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PRACTICE NOTE ON
EMPLOYEE RISK MANAGEMENT

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Issue

Employee-related risks include claims of wrongful dismissal, discrimination or harassment made by current or former employees, especially in the United States. Another significant risk involves key employees who leave the group to work for competitors.

Strategy

To manage these risks, the group should put in place global policies regarding high-level employment practices. At the country level, the group should more detailed policies at the country level that are in line with the global policies and reflect local employment law and practice, and take action to ensure that all group companies apply a fair and consistent approach to employment contracts, compensation and benefits, performance management, and lay-offs. The group should also develop a policy with respect to the use of restrictive covenants, although these will necessarily be country-specific because of local enforcement issues.

Global Employment Policy

Every international group should adopt high-level global policies stating that it is an equal opportunity employer, that it will not tolerate discrimination (based on age, sex, race, sexual orientation, nationality, religion, disability or any other difference) or harassment in the workplace, and that promotion will be based on merit.

Country Employment Policies and Practices

Each of the group's businesses in the country should establish and consistently apply detailed employee policies and practices that are in line with the group's global policies and reflect local employment law and practice, including:

- Employee handbooks that set out the business's employment policies and procedures.
- Documents for new hires, such as employment applications, nondisclosure and ownership of work agreements, harassment policy.
- Classification of employees, and the use of independent contractors and consultants.

- Employment contracts to be entered into with key executives (criteria to be defined), including provisions regarding salary, bonus, benefits, perquisites, termination notice, severance, and restrictive covenants (see below).
- Severance policy, together with a template/checklist for the termination process and a model separation agreement.

Groups may also wish to promote diversity initiatives in response to the anti-discrimination laws in certain countries and in furtherance of the group's policy against discrimination.

Training

Human resource professionals in the group's businesses and their supervisors should receive training on the legal issues that can arise in the workplace. The in-house legal department should provide regular training and compliance programs to HR staff. A professional HR training program for HR teams may also be desirable so that they can deal more effectively with potential issues that could lead to costly litigation if not properly handled.

Training should cover employment from "the cradle to the grave" – i.e., from the hiring process to the termination process – including:

- How to interview
- Performance management
- Compensation
- Investigating employee complaints
- Social networks and issues of confidentiality and privacy
- Disciplining employees
- Terminating employees
- Reductions in force

Supervisors should be required to attend a simplified version of the HR training program. In particular, managers need to understand the importance of setting performance goals with their employees, evaluating employee performance objectively against the mutually agreed goals, establishing career development plans in conjunction with their employees, and creating a "pay for performance" environment. Having an effective, consistent performance management program will not only reduce the group's potential liability against charges of discriminatory pay practices, it will also reduce turnover, enhance employee satisfaction and motivation, and create an open dialogue regarding performance expectations between the employee and the manager.

Discrimination Claims and Large Groups

In the United States and many other countries, lawsuits by employees alleging discrimination in the workplace represent a significant source of litigation against companies. In the UK, the number of discrimination claims is also high because – unlike a claim for unfair dismissal, for example – compensation is uncapped.

The risk of discrimination claims is exacerbated when an employee can argue that similarly situated employees in different businesses of a group in the same country are treated differently. This risk can be mitigated by adopting and consistently applying one set of employment policies and practices (see the list above) across all group companies in the same country. The implementation of uniform policies and practices across all group companies also eliminates redundancy, thereby reducing costs, and makes it easier to transfer employees from one business to another, increasing the pool of candidates for open positions within the group and creating greater career opportunities for employees.

Confidentiality Agreements

Unlike restrictive covenants which prohibit former employees from working for competitors and are sometimes viewed as a restraint on trade, courts everywhere are sympathetic to an employer's right to prevent its employees from disclosing its trade secrets and other confidential information. Consequently, every new employee should be asked to sign a confidentiality agreement when he or she joins the group. For current employees, who may be reluctant to sign agreements or it may simply be logistically impossible to get all employees to sign nondisclosure agreements, the next best solution is for the company to distribute its confidentiality policy to all employees and be able to demonstrate that it has done so.

