

# **Employment Agreements, Separation Agreements, and Restrictive Covenants**

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## Concepts in Contracts

- Offer and Acceptance
- Consideration
- Breach v. Material Breach
- Covenant of Good Faith and Fair Dealing
- Rules of Interpretation
  - 4 Corners v. Looking Outside the Contract
  - Typically Against the Drafting Party (Which Is Usually the Employer)
- Promissory Estoppel

## Employment Agreements

- Purpose
  - To Provide You and Your Employee With a Sense of Commitment and Security
  - To Define Expectations up Front
- Standard Provisions
  - Responsibilities
  - Compensation
  - Job Security
  - Restrictive Covenants

## Employment Agreements

- Common Mistakes
  - Thinking Employment-at-Will Must Be Preserved at All Costs
  - Making an Agreement and Not Realizing It
  - Not Giving Adequate Thought to Contract Provisions
    - For Example, Termination Upon Disability
  - Relying Too Much on the “Form”
    - For Example, Termination “for Cause”

## Employment Agreements

- Common Mistakes
  - Not Maintaining Flexibility With Respect to Assigning Duties, Title and Location
  - Not Defining Expectations With Respect to Work Effort
  - Not Addressing Conflict of Interest
  - Too Specific Regarding Benefits
  - Providing for Automatic Renewal
  - Not Following Terms of the Agreement
  - Not Understanding Potential Liability for Discrimination for Non-renewal

# Compensation Agreements

- Examples
  - Incentive Plans
  - Bonus Arrangements
  - Commission Plans
  - Stock Option Plans
  - Deferred Compensation Arrangements

# Compensation Agreements

- Standard Provisions
  - Amount to Be Paid
  - For Accomplishing Stated Objectives
- Individual Incentives v. Group Incentives
- Subjective v. Objective Standards
- Tax Ramifications

# Compensation Agreements

- Common Mistakes
  - Not Clearly Defining Terms and Conditions
    - When Is It Earned?
    - How Is It Calculated?
    - When Is It Paid?
    - Limits on Benefit Accruals?
  - Not Reserving Right to Interpret, Amend, Terminate
  - Not Reserving Right to Offset Amounts Owed by the Employee

# Compensation Agreements

- Common Mistakes
  - Not Reaffirming Employment at Will
  - Not Addressing What Happens Upon Termination of Employment
    - Vesting / Pro Rata Accrual
    - Before Earned / After Earned, Before Paid

## Unfair Agreement Provision 29 M.R.S.A. Section 629

- Makes it illegal for an employer to have an agreement with an employee requiring the employee to return any portion of his or her compensation.
  - Just having the agreement is a breach of the law.
- Exceptions for payment of benefits, purchase of merchandise and debts and advances made to the employee (authorized by the employee, in writing)
- Intended to prevent employers from charging employees for their mistakes
- Discipline the employee but you cannot make employees pay for their mistakes in order to keep their job or as a condition of employment.
- Does not prevent an employer from bringing a legal action against an employee, especially in the context of intentional misconduct, e.g., theft, to recover any losses.

## Unfair Agreement Provision (cont.)

- May an employer make an employee agreement to repay the cost of training or relocation?
  - Can be a problem if not properly worded
  - Never reference “forfeit” or “forfeiture”
  - Best to structure as a loan or advance that will be forgiven over time

## Lessons to Be Learned

- Be Very Careful Regarding Structure of Compensation Arrangements
- Vacation Pay, Commission and Bonus Plans Generate a lot of litigation
- Well Drafted Plans Is the Key, With Particular Attention to What Happens Upon Separation

## Retention Agreements

- Purpose
  - Provide Incentive to an Employee to Remain With the Business for a Stated Period of Time
- Standard Provisions
  - Payment Amount
  - Definition of When Payable
  - Change of Control

# Retention Agreements

- Common Mistakes
  - Not Reaffirming Employee at Will
  - Failing to Specify Condition When Payment Will Not Be Made
  - Failing to Use As Consideration to Support Other Employee Obligations (i.e., Release, Restrictive Covenants)

## Severance Agreements

- Purpose
  - Sometimes Referred to As Separation Agreements
  - Entered Into at the Start or End of Employment
    - Sometimes Made Part of Employment Agreement
  - Allow for Amicable Separation
  - Support Future Recruiting Efforts
  - Minimize Risk of Liability

## Severance Agreements

- Standard Provisions
  - Severance Payment
  - Release
    - Or If Part of Employment Agreement, Indicate Execution of Release Condition of Receiving Payment
  - Non-disclosure
  - Non-disparagement

# Severance Agreements

- Common Mistakes
  - Failing to Address Future Cooperation
  - Failing to Require Return of Property
  - Recommendation / Non-disparagement Clauses Too Broad
  - Does Not Address [No] Right to Future Employment
  - Allowing illegal Benefit Continuation
  - Failing to Address Tax Allocation / Retirement Plan Contribution
  - Non Compliance With ERISA Safe Harbor
  - Failing to Include Non-Admission of Liability Clause

## If There Is a Release,

- **Critical Considerations**

- Must Be Knowing and Voluntary (and Say That)
- If 40 or Older, OWBPA Compliance
  - Group Plans
- Do not include a covenant not to sue
- Specify right to bring claims and cooperate with government agencies
- Cannot release releasing Future Claims
- Include representations with respect to claims that cannot be releases (e.g., FLSA, FMLA)

## If There Is a Release,

- **Critical Considerations**

- Severability Provision
- Is Release Mutual?
  - Must Specifically Reserve Rights
  - Representation by Employee About Potential Liability
- Who Are Released Parties and What Are the Released Claims?
- Reaffirm Restrictive Covenants and Other Post Separation Obligations

