

**TERMINATION OF AN EMPLOYEE:
AVOIDING LITIGATION**

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**NEGOTIATING SEVERANCE AGREEMENTS
IN AN UNCERTAIN ECONOMY**

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Negotiating Severance Agreements in an Uncertain Economy

Attorneys who represent employees frequently negotiate severance agreements for their clients. In the current economic climate, the terms of these agreements have become particularly crucial for terminated employees, given the constricted and difficult job market. For employee-side lawyers, it is essential to understand the leverage a client has to negotiate significant changes in severance terms, and the particular employer's culture and idiosyncracies.

Negotiating these agreements requires an attorney to understand a great deal of information about the company, the employee, the events that led to the termination, the employee's goals, and the internal corporate politics involved. The watchwords in these negotiations are: be thorough, be patient, be creative and be realistic. This paper discusses, in practical terms, how you can do that.

I. The context: Why do these agreements exist, and why do employers want terminated employees to sign them?

Employers have two compelling reasons to have departing employees sign severance agreements: to limit potential liability and ensure confidentiality.

A. Limiting liability:

To limit liability, employers seek to have the employee release and waive any legal claims against the company. In New York, employers are

chiefly interested in having employees waive federal, state and local discrimination, retaliation and wage payment claims, breach of contract claims, and potential whistleblowing claims. When an employee signs a valid release, the employee is precluded from prosecuting a waived claim, and is usually held to a penalty if the employee violates the agreement.

Most employers would like to obtain a release of claims even if they do not think a particular employee has a strong claim to prosecute. The value of such a waiver is that the employer knows that the employee will not come back to haunt it, even with a frivolous lawsuit. On the other hand, sometimes an employer would ideally prefer to obtain a release, but because it believes an employee's potential claims are weak, its severance offer is minimal and it is inflexible in negotiations.

B. Confidentiality:

Most companies want to make sure that departing employees preserve the confidentiality of crucial business information as well as information about employees' experiences while employed. To do this, employers often secure confidentiality and non-disclosure agreements from employees when the employee starts work. Employers that do not obtain these agreements when an employee is hired are particularly concerned

about obtaining them when the employee leaves, particularly if the employee is senior or has specialized skills or knowledge. Having the employee sign a confidentiality agreement upon departure, in exchange for beneficial severance terms, gives the company some assurance that its confidential information (and potentially embarrassing information about sticky Human Resource problems) will not leak out.

II. The legal terrain

The overwhelming majority of employees in New York are “employees at will” — which means that absent a valid discrimination, retaliation, whistleblowing or other statutory claim, collective bargaining agreement, employment contract or unusual common-law protection, they can be terminated or demoted at any time, for a good reason, bad reason, or no reason. While many employees believe that they were “harassed” or “wrongfully discharged,” without these limiting factors, it is likely that while they may have been unfairly terminated, the employer’s actions were lawful.

The courts can be hostile to employment discrimination cases, because many cases are weak, and some should never have been brought. There has been a huge upsurge in employment litigation in the two decades, and the percentage of the federal court docket which is devoted to employment cases has grown tremendously. Judges do not like to spend their time second guessing the judgment of Human Resource managers. As a result, many cases are dismissed on summary judgment motions, and whopping jury

verdicts stand a chance of being vacated or cut back.

III. Information to review

A. Documents

To assess a client's possible legal claims, and the implications of a proposed severance arrangement, it is crucial to understand the employer's corporate structure. You should have your client obtain or sketch an organizational chart of the company (if discrimination may be an issue, note the ethnicity, sex and age of relevant individuals). The client should also draft a fairly detailed chronology of events (including the employee's hiring, responsibilities, achievements, reviews, any conflicts with management, and what led up to the termination). Documents to review include:

Any employment contract or agreement

The employer's benefit plans, including health insurance, 401(k), pension plan, cafeteria plan, life insurance, long term disability insurance, etc.

