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The Executive Suite: Labor Law Issues Relating to the Hiring and Firing of Senior Executives

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TABLE OF CONTENTS

I. Introduction

II. The Pros and Cons of Executive Employment Agreements and Their Provisions

A. Entering Into Executive Employment Agreements

B. Establishing the Terms of Executive Employment Agreements

C. Provisions Affecting Ability To Manage or Terminate the Executive

1. Duties, Authority and Responsibility

2. Termination

3. Anticipating Business Changes

4. Employment Term

5. Ownership of Inventions, Intellectual Property and Trademarks

6. Alternative Dispute Resolution

7. Indemnification of the Executive

8. Promises that Survive the Termination of the Agreement

8. Promises that Survive the Termination of the Agreement
9. Choice of Law
10. The Integration Clause

III. Sexual Harassment Issues in the Executive Suite

1. Introduction: Quid Pro Quo vs. Hostile Work Environment
2. Employer Liability for Sexual Harassment
    1. Imputing Liability for the Acts of Executives Who Harass
    2. Employer's Duty to Investigate Allegations of Harassment
3. Individual Liability of Executives and Other Supervisors
4. Special Problems Relating to Social and Sexual Relationships Between an Executive and a Subordinate Employee
    1. Favoritism for Sexual Partners: Rights of Other Employees
    2. Claims of Retaliation or Gender Discrimination at Soured Termination of Paramour Relationship
    3. Fraternization Policies

IV. Issues Involving the Termination of the Executive

1. Unprotected Disloyalty vs. Protected Opposition Behavior
    1. Employers' Demands of Loyalty and Cooperativeness from Employees with Significant Management Responsibility
    2. Oppositional Conduct that Directly Conflicts with Employees' Job Duties
2. Age-Related Claims and "Real World" Grounds for Termination
3. Actual Discharge Versus Constructive Discharge
4. Managing Discharge and Decisions Not To Renew
5. Negotiated Resolutions: Separation and Consultation Agreements
    1. Releases
    2. Confidentiality
    3. Prior Agreements

V. Conclusion

I. Introduction

Too frequently insufficient attention is paid to the myriad of special employment law issues affecting the hiring, firing and management of executives.

While there is commonality in some employment law issues whether one is an entry level accounting clerk or chief financial officer, as one rises through the ranks, employment law considerations vary. For instance, should the corporation have employment agreements with senior executives? If so, what provisions should be included and what are the variable factors impacting those provisions?

Special concerns exist when senior management is accused of sexual harassment. When is liability imputed to the corporation? Who investigates alleged misconduct of

Special concerns exist when senior management is accused of sexual harassment. When is liability imputed to the corporation? Who investigates alleged misconduct of the President or other senior staff? If a breach of the company's harassment policy is found to have occurred, how does the company remediate? Must the senior executive be removed to avoid punishing the innocent victim? Under what circumstances can the individual executive, in addition to the corporation, be held liable? How does a corporation regulate social and sexual relationships between executives and subordinates?

Separate and apart from the difficult issues of sexual harassment are issues involving termination of the senior executive. Where a member of the executive team opposes certain employment decisions or practices favored by the team as a whole, is such conduct unprotected disloyalty for which termination is appropriate or protected oppositional behavior for which termination is unlawful? Is the termination of an executive because he/she does not "fit" or because the corporation is "moving in a different direction" a valid, lawful reason or an euphemism for age discrimination?

Once a decision to fire is made, how should termination of the executive be effectuated? What separation provision should be negotiated?

These thorny legal and practical issues will comprise the focus of this paper.

II. The Pros and Cons of Executive Employment Agreements and Their Provisions

A. Entering Into Executive Employment Agreements

There are many logical reasons for entering into written employment agreements with the executives who run the corporation. First, the "high-in-demand" talent may require such an agreement. The executive employment agreement is a benefit to those joining or being promoted within the company because it can provide a sense of job security as well as a tangible manifestation of the new position and status. Second, executive employment agreements present an opportunity for establishing vital terms of the employment arrangement. Some of these significant terms are the designation of an at-will or other termination provision and inclusion of an arbitration agreement for the resolution of employment disputes. Third, the executive agreement can aid a corporation in retaining the talent, and thus control of a company where corporate ownership may change hands. Other benefits and detriments, specific to each corporation's circumstances, should also be considered before entering into and in preparation of employment agreements with executives.

If a corporation chooses to forego individual written executive agreements, it must ensure that its policies, procedures and handbooks, applicable to non-managerial employees, purposefully and expressly either include or exclude executives and other high-level positions as appropriate. Even where there is a written agreement, the corporation should confirm that additional employment protections are not inadvertently incorporated into that agreement. For example, in Ware v. Prudential Insurance Co., a management employee suing for wrongful termination had an individual, written employment contract expressly stating that his employment was at will. The documents, including handbooks and manuals, distributed to him to guide the supervision of lower level employees were silent as to his own rights. The court held that because the parties had expressly agreed that his employment was at will, the procedures in the company handbooks did not give the executive additional contractual rights. Ware is notable because it implies that the executive would have enjoyed the employment protections under the general company handbooks if his contract had not had a different, express characterization of his employment.

Regardless of the specific provisions to be included, the drafting of the executive agreement should be handled by the company attorney with the clear and express understanding that he or she is representing the company and not the entering executive. Indeed, the entering executive should be advised to seek independent counsel before executing the document. When developing the agree-ment the drafting attorney must avoid conflicts, as well as the appearance that he or she represents the executive's interests. This point becomes significant if there is litigation concerning the agreement and the executive claims an attorney-client privilege or relationship. Additionally, outside counsel must be mindful of the conflicts which arise

relationship. Additionally, outside counsel must be mindful of the conflicts which arise from negotiating his or her own move to the inside.

Significantly, during the recruitment, offer and subsequent stages of negotiation, the corporation must be careful that recruiting puffery done in the zeal to attract the candidate not cross the line of fraud or misrepresentation. Distilling the case law, common areas of liability arise from misrepresentations regarding the financial stability or market position of the company, projections about size and organization of the company, and the likelihood of future advancement for the executive. While these areas are typical to the inducement and negotiation stages of deals with new executives, the company must be mindful of the perception and promises it is creating.

