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FLORIDA
EMPLOYMENT LAW LETTER

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EMPLOYMENT CONTRACTS

Employees' proactive job search may violate nonsolicitation clause

by Jeffrey D. Slanker
Sniffen & Spellman, P.A.

The 1st District Court of Appeals in Tallahassee recently issued an opinion addressing the often complex issue of nonsolicitation and noncompete agreements. Such agreements, which we've written about in past newsletters, restrict an employee's ability to work for another employer after leaving his employment. The court's opinion provides guidance on the type of employee conduct that amounts to a violation of a nonsolicitation and noncompete agreement.

Facts

Convergent Technologies, Inc. (CTI), a U.S. Government contractor that provides cybersecurity training, hired Jasper Stone, Kurt A. Bernard, Paul R. Hutchinson, and Michael D. Fleming to work as instructors for U.S. Navy personnel in connection with a subcontract with Telecommunications Systems, Inc. (TCS). The instructors entered into employment contracts with CTI that contained a nonsolicitation clause stating:

> In accordance with contract guidelines, I . . . agree that I will not solicit employment with any other company associated with the [joint cyber analysis course (JCAC)] contract during the customer review period, full-time employment period, or a [six-month postemployment] period.

CTI required the instructors to enter into contracts with a nonsolicitation clause for several reasons, including the considerable resources it expended in recruiting and onboarding them for the JCAC project and the significant training expense and time it would incur to replace them on the project. Moreover, CTI managed the instructors remotely from its Maryland headquarters, and its relationship with TCS required the nonsolicitation agreements as a term of the instructors' employment.

TCS contracted for instructional services with several other subcontractors, including Epsilon, Inc. Unlike its contract with CTI, TCS's contract with Epsilon didn't contain a clause providing that the companies wouldn't solicit or hire each other's employees who were working on the Navy contract.

After the CTI instructors complained about their work for CTI to their Epsilon counterparts, Epsilon reached out with an offer of employment, initially through Hutchinson, who provided the names of the other disaffected instructors. Epsilon subsequently hired the instructors. CTI then filed suit against them for violating the nonsolicitation clause of their employment contracts and to enforce their noncompete agreements.

AGENCY ACTION

DOL announces record amount in recovered wages. The U.S. Department of Labor (DOL) announced in October that its Wage and Hour Division (WHD) had recovered a record $304 million in wages owed to workers in fiscal year (FY) 2018. The WHD also announced it set a new record for compliance assistance events in FY 2018, holding 3,643 educational outreach events to help employers understand their responsibilities under the law. The DOL also announced an extension of the voluntary Payroll Audit Independent Determination (PAID) program, which is a compliance initiative aimed at helping workers receive more back wages due in an expedited manner.

DOL launches new compliance assistance tools. The DOL has launched two new webpages—the New and Small Business Assistance page (www.dol.gov/whd/smallbusiness.htm) and the Toolkits page (www.dol.gov/whd/regs/compliance/CAKits.htm)—intended to provide small businesses and workers information from the WHD and links to other resources. The webpages, announced in October, were established in response to feedback from new and small business stakeholders voicing their need for a centralized location to secure the information needed to comply with federal labor laws. The pages provide publications and answer the questions most often asked by new and small business owners.

Compliance assistance available for AHPs. Employers offering association health plans (AHPs) can find compliance assistance materials on the DOL's employer.gov website. The materials—located at www.dol.gov/general/topic/association-health-plans—will help employers understand their Employee Retirement Income Security Act (ERISA) obligations when setting up and managing AHPs, which are intended to help small businesses pool resources and create health insurance plans for their employees.

OSHA program targets high injury, illness rates. The Occupational Safety and Health Administration (OSHA) announced in October that it was initiating the Site-Specific Targeting 2016 Program using injury and illness information electronically submitted by employers for calendar year 2016. The program targets high-injury-rate establishments in both the manufacturing and nonmanufacturing sectors for inspection. Under the program, OSHA inspects employers it believes should have provided 300A data for the 2016 injury and illness data collection. For 2016, OSHA required employers to electronically submit Form 300A data by December 15, 2017. The 2017 deadline was July 1, 2018, but employers were allowed to provide data after the deadline. ✤

The trial court dismissed the complaint, holding that the instructors didn't solicit employment with Epsilon in violation of their individual employment contracts with CTI. Rather, Epsilon solicited them to leave CTI. The court found that the instructors didn't engage in proactive conduct sufficient to violate their nonsolicitation agreements. CTI appealed, and the appellate court reversed the lower court's ruling in a decision that highlights the type of conduct that can suffice to violate a nonsolicitation clause.

