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Introduction to Employment & Severance Agreements

Steven S. Landis, Esq.

Federal Bar Association
June 4, 2014

Steve Landis represents both employers and employees in all areas of labor and employment law, including litigation, negotiation and counseling involving employment, severance and collective bargaining agreements. Steve Landis was the Chair of the NYCLA Labor Relations and Employment Law Committee from 2001 to 2006 and served on the NYCLA Board of Directors from 2008 to 2011.

For the SDNY Chapter of the Federal Bar Association, Mr. Landis serves as Committee Chair of the Labor and Employment Committee, and is nominated to become the incoming Treasurer.

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❍ Male ❍ Female Have you been an FBA member in the past? ❍ yes ❍ no Which do you prefer as your primary address? ❍ business ❍ home

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( )
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( )
Phone | Date of Birth

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Court of Record: _____

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- ❍ *Immigration Law* $10
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- ❍ San Diego
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Delaware
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By signing this application, I hereby apply for membership in the Federal Bar Association and agree to conform to its Constitution and Bylaws and to the rules and regulations prescribed by its Board of Directors. I declare that the information contained herein is true and complete. I understand that any false statements made on this application will lead to rejection of my application and/or the immediate termination of my membership. I also understand that by providing my fax number and e-mail address, I hereby consent to receive faxes and e-mail messages sent by or on behalf of the Federal Bar Association, the Foundation of the Federal Bar Association, and the Federal Bar Building Corporation.

Signature of Applicant ***Date***

(Signature must be included for membership to be activated)

*Contributions and dues to the FBA may be deductible by members under provisions of the IRS Code, such as an ordinary and necessary business expense, except 4.5% which is used for congressional lobbying and is not deductible. Your FBA dues include $14 for a yearly subscription to the FBA's professional magazine.

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Steven S. Landis practices in the area of labor relations, employment and education law. The firm's area of interest is in the representation of management and employees in all areas of labor and employment law, including litigation, arbitration, counseling and negotiation of employment, compensation and severance issues. Mr. Landis practices in federal and state courts, administrative agencies and alternative dispute forums.

Mr. Landis has been an active leader in the field of labor and employment law. From July 2001 to June 2006, Mr. Landis served as the Chair of the NYCLA Labor Relations and Employment Law Committee, where he created and moderated programs on a leading topics in labor and employment law, including:

- Arbitration and Employment Disputes: The Drafting of Arbitration Dispute Clauses and Their Issues and Implications.
- Recent Developments in the Americans with Disabilities Act and the Family and Medical Leave Act
- Proposed Exception of New York's Employee at Will Doctrine to Extend to Physicians
- Employment Agreements for the Corporate Practitioner
- Sarbanes-Oxley: The Employee Whistleblower Provisions
- New York City's Local Law 1 Protection to Victims of Domestic Violence
- U.S. Department of Labor's New Federal Overtime Regulations
- New York's Public Sector Labor Relations Law
- Workers' Compensation Law for Employment Attorneys
- The Nuts & Bolts of Employment Agreement
- The Use of Psychiatric Experts In Employment Litigation
- Practical Ethics For Employment Attorneys
- Jonathan Kay, Esq., the Regional Director of the U.S. Department of Labor's New York Regional Office of the Employee Benefits Security Administration (EBSA)
- Meetings with the NLRB Regional Director and the Commissioner and Chair of the New York City Commission on Human Rights

Mr. Landis served on the Board of Directors of New York County Lawyers' Association (NYCLA) from 2008 through 2012 and was also the Chair of the NYCLA Education Law Committee from 2007 to 2012.

STEVEN S. LANDIS, P.C.

Mr. Landis currently serves as Committee Chair of the Labor and Employment Committee for the SDNY Chapter of the Federal Bar Association, and is nominated to become the incoming Treasurer for the Chapter.

Previous educational and continuing legal education programs presented by Mr. Landis include the following: Conducting Investigations of Employee Discrimination; The Nuts & Bolts of Employment Agreements; The Nuts & Bolts of Severance Agreements; How to Handle an Employment Discrimination Case-Discovery from the Plaintiff's Perspective; Personnel Law Update—Protecting Your Organization from the Expanding Scope of Workplace Harassment & Retaliation Claims; on "It's 3 PM: Do you Know What to do When Your Mediation Seems Hopeless?"; and Human Resources Compliance for Law Firms as the Landscape Changes: Understanding the Basics

Mr. Landis also served as a guest lecturer on labor and employment law for graduate level Education Law classes at Brooklyn College and Fordham University.

Prior to starting his current firm, Mr. Landis was an associate and then a partner at Shebitz Berman & Cohen, P.C.

Mr. Landis is a graduate of the State University of New York at Albany and Brooklyn Law School, where he was an Edward V. Sparer Public Interest Law Fellow. Mr. Landis is admitted to practice in New York and New Jersey, as well as the Eastern and Southern Districts of New York and the Second Circuit Court of Appeals.

Prior to his legal career, Mr. Landis worked in the New York State Legislature in Albany as a legislative coordinator for New York State Assemblyman Mark Alan Siegel, who was the Chair of the New York State Assembly Committee on Higher Education and the New York State Assembly Committee on Corporations, Authorities and Commissions.

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Introduction to Employment & Severance Agreements

I. What is Labor and Employment Law?

Labor law refers primarily to issues involving unions and health and welfare (medical insurance) funds. This includes but is not limited to: organization and unionization of a workplace; negotiations related to the creation, modification and renewal of a collective bargaining agreement (CBA); proceedings before the National Labor Relations Board and relevant state labor agency; arbitration of disputes between the employer, the union and the employees/union members; administration of the CBA; administering the benefits under the health and welfare fund, including collecting unpaid employer contributions, determining the level of benefits provided to union members, investment of union funds, negotiating with service providers and reviewing contracts; and counseling the client. The primary federal law that govern labor relations is the National Labor Relations Act (29 U.S.C. §§ 151-169). Originally enacted in 1935, it has been modified over the years and the full text can be found at: www.nlrb.gov/about_us/overview/national_labor_relations_act.aspx. On the federal level, the National Labor Relations Board (www.nlrb.gov) enforces federal labor law. Many states, including New York, have separate labor laws that govern employees not covered by federal law, including but not limited to public employees. In New York, for example, many public employees are covered by the "Taylor Law" (Article 14 of the New York Civil Service Law) and the New York Public Employees Relations Board (www.perb.state.ny.us), which prohibits strikes for certain New York state employees.