Any incentive compensation plan, including plans regarding stock grants, stock options, commissions, or bonuses, and award letters and agreements.

The employer's written severance plan, described in its Summary Plan Description

Note: Benefit and severance plans and many incentive compensation plans are subject to the Employee Retirement Income Security Act (ERISA), and therefore include a Summary Plan Description (SPD), which outlines what benefits the employee is entitled to receive and

the conditions under which payments or awards are made. Under ERISA, the employer must provide participants in such benefit plans with copies of the SPD within 30 days of a written request, but most employer HR departments will give a departing employee the SPDs immediately.

The employer's personnel / policy / employee handbook – which may set out the company's policy on sexual harassment, discrimination, internal complaints, discipline and employee benefits

Any arbitration agreement. This may be contained in the employment application or a separate document. Or, it may simply be set out in the employment handbook, in which case you will have to evaluate whether the employee can be deemed to have agreed to it. The arbitration agreement may mandate arbitration of the employee's claims, limit his remedies, and require the payment of costly arbitration fees. If there is a valid arbitration agreement, you have to check the rules of the arbitral forum (for example, JAMS, AAA or FINRA) to determine procedural requirements, available discovery and hearing procedures, and costs.

Performance evaluations, and the employee's responses to them.

Documents, letters and e-mails concerning the termination and other relevant issues, including complaints raised by the employee.

Note: Under the Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. Sec. 626(f), if the employer is terminating the employee as part of a group layoff or exit incentive program, the employer must give the employee, along with the severance agreement, a list of the job titles of the individuals being terminated and those remaining in the affected business units, and the age of each individual. This information can sometimes help you determine if there is a potential claim of age discrimination.

The employer's notice regarding continuation of health insurance under COBRA, 29 U.S.C. Sec. 1161 et seq., and the employee's response (i.e. has the employee elected to continue coverage at the cost set out in the notice).

B. Relevant events and issues to understand

Make sure you understand:

The outlines of the employee's education, employment and compensation history

The client's job responsibilities

The employer's organizational structure (business units, supervisors, co-workers, and subordinates)

Events leading up to the employee's termination, the reasons given by the employer, and the employee's view of that rationale.

If discrimination may be an issue, the employer's treatment of similarly situated employees who are not members of the protected class in question, and any discriminatory acts against others who are in the client's protected class.

If sexual harassment is an issue, review the incidents of harassment, the employee's complaints to the employer, the employer's sexual harassment policy, and the employer's response, including any corrective action.

The client's relationships with supervisors and co-workers: Is the employee someone who cannot get along with others, is overly suspicious, has trouble taking criticism, or cannot fairly evaluate his own strengths and weaknesses?

Potential witnesses, both for the employer and for the employee. If possible, determine whether the former employee has a relationship with witnesses, and whether they are current or former employees.

The terms of the employer's severance offer, and any negotiations that have already taken place.

IV. Legal claims to consider

Typical claims to consider include:

A. Federal

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* (prohibits discrimination in employment on the basis of sex, race, national origin, color and religion).

Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, and the Older Workers Benefit Protection Act, Pub. L. 101-433, 104 Stat. 978 (1990), incorporated in the ADEA.

Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, as modified by the Americans with Disabilities Act Amendment Act of 2008, effective January 1, 2009.

Rehabilitation Act of 1973, 29 U.S.C. §§ 706 *et seq.*, particularly 29 U.S.C. § 794 ("Sec. 504") – prohibits discrimination on the basis of handicap by recipients of federal funds, and permits a private right of action.

Equal Pay Act, 29 U.S.C. § 206(d) - prohibits sex discrimination in compensation between employees performing "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*; Department of Labor regulations implementing the FMLA, 29 CFR Part 825; recent amendments to the FMLA, governing leave for families of members of the military - Pub. Law 110-181, HR 4986 (National Defense Authorization Act for FY 2008).

