Executive Separation Agreement Negotiation (Pro-executive)

A Practical Guidance® Practice Note by Stephen E. Zweig, FordHarrison LLP

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Many terminated executives accept far too little in severance and far too much in post-employment restrictions because they believe they have no bargaining power. In fact, executives have far more bargaining power than they realize. This practice note explains the sources of this power and how it is based on the employer's interests and the risks the employer faces when terminating an executive. The practice note explains how executives can engage in *real* negotiations with their employer and offers sample talking points to illustrate how this is done. The practice note is written in the second person, with "you" referring to the terminated executive. Whenever an attorney is negotiating for the executive, "you" may refer to the attorney or the executive.

The practice note is divided into the following sections, which can be accessed individually from the section headings:

- Employer and Executive Interests upon a Termination
- An Employer's Obvious and Hidden Risks in Terminating an Executive
- An Executive's Bargaining Power and Leverage
- Practical Insights to Make You a Better Negotiator
- Creativity and Innovation in Negotiations
- Examples of Talking Points in Negotiations

For additional resources regarding executive terminations, see Severance Benefits Resource Kit, Restrictive Covenants Resource Kit, and Departing Employees Resource Kit.

Employer and Executive Interests upon a Termination

You and your employer each may view a severance package as a cost of doing business. But the similarity ends there. Many employers consider anything more than a minimal severance amount as an undeserved benefit. Even if your employer values your past contributions, it may believe that you have already been paid for what you did. As your employer sees it, spending money on you when you are no longer with the company is wasteful. Public companies, in particular, believe that offering you more than the bare minimum on the way out will bring undesired investor and government scrutiny. Your employer may also prefer to conserve its cash, equity, and benefits to recruit and reward your replacement.

Many employers also believe that the act of termination, alone, if involuntary, whether for cause or not-for-cause, leaves you feeling so dispirited, needy, and powerless that you will accept whatever is offered. In fact, some employers count on this occurring. They present their separation agreement on a take-or-leave-it basis. They say it is their standard form and cannot be changed. They impose a strict deadline for the agreement's execution and return. If it were not that negotiations over severance packages and separation agreements are based on the employer's interests and risks and not their positions, and the employer can be compelled to recognize this, there would not be any negotiations at all.

An Employer's Interests

An employer's interests are what it needs and wants. Some of these interests are obvious. Others are hidden. Obvious interests are expressed in the separation agreement. An employer wants a general release of claims, because a general release protects the employer from lawsuits and arbitrations by you on waived claims. An employer wants restrictions on post-employment conduct because restrictions limit what you can do to hurt the employer and its business after your employment ends. A non-compete covenant (if permissible in the state in which the employer operates) sidelines you until the covenant's restriction period expires. This gives your employer time to protect the investment it has made in its business, its services and products, and its market share. A non-solicit of customers covenant prohibits you from enticing or urging the employer's customers to leave. This gives your employer time to replace you in relationships with important customers and solidify those relationships. A non-solicit of employees covenant prohibits you from inducing other employees to leave or follow you to a new employer. A confidentiality and non-disclosure covenant prohibits you from misappropriating or disclosing your employer's confidential information. A noninterference covenant prohibits you from disrupting your employer's contracts and arrangements with those it conducts business, including referral sources, suppliers, and vendors. A non-disparagement covenant prohibits you from bad-mouthing your employer, its directors, officers, and employees and the employer's services and products.

For a release agreement, see Separation Agreement and General Release (Individuals 40 and over) and Separation Agreement and General Release (Individuals under 40). Also see Restrictive Covenants Resource Kit.

These obvious interests are what motivate your employer to offer you a severance benefit in the first place. But these obvious interests do not motivate your employer to offer any more than it wishes. They do not motivate your employer to increase what it is willing to offer you in severance or reduce the post-employment restrictions it wants to place on you. Only your employer's hidden interests motivate it to do more. Those interests are not expressed in writing. In fact, they are rarely spoken about unless you raise them.

Every employer wants a clean break from you, not a messy divorce. It wants to wrap things up with you neatly, orderly, and completely, with no loose ends. Every employer wants a quiet rather than a noisy exit by you, where other executives do not learn what is going on. Gossip is bad for morale and creates misgivings among those who may identify with you, may question your employer's intent and motives, and may wonder how they would be treated if they were terminated.

A termination whose basis or execution is legally questionable is also a hidden risk that increases the cost of a termination because the employer has to settle a legal claim as well as reach an amicable severance package and separation agreement.

Finally, every employer wants any negotiations with you about your termination to conclude quickly so it does not lose control of the process. No employer wants its internal business affairs or the shortcomings or foibles of its executives to become a source of litigation, media reporting, or government scrutiny. No employer wants its public image, goodwill and reputation, respect in the marketplace, and its business and community relationships to be impacted by a termination. It is these hidden interests, more than the obvious ones, that motivate your employer to offer more than it wishes.

An Executive's Interests

Your interests are what you need and want. In your view, termination was a risk and expense your employer took on when it hired you. If it chose to terminate you for other that justifiable cause, it was a risk to be shared, not borne by you alone. You are losing your position and the status, prestige, and respect that came with it; your future income, benefits, and incentive compensation; the job security you relied on to reach higher-level positions; and the opportunity to find an equivalent position outside your employer while you still were employed. Even if your employer claims it has the legal power to terminate you at any time for any reason, as you see it, this power does not mean its actions are right-minded, fair, or just. If your employer made a mistake in hiring you or determines that it no longer needs you, in your view, you must be compensated for what has been taken from you.

