Considerations in Negotiating and Drafting Severance Agreements

by Peter M. Langdon

Introduction

Generally, employers utilize severance agreements to provide employees with a source of compensation after the employment relationship concludes and to insulate the employer from liability through a release of claims. The reasons for utilizing severance agreements vary depending on each situation. This article discusses issues that legal advisors should be aware of in negotiating and drafting severance agreements. This article is not intended to provide a comprehensive and exhaustive accounting of issues that arise in negotiating and drafting severance agreements. Each situation is fact sensitive and demands a critical analysis of the issues at hand.

Release

A release of claims provision included in a severance agreement is an important tool to mitigate potential liability. The release should be broad enough to sufficiently cover the desired waivable claims. However, the language should be tailored so that it is enforceable and clear enough to apply to specific claims where appropriate.

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The Older Workers Benefit Protection Act ("OWBPA"),[1] which amended the Age Discrimination in Employment Act ("ADEA"),[2] addresses age discrimination releases for employees age forty (40) years of age or older.[3] The release must be knowing and voluntary.[4] The knowing and voluntary standard generally requires that the release contain specific language and that certain procedures are followed.[5] However, at least one court has determined the OWBPA requirements are satisfied if the release is in substantial compliance with the statute.[6]

Additionally, state law may prescribe certain requirements to properly release certain claims.[7] In Nebraska, severance agreements often include specific references to certain claims under Nebraska law, including without limitation the Nebraska Fair Employment Practices Act; the Nebraska Age Discrimination in Employment Act; the Nebraska Wage Payment and Collection Act; and Nebraska's privacy laws, drug testing laws, leave laws, and laws related to equal pay.

Conversely, certain claims cannot be released. Purportedly releasing claims that cannot, in fact, be released introduces risk that subjects the agreement, or a portion thereof, to invalidity. At the least, the agreement should include general language explaining that the release does not, and is not intended to, release claims that cannot be released under applicable law. Additionally, the agreement may specifically carve out claims that cannot be released.

Generally, wage claims that arise under the Fair Labor Standards Act ("FLSA") cannot be released unless approved by the United States Department of Labor ("DOL") or with judicial approval.[8] However, at least one court has questioned whether court approval is necessary.[9] Therefore, severance agreements should be drafted in a manner that carves out

nonwaivable FLSA claims. Employers may include a representation providing that the employee has received payment for all wages, salary, bonuses, commissions, tips, and any other compensation to which the employee is entitled.

Employees can release certain claims under the Family and Medical Leave Act ("FMLA").[10] Employees are precluded from releasing prospective FMLA claims.[11] The release of appropriate FMLA claims applies to allegedly illegal conduct that occurred prior to the execution of the agreement.[12] The issue then becomes what constitutes a prospective FMLA claim that is based on retaliation for, or interference with, an employee's exercise of his or her FMLA rights. One court described prospective FMLA rights as "those allowing an employee to invoke FMLA protections at some unspecified time in the future."[13]

Additionally, a release cannot prohibit a former employee from filing a charge with, or participating in an investigation or proceeding conducted by, the Equal Employment Opportunity Commission ("EEOC").[14] Similarly, an employer cannot restrict a former employee from filing a charge with, or otherwise assisting, the NLRB.[15] Finally, state law may prohibit the release of certain claims. Nebraska state law, for example, prohibits the release of unemployment insurance claims,[16] minimum wage claims,[17] workers' compensation claims,[18] and any protections granted under Nebraska's Workplace Privacy Act.[19] Similar to the representation that an employee has received all wages, employers should include a representation that the employee was not injured on the job.

Compensation

The foundation for enforceable severance agreements is full and adequate consideration. This means a severance benefit must be in excess of what the employee is already entitled to receive. Severance payments can be structured in several ways. For example, an employer could offer a lump-sum payment or payments could occur in intervals over a certain period of time. Notably, severance pay is not considered wages under the Nebraska Wage Payment and Collection Act.[20]

Prior to the United States Supreme Court's decision in U*nited States v. Quality Stores, Inc.*,[21] whether severance payments were subject to Federal Insurance Contribution Act ("FICA") taxes was an outstanding issue.[22] In *Quality Stores*, the Supreme Court resolved the issue and found that, for FICA tax purposes, severance payments are generally considered wages and are subject to FICA taxes.[23] For completeness, severance pay is also subject to the Federal Unemployment Tax Act ("FUTA"), federal income tax withholding,[24] and Nebraska state income tax withholding.[25]

Code Section 409A

An often overlooked aspect of severance agreements is Internal Revenue Code ("Code") Section 409A. Code Section 409A is a comprehensive Code provision that provides rules and regulations for nonqualified deferred compensation plans and arrangements.[26] Nonqualified deferred compensation is an arrangement that provides for the deferral of compensation.[27] To the extent severance pay is subject to Code Section 409A, the agreement should comply with that section or qualify for an exception thereunder.

