

LEGAL ISSUES IN DRAFTING AND ENFORCING
KEY EMPLOYEE CONTRACTS

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I. INTRODUCTION

This chapter covers the key elements of express employment contracts for individual employees. The chapter discusses the typical terms of employment contracts, in the approximate sequence that these terms would appear in a written employment agreement. Only a small percentage of nonunion employees have written employment contracts. But employees with written contracts typically include an organization's key employees: high-ranking executives; highly compensated professionals such as physicians; sales personnel; and others with confidential business or technical information who are subject to post-employment contractual restrictions.

The formation of an employment contract (like any other contract) requires (1) a mutual manifestation of an intention to be bound; (2) terms sufficiently definite to be enforced; and (3) consideration. *Kirleis v. Dickie, McCamey & Chilcote*, 560 F.3d 156, 160 (3d Cir. 2009). As in any contract, there must be an "intended, definite, specific offer before any offer can be accepted or any enforceable contract created." *Morosetti v. Louisiana Land & Exploration Co.*, 522 Pa. 492, 564 A.2d 151 (1989). An outline of the terms of employment, stating that execution of a formal contract would be necessary before the employer would be bound, does *not* constitute a contract of employment. *Fetter v. North American Alcohols, Inc.*, 2008 WL 5187877 (E.D. Pa. Dec. 10, 2008). Acceptance of the offer must be absolute and identical with the terms of the offer. *Stankiewicz v. Cisco Systems, Inc.*, 2009 WL 3152168 (E.D. Pa. Sept. 30, 2009).

Pennsylvania law does not require an employment contract to be in writing. The Pennsylvania Statute of Frauds, 33 P.S. § 1, does not prohibit oral employment contracts. Therefore, this chapter is relevant to oral employment contracts as well. One central issue in employment contracts is the duration of employment tenure. On this central issue, courts in Pennsylvania have not hesitated to enforce oral contracts of employment for a fixed period. *See, e.g., Scully v. U.S. Wats, Inc.*, 1999 WL 391495 (E.D. Pa.), *amended by* 1999 WL 592695 (E.D. Pa.), *affirmed in part, reversed in part*, 238 F.3d 497 (3d Cir. 2001); *DuSesoi v. United Oil Refining Co.*, 540 F.Supp. 1260 (E.D. Pa. 1982); *Browne v. Maxfield*, 663 F.Supp. 1193 (E.D. Pa. 1987). An oral contract for employment for a particular duration is enforceable if the contract's existence and length can be established by "clear and precise" evidence. *See, e.g., Scully v. U.S. Wats, Inc.*, 238 F.3d 497, 505 (3d Cir. 2001); *Greene v. Oliver Realty, Inc.*, 363 Pa. Super. 534, 526 A.2d 1192 (1987), *appeal denied*, 517 Pa. 607, 536 A.2d 1331 (1987); *Gorwara v. AEL Industries, Inc.*, 784 F.Supp. 239 (E.D. Pa. 1992); *Strategic Staffing Group, Inc. v. Friedell*, 2006 WL 2668576 (E.D. Pa. Sept. 14, 2006). Some cases hold that only a preponderance of the evidence is necessary to establish a contract for a definite length, thereby overcoming the employment at will presumption. *Robertson v. Atlantic Richfield Petroleum*, 371 Pa. Super. 49, 60, 537 A.2d 814, 820 (1987), *appeal denied*, 520 Pa. 590, 551 A.2d 216 (1987); *Pinnizzotto v. Parsons Brinkerhoff Quade and Douglas, Inc.*, 697 F.Supp. 886 (E.D. Pa. 1988), *affirmed*, 872 F.2d 413 (3d Cir. 1989). Since oral employment contracts are enforceable, employers who wish to disclaim any agreement to hire an employee for a fixed term should reaffirm the at-will nature of any employment relationship, in as many ways and on as frequent a basis as is practicable.

Even an at-will employment relationship is contractual. The at-will employment relationship differs from the contract for a specific duration, in that either party may terminate the employment relationship at any time, for any reason, or no reason. *See, e.g., Lubrecht v. Laurel Stripping Company*, 387 Pa. 386, 127 A.2d 687 (1956); *Gruenwald v. Advanced Computer Applications, Inc.*, 730 A.2d 1004 (Pa. Super. 1999); *Luteran v. Loral Fairchild Corp.*, 688 A.2d 211 (Pa. Super. 1997), *appeal denied*, 549 Pa. 717, 701 A.2d 578 (1997). By contract, a contract of definite duration cannot be terminated before the contract expiration date, except upon just cause or under the terms of the contract (*Janis v. AMP, Inc.*, 856 A.2d 140 (Pa. Super. 2004), *appeal denied*, 583 Pa. 663, 875 A.2d 1075 (2005); *Schechter v. Watkins*, 395 Pa. Super. 363, 577 A.2d 585 (1990), *appeal denied*, 526 Pa. 538, 584 A.2d 320 (1990)).

A written employment contract that sets a fixed term of employment or limits the employer's grounds for discharge deprives employers of important leverage with employees. This loss of flexibility is an important concession, particularly in difficult economic times. However, there are also benefits to the employer from a written contract. A written contract can give the employer greater certainty in dealing with the employee, particularly through post-employment restrictions on the employee's conduct. In addition, the employer acquires greater certainty that the employee will not be able to use non-contractual theories to challenge a termination. For example, the existence of a written employment contract for a fixed term will limit an ex-employee's ability to bring the following discharge-related claims:

- (a) Claims for wrongful discharge for violation of public policy. *See, e.g., Edie v. Thomas Jefferson University*, 2004 WL 2600639 (E.D. Pa. Nov. 15, 2004); *Smith v. Greyhound Bus Lines*, 614 F.Supp. 558 (W.D. Pa. 1984), *affirmed*, 800 F.2d 1139 (3d Cir. 1986).
- (b) Implied or quasi contractual claims. *See Galdieri v. The Monsanto Company*, 245 F.Supp.2d 636 (E.D. Pa. 2002); *Carlson v. Arnot-Ogden Medical Hospital*, 918 F.2d 411 (3d Cir. 1990); *Rho v. Vanguard Ob/Gyn Associates, P.C.*, 1999 WL 228993 (E.D. Pa. April 15, 1999).
- (c) Tort claims, because of the "gist of the action" doctrine. *See Galdieri v. The Monsanto Company, supra*.

A number of documents that are ancillary to the employer-employee relationship may have the force and effect of a contract, even if the underlying employment is at will. These documents include compensation agreements (*see, e.g., Bootel v. Verizon Directories Corp.*, 2004 WL 1535798 (E.D. Pa. June 25, 2004)) and "last chance" agreements for non-performing employees (*Follweiler v. Brush Wellman, Inc.*, 2004 WL 1920781 (E.D. Pa. Aug. 20, 2004)). However, before a handbook can give rise to a contractual obligation, an employee must show that the employer intended to offer the handbook as a binding contract. *Compare Jamison v. Campbell Chain Cooper Tool*, 2008 WL 857526, *4 (M.D. Pa. March 27, 2008) (employee could conclude contract existed; denying motion to dismiss) *and Kane v. Cook Brothers Companies, Inc.*, 2009 WL 179728, *3-4 (E.D. Pa. Jan. 23, 2009).

Ambiguous terms in an employment contract are to be construed against the drafter. *Stineback v. Cutrona*, 2008 WL 859240 (E.D. Pa. March 28, 2008); *Doyle Consulting Group, Inc. v. Stoffel*, 2004 WL 362316 (C.P. Philadelphia 2004), *affirmed w/o opinion*, 869 A.2d 18 (Pa. Super. 2005).

II. INTRODUCTORY LANGUAGE AND RECITALS

A. Identification of the Parties

A complete legal description of both parties is essential. The employee should be sure that a duly organized legal entity is named as the employer, rather than an individual, a trade name, or an unincorporated division of a business entity. *See Surovcik v. D&K Optical, Inc.*, 702 F.Supp. 1171 (M.D. Pa. 1988) (employment contract with individual may not be enforced against corporation).

Practical Tip: The parties to the contract should NOT be defined as “Employer” and “Employee”; use of such similar definitions only invites confusion and mischaracterization. It is far better to use a term such as “Company” to describe the employer and the employee’s last name to describe the employee.