Employment law is a broad and dynamic area of law that generally refers to non-union employees, whether individually or as a group. This contrasts with labor law, which refers to issues involving unions.

Numerous issues exist in employment law, including but is not limited to:

- federal, state and local statutes (e.g. Title VII anti-discrimination provisions, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Age Discrimination in Employment Act, the Pregnancy Discrimination Act, COBRA, ERISA, Worker Adjustment and Retraining Notification Act (WARN), False Claims Act (Qui Tam), Sarbanes-Oxley whistleblower provisions, retaliation), Fair Labor Standards Act, NYS Executive Law, various whistleblower law, New York City Administrative Code
- federal and state constitutional issues
- contract claims (e.g. breach of contract, misrepresentation, fraudulent inducement, anticipatory breach, fraud, non-competition and non-solicitation agreements, confidential and proprietary information, trade secrets, arbitration agreements, employee benefit plans, stock option agreements)
- tort claims (e.g. defamation, negligent retention/supervision, negligent and intentional infliction of emotional distress, prima facie tort, fraudulent inducement)
- employment, compensation and severance agreements
- employee manuals and human resources policies and procedures
- ERISA plan and pension matters (e.g. creation of plan, disputes over calculations of pension amounts, vesting and exercisability of stock options and bonus compensation plans)

These issues, and many others, can and often will arise during the representation of an employee. This outline will broadly present those areas of concern in a general employment matter involving the start of an employment relationship and its termination.

Litigation/Arbitration-federal and state court; arbitrations before the American Arbitration Association (AAA), the New York Stock Exchange, and the National Association of Securities Dealers (NASD) and as set forth in employment and collective bargaining agreements.

Mediation-before a court or a private entity (e.g. JAMS/Endispute).

Counseling-clients, prospective clients, employers and employees, training sessions

While labor law has many settled areas of law, employment law is a dynamic practice area with the real opportunity to create law and interpret recent new statutes. For example, the ADA, the

amended Civil Rights Act and FMLA were enacted in 1990, 1991 and 1993, respectively. In addition, practitioners are focusing on previously little-used state and local laws.

II. Employment Discrimination-A Brief Overview

The field of employment discrimination law is broad, with a wide variety of provisions and circumstances for each type of claim. Numerous employment protections exist at the federal, state and local levels, often complementing each other. Often, an employee will raise several different types of claims, relying on statutory (federal, state and local) and common law provisions to achieve the desired remedy. The general nature of this outline cannot go into each area, but the practitioner should at least be aware of the significant federal statutes in order to identify potential issues

The federal anti-discrimination statutes, listed with their dates of enactment, are:

- Early Civil Rights laws [42 USC §§ 1981, 1983, 1985] (1861-1871)]
- Equal Pay Act (EPA) [29 USC § 206] (1963)-prohibits gender discrimination in compensation
- Title VII of the Civil Rights Act [42 USC § 2000e et seq.] (1964)-applies to employers of 15 or more employees and prohibits race, color, religion, sex or national origin discrimination
- Executive Order No. 11246 [42 USC § 1000] (1965)
- Age Discrimination in Employment Act (ADEA) [29 USC §621 et seq.] (1967)-applies to employers with 20 or more employees and protects employees aged 40 and over.
- Title IX [20 USC § 1681 et seq.] (1973)
- Rehabilitation Act of 1973 [29 USC § 701 et seq.] (1973)
- Pregnancy Discrimination Act (PDA) [42 USC § 2000e(k)] (1978)
- Immigration Reform and Control Act of 1986 (IRCA), amending the Immigration and Nationality Act (INA) [8 USC § 1324a] (1986)
- Employee Polygraph Protection Act (PPA) [29 USC § 2001 et seq.] (1988)
- Older Workers Benefits Protection Act (OWBPA [29 USC § 621 et seq.] (1990)

- Americans With Disabilities Act (ADA) [42 USC §12101 et seq.] (1990)-applies to employers with 15 or more employees and prohibits disability discrimination.

- Civil Rights Act of 1991 (CRA 91) [Pub L No 102-166, 105 Stat. 1072, 1081,1088 (1991), as codified at 42 USC § 1981a, 42 USC § 2000e, and 2 USC § 1201]

- Family and Medical Leave Act (FMLA) [29 USC § 2601 et seq.] (1993)

- Uniformed Services Employment and Reemployment Rights Act (USERRA) [38 USC § 4301 et seq.] (1994)

- Sarbanes-Oxley Whistleblower Protections (Corporate and Criminal Fraud Accountability Act of 2002) [18 USC § 1514A] (2002)

- New York City Administrative Code anti-discrimination laws (http://www.nyc.gov/html/cchr/html/hrlaw.html), which can provide significantly stronger protections than federal and state laws

- Retaliation provisions under the various statutes

When people refer to anti-discrimination laws, they generally mean Title VII (http://eeoc.gov/laws/statutes/titlevii.cfm), which is the main federal law that prohibits discrimination. There are typically two types of discrimination cases: disparate treatment and disparate impact. Note that the anti-discrimination laws only prohibit illegal discrimination (i.e. in those areas that are protected, such as race, age, gender, disability and sexual orientation). The law does not prevent all discrimination as employers may still play favorites, or treat one employee differently than another. But an employer may not do so reasons that violate the law against illegal discrimination (i.e. based on those areas that are protected). An exception to the law may be for a "bona fide occupational qualification", or BFOQ, which allows for illegal discrimination in certain rare areas (i.e. only hiring women to work in a women's dressing room).

Federal anti-discrimination statutes are administered and enforced by the U.S. Equal Employment Opportunity Commission (EEOC). Similar agencies exist for New York (N.Y.S. Division of Human Rights) and New York City (New York City Commission on Human Rights). The difference is that for federal law, an employee must first file with the EEOC to protect their federal rights, whereas an employee may go directly to court under New York state and city law. Under federal law for New York and New Jersey employees, an employee must file with the EEOC within 300 days of the alleged discriminatory act (in other states, the deadline may be reduced to 180 days) or the claim will be deemed untimely. The EEOC then investigates the claim and typically requires the employer to respond in writing. The EEOC may find "probable

cause" of discrimination, or find "no probable cause", or may just issue a "Notice of Right to Sue" letter that then allows the employee to bring his/her claim in federal court within 90 days of his/her receipt of the Notice of Right to Sue.

