

The Performance Review Podcast
Greenberg Traurig, LLP
Episode 29

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Brian Kelly: Welcome to The Performance Review podcast. This is Brian Kelly. I'm here with my good colleague and friend, Michael Wertheim. We are very excited for [00:00:30] what we're calling season two, episode two of The Performance Review podcast. Michael, I want to lead off by thanking our listeners for the massive response we had to our first episode last month. My mom texted me that she was very proud of me and also asked, "What's a podcast?" That kind of feedback means a lot. Yeah, what did you hear from the listeners?

Michael Wertheim: There's nothing quite like a mother's love. As a new father, I know how big that is for you, [00:01:00] Brian. So I'm happy to get that feedback. But no incredible feedback from a lot of different people. And we're thankful to be here because we get to get together as friends and talk about what we do, and it happens to be something we love. So keep coming back, keep diving into old episodes, keep checking out the new ones. And before we go further, I thought it actually maybe makes sense to introduce ourselves a little bit. We came with a hot start in January to kick things off, but maybe we should say a [00:01:30] little bit about who we are and what our vision is for the podcast. So I'll start.

My name is Michael Wertheim. I'm a shareholder in Greenberg Traurig's Sacramento office. And as lawyer and an employment litigator, I bring over a decade of experience in both counseling and litigation, dealing with mostly class action defense and single plaintiff defense. But really like to think of myself as I help clients stay out of court through the counseling [00:02:00] process to try to get things right before you're in trouble. And then when you do find yourself in court, you can give us a call so we can navigate how to get you out of there. And Brian, I think on the other side of it, predominantly being a counselor, you're really there at the forefront to make sure none of those issues arise, or to the best extent of our abilities to prevent that, right?

Brian Kelly: That's right. And all of a sudden I'm feeling very insecure and less versatile than Michael because I... As Michael alluded to, I focus primarily on the counseling [00:02:30] side, helping employers across all industries, all sizes with day-to-day issues affecting their workforces. Whether it's prophylactic stuff like changing company policy, practices, plans, or reactive things, like helping an employer through a difficult moment in an employment relationship with a particular employee. I always like to see people get along wherever possible. So my job in part is to make sure that my clients never reach [00:03:00] that moment in time

where litigation occurs. But one benefit of working here at Greenberg Traurig is that we have a deep bench of litigators in the employment space like Michael, who know how to handle things once it gets to that point.

A little bit about me. Who am I? I mean, that's a question I've struggled with my whole life. But I guess I'm a lawyer. I've been at Greenberg Traurig now for a few months. Came over from WeWork after several years there in-house and have really enjoyed taking [00:03:30] my in-house experience back to a diversified set of clients and helping find solutions in practical ways. I think that's the best I can do to look in the mirror, Michael.

Michael Wertheim: It's a quick snapshot, but certainly, we are so much more. And hopefully, you'll see that throughout the rest of the podcast. Don't feel too insecure, Brian. When any of those issues come up, I'm just going to email you anyway. So you'll be fielding those questions. Now we're diving into the... I guess it's episode 29 [00:04:00] of the entirety of The Performance Review podcast. But being as it is, the new era of our host ship, it's our second episode and we're talking about offer letters, a pivotal document to start or at least propose the start of an employment relationship. So what are we getting into today?

Brian Kelly: Putting myself in the shoes of the employer. This is really the first document that sets the tone for your relationship with your prospective employees. So resist [00:04:30] the urge to use papyrus font. Let's put on our professional pants and present a nice document because poorly drafted offer letters can be a recipe for fights down the road as to what was meant by ambiguous language. It can be an easy cheat sheet for plaintiffs council for employees to surmise what the company's sophistication on HR issues are. And you want to be setting the right tone with your new employees right off [00:05:00] the bat and the offer letter is the place to do it.

