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STRATEGIES FOR NEGOTIATING EXECUTIVE SEPARATION AGREEMENTS FOR EMPLOYERS

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Many employers believe they owe executives nothing after employment ends. If they choose to offer any severance, they usually offer just enough to make it difficult for the executive to turn down. The employer asks for a general release and presents the executive with its standard separation agreement to sign. The employer contemplates no negotiation, but many executives push back nevertheless. Based upon what they see as fair, many executives want more severance than the employer offers and fewer post-employment restrictions than the employer seeks. Employers ultimately must choose whether or not to negotiate. Just saying “no” is not negotiating.

This practice note offers advice on how you can help an employer protect its interests and obtain the agreement it needs.

How Executives View Negotiations

Terminated executives often demand much more than their employers offer. These executives believe that a termination without reason breaches the social contract with the employer. If the executive has been loyal, faithful, and devoted, the executive expects to be treated with the same loyalty and faithfulness until the executive and employer mutually agree to separate. Especially if terminated for a reason the executive sees as arbitrary, the executive wants to be compensated for the livelihood and business identity that is being taken away.

Consequently, executives may expect their severance packages to include continuing salary and

bonus during a lengthy notice period and accelerated vesting in all time-based deferred equity awards, such as restricted stock, stock options and stock appreciation rights, as well as phantom equity such as restricted stock units. These executives reason that the employer should not deprive an executive of what the executive has already earned, especially if the termination was due to an event totally outside the executive’s control, such as a restructuring, reduction in force, or change-in-control. As an executive see it, deferred awards should serve only to retain the executive, not to punish the executive.

Terminated executives also believe that employers must ease the burdens of unemployment. This means providing enough severance pay and benefits to carry them through what may be a prolonged period of unemployment. Executives at a more advanced stage of their career – who may have difficulty obtaining other positions with the same earning power – sometimes believe their employers should provide even more compensation for pushing them aside. Even executives who had the foresight and leverage to negotiate severance packages prior to hire want more when their employment ends.

Executives believe also that employers must not hamstring them with post-employment non-competes and non-solicits that limit their job prospects and opportunities. And they also reject offsetting their severance payments with compensation earned at a new employer during the severance pay period, especially if the executives

felt compelled to take positions at lower compensation levels. As an executive sees it, a severance package is not “double dipping,” but a fair exchange for the risks the employer forced the executive to assume when it terminated the executive’s employment.

Why Employers Negotiate

Litigation Risk

Terminating an executive exposes an employer to the risk of legal claims and lawsuits that can cause damage just by the mere fact of being brought. Even if totally unfounded and ultimately dismissed, a legal claim or complaint of discrimination, retaliation, or whistle-blowing puts an employer at risk.

More specifically, such claims can disrupt an employer’s business and diminish confidence in the judgment of those in charge. Shareholders and investors may become unsettled because the employer appears unable to keep its house in order. Prospective buyers may lose interest. Banks financing the employer may get nervous. Desirable candidates for employment may prejudge the situation and choose to accept employment elsewhere. Valued employees may consider leaving. Customers may choose to do business with others instead of the employer. Government regulators may use the legal claim or lawsuit to justify more intense scrutiny. Denials by the employer still leave suspicions.

Business Risks

Terminated executives can also pose business risks to employers in other ways. To an extent, an employer can address these risks in a separation agreement. For example:

- A non-compete covenant sidelines the executive for a period of time and gives the employer the opportunity to protect its business investment and market share. *See Understanding, Negotiating, and Drafting Non-Competes.*

- A non-solicit of customers covenant restrains the executive from taking or performing work for the employer’s customers for a period of time and gives the employer the opportunity to replace the executive in relationships with important customers. *See Understanding, Negotiating, and Drafting Customer Non-Solicitation Agreements.*
- A “no-poach” of employees covenant bars an executive from raiding a company’s employees and gives the employer the opportunity to address the concerns of any employees unsettled by the executive’s departure. *See Understanding, Negotiating, and Drafting Employee Non-Solicitation Agreements.*
- A non-disclosure covenant protects against the use or misappropriation of confidential information. *See Understanding, Negotiating, and Drafting Non-Disclosure Agreements.*
- A non-disparagement covenant protects against outright badmouthing. *See the “Non-Disparagement” section of Understanding, Drafting, and Negotiating Separation Agreements — Understanding and Negotiating Common Provisions in Separation Agreements.*

But all of these restrictive covenants only act as deterrents if the executive believes the employer will enforce them immediately upon breach and will succeed in eliminating any gain or advantage the executive may have obtained.

Unspoken Risks

Some risks to the employer lurk beneath the surface of its negotiations with the executive. This section explores those risks.

Reputation Risk

Reputation risk stands as the greatest tacit risk to an employer. During employment, an executive usually maintains the reputation of the employer and its senior executives because their reputations align with the executive’s self-interest. But after an executive is terminated and interests diverge, the

executive may not feel so constrained. A disgruntled former executive can tarnish an employer's and its senior executives' reputations very quickly.

If the information the executive discloses does not constitute confidential information under law, the employer will have a difficult time preventing its disclosure. When an executive tells an unflattering story about an employer, such conduct can harm the employer because of its negative effect on others' confidence, trust, and respect – even if the stories are true. Even silence from a terminated executive can damage an employer's reputation when more than silence is expected. For example, not speaking positively when the circumstances would suggest the executive should, can leave a negative impression. So too can faint praise or failing to answer a question directly or completely when a forthright answer would be expected.

Relationship Risk

The business relationships of every employer and those of its senior executives are fragile. An employer cannot compel a customer to continue buying, a supplier or vendor to continue to extend favorable terms, or a bank to continue to provide financing. Many individuals watch closely when a well-liked executive is terminated.