There are a plethora of cases in the area of employment contracts and negotiations, for all levels of employment, concerning the effects of fraud and misrepresentation by the employer. In a recent example, the California Supreme Court recognized the employee's cause of action for promissory fraud based on an oral promise for continued employment. In Lazar, the employer induced the employee to leave his secure, long-time home and business in New York, by knowingly distorting the financial condition of the corporation, misrepresenting future prospects within the corporate hierarchy and lying about job security (the company had already planned to eliminate plaintiff's position). After two years, the corporation fired Mr. Lazar from his executive position. Generally, as in Lazar, courts recognize a cause of action for fraud where there is (1) a misrepresentation, including nondisclosure, (2) knowledge of falsity, (3) intent to defraud, or induce reliance, (4) justifiable reliance, and (5) resulting damage. As this is a tort claim, the employee is not limited to contract damages and can claim emotional distress and other, often high-judgment, damages. As discussed below, written agreements which include integration clauses can reduce the corporation's exposure to future claims of fraud and misrepresentation.

B. Establishing the Terms of Executive Employment Agreements

As in any economic negotiation, the ultimate agreement will depend on the relative bargaining power of the parties. It is axiomatic that there is an inverse relationship in the corporation's ability to "dictate" the terms of the agreement, and the significance of employing a particular individual for the position.

Where in relation to the sought after executive the corporation is in a relatively weak bargaining position, its ability to negotiate the most desirable terms is limited. At the one end of the spectrum where the corporation is in a strong bargaining position, it would commonly be in the corporation's interest to have an "at will" or "no cause" termination provision, an arbitration provision, restrictions on outside business activities, a non-compete, confidentiality and intellectual property ownership provisions and broad discretion as to assigning job duties and determining compensation.

As the corporation moves along the continuum, the executive may be in a position to negotiate a very restrictive termination provision, e.g., termination only for gross negligence with severe penalties if the agreement is terminated for any other reason. If the sought after executive is in a strong bargaining position, the employment agreement most likely will give the company very little discretion as to job duties and compensation, and give the executive maximum leeway.

The following discussion highlights the types of provisions that should be included in an employment agreement and their various permutations.

C. Provisions Affecting the Ability To Manage or Terminate the Executive

1. Duties, Authority and Responsibility

From the corporate perspective maximum flexibility is desirable in the contract provision regarding duties, authority and responsibility. Such a provision may minimize chances of liability for breach of contract, breach of the covenant of good faith and fair dealing and constructive discharge resulting from "changes" in the organization's operations. At different times during the life of the employment agreement changes may become necessary. These changes can include an increase

or reduction in duties, authority, pay or alteration of reporting relationships. When an agreement's characterization or description of responsibilities and authority is specific, the executive has a greater claim of an entitlement to them. Therefore, to the extent feasible, the company should reserve to the Board of Directors or other higher authority the power to set and change the executive's title, duties and authority.

This reservation of change can effectively maximize corporate flexibility. For example, an agreement that specifies corporate-wide responsibility for financial operations, without a reservation of rights, may create contractual or constructive discharge liability where a subsequent reduction in authority is mandated by the executive's performance (albeit not warranting termination) or by a change in the corporate organization. If it is in the corporate interest to reduce the authority of the CFO to a specific division and bring in a new CFO for the entire company, a flexible employment contract may limit claims of a contract breach or a constructive discharge.

As a corollary, the employment agreement should give flexibility as to the reporting relationship or specification as to the executive's boss. A problem can arise where the agreement states, for example, that the executive will report directly to the CEO. In the above situation, after the reorganization, the executive whose duties have been reduced to a division may now have to report to the new corporation CFO instead.

Similar flexibility may be called for in remuneration. The corporation in this hypothetical may wish to reduce compensation or perquisites concomitant to the reduction in duties. Regardless of contractual language, however, a draconian change may more likely result in liability. If such a dramatic change is appropriate, the corporate interests may be better served by a renegotiated contract under the threat of termination as an alternative. In this circumstance, an "at will" or a liberally based discretionary termination standard is important to maximize corporate flexibility and minimize liability. Again, the parties' particular needs, risks and negotiating power affect the degree to which specificity or flexibility can be attained.

This portion of the contract should also establish the level of commitment expected of the executive. The corporation may desire to restrict the executive's outside business activities. This commitment can range from a covenant to devote one's full energy, interest, ability and productive time to the performance of the executive duties to a covenant not to render services of any kind or to engage in outside business activity without the prior, written consent of the company. This type of provision reduces disputes about the company's right to take action in the event of outside or competing activities. Considerations in deciding among the options are whether the employment relationship is part-time or whether the particular business field is more conducive to outside consulting.

2. Termination

Of all the provisions in the employment agreement, the termination clause may be the most significant if the employment relationship "goes south." Indeed, it is this provision that will establish the legal standard by which a termination will be judged. It can also be anticipated that this provision will be one of the more hotly negotiated terms by the prospective executive in a strong bargaining position.

Generally, employment is presumed to be "at-will." That is, the employment relationship can be terminated at the will of either the employer or the employee for good reason, bad reason or no reason at all. Employment agreements can alter this at-will presumption. The diverse range of termination clauses provide varying degrees of discretion for the corporation. An executive agreement that maintains the at-will status provides the greatest flexibility for the corporation. To the extent the company has standard agreements for most employees, an "at will" term is important.

To the extent the prospective executive is in a bargaining position to limit the corporation's flexibility by refusing to accept an "at will" relationship, great caution must be exercised. Too often terminology is included without sufficient regard to its legal significance. Termination standards of "gross negligence" or "serious and willful misconduct" are virtually impossible to establish in the normal employment relationship even where performance is severely inadequate. Even general negligence standards should be avoided.

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If a limitation on the corporation's ability to terminate is demanded by the executive, the next best standard is a general "for cause" provision. For cause gives the corporation wide latitude if there is a performance problem or economic problem, and the standard covers a broad spectrum of conduct. While under this standard actual cause must exist "motivated by a good faith belief," it is far more preferable than a litany of specific reasons for which termination can occur. Where the prospective executive can demand an even more restrictive termination clause than a general "for cause" standard, typical options include (1) failure to perform, negligence in performance of duties and responsibilities, or negligence in compliance with the company's legal obligations; (2) breach of enumerated contract provisions, such as a covenant not to compete, confidentiality or restrictions on outside business activities; (3) conviction of a crime involving personal dishonesty, commission of other serious misconduct, mal-feasance or nonfeasance. The corporation should strive to include in a defined "for cause" standard elimination of the position in a reorganization, reduction in force or change in business ownership.

Executive agreements can also provide alternate methodologies for termination, including a "no-fault" dismissal. A common example of this format permits the corporation to terminate the agreement and the employment "for cause," as defined in the agreement or, when other than for cause, at any time so long as the specified notice and pay-out requirements are met. This latter "no-fault" option assists in terminations which are largely subjective, such as if the executive is perceived to be a "poor team player" or for any other reason. The downside is that it requires a payout as negotiated at the outset which may in reality be unwarranted given the executive's performance or the company's economic condition. However, it also allows the company to terminate without disclosing confidential or sensitive information if litigation should ensue.