In addition, employment discrimination provisions exist under New York's Executive Law (see Executive Law section 296) and Labor Law, as well as under Title VIII of the New York City Administrative Code (http://www.nyc.gov/html/cchr/html/hrlaw.html). Other localities may have their own similar employment protections. Often, the state and city provisions are broader than their federal counterparts and offer greater remedies than the federal law. For example, New York's Executive Law requires only 4 or more employees for the law to apply, whereas certain federal laws require 15 or more (federal age discrimination law requires 20 employees under the Age Discrimination in Employment Act). Title VII imposes a cap on certain damages, but New York's law does not provide for a cap on damages. New York courts now explicitly hold that a different analysis must be done under New York City law to reflect the greater employee protections as compared to federal law and some practitioners waive the federal claims in favor of proceeding only on the City claims in state court.

The practitioner should explore all provisions, including but not limited to various retaliation provisions, which prohibit an employer from retaliating an employee who participates or assists a discrimination claim. Retaliation claims are broad and may succeed even though the underlying discrimination claim may fail or lack merit. And, of course, various common law provisions may apply, as well.

III. Helpful Web Sites

1. Equal Employment Opportunity Commission (www.eeoc.gov)
2. New York State Division of Human Rights (www.nysdhr.com)
3. New York City Commission on Human Rights (www.nyc.gov/html/cchr/home.html)
4. National Employment Lawyers Association (www.nela.org and www.nelany.com)
5. United States Department of Labor (www.dol.gov)
6. New York State Department of Labor (www.labor.state.ny.us)
7. Findlaw (www.findlaw.com)
8. Workplace Fairness (www.workplacefairness.org)

IV. The Start of an Employment Relationship and Employment Agreements

A. Role of the Employment Lawyer

One of the most fundamental roles of an employment attorney is identify the goals, risks and rewards of any relationship and look towards the future to protect the concerns that are important to the client. Discussion with your client will include both legal and business issues. Often, the business issues (i.e. salary, bonus, title and duties) were decided and/or negotiated before the client arrived at your office. However, this does not preclude the attorney from raising issues that need to be addressed prior to final agreement.

The first question to be asked of the client is "What do you want?" The client should know what s/he expects from the relationship, and if s/he does not, it is the attorney's role to identify the various issues in advance and resolve them. The checklist below highlights many, but not all, of the issues that might be expected and is not meant to be exhaustive or to suggest that every issue is applicable to a given matter. Judgment must be exercised to decide which issues are important and not all issues arise or should be expected to arise.

The client and attorney should each review any employment policies and/or manuals, as well as any other policies and procedures that may govern the employment relationship. Often, these documents will contain provisions that may attempt to override whatever is discussed or agreed upon in negotiations between the employer and employee.

Although the issues below suggest that they may only be addressed in a written employment agreement, this is not the case. These issues arise in virtually all employment matters, whether an employee at will or in a detailed written agreement. Although always advisable for purposes of clarity and mutual understanding, a written agreement may not always be possible. In such cases, a confirming memo outlining the agreement may be sufficient to lock in the negotiated agreement.

Note that employment agreements often protect compensation during and after employment, but do not protect employment or guarantee that an employee will not be terminated from his or her position.

B. Nature of the Relationship

1. Employee
2. Independent Contractor-The essential issue is who controls the method and manner of the work being performed, though various factors are reviewed, including whether a person is an "employee:" or an "independent contractor". This includes: control of the location, method

and manner of work; method of payment; extent of direct supervision; control of the work schedule; ownership of equipment; availability of benefits; whether the person runs an independent business. In New York, most professionals will be deemed employees. Labor Law § 511. Employees, but not independent contractors or partners, are protected by various statutory protections, including discrimination, unemployment insurance and leave under the Family and Medical Leave Act.

3. Partner-the classification, and the terms and conditions of the partnership, are subject to negotiations between the parties.
   a. Equity
   b. Contract-although called a partner, and depending on the terms of the contract provisions the person is essentially an employee
4. Consultancy
5. Joint Venture

C. Term of Employment

1. At will employment—in New York, employment for an indefinite term is presumed to be a hiring at will, which may be freely terminated by either party at any time for any reason or no reason at all, with or without notice. *Sabetay v. Sterling Drug*, 69 NY2d 329, 514 NYS2d 209 (1987); *Murphy v. American Home Products*, 58 NY2d 293, 461 NYS3d 232 (1983). In the absence of an agreement to the contrary, such as an employment agreement or union contract, or statutory protection, employment in New York is "at will." This means that "cause" may not be required for an employee's termination.

   Exceptions:

   Attorneys: *Wieder v. Skala*, 80 NY2d 628, 593 NYS2d 752 (1992)(limits a law firm's unfettered right to discharge its associate on the basis of an implied-in-law obligation on the part of the firm to deal fairly and in good faith with the associate)

2. By agreement-oral or written. Even in the absence of a written agreement for a specific term, the parties can negotiate for, and agree upon, the terms and conditions of employment.
3. Set Term-ex. 6 months or 2 years. S*ee, e.g., Rooney v. Tyson*, 91 NY2d 685, 674 NYS2d 616 (1998) (an oral contract between a fight trainer and a professional boxer to train the boxer "for as long as the boxer fights professionally" is a contract for a definite duration)
4. Tied to specific project or completion of assignment-a particular case or type of surgery
5. Seasonal
6. Performance based-includes the setting of particular employment goals based-ex. for depositions only or audit of Enron

7. Status at end of agreement and renewal-relationship ends (with payment of severance to employee) or automatic renewal unless written notice provided by a certain time (known as an evergreen clause). Note that New York cases allow contracts to automatically renew at the end of the contract term, even if there is no provision for renewal of the contract. See, e.g., *Cinefot International Corp. v. Hudson Photographic Industries*, Inc., 13 NY2d 249; *Perlick v. Tahari*, 293 AD2d 275 (1st Dept. 2002); *c.f. Payne v. Enable Software, Inc*., 229 AD2d 880 (3rd Dept. 1996).
8. Future relationship-define criteria for partnership if partnership is contemplated within, or after, the employment agreement

