

# **SETTLING THE CASE AND WRAPPING UP EMPLOYMENT: NEGOTIATING STRATEGIES, DRAFTING REALITIES**

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**By Wendi S. Lazar\***

## **I. Introduction**

For the employee, even the high level executive, separation or settlement agreements are often the first legal document that they have had to sign in regard to employment and often the first circumstance in which they have needed to hire counsel outside of a closing or a divorce. Negotiating and drafting these agreements can be a challenge for employee counsel. This is especially true for attorneys who represent executives. With the amount of recent regulation in this area and the reluctance of companies to commit to employment agreements and severance plans, it is increasingly more difficult to protect the at-will employee ahead of a downsizing or other termination event, leaving the employee vulnerable when her employment ends.

Even when a contract of employment exists, there are other issues that may arise on account of the settlement or separation that were unforeseen, such as new tax or other government regulations or conditions on incentive compensation equity or new restrictive covenants.

Once the monetary package has been negotiated, issues of drafting become paramount and understanding the underlying case and statutory laws that guide certain provisions including those relevant to waivers and releases is key to achieving a balanced and equitable agreement for the client and giving her the best chance at re-employment.

## **II. Employee's Existing Obligations**

While knowing the client's entitlements are critical, being aware of her obligations post employment can also help to prevent liability in the future. Employees often have post employment obligations that they owe to their employers and these are often re-confirmed in the separation agreement.

For most executives, these obligations will generally appear in an employment agreement, and/or confidentiality, non-compete and non-solicitation agreement executed prior to separation. Further, such obligations may be contained in the company's handbook, deferred compensation or equity plan. Knowing about these agreements or policies prior to any negotiation is important in order to protect the client from entering into new and unfair restrictions without additional and adequate consideration.<sup>1</sup> Also, discerning if these restrictions pre-dated the separation agreement is critical to any negotiation of terms, particularly in this economy, where restrictions can prevent an employee from becoming re-employed with a competitor.

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\* Jennifer Liu, an Associate at Outten & Golden LLP, New York, assisted in the writing and research of this paper.

<sup>1</sup> While there has not been a lot of litigation over non-competes entered into after an 'employee's termination, there is some authority that such agreements are not enforceable. See *Gorman Publishing Company v. Stillman*, 516 F. Supp. 98, 108 (N.D. Ill. 1980) ("[W]here, as here, a covenant not to compete is entered into after the underlying employment relationship is terminated, no enforceable rights arise."); *Marsh USA Inc. v. Cook*, 354 S.W.3d 764, 771-72 (Tex. 2011) (observing that, in order to be valid and enforceable, "a covenant not to compete must be 'ancillary' to another contract, transaction or relationship"); *Rabinowitz v. Tillman*, 192 N.Y.S.2d 535, 536-37 (Sup. Ct. 1959) ("A restrictive agreement entered into for a cash consideration after termination of employment is invalid."); *Bond Electric Corp. v. Keller*, 113 N.J.Eq. 195, 166 A. 341 (1933) (holding that a contract not to compete made after the defendant's employment terminated, and which was not incidental to the sale of a business or any other transaction, was invalid and unenforceable as an unreasonable restraint of trade).

For certain executives, these obligations may also be statutory or a matter of common law and will depend on the jurisdiction.<sup>2</sup> Again, reviewing these documents prior to any severance negotiation is important in order to determine what is an existing obligation and what can be traded or leveraged for additional consideration. Moreover, good lawyering demands that the client be informed of her obligations and what behaviors need to be avoided when employment ends to ensure that she doesn't become a defendant in a claim for breach of a restrictive covenant, fiduciary duty, or trade secret.

Finally, some states like New York will find certain restrictions unenforceable if the employee was terminated without cause or resigned for good reason because the underlying consideration for the restriction—employment—no longer exists.<sup>3</sup> This presents another opportunity to negotiate hard for adequate consideration if a restriction is introduced or even confirmed in the separation agreement.

### III. Final Steps—Knowing When to Quit and Wrapping Up

The most difficult place in a negotiation, is knowing when to stop pushing. Being sensitive to when the other side will not move any further, and may, in fact, be pushed too hard and start backtracking is essential. While confrontation and bargaining can take a toll on counsel and the client's fees—and even result in a lose-lose situation—backing down too soon may also cause the employee's attorney to lose credibility in the rest of the process. Again, keeping in mind what the client wants should lead the

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<sup>2</sup> An employer's confidential information or trade secrets are protected under common law, by statute (such as by the Economic Espionage Act of 1996, 18 U.S.C. § 1831 *et seq.*), and in most states by the Uniform Trade Secrets Act (UTSA). These protections apply regardless of whether they were specifically provided for in an employment agreement, offer letter, or other employment arrangement. See *Thin Film Lab, Inc. v. Comito*, 218 F. Supp. 2d 513, 520 (S.D.N.Y. 2002) (“[A]n agent has a duty not to use confidential knowledge acquired in his employment in competition with his principal.”) (internal quotation marks and citation omitted); *PSC Inc. v. Reiss*, 111 F. Supp. 2d 252, 255-56 (W.D.N.Y. 2000) (“Second Circuit and New York courts have held that an agent has a duty not to use confidential knowledge acquired in his employment in competition with his principal.”) (internal quotation marks and citation omitted); *N. Atl. Instruments, Inc. v. Haber*, 188 F.3d 38, 47 (2d Cir. 1999). This duty not only exists during the employee's employment but also continues after the employment has terminated. *Thin Film Lab*, 218 F.3d at 520; *N. Atl. Instruments*, 188 F.3d at 47.

<sup>3</sup> Under New York law, an employer may not enforce a non-compete clause against an employee whose termination was “involuntary and without cause.” See *Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 N.Y.2d 84 (N.Y. 1979) (refusing to enforce forfeiture provisions of non-compete agreement where employee was terminated involuntarily and without cause); see also *SIFCO Indus., Inc. v. Advanced Plating Techs., Inc.*, 867 F. Supp. 155, 158-59 (S.D.N.Y. 1994); *Cornell v. T.V. Dev. Corp.*, 17 N.Y.2d 69, 75, 268 N.Y.S.2d 29, 34, 215 N.E.2d 349 (1966) (otherwise valid covenant against competition is unenforceable “when the party benefited was responsible for the breach of the contract containing the covenant”). A few other states follow a similar rule. See, e.g., *Rao v. Rao*, 718 F.2d 219, 224 (7th Cir. 1983) (interpreting Illinois law); *Bishop v. Lakeland Animal Hosp., P.C.*, 644 N.E.2d 33 (Ill. App. Ct. 1994) (agreeing with *Rao* and holding that under Illinois law, “in order for a noncompetition clause to be enforceable . . . the employee must have been terminated for cause or by his own accord.”); see also *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, 265 P.3d 646, 652-54 (Mont. 2011) (“[A]n employer normally lacks a legitimate business interest in a covenant when it chooses to end the employment relationship.”); *But see Hyde v. KLS Professional Advisors Grp., LLC*, No. 12-1484-cv, 2012 WL 4840714, at \*2 (2d Cir. Oct. 12, 2012) (noting reservation about extending *Post* beyond forfeiture provisions to render all restrictive covenants per se unenforceable under New York law against employees who have been terminated without cause). See generally Kenneth J. Vanko, “You’re Fired! And Don’t Forget Your Non-Compete...”: *The Enforceability of Restrictive Covenants in Involuntary Discharge Cases*, 1 DEPAUL BUS. & COM. L.J. 1, 1 (2002).

negotiation, following one's instincts is key at this phase. Persistence does weaken resistance as long as the relationship with opposing counsel remains civil and intact.

What can also be learned at this stage of the negotiation is what the employer can practically give the client and how that can be used to leverage or work a trade. If cash is something that the company doesn't have, moving to the non-monetary issues or expenses that may be very meaningful to a client's situation is sensible. Again, health coverage or meaningful outplacement may be what the company can provide instead of cash, or even the opportunity for the client to remain in an office with a secretary or a longer exercise period on options (if the plan has discretion). Moving the negotiation to conclusion by substituting cash for benefits can help both parties achieve closure—which is ultimately what the client needs and likely wants.

#### **IV. Post-Negotiation: Tax Regulations, Government Legislation and Clawbacks**

The old adage of "be careful what you wish for" applies here. It is important to make sure that the additional monetary and non-monetary enhancements that can be successfully negotiated for the client do not wind up costing her more in taxes or result in other penalties. This has become a greater challenge for most attorneys since the IRS and the Treasury have gotten involved in regulating severance and executive pay.

Being aware of the tax laws and other regulations that can affect what is actually possible to achieve in the negotiation for separation pay is crucial to preparation. Further, bankruptcy and other corporate transactions must be taken into account in our vulnerable economy as they have the potential to clawback or eliminate any severance entitlements.

##### **A. Section 409A of the Internal Revenue Code and Separation**

In June, 2007 the IRS finalized regulations that treated separation pay as non-qualified deferred compensation.<sup>4</sup> The final regulations became effective and the transition period expired on Jan. 1, 2009.<sup>5</sup> Since then, it has become impossible to negotiate an executive separation agreement without paying close attention to these rules when negotiating or structuring separation pay. In order to comply with the regulation, the time and method of the severance payment must be specified (i.e., lump-sum versus installments) and comply with any other election and distribution requirements, unless it qualifies for one of the exceptions below. These rules apply to all payments including reimbursable expenses and some equity arrangements.<sup>6</sup>

In connection with termination of employment and severance benefits, the following two exceptions to 409A should be noted, understood and considered part of any attorney's due diligence process in preparing for negotiation of a separation agreement. "Separation pay"<sup>7</sup> arrangements that provide for

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<sup>4</sup> See American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 885, 118 Stat. 1418, 1634 (2004) (codified at I.R.C. § 409A (Supp. V 2005)).

<sup>5</sup> During the transition period, various companies modified their plans in order to comply with §409A standards for deferred compensation and preserve favorable tax treatment for plan participants or "service providers" (e.g., employees).

<sup>6</sup> Treas. Reg. §1.409A-1(b)(5)(i)(A)(1); Treas. Reg. §1.409A-1(b)(9)(v).

<sup>7</sup> Under §409A, "separation pay" means an amount to which an individual obtains a right to payment only because of her separation from service.

payment only upon an involuntary termination of employment (i.e., a termination by the employer without Cause or resignation by the employee for Good Reason that meets the requirements of Section 409A) are not considered nonqualified deferred compensation under Section 409A to the extent that a portion of the total amount of the "separation pay" does not exceed the lesser of (i) two times the amount of annual compensation that can be taken into account under a tax qualified plan under Section §401(a)(17) of the IRC (\$250,000 for 2012; \$500,000 when multiplied by two<sup>8</sup>) for the year of separation, and (ii) two times the annual rate of pay for the employee at the time of separation, provided that, in either case, this portion of the severance amount is paid no later than the end of the second taxable year following the year in which separation occurs.<sup>9</sup> This is usually referred to as the involuntary termination exception. Alternatively, in order to completely take the employee out of the realm of 409A, the employee's counsel can negotiate for the severance benefits to be paid within the "short-term deferral rule," which means that the severance amount must be paid within 2 ½ months following the end of the employee's tax year or the employer's tax year, whichever is later.<sup>10</sup> Further, in the event that an executive is a "specified employee"<sup>11</sup> under Section 409A, any "separation pay" will have to be delayed for six months from the date of termination.<sup>12</sup> Knowing if a client will meet these exceptions and also when she can receive severance pay will likely factor into the negotiations.

Also, knowing how to structure the severance package and all of its components in order to avoid any violations under 409A is essential. For example, in trying to ensure that the severance package is exempt from 409A under the involuntary separation exemption, the employee's attorney should be mindful that those benefits or reimbursement expenses that are not exempt from Section 409A should fit within the monetary limit. Reimbursement of expenses incurred by a separated employee are exempt from Section 409A to the extent the reimbursements are excludable from the employee's taxable income. Further, reasonable outplacement, moving expenses, other deductible business expenses, in-kind benefits and service payments on behalf of the employee are also exempt. These expenses or in-kind benefits must be incurred no later than December 31 of the second calendar year following the calendar year in which the termination occurs and must be reimbursed by the end of the third year after the

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<sup>8</sup> For 2013, the limit is indexed for \$5,000 inflation.

<sup>9</sup> Treas. Reg. §1.409A-1(b)(9)(iii).

<sup>10</sup> I.R.C. §409A (a)(2)(A).

<sup>11</sup> I.R.C. §409A(a)(2)(B)(i). Under § 409A, a "specified employee" as a key employee (as defined in I.R.C §416(i)) of a company whose stock is publicly traded on an established securities market. Under I.R.C. §416(i) a key employee is an employee who is (i) an officer of the employer whose 2009 annual compensation is greater than \$160,000 (the amount is subject to change from year to year due to cost of living), (ii) owns more than 5 percent of the employer or (iii) owns more than 1 percent of the employer with annual compensation in excess of \$160,000. The number of employees that can be included as "key employees" because they are officers is limited to a maximum of 50 highest paid officers. If the corporation has 30 to 500 employees, maximum number of officers can be 10 percent of employees. If the employer has 30 or fewer employees, officers are limited to three employees.

<sup>12</sup> For further discussion of Section 409A, see Wendi S. Lazar & Katherine Blostein, *Executive Employment Agreements*, in *Executive & Director Compensation Reference Guide*, Executive Compensation Library on the Web (BNA).

separation.<sup>13</sup> Medical expenses must be incurred and reimbursed by the end of the period of COBRA continuing coverage to which the employee would otherwise be entitled.<sup>14</sup>

Finally, following the release of IRS Notices 2010-6 or 2010-80, any employment or separation agreement that provides for payment subject to the employee's return of a release within a designated period, has to provide for such separation payment to be made either on the 60th or 90th day following the employee's separation from service or during a specified period not longer than 90 days following the separation from service, provided that if such period begins in one taxable year and ends in a second taxable year, the payment will be made in the second taxable year. However, these timing restrictions apply only if the severance or other payments do not qualify for one of the exceptions to §409A described above. If the payments are designed to satisfy one of the exceptions under §409A, the agreement may require payment immediately after receipt of an effective release (following expiration of any statutory revocation period).

## B. TARP

After the fall of Bear Stearns and Lehman, many financial institutions received government "bail out" money through the Troubled Asset Relief Program (TARP). TARP, along with the amended American Recovery and Reinvestment Act of 2009 ("ARRA"),<sup>15</sup> severely limited executive and separation pay.

Any attorney negotiating a separation arrangement for an executive or employee who is departing a financial institution that received (and has not paid back) government funds under TARP must be aware of the regulations' limitations on executive compensation. Under these regulations, the five most highly paid executives of a public company receiving assistance are subject to compensation limitations and restrictions. Further, depending on the company's commitment under TARP, these limitations and restrictions can apply to as many as the next twenty most highly compensated employees, or to such higher number as the U.S. Department of the Treasury (Treasury) may determine is in the 'public interest.'

In regard to separation pay and severance agreements, ARRA prohibits so-called "golden parachutes," which are payments to one of the top five senior executive officers or any of the next five most highly-compensated employees that are triggered by a termination of employment or a change in control. Exceptions to this rule include payments for services performed or benefits accrued, qualified retirement plan (or foreign retirement plan) benefits, payments made by reason of death or disability of the employee, or severance payments required by state or foreign law. Further, under ARRA, institutions receiving exceptional assistance must in the future eliminate any severance payment to the top ten senior executives and limit severance payments for the next twenty-five senior executives to the equivalent of one year's compensation. In the case of institutions that receive future assistance from a

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<sup>13</sup> Treas. Reg. §1.409A-1(b)(9)(v).

<sup>14</sup> Treas. Reg. § 1.409A-1(b)(9)(v)(B).

<sup>15</sup> After June 15, 2009, the expanded definition of a TARP Recipient includes entities in a parent-subsidary relationship with the TARP Recipient based on a 50% ownership threshold (using IRC 414 rules), and any related entity created to avoid/evade TARP restrictions.

generally available program, severance payments for the top five senior executives must be limited to the equivalent of one year's compensation. New guidance under ARRA released on June 15, 2009 clarified that the departing executive is deemed to have received all of her severance on the date of the executive's departure. Therefore, a TARP recipient cannot avoid the prohibition by delaying payment until after the TARP period has expired. Finally, there is no grandfathering for arrangements entered into before the TARP period began, except for amounts that were paid before June 15, 2009.

### C. Clawbacks

Clawbacks are contractual provisions that require an employee to repay compensation if a specific event or other trigger occurs. In a separation agreement, these provisions are frequently triggered by the company finding out about employee's misconduct (especially in a securities-related industry) or the employee's violation of a restrictive covenant after employment ends.

With these new developments in the regulation of financial institutions and executive compensation, employers are now frequently inserting clawback provisions into employment agreements, executive compensation plans, and even separation agreements. Accordingly, employees' counsel must be vigilant to try and narrow these clawbacks where appropriate.

Employee's counsel should insist on removing any clawback provisions proposed by the employer that are not related or appropriate to her employment role. They should also be eliminated if the employee is terminated without cause or resigns for good reason. If the clawback is not totally removed, the clawback trigger should be limited in time and scope. Finally, the manner and timing of the clawback payment should be carefully planned to avoid negative Section 409A consequences, standard income tax consequences, and possible violations of wage laws that may be triggered if clawback provisions are not constructed carefully in the separation agreement.

### D. Structured Settlements

Finally, for separation agreements that reflect a settlement of discrimination claims, employee's counsel may want to try to make use of the Tax Relief Act of 2009, which allows the employee to avoid having the severance amount attributable to the settlement of those claims being taxed as separation pay. Further, in the event the employee is receiving a large settlement under a separation or settlement agreement, counsel may want to bring in a structured settlement consultant to explain to the client how the settlement amount can put in a financial or insurance arrangement that will include periodic payments, such as an annuity.

## **IX. Post Negotiation: Papering the Deal**

Unless an employee has a pre-negotiated separation agreement or has clearly defined the terms of the separation in her employment agreement, most employers will offer her a standard separation agreement that favors the employer. These provisions are usually one-sided with no mutuality, often contain offsets and clawbacks, and may have new overbroad and unreasonable restrictive covenants as discussed above. They may also restrict an employee from re-hire or waive rights that are critical to an employee's future such as indemnification, workers compensation, unemployment insurance and even rights to equity and deferred compensation. Further, reporting requirements and mitigation have become more popular in these economic times and can be harsh when coupled with certain restrictions.

These agreements will require skillful drafting on the part of employee's counsel in order to achieve a lawful, fair and equitable agreement.

While this list is far from exhaustive, below are a few common examples of provisions that employees' counsel should aggressively negotiate if they are presented unilaterally.

#### A. The Reason for Termination

The reason for the employee's termination should be represented in a way that gives an employee the best chance of re-employment while at the same time protects unemployment insurance benefits and avoids 409A or other tax penalties. If possible, negotiating a mutual termination statement will be far less harmful to the employee and may allow her to receive severance benefits without having to tell future employers that she was terminated. If the employer is amenable, it may agree in this provision to allow the employee to tell recruiters and new employers that she resigned and agree to confirm this if asked.

#### B. Non Disparagement

In regard to mutuality, depending on the circumstances of the employee's departure, a mutual non-disparagement provision will help to ensure that the company will direct certain employees and or senior management from speaking ill of the client both internally and externally. While it can be argued that unless named employees or senior management are signatories to the agreement, the obligation will not be binding on them, including language such as "the company will direct John, Alice and Tim in writing" does generally put these named employees on notice and create an affirmative duty on the part of the employer not to disparage the departing employee.

#### C. Over-Inclusive Waivers

Every separation agreement that contains a release and waiver of claims should include an exclusion of benefits in which the employee is vested by contract, law, plan or policy. This includes employee's rights to workers' compensation, indemnification and defense, and certain deferred or vested benefits (including equity or pension). Further, the separation agreement should also state that the employee is not releasing her rights to apply for unemployment insurance for which the company will not contest.

#### D. OWBPA Waivers

To release any claim under the Age Discrimination in Employment Act ("ADEA"), which covers individuals age 40 and over, the separation agreement must comply with the requirements of the Older Workers Benefit Protection Act ("OWBPA"). The OWBPA requires that to waive an ADEA claim, the waiver must be "knowing and voluntary."<sup>16</sup> To be deemed knowing and voluntary under the OWBPA, the waiver must: be part of a written agreement that is readily understandable by the employee; refer specifically to claims under the ADEA; not encompass future ADEA claims; be given in exchange for consideration that is over and beyond any benefit to which the employee is already entitled; provide in writing that the employee is advised to consult with an attorney before signing the waiver; and give the employee adequate time to consider the waiver before signing it.<sup>17</sup> Additionally, in the case of a group

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<sup>16</sup> 29 U.S.C. §§ 621, *et seq.*

<sup>17</sup> 29 C.F.R. § 1625.22(e)(4). In the case of an individual termination, the employer must give the employee at least 21 days to consider the waiver. In the case of an exit incentive or other employment termination program offered to a group of employees, the employer must give at least 45 days. In either case, the employee has 7 days after



exit-incentive program, the employer must also disclose in writing: the groups of employees eligible for the program; the program requirements; any time limitations under the program; and the job titles and ages of all employees eligible or selected for the program and the same information for those not eligible or selected.<sup>18</sup>

In order to be deemed effective, the release must meet all OWBPA requirements. Further, a release that does not meet the requirements of OWBPA may *not* be ratified by the employee's retention of the consideration received in return for the release.<sup>19</sup> Therefore, while the employee may keep the severance benefits under the separation agreement, a release that does not comply with OWBPA will be invalid as to ADEA claims.

#### E. No- Rehire

Provisions in which an employee agrees not to apply for re-employment and to waive any rights to be recalled to employment in the future are highly restrictive and should be rejected whenever possible. In 2008, the EEOC vowed to oppose any term in a separation agreement that denies the employee of an opportunity to reapply for a job with that employer.<sup>20</sup> Moreover, the practical effect of these no-hire

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signing in which to revoke the waiver. 29 C.F.R. § 1625.22(e)(6). However, in the case of settlement of court proceedings or settlements with the EEOC, "a reasonable period of time" to consider the waiver is acceptable.

<sup>18</sup> See 29 U.S.C. § 626(f)(1).

<sup>19</sup> *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).

<sup>20</sup> See Tom Gilroy, EEOC Opposes Settlement Clauses That Bar Re-Application and Rehiring, BNA DAILY LABOR REPORT, Apr. 4, 2008, at C1 (stating that "the agency opposes as a matter of policy both 'no-hire' and 'no-re-apply' covenants" as such clauses "are not good public policy, since they could be viewed almost as retaliation for coming forward for a discrimination claim"). At an ABA Labor and Employment Law Section meeting on April 3, 2008, an EEOC attorney stated that the Commission will oppose so-called "no rehire" or "re-application" clauses in settlement or employment agreements. See <http://suitsintheworkplace.com/blogs/archive/2008/04/05/827.aspx>. However, case law on the issue seems to suggest just the opposite. To date, courts and the EEOC have upheld settlement agreements or any other agreements containing no re-employment provisions. See *Jencks v. Modern Woodmen of America*, 479 F.3d 1261, 1265-66 (10th Cir. 2007) (affirming district court's holding that employee waived entitlement to re-employment or reinstatement with the employer in an enforceable settlement agreement and that such agreement was a "legitimate non-discriminatory reason for declining employee's application"); *Austin v. Spirit Airlines, Inc.*, No. 08 Civ. 60540, 2008 WL 4927003, at \* (S.D. Fla. Nov. 17, 2008) (on motion to enforce a settlement agreement, compelling plaintiff to execute a full settlement agreement, including a no-rehire provision); *Salerno v. City Univ. of N.Y.*, No. 99 Civ. 11151, 2005 WL 578944, at \*3 (S.D.N.Y. Mar. 10, 2005) (imposing a settlement judgment that included a no-reemployment provision and noting that "a bar on future employment is not unusual"); *Franklin v. Burlington N. & Santa Fe Ry. Corp.*, No. 03 Civ. 228, 2005 WL 517913 (N.D. Tex. Mar. 3, 2005), *aff'd*, 174 Fed. Appx. 831 (5th Cir. Apr. 5, 2006) (holding that employee failed to show that employer's refusal to process plaintiff's application on the basis of the separation agreement, which the company believed to include a no-rehire provision, was pretextual); *Khou v. Methodist Hosps. of Dallas*, 2004 U.S. Dist. LEXIS 4148, (N.D. Tex. 2004), *aff'd*, 2005 U.S. App. LEXIS 4206 (5th Cir. 2005) (court affirmed judgment against an employee who applied for a job after entering into a separation agreement where employee promised to voluntarily and permanently resign); *Homeport Ins. Servs., Inc. v. Lundy*, B236276, 2012 WL 5385640, at \*5 (Cal. Ct. App. Nov. 5, 2012) (finding no

provisions is that they can prevent a client from taking a job with a new employer after a merger or acquisition of or by the old employer. Limiting these provisions to the existing company or division is one means to reduce the negative effect of a no-rehire provision. Also, stating that the employer is under no obligation to re-hire can often serve the company's purpose as well.

#### F. Mitigation

Many separation or settlement agreements will state that in the event the employee is hired back by the company, or finds another position outside the company, the compensation received will be deducted from the severance amount. An employee's counsel should make sure that this does not reduce a pre-existing entitlement to unmitigated severance pay. If there is a severance plan in place that does not require mitigation, this new obligation should not be assumed without consideration.

#### X. **Getting It Right from the Start**

In order to avoid some of the conflicts and uncertainties involved in negotiating a separation agreement, certain terms, compensation, and benefits should be agreed to at the commencement of employment in an employment contract, offer letter, or separation agreement.<sup>21</sup> These agreements should be negotiated during the honeymoon period rather than at the point of divorce. Depending on the position and circumstances of employment, an employee may be able to negotiate an equitable severance package at an earlier, non-adversarial time with all the necessary contingencies which may apply or not, depending on the reason for the termination.

Notice and separation pay should be clearly stated as well as what will be paid to the employee upon termination. Not only should there be negotiated definitions of "cause" and "good reason" that protect the employee, but there should also be allowances for a change in control, relocation, death, disability, or other foreseen or unforeseen circumstances. Further, a solid agreement should be favorable to the employee if a dispute arises or discrimination or retaliation claims are involved, and it should give the employee a chance to bring a dispute in court, rather than mandating arbitration. Also if mediation and arbitration are chosen for all or some disputes, the agreement should state which specific arbitral body or association the parties will use and which rules will apply. Drafting a clause that states that the employer pays costs and fees in a dispute is also worth negotiating for, since the cost of litigation to an employee will be exorbitant and likely prohibitive.

In the end, choice of law and jurisdiction provisions that favor the employee and help make litigation more affordable may be very relevant to the employee's termination as noted above. Because law and jurisdiction have a significant effect on the employee's rights and obligations at termination, particularly with issues like restrictive covenants, research on choice of law may be key.

Provisions for how salary, bonus, and equity are paid if and when the relationship ends are just as important as they are in the initial negotiation when an employee accepts a position. Will the employee receive a full year or pro-rata bonus if terminated mid-year or before bonuses are paid? Will equity vest

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reemployment provision to be enforceable) (unpublished/noncitable); *O'Brien v. Potter*, 2004 EEO PUB LEXIS 448 (Feb. 3, 2004) (holding that the settlement agreement between the parties, which included a no-rehire provision, was enforceable); *Jablonski v. Battista*, EEOC DOC 01A23730 (Sept. 17, 2003) (enforcing no re-employment clause in agreement).

<sup>21</sup> See Wendi S. Lazar & Katherine Blostein, *Executive Employment Agreements*, in *Executive & Director Compensation Reference Guide*, Executive Compensation Library on the Web (BNA).

and options have time to be exercised? These are just a few among many examples of issues where uncertainty can present hardship if appropriate provisions are not unambiguously drafted or agreed to in advance.

Most employees offered a position want it so badly that they do not want to “rock the boat,” and push for an agreement, particularly in an economic environment where applicants still outnumber the number of jobs available by a significant margin. However, looking ahead and knowing that the employee will have less, not more, leverage at the time of termination is reason enough to get it right and negotiate termination provisions and agreements upon hire.

## **XI. Conclusion**

The process of unwinding from employment is difficult and often stressful for both parties. It is rarely a positive reason that is motivating the separation. Counsel for the employee needs to be vigilant in analyzing the situation and assessing the employee’s leverage. Sometimes that leverage is legal; at other times it is political or merely that the employee’s personal plight is compelling. Whatever it is, counsel will need to be thoughtful, assertive, and sensitive about the power and/or legal claims that dominate the negotiation. No matter how much has been won in a negotiation, papering the deal to favor and protect your client in the future and to fully reflect what has been agreed to and not waived is critical. There are no “form” agreements that withstand the change in laws and policies and moreover, each agreement should be tailored to the individual employee’s situation. Finally, keeping good relationships with opposing counsel should remain a priority throughout the negotiating and drafting process as you likely will encounter each other “the next time.”