42 U.S.C. § 1981 - Prohibits discrimination in employment based on race and alienage.

Regulations promulgated by the Equal Employment Opportunity Commission (29 CFR §§ 1600 *et seq.*), implementing:

Title VII (29 CFR Part 1600 - 1608)

ADEA (29 CFR Part 1625, 1626)

ADA (29 CFR Part 1630; see also 29 CFR Part 1601 *et seq.* re EEOC procedures)

Sec. 510 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1140, prohibiting discrimination against employees for the purpose of interfering with their attainment of rights under an employee benefit (pension or health and welfare) plan.

Statutory anti-retaliation provisions (such as those in Title VII, the ADA, the ADEA, ADA and FMLA).

Statutory whistleblower protections:

Sec. 806 of the Sarbanes-Oxley Act, 18 U.S.C. Sec. 1514A (prohibiting retaliation against employees of publicly traded companies who investigate or report certain types of fraud, violation of federal securities provisions, or fraud on shareholders.)

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010:

Sec. 1057 (prohibiting retaliation against employees of “consumer financial services” organizations for specified internal and external complaints concerning consumer financial services violations)

Sec. 922 (bounty incentives for reports of securities fraud to the SEC)

Sec. 923(b) (prohibiting retaliation against employees who provide information to the SEC about securities law violations)

False Claims (Qui Tam) Act, 31 U.S.C. § 3730(h) (prohibiting retaliation against employees who investigate or report submission of false claims to a federal entity)

American Recovery and Reinvestment Act of 2009, P.L. 111-5, 123 Stat. 115, Sec. 1553 (prohibiting retaliation against employees who

complain about or disclose certain misuses of federal bailout funds).

OSHA, 29 U.S.C. 660 (prohibiting retaliation against employees who complaint about or participate in proceedings concerning OSHA violations.)

Federal Deposit Insurance Corporation Act, 12 U.S.C. 1831(j) (protecting employees of federal depositories, which include, among others, the Federal Reserve Banks, federal banking agencies, and the Federal Home Loan Bank.

B. State law

New York State Human Rights Law (Executive Law §§ 290 *et seq.*)
Regulations of the State Division of Human Rights -
9 N.Y.C.R.R. Part 465

New York Labor Law Sec. 740 and 741 (narrowly limited whistleblower claims)

New York State False Claims Act (New York State Finance Law, Art. 13)

New York Labor Law Sec. 193 and 198(1-a) (unlawful deductions from wages and claims for failure to pay wages, bonuses and commissions)

New York Wage Theft Protection Act (effective April 9, 2011) (amending various provisions of the Labor Law to provide for annual written notices to employees of their compensation, increased penalties for underpayment of wages, and anti-retaliation protections for employees who complain about violations of Labor Law's wage payment requirements.

C. New York City:

New York City Human Rights Law - New York City Administrative Code §§ 8-107 *et seq.* For an excellent analysis of why the NYCHRL is far more favorable to employees than federal anti-discrimination provisions, see *Williams v. New York City Housing Authority*, 13 N.Y.3d 702, 885 N.Y.S.2d 716 (1st Dept. 2009), and *Loeffler v. Staten Island University*

Hospital, 582 F.3d 268 (2d Cir. 2009).

New York City False Claims Act (Admin. Code of the City of New York, Title 7, Chap. 8; Rules of the City of New York, Title 46, Chap. 3.)

- D. Common law claims** such as breach of contract, fraudulent inducement, or compelled self-defamation.

V. Common issues for negotiation

Severance negotiations can deal with monetary and non-monetary benefits.

A. Monetary elements

1. Severance

Many employees believe that the law requires an employer to pay a terminated employee severance. Some employees believe the law requires severance to be fair and rationally related to the employee's length of service. Nothing in federal or New York law requires this. (Note: Employees of foreign employers working in other countries may be entitled to statutorily-mandated severance benefits under those nations' employment laws.)