Michael Wertheim: Right. You and I have both received offer letters in our time as employees. It's a moment for first impression, but for the employee, this is a big deal. Getting a job offer and seeing it in writing and seeing how much money they're going to pay you and what the job is, this is a big deal, a huge moment in your life, not unlike other big achievements. Could be getting married, having a kid, graduating college. I mean getting a job [00:05:30] that you have been eyeing forever, putting all your ambition towards, this is a big deal. And so it is the first moment for the employer to make that impression, especially if someone's fielding multiple offers. This is a space where you're looking at what are they offering me. And so what are they saying about it, how does it look, how does it feel, all that good stuff. But this is a big moment, and so employers should really harness it, right?

Brian Kelly: Yeah. You want to attract top talent, you should assume that top talent has [00:06:00] their choice of any number of employers. Let's make sure the window dressing looks good to them so they'd choose you.

Michael Wertheim: Right. And then what can go wrong?

Brian Kelly:

A lot. That's a good segue, Michael. Let's talk about what should be in offer letters and perhaps what shouldn't be. First, flashing lights, disclaimer. This is not meant to be an exhaustive list of every possible clause you might put in an offer letter, although we certainly hope that it's informative for a large majority of employers and a large majority of [00:06:30] positions that they're offering. And we, of course, always encourage you to reach out to us if you have particular questions on bespoke details for different types of employment situations like seasonal employment, temporary employment, outsourced employment, so on and so forth. So today's offer letter discussion will really focus on, for your core workforce, whether it's part-time or full-time employees, what do those offers look like. And maybe we'll touch on a couple of pet peeves, Michael, stuff that really rattles our cage when we see poorly drafted offer letters. [00:07:00] Hopefully, it allows you to stay away listeners from falling into those traps.

Michael Wertheim:

So offer letter, you're putting it together, big deal for the employee, what are they looking for? Number one... Well, let's be honest. Number one, they're looking for how much they're getting paid. That's a given. But we'll come back to that. What they're looking for is when are they starting. What do you want to put in there? You want to put what's their start date. You want to get into some but probably not all job details. So in terms of pet peeves, maybe it gets your goat, [00:07:30] Brian, to use a turn of phrase as I think you artfully have put forth a few. We don't need the full job description, but some of the job details like the title. What's the job title going to be? Are they a full-time or a part-time employee? So that job status. Potentially what their work schedule is going to be so they have some sense of, hey, does this fit with my lifestyle and am I going to achieve the work-life balance that I expect from this job.

You might want to put the [00:08:00] location, particularly if you have in-person requirements versus if the person's going to be working remotely or from home and whether or not there could be some hybrid model there. You might want to put in the title of their manager or the person that they'll be reporting to and whether they are exempt or non-exempt, which is a distinction that's incredibly important in California because there are requirements for whether an employee can be classified as an exempt employee, [00:08:30] meaning they're not entitled to overtime because they're paid a salary that's above a certain threshold and they do certain things that require independent judgment. So those may be the box checker, avoid confusion, but just the basic pieces of information that makes sense in a letter and frame up here's the job. But now let's get into what the employee really wants to know. It's all the other goodies, right?

Brian Kelly:

Yeah. Show me the money. [00:09:00] Compensation. Okay, be very clear as to what the base compensation is. And using a segue from the last subtopic Michael discussed, exempt versus non-exempt. For exempt employees, you better make sure that base compensation is salary and not an hourly figure because if you're exempt, one of the requirements is you have to be paid on a salary basis for the most part. So that would be an easy first way to screw up.

And then to the extent that there's anything in the job's [00:09:30] compensation that will be part of the minimum wage paid, like meal, lodging, other allowances, be sure to call those out so that you get credit towards their inclusion for the minimum wage. Beyond base compensation: incentive compensation. Many positions are eligible for some form of incentive compensation, whether that is commissions for sales positions or for oftentimes corporate staff there's [00:10:00] perhaps an annual discretionary bonus or maybe for some other corporate functions there's a monthly performance bonus, something like that.

