3 Reasons

That Your Employment Agreement May Not Be Worth The Paper It's Printed On

AND HOW TO GET AROUND THEM

JONATHAN M. COOPER, ESQ.

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PROLOGUE

A few years ago, an older woman was referred to my office who had immigrated to this country from France, and was just eking out a living from her commissions as a sales rep for a small electronics company based out of Westchester, New York. After she had spent more than two years cultivating contracts for this company through her own established network of connections, the owners of the electronics company decided to unilaterally reduce her commissions and cut her pay, pocketing the difference. Although her claims that she was bilked out of more than $200,000 ultimately proved to be greatly exaggerated (which did not particularly surprise me), nevertheless, I decided to take her case for one simple reason: when I spoke with her, I believed her; I believed that she had been swindled out of hard-earned money, and I wanted to help her.

Sadly, many employees believe that when their employers unilaterally – and wrongfully – change the rules of their agreement that they are left without recourse, and remain completely subject to their employers' whims.

But that just isn't true.

I've written this book in order to educate the working public about their rights, and, by discussing some common errors that were made by other people in this realm, helping the readers of this book learn some *mistakes to avoid* in order to prevent what is an otherwise viable breach of employment agreement

case from prematurely and unnecessarily being ruined from the get-go.

Now for the "fine print."

Is this Book for You?

If you are willing to understand that the world of employment litigation is, generally speaking, quite intricate, and, for the reasons that are explained below, there are very few "nuisance value" employment litigation cases that are worth pursuing in New York, then you stand to gain a fair amount of knowledge from this book. On the other hand, if you have an unshakable belief that prosecuting or defending one of these cases is simply a question of wrong or right, and that these cases can or should be disposed of easily (in your favor, of course), then you are simply wasting your time reading this book.

This book is, in large part, a distilled compilation of articles that I've published pertaining to breach of employment contract and closely related issues that flow from it. And this is by deliberate design, because the genesis of these articles was from some of the more commonly asked questions that I've received pertaining to breach of contract in the employment context.

By reading about how some of the more common issues raised in the context of breached employment agreements have been addressed by New York's courts, it is my hope that this book will give you a basic understanding as to how these cases should be evaluated, and what questions you should

ask your attorney to assure that you are being given an honest assessment of the liability and exposure in your case. And I have written this book so you can do all of this from the comfort of your own office or home.

Quite frankly, I think this is the best part: you get to learn what you need to know about these cases so you can make a more informed decision about what steps can help assure that your interests are protected – *even before you consult with an attorney.*

This Book Is Not Legal Advice

That being said, it is also important that you understand the limitations of this book. Although I believe this book is extremely valuable as a resource to identify common pitfalls that plague breach of employment agreement cases and the defenses to these claims, every case is unique, and presents its own particular facts and legal issues. Consequently, please do not construe anything in this book to be legal advice about your case until we have mutually agreed in writing that I have accepted your case.

So where do we begin?

That's easy; Let's cut right to the cold, hard truth.

3 REASONS WHY MOST EMPLOYMENT AGREEMENTS MAY NOT BE WORTH THE PAPER THEY'RE PRINTED ON

As suggested in the title, there are 3 reasons that most breach of employment agreement claims are doomed to fail.

Here they are, in order:

(1) *The Judgment May Not Be Collectible*

Even before addressing the merits of a breach of contract/wrongful termination claim against an employer, the threshold question is – or should be – whether a judgment would be collectible. Unfortunately, in this economy, the answer to this question is increasingly "no." Therefore, even if you have a clearly meritorious claim, external economic factors may render the claim moot before it even begins.

(2) *At-Will Employment*

Assuming you clear that first hurdle, there is a second question that may prove even more daunting: Did you have a contract, or were you an "at-will" employee? And the answer to this question is critical, because absent a written contract, the agreement "is presumed to be a hiring at will that may be freely terminated by either party at any time for any reason

or even for no reason."[1] Furthermore, there is no exception for firings that violate public policy such as, for example, discharge for exposing an employer's illegal activities, *UNLESS* the employee made its employer aware of an express written policy limiting the right of discharge and the employee detrimentally relied on that policy in accepting employment.[2]

As you might well surmise, this condition is rare indeed.