B. Recitals

1. Authority to contract

A proper recital should describe the nature of the employer’s business and should state that the employer has the authority to enter into the contract. The issue of authority to contract is particularly important for public employers, which may have statutory or constitutional limitations on the power to enter into employment contracts, particularly if the term extends beyond the term of the existing elected officials. *See, e.g., Sacco v. Township of Butler*, 863 A.2d 611 (Pa. Cmwlth. 2004); *Bolduc v. Lower Paxton Township*, 618 A.2d 1188 (Pa. Cmwlth. 1992), *appeal denied*, 533 Pa. 662, 625 A.2d 1195 (1993). An *ultra vires* contract is not enforceable against a governmental entity. *Bolduc, supra*; *Falls Tp. v. McManamon*, 537 A.2d 946 (Pa. Cmwlth. 1988); *Wilson v. Southeastern Pennsylvania Transportation Authority*, 709 F.Supp. 623 (E.D. Pa. 1989). However, even a null and void contract may be ratified by a governing body, as where a current municipal council accepts the services of an employee whose contract with an earlier governing body was void because it bound succeeding councils. *Hess v. Borough of Blairsville*, 2009 WL 2750259, *2 (W.D. Pa. Aug. 25, 2009).

It is also essential that the individual who signs the contract on behalf of the employer have the authority to bind the employer. *See, e.g., Fetterolf v. Harcourt General, Inc.*, 2001 WL 1622196 (E.D. Pa. Dec. 18, 2001); *Welch v. Maritrans, Inc.*, 2001 WL 73112 (E.D. Pa. Jan. 25, 2001). A private employer will be held to ratify an employment agreement by accepting the

benefit of the employee's performance. *Lokay v. Lehigh Valley Cooperative Farmers, Inc.*, 342 Pa. Super. 89, 492 A.2d 405 (1983).

2. Approval

The recitals should state that the contract has been approved in the manner that is legally required in order to bind the employer. A contract with a public employer should recite compliance with statutes and ordinances and open meeting laws (*See Perry v. Tioga County*, 694 A.2d 1176 (Pa.Cmwlth. 1997)). A contract with a private employer should recite proper corporate action (*See Zitelli v. Dermatology Education & Research Foundation*, 534 Pa. 360, 633 A.2d 134 (1993)).

3. Consideration

- a. The recitals should set forth the consideration for the contract. The consideration must involve some bargained for exchange between the parties. A party's performance of an existing duty owed to the employer does not constitute consideration. *See Vitow v. Robinson*, 823 A.2d 973 (Pa. Super. 2003) (vote in favor of merger, which was shareholder's duty, was not consideration for severance contract).
- b. The Uniform Written Obligations Act, 33 P.S. § 6, provides that a contract in Pennsylvania need not be supported by consideration if the contract specifically states that the parties enter into the contract "intending to be legally bound". In *McGuire v. Schneider, Inc.*, 368 Pa. Super. 344, 534 A.2d 115 (1987), *affirmed*, 519 Pa. 439, 548 A.2d 1223 (1988), the Pennsylvania Superior Court held that consideration was not necessary to uphold an employment contract if this required "boilerplate" under the UWRA was included. *See also Connell v. Meritor Savings Bank*, 1991 WL 25715 (E.D. Pa. Feb. 27, 1991); *see also Latuszewski v. Valic Financial Advisors, Inc.*, 2007 WL 4462739 (W.D.Pa. Dec. 19, 2007) (holding that consideration is not required when UWRA boiler plate is present, but alternatively that adequate consideration was present); *but see Surgical Sales Corporation v. Paugh*, 1992 WL 70415 (E.D. Pa.); *Young Bros., Inc. v. Hatch*, 1990 WL 18903 (E.D. Pa. March 31, 1992) (UWRA "boilerplate" will not excuse the lack of consideration in a post-employment restrictive covenant).

III. EMPLOYMENT TENURE

A. Employment on Terms and Conditions in Agreement

In order to provide for tenure beyond the traditional employment at will relationship, a contract of employment must contain the employer's explicit agreement (a) to employ the individual for a definite period of time, or (b) to limit the employer's ability to discharge the employee at will. An agreement that provides for a particular effective period (e.g., one year) but does not contain a promise of employment for this period will not necessarily override the presumption of at-will employment. *See Case v. Lower Saucon Township*, 654 A.2d 57 (Pa.Cmwlth. 1995). NOTE: Courts will only uphold an implied contract for a reasonable period of time where the employee is terminated after a very brief period of employment, typically ranging from a few days to a few months. *See Clinkscales v. Children's Hospital of Philadelphia*, 2009 WL 1259104, *7 (E.D. Pa. May 7, 2009).

B. Period of Employment

1. Fixed term

- a. The duration of the employee's employment must be fixed and definite (e.g., one year, two years). *Case v. Lower Saucon Township, supra*. A "permanent" employment contract will be presumed to be an at-will contract unless the employee can show the parties' intent to contract for a reasonable period of time or to limit the employer's ability to discharge the employee. *See Mayerson v. Washington Manufacturing Co.*, 58 F.R.D. 377 (E.D. Pa. 1972).
- b. Employment of an individual for the duration of a particular event or project does not constitute a fixed and definite term. Therefore, employments for the "run of the tour" for a traveling show (*Rapagnani v. Judas Co.*, 736 A.2d 666 (Pa.Super. 1999)); for the length of a marketing program (*Chadwick v. Capital Advisors*, 1992 WL 121616 (E.D. Pa. May 26, 1992)); for the length of a visa (*Woods v. ERA Med LLC*, ___ F.Supp.2d ___, 2010 WL 94566 (E.D. Pa. Jan. 7, 2010)); or for a specified construction project (*Schleig v. Communication Satellite Co.*, 698 F.Supp. 1241 (M.D. Pa. 1988)) do not override the at-will presumption. Nor does a handbook statement as to the duration of a sabbatical at full pay after six years of employment. *Dridi v. Whole Foods Market Group, Inc.* 2008 WL 43705 (E.D.Pa. Jan. 2, 2008).
- c. Even under an employment contract for a fixed term, both parties may treat the contract as an at-will relationship at the expiration of the contract's term, unless the contract limits the parties' ability to end the relationship at expiration. *See, e.g., Synthes, Inc. v. Shimer*, 1994 WL 361382 (E.D. Pa. July 12, 1994), *affirmed*, 54 F.3d 770 (3d Cir. 1995); *Velez v. QVC Corporation*, 227 F.Supp.2d 384, 423 (E.D. Pa. 2002). There is no inherent right to an extension of a contract for a fixed term. A provision that renewal is at the pleasure of the parties will reinforce the at-will nature of the renewal. *See Atkinson v. Lafayette College*, 460 F.3d 447, 452 (3d Cir. 2006).

2. Automatic Rollovers

If an employee continues to work for the employer after the expiration date of a contract for a fixed term, the contract will be enforceable for a new term equal to the original term. *See Janis v. AMP, Inc.*, 856 A.2d 140 (Pa.Super. 2004), *appeal*

denied, 583 Pa. 663, 875 A.2d 1075 (2005); *Burge v. Western Pennsylvania Higher Education Council, Inc.*, 391 Pa.Super. 108, 570 A.2d 536 (1990); *Smith v. Shallcross*, 105 Pa.Super. 472, 69 A.2d 156 (1949). This rollover may occur even earlier than the contract's expiration date if the contract contains an "evergreen" clause, providing that the contract will automatically renew in the absence of advance notice of renewal. However, the parties' repeated use of written amendments (coupled with a contract clause requiring amendments to be in writing) will rebut the presumption of automatic renewal. *Auerbach v. Kantor-Curley Pediatric Associates, P.C.*, 2004 WL 870702 (E.D. Pa. Mar. 22, 2004).

3. **Indefinite Term- Dismissal only on "Just Cause"**

See, e.g., Helpin v. Trustees of the University of Pennsylvania, 969 A.2d 601 (Pa. Super. 2009), *appeal granted*, 981 A.2d 1280 (2009).

IV. **POSITION / TITLES / DUTIES / PERFORMANCE**

A. **Employee's Position and Title**

An agreement should specify the employee's position and title, especially if the employee is an officer or board member. The description of the employee's position and title calls for flexibility. The employer may find it necessary to change the position and title that cover a particular employee's duties over the term of a contract. Such changes should not lead to an argument for invalidation of the contract. Granting the employee a title does not, by itself, establish the right to employment tenure. *See Halpin v. LaSalle University*, 432 Pa. Super. 476, 639 A.2d 37 (1994), *appeal denied*, 542 Pa. 670, 668 A.2d 1133 (1995). But the grant of a title in an employment contract may give rise to a breach of the contract if the title is changed or removed. *Anchel v. Shea*, 762 A.2d 346 (Pa. Super. 2000), *appeal denied*, 566 Pa. 656, 782 A.2d 541 (2001) (removal of a director is invalid when the director's employment agreement provides that the employee will be a director as long as he is employed). It is important to the employer to preserve the discretion to deny promotions or tenure to employees. *See, e.g., Robertson v. Drexel University*, ___ .2d ___, 2010 WL 599386 (Pa. Super. Feb. 22, 2010) (holding that denial of tenure to college teacher did not constitute a breach of an employment agreement).

