

Making a Difference

Long Term Care Newsletter

BAKER DONELSON

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Issue 1, 2013

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Proper Use of Letters of Intent

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The parties to purchase or lease transactions involving long term care facilities frequently sign letters of intent¹ as a preliminary step in completing the transaction. Drafted carefully, letters of intent enhance the negotiation phase of the transaction process. On the other hand, poorly drafted letters of intent may lead to claims of breach of oral, written or implied contract, fraud and misrepresentation.

Letters of intent serve a number of important functions. They can give both parties comfort that the other side is motivated to complete the transaction. They can also focus the negotiation by defining a number of deal terms on which the parties have agreed, as well as highlighting areas where further negotiation will be necessary before the parties can enter into a definitive agreement. Typical deal terms included in a transaction letter of intent include the purchase price and how it's to be paid, assets to be acquired, non-competition terms, financing contingencies, exclusivity of dealing, confidentiality and a closing date.

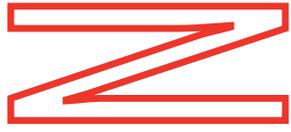
Letters of intent pose some level of legal risk and should not be entered into without careful consideration. For example, a poorly drafted letter of intent may, if negotiations break down, allow one of the parties to take the position that the letter amounts to a binding contract rather than a statement of intent, thereby entitling it to damages for breach by the other party. When that happens, litigation often will result, and a court will have to interpret the legal effect of the parties' words and actions. Unless the letter of intent is clearly written, the fact that the parties contemplated the later execution of a definitive agreement will not necessarily mean a court will find that all prior agreements between them were merely unenforceable negotiations. See, *Texaco; W.R. Grace & Co.-Conn., et al. v. Taco-Tico Acquisition Corporation, et al.*, 216 Ga.App. 423, 454 S.E.2d 789 (1995) (GA).

Binding vs. Non-binding Provisions

Although buyers and sellers frequently refer to letters of intent as being "non-binding," certain provisions of the letter of intent *should be binding*. The following provisions, customarily found in letters of intent concerning the purchase and sale of long term care facilities, generally should be binding:

- Exclusivity – Strategically, a buyer will want the exclusive right to negotiate with the seller for a certain period of time. Otherwise, the seller would be able to shop the deal to others, resulting in a possible bidding war or auction-type process that drives the purchase price up and increases transaction costs. If its negotiating leverage will allow, a buyer should insist on a binding exclusivity provision in the letter of intent that lasts for some reasonable period of time to allow the parties to hammer out the definitive agreement terms. The challenge for the draftsman is to specify what exactly is covered by the exclusivity provision. From the buyer's perspective, it should prohibit the seller from actively soliciting offers as well as receiving proposals. From the seller's perspective, the exclusivity provision of the letter of intent should allow the seller to negotiate with a third party when necessary to allow the Board of Directors to comply with its fiduciary obligations to the seller.

¹ Letters of intent may be referred to in a given transaction as an expression of interest, term sheet, memorandum of understanding or other name. Although parties may intend subtle differences with these terms, for simplicity of reference, this article will refer to all such writings as letters of intent.



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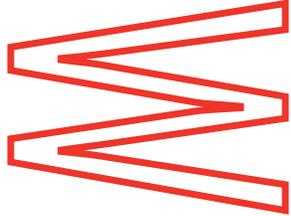
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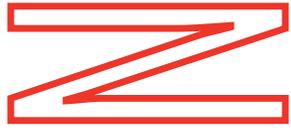