(3) *Some Clauses, Like Non-Compete And Whistleblower Provisions, Are Generally Not Enforceable*

This is pretty much self-explanatory, and, as you've probably figured out by now, cuts both ways: on the one hand, you will likely lose if you try to hold your employer liable in breach of contract based upon a provision in the general employee manual.

On the other hand, your employer will be hard-pressed to hold you to an non-compete clause contained in your contract, especially if you are fired.

Okay, so returning to the threshold issue, let's assume that a judgment is collectible. What's next?

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[1] *Lobosco v. New York Telephone Co./NYNEX*, 96 NY2d 312, 316 (2001).

[2] See, *Weiner v. McGraw Hill, Inc.*, 57 NY2d 458 (1982).

What is At-Will Employment?

Let's start with the general rule: *New York's courts may not imply an employment agreement*; to the contrary, the law in New York on this issue is unmistakably clear: absent a written contract, it is presumed that the relationship is an at-will employment.

Simply put, an at-will employee can be hired, fired, promoted, demoted, or transferred at his employer's whim.[3]

Make no mistake; this rule has very real – and strict – ramifications. For example, in *Bernhardt v. Tradition North America*, a case very similar to the one discussed in below in "*Why A Whistleblower Protection Clause In An Employee Manual May Be Worthless*," the plaintiff, who was a vice president at defendant Tradition North America Inc., notified the SEC of various securities schemes that he had supposedly uncovered at his company. Not surprisingly, after he told defendant's senior vice president and the company's legal department that he had gone to the SEC, he was fired.

In seeking to recover damages for breach of contract and wrongful termination, the plaintiff asserted that he had an implied contract of employment (rather than being a mere "at will"

[3] While there is a narrow exception to this rule for discriminatory practices in violation of Title VII, that topic is beyond the scope of this book.

employee) because he had been assured "that [d]efendants would operate the firm, and that [p]laintiff would be permitted to perform his job responsibilities, in accordance with the prevailing laws, rules and regulations of the securities profession." In a similar vein, he claimed that since the defendants had made clear that he would be terminated for violating any laws, the defendants thereby impliedly warranted that they would not fire him for upholding those same laws.

As you may have guessed, these arguments didn't even make it out of the starting gate; the Court dismissed the case without even requiring the defendants to answer the complaint.

And the reason the Court did so is straightforward: not only did the plaintiff fail to overcome the presumption of employment at will, the plaintiff failed to produce any writing that limited the defendant's right to hire, fire, promote, demote, transfer or take any other employment action it deemed otherwise appropriate.

On the other hand …

Being an At-Will Employee Doesn't Mean You Automatically Forfeit Your Right to Recover Earned Wages or Commissions

Over the last several years, most people that have contacted my office regarding a breach of employment contract matter came in with the assumption that absent a written agreement, they had

no legal recourse to recover what they were owed. And in the same vein, these people assumed that this would certainly apply if they had resigned or quit before getting paid their sales commissions.

While in many cases these assumptions proved correct, it should come as no surprise that in many cases, they were erroneous.

And the reason is this: even absent a written agreement (which is often the case, particularly in an at-will employment), New York's courts have distinguished between an employee's commissions - which may be recoverable - and a non-employee's finder's fees - which are generally *not* recoverable.

As New York's Appellate Division, First Department recently held, absent a specific written agreement to the contrary, earned and uncollected wages or commissions cannot be forfeited.[4]

In order to appreciate this rule in its proper context, though, some background discussion is needed.

[4] See, *Davidson v. Regan Fund Mgt. Ltd.*, 13 AD3d 117 [2004]; *Weiner v. Diebold Group, Inc.*, 173 AD2d 166-167[1991].

Generally speaking, the Statute of Frauds (N.Y. Gen. Obl. Law §5-701, *et seq.*),[5] bars a claimant from recovering damages on a breach of contract claim if the agreement was not reduced to writing, and the agreement could not have been performed within one year. Applying that rule, New York's courts have held that the "negotiation of business opportunities," or "fee-finders" arrangements fall squarely within the ambit of the Statute of Frauds, and therefore, the essential terms of agreement must be reduced to writing in order to be enforceable.