# Restrictive Covenant Agreements

- Purpose
  - To Protect Against a Former Employee Having an Unfair Competitive Advantage Because of their Prior Employment
- Standard Provisions
  - Non-competition Covenant
  - Non-solicitation of Customers Covenant
  - Non-solicitation of Employee Covenant
  - Right to Inform Future Employers

## Restrictive Covenant Agreements

- Are They Enforceable?
- Enforced in Equity
- Must Be No Broader Than Absolutely Necessary to Protect the Employer's Legitimate Interest
  - Good Will
  - Trade Secrets
- Resignation v. Termination
- Negotiation / Tailoring the Agreement
- Pre-termination Activities / Breach of Fiduciary Duties

## Non-Competition Agreements

- 26 M.R.S. § 599-A (applies only to Non-Competes)
- **Public Policy**
  - Noncompete agreements are **disfavored** under Maine law
  - Enforceable **only if reasonable** and **no broader than necessary**
- **Legitimate Business Interests**
  - Protection of **trade secrets**
  - Protection of **confidential information**
  - Protection of **goodwill**
  - Noncompetes presumed unnecessary if interests can be protected by **nondisclosure or nonsolicitation agreements**

## Non-Competition Agreements

- **26 M.R.S. § 599-A**
- **Some Workers cannot be subject to Noncompetes**
  - Employees earning  $\leq$  **400% of the federal poverty level**
  - **Veterinarians** without an ownership interest in the practice
- **Notice and Disclosure Requirements**
  - Disclosure required **before an employment offer** is made
  - Copy of agreement must be provided **at least 3 business days before signing**

## Non-Competition Agreements

- **26 M.R.S. § 599-A**
- **Delayed Effective Date**
  - Takes effect after the later of:
    - **1 year of employment, or**
    - **6 months after signing**
  - Exception for licensed physicians
- **Enforcement**
  - Civil violation; **minimum \$5,000 fine**
  - Enforced by the **Maine Department of Labor**

# Restrictive Covenant Agreements

- Common Mistakes
  - Fails to comply with **26 M.R.S. § 599-A**
  - No Consideration
  - “Competition” Not Adequately Defined
  - “Protected Customers” Not Adequately Defined
  - Activity Not Well Defined (Solicit v. Accept Business)
  - Not Enough Thought Given to Length, Area and Scope
  - Failure to Include Blue Pencil Clause

## No-Poach Agreements

- **26 M.R.S. § 599-B**
- **What the Statute Covers**
  - Agreements between **two or more employers**
  - Includes franchise, contractor, and subcontractor arrangements
- **Does not apply to non-solicitation provisions agreed to by an employee**
- **Prohibited Conduct**
  - Entering into agreements that:
    - Restrict soliciting another employer's employees
    - Restrict hiring another employer's employees
  - Enforcing or **threatening to enforce** such agreements

## No-Poach Agreements

- **26 M.R.S. § 599-B**
- **No Exceptions**
  - No reasonableness or business-necessity defense
  - Applies regardless of duration or scope
- **Enforcement**
  - Civil violation; **minimum \$5,000 fine**
  - Enforced by the **Maine Department of Labor**
- **Compliance Implications**
  - Requires review of franchise, vendor, staffing, and affiliation agreements

## Confidentiality Agreements

- Purpose of Agreement
  - To Protect the Value of the Company's Trade Secrets and Proprietary Information
- Standard Provisions
  - Non-disclosure of Confidential
  - Ownership of Ideas, Information, Documents
  - Return of Documents and Records
- Maine Trade Secrets Protection Act
- Doctrine of Inevitable Disclosure

## Confidentiality Agreements

- Common Mistakes
  - Policy v. Agreement
  - No Consideration
  - Not Both During and Post Employment
  - Limited in Time
  - Covered Materials Not Adequately Defined
  - Covered Materials Not Actually Kept Confidential
  - Insufficient Thought Given to Possibility of Proof  
i.e., Computer Records; Intentional Typo
  - Do Not Reserve Right to “Wipe Clean” Computer

## Nondisclosure Agreements

- **26 M.R.S. § 599-C**
- **Purpose**
  - Preserves the right to **report and discuss unlawful employment discrimination**
- **Prohibited Employment Agreements**
  - Employers may not require agreements that:
    - Waive or limit reporting or discussion of unlawful discrimination
    - Apply to workplace or work-related conduct

## Nondisclosure Agreements

- 26 M.R.S. § 599-C
- **Prohibited Settlement and Severance Provisions**
  - Clauses that:
    - Limit reporting to government agencies
    - Prevent testimony or evidence in court
    - Prohibit reports to law enforcement
- **Permitted Confidentiality in Settlements (Conditions)**
  - Allowed only if:
    - **Separate monetary consideration** is provided
    - Confidentiality applies to **all parties**
    - Agreement preserves rights to report and testify
    - Employer retains agreement for **6 years**

## Nondisclosure Agreements

- 26 M.R.S. § 599-C
- Important Limitation
  - Does not restrict NDAs protecting:
    - Trade secrets
    - Proprietary information
    - Information confidential by law
- Enforcement
  - Enforced by the Department of Labor
  - Attorney General may seek fines or injunctions
  - Intentional violations: fines up to \$1,000

## Other Contract Provisions

- Confidentiality of Client Information
  - Insider Trading / Client's Required Agreement
- Assignment Clause
- Injunctive Relief
- Liquidated Damages
- Attorney Fees Provision
- Amendment Only In Writing
  - But Is That Enforceable?
- No Waiver Provision
- Choice of Law; Jurisdiction

# Thank You!

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