However, if employers do have a severance plan, they are obliged to follow and apply it. Severance plans are governed by ERISA, and are required to have a Summary Plan Description that explains who is entitled to severance benefits, what those benefits are, and how an employee can appeal the denial of severance

benefits under the Plan. (The appeal is usually a two-step internal process, followed by federal court review.)

Many employer severance plans tie the amount of severance to the length of employment, and provide for one or two weeks per year of service. The more generous ones provide for one month or more per year. Obviously, for most employees, a “week per year” formula is normally unsatisfying.

Some severance plans provide for a base amount of severance to be paid to all departing employees, based on a formula, and a substantial supplement for employees who sign a severance agreement and release. In recent years, we have seen these less frequently. Severance agreements now customarily condition the payment of any severance on the signing of an agreement and release.

In general, lower-level employees who have not worked at the company very long, and who do not have a serious legal claim, can expect the smallest severance offer, and the least negotiating flexibility, from employers. Senior executives of long duration, who either have a good legal claim or who the company otherwise wishes to placate (for example, in anticipation of a future business

relationship) will do far better.

2. Payment: lump sum or over time, and tax implications under Internal Revenue Code Sec. 409A:

This question may have significant implications. If the employee is seeking to have the employer maintain the client on the payroll for some period of time as a way of continuing benefits and vesting in stock options, pension benefits or a bonus plan (see below), benefits may be paid over time through the normal payroll cycle.

Tax implications of deferred payments under Sec. 409A:

An important issue to consider is whether severance payments (cash, equity or in-kind) will create a tax problem for the employee under Sec. 409A of the Internal Revenue Code. Under 409A, payments which are considered “deferred compensation” may result in a 20% excise tax for the employee; the immediate taxation of the deferred payment, even if the employee has not yet received it at the time; and interest. The employer is also subject to a penalty. A payment will be considered a “short term deferral” and thus not subject to 409A penalties if it is made within two and a half months after the close of the employer’s fiscal year, (that is, by the next March 15 for a calendar year, or, for employers with fiscal years

ending on other dates, within two and a half months after the close of the fiscal year),

Compensation possibly subject to 409A treatment *can* include severance, bonus payments, in-kind payments, change in control payments, and retention payments. An executive's equity interests may or may not be subject to the tax penalties under Sec. 409A.¹

There are important additional exceptions to the penalties under 409A. Normally, severance payments are subject to 409A, unless the payments meet the definition of a short-term deferral. However, separation payments that do not meet the short-term deferral requirement will still be exempt from 409A if :

- a. they are in connection with an involuntary separation from service (which includes certain Good Reason resignations, as defined in the IRS' regulations), or they are made in connection with an employer-sponsored Window

¹ In general, stock or stock options are not considered deferred compensation and therefore not subject to 409A *if* they 1) are granted with an exercise price not less than the fair market value; 2) are vested on the date of the grant; and 3) are stock of the employer or a corporate parent. (Of course, for most awards, vesting will be over several years.) The IRS' implementing regulations provide for permissible valuation methods for equity interests in both public and private companies. Incentive stock options under IRC 422, and options under an employee stock purchase plan under IRC 423 are not subject to 409A. 26 CFR 1.409A-1(a)(5) et seq. The regulations detail the treatment of other categories of equity interests.

Program (in which employees are offered separation pay in exchange for a resignation, and the offer is open for no longer than a year); *and*

b. they are made no later than December 31 of the second calendar year after the calendar in which the separation takes place; *and*

c. to the extent they are no greater than the *lesser of either* (i) twice the employee's annual rate of compensation for the year prior to the separation or (ii) the maximum amount of compensation that may be taken into account for qualified retirement plans under IRC 401(a)(17) -- which in 2010 was \$245,000.

See 26 CFR 1.409A-1(b)(9)(iii).

Specified senior employees of public companies are subject to a mandatory six month delay in the payment of deferred compensation. The employer must identify the specified employees annually. Specified employees are those who own more than 5% of the stock during the year; or own more than 1% of the stock and who earned more than \$150,000 during the year; or are the fifty most highly compensated officers who earned more than \$160,000 during

the year (\$160,000 in 2010). (The number of officers to be named varies with the number of employees, and the “officer” designation refers to authority rather than title.) 26 CFR 1.409A-1(g).

Note that the six month delay only applies if the amounts are deferred compensation under 409A. If the payments are exempt from 409A because they are part of an exempt separation plan or because they qualify for short-term deferral, the six month payment delay does not apply.

Settlements or awards based on bona fide legal claims:

Compensation paid based on an award or settlement of a bona fide legal claim is not considered deferred compensation under 409A to the extent the award or settlement resolves a claim based on wrongful termination or employment discrimination (as well as FLSA and Worker’s Compensation claims). Note that this exception only applies to damages paid as a result of the claim; it does not apply if the payment would have been deferred or made even without the employee’s release. 26 CFR 1.409A-1(b)(11).

409A issues are best addressed by a tax lawyer, since the IRS’ regulations interpreting them run into the hundreds of pages and are unusually complex.

3. Benefits and incentive compensation

a. COBRA:

Under COBRA, employees may continue their group health insurance coverage for up to 18 months (if they are disabled, for 29 to 36 months). In general, COBRA coverage will end the earlier of either 18 months after the termination of the employee's insurance, or at the time the employee obtains coverage under another plan, as long as the new plan does not include a preexisting condition exclusion. (Pre-existing condition limitations are themselves limited under the Health Insurance Portability and Accountability Act, HIPAA, 29 USC 1181.)

The federal COBRA statute covers group plans maintained by employers that have twenty or more employees on a typical business day during the preceding plan year.

New York has a COBRA provision that covers smaller employers, Insurance Law 3221(m); the New York COBRA law permits coverage to extend up to 36 months.

In drafting severance agreements, employers commonly offer to pay for some months of the employee's COBRA coverage, or to reimburse the employee for those costs. Employers are often willing to negotiate payment of additional COBRA premiums.

Remember that if an employer reimburses the employee rather than paying COBRA costs directly, the reimbursement will be taxed, and the employee will not recover the full cost of the premium; you can seek to have the employer gross up the reimbursement, to make the employee whole.

b. Life insurance:

Under New York's Insurance Law, an employee can convert employer-provided life insurance to an individual policy within 31 days after the employer's coverage terminates. Insurance Law 3220(6). The employee normally has to contact the insurer to get this process going. There is no entitlement under New York law to a continuation of Long Term Disability coverage, but some LTD plans allow employees to convert to an individual LTD policy if they elect that coverage within 31 days.

c. Incentive compensation:

For some employees, a significant portion (or the largest portion) of their compensation is in the form of stock options, restricted stock, bonus or commissions. (The freefall of share prices since 2008 may make equity compensation far less valuable for many employees.) Many stock, stock option, bonus and commission plans tie vesting or payment of such benefits to an employee's

current employment. When working with these clients, it is crucial to review the governing plan documents, agreements and award letters, because they will spell out the effect of termination on a client's compensation.

If an employee's incentive compensation is lost upon termination – either because the employee ceases to vest in future equity, or forfeits equity which has already vested – the issue should probably be part of a negotiation. The employer may agree for the employee to nonetheless vest in and/or not forfeit certain incentive compensation, and for the employer to waive the provisions of a plan that would otherwise penalize the employee. However, be sure that such provisions do not violate the requirements of Internal Revenue Code Sec. 409A, discussed above.

Some employer stock, stock option and bonus plans provide that a departing employee will lose entitlement to these benefits if the employee is terminated for cause, with a definition of cause provided by the plan. Former employees may seek to negotiate a statement in the severance agreement that the employee is being terminated without cause. Some plans permit vesting if the employee is being terminated as part of a reduction in force, in which

case similar language can be used in the agreement.

Continuation of current employee status:

Because employee benefits will probably end as of the last date of employment, you may want to negotiate a provision extending your client's employment for some reasonable period of time, during which the client remains on payroll but does not have to report to work. If the employer agrees, your client will be able to maintain current insurance coverage, continue vesting in equity, and have the advantage of other employee benefits.

Employers are sometimes loathe to negotiate such arrangements, since their ERISA plans may require that beneficiaries be "actively" employed. The employer's equity plans may also contain such provisions.

d. Other benefits:

Your client's other benefits may also be amenable to negotiation. (For example, Long Term Disability coverage, Long Term Care insurance, 401(k) plans, cafeteria plans for banking of savings for medical costs, perks such as fitness club memberships.) However, often the governing plans preclude eligibility for terminated employees.

4. Other tax issues

Payment of attorney's fees: If the employer agrees to pay attorney's fees as part of a severance agreement, and the severance agreement settles and releases statutory and/or common law employment claims, you can probably protect your client from having those attorney's fees taxed. The Civil Rights Tax Relief Act of 2004, amending Internal Revenue Code 62(a), allows a complete deduction for attorney's fees paid by an employer in settlement of a long list of employment claims. You should include language in the severance agreement, making clear that the payment is in settlement of such a claim, and that the attorney's fees are being paid pursuant to the Civil Rights Tax Relief Act.

B. Non-monetary issues to negotiate

1. The basis of the termination: resignation, termination, and the consequences

Many employees would like the agreement to provide that the employee was not terminated but resigned. Employees may have strong emotional reasons for wanting this, but as a practical matter, for many employees it may not be so important. Because severance agreements are normally confidential (with limited exceptions - see

below), it is unlikely that anyone outside the company will ever see the agreement.

A resignation provision may hurt the employee's chances of qualifying for Unemployment Insurance Benefits. The employer may believe it is required to report to the Department of Labor that the client quit his position. In that case, the employee will normally be precluded from qualifying for UIB, absent a finding that the employee resigned for good cause. Some employers will avoid any reference to UIB in the agreement, but will provide an oral assurance that they will simply not respond to a DOL inquiry.

An employee who insists on a resignation provision may also jeopardize the employee's entitlement to vesting of stock, stock options, bonus, or other incentive compensation, if those plans penalize employees who resign before vesting and payment. You can seek to negotiate a prospective waiver of those provisions.

If the employee is a "registered representative" in the financial services industry and is subject to the employer filing a termination report (called a U5) with the FINRA, pay careful attention to what will be reported on that form. The form requires the employer to indicate whether the termination was "discharge, resigned, voluntary,

deceased [or] permitted to resign.” “Permitted to resign” is an indication that the employee was allowed to leave so s/he would not be terminated. Because the U5 must be filed by the employer within 30 days of the termination, these issues should be addressed quickly.

2. Period of employment

As described above, some employers will agree that for some period the employee will continue on the payroll as an employee, but will not report to work, in order to preserve the employee’s ability to vest in crucial incentive compensation or pension benefits. Be sure to examine the relevant benefit plans so that you can deal with these issues.

An important side benefit to the employee of continued employment is that s/he can present him or herself to prospective new employers as someone who is still employed. Some employers will agree to continue the employee’s access to corporate voice-mail.

3. References

Most employer severance agreements now provide that in response to request for a reference, the company will only provide the employee’s job title, dates of employment and (in some cases)

compensation. Often these responses are handled through e-mail by an outside contractor. If employers are averse to doing more, it is because they are concerned about being slapped with a defamation action by a former employee who loses a job opportunity because of a bad reference.

Some employers will agree to designate a particular individual who will provide a substantive oral reference. The company may insist that the agreement state that the reference is being provided in the referral source's personal capacity and not as a representative of the company.

Some employers will agree to provide a reference letter, a copy of which will be attached to the agreement. The employee can draft the letter and the employer can revise it. Most employers want these letters to be specific and factual, rather than breathlessly laudatory. For employees who are executives or professionals, a letter is normally useless, since most prospective employers will want to speak with a reference on the phone; a letter will only raise uncomfortable questions.

4. Non-disparagement

Many employers' severance agreements include a non-

disparagement clause, in which the employee agrees not to disparage the employer. Many employees find these clauses offensive, and will balk at signing them or insist the clause be made mutual.

These clauses are less of a practical problem than an emotional issue. Claims of disparagement are extremely rare. The employer may agree to a requirement that it first contact the employee or employee's counsel if the company believes there has been a breach. If a non-disparagement clause is agreed to, you should include language protecting your client's ability to discuss his employment in the context of a job search or for other professional development.

You can also seek to have the non-disparagement clause made mutual, particularly if it is limited to specific individuals at the company. Employers are loathe to be bound by a broad non-disparagement clause, since they do not want to be on the hook for what every current employee says in a private conversation.

A modified version of such a clause would state:

The parties agree not to make any disparaging public statements which are reasonably likely to have a material adverse effect on the other party's reputation. If one party believes that the other has breached this provision, ten days before seeking enforcement of this Agreement,

it shall contact the attorney for the other party at the address below and seek to resolve the dispute. Nothing in this Agreement shall preclude Employee from describing her accomplishments and responsibilities while employed at Employer to a prospective employer or for purposes of professional development.

5. Non-re-employment

Employers usually want the employee to agree that she will not apply for re-employment and will not raise a claim of retaliation if that application is denied. Most former employees have no wish to return to the employer. However, they are often concerned that in an era of corporate acquisitions, they should not be precluded from applying for re-employment with a successor company, and not have to leave a job with a new employer if the new employer is acquired by the old one.

This can be a significant issue for former employees. You should push the employer to limit the bar on re-employment to the employee's specific business unit, agree that the bar will last only a short time, and/or agree that if the employee is working at another company at the time it is acquired by the employer, the prohibition will not apply.

6. Cooperation

Employers commonly want departing employees who were executives or served in positions affected by compliance requirements to agree to cooperate with the company in future litigation or investigations.

Many agreements require the employer a) pay a per diem to the former employee for all cooperation (although many employers will not want to do this because it will create the appearance of buying the employee's testimony); b) pay the former employee's reasonable costs and expenses; c) schedule the cooperation at reasonable times ("so as not to unreasonably interfere with Employee's business or professional obligations"); and d) indemnify the employee for all legal fees incurred in that cooperation.

7. Confidentiality

All employers want these agreements to be confidential. Employers want to limit disclosure of the severance and benefits being paid; the non-financial terms negotiated; and the employee's legal claims.

The employee should retain the right to disclose the terms of the agreement to the client's immediate family, counsel, accountant,

tax advisor, financial advisor and the taxing authorities of any jurisdiction.

Taxing authorities must be exempted because issues may arise concerning how the payments were or should be taxed, the applicability of Sec. 409A, or the deductibility of attorney's fees under the Civil Rights Tax Relief Act of 2004 (See Sec. V A (2) and (4) above). Therefore, the employee may need to disclose the agreement to the IRS or other taxing agency in order to protect his interests on this point.

Confidentiality should also not bar the employee from disclosing information "as otherwise required by law." This will permit the employee to respond to a subpoena, testify in court, or testify in a deposition. Employers often want a provision requiring the employee to notify the employer if the employee will have to testify.

Some employers want the employee to agree to not disclose the legal claims on which the negotiation was based, or the facts underlying the employment and termination. If the employee agrees to this, s/he may want to include a provision allowing descriptions of responsibilities and accomplishments in the course of a job search or

for other professional development.

8. Non-competition and non-solicitation issues

If the employee has not already signed a non-compete agreement, and an agreement to not solicit former employees for some period of time after termination, the employer may insist on these as a condition of severance. Ideally, both of these constraints should be as narrow and brief as possible. In the case of a non-compete, you should press the employer to pay the employee's salary and other compensation during the non-compete period. If the employee previously signed a non-compete agreement, you can seek to have it waived.

9. Return of property

Employers will want the employee to return all personal computers, cell phones, company documents (including copies of documents on home computers and PDAs), ID cards and the like. If the employee has already returned company property, clarify this in the agreement.

10. Claims released and claims not released

Employers want employees to release all legal claims they may have against the employer – whether or not the employee knows about them, whether or not they have been discussed, and whether or not they have any merit.

Employees often seek to carve out exceptions to the release:

a. Future claims

The employee cannot release a claim based on a *future* illegal act by the employer.

b. Claims for vested benefits

Vested benefits under ERISA, and in particular the employer's pension, health insurance, incentive compensation or other employee benefit plans, should not be not waived. However, if you have negotiated the accelerated vesting of stock options or the payment of incentive compensation, the employee will need to release claims under those plans, except as otherwise provided in the agreement.

c. Claims for indemnification

Some employees may be entitled, under their employment contracts or corporate bylaws, to have the

employer indemnify them if they are sued based on acts committed while employed. Claims for indemnification are generally not released.

d. Claims under certain statutes.

I. Claims under the Fair Labor Standards Act are not effectively released unless in full payment of statutory damages and approved by the Secretary of Labor or supervised by a court. *Manning v. New York University*, 2001 WL 963982 (S.D.N.Y. 2001).

ii. Claims for Unemployment Insurance Benefits

e. Mutuality of releases:

Employees who are concerned about possible liability to the former employer may seek a general release from the employer. This is particularly important if the employer has raised claims that the employee has violated a non-compete or non-solicitation agreement, or breached any duty to the company.

11. Liquidated damages

Employers commonly include a provision for the employee to pay liquidated damages, including attorney's fees and costs, if the

employee violates the confidentiality provisions of a severance agreement. The language of these provisions should be scrutinized so that the employee is not placed in a precarious position. Of course, the employer must be required to prove a breach in the forum picked to resolve disputes. A common term requires the parties to seek to resolve such a dispute before seeking to enforce the agreement.

12. Governing law and forum for dispute resolution

Employers will want to choose the state law governing the agreement, and where a dispute will be resolved. If the employer seeks to have any disputes arbitrated, you should negotiate which arbitral forum will be used, the payment of the arbitration costs, and whether the prevailing party will be entitled to recover its attorneys fees and costs. (Since these issues will probably be governed by the rules of the arbitral forum, you may need to create an exception to those rules.) It is important to avoid picking a forum (whether arbitral or judicial) that requires your client to deal with a dispute far from his or her home.

13. Requirements for releases under the Older Workers Benefit Protection Act

The Older Workers Benefit Protection Act (OWBPA), 29 U.S.C. Sec. 626(f), governs the release of claims under the Age Discrimination in Employment Act, which covers employees age 40 and above. The EEOC has promulgated detailed regulations pursuant to OWBPA. 29 CFR 1625.22.

As noted above, OWBPA requires that an employee have 21 days to consider a settlement agreement (or, in a group lay-off, 45 days.) A release must also provide for a seven day period after the date the employee signs the agreement, in which the employee can revoke the agreement. Most employers include these provisions even if the employee is covered by ADEA.

The OWBPA requires that for a release to be valid, it must (among other things) be written in a form understandable to the average person, and offer consideration to the employee greater than what the employee is otherwise entitled to. The release cannot waive claims that arise after the date the agreement is executed. The release cannot preclude the employee from filing an ADEA charge with the EEOC, as long as the employee does not receive monetary relief in that proceeding.