For example, in *Nichols v. SG Partners, Inc.,* the plaintiffs were employed by defendant as placement professionals, earning both a base salary as well as a percentage of defendant's revenues generated for placements that the plaintiffs made, or commissions. After the plaintiffs found the working conditions "intolerable," they resigned, and requested that the defendant pay them for the commissions they had earned during their employment. Not surprisingly, the defendant (who was responsible for these "intolerable" conditions) ignored these requests.

Accordingly, the plaintiffs sued the defendant, for, among other things, breach of contract and breach of an implied covenant of good faith and fair dealing (this topic is discussed in greater depth in the very next piece). Predictably, the defendant moved to dismiss the plaintiffs' case on the grounds that

[5] This statute is discussed at greater length in my book, "*When You Don't Have a Written Agreement.*"

plaintiffs did not have a written contract, and therefore the claims were barred under New York's Statute of Frauds (N.Y. Gen. Obl. Law §5-701).

In rejecting the defendant's argument, though, the Court cited a litany of precedent for the proposition that

> "[B]ecause an at-will employment relationship may be freely terminated by either party at any time for any reason or even no reason, employment agreements of this type generally do not fall under the proscription of the Statute of Frauds."

How "Good Faith" Is Implied in New York Employment Contracts

As you may know, under New York law, every contract carries an implied covenant (i.e., promise) of "good faith and fair dealing."[6]

But what on earth does that mean?

It's actually rather tricky; in fact, New York's courts have expressly acknowledged that there is an inherent conflict between the implied good faith in a contract on the one hand, and not allowing plaintiffs to use this implied promise as a sword to create new

[6] *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 746 NYS2d 131, 773 NE2d 496.

contractual responsibilities that completely negate the rights that were specifically established by the contract itself.

Perhaps the simplest way to explain this concept – which is concededly more than a bit vague – is that the implied covenant of good faith and fair dealing is breached when the defendant acts to prevent the plaintiff's ability to perform his end of the contract, or to assure that the benefits of the contract are withheld from the plaintiff.

This concept has been specifically applied in the context of the wrongful termination of an employment agreement:

For example, in *Zuckerwise v. Sorceron Inc.*, 289 AD2d 114, 735 NYS2d 100, the plaintiff, who worked as a consultant for a corporation, was not paid a regular salary; instead, she was given stock purchase options at preferred rates. But when she was fired without cause, the defendant contended that she had forfeited her stock options, and therefore was owed nothing for the work she had done.

The Court disagreed.

Since the defendant was guilty of bad faith, they were not entitled to profit from their wholly inappropriate actions.

Why Whistleblower Clauses in Employee Manuals May Be Worthless

In *Candela v. Banco Industrial de Venezuela C.A.*, the New York County trial court's decision to dismiss a breach of contract and wrongful termination claim by a bank employee serves a clear warning to at-will employees everywhere: know your rights and what you must do to protect them before you are fired. Conversely, the decision also serves as a strong reminder to small business owners: make sure that your employee manual is properly drafted – or else.

In this case, the plaintiff, a former assistant treasurer of the defendant bank, claimed that she was fired as a direct result of her attempts to expose suspicious irregularities with respect to several trade confirmations that had come to her attention. Although she acknowledged that she was an at-will (as opposed to a contract) employee (for more information on the limited rights of at-will employees under New York law, see above "*Why Most Breach of Contract/Wrongful Termination Claims By At-Will Employees Are Doomed To Fail*"), she alleged that the defendant's own "Personnel Policies and Practices Manual promised to protect her from adverse action in connection with reporting suspicious activities," and that this promise gave rise to a contractual obligation to protect her from retaliatory termination.

According to the Court, there are two problems that prove fatal to her claim, however. First, the Manual only protected against retaliatory action those who file a Suspicious Activities Report (SAR) –

which the plaintiff never did. Second, the Manual also contained an explicit disclaimer that allowed them to terminate any at-will employee.

Thus, the implication of this decision is two-fold:

(1) If you are an employee, make sure you read carefully your employment manual before you undertake any actions that might affect your job; and,
(2) If you are the employer, make sure that your employment manual is appropriately drafted to protect your right to terminate at-will employees.

What if My Written Employment Agreement is Unclear?