Other "no-fault" issues concern termination upon retirement, death or disability. With respect to retirement or disability termination, regardless of the contract's language, the corporation must still comply with state and federal law, such as age and disability discrimination laws. Similarly, provisions regarding termination in the event of death are particularly useful where issues of vesting may arise.

In formulating any termination provision, the parties must insure that the contract language specifically corresponds to their intent. If a disagreement arises, a reviewing court will simply give effect to the unambiguous contractual language. For instance, the Seventh Circuit Court of Appeals in Scherer v. Rockwell International Corporation found an employer's "good faith belief" that an executive had engaged in sexual harassment of a subordinate insufficient grounds for termination under the agreement. The contract language, on its face, provided for immediate termination only if "guilty" of misconduct. Thus, the court reasoned, the employer must prove that the executive had actually engaged in the sexual harassment in order to terminate him.

3. Anticipating Business Changes

Because the contract is intended to cover the life of the relationship, the corporation should anticipate business changes. For example, a merger or other corporate change may occur. In this circumstance, the company should determine whether it wishes the executive employment agreements to survive such business changes. On the one hand, the agreements could be written to function as an impediment to a hostile acquisition. Alternatively, they could be drafted to permit termination in order to maximize the corporation's appeal to a prospective acquiring entity.

Examples of contract provisions in this area of anticipated business change are wide-ranging. First, in the event of either a voluntary of involuntary dissolution, the company could choose to terminate the agreement and employment according to the no-fault notice and payment clauses, as discussed previously. Alternatively, the agreement could specify that as a condition of sale the contract applies to the company's successors and assigns or, more specifically, that it shall not be terminated by a voluntary or involuntary dissolution, merger, acquisition of the company by another business entity, or by the transfer of substantially all of the company's assets. Instead

business entity, or by the transfer of substantially all of the company's assets. Instead, the company could provide that it retains sole discretion to assign the agreement and all rights and obligations thereto to any business that succeeds it. Ultimately, the option chosen will depend on the corporation's perspective.

In general, an acquisition by the exchange or sale of stock requires the surviving company to assume the liabilities, including succeeding to the prior employment agreements, of the acquired company. However, in a sale of assets, the assumption of liabilities is typically negotiated. If there is a successor clause and the purchasing company does not assume the contract, the predecessor company may be liable to pay out the contract term. In addition, the corporation should recognize that a voluntary dissolution of a business may not necessarily relieve it of liability for term employment agreements.

4. Employment Term

As is already evident, an executive agreement can include almost any term. Typically, agreements specify the duration of employment. On this point, it is wise to explore the applicable legislative statutes because numerous states have set maximum contract terms. Alternatively, instead of locking in a lengthy term of employment, the contract can provide for a shorter term with renewal options at the discretion of the company. For example, evergreen provisions effect automatic renewal of the contract for an additional, designated term if notice of termination is not provided within the specified time period. However, caution must be exercised to prevent automatic renewals when they are not desired. Reducing the amount of advance notice to exercise a termination option maximizes corporate flexibility with respect to terminations.

5. Ownership of Inventions, Intellectual Property and Trademarks

Businesses with "outsourcing" opportunities as well as those with potential for inventions, intellectual property and trademarks should have express provisions on ownership of inventions, intellectual property and trademarks. This will both secure property rights and establish parameters of permissible and impermissible conduct. As with other employment terms, consulting with counsel regarding statutory restrictions is advisable to ensure that the rights being secured are properly defined, the rights retained by the employee are included and judgments are made about when an employee is required to disclose his or her existing inventions.

6. Alternative Dispute Resolution

Alternative dispute resolution, generally arbitration, is a method by which the parties can waive their rights to have employment disputes settled in a judicial arena. The parties instead choose an alternate forum that is usually cheaper and quicker for dispute resolution. Enforceability of such resolution methods is improved if the agreement is bilateral in this regard. That is, both parties are limited to resolving disputes in the private, alternative arena designated.

The primary objective of alternative dispute resolution is to substitute a forum, not to interfere with either party's substantive rights. Included in the drafting of such a term is the selection of the procedure to be used such as the American Arbitration Association's protocol on arbitration of employment disputes. The parties can choose to be governed by the state or the Federal Arbitration Act. The arbitration clause should also define which disputes will be subject to or excluded from arbitration. Candidates for exclusion include disputes where the company would be seeking specific enforcement, such as violation of a no-competition clause and ownership of intangibles. In addition, the agreement should specify the procedural rights of the parties, the method for selecting the arbitrator, and the manner of progress for resolution, such as time limits. Before finalizing such a clause, consideration should be given as to whether there are other relationships between the company and the executive that should or should not be included in the arbitration clause.

In one instance, an impending acquisition prompted the corporation to enter into executive employment agreements which included substantial "golden parachutes." These agreements indicated that all disputes arising thereunder were to be resolved exclusively through arbitration. After the change in control, the acquiring company hired someone to assume several of plaintiff's duties -- an action falling under the

hired someone to assume several of plaintiff's duties -- an action falling under the employment agreement's definition of involuntary termination. Thus, the court ruled, arbitration was the exclusive means for resolution.

7. Indemnification of the Executive

Executives may seek express indemnification provisions with respect to the individual legal liabilities that result from their special responsibilities. State labor codes may require employer indemnification in certain circumstances. Significantly, the company may be subject to another state's law, such as Delaware, in addition to that for the state of its business operations. These laws must be reconciled before entering into an indemnification agreement.

The specific language of the indemnification clause is relevant. Broad language promises indemnification of the executive for any acts "arising out of the executive's employment." A narrower provision indemnifies the executive only for those acts arising "out of the course and scope of the employment." In addition, the company may want to tie its duty to indemnify to the employee's duty to cooperate in resolving the legal matter at issue. Depending on state law, the clause may specify whether the company can agree to purchase and maintain an indicated level of indemnity insurance, limited by cost and coverage restrictions.

8. Promises that Survive the Termination of the Agreement

Some of the clauses agreed to within the contract can survive it, such as promises to maintain the confidentiality of information and trade secrets or promises not to engage in "unfair" competition after employment termination. States vary on the extent to which competition can be limited post-termination, and even if it can be limited at all. The limitation on "unfair" competition should be adequately described in duration, territory and job type. Other parameters may be required by state law.