With respect to monetary items, you need salary and benefits to continue until a termination date you can mutually agree on with your employer, not necessarily the one the employer has set. In addition, you want:

- Time while on the payroll to find an equivalent job with equal compensation while you still have one
- Transition pay to enable you to provide for your financial needs and those of your family
- Earned and unpaid annual bonuses and your annual bonus for your termination year at target level

- Severance pay based on your cumulative contributions to your employer, not merely on your years of service
- All your deferred compensation, equity, and quasi-equity, with full acceleration of any still unvested at time of termination, and all clawback conditions eliminated
- Extended exercise periods to exercise stock options, restricted stock units, and any other forms of equity and quasi-equity that are subject to exercise
- Paid health insurance for yourself and your family during your transition and severance periods
- A liquidated amount for all expenses you will incur, such as a recruitment firm to find you a new position (not just write your resume) and relocation expenses –and–
- Payment by your employer of all fees, costs, and expenses of any arbitration process required by your employer to settle disputes whether you or your employer initiates the arbitration

In addition, you want your separation agreement to override vague and ambiguous forfeiture or clawback conditions, such as "engaging in detrimental conduct," or other restrictions in any equity or quasi-equity plan whose awards you will continue to vest in post-termination.

With respect to nonmonetary items, you want to depart with dignity, honor, and respect and the freedom to move on with your career and earn a livelihood without non-compete restrictions or liquidated damages, forfeiture, or clawback provisions. You want your good reputation restored, which your termination has already tarnished, with internal and external announcements that praise you and dispel any thought that you did something wrong that resulted in your termination. You want an agreement about who will respond and what will be said about you, much more than title and years of service, when your employer is asked for a reference.

If you had the foresight and bargaining strength to negotiate some of these "downside protections" when you were recruited by your employer, you are in a better position to negotiate additional protections when you are terminated. When your employer was recruiting you, it was investing time and energy and if using a recruiter, money as well, in wooing and winning your trust and confidence. Especially if your employer had no practical alternative to hiring you, you had real bargaining power. Even public companies have less problem agreeing to downside protections upon hire than upon termination.

Foresight in negotiating downside protection was also important if you were asked to sign a fixed term employment agreement or your agreement was assignable to a successor employer. A fixed term agreement locked you in, which benefited your employer, especially if it could foresee an acquisition by a successor but may not have sufficiently benefited you. Even if you negotiated a severance package on a termination without cause or a resignation for good reason occurring during your employment, if you were not guaranteed a severance package when the fixed term ended, you were left with nothing when that occurred. Also, if your agreement was assignable to a successor employer but was silent or vague about the successor's obligation to assume the agreement in full, including its incentive awards and severance packages, you were left at a serious disadvantage.

An Employer's Obvious and Hidden Risks in Terminating an Executive

Your employer's interests when terminating you correspond to identifiable risks that it assumes.

Litigation Risk

Litigation risk is the possibility that you will sue your employer in court or file for arbitration with ensuing discovery proceedings and trial or hearing. Activating this risk only requires that you have a colorable claim, whether of unlawful discrimination or retaliation, breach of contract, defamation, whistleblowing, wage and hour, or any other statutory violation of federal, state, or local law, or breach of common law. Litigation risk also encompasses investigation and audit by a federal, state, or local government agency.

Given the many laws that affect the workplace today, hardly any employer can confidently say they comply fully with every law. If you feel aggrieved and damaged by your termination, you may be willing to file a "tell-all" narrative complaint to get your story told. For companies with high visibility to the public who value the public image and reputation they have built over years, negative publicity about a claim or lawsuit or even the threat of one is a significant risk to them. Many companies will pay a lot to make a potential complaint or lawsuit go away, in particular one that they cannot get dismissed on a summary judgment motion because it alleges too many disputed facts. Assuming you are prepared to proceed and can credibly communicate this, raising the prospect of a lawsuit can be very effective if the employer believes you will actually file.

Reputation Risk

Reputation risk is the employer's and its executives' loss of power, status, prestige, and respect with those whose high regard they want to maintain, including those who continue to work for the employer and those it seeks to recruit. Employers and continuing executives often underestimate their vulnerability to reputation risk and miscalculate the impact of a single event or occurrence. They also underestimate the anger and resentment you may feel and your willingness to act solely to get back at your employer.

Non-compete, non-solicitation, and noninterference covenants each protect an employer to a degree, but none can insulate an employer from all the ways you can put the employer's reputation and respect at risk. What is more, enforcing one of these covenants is expensive and time-consuming and may reveal facts about the employer's business practices or internal affairs that the employer may not want disclosed. This applies especially to written or verbal exchanges that the employer would rather not be made public because they are embarrassing or worse, and cannot be explained away. Also, if a covenant is declared overbroad and unenforceable, this reduces its prohibitory effect on all executives who have the same covenant.

Relationship Risk

Relationship risk is any entity or person's re-evaluation of their relationship with the employer or its executives. Relationships the employer holds dear exist with customers, referral sources, suppliers, vendors, bankers, insurers, shareholders, investors, employees, and the community at large.

Every employer wants to maintain goodwill and good faith, especially with important customers and referral sources. Termination of an executive whom a customer or referral source trusts is an inflexion point in that relationship. It is not enough for an employer to transition work or projects to other executives. When your employer terminates you, it puts at risk every business relationship you have with those who trusted you to look out for their interests.