At this point, one of the most important doctrines in all of contract law bears mention: any ambiguity in a written agreement, particularly in the employment context, is, as a general rule, construed against the drafter of the agreement (i.e., the employer). In legalese, this is known as the doctrine of "*contra proferentem.*"

Practically, this means that if your agreement is vague on a particular issue, any dispute about that provision will be decided in the employee's (non-drafter's) favor.

PRACTICE TIP: If you're drafting a contract, make sure that it contains a paragraph stating that the contract was *jointly* drafted, and that

no ambiguities should be construed against either side to the agreement.

NON-COMPETE AGREEMENTS and TRADE SECRET PROTECTION

When NY Employers Condition Receipt of Post-Employment Benefits on a Non-Compete

As you may be aware, it has become increasingly common for employers to condition their employees' receipt of post-employment benefits upon the employees' agreement to abide by a strict non-compete clause. So here's the question (which, sadly, occurs altogether too frequently):

What if the non-compete is unreasonably and unduly restrictive (i.e., prevents you from using your acquired knowledge and expertise to earn a living), and your job has become intolerable to the point you want to quit?

For purposes of evaluating the enforceability of a non-compete agreement, the difference between voluntarily resigning and being fired is quite important under New York law. This is known in legalese as the "employee choice doctrine." (For additional information on this topic, please see below, "When NY Courts Will Uphold Non-Compete Clauses – No Matter How Unreasonable").

As a tacit exception to New York's rule that disfavors non-compete agreements, the employee choice doctrine is based on the notion that "if the

employee is given the choice of preserving contract rights by refraining from competition or risking forfeiture of such rights by exercising a right to compete, there is no unreasonable restraint upon an employee's right to earn a living."[7]

But there is a way to defeat this exception.

In case you didn't already know it (and I suspect that's most people), you don't have to actually *be* fired in order to be *considered* fired from a job under New York law, and thereby effectively invalidate the non-compete agreement. But as you might suspect, the test to satisfy this doctrine, which in legalese is called "constructive termination" or "constructive discharge," is difficult to prove.

The test for constructive discharge was established by the Federal courts, and occurs "when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation."[8] A claimant can prove that she was constructively discharged by establishing that the working conditions "[were] so difficult or

[7] *Post v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 NY2d 84, 421 NYS2d 847, 397 NE2d 358.

[8] *Pena v. Brattleboro Retreat,* 702 F.2d 322, 325 [2d Cir.1983].

unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign."[9]

Is My Non-Compete Agreement Enforceable?

In the wake of the massive layoffs of the last few years, I've been asked this question an awful lot. Fortunately, the Court of Appeals – New York State's highest court – has written rather extensively on the subject. In my view, here are the most pertinent parts:

> "A restraint is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public … A non-compete agreement must also be reasonably limited temporally and geographically."
>
> Well, that's awfully vague, you say.
>
> And you're right.

Fortunately, the Court gave us a clearer insight into the policy considerations that help determine whether a particular non-compete provision will be upheld:

[9] *Pena,* 702 F.2d at 325.

> "Undoubtedly judicial disfavor of these covenants is provoked by 'powerful considerations of public policy which militate against sanctioning the loss of a man's livelihood' …
>
> "Indeed, our economy is premised on the competition engendered by the uninhibited flow of services, talent and ideas. Therefore, no restrictions should fetter an employee's right to apply to his own best advantage the skills and knowledge acquired by the overall experience of his previous employment. This includes those techniques which are but 'skillful variations of general processes known to the particular trade.'
>
> "Of course, the courts must also recognize the legitimate interest an employer has in safeguarding that which has made his business successful and to protect himself against deliberate surreptitious commercial piracy."

So where does that leave us?

Here's the Court's conclusion:

> "Restrictive covenants will be enforceable to the extent necessary to

> prevent the disclosure or use of trade secrets or confidential customer information."

On the other hand …

When NY Courts Will Uphold a Non-Compete Agreement – No Matter How Unreasonable

There is an extremely important exception to the New York Courts' express disfavor for non-compete agreements: *the employee choice doctrine*.

