD BAR, ESQ.

You nailed the interviews. The job is yours. Everything is agreed. The relationship is solid. A new employment agreement is sent over. It should be a breeze. The hard part is over. Phew!

Everything looks to be in order. The money, bonuses and benefits are right. The job description is correct. The rest are standard clauses. No problem. Oh wait. You need to understand the termination rights. You read them carefully. They are standard termination "for cause" and "not for cause" clauses. Maybe you tweak them. Phew!

Pause. You don't get severance if you are terminated "for cause" or resign. If you are terminated "not for cause", you get severance. That's fair and normal. Phew!

Hold on. You must sign the standard waiver and release to receive severance. That's customary. They need to know you won't sue. It's a good severance amount. Phew!

One thing. The agreement contains restrictive covenants. After you leave, you must maintain confidentiality. You cannot solicit the organization's employees to leave. You cannot ask others to not do business with the organization. These make sense. The agreement says that, in order to receive the severance payment, you cannot work with a competitor organization or engage in competitive activities for a stated period of time. Phew, you think?

Covenants not to compete are tricky. What seems basic and acceptable may be less so in the future when your employment ends. What is a "competitor organization"?

What exactly does it mean to be engaged in "competitive activities" with your organization? These types of activities require your attention about what and where your next job may be and whether you can live with these broad restrictions.

Let's look at an example. You are hired as the CEO of a healthcare non-profit organization. You sign the standard employment agreement. You are well compensated. You love your staff. You get along with your Board. Your job is clear - operate the organization, comply with Board direction, and promote the organization's mission. You grow in your role. You are the chief spokesperson. You are a frequent writer. You have constant social media presence. You are a featured speaker at your organization's conferences. You become an expert about trends in medical reimbursement. Your conferences are well attended. Attendees come to see you. You are the face of the organization.

Your Board wants to speak with you. The new Chairperson wants different leadership. It's not a termination "for cause". It's just time to move on. You have a good severance. All you have to do is sign a waiver and release. You are approached by another organization. It is not a direct competitor. It recognizes your speaking talents and that you are a medical reimbursement "rock star". It wants you to speak about medical reimbursement at its conferences. This is going to work out. You have an excellent skill set, great severance and a new job. Phew!

But, there's that restrictive covenant. It mentions "competitor organizations" and "competitive activities". Your future employer isn't a competitive organization. What about "competitive activities"? Your former employer says you cannot speak or write about medical reimbursement. It believes it has a well-regarded reputation in that space. It will continue emphasizing this topic in the future. Its conferences are well attended and make money. You are told that, if you speak about medical reimbursement at other conferences, attendance will go down and revenue will decrease. You are advised that your potential "activities" are competitive. Can you take the new job? Will you be in violation of the agreement? Are you risking your severance? Things don't look so good anymore.

What can you do? You can try to negotiate. You can risk a lawsuit, but that's not good because you likely will lose the new job opportunity. You can move on and not take the risk. Not great choices. The time to deal with these issues was when you were presented with the agreement. That's when your employer was excited about you. It was more flexible. This is when you should carefully think about what your job will entail and where you may want to work after this job is completed. Try to narrow the restrictive covenants so that they don't negatively impact your future job opportunities. Perhaps limit the restrictions to only "direct competitors". Perhaps identify the "direct competitors" in the agreement.

It's hard to anticipate every possible future situation, but the more you think about these issues during your initial contract negotiations, the better are your chances to have flexibility to move forward with new, exciting and rewarding employment possibilities.

# LIMITING LIABILITY RISK WHEN TERMINATING EMPLOYEES

BY KATHARINE MEYER, ESQ.

Handling a wrongful termination claim can be expensive and stressful. While most employees are "at will" - which means you can terminate them at any time, with or without cause - a terminated employee can always make a claim that they were fired for illegal or discriminatory reasons. Additionally, upon termination, an association can be sued for other reasons, such as Fair Labor Standards Act (FLSA) violations or the denial of unemployment benefits. However, there are ways you can limit your liability exposure before terminating an employee. By reviewing each case carefully before you take action, you can reduce the likelihood you will be sued, and create a strong defense in the event that an ex-employee decides to file a wrongful termination claim against you.

