Scribbles Squibs #15 - July 5, 2013 - Protecting Your Business with Employment Agreements

by Attorney Jonathan Sauer

I. Problem: This is a story we have heard over and over. You bring into your organization a youngster - someone wet behind the ears. Through a series of positions and training and a lot of your own time and effort, you bring this individual along, increasing his responsibilities and pay. At some point, this person figures prominently in your business. He may become your chief estimator or possibly your best salesman. People who used to call your business asking to speak with you now ask to speak with him. He understands your business's strengths and market advantages. This person long since stopped being only an employee. He has become a friend. You trust him with the keys to the kingdom. You now have a right hand man (or woman).

But, one day, you come into work and find that he has gone, leaving you a hand-written note that he/she has gone out on his own. In fact, he is located just across the street. Having your partial bids for projects you were intending to bid and which you paid him to work on, now he is using those bids for his own purposes. Or, perhaps he has gone to work for one of your competitors, using what he took from you to help him get a job. He took your rolodex and your customer list. Perhaps he took certain written and software files. If he had any kind of employment contract, he went to the files and took it along with all copies.

So you call up your lawyer: "*Do* something!" Then, you are told how hard it is to get an injunction. How there is judicial and legal authority for opposing 'involuntary servitude'. How injunctions are not given, generally, when there is an 'adequate remedy at law' (meaning a potential action for money damages). How, basically, things are stacked in favor of the employee in these situations, particularly in a liberal state such as Massachusetts.

II. A (Partial) Solution: You want to know: how could I have handled this situation *better?* A way to *somewhat* lessen these unfortunate happenings is to have him sign an employment contract of some form at the very beginning of his employment, which agreement will have some 'non-compete' language and which will identify which of your ideas and systems you consider to be *proprietary* to you and which he cannot leave with without sanctions.

While employees may be somewhat leery of signing one, your best shot at getting someone to sign one is in the beginning stages of your relationship. You are a salesman. So, sell! "I have all of my key employees sign such an agreement. That way, what is expected of you and what you are entitled to as an employee are clearly set forth. By having such agreements, this helps protect the continued existence of this company, which will hopefully mean that we all have jobs that much longer. Granted, there is some non-compete language in the agreement. This is only there to make sure that no employee takes unfair advantage of what he learns here, particularly as to customer lists, our current jobs being bid and our bidding and other unique methods of doing business. Having all of our key people under similar agreements means that we are all on the same page as to a lot of important things affecting this company with works towards

everyone's benefit. Plus (as to existing employees) you get five hundred bucks upon signing as a token of our appreciation of what you bring to our business." With construction unemployment about twice the national average for general unemployment, your chances of getting an employee to sign improve, particularly for new employees who don't know what to expect. Long experience at the law has demonstrated to me time and time again that people (and companies) sign any number of important documents and forms without thoroughly reading them or without understanding them and, sometimes, without reading them *at all.*

No one is saying that getting someone to sign such an agreement – particularly, with regard to current employees – will be easy. But, how much of what is really important in life *is* easy? Starting and maintaining a business is not easy. Negotiating a contract with a larger construction company or owner which has the work and then fighting for and insisting on changes is not easy. Fighting your contractual party as to the wording of lien waivers and releases is not easy. Cutting expenses to the bone and tightening your belt because of the 'Great Recession' is not easy. But, considering the issues that are or can be involved with a bad ex-employee, are you willing to live with the alternative of nothing in writing as to your employment agreements with your employees? Even if you only got *half* of what is in the following proposed form, wouldn't that be better than having *nothing*?

A proposed form – to give you some ideas of what this might look like – follows the written materials. Please note that it is not guaranteed as completely successful or viable for any particular state, including Massachusetts. This is simply being offered as a vehicle to point out some of the key issues involved with this problem and some ideas as to how they might be handled. Employment law is a significant field in the law with a great many changes occurring year to year, month to month and sometimes even day to day, all dependent upon various appellate court decisions and, possibly, various statutes and regulations. Before using any employment agreement you may have written or taken off of the internet, consult with a lawyer. A better agreement may help you lessen or avoid employment issues. Trying to manage such issues after the fact without an effective agreement – or no agreement at all – is more complex and more expensive and potentially much more dangerous to your business.

III. Some Issues and Ideas:

1. Keep your signed employment agreements off-site, under lock and key.

Let's address the obvious. If you have signed employment contracts, they should be kept off-site or in a location on-site but unavailable to your employees, such as in a safe. Safes, however, have functions such as 'day lock' (leaving the safe only one turn away from a pre-determined number to open it). And, presumably, one or more employees may know what the combination to the safe is, in any event. It would be better practice to keep these agreements in a safety deposit box somewhere or in an undisclosed secure location in your home.