Under this exception to the rule, the employer is permitted to make the employee's right to receive post-employment benefits contingent upon the employee's agreement to abide by a non-compete agreement. The reason that this practice is permitted, according to New York's highest court, is as follows:

> "The doctrine rests on the premise that if the employee is given the choice of preserving his rights under his contract by refraining from competition or risking forfeiture of such rights by exercising his right to compete, there is no unreasonable restraint upon an employee's liberty to earn a living … It assumes that an employee who leaves his employer makes an informed choice between forfeiting his benefit or retaining the benefit by avoiding competitive

> employment (*Kristt,* 4 A.D.2d at 199, 164 N.Y.S.2d 239)."[10]

Importantly – and the significance of this cannot be overstated – under the employee choice doctrine, *a restrictive covenant (i.e., a "non-compete agreement") will be enforceable without regard to reasonableness if an employee left his employer voluntarily*.

Conversely, New York's high court has articulated an almost equally important caveat to this rule: "An essential element to the doctrine is the employer's 'continued willingness to employ' the employee. Where the employer terminates the employment relationship without cause, 'his action necessarily destroys the mutuality of obligation on which the covenant rests as well as the employer's ability to impose a forfeiture.'"[11]

What Kinds of Information Are Subject to Trade Secret Protection?

Contrary to popular belief, trade secret protection is not limited to proprietary technology

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[10] S*ee Kristt v. Whelan,* 4 A.D.2d 195, 199, 164 N.Y.S.2d 239 [1st Dept.1957], *affd. without op.* 5 N.Y.2d 807, 181 N.Y.S.2d 205, 155 N.E.2d 116 [1958]; *see also Post,* 48 N.Y.2d at 88-89, 421 N.Y.S.2d 847, 397 N.E.2d 358).

[11] *Post,* 48 N.Y.2d at 89, 421 N.Y.S.2d 847, 397 N.E.2d 358.

and formulae; it can even be applied to customer lists and product pricing if these things took time, effort, research and expense to develop, and is not readily available to the general public.

Consider the following cases:

A trade secret theft lawsuit that was recently filed in upstate New York by the Price Chopper chain store illustrates rather vividly how the disclosure of your small business's trade secrets – in this case pricing information – can dramatically impact your bottom line.

In its initial suit papers, Price Chopper claims that competitor Giant Market would have someone consistently and surreptitiously obtain copies of Price Choppers' fliers that would announce their special sale items, and then undercut those specific sales items in their own advertisements, thereby depriving Price Choppers' sales of any measurable impact, and giving Giant Market an unfair competitive advantage.

If true, the details set forth in Price Choppers' complaint are indeed tantalizing, and if this case were ever to go to trial, would certainly have a great deal of jury appeal. For example, Price Chopper apparently has videotape of someone sneaking into the warehouse where their pre-publication fliers were stored, and then handing them to a Giant Market employee. And it appears that they have videotape of this occurring on several occasions.

One important tidbit to glean from this story – and it bears repeating - is this: trade secret protection is not limited to proprietary technology and formulae; if your product marketing and pricing took time, effort, research and expense to develop, and is not readily available to the general public, it can be applied to that as well.

How One U.S. Company is Aggressively Protecting Against the Piracy of its Software

In January, 2010, the New York Times reported on a lawsuit that was brought by California-based Cybersitter, claiming that two Chinese software companies had engaged in unfair competition, and misappropriated, or stolen, thousands of lines of the code contained in its proprietary software to develop Green Dam, a type of software designed to block users from viewing unwanted websites.

The significance of this particular case lies in its scope, however: apparently, the Chinese government mandated that Green Dam Youth Escort be included with all computers sold in the country, thereby forcing several prominent computer manufacturers, including Acer, Lenovo and Sony to include this software with its computers. According to the lawsuit, these manufacturers continued to market and sell their computers with the software even after they were made aware that the software was indeed pirated.

The lawsuit seeks more than $2 billion in damages, representing the amount of money

Cybersitter would have earned had all of these users paid for their software.

But as I'm sure you've guessed, trade secret protection also plays itself out on a far smaller scale as well.

In fact, in a case I handled just a few months ago, my client – successfully – secured an injunction requiring a former employee to return prospective customer lists that they had expended substantial financial resources to develop. And even my client conceded that this customer list was not worth anywhere near $2 billion. (That's not to say it wasn't worth several hundred thousand dollars, though).