Now to the extent that you have as an employer a formal bonus or commission plan, then it's not incumbent upon you to list out every single detail that's in that plan. You may simply note the fact that their target incentive compensation for a given performance [00:10:30] period will be X dollars, but you should be cross-referencing that formal plan to make clear that their eligibility to earn that target compensation is subject to all the terms and conditions of that other plan. So what's a pet peeve in this area? Something that really is a kick in the shin when I'm reviewing a poorly drafted offer letter. It would be a very basic short sentence that says something like, the company will pay you an annual bonus of \$15,000.

Now reading [00:11:00] that, an employee might think, wow, I have a guaranteed bonus every single year, when in fact the employer has an annual discretionary bonus that is subject to continued employment on a given date. May fluctuate based on company performance, employee performance. But if all you're saying is the company's going to pay you an annual bonus of 15K, well, you might have a dispute on your hands come next year when that employee is not getting that exact amount. And remember, [00:11:30] incentive compensation just like base compensation is capital W wages for federal and state law purposes. And in episode one, Michael and I talked about the parade of horrors that happens in California especially when you have potential unpaid wage claims. So you want to get that right.

And further down in the weeds some things to think about. If someone is hired mid-year and is eligible for incentive compensation, you should probably make clear [00:12:00] whether the treatment in the first year is pro rata for their target incentive compensation or not. Or maybe they're not eligible at all during the first year and they're only eligible come their first full year of calendar employment the next January 1st. If you're not spelling out those details, if you're leaving important details out, if you're ambiguous, you should not be surprised if later on you're getting a claim from one of those employees that they're owed money that you haven't paid them.

Michael Wertheim: Yeah, there's a lot of specific ways things [00:12:30] can turn awry, but again, balancing... This is the moment to indicate the value proposition of the job offer to the employee. The hope at this point is you've made it through the interview process and you're making this offer because you want this employee. What you don't want to do is turn them away with a tome. A 15-page offer letter

would also be confusing. If you receive that, like okay, this is a weird contract I'm looking at. So finding that balance between [00:13:00] where less is more and where you need to have more because otherwise you're not putting enough in there and it could harm you. I mentioned contract. It's not a contract, but it's like one. You're making a job offer and hopefully, they accept it. And the terms are important, they're going to rely on these.

And there's even a labor code statute dealing with... Detrimental reliance is a concept you learn in your first year in law school about making an offer that somebody relies [00:13:30] on to their detriment and then you end up pulling the plug on it and then they've expended a bunch of money or incurred damages as a result of that reliance. In California, if you lure someone from another state and they rely on your promises and they've moved and uprooted their entire family, there is a cause of action for that. So wanting to put that in perspective in terms of making the offer, making it clear enough that you're not over-promising and under-delivering, but also putting enough out there that says, hey, this is a job you want. [00:14:00] So a bunch of caveats, but important enough that if you have specific compensation more than just hey, you're making X dollars per hour. You want to be careful about how you word that, right?

Brian Kelly:

Exactly.

Michael Wertheim:

Yeah. Another area that employees are going to want to see and employers are going to want to touch on in an offer letter or at least a robust offer letter, is going to be benefits. Because in addition to just the cash money that you receive, benefits can go a long way to incentivizing employees, [00:14:30] retaining employees. So those are going to be things like what sort of health coverage is offered. Again, not the full plan document, but whether there is even full coverage and whether that's included, whether you have a 401(k) matching program, something like that that employees can take advantage of, whether the employee will be entitled to paid time off or certain amounts of vacation. And of course, there are specific laws [00:15:00] with respect to sick leave in California that are going to be baseline. But if you want to go above and beyond those amounts, those are going to be potentially things that you'd want to put in the offer letter.