B. **Employee's Duties**

The employer will prefer to describe the employee's duties in the contract in general fashion, so as to have the flexibility to establish new duties without violating the contract. The employer's use of a catchall term – e.g., "to perform such other duties as the Board of Directors shall direct" – will allow the employer to assign additional duties to the employee, so long as the additional duties are reasonably related to the employee's position. *Giuffrida v. American Family Brands, Inc.*, 1998 WL 196402, *9 (E.D. Pa. April 23, 1998).

There are practical and legal reasons that favor a specific description of an employee's duties, however. If an employee fails to perform specific duties set forth in a contract, the employer may discharge the employee without the need to show that the employee's shortcomings caused actual harm to the employer. *Ott v. Buehler Lumber Company*, 373 Pa. Super. 515, 541 A.2d 1143 (1988). By contrast, if the employer merely requires the employee to perform "to the satisfaction" of the employer, the courts may examine the employer's good faith in claiming dissatisfaction with the employee. *See Kramer v. Philadelphia Leather Goods Corp.*, 364 Pa. 531, 73 A.2d 385 (1950). A specific listing of employee duties may also help the employer to enforce post-employment restrictions against working for a competitor or disclosure of trade secrets.

A corollary to employee duties is the employee's reporting relationship, both upward and downward within the organization. The employer will again prefer the maximum flexibility to change these relationships.

C. Full-Time Performance of Duties

An employment contract should provide that the employee will perform services for the employer on a full-time basis, and will devote the employee's entire work effort to the employer. *See Decision Services Consultants, Inc. v. Blumberg*, 1987 WL 5731 (E.D. Pa. Jan. 15, 1987), *affirmed*, 831 F.2d 285 (3d Cir. 1987); *Remington Financial Group, Inc. v. Corcoran*, 2007 WL 2936203 (E.D.Pa. Oct. 9, 2007). Without this provision, the employer may be unable to treat an employee's "moonlighting" as a breach of contract. *See Jay Goldstein & Company, P.C. v. Goldstein*, 52 Pa. D.&C.4th 211 (C.P. Philadelphia 2001). Even if working for another organization does not constitute a breach of contract, such outside work may constitute a breach of fiduciary duty that the employee owes to the employer. *Decision Services Consultants v. Blumberg, supra*.

D. Location of Performance of Duties

Again, the employer will prefer to keep the location of the employee's duties general, in order to relocate the employee (or to require travel) without breaching the contract. The employee will want the location of duties to be more specific. Regardless of the contractual language, the actual location at which an employee performs duties may determine the reach of an employer's restrictive covenant. *See, e.g., Albee Homes, Inc. v. Caddie Homes, Inc.*, 417 Pa. 177, 207 A.2d 768 (1965), in which the Pennsylvania Supreme Court invalidated a restrictive covenant that extended 50 miles from any location in which the ex-employer had offices, but enforced the restrictive covenant within 50 miles of the employee's work location.

E. Standards of Performance / Effort

The standards of performance should not be too vague or too easy for either party to use to justify its position. A provision requiring an employee to devote "best efforts" to the job is a problematic standard. In *Madreperla v. Williard Co.*, 606 F.Supp. 874 (E.D. Pa. 1985), the Court

denied a motion for summary judgment dismissing an ex-employee's action because of a genuine issue of material fact as to whether the employee had used "best efforts" in an executive position. *See also Kramer v. Philadelphia Leather Goods Corp.*, 364 Pa. 531, 73 A.2d 385 (1950) (court will inquire as to employer's good faith in finding that employee did not perform to employer's 'satisfaction). On the other hand, a provision allowing dismissal for "ineffectiveness in performance of duties" will enable an employer to defend against an action for breach of contract and employment discrimination where there is evidence that the employee performed some duties ineffectively. *Horvat v. Forbes Regional Hospital*, 184 Fed.Appx. 216 (3d Cir. 2006).

F. Disciplinary Procedures

The contract may either establish specific procedures for discipline for poor performance, or incorporate procedures from other sources such as an employee handbook. The existence of a written contract with specific discipline procedures requires the employer to adhere to these procedures, particularly for a tenured employee. *See Ferrer v. Trustees of the University of Pennsylvania*, 573 Pa. 310, 825 A.2d 591 (2002), in which a professor recovered substantial damages because of the University's efforts to sanction a professor after the professor was found not guilty of specified misconduct. *Compare Murphy v. Duquesne University of the Holy Ghost*, 565 Pa. 571, 777 A.2d 418 (2001) (university professor could not challenge termination where university had followed all procedures for termination). The employer's obligation to comply with contractual disciplinary procedures contrasts with the employer's ability to bypass the disciplinary procedures specified in the employee handbook in the employment at will relationship. *See DiBonaventura v. Consolidated Rail Corporation*, 372 Pa. Super. 420, 539 A.2d 865 (1988).

V. COMPENSATION AND BENEFITS

A. Introduction

The employer's obligation to provide compensation and benefits is separate from the employer's obligation to provide employment for a particular duration. In general, courts have been more willing to enforce employers' promises to provide compensation and benefits than promises of employment tenure. Therefore, specific provisions in a contract or handbook for compensation or benefits, e.g., vacation leave, sick leave, severance pay, or paid holidays, may bind the employer to provide such items. *Bauer v. Pottsville Area Emergency Medical Services, Inc.*, 758 A.2d 1265 (Pa. Super. 2000); *Bootel v. Verizon Directories Corp.*, 2004 WL 1535798 (E.D. Pa. June 25, 2004). Even an at-will employee may have a contractual right to compensation. *Sullivan v. Chartwell Investment Partners, L.P.*, 873 A.2d 710 (Pa. Super. 2005). However, a handbook disclaimer may extend to benefits as well as tenure, in which case the handbook will not provide a contractual right to specific benefits. *Diehl v. Electronic Data Systems Corp.*, 2008 WL 2705540 (M.D. Pa. July 10, 2008).

There is no legal requirement that the specific provisions for benefits be in writing, although written provisions for benefits will control over unwritten provisions and will be easier to prove. *Hamilton v. Air Jamaica, Inc.*, 945 F.2d 74 (3d Cir. 1991), *cert. denied*, 503 U.S. 938, 112 S.Ct. 1479 (1992). At a minimum, the employer must have communicated the benefits provisions to the employee in order to be bound by these provisions. *Morosetti v. Louisiana Land and Exploration Co.*, 522 Pa. 492, 564 A.2d 151 (1989).

Contractual provisions for salary and benefits do not alter the employment at will presumption, however. *Bauer, supra*. The employer can reserve the right to change salary and benefits by including a statement in the handbook or benefit plan that the benefits may be

changed at any time, for any reason, and with or without notice. *Hamilton v. Air Jamaica, Inc.*, *supra*.

Where employment is at will, the employer may reduce the employee's compensation or benefits at will prospectively. *Green v. Bettinger, Inc.*, 608 F.Supp. 35 (E.D. Pa. 1984), *affirmed*, 791 F.2d 917 (3d Cir. 1986), *cert. denied*, 479 U.S. 1069, 107 S. Ct. 960 (1987). An employer may not unilaterally reduce compensation retroactively. *Lipson v. Jackson National Life Ins. Co.*, 2004 WL 163681 (E.D. Pa. Jan. 8, 2004); *Skodnick v. Rand McNally & Co.*, 1987 WL 28091 (E.D. Pa. Dec. 14, 1987).

Specific contractual provisions for wages and other benefits may give rise to liability on the employer's part under the Wage Payment and Collection Law, 43 P.S. § 260.1 *et seq.* ("WPCL"). See *Bowers v. NETI Technologies, Inc.*, 690 F.Supp. 349 (E.D. Pa. 1988); *Hartman v. Baker*, 766 A.2d 347 (Pa.Super. 2000), *appeal denied*, 564 Pa. 712, 764 A.2d 1070 (2000). The WPCL is an enforcement tool for employees' right to collect wages and wage supplements; the WPCL does not create any rights beyond those contained in an employment contract. At the same time, the WPCL prohibits the application of an employment contract to deprive an employee of compensation that the employee has already earned. *O'Donnell v. LRP Publications*, 2010 WL 571849, *7 (E.D. Pa. Feb. 16, 2010).

Group benefits may acquire the status of pension or welfare plans that are subject to the Employee Retirement and Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"). A detailed discussion of ERISA is beyond the scope of this chapter.