WHEN YOUR EMPLOYMENT AGREEMENT IS BREACHED

How a Demotion Can Be Deemed a Breach of Employment Agreement

Consider the following hypothetical scenario: Jim is hired by ABC Stores as Executive VP of Sales and Marketing. His 3-year employment contract states that all managers at ABC's stores are required to coordinate their in-store marketing efforts through him, including securing his approval of all vendors.

Six months later, ABC brings in its CFO's son Peter into the company, who has just received his MBA. Within one week of Peter starting his job at ABC, Jim notices that 3 of ABC's 25 store managers failed to forward him their monthly marketing

proposals. Two months later, that number increased to 20 out of the 25. And now, he also learns from two of his favored vendors that Peter, whose title is now Senior Vice President, terminated ABC's agreements with them – all without Jim's knowledge, and that he circulated a confidential memorandum – which also bore the CEO and CFO's signatures – directing that all sales and marketing efforts now be run through *him*, rather than Jim.

In the face of this embarrassment and the stripping of all his essential job duties, Jim feels compelled to resign. But he is concerned: the job market is much worse now than when he signed the contract, and if he quits, won't he be automatically forfeiting his right to recover under the employment contract?

Fortunately for Jim, under New York law the answer is no. In New York, if an employee is hired to fill a particular position, any material change in duties, or a significant reduction in rank may qualify as a breach of the employment contract.

On the other hand, and in the interests of full disclosure, resignation is not without risk: although in this particular fact scenario it is unlikely, a jury may ultimately decide that the change in duties that the employee suffered were not in fact "significant," and defeat the employee's breach of contract claim.

How Damages for Breach of an Employment Contract Are Calculated Under New York Law

From the foregoing, you are probably wondering (or should be) the following: let's assume a fact finder (i.e., whether a judge or jury) finds that my employer breached my employment agreement. What damages can I reasonably expect to recover under New York law?

As you might expect, the answer is a little bit complicated, and the determination of the right measure of damages is inherently fact-specific. That said, here are some of the major principles at play:

First, and as a threshold matter, the employee is entitled to recover the amount of salary and other benefits that he/she would have received under the contract – and here's the important caveat – *minus certain deductions*. (It's the "fine print" that always gets you, isn't it?)

The employer is entitled to a set-off of those amounts that the employee, using his/her best efforts, either earned, or should have earned from other employment since the date that the agreement was ended. Significantly, however, *the defendant bears the burden of proving the amount the plaintiff could – or should – have earned through diligent efforts.*

Moreover, although the newly-discharged employee is required to try to find similar employment, that does not mean that he/she is barred from starting his/her own business. It is just

that the damages will still be reduced by what plaintiff can reasonably be expected to earn from the venture during the unexpired term of the contract.[12]

One final point is in order here: the expenses that were necessarily incurred by the employee in the course of seeking new gainful employment *are recoverable* – provided that the employee has conducted the job search in good faith, and with reasonable prudence, and skill.

SEVERANCE AGREEMENTS

One Way That Employees Can Forfeit Their Severance Under New York Law

I've spoken with many people who, when confronted with the possibilities of starting their own business, hesitate – and not in a minor way – because of their fear that they will forfeit their severance package from their current employer. Stated in slightly different fashion, they are concerned that any effort they expend to start a new business while they are still employed will be perceived as employee disloyalty, or, in legal terms, a breach of fiduciary duty, and thereby nullify their right to severance.

But is that fear grounded in reality?

[12] *Cornell v T. V. Development Corp.*, 17 NY2d 69, 268 NYS2d 29, 215 NE2d 349.

The short answer under New York law, as you might well guess, is that it depends on whether you have a formal written severance agreement, and if so, what the agreement says. For example, in *Coastal Sheet Metal Corp. v. Vassallo*, New York's Appellate Division, First Department held that the plaintiff's former CEO had forfeited his right to his severance package because "the [trial] court's finding that [defendant] breached his employment agreement by 'violat[ing] the trust of his position' negates [his] claim for severance, as a matter of law."

How to Win the Breach of a Severance Agreement Case in New York

It seems to me that many people are under the impression that your hands are completely tied, and you have no immediate recourse to the New York State courts if your former employer breaches your severance agreement. While in many cases, e.g., where the severance plan is governed by ERISA (in which case a common law breach of contract is automatically barred (in legalese, that's called "pre-emption"), these cases may prove quite difficult, there are a significant number of instances where a discharged employee can still recover damages for his/her unpaid severance benefits.

And in order to succeed on such a claim, the plaintiff need only prove two things.

That's sounds like incredibly good news, right?

Not so fast.

These two things are, in actuality, quite difficult to prove:

(1) that the employer made a regular practice of making severance payments; and,
(2) that the plaintiff relied to his/her detriment on the severance policy.[13]

In a parallel vein, in order to recover for accumulated vacation time, an at-will employee must establish that the defendant had a regular practice of paying employees for their unused vacation time and that he/she relied upon that practice in either accepting or continuing in that employment position.[14]

Why It's So Hard to Prove the Breach of an ERISA Severance Plan in NY

As noted above, although an employee may, as a general rule, bring a common law (i.e., non-statutory) breach of contract claim based upon the employer's failure to live up to their end of the deal of

[13] *Skarren v Household Finance Corp.*, 296 AD2d 488, 745 NYS2d 556; *Hirschfeld v Institutional Investor, Inc.*, 260 AD2d 171, 688 NYS2d 31; see *Gallagher v Ashland Oil, Inc.*, 183 AD2d 1033, 583 NYS2d 624.

[14] *Spencer v Christ Church Day Care Center, Inc.*, 280 AD2d 817, 720 NYS2d 633.

a severance agreement, the same does not hold true where the severance plan is governed by ERISA (see, 29 USC § 1001, et seq.). In those cases, it is far *more* difficult to recover, and here's why:

The United States Supreme Court has held that in order to recover pension benefits for the breach of an ERISA plan, "a plaintiff must prove that his or her discharge was motivated by a specific intent to deprive him or her of pension benefits, and that the loss of such benefits was not a mere consequence of his or her termination."[15]

That, as I'm sure you can imagine, is *extremely* difficult to prove.

How New York's Courts Determine Whether an Arbitration Clause is Enforceable

When your contract has been breached, your first reaction might very well be to bring a lawsuit in State or Federal Court. But that option may not be available, especially if your written contract contains a clause mandating that all disputes be resolved by arbitration.

So, you ask, under what circumstances are those mandatory arbitration clauses enforceable?

[15] S*ee, Lightfoot v. Union Carbide Corp.,* 110 F.3d 898, 906, *cert. denied* 528 U.S. 817, 120 S.Ct. 56, 145 L.Ed.2d 49; *Dister v. The Continental Group,* 859 F.2d 1108, 1111).

Well, first, and as a threshold matter, the question as to whether the parties agreed to arbitrate should be decided by a court, not an arbitrator. That said, and while "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit,"[16] the preference for arbitration is so strong that, "under the FAA, 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'"[17]

So, what are the factors that a court looks to in deciding whether a case must go to arbitration?

The longstanding rule in New York is as follows:

> "In deciding whether any part of an action should be directed to arbitration, [the] Court must determine: (i) whether the parties had an agreement to arbitrate; (ii) the scope of that agreement; (iii) if federal statutory claims are asserted, whether

[16] *Merrill Lynch Inv. Managers v. Optibase, Ltd.,* 337 F.3d 125, 131 (2d Cir.2003) (per curiam).

[17] *JLM Indus., Inc. v. Stolt-Nielsen SA,* 387 F.3d 163, 171 (2d Cir.2004) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)).

> Congress intended those claims to be non-arbitrable; and (iv) if some, but not all, of the claims are subject to arbitration, whether to stay the balance of the proceedings pending arbitration."[18]

In Breach of Employment Contract Case, NY Court Holds Arbitration Clause Unenforceable

It's no secret that mandatory arbitration clauses have essentially become standard fare in business contracts, particularly in the employment or consultant context. But, as a Federal appeals court recently held, "It is well-accepted that although the presumption in favor of arbitration is strong, "the obligation to arbitrate nevertheless remains a creature of contract."[19]

On a practical level, that means that there are some important facts that must be in place before a New York court will bar a lawsuit, and compel the parties to pursue arbitration; one such fact is that *the party seeking to compel arbitration must actually be a party to the underlying contract – or at the very least, a tacitly*

[18] *See, JLM Indus.,* 387 F.3d at 169; *Oldroyd v. Elmira Sav. Bank, FSB,* 134 F.3d 72, 75-76 (2d Cir.1998).