Virginia, for example, employs a three-part test to determine the validity of restrictive covenants. In reviewing a covenant not to compete, a Virginia court will analyze whether (1) from the employer's viewpoint, the restraint is reasonable in that it is no greater than necessary to protect a legitimate business interest, (2) from the employee's standpoint, the restraint is reasonable in that it is not unduly harsh and oppressive in curtailing legitimate efforts to earn a livelihood, and (3) the restraint is reasonable in terms of public policy. Higher standards may be required by some states, while others completely prohibit covenants not to compete. In addition, some states "blue pencil," or strike out, only the unlawful language from the contract clause and others invalidate the entire clause if a portion is found to be unlawful.

9. Choice of Law

In general, the parties should make an affirmative decision about which law should govern the disputes under the agreement. This will provide the parties with some degree of predictability of the outcome of disputes and thus may foster early resolution. Obviously there must be a reasonable nexus between the employment and the state whose law is chosen, but it need not necessarily be the state in which the employee performs his work. It may, for instance, be the locus of the headquarters.

10. The Integration Clause

Integration clauses confirm the extent of the parties' agreement. That is, where there has been protracted negotiations, numerous drafts or oral representations, an integration clause specifies which agreements or promises are intended to constitute the final agreement. An integration clause is essential to any agreement, but particularly an employment agreement, where personnel policies, practices and oral representations may later by used by an employee to imply contractual commitments varying to those provided in the written agreement. As discussed previously, an integration clause can be relied upon in an effort to defeat a subsequent claim of fraud in the inducement or misrepresentation. In Boginis v. Marriott Ownership Resorts, Inc., an employee sued for fraudulent misrepresentation related to statements of expectation allegedly made during negotiations. The employment agreement at issue contained an integration clause stating that the contract "supersedes all prior

agreements, written or oral, . . . sets forth the entire agreement" between the parties, and "may not be modified, renewed, or extended" orally. The court found that this integration clause prevented any recovery for statements made during hiring.

In drafting an integration clause, make sure that existing agreements, such as prior employment contracts, benefit documents and separate arbitration agreements expressly survive the integration clause if that is the parties' intent.

III. Sexual Harassment Issues in the Executive Suite

A. Introduction: Quid Pro Quo vs. Hostile Work Environment

There are generally two types of legally-recognized sexual harassment under Title VII of the Civil Rights Act of 1964, as amended. First, "quid pro quo" harassment occurs when an employee is subjected to unwelcome sexual advances or other conduct of a sexual nature for which submission is made either explicitly or implicitly a term or condition of the individual's continued employment or is used as the basis for employment decisions affecting the individual.

Second, and more commonly, lawsuits allege "hostile work environment" sexual harassment. This form of harassment, first recognized by the U.S. Supreme Court in Meritor Savings Bank v. Vinson, involves unwelcome conduct of a sexual nature which has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment. To be unlawful, this type of harassment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." The Supreme Court in Harris v. Forklift Systems, Inc. directed the courts to examine the "totality of the circumstances" to determine whether the environment is hostile or abusive, considering such factors as the frequency of the conduct, its severity, whether it is physically threatening or humiliating as opposed to a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. Furthermore, a plaintiff can prevail solely on proof of the illegal conduct, even if she cannot demonstrate any psychological or physical injury.

B. Employer Liability for Sexual Harassment

1. Imputing Liability for the Acts of Executives Who Harass

There is little question that an employer is strictly liable for quid pro quo harassment. "Because the quid pro quo harasser, by definition, wields the employer's authority to alter the terms and conditions of employment -- either actually or apparently -- the law imposes strict liability on the employer."

The issue of liability for hostile work environment is less clear. Where the harasser is the victim's co-worker, the employer is liable only if it was itself at fault, i.e. if it knew or should have known of the harassment and failed to take immediate remedial action. More importantly, where the harasser is a supervisor, such as is the case when a high-ranking executive engages in inappropriate conduct, no definitive rule has been laid down. The Supreme Court in Meritor, when confronted with the question, declined to always hold employers automatically liable, but instead only urged courts to "look to agency principles for guidance in this area." While the EEOC Guidelines suggested that an employer in this case should be liable regardless of whether it was itself at fault, the courts have conflicted in interpreting Meritor's "agency guidance" directive. Some federal courts continue to analyze employer liability by determining whether the employer failed to remedy or prevent a hostile work environment of which it knew or reasonably should have known.

Courts in many cases, on the other hand, have combined the rule set down by the EEOC Guidelines with the Meritor directive and have relied on an "apparent authority" analysis under Section 219(2)(d) of the Restatement (Second) of Torts. In these cases, the employer is found liable where the harasser purported to act or speak on behalf of the employer and there was reliance on this apparent authority, i.e. he used his authority as a supervisor to further the harassment or was otherwise aided in accomplishing the harassment by the existence of the agency relationship. Under a similar analysis, courts in other cases refused to find "apparent authority" where the victim did not reasonably believe that the harasser was acting within the color of his

supervisory authority, as evidenced by the employer's prohibition of sexual harassment and its thorough and meaningful grievance procedure. A court in one such case concluded that an employer can avoid liability under this theory if it can establish that it had "taken energetic measures to discourage sexual harassment in the workplace and has established, advertised, and enforced effective procedures to deal with it when it does occur." However, and critical to this paper, one court has suggested that "at some point, the actions of a supervisor at a sufficiently high level in the hierarchy would necessarily be imputed to the company." Therefore, jurisdictions that rely on the "apparent authority" analysis to impute liability on the employer may do so when the harasser is a high-ranking executive.

2. Employer's Duty to Investigate Allegations of Harassment

Regardless of the standard for *vicarious* liability the jurisdiction follows, it is unquestioned that an employer can always be held *directly* liable under *fault*-based negligence principles where it knew or should have known of the conduct and failed to take immediate and appropriate remedial action. Generally, an employer's remedial action when faced with a sexual harassment complaint must be "reasonably calculated to end the harassment." The reasonableness of the remedy depends on the employer's ability to stop the harassment and the remedy's ability to dissuade potential harassers from inappropriate conduct. Under this standard, therefore, the employer has an *affirmative* duty to investigate. A timely and thorough investigation is thus often essential to meet these obligations, as plaintiffs are regularly arguing and recent judicial decisions are concluding.

The employer's duty to investigate and remedy allegations of sexual harassment raises an important issue regarding high-ranking executives. If harassment is found to have occurred, must the executive be transferred or terminated? Courts generally look at the sufficiency of an employer's response on a case-by-case basis to determine whether the response was actually appropriate and "reasonably calculated to end the harassment." Sometimes, depending on the severity of the alleged conduct, a simple instruction to refrain from future harassment may be sufficient. Sometimes, a threat of termination or other discipline in the event of reoccurrence has been found to be sufficient. Most importantly, courts usually will judge the reasonableness of the employer's remedy by its ability to actually stop the harassing behavior. If the behavior continues after a warning, courts will usually require more explicit corrective action that is disciplinary in nature. What emerges from these decisions is, therefore, that should an employer be able to successfully end the alleged harassing behavior of one of its executives, depending on the seriousness of the offense, it may not be liable even if no substantial disciplinary action is taken against the executive.