Appellate court's opinion

The appellate court disagreed with the trial court's conclusion that the instructors didn't engage in "proactive conduct" that would violate the nonsolicitation agreement. Essentially, the question was who solicited whom. Under 1st District precedent, employees subject to a nonsolicitation agreement must engage in sufficiently proactive conduct to constitute solicitation of employment with another employer. That's true even if the first contact regarding the job offer was technically made by the new employer instead of the employee.

As the court explained, the standard for solicitation it established in the previous case contemplates not just direct solicitation but also conduct by an employee that, while less direct, is nonetheless more active than passive in nature. The court concluded that there was a question in this case about whether the instructors engaged in proactive conduct sufficient to constitute solicitation of alternative employment that prevented dismissal of CTI's claims.

The court noted that the evidence suggesting the instructors engaged in sufficiently proactive conduct included the fact that they complained about their employment with CTI "in a working environment where everyone involved knew there was more than one subcontractor on the job to hear their protests." The court also noted the fact that Hutchinson rounded up the other instructors suggested that there might have been a concerted plan to leave CTI for Epsilon. Because those facts precluded dismissal of the complaint, the court reversed the trial court's order. *Convergent Technologies, Inc. v. Jasper Stone, Kurt A. Bernard, Paul R. Hutchinson, and Michael D. Fleming*, Case No. 1D18-389 (District Court of Appeal of Florida, 1st District, November 13, 2018).

Employer takeaway

If you include nonsolicitation and noncompete clauses in your employment contracts, you should pay attention not only to situations in which another employer solicits your employees but also to situations in which the solicitation of new employment might be proactively initiated by an employee. Such situations may constitute a violation of the contract, giving you the right to enforce the terms of your nonsolicitation clause.

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ANDY'S IN-BOX

Weighing the options: 2 ways to calculate overtime for dual-job employees

by Andy Rodman
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I've been asked on a handful of occasions over the past couple of months about calculating overtime for nonexempt employees who work two different jobs at two different rates of pay during the same workweek. Federal regulations under the Fair Labor Standards Act (FLSA) expressly address this issue.

Assume, for example, that during the same workweek, an administrative assistant works 25 hours in her administrative job at $12 per hour and 20 hours in a marketing position at $18 per hour. The employee has worked a total of 45 hours for the workweek at two different rates of pay. How should her employer calculate the "regular rate of pay" on which to base her overtime pay? The FLSA regulations provide two different calculation options.

'Weighted average' method

The first is the "weighted average" method, which is the default way to calculate overtime in this scenario. Under this method, the employee's total earnings for the workweek in all jobs are divided by the total number of hours she worked in all jobs during the workweek, to arrive at the weighted average used to calculate overtime. So, in our example above, the employee's total straight-time earnings for the workweek are calculated as follows:

(25 hours × $12 per hour) + (20 hours × $18 per hour) = $660

Then, her total straight-time earnings are divided by her total hours worked to arrive at the weighted average hourly rate as follows:

$660 ÷ 45 hours = $14.67

Keep in mind that the $660 represents straight-time pay for all hours worked. Because that calculation already includes the "time" for all hours worked, the additional overtime is calculated at "half-time" using the weighted average as follows:

$14.67 × .5 × 5 overtime hours = $36.70

The $660 in straight-time earnings is then added to $36.70 in overtime to arrive at the total compensation the employee is owed for the workweek—$696.70.

'Agreement' method

As an alternative to the weighted average method, an employer and its employee may agree, preferably in writing and *before the work is performed,* that the employee will be paid for overtime hours at 1½ times the hourly rate associated with the job she was performing when the overtime hours were worked. However, this method isn't always practical or feasible because, for example, there may not be a clear division of work throughout the workweek (the employee may go back and forth between the two jobs) or both jobs may contribute to her overtime hours. For those reasons, most employers choose to use the weighted average method.