2. What interests should you protect? This varies from business to business. Generally, you will want to protect your customer list. This includes the 'good will' you have taken pains to develop with your core customers over the years. Secondly, to the extent you have specific, unique-to-you estimating procedures and systems, these should be protected.

Thirdly, all of your bids in process should be protected. Fourthly, your employee should not be allowed to walk out with 'his' rolodex (your property, actually) or with copies of any of your documents and files. Fifthly, you want to protect business marketing plans and any management systems you consider to be proprietary. Sixthly, it should be clear that if your ex-employee turns any of these documents and information over to one of your competitors (his new employer), there will be serious ramifications for him personally, as well as for his new employer.

3. Your agreement should be written in such a way as to help you get an injunction post-employment. One of the legal remedies you can pursue at the start of any legal matter is seeking an injunction, which is a court order addressed to someone to either *do* something or *not* to do something.

To get an injunction, there are a number of 'tests' that must be met before an injunction is warranted. Since an injunction might effectively end a case at the very beginning of the case if it is issued – all without discovery, even pleadings – getting an injunction is difficult. There are generally four tests which must be met and a good employment agreement can help you with the two most difficult: 'likelihood of success on the merits' and 'irreparable harm', the latter sometimes described as 'no adequate remedy at law.' (The other two are 'public interest' and 'balancing of the equities', not necessary to discuss here.) 'Likelihood of success on the merits' means that to get an injunction, it has to appear to the judge on a quick examination of the documents and allegations that you are likely to win your case, ultimately. 'Irreparable harm' – perhaps the most difficult test to meet – means that a plaintiff – the party suing – won't be fully compensated by an award of money damages, the usual remedy in breach of contract situations. If the specific rights you are seeking to protect are not expressed in a written, contractual format, your chance of meeting the 'likelihood of success on the merits' test is greatly lessened. The second test can be met largely by stating in the contract that both parties are in agreement that simply awarding money damages in the event of a breach may not be sufficient. So, for example, if you have a 'proprietary' method of bidding that is sufficiently unique, even if you win your case down the road and get an award of damages, you may have lost your unique bidding advantage to a competitor and an award of damages, in any event, is for conduct *before* the trial, not for conduct *after* a trial, such as future bidding.

A key way to set up such an argument is to have your employee agree - in *advance* - that an award of damages alone will not be a sufficient remedy at law. Courts seem to respect such agreements if they find the agreement itself enforceable.

4. People don't tend to challenge signed legal agreements as much as you might imagine. I had one site guy who lost a ton of money on a sub-division because he had signed a contract which said "there will be no change orders under this contract." And, of course, there were numerous changed conditions and, particularly, differing site conditions, adding hundreds of thousands of dollars to his costs. Yet, he didn't submit even one change order proposal. When asked 'why', he said that he couldn't because his contract said there wouldn't be any change orders. A contract is almost *always* subject to modification. General contract law assumes that contracts will have modifications. Written contracts that say they can

only be modified in writing can have that provision modified *orally* under Massachusetts law. People sign contracts with provisions that say they can't file mechanics' liens. While, mostly, in Massachusetts such provisions are unenforceable, people might not challenge them because they *think* that they are enforceable because they *agreed* they wouldn't file mechanics' liens. Similarly, people with 'no damages for delay' and 'pay-when-paid' clauses in their contracts may not always challenge them even though both are subject to effective challenge in certain situations. After all, since they are contractual provisions and they signed the document, they figure that they don't have a leg to stand on. I have been to real estate closings where the borrowers are asked to sign dozens of forms and from the glazed-over expression in their eyes, it was clear to me that they had no real idea what they were signing.

Folks, over the years, I have found that people generally go to a lawyer after the situation has already been made worse by their action and inaction. People don't like lawyers and they don't want to spend the money (even when smaller expenditures earlier might prevent greater expenditures later with potentially less chance for success later on.) The last five or so years of the 'Great Recession' have only made these tendencies more so. So, even if a court might not enforce a contract or certain provisions in a contract for a variety of reasons, the fact that contractors less frequently inquire into these matters earlier may result in a climate where people are more inclined to just accept what is in a contract irrespective as to whether that provision(s) which causes that party to give up rights is enforceable or not.

All a long-winded way of saying that if you can sign key employees to employment agreements, they may tend to follow the agreements, feeling they have no choice *not* to, fearing the consequences if they don't.