D. Duties

1. General description-those tasks assigned by the partner
2. Specific description-division of duties among the employees (ex. responsible for all audits in New York region), authority of individual employee and in relation to others
3. Title-Athletic Director, Football Coach, associate or senior associate
4. Fingerprinting and Security and Background Clearance for Employment
5. Effect of change in duties on agreement-constitutes breach or is within management's discretion
6. Full devotion-employee shall devote her full-time and energy to the or practice of law for the firm
7. Geographic or travel limitation-ex. "attorney will be based in New York City and shall not be required to travel outside the region absent extraordinary circumstances."
8. Reporting relationship and direct reports
9. Outside duties and ability to perform work/duties elsewhere during term of employment
10. Compliance with Third Party Policies-ex. comply with goals of voluntary membership organization

E. Compensation and Related Matters

5. Salary/compensation terms-includes, and as noted below, salary, payment by W-2 or 1099, referral fees (note prohibitions on doctors under anti-kickback statute; for attorneys, no referral fees but only co-counsel fees), and future salary increases
6. Commissions
7. Incentive compensation-define and set the terms to be met for payment-ex. Increase in student participation in athletic events, creating a sports program in archery, number of patients or revenue amount for settlements or billable hours

8. Bonuses-amount and when and under what conditions it will be paid, ex. appearance in post-season games, win-loss record, home game attendance, graduation rates or grade attainment levels, bringing in clients, signing, during the term, guaranteed amounts or discretionary
9. Personal Appearances-ex. speaking engagements, recruiting trips
10. Stock options and other equity based compensation-vesting, exercisability
11. Deferred compensation
12. Reimbursement for expenses
13. Perks-professional dues, license fees, health and country clubs, tax planning, continuing education,
14. Company car and car insurance
15. Severance pay where termination not for cause or for good reason
16. Matching contributions-pension plan or other retirement plans (ex. 401(k), 403(b), and SEP-IRA)
17. Cost to buy into partnership
18. Malpractice insurance coverage-claims made or occurrence, will tail coverage be provided for acts done at prior employer
19. Indemnification
20. Tie-ins to real estate ownership and property interests
21. Relocation expenses

F. Benefits

1. Sick and personal days-accrual method, carry over, forfeiture if not used, payout upon termination
2. Vacation/personal days-includes accrual method, carry over to future years, forfeiture if not used, payment upon termination, use for attendance at professional conferences and continuing education programs
3. Medical plan
4. Life and disability insurance
5. Sick days
6. Severance pay
7. Car
8. Reimbursement for expenses
9. Payment of various dues and fees, licenses, professional memberships
10. Marketing expenses-professional announcements, holiday cards, business and rolodex cards
11. Supplemental Executive Retirement Plans (SERPs)

G. Other Provisions

1. Restrictive Covenants-non-compete (competing firms/businesses, practice area, profession**)**, non-solicitation (clients, customers, employees, staff,

business), non-hire. Enforcement is fact specific to each case and jurisdiction and is beyond the scope of this outline. Generally, enforcement is based on reasonable time, place, and scope. "Garden leave"—payment of compensation during period of restriction. Note that these can represent a significant risk to an employee's ability to leave the employer and practice elsewhere and they should be rejected and/or limited in scope. Of course, non-competes are inapplicable to attorneys as it unfairly restricts a client's (or potential client's) right to his or her choice of counsel.

2. Ownership of reports, documents, professional and financial records
3. Time available for authoring professional books and articles
4. References
5. Taxes
6. Professional Goals-practice development and rainmaking
7. Faculty practice agreements
8. Union/Association Issues-e.g. Committee on Interns and Residents (www.cirseiu.org)
9. Expatriate issues-taxes, housing, currency differences, immigration, return to the United States, shipping of personal goods
10. Indemnification-for acts within the employee's scope of authority-Directors and Officers (D&O) Liability insurance
11. Relocation- various costs, including but not limited to broken lease, real estate and closing costs
12. Job resources-specific job equipment, assistant, secretary, paralegal, office technician
13. Access to financial records-billing, insurance, medical, legal
14. Compensation upon change of control-ex. employer's business or upon reorganization of practice
15. Duty of loyalty
16. Fiduciary duty-see *U.S. v. Rybicki*, 287 F.3d 257 (2d Cir. 2002) regarding violation
17. Non-disclosure-trade secrets, proprietary and confidential information
18. Non-disparagement
19. No right of assignment
20. Compliance with company handbook and/or employer policies
21. Agreement contingent on completion of fingerprinting and check of past employment and references
22. Re-assignment Clause-allows the employer to change the employee's position and duties without terminating the agreement. Salary and compensation issues will need to be addressed and decided in advance regarding the effect of any re-assignment.

H. Representations

1. Employer represents that it has been authorized to enter into agreement
2. Employee represents that s/he is able to enter into relationship (issue of whether restrictive covenants limits employee)

I. Termination of Agreement

1. For cause-failure to substantially perform duties of position, breach of terms of agreement, conviction of a crime, fraud, breach of fiduciary duty, "misconduct", dishonesty
2. Without cause-allow employer to terminate upon payment of severance payment (called "liquidated damages")
3. With good reason-allows employee to terminate, without penalty, under a given set of circumstances (ex. employer breaches, payments not made, spouse transfers job, material change or diminishment of job duties)
4. On notice, with or without an opportunity to cure-ex. 30 days written notice, no reason required
5. Pre-termination notice, with or without opportunity to cure the reason for the breach of the agreement or termination
6. At-will
7. Effect of early termination of the agreement on various provisions, including but not limited to various compensation issues (ex. bonuses, deferred compensation, equity), restrictive covenants,
8. Upon completion of project
9. Upon loss of client, designated contract, revenue below a certain figure, closure of a satellite office, loss of specialty certification
10. Permanent disability-define disability, absent for how many interim or consecutive days
11. Change of control-with or without golden parachute
12. Resignation-voluntary or involuntary
13. Death
14. Retirement

