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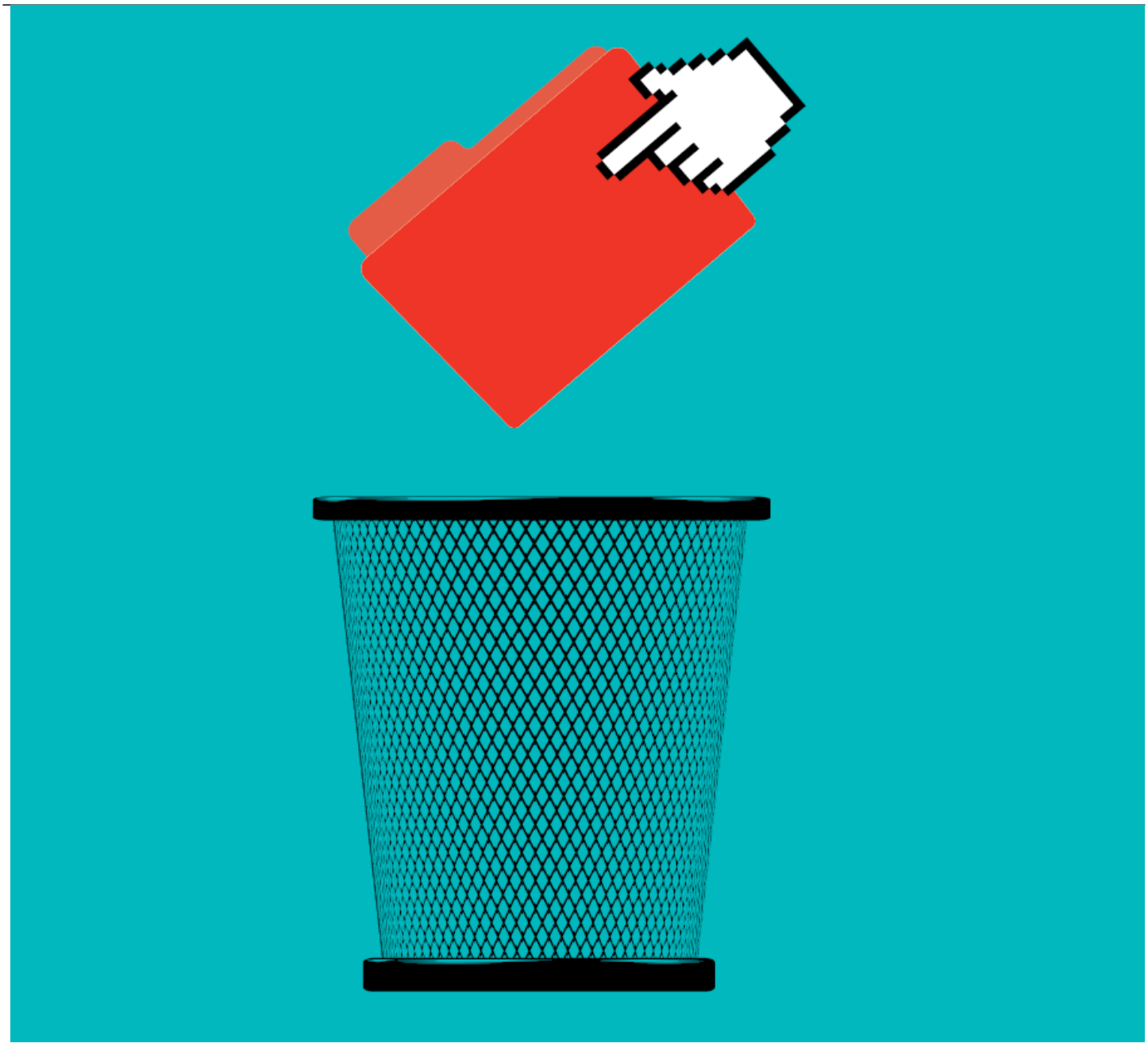