- Confidentiality Covenant – The seller of a long term care facility generally wants to keep negotiations confidential for as long as possible to prevent its employees from becoming preoccupied with the ramifications of the sale and to maintain their loyalty. From the seller’s perspective, the letter of intent should specify one individual at the seller’s business through whom all of the buyer’s requests for information are to be channeled, and the letter should flatly prohibit the buyer from contacting any of the seller’s employees prior to a pre-determined stage in the transaction (usually after execution of a definitive agreement and a public announcement of the proposed transaction).
- Non-Solicitation Covenant – During the course of its due diligence, a buyer often will learn information about specific employees of the seller, whether on its management team or at the facility. The seller will want to include in the letter of intent a binding provision that in the event the transaction is not consummated, the buyer is prohibited from soliciting or hiring the seller’s employees. A buyer will seek to limit the general non-solicitation prohibition by allowing the buyer to hire employees of the seller in connection with any generally advertised job postings.
- Standard Applicable to Negotiations – Some courts are reluctant to find an implied duty on parties to negotiate in good faith. Accordingly, the letter of intent should expressly state whether the parties are required to negotiate in good faith for some period of time, after which either party may terminate negotiations for any reason. In the event of such a termination, the letter of intent should state that the confidentiality and non-solicitation covenants survive the termination for some period of time.



As for those business terms that the parties do not intend to be binding, the letter of intent should expressly disclaim any contractual effect regarding those specific terms. To prevent any misunderstanding concerning the binding and non-binding provisions of the letter of intent, the provisions that are intended to be binding and enforceable should be physically separated from the non-binding provisions of the letter by laying them out in a separate part of the letter. The letter also should contain a separate paragraph that specifically states which of the binding provisions survive expiration of the letter of intent, and for how long.

When drafted casually or loosely, letters of intent can create confusion and uncertainty and lead to litigation. When drafted carefully and deliberately, letters of intent can focus the parties’ attention and streamline the entire negotiation process.



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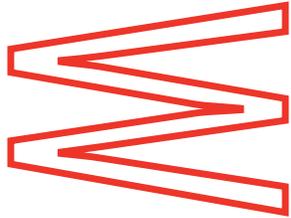
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NLRB Takes Aim at Non-Union Employers

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The National Labor Relations Board (NLRB) recently handed down a series of decisions that challenged the fundamental tenet of the employee-employer relationship: at-will employment. This new affront came on the heels of a decision several months ago which rendered unlawful the confidentiality requirements that many health care employers follow in conducting internal investigations. Although it is not clear whether the NLRB will prevail in its most recent challenge to the at-will relationship, what is clear is that the NLRB is taking aim at non-union employers.



Most employers have a disclaimer in their employee handbooks confirming that their employees are employed on an at-will basis, meaning that either the employee or the employer may terminate the employment relationship at any time with or without cause. To ensure that the at-will employment relationship is not altered by the words or actions of lower level managers, employers typically include language in their handbooks stating that the at-will relationship cannot be modified without the express written approval of a senior company executive. In a string of recent cases, the NLRB has taken the position that the “cannot be altered or modified” disclaimer language is a violation of Section 7 of the National Labor Relations Act (NLRA). Section 7 of the NLRA gives employees the right to engage in protected concerted activity in order to improve their working conditions. In *American Red Cross Blood Services, Arizona Region and Lois Hampton*, No. 28-CA-23443 (2/1/12), an NLRB administrative law judge found the American Red Cross Blood Services’ handbook unlawful because it included the statement, “I further agree that the at-will employment relationship cannot be amended, modified, or altered in any way.” The judge ruled that such language was unlawfully overbroad and acted as a waiver of the employee’s right to advocate concertedly to change his or her at-will employment status. While the NLRB has clarified that it is not holding that all at-will language is *per se* unlawful, it has made clear that such clauses will be scrutinized closely on a case-by-case basis.

In a bit of good news for employers, the NLRB’s General Counsel recently released an analysis of at-will employment clauses in two employment handbooks and concluded that neither violated the NLRA. See Advice Memoranda of the Office of the General Counsel, Nos. 28-CA-084365 and 32-CA-086799 (10/31/12). Employees at Rocha Transportation, a California-based trucking company, and SWH Corporation, doing business as Mimi’s Café, an Arizona restaurant, each filed charges with the NLRB alleging that the at-will employment clauses in their employee handbooks defined at-will employment so broadly as to cause them to believe that they could not engage in activity protected under the NLRA.