J. Dispute Resolution

1. Litigation
2. Arbitration-what forum and what set of rules (ex. American Arbitration Association's Commercial Dispute Resolution or Employment Disputes)
3. Mediation-voluntary or required before commencement of formal dispute process
4. Consent to particular court's jurisdiction

5. Venue
6. Applicable law-New York, without regard to its choice of law provisions
7. Acknowledgement of irreparable injury incase of breach
8. Remedies upon breach-payment to end of contract term or different amount, liquidated damages, attorneys' fees, costs, disbursements

K. Sample Post-Termination Issues (see Section VI)

1. Severance amounts
2. Return of company documents, property, keys, records
3. Agreement to maintain confidentiality-trade secrets, confidential and proprietary information, business plans, patient/client information, business practices
4. Non-competition-but note that inapplicable to attorneys
5. Non-solicitation of clients, employees and business
6. Non-disparagement
7. Obligation to mitigate damages-ex. if severance is payable
8. Access to client and financial and client records/files
9. Notice to clients upon departure from practice
10. Payment of referral fees post-termination

L. Standard Clauses

1. Governing law
2. Zipper clause-ex. "This agreement contains all of our agreements and no other understandings exist"
3. Manner of providing notice under agreement-preferable in writing with copy to each side's counsel
4. No oral modification and only in writing signed by all parties
5. Savings clause
6. Advice of counsel encouraged and obtained
7. Inures to the benefit of, and be binding upon, each of the parties and their assigns, successors, heirs and representatives

V. An Overview of Severance Negotiations

Under New York's at will employment provisions, an employer may fire an employee with or without notice, for any reason or no reason at all. No requirement of two weeks' notice exists and, generally, in the absence of an employment contract, severance plan or policy of an employer, there is no legal right to severance.

That said, severance is often available to a terminated employee. In the past, severance was previously offered only to high level executives, often characterized as a "golden parachute." Now, despite an occasional employer's rhetoric that severance is either not offered or is not negotiable from an employer, severance (and the terms by which it is offered) is often available and is negotiable. The role of an employment attorney is to determine when and if severance should be offered.

At its most basic level, severance is a tool used by an employer to manage risk. Rarely does an employer give a severance payment without an expectation of receiving something in return. From the employer's point of view, the goal of severance is get the employee to sign a waiver and general release, which will sign away the employee's rights and ability to sue the now-former employer. The employer wants this signed agreement from the employee for as cheap of a price as possible. In contrast, the employee wants the highest price possible. Generally, the appropriate response for both the employer and employee is to be reasonable and focus on resolution rather than retribution. This is sometimes easier said than done.

If severance is not included as part of the employment agreement, the goal is generally to resolve the employment termination issues through negotiation rather than litigation. Many of the same issues raised during employment negotiations are raised in a severance agreement.

As in litigation and in any other negotiation, the goal is to identify the facts and arguments to maximize leverage over the former employer and the various individuals at the former employer. Leverage is not limited to legal arguments. Business issues, as well as moral, practical and ethical approaches, and an appeal to a sense of fairness, can often work just as well, and in certain instances, if not better than a legal argument in obtaining severance or increasing the offered severance amount.

Negotiation strategies depend on the given situation. As with employment agreements, the concern is on the employee (or former employee's) future and the impact of the termination event on his/her career. Negotiations can be done directly by the employee with his/her former employer, which is often effective to raise more personal issues and may reduce any adversarial position if counsel becomes directly involved. Counsel for the employee can advise the employee in a "ghost" fashion, operating quietly in the background without the employer knowing the employee is getting strategic advice and assistance from an attorney. Then, if necessary, the attorney can become involved and seek to negotiate, sometimes getting the proverbial "second bite at the apple" in negotiations. Alternatively, negotiations can take place through counsel via an attorney demand letter or in direct oral negotiations.

VI. The End of An Employment Relationship and Severance Agreements

A. Role of the Employment Lawyer

Just like the start of an employment relationship, one of the most fundamental roles of an employment attorney is identify the goals, risks and rewards of any relationship and look towards the future to protect the concerns that are important to the client.

Again, the first question to be asked of the client is "What do you want?" Prior to discussion with the other side, whether employer or employee, the client and attorney should each review any employment policies and/or manuals, as well as any other policies and procedures that may govern the employment relationship. Often, these documents will contain provisions that may shed light on the employment relationship and provide the client with an opportunity to obtain leverage and negotiate more favorable terms. The documents may also state the employer's termination and severance policy, which may be included in the handbook or manual, in the collective bargaining agreement or as part of a separate summary plan description ("SPD"). An SPD is a requirement if the severance policy is governed by the Employment Retirement Income Security Act ("ERISA").

Keep in mind that if an employer terminates an employee for the purpose of preventing the employee from obtaining a benefit under the severance plan, or other ERISA governed plan, the employer may be in violation of ERISA §510.

B. When to Consider Severance Issues

The best time to consider and negotiate severance is at the very beginning of the employment relationship. Why? No one works forever and every employee will eventually leave his or her job, whether voluntarily or involuntarily. As a business issue, every employee should immediately begin planning their departure at the time they start their new job. Rather than address that inevitable end, most often the parties ignore it and leave the terms and conditions to chance and subsequent negotiations that take place under not-so-friendly conditions.

In contrast, when an employee starts his or her new position, or is negotiating to start, the "romance" in the relationship still exists. Both sides are happy with each other and are looking forward to a positive successful relationship that will be profitable for both employee and employer. At that point, neither side generally considers or expects the occurrence, i.e. termination, to occur.

While seemingly counterintuitive, that positive relationship creates a good time to negotiate for when the relationship turns sour, whether due to poor performance, new leadership, a changed business environment or some other reason. The result? A friendlier discussion of the issues that generally will not exist when the occurrence, i.e. termination, is actually at hand. While not always true, a friendlier discussion also allows for either side to address and reduce risk and protect their respective interests, which can create a win-win situation at the very time all seems negative. It may also flesh out problems or mismatched expectations in the employment relationship, which might otherwise be ignored or be allowed to fester. For this reason, employment agreements for senior executives, who often have the most to lose economically and professionally, frequently include provisions regarding severance, which is either explicitly mentioned or couched as what will happen after a termination "without cause."