Moreover, no customer or referral source likes to see you, an executive who they had confidence in, be terminated. When that occurs, they want to know why you were terminated. They want an acceptable explanation to continue to feel good about your employer. They want to know that your employer still cares about its relationships and does not just discard those it no longer wants without any concern for them.

Your employer has to reassure those customers and other relationships that nothing will change, despite your departure. You can help or hurt this process. You can assist your employer in transitioning to those who will succeed you your goodwill with customers, referral sources, suppliers, and vendors and your good faith in dealings with bankers, insurer, shareholders, investors, employees, and the community at large. You can assure those who had trust and confidence in your judgment that your employer has treated you well even though it has terminated you. Or you can tell true stories about your own and others' mistreatment when terminated.

You can damage your employer's relationships by what you do not say as well as what you do say. You can say nothing about the continued capability, competence, and judgment of those who will succeed you. When circumstances suggest that you should say things in their favor, remaining silent or offering only faint praise sends the opposite message. So does your showing a lack of support as evidenced by your demeanor, tone of voice, or body movements, such as a deep sigh, raising your shoulders to show doubt, or shaking your head when asked a question.

No matter how tightly drawn, no non-disparagement covenant can protect fully against reputation risk. Though a non-disparagement covenant can prohibit bad-mouthing, it cannot prohibit inaction or mandate action. It cannot make you speak positively about the employer to those who need to hear this. What is more, disparagement is difficult to prove and enforcement may reveal facts about the employer's business practices or internal affairs that the employer may not want disclosed. In addition, no court injunction can undo what was said or damage done to your employer's reputation and money damages may be a poor substitute for the loss of a valuable customer or other relationship or for unfavorable media attention and government scrutiny. True stories you may tell about mistreatment also may make it harder for your employer to recruit new executives and harder to maintain the morale of those executives who continue with your employer.

Revelation Risk

Revelation risk is the disclosure of your employer's internal affairs and business practices. While employed, it is in your interest to maintain confidences. You do not reveal any information the employer does not want you to reveal. But after employment ends, if you believe your employer or its executives' conduct is questionable, whether on legal, moral, or ethical grounds, you may feel far less constrained.

Confidential information and non-disclosure covenants prohibit disclosure of information that qualifies as confidential under law but personal conduct and interactions that are illegal or demonstrate a lack of

integrity, ethics, or honorable behavior are not necessarily confidential information, and revealing this information may be embarrassing to an employer or lead to scrutiny or audits by government agencies, requiring the employer to make even further disclosures.

Rejection Risk

Rejection risk is your refusal to sign a separation agreement and general release. It is the employer representatives' responsibility to obtain your signature. Rejection risk arises when your employer and its representatives consider only their own interests and reject yours, make no concessions, do not propose any compromises to meet your interests, and thereby forfeit the opportunity to reach an amicable agreement with you. Rejection risk increases when your employer and its representatives show no empathy for you and what you are going through upon termination, and only alienate you further by their words and actions.

An Executive's Bargaining Power and Leverage

Bargaining power is the raw material of leverage. Your bargaining power arises from four sources:

- What your employer believes it must have and cannot do without
- What your employer desires and wants so badly to have
- What your employer's real competitive options and alternatives are –and–
- Who will benefit from the passage of time and time constraints, you or your employer

The best way to convert bargaining power into leverage is to identify your strongest bargaining power source and press where the employer is weakest and most vulnerable, using the lever that magnifies the pressure and accentuates the pain.

Your levers are any advantages you have or can create in negotiations. Positive leverage means offering the employer something it wants or removing something it does not want. Normative leverage means applying general norms and standards, market metrics, precedents, and past practices. Negative leverage means pressing, pulling, and pushing on something the employer does not want to occur or taking away something it wants to occur.

Leverage opportunities exist at the beginning of negotiations when anchoring a position and determining the ground rules for negotiations, including what issues will be discussed, whose interests will be considered, whose facts and opinions will matter, and when the negotiations will end. Leverage opportunities also exist or can be created during negotiations when determining how to frame issues, interests, and options; how to apply norms and standards; and how to create rights and obligations before they are claimed.

Negative leverage presses, pulls, and pushes on one or more of four character traits: on virtues and values, on reason and logic, on emotional ties and connections, and on anxieties and fears. You determine the appropriate character trait to press, pull, and push on by deciding what will motivate your employer and its representatives to change their thinking and either make concessions or look for ways to compromise and accommodate. You apply pressure in stages. You determine how far you need to go to show how serious you are.

In negotiating a severance package and separation agreement, until you reach final agreement on the whole, it is usually better not to settle one item at a time with no possibility of return. Until final agreement on the whole is achieved, you can expand or repackage what the employer has offered, both as to monetary and nonmonetary items, using the flexibility you have left yourself to adjust the agreement to meet your interests.

Virtues and Values

Virtues and values are the principles and priorities that your employer and its representatives hold dear, and what, if forsaken or betrayed, threaten their core beliefs. Most employers believe they act responsibly and ethically in offering you what they do. Most employer representatives want to be known as decent, fair, and honorable in dealing with you and are concerned with how their words and actions will be perceived by others, including continuing executives.

Appeals to virtue and values can work if the employer representatives' own beliefs are guided by moral and ethical principles. They work best if the employer's representatives are willing to accept that you have been damaged by your termination and acknowledge what you have lost, realize that the severance package offered is inadequate to provide sufficient funds to enable you to meet fixed and anticipated costs and expenses until you resituate in another position, and recognize that the separation agreement's restrictive covenant on competition makes this too difficult for you to accomplish. You appeal to what both sides should hold dear as the morally right thing to do if proceeding in good faith and with goodwill. You appeal to integrity and what is respectful and compassionate.