A crucial remaining issue is what employers should do when it is clear that separating the harassing executive and the complainant is appropriate and necessary in order to remedy the situation. Courts have held that the victim should not be "punished," i.e. by being moved to a less desirable location. However, this does not mean that a transfer of the offender is always required or that the victim can never be moved. Many courts have upheld an employer's decision to move the victim -- so long as the transfer is not regarded as a demotion or detrimental to the victim -- especially when a high-ranking executive is involved. Importantly, therefore, under this standard the employer is not always obligated to terminate or discipline the harasser, or remove him from his position, and can sometimes move the victim herself (if separation is necessary), so long as the hostile work environment no longer exists.

The importance of a thorough investigation is also underscored in a different context: where an alleged harasser, who was disciplined, sues the employer for wrongful termination. The exposure to liability from a suit brought by a terminated or disciplined harasser is especially high in the case of an executive, who has much to lose from an accusation of sexual harassment and resulting discipline. However, careful employers should not fear liability too strongly. For example, in a California case brought under the Fair Employment and Housing Act, which substantially mirrors Title VII, the court held that a thorough investigation would enable the employer to avoid liability in a wrongful termination claim by the alleged harasser, who had been terminated following the investigation. The court held that the critical issue was whether the employer reasonably and in good faith believed that the terminated employee had

committed the alleged conduct, not whether it had in fact occurred. Thus a thorough investigation would show that the employer's belief was both reasonable and held in good faith, relieving the employer of liability -- in the absence of a contractual provision to the contract.

C. Individual Liability of Executives and Other Supervisors

The Ninth Circuit was the first to address individual liability under Title VII following the 1991 amendments. In Miller v. Maxwell's International, the court concluded that because Title VII limits its application to employers with fifteen or more employees, Congress must have intended to protect small entities (such as individuals) from the costs of litigating discrimination claims. Several federal courts have followed Miller in this respect. Some district courts, however, have relied on Title VII's definition of "employer" as including an employer's agents in determining that Congress intended that individual agents be liable.

While the Miller standard appears to be widely accepted, executives and other supervisors should nonetheless be careful that they may be subject to individual liability under state anti-discrimination statutes. For example, the California Fair Employment and Housing Act ("FEHA") does expose individual supervisory employees to the risk of personal liability for their actions constituting sexual harassment. In Janken v. GM Hughes Electronics, the California Court of Appeals so held, relying on the fact that harassment consists of conduct *outside the scope* of the supervisor's necessary job performance, presumably engaged in for personal gratification or other personal motives (as well as the fact that the FEHA imposes liability to an employer "or any other *person*").

D. Special Problems Relating to Social and Sexual Relationships Between an Executive and a Subordinate Employee

Two distinct issues have arisen regarding employee relationships. One is a line of cases in which employees look to the sexual harassment laws to challenge a superior's favoritism for a subordinate sexual partner or paramour. Second, subordinate employees involved in such paramour relationships that go sour have claimed gender-based retaliation or harassment when the superior takes adverse action against the subordinate. After analyzing these two problems, this section will examine possible action that employers can take (legally and practically) to avoid these problems and related issues arising from inter-office relationships.

1. Favoritism for Sexual Partners: Rights of Other Employees

Generally, gender claims do not exist for a third-party employee, either male or female, who does not get preferential treatment from a superior because he or she is not in the consensual paramour relationship. Recent case law has made this point very clear: The overwhelming authority under Title VII has held that an employer who solely promotes his lover or paramour or otherwise accords her preferential treatment is not liable to other employees for gender discrimination or quid pro quo or hostile environment sexual harassment.

However, the courts have left open some avenues for a third-party claim challenging a "paramour" relationship. For example, if a female employee is coerced into submitting to *unwelcome* sexual advances in return for a job benefit, others who were qualified for but denied the benefit may have a claim under traditional "quid pro quo" principles, i.e. that sex was impliedly made a condition for receiving the benefit. See also EEOC: Policy Guide on Employer Liability for Sexual Favoritism Under Title VII, 694 Fair Empl. Prac. (BNA) 405:6817-405:6821. Furthermore, if favoritism in return for the granting of sexual favors is *widespread*, employees who do not welcome this conduct (if sufficiently pervasive) might have a claim for environmental harassment arising out of the implied message that women are viewed as "sexual playthings." Such widespread favoritism may also communicate an implicit message that sexual solicitations are a prerequisite to getting ahead in the workplace, thereby forming the basis for a "quid pro quo" harassment claim.

2. Claims of Retaliation or Gender Discrimination at Soured Termination of Paramour Relationship

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While the law is unsettled, generally retaliation after the end of a relationship has been held to be a *personal reaction* to the individual and *not gender-based*. The affected employee will only overcome this presumption if she can meet an increased burden that the jilted lover/supervisor desired to continue the relationship, that such advances are no longer welcome, and that the supervisor threatened retaliation if refused.

3. Fraternization Policies

In light of the above legal problems an employer may face when employees engage in social and sexual relationships, especially those between executives or other supervisors and their subordinates, some employers have made adverse employment decisions against such employees, sometimes "guided" by an express employer policy. In addition to liability issues, employers also wish to avoid friction in the workplace arising from real or perceived conflicts of interest or favoritism, preserve the company's reputation, trade secrets and integrity, and ensure the safety and security of its employees and customers. While no recent developments have occurred on the legality of such employment actions, a brief discussion is beneficial in light of the developments in the law regarding paramour relationships, and the apparent increased frequency of legal fallout from relationships gone awry.

Title VII, and most states, do not have a specific statute that prevents an employer from restricting the dating practices of its employees. However, employees have, for example, looked to the constitutional right to privacy as a means of attacking such practices. In Rulon-Miller v. International Business Machines Corp., a California court held that an employee's right to privacy under the California Constitution was violated where she was terminated for dating a co-employee after he became employed by a competitor. The court relied on the fact that the employer did not have an express policy prohibiting fraternization with co-employees or competitors, and that there was an express policy to the effect that employees would not be scrutinized for off-the-job activities unless they interfered with the employee's job performance. It therefore rejected the employer's "conflict of interest" argument as weighed against the Constitutional right to freely choose one's romantic encounters.