Just like a negotiation of an employment agreement, the issues to consider in severance address all areas that affect the current and future employment of your client. Although the issues below suggest that they may only be addressed in a written severance agreement, this is not the case. These issues arise in virtually all employment and severance matters. Although always advisable for purposes of clarity and mutual understanding, as well as to provide a waiver and release of claims, a written agreement may not always be possible or desirable. In such cases, a confirming memo outlining the agreement may be sufficient to lock in the negotiated severance agreement.

C. Severance Negotiation is Through Leverage

The reality is that most employees accept the offered severance agreement without any negotiations or changes to the agreement. Many employees feel at a disadvantage after being terminated and believe that the offered severance, to the extent any severance is offered, is a final offer that is not subject to any negotiations. This viewpoint is generally reinforced by the employer and its human resources ("HR") department, which has a goal of accomplishing terminations in a quick and inexpensive manner.

However, severance is generally negotiable. The employer wants something, namely the waiver and release, along with other provisions, and the issue is at what cost is the employer willing to pay to get those risk minimizers contained within the severance agreement. As in any business negotiation, the issue is what leverage exists in support of the employer's and the employee's position.

From the employee's perspective, who may have been let go after years of employment or without notice, the sense is that "the employer owes me severance because of my hard work." This argument tends to fail and the employer will generally not respond favorably, except to note that the employee was previously paid for his or her work and that no obligation exists to again pay for that work through severance.

A successful negotiation strategy will identify the various areas of strengths and weaknesses for each side. Typically, the areas tend to focus on the following areas: (1) contractual issues; (2) tort issues; (3) statutory issues; and (4) equity issues. In Section I, above, typical examples of each of these issues are provided. These are not meant to limit the possible areas of leverage. Through careful questions and investigation, counsel must work with his or her client to reveal facts, from both parties' perspective, that works to the advantage of that party and to the disadvantage of the other party. This is no different than what occurs in a business negotiation or in settlement negotiations during litigation.

Identifying leverage issues for severance negotiations differs from identifying what might be useful or necessary to withstand summary judgment or be successful at trial. For severance negotiations, the goal is to maximize the risk to the other side such that it will bring about a quick and successful resolution. Fact issues may stop a summary judgment motion but may not put pressure on the other side to increase the severance offer.

D. Negotiation Steps

Once the leverage points are identified, the target of the leverage must be chosen. Generally, that person will be from the business side and not from HR. When representing an employee, your client will prefer to deal with HR because that is what he or she is taught: if a workplace problem exists, go to HR. But the reality is that solutions are created by the business side and not HR. HR can sometimes play a valuable role, but the business side controls the money and makes the key decisions while the HR staff implements those decisions.

The target must be someone who has the desire and, more importantly, the ability to grant the request being sought. Preferably, the target should be a business-side person with whom the employee has a personal relationship. If this is not possible, then the target focus should be on someone who is higher in the employer's organization than the employee's direct supervisor. This is based on the management approach of business decisions flowing down, not up. Often, my preference is that the employer's President, Chief Executive Officer or Chairman/woman will receive the letter.

In representing the employee, face to face negotiations between the employee and the applicable business person work best. This is because it is difficult to turn down a request made in person. However, assuming the business person will meet with the employee, as often the business person refers the matter to HR, this is often the most difficult to do. Having been terminated, the employee tends to feel vulnerable, sometimes powerless and is not always articulate enough to make their case for increased severance. Even if the points are well stated, the conversation may be significant to him or her, but once said, it disappears into the air with no further impact or proof as to what was said.

For that reason, a letter is often a good method to lay out the leverage points and communicate directly with the business person. Preferably, the letter will be accompanied by a

meeting or conversation with the business-side target, which creates a human connection, but a letter can stand alone as a request for increased severance.

Two types of letters typically exist: (1) a ghost letter; and (2) an attorney demand letter. The ghost letter is either written by the employee, or the attorney on behalf of the employee for the employee's signature and in the employee's own "voice." The leverage points are included, but not directly and not in legal language. When done well, the ghost letter reads as if it came directly from the employee, including spelling errors, run on sentences and a lack of organization to the thoughts and issues raises. Ghost letters tend to work well because they allow the employee to communicate directly to the employer, generally without getting the employer's counsel directly involved, and with the aura of wanting to get things done "without getting the lawyers involved." An "authentic" employee letter creates a different impact than one received from an employee's counsel, which generally gets referred to the employer's counsel for review and analysis under the various cognizable legal theories. While severance negotiations are just business, and not personal, a little personal attention through the employee's direct contact sometimes works where the legal and business would otherwise fail. In any event, the letter provides documentary evidence of the issues raised, which can be used subsequently should the matter not be resolved.

To the extent the personal does not work, the attorney demand letter is the next step and provides for a second bite at the proverbial apple. No particular format is needed for a demand letter, other than to identify yourself as counsel to the employee and that you seek to begin discussions regarding the terms and conditions of the severance agreement. My preference is to include an overview of the facts and issues, along with specific demands, but some argue against doing so as it may limit or stop negotiations at the beginning. No right or wrong answer exists for all instances and it depends on the given situation and attorney preferences. If a ghost letter is used, the demand letter should build upon the themes used by the "ghost letter," including raising the absence of any investigation by the employer if one was requested by the employee.

VII. An Overview of Issues and Terms to Consider

In a well-crafted employment agreement, most of the severance issues will have been considered in advance and resolved. Given the practical reality of this not being done for the vast majority of employees, below represents a broad outline of issues to consider. What, and how much, to ask for in a given situation represents a matter of strategy that depends on the particular circumstances of each case.

An employee's concern will likely involve cash. However, in addition to cash, there are many other issues that can be of significant importance to a client and can have an equal or great impact on the employee's future. Non-cash items are similarly negotiable and should be addressed in the severance agreement.