Rocha Transportation’s handbook advises employees that their employment is at-will and may be terminated at any time. It further states that “[n]o manager, supervisor, or employee of Rocha Transportation has any authority to enter into an agreement for employment for any specified period of time or to make an agreement for employment other than at-will. Only the president of the Company has the authority to make any such agreement and then only in writing.” Likewise, Mimi’s Café’s handbook states, “[n]o representative of the Company has authority to enter into any agreement contrary to the foregoing ‘employment at will’ relationship.”



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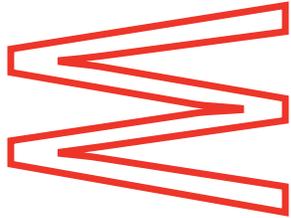
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The NLRB's Division of Advice concluded that each handbook's language was lawful. Respecting Rocha Transportation, the NLRB reasoned that because the employer's at-will employment clause explicitly states that the relationship could be changed, employees could not reasonably assume that their NLRA rights are prohibited. Respecting Mimi's Café, the NLRB concluded that its at-will clause passed muster because it did not require its employees to refrain from seeking to change their at-will status or agree that their employment relationship could not be changed in any way. Rather, it merely stated that the company's representatives are not authorized to change it.



Due to the fact that this area of law remains somewhat unsettled, the NLRB has asked its Regional Offices to submit cases involving employer handbook provisions that restrict the future modification of an employee's at-will status for further analysis. Employers should review the at-will disclaimers in their employee handbooks to ensure that they do not contain a provision which eliminates any possibility of modifying the at-will relationship.

In another recent bold move, on July 30, 2012, the NLRB issued a decision that affects how all employers (not just those with unions) conduct human resources investigations. It is standard practice for many human resources professionals to instruct employees to maintain the confidentiality of internal investigations. Employers often have legitimate concerns that if employees talk to each other about an investigation, not only could it cause unnecessary disruption in the workplace, but also that as a result employees may have the opportunity to align their statements or even conceal evidence. There are also valid concerns of protecting the accused employee from stigmatizing allegations should those allegations ultimately prove to be false. The NLRB has, however, made it clear that the practice of routinely instructing employees to keep investigatory interviews confidential violates the National Labor Relations Act.

In *Banner Health System d/b/a Banner Estrella Medical Center and James A. Navarro*, 358 NLRB No. 93 (7/30/12), the NLRB challenged a health care company's practice of requiring all employees who participate in an internal investigation to keep the contents of the investigation confidential and not to discuss it with other employees. The NLRB ruled that "the [Employer's] generalized concern with protecting the integrity of its investigations is insufficient to outweigh employees' Section 7 rights... [I]n order to minimize the impact on Section 7 rights, it was the [Employer's] burden to first determine whether in any given investigation witnesses needed protection, evidence was in danger of being destroyed, testimony was in danger of being fabricated, or there was a need to prevent a cover-up." The NLRB held that the employer's "blanket approach clearly failed to meet those requirements."

The practical application of the NLRB's ruling dictates that employers cannot, as a matter of course, instruct employees to maintain the confidentiality of investigations. Instead, confidentiality instructions should only be used on a case-by-case basis, when warranted by particular facts.

These decisions make clear that the NLRB is moving swiftly and boldly to make itself relevant to non-union workforces. Given the results of the recent election, we expect the NLRB to continue to target the policies of non-union employers for the foreseeable future. As a result, employers should review their policies and employee handbooks with the assistance of their counsel to ensure that they are narrowly tailored to withstand the NLRB's scrutiny.



