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DATA AND RESTRICTIVE COVENANT ONBOARDING CHECKLIST

The following issues should be considered during the recruitment and onboarding of a prospective employee (“candidate”). The goal is to (1) ensure the candidate fully understands and appreciates his/ her obligations related to the candidate’s resignation, transition to the prospective employer and future work given any contractual obligations that may apply; (2) inform the prospective employer of any non-contractual risks or concerns arising out of the candidate’s activities prior to the candidate’s move to the new employer; and (3) assist the candidate and prospective employer in the transition.

I. Before-Resignation

- A. Collect and review all agreements between candidate and his/her company that may contain post-employment obligations/restrictions bearing on the candidate’s ability to perform job responsibilities for new employer. Ask the candidate about all potential agreements in addition to the candidate’s employment agreement (e.g., shareholder agreement, sale and purchase agreement, agreements attendant to stock grants or options, deferred compensation agreement, employee manual acknowledgment, etc.).
- B. Provide assessment and advise about the existing agreement(s), enforceability of the obligations and practical effects of such agreement(s) on the candidate’s possible transition. Discuss and understand strategy for the candidate. Then, meet with the candidate and discuss.
- C. Ask candidate about any activities or circumstances that that already occurred that could cause concern and present potential tort liability (e.g. breach of confidentiality, duty of loyalty or fiduciary duty obligations). Based on the candidate-specific activity and circumstances, counsel should then advise prospective employer on potential tort liability.
- D. Advise candidate about conduct prior to resignation and during the off-boarding process:
 - 1. Continue to work diligently for current employer through resignation and any enforceable notice period;
 - 2. Do not solicit clients or employees;
 - 3. Do not delay projects, work, meetings other otherwise prepare to move business while working for current employer;

4. Do not inform clients or employees intention to leave.
5. Provide advice for conversations with current employer while still working for the company (e.g. if candidate is asked about potential move before resigning, whether candidate should ask for agreements that contain restrictive covenants and upon resignation and departure;
6. Assist with resignation process and communications (e.g., prepare of resignation letter, determine of last day of employment, request in resignation letter for any and all agreements with restrictive covenants, whether to submit to specific off-boarding requests, preparing and obtaining sign-off on an inventory of documents and property left in the office, and addressing actions with respect to any documents or data in the candidate's possession;
7. Discuss and advise prospective employer and candidate as to candidate's access to hard copy or electronic data of the company, including the following:
 - a. Hard Copy Data – All files or hard copy documents that belong to the company, should be returned to the office, inventoried prior to the resignation and addressed in the resignation letter;
 - b. Electronic Data – While the candidate is with the company, he/she should be advised that the company likely has the technology to monitor internet, e-mail, print jobs, texts, network activity and download activity (e.g., date and time of all downloads or emails, exact content at the file level of downloaded or transferred documents, email communications, text communications, etc.). Prior to resignation, the candidate should not engage in any conduct that could be scrutinized following the resignation (e.g. no copying, no downloading, no uploading to the cloud, no e-mails to personal e-mail, no photocopying of client lists). Documents should only be accessed for the performance of the candidate's job responsibilities and used consistent with past practices and applicable company policies. Do not delete e-mails, texts or files or otherwise "clean up" electronic data prior to resignation. Ask the candidate to identify and inventory any electronic documents or storage devices that he/she may have access to or that are in candidate's possession (this may include data downloaded to external drives, data uploaded to cloud storage, data sent to personal email account, etc.). Counsel should notify prospective employer of any documents or electronic data in the candidate's possession and determine, with prospective employer, the best approach to address and mitigate exposure. The best approach may be to hire an outside forensic consultant to forensically remove the data while capturing a forensic image of the before and after data set. In addition to forensic removal (or

alternatively), the candidate may need to notify the employer in the resignation letter of the data in candidate's possession and the fact that the candidate has either permanently deleted the data or returned the data prior to resignation or the candidate may ask the employer in the resignation letter for direction for handling any data that cannot be returned (i.e. data in personal e-mail or cloud storage);

c. Electronic Devices – If the candidate has a company-issued laptop, Ipad, phone, or other device containing company information that he or she would like to retain or there is personal data on the device, counsel should notify prospective employer and discuss. The candidate should address the need for personal data with the current employer at the time of resignation and document the request in the resignation letter; and

d. Contact Lists – Candidate should be advised not to download, e-mail to personal e-mail, copy, or photocopy or otherwise take a client or contact list. If candidate has certain contacts (i.e. friends, family) that the candidate would like to retain, the candidate should document the request in the resignation letter and have an officer of the company, with authority to bind the company, authorize in writing the candidate's retention of the desired contacts. Candidate may need to work with the company's technology staff to retain personal contacts and remove business contacts from a phone or electronic list.

8. Communicate with prospective employer to ensure advice and directives are consistent with prospective employer's risk tolerance and to enable prospective employer to follow up with the candidate to ensure he/she has, in fact, taken all remedial steps as directed.

II. After-Resignation

A. Provide practical advice to candidate regarding conduct following resignation (i.e. during and after the on-boarding of the employee with prospective employer):

1. Address specific circumstances or concerns;

2. Advise not to initiate communications with clients or owners/employees of the former company and provide script should the candidate receive calls; advise candidate to keep a written log of all calls received;

3. Prospective employer should handle public announcement; employee should not provide list of clients or prospects for the distribution of that announcement; best practice is for the prospective employer to independently develop the distribution list from pre-existing client/prospect/industry contact lists or purchased lists; the announcement

will provide prospective employer's main number, not the contact information for candidate/employee;

4. Assist with prospective employer on-boarding process and communications (e.g. determination of start date at prospective employer, instruction on when to sign an offer letter, how prospective employer will announce the move/neutral announcement using prospective employer or public resources/lists and not using any of candidate client lists, when it is appropriate and how to update social networking accounts, etc.); and,
 5. Communicate with prospective employer to ensure advice and directives are consistent with prospective employer's risk tolerance.
- B. Discuss and advise as to candidate's post-resignation access to hard copy or electronic data of the former company.

Attempt to ensure candidates do not retain data from their former companies.

If the candidate fails to return documents, whether in hard copy or electronic format, or has retained client or contact lists prior to his or her resignation date, counsel should notify prospective employer immediately and address options for remedial action. Further, the candidate should be notified that any devices that contain data from the former company should never be plugged into a prospective employer computer (even if they are not plugged in to access the specific documents) or otherwise accessed by any prospective employer associate.

If you have any questions about this form, please contact: Michael L. Matula | Kansas City | Telephone: 816-410-2223 | E-mail: michael.matula@ogletree.com

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