Set forth below is a list of questions that an association should answer prior to terminating any employee:

1.) **Have You Documented All Performance Issues?** If you are sued for improper termination, you will need to provide evidence that the person was terminated for non-discriminatory reasons. Any incidents of insubordination, improper work behavior, chronic lateness or poor performance should be promptly documented at the time it occurs. Documentation should include a description and the date of the incident along with how it was addressed.

2.) **Have You Followed Your Policies and Procedures?** Many associations have progressive discipline policies for employees. Make sure that you have adhered to your discipline and termination policies prior to firing an employee.

3.) **Has the Employee Recently Filed, or Cooperated with, any Harassment or Discrimination Complaints?** Retaliation is a very common claim made by former employees. It is unlawful for a company to fire an individual because he or she has made a claim of discrimination or harassment. Before terminating an employee, you should check to see if the employee has filed any discrimination complaints, made any ADA requests, or made any other allegations of wrongdoing. It is more difficult to defend against a claim of retaliation when termination occurs soon after a complaint was filed.

4.) **Has the Employee Been Properly Paid?** Determining whether an employee is non-exempt or exempt under FLSA can be tricky. It is common for associations to improperly classify non-exempt employees as exempt employees. Many assume that, because an employee has an important title and gets paid a salary, they are

exempt under FLSA. However, for an employee to be exempt, he or she must: (i) be paid a salary; (ii) earn at least $455.00 a week; and (iii) perform certain executive, administrative or professional duties. Therefore, when terminating an employee, make sure he or she has been properly classified. Additionally, if a person is non-exempt, confirm that you have paid he or she for all overtime the employee has accrued. Finally, be aware that on January 1, 2020, the new overtime rules will go into effect. Any employee who earns less than $35,568.00 will be non-exempt under FLSA.

5.) **Should You Deny Unemployment?** Occasionally an association will deny unemployment benefits to employees terminated for misconduct. However, an association's definition of "misconduct" may be inconsistent with the state's statutory definition of that term. Make sure you are able to meet the state's standard for misconduct prior to denying unemployment. You do not want to spend time and money defending an unemployment claim that could have been easily avoided.

6.) **Have You Complied with All Discrimination Laws?** Prior to terminating an employee, you should always assess whether a person could claim he or she was dismissed because the employee was part of a protected class. Sometimes, associations are not even aware that a discrimination cause of action exists. For example, our law firm represented a client who was sued for sex discrimination. Our client assured us that there was no basis for this allegation. However, the employee was able to show that: (i) the last six people who had been dismissed from the association were female; (ii) in the past three years, only male employees had received severance payments upon termination; and (iii) the last seven people the association hired were male. The association had not been paying attention to whom they hired and fired and was caught off guard by these allegations. What it thought was a baseless discrimination case quickly turned into a serious claim of sex discrimination.

7.) **Have You Complied with the ADA?** Occasionally we have clients that want to terminate an employee who has missed too much work due to illness. This is always a red flag. Terminating someone with a valid disability or serious illness can lead to an Americans with Disability Act (ADA) claim. Prior to terminating someone with an illness or disability, you should speak with your attorney to ensure you have complied with all ADA requirements.

Ultimately, if your association is planning on terminating an employee, speak to your attorney prior to taking any employment action against them. It is always better to be fully aware of any risks associated with employee terminations so that your association can best plan a course of action.

## GET MORE 411

- **United States Department of Justice Antitrust Division - Corporate Compliance Program Evaluation**: https:/www.justice.gov/atr/page/file/1181891/download
- **United States Department of Labor Overtime Rule Update:** https://www.dol.gov/whd/overtime2019/United States
- **Department of Justice ADA Info and Guidelines:** https://www.ada.gov
- **GKG Law** also specializes in assisting associations with **data privacy and GDPR compliance** issues. Read about GDPR basics for U.S.-based organizations **here**.

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