Again, these are employee incentives or employee benefits that people look favorably on. If you have a good policy, you want to put that out there. I guess I'll stop there. And I touched on this a second ago, but why put any more detail than what we've just discussed? I don't know. [00:15:30] I mean, maybe as lawyers we get a little worried about are we putting ourselves in a bind by telling employees you're going to be entitled to say a 401(k) matching. And then the company has a down year and that's no longer a very attractive thing for the company, they may not have the money to pay it. Or you referred to a bonus that somebody's planning on and banking on. They're going to go buy a certain thing for their spouse and then all of a sudden that money's not there and the

company's like, "Oh, why did we promise it?" So [00:16:00] why put that in the letter?

Brian Kelly:

So fair question. And here I think making sure your offer letter includes choice adjectives or adverbs and other qualifying phrases can really help protect the company. So using your example, Michael, the company is offering a 401(k) match this year, the year in which the employee joins. Very possible it's not going to be offered in the future year. So what language would you want to make sure to include in that provision of the offer letter? The company [00:16:30] currently or initially offers a 401(k) match subject to the current terms of the 401(k) plan. So the company is not in this offer letter provision altering the flexibility it otherwise enjoys under the formal plan document. So just thinking through how you can add some choice adjectives, adverbs, and other qualifying phrases to protect yourself while still being clear [00:17:00] enough to the employee, here's a material inducement for you to take the job. We're not making any promise it'll be around forever, but here's what we currently do.

Michael Wertheim:

That's the good lawyer stuff right there. That's the lawyerly phrases, whereas you said, the choice adjectives and words.

Brian Kelly:

That's why we paid all that money to go to law school, Michael. Moving on. This is I think a lesser-known provision, but I think an especially helpful one in a jurisdiction like California where non-competes are impermissible, unlawful. The provision I am [00:17:30] talking about is a non-disclosure of prior employer's confidential information. I often like to see in an offer letter a statement that in accepting this job with company X, you represent, new employee, that you are not bringing over any confidential information from a former employer, and that there's no expectation that you do so. We prohibit you from doing so. Including that statement protects the company from a claim that it knowingly [00:18:00] welcomed an employee in the door who is violating its obligations to a former employer.

And remember that former employer, if we're dealing with someone in California who's switching from a California job to a California job, could never enforce a non-compete. So what's that former employer's only recourse? It's a breach of confidential information. And if that former employer can prove that your company, new employer knowingly allowed an employee to come in and use [00:18:30] or even expressly asked that new employee to use the former employer's information, you may be facing liability too as the new employer, not just the employee who moved over. So that's why I like putting this provision in. It really sets the expectation that this is a fresh start. We're not asking you to bring anything over. Conform your behavior accordingly.

Michael Wertheim:

Right, sort of a prophylactic step. Now you said never enforce non-competes. There's a couple of exceptions, right? If you've sold to goodwill in a company you're... There may be some contractual [00:19:00] limited circumstances, but in general and broad strokes, we're in a world where non-competes are going to

be seen incredibly disfavorable within the courts and probably unlawful based on current reading statutes. In dealing with this promise of employment, the pseudo contract nature of the offer and... What about at-will employment? What happens if this employment relationship needs to end? Not all relationships last forever and [00:19:30] in the employment space, people move around. So the baseline in California is called at-will employment. This is a concept that you are free to leave whenever you want and the company is free to let you go whenever you want for any reason or no reason at all, so long as the reason is not unlawful. So you have unlawful reasons like protected categories and discrimination, or retaliation as a result of some protected activity, that would be unlawful. But for any [00:20:00] other reason, they don't like your face-

Brian Kelly: Hold on, hold on. Let's not dig in too far in that example.

Michael Wertheim: It could be they don't like your attitude. Maybe that's better.

Brian Kelly: Yeah, that's okay.

