The Essentials of Employment Contracts in a Bad Economy
Looking Down the Road at Termination Provisions

When an employee starts a new job, one of the last things on his mind may be what will happen if he loses that job. Employees who take on a new job in this economic climate should pay close attention to certain provisions in their proposed employment contracts and know the areas where there is room for negotiation. The following provisions are essential to any new employee reviewing an employment contract:

1. **Termination of Employment by the Employer – "At Will" Employment**

Many employers will specify that an employee may be terminated "without cause" or that the employee's relationship with the employer is "at will." Essentially, the employer is telling the employee that he can be fired for no reason at all, at any time. Although most states are "at will" employment states, an employee can try to negotiate some degree of protection within this clause.

First, the employee can request notice from the employer – that if the employer chooses to terminate the employee without cause, it must provide the employee with a few weeks' notice or pay in lieu of such notice.

Next, the employee may try to negotiate the enforceability of a non-compete clause (if one exists within the employment contract) if he is terminated without cause. In New York, for example, some courts have ruled that a non-compete clause is *not* enforceable if the employee was terminated without cause – employees in New York may be able to negotiate the outright removal of any non-compete restrictions if a without cause termination takes place. Otherwise, employees may also try to negotiate the scope of the non-compete clause if a without cause termination takes place by negotiating a less restrictive limitation on the geographic or temporal scope of the non-compete clause.

Finally, the employee should be aware that although an employer may have the right to terminate an employee "at will," federal provisions and state laws carve out exceptions to this general rule for certain types of discrimination or violations of public policy. Although these exceptions will apply even if they are not written into the original employment agreement, an employee may wish to include a provision that acknowledges that the employer is prohibited from terminating an employee in certain cases.

2. **Termination of Employment by the Employer – "For Cause" Termination**

Employers may include a provision that specifies that the employee may be terminated "for cause," which essentially means for some wrongdoing on the employee's part. Employees may wish to negotiate some additional provisions to elaborate on what constitutes "cause."

First, the employee may negotiate a definition of what would constitute "for cause" termination, to eliminate a potentially overly broad definition that would give the employer broader authority to terminate the employee under this provision. Failure to substantially perform an employee's duties or responsibilities under the employment contract, a conviction or plea of guilty to a misdemeanor or felony, any serious act of misconduct of moral turpitude, or a material breach of any of the provisions in an employee manual are some examples of the situations which may give rise to a "for cause" termination.

Employees may try to negotiate the opportunity to remedy the reason for "for cause" termination within a specific amount of time after the employer gives the employee notice that it is considering terminating the employee "for cause." This may give employees who are short of performance standards one last chance to perform to the employer's expectations.

Finally, employees should be aware that a termination "for cause" may trigger other provisions within the employment contract, such as those concerning benefits, bonuses, deferred compensation or other provisions offered by the employer. Employees should read through those provisions to determine how, if at all, they are affected by "for cause" terminations.

3. **Termination of Employment by the Employer – Death or Disability**

An employer will likely include a clause specifying that the employment agreement terminates upon the death or total disability of the employee. An employee may wish to negotiate a provision which grants his heirs/estate a pro rata share of any bonus payments owed to the employee and, of course, that any salary, commissions, fees, etc. earned up to the date of his death be paid out. The more essential provision concerns the definition of "total disability." The employee should note whether the agreement includes a definition of this term. The employee may wish to negotiate a provision that he should continue to receive his salary for a specific period of time, even in the event of disability. The employer will certainly want to impose a lower temporal threshold. The employee should also be sure that the employer provides the employee a "reasonable accommodation" to assist the employee in performing his duties under the employment agreement. The employer may wish to include a provision that states, "Employee's employment shall be deemed to have been terminated by Employee upon Employee's inability to perform Employee's duties under Agreement, even with reasonable

accommodation, for more than twenty-four weeks (24), whether or not consecutive, in any twelve-month period."

4. **Termination of Employment by the Employer – Severance**

An employee should negotiate a provision which provides a severance payment to him in the event of a termination "without cause" or a resignation for "good reason." The employer will likely be unwilling to negotiate payment of severance for a relatively new employee, so the employee should be aware that severance payments may not become available until six months to a year after he commences employment with the employer. The employee may try to negotiate a scale for severance payments (two months of severance for every year of employment, as an example) or may try to set a specific number of months severance in any event (six months, for example). The employee may also wish to negotiate the payment of a portion of his bonus within the severance provision. Within this provision, the continuation of benefits, such as health benefits under COBRA, may be included as something that the employer pays on behalf of the employee for a specific amount of time. An employer will likely require an employee to sign a release of all potential claims against the employer in exchange for severance payments, and this may appear within the employment contract. The employee should keep this in mind if faced with the decision of whether or not to accept a severance payment down the road.

5. **Termination of Employment by the Employee – "Good Reason"**

An employer may wish to address an employee's ability to resign by requiring that the employee provide "good reason" for his resignation. Without "good reason," the employer may penalize the employee by placing him on administrative leave or by withholding or terminating the aforementioned benefits, bonuses, deferred compensation, etc. "Good reason" may include a merger, consolidation, sale, buyout or asset sale of the employer, the employer's material failure to perform under the employment contract, or the employee's relocation, without his consent, to more than a specific number of miles from his employment. It is in an employee's interest to include broader provisions within the "good reason" definition. An employee may also wish to negotiate down the number of days notice he is required to provide to the employer if he wishes to resign (with or without "good reason").

6. **Covenants Not to Compete**

Non-compete clauses, also called restrictive covenants, covenants not to compete or non-solicitation clauses, are often found in employment contracts for new employees – and they can pop up in almost any industry. The purpose of the non-compete clause may be to help an employer to prevent former employees from disclosing its trade secrets or other confidential

information to its competitors. The validity of a non-compete agreement will vary by jurisdiction. To determine which state's law applies, first check the employment agreement itself. Often employment agreements will specify the law of a particular state chosen to govern everything arising under the contract. If the contract does not contain this provision, the law of the state where the contract was executed or the law of the state in which the contract services were performed may govern. Some states prohibit non-compete clauses with a few narrow exceptions, but others permit enforcement of reasonable non-compete clauses. A competent attorney can advise an employee as to which states permit non-compete clauses and to which extent.

Where permitted, non-compete clauses will generally be enforceable only if they are reasonable as to the temporal and geographic scope. The geographic scope of a non-compete clause must be reasonable, which will vary based on each case, but may depend on the scope of the employee's employment or the employer's protectable interest. An employee may try to negotiate a smaller geographic scope that will allow him to find employment elsewhere without having to move a long distance from his previous place of employment. Likewise, the employee should try to negotiate the temporal scope to lower the amount of time the employee will be restricted by the non-compete. The employee may also be able to negotiate the type of activity prohibited by a non-compete – this may include working for specific competitors, contacting the employer's clients or employees or working in competition with the company in a specific industry. The employee should try to narrow the scope of the non-compete to enable him to find alternative employment in the event that his employment is terminated.

Conclusion

With these essential provisions in mind, an employee can face the difficult task of negotiating with an employer with his future in mind. Of course, the advice of competent counsel ensures that an employee is aware of all of the potential pitfalls of employment contract negotiation, and an employee who has any questions concerning an employment contract should retain counsel for specific advice based on his particular circumstances.

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