

Getting the Most Out of a Talent Agreement

By Sally A. Buckman and Jean W. Benz

Imagine this: Your company has expended substantial time and resources to train and market your new on-air talent. The hard work has paid off and her ratings are going sky high, bringing more advertising dollars into your company. Your advertisers are pleased and you are too. Suddenly, she quits, and takes her name, her listeners, and those advertising dollars to your competitor across the street.

Alternately, picture this: Your on-air talent says something on air that alienates your advertisers. Although inflammatory, her statements do not provide a basis to terminate her for cause.

Nonetheless, your advertisers threaten to pull their ads if she remains on the air.

Unfortunately, these situations occur all too frequently in the media industry. However, by using a carefully crafted, well thought-out employment agreement for on-air talent, your company can account for and protect itself from scenarios like these as well as other potential problems with key talent.

First and foremost, it is critical to ensure that all on-air talent are covered by an employment agreement. Second, no matter how big or small your media outlet is, it is important to develop an agreement that is detailed enough to give you adequate protection in several areas.

Although most basic employment agreements will contain an employee's start date, salary, and benefits, we recommend including other provisions that are designed to provide your company with the ability to control its investment in talent and confidential information, as well as provide maximum flexibility in programming decisions.

Detailed Duties

First, an employment agreement for on-air talent should spell out the specific on-air duties an employee is expected to perform, and stipulate that all services must be provided under the employer's supervision, direction, and control. Further, to provide flexibility, an employment agreement should allow an employer the right to change the scope of an employee's duties and the hours of the employee's shift. Also, it is important not to overlook significant duties talent have to perform off the air, such as promotional appearances, meetings with advertisers, attendance at staff meetings, and other program preparation duties. Make every effort to include the full scope of the talent's duties in his or her agreement to avoid confusion and disputes down the road.

Exclusivity

To avoid a situation in which one of your star reporters gets a regular stint on a talk show broadcast by one of your competitors, include an exclusivity provision in talent agreements. This provision should specify that the employee cannot provide any services for any other entity involved in the electronic media without your prior consent. If you have agreed on certain limited outside services an employee can provide—such as voice-over work—these services should be spelled out in the employment agreement. For key talent, this provision should also prohibit the employee from discussing future employment with a third party during the term of the employment agreement. The exclusivity provision will assure company clearance before the talent engages in a business activity that may dilute the benefit your company receives from its relationship with the talent or tarnish your company's image.

Property Rights

It is also important to ensure that the employment agreement adequately protects your company's property rights. This provision should assure that both during and following the term of employment, the employer retains all rights to intellectual and other property conceived, created, or executed while the talent was employed. This provision will keep talent from retaining and possibly distributing or using tapes of programming as well as prevent them from taking popular bits, themes, ideas, or names developed during the term of the agreement to his or her next employer.

Pay or Play

A "pay or play" provision allows an employer to freely determine whether or not it will actually use the services of the talent or air a program on which the talent has worked. Under a pay or play provision, an employer is not obligated to use the talent as specified in his or her contract, as long as the employer continues to pay the employee his or her compensation. Thus, in a situation where you are committed to a long-term agreement and cannot terminate an employee without cause, you can decide not to "play" the talent—if, for example, your on-air talent alienated your

advertisers, and you wanted to take her off the air temporarily or permanently without incurring a breach of contract lawsuit.

Confidentiality

Including a confidentiality provision is necessary to protect your company from the disclosure of confidential information to which an employee may have had access during the term of his or her employment. This provision should require an employee or ex-employee to agree not to disclose any confidential information he or she may have obtained during the course of his or her employment to any third party without the employer's prior consent. The provision should also stipulate that all confidential information will remain the sole property of the employer. Finally, your agreement should provide you with the option to use equitable remedies, such as obtaining an injunction, to enforce a confidentiality provision.

Termination

One of the most important provisions in a talent agreement is the termination provision. A well-crafted termination provision will provide certainty to both the employer and the talent. The termination provision should specify whether you can terminate your employee without cause, and if so, how much notice and/or severance pay would be required.

Also, the agreement should set forth as much detail as possible in describing the circumstances under which an employee can be terminated for cause. Such circumstances should include continued incapacity, theft, use of alcohol or drugs during working hours, insubordination, substantial neglect of duties, and failure to comply with the employer's policies. The agreement should make clear that an employee terminated for cause receives no severance or other payment with the exception of compensation accrued before the date of termination.

Covenant Not to Compete and Right of First Refusal

Losing highly rated and gifted talent to a competitor can be costly, both in terms of economics and image. One way to avoid this outcome is to include a covenant not to compete provision in the talent agreement, pursuant to which the talent agrees not to provide the same type of services to a competitor for a specified period of time and within a specified geographic area. Unfortunately, there has been a push in many state legislatures recently to prohibit broadcasters from enforcing covenants not to compete against talent, and a few states have enacted such prohibitions. (For a summary of certain legislative initiatives, see "Noncompetition Provisions in Media Industry Contracts" by Peter M. Gould, *The Financial Manager*, Dec. 2002/Jan. 2003.) Another way to garner some protection for your investment in talent is by using a right of first refusal clause, which is commonly referred to as a "right to match." Generally, this provision provides that for a certain period before and after termination or expiration of a talent agreement, the talent will not enter into an employment or services agreement with a competitor without first providing notice of the offer to the employer and allowing a reasonable time for the employer to match the offer. The talent should be required to provide a copy of, or at least a detailed description of, the offer that is signed by the talent and prospective new employer. In addition, if possible, your employment agreement should provide that you are only required to match the financial terms of the offer (i.e., compensation and benefits).

As with a confidentiality provision, it is important for employers to have the ability to obtain equitable remedies, such as an injunction, to enforce a covenant not to compete and right of first refusal.

Indemnification

Media programming may expose both the company controlling the media and the talent to liability. An indemnification provision protects both parties to an employment agreement against the obligations and liabilities sustained as a result of the use of material provided by the other party. For example, as part of the talent agreement, an employer should require on-air talent to indemnify it for any claim or litigation brought as a result of material that the talent furnished for use on the air.

The Practical Effect of State Laws and Union Agreements

While the use of any of the provisions outlined above may help your company protect its investment in talent and property, such use also requires careful compliance with state laws. Each jurisdiction will have its own law regarding the legality and proper scope of any contractual provision. In addition, as the legal climate is never static, it is important to stay abreast of developments in the law. Further, many on-air talent are members of labor unions that have separate agreements with broadcasters and cable companies. Any employment agreement for

such employees should reference such union agreements and reflect any relevant restrictions they contain.

Sally A. Buckman is a member and Jean W. Benz is an associate of Leventhal Senter & Lerman PLLC in Washington, DC; sbuckman@ls-law.com and jbenz@ls-law.com.