Bottom line

Wage and hour law in general, and the calculation of overtime in particular, continues to present challenges for HR practitioners. Be sure to consult with your employment law counsel when you're dealing with FLSA issues.

Andy Rodman is a shareholder and director at the Miami office of Stearns Weaver Miller. If you have a question or issue that you would like him to address, e-mail arodman@stearnsweaver.com or call 305-789-3255. Your identity will not be disclosed in any response. This column isn't intended to provide legal advice. Answers to personnel-related inquiries are highly fact-dependent and often vary state by state, so you should consult with employment law counsel before making personnel decisions. ✤

WAGE AND HOUR LAW

Federal court approves FLSA settlement that includes broad general release for employer

by Tom Harper
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Florida employers that have defended wage and hour claims by current and former employees know that after a lawsuit is filed and answered, a court must approve any settlement agreement reached by the parties—unless the settlement provides for full payment for all hours worked and overtime damages for all employees involved in the case.

Some background on FLSA settlements

There are two ways in which claims filed under the Fair Labor Standards Act (FLSA) can be settled and released by employees. First, the FLSA allows employees to settle and waive their claims if the secretary of the U.S. Department of Labor (DOL) supervises the employer's payment of unpaid wages to the employees. Second, an employee who files an independent lawsuit may settle and release his FLSA claims against the employer if the parties present a proposed settlement to the district court and the court enters an order approving the settlement.

In detailing the circumstances justifying court approval of an FLSA settlement, the U.S. 11th Circuit Court of Appeals (whose rulings apply to all Florida employers) stated in the 1982 case *Lynn's Food Stores:*

> Settlements may be permissible in the context of a suit brought by employees under the FLSA for back wages because initiation of the action by the employees provides some assurance of an adversarial context. The employees are likely to be represented by an attorney who can protect their rights under the statute. Thus, when the parties submit a settlement to the court for approval, the settlement is more likely to reflect a reasonable compromise of disputed issues than a mere waiver of statutory rights brought by an employer's overreaching. If a settlement in an employee FLSA suit does reflect a reasonable compromise over issues, such as FLSA coverage or computation of back wages that are actually in dispute, we allow the district court to approve the settlement in order to promote the policy of encouraging settlement of litigation.

When a court is asked to review and approve the terms of a settlement under the FLSA, there is a strong presumption in favor of approval. However, there are many cases in which Florida courts have rejected settlement terms an employee wouldn't be required to accept if he took his claim to trial and won.

For example, agreements that require the employee to keep the amount of his settlement confidential have been rejected by numerous Florida courts. Similarly, settlement language requiring the employee to keep even the fact of a settlement confidential has also been rejected. And releases that waive other claims the employee might make do not pass muster. A recent decision by the federal district court in Ft. Meyers may be of interest to Florida employers who are attempting to settle FLSA claims.

Court rejects general release

Thomas Weber worked as an account executive for several trucking companies. He sued his employers, claiming he had been misclassified as an exempt employee and was owed unpaid overtime. Seven other employees eventually joined Weber's lawsuit. Rather than incurring the expense and risk of protracted litigation and a trial, the employers decided to settle with the employees for about $50,000.

The employees and the trucking companies filed copies of their written settlement with the federal court in Ft. Myers and asked the court to approve the agreement. The settlement listed the unpaid overtime each of the eight employees would receive and provided that each employee would also receive an amount equal to their unpaid overtime as liquidated damages, in accordance with the FLSA. Finally, each employee would receive an extra payment for "mental anguish" damages.

So, for example, Weber, the lead plaintiff, was to receive $3,855.82 in overtime pay, $3,855.82 in liquidated damages, and $856.86 in mental anguish damages, for a total payment of $8,568.50. Under the settlement, the trucking companies also agreed to pay the employees' attorneys' fees.

To the surprise of both the trucking companies and the eight employees, the federal court refused to approve what they had agreed to. The court rejected the settlement because it required the employees to sign a general release of any and all claims they had against their employers. Although that's standard language in settlement agreements, it isn't the norm for claims that must have court approval. In this case, the employers just wanted to make sure the employees weren't going to turn around and sue them on some other basis.