Restrictive Covenants

Post-employment restrictive covenants can restrict an employee's ability to work for a competitor, solicit business from clients of his former employer, and raid (solicit/hire) the employees of his former employer. To be enforceable (where they are enforceable), the restrictions must be reasonable in duration, geographic coverage, the scope of the activities being restricted, and they must relate to the employer's legitimate business interests. The restrictions must also be supported by adequate consideration.

The ultimate enforceability of restrictive covenants depends upon the applicable law, as well as the particular facts of the given case. Some countries, and some states within the United States, are more restrictive than others. California, for example, invalidates all employment agreements containing a pure non-competition provision, unless it involves the sale of a business or substantially all of its assets or the dissolution of a partnership.

As a result, it is difficult for an international group to have a global policy on post-employment restrictive covenants. Instead, it will have to adapt its policy from country to country. For example, a group may be willing to include a certain level of post-termination compensation in a noncompetition agreement with a key executive so long as it retains the option to enforce the agreement – and pay the compensation – upon termination of the executive's employment. If the employer will, on the other hand, have to pay the agreed compensation even if it does not seek to enforce the noncompetition agreement (as is the case in Spain), the group may decide not to systematically enter into noncompetition agreements with key executives in that country or to do so only on a case-by-case basis.

Non-Competition, Non-Solicitation and No-Raiding Agreements for Key Executives

In principle, it seems reasonable that the "key executives" of a group should be barred from taking a similar position with a competitor, and from soliciting customers and former co-workers. But which executives are "key"? And what specific competitive threats do they each pose?

Since it is impractical for a group to assess the nature of the competitive threats posed by each individual employee in order to determine whether he or she is a "key executive", large employers often target categories of employees. The categories may be by department (e.g., sales, finance, information systems, etc.), by management level (e.g., all employees at or above a certain job classification or pay-grade level), by equity interest (e.g., all employees granted a minimum amount of stock in the company), and/or by any other category of employee that permits the employer to administer a restrictive covenant program with certainty and not on an individual-by-individual basis. When this approach is taken, it is important the reasons why the categories were selected, and why other categories were not (e.g., the maintenance department), be put down in writing since it is foreseeable that one day the employer will have to explain them in court.

Another administrative expedient often adopted by large employers is the inclusion of all restrictive covenants – non-competition, non-solicitation and no-raiding (in addition to non-disclosure of confidential information) – in each agreement with the selected categories of employees, rather than attempting to discern which individuals pose which threats. When the employee leaves to join a competitor, the employer determines what sort of threat the individual poses and seeks to enforce only the relevant restrictive covenant(s).

Enforcement of Restrictive Covenants

Once an employee who is subject to restrictive covenants leaves the group, his employer under his employment contract should formally notify the employee in writing of his contractual undertaking to respect the restrictive covenants. If the employee breaches one or more of the covenants and the employer wishes to enforce them, the employer should promptly apply to the local court for an injunction ordering the employee to comply with his undertakings. This is an expensive and time-consuming process.

'Garden Leave'

To avoid the cost and uncertainty of enforcement, in the UK it is common for employment contracts ("service agreements") to give the the employer a contractual right to require the executive not to attend work or carry out normal duties during the notice period. By providing for an extended notice period, the employer can therefore be certain that the executive will not work for a competitor during the so-called "garden leave", during which the executive will continue to receive his salary.

International groups may wish to consider employing this tactic in employment contracts with key executives in other countries.

Conclusion

If employees are a group's most important asset, it is in the group's best interest to put in place policies and practices that promote employee performance and career development, prohibit discrimination and avoid wrongful termination, and to apply them fairly and consistently across all group companies. Such policies will attract and retain employees. Since there is always the risk that some employees will leave to join a competitor, the group should also have in place policies regarding the use of restrictive covenants consistent with the group's legitimate business interest to protect itself against unfair competition.

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