B. Salary

Courts will enforce salary terms that are clear and precise. *Gorwara v. AEL Industries, Inc.*, 784 F.Supp. 239 (E.D. Pa. 1992). Typical salary terms in an employment contract include the following:

1. annual rate of compensation (*Doe v. Kohn, Nast & Graf, P.C.*, 862 F.Supp. 1310, 1324 (E.D. Pa. 1994));
2. frequency of periodic salary payments (*Id.*);
3. frequency of adjustments to salary;
4. amount, formula and basis of such adjustments (*Smith v. Neyer, Tiseo & Hindo, Ltd.*, 1993 WL 428992 (E.D. Pa. Oct. 22, 1993)); and
5. deductions from salary.

C. Commissions

An employer's contractual obligation to pay an employee commissions is enforceable even where the employment is at will. *Kofsky v. Chemical Residential Mortgage Corporation*, 1999 WL 1016976 (E.D. Pa. Oct. 28, 1999). A right to commissions may exist separately from any contract for employment tenure; for example, an employee may establish a right to commissions under an oral contract (*Golkow v. Esquire Deposition Services, LLC*, 2009 WL 3030218 (E.D. Pa. Sept. 23, 2009)) or an oral contract that is independent from the employee's written contract containing an integration clause. *Pilallis v. Electronic Data Systems Corporation*, 1998 WL 211740 (E.D. Pa. April 28, 1998).

A contract to pay commissions may have as many as eight key elements, as follows:

1. draw payment to the employee;
2. commission percentage;
3. base upon which commissions are computed (e.g., total sales produced by a salesperson);
4. role required in a sale in order to be eligible for a commission;
5. time of vesting of the right to receive a commission;
6. timing of payment of the commissions;
7. right to receive commissions at or after the end of the employment relationship; and
8. employee's obligation to refund any draw payments that exceed commissions; this obligation may arise periodically or when employment ends.

There have been many divergent decisions on the vesting and payment of commissions, particularly in litigation by ex-employees. The vesting date for an employee's right to receive commissions may range from the date on which orders are accepted (*see, e.g., In Re: Industrial Car Manufacturing Co.*, 1 B.R. 339 (Bankr. E.D. Pa. 1979)) to the date on which the employer receives payment on the sale. The employer will typically want to delay the date for payment of commissions until sales are invoiced or payment is received on the sale. *See, e.g., Levan v. Royal Paper Products Co.*, 199 Pa. Super. 502, 185 A.2d 801 (1962).

Courts will look to the terms of the contract in weighing the right of a departing or former employee to receive commissions. Unless there is a contract provision to the contrary, an employee selling on commission is entitled to a commission on a sale when the sale is made and accepted by the employer. *Little v. USSC Group, Inc.*, 404 F.Supp.2d 849, 854 (E.D. Pa. 2005). In general, the courts will not favor a forfeiture of commissions on termination of the employee unless the contract has specific forfeiture provisions or further work is needed to obtain the

commission. See *Little v. USSC Group, Inc.*, *supra*; *Hazell v. Servomation Corp.*, 294 Pa.Super. 465, 440 A.2d 559 (1982) (pro-rating annual draw payments before subtracting draw from commissions payable to employee who leaves in mid-year, and rejecting employer's proposed deduction of entire annual draw). A forfeiture of commissions after termination will be upheld if supported by consideration (e.g., an increase in weekly pay). *Stebok v. American General Life and Accident Insurance Co.*, 715 F.Supp. 711 (W.D. Pa. 1989), *affirmed*, 888 F.2d 1382 (3d Cir. 1989).

Until 2000, Pennsylvania allowed an employer to recover excess draw over commissions without a specific provision in the contract permitting this recovery. (Only one other state – Alabama – had this requirement.). In 2000, however, the Pennsylvania Supreme Court held in *Banks Engineering Co. v. Polons*, 561 Pa. 638, 752 A.2d 883 (2000), that an employer could not recover excess draws from an employee without a specific contractual provision. For an example of a specific contractual provision, see *Mannino v. Lazerpro, Inc.*, 76 Pa.D.&C.4th 526 (C.P. Centre 2005).

D. Bonuses

Contractual provisions for bonus payments resemble those that govern payment of commissions, and typically include:

1. amount or percentage of the bonus;
2. base on which the bonus is computed;
3. events that give rise to the right to receive a bonus;
4. time of vesting of the right to receive a bonus;
5. rules and procedure for deciding who will receive a bonus;
6. timing of payment of the bonus;
7. right of former employees to receive a bonus; and
8. provisions for forfeiture of a bonus.

An at-will employee has no claim for a bonus unless the employee has worked until the end of the vesting period for the bonus. *Kafando v. Erie Ceramic Arts Co.*, 764 A.2d 59 (Pa. Super. 2000); *McIntyre v. Frionor U.S.A.*, 1990 WL 92670 (E.D. Pa. June 29, 1990). A vague promise to pay additional compensation, without agreement as to definite terms, will not give the employee the right to additional compensation. *Lackner v. Glosser*, 892 A.2d 21 (Pa. Super. 2006). Likewise, an employee cannot expect to receive an incentive bonus for merely doing the assigned job. *Integrated Service Solutions, Inc. v. Rodman*, 2009 WL 1152162 (E.D. Pa. April 29, 2009). An employee hired for an indefinite term cannot assume that a bonus plan for a given

year will automatically continue in the next year. *Ankjerstine v. Schlumberger, Ltd.*, 155 Fed.Appx. 48 (3d Cir. 2005). An employment agreement may provide for forfeiture of a bonus if an employee is discharged for cause. *Middleton v. Realen Homes, Inc.*, 24 F.Supp.2d 430 (E.D. Pa. 1998).

E. Stock Options

An exhaustive examination of stock option provisions is beyond the scope of this outline. However, key agreement provisions will include the following:

1. stock price
 - a. market price
 - b. above market price to incent/reward increase in stock price and/or valuation
2. vesting schedule
 - a. continued employment and specified period of time
 - b. stock performance, e.g., specified price or valuation
 - c. meeting specified business goals, obtaining funding, etc.
 - d. accelerated vesting., e.g., termination without cause during term, resignation with good reason, change in control
 - e. potential impact upon termination of employment claims
3. forfeiture of unvested options
 - a. violation of non-compete or other contract terms
 - b. resignation without good reason or termination without cause

As is the case with other incentive compensation, employment at will status does not defeat the right to receive stock options. See *Denny v. Primedica Argus Research Laboratories, Inc.*, 2001 WL 1807885 (C.P. Philadelphia 2001). Generally, the right to stock options must be based on a written document, however. *Hartman v. Baker*, 766 A.2d 347 (Pa.Super. 2000), *appeal denied*, 564 Pa. 712, 764 A.2d 1070 (2000); *Bowers v. NETI Technologies, Inc.*, 690 F.Supp. 349 (E.D. Pa. 1988); *Keck v. Tri-Foods International, Inc.*, 1996 WL 665536 (E.D. Pa. Nov. 12, 1996). The specific terms of any stock option agreement will govern the employee's right to receive stock. *Kirk v. The Jerrold Corporation*, 332 F.Supp. 247 (E.D. Pa. 1971), *affirmed*, 465 F.2d 1398 (3d Cir. 1972). The right to exercise stock options after termination will depend upon the language in the stock option plan. See *Scully v. U.S. Wats, Inc.*, 238 F.3d 497

(3d Cir. 2001) (exercise allowed); *compare Cappuccio v. Pfizer, Inc.*, 2007 WL 2593704 (E.D.Pa. August 31, 2007) (exercise not allowed); *but see Moses v. Corning Incorporated*, 105 Fed.Appx. 363 (3d Cir. 2004) (remanding to consider equitable estoppel claim). *Compare McIntyre v. Philadelphia Suburban Corporation*, 90 F.Supp.2d 596 (E.D. Pa. 2000), in which the language of the stock option plan prohibited post retirement exercise of vested stock options. The employer who interferes with an employee's ability to exercise vested stock options may face possible liability under both contract law and the Wage Payment and Collection Law. *Regier v. Rhone Poulenc Rorer, Inc.*, 1995 WL 395948 (E. D. Pa. June 30, 1995), *affirmed*, 92 F.3d 1172 (3d Cir. 1996).

F. Retirement/Deferred Compensation

It is not unusual for an executive employment contract to provide for deferred or retirement compensation at a level determined by the executive's annual income. In *Dieter v. Fidelcor, Inc.*, 441 Pa. Super. 215, 657 A.2d 27 (1995) and *Gallagher v. Fidelcor, Inc.*, 441 Pa. Super. 223, 657 A.2d 31 (1995), *appeal denied*, 544 Pa. 675, 678 A.2d 365 (1996), the courts held that the "annual compensation" base for computing retirement income did not include income from the exercise of stock options.