Under Code Section 409A, nonqualified deferred compensation must satisfy certain deferral election rules, distribution requirements, and anti-acceleration provisions.[28] If at any time during the taxable year a nonqualified deferred compensation plan that is subject to Code Section 409A does not meet the previously mentioned requirements or is not operating in compliance with those requirements, then, all compensation deferred under the plan for the taxable year and all preceding taxable years is included in the service provider's (i.e, the employee's) gross income.[29] Additionally, the amount included in gross income is increased by (i) twenty percent (20%) of the compensation included in the service provider's gross income and (ii) a specified interest rate applies.[30] Therefore, care must be taken to ensure that either the severance payments are in compliance with Code Section 409A or the arrangement satisfies an exception.

Code Section 409A contains a number of exceptions. One way to except the severance pay from Code Section 409A is to ensure the payments are not considered a deferral of compensation. This can be accomplished when the entire severance amount is paid to the former employee in the year of termination.[31]

A second way of excepting severance payments from Code Section 409A is to satisfy the separation pay exception.[32] That rule says that a plan that provides for separation pay only upon an involuntary separation from service[33] or pursuant to a window program[34] is not a deferral of compensation so long as the separation pay:

> (1) is paid by the end of the second taxable year following the termination year and
>
> (2) does not exceed the lesser of two times:
>
> (i) the employee's annual compensation in the year before the termination year, or
>
> (ii) the limitation on compensation under a qualified plan for the termination year ($285,000 for 2020).[35]

A third way to escape the requirements of Code section 409A is to fall within the short-term deferral rule.[36] Under that rule, no deferral of compensation occurs when an employee actually or constructively receives the severance pay on or before the last day of a two and one-half month period follow-

ing the end of the later of: (i) the employee's taxable year in which the right to payment is no longer subject to a substantial risk of forfeiture[37] or (ii) the employer's taxable year in which the right to payment is no longer subject to a substantial risk of forfeiture.[38] In other words, assuming an employer operates on a calendar-based fiscal year, the employee must receive the payments before the March 15th following the year in which the payment is no longer subject to a substantial risk of forfeiture.

The Internal Revenue Service has indicated that generally severance payments may run afoul of Code Section 409A in certain situations where the period in which an employee must execute a severance agreement straddles two calendar years.[39] This is because the employee can essentially dictate the tax year in which the severance pay is paid out based on the timing of the execution of the severance agreement. In the event the period in which an employee has to execute a severance agreement straddles two calendar years, the agreement should provide that payments under the agreement will commence no earlier than the first day of the second year in the straddle period.

Restrictive Covenants

Non-competition/Customer Non-solicitation

In Nebraska, a non-competition provision is enforceable if (1) it is not injurious to the public, (2) it is not greater than reasonably necessary to protect the employer's legitimate interests, and (3) it is not unduly harsh and oppressive on the employee.[40] The manner in which the three-factor test is applied differs depending on if the non-competition covenant is employment-related or if it arises in connection with the sale of a business.[41] Courts are generally more willing to uphold promises to refrain from competition made in connection with the sale of a business rather than those made in connection with contracts of employment.[42]

An employer has a legitimate business interest in protecting against competition by improper and unfair means but not ordinary competition.[43] In the employment context, unfair competition is tantamount to an employee appropriating the employer's goodwill by contacting the employer's clients or customers with whom the employee actually did business and had personal contact.[44] To ensure enforceability in Nebraska, the non-competition/customer non-solicitation language should track what the Nebraska Supreme Court has repeatedly and clearly explained—that a non-competition provision "may be valid only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and has personal contact."[45] Temporal restrictions of 12 or 18 months are generally preferred, but courts in Nebraska have upheld longer temporal restrictions when justified.[46] It should be noted that Nebraska

courts will not reform, or "blue pencil," restrictive covenants as a remedy to cure unenforceable restrictive covenants.[47]

Employee Non-solicitation

The agreement may also contain a provision prohibiting solicitation of a former employer's employees, otherwise known as an anti-raid provision. Based on the dearth of case law on this topic, an anti-raid provision should track the principles set forth for non-competition covenants and customer non-solicitation provisions.[48]

Confidential Information/Trade Secrets

Confidential Information

A departing employee should covenant to treat all employer confidential information as strictly confidential. The disclosure and use restrictions should apply only to the extent necessary to protect the employer's legitimate business interests in compliance with applicable state law.[49] Additionally, the severance agreement should include a carve out permitting disclosure or use as may be required under applicable law. The confidentiality provision should further require the employee to notify the employer if permitted by law when a disclosure of confidential information will occur or has already occurred.

The definition of what constitutes employer confidential information is critical. Confidential information should be sufficiently defined to cover information that requires protection, which is fairly broad in and of itself, but should not be overbroad. Confidential information should also be defined to include any form in which such information may be disclosed. Furthermore, confidential information should include information that is marked confidential, information that a reasonable person would consider confidential based on the precautions the employer uses in transmitting the information, and information that a reasonable person would consider confidential based on the nature of the information itself. The drafter should also identify specific types of information that do not constitute confidential information.[50] The requirement for keeping information confidential can be in place for the duration of the useful life of such information.[51]

Trade Secrets

An employer should protect its trade secret information under both state and federal law. Nebraska has adopted the Nebraska Trade Secrets Act ("NTSA").[52] In 2016, the federal government passed the Defend Trade Secrets Act ("DTSA").[53] Generally, trade secrets are afforded more protection than confidential information.[54] The term trade secrets should be included in the definition of confidential information to ensure protection.

