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# Can an Employer Legally Withdraw a Job Offer after It's Been Made?

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**Question: Can an employer legally withdraw a prospective employee's job offer before that particular individual actually begins working at the company?**

It happens more frequently than one might think, but under a variety of different circumstances. There are many reasons why a company might rescind an offer of employment, such as: a candidate's criminal history, failed drug test, or unsatisfactory background check results; negative references; falsification of application materials; budget cuts; cancelled or postponed projects or contracts with customers; installment of a new executive; an eleventh-hour, about-face decision change by the hiring manager; belated realization of previously unnoticed or overlooked evaluation-altering information about the candidate; unfavorable post-offer experience or interactions with the candidate; and many others.

Whereas one situation may implicate certain legal considerations, another situation may require the consideration of a completely different set of legal issues and concerns. Some of these issues are discussed in prior posts by my colleagues—e.g., pre-employment drug screenings (here) and criminal background checks (here).

The focus of this post, however, is unique in that it relates to a legal issue that potentially cuts across the entire spectrum of reasons an employer may rescind an offer of employment—to wit, the employer's potential exposure to liability for damages suffered by the prospective employee in reliance on the employer's unfulfilled promise of employment. In New Jersey, this is a very real risk. There are, however, some simple steps and precautions employers and employees alike can take to mitigate their respective risks, better protect their respective interests, and overall mutually benefit parties on both sides of the prospective employment relationship.

The general rule in New Jersey—and in nearly every other state—is that employment relationships are, by default, presumed to be "at-will." This means that absent some agreement to the contrary, the employment relationship may be terminated at any time, by the employer or the employee, for any reason or no reason, with or without cause or notice, so long as the reason is not statutorily prohibited or otherwise unlawful (e.g., discrimination on the basis of the employee's membership in a protected class or retaliation for engaging in protected whistleblowing activity).

Generally, this means that when an employer makes an offer of at-will employment, the employer is free to rescind that job offer, for any reason or no reason at all, at any time, including the period after the potential employee has accepted the offer but before he or she begins work, without legal consequence. Even in the absence of a binding contract of employment or violation of some statutory proscription, however, the at-will employment doctrine is not an absolute shield to liability.

Sometimes, withdrawing the offer of employment before the prospective employee has started work may expose the employer to liability in an action by the employee for the damages resulting from repudiation of the offer (or, if already "accepted," termination prior to commencement of employment). In certain states, including New Jersey, a judicial exception to the at-will employment doctrine has been carved out for certain circumstances where an employer rescinds an offer of employment after the prospective employee has relied on that offer to his or her detriment, such as by leaving another job or moving.

In contrast, courts in other jurisdictions, like New York, have rejected such a claim as a matter of law, declining to make a distinction between the time period before and after at-will employment begins.

A cause of action for promissory estoppel is well-recognized under New Jersey law in the context of at-will employment generally and, in particular, arising from the revocation of an employment offer. New Jersey courts have applied the doctrine of promissory estoppel to such circumstances—where a prospective employee has left another job, moved, or otherwise incurred expense in reliance on an offer of at-will employment which the employer later rescinded or withdrew. See, e.g., Peck v. Imedia, Inc., 293 N.J. Super. 151, 167-68 (App. Div. 1996).

Depending on the facts in a particular matter, breach of a promise to hire an employee, even an "at will" employee, upon which a prospective employee relies, may give rise to an award of damages for breach of that promise under this doctrine. Id. at 162, 167. Thus, in Peck, the New Jersey Appellate Division held that even when a job is terminable at will, a promissory estoppel claim can arise from rescission or revocation of a job offer "where there is denial of a good faith opportunity to perform after a prospective employee has resigned from an existing position in reliance upon a firm job offer." Id. at 167-68; see also Bonczek v. Carter-Wallace, Inc., 304 N.J. Super. 593, 599 (App. Div. 1997) (same).

To recover against a former prospective employer on a theory of promissory estoppel in the job offer rescission context, the spurned employee must prove: (1) there was a clear and definite promise of employment by the employer; (2) the employer made the promise with the expectation the employee would rely upon it; (3) the employee reasonably did rely on the promise; and (4) he or she incurred a definite and substantial detriment as a result of such reliance. See Peck, 293 N.J. Super. at 165.