G. Vacation, Holidays, and Other Leave

Contractual provisions on paid vacation leave typically cover the following topics:

1. length of vacation per 12-month period;
2. length of service before acquiring the right to take either initial or subsequent vacations;
3. period over which the right to take vacation accrues (e.g., 1 day per month of employment);
4. right to carry over vacation days from year to year;
5. payment to the departing employee for unused accrued vacation (or repayment by the departing employee for excess vacation);
6. paid holiday leave;
7. personal leave.

An employee has the right to receive payment for accrued but unused vacation at the end of the employee's tenure. *See Anderson v. Pittsburgh Press Company*, 880 F.Supp. 407 (W.D. Pa. 1995); *Matson v. Housing Authority of the City of Pittsburgh*, 353 Pa. Super. 588, 510 A.2d 819 (1986).

H. Sick and Disability Leave and Pay

Typical contractual provisions include the following:

1. number of sick days per 12-month period;
2. length of service before acquiring right to receive paid sick leave;
3. right to carry over unused sick days;
4. payment to the departing employee for unused sick leave (*See Matson v. Housing Authority of the City of Pittsburgh*, 353 Pa. Super. 588, 510 A.2d 819 (1986));
5. rights to unpaid sick leave;
6. short-term disability coverage;
7. long-term disability coverage.

All contractual provisions for sick and disability leave must be analyzed under the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.* Any detailed discussion of the ADA and FMLA is beyond the scope of this chapter. Individual disability coverage is a critical element of an employment contract for a highly compensated employee. For an illustration of the problems that develop when a key employee becomes disabled and coverage is uncertain, *see Langer v. Monarch Insurance Co.*, 879 F.2d 75 (3d Cir. 1989) and 966 F.2d 786 (3d Cir. 1992).

I. Expense Reimbursement

The reimbursement of employee expenses is rarely a central factor in employment contract litigation; however, many reported employment cases include reimbursement claims in addition to discharge-related claims. “Reimbursement of expenses” is a “wage supplement” under the WPCL, allowing an employee to bring a WPCL claim along with a contract claim for expenses. 43 P.S. § 260.2a. Typical reimbursable expenses include:

1. **Litigation expenses.** Indemnification or advances of expenses should be secured in accordance with state corporate statutes and corporate by-laws. *See, e.g., Pearson v. Exide Corporation*, 157 F.Supp.2d 429 (E.D. Pa. 2001).
2. **Transportation expenses.** The establishment of a new policy for reimbursement of automobile expenses was one of the elements of additional consideration that supported a new restrictive covenant in *Davis & Warde, Inc. v. Tripodi*, 420 Pa. Super. 450, 616 A.2d 1384 (1992), *appeal denied*, 536 Pa. 624, 637 A.2d 284 (1993).
3. **Moving expenses**, which may be capped at a fixed dollar amount over the cost of moving household goods and temporary living quarters. *See Pociask v. KDI Sylvan Pools, Inc.*, 1990 WL 161256 (E.D. Pa. Oct. 17, 1990).

J. Group Benefits

These benefits are typically provided to most fulltime employees and (if part of a benefit plan) may be subject to federal laws such as ERISA. Typical group benefits include such items as:

1. health insurance;
2. life insurance;
3. pension benefits;
4. profit sharing;

5. 401(k) participation.

K. Other Benefits

1. deferred compensation;
2. special severance arrangements;
3. special insurance arrangements;
4. housing;
5. automobile use;
6. travel;
7. relocation and temporary living expense payments;
8. tax and financial planning;
9. loans;
10. professional liability insurance;
11. sabbaticals;
12. club memberships.

L. Permissible Outside Work and Compensation

The parties should reach a clear understanding at the outset of employment on the employee's ability to perform services outside the workplace and to keep compensation for such services. *See Freedom Medical, Inc. v. Gillespie*, 2007 WL 2713222 (E.D.Pa. Sept. 14, 2007) (authorizing outside work for non-competitors, with prior supervisor approval). Otherwise, it may appear that the employee is breaching a fiduciary duty to the employer, both by obtaining individual economic benefit and by failing to devote full time to services for the employer. *See Jay Goldstein & Company, P.C. v. Goldstein*, 52 Pa.D.&C.4th 211 (C.P. Philadelphia 2001).

Outside services and compensation may arise in the following areas:

1. service on boards of directors or trustees;
2. charitable work;
3. stock ownership;
4. fiduciary services, e.g., services as an executor;

5. services as an arbitrator;
6. teaching;
7. lecturing;
8. writing;
9. consulting;
10. expert testimony.

M. Importance of Tax Counsel Review for Section 409A Issues (Executive Contracts)

N. Change in Control Payments – Importance of Tax Counsel Review re: Section 280(g) Limitations

VI. REPRESENTATIONS

A. Employer Representations to Employee

1. Financial condition of the employer

An at-will employee may maintain a fraud claim against an employer that fails to disclose its financial condition, or affirmatively misrepresents the possibility of a takeover of the employer. *See Martin v. Hale Products, Inc.*, 699 A.2d 1283 (Pa. Super. 1997). NOTE: The Pennsylvania Superior Court has called the *Martin* holding into question because the *Martin* parties did not raise the “gist of the action” doctrine, which precludes a claim for fraud when the “gist of the action” lies in contract. *Etoll, Inc. v. Ellis/Savion Advertising, Inc.*, 811 A.2d 10 (Pa. Super. 2002).

In the case of an employee with a contract for a fixed term, the existence of an integration clause makes it more difficult for the employee to challenge a contract on the basis of fraud. The misrepresentations must be independent of the contract so that the “gist of the action” lies totally outside the contract. *See, e.g., Lokay v. Lehigh Valley Cooperative Farmers, Inc.*, 343 Pa. Super. 89, 492 A.2d 405 (1983).

2. Corporate changes (takeovers), etc.

In *Martin v. Hale Products, supra*, an employee was able to maintain an action for fraud upon being discharged after a corporate takeover, when the interviewer failed to disclose to the employee that the Company was about to be bought. *But see Etoll, Inc. v. Ellis/Savion Advertising, Inc., supra*.

B. Employee Representations to Employer

1. **Professional licensure**

The failure to disclose any professional disciplinary problems provides an employer with grounds to terminate an employee. *Rho v. Vanguard Ob/Gyn Associates*, 1999 WL 228993 (E.D. Pa. April 15, 1999). NOTE: An employer's permission to a new employee to begin work without proper licensure may give the employee the right to challenge a termination for non-licensure on the basis of promissory estoppel. See *Arasi v. Neema Medical Services, Inc.*, 407 Pa. Super. 393, 595 A.2d 1205 (1991), *appeal denied*, 529 Pa. 655, 604 A.2d 247 (1992); *Travers v. Cameron County School District*, 544 A.2d 547 (Pa.Cmwlt. 1988).

2. **No criminal history**

The Criminal History Record Information Act, 18 Pa.C.S. § 9125, limits the types of criminal activity that prospective employers may consider in hiring an employee. The employer may only consider felony and misdemeanor convictions that relate to the employee's duties.

3. **No previous discharges for misconduct**

An employee's erroneous statements to an employer about the reason for the employee's departure from a previous job may enable the employer to both terminate the employee's contract and sue the employee for fraud or misrepresentation. *See Edwards v. Storage Technology Corp.*, 1999 WL 33505545 (E.D. Pa. March 1, 1999).

4. **Restrictive covenants**

a. **Disclosure of restrictive covenants**

The contractual provision that the employee must disclose (and has disclosed) any existing restrictive covenants helps to protect both the employer and the employee. This provision allows the employer to assess the possible exposure to litigation over any restrictions. The employee may be reluctant to make such a disclosure before being offered a position, because of the possibility that the employee's current employer will find out about the search for new employment, and fire the employee. One possible solution is to disclose this restriction under a confidentiality agreement, as the employee did in *National Business Services, Inc. v. Wright*, 2 F.Supp.2d 701 (E.D. Pa. 1998). The employee who makes such a disclosure should do so in writing to avoid any question about the disclosure. The disclosure of such restrictions will make it more likely that the new employer will support the employee in defending against any action on the restrictive covenant.

b. **Indemnity for fees if undisclosed restrictions exist**

VII. RESTRICTIONS ON ACTIVITIES

The topic of contractual restrictions on an employee's activities during and after employment is too long to allow detailed coverage in this chapter. Such restrictions go beyond the oft-mentioned "non-competes" that prevent an ex-employee from working for a competing employer for a period of time after employment. Possible restrictions include the following:

A. Restrictions on Outside Duties During Employment

Any business transactions by the employee in the employer's line of business may violate the employee's common-law fiduciary duty to bring all business opportunities to the employer. The enforcement of this fiduciary duty does not depend upon any contract, but the existence of a contractual prohibition on outside duties reinforces the fiduciary duty. *See SHV Coal, Inc. v.*

Continental Grain Co., 376 Pa. Super. 241, 545 A.2d 917 (1988), *reversed in part on other grounds*, 526 Pa. 489, 587 A.2d 702 (1991).

