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IV. NEGOTIATING AND DRAFTING SETTLEMENT AGREEMENTS

A. OVERVIEW

1. The Context of the Settlement.

This section of the chapter addresses negotiating and drafting settlement agreements for employment disputes. Settlements may come from direct negotiations between the parties (or their respective counsel), from mediation, or from negotiations before or during arbitration proceedings. In all of these contexts, many substantive issues, and thus many negotiation and drafting issues will be similar. When the context presents special issues, they will be specifically addressed.

2. Severance Agreements.

Upon termination of an employee's employment, most employers provide severance benefits, typically in exchange for a release of claims against the employer. Moreover, many employment disputes arise because the employer terminates or threatens to terminate the employment relationship. Some employment disputes -- involving current employees -- result in a negotiated termination or resignation of employment.

All of these situations raise severance issues, so they usually result in an agreement containing provisions typically found in severance agreements. Accordingly, this section IV, while covering settlement agreements, also highlights negotiating and drafting issues common in severance agreements. For further discussion, see Chapter 13.

3. The First Draft of the Agreement.

It is customary for the employer's counsel to prepare the initial draft of a settlement agreement involving an employment dispute.[1] Thus, the employee's counsel is usually in the position of reviewing and responding to a document prepared by the other side. Typically, that initial draft will be one-sided – maybe even outrageously so. Moreover, the employee's counsel has little direct control over the timing of that draft.

One way to try to avoid this situation is for the employee's counsel to take the initiative and prepare the draft agreement. Of course, this results in more work for the counsel, at least initially. Some employee's counsel are more than willing to cede the drafting to the other side, particularly when the counsel is working on a contingency basis. But ceding control over the first draft allows the employer's counsel to determine

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[1] Almost invariably, a severance agreement will be drafted by the employer's counsel and presented to the employee (or the employee's counsel).

when the document is ready,[2] what terms are covered, and what language is used to express those terms.

Preparing the first draft can be a tactical benefit, especially in negotiating terms that were not clearly and completely addressed in the pre-drafting negotiations. And doing so helps insure a balanced and fair first draft. Thus, taking the initiative can improve both the substance and the timing of the final agreement.

Typically, once the broad terms of a settlement have been agreed upon, the employee is eager to get the paperwork done and receive the settlement proceeds. The employer, on the other hand, has little incentive to expedite the process, unless some external deadline (e.g., a trial date) is imminent. Indeed, employers sometimes prefer to move slowly if for no other reason than to delay writing the settlement check. Thus, in the final pre-drafting stage of negotiations, an employee's counsel should try to get a firm commitment from the other side on the timing of the process, including the date for payment of the settlement proceeds.

To induce the employer to expedite the process, the employee's counsel should try to build financial incentives into the settlement. The most obvious way to do that is to provide for interest on the settlement proceeds at a high rate beginning on a specified date, such as ten days after the broad terms of agreement are in place. Another approach is to require the employer to deposit the settlement proceeds into an interest-bearing escrow account, held by the employee's or the employer's counsel pending the consummation of the deal, with the interest going to the employee. This approach removes the incentive for the employer to move slowly to postpone writing the settlement check.

4. Reciprocity and Mutuality.

After the key financial and non-financial terms of a settlement have been agreed upon, the employee's counsel should focus on other terms that are sometimes overlooked altogether, or overlooked until the employee's tactical leverage is reduced. These terms include a release in favor of the employee, a favorable oral or written reference, a non-disparagement clause in favor of the employee, and effective enforcement mechanisms for the employer's obligations under the agreement. A useful tactic for the employee's counsel during negotiations on non-financial issues is to insist on reciprocity and mutuality – "what's good for the goose is good for the gander." Once that principle is established, the employer's counsel will be less likely to insist on extreme provisions in the agreement (e.g., an onerous liquidated damages clause), and a balanced settlement agreement is more likely. These issues are addressed in detail later in this section.

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[2] Employer's counsel will invariably insist on having the employer review and approve the draft before sending it to employee's counsel. Thus, even when the employer's counsel is reasonably prompt in preparing a draft, which is often not the case, the employer's review frequently delays the process longer than the employee and the employee's counsel would like.

B. SEVERANCE AGREEMENTS – SPECIAL ISSUES

1. Generally.

As discussed earlier, a severance agreement is a type of settlement agreement. Typically, severance agreements are prepared unilaterally by the employer's counsel and presented to the employee to sign. After that, negotiations over the terms may ensue. Negotiations in that context raise some special issues. Should the employee negotiate for a better package or agreement? Generally, yes. If you don't ask, you don't get. It doesn't hurt to ask.

2. Whether to Negotiate.

It depends. Frequently, the employee should try to negotiate an enhanced package, with counsel in the background. This approach is cheaper for the employee and is less confrontational. Often it is far more effective, particularly when the employee's negotiating leverage is based more on personal and political factors than on legal ones. In those situations, direct intervention by the employee's counsel can be counterproductive, because it appreciably changes the dynamics of the negotiations. Invariably, it precipitates direct involvement by the employer's counsel, who is likely to focus on the legal merits of the employee's position, rather than those personal and political factors that better serve the employee's interests.

If the employee is unable or unwilling to negotiate directly, or if that approach appears unpromising, or if it is tried but fails to achieve an acceptable result, then the employee's counsel can step forward to deal directly with the employer, or the employer's counsel. Generally, little is lost by trying this incremental approach. Even when it does not work, the employee and the employee's counsel may learn about the strengths and weaknesses of their bargaining position in the process.

3. With Whom to Negotiate.

When the employee is going to negotiate directly with the employer, choosing the person with whom to negotiate is an important tactical decision. Sometimes, the proposed severance agreement or a cover letter specifies who will handle any questions about the agreement. The employee should not feel constrained by that designation since the designated person often is not the best person with whom to negotiate. The employee or the employee's counsel should try to identify someone in the company who has both the power and the inclination to help the employee. Often, the employee is better off negotiating with people in his or her management chain, with whom the employee has worked, rather than with people in the human resources or counsel's offices. Moreover, the employee generally is better off negotiating with a human resources representative rather than a company attorney.

4. How to Negotiate.

A key to any severance negotiation is determining what negotiating leverage the employee has and can use. Obviously, that depends on the situation. If the employee has a strong (or at least colorable) legal claim, that is critical leverage, though occasionally it pays to hold it in reserve. Absent a legal claim -- or before asserting one -- the employee can try to "push the buttons" of the employer through people in the company who know and like the employee. The "buttons" include fairness, guilt (a great motivator), fear (of bad publicity, the government, or higher management), and friendship. An especially powerful button is the desire of many company officials to be perceived as fair and reasonable in the eyes of others, such as other employees, senior employees, directors or shareholders of the company, customers or clients of the company, or people in their industry. With some companies and some employees, these non-legal factors work, especially for employees. This is especially true when proposed changes will cost the employer little or no money, while helping the employee.

5. Standard Severance Policies.

Typically, it is harder to negotiate potential changes in the context of a reduction-in-force. Employers often say they can't or won't make changes that could undermine the standard package or create a bad precedent. Even in the face of such a mindset, changes can be obtained -- even substantial ones -- through the creative approaches discussed below.

6. Withdrawal of Offer.

Can the employer rescind or withdraw a proffered severance package during any consideration period if the employee asks for more? Generally, yes, but it rarely happens. An employee’s attorney is safe in assuming that the standard package provided under a company policy or an ongoing exit or reduction program will not be withdrawn. Under the Older Workers Benefit Protection Act, moreover, the employer arguably cannot withdraw the offer during the 21/45 day consideration period.[3] In any event, the consideration period is routinely extended, though the employee’s attorney should be alert to the risk that the employer might not extend it and should get written confirmation of any extension to the extent practicable.

7. COBRA.

A discharged employee has the right under COBRA[4] to continue group health insurance or medical coverage, at the existing benefit level and rates, for up to 18 months after the off-payroll date (up to 29 months if the employee is disabled under Social Security standards). The employer can require the employee to pay up to 102% of the cost of continuing this benefit coverage.

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[3] *But see* Ellison v. Premier Salons International Inc., 981 F. Supp. 1219 (D. Minn. 1997).

[4] 29 U.S.C. 1161 et seq.

C. SEVERANCE AGREEMENTS – ECONOMIC TERMS

1. Generally.

Negotiating a severance agreement offers many opportunities to structure the economic terms beyond the mere payment of a lump-sum settlement amount. Some of these approaches can be adapted for use in structuring the economic terms of a settlement agreement in a non-severance situation. Accordingly, those approaches are set forth here.

2. Severance Pay and Other Cash Compensation.

a. Severance Pay Options.

The basic options are lump sum and salary continuation. Typically, benefits end when a lump sum is paid, and some benefits continue during a continuation period, though exceptions occur both ways. Employers will sometimes negotiate a switch from one to the other at the employee's request.

b. Effect of Options.

During a salary continuation period, employers often will continue to pay for health/medical benefits on the same terms as during active employment, though the employer can require the employee to pay up to 102% of the cost. Employers sometimes will continue other benefits, such as life insurance coverage, pension or 401(k) contributions and accruals, and vesting under stock plans, etc. Employers generally do not continue disability benefits or vacation and sick day accruals during a salary continuation period, though sometimes vacation accruals can be negotiated.

c. Termination of Severance Pay.

An important negotiating point is whether continuation pay will end when the employee gets a new job. Some severance arrangements so provide; such a provision may or may not impose a duty to mitigate on the employee. Other arrangements provide that the employee may choose to cease continuation pay and obtain a lump sum payment for the balance, upon starting a new job or merely upon request. Of course, if the proposed agreement contains a defeasance or mitigation provision, or lacks an option to choose a lump sum payment, try to negotiate for a change.

An employee who is concerned about the prospect of running out of severance pay before finding a new job may try to negotiate a trade-off -- exchanging a fixed duration of severance pay for a potentially longer variable duration, depending on when

the employee gets a job. For example, in lieu of 26 weeks fixed severance pay, an employee may prefer to receive severance until (and only until) reemployment, which could happen after only 10 weeks or after 40 weeks. In such a situation, the employer will always insist on a time limit and may insist on a duty to mitigate. Sometimes a combination of fixed and variable pay is negotiated, providing a floor and a ceiling.

A modified arrangement sometimes is negotiated to meet the employee's security objectives (i.e., limiting the risk of missing paydays), while meeting the employer's concern that the employee won't try hard enough to find a job. For example, under a variable payment arrangement with an outside date, the employee may receive pay until reemployment and then split (e.g., 50/50) with the employer the amount of severance covered by the remainder of the severance period. This shares risks and benefits.

d. Incentive Compensation.

Severance pay is typically based on base salary and does not include bonuses, incentive pay, commissions, etc. Nonetheless, employees should be alert to opportunities to lay claim to such compensation. Employers will often argue that incentive compensation is discretionary or is not payable to employees who depart before the payment date for such compensation. Sometimes, however, the employee may have been given an oral or written assurance of a minimum or guaranteed bonus (such as in an offer letter). Even without that, an employee may be able to make a strong equitable claim for at least a pro rata bonus. Such a claim can have special merit toward the end of the business year when the compensation would normally be paid, especially if the employee has met most or all of the applicable standards for the extra compensation. Those claims can be quite substantial.

3. Leave pay.

It is always important to ascertain the employee's entitlement, or potential claim, to accrued but unused vacation or other leave pay. Sometimes, you can get the whole year's allotment; other times, all you can get is the pro rata portion. Check the employer's manuals and policies and ascertain what other employees have gotten. Increasing the amount of vacation pay is a way to enhance the package without "breaking the mold" of the standard package.

4. Creative Approaches.

When an employer refuses to alter a standard severance pay amount or period, look for creative ways to improve the package "around the edges" while leaving the core intact. Examples of such improvements include the following:

- Defer the effective date of the termination. This could be in the form of a "notice period" or simply continued employment. If the off-payroll date is postponed, the employee gets paid longer before getting the standard package. It may be understood (or better, stated) that the employee will

not be expected to perform any or much service during all or part of the extended period, presumably while looking for a new job.

- Add a consulting agreement (discussed later).

- Convert some benefit to cash. For example, if the employee does not need proffered outplacement services, occasionally an employer will allow the cost of that service to be "traded in" for cash; this can be as much as 15% of the employee's salary. Similarly, if the employee does not need medical coverage (e.g., when covered under a spouse's plan), the cost of such coverage might be traded in.

- Get more money allocated to incentive compensation or to leave pay (see above).

- Agree to a restrictive covenant, such as a covenant not to compete or to solicit customers or employees, which has value to the employer (see below).

- Consider tax issues (see below).

5. Offsets.

In most states, employers are not allowed to offset unilaterally against "wages" any amount that the employer contends the employee owes the employer (e.g., cash advances, loans, alleged thefts).[5] Nonetheless, employers can require an employee under some circumstances to allow an offset as a condition for receiving certain consideration, such as a loan or advance.

6. Benefits.

As discussed earlier, COBRA provides a right to continued medical coverage, and some benefits are commonly extended during a salary continuation period. In any event, as to all benefits, employees should gather all pertinent information as soon as possible, including benefit and account statements, plan documents, summary plan descriptions, etc. This is especially applicable to any severance plan documents. With these documents, the employee and counsel can assess the effects of the severance on those benefits -- what is being preserved and what may be lost (e.g., due to inadequate accrual or vesting). This process can identify problems, clarify ambiguities, and locate improvements that can benefit the employee, often without substantial cost to the employer.

Employee’s counsel should be alert to the possibility that the employer might be terminating the employee for the purpose of preventing the employee from obtaining a

[5] See, e.g., N.Y. LABOR LAW § 193.

benefit (e.g., vesting in a pension). While obviously hard to prove, such a purpose could violate Section 510 of the Employee Retirement Income Security Act.[6]

When the employee is close to, but short of, a date for accruing or vesting some benefit, try to negotiate a way to bridge to that date. This is especially applicable to pensions, 401(k)s, deferred compensation plans, and stock plans. Ways to do that include: getting a longer severance period; spreading the same severance pay over a longer period; getting an authorized leave of absence (i.e., continuing employment status without pay); or getting credit for some prior service with the employer or a predecessor-in-interest. With respect to non-qualified plans (e.g., some deferred compensation and stock option plans), it may be possible to obtain accelerated accrual or vesting, particularly when the employee was terminated without cause. Sometimes an employer can be persuaded to provide some cash in lieu of a forfeited benefit.

7. Consulting.

Sometimes it is advantageous for both the employer and the employee to enter into a consulting agreement after the end of employment. The employer may have continued use for the employee's expertise, contacts, or institutional memory, and the employee can obtain additional income that may not interfere with other employment. Sometimes a consulting agreement is a way for the employer to assure the employee's good will, avoid trade disparagement, or obtain a covenant not to compete or to solicit clients or employees. A consulting agreement is a way for the employee to obtain more money in exchange for something of real value to the employer, which makes it easier to negotiate.

Sometimes, a "no-show" consultancy can be arranged. For example, the employee may be paid to "be available" or to be "on call". Obviously, employee’s counsel should be careful to assure that the agreement is not drafted in a way that imposes real, significant obligations as a condition for payment, if that is not the intent. Otherwise, the employer could stop payments for alleged non-performance. Consulting agreements are especially useful when the employer does not want to alter a standard package but is otherwise willing to improve the deal.

8. Attorneys' Fees.

The employee’s counsel should try to get the employer to pay the employee's attorneys' fees for reviewing and negotiating the agreement. Sometimes it works. Payment of attorneys' fees may be traded off against other amounts that would be subject to employment taxes, thereby saving both parties some taxes.

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[6] Similarly, if an employer terminates an employee for the purpose of preventing the employee from obtaining compensation (e.g., a large commission or bonus), there may be a breach of the implied covenant of good faith and fair dealing. See Wakefield v. Northern Telecom, 769 F.2d 109 (2d Cir. 1985) and 813 F.2d 535 (1987).

9. Outplacement Services.

Some employers offer professional outplacement services. For some employees, particularly those who have not been in the job market for a long time, these services can be very helpful. If this option is not offered and the employee could benefit from it, ask. If the employee doesn't need or want such outplacement services, the employer may be willing to trade the cost for cash. Some employers refuse to do so, however, taking the position that the outplacement service is offered to help the employee find a new job/career and the employee can take it or leave it. In the absence of professional outplacement assistance, the employee may ask for and obtain help from the employer in looking for a job. The ability to use a company office, secretarial and reception services, a telephone, voicemail, e-mail, and photocopying and other services can be a substantial benefit, especially when it helps preserve the appearance that the employee is "looking for a job from a job."

10. Property and Perquisites.

The employee's counsel should be alert to issues involving personal property, such as the employee's Rolodex (or electronic equivalent), personal papers and files, copies of some "business" documents, and office furnishings. As to documents, ascertain whether a confidentiality agreement is already in place. If so, it may govern the employee's rights to keep, obtain, or use certain documents. Employers sometimes allow employees to keep (or purchase at a reduced price) such company property as the employee's personal office computer, laptop, personal digital assistant, home fax machine, cellular telephone, or even company car.

11. Unemployment Insurance ("UI").

The employee's counsel should always remind the terminated employee of the right to collect UI benefits. Those benefits are not payable until the employee applies. UI benefits are not payable to employees who quit without sufficient reason or are fired for misconduct. If there is a doubt about what the employer will tell the UI office about the termination, try to get that straightened out beforehand and acknowledged in the agreement. Generally, UI benefits are payable despite a lump sum severance payment and during a fixed period of severance payments, but not while on the active payroll (e.g., during a "notice period"). It appears that these distinctions are not uniformly applied. If an employee is denied UI benefits improperly, an appeal can be filed. Initial determinations are often reversed on appeal.

D. TAX CONSIDERATIONS IN SETTLEMENTS

1. Background.

Before August 20, 1996, it was sometimes possible to structure and allocate settlements so that some, or all, of the proceeds would not be subject to income taxes, specifically amounts received as compensation for emotional distress under tort or

statutory claims.[7] At that time, Internal Revenue Code Section 104(a)(2) was amended to permit exclusion from income only for damages received "on account of personal physical injuries or physical illnesses" (emphasis added). For these purposes, "emotional distress shall not be treated as a physical injury or physical illness," except to the extent of damages paid for medical care.

Under Section 104(a)(2) as amended, the opportunities for tax-free settlement amounts are all but eliminated. The remaining possibilities for tax-free or tax-deferred amounts include:

1. damages received on account of physical injuries or illnesses (tax-free);
2. damages paid for the costs of medical care (tax-free);
3. amounts paid into tax-deferred accounts (e.g., 401(k)s and pension plans) (tax-deferred);
4. employer contribution to a "rabbi trust" for the employee's benefit (tax-deferred);
5. structured settlements, with payments made in later taxable years (tax-deferred); and
6. direct payment by an employer of attorneys' fees for the employee's attorney[8] (tax-free).

2. Payroll Taxes.

Amounts received as compensation for interest, emotional distress, or punitive damages, though subject to income taxes, are not wages for purposes of FICA and other payroll taxes and contributions.[9] Similarly, an amount paid as consideration for cancellation of a fixed-term employment agreement is not considered wages.[10] Thus, for

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[7] See Commissioner v. Schleier, 515 U.S. 323 (1995).

[8] The position of the Internal Revenue Service is that the amount of attorneys' fees paid to the attorney by the employer is taxable income to the employee because the payment satisfies the employee's obligation to the attorney and because attorneys' fees under statutory fee-shifting provisions belong to the employee, not the attorney. Courts generally agree with that position. On the other hand, some contend that the amount of such fees can be excluded from the employee's taxable income under certain circumstances, such as where the employee has assigned to the attorney the right to recover statutory attorneys' fees. See, generally, Wood, Robert W., Taxation of Damage Awards and Settlement Payments, Tax Institute (2d ed.)

[9] Note that a Form W-2 tax report is issued for wages, a Form 1099 tax report is issued for non-wage income, and no tax report is issued for non-taxable payments.

[10] See Rev. Ruling 58-301; cf. Rev. Rulings 74-252 and 75-44.

amounts allocated to such non-wage categories, the employer and employee can each save 7.65% on income up to $84,900 for 2002 (subject, of course, to the effect of other wages during the year), plus 1.45% beyond that amount.

E. OTHER SEVERANCE AND SETTLEMENT ISSUES

1. Releases and Waivers.

In the settlement of an employment dispute or when an enhanced severance package has been negotiated, the employer invariably insists on a release of any and all claims and rights by the employee against the employer (and its agents, representatives, successors, assigns, etc., etc.). Likewise, many employers require such a release or a condition of receiving basic and/or enhanced severance benefits. For adequate consideration, such releases are fair and appropriate.

A waiver that does not conform to the requirements of the Older Workers Benefit Protection Act ("OWBPA")[11] is ineffective as to ADEA rights. It would still be effective as to all other rights and claims, assuming it is otherwise knowing and voluntary and is not barred by some other statutory provision, such as those relating to minimum wage and overtime pay claims under the Fair Labor Standards Act and workers' compensation claims.

Releases included in separation agreements and settlement agreements prepared by employer's counsel are often unduly broad, perhaps unknowingly. For example, read literally, such releases often would encompass an employee's rights under benefit or compensation plans, vested or otherwise. Such a release would undoubtedly be unenforceable as to vested rights, but the release language should be clarified anyway. Similarly, the release language should exclude the employee's proprietary interests that may be associated with the employer, such as the employee's interest in investment funds, partnerships, or ventures and any securities or bank accounts the employee maintains with the employer. In any event, the employee's counsel should be sure to exclude specifically from the scope of the release all benefits and rights that should be excluded.

In appropriate circumstances, try to exclude from the release whatever existing rights the client has under any company liability insurance policy (e.g., director's and officer's liability) or under company defense and indemnification policies or practices (which are often provided by state law or in corporate by-laws or board resolutions). In the release, employee's counsel should be careful not to forfeit reimbursement for business expenses; the employee should submit the expenses and get reimbursed before

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[11] 29 U.S.C. 626(f). The OWBPA requires that, for a waiver of ADEA rights to be deemed "knowing and voluntary" and therefore enforceable, the waiver must meet certain minimum standards, including the following: at least 21 days to consider the agreement (45 days in connection with an exit incentive or employment termination program offered to a group or class of employees); at least seven days to revoke the agreement after signing; advice in writing to consult with an attorney before signing; and specific mention of waiver of ADEA rights.

signing the agreement, or at least reserve the ability to submit the expenses for reimbursement.

If the employee expects to preserve any rights under any other agreements or plans, employee's counsel should assure that they are incorporated into or mentioned in the settlement or severance agreement. Otherwise, they could be deemed released, particularly when the agreement has an integration clause.

A release by the employer of any rights and claims against the employee may be desirable or even essential. Employers often resist such releases, especially in a typical severance situation; mutual releases are more common in negotiated settlements of asserted claims. When a release by the employer is agreed to, employers sometimes want an exception for after-discovered claims, such as any claim for defalcation or theft, particularly when the employee's departure was fairly recent. Such exceptions must be narrowly tailored and the employee's counsel should obtain a representation from the employer that it is aware of no basis for any such claims against the employee.

2. Confidentiality.

Employers generally want the terms of a severance package to be kept confidential when an employee gets a non-standard package. Generally, employees have no real problem with this, as long as they accept the financial terms. Such confidentiality provisions obviously make it harder for other employees (and their attorneys) to learn about enhanced severance terms -- which is the whole point, from the employer's perspective. The typical confidentiality clause contains some exceptions, but they are usually incomplete. The employee should ask for the following exceptions: (a) the employee's professional advisors (attorney, accountant, financial planner, etc.); (b) the employee's immediate family (and perhaps other specified family, friends, etc.); (c) tax and regulatory authorities; (d) any proceeding arising under or pertaining to the severance agreement; and (e) any subpoena or other compulsory legal process (though employers sometimes insist that the employee give prompt notice of any such process received, so the employer can move to quash).

The employee's counsel should be careful about retroactive application of a confidentiality clause, i.e., purporting to proscribe disclosures that the client may have made before the deal was made. (It's generally a good idea to advise employees to be discreet about settlement talks even before formal agreement is reached.) Also, be careful with any provision that makes confidential the "existence" or "fact of" the severance agreement; generally, try to limit the scope to the terms of the agreement, unless a good reason exists for a broader scope. Particularly when the confidentiality clause is very broad, it can be useful to have a "safe harbor" clause, specifying what your client can say safely, if asked what happened (e.g., "We entered into an amicable resolution.") A review of case law reveals that confidentiality clauses are seldom the subject of litigation.

3. References and Non-Disparagement.

A good job reference can be very valuable to an employee. Forestalling a bad job reference can be even more valuable. An agreed upon reference letter is a good idea. It is often useful for the employee to draft a reasonable proposed letter that the employer should accept, and then negotiate from that draft. The agreed-upon letter can be annexed as an exhibit to the severance agreement. The letter can be used in two forms: as a "To Whom It May Concern" letter that the employee can use any time; and as the standard letter to be sent out by the employer in response to any requests.

The content of the letter can also be the script for any oral references given. It is advisable to name specific individuals who are deemed acceptable to respond to any call for a reference and to obtain assurances that no one else will handle such a call. Failing that, try to obtain agreement that in response to any reference request the employer will state that pursuant to standard company policy it can only confirm limited employment information (such as the last position held and the dates of employment).

Employers often seek non-disparagement clauses in favor of the company (including its officers, agents, products, and services). Employees often accept such clauses, though some limitations may be negotiated (e.g., statements pursuant to subpoena or court order, or a "safe harbor" for statements made during job interviews or during legitimate competitive activities.). Employees also may seek non-disparagement clauses in their favor. These are broader than provisions limited to job references. Employers sometimes object that a broad non-disparagement clause is impractical and unenforceable as applied to all of the company's employees. This objection can be countered by having the non-disparagement clause apply to certain categories of employees (e.g., all officers over a certain rank or in a certain division) or to certain named persons.

4. Restrictive Covenants.

In some contexts, employers try to include in severance agreements restrictive covenants, such as a covenant not to solicit customers or employees ("non-solicitation"), a covenant not to compete for a period of time within certain geographic and/or business parameters ("non-competition"), or a covenant not to disclose confidential or proprietary information ("non-disclosure"). Sometimes, an employee may already be subject to such restrictions contained in prior agreements (such as employment agreements, compensation agreements, and stock or stock option grant agreements), and the employer may ask to confirm their continued validity or to extend their scope. Alternatively, the employee may seek to narrow or eliminate them.

These covenants present obvious limitations on the ability of many employees to earn a living after leaving the employer. A logical argument can be made that such restrictions should not extend beyond the end of the severance pay period in such circumstances. Put another way, severance pay should be paid for the entire duration of any such restrictions.

Generally, non-competition and non-solicitation covenants are enforceable to the extent that they protect an employer's legitimate protectible interests in trade secrets or confidential or proprietary information and that they are reasonable in time, place, and scope. In most states, unreasonable provisions can be "blue-pencilled" to make them reasonable. Such covenants are treated differently in other states. Some states consider such covenants as promoting public policy and encourage them by statute or common law; other states (like California) consider such covenants to be against public policy and therefore totally or largely unenforceable. Some states declare any unreasonable provision to be unenforceable, without "blue-pencilling" to preserve reasonable aspects.

One way of handling an employer's legitimate non-competition or non-solicitation concerns is to be very specific about what is prohibited. For example, the employee may covenant not to solicit named customers or employees for a period of time, or not to compete as to named clients or products. A list can be attached as an exhibit to the agreement.

It is important to keep in mind the difference between non-solicitation and non-hire. A clause that prohibits an employee from soliciting co-workers to leave the employer would not prohibit the employee from actually hiring a co-worker who approaches the employee. The same thing applies to customers and clients. See *Covenants Not to Compete* (published by BNA with the Section of Labor & Employment Law of the American Bar Association).

5. Cooperation.

Employers sometimes want to assure that former employees will cooperate in the future if necessary for a lawsuit, claim, or regulatory matter as to which the employee has knowledge. For example, the employer's counsel may want to interview the employee or to have the employee available for an affidavit, deposition, or trial. While the employee is receiving severance benefits, the employer might have some self-help remedies when a former employee fails to cooperate. In any event, an employer may seek a written assurance of cooperation.

If the employee is willing to provide future cooperation, which is typically the case, some ground rules are appropriate. For example, it may be agreed that any cooperation must not interfere unreasonably with the employee’s business or personal pursuits, or that the employee will be available only outside business hours or up to a certain amount of time. Moreover, it is often advisable to negotiate a per diem or per hour compensation arrangement for such services, sometimes with a small amount of time (say, one day) provided free, plus assurance of reimbursement for all expenses. In addition, sometimes it is appropriate to seek a commitment that the employer will pay reasonable legal fees incurred by the employee in connection with such cooperation.

6. "Gag" Clauses.

Employers sometimes seek to prohibit former employees from providing information to, or cooperating with, regulatory agencies or other persons who might have claims against the employer. For example, a clause might provide that the former employee may not file a charge with the EEOC, may not voluntarily assist the EEOC or any other administrative agency, may not voluntarily appear as a witness or party in any judicial or administrative proceeding in which the employer is a party, and must notify the employer of any subpoena and cooperate with any efforts by the employer to resist that subpoena.

These clauses present a tension between public policy considerations (i.e., encouraging and facilitating disclosure and investigation of potentially unlawful conduct by employers) and private considerations of the parties (i.e., the desire by an employer to try to assure complete peace, which an employee may be willing to provide in exchange for appropriate consideration). Because of the public policy considerations, such gag clauses may not be enforceable.[12]

7. Applications for Future Employment.

Employers sometimes seek to preclude a former employee from ever seeking re-employment with the employer, particularly when the employee has asserted claims against the employer. Some employees object to such a provision, considering it unfair and punitive. The usual rationale for such a provision is that it protects the employer from a discrimination or retaliation claim if it denies the former employee's subsequent application for a job. Typically, employees accept such a provision, though certain exceptions should be considered. For example, it is reasonable to exclude circumstances in which a future employer of the employee is acquired by or merged with the former employer, the employee applies for employment without realizing that the prospective employer is the former employer, or the parties knowingly agree to the new employment.

8. Liquidated Damages.

Employers sometimes include a provision that the employee will forfeit or disgorge all or part of the severance package (or a certain sum of money) if the employee does certain things (e.g., sues on a released claim or violates a restrictive covenant or confidentiality clause). Obviously, such a provision should be opposed whenever possible and narrowed to the extent possible. In the latter event, it can be argued that a lower amount is sufficient to provide the desired incentive for the employee to comply.

Generally, the employee's risk of forfeiture or disgorgement is not a problem when the triggering event is something well within the employee's control, such as suing on a released claim. A real risk may exist, however, when the triggering event is less

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[12] See, e.g., Connecticut Light & Power Co. v. Secretary of Labor, 85 F.3d 89 (2d Cir. 1996) (employer's proposed settlement provision, which would have prohibited employee's voluntary appearance as a witness or party against the employer, found to violate the Energy Reorganization Act's anti-discrimination provision); EEOC v. Astra, U.S.A., Inc., 94 F.3d 738 (1st Cir. 1996) (settlement agreement clause that prohibited former employees from assisting the EEOC held to violate public policy).

readily controllable or identifiable -- such as an alleged breach of confidentiality or of a restrictive covenant. One way to limit the risk is to insist that the employer provide advance written notice of any alleged breach and a reasonable opportunity to cure, when it is possible to do so. In addition, making such provisions reciprocal can provide protection for the employee and can result in more moderate terms.

9. Dispute Resolution and Attorneys' Fees.

Employers sometimes include a provision that any dispute under a settlement or severance agreement will be resolved through arbitration. Even so, such employers may provide that they reserve the right to go to court to seek injunctive relief for violation of the employee's commitments, such as restrictive covenants. Even when the employer does not include an arbitration clause, employee's counsel should consider suggesting one. Arbitration can be an effective, inexpensive, and speedy way of enforcing or defending rights and obligations under a settlement agreement. Also consider suggesting a provision stating that, before commencing any arbitration or litigation, the parties will enter into direct, good-faith negotiations and will try mediation. If the settlement is the result a mediation process, the settlement agreement should include a provision that, if any disagreement arises regarding the interpretation or implementation of the agreement, the parties and their counsel will discuss the disagreement with the mediator before any legal proceedings are commenced. It is generally in the employee's interest to include a provision that, in the event of a dispute, the arbitrator or court will have the authority to award reasonable attorneys' fees and costs to the prevailing party.

F. CONCLUSION

With careful attention to all aspects of negotiating and drafting the settlement agreement, the employee’s attorney can materially advance the client’s economic, practical, and legal interests under the final agreement signed by the parties.