

BUSINESS LAW NOTES

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Our law firm has provided exceptional legal services to clients throughout the state and the U.S. for more than 45 years. A full-service firm founded in 1955, we have built a reputation for helping clients solve difficult problems with sound counsel, sophisticated analysis and superior performance.

A hallmark of our firm is personalized client service. Recognizing that each of our clients has a unique set of issues, objectives and needs, our firm is committed to individualized attention and works as an integrated team to respond to our clients' needs. We serve diverse clients, including Fortune 500 companies, government agencies, professional associations, closely held corporations, limited liability companies, partnerships and individuals.

Founding Member of Our Firm

Samuel H. Johnson Inducted Into North Carolina Bar Association's General Practitioner Hall of Fame

Samuel H. Johnson, founder and senior member of our firm, was inducted into the General Practice Hall of Fame at the recent annual meeting of the North Carolina Bar Association. He was recognized for his outstanding accomplishments in the fields of law and public service during his 50 years of law practice.

He was born September 13, 1927 in Sampson County, N.C. He attended Pfeiffer College and following service in the Navy at the Naval Research Laboratory (1946-1948), he attended Mexico City College and graduated from the University of North Carolina (A.B.) in 1950, and in 1953 from the U.N.C. School of Law (J.D.). He was admitted to the N.C. bar on September 3, 1953 and is admitted to practice in the U.S. District Court, Eastern District of N.C. and U.S. Supreme Court.

He served in the N.C. House of Representatives from 1965 to 1974. He has also served as a Trustee, University of North Carolina, 1967-1972; Chairman, N. C. Local Government Study Commission, 1967-1973; N.C. Joint Select Commission on Fiscal Trends and Reform, 1992-1993; Advisory Budget Commission of N.C., 1969-1971; and Special Counsel to Speaker of House of Representatives and Lt. Governor, 1975-1977. His professional and civic memberships and accomplishments are too numerous to mention here. He was a general practitioner in the early part of his career. His current practice areas are legislative practice; estate planning; business law; and trade association law. He maintains his active practice with the firm but finds more time to enjoy his family and his various hobbies.

[Part three of this series]

The Franchise Agreement

By M. Blen Gee, Jr.

The Franchise Agreement will control your life as a franchisee. It is designed to protect the franchisor in every way possible, and is usually nonnegotiable. Key issues to look for in a franchise agreement are:

- *Do you have an exclusive territory.* Is the size of the territory adequate and are you protected from other types of encroachment into your market, such as internet and catalogue sales (Note that you can sometimes protect your exclusivity if you are located in a shopping center by negotiating exclusivity with your landlord, i.e. the landlord will not lease space in a shopping center for a similar business).

The key issues to look for are ...

- *Is there a right for you to assign the franchise?* If so, what are the restrictions? (Note that the assignment of a franchise can be risky since the seller typically will remain secondarily liable on the franchise agreement. If you sell your franchised business, it is safer for the buyer to negotiate a new franchise agreement. This also may be more attractive to the buyer since he can negotiate a longer contract term.)

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The Franchise Agreement, Part 3

(continued from Page 1)

- Jurisdiction and Venue. Are you required to litigate any dispute in a distant state?
- Do you have a reasonable right to cure a default?
- Does the agreement require that a certain amount of advertising dollars be spent in your market?
- The franchise agreement will likely have a non-competition provision. Unless it is poorly drafted, a non-competition provision will be enforced by the courts and it should be examined carefully. If you decide to sell your franchise, will you be required to move out of your community in order to earn a living?
- What are the termination provisions? These should be examined carefully. The franchisor should only be able to terminate a franchisee for some good reason and then, only after a reasonable opportunity to cure an alleged default.
- Does the franchise agreement require you to sign a release of all claims against the franchisor if you ever want to sell your franchise?
- Does the franchise agreement unreasonably restrict your sources of supplies or products? This is a frequent area of abuse by franchisors.
- What are the restrictions on renewal of the franchise? If you want to voluntarily terminate the franchise, is this allowed and what are the restrictions.
- Is there a time limitation on when a claim against the franchisor must be made? Some franchisors may allow as little as 180 days to bring a claim or the claim is barred.
- Is dual branding allowed?
- Does the agreement give the franchisor a right of first refusal or an option to purchase your business? Are these reasonable?
- Personal guarantees will almost certainly be required. However, some franchisors also require the personal guarantee of the franchisee's spouse. Personal guarantees by your spouse should be avoided unless the spouse is going to be an active owner of the business.
- Will you be leasing from your franchisor? This substantially increases the franchisor's leverage over the franchisee. Also, typically a default under the franchise agreement is deemed to be a default under the lease and vice versa. If you are leasing from your franchisor, careful consideration should be given to the lease agreement. You may find that the terms of the lease are much more negotiable than the franchise agreement.
- make sure that your lease term is consistent with your franchise agreement. For example, if you have a 10-year franchise agreement and you cannot relocate without the franchisor's consent but you have only a five-year lease, at the end of five years you have a problem.