B. Non-competition Clauses (Restricting the Former Employee From Competing)

Generally, *American* courts insist that an employer may not enforce a post-employment restriction on a former employee simply to eliminate competition *per se*; the employer must establish a legitimate business interest to be protected. *Hess v. Gebhard & Co., Inc.*, 570 Pa. 148, 808 A.2d 912, 918 (2002). Non-competition clauses typically contain the following elements:

1. Definition of competing activities.
2. Duration of restrictions. Any restrictions should begin when employment ends, rather than when the contract expires, since employment may outlast the employment contract. *See Geisinger Clinic, Inc. v. DiCuccio*, 414 Pa. Super. 85, 606 A.2d 509 (1992), *appeal denied*, 536 Pa. 625, 637 A.2d 285 (1993) *cert. denied*, 513 U.S. 1112, 115 S.Ct. 904 (1995).

3. Geographic scope of restrictions.

NOTE: For the non-compete to be enforceable, the prohibitions against competing activities and the durational and geographic restrictions in B.1.-B.3. above must be reasonable.

4. Remedies for violations (*see VII(F), infra*).
5. Assignability. This provision is very important since a restrictive covenant without an assignment clause will not be enforceable by a new employer. *See Hess v. Gebhard & Co. Inc.*, 570 Pa. 148, 808 A.2d 912 (2002); *All-Pak, Inc. v. Johnston*, 694 A.2d 347 (Pa. Super. 1997).

C. Non-use of Confidential Business Information / Trade Secrets

Such agreements designate information that is confidential and protect against use and disclosure of such information. Although an employer may protect such information without such an agreement, the existence of the agreement will help the employer to enforce post-employment restrictions. *Bell Fuel Corp. v. Cattolico*, 375 Pa. Super. 230, 544 A.2d 450, 458 (1988).

D. Non-solicitation of Employees

E. Non-solicitation of Customers

F. Remedies for Violations of Restrictions

1. Injunctive relief

2. Restarting the covenant with each violation;
3. Liquidated damages
4. Override of arbitration clauses
5. Venue/Jurisdiction
6. Attorney's fees – *See, e.g., Profit Wize Marketing v. Wiest*, 812 A.2d 1270 (Pa.Super. 2002)
7. Forfeiture of deferred compensation – *Fraser v. Nationwide Mutual Insurance Co.*, 135 F.Supp.2d 623 (E.D. Pa. 2001), *vacated in part*, 352 F.3d 107 (3d Cir. 2004), *on remand*, 334 F.Supp.2d 755 (E.D.Pa. 2004)
8. “Garden leave” clauses – *See Visual Software Solutions v. Managed Healthcare Associates*, 2001 WL 1159741 (E.D. Pa. Aug. 15, 2001)

G. Assignment of Intellectual Property Rights

1. Copyrights

An employer has the right to copyright all copyrightable work generated by an employee, without the need for any assignment.

2. Patents

An employer may require an employee to assign all rights to patent any invention developed by the employee during employment, and may discharge the employee for refusing to make the assignment. *See e.g., Brosso v. Devices for Vascular Intervention*, 879 F.Supp. 473 (E.D. Pa. 1995), *affirmed*, 74 F.3d 1225 (3d Cir. 1995); *Zlotnicki v. Harsco Corp.*, 672 F.Supp. 161 (M.D. Pa. 1987). Even absent an assignment, the employee will be obligated to give rights to the employer if the employee is employed and paid for his inventive abilities. *B&B Microscopes, Ltd. v. Armogida*, 2006 WL 3694507 (W.D. Pa. Dec. 13, 2006).

VIII. TERMINATION

A. During Term of Employment

1. Involuntary

a. Termination by employer at will after a specified notice period

In *Schechter v. Watkins*, 395 Pa. Super. 363, 577 A.2d 585 (1990), *appeal denied*, 526 Pa. 538, 584 A.2d 320 (1990), an employer retained the right to terminate an employment agreement at will

upon 90 days' notice before the end of the contract period. The employer's right to terminate the contract in this fashion obviated the need to decide whether the employer had good cause to terminate the contract because of the employee's alcoholism. To the same effect, *see Brown v. Hamot Medical Center*, 323 Fed.

Appx. 140 (3d Cir. March 26, 2009). The employer's termination will have legal effect if it provides notice of non-renewal coupled with expression of intent to renegotiate or to terminate if renegotiation is not successful. *Pym v. Einstein Practice Plan, Inc.*, 2004 WL 2439241 (C.P. Philadelphia July 21, 2004).

b. Termination for poor performance, misconduct, criminal conduct, etc.

(1) Poor performance

If an employee fails to perform specific duties set forth in a contract, the employer may discharge the employee without the need to show that the employee's shortcomings caused actual harm to the employer. *Ott v. Buehler Lumber Company*, 373 Pa. Super. 515, 541 A. 2d 1143 (1988). By contrast, if the employer merely requires the employee to perform "to the satisfaction" of the employer, the courts may examine the employer's good faith in claiming dissatisfaction with the employee. *See Kramer v. Philadelphia Leather Goods Corp.*, 364 Pa. 531, 73 A.2d 385 (1950). The employer may not terminate a contract for poor performance during an earlier term of the contract if the employer has renewed the contract. *In re Allegheny International, Inc.*, 954 F.2d 167 (3d Cir. 1992).

(2) Misconduct

The employee's failure to disclose any professional disciplinary problems provides an employer with grounds to terminate an employee. *Rho v. Vanguard Ob/Gyn Associates*, 1999 WL 228993 (E.D. Pa. April 15, 1999).

(3) Negligence / Failure to perform professional duty

See Fort Washington Resources, Inc. v. Tannen, 901 F.Supp. 932 (E.D. Pa. 1995).

(4) **Use of after-acquired evidence to justify counterclaim or defense of termination as being “for cause”**

In *Loftis v. Key Energy Services, Inc.*, 2008 WL 2609918 (E.D. Pa. June 26, 2008), the District Court allowed the defendant employer in a breach of employment contract case to counterclaim for breach of contract, restitution, legal malpractice, and breach of fiduciary duty against a former corporate counsel. The employer based its counterclaim on after-acquired evidence. The counterclaim defendant asserted unsuccessfully that after-acquired evidence could only serve as a defense to a complaint, citing *Dobinsky v. Crompton & Knowles Colors Incorporated*, 2004 WL 2303686 (M.D. Pa. March 30, 2004). In *Dobinsky*, the employee’s contract provided for generous severance pay if the employees were terminated for other than good cause after a change in control. The court allowed the employer to introduce after-acquired evidence of misconduct in order to prevent summary judgment for the plaintiff-employees on their severance claim.

c. **Termination by employee for employer breach**

2. **Voluntary resignation by employee**

An employee’s “resignation” constitutes a termination of employment that triggers a non-compete when the ex-employee goes to work for a competitor. *Geisinger Clinic, Inc. v. DiCuccio*, 414 Pa. Super. 85, 606 A.2d 509 (1992), *appeal denied*, 536 Pa. 625, 637 A.2d 285 (1993) *cert. denied*, 513 U.S. 1112, 115 S.Ct. 904 (1995). COMMENT: It is important to define “termination” to include “resignation” in the restrictive covenant!

3. **Cancellation of contract by mutual consent**

4. **Disability**

5. **Death**

6. **Change in ownership or control**

See Boone v. Platinum Technology, Inc., 2000 WL 33119415 (E.D. Pa. Dec. 21, 2000) (Illinois law).

B. Termination at End of Term

At the expiration of the term of an employment contract, each party may treat the contract as an at-will relationship, and may decline to renew the contract for any reason, unless the contract limits the parties' freedom to end the relationship at expiration. *See, e.g., Synthes, Inc. v. Shimer*, 1994 WL 361382 (E.D. Pa. July 12, 1994) *affirmed*, 54 F.3d 770 (3d Cir. 1995); *Velez v. QVC Corporation*, 227 F.Supp.2d 384, 423 (E.D. Pa. 2002). A contract may also provide for notice of non-renewal in advance of the expiration date. *Brown v. Hamot Medical Center*, 2008 WL 55999 (W.D.Pa. Jan. 3, 2008).

