Non-Disparagement Tips for Employers

Sarah Sawyer: Welcome to this week's OK at Work with myself, Sarah Sawyer, my colleague Russell Berger, both attorneys at Offit Kurman, and today we are talking about non-disparagement as it relates to exiting employees. So this is a term that folks might hear a lot in the context of separation agreements and just in general when we're talking about how we communicate about other people and the risks associated with that. It's something to always be considering in those contexts because a lot of times both an employee and a company might have motives to want to make sure that no one's talking about each other if ending maybe on less than desirable terms or even when you're ending on desirable terms, there may be an interest on both sides to not want the other to say things about each other, in the negative light. So what are some things that employers should be considering when it [00:01:00] relates to non-disparagement, Russell?

Russell Berger: Yeah, a quick point of distinction, there's disparagement and there's defamation, and disparagement basically means saying something bad about somebody.

Whereas defamation means saying something untrue about somebody. That's an important distinction because if you don't do anything at all the law doesn't prevent people from saying or writing or expressing, negative thoughts or negative opinions about somebody or even truthful facts that are negative for somebody.

But what the law does prohibit is defamation, which is, falsehoods, injurious falsehoods, as we would say in law school about somebody. That's what's prohibited as a baseline, starting point. So some could say, this company stinks. I don't like it. I don't like their culture. None of that, that's might be disparaging, but it's not inherently defamatory. You may want to consider particularly if you're talking about like higher level executive type employees, if you have a separation agreement, you want to have, some sort [00:02:00] of non-disparagement provision.

And oftentimes those end up being mutual. The departing employee, can't say anything critical of the business. Its customers, its product, it's services, it's employees, what have you. And in return the business can't do the same thing to the employee. Now, when you do that, you've got to be conscious of the fact that, if you have a business with 200 employees, you can't be responsible for 200 employees and what they may or may not say.

So you gotta be careful in the drafting to limit it to an executive team or, specified managers or whoever that might be, so that the restriction is not so broad as to make it totally unenforceable. But, I think those are important considerations because, someone could just give opinions, which can't be defamatory by definition and could cause you a lot of damage.

So I think being protective against, the bad publicity from someone who is formerly on the inside is oftentimes worthwhile.

Sarah Sawyer: It also can be complicated by just internally as well. Often when someone's departing, there [00:03:00] might be questions about that departure from other employees, people wanting to know more information.

And depending on whether you entered into a non-disparagement agreement. And then also just from a practical perspective, there's reasons to provide limited amounts of information as it relates to what might have happened and the characterization of that. And trying to strike a balance in every situation is very unique.

I think in circumstances around the dynamics, depending on who the person was and what you should share and how you should share it. So it's just something to be really mindful of, especially when you have something in a contract, like a separation agreement or severance agreement that it relates to non-disparagement.

And why you're tripping that wire, so to speak, especially if you're in leadership at a company or you're in that management structure, often you will be the part of the group that's covered by that agreement, it might not be every employee in a thousand person company, but it's likely to be the people at the top who were the direct managers or folks that interacted with that person that have the most [00:04:00] restrictions.

So something to consider, it's always good to have a messaging plan in place when anyone is departing, whether it's good terms or under bad terms or somewhere in between something more neutral or whatever it might be, just to figure out that change management plan and how to handle that and be mindful that both when signing the agreement and then after signing an agreement or agreeing to some types of non-disparagement terms as well.

Well, thanks Russell. We'll see you next time.

Russell Berger: Thanks, Sarah.