

Beware of those “No Hire” Provisions In Consulting Services Agreements

Your company is in the middle of a project to totally revamp its inventory and order-entry systems. The project is critical to your company's business and involves a significant investment of time and money. A group of consultants from ABC

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Consulting is spearheading the project. Out of the blue, your company's project leader gets a call from the primary consultant. He and the rest of his team are leaving ABC Consulting to join XYZ Consulting. Your project leader rushes into your office to ask what can be done? The primary consultant and his team are essential to complete the job. They are the only ones who have the necessary know how and expertise. The learning curve on the project is too steep to bring in anyone else from ABC Consulting. Your project leader wants to terminate ABC Consulting and then hire XYZ Consulting, including the former ABC Consulting team, to complete the project.

Does your Company have the Right to Terminate ABC Consulting?

The first thing to determine is whether you can terminate ABC Consulting. Most Consulting Services Agreements have a “termination for convenience” provision that allows the client to terminate the consultant's engagement at any time – there may be some financial penalties, but at least the engagement can be terminated. Let's assume that your agreement has a “termination for convenience” provision or, if there is no “termination for convenience” provision, that ABC Consulting agrees to let your company terminate the engagement. Is there anything else in the Consulting Services Agreement that could create a problem?

You should also confirm that the Consulting Services Agreement gives your company the right to use ABC Consulting's work product and deliverables without ABC Consulting's continued participation in the project. Let's assume your agreement gives you this right, as most

Consulting Services Agreement do.

The “No Hire” Provision

At this point, everything is looking fine, but then you get to a “no hire” provision tucked away at the end of the agreement:

“During the Project and for a period of one year after the completion or termination of the Project, Client will not directly or indirectly solicit, employ or retain in any capacity, or directly or indirectly offer to employ or retain in any capacity, any personnel of Consultant who are working or have worked on the Project.”

When the Consulting Services Agreement was signed, this provision seemed innocuous. But now, unless the “no hire” provision is waived, your company runs the risk of being sued by ABC Consulting for breach of contract if it retains XYZ Consulting and the former ABC Consulting employees. For the most part, courts are willing to enforce “no hire” provisions that are reasonable in scope.

There's another Problem

If the Consulting Services Agreement doesn't have a “no hire” provision (or you get ABC Consulting to waive the provision), will your company be able to hire XYZ Consulting and the former ABC primary consultant and his team? Unfortunately, the answer is probably no. But this time, it's not a provision found in the Consulting Services Agreement that is creating the problem.

Most consulting firms require their consulting professionals to enter into restrictive covenants as part of their employment. These covenants typically include a “non-solicitation” provision prohibiting the professional from performing services for the firm's clients for a period of time after their employment ends. Courts will frequently enforce these “non-solicitation” covenants, particularly if they are deemed necessary to safeguard a protectible

interest, such as the firm's client relationships or trade secrets, and they prohibit only the solicitation of clients with whom the consulting professional had significant contact during his or her employment and only for a period of one or two years after termination of employment.

When a group of employees leaves to join or form a competing firm, emotions run high, and there is typically a great deal of acrimony. ABC Consulting might attempt to enjoin, or threaten to enjoin, its former employees who have "non-solicitation" covenants from performing continuing services on your project. Although businesses are generally loath to sue a client, ABC Consulting might even implicitly, or overtly, threaten your company with a lawsuit for tortious interference with contract if you attempt to use the former ABC Consulting employees to complete the project.

Address these Problems during Negotiation of the Consulting Services Agreement

The best time to address the problems created by "no hire" provisions and restrictive covenants is during negotiation of the Consulting Services Agreement. This is the time your company has the most leverage to obtain appropriate concessions from the consulting firm. Before entering into the Consulting Services Agreement, the consulting firm should be made to understand that addressing your concerns about the "no-hire" provision and its employees' restrictive covenants is critical to obtaining your business.

Ideally, any "no hire" provision in the Consulting Services Agreement should be modified to allow your company to employ or retain the persons who are working on your project (and any new consulting firm by whom they may become employed) after their employment with their consulting firm ends, so long as your company did not solicit them to leave the consulting firm. In addition, a provision should be added to the Consulting Services Agreement that requires the consulting firm to waive enforcement of any restrictive covenants that would otherwise prohibit such persons from performing services for your company after their employment terminates. At a minimum, the "no hire" provision and the waiver of restrictive covenant enforcement should permit the key consulting personnel to complete those particular projects on which they were engaged at the time their employment ended.

Following is sample language for a "no hire" provision

with a waiver of restrictive covenants:

"During the Project and for a period of one year after the completion or termination of the Project, Client will not directly or indirectly solicit any personnel of Consultant who are working or have worked on the Project to leave the employ of Consultant. After personnel of Consultant who are working or have worked on the Project cease to be in the employ of Consultant, Client shall be free to directly or indirectly employ or retain such personnel in any capacity (including, without limitation, as employees of Client or as individual consultants or as employees of another consulting firm), so long as Client did not solicit such personnel to leave the employ of Consultant, and Consultant shall waive enforcement of any and all restrictive covenants that otherwise restrict such personnel's post employment activities to the extent necessary to enable such personnel to directly or indirectly perform services for Client in any capacity (including, without limitation, as employees of Client or as individual consultants or as employees of another consulting firm)."

Even if addressed before execution of the Consulting Services Agreement, the consulting firm might resist a modification of the "no hire" provision and a waiver of enforcement as to the restrictive covenants. If it views the modification and waiver as an incentive for its consulting professionals to leave their employment, the modification and waiver could be covered in a side agreement to which the firm's employees working on the project are not privy. If the consulting firm continues to balk at making the changes, your company would be well advised to consider hiring a different consultant, especially when the project is critical to your company's business and involves a significant investment of time and money.

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