When using virtues and values as a lever, you should not feel restricted to speak only with the specific representatives your employer designates. Your requests must reach the individual with the power and authority to make the changes requested.

Reason and Logic

Reason and logic are about reasoning rationally. You may believe that if you could just get the employer and its representatives to listen to reason and logic, they would understand that the employer's offer and severance is too little and its restriction are too much. Reason and logic arguments are based on market norms and standards, custom and usage, analogous situations, and precedents and practices. Because employers will only consider your interests if they align with their own, your reason and logic must focus to the greatest degree on their interests, not your own.

Emotional Ties and Connections

Emotional ties and connections are attachments to individuals that motivate through personal feelings. They include the sympathy of the manager who recruited you from a secure position to come to the employer or who made job security commitments to you, the feeling of indebtedness of the manager who benefitted from your hard work, the shame of the manager who inwardly knows that their failings or mistakes contributed to your termination, the embarrassment or guilt of the manager who did not give you sufficient warning or opportunity to transfer to another position, the humiliation of the manager who could not prevent you from being terminated, and the friendship of your personal and business relationships who are willing to speak on your behalf. You trigger their feelings of caring and regret that they did not do more for you and must now rectify this by speaking and acting to help you.

You appeal to emotional ties and connections by reaching out on your own to the person who is connected to you. It is best if this person is someone your employer respects, whose approval it wants or disapproval it dreads. This can be your manager, a higher-level executive, a board member, an investor or a prominent relationship the employer cannot do without.

Fears and Anxieties

Fears and anxieties are thoughts and feelings of loss, exposure, failure, danger and pain. No less than individuals, employers have an aversion to risk and loss. They fear risking what they believe they need and must have. To an even greater extend, they fear losing what they believe they already have. Potential losses loom larger than potential gains. Employers fear loss of control and will move to eliminate the uncertainty of predictable outcomes that endanger their interests.

Employer representatives have their own fears, including failure to obtain the agreement the employer wants and damage to their own personal reputations. What is more, few employer representatives want to risk showing their lack of control over events.

It is unethical and in most states illegal for your counsel to threaten an employer that if a request is not met, they will expose secrets or publicize asserted facts tending to subject a person or entity to hatred, contempt, or ridicule. However, warning orally or in writing that you will file a lawful suit is not an improper threat, assuming it is a sincere belief. Nor is explaining to the employer's representatives in settlement negotiations how a lawsuit would necessarily involve the disclosure of certain information and the consequences that would naturally follow from the filing.

Practical Insights to Make You a Better Negotiator

Negotiating your severance package and separation agreement begins long before your employment is terminated. It begins when you first receive signals that all is not well, and your employment is at risk.

When Negotiations Begin

These signals may be business-related, such as your employer's failing business metrics, or job performance-related, such as a mediocre evaluation, or related to how you are perceived, such as having difficulties in interacting with others or being a poor fit for the employer's culture. If you are mindful and alert to these signals, you can influence both the process and outcome of what will happen next. You can even preempt the process entirely and initiate exit negotiations on your own before your employer has decided on how to proceed.

Most employers take a power-based approach to terminating you. They assume that power makes right. They act as if their actions need not be justified, just decreed by them. They position to control the entire termination process. They determine how much money or other consideration they will offer you in exchange for a general release of all claims. They include in the separation agreement whatever post-employment restrictions they want and word them as they please. As to any discussion they may allow, they attempt to preempt what issues will

be discussed, whose interests they will consider, whose facts and opinions matter, and when the discussions will end. In pursuit of their own interests many employers also will pressure you with ultimatums and deadlines.

If you are to have any real say and negotiate in any real way, you must disrupt this process and counter the employer's actions, its misconceptions about how you will react, and is its misassumptions about what you will accept. You must make it clear that your issues, interests, and options, as well as the employer's, must be considered if there is to be any hope of reaching an amicable separation agreement.

What Are Real Negotiations?

Despite what you may think, *real* negotiations are not about you at all. Harsh though it may sound, once your employer has decided to terminate you, it only cares about what it needs from you, what it wants from you, and how to get you to move on without creating any problems. Your employer does not care about your hurt or angry feelings or what you think is fair and just. No employer offers more than it wants to offer you because you think you deserve more.

Real negotiations is not an event; it is a process. It takes time, requires patience, and goes through stages. The right things have to be done in the right sequence. It requires that you first develop an overall strategy with clear objectives and decide on the steps needed to implement that strategy. You gather the facts. You determine your goals, both aspirational and feasible. You consider your bargaining strengths and weaknesses and your employer's. You evaluate how and why the employer has positioned the way it has. You learn as much as you can about the employer's culture and philosophy and the personal values and predispositions of the employer's representatives. You think through how you need to act to deal with the employer representatives' biases, attitudes, and temperament. You assess their bargaining styles and whether they have been given the authority necessary to negotiate changes with you. You listen to their version of why you were terminated, who they say said what and did what to whom and who they say was right or wrong and to blame. You assess their story for its flaws and inconsistencies with yours. You analyze whether your termination was unlawful, whether you should contest it, and whether you should ultimately hold your employer legally accountable.

In real negotiations, you reframe the issues so they focus on what you want to discuss, not how the employer has oriented and directed what is to be discussed. You focus on the parties' interests, not positions. You counter your employer's misreading of its own needs and wants and focus on the hidden and underlying interests beneath them. You point out the interests that are common, complementary, or contrasting as well as the process for working things out. You use the employer's desire for order, consistency, and no legal exposure to neutralize any claim that what you are asking for is unprecedented or the circumstances and the employer's interests do not allow for a justifiable exception.