C. Procedure for Ending Contract (e.g., Notice)

An employee has no inherent right to time the departure from employment in order to receive special compensation such as a bonus or commissions. Thus, an employer may discharge an at-will employee immediately upon the employee's giving two weeks' notice of departure to work for a competitor, even if the employee is deprived of bonus payments that would vest during the two-week period. *Redick v. Kraft, Inc.*, 745 F.Supp. 296 (E.D. Pa. 1990). An employee at will has no right to defer the effective date of resignation beyond the normal notice period in order to receive a commission that is only payable to a current employee. *See Sendi v. NCR Comten, Inc.*, 619 F.Supp. 1577 (E.D. Pa. 1985), *affirmed*, 800 F.2d 1138 (3d Cir. 1986).

Where an employer terminates an employment contract shortly after its commencement, the contractual notice period may be treated as the minimum period for which the employee has a right to compensation. *See Carlson v. Arnot-Ogden Memorial Hospital*, 918 F.2d 411 (3d Cir. 1990).

D. Employer Payments to Employee at or After Termination

1. Salary/Wages

An employee has the right to receive wages earned up to the effective date of termination. *See Allende v. Fruit Distributors, Inc.*, 709 F.Supp. 597 (E.D. Pa. 1989). An employer has the burden of establishing that it withheld a departing employee's wages in good faith in an action for liquidated damages under the WPCL. *Thomas Jefferson University v. Wapner*, 903 A.2d 565 (Pa.Super. 2006). In the absence of any provision for post-termination pay, an ex-employee has no right to receive post-termination compensation, even if the ex-employee renders services after termination. *Brown v. Peoples Security Insurance Co.*, 890 F.Supp. 411 (E.D. Pa. 1995).

2. Severance or termination pay

The employer's policies on severance or termination pay will bind the employer if those policies are either communicated to the employee (*Morrisetti v. Louisiana Land & Exploration Co.*, 522 Pa. 492, 564 A.2d 151 (1989)) or are the subject of an agreement between the parties. Severance pay constitutes a fringe benefit or wage supplement under the WPCL. *See Bowers v. NETI Technologies, Inc.*, 690 F.Supp. 349, 352 (E.D. Pa. 1988). The employer's failure to pay

agreed-upon severance pay will expose the employer to liability for breach of contract and will enable the employee to pursue remedies under the WPCL, including individual liability of officers and agents and attorney fees. WPCL remedies are available where the absence of the severance pay provision was the result of a mutual mistake (*Voracek v. Crown Castle USA*, 907 A.2d 1105 (Pa. Super. 2006)) or in a promissory estoppel claim (*Sullivan v. Chartwell Investment Partners, L.P.*, 873 A.2d 710 (Pa. Super. 2005)).

An agreement may contain provisions for forfeiture of severance payments or deferred compensation if the ex-employee engages in competition with the employer. *See Fraser v. Nationwide Mutual Insurance Co.*, 135 F.Supp.2d 623 (E.D. Pa. 2001), *vacated in part*, 352 F.3d 107 (3d Cir. 2004), *on remand*, 334 F.Supp.2d 755 (E.D. Pa. 2004). Even without a forfeiture provision, the employer may try to withhold severance pay for employee misconduct that constitutes a breach of the employment contract. *See Slagan v. John Whitman & Associates*, 1997 WL 587354 (E.D. Pa. Sept. 10, 1997).

3. **Vacation/Other benefits**

An employer may offset claims for violations of the employee's contract against the employee's claim for vacation pay. *See, e.g., Boyce v. Smith-Edwards-Dunlap Company*, 398 Pa. Super. 345, 580 A.2d 1382 (1990).

4. **Commissions**

Courts have *upheld* the right of a commissioned salesman to receive commissions after cessation of employment where the salesman's contract does not set limits on commission payments after an at-will termination. *See Marcin v. Darling Valve Manufacturing Co.*, 259 F.Supp. 720 (W.D. Pa. 1966). *See also Hazell v. Servomation Corp.*, 294 Pa. Super. 465, 440 A.2d 559 (1982) (pro-rating annual draw payments before subtracting draw from commissions, and rejecting employer's proposed deduction of entire annual draw). *But see Stebok v. American General Life and Accident Insurance Co.*, 715 F.Supp. 711 (W.D. Pa. 1989), *affirmed*, 888 F.2d 1382 (3d Cir. 1989) (upholding contractual forfeiture of post-employment commissions).

5. **Bonuses**

An employment agreement may provide for forfeiture of a bonus if an employee is discharged for cause. *Middleton v. Realen Homes, Inc.*, 24 F.Supp.2d 430 (E.D. Pa. 1998).

Although a former employee may have the right to receive a bonus, an employer may withhold or refuse to pay a bonus to an employee who has acted in a manner that is disloyal to the ex-employer. *See Kassab v. Ragnar Benson, Inc.*, 254 F.Supp. 830 (W.D. Pa. 1966); *Redick v. Kraft, Inc.*, 745 F.Supp. 296 (E.D. Pa. 1990).

6. **Deferred compensation**

E. Employee Payments to Employer at or After Termination

1. **Advances**

In *News Printing Co. v. Roundy*, 409 Pa. Super. 60, 597 A.2d 662 (1991), a jury awarded an employer the amount of a loan that the employer had *advanced* to a terminated employee to finance the purchase of a residence. The employee had failed to repay the loan before termination.

Where an employer advances funds to an employee who breaches a duty to the employer, the employer's ability to recover the advances may depend on whether the employee had breached a duty when the advance was made. Thus, in *SHV Coal, Inc., v. Continental Grain, Co.*, 376 Pa. Super. 241, 545 A.2d 917 (1988), *reversed in part on other grounds*, 526 Pa. 489, 587 A.2d 702 (1991), an employer was unable to recover real estate closing costs advanced to an employee because the employee had not yet committed a disloyal act at the time of the closing.

2. **Repayment of excess draw against commissions**

Payment to an employer of excess draw payments depends upon a specific agreement with the employee. *See Banks Engineering Co. v. Polons*, 561 Pa. 638, 752 A.2d 883 (2000). For an example of a specific contractual provision, see *Mannino v. Lazerpro, Inc.*, 76 Pa.D.&C. 4th 526 (C.P. Centre 2005).

3. **Repayment of training costs**

Key Consolidated 2000, Inc. v. Troost, 432 F.Supp.2d 484 (M.D. Pa. 2006) (holding that repayment provision was not a restrictive covenant). *But see Mannino v. Lazerpro, Inc.*, 76 Pa.D.&C.4th 526 (C.P. Centre 2005) (dismissing as excessive a liquidated damage claim for training costs after early termination).

4. **Repayment of employer tax payments**

Tyco Electronics Corp. v. Davis, 895 A.2d 638 (Pa.Super. 2006).

5. **Damages**

See Fort Washington Resources, Inc. v. Tannen, 901 F.Supp. 932 (E.D. Pa. 1995) (upholding the right to recover damages for negligence by an ex-employee).

F. Dealings After Termination/Resignation/Retirement

1. **Employee assurances**

- a. return of property
- b. assistance in transition
- c. cooperation in litigation

2. **Employer assurances**

- a. indemnification of litigation expenses
- b. outplacement
- c. use of office space

IX. CONSENTS / SAVINGS CLAUSES

A. Consent to Investigation / Testing / Search of Personal Property

See, e.g., Kerns v. Chalfont-New Britain Township Joint Sewage Authority, 263 F.3d 61 (3d Cir. 2001).

B. Consent to Reference Upon Departure (With Covenant Not to Sue per Disclosure)

An employee's consent to an evaluation or reference will provide the employer with a defense against a claim for defamation. *See Baker v. Lafayette College*, 350 Pa. Super. 68, 504 A.2d 247 (1986), *affirmed*, 516 Pa. 291, 532 A.2d 399 (1987).

C. Waiver Clause

In *Swisher v. Caterpillar, Inc.*, 65 Pa.D.&C.4th 32 (C.P. York 2003), Common Pleas invalidated a contract provision that waived any employee claims against a client arising from an assignment to assist a client. The Superior Court reversed and remanded without opinion, 888 A.2d 19 (Pa. Super. 2005). The Supreme Court denied appeal, 588 Pa. 751, 902 A.2d 1242 (2006).