Conclusion.

After having considered various business issues and after having discussed the legal implications of the UFOC and

the franchise agreement with your lawyer, you will be in a position to evaluate your business risk in moving forward. If you have significant legal issues that you feel need to be changed in the franchise agreement, it may be possible to negotiate a "Rider" to the standard franchise agreement that would be acceptable.

Be Careful About What You Agree To

CHOICE OF LAW AND FORUM SELECTION IN N. C. CONTRACTS

By Frank X. Trainor, III

Any time any party enters into a contract, some attention should be given to the consequences which arise if that contract is breached by one of the parties. It is quite common for the party who drafts the document to add a short provision to the end of that contract which dictates what state's law should be applied to the contract or where a suit concerning that contract should be filed. Although those short provisions may not seem important at the time the document is created, they can often have very real and substantial consequences if problems arise in the future. There are three varieties of provisions which are added to the end of contracts which have an impact on where a suit must be filed and what law is applied: (1) forum selection clauses; (2) choice of law provisions; and (2) consent to jurisdiction provisions. Each of these different types of clauses have different effects upon your legal rights.

A "choice of law" provision has nothing to do with where a lawsuit is filed. Rather, it determines which state's laws will be applied to a dispute.

A "consent to jurisdiction" clause in a contract sets forth the state in which a party may file a lawsuit. This clause does not dictate what law should be applied to a contract. However, if no jurisdiction is selected, generally the law of the court where the lawsuit is filed will govern.

"Forum selection" clauses go a step beyond the "consent to jurisdiction" clauses by designating the particular state where the parties must file a lawsuit over a dispute arising out of the contract. As you can see, the negotiation of these contract clauses is quite important!! Consult your business attorney *BEFORE* you negotiate or sign a contract.

BUSINESS LAW NOTES

SPECIAL EMPLOYMENT LAW UPDATE

By F. Stephen Glass

\$760,000 IS PRICE FOR AN OFFICE

ROMANCE GONE BAD

Sexual harassment is disruptive to the workplace and costly to employers. It can be difficult to deal with in the typical scenario, where one employee makes sexual advances or repeated sexual remarks to another employee who is offended by such conduct. It is even more difficult to deal with cases of sexual harassment that is the result of an office romance gone bad. As one court recently found, such situations can be just as costly to employers as the case of a supervisor demanding sexual favors from an unwilling subordinate.

Employers should carefully develop comprehensive policies to deal with sexual harassment at all levels, publicize, train and enforce such policies even-handedly.

EMPLOYMENT-AT-WILL RULING

Plaintiff/former-employee alleged that his manager repeatedly assured him that his employment would not be terminated if he reported to the manager any mistakes he made in the course of his work and did not attempt to fix or cover up the mistakes, and that despite these repeated assurances, management discharged him for reporting a mistake. Defendant contends that plaintiff made a mistake while carrying out his job duties but did not report the mistake. Management alleged that plaintiff was an employee at-will and could be discharged as such.

The court reviewed N.C.'s at-will employment law, noting that "the relationship between employer and employee is presumed to be terminable at will" by either party and without cause absent an agreement to the contrary. There are three exceptions to the at-will employment doctrine: (1) a contract providing for a definite term of employment; (2) a discharge occurring for "impermissible considerations such as the employee's age, race, sex, religion, national origin, or disability, or in retaliation for filing certain claims against the employer;" and (3) a termination contravening public policy.

