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TO: Clients & Interested Parties

FROM: NLG Professional Staff

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RE: Last Chance Agreements

INTRODUCTION

When you hire someone, it is not with the expectation that a supervisor will spend countless hours trying to coach, counsel, and discipline the person. Yet, these are all a part of the supervisor's overall responsibilities when trying to manage the employee performance. While these responsibilities are certainly expected, at some point you, the union and the courts will concede enough is enough. Knowing where to draw that line is difficult. There are occasions when you draw the line with a Last Chance Agreement (LCA). They are designed to clearly set out the employee's recurring employment problems, make clear to the employee expectations for continued employment, and spell out the ramifications (i.e., termination) if the employee fails to conform performance to expectations.

LCAs are not fail-safe. They do not guarantee freedom from future suits by employees. However, if drafted correctly and used appropriately, LCAs will support a decision to terminate.

AVOIDING PITFALLS

LCA As An Implied Contract

Even a well drafted LCA can be misconstrued by an employee. In one case, the employee tried to turn a disciplinary letter, which was an LCA, into a contract for continued employment.

The employee was issued a disciplinary action letter due to an investigation that found he had sexually harassed his secretary. He argued that he was wrongfully fired because the disciplinary letter altered his at-will employment relationship. The letter said further involvement in any situation of this nature, substance abuse, or any other type of misconduct, will lead to your immediate discharge. The employee interpreted this letter to mean that he was no longer an at-will employee and he could only be fired if he failed to comply. The court rejected this interpretation of the letter.

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Other employees may argue you exchanged your right to terminate the employment relationship at will when you entered into an LCA with the employee. The LCA must be drafted so it is clear that the parties intended the agreement to be a disciplinary document; not a negotiated agreement for long-term employment.

Mean What You Say

Another case demonstrates you must do more than simply write an agreement. In this case, the employer required a supervisor accused of sexually harassing a subordinate to sign an LCA. The agreement said the employer does not condone the harassment of any patron or employee and that any such activity would result in immediate termination. In addition to requiring the employee sign the agreement, the employer verbally warned the employee concerning his behavior and made it clear that he would not remain employed if his conduct continued.

Despite this, the conduct continued. At one point another employee reported his conduct to the employer and no action was taken by the employer until the ignored employee sued. The employer tried to use the agreement as proof of its opposition to the behavior. The court decided the employer failed to exercise reasonable care to prevent and promptly correct the behavior.

Don't enter into an LCA if you are not prepared to enforce the agreement terms. If you do not pull the trigger when the employee violates the agreement, the message sent is that the behavior can continue without reprisal. If you want to send a message but are not prepared to fire, it is better to impose lesser discipline like a demotion, reduction in pay, or suspension.

Do LCA's Violate Public Policy?

At least two courts have reached different opinions on whether LCAs can be construed to violate the ADA. In one case the court upheld firing an employee for drinking alcohol during non-work hours in violation of his LCA. Another found termination of an employee who was required to sign an LCA while undergoing rehabilitation violated the ADA.

A 25-year employee had recurring substance abuse battles over his employment. The parties entered four prior agreements before the fifth and final LCA. The final LCA said future use of any mood altering chemicals, including alcohol, or violation of working rules generally related to chemical dependency will result in immediate termination. Four years later, the employee was arrested for driving while intoxicated and was fired for violating the LCA.

In court the employee argued the LCA violated the ADA because it subjected him to employment conditions that were different than conditions imposed on other employees. Pointing out that courts have consistently upheld LCA's, the court rejected this argument and refused to invalidate the terms of the voluntarily signed agreement.

He also argued the LCA violated the ADA because the ADA does not permit the company to place restrictions upon his conduct outside of the workplace. The court dismissed this claim and held the ADA placed no limitations on the constraints an individual may place upon himself. By entering into an LCA that contained restrictions on any future use of any mood altering chemicals the employee voluntarily placed these restrictions on his own conduct.

In the second case, an assistant fire chief employed by the Lima, Ohio Fire Department was also a long term employee of more than 20 years. After suffering from kidney stones, he was prescribed

various pain medications. He became addicted to the pain medications and eventually began taking heroin. Realizing he had a drug addiction, he voluntarily checked himself into an addiction treatment center. While receiving treatment, his chief visited him and informed him that he would have to sign an LCA or face termination. The purpose of the LCA, according to testimony, was to treat him the same as another firefighter who was in recovery from an addiction to crack cocaine. The assistant chief had no prior incidents to indicate his use of drugs.

The employee suffered further kidney stone problems and was given prescription pain medication. The hospital, although aware of his addiction, did not follow up with him to prevent further addiction to the pain killers. When he returned to work and had to submit to a drug test, the test revealed the presence of pain killers. He was then terminated under the LCA.

At trial, he argued the city should not have been permitted to change the terms of his employment based upon his simple voluntary act of seeking treatment. The court agreed and reasoned the LCA was a form of discipline based on his disability. The city argued the LCA was not discipline because it did not adversely affect him when he signed it. The court disagreed.

The timing of the LCA, coupled with the absence of any prior work violations or performance issues, made it easier for the court to infer the city was disciplining the assistant chief for his status as a recovering addict rather than for any work related behavior. It is not clear from the opinion what more the court would have liked to have seen the city demonstrate.