In real negotiations, you always want to take and hold the moral high ground despite efforts by the employers' representatives to take it from you. You reject any claims that you are being greedy and unseemly in what you request. You rebuff explicit and implicit threats that you will leave with nothing if you do not accept what your employer is offering. You repel bullying in whatever form by the employer and call it out. You say "no" when you must, in no uncertain terms. You press the limits of the employer's resolve and commitment to its positions to uncover its bottom line, which is bounded by the employer's best alternative to a negotiated agreement with you.

In real negotiations, you use facts and law to dispute your employer's mistaken beliefs, opinions, and conclusions. You use emotional ties and connections to humanize your "asks" and make them relatable. Most importantly, you or your legal counsel stoke your employer's and its representatives' doubts, anxieties, and fears about how they will lose control over you and your actions if they do not reach an amicable agreement with you, how the natural consequences of these actions will overtake them, and how detrimental the outcome will be for them. You make the employer's representatives uncertain and uneasy about how unpredictable you are, how far you will go, and what risks to yourself you are willing to take. You use brinkmanship, increasing your own risk exposure if necessary to increase the employer's risk exposure until the employer realizes it has more to lose than you do. If you have decided you could live with no agreement or are willing to take legal action despite the risk or cost to yourself, and you can convey this convincingly, you will negotiate in a much more powerful way than if you feel you have to reach agreement.

In real negotiations, you obtain meaningful changes to what you have been offered. You do not settle for the nibbles your employer allows. You change your negotiating style, as needed, from collaborative to competitive to confront the employer representatives' objections and refusals and to demonstrate your own conviction and resolve. As a collaborative negotiator, you listen and learn, share information, and work out solutions with the employer's

representatives that serve each other's interests. As a competitive negotiator, you challenge, contest, and confront the employer's arguments, take apart its justifications, argue forcefully for principles that would provide favorable results for you, issue warnings about actionable claims, and predict the natural consequences of bringing those claims. You jockey for position to maintain momentum and press your advantages, especially when the employer's representatives appear unprepared or prone to verbal slips, stumbles, or revealing of their inner thought processes. Some conflict in negotiations is inevitable if only because it is a natural human tendency for both you and the employer's representatives to actively pursue what you each want to avoid regretting later that you did not do enough.

Every negotiation develops its own rhythm and momentum as you and the employer's representatives make moves and countermoves. On each issue you negotiate and the agreement as a whole, you tee up what you seek, explaining how it serves the employer's interest to give it to you, and you press down hard on what you need in exchange for giving the employer what it needs. You also develop fallback positions in advance, justifiable based on the facts, allowing you to present the fallback if the momentum of the negotiations demands it and does not allow time for reconsideration or delay.

In real negotiations, you use behavioral economics principles like anchoring, risk and loss aversion, reference points, and massing of bargaining leverage to your advantage. You use anchoring by proposing your aspirational severance package and separation agreement and focusing negotiations on your target goals, not the employer's. You use risk aversion by showing the employer how it lacks the practical tools to protect its own reputation, relationships, revenue, and the revelation of facts it wants to keep private. And, because losses loom larger than gains, you use loss aversion to show the employer what it will lose in intangible as well as tangible value if it does not come to terms with you. You use reference points to identify negotiation parameters. You mass your bargaining leverage at tipping points in negotiations to push, pull, and press to make the employer accede.

Ultimately, real negotiations is all about your credibility. Credibility is built on logos, pathos, and ethos. Your facts must be understated not overstated and your arguments must be logical and sound. You must be passionate and believable. You must convince the employer's representatives that your moral integrity underlies everything you say and do.

Persuasion is the key to successfully negotiating. How far you will have to go to persuade will depend on the circumstances. But if your persuasion is convincing, most employers will find a face-saving way to reach an agreement with you.

The Executive's Negotiator

If the lines of battle have been drawn and you can assert a legal claim that puts the employer's interests at risk, you should engage legal counsel at the outset to make your claim. Engaging counsel shows you are serious and negotiations are about settling your claim, not merely about increasing your severance. Your counsel can also be less timid than you might be in setting forth your requirements for an agreement and, if an experienced negotiator, can determine whether a zone of agreement can be narrowed enough to reach an agreement. Your counsel also can say things you may be uncomfortable or unwilling to say because of existing relationships or your own anxieties and fears.

Alternatively, if the lines of battle have not yet been drawn, you may wish to proceed on your own at the outset or work side-by-side with legal counsel, with you addressing the business terms and your counsel addressing the legal terms and conditions. As the terminated executive, you can use your personal relationships with managers and the decision maker to test the outer boundaries of their discretion. You can consider whether what you have to say would be better received by those who know you, can understand what losing your position means to you, and can empathize with how distraught you are. You can appeal to their integrity if they see themselves as possessing high moral standards and scruples, to their ethics if they see themselves as conducting affairs fair-mindedly and justly, and to their honorable behavior, if they see themselves as behaving with human decency and compassion. You can judge how intent the employer is on only having things its own way and how willing it is to engage in negotiation over what you propose. If, however, you are naturally disposed to avoid confrontation and tend to accommodate, compromise, or trade off with others too quickly, you may be better off leaving the negotiations to a legal counsel you trust and have confidence in to look out for your interests.