Under the NTSA, a trade secret is a drawing, formula, pattern, compilation, program, device, method, technique, code, or process that (1) derives actual or potential independent economic value because it is not ascertainable by proper means by persons who can obtain economic value from its disclosure and it is not known and (2) is the subject of reasonable efforts to maintain its secrecy.[55] Examples of trade secrets under the NTSA include customer lists,[56] architectural plans,[57] and recipes.[58] An employer's remedy for actual or threatened misappropriation of trade secrets under the NTSA is injunctive relief and possible damages.[59]

The DTSA defines a trade secret as financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes if (1) the owner has taken reasonable measures to keep such information secret; and (2) the information derives independent economic value from not being generally known to, and not being readily ascertainable through, proper means by another who can obtain economic value from the disclosure or use of the information.[60] The DTSA provides for criminal and civil immunity to individuals who disclose trade secrets to governmental authorities, or an attorney, for a suspected violation of law.[61] Employers are required to provide a notice of the immunity described above to employees if any contract or agreement governs the use of a trade secret or other confidential information.[62] Although the immunity notice is technically required, the consequence of not providing the notice is that an employer may not be awarded exemplary damages or attorney's fees pursuant to an action for misappropriation of trade secrets.[63]

Inevitable Disclosure

A final note under the topic of confidential information and trade secrets is consideration of the inevitable disclosure doctrine. That doctrine provides that an individual may be unable to assume a new role with a prospective employer based on that individual's inevitable disclosure of, use of, or reliance on, a former employer's confidential information.[64] The doctrine has not been formally adopted in every jurisdiction and Nebraska is one of the states that has yet to formally adopt it.[65]

Miscellaneous

Severance Pay Plans

Severance arrangements may be governed by the Employee Retirement Income Security Act ("ERISA") in some circumstances.[66] Generally, ERISA applies to severance arrangements when a plan, fund, or program is established by an employer with an ongoing administrative scheme to facilitate the severance arrangement.[67] Advisors and employers should consider whether a severance plan or arrangement is subject to ERISA. A failure to realize or understand a severance arrangement is subject to ERISA exposes an employer to risk because of the

obligations required pursuant to ERISA. If ERISA applies to a severance agreement, the obligations under ERISA will differ depending on whether the severance pay plan is considered a welfare benefit plan or a pension benefit plan.[68] Nonetheless, creating a severance pay plan that is subject to ERISA may provide desirable tools; for example, ERISA preempts state law in the event litigation arises, federal judges will decide legal issues, and the claims procedures in the plan would apply to adverse benefit determinations, among other potential benefits.[69]

Cooperation

An employer may require a former employee to cooperate in certain activities after the conclusion of his or her employment. Cooperation clauses are important especially as they relate to key employees who may need to lend certain services for transitioning employees, provide advice during significant events, or provide certain information under legal proceedings.

References

A former employee will likely be concerned about what a former employer will communicate to the former employee's prospective employer. This provision should provide that the former employer will only provide certain information to an employee's prospective employer, such as dates of employment and the employee's title. Additionally, the employer may consider drafting and negotiating a "to whom it may concern" letter that the employer will provide to any prospective employers of the departing employee, the contents of which are agreed upon in advance by the employer and departing employee.

Future Employment/Re-Hire

An added protection for employers is to include a future employment or re-hire provision. Such a provision is an employee waiver for future employment whereby the employee cannot reapply for any positions with the employer after termination and the employer does not have a duty to rehire the former employee. This clause is designed to avoid future retaliation or discrimination claims by former employees who reapply and are not hired. It appears jurisdictions generally approve of future employment waiver provisions in severance agreements.[70]

Remedies

In the event of threatened or actual breach of the severance agreement, the employer will need to rely on its remedies under the agreement. The agreement should provide for any damages and actions the employer may pursue in the event of breach.

As a general rule, a former employer is permitted to recover damages as a result of a former employee's breach of a non-competition agreement, including gains prevented and losses incurred, provided they are reasonably certain and expected to follow from the breach.[71] Injunctive relief is an available remedy to prohibit future conduct. An employer could also rely on a liquidated damages provision.[72] In Nebraska, issues may arise under a severance agreement if an employer pursues both liquidated damages and injunctive relief. For example, the Nebraska Court of Appeals provided, "[i]t therefore seems clear that [plaintiff] may have the benefit of the $50,000 judgment for liquidated damages [as a result of defendant's breach] or the injunction requiring [defendant] to comply with the restrictive covenant, but not both, and that [plaintiff] shall have 30 days to elect which relief he wishes."[73]

Finally, in Nebraska, a provision addressing the recovery of attorney's fees is unenforceable as void against public policy because attorney's fees are recoverable only when authorized by statute or under a recognized and accepted uniform course of procedure.[74] The same rule applies even in the event a non-competition agreement provides for the recovery of attorney's fees.[75] However, other jurisdictions may allow for recovery of attorney fees.[76] Moreover, if the proper notice of immunity under the DTSA is included in the severance agreement, as provided above, an employer may be able to collect attorney's fees under the DTSA for trade secret misappropriation.