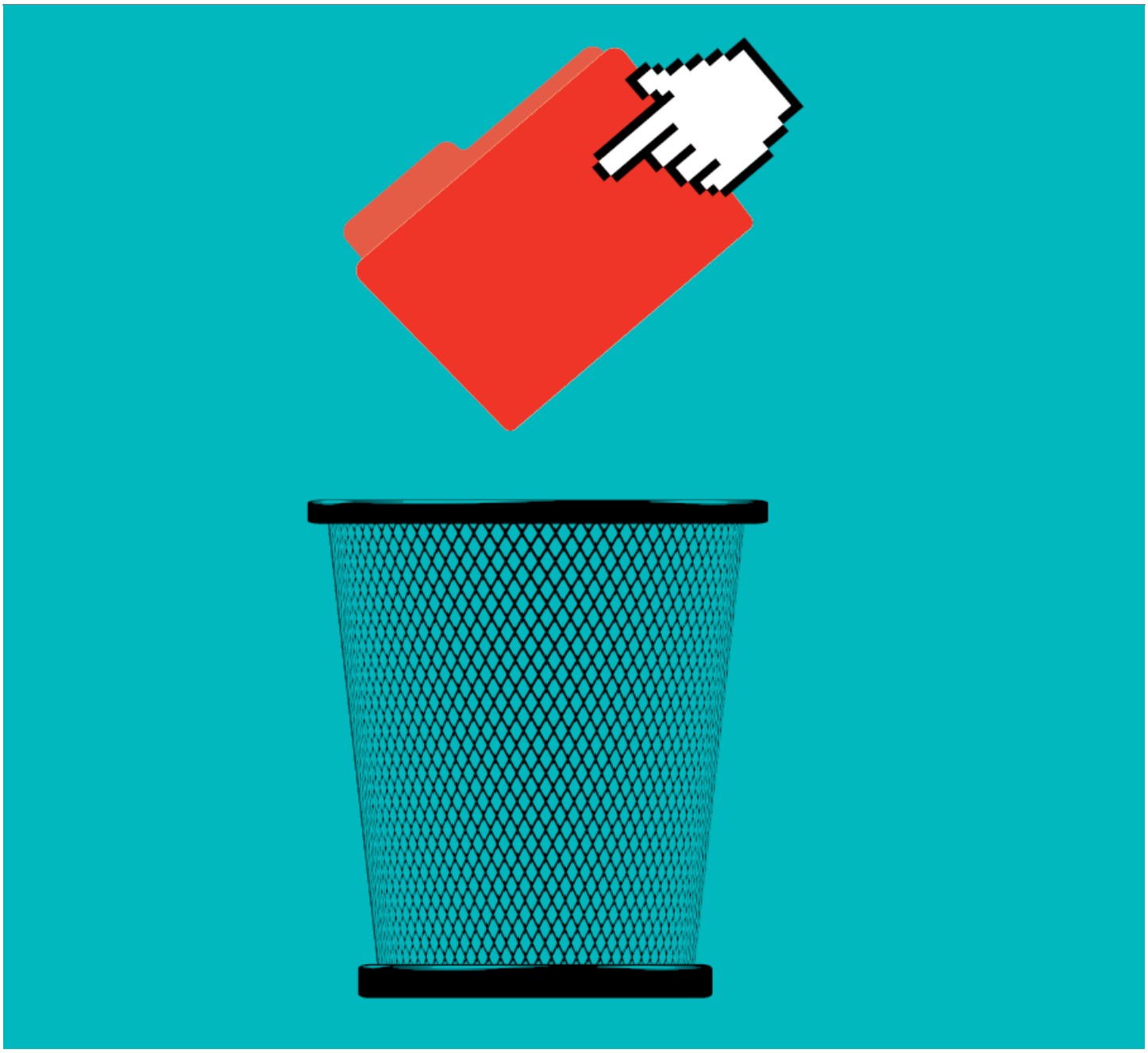
Ditch the Boilerplate: Avoid Drafting Mistakes in Employment Agreements