While many of the issues are the same as in employment agreements, many of which are repeated below for your convenience, there are differences in the areas of concern. Among the various issues, a typical employee may be concerned about:

A. Compensation and Related Matters

1. Salary/compensation terms-includes, and as noted below, salary, payment by W-2 or 1099, referral fees
2. Commissions
3. Incentive compensation-preferably an exact dollar amount will be listed. If not, clearly define and set the terms to be met for payment and in what amount payment will be if the terms are met, i.e. if revenue goals are met for 1st quarter of fiscal year.
4. Bonuses-amount and when and under what conditions it will be paid
5. Post-Termination Consulting Relationships
6. Stock options and other equity based compensation-vesting, exercisability
7. Equity Interests-if a part owner of the business
8. Deferred compensation
9. Reimbursement for expenses
10. Perks-professional dues, license fees, health and country clubs, tax planning, continuing education,
11. Company car and car insurance
12. Matching contributions-pension plan or other retirement plans (ex. 401(k), 403(b), and SEP-IRA)
13. Malpractice insurance coverage-claims made or occurrence, will tail coverage be provided for acts done at prior employer
14. Indemnification
15. Tie-ins to real estate ownership and property interests
16. Attorneys' fees for review of the agreement
17. Obligation to mitigate damages-ex. reduction of severance if employee gets a new job within a certain time period

B. Benefits

1. Sick and personal days
2. Vacation/personal days
3. Medical plan-continued participation in employer sponsored health plans, either directly through a severance payout or through COBRA, with payments for self and family
4. Life and disability insurance-continuation of benefits and payment of premiums after conversion to individual policies

5. Car Payments-especially useful if the car was leased in the individual's name for job requirements
6. Reimbursement for expenses
7. Payment of various dues and fees, licenses, professional memberships
8. Marketing expenses
9. Supplemental Executive Retirement Plans (SERPs)
10. Outplacement assistance (or payment in lieu of outplacement)
11. Financial, tax and estate planning assistance
12. Continuing professional insurance-includes malpractice coverage
13. Continuing education
14. Relocation expenses
15. Tuition assistance
16. Admission privileges-for a doctor
17. Minimizing taxes on payments-ex. delaying payment until next tax year when marginal tax rate may be lower

C. Other Provisions

1. Changing a termination to a resignation
2. Changing the effective date of the termination so an employee may look for a job from a job-can reduce gap between dates of employment. The employer can remove the employee from the workplace, but shall remain an employee, with the agreement stating that the employee shall have no duties or responsibilities after a specified date.
3. Release from or Continuation of Various Restrictive Covenants-non-compete (competing firms/businesses, practice area, profession**)**, non-solicitation (clients, customers, employees, staff, business), non-hire. Enforcement is fact specific to each case and jurisdiction and is beyond the scope of this outline. Generally, enforcement is based on reasonable time, place, and scope. "Garden leave"—payment of compensation during period of restriction. Note that these can represent a significant risk to an employee's ability to leave the employer and practice elsewhere and they should be rejected and/or limited in scope. Of course, non-competes are inapplicable to attorneys as it unfairly restricts a client's (or potential client's) right to his or her choice of counsel. Be very careful to review all documents for hidden restrictive covenants, including but not limited to stock option plans, "confidentiality agreements" and employee manuals, which get incorporated by reference into other documents.
4. Access to and Ownership of reports, documents, professional and financial records
5. References-neutral, positive, agreed upon language, referral to specific business or HR person for employment verification requests
6. Taxes

7. Union/Association Issues-filing of grievances, access to employee's personnel file and opportunity to submit clarification letters
8. Expatriate issues-taxes, housing, currency differences, immigration, return to the United States, shipping of personal goods
9. Indemnification-exclude from release all acts within the employee's scope of authority and covered by insurance, such as Directors and Officers (D&O) Liability insurance
10. Relocation- various costs, including but not limited to broken lease, real estate and closing costs
11. Return of company documents, property, keys, records
12. Job resources-access to specific job equipment and staff, such as an assistant, secretary, paralegal, office technician, or use of a computer
13. Use or purchase of the employer's equipment-such as an old computer, fax, company car or cell phone that may have little or no residual value
14. Use of company documents or business documents-as may be redacted for samples or a portfolio of templates
15. No contest of unemployment benefits. Note that NY Labor Law §595(1) prohibits the waiver of unemployment benefits
16. Forwarding of, or access to, telephone calls and emails
17. Advising former clients of new work location
18. Use and transfer of work cell phone number
19. Access to financial records-billing, insurance, medical, legal
20. Compensation upon change of control-ex. employer's business or upon reorganization of practice
21. Duty of loyalty
22. Fiduciary duty-see *U.S. v. Rybicki*, 287 F.3d 257 (2d Cir. 2002) regarding violation
23. Confidentiality and Non-disclosure-trade secrets, proprietary and confidential information, business plans, patient/client information, business practices
24. Non-disparagement
25. Notice to clients upon departure from practice
26. Payment of referral fees post-termination

D. Representations

1. Employer represents that it has been authorized to enter into agreement
2. Employee represents that s/he is able to enter into relationship (issue of whether restrictive covenants limits employee)

E. Dispute Resolution

1. Litigation
2. Arbitration-what forum and what set of rules (ex. American Arbitration Association's Commercial Dispute Resolution or Employment Disputes)
3. Mediation-voluntary or required before commencement of formal dispute process
4. Consent to particular court's jurisdiction
5. Venue
6. Applicable law-New York, without regard to its choice of law provisions
7. Acknowledgement of irreparable injury incase of breach
8. Remedies upon breach-payment to end of contract term or different amount, liquidated damages, attorneys' fees, costs, disbursements

G. Standard Clauses

1. Waiver and release from all claims
2. Governing law
3. Confidentiality provisions-no disclosure of amount of severance to others, but typically allows the employee to disclose information to spouse or immediate family, tax advisor, attorney
4. Zipper clause-ex. "This agreement contains all of our agreements and no other understandings exist"
5. Manner of providing notice under agreement-preferable in writing with copy to each side's counsel
6. No oral modification and only in writing signed by all parties
7. Savings clause
8. Advice of counsel encouraged and obtained
9. Inures to the benefit of, and be binding upon, each of the parties and their assigns, successors, heirs and representatives
10. Cooperation with an employer in the future, either for business or legal reasons, should the employer require assistance from the employee
11. Gag clauses-denies the employee from assisting others or cooperating with persons with adverse interests to that of the former employer

H. Termination of Agreement Provisions Typically Found in Employment Agreements

To the extent severance issues are addressed in an employment agreement, the below issues are situations that may arise where the employment relationship can end and a determination should be made as to what will happen should that event occur.