Conclusion

This discussion is intended to provide an explanation for certain fundamental provisions as well as often overlooked issues surrounding severance agreements and the employment relationship. The provisions discussed in this article are not exhaustive. A severance agreement may require additional substantive provisions not outlined in this article. Each situation is different, and as a result, each situation must be assessed to determine which appropriate provisions to include in a severance agreement.

Endnotes

1 29 U.S.C. §§ 621, 623, 626, 630.

2 29 U.S.C. §§ 621-634.

3 29 U.S.C. § 631(a).

4 29 U.S.C. § 626(f); 29 C.F.R. § 1625.22(a)(2).

5 Pursuant to the OWBPA, the following requirements must be satisfied: (1) the release is part of a written agreement that is calculated to be understood by an average individual; (2) the release specifically refers to rights or claims under the ADEA; (3) the employee does not release claims that may arise after the execution of the severance agreement; (4) the employee releases rights or claims only in exchange for consideration in addition to what the employee is already entitled to receive; (5) the employee is advised in writing to consult an attorney; (6) the employee is either: (i) provided at least 21 days to consider the agreement, or (ii) provided at least 45 days to consider the agreement if the release is requested in connection with an exit incentive or other termination program offered to a group or class of employees; (7) the agreement provides for a seven day revocation period after execution; and (8) if the release is requested for an exit incentive or other termination program offered to a group or class of employees, the employer must inform the employee about: (i) any class or group of employees covered by the program, eligibility factors, and the time limits for such program, and (ii) the job titles and ages of those eligible or selected for the program, and the ages of all employees in the same

job classification or unit who are not eligible or selected for the program. 29 U.S.C. § 626(f)(1)(A)-(H)(ii).

[6] *Foster v. Mountain Coal Co., LLC*, 61 F. Supp. 3d 993, 1002 (D. Colo. 2014) (explaining that although Mountain Coal Company, LLC was not in strict compliance with the OWBPA, it substantially complied with the law's requirements and thus the waiver was enforceable).

[7] *Fratea v. Unitrends, Inc.*, No. SUCV2016-31822, 2017 WL 7362341, at *2 (Mass. Super. Ct. Dec. 15, 2017) (explaining that "an employment termination agreement that includes a general release will be enforceable as to [Massachusetts] Wage Act claims 'only if such an agreement is stated in clear and unmistakable terms.' That is, 'the release must be plainly worded and understandable to the average individual, and it must specifically refer to the rights and claims under the [Massachusetts] Wage Act that the employee is waiving.'").

[8] *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 713 (1945) (explaining that an employee cannot waive his or her right to liquidated damages under the FLSA); *Beauford v. ActionLink, LLC*, 781 F.3d 396, 405-06 (8th Cir. 2015) (explaining that the statement "[b]y cashing this check, the employee to whom is made [sic] is agreeing that he or she has received full payment from Actinlink [sic] or [sic] wages earned, including minimum wage and overtime, up to the date of the check" was insufficient as a release, partly because the DOL did not approve the language and the DOL approved the settlement amounts after they were distributed); *Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352-53 (11th Cir. 1982) (concluding that a settlement with employees was not approved by a court or supervised by the DOL and thus was invalid); *Cheeks v. Freeport Pancake House, Inc.*, 796 F.3d 199, 206 (2d Cir. 2015) (requiring settlement agreements under the FLSA that occur while in litigation must be approved by a court or the DOL). *But see Martin v. Spring Break '83 Prods., LLC*, 688 F.3d 247, 255 (5th Cir. 2012) (noting that the United States Court of Appeals for the Fifth Circuit adopted the holding and logic from the United States District Court for the Western District of Texas that "a private compromise of claims under the FLSA is permissible where there exists a bona fide dispute as to liability"); *Gaughan v. Rubenstein*, 261 F. Supp. 3d 390, 402 (S.D.N.Y. 2017) (following *Martin* and reasoning that an enforceable FLSA settlement was entered into outside the context of litigation).

[9] *Johnson v. Thomson Reuters*, No. 18-CV-0070, 2019 WL 1254565, at *2 n.1 (D. Minn. March 19, 2019) (explaining that "[i]t is not entirely clear whether court approval is necessary . . ." to approve an FLSA settlement agreement, relying primarily on case law within the United States Court of Appeals for the Eighth Circuit, but also outside the Eighth Circuit).

[10] 29 C.F.R. § 825.220(d) (2014).

[11] *Id*. (providing that "[e]mployees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot trade off the right to take FMLA leave against some other benefit offered by the employer.").

[12] *Miller v. RK Grocers, LLC*, 170 F. Supp. 3d 973, 976 (E.D. Mich. 2016) (concluding that "that the proper focus is on the timing of the conduct allegedly denying or interfering with FMLA rights relative to the execution of any release. On this issue, [defendant] has the better argument, because the conduct that actually gave rise to the alleged FMLA violation occurred, at the latest, when Plaintiff was presented with and signed the separation agreement.").

[13] *Paylor v. Hartford Fire Ins. Co.*, 748 F.3d 1117, 1124 (11th Cir. 2014).