In addition, employers must carefully consider several factors before implementing an anti-fraternization policy or practice. For example, the corporate culture should be considered in determining what morale and compliance issues will occur in connection with any type of fraternization policy. Next, employers must be careful to only create a policy which can be evenly and non-discriminatorily enforced, even when high-level managers are involved, in order for its professed purposes to overcome a claim of the right to privacy. This factor is a significant consideration, as employers do not want to be in a position where they are forced to terminate a high-ranking executive in order to avoid a potential lawsuit when it later terminates low-level employees who violate the company's fraternization policy.

Ranges of "regulation" should be considered before finalizing the employer's approach. Possibilities include: prohibiting "relationships" at risk of having to discipline; discouraging "relationships;" requiring disclosure of "relationships" or encouraging such disclosure in order for the employer to make employment decisions concerning the two people in accordance with morale, safety, security and supervision; creating a conflicts of interest policy for supervision; including a statement in the sexual harassment policy about freedom to enter and end "relationships" and recourse if problems arise; or silence, coupled with ad hoc solutions (the most common approach in business!). In deciding which of these options is preferable, employers must be careful to recognize the difficulties of defining what conduct amounts to a "relationship" or "dating." Overly broad regulations that are unrelated to bona fide business concerns should be avoided.

IV. Issues Involving the Termination of the Executive

When a corporation decides to terminate a high-ranking executive, many factors have to be accounted for. Law suits by executives can expose corporations to large monetary liability, since compensation from such suits is based on lost wages, and executives tend to carry large pay checks. Former executives know their adversaries

executives tend to carry large pay checks. Former executives know their adversaries and have significant resources with which to fight. The following issues, which can be significant aspects of an executive's termination, should be looked at closely before making that decision:

E. Unprotected Disloyalty vs. Protected Opposition Behavior

Employees are generally protected under Title VII and other anti-discrimination statutes from retaliation for opposing discriminatory employment practices. Interesting and complicated issues thus arise when executives either voice their opposition to certain company practices or file charges of discrimination. Title VII's anti-retaliation provision, at Section 704(a) of the Civil Rights Act of 1964, provides, in relevant part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Under this provision, protection extends to employees who have themselves been discriminated against, to employees who oppose discriminatory practices against others, and to employees who assist other employees in enforcing their Title VII rights.

In order to establish a claim for retaliation against protected opposition behavior, an employee must show that (1) he or she engaged in activity protected by Title II; (2) that an adverse employment action occurred; and (3) that there was a causal connection between the protected activity and the adverse employment action. However, and critical to actions by executives, this protection is not absolute. "There may arise instances where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed." To this effect, the courts have developed a balancing test, first expressed in the seminal case of Hochstadt v. Worcester Foundation for Experimental Biology, which weighs Title VII's purpose to protect employees engaging reasonably in activities opposing discrimination, against Congress' desire to not "tie the hands of employers in the objective selection and control of personnel." The Court in Hochstadt was adamant that employers are entitled to loyalty and cooperativeness from its employees, and thus a balancing test is necessary to determine of the employee has gone "too far." "Serious acts of disloyalty," therefore, provide an employer with a legitimate basis for discharging the employee, notwithstanding the protections of § 704(a).

1. Employers' Demands of Loyalty and Cooperativeness from Employees with Significant Management Responsibility

Clearly, an employer's interest in maintaining a perception of cooperativeness and loyalty from its high-ranking executives is great, and employers should generally be given more latitude in its decisions regarding such executives. The question, therefore, is whether employees with significant management responsibilities and a heightened duty of loyalty can nonetheless avail themselves to the protection of Section 704(a) similarly to rank-and-file employees. While given the nature of the Hochstadt balancing test it appears rational to give employers more latitude when dealing with the disloyal acts of its executives, only one case has directly addressed this issue. The plaintiff in Novotny v. Great American Federal Savings & Loan Association was a member of the company's board of directors, its Secretary, and the "number two man" in management. Novotny alleged that he was terminated because of his vocal opposition to what he perceived as sex discrimination against other employees. The court, on the other hand, ruled that Novotny's actions were unprotected because he showed poor judgment in siding with the employees in a public confrontation having the effect of crippling the President's authority. His actions were viewed as disruptive and disloyal, and gave the board of directors the reasonable belief that he could no longer be an effective management employee. Critical to the court's conclusion was it's belief that:

> [I]t is axiomatic that the higher an employee is on the management ladder, the more circumspect that employee should be in expressing opposition to employment practices of which he disapproves.

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Novotny thus stands for the proposition that an employee's protection under Section 704(a) varies inversely with the employee's height on the management ladder. If a high-level executive wishes to voice his or her opposition to the company's practices perceived to be discriminatory, the greatest of care and tacitness must be used, or the company will have the courts' support in terminating or otherwise disciplining the executive. Given the manner in which Novotny chose to express his opposition, the company came to the correct conclusion that he could no longer effectively perform his job. As the court noted, "[t]he number two man in the Association could scarcely manage and supervise successfully after a confrontation with the number one man in front of the employees he was expected to help supervise."

One other court, in a dissenting opinion, agreed with Novotny in examining the importance of a complainant's position within the company, i.e. where the employee is placed in a position of significant responsibility, trust and confidence. In that case, the plaintiff, who was an executive secretary, had access to highly confidential and personal information of the employer, and thus the ability of the employer to trust and work closely with her was paramount and essential to the efficient operation of the office. Thus, the dissenting judge asserted that "'trust' and 'confidence' are very legitimate considerations in the determination of whether or not to discharge an 'executive secretary.' This record is most clear that the termination of plaintiff was not retaliatory but was required if the executive office was to continue to operate in a proper business-like environment. . . ." Other courts, while not expressly adopting the Novotny approach explicitly, have mentioned the employee's management status as a factor in upholding the discharge of the complaining party. Courts do, however, often rely on the "ineffectiveness in performing job duties" rationale to justify an employer's discharge of a disloyal, disruptive, or insubordinate employee, which could just as effectively justify an employer's decision to terminate a disloyal executive.

2. Oppositional Conduct that Directly Conflicts with Employees' Job Duties

Another line of cases relevant to a company's dealings with its executives directly addresses application of these principles to oppositional conduct by EEO Officers and in-house lawyers. These cases consistently hold that where oppositional conduct crates an actual, direct conflict with the employee's primary job duty, Section 704(a) affords the employee little protection. These cases argue that the nature of a personnel manager, EEO Officer, or in-house lawyer's job is different from that of other employees in that he or she is hired specifically to represent the company against employees who have or might have discrimination claims. Therefore, these cases generally agree with employers' argument that they are entitled to demand a greater degree of loyalty from these employees.