1. For cause-failure to substantially perform duties of position, breach of terms of agreement, conviction of a crime, fraud, breach of fiduciary duty, "misconduct", dishonesty
2. Without cause-allow employer to terminate upon payment of severance payment (called "liquidated damages")
3. With good reason-allows employee to terminate, without penalty, under a given set of circumstances (ex. employer breaches, payments not made, spouse transfers job, material change or diminishment of job duties)
4. On notice, with or without an opportunity to cure-ex. 30 days written notice, no reason required
5. Pre-termination notice, with or without opportunity to cure the reason for the breach of the agreement or termination
6. At-will
7. Effect of early termination of the agreement on various provisions, including but not limited to various compensation issues (ex. bonuses, deferred compensation, equity), restrictive covenants,
8. Upon completion of project
9. Upon loss of client, designated contract, revenue below a certain figure, closure of a satellite office, loss of specialty certification
10. Permanent disability-define disability, absent for how many interim or consecutive days
11. Change of control-with or without golden parachute
12. Resignation-voluntary or involuntary
13. Death
14. Retirement

http://www.sec.gov/Archives/edgar/data/40545/0000040545-97-000005.txt

EXHIBIT 10(W) to SEC Form 10-K, filed on March 20, 1997

EMPLOYMENT AND POST-RETIREMENT CONSULTING AGREEMENT

Between GENERAL ELECTRIC COMPANY and John F. Welch, Jr.

This agreement is entered into on December 20, 1996 by and between General Electric Company, a New York corporation, and John F. Welch, Jr.

WHEREAS, in recognition of Mr. Welch's unique contribution to the creation of more than $150 billion of shareholder value during his tenure as the Chairman of the Board and Chief Executive Officer of General Electric Company ("Company"), the Board of Directors wishes to obtain his commitment to serve as Chairman of the Board of Directors and Chief Executive Officer of the Company until December 31, 2000, and his commitment to serve thereafter as a consultant to and representative of the Company, at the direction of the Chief Executive Officer of the Company; and

NOW THEREFORE, the Company and Mr. Welch agree as follows:

1. Mr. Welch agrees to continue to serve as Chairman of the Board of Directors and Chief Executive Officer of the Company for the period from the date of this agreement until December 31, 2000, on terms no less favorable to him than his present conditions of employment, or such earlier date as the Board of Directors may determine at anytime in its sole discretion.

2. Mr. Welch agrees that, following his retirement from the Company, and when and as requested by the Chief Executive Officer of the Company, he will provide consulting and advice to the Company and will participate in various external activities and events for the benefit of the Company. Mr. Welch agrees to provide up to 30 days per year to the Company, subject to his reasonable availability, for such consulting services or such participation in external activities and events. In addition, Mr. Welch agrees to obtain the approval of the Management Development and Compensation Committee of the Board of Directors before providing any consulting, advice or service of any kind to any other company or organization that competes with the Company.

3. The services contemplated under this agreement will require that Mr. Welch have access, following his retirement, to information which is proprietary or confidential to the Company. Mr. Welch agrees not to publish or otherwise disclose to persons outside the Company, without specific permission from the Company, any Company proprietary or confidential information which he acquires as a result of services performed under this agreement, and not to use such information in any way which might be detrimental to the interests of the Company.

4. Mr. Welch also agrees to promptly disclose to the Company any information, ideas, or inventions made or conceived by him which may result from or be suggested by post-retirement services performed by him under this agreement, and to assign to the Company all rights pertaining to such information, ideas, or inventions. Knowledge or information of any kind disclosed by Mr. Welch to the Company shall be deemed to have been disclosed without obligation on the part of the Company to hold the same in confidence, and the Company shall have the full right to use and disclose such knowledge and information without compensation to Mr. Welch beyond that specifically provided in this agreement.

5. In return for his willingness to continue to help create value for the Company's shareholders throughout his retirement, and in return for the foregoing commitments by Mr. Welch, the Company shall pay Mr. Welch, for consulting services or participation in external activities and events performed at the request of the Chief Executive Officer of the Company, a daily consulting fee, for the days he renders services, equal to his daily salary rate at the time of his retirement, and, as an annual retainer, shall pay for 5 days of such services in advance at the beginning of each year of his retirement. In addition, the Company shall provide Mr. Welch, for the remainder of his life, continued access to Company facilities and services comparable to those provided to him prior to his retirement, including access to Company aircraft, cars, office, apartments, and financial planning services. The Company shall also reimburse Mr. Welch, upon the receipt of appropriate documentation, for reasonable travel and living expenses which he incurs in providing services at the request of the Chief Executive Officer, or which he incurs because of his position as a retired Chairman of the Board and Chief Executive Officer of the Company. Subject only to Mr. Welch's compliance, to the best of his ability, with his commitments set forth in paragraph 1 of this agreement, the Company's obligations set forth in this agreement are unconditional and irrevocable and shall apply irrespective of Mr. Welch's incapacitation, prior or subsequent to his retirement, to perform services hereunder, provided, however, that the Company's obligation to pay Mr. Welch an annual retainer shall terminate if he should become totally and permanently unable to provide services hereunder.

6. Nothing in this agreement shall require any change in the Board's current processes for establishing Mr. Welch's salary, bonus and long-term incentive compensation awards based on his performance during the remainder of his service as Chairman and Chief Executive Officer.

7. Following his retirement, Mr. Welch shall be an independent contractor under this agreement, and no provision of, or action taken under, this agreement shall affect in any way Mr. Welch's rights under any Company compensation, employee benefit and welfare plans, programs or practices, including, without limitation, Company executive compensation, insurance, or pension plans.

8. This agreement is the sole agreement between Mr. Welch and the Company with respect to the duration of his service as Chairman of the Board and Chief Executive Officer, and to his post-retirement consulting services and activities for the Company, and supersedes all prior agreements and understandings with respect thereto. No change, modification, alteration or addition to any provision hereof shall be binding unless in writing and signed by both Mr. Welch and a duly authorized representative of the Board of Directors of the Company.

GENERAL ELECTRIC COMPANY

By_____ Date _____
Silas S. Cathcart
By order of the Board of Directors

_____ Date _____
John F. Welch, Jr.