[14] 29 U.S.C. § 626(f)(4); 29 C.F.R. § 1625.22(i)(1)-(3).

[15] *U-Haul Co. of Cal.*, 347 N.L.R.B. 375, 377-78 (2006) (discussing that employees cannot waive their right to file an unfair labor practice charge under the NLRA or otherwise assist or access the NLRB's processes); *In Re Resco Prods*., 331 N.L.R.B. 1546, 1547-48 (2000) (providing that an employer violates the NLRA when it solicits or requires employees to waive rights under a collective bargaining agreement without the union's knowledge or consent).

[16] Neb. Rev. Stat. § 48-645(1).

[17] *Mays v. Midnite Dreams, Inc.*, 915 N.W.2d 71, 81-82 (Neb. 2018).

[18] Neb. Rev. Stat. § 48-131. However, in Nebraska, certain workers' compensation claims may be settled provided certain procedures are followed. Neb. Rev. Stat. §§ 48-136 – 48-147.

[19] Neb. Rev. Stat. § 48-3504.

[20] *Babb v. United Food and Commerical Workers Dist. Union, Local 271*, 448 N.W.2d 168, 172 (Neb. 1989) (citing *Heimbouch v. Victorio Ins. Serv., Inc.*, 369 N.W.2d 620, 624 (Neb. 1985)); *Eikmeier v. City of Omaha*, 783 N.W.2d 795, 798-99 (Neb. 2010).

[21] 572 U.S. 141 (2014).

[22] *Compare CSX Corp. v. United States*, 518 F.3d 1328, 1352 (Fed. Cir. 2008) (holding severance payments were wages for FICA tax purposes); *Mayberry v. United States*, 151 F.3d 855, 860-61 (8th Cir. 1998) (holding that settlement award to laid off employee was subject to FICA taxes); *Hemelt v. United States*, 122 F.3d 204, 210 (4th Cir. 1997) (finding that settlement amounts were wages rather than tort-based awards), *with In re Quality Stores, Inc.*, 693 F.3d 605, 616 (6th Cir. 2012) (holding that severance payments to terminated employees were not subject to FICA taxes), *rev'd sub nom. United States v. Quality Stores*, 572 U.S. 141 (2014).

[23] *Quality Stores, Inc.*, 572 U.S. at 156. *Contra* Rev. Rul 56-249; Rev. Rul. 90-72 (explaining that severance pay that is tied to, supplements, or is linked to state unemployment benefits is exempt from federal income tax withholding, FICA tax, and FUTA tax).

[24] Treas. Reg. § 31.3401(a)-1(b)(4); I.R.S. Chief Counsel Advisory 201020018 (May 10, 2010); I.R.S. Chief Counsel Letter 2013-0023 (May 31, 2013).

[25] Neb. Rev. Stat. § 77-2753(a)(1); 316 NEB ADMIN. CODE § 21-001.02; 316 NEB ADMIN. CODE § 21-002.11D.

[26] IRC § 409A(a)(1)(A)(i).

[27] A plan provides for the deferral of compensation if the service provider (i.e., employee) has a legally binding right during a taxable year to compensation that is or may be payable to the employee in a later taxable year. Treas. Reg. § 1.409A-1(b)(1).

[28] IRC § 409A(a)(2)-(4).

[29] IRC § 409A(a)(1)(A).

[30] IRC § 409A(a)(1)(B).

[31] Treas. Reg. § 1.409A-1(b)(1).

[32] Treas. Reg. § 1.409A-1(b)(9)(iii).

[33] An involuntary separation from service is generally defined as a separation from service due to the independent exercise of the unilateral authority of the employer to terminate the employee's service where the employee was willing and able to continue performing services. Treas. Reg. § 1.409A-1(n).

[34] A window program is an arrangement established in connection with an impending separation from service to provide separation pay made available for a limited period of time (not longer than one (1) year) to employees who separate from service during that time under certain circumstances. Treas. Reg. § 1.409A-1(b)(9)(vi).

[35] Treas. Reg. § 1.409A-1(b)(9)(iii)(A)-(B).

[36] Treas. Reg. § 1.409A-1(b)(4).

[37] Compensation is subject to a substantial risk of forfeiture if the possibility of forfeiture is substantial and entitlement to the compensation is conditioned on either (i) the performance of substantial future services or (ii) the occurrence of a condition related to a purpose of the compensation. Treas. Reg. § 1.409A-1(d)(1). For purposes of this article, "if a service provider's entitlement to the amount is conditioned on the occurrence of the service provider's involuntary separation from service without cause, the right is subject to a substantial risk of forfeiture if the possibility of forfeiture is substantial." Id. Conversely, a non-competition restrictive covenant in a severance agreement does

not constitute a substantial risk of forfeiture for purposes of Code Section 409A. Id.

[38] Treas. Reg. § 1.409A-1(b)(4)(i).

[39] I.R.S. Notice 2010-6 Section VI(C) Example 4, as modified by I.R.S. Notice 2010-80 Section III(D) Example 5.