In recent years, many federal courts in Florida have rejected settlements containing general releases because an employee who goes to trial and wins doesn't have to release all of the future claims she might have against her employer. In other words, a general release of all claims isn't something the FLSA would require an employee to agree to. Without court approval, the employees in this case could have taken the settlement money and continued with their lawsuit.

A surprise reversal

Faced with the court's refusal to approve their agreement, the parties went back to the bargaining table and changed the way the settlement was structured. The amended settlement provided that approximately 10 percent of the employees' individual settlement amounts constituted separate consideration (i.e., compensation) for the general release of claims rather than mental anguish damages. The court then changed its mind and approved the settlement, finding the proposal to be "a fair and reasonable compromise of the dispute."

It's surprising that the court approved the employees' general release of liability in an FLSA case. In OK'ing the settlement, the court noted that general releases are "typically disfavored" in wage and hour lawsuits. However, it pointed to several cases in which general releases were allowed because the employee received compensation in addition to the benefits to which he was entitled under the FLSA or "when such releases [were] mutual and thus confer[red] a benefit on the [employee]." *Weber v. Paramount Transportation Logistics Services, LLC, et al.,* Case No. 2:17-cv-627-FtM-38CM (M.D. Fla., November 8, 2018).

Takeaway

Unless the district court judge in Ft. Myers reverses this decision, you can use this case to negotiate a settlement that includes a broad general release of liability as long as you pay the employee separate compensation for agreeing to waive future claims. The obvious next question is whether you can pay additional compensation to require an employee to keep the settlement confidential. Unfortunately, that remains unlikely since keeping court documents sealed from public view is very difficult these days.

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SEXUAL HARASSMENT

Can you keep a secret? How to handle 'confidential' employee complaints

The #MeToo movement just turned one. And while its long-term effects on the workplace remain to be seen, it's commonly expected that increasing numbers of women (and some men) will be informing their employers about problems with sexual harassment.

While that may be true, there is a long history in this country of harassment victims "complaining" unofficially, hoping to somehow resolve the situation without making an official complaint. Frequently, employees say things like "I just thought you should know" or "I don't want you to do anything about it." Even in the wake of #MeToo, it's unlikely this trend will go away anytime soon.

What are your obligations when that happens? The answer depends on a number of factors, including to whom the employee complains, the nature of the complaint, and even whether the employee is the alleged victim or someone else.

WORKPLACE TRENDS

Research shows slow growth for middle-wage jobs. A study from CareerBuilder shows that high- and low-wage job growth is overshadowing the increase in middle-wage jobs. According to the study, the United States is expected to add 8,310,003 jobs from 2018 to 2023, with just one-fourth of them in the middle-wage category. Factored into the total job growth is an expected loss of 369,879 jobs over the same period, with middle-wage occupations experiencing the majority of the decline. The research shows that a total of 121 occupations will experience a decline in jobs between 2018 and 2023, and 75 of them are middle-wage jobs. High- and low-wage occupations are expected to have the highest net job growth from 2018 to 2023 at 5.71% and 5.69%, respectively. Middle-wage employment will grow at 3.83%. STEM-related occupations will continue to dominate fast-growing occupations, according to the research.

Survey shows willingness to provide tuition reimbursement. A Robert Half Finance & Accounting survey released in October shows that 63% of finance executives are willing to provide tuition reimbursement or professional development for new staff members who don't have a four-year degree. The survey also shows that a college diploma may not always be a requirement for new hires in accounting and finance, especially in areas such as accounts payable, accounts receivable, credit and collections, and payroll. The research suggests that companies with 1,000 or more employees are almost twice as likely as companies with 20 to 49 employees to provide tuition reimbursement or professional development to those new hires.