Whichever approach you decide to take at the beginning, legal counsel can help you prepare the negotiation strategy and help you decide which one of you should engage as negotiations proceed. An experienced counsel can anticipate all the reasons the employer will say "no" to you, why it will say no, and how to get the employer to change its position to a "yes." Your counsel will help you create and

present options as well as help you determine your own bottom line and then resolve to reject employer proposals that at odds with market practices and general norms and standards and do not meet your needs.

Creativity and Innovation in Negotiations

Creativity in negotiations means you think deeply and open-endedly about your moves and countermoves and how to frame and convey them. Through innovative ideas, you rearrange, restructure, and expand or repackage what the employer has offered, both as to the severance package's monetary items and the separation agreement's nonmonetary items. You research industry examples and precedents to learn and apply market terms and norms and standards and illustrate that your requests are reasonable and have been accepted by other employers. You expand the pie by adding items of value to you or the employer, repackage the pie by assembling items of different value or utility to you or the employer, increase your bargaining strengths or decrease the employers by allying yourself with others, and alter the employer's needs or desires or its options and alternatives by actions you engage in, away from the bargaining table. You balance your cooperation with assertiveness and your flexibility with persistence.

Monetary Items

Often it is best to focus on monetary items before tackling nonmonetary items unless the effect of a nonmonetary item, such as a non-compete, will inhibit your ability to resituate in another job without losing career opportunities. Because money is fungible, monetary items can readily be reconfigured and stretched using differences in time and utility to increase their value. Also, the names given to monetary items can be relabeled to make them more palatable or optically acceptable to the employer. Here are some of the options for increasing the monetary value of a severance package:

- Postpone your termination date to provide a longer period for salary, bonus, and benefits to continue and equity, quasi-equity, and other deferred compensation to vest—even if it means placing you on a terminal leave of absence.
- Bridge your service to increase your nonqualified supplemental retirement or profit-sharing plan benefit by giving you additional service credit for years before you participated in the plan or for years in the same industry.
- Extend your notice period, with the employer deciding if and when it wants you to work during that period.
- Relabel added money, calling it something else, such as a transition, special continuation, or special payment or consulting fee or allowance.
- Specify that transition pay continues until the earlier of your employment in a position equivalent in duties and compensation to the one you held with the employer or an agreed end date.
- Monetize certain benefits by giving you the dollar equivalent for expenses such as moving, relocation, tuition reimbursement for children; outplacement services, accounting services for income tax preparation and legal services, and allowing you to retain employer equipment, such as your laptop computer and cellphone.
- Receive pay for COBRA continuing health benefits or an equivalent sum for the duration of any transition and severance periods or longer for your chronic health condition or that of a family member.
- Exchange a fixed severance amount for a variable amount, such as a reduced amount in the beginning of the severance period that increases if you are unable to find an equivalent position within a given amount of time.
- Exchange a fixed severance period for a variable period, such as a contingent extension of severance pay on a month-by-month basis to a maximum amount if you are unable to obtain an equivalent position within the initial severance period.
- Gross up severance or another cash benefit, in whole or in part, for income taxes and employment taxes.
- Have money allocated as special consideration for a limited non-compete covenant or another commitment by you to the employer.
- Have money allocated to settle a potential legal complaint against the employer, with special tax consideration for compensation carved out for emotional pain and suffering, if allowed by law, and allowing the employer to specifically disclaim liability.
- Agree to a paid post-employment consultancy and engagement as an independent contractor. –and–
- Provide for payments to you at your last salary rate for hours of work the employer may request from you in connection with any investigations, audits, deposition preparation, etc. under a cooperation provision.

Nonmonetary Items

Similarly, language in a separation agreement can be added to, subtracted from, and modified. Here are some options for eliminating or minimizing disadvantageous nonmonetary items in a separation agreement:

- Insert pro-executive definitions for all key terms that can be used by the employer to reduce, divest, forfeit, cancel, or claw back any compensation or benefits from you under the agreement.
- Supersede and override any inconsistent or contrary provisions in long-term incentive plans, programs, and grant and award agreements that will continue to impact you, such as the employer's contractual rights to void, reduce in value, or buy back equity or quasi-equity for alleged post-employment breaches of company policies, "existing restrictions," or "detrimental conduct" the employer determines in its sole discretion.
- Clarify and make definite and certain any definitions or other ambiguous and vague language the employer may otherwise interpret in its own interest in applying the agreement.
- Make general release, confidentiality, non-disclosure of the agreement and facts leading to it, and non-disparagement covenants, reciprocal.
- Delete ambiguous and vague words like "negative," "adverse," and "in the reasonable belief of the employer" in any non-disparagement covenants.
- Delete any effort to have a non-disparagement covenant curtail what you may do as well as what you may say.
- Eliminate entirely or reduce non-competes to align with what your specific job function and scope of duties were, to narrow the scope of any "competitive business" definition or specifically name primary competitors, and to decrease the provision's duration and its geographical breadth.
- Limit non-solicitation of existing and prospective customers to those you personally interacted with or to whom you made a substantive business proposal.
- Require written notice from the employer and time to cure any breach of a confidentiality or non-disclosure covenant that is alleged.
- Eliminate overreaching contract provisions such as punitive liquidated damage clauses, your obligation to indemnify and hold the employer harmless, and you paying the employer's attorney's fees if it claims you breached the agreement and it sues you.
- Provide tail coverage for yourself under the employer's D&O insurance coverage, with at least a six-year tail, and add a contractual indemnification, defense, and hold harmless provision that allows you to engage independent counsel.
- Provide that any cooperation required of you under a cooperation provision be scheduled so it does not interfere with your post-employment personal and professional commitments and engagements and compensates you for your time.
- Provide a protocol for the employer's response to reference checks, referring requests to a specific person who is authorized to provide only specific information about you, your employment, and the reason for the separation, which you agree to in advance. –and–
- Provide for you to join in composing an announcement of your departure saying that you left in good standing, complimenting you on your contributions to the employer's successes, and citing your accomplishments.