An employee bears the burden of establishing employment for a specific duration to remove it from the employment at-will presumption. Our Court consistently has held that assurances of continued employment, permanent employment or employment for life

There are three exceptions to the employment at-will doctrine . . .

are insufficient to rebut the at-will presumption. Examples from N.C. cases include: (1) assurances such as "you'll have a job" and an offer for a "secure position" did not remove employment from the at-will employment doctrine; (2) although the employer promised

employment for as long as the employee's work was satisfactory, such employment remained at will. However, our Court has held that if an employee contributes "some special consideration in addition to his services," assurances of continued or permanent employment may be contractually enforceable.

In this case, the court said that management's assurances that plaintiff would have a job if he reported his mistakes and did not conceal them falls into the category of "general assurances" of continued employment which our courts have held will not convert at-will employment into employment for a definite term, terminable only for cause. *WORLEY v. BAYER CORPORATION*, N.C. App. (2002).

AIRLINE PILOT'S CASE DOESN'T GET OFF THE GROUND

Airline pilot brought breach of contract and fraudulent inducement action against airline arising out of termination of his employment. The Court held: (1) under N.C. law, employee handbook and memoranda from airline's president to employees were not binding on airline; (2) pilot's allegations that he provided additional consideration in exchange for a promise of termination only "for cause" were insufficient to overcome presumption of at-will employment under N.C. law. *NORMAN v. TRADEWINDS AIRLINES, INC.*, 286 F. Supp 2d 575 (M.D. N.C. 2003):



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M. Blen Gee, Jr., is an honors graduate of the University of North Carolina School of Law. His areas of concentration include business and corporate law, including sales of businesses; business litigation, including arbitration and mediation; franchise law; automobile dealer law; and insurance company insolvency.

F. Stephen Glass is the author of *The Legal Handbook for North Carolina Businesses; Your Estate Planning and Administration Handbook; Limited Liability Companies Update 2004 (Formation and Operation; State LLC Law Issues; LLC Tax Issues; LLC Securities Law Issues; Special Uses of LLCs)*. His practice is concentrated in the areas of business, employment and corporate law, business succession planning and estate planning. He serves on the Cary board of Capital Bank.

Jean Winborne Boyles, concentrates her practice in health law, corporate law, bankruptcy and creditors' rights, commercial leasing, antitrust and state administrative law.

Frank X. Trainor, III, graduated with honors from Tulane University School of Law in 1998. He has a general practice but concentrates in commercial litigation and administrative law.

BANKRUPTCY NOTICES - WHAT TO DO: A CHECKLIST

By: Jean Winborne Boyles and M. Blen Gee, Jr.

Do not throw away the Bankruptcy Notice because you think it just means you will not be paid by the deadbeat. Pay attention to this notice; you may be losing an opportunity or worse, you may actually owe the bankruptcy estate money.

Here is a quick checklist to determine if any action needs to be taken:

- Has the bankrupt person or company made any payments to you within 90 days of filing of the bankruptcy, measured from the date the check clears the bank?
- Have you delivered goods to the

bankrupt person or company within 10 days?

- Do you have lien rights to protect, such as labor and materialmen's liens, UCC filings, reclamation of goods shipped within 10 days, etc.?
- The Notice will give a date and time of a 341 meeting, or the Meeting of Creditors. If this meeting is local, you may want to go and ask the Debtor questions. If a large amount of money is at stake, you may want to hire an attorney to go to the meeting, or at least talk to an attorney about the advisability of going. If you think fraud is involved, be sure to talk to an attorney because you may want to file an objection to discharge.
- Does the Notice say "**DO NOT FILE A CLAIM AT THIS TIME**"? If so, monitor future mailings to make sure the status is not changed. If a

large amount of money is involved, you may want to contact an attorney to see if there is any action that can be taken.

- When you have a bankruptcy document stating "Bar Date to File Proof of Claim," **ALWAYS FILE** a proof of claim, even for a small amount of money.
- Keep everything you receive related to the bankruptcy. Instruct whomever reviews the mail to monitor for anything related to a bankruptcy proceeding.
- If you are sued in bankruptcy, you may receive the suit documents by regular mail. You do not have to read everything, but monitor for your company's name on any document and the words "Complaint," "Adversary Proceeding," or "Motion."