[40] *C & L Indus., Inc. v. Kiviranta*, 698 N.W.2d 240, 247 (Neb. Ct. App. 2005) (*citing Prof. Bus. Servs. v. Rosno*, 680 N.W.2d 176, 184 (Neb. 2004)).

[41] *H & R Block Tax Servs., Inc. v. Circle A Enters., Inc.*, 693 N.W.2d 548, 553-54 (Neb. 2005) (discussing the distinction between noncompetition agreements in the employment context versus the sale of a business context).

[42] *CAE Vanguard, Inc. v. Newman*, 518 N.W.2d 652, 655 (Neb. 1994).

[43] *Rosno*, 680 N.W.2d at 185.

[44] *Id*.

[45] *Kiviranta*, 698 N.W.2d at 248 (citing *Rosno*, 680 N.W.2d at 181; *Mertz v. Pharmacists Mut. Ins. Co.*, 625 N.W.2d 197, 205 (Neb. 2001); *Moore v. Eggers Consulting Co.*, 562 N.W.2d 534, 540 (Neb. 1997), *superseded by statute on other grounds*, Neb. Rev. Stat. § 49-1229(4), *as recognized in Coffey v. Planet Grp., Inc.*, 845 N.W.2d 255, 261 (Neb. 2014) *and Prof'l Firefighters Ass'n of Omaha v. City of Omaha*, 860 N.W.2d 137, 142 n.11 (Neb. 2015); *Whitten v. Malcolm*, 541 N.W2d 45, 48 (1995); *Vlasin v. Len Johnson & Co., Inc.*, 455 N.W.2d 772, 776 (Neb. 1990); *Polly v. Ray D. Hilderman & Co.*, 407 N.W.2d 751, 754-55 (Neb. 1987)). *See also Farm Credit Servs. of Am., FLCA v. Mens*, No. 8:19-CV-14, 2020 WL 3448245, at *6 (D. Neb. April 21, 2020); *Kistco Co. v. Patriot Crane and Rigging, LLC*, No. 8:19-CV-482, 2019 WL 6037416, at *6 (D. Neb. Nov. 14, 2019); *Gaver v. Schneider's O.K. Tire Co.*, 856 N.W.2d 121, 128 (Neb. 2014). Such specific language is meant to further the policy that an employer has a legitimate interest in protection against a former employee's competition by improper and unfair means, but not ordinary competition. *Mertz*, 625 N.W.2d at 204.

[46] *Farmers Underwriters Ass'n v. Eckel*, 177 N.W.2d 274, 277 (Neb. 1970) (upholding a one (1) year restriction period); *Brewer v. Tracy*, 253 N.W.2d 319, 321-22 (Neb. 1977) (affirming a finding that five (5) year limitations period was unenforceable); *Chambers-Dobson, Inc. v. Squier*, 472 N.W.2d 391, 402 (Neb. 1991) (enforcing a two (2) year noncompetition covenant); *Am. Sec. Servs., Inc v. Vodra*, 385 N.W.2d 73, 81 (Neb. 1986) (finding a three (3) year time restriction was enforceable); *Presto-X-Co. v. Beller*, 568 N.W.2d 235, 240 (Neb. 1997) (explaining that a ten (10) year duration on restraint of competition in unenforceable).

[47] *Gaver*, 856 N.W.2d at 134; *Vlasin*, 455 N.W.2d at 774; *CAE Vanguard*, 518 N.W.2d at 665; *H & R Block Tax Servs. Inc.*, 693 N.W.2d at 553.

[48] *Woodmen of the World Life Ins. Soc'y v. Weathersbee*, No. 8:16-CV-498, 2017 WL 3128804, at *2 (D. Neb. July 21, 2017) ("The Nebraska Supreme Court has not yet considered the enforceability of a non-recruitment clause. But this restriction shares a similar purpose with more commonplace covenants not to compete and other provisions partially restraining trade–namely, to prevent [defendants] from soliciting the employment of Woodmen personnel on behalf of a direct competitor. As such, the Court looks to Nebraska's three-part test for determining the provision's validity").

[49] *Farmers Edge Inc. v. Farmobile, LLC*, No. 8:16CV191, 2018 WL 2869005, at *8 (D. Neb. May 3, 2018) (discussing the unenforceability of a confidentiality clause based on the fact that the confidentiality clause covered information regarding virtually every aspect of the business, which impermissibly limits the employees' ability to use their skills after leaving the employ of their former employer); *GPS Indus., LLC v. Lewis*, 691 F. Supp. 2d 1327, 1335 (M.D. Fla. 2010) (finding that plaintiff sought to impermissibly restrict the defendant by requesting the enforcement of provisions that protect information generally known and readily accessible to third parties); *Friemuth v. Fiskars Brands, Inc.*, 681 F. Supp. 2d 985, 991 (W.D. Wis. 2010) (dismissing suit and finding that nondisclosure provisions are unenforceable because they lack time limitation required under state law); *Fister Cable Servs., Inc. v. Deville*, 368 F. Supp. 3d 1265, 1274 (W.D. Ark. 2019) (explaining that the confidentiality agreement is unenforceable under Arkansas state law because "the Agreement [was] not reasonably drawn, as it not only bars Defendant Deville from disclosing any trade secrets learned during his employment, but also prevents him from disclosing any information, including his experience and knowledge gained during that time" (emphasis omitted)). Excessive use or disclosure restrictions, for example, could implicate issues under the Financial Industry Regulatory Authority. For example, confidentiality provisions should explicitly permit an employee to communicate with government regulators such as the Security and Exchange Commission ("SEC"). FINRA Notice 14-40, 2014 WL 5107133 (Oct. 9, 2914) (explaining a violation of FINA Rule 2010 occurs when a firm includes a confidentiality provision in any document that restricts any person from communicating with the SEC, FINRA, or any federal or state regulatory authority regarding potential violations of securities laws). Additionally, issues could arise under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Dodd-Frank, among other things, prohibits stopping an individual from discussing a possible securities law violation with the SEC, which includes enforcement of a confidentiality agreement. 17 C.F.R. § 240.21F-17.