Employment and Labor





CHEAT SHEET

- ***Forum selection and choice-of-law clauses.*** These clauses establish who will decide any disputes (forum selection or choice-of-forum) and what law applies (choice-of-law or governing law).
- ***Integration and merger clauses.*** The effect of an integration provision is to preclude either party from introducing evidence of additional or inconsistent terms outside the contract.
- ***Survival clauses.*** Survival clauses list which provisions of the employment agreement survive termination of the agreement. For example, confidentiality provisions are commonly included in a survival clause.
- ***Severability clauses.*** These clauses state that to the extent certain provisions in the agreement are unenforceable, those provisions can be severed and the remainder of the

agreement will survive.

Assume your US-based company is headquartered outside California, but you have an executive in California. When you hired her a few years back, she signed your company's standard employment contract, which includes a one-year non-competition clause. Now the executive has informed you that she is leaving to go work for a competitor. Can you enforce the non-compete provision against her, even though noncompetes are clearly unenforceable under California law? Possibly, but it will depend on whether that agreement also contained choice-of-law and forum selection provisions that provide for resolution in a state that permits post-termination non-compete agreements. In short, it may turn on whether, when pulling together that employment contract, the boilerplate provisions were simply cut and pasted from someone else's prior agreement, or carefully reviewed and considered.

And what if the facts were changed, so the employee (who is a US citizen) was expatriated or seconded to one of your overseas offices? The basic terms of her employment contract are what you use for all your US-based employees. But have you considered what law applies — foreign, US or maybe both? And, are there contract provisions you must now include, or maybe provisions that you're prohibited from including?

Contract "boilerplate" — including choice-of-law, forum selection, integration, severability and survival clauses — are standard and usually necessary provisions in various types of agreements used in the employment relationship, such as employment contracts, nondisclosure and confidentiality agreements, non-competition agreements, and employment separation agreements. These boilerplate clauses are typically inserted in agreements to add clarity about, for example, where a contractual dispute will be heard, what law will apply, or what happens if part of the contract is thrown out. These clauses are so common that they're often recycled from one agreement to the next. Creating this language is easy, with just a few clicks of the keyboard the basic contract terms are complete.

But beware — dangers may be lurking in these commonly used provisions.

Problems can arise from the fact that the clause has specific terms that don't apply to the current contract. Or an issue might arise from the interplay between contract provisions — that is, the boilerplate clause may be fine on its own, but it creates ambiguity or conflicts when read in conjunction with other provisions in that agreement, or if certain provisions are lacking in the agreement. Either way, including boilerplate without considering the risks and ramifications and carefully modifying it to fit the current agreement can create unintended results. Provisions that counsel may consider to be routine and intended to protect the organization may, create, rather than eliminate, legal risks. Without proper scrutiny and drafting, standard terms may lead to contract interpretation disputes, and even litigation, with currents or former employees.

In this article, we will explore the unintended consequences that can arise when boilerplate clauses are used in employment agreements. When drafting employment agreements, attorneys need to ensure that boilerplate provisions "play well" with other provisions in the agreement. Keep in mind the legal result your client is intending to achieve by entering into the agreement and ensure that the boilerplate provisions are consistent with those goals. If not, don't be afraid to modify the boilerplate language, or exclude it entirely, as needed to meet your needs. Failure to do so may lead to unintended consequences in disputes with current and former employees that could have been

avoided.

Forum selection and choice-of-law clauses

Forum selection and choice-of-law clauses are some of the most widely used provisions in any type of contract, including employment agreements. They establish who will decide any disputes (forum selection or choice-of-forum) and what law applies (choice-of-law or governing law). Generally, forum selection and choice-of-law provisions are enforceable, and courts tend to look upon them favorably. In fact, the US Supreme Court, in *Atlantic Marine Construction Co., Inc. v. U.S. District Court for the Western District of Texas*, 134 S. Ct. 568, 571 U.S. _ (Dec. 3, 2013), held that forum selection provisions should be enforced in most cases.

A forum selection provision allows the parties to agree that a lawsuit, regarding the agreement or the subject matter of the agreement, will be decided in a particular court. The provision essentially chooses which forum will apply the law to the contract. A forum selection provision may require that disputes be brought before a court in a certain state or county, particularly if the employer and employee are located in different states, or that disputes must be brought before an arbitrator. A typical forum selection clause might read: “The parties agree to submit all disputes arising out of or in connection with this Agreement to the exclusive jurisdiction of the Courts of the State of California.”

A choice-of-law provision specifies that a particular state’s or country’s laws will be used to interpret the agreement, even if the employee works or resides in a different location, or the contract is entered into in a different location. For example, an employment contract for a company headquartered in New York might specify that New York law applies, even if the employee works in California.

The two types of clauses can work in tandem: A forum selection clause typically is a stepping stone to arrive at the type of legal analysis that the employer wants. That is, the employer includes a forum selection clause, in part, to affect the law that will be applied, or to confirm the choice-of-law in the agreement.

