

Hiring? Being Hired? Uncovering the Fine Print.



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Clauses in employment contracts may appear benign when a contract is signed, but then later balloon into serious problems. This article will address several of the issues that we see commonly litigated, helping you to understand the issues upfront. There is no one-size-fits-all solution for employment contracting, but it would be wise to heed the old adage that an ounce of prevention is worth a pound of cure. Whether you're the employer or the employee, you need to read your contract to understand what it contains. And also, ask for help. A savvy employment lawyer will spot and explain the foreseeable issues. Here are a few of the issues that we counsel clients to anticipate, plan for, and navigate strategically.

Non-Compete Clause: An agreement restricting a party from engaging in certain business activities that are competitive with the other party. Such restrictions are generally limited by scope, duration and geography. These clauses can appear in all kinds of employment contracts, not just those involving employees in leadership positions. In one such example, a company brought a lawsuit against a former janitor for violation of a non-compete clause (though the company called it a "non-service" agreement). Whether non-compete clauses are enforceable and under what circumstances they are enforceable varies by state. Takeaway: don't just assume that a non-compete clause will not be enforced; consider prior to signing the position you would be in if the clause were enforced and the effects that would have you on personally and professionally.

Merger/Integration Clause: A clause establishing that the written contract is the final and complete agreement and controls over prior or contemporaneous agreements. Merger clauses solve many problems before they arise, but the existence of a merger clause has the potential to create new problems of its own. For example, this came up in a case where an employee had signed a valid non-compete agreement in his employment contract. When the employee later separated from his employment, he signed a "Severance and Release Agreement." That agreement contained a merger clause, reading in part "[t]his agreement contains the entire agreement and understanding concerning the subject matter between the parties...no one has made any representations whatsoever not contained herein." Later, the employee wanted to compete and he claimed that the merger clause in the "Severance and Release Agreement" trumped his non-compete agreement. The court said that would be possible. Takeaway: when an employee signs multiple agreements and the later one contains a merger clause, be aware that unless carefully drafted it might reach back and effect prior agreements.

Non-Disparagement Clause: A clause restricting what an employee can or cannot say about the employer following a separation of employment. These often appear in separation agreements. The employer agrees to provide a certain benefit, like severance pay, in exchange for an agreement from the employee not to speak poorly about the employer. Takeaway: posts venting about an employer on social media

could be construed as disparagement, even if the employee intends to share only with friends or followers.

Liquidated Damages Clause: A clause that requires a party in breach to pay a pre-determined amount to the other party as compensation for failure to perform a specific task or comply with a particular duty or obligation. These often come up where actual damages would be difficult or impossible to calculate. They can be beneficial to both employers and employees because they allow any party contemplating a breach to look at a contract and determine what the ramifications would be. Liquidated damages clauses often come up coupled to non-compete agreements. In one such case, a liquidated damages clause effectively coupled damages to a salesman's gross sales. The salesman later claimed he should not be held to this liquidated damages clause because net sales would be a much more accurate and fair measure of damages. In this particular case, the court held the salesman to the liquidated damages clause, communicating "you get what you contracted for." Takeaway: liquidated damages clauses are generally upheld, or at the very least can be involved in litigation where a party is arguing that such a clause should be upheld.

Arbitration/Mediation/Trial Waiver: There are multiple forms of an agreement to be bound by non-court alternative methods of resolving disputes. These alter the procedure, cost, access to documents, privacy, and most notably the decision maker. In an age where newspaper headlines tell of million and billion dollar jury verdicts, it is no surprise that employers seek alternative means of resolving disputes. Many contracts contain some form of a waiver of the right to sue, favoring instead mediation or arbitration. Clauses compelling mediation and/or arbitration are common and must be carefully drafted.

The authors presented on this topic as part of the [Mitchell Williams Peer Speaker Series](#).