An Example of Reframing

Here is an example of reframing to show how you frame your monetary and nonmonetary requirements if you lose your job in a reorganization, regardless of the reason given to justify your termination.

> **The Facts:** You are an executive with more than 30 years of service. You are terminated as part of an alleged "strategic reassessment" of your department. Your employer says its severance plan benefit is the equivalent of two weeks of salary multiplied by years of service, capped at 20 years. You do not accept the severance plan's benefit as fair or just. Your employer says it is just following its plan and needs to apply the plan's formula consistently with all employees. In exchange for the severance plan's benefit, your employer wants you to sign a separation agreement with a general release of all claims as well as broadly worded non-compete, non-solicitation and confidentiality covenants, and a non-disparagement covenant that has no end date and prohibits, in addition to badmouthing, any statements that are, in the employer's belief, negative or critical of the employer, its executives, products or services.
>
> **Re-Framing:** You re-frame the issue to focus on what is needed by the employer to protect its interests and what you need to protect yours. You begin discussing with the employer what you see as its hidden or underlying interests, why it cannot satisfy them on its own even with all the deterrent language it has included

in the agreement, and why the risks of not discussing what you need to come to an agreement outweigh any benefit the employer would receive by refusing to discuss these items.

You then explain what your interests are. As to monetary items, you say you want to have your vesting in any unvested time or performance-vesting stock options or restricted unit awards accelerated, so you are not penalized because the employer has prevented you from reaching the vesting dates; you want a bonus for the year in which you are terminated that is equal to the prior year's bonus, here again, because the employer has prevented you from reaching the bonus's payment date; you want to remain on payroll to allow you to look for a job while you have one; and, in addition to severance pay, you want sufficient transition pay to allow you sufficient time, without the press of your family's financial expenses, to find an equivalent position that does not set you back in your career.

As to non-monetary terms, you explain that the ambiguities and vagueness in certain terms and conditions in the separation agreement must be corrected because they only set you up for disputes and litigation with the employer. And you reject any liquidated damages or other punitive terms and conditions which the employer is using to gain an undue advantage over you or preempt a court or arbitrator's decision.

Examples of Talking Points in Negotiations

Talking points are words prepared in advance that are purposely drafted to be acceptable to anyone's ear. They reign in any idle and unfocused thinking. If you prepare your talking points in advance, you will not later regret that you could have said something better, been less susceptible to misinterpretation, or less vulnerable to rebuttal.

Talking points can be direct and unambiguous or subtle and nuanced. You do not speak in generalities if it serves you better to be specific and give examples. You do not give specifics and examples if concepts are more important than details. You are agile in what you say and how you say it. You say the right things in the right sequence. You present your facts tactfully and your arguments with finesse. You choose the manner and demeanor you want to project. You show respect for the employer's representatives and speak to them in their voice pitch, tone, and level of formality. You do not leave yourself open to accusations that you are out-of-line or self-impressed. At the same time, you do appear too timid or over-concerned that you will say the wrong thing and your employer will perceive this as weakness. Though you obviously cannot prepare all your rejoinders to the employer's responses in advance, you can anticipate and prepare conceptually how you will reply, or you can preempt the employer's responses and neutralize their impact.

Talking points are calibrating to fit the situation or circumstance. You elevate them in intensity to meet the resistance level you encounter as you move back and forth from soft to hard negotiating. You may choose to phrase your talking points in a collaborative way when you are beginning negotiations or conciliating to resolve differences. Conversely, you may choose to phrase your talking points in a competitive way when you are challenging the employer's misconceptions and mistaken assumptions about you and your beliefs, contesting its severance package and restrictive language, or confronting its intransigence and refusal to consider your interests.

Talking points can make or break your credibility. If you are making a move or countering the other side's move without preparing what to say beforehand, you may get flustered by the other side's comebacks, rebuttals, or attitude. You may not speak forcefully enough in rebutting and rebuffing the other side. Or you may speak too openly and give way too much too soon. You may leave a thread for the employer's representative to pull on and unravel your whole argument. Or you may miss a moment ripe for a conciliatory gesture or a mutual interest consideration.

Talking points that utter warnings, in particular, must be credible both in what you say and how you say it. You and any legal counsel you engage will decide who will issue the warnings, whether they will be said directly face-to-face, by letter, email, or phone call, and when and in what sequence they will be said. They can be hypothetical or explicit. They can identify the mistakes the employer made in terminating you, the fallacies in its story, and the incredulity of its justifications. They can point out what the natural consequences will be if no agreement is reached and the legal claims and ensuing embarrassments and injury the employer will suffer to its public image, reputation, and business relationships unless it comes to an acceptable agreement with you.

Following are examples of introductory talking points for you or your legal counsel (to be appropriately revised if for your counsel), at each stage of negotiations.

Negotiating Exit prior to Termination

To negotiate your exit before you are terminated, you may communicate the following:

- **Example 1.** I know you are downsizing and considering which positions to eliminate. Before this occurs, I would like to know whether you would consider an exit package for me if I agree to a voluntary separation. I don't want to confuse you. I am not resigning. You may not have approached me because you believe it inappropriate to initiate this conversation (because of my age or another legally protected class to which I belong). But I believe it would be in the company's interest to have this conversation and would be willing to talk with you.
- **Example 2.** Despite all my efforts to meet your expectations, I've recently received signals from you that my employment here is less secure than I believed. I intend to continue to work hard to reach the company's expectations. However, if, in your view, that is not likely to occur, I am willing to leave voluntarily if we can reach agreement on an acceptable severance package and separation date. I don't want to confuse you. I am not resigning. But I am offering this opportunity for us to see if this is worthy of further discussion.

Conveying Emotion When It Is Appropriate

To convey emotion when it is appropriate, you may communicate the following:

> I am shocked and angry about why you terminated me and how it was done. It was devastating and humiliating. What you are offering me is not fair or just, and I cannot accept it.

Conveying the Real Issue

To convey what the real issue is, you may communicate either of the following:

- **Example 1.** The issue is not about the facts or the action you have taken, which I doubt we will ever agree upon. Each of us has its own version of what occurred, who was right or wrong, and who is to blame. The issue also is not about your power to terminate me.
- **Example 2.** The issue is whether you will recognize and reconcile with me about what you have taken away from me—not only my position and the identity that came with it, but my future income to safeguard my family's financial well-being, the job security I relied on to reach a higher-level position in my career, and the respect of my fellow executives and peers in the industry.

Conveying the Real Interests

To convey what the real interests are, you may communicate either of the following:

- **Example 1.** Your interests are to obtain a general release of all claims from me, to prohibit me from using or disclosing your confidential and proprietary information, and to prohibit me from soliciting your customers or employees or disparaging you or your products or services. You want our employment relationship to end quietly with no loose ends, without a gossipy termination or messy divorce and without litigation and the resulting media attention that could hurt your public image, reputation, revenue, and your relations with your customers, clients, and other business relationships.
- **Example 2.** My interests are to receive a severance package that compensates me in all respects for what you have taken from me, a separation agreement that protects my professional reputation and standing in the industry, and enough time while I am continued as an employee to find another position of equal stature and compensation. My interests also are to move forward without any restrictive covenants that interfere with who I can work for, what I can do or where I can work, a reciprocal non-disparagement covenant and no liquidated damages, cancellation, forfeiture, or clawback provisions.

Countering a Separation Agreement Proposal

To counter a separation agreement proposal, you may communicate the following:

> I appreciate the offer you have made. But judging from the severance package and the post-employment restrictions you've included it appears we are looking at this in very different ways. I want to respect your time, so I've prepared my thoughts on what the severance package and separation agreement should contain. Please let me know when we can schedule a convenient time to talk.

Contesting a Separation Agreement Proposal

To contest a separation agreement proposal, you may communicate the following:

> I see you as trying to convince me that your interests and your way of seeing things is the only way. I can't agree with that. Are you willing to discuss what real options and alternatives each of us has in the timeframe we face and before you lose control of the outcome?

Confronting a Separation Agreement Proposal

To confront a separation agreement proposal, you may communicate the following:

> How much is it worth to you avoid a narrative complaint being filed that will describe the real reason for my termination and how you treat your employees, customers and other business relationships? Will this lawsuit be picked up by the media because of its interest in your public image, your reputation as a company and those of your senior executives? Is this lawsuit really worth fighting on principle? What will be the cost to you? Why is that a better outcome that working with me to reconcile our interests?

Collaborating on a Separation Agreement Proposal

To collaborate on a separation agreement proposal, you may communicate the following:

> If we are to reach any agreement, we will have to work together to make that happen. What if I were to propose a settlement range for the monetary issues? Would you propose yours so we can narrow the difference in our expectations? How would you solve the problem of reconciling our interests on the non-monetary issues?

Compromising on a Separation Agreement Proposal

To compromise on a separation agreement proposal, you may communicate the following:

> We are far apart in our expectations. I'm making a concession with the understanding that you will reciprocate with a concession of similar magnitude. This is the only way we will be able to reach an agreement that we both can accept.

Conclusion

It is all too easy for an employer and its representatives to "just say no" to all of your requests after your employment is terminated. It comes naturally to them unless they recognize your bargaining strengths and leverage, perceive your warnings as credible, and appreciate the risks they will assume if they do not reconcile with you. Adding to and increasing the monetary terms and benefits in your severance package and subtracting from and decreasing the nonmonetary terms and restrictions in your separation agreement is possible for every terminated executive.

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Stephen Zweig leads the executive compensation practice of Ford & Harrison LLP, a national labor, employment and benefits law firm, where he was also managing partner of the firm's New York office. He has counseled and negotiated for hundreds of individuals on how to obtain better compensation packages and other terms and conditions upon receiving a job offer and during employment, and how to obtain better severance packages when terminated.

Stephen is a Lexis Practice Advisor on executive compensation, has authored a chapter in Bloomberg BNA's Executive Compensation treatise, has been published and quoted by many media sources, including Bloomberg and the Wall Street Journal, and speaks regularly to trade and bar associations and professional groups.

In 2019 the Financial Women's Association of New York gave Stephen its first "Male Ally of the Year" Award for his work leading the Association's Men's Alliance and his workshops on "How to Negotiate with Bullies and Win" and "How to Negotiate for Yourself at Work."

Stephen is general counsel to the Executive's Association of Greater New York, Inc. and pro-bono counsel to Eye-to-Eye, a national charity for children with learning disabilities.

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