But it’s not uncommon to see employment agreements that only include a choice-of-law clause without selecting a forum, and it’s important to understand that simply having a choice-of-law clause doesn’t mean the employer will have a favorable arbiter of that law. Going back to our initial hypothetical, consider the follwoing: A Massachusetts employer and its California employee enter into an employment agreement that contains a non-compete provision. The agreement is silent on forum selection but includes a Massachusetts choice-of-law clause because the employer knows that Massachusetts enforces non-competes and California does not. The employee is terminated and asks a California court to interpret the noncompete agreement. Due to the public policy concerns, a California court will apply California law on the topic of non-competes, despite the strong public policy favoring choice-of-law provisions. Had the contract also included a Massachusetts forum selection clause, the employer likely would have avoided this result. It’s worth noting, however, that there could be rare instances when even a Massachusetts court might apply California law.[1] In sum, how choice-of-law and forum selection clauses are used in employment agreements can be critical to the outcome of an employment dispute. Here are several drafting considerations:

1 In one case in which a Massachusetts court upheld a non-compete agreement that contained both Massachusetts choice-of-law and forum selection provisions, the court highlighted the fact that even though the employee now worked and resided in California, he had signed the non-compete in Massachusetts and remained a Massachusetts resident. The court, in granting a restraining order

enjoining the employee from working for a competing California company, suggested that the result could have been different had the employee lived and worked in California all along: “It is one thing for a person who has lived and worked in California to wish to continue to live and work in California, only for a different employer. It is quite another for a Massachusetts resident who has agreed to a noncompetition covenant, enforceable in Massachusetts, to choose for his new residence and place of employment the one state where the likelihood of his defeating his non-competition covenant may be the greatest.” EMC Corp. v. Donatelli, 25 Mass.L.Rptr. 399 (Mass. Sup. Ct., May 5, 2009).

- Be aware that one clause might not work without the other, and carefully review provisions to ensure that the forum selection and/or choice-of-law clauses will yield the intended result. In this regard, multistate (and multinational) employers, in particular, should be wary of a boilerplate approach and should evaluate what combination of provisions has the greatest chance of producing the company’s desired outcome.
- Courts generally require that the choice-of-law be reasonable, based on whether the parties, or at least one of them, has a strong connection to that forum — for example, the employer is headquartered there or has operations there. On the other hand, the mere fact that the company is incorporated in that state may be too tenuous a connection for the choice-of-law to be reasonable. What’s the risk? While you may be successful in moving the litigation to the state of choice, the suit may be subject to attack on *forum non conveniens* grounds.
- When selecting a forum, keep in mind that the forum’s rules will apply as to whether the choice-of-law in the contract will be enforced. Thus, be sure that you have considered whether the choice-of-forum is likely to lead to the application of the desired law that is selected in the agreement.
- Arbitration is a type of forum. If an agreement contains both an arbitration provision and a forum selection provision, that could give rise to an ambiguity in the contract — a particular concern for national employers. Because courts will interpret ambiguities against the drafter — usually the employer — inserting both types of clauses could render the arbitration provision unenforceable in the event of a conflict (not to mention that the efforts to compel arbitration can prove very costly). In one recent case (see sidebar), for example, a California court found that a Massachusetts choice-of-law clause rendered an arbitration provision unenforceable as to California statutory discrimination claims.

Be careful what you wish for

A recent US case underscores the sometimes unintended consequences of inserting standard contractual terms without carefully evaluating them in light of the contract at hand — and applicable state law. In *Harris v. Bingham McCutchen LLP*, 214 Cal.App.4th 1399 (2013) (cert. denied), a California Court of Appeal ruled that an arbitration provision in an employment agreement was unenforceable as to statutory discrimination claims in light of a Massachusetts choice-of-law provision in the agreement, where Massachusetts law specifically barred arbitration of an employee’s statutory discrimination claims.

The case involved a lawsuit filed by Bingham McCutchen associate attorney Hartwell Harris, who asserted claims for, among other things, disability discrimination under the California Fair Employment and Housing Act. The law firm petitioned to compel arbitration, based on a letter agreement that set out the terms of Harris’s employment and included both an arbitration clause and the Massachusetts choice-of-law clause. The agreement stated that the parties “agree that any legal disputes which may occur between you and the Firm and which arise out of, or are related in any way to your employment with the Firm or its termination, and cannot be resolved informally, shall be

resolved exclusively through final and binding private arbitration before an arbitrator mutually selected by you and the Firm …" The letter also specified that it was to "be construed in accordance with the internal substantive laws of the Commonwealth of Massachusetts."