Although the factual nuances can vary greatly from one case to the next, at a basic level a typical scenario supporting such a claim may look something like this:

After several rounds of interviews and lengthy negotiations regarding the position, salary, relocation, and other details, a New Jersey employee ("Employee") is offered a management position with a Fortune 500 company at the company's headquarters in California. One of the company's hiring partners conveys the offer to Employee over the phone and mails a written offer letter detailing the position being offered, title, benefits, salary, location, supervisor, start date, a summary of the onboarding process, and other information. Employee accepts and mails back the signed offer letter.

Prior to Employee's scheduled start date, the hiring partner encourages Employee to put his New

Jersey home on the market, purchase a new home for him and his family near the company's corporate headquarters in California, make the necessary arrangements for the move, and give his New Jersey employer notice of his resignation. Employee does all of this only to receive a call one week before his scheduled start date at the new company rescinding the offer. At that point, Employee contacts his boss from his then-former employer in New Jersey with the hope of retaining or getting back his job, but it is too late as the position has already been filled and there are no other openings. Meanwhile, Employee has incurred tens of thousands of dollars in out-of-pocket expenses preparing for the cross-country move that is no longer happening.

Fast-forward six months, and Employee finally has managed to re-sell the property previously purchased in California at only a moderate loss, but still is not able to secure a new job until after another four months go by.

In the above scenario, if the employee did everything he was supposed to do and had no blemishes on his record, and if the hiring partner induced the employee to resign from gainful employment and sell his home while purchasing a new one in California, the availability of the promissory estoppel doctrine under such circumstances serves its essential purpose: to avoid the substantial hardship or injustice which would result if such a promise were not enforced.

When these situations arise, they can be a crushing blow financially (especially with the likely unavailability of unemployment benefits). The promissory estoppel doctrine tempers those harsh consequences by placing the aggrieved former employee or candidate back in the same position he or she would have been in had the relied-upon offer of employment never been made in the first place.

Thus, assuming Employee's reliance was reasonable and intended, Employee could recover damages consisting of lost earnings he would have received from his former employer had he not detrimentally relied on the promise, as well as the amounts spent for moving expenses and possibly money lost from selling real property at a loss.

There will always be times where employers want or may be legally required to withdraw previously conveyed offers of employment. Knowing that, what can employers do to best insulate themselves from these kinds of claims? While employers throughout the State should review their current hiring practices, policies and procedures, and work with experienced employment counsel to confirm these processes and update and revise them as needed, here are three starting points:

First, employers should be clear with candidates about any pre-employment screenings and other conditions precedent to actual employment that must be satisfied. If an offer is conditional, that should be clearly conveyed to the candidate. This will strengthen the company's defenses against potential job offer rescission claims brought by job applicants whose offers were withdrawn due to their failure to satisfy stated contingencies.

Second, when a conditional offer of employment is being made, the offer letter should clearly state that the prospective employee should not give notice of his or her resignation to his or her then present employer until he or she receives written confirmation that he or she has successfully satisfied all preconditions of employment.

In furtherance of this point, employers should implement appropriate policies and procedures to ensure that everyone involved in the employment process understands and abides by that same directive. No matter how clear an employer's offer letters and other employment forms are, all it

takes is one person from the employer to indicate prematurely that someone is safe to give his or her two weeks' notice for that applicant to have an actionable claim if the offer of employment is subsequently withdrawn. See, e.g., Schley v. Microsoft Corp., No. 08-3589 (DRD), 2008 U.S. Dist. LEXIS 96059 (D.N.J. Nov. 24, 2008) (despite clear and unambiguous language in offer letter that employment offer was conditional on successful completion of criminal background check, plaintiff had viable claim against Microsoft for revoking offer due to failure to satisfy condition where Microsoft hiring manager had pushed plaintiff to resign from previous job and search for new home across the country).

Third, offer letters should also state that the letter is neither intended nor should be considered to be a contract of employment for a definite or indefinite period of time, and that any employment offered is and solely will be employment at-will. The prospective employee or applicant should be required to sign and return an acknowledgment to this effect.

While all three of the above points are crucial to the analysis, employers should revisit their employment processes, procedures, and forms, and should work with experienced employment counsel to minimize risk in connection with the hiring process.

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