X. DISPUTE RESOLUTION

A. Arbitration

The subject of arbitration clauses in employment contracts is too broad to cover in this chapter. However, several points are clear:

1. Courts are becoming more reluctant to enforce arbitration agreements where any questions exist as to the employee's affirmative consent to arbitrate.
 - a. The courts will not compel an employee to arbitrate where the employee was never given a copy of the employee handbook that explained the employer's arbitration policies; under the circumstances, no agreement to arbitrate had been formed. *Quiles v. Financial Exchange Co.*, 879 A.2d 281 (Pa.Super.2005).
 - b. The courts will not compel an employee to arbitrate where the employer did not make the employee aware of an arbitration policy embedded in a handbook, and the employee had no notice as to the provision. *Plebani v. Bucks County Rescue Emergency Medical Services*, 2007 WL 4224365 (E.D.Pa. Nov. 27, 2007).
 - c. An arbitration agreement was not enforced when the agreement was contained in corporate by-laws to which a law firm shareholder did not explicitly assent. *Kirleis v. Dickie, McCamey & Chilcote, P.C.*, 560 F.3d 156 (3d Cir. 2009).

- d. An arbitration agreement was not applied to an employment dispute where the employee affirmatively refused to sign an arbitration clause but was told that he would be bound by the clause whether he signed it or not. *Stankiewicz v. Cisco Systems, Inc.*, 2009 WL 3152168 (E.D. Pa. Sept. 30, 2009).
2. Courts will enforce arbitration clauses even-handedly.
 - a. Courts will allow both ex-employees and ex-employers to bypass arbitration when seeking injunctive relief in a noncompete case, where the arbitration clause has a carve out for “injunctive relief”. *Manning v. Ardex, L.P.*, 2008 WL 2468690 (E.D. Pa. 2008).
 - b. The courts will excise the portions of an arbitration agreement that impose an undue burden on employees, e.g. those that impose fees for the arbitration on the employee notwithstanding the employee’s ability to recover statutory attorney’s fees in discrimination claims (*Spinetti v. Service Corporation International*, 240 F.Supp.2d 350 (W.D. Pa. 2001), *affirmed*, 324 F.3d 212 (3d Cir. 2003)), or those that allow only the employer to select the arbitrator (*Roberts v. Time Plus Payroll Services, Inc.*, 2008 WL 376288 (E.D.Pa., Feb 7, 2008)), but the courts will not invalidate the entire arbitration agreement.

B. Forum Selection

Courts will typically uphold a clause establishing a forum unless it is clearly unjust, or the product of fraud or coercion. This issue most often arises in restrictive covenant cases. *See BABN Technologies Corp. v. Bruno*, 25 F.Supp.2d 593 (E.D. Pa. 1998); *Behavioral Health Industry News, Inc. v. Lutz*, 24 F.Supp.2d 401 (M.D. Pa. 1998); *Hay Acquisition Company I, Inc. v. Schneider*, 2005 WL 1017804 (E.D. Pa. Apr. 27, 2005) (all upholding forum selection clauses); *Compare Dentsply International, Inc. v. Benton*, 965 F.Supp. 574 (M.D. Pa. 1997) and *Fabian v. Steve Brady, Inc.*, 49 Pa.D.&C.4th 242 (C.P. Lehigh 2000) (both invalidating selection of remote jurisdictions for enforcement of restrictive covenant).

C. Statute of Limitations

Under Pennsylvania law, parties may agree to a limitations period shorter than the applicable statute, provided that the period is not manifestly unreasonable. 42 Pa.C.S. § 5501(C) (3). However, a contractual provision for a six-month statute on employment claims is manifestly unreasonable. *Grosso v. Federal Express Corp.*, 467 F.Supp.2d 449 (E.D. Pa. 2006). Such a short limitation period is also unenforceable in an action under the Family and Medical Leave Act (“FMLA”). *See Grosso, supra*. *Grosso* was limited to FMLA claims, and a six-month

statute was upheld in state common law claims, in *Cole v. Federal Express Corp.*, 2008 WL 4307090 (E.D. Pa. Sept. 19, 2008).

XI. MISCELLANEOUS

A. Choice of Law

The court will generally honor the parties' choice of law clause. *See, e.g., Tucci v. Kelso*, 2002 WL 31261054 (E.D. Pa. Oct. 10, 2002). The law of the state selected by the parties to the agreement will govern unless (1) the chosen state has no substantial relationship to the parties or transactions and there is no other reasonable basis for the parties' choice; or (2) application of the chosen state's law would be contrary to the fundamental policy of the state that has a materially greater interest than the chosen state in the issue and would be the state whose law would apply in the absence of an effective choice of law by the parties. *Perma-Liner Industries, Inc. v. U.S. Sewer & Drain, Inc.*, 630 F.Supp.2d 516 (E.D. Pa. 2008).

B. Notice Clauses

1. Means of notice
2. Address of notice
3. Effective date and time of service

C. Rules of Interpretation

D. Incorporation of Other Documents

See, e.g., Girard Medical Center, 128 B.R. 938 (Bankr. E.D. Pa. 1991) (incorporating bylaws).

E. Integration Clause

An integration clause, providing that the contract is the parties' entire understanding and supersedes all prior understandings, will insulate the parties against exposure for liability under earlier contracts (*McGuire v. Schneider, Inc.*, 368 Pa. Super. 344, 534 A.2d 115 (1987), *affirmed*, 519 Pa. 439, 548 A.2d 1223 (1988)) or outstanding oral agreements on the same subject matter (*Harrison v. Fred S. James, Inc.*, 558 F.Supp. 438 (E.D. Pa. 1983), *but see Pilallis v. ElectronicData Systems Corporation*, 1998 WL 211740 (E.D. Pa. April 28, 1998) (written contract does not supersede oral understanding on commissions)); and claims for promissory estoppel (*Rho v. Vanguard Ob/Gyn Associates, P.C.*, 1999 WL 228993 (E.D. Pa. April 15, 1999)).

CAUTION: An integration clause can inadvertently cancel a valid existing contract that an employer wishes to preserve, such as a restrictive covenant. In *Innoviant Pharmacy, Inc. v. Morganstern*, 390 F.Supp.2d 179, 193 (N.D. N.Y. 2005), the employee signed a valid one-year restrictive covenant. Two years later, the employer required the employee to sign and return an employee handbook disclaimer that disclaimed "employment agreements or other agreements of any kind". Faced with this comprehensive disclaimer, the Court held that the employer had effectively reformed and terminated the restrictive covenant, and that the covenant could not be enforced. *See also William A. Graham Co. v. Haughey*, 430 F.Supp.2d 458 (E.D. Pa. 2006) (comprehensive 1991 purchase agreement superseded 1989 restrictive covenant in employment agreement).

F. Amendments

Most agreements provide that all amendments must be in writing and signed by the parties. Any provision for unilateral amendment should be set forth explicitly, particularly if the unilateral amendment is to take place after one party acquires vested rights in the subject matter of the contract. *See, e.g., Abbott v. Schnader, Harrison, Segal & Lewis*, 805 A.2d 547 (Pa. Super. 2002), *appeal denied*, 573 Pa. 708, 827 A.2d 1200 (2003) (prohibiting unilateral amendment of pension plans).

G. No Oral Representations

H. Assignment Clause

It is essential that the contract bind and benefit successors and assigns, and that the contract be specifically assigned, particularly for any enforcement of employees' compensation claims or employers' claims for breach of restrictive covenants in the context of an asset sale or the transfer of an employee to a new entity. *See Hess v. Gebhard & Co., Inc.*, 570 Pa. 148, 808 A.2d 912 (2002); *All-Pak, Inc. v. Johnston*, 694 A.2d 347 (Pa. Super. 1997); *System One Holdings, L.L.C. v. Hill*, 2008 WL 4006688 (W.D. Pa. August 26, 2008). Such an assignment is not necessary when the employer's stock, as to opposed to assets, is sold. *Zambelli Fireworks Manufacturing Co., Inc. v. Wood*, ___ F.3d ___, 2010 WL 143682 (3d Cir. 2010).

I. Severability

J. Execution

It is prudent to set specific timelines and follow specific procedures for execution of employment *contracts*, in order to prevent one party from treating an unexecuted contract as a binding contract. *See Tomlinson v. Checkpoint Systems, Inc.*, 2008 WL 219217 (E.D.Pa. Jan. 25, 2008) (denying motion for summary judgment on contract claim, though employee failed to sign contract before layoff; reasonableness of acceptance period was question for the jury). *See also McGoldrick v. Trueposition, Inc.*, 623 F.Supp.2d 619 (E.D. Pa. 2009 (summary judgment denied on claim based on unsigned contract); *See also Shaer v. Orthopaedic Surgeons of Central Pennsylvania*, 938 A.2d 457 (Pa. Super. 2007).

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