Report shows mental health benefit trends. The International Foundation of Employee Benefit Plans released a report in October examining the state of mental health and substance abuse in the workplace and how employers are taking action. The report found that 60% of U.S. and Canadian organizations are noticing an increase in mental illness and substance abuse compared to two years ago. Forty percent of organizations report their participants are very or extremely stressed, and almost 40% say stress levels are higher now than they were two years ago. The report identifies the top 10 mental health and substance abuse conditions covered by employers: depression, alcohol addiction, anxiety disorders, prescription drug addiction, nonprescription drug addiction, bipolar disorder, eating disorders, posttraumatic stress disorder, attention deficit disorder/attention deficit hyperactivity disorder, and autism. ✤

UNION ACTIVITY

"Public charge" proposal prompts union criticism. Unions are reacting to the U.S. Department of Homeland Security's (DHS) plan to change policy related to the "public charge" provisions of immigration law. "Public charge" refers to an individual who is likely to become primarily dependent on the government, according to U.S. Citizenship and Immigration Services (USCIS). On October 10, the Trump administration published a Notice of Proposed Rulemaking on the policy, potentially making more people ineligible for permanent residence. National Education Association President Lily Eskelsen Garcia said the proposed change "will have a destructive impact on our students and their families." Service Employees International Union Vice President Rocio Saenz said, "New Americans pay city, county, state, and federal taxes that strengthen their communities and finance health care and social service programs. If they are driven into the shadows or out of this country, everyone will suffer."

Columbia University postdocs vote for union. Columbia University postdoctoral researchers announced in October that they have formed the Columbia Postdoctoral Workers-UAW union. In a National Labor Relations Board (NLRB) election held October 2 and 3, the vote to unionize with the United Auto Workers (UAW) passed by a margin of 68 percent. The vote sets up what the union said will be the first union contract covering postdocs at a private university. According to the UAW, the Columbia University vote means more than 17,000 graduate student workers, contingent faculty, and postdocs across the Northeast United States have chosen UAW representation in the last five years. The union advocates said they wanted to form a union to negotiate salaries, ensure stronger workplace sexual harassment protections, and get help with immigration and visa issues facing international postdocs.

Union launches first-responders website. The Communications Workers of America has launched FirstResponderVoice.org, a new advocacy initiative and website devoted to increasing the availability of information about the First Responder Network Authority (FirstNet), an independent agency within the U.S. Department of Commerce. The union said the creation of FirstNet has placed a spotlight on emergency communications. According to the union, the website "is poised to be a leading resource for first responders—professional and volunteer, urban and rural—and other public-safety stakeholders, including IT directors, emergency communications coordinators, private citizens and elected officials, to learn how communities can take full advantage of FirstNet and stay abreast of developments related to emergency communications and public safety." ✤

Scenario 1: Employee complains to HR

As an HR professional, your obligations are pretty clear. Once you become aware that harassment may be taking place—any type of harassment, not just sexual—you are legally obligated to take steps to protect the employee and prevent additional harassment. That could include:

- Interviewing the employees involved to determine their versions of events;
- Identifying and gathering other evidence (such as security videos, e-mails, and texts) and interviewing other employees who may have been involved tangentially or witnessed the harassment;
- Taking corrective action against the alleged harasser (which could be anything from counseling/warnings to termination of employment); and
- Offering companywide harassment training (especially for managers).

But that doesn't really answer the question of what to tell an employee who wants to complain unofficially. Usually, employees in this situation will indicate up front that they don't want you to take any action on what they're about to tell you. When that happens, you need to make clear that you may be legally required to investigate, depending on the nature of the complaint. Then, if the employee decides to share the information and it could be construed as harassment, you may need to proceed with an investigation in spite of her wishes. The same is true for employees who wait until after confiding in you to say they don't want to make an official complaint.

You could also try to reassure the employee that you will keep her complaint and the investigation as confidential as you can but it may not be possible to conceal her identity completely.

Scenario 2: Employee complains to management or coworker

If an employee tells a manager (not just her own) about conduct that could be considered harassment, your legal obligations are no different. They don't go away just because the manager never shared the necessary information with HR. You're stuck with the obligation to stanch the harassment—and face the eventual liability for failing to do so—regardless.

That's just one of many reasons harassment training for managers is so important. You can't adequately protect your company without it.

But what if the employee complains to or confides in another employee who isn't a member of management? Unlike complaints to managers, you won't be treated as having knowledge of the complaint, and no action is required.

Scenario 3: Coworker complains to HR or management

Finally, what happens if an employee who comes to you with information about harassment isn't the victim but is the

victim's confidant? Similar variables apply in this situation. If the person who comes to you is a manager, you can force her to identify the employee who complained as well as the alleged harasser and impose discipline if she refuses to do so. If the person who comes to you is a nonmanagement coworker, you may ask him to encourage the victim to come to you or authorize him to reveal her identity to you.