In Smith v. Singer Co., for example, the company's director of industrial relations, who was charged with developing affirmative action programs and serve as the liaison between the company and the enforcement agencies, was fired for himself filing a complaint of discriminatory practices on behalf of other employees and then denying knowledge of the identity of the charging party to the company. The court held that he was justifiably fired "for failure to perform tasks fundamental to his position," and specifically observed that:

> It was the very purpose of [Smith]'s job to assist Singer in achieving [voluntary] compliance; the job was held by him not as a private attorney general but as a company executive. The position was unique in that it required the occupant to act on behalf of his employer in an area where normally action against the employer and on behalf of the employees is protected activity.

Thus, by filing complaints against Singer because he opposed their choice of policies, Smith placed himself in a position "squarely adversary to his company". He could no longer effectively represent the company's interests, and thus rendered himself unable to perform his job functions.

Similarly in Jones v. Flagship International, the plaintiff was a licensed attorney hired by the company as EEO Manager, whereby she was to investigate charges of

Similarly in Jones v. Flagship International, the plaintiff was a licensed attorney hired by the company as EEO Manager, whereby she was to investigate charges of discrimination brought against the company and represent the company before state and federal administrative agencies with respect to such charges. When she filed a sex discrimination charge for herself and solicited others to file as well, the company immediately fired her, alleging that such action was necessary because of the conflict of interest created by her job. The court agreed, finding that such conduct under the circumstances qualified as conduct that was "so disruptive or inappropriate as to fall outside the protections of 704(a)," since the plaintiff's conduct "not only rendered Jones ineffective in the position for which she was employed, but critically harmed Flagship's posture in the defense of discrimination suits brought against the company."

Thus some courts have held that an employee charged with representing the company, such as an EEO Manager or in-house lawyer, cannot take a position adverse to the company and still effectively perform her job. Likewise, when loudly voicing her opposition to a company's practices, a high-ranking executive would likely breach her undivided loyalty to the company, in that by taking a position adverse to the company, she could no longer effectively perform her job functions as a manager.

One caveat is important in the discussion of an employer terminating its in-house counsel. While the above line of cases appears to stand for the proposition that in-house counsel can rarely (if ever) state a claim for retaliatory discharge for engaging in oppositional behavior protected by Title VII, they do not address whether in-house counsel *can ever* maintain a wrongful discharge cause of action. For example, an important line of cases holds that under some state tort laws, a corporation's in-house counsel could avail herself of a retaliatory discharge remedy in those instances in which mandatory ethical norms embodied in Rules of Professional Conduct collide with the illegitimate demands of the employer and she insists on adhering to her clear professional duty. In General Dynamics Corp. v. Superior Court, for example, the California Supreme Court articulated this standard, distinguishing the general disloyalty associated with an employee who disagrees with his employer's policies from that of a attorney-employee faced with mandatory ethical norms which she must insist on adhering to. However, if the conduct required by the employer is merely ethically *permissible*, but not *required* by statute or ethical code, then an attorney's wrongful discharge claim will stand only if the conduct would give rise to a retaliatory discharge action by a non-attorney employee, and if some statute or ethical rule wold permit the attorney to depart from the usual requirements of confidentiality.

F. Age-Related Claims and "Real World" Grounds for Termination

Because executives make sensitive, highly important decisions and are viewed as representing the corporation, it is critical for a growing, forward-thinking corporation to keep its image in mind when making employment decisions regarding executives. While often for reasons falling short of insubordination or incompetence by the executive, corporations wishing to take their business to the "next level" often decide to let go top executives who, for example, no longer "fit in" with the corporate image or its new "direction," or who are not viewed as "team players." However, while such real world reasons for terminations may be the true motive for an employment decision, the affected executive, who is generally among the more elderly employees in the company, may perceive these reasons as a pretext for age discrimination. Therefore, such potential liability must be accounted for when making these employment decisions.

The Age Discrimination in Employment Act ("ADEA") prohibits discrimination against workers aged over forty, providing in relevant part that "it shall be unlawful for an employer . . . to discharge any individual . . . because of such individual's age." The basis substantive provisions of the ADEA are identical to those of Title VII, and thus the basic proof framework is also identical. To establish a prima facie case of age discrimination, the employee must show that: (1) he belongs to the protected class, i.e. he is over forty; (2) he was qualified for the position at issue; (3) he was discharged despite those qualifications; (4) he was replaced by a person sufficiently younger to permit an inference of age discrimination, or the employer did not treat age neutrally. The person who replaces the discharged employee need not fall outside the protected category, so long as he is sufficiently younger to permit an inference of

discrimination. Once a prima facie case is established, the burden shifts to the employer to articulate a "legitimate business purpose," and any nondiscriminatory reason for the adverse action will suffice to meet this burden. The plaintiff then has the burden of proving that the employer's proffered reason is pretextual and that unlawful discrimination was the real reason. Critical at this stage is for the plaintiff to prove that age "actually played a role in" and "had a determinative influence on" the employer's decisionmaking process.

Recent cases suggest that when a corporation comes forward with such "real life" reasons for terminating its executives as a lack of "fit" or a decision to move in a "new direction," age discrimination will be more difficult to prove than when similar reasons are made for rank-and-file employees. In Duvall v. Polymer Corp., for example, the plaintiff, aged 52, was the defendant's Chief Financial Officer, and had received satisfactory reviews and a merit pay increase. However, the corporation underwent a business reorganization, and plaintiff was eliminated as expendable. Evidence was presented that the plaintiff was not a "team player" and did not have the "approach" the new business wanted. The court concluded that these were sufficient business reasons, which the plaintiff failed to rebut. Similarly in Mehn v. Professional Construction Services, a company Vice President, aged 54, was discharged pursuant to a company reorganization. Evidence was presented that the company's President stated that the termination was "a continuation of the youth movement" and the Executive Vice President stated that plaintiff "no longer fit into the plans of the company." The company asserted that it was only thinking in terms of a "different direction" for the company and the plaintiff was perceived as not committed to the company, a disruptive influence, and not a "team player," and thus he did not "fit into" this new direction. The court held that these reasons were legitimate and non-discriminatory, which the plaintiff could not rebut. Finally in Bern v. United Mercantile Agencies, plaintiff, aged 67, a Division Manager, was terminated and replaced with a 38 year-old. The company asserted that plaintiff had "really slipped over the past year" and that it had thus decided to take the office in a "new direction." Again, the court held that these were legitimate business reasons, which plaintiff could not rebut.