[19] *Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc.*, 252 F.3d 218, 224 (2d Cir. 2001).

acknowledged third-party beneficiary of the contract (i.e., that the contract was entered into for their benefit).

For example, in *Miness v. Ahuja,* the plaintiff sold to defendants several nursing homes that had been owned by his family. As part of the purchase agreement, the defendants agreed to retain plaintiff as a consultant for a period of two years, providing that the nursing homes met certain performance criteria.

After defendants terminated plaintiff – well before the expiration of the two-year period – plaintiff sued, and defendants predictably sought to dismiss the case on the grounds that the claim was barred by a mandatory arbitration clause that was in the agreement.

There was one "little" problem with this argument, however; the entities that signed the agreement with the plaintiff were not the same ones that were actually sued.

The defendants' operating companies – which had signed the employment agreement – were not parties to the lawsuit, and therefore, the Court held, lacked standing to enforce the arbitration provision of the contract, stating:

> "[T]he only signatories to the Miness Employment Agreement are Miness and the Operating Companies. The Operating Companies are not parties in this action, and thus cannot invoke its provisions in this case. As for the

> defendants, none are party to the Miness Employment Agreement, and unless they are explicit third party beneficiaries of the contract, they cannot enforce its terms … Here, there is nothing in the Miness Employment Agreement that suggests that the defendants have a right to enforce the contract as third parties."[20]

[20] See, *Premium Mortg. Corp. v. Equifax, Inc.*, 583 F.3d 103, 108 (2d Cir. 2009) ("A non-party to a contract governed by New York law lacks standing to enforce the agreement in the absence of terms that 'clearly evidence an intent to permit enforcement by the third party' in question," quoting *Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 N.Y.2d 38, 45, 495 N.Y.S.2d 1, 485 N.E.2d 208 (1985)).

CONCLUSION

Given the high level of technicalities involved in assessing the viability of a breach of employment agreement matter, you owe it to yourself to at least consult with an attorney on this issue before making a final determination as to whether you have a viable case, and whether you can – or should – pursue it.

Even if you've lost your job, that doesn't necessarily mean that you can't hire a competent lawyer to pursue a viable breach of contract case.

There are increasing numbers of lawyers, like me, who are willing to accept these cases in ways that call for other than a straight hourly fee. Some of those arrangements might include either prosecuting the case on a flat fee, or imposing a cap on the legal fees in the case, thereby giving you, the client, a firm limit on the expenses they will have to incur in seeking to recover their damages.

As set forth above, I do not expect that this book will answer all of your questions regarding a breach of employment contract matter.

But it's a pretty good starting point.

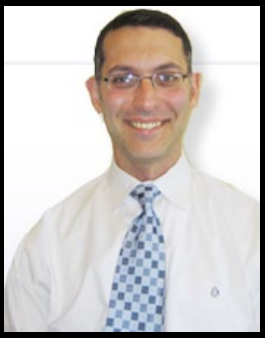
If you have any further questions about your particular legal issue(s), please feel free to pick up the phone and give me a call at 516-791-5700. If you prefer, you can even send me an e-mail at

jcooper@JonathanCooperLaw.com, and we can set up a mutually convenient time to discuss your legal questions.

Jonathan Cooper

3 Reasons

That Your Employment Agreement May Not Be Worth The Paper It's Printed On



Jonathan Cooper is, first and foremost, a husband and father to six (yes, that's right - 6) adorable children with whom he lives in Queens, New York. Less importantly, he has litigated numerous business litigation cases, ranging in complexity and scope from a simple breach of a sub-lease agreement to breach of employment agreements and State and Federal Class Actions against foreign and domestic manufacturers and distributors arising out of their breach of warranties regarding their products.

Jonathan has been quoted in the Wall Street Journal, as well as having one of his previous books featured on CNBC's website. The real public service though, has been his firm's websites and blogs providing a lot of free, useful information and links on a variety of topics, such as breach of contract, business fraud, defamation, and the different types of tortious interference claims under New York law, which are regularly updated.

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