Depending on the severity of the conduct being reported, you may also want to initiate an investigation even without knowing the identities of the harasser and victim or the details of the alleged harassment.

Best practice is prevention

Once you're in the middle of this type of situation, there may not be any great answers. As with many HR matters, the best-case scenario would be to prevent harassment from happening in the first place by having sound policies and procedures and regular, thorough harassment training. You should also consider specifically explaining (in your policy, training, or both) how confidential complaints will be handled. ✤

EMPLOYEE BENEFITS

Wellness programs are about more than health insurance costs

When attorneys talk or write about wellness programs, it's almost always from a highly legal perspective. We could talk all day about the convoluted and overlapping requirements of the various laws that apply to such programs. But this month, we want to take a different approach and look at wellness programs from more of a business perspective.

People tend to get caught up in the idea that a wellness program's main purpose is to reduce the cost of providing health insurance. The truth is, there's not a lot of data to support that idea. There is, however, plenty of data to support other cost reductions that can result from a properly designed and managed wellness plan.

Improving employee health

According to Aflac, 61% of employees say they have made healthier lifestyle choices because of their company's wellness program. And unlike savings on health benefits, it's fairly easy to demonstrate that wellness plans have a positive impact on specific health concerns that may be prevalent in your employee population. Many health insurance carriers, third-party administrators, and brokers can provide detailed (deidentified) data about the incidence of such conditions, and you can use that information to develop wellness initiatives to address the most common or costly ones.

For example, smokers cost roughly $6,000 more than nonsmokers in annual healthcare expenses and lost productivity. If a high percentage of your employees have smoking-related health problems, you could reduce those costs by developing policies, initiatives, and incentives to help them quit smoking. You could take a similar approach for obesity, diabetes, blood pressure, anxiety, and so on.

Reducing workers' comp claims and costs

According to the University of Michigan's Health Management Research Center, employees with high health risks have the highest workers' compensation costs. For example, the National Council on Compensation Insurance compared the claims of obese employees to nonobese ones and found that:

- Obese claimants were twice as likely to file a claim;
- The duration of their claims was about 13 times longer; and
- Their medical costs were 6.8 times higher.

Depression, anxiety, and smoking can have similar impacts on your workers' comp claims experience. By helping your employees address their serious health concerns, you have a very good chance of reducing your workers' comp costs.

A similar impact can be seen on the incidence and ultimate cost of both short- and long-term disability claims.

Improving engagement and retention

In today's tight labor market, many employers believe the first step toward maintaining staffing levels is to keep as many of their good employees as they can. Wellness plans can help with that. In a study from the International Foundation of Employee Benefit Plans, 67% of employers offering a wellness plan reported that it improved employee satisfaction. Similarly, other recent studies have found that:

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1-30 Market Pricing: How to Set Competitive Pay Rates and Ranges with Market Data

- 74% of employers view well-being as a useful tool for recruiting and retaining staff;
- 66% said their wellness initiatives resulted in increased productivity;
- 50% reported decreased absenteeism; and
- 54% reported that their most improved metric is employee morale.

Wellness programs can also help with recruitment. Eighty-nine percent of workers at companies that support well-being are more likely to recommend their company as a good place to work.

Final thoughts

Employees don't always respond positively to wellness incentives. You should be very deliberate in designing and rolling out a program that best suits your workforce. You can start by:

(1) Conducting employee surveys to see what types of offerings they are receptive to;

(2) Promoting wellness as a part of your culture rather than just linking it to the health plan;

(3) Implementing general policies that encourage healthy habits (such as generous paid leave policies and flextime);

(4) Including employees in the planning and implementation process (e.g., through a wellness committee); and

(5) Implementing the program in stages (potentially over several years) rather than unveiling it all at once.

Of course, there are legal concerns associated with implementing a wellness program, and you should definitely contact your attorney if you have any questions about the legal implications of your plan. But in the broad scheme of things, those concerns are likely a relatively small part of the process of creating a wellness program that results in positive outcomes for you and your employees. ✤

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