In contrast, in Hardin v. Hussmann Corp. a 51 year-old rank-and-file employee was terminated along with a 28 year-old due to corporate downsizing. Plaintiff (the 51-year-old) presented evidence that he had been told that it was "unusual" for someone over age 40 to be hired, and that on one occasion, he was told that a technical book he used was antiquated and "should be kept out of sight" as it might give their customers the "wrong image." The company responded that the two terminated employees had the poorest performance records and seemed to be the "worst fit" in the department. The court nonetheless held that the plaintiff's evidence could suggest that the company prefers to extend a "youthful look" and harbors a company-wide animus toward older employees, and thus summary judgment for the employer was inappropriate. Therefore, it appears that suggesting that an employee doesn't "fit in" or is not a "team player" will be more convincing where the employee is a high-ranking executive -- where such qualities as proper "fit" and "team" are crucial to a company's forward growth and success.

G. Actual Discharge Versus Constructive Discharge

Instead of discharging an executive outright, a corporation may, intentionally or otherwise, act in a manner which makes the executive's resignation inevitable. A constructive discharge occurs when an employee would not have resigned but for the actions of the employer. While not an "actual" discharge, a constructive discharge can still violate the law. In fact, the "discharge" may be held to be a breach of the employment contract, wrongful termination or other violation of law.

Generally, an employee has been constructively discharged if (1) his working conditions at the time of his resignation were so intolerable or aggravated that (2) a reasonable person in the same position would have been compelled to resign and that (3) the employer either intentionally created or knowingly permitted the intolerable working conditions. While this, or similar, standard is widely applied in this area, the law on what conduct actually constitutes a constructive discharge varies among the states.

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The Fifth Circuit Court of Appeals has recognized that the reduction of pay and duties of an executive can be enough for a constructive discharge. In contrast, the United States District Court for the Southern District of New York and the Ninth Circuit have held that reductions in an executive's pay and/or duties alone are insufficient to create a constructive discharge. Regardless, the essential inquiry is whether the corporation's actions are so intolerable or aggravated that a similarly situated executive would be compelled to resign. That is, the stresses and strains of life at the top of a corporation are different than those for a lower level employee and will be considered in evaluating an alleged constructive discharge.

H. Managing Discharge and Decisions Not To Renew

According to a recent study by Jury Verdict Research, executives win wrongful termination lawsuits far more often than other workers and with significantly higher damage awards. For this reason alone, corporations must actively manage the discharge of an executive by maintaining a keen understanding of the termination issues discussed herein.

At the most basic level, the corporation must comply with the relevant provisions of the executive agreement. That is, the corporation must follow any notice, cause or other requirements before terminating the executive. For example, the failure to renew an employment agreement can be the basis for an executive's age discrimination claim. Furthermore, if an employer has a practice of renewing contracts only for young executives it would be guilty of age discrimination.

In addition to following contract specifications, the corporation should review the executive's personnel file and its own history in dealing with similar factual situations and positions. Consistency with previous termination decisions will aid in supporting the current discharge. It is also wise to consult with corporate counsel before proceeding with any termination decision in order to insure that all applicable contract provisions and laws are followed.

The method for accomplishing the termination of an executive should be specifically planned as well. Among the more important considerations are who should be the decision maker, including whether there is accountability to the Board of Directors; who should be the messenger of the decision; what level of specificity should be provided; whether the decision will be in writing; and if there will be any witnesses. The answers to this questions will vary according to the reasons for termination, the position of the executive being terminated, the executive agreement specifications, and the corporation's laws and structure. Finally, with ever-escalating "golden parachutes" being offered to terminated executives, shareholder suits for corporate waste have increased. Therefore, if a severance payment is contemplated, another consideration is the likelihood and subsequent detriment of a shareholder suit.

I. Negotiated Resolutions: Separation and Consultation Agreements

While terms of separation can be included within the initial employment agreement, formal separation agreements are typically entered into to memorialize the parties' understanding as of the time of the employment termination. A consultation agreement can provide an attractive alternative to a separation agreement when the corporation wishes to continue its receipt of the individual's expertise after the conclusion of the employment relationship. These agreements can help to minimize disputes, and lawsuits, especially where the termination of the employment relationship is not agreed upon by the parties. When seeking these agreements, remember to avoid inadvertent admissions against interest, which later can be used against the corporation in litigation.

Many of the provisions of the original employment contract are similarly appropriate for the separation or consultation agreement. These dual-purpose provisions include confidentiality of business information, covenants not to compete or raid, alternative dispute resolution, coverage of attorney's fees, retirement plans, and others. However, there are other provisions unique to separation which should also be included. These are discussed below.

1. Releases

Releases are commonly negotiated and inserted into separation or consultation agreements. A release can be individual or mutual and should specify which claims it covers and to what extent. In essence, a release can be a bargained for exchange of legal rights. For example, the corporation might have a claim against the executive for violation of trade secrets, patent or copyright infringement, home or automobile loans, breaches of fiduciary duty, or others. These claims can be used to offset the executive's legal claims or reduce severance pay. Because these agreements are contracts, releases must be accompanied by consideration to be valid. Releases can also be included in consultation agreements.

Broad releases, accompanied by consideration, can cover both current and potential liabilities. In Vitus v. National Union Fire Insurance Company of Pittsburgh, at termination, severance benefits and pay were offered to the executive in exchange for his broad release of all financial obligations, actions or suits of any kind, whether known or unknown, against the corporation. Later, the executive sought indemnification as provided for in his original employment contract. The Tenth Circuit held that the release included all existing contractual duties and obligations "even where those obligations have not yet come due and before a claim concerning a breach of those obligations has as yet arisen." In other words, the executive's right to indemnification existed at the time he signed the release, even though the corporation's obligation to indemnify had not yet arisen.

A release of an employee over the age of 40 must include the protections of the Older Workers Benefit Protection Act to be valid against age discrimination claims. These include advice to consult an attorney, a 21-day term to consider the agreement and a seven day revocation period after execution.

2. Confidentiality

Confidentiality of the severance or consultant agreement is another issue to be resolved through the inclusion of a confidentiality clause. The confidentiality provision should specify if it is individual or mutual; list the specific instances covered, if any; indicate any permissive disclosures, such as press releases for public relations purposes; and provide for damages upon breach. Note that the confidentiality provision applies only to the ex-executive and the corporation and thus may be discoverable in third-party litigation.

3. Prior Agreements

The severance or consultation agreement should indicated whether all or part of prior agreements will remain in effect. Where appropriate, an integration clause can specify which contracts or provisions survive the termination of the employment relationship. Similarly, if the employment agreement provided for unexhausted "perks," such as use of an automobile or computer equipment, the severance agreement should designate whether such perks are to continue.

V. Conclusion

The consequences of employment law errors in dealing with executives are typically far greater than with other employees. Because the high paid executive has greater potential damages, the likelihood of litigation and its risks are propor-tionately greater. Accordingly the precautionary measures and the legal principles outlined herein must be scrupulously followed.

Back to Top