Although they reach different results, these decisions can be reconciled. The lessons learned are that an employer should not immediately discipline an employee based upon the first indication of substance abuse if there is no corresponding work related performance issue. However, once an employee has demonstrated a work related performance issue or violation of a work rule, the employer may impose discipline, even if the performance issues stem from substance abuse. Moreover, the employer may require the employee to impose more restrictive workplace and off duty requirements upon himself in exchange for continued employment without running afoul of the ADA.

Collective Bargaining Agreements

The use of LCAs has been popular in unionized settings. While the substance of the underlying agreement is likely to be the same, the parties involved in the LCA can impact the enforcement. In the non-union setting where the aggrieved employee is in court, the likelihood of her prevailing on her claim is lessened because courts, already overburdened, typically strictly adhere to contract principles. In a unionized setting, the arbitrator views the circumstances through different lenses. The arbitrator's view is one where progressive discipline and just cause dictate outcomes. In an arbitrator's view, the employee practically always has more than one bite at the apple. Thus, in a unionized setting, using of "last" when referring to an LCA can be a bit misleading. Employees in union settings are typically given multiple opportunities to challenge the LCA and may even have several iterations of an LCA. Unionized employers have to careful writing an LCA and resilient in enforcement.

An 8th Circuit decision provides a good guide. Here, an employee failed to call in or to report for work and missed 45 days in a 13 month period. She was placed on six months probation and required to sign an LCA. She did not grieve either the LCA or the written warnings that preceded it. She satisfied the LCA conditions and successfully completed the probationary period. Less than one

year later, she reported to work and a manager noticed her breath smelled of alcohol, her speech was slurred, and her mannerisms were different. A urine test showed her blood alcohol content was 0.28, or nearly three times the legal limit for operating a motor vehicle. She could have been fired immediately for this violation of the company's drug and alcohol policy; instead she was placed on another LCA.

The second LCA required her to enroll in and complete a counseling program through the Employee Assistance Plan ("EAP") and subjected her to two years of random drug and alcohol testing after completion of the program. The LCA said it was her responsibility and obligation to follow all published policies and procedures. Violation of any rules and/or failure to comply with the terms and conditions of the LCA could result in her immediate termination. The employees and her union representative read the LCA and conferred privately about the agreement. She had no questions about the LCA and fully understood what was required of her under it. She told the company she was fine with it. She, her supervisor, and the union representative all signed the LCA.

Shortly after signing the LCA, she began to call in and request immediate vacation just before her shift began. After one such occasion, she and her union president met with her supervisor. At this meeting, she admitted she had violated Boise's unwritten rule requiring employees to notify the company of absences at least two hours before the start of a shift, and that her supervisors had shown leniency by not enforcing the LCA and terminating her for this violation of an unwritten attendance rule. A year later, she failed to report to work. The company learned from her EAP counselor that the absence was due to intoxication. After reviewing the situation with the union representative, she was fired for breach of the LCA. The union filed a grievance protesting the termination. The grievance was denied and the union appealed to arbitration.

The arbitrator held the agreement permitted termination only for violation of written rules, and ordered reinstatement with full back pay. The company appealed and the district court voided the award, holding the plain language of the LCA did not support the arbitrator's decision. The court also ruled the arbitrator had ignored the parties' intentions when they entered into the LCA. The union appealed to the Eighth Circuit.

The court held the arbitrator's paramount obligation is to apply the parties' agreement in a way that gives effect to their intent. There was abundant evidence the arbitrator's decision did not consider the parties' intent and there was other language in the decision that suggested the arbitrator was motivated to dispense his own brand of industrial justice. Because he understood she was not to violate any of the rules again, when the arbitrator ruled the LCA applied only to written agreements, he was, in effect, ruling directly against the intent of both parties. The court affirmed the lower court's decision.

It is not clear from the facts why the first LCA was for six months. Most employers try to establish an indefinite term for performance improvement, particularly when the performance issue is something like tardiness or attendance. Another lesson for employers is to document all well known but unwritten rules. Because the second LCA left out clear reference to compliance with these well known rules, the employer left open for interpretation which mill rules were at issue. This left room for the arbitrator to find the LCA language was ambiguous.

Elements Of A Good LCA

An LCA should not be reduced to a list of guidelines. It should be a flashing neon sign in the employee's eyes saying the employee can be fired today, and if the employee fails to comply with the LCA at any point in the future, the employee will be fired. A good LCA does the following:

- Makes it clear the employer has grounds to fire now but is foregoing that right in exchange for the commitment to abide by the terms of the LCA.
- Focuses on performance deficiency and correcting that behavior, even where the LCA stems from substance abuse.
- Identifies specific performance deficiencies.
- Includes dates of prior communications with the employee about recurring performance deficiencies.
- Provides a clear description of expectations for improved performance.
- Makes it clear that compliance with all workplace rules is mandatory.
- Plainly indicates that improved performance must be continued and sustained and any violation of the LCA terms means immediate firing.
- If substance abuse is at issue, provides instructions on the frequency and type of substance abuse testing. Makes it clear the employee agrees to undergo drug testing as a condition of continued employment when he or she returns from leave.
- If a union is a party to the LCA or advising the employee, get the union to agree not to pursue a grievance if the employee violates the LCA.
- In a non-union setting, and where law will allow, makes it clear the employee remains an employee at will.