Michael Wertheim: Essentially they don't need a reason and you don't need a reason to quit. I mean subject to some contractual reason, you don't even need to give notice. Now, there may be other moral reasons or bridge-building reasons not to do that, but the concept is you can go whenever you want. That's usually [00:20:30] in an offer letter because you want to expressly put out front, hey, there's no promise of continued employment on a go-forward basis. The company reserves rights to modify those terms. You might even, and you see this in some offer letters as probationary period, which in some ways... I'm not sure it's saying much. You're signaling to the employee maybe that there's a probationary period under which... There's the belt and suspenders saying this isn't a promise forever employment, for employment forever rather.

But [00:21:00] there are certain jobs where there's technical skills involved. And as much as the interview process can make you believe an employee knows what they're doing, sometimes things just don't work out. And so having a probationary period can be useful in signaling to employees this is a period in time that we'll be looking to see if this is a more permanent relationship. You might also have separately probationary periods for whether benefits accrue, and that's separate from what I'm talking about here.

Brian Kelly: Anecdotally, Michael, [00:21:30] I think probationary period clauses are getting a little antiquated because I think there's a growing recognition that even with a probationary period, 90 days, six months, what have you, it doesn't change the fact that employment is at will both during and after that probationary period. So what legal purpose does it really serve other than to perhaps set the employee's expectations that they really need to prove themselves early on in the relationship? Some may [00:22:00] argue that it creates a false implication that after the probationary period closes, the employee is insulated from performance management. We know that not to be the case. So query what

purpose is your probationary period clause serving, if any. All right, now tied into the notion of at-will employment is for some senior employees in your company, you may need to offer them severance eligibility in order to lure them over or they occupy such a senior position that [00:22:30] it's market standard to offer severance upon certain triggering events.

Now, pet peeve with severance provisions, something that really gets under my skin, sets me off so to speak is severance provisions that do not clearly define what the triggers for severance are. Or God forbid even worse, say that you get your severance without the condition that you first sign a release of claims, really giving away the farm for nothing in exchange. [00:23:00] So let's double-click on both of those concepts. First, what are the triggers for severance? A couple of different conceptions here. The most common one being that you get severance if you are terminated without cause. Now I would highly recommend that cause be defined, otherwise there will be ambiguity as to what is meant by cause. Does cause include performance? Does it not include performance? Does it only include misconduct? Does it only include [00:23:30] misconduct at work or could it also include misconduct outside of work? You can imagine all the different permutations that a cause definition can take on, so we recommend you work with us to help define that.

Another possible trigger for severance is a resignation by the employee for good reason. Now a standard good reason definition has a few prongs, one of which might be a material change in job title or base compensation to the employee's detriment or a requirement that they change [00:24:00] work locations by say more than 50 miles or a breach of the employment agreement by the employer. If it's the case that you want to offer that, again, very important that you define good reason specifically. And then going back to what I said, the thing that really pushes my buttons is when you have a severance provision that just says if that trigger occurs, you get X severance. You've got to say that it's subject to [00:24:30] signing a release, the release becoming effective, and the employee complying with any continuing obligations to the company such that... Let's just imagine employee is terminated without cause, they sign their separation agreement with the release, but then they go use or disclose all of your confidential information in their new job.

Well, wouldn't you be pretty bummed if you were still on the hook for paying severance? Well, not if you expressly state [00:25:00] in the severance provision that they must comply with their continuing obligations to the company in order to get that severance, which then would probably be reflected again in the separation agreement that they have to sign to get it. So just thinking through what are we giving away here and for what.

Michael Wertheim: Right. I keep thinking about from the litigation perspective, this offer letter becoming an exhibit in court. And it's a weird dichotomy because this could be used against you. I want to go back to the hopeful view that that's [00:25:30] never going to be a problem. The offer letter represents something really lovely. It gets framed and put up in someone's office. That's the hope here. You've

dealt with benefits, other goodies that are in there. Just a couple of details that may be important. I-9 requirements and work authorizations if applicable to a particular job, or any job really, certain things that they're going to need to do. If you're going to do a background check, reference check, or some sort of drug [00:26:00] testing that's applicable to the job, those are things that you don't need to put the entire plan or policy in there because there are certain rules like Fair Credit Reporting Act and other addenda that may be attached. But reference to those things, it's important within the letter.