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In the Trenches

Chattanooga Team Closes Bridge Loan

Members of Baker Donelson’s Long Term Care Transactions Team served as lender’s counsel on a \$30 million nursing home loan for one of the industry leaders in bridge-to-HUD financing. The Firm was hired to develop a model bridge-to-HUD lending template for skilled nursing and assisted living facilities. The bridge loan program was designed to support our client’s HUD agency lending by providing an interim credit facility for projects that are not yet eligible for the HUD 232 program. Members of the Long Term Care Transactions Team participating in the transaction were Mary O’Kelley, Rich Faulkner, Jim Levine and Claire Tuley.

Attorneys Obtain TRO, Halt Closure of Nursing Home

In a rare victory against the government for nursing home providers under the Special Focus Facility designation, Baker Donelson attorneys obtained a Temporary Restraining Order enjoining a state Medicaid agency and state Department of Health from involuntarily discharging Medicaid residents from a skilled nursing facility.

While this was only the first step in a long process, it is rare for nursing home operators to receive an injunction, and most nursing homes in the client’s situation are summarily closed prior to a hearing on the merits. The result impacts approximately 100 residents and 100 employees at the facility.

The Firm is continuing its efforts on behalf of the nursing home to prevent discharge of the residents until a hearing on the merits. In addition, members of the Long Term Care Industry Service Team are challenging the government survey findings in separate administrative actions on the federal and state levels. Baker Donelson attorneys working on this matter are Gary Edwards, Rich Faulkner, Amy Mahone, Christy Crider and Carrie McCutcheon.

Jackson Team Obtains Directed Verdict

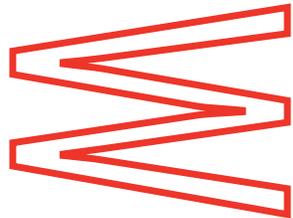
In February, Davis Frye, La’Verne Edney, Barry Ford and Brad Moody obtained a directed verdict in a nursing home negligence case for a client in Mississippi. The plaintiff alleged that the nursing home neglected an elderly resident, allowing her to develop a pressure ulcer on her sacrum measuring 10 cm by 9 cm. The court granted a directed verdict based on inconsistencies in the testimony of the plaintiff’s expert witnesses, who disagreed on the cause of the ulcer.

Jackson Teams Obtains 12-0 Defense Verdict

In December, Brad Smith, La’Verne Edney and Jeremy Clay obtained a 12-0 defense verdict in a nursing home negligence case a client in Mississippi. The decedent was a resident of the client’s facility for 13 days between two hospitalizations, and the plaintiff alleged that the nursing home’s negligence resulted in dehydration, fecal impaction and death. The plaintiff blamed her severe dehydration on the staff not giving sufficient fluids. The defense argued that the decedent’s condition was caused by progressive dementia and Alzheimer’s; the decedent had end-state Alzheimer’s that was charted by many doctors and the death certificate listed Alzheimer’s as the cause of death.

New Orleans Team Appeals Notice of Deficiency

Monica Frois, Brandy Sheely and Margaret Silverstein successfully appealed a Notice of Deficiency issued to a long term care client on a staffing requirement in a matter of first impression in Louisiana.





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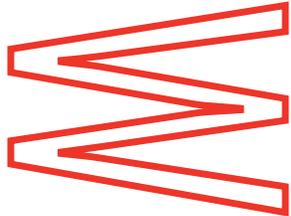
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Join Us For Our Monthly Long Term Care Webinar Series



- 6.11.2013:** How to Prevent a Punitive Damages Verdict Against Your Long Term Care Facility
- 7.16.2013:** Financing and Acquisitions in Today's Marketplace
- 8.13.2013:** How Can the HUD LEAN Program Help Your Long Term Care Company?
- 9.10.2013:** What You Need to Know About Government Investigations of Long Term Care Facilities
- 10.22.2013:** Top 10 Employment Law Mistakes Long Term Care Employers Make
- 11.12.2013:** Early Resolution with Families of Your Long Term Care Facility's Residents
- 12.10.2013:** Corporate Compliance, HIPAA and Privacy for Your Long Term Care Facility
- 1.14.2014:** How to Conduct Effective Internal Investigations



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