5. New consideration for existing workers. The best time to have an employee sign an employment contract is when they are hired. In such a situation, a court can reasonably deduce that such rights as the prospective employee is giving up were paid for by valuable 'consideration' (something of value.) In other words, in exchange for signing the agreement, they became employed and began earning wages and benefits. The concept of 'consideration' means that which one gets for performing a certain act. You build a building for the 'consideration' of getting paid your contract price.

Now, when you ask a current employee to sign an employment contract - such as the one below - a question might be suggested legally as to whether being made to sign this was supported by new consideration. In other words, if an employee is now being made to give up various rights for no new 'consideration' to support this sacrifice, a court might refuse to enforce it because there was nothing (new) given by the employer to the employee in exchange for that employee's giving up substantive rights. Subject to advice of counsel, there might be some value to giving the employee something of value - an extra week's vacation, one thousand dollars, possibly even a raise - as 'consideration' for the 'new' promises contained within the employment agreement. That way, a court would more likely find new 'consideration' for the changes in the employee's employment as caused by the agreement, causing the employee to potentially give up certain rights.

6. Reasonable restrictions on an ex-employee's ability to earn a living. It is a constitutional guarantee that one should not be subject to 'involuntary servitude', a kind of polite way of saying 'slavery'. For a court to enforce either or both a time limitation or a distance limitation as to competing with a former employer, courts are more likely to enforce more limited restrictions on an employee's ability to make a living and support their family. So, shorter time durations on these restrictions (how long and for what geographic area) might give an employer a better chance at 'enjoining' behavior than would longer ones. This is why in the agreement below there are two different time periods involved and two different geographical areas indicated: a *more* conservative limitation and a *less* conservative limitation. In other words, the greater time and distance limitations favor the employer, while the shorter time and distance limitations favor the employee. A court would usually favor more shorter durations. Keeping in mind the ideas contained within #4 above, there might not be that much difference to the employer in having shorter durations as to time and distance limitations.

7. Having your employee agree, in advance, that the award of damages is insufficient might help you get an injunction. It is generally assumed in court that if a party breaches a contract, that party may be 'made whole' (compensated) by an award of money damages. (As many of you know, having received court judgments in your favor, collecting on that judgment is often far more difficult than getting the judgment.) But, an award of money may be insufficient compensation for use of proprietary systems in the past, in the present and in the future. After all, if your employee has improperly taken from you any number of proprietary systems, they are now 'out there'. The genie has been let out of the bottle. Since a finding of 'irreparable harm' is a condition precedent to the awarding of an injunction, having your employee agree *in advance* that the award of money damages will be insufficient - or, *might* be insufficient - to compensate the employer should the employee breach the agreement, will actually help encourage a court to make such a finding. After all, courts generally enforce the contracts that parties 'voluntarily' entered into.

8. Having written employment agreements may minimize claims for wrongful termination. Is your employee hired for an indefinite period? Are expectations of employment year after year irrespective of business volume and conditions reasonable? This can be somewhat controlled by indicating that your employee is an 'employee-at-will'. Meaning, this person might be employed for the next forty years or only for the next forty hours. Wrongful termination claims are difficult, expensive and scary in a pro-consumer state such as Massachusetts. I had a client against whom claims were made for age discrimination and handicap discrimination at the Massachusetts Commission Against Discrimination. The employee wanted a quarter million dollars even though there was substantial evidence that the employee had 'milked' his claimed 'handicaps' in a company where any number of the employees were older than him. We completely won the case but it took years and years of worry and expense. A lot of bad feelings between employee and employer are potentially caused by not having the basic terms of employment set down. Perhaps, the employer during the hiring process hinted or suggested that certain benefits or bonuses would happen over time, which didn't actually happen. Are such oral representations enforceable as concurrent (to signing) additional terms or as modifications to the terms of employment subsequently? Or, once the employee comes on board, he finds that other employees have better benefits or better

pay than he has. We've all been employees at one time or another. And, let's face it. It pissed us off royally when we saw 'senior' employees working half as hard or being half as effective as we were but getting greater pay or benefits. Forty years studying the law and more than sixty years of life have taught me that there really aren't any secrets. Sooner or later, people being what they are, so-called secrets such as what one is paid and what benefits one gets will be made known to anyone interested. Therefore, having defined hours of work – particularly for administrative and higher-level employees – along with clearly-defined compensation with a definition of expected performance/goals can tend to minimize misunderstandings later on.

