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BUCHANAN LAW
Intellectual Property and Technology

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In this BL CLIENT BULLETIN we deal with the thorny issue of employees signing agreements on behalf of their employer

Left unchecked, allowing employees to negotiate and enter contracts on behalf of their employer companies carries with it significant risk from the perspective of the employer, the employee and the third party supplier / customer with whom the contract is formed.

In this Bulletin we provide a short summary of the key risks involved and some practical steps to implement to protect the parties and individuals involved in the contracting process.

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An employee's authority to sign on behalf of their employer

During the course of any business day, there will be numerous occasions upon which a third party supplier to or customer of your business will need the signature of a person who has authority to bind your business. That authority may be actual, implied or ostensible in nature. Company directors will usually have the requisite authority by force of law, but what about employees? The answer lies in what the employee has been given authority to do.

First, an employer can give an employee actual, **express authority** to execute certain agreements on behalf of the employer. This actual authority is commonly found in an employment contract or other written document . such as a power of attorney issued by the relevant powers (e.g. in the case of a company, a resolution of the board of directors) granting the employee to execute an agreement on behalf of the company. In some circumstances, by way of an alternative, an employee may have **implied authority** where the nature of that employee's position or role would imply certain powers.

The third type of authority is **ostensible authority**. Ostensible authority generally arises where a person who does not have authority does an act or omission that suggests to a supplier or other third party that an employee (or other person without actual authority) has the authority to bind the company. In other words, ostensible authority is the authority of an individual as it appears to a third party as a result of a representation made by the company. It can occur in many different circumstances and can result in a business being a party to a contract that it never intended to enter.

It is common for issues of ostensible authority to arise as a result of a relationship between an employee and third party supplier. For example, the employee may have actual or implied authority to enter a contract with a supplier on behalf of his or her employer. Two months later, that same employee may again bind the employer by entering a subsequent contract with the supplier. It may be that the employer gave the employee authority to enter the first contract, but the employee does not have authority to enter the second contract. However, the supplier would be justified in assuming that the employee had authority to enter the second contract because the employee had the authority to enter the first contract.

Another common issue is where an employee has been given authority to negotiate a contract, but is not given authority to execute that contract. The employer, by permitting the employee to attend the contract negotiations on the business's behalf, has represented to the supplier that the employee has authority to negotiate the contract. The supplier may assume that the employee also has authority to execute the final agreement, and a failure of the employer to rebut that assumption may constitute a representation made by the employer to the supplier that the employee has the necessary authority.

Permitted assumptions under the Corporations Act 2001 (Cth)

In addition to issues of ostensible authority and limitations on authority as noted above, you should always remember that the *Corporations Act 2001* (Cth.) permits persons dealing with a company to make certain assumptions, including the assumption that an officer or agent of a company is properly performing his or her duties to the company (unless there is reason for the supplier to believe otherwise). Further, where the company holds out that a person is an agent or officer of the company, a third party supplier is entitled to assume that the person has the authority to perform the duties customarily performed by that kind of agent or officer.

What is the worst case scenario in light of all the above? Your company may end up being bound by a contract that it did not originally want to enter. Despite this, if the company then fails or refuses to perform under that agreement or attempts to terminate it for this reason alone, such actions may well amount to a breach of contract; this is rarely good for a business's reputation or its bank balance.

Further, it is possible for a director of the company to be in breach of statutory directors' duties by failing to exercise a degree of care and diligence in relation to their control over their employees.

So, what about the employee? The employee may find him or herself in breach of their employment agreement and/or any internal company policies, and as a result they may be terminated from their position of employment. Depending on the employment agreement, the employee may also be liable to pay the costs incurred by the business as a result of his or her conduct.

Practical steps for the company employer ...

The best prevention is the implementation of tight procedures and policies and communication. Make sure all employees understand the scope of their actual authority. For example, you may give an employee authority to execute specific agreements up to a certain fee amount. If you grant authority to an employee to execute a one-off agreement, make certain that the employee (and the other party to the contract) is aware that the authority is limited to that one agreement. Communicate with your suppliers and customers: make sure they are aware of who has the ability to sign on behalf of and bind your company.

Practical steps for the employee ...

If you are an employee, do not adopt the approach of ~~act~~ act now, apologise later+. Protect yourself by having a suitable superior (i.e. someone within the business who has the requisite authority) give your prior written approval to negotiate and / or execute agreements on behalf of your company. Do not simply assume you have authority based on previous agreements: seek specific authority for each and every agreement. If unsure as to your authority, always double check. Not only will this protect your employer's interests, it will go a long way in protecting you against incurring the wrath of a disgruntled employer who may otherwise have cause to seek an indemnity from you insulating the company against losses arising from your unauthorised actions.

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Buchanan Law – who we are

Buchanan Law is a legal practice with a difference. Our primary focus is on the commercial aspects of intellectual property, telecommunications, technology and innovation law. We are leaders in our chosen practice areas, providing specialist and commercially oriented legal advice and creative solutions.

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