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Effective Outsourcing for Israeli Companies

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Overview of Today's Program

1. What is Outsourcing?
 - (a) BPO vs. ITO
 - (b) Inbound vs. Outbound
2. Examples of Outsourced Activities
3. Risks of Outsourcing
 - (a) Employer-Employee issues
 - (b) Intellectual Property/Trade Secrets
 - (c) Privacy Issues
 - (d) Liability for Defective Products
4. Contract Drafting Tips

What Is Outsourcing?

Outsourcing is the act of moving some of a company's internal activities and decision responsibilities to outside providers

BPO- “Business Process Outsourcing” refers to outsourcing to improve performance, efficiency, and productivity of a business; e.g., changing and improving competitiveness in the marketplace to generate higher revenues and improved margins.

ITO- “Information Technology Outsourcing” refers to outsourcing to reduce costs of IT systems and site/data centers (reducing capital expenditures)

Inbound vs. Outbound

Inbound Outsourcing: providing outsourcing as your company's revenue generating service/product (software development; testing; manufacturing; assembly; quality control; etc.)

Outbound Outsourcing: using outsourcing for efficiencies in your company's operations (BPO/ITO)

Outsourced Activities

Software (development; testing; maintenance; config. Mgmt)

Manufacturing (assembly; testing; design/development)

Distribution and logistics (Information systems; Import/export; warehousing; general distribution and logistics; purchasing)

Human Resources (Benefits; Placement; Training; Relocation)

IT (ASP's; client/server; WAN/LAN; Internet/Intranet; voice;)

Finance (consulting; accting; IR; payroll; investments)

Sales and Marketing (CRM; PR; S&M; market research)

Transportation (fleet management/maintenance; operations)

Real Estate/Facilities Mgmt (construction mgmt; facilities maint.; cafeteria; securities; telecom; travel)

Contact/Call Centers (help desk; RMA's; cust. service)

- NOTE: Start-UP Jerusalem seeks to put Israel at the top of the call center industry

Why Should You Care?

1. Your Company's Operations - Increased pressure on reducing operational costs
2. Your Company' Services - your company provides outsourcing services
3. Your Company's U.S. Subsidiaries - either providing or receiving outsourced services

The Risks of Outsourcing

- 1. Employer-Employee Issues**
- 2. Intellectual Property/Trade Secrets**
- 3. Privacy Issues**
- 4. Liability for Defective Products**

The Risks of Outsourcing

1. Employer-Employee Issues

(a) Claims of lost benefits by Employees displaced by outsourcing arrangements

1. *Register v. Honeywell Federal Manufacturing and Technologies LLC*, 397 F. 3d 1130 (8th Cir. 2005)

2. *Makenta v. University of Pennsylvania*, 88 Fed. Appx. 501 (3d Cir. 2004)

(b) Claims by American employees of US subsidiaries of Israeli outsourcing companies that Israeli employees are treated better e.g., “Americans need too much handholding”

See Keelen v. Majesco Software, Inc., 407 F.3d 332 (5th Cir. 2005)

The Risks of Outsourcing

1. Employer-Employee Issues (cont'd)

(c) Risk of Joint Employment

A finding of joint employment subjects both the client company and the contractor to employment liability for contractor's employees

Avoid direct or indirect control over contractor's employees:

(1) Contractor should have sole responsibility to hire, fire, and supervise contractor's employees;

(2) Compensation model should not be based upon a fee per person

The Risks of Outsourcing

2. Intellectual Property/Trade Secrets

(a) Copyright Infringement/Breach of Contract

See Beckman Instruments, Inc. v. Cincom Systems, Inc., 2000 U.S. App. LEXIS 18166 (9th Cir. 2000) (outsourcing contractor transferred software to its subcontractor breaching license and infringing copyright - unauthorized use)

(b) Misappropriation (holding IP pending payments)

See Liu v. Price Waterhouse LLC, 302 F.3d 749 (7th Cir. 2002)

(c) Piracy (e.g., outsourcing contractor employees stealing technology and selling to client's competitors)

The Risks of Outsourcing

3. Privacy Issues: Information Processing Considerations

Various laws impose obligations to maintain reasonable security and access controls

(a) EU Data Protection Directive - all personal information

(b) Gramm-Leach-Bliley Act (GLB) - non-public personal financial data processed by financial institutions

(c) Health Insurance Portability and Accountability Act (HIPAA) (personal health information)

(d) Unfair and Deceptive Trade Practice - breach of privacy representations (e.g., company must actually comply with website privacy statements)

(e) FTC Regulation on unfair practices (very broad)

The Risks of Outsourcing

4● Liability for Defective Products

If your company sells defective products, even if manufactured by an outsourced contractor, your company is on the hook in tort and contract

(a) Product Liability issues: all suppliers in the chain of distribution can be held liable for injuries

(b) Incidental and Consequential Damages, including damages for injury to person or property resulting from warranty breaches

See UCC Section 2-715

Contract Drafting Tips

1. Termination Provisions: in addition to material breach - include provision allowing for termination in the event of cumulative non-material breaches (either lateness; delays in service; chronic problems)
2. IP Ownership Issues (assignment and work made for hire)
3. Post-Termination (transition back/to new supplier; return of information)
4. Penalty/Bonus Provisions: (Quality benchmarking, review and measurement against standards)
5. Cost reductions: should be phased in following start-up stage
6. Non-solicitation/hiring provisions: to avoid flight of outsourcing contractor's employees

Summary

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THE END

THANK YOU

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