The Court of Appeal affirmed the trial court's denial of Bingham's arbitration petition. The court first noted that California law strongly favors enforcement of choice-of-law provisions, including in the context of arbitration agreements (see *Pelig v. Neiman Marcus Group Inc.*, 204 Cal.App.4th 1425 (2012)). The court went on to find that Massachusetts law requires that "'parties seeking to provide for arbitration of statutory discrimination claims must, at minimum, state clearly and specifically that such claims are covered by the contract's arbitration clause.'" *Warfield v. Beth Israel Deaconess Medical Center Inc.* (2009) 454 Mass. 390, 398. Because the arbitration provision here did not specify that it covered statutory discrimination claims, the court found that the arbitration provision was unenforceable under Massachusetts law. The court indicated that any ambiguities in the letter agreement had to be construed against the law firm, which drafted a document that required a California employee to be bound by Massachusetts law. (The court also noted that its conclusion did not interfere with the fundamental attributes of arbitration as stated in the US Supreme Court's decision in *AT&T Mobility v. Concepcion*, 563 U.S. 321, 131 S.Ct. 1740, 1743, 179 L.Ed.2d 742 (2011).)

Harris illustrates how dueling employment agreement provisions can interfere with enforcement of that agreement — and specifically, how a choice-of-law term can thwart enforcement of arbitration provisions. To help ensure that an employer's goals of arbitration can be accomplished, be certain to periodically review arbitration agreements and choice-of-law provisions, particularly as the legal landscape surrounding arbitration of employment disputes continues to evolve in many states.

Integration and merger clauses

Through an integration or merger clause, the parties affirm that the agreement is the entire agreement, as to the past, present and future. Presently, the agreement constitutes the entire agreement. It supersedes prior agreements. And, any future changes must be in writing to foreclose any possibility of modification by way of oral statements or implied conduct. Stated another way, the effect of an integration provision is to preclude either party from introducing evidence of additional or inconsistent terms outside the contract. Clearly, integration and merger clauses have their place in most employment agreements, but there are hidden dangers as well.

In particular, an integration clause can have the effect of superseding prior agreements. While in some instances this may be the intended result, in others it could lead to extinguishing important terms and agreements. For example, assume the employee signed an offer letter that contained an important non-disclosure provision. Subsequently, the employer and employee enter into a more detailed employment agreement, which contains an integration clause but does not include the non-disclosure terms. As a result, the new agreement will completely supersede the terms of the signed offer letter, along with the critical non-disclosure provision. To avoid this result, use care to incorporate all substantive terms into a subsequent agreement, or to specify in the integration clause any prior agreements or promises that should survive.

How to draft an integration clause

An integration or merger clause is a critical provision in most employment agreements. And, when properly drafted, the clause can help ensure that, for example, a disgruntled employee cannot claim that they were promised a higher salary than that stated in their employment contract.

What should a well-drafted employment agreement integration clause contain? Typically, it will state the following: that the contract sets forth the entire agreement between the employer and employee; that it fully supersedes all prior agreements and understandings, written or oral; that no change or modification to the agreement will be binding unless made in writing and signed by an authorized officer of the company; and that neither the employee nor the employer has relied on any representations other than those specifically contained in the agreement.

To help ensure that integration clauses are upheld — and fulfill the company's intention to exclude reliance on any pre-contractual representations — here are some drafting pointers:

- Draft the integration clause in discrete segments, to help ensure that if any particular aspect of the clause is held to be unenforceable, a court could sever that portion, leaving the rest of the provision intact (assuming the contract also has a severability provision).
- Spell out in the integration clause (or list in a separate exhibit) all of the documents that are covered by the clause and agreement. This may include, depending on the circumstances, nondisclosure agreements or side letters.
- Keep in mind that courts may read the entire contract to determine whether or not a particular term is integrated. In other words, courts can interpret an integration clause to either include or exclude certain contract terms.

A similar caution arises with respect to at-will employment provisions. Many employers include at-will language in offer letters but may not incorporate the provision into a subsequent employment agreement. As with the example above, an integration clause in the new employment agreement could dilute the at-will nature of the relationship. The problem can be avoided simply by drafting clear at-will language into the new agreement.

A recent case illustrates the integration clause trap. In *Diskriter, Inc. v. Baker*, Case No. 14-1245 (Pa. Super., Aug. 1, 2014), Diskriter was acquired by Joansville Holdings Inc. The acquisition terms included a stock purchase agreement and an agreement which contained non-compete and non-solicitation provisions ("stock purchase/non-compete") that bound Diskriter's President and CEO Randy Baker. Eventually, