I. NEGOTIATING EMPLOYMENT AGREEMENTS *

In earlier chapters, particularly Chapters 1, 13 and 14, the subject of agreements between an employer and employee is thoroughly analyzed and discussed. Since the early discussion is generally applicable to aspects that the employer needs to consider and offer, this chapter emphasizes and in at least some cases recaps what the employee, with the aid of his or her attorney, needs to argue for, and it is presented in one place for ease of reference.

A. INTRODUCTION

During the 1990s, formal written employment agreements became increasingly common, especially for employees, technical experts, finance experts, and top sales and marketing people. By 1999, according to a survey of employee search firms, employment agreements were included in 45% of employee placements.[1]

Given the employment-at-will rule in the United States, an employment agreement containing such terms as a fixed term of employment, "good cause" for termination, notice of termination, and/or minimum severance pay is generally more desirable for employees than for employers. Even so, employers sometimes want employment agreements to serve their interests, such as imposing restrictive covenants limiting an employee's ability to compete or to solicit clients or employees.

In a tight labor market, when employers compete for top talent, employees have more leverage to insist on firm, written commitments regarding compensation, job security, severance pay, and other terms of employment. This is especially true when an employer is trying to lure an employee away from a secure or lucrative position or to relocate to a new area. Moreover, the compensation packages for many employees include not only cash and stock bonuses, but also equity grants (e.g., restricted stock and stock options), deferred compensation, and other interests that vest over time. An employment agreement can ensure and secure those interests during and after the employment.

Before addressing the provisions of employment agreements, the role of the attorney representing the employee should be addressed. Although an employee might obtain a fair employment agreement without an attorney, the odds are against it.

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[1] Pamela Sebastian Ridge, Business Bulletin, Wall St. J., May 4, 2000, at 1, col. 5.

* This paper is the basis for part of a chapter entitled "Representing The Executive" in Executive Compensation, BNA 2002, Tauber & Levy.

Invariably, the employment agreement will be drafted by the employer's counsel, typically using a model that the attorney has used for other employers (if the attorney is an outside counsel) or has used for other employees of the employer. In any event, that document is rarely balanced or sufficiently protective of the employee's interests.[2] Thus, the employee's attorney can make a big difference in the negotiation and drafting of the terms and language of the agreement. A qualified attorney can almost always help an employee get a better, stronger agreement than would otherwise be the case.

B. TYPES OF ISSUES COVERED IN EMPLOYMENT AGREEMENTS

In negotiating employment agreements, two broad categories of issues arise: business and legal. The two categories are not very distinct, and they often overlap. But the categories can help in discussing the issues with the client and with opposing counsel.

The basic business issues include: the duration of the employment agreement; the employee's title, duties, and responsibilities; the basic compensation package (e.g., base salary, bonuses, commissions, and/or other incentive compensation); the basic benefits (e.g., health insurance, disability and life insurance, and vacation); and special compensation arrangements (e.g., stock options, restricted stock, deferred compensation, and supplemental retirement benefits). Other business issues might include "perquisites" (car allowance, club dues, financial counseling, and tax return preparation), a relocation package, and expatriate benefits.

The basic legal issues include: renewal or extension of any fixed term; grounds for early termination by the employer (e.g., death, disability, or for "cause") or the employee (e.g., for "good reason"); the effect, if any, of a change of control; definitions of such terms as cause, good reason, and change of control; the effect of early termination on bonuses, unvested stock, stock options (including the length of time to exercise after termination), deferred compensation, and other aspects of compensation and benefits; the amount and type of severance compensation under various scenarios; the nature and scope of restrictive covenants, especially a covenant not to compete; the amount and nature of notices required to be given; dispute resolution (i.e., mediation, arbitration, forum, governing law, etc.); remedies for breach, including injunctive relief, liquidated damages, and attorneys' fees and costs; and a broad array of "boilerplate" provisions (e.g., integration clause, warranties and representations, non-waiver clause). Of course, the attorney is responsible for assuring that the language of the final employment agreement fully, accurately, and clearly sets forth essential terms of the arrangement, whether they are "business" or "legal" terms.

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[2] A notable exception is so-called "golden parachute" agreements crafted for the specific purpose of benefiting senior employees in the event of a change of control. "Stay" or retention bonus agreements are sometimes drafted in a pro-employee manner as well.

Typically, the employee already has negotiated at least the general outlines of the business terms before contacting an attorney. Some employees, however, consult counsel before beginning such negotiations or early in the process. Early counseling can be very helpful in planning the negotiation and structuring the business terms, even with a sophisticated client. Generally, the earlier the better.

Moreover, at such a stage, some employees and their counsel use compensation consultants. Using publicly available information, survey results, and other information that may not be readily available, consultants can advise on the nature and amount of compensation and benefits others are getting in the same industry or in comparable types of businesses. They can be especially helpful in structuring sophisticated equity-based compensation packages for senior employees. For example, they can show what percentage of the equity of a start-up or early-stage company other CEOs have been granted in similar situations, or how many stock options they have received. Moreover, consultants sometimes have specialized knowledge in the tax, securities, and ERISA issues that arise in some employee employment agreements.

Even when the client consults counsel after negotiating the basic business terms counsel can help the client with business terms, perhaps by suggesting grounds for renegotiation or by adding new substantive terms not already addressed. Thus, the attorney may stay in the background while advising the client to continue or renew negotiations with the employer on various business terms. This can be advantageous to the employee in several ways. First, the employee and the employer are the ones best able to evaluate and make business decisions about the job. Second, the employee is far better able than the attorney to compare and contrast the many aspects of alternative job prospects. Third, direct discussions between the employee and the employer can help flush out any areas of actual or potential disagreements about the job, compensation, etc. Fourth, direct discussions can help foster the relationship between the employee and the employer. Fifth, the employee can sometimes negotiate better business terms directly than the attorney could, given the more personal connection between the employee and the employer. And sixth, the employee can keep down attorneys' fees by engaging in direct negotiations over the business terms.

Typically, once the basic business terms are set, the employer's counsel will prepare and present a proposed employment agreement, which the employee's counsel will then review. It is at that stage, if not before, that the employee's attorney focuses on the legal issues, and perhaps business issues that were not adequately or properly covered in the negotiations or the proposed agreement. To do that job, the attorney not only must review the agreement very carefully, but also must spend some time with the client discussing the nature of the position, the elements of compensation, expectations for the future, and how risk averse the client wants to be, etc., in order to understand how best to serve the client's interests under the agreement. Ultimately, of course, the client has to decide how much he or she wants the job, given the deal offered and the client's alternatives.

The employee's attorney needs to know what to look for, what the key issues are, what terms and conditions are typical, what the typical range of outcomes is on particular issues, what traps for the unwary exist, and what legal, regulatory, and practical constraints apply to certain topics. This outline will try to highlight these issues, with more emphasis on the legal issues than the business issues.

C. BASIC THRESHOLD PROVISIONS

1. Term.

An employment agreement can have a fixed or indefinite term. In many respects, it does not matter which it is. The key issues are (1) under what circumstances can the employment be terminated and (2) what are the consequences of termination under the various circumstances.

With a fixed term agreement, the initial consideration is what happens at the end of the term. Under the laws of some states, an employment agreement is automatically renewed either for the period of the initial term or for one year, unless the agreement provides otherwise. In other states, the agreement expires, unless the agreement provides otherwise. In any event, the careful attorney should assure that the agreement addresses specifically what happens at the end of the term.

Many agreements have a default provision to the effect that, if neither party gives notice to the other a certain number of days before the expiration date, the agreement will renew automatically for another year. Such a provision assures that the agreement stays in effect if neither party remembers or decides to end it. On the other hand, some agreements provide that the agreement will end unless one party gives notice of renewal and the other party does not object within a certain period before expiration. Some agreements provide that the parties agree to discuss in good faith the renewal or extension of the agreement beginning a certain number of days before expiration.

In any event, the employee's attorney should be alert to the consequences for the employee of a possible expiration of the agreement. For example, if the agreement provides for severance pay or accelerated vesting of options upon termination without cause by the employer during the contract term, what happens to those provisions if the agreement simply expires but the employee keeps working? If the severance and vesting provisions expire, the employee may lose out on those expected benefits. The solution may be a provision that such provisions survive the expiration of the agreement.

Fixed term agreements typically provide for early termination under certain circumstances, such as death, disability, termination by the employer for cause, and termination by the employee for good reason.

Many employment agreements are of indefinite duration, meaning that they continue until terminated by death or by action of either party. These agreements sometimes provide that either party can terminate at any time for any reason. Under such agreements, the key issue for the employee is what happens upon termination under various circumstances. Again, the grounds for termination and the consequences of termination on each ground will be discussed in Subsection E of this chapter.

2. Position.

The employment agreement should identify the employee's job with as much specificity as possible. Of course, this includes the job title. But it also might include a description of the duties, responsibilities, and authority that go with that job, identification of the employee's immediate boss, and, when appropriate, specification of where the employee will work. If there might be some question about the scope of the employee's duties, responsibilities, or authority may be an issue, a comprehensive job description may be attached as an exhibit to the agreement.

The reason for specificity as to job details is to assure that the employer does not assign the employee duties and responsibilities that are less attractive or desirable, or materially diminish the employee's authority or stature, without the employee's concurrence. If the employer does change the employee's duties, responsibilities, or authority in a way that contravenes the specific terms of the employment agreement, the employee may have a claim for breach of contract. Moreover, the employee may have the right to treat any material diminishment of the job as grounds to resign for "good reason" (discussed later in subsection E of this chapter). The more specific the job description, the better the chance the employee can establish breach of contract or grounds to resign. In any event, a careful discussion of this topic may flush out areas of ambiguity or disagreement that should be addressed.

Employers sometimes include language to the effect that the employee will undertake "such other or different duties as the employer (or a particular officer or the board) shall direct." Under such a provision, the employer could effectively demote the employee to an inferior position, perhaps in an effort to get the employee to quit. Obviously, such an open-ended provision should be resisted. At a minimum, such a provision should be qualified so that any other or different duties must be consistent or commensurate with the job specified in the agreement.

3. Salary.

Of course, the amount of the salary is a business issue for the employee to decide, though the employee's attorney might be in a position to opine as to whether the salary seems in line with the salary paid to others similarly situated. In addition, the agreement should provide for periodic reviews, perhaps with built-in increases of certain amounts; the agreement should, at a minimum, provide that the salary cannot be decreased. The main job of the attorney here is to assure that the amount of the salary and the periodicity of payment are stated clearly and accurately.

Other than minimum wage and overtime laws and state statutes on how frequently employees must be paid, few restrictions apply to salary terms. A notable exception is

Section 162 (m) of the Internal Revenue Code, which provides that employers cannot deduct compensation to certain covered employees of publicly-traded companies to the extent that the compensation (including salary and bonuses) exceeds one million dollars per year. Certain "performance-based" compensation is not, however, subject to the one million dollar deduction limit.

4. Incentive Compensation.

The amount of incentive compensation and the standards for earning it are, generally, business issues for the employee. Nonetheless, the lawyer often can help the employee obtain better assurance of full and fair bonuses.

Many large companies have incentive compensation plans that outline under what circumstances employees earn what bonuses. The employee and the employee's attorney should review carefully any such plans mentioned or relied upon in the employment agreement, if for no other reason than to make sure the employee understands how the plans work. Moreover, the employee may be able to obtain beneficial clarifications, enhancements, or guarantees under any applicable plans.

Proposed employment agreements often provide that incentive compensation will be in the discretion of the employer. Obviously, that can be quite problematic for the employee, given that the employer could exercise its discretion to give little or no bonus. For a new employee, this may be an unacceptable risk. Thus, it is often possible to negotiate a guaranteed or minimum bonus for the first year or two of employment, especially when the employee is leaving behind some bonus pay at the prior employer.[3]

Moreover, the employee may be able to get the employer to replace a discretionary or subjective bonus with one based on clear objective goals, whether for the employee's own performance, for the employee's department or division, and/or for the company as a whole. For example, such goals might consist of the company or the department achieving a specific increase in share price, a certain level of revenues, profits, or EBITDA (earnings before interest, taxes, depreciation, and amortization), or a certain percentage of budget. Or the goals might pertain to the employee's own personal performance, such as a certain number or amount of sales. When such objective goals cannot be set forth in the employment agreement, an alternative is to provide for the employer and the employee to agree on objective goals before or early in the applicable period.

Consideration should be given to bonuses for partial years at the beginning or end of the employment. The agreement should make clear how the bonus will be determined for the initial year and should address whether the employee will get a full or prorated

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[3] The employee may be able to negotiate a "signing bonus" with the new employer, particularly when the employee is leaving behind bonus pay or unvested equity interests from the prior employer. Such bonuses are common for jobs, such as investment bankers, in which bonuses constitute a high percentage of the employee's total compensation. Sometimes, employers contend that all or part of the signing bonus should vest over a period of time or should be forfeited if the employee leaves the new job within a certain period of time.

bonus for the final year, especially if the employee has achieved or largely achieved bonus objectives. The latter subject is typically addressed in the severance pay portion of the employment agreement.

5. Benefits and Perquisites.

The employee should obtain copies of any benefit plans and policies to understand how they will apply to the employee. Often, the benefits provision in an employment agreement will provide simply that the employee will receive the same benefits as other employees of the same or comparable rank. This may be sufficient, if the employee understands generally what those benefits are or will be.

Occasionally, particularly when the employer's benefit plans are not fully developed, the employee may seek to obtain a "most favored nations" clause, assuring that the employee's benefits will be at least as good as those of a designated person or group of persons.

Of course, if the employer has promised any special benefits to the employee beyond those customarily provided to others, the employment agreement should so specify. For example, the employee might negotiate more life insurance coverage, more disability benefits, or more vacation time than is standard. If such arrangements are not set forth in an integrated employment agreement, they may be unenforceable.

6. Special Compensation Arrangements.

Senior employees often obtain special compensation arrangements, such as deferred compensation and supplemental employee retirement plans ("SERPs"). Sometimes, these arrangements are set forth in plans applicable to certain employees or categories of employees, typically the most senior employees.

Such plans are non-qualified, meaning that they do not qualify under the Internal Revenue Code for special tax treatment. But they can enable employees to defer the receipt of compensation – and therefore the payment of income taxes on such compensation – until they have left the employer, perhaps upon retirement, when the employee's income and tax rates probably will be lower. Such deferred compensation amounts typically accrue earnings and/or appreciation until paid out.

The employee should be aware, however, that to avoid current taxation, the deferred compensation must remain a liability of the employer (as further discussed in Chapter 4). This is true whether or not the employer sets aside funds currently to meet its future obligations (e.g., places funds into a "rabbi trust"). In either situation, the employee will be merely an unsecured creditor of the employer.

A deferred compensation arrangement need not be set up or governed by a plan of general applicability. It may be created by an employment agreement for a particular employee. Like a deferred compensation plan, such a deferred compensation arrangement is simply a contractual commitment by the employer to make certain payments at certain times in the future.

Notably, deferred compensation may be subject to vesting and forfeiture provisions. Thus, an employee who quits or is fired for cause may not get all or part of the deferred compensation. The employee's attorney should try to obtain protection against such potential loss by providing in the agreement for accelerated or continued vesting under appropriate circumstances.

D. EQUITY-BASED COMPENSATION

Many employment agreements include equity-based compensation, such as restricted stock, stock options, phantom stock, and stock appreciation rights (SARs), as further described in Chapter 3. These arrangements are used by employers for two basic purposes: to provide "handcuffs" to keep employees from leaving before the vesting of equity interests and to provide an incentive for performance by rewarding employees for future appreciation in the price of the employer's stock, whether privately held or publicly traded. Equity-based compensation raises many complex legal, tax, securities, and accounting issues that are beyond the scope of this chapter; here are some highlights.

Equity-based compensation is often the key attraction for an employee to join and stay with a particular employer. Indeed, some employees give up secure positions with good pay to accept jobs at lower rates of pay – but with the opportunity to participate in anticipated increases in the company's stock price. This phenomenon has been common at start-ups and emerging companies, especially those with a realistic chance of an initial public offering (IPO) in the foreseeable future.

Stock options are a common form of equity-based compensation. Incentive stock options (ISOs) meet certain requirements under the Internal Revenue Code and therefore receive favorable tax treatment. Non-qualified stock options (NQOs) do not receive favorable tax treatment but are not subject to the restrictions that are applicable to ISOs under the Internal Revenue Code. For example, when an employee exercises an ISO (i.e., buys the stock at the exercise or strike price set when the ISO was granted), the employee does not recognize any taxable gain on the difference between the exercise price and the fair market value at the time of exercise. The employee pays taxes only when the stock is sold at a profit. Moreover, if the employee holds the stock for more than two years after the date of the option grant and more than one year after the exercise date, any profit upon sale will be taxed as a long-term capital gain, not as ordinary income. With an NQO, on the other hand, the employee will recognize a taxable gain to the extent that the fair market value exceeds the exercise price at the time of exercise (even if the employee does not sell the stock then) and the gain is taxed as ordinary income; even so, any appreciation in the value of the stock between the date of exercise and the date of sale will receive capital gains treatment. Among the restrictions on ISOs are: the exercise price cannot be lower than 100% of the fair market value on the date the option was granted[4]; the maximum amount in which any employee can vest is $100,000 worth of options per year (determined at the time of grant); and the term of the option cannot exceed ten years.

Phantom stock and SARs are not really stock at all. The employee owns no stock and has no voting rights as a stockholder. Rather, the employee is entitled to payment (typically in cash, though sometimes in stock) based on the price of the employer's stock (phantom stock) or the appreciation in the price of the employer's stock (SARs) during the relevant period.

The employee and the employee's attorney should obtain and review whatever plans govern any stock grants, stock options, phantom stock, and other equity-based compensation. Notably, equity-based compensation grants do not require formal plans – they could be creatures of contract — though they usually are set forth in one or more plan documents. When a plan sets forth the general terms of an equity-based vehicle, a separate agreement is usually prepared and executed at the time of the initial grant and each subsequent grant, in which the terms of the particular grant are set forth.

The employee's attorney should compare the terms of the stock plan, the agreement pertaining to each grant, and the terms of the employment agreement to assure consistency. Any differences should be clarified. It may be advisable in certain circumstances to insert language into the employment agreement stating that the terms of that agreement prevail over any inconsistent terms in the grant agreement or in the underlying plan document; sometimes, negotiation over such provisions may lead to changes in the grant agreement or even the plan itself.

The employee and the employee's attorney should focus very closely on the vesting of equity grants. For the employee, the faster the vesting the better. For the employer, on the other hand, slower vesting is preferable; unvested shares and options can provide "handcuffs" to keep employees from departing when the employer wants them to stay, particularly when unvested options are "in the money" (i.e., the current stock price is higher than the exercise price). Typically, stock grants and options vest ratably over time, usually one to five years. Such vesting might be annually, quarterly, or monthly; generally, employees benefit from the shorter intervals of vesting. The vesting of some options (i.e., performance-based options) is based not on the passage of time but on the achievement of certain goals, such as a certain level of financing or revenues. Generally, the employee or the employee's lawyer should try to negotiate accelerated or continued vesting of all unvested stock and stock options if the employer terminates the employment without cause or the employee quits for good reason. As a fallback, they may be able to obtain accelerated or continued vesting for some period, say one year from the date of termination.

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[4] For ten percent shareholders, the exercise price must be at least 110% of the fair market value at the time of the option grant.

The period for exercise of vested options after termination of employment also should be examined. Some option agreements and employment agreements provide that an employee's vested options expire immediately upon termination for cause or resignation without good reason and expire within a short period (say, 30 or 90 days) after termination for other reasons. Obviously, such provisions can jeopardize the employee's ability to realize a gain on the options if the options expire before they can be exercised or if the options are "under water" (i.e., the exercise price exceeds the current stock price) during the shortened exercise period. The solution is to try to obtain at least a modest period (say, 30 days) to exercise even in the event of termination for cause or resignation without good reason, and an ample period (say, 90 days to a year) to exercise in other circumstances. It is common to provide a lengthy period for the estate of a deceased employee to exercise after termination of employment due to death.

The employee's attorney should also consider "tag-along" and "drag-along" rights in certain situations. Basically, with a tag-along right, the employee-shareholder has a "put" – a right to force the purchase of his or her equity interest – if a majority shareholder sells its interest. By contrast, under a drag-along right, a majority shareholder has a "call" – a right to force the employee-shareholder to sell – if the majority shareholder sells its interest.

E. TERMINATION AND SEVERANCE PROVISIONS

Generally, these are among the most important provisions in an employment agreement. For a fixed-term contract, these provisions govern early termination of the agreement. For an indefinite term contract, these provisions govern when and how the term of the agreement will end. Moreover, the severance provisions govern what the employee will get under various scenarios.

The employer's proposed employment agreement typically will address the following grounds for termination of the term of the agreement: death, disability, retirement, and termination by the employer for cause. In addition, the employee's attorney should try to add termination by the employee for good reason.

Employment agreements typically provide that, when the employee dies, the employer's only obligation under the agreement is to pay to the employee's estate any accrued salary and accrued unused vacation pay. The employee's attorney may try to add payment of any accrued but unpaid bonus and a prorated bonus for the final year of employment. The agreement may also provide for a specified amount of life insurance coverage.

The issues relating to termination and payments upon disability are similar to those relating to termination and payments upon death, except that the employee may be entitled to certain disability benefits after termination, which may include continued vesting of equity interests. Moreover, employees often can obtain continuation of certain benefits, particularly health insurance, at the employer's expense for some period after termination due to disability. The employment agreement should contain a definition of "disability". From the employee's perspective, the definition should be fairly stringent, so the employer cannot terminate the employee too readily. The typical definition of disability provides that the employee will be deemed disabled after a certain number of consecutive days (e.g., 90 days) of inability to perform the job and/or after a certain number of days within a set period (e.g., 180 days during a one-year period). The language should be crafted to assure that the termination date does not occur until the end of the relevant period, even if the parties know before then that the employee will not be able to return to work.

Retirement is generally treated the same as death, except that the employee may be entitled to certain retiree benefits after termination, which may include continued vesting of equity interests. Moreover, employees often can obtain continuation of benefits, particularly health insurance, at the employer's expense.

The employee's attorney should focus very intently on the provisions concerning termination by the employer for cause. They can have a major impact on the employee's rights upon termination to salary, benefits, severance pay, and vesting of deferred compensation and equity interests. In short, the attorney should try to make the definition of "cause" as narrow as possible. Typical elements of cause include: conviction of a felony or other crime involving moral turpitude; loss or suspension of any necessary licenses; breach of company policies; failure or refusal to perform the duties of the job; insubordination; and breach of contract by the employee. For each of these, the employee's attorney should seek to include, to the extent applicable, qualifiers regarding the employee's state of mind and the nature and extent of the employee's conduct. Thus, for example, words like "material" or "substantial" should be inserted before nouns like "breach" and words like "willful," "intentional," "knowing," "repeated" or "persistent" should be inserted before nouns like "breach" and "failure." Of course, the employee's attorney should resist vigorously an employer's efforts to include words like "discretion" and "satisfaction" that give the employer too much room for discretionary and subjective decisions.

The employee and the employee's attorney should try to obtain the ability of the employee to resign for a good reason, with such a termination being treated like a termination by the employer without cause – similar to constructive discharge. Such "good reasons" might include: a material diminution in the employee's title, duties, responsibilities, authority, compensation, or benefits; a requirement to relocate beyond a certain area; the employer's breach of the contract; or a "change of control." A "change of control" definition might include: a merger or sale of a majority of the company's stock; sale or transfer of all or substantially all of the company's assets; a major change in the composition of the board of directors; or the departure of a designated person as a controlling shareholder, board member, board chair, CEO, etc.

The employee and the employee's attorney should try to obtain a provision requiring the employer, before terminating for cause, to give the employee adequate written notice of the proposed action and a reasonable opportunity to cure. Such a provision need not apply to grounds that are not curable (e.g., conviction of a felony) but are especially appropriate for grounds that are curable and somewhat subjective, such as failure to perform or breach of contract. The notice should identify the specific provision(s) of the cause definition being relied upon and should describe with specificity the conduct of the employee that is the basis for the proposed termination. The cure period may be described as "reasonable," but a specific ample period of time (say, 30 days) is preferable to avoid dispute. A cure provision serves not only to provide information and protection for the employee but also to limit rash and arbitrary conduct by the employer.

The employee's attorney should also be aware of the punitive excise taxes imposed on certain "golden parachutes" that are triggered by a change of control. See IRC §§ 280G and 4999.

F. RESTRICTIVE COVENANTS

Books can be and have been written about the many types of restrictive covenants that employers include in employment agreements, severance agreements, and other agreements with employees. Such restrictive covenants include confidentiality and non-disclosure agreements and agreements not to compete or to solicit clients and employees. A discussion of such agreements is beyond the scope of this chapter. For further information, see *Covenants Not to Compete: A State by State Survey* (ABA, published by BNA).

The employee's attorney should be conversant with the case law (and any relevant statutes) regarding restrictive covenants in applicable jurisdictions. This is especially important regarding a state's policy and law on the enforceability of non-compete clauses. Such laws varying considerably state-by-state.

Obviously, the employee's counsel will try to make any such covenants as narrow and reasonable as possible. Generally, fairly broad confidentiality and non-disclosure agreements are not objectionable; in fact, some of the strictures contained in such agreements may exist as a matter of law anyway. Moreover, in most contexts, employees do not object to broad agreements providing for the employer's ownership of any copyrights, patents, etc., arising out of or during the employment relationship. Thus, except in special circumstances, little energy needs to be focused on such provisions.

Usually, the main concerns of the employee pertain to non-competition and non-solicitation clauses, which can seriously limit the employee's ability to earn a living after leaving the employer. Such provisions have become common, as employers seek to limit competition and protect their confidential, proprietary, and trade secret information. The employee and the employee's counsel should focus carefully on the language proposed, evaluate how that language, if enforced, might affect the employee's post-employment ability to work, and then negotiate for narrower, clearer, and fewer limits. For example, generally a non-compete clause should not prevent the employee from working for a competitor of the employer if the employee's own activities are not competitive.

One area for possible focus is the impact of the grounds for termination on the non-compete clause. The employee may negotiate for a provision that, if the employment is terminated by the employer without cause or by the employee for good reason, then the noncompete clause does not apply, or it applies for a shorter period or with a narrower scope.

Moreover, the duration of the non-compete period can be linked to severance pay. For example, the employer or the employee may have the option to shorten the non-compete period by ceasing or waiving severance payments.

G. DISPUTE RESOLUTION

A comprehensive employment agreement should include a dispute resolution provision setting forth what forum will address any disputes that arise under the agreement. For further discussion, see the discussion in Section III of this chapter and see Chapter 14, also dealing with alternative dispute resolution procedures.

Although mandatory arbitration of statutory discrimination cases is abhorrent to employees' attorneys, arbitration of contractual disputes is not. Indeed, arbitration of contractual disputes has many relative advantages for employees, including speed, cost, and finality. Consider suggesting such a provision if the employer does not include one in the initial draft.

Moreover, it is a good idea for the dispute resolution provision to have three steps:

1. good faith discussions for a reasonable but short period;
2. mediation using an agreed upon (preferably named) mediator or meditaion provider;
3. arbitration using a named arbitrator or arbitration provider (such as the American Arbitration Association, JAMS, or CPR Institute for Dispute Resolution).

Of course, the parties could agree to engage in the first two steps (and even the third) once a dispute has arisen, but including such a provision in the agreement may help initiate early discussions and possible early resolution of the dispute.

The initial issue to address in the dispute resolution provision is its scope. Does it apply to disputes arising under or relating to the agreement only or to all disputes arising out of or relating to the employment relationship, including the termination of that relationship? The latter language is much broader and would encompasses statutory and tort claims as well as contract disputes.

Another issue is location. Employers' standard agreements sometimes provide for any mediation or arbitration to take place in the jurisdiction of the company's headquarters or a regional office. For the employee, the preferred site is near the employee's workplace or home.

Dispute resolution provisions sometimes are silent on who pays for mediation or arbitration; sometimes, they provide for equal contributions. Of course, the employee generally prefers for the employer to bear all or most of the cost of such proceedings. In any event, it is advisable to include a statement that the arbitrator may or shall award costs and expenses to the prevailing party.

In addition, try to include a provision that the arbitrator has the authority to award attorneys' fees to the prevailing party. Absent such a provision, arbitrators generally lack the authority to award attorneys' fees to a prevailing party in a contract dispute, which disadvantages employees relative to employers. On the other hand, a provision <u>requiring</u> the arbitrator to award attorneys' fees to a prevailing party could present a risk that the employee may have to pay the employer's attorneys' fees. The best balance for employees is to enable but not require the arbitrator to make such an award.

Other issues include the number of arbitrators (one or three), which states law governs, and what rules govern. If the AAA is the arbitration provider, its National Rules for the Resolution of Employment Disputes should apply.

H. MISCELLANEOUS

Boilerplate provisions at the end of employment agreements typically address some of the following subjects: remedies (including availability of injunctive relief and liquidated damages), governing law, successors and assigns (binding and benefiting successors of both employer and employee), integration and merger, severability, and survival of certain rights.

In special circumstances, employees should seek an assurance of performance of some or all obligations under the agreement from someone other than the employing organization. This could be a personal guarantee by a major shareholder or an endorsement or guarantee by a corporate parent or affiliate. Such an assurance is especially important when the employing organization is new, struggling, or thinly capitalized.

Last but not least, the employee's attorney should try to obtain the employer's commitment to pay the reasonable attorneys' fees incurred by the employee for negotiating the agreement, perhaps with a cap on the amount.