

Litigating Against a Former Employer for Additional Compensation

BY JENNIFER B. ZOURIGUI

At the end of an employment relationship, a former employee may assert that he or she is entitled to additional compensation from a former employer. This could be, for example, in the form of bonus, commissions, or profit sharing.

If a demand has been made by the former employee and the former employer refuses to pay, the former employee will be left with the sometimes difficult decision of whether or not to pursue litigation. In my practice, I have had the benefit of handling these type of matters on both sides of the coin—representing both individuals seeking additional compensation and the companies defending against such claims. With this dual perspective, there are four topics I find it is best to discuss with a former employee before commencing litigation.

Topic 1: Analyzing and weighing the merits of the claim. In assisting an individual in determining if they want to pursue litigation, the first task, as with any potential claim, is to analyze the strength

JENNIFER B. ZOURIGUI is a partner at Ingram Yuzek Gainen Carroll & Bertolotti, practicing in the commercial litigation, labor & employment, and creditors' rights groups.



of the claim, reviewing the employment contract, if any, and any applicable labor laws. The analysis should also include asking the former employee such questions as: whether a release was signed at

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the end of employment; whether there was a discretionary aspect to the compensation at issue; or whether there is a potential waiver defense.

Topic 2: Realistically considering the costs of an individual litigating

against a company. If the results of such analysis are that the claim is favorable, the determination by both lawyer and client whether an individual should actually engage in litigation against the company where he or she was formerly employed must go beyond the merits of the claim. As with other types of litigation, this can include a frank discussion about the costs of litigation. But in this situation, it also means being realistic about the likely unequal footing of the parties. If no settlement or compromise could be reached when a demand for the compensation was made, it is unlikely the mere filing of a lawsuit will change the company's position. There is "the cost of business" mentality that many companies are willing to take when

dealing with litigation. And more likely than not, a company may use litigation costs to outmaneuver an individual. This may include, for example, excessive motion practice or overly burdensome discovery demands. Of course, a skilled litigator working on behalf of the individual will know how to fight back but inevitably this may mean spending more money.

Topic 3: Discussing how emails, texts, and social media may be discoverable.

The company being sued will seek discovery regarding the former employee's claim. But they will also assert defenses and, possibly, counterclaims. They will demand discovery in connection with those as well. The former employee should understand that this will likely mean discovery requests in connection with their emails or even text messages. I typically advise clients that they should expect that the former employer will request discovery from any personal email accounts but will also have access to and will search their old work email accounts. For some, this won't matter. But for others, there may be some discomfort with their email communications being reviewed and scrutinized. Worse yet, for some, there may be information within those emails that could be harmful.

There is also the issue of social media, including Facebook and Twitter accounts. Not only should an attorney consider advising his or her client not to make any statements about the former employer or the litigation on social media, but there should also be a review and discussion of any existing negative statements about the former employer or details about work that perhaps should not have been posted and the potential impact on the litigation.

Topic 4: Understanding that skeletons in the work closet will come out.

Be ready for the former employer to fight fire with fire. When those emails and other documents are reviewed, they will be looking for ways to attack back—including the former employee's performance. Both formal written reviews and informal feedback may be at issue, especially if there is any discretionary aspect to the compensation sought. But even if the contractual language is non-discretionary, the company may still argue that the former employee failed to perform. A plan should be discussed for how to counter any such contentions by the former employer, crafting both legal and factual arguments.

Another counterattack I frequently see is a claim that the former employee has violated a confidentiality agreement and retained company documents or other property. Maybe the employee had a work laptop that was not returned. Or routinely brought documents home during the employment term but may have been required to return such information to the company prior to departure. Once the company reviews old work emails, another issue that may come up as a potential violation of the work agreement is if the former employee was forwarding emails or other documents to a personal email account during employment.

In addition to breaches of confidentiality agreements, if there is a non-compete or non-solicitation agreement, the former employee should expect the company will raise any claims for breach if they exist. It is possible the former employer may not have been aware of what might be considered a breach but the former employee's claim brings it to light. Alternatively, a company may have decided to forbear asserting a

violation of a non-compete—until the former employee engaged in litigation. If this is a potential counterclaim, an analysis of the scope and validity of the restriction will be necessary, as well as a balancing of the risks and rewards of initiating a lawsuit for the additional compensation.

Although the former employee may not have signed any non-compete agreement, in New York there is an inherent duty of loyalty to an employer during the course of the employment. This duty is less well known than a non-compete restriction. It means an employee may not compete with his employer during employment and cannot place his personal interests above those of the employer. The employee may take preparatory steps to set up her own company but cannot use the employer's time or facilities. Particularly if the employee left to start her own business, a frank discussion about what steps were taken during the employment should be raised.

All of these topics should be discussed with the former employee *before* litigation commences so the individual has a realistic perspective of the various issues that could come up along the way. Knowledge is power—and a fully armed litigator can more successfully navigate the case to a successful conclusion. This will also make for a stronger working relationship with the client if the lawyer prepares them for the fight ahead.