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Employee Retention Issues [PODCAST]

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In this episode of The Proskauer Benefits Brief, Proskauer partner David Teigman, senior counsel Nick LaSpina, and special guest Michelle Garrett, a principal at the compensation consulting firm Semler Brossy, discuss employee retention. It seems like there is an article almost every day talking about the “great resignation.” In a nutshell, there have been far more job transitions recently than there have been in the past. Tune in as we discuss what employers can do to help retain employees in this working environment.

Transcript Below

David Teigman: Hello and welcome to The Proskauer Benefits Brief: Legal Insight on Employee Benefits and Executive Compensation. I’m David Teigman, partner in the Tax Department at Proskauer and with me today is my colleague, Nick LaSpina, who is a senior counsel in our Employee Benefits and Executive Compensation Group, and Michelle Garrett, who is a principal at the well-known compensation consulting firm Semler Brossy. Welcome to you both.

Nick LaSpina: Good to be here.

Michelle Garrett: Thank you for having me.

David Teigman: Today, I wanted to talk about employee retention. It seems like there is an article almost every day talking about the “great resignation”. In a nutshell, there have been far more job transitions recently than there have been in the past. Michelle, why do you think that is the case?

Michelle Garrett: It’s hard to say exactly what the cause of the issue is, and we can’t underestimate the opportunity the pandemic has provided in reassessing priorities and in some cases motivating people to make major decisions about their lives and career, but certainly the prevalence of the remote working environment is helping to facilitate job transitions. That is, employees no longer have to move to find their “perfect” job. They can simply work at the same desk and transition to a new company and a new role without moving. They don’t even need to worry about finding an excuse to be outside the office for a job interview!

David Teigman – That's a good point, Michelle. Are there any industries that appear to be more affected than others?

Michelle Garrett: We recently conducted a pulse survey of our own clients on this topic at year-end, and our results showed that there is significant concern around employee retention across industries, with two-thirds of companies reporting employee retention challenges above what has been typical in the past. Not surprisingly, the retail and hospitality industries seem to be particularly impacted, and the war for digital talent was evident also, with many companies reporting an increase in voluntary attrition rates of over 50% among technical talent, but it will be interesting to see how this develops with stock prices teetering.

David Teigman: That's very interesting. Nick, to combat the rising levels of attrition, what are you seeing employers do to help retain employees?

Nick LaSpina: One common approach right now is awarding retention bonuses. The interesting thing about this approach in the current environment, however, is that if enough employers are offering retention bonuses, can we really call them retention bonuses? Are they really market compensation at this point in certain industries? Or even just making it more expensive for companies to recruit talent since in many cases they will need to make an employee whole for a bonus that the employee may be forfeiting from an employer?

David Teigman: That's a fair point, Nick. Could you talk a little bit more about the structure of these retention bonuses?

Nick LaSpina: There are a variety of structures that range from quite simple to fairly complicated. On one end of the spectrum, companies can simply implement payments tied to continued employment. For example, a company could offer a $100K retention bonus, 50% of which is paid six months from today and the remaining 50% is paid one year from today, subject to the employee being employed on the payment dates and in good standing. On the more complicated side, a company could tie a retention bonus to both continued employment and performance metrics.

David Teigman: You raise a good point about using performance metrics here. It's interesting on a couple of levels. First, for public companies, I think the proxy advisors like ISS and Glass Lewis are going to want to see performance metrics for the most senior executives where their compensation is reported in annual proxy statements. ISS and Glass Lewis generally disfavor compensation that is not tied to performance, particularly if the new retention bonuses are plugging a hole for compensation that was not otherwise earned under the existing LTIP program. The point is that the retention bonuses really shouldn't be a way to reward an executive of a company that is not otherwise performing well. Second, I think a company needs to be quite careful when using performance metrics in retention bonuses. If the performance metrics are too difficult to achieve, this could undermine the retention component of the program. Michelle, are there any particular industries where you are seeing significant use of retention bonuses or other compensation vehicles aimed at addressing retention concerns?

Michelle Garrett: As we've all been hearing, the tech industry is driving some of the largest and most disruptive pay trends we're seeing in today's market. The more traditional retention bonuses Nick addressed are less prevalent here, and instead where we've seen the most activity is around equity grants – both grant size, contributing to a general increase in executive pay, and changes to vesting terms. Some tech companies have shortened vesting periods to as short as one-year, with grants made each year, and we've also seen a significant increase in the use of front-loaded founder equity awards with rigorous stock price hurdles. Interestingly, these changes have ripple effects throughout industries, particularly as non-tech companies recruiting digital talent have had to rethink their equity grant practices and levels, in some cases even creating different structures and programs for technical talent. But again, “watch this space”, as we may start to see some changes here given stock price volatility in the industry.

David Teigman: Thank you, Michelle. Switching gears a bit, we’ve talked about certain “money” aspects of retaining employees but to Nick’s point if lots of companies are offering retention bonuses, what else can companies do to potentially ease attrition?

Michelle Garrett: Yes, there is more to a job than simply the financial aspects. More than ever before companies are focused on driving a good culture – a culture that rewards team work where all members of the team are working towards the company’s goals together. The power of the manager-employee relationship has also become increasingly evident, with attrition impacted significantly by the extent to which employees feel that their managers provide constructive feedback and professional growth opportunities, and at the same time are also invested in getting to know them on a personal level.

What’s interesting about this is that ironically a company’s compensation program can actually further the cultural goals of a company by creating performance metrics that reward this type of behavior. These metrics could include hard goals, for example, with respect to the number of employees you are mentoring. In fact, at the large financial services companies, we have begun to see goals relating to driving “good” company culture incorporated into individual scorecards used for determining pay, and I wouldn’t be surprised if this slowly becomes more commonplace in companies’ annual bonus programs for key executives who would not otherwise typically be expected to have compensation tied to HR-type outcomes.

David Teigman: Thank you, Michelle. Nick, we’ve talked about rewarding employees, but now I want to turn to the proverbial stick. Is there anything that an employer can do to restrict the movement of its employees?

Nick LaSpina: Yes, employers could implement, if they do not already them, restrictive covenants. I’m talking about non-compete and non-solicitation arrangements. However, this approach is not free from risk.

David Teigman: Could you tell us a little more about these risks?

Nick LaSpina: Sure. Several states either flatly prohibit certain restrictive covenants in certain contexts or restrict their use. Even where a state allows restrictive covenants, there is always a risk that the restrictive covenants could be deemed to be overbroad and therefore unenforceable. Careful planning and drafting can help to mitigate these risks, as can tying the covenants to significant payments or benefits – said another way, restrictive covenants often are not used as retention tools alone, but in combination with other tools that are more appetizing to employees. Of course, restrictive covenants also do very little to prevent an employee from making a career change and taking a new job with a non-competitive employer.

David Teigman: Michelle and Nick, thank you so much for this informative discussion about the retention issues that so many industries are facing today. And thank you to our listeners for joining us on The Proskauer Benefits Brief today. Stay tuned for more insights on employee benefits and executive compensation.

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