How an employer treats a terminated executive can reflect positively or negatively on the employer. If the terminated executive had personal as well as business relationships with customers, the employer must act quickly to assure these customers, as well as vendors, suppliers, and others with whom the executive did business that nothing will change. The employer must solidify these relationships. Stinginess with a former executive is perceived negatively by business relationships who counted on the executive to look out for them.

Miscalculation Risk

Miscalculation risk occurs when an employer assumes that a terminated executive has no alternatives. Overreaching or pressing too hard or at the wrong time can derail a negotiation.

An employer wants the executive to sign its separation agreement and release quickly and quietly. A prolonged negotiation only gives the executive more time to create and raise objections and press arguments. A negotiation that becomes a source of common gossip risks confusion and morale issues among remaining executives, who may worry about the employer treating them similarly if and when they are terminated. A messy termination can also affect future recruiting if it becomes a topic of conversation among recruiters and potential candidates.

A Negotiating Strategy

This section provides pointers for developing and executing a negotiating strategy.

Take Charge and Control the Negotiations

If you represent an employer, you should take control of the negotiation process at the outset. This means:

- You author the separation agreement and release;
- You insert disincentives and self-help remedies like forfeitures, liquidated damages, and claw-backs to dissuade the executive from attempting to take business away or speaking ill of the employer;
- You say certain (or all) provisions are non-negotiable; and
- You provide a deadline for the agreement to be signed and returned.

Combine Competitive and Cooperative Negotiation Styles

Different negotiations require different bargaining styles.

When using a competitive style of negotiating, you not only seek to control the opening of the negotiation but try to dominate the entire negotiation. You take hard bargaining stances and are resolute. You give only limited information. You limit any concessions to slow small moves and demand much larger concessions from the other side in return. You issue ultimatums and threaten to withdraw your offer.

When using a cooperative style, you look to work with the other negotiator. You explain and educate. You problem solve together. You work to understand the executive's underlying needs, acknowledge the executive's feelings, give away generously what is not important, and look for creative ways to bridge the gaps that remain.

Mixing a cooperative with a competitive style usually works best and requires not only good persuasion skills, but the ability to find innovative ways to get what you want, the ability to finesse a situation with tact, and the good sense to allow the executive's negotiator a way out.

Take Advantage of an Executive's Weaknesses

Terminated executives have many negotiation weaknesses. They may be angry, emotional, and unable to distinguish between feasible and infeasible demands. They may fear further loss of their business identity and their individual reputation. They may fear uncertainty and what the future may hold for them.

In almost every case, terminated executives are unsure about what norms and standards should apply to a severance package and separation agreement. Unless they know or can discover what

others in the same industry have received in severance packages, or what the employer has given to other similarly situated executives, they do not know what to ask for. They fear that asking for too much will be rejected out of hand and asking for too little will leave them feeling that the employer took advantage of them.

Tips for Applying Negotiating Pressure

As the employer's counsel, you can put pressure on an executive's weaknesses and protect against your own client's risks at the same time.

- (1) *Frame the Issues.* Beginning with the drafting of the settlement agreement and release, frame the issues as you want. Make the executive's negotiator work to re-frame the issues or introduce new ones.
- (2) *Explain How the Separation Package Covers the Executive's Underlying Needs.* Help the executive's negotiator understand what the executive's interests should be, distinguishing between what the executive really needs and that which the executive wants, but does not need.
- (3) *Keep to Your Own Norms and Standards.* Listen to what the executive's negotiator has to say, but make it clear you will provide the norms and standards that will control.
- (4) *Use Time to Your Advantage.* Keep to your deadline for the executive signing the separation agreement and release. Raise the executive's anxiety level as the deadline nears. Put a price on the executive's request to extend the deadline.
- (5) *Employ Tactics to Help Convince Executives to Drop Demands.* Leverage the executive's weaknesses by emphasizing what the executive will lose if he or she does not sign the separation agreement and release.
- (6) *Use Emotional Pressure.* Bring emotional pressure to bear by having those whose opinion and judgment the executive respects, whose

approval the executive wants, or whose disapproval the executive dreads, help convince the executive to drop unreasonable demands.

(7) *Offer Non-Monetary or Low-Cost Benefits in Response to Counter-Proposals.* Agree to changes that will cost the employer little or no money but will help the executive. As examples, (i) jointly agree with the executive on talking points to be used in response to reference requests, emphasizing the executive's strengths and accomplishments, to help the executive obtain another position; (ii) modify the severance package to allow the executive to receive the cash value of certain benefits or allow the cash value to be used for various other designated expenses; and (iii) agree to continue the executive as a consultant on an "on assignment" basis to allow the executive to separate from employment with greater dignity and respect.

(8) *Offer a Joint Departure Announcement and Continued Access to Email and Voicemail.* Allow the executive to compose his or her departure announcement with you and, during the severance pay period, allow the executive continued access to voicemail and limited access to email through the employer's server.

(9) *Inform the Executives of the Negative Consequences of Opposition.* Remind the executive of the employer's resources and the uncertainty of the outcome if the executive refuses to sign the separation agreement and release. Describe what the executive might lose, such as the relationships within the employer that could help the executive find another position. Describe the injury to the executive's own reputation if the executive's deficient performance or unsatisfactory conduct, even if not constituting just cause for termination, were to become known to others. Even if an executive has a viable legal claim, let the executive know that bringing it will be costly to the executive's reputation, relationships, and respect.

(10) *Stretch to Reach an Agreement.* To reach an agreement, sometimes the employer has to stretch. Use the variables of time and amount to expand negotiating options and alternatives. As an example, exchange the fixed duration of severance pay for a potentially longer variable duration. Place a cap on the total amount, drop the severance amount the longer the executive remains unemployed, and stop the severance as soon as the executive obtains a new position.