NEGOTIATING EMPLOYMENT AGREEMENTS:
AN EMPLOYEE’S LAWYER’S PERSPECTIVE

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By
Wayne N. Outten
Outten & Golden LLP
1740 Broadway
25th Floor
New York, New York 10019

(212) 245-1000
Fax (212) 977-4005
wno@outtengolden.com
www.outtengolden.com

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I. INTRODUCTION

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.

Formal written employment agreements are becoming more common, especially for executives, technical experts, finance experts, and top sales and marketing people. According to a survey of executive search firms, employment agreements were included in 45% of executive placements in 1999, compared to 35% in 1998.1

Particularly in a tight labor market, employers are competing for top talent, so 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 more and more 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 assure and secure those interests during and after the employment.

Meanwhile, employers interested in retaining valued employees are relying on “golden handcuffs” that make it costly for employees to quit. And employers are increasingly imposing restrictive covenants (e.g., non-competition, non-solicitation, and non-disclosure) on employees, particularly those with access to confidential, proprietary, and trade secret information. Compensation arrangements are sometimes addressed in general plans adopted by employers that apply to categories of employees; and they are sometimes the subject of a topic-specific agreement between an employer and an employee. Likewise, restrictive covenants are often contained in topic-specific agreements; and they are sometimes included as part of the consideration in incentive compensation, deferred compensation, supplemental executive retirement, and other special compensation plans. Nonetheless, many employers find it appropriate or necessary to cover these subjects in individual employment agreements – whether in addition to or in lieu of other plans and agreements.

II. THE ROLE OF THE EMPLOYEE’S LAWYER

Before addressing the provisions of employment agreements, the role of the lawyer representing the employee should be addressed.

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Although an employee might obtain a fair employment agreement without a lawyer, the odds are against it. In any event, a qualified lawyer can almost always help an employee get a better, stronger agreement than would otherwise be the case.

Invariably, the employment agreement will be drafted by the employer’s counsel, typically using a model that the lawyer has used for other employers (if the lawyer 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. Thus, the employee’s lawyer can make a big difference in the negotiation and drafting of the terms and language of the agreement.

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 “perks” (car allowance, club dues, financial counseling, and tax return preparation), a relocation package, and ex patriate 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 clauses, 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 lawyer 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.

Typically, the employee already has negotiated at least the general outlines of the business terms before contacting a lawyer. Some employees, however, consult counsel before beginning such negotiations or early in the process. Such early counseling can be very helpful in

2 A notable exception is so-called “golden parachute” agreements crafted for the specific purpose of benefiting senior executives in the event of a change of control; and “stay” or retention bonus agreements are sometimes drafted in a pro-employee manner.
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. Such consultants (using publicly available information, survey results, and other information that may not be readily available) 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 executives. 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 gotten. Moreover, such consultants sometimes have specialized knowledge in the tax, securities, and ERISA issues that arise in some executive employment agreements.

Even when the client consults counsel after the basic business terms have been negotiated, counsel can help the client with business terms, perhaps by suggesting grounds for renegotiation or for adding new substantive terms not already addressed. Thus, the lawyer may advise the client to continue or renew negotiations with the employer on various business terms, while the lawyer stays in the background. 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 lawyer 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 lawyer 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 lawyer 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 lawyer must not only 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, how risk averse the client wants to be, etc. in order to understand how best to serve the client’s interests under the agreement.

The employee’s lawyer 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.
III. BASIC THRESHOLD PROVISIONS

A. 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 agreement 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 lawyer 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 lawyer 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. These grounds for early termination and the consequences of termination on each ground will be discussed later.

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 later.
B. 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, a comprehensive job description may be attached as an exhibit to the agreement.

The reason for the specificity is to assure that the employer does not assign duties and responsibilities that are less attractive or desirable to the employee and to assure that the employer does not 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). 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.

C. Salary

Of course, the amount of the salary is a business issue for the employee to decide, though the employee’s lawyer might be in a position to opine as to whether the salary seems in line with the salary paid to others similarly situated. The main job of the lawyer 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.
D. 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 getting 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 lawyer should review carefully any such plans mentioned or relied upon in the employment agreement, if nothing else to make sure the employee understands how such plans work. Moreover, the employee may be able to obtain beneficial clarifications, enhancements, or guarantees under such 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 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.

3 When the employee is leaving behind bonus pay from the prior employer, the employee may be able to negotiate a “signing bonus” with the new employer. Such bonuses are common for jobs, such as investment bankers, in which bonuses constitute a very high percentage of the employee’s total compensation. Sometimes, employer’s require that all or part of the signing bonus is forfeited if the employee leaves the new job within a certain period of time.
E. Benefits and Perks

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 obtain 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 or more vacation time than is standard. If such arrangements are not set forth in an integrated employment agreement, they may be unenforceable.

F. Special Compensation Arrangements

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

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, presumably upon retirement when the employee’s income and tax rates will probably be lower.

The employee should be aware, however, that to avoid constructive receipt – and therefore current taxation – the deferred compensation remains an asset of the employer. This is true whether the deferred compensation plan is unfunded (i.e., the employer does not set aside funds currently to meet its future obligations to employees) or funded (e.g., funds are put into a “rabbi trust”). In either situation, the deferred compensation is subject to the claims of the employer’s creditors and the employee may 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 lawyer should try to obtain protection against such potential loss by providing in the agreement for accelerated or continued vesting under appropriate circumstances.

IV. EQUITY-BASED COMPENSATION

A. Many employment agreements these days include equity-based compensation, such as restricted stock, stock options, phantom stock, and stock appreciation rights (SARs). These arrangements are used by employers for two basic purposes: to provide “handcuffs” to keep employees from leaving pending 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 outline; here are some highlights.