[50] For example, exceptions may include: (1) information that is or becomes public knowledge, (2) information independently developed by the former employee without use of, or reference to, any confidential information, (3) information that the employee obtains that was disclosed by a third party without any disclosure or use restriction attached, (4) information required to be disclosed by law, or (5) information that the employer and employee agree is not confidential.

[51] *Brockley v. Lozier Corp.*, 488 N.W.2d 556, 564 (Neb. 1992).

[52] Nebraska Trade Secrets Act of 1988, Neb. Rev. Stat. §§ 87-501 – 87-507.

[53] The Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (codified as amended in scattered sections of 18 U.S.C.).

[54] Collings, Jessie & Hammell, Joseph, PRACTICAL LAW THE JOURNAL, *Protection of Employers' Trade Secrets and Confidential Information* 50 (September 2010), available at http://files.dorsey.com/files/upload/tradesecretsconfidential.pdf.

[55] Neb. Rev. Stat. § 87-502(4).

[56] *Home Pride Foods, Inc. v. Johnson*, 634 N.W.2d 774, 780-82 (Neb. 2001); *Radiology Servs., P.C. v. Hall*, 780 N.W.2d 17, 26-27 (Neb. 2010).

[57] *Richdale Dev. Co. v. McNeil Co., Inc.*, 508 N.W.2d 853, 859-60 (Neb. 1993).

[58] *Magistro v. J. Lou, Inc.*, 703 N.W.2d 887, 890-91 (Neb. 2005).

[59] Neb. Rev. Stat. § 87-503(1). A complainant is also entitled to recover damages for misappropriation that includes actual loss caused by the misappropriation and unjust enrichment caused by the misappropriation that is not taken into account in computing the actual loss. Neb. Rev. Stat. § 87-503(1).

[60] 18 U.S.C. § 1836(3).

[61] 18 U.S.C. § 1833(b)(1)-(2).

[62] 18 U.S.C. § 1833(b)(3).

[63] 18 U.S.C. § 1833(b)(3)(C).

[64] *PepsiCo, Inc., v. Redmond*, 54 F.3d 1262, 1269 (7th Cir. 1995); *Interbake Foods, LLC v. Tomasiello*, 461 F. Supp. 2d 943, 970 (N.D. Iowa 2006).

[65] *LeJeune v. Coin Acceptors, Inc.*, 849 A.2d 451, 471 (Md. 2004) (holding that the doctrine of inevitable disclosure does not apply in Maryland); *Del Monte Fresh Produce Co. v. Dole Food Co., Inc.*, 148 F. Supp. 2d 1326, 1337 (S.D. Fla. 2001) (explaining that an employer cannot use the doctrine of inevitable disclosure to enjoin an employee from working for an employer of his

choice); *Computer Sci. Corp. v. Computer Assoc. Int'l, Inc.*, No. CV 98-1374-WMB SHX, 1999 WL 675446, at *16 (C.D. Cal. Aug. 12, 1999) (stating that California has rejected the inevitable disclosure doctrine). *But See Merck & Co. Inc. v. Lyon*, 941 F. Supp. 1443, 1458 (M.D.N.C 1996) (enjoining a former employee from working with a prospective employer based on the inevitable disclosure doctrine); *DoubleClick Inc. v. Henderson*, No. 116914/97, 1997 WL 731413, at *5-6 (N.Y. Sup. Ct. Nov. 7, 1997) (granting injunction under inevitable disclosure doctrine against two former employees).

[66] 29 U.S.C. § 1002(a); 29 U.S.C. § 186(c); *see Kolkowski v. Goodrich Corp.*, 448 F.3d 843, 848 (6th Cir. 2006) (analyzing whether a severance pay plan is a an ERISA welfare benefit plan by examining whether there is "an ongoing administrative program to meet the employer's obligation") (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 11 (1987)); *but see Dakota, Minnesota & Eastern Railroad Corp. v. Schieffer*, 648 F.3d 935, 938 (8th Cir. 2011) (explaining that an individual agreement providing severance benefits to a single executive is not an ERISA employee welfare benefit plan).

[67] *Emmenegger v. Bull Moose Tube Co.*, 197 F.3d 929, 934 (8th Cir. 1999) (explaining that "ERISA will be implicated, then, only if the benefits involved are administered according to a plan of some sort. In other words, ERISA regulates only those 'benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation'") (quoting *Fort Halifax*, 482 U.S. at 11).