The other thing is then are there ancillary agreements that are going to be needed? So are they going to be signing a concurrent confidentiality agreement? Are you going to be offering a mutual arbitration program in the event [00:26:30] that there is a dispute? On a future episode, probably the next episode we'll dive into arbitration agreements in more detail. But these are important foundational documents at the beginning of that employment relationship that should be referenced in the employment letter if you're going to be using them. Right, Brian?

Brian Kelly: Yeah. You don't want to make the offer of employment not mention those agreements. Have someone sign the offer letter and then come day five of employment, you tender them the confidentiality agreement, mutual arbitration agreement, and the employee says, " [00:27:00] What the heck? You never told me these would be required." Now we can cross that bridge if we get there, but why not just specify that all up front in the offer letter? Say that, to accept employment you not only have to sign the offer letter but you have to sign these other agreements and return them at the same time too. It's part of the onboarding package, so to speak, of key agreements that will live in their personnel file.

Michael Wertheim: And then, of course, what law governs. In general, it's going to be California law. California has a statute Labor Code 925, [00:27:30] which actually prohibits the use of... or the requirement that the employment be governed by some other state's laws unless the person is represented by counsel. So there's a process there, but otherwise, it's going to be under California law. In conclusion here that the offer letter is not going to replace other legal requirements and notices that need to go out. So workers' compensation, SDI, paid family leave, any other notices that are at the beginning of the [00:28:00] employment relationship, it's not going to be replaced by the offer letter but rather will be supplemented. Wow, we've covered a lot of ground here in terms of what might or might not be in an offer letter. Let's apply this to the pop culture corner and see how this can play out in the entertainment real world.

Brian Kelly: Yeah. It's time to turn eye towards a show that I hope most of our listeners know and love, which is The Office. Michael, why [00:28:30] don't you take us through what we think is probably the best example of a poorly defined offer in an offer letter?

Michael Wertheim: So The Office which provides fodder for what could be an entire season of podcasts just doing employment law review of The Office and the antics therein. But in the early seasons, Dwight Schrute, who is a paper salesman, is informed that he's the assistant to the regional manager Michael Scott. And we can [00:29:00] imagine a scenario where his offer letter, there's some confusion as to whether is he the assistant regional manager or is he the assistant to the regional manager. The discussion in the show is quite hilarious because Dwight tries to use it to assert power as the assistant regional manager, but he's the assistant to the regional manager. So how could this unfold and how could this impact an employee's view of their job, the authority that they have?

Brian Kelly: Yeah. [00:29:30] I think the troubling thing is we may never know whose fault it was. It's easy to imagine Toby in HR sleepwalking his way through drafting the offer letter and perhaps inadvertently leaving out the critical to the regional manager and just putting assistant. It's also easy to imagine Michael Scott getting out over his skis in the interview and promising a lofty position to Dwight that in fact didn't exist. But we know that this was crippling issue for Dwight [00:30:00] and he potentially never recovered from it in the eyes of his coworkers.

Michael Wertheim: Right. Because you can imagine the assistant to the regional manager could be seen as more of like a personal assistant. Rather than the second in command, in the event of his demise, was Dwight going to step in. And certainly, Dwight thinks that he should and he wants to assert his authority over his coworkers. A critical to the, two very small words that could have changed the course of history [00:30:30] in the correct offer letter.

Brian Kelly: Yeah. Let's maybe have some sympathy for Dwight. He could have genuinely in good faith thought I am the assistant regional manager because there was a faulty offer letter.

Michael Wertheim: All because of the offer letter.

Brian Kelly: That's the takeaway. All right, Michael. Well, that wraps it up for episode two. Thank you again to everyone for listening. And we look forward to coming back to you next time, on the topic of arbitration agreements.