9. Suggestions on how to sign the agreement. Also, try to have both of you sign at the same time and in front of the same notary, having the notary emboss his/her signature with the notarial seal. This will minimize, if not prevent, claims down the road that "this isn't my signature", which is often the only real defense as to contractual documents one signs. It will also tend to minimize someone's using a 'pretend' or make-believe notary (which I have seen many times) who, after whatever hits the fan, will be in parts unknown. Signatures on important contractual documents - construction contracts, lien waivers, releases - should always be notarized. Accepting anything less leads to potential unnecessary problems down the road.

Here is a form that suggests some ideas for what *your* form might look like and as to what the issues are. What you might need, what might be required by the laws of the state in which you work and what you can get will probably vary. But, most likely, *something* in writing is better than *nothing:*

EMPLOYMENT AGREEMENT

This employment agreement (hereinafter Agreement) is made and entered into this fifth day of July, 2013 between Any General Contractor, Inc. (Employer or Company) and John Jones of 14 Main Street, Any Town, Massachusetts (Employee). The intent of this agreement is to set out the terms and conditions of Employee's employment with Employer including, without limitation, provisions for the protection of Employer from unfair competition, disclosure and harm with regard to all legitimate secrets and confidential information of Employer which Employee will become privy to as the result of his employment, generally described as Employer's Protected Information and Materials (EPIM), including, but not limited to:

A. "Good Will" - meaning, without limitation, customer goodwill, consisting of the Company's relationships with its customers (and identification of its customers, such as in a customer list) and its reputation and special expertise in the industry in which Company is engaged, all of which as is involved with existing customers presently and with existing customers and new customers as to future business, and;

B. "Trade Secrets" - referencing, without limitation, any formula, pattern, method of bidding or estimating, method of performing work, device or compilation of information which is used by the Company, software and marketing programs all of which Employee herein acknowledges was developed at considerable time and expense by the Company prior to his employment and which gives the Company an opportunity to obtain an advantage over competitors who do not know or use it/them and to remain in business; and;

C. "Confidential Information" - meaning, without limitation, all trade secrets as well as all customer or supplier lists and computer files held or maintained by Employer of any kind or description, including names and all relevant information gathered through the Company's time, effort and expense both prior to and during Employee's employment including, without limitation: quotations, which are in the process of being made or which have been previously made and not yet accepted to existing or potential customers; histories of prior purchases, prices paid, discounts offered or given to Company's customers; the names of designated contact persons at vendors and clients; all marketing studies and strategies of any kind or nature; advertising campaigns, slogans and methods; rolodexes or other such devices, including any form of computer and paper files; plans for expansion or new merchandising techniques or products; contracts and agreements between Customer and various manufacturers and distributors as to various products Company has a designated market for; methods of estimating jobs and of figuring pricing; product mixes or information regarding the success or failure of past marketing and performance techniques; the identity of all prior customers and jobs worked at or estimated by Employer, continuing throughout the period of Employee's employment with Employer.

D. "Company Property" - meaning, without limitation, any materials, tangible things, software and paper files Employer has provided to Employee or made available to Employee at any time during the course of Employee's employment.

In exchange of valuable consideration received by the Employee from the Employer, herein acknowledged as received by Employee, including, without limitation, present or continued employment with Employer, and the compensation and benefits listed below, the Employee and Employer herein agree that:

1. The Employee shall not directly or indirectly as employee, owner, partner, shareholder, supervisor or sales manager or in any other capacity engage in a business similar to the operations carried on by the Company for a period of two years **(six months)** subsequent to Employee's termination of employment with Company (however that occurs) and within a distance of one hundred miles **(fifty miles)** from the principal place of business of Employer, which is located at 100 Main Street, Any Town, Massachusetts. This Agreement includes Employee's promise, herein made, that he or she will not communicate or make available to any future employer or business partner the information and materials listed in paragraphs A through D above for at least the minimum period of two years from termination, however caused, and longer, if so allowed by law. Employee further agrees that EPIM identified, without limitation, in paragraphs A through D above is sensitive and of extreme importance to Employer and that any disclosure of that information and materials could leave Employer with no adequate remedy of law, thus entitling Employer, if necessary and in the sole exercise of Company's judgment, to protect these rights by seeking injunctive relief in a court of competent jurisdiction, which Employee agrees is the district or superior court having jurisdiction over the town or city where Employer maintains its principal office, which is currently Any Town, Massachusetts. Employee agrees that Employer shall be entitled to an award of the reasonable attorneys' fees and costs it incurs in protecting its rights under this Agreement if Employer is successful in obtaining any form of judicial relief against Employee including, but not limited to, money

damages and/or injunctive relief but not otherwise. Employee further agrees to return to Employer within one day of his termination of employment with Company, however caused, any EPIM he has in his possession or control without keeping any copies of the same and that a failure to do so will constitute a material breach of this Agreement. Both parties hereto acknowledge that nothing in this Agreement shall prohibit Employee's working as a mechanic or tradesman (i.e. 'working with the tools') subsequent to termination with Employer, however caused, which labor is not subject to the various time and distance limitations listed above.

2. This Agreement is for employment of Employee as an "Employee-at-will" as understood under Massachusetts law, meaning, without limitation, that the employment is not for any particular period of time and is not, in any fashion, guaranteed for any particular length of time and that no compensation or benefits are due to Employee under this Agreement except as specifically set forth in the next paragraph.

3. This Agreement between Employer and Employee as to the terms and conditions of employment of the Employee is as follows:

· Hours expected from the Employee on a weekly basis _____

· Weekly compensation (before taxes) _____

· Other benefits shall be as follows:

. Bonus upon executing this Agreement: five hundred dollars. **(NOTE: As discussed above, 'new consideration' should only be necessary for existing employees who have been asked to sign such an agreement some time subsequent to their beginning employment with the employer. The offer of employment under the terms and conditions of this agreement should be sufficient to constitute adequate consideration for new employees, subject to local law where such agreement will be sought to be enforced.)**

· Employee's duties are generally described as: . Both Employer and Employee agree that these duties may be modified from time to time by Employer and that Employer will supply Employee with such written modifications to his duties as they occur.

4. Employer and Employee herein agree that if any provision(s) of this Agreement is/are unenforceable, the remaining provisions in the Agreement shall remain in full force and effect.

5. This agreement is controlled by and subject to Massachusetts law, both procedurally and substantively.

6. The above constitutes the entire Agreement between Employee and Employer and that any prior discussions between the parties are of no force or effect, being subsumed by this Agreement. Further, both parties acknowledge that any modification of this Agreement shall only be binding upon both parties hereto if in writing and only if signed by both parties hereto. Both parties agree in advance that as a material term of this agreement, no oral modifications of

the same shall be permitted and that this provision is not subject to oral modification irrespective of any local law applicable to the enforcement of this Agreement.

7. This Agreement is three pages in length.

WITNESS our hands and seals to this Agreement, executed as a sealed contract, this fifth day of July, 2013.

_____
Any General Contractor, Inc.
By a corporate officer

_____
John Jones

Norfolk, ss

Then personally appeared before me on July 5, 2013 the above-named John Jones (Employee) and Molly Smith, president of Any General Contractor, Inc., (Employer's representative) to me personally known (production of drivers' licenses) who after being duly sworn acknowledged that their individual execution of this Agreement was their free and voluntary act and deed before me and the free and voluntary and authorized act by Any General Contractor, Inc. .

_____
Notary Public:

My commission expires:

*(These materials are intended as general information only, not specific legal advice. When confronted with a legal problem you don't understand, seek the assistance of legal counsel. Construction law is something that most 'general' lawyers don't do a lot of. At Sauer & Sauer, we **only** practice construction law, dealing also with other areas of the law as they affect contractors such as employment agreements.)*

SEVEN QUICK THINGS ABOUT OUR FIRM:

1. No charge to non-clients for quick answers to *general* Massachusetts construction law

questions.

2. We guarantee our billing rate for five years in writing for all new clients through the end of this year who mention this offer at engagement.

3. As trials can be expensive, take a great deal of management time and the result of which is uncertain, we make our best efforts towards seeing whether something short of a trial – such as mediation – might be possible for resolving the matter. If a trial is necessary, we have a lot of experience trying cases.

4. We endeavor to maintain, wherever possible, future business relationships with your contracting party by emphasizing a fair and reasonable approach to disputes, which often helps promote earlier (and cheaper) case resolutions than does 'mean and angry'. And, while you might say now 'I'd never work for that guy again', a lot of experience over the years suggests otherwise. Given the right job, he'd be given another chance, particularly if it was a good job!

5. We try to defer until later in the case the more expensive elements of discovery – i.e. depositions – in order to try less expensive discovery first. We recently obtained a 1.5 million dollar settlement for a subcontractor against a bankrupt general contractor's payment bond surety on three projects without a single deposition ever being taken and without our client's even having to answer interrogatories.

6. Being a smaller firm, our attention is focused *solely* on our clients and their problems, not on feeding the overhead of a fancy office and many partners, associates and support staff. We only have to feed our five dogs, most of which, however, are *quite large!* (If you ever meet The Worm, be respectful and, perhaps, a bit wary. After all, Rotties *can* be difficult! Especially around meal times. For big dogs like this, it is almost *always* around meal times! Or, close enough.)

7. Satellite offices in Boston and Worcester for more convenient meetings.

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