[68] S*chonholz v. Long Island Jewish Med. Ctr.*, 87 F.3d 72, 76-77 (2d Cir. 1996) (finding that Long Island Jewish Medical Center's severance pay plan was an ERISA welfare benefit plan); *Zgrablich v. Cardone Indus., Inc.*, 2016 WL 427360, at *6 (E.D. Pa. Feb. 3, 2016) (finding that an employment agreement providing severance to one employee is an ERISA governed pension benefit plan). Severance plans that are considered welfare benefit plans are exempt from ERISA's participation, vesting, and funding rules. Severance plans that are considered pension benefit plans are subject to ERISA's labor provisions such as participation, vesting, funding, and fiduciary rules. However, a severance pay plan will not be considered a pension plan solely by reason of payment of severance benefits based on termination of an employee's service provided that (1) the payments are not contingent upon the employee's retiring, (2) the total payments do not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service, and (3) all payments are completed (i) in the case of an employee whose service is terminated in connection with a limited program of terminations, within the later of 24 months after the termination of the employee's service, or 24 months after the employee reaches normal retirement age and (ii) in the case of all other employees, within 24 months after the termination of the employee's service. 29 C.F.R. § 2510.3-2(b)(1).

[69] *Gomez v. Ericsson, Inc.*, 828 F.3d 367, 374 (5th Cir. 2016).

[70] *Jencks v. Modern Woodmen of Am.*, 479 F.3d 1261, 1266-67 (10th Cir. 2007) (explaining that reliance on a no-hire provision in a settlement agreement can serve as a legitimate, nondiscriminatory reason for an employer to not hire a former employee allegedly in violation of Title VII); *Salerno v. City Univ. of N.Y.*, No. 99 Civ. 11151(NRB), 2005 WL 578944, at *3 (S.D.N.Y. Mar. 10, 2005) (incorporating into the settlement judgment the no re-hire provision from the settlement agreement); *Robertson v. Ther-Rx Corp.*, No. 2:09cv1010-MHT (WO), 2011 WL 1810193, at *2 (M.D. Ala. May 12, 2011) (finding a no-hire provision inconsequential and not retaliatory); *Cruz v. Winter Garden Realty, LLC*, No. 6:12-cv-1098-Orl-22KRS, 2013 WL 4774617, at *3 (M.D. Fla. Sept. 4, 2013) (explaining that a settlement agreement waiving FLSA claims is fair despite the fact the plaintiff is waiving her right to future employment). *But See* Cal. Code of Civ. Pro. § 1002.5(a)-(b) (providing that an agreement to settle an employment dispute shall not contain a no re-hire provision; provided, however, an employer and an aggrieved party may (1) agree to end a current employment relationship or (2) prohibit or restrict the settling aggrieved party from obtaining future employment with the settling employer, if the employer has made a good faith determination that the person engaged in sexual harassment or sexual assault).

[71] *Quad-States, Inc. v. Vande Mheen*, 368 N.W.2d 795, 797 (Neb. 1985).

[72] A liquidated damages provision should represent a reasonable relationship to any anticipated actual damages as a result of a breach. Additionally, liquidated damages clause must not be a considered a penalty. *See e.g., Wichita Clinic, P.A. v. Louis*, 185 P.3d 946, 956-57 (Kan. Ct. App. 2008) (enforcing liquidated damages clause in a non-compete); *H&R Block Enters., Inc. v. Short*, No. Civ.06-608(JNE/JJG), 2006 WL 3437491, at * (D. Minn. Nov. 29, 2006) (finding that, under Missouri law, the employer is entitled to both injunctive relief and liquidated damages as a result of an ex-employee breaching employment agreement that contained a restrictive covenant) (citing *Home Shopping Club, Inc. v. Roberts Broad. Co.*, 989 S.W.2d 174, 180 (Mo. Ct. App. 1998).

[73] *Blankenau v. Kern*, No. A-98-610, 1999 WL 759977, at *12 (Neb. Ct. App. Sep. 12, 1999)

[74] *First Nat'l Bank v. Schroeder*, 355 N.W.2d 780, 783 (Neb. 1984); Q*uinn v. Godfather's Invs.*, 348 N.W.2d 893, 894 (Neb. 1984).

[75] *Chambers-Dobson*, 472 N.W.2d at 402.

[76] *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 363-64 (Minn. 1998) (finding that plaintiff successfully asserted that defendant tortiously interfered with an enforceable non-compete and awarded attorney fees); *Ales v. Anderson, Gableman, Lower & Whitlow, P.C.*, 728 N.W.2d 832, 843 (Iowa 2007) (explaining that non-compete agreement that provided for collection of attorney's fees against breaching party was enforceable); *Idheis v. Wichita Surgical Specialists, P.A.*, 173 P.3d 642, 652 (Kan. 2007) (explaining that in the context of enforcing a restrictive covenant agreement "[attorney's] fees are strictly limited to those incurred in the removal of that temporary restraint – the dissolution of the temporary injunction – and are not intended to cover fees incurred in determining all of the claims and counterclaims asserted by the parties").