B. Such 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 very common with respect to start-ups and high tech companies, especially those with a realistic chance of an initial public offering (IPO) in the foreseeable future.

C. Restricted stock is sometimes granted to an employee at the commencement of employment. The employee may have to pay nothing for the stock or may have to pay part or all of the stock’s fair market value at that time. Frequently, when the employee must pay for the stock, the employer will allow the employee to sign a promissory note for most, if not all, of the purchase price. Such stock is generally subject to vesting requirements, particularly when the employee pays little or no consideration for the stock. Moreover, such stock is sometimes subject to buyback rights of the employer (or other shareholders) when the employee leaves the employer; in such circumstances, the employee may have to sign a separate shareholders’ agreement. The buyback price may depend on how long the employee worked for the employer and/or the reason for the termination of employment. For example, if the employee was fired for cause or quit without good reason, the employee may be required to sell the stock back to the company at the initial purchase price (perhaps with interest), even though the value of the stock has risen during the interim. On the other hand, if the employee was fired without cause or quit for good reason, the buyback price may be the fair market value at the time of termination.

D. Stock options are very popular these days. Qualified or incentive stock options (ISOs) are qualified under the Internal Revenue Code. ISOs receive favorable tax treatment, but are subject to certain restrictions. Non-qualified stock options (NQOs) do not receive favorable tax treatment, but are not subject to such restrictions. 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 waits 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 capital gain, not as ordinary income. With an NQO, on the other hand, the employee will recognize a taxable to gain 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 granted4, the maximum amount that an employee can treat as an ISO is $100,000 worth of options per year (determined at the time of grant), and the term of the option cannot exceed ten years.

E. 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 appreciation in the price of the employer’s stock during the relevant period.

F. The employee and the employee’s lawyer should obtain and review whatever plans govern any stock grants, stock options, phantom stock, and other equity-based compensation. Notably, stock grants, NQOs, and phantom stock grants do not require formal plans – they could be creatures of contract - though they usually are set forth in plan documents. One plan may encompass all or some of these vehicles, or each vehicle could have a separate plan. 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 or at the time each grant, in which the terms of the particular grant are set forth.

G. The employee’s lawyer should compare the terms of the stock plan, the agreement pertaining to each stock or option 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 stock or option grant agreement or in the underlying plan document; sometimes, negotiation over such provisions may lead to changes in the grant agreement and/or the plan itself.

H. The employee and the employee’s attorney should focus very closely on the vesting of stock grants and stock option 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 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 (performance-based

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.
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 restricted 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.

I. The period for exercise of vested options after termination of employment should also 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 fair market value) 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.

V. TERMINATION AND SEVERANCE PROVISIONS

A. 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.

B. Employer’s proposed employment agreements typically 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 lawyer should try to add termination by the employee for good reason.

C. Death: 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 perhaps, accrued unused vacation pay. The employee’s lawyer may try to add payment of any accrued but unpaid bonus and a prorated bonus for the final year of employment.

D. Disability: The issues relating to termination and payments upon disability are similar to those relating to termination and payments upon death. Moreover, employees often can obtain continuation of certain benefits, particularly health insurance, for some period after termination due to disability. The employment agreement should contain a definition for 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

(say, 60 days) of inability to perform the job and/or after a certain number of days within a set period (say, 120 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.

E. Retirement: This is generally treated the same as death, except that the employee may be entitled to certain retiree benefits after termination.

F. Termination by the Employer for Cause: The employee’s lawyer should focus very intently on these provisions. They can have a major impact on the employee’s rights at the time of termination to salary, benefits, severance pay, and vesting of equity interests. In short, the lawyer 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 lawyer 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,” or “knowing,” and words like “repeated” or “persistent should be inserted before nouns like “breach” and “failure.” Of course, the employee’s lawyer 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.

G. Termination by the Employee for Good Reason: The employee and the employee’s lawyer 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 acquisition of a majority of the company’s stock, acquisition 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.

H. Notice and Opportunity to Cure: 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, 10 or 30 days) is preferable to avoid dispute. Such 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.
VI. RESTRICTIVE COVENANTS

A. 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 outline.

B. The employee’s lawyer 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.

C. 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.

D. Usually, the main concerns of the employee pertain to non-compete and non-solicitation clauses, which can seriously limit the employee’s ability to earn a living after leaving the employer. Such provisions are increasingly common these days, 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 and 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.

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

VII. DISPUTE RESOLUTION

A. A comprehensive employment agreement should include a dispute resolution provision setting forth what forum will address any disputes that arise under the agreement.
B. Although mandatory arbitration of statutory discrimination cases is abhorrent, 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.

C. Moreover, it is a good idea for the dispute resolution provision to have three steps: first, good faith discussions for a reasonable but short period; second, mediation using an agreed upon (preferably named) mediator; and third, 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.

D. 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 encompass statutory and tort claims as well as contract disputes.

E. Another issue is location. Employers’ standard agreements often provided 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.

F. Dispute resolution provisions sometimes are silent on who pays for any 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.

G. 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 plaintiff in a contract dispute, which disadvantages employees relative to employers. On the other hand, a provision requiring the arbitrator to award attorneys’ fees to a prevailing plaintiff could present a substantial 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.

H. Other issues include the number of arbitrators (one or three), what law governs, and what rules govern. If the AAA is the arbitration provider, its Employment Dispute Resolution Rules will apply. (Those rules apply to any employment arbitration, even if the arbitration clause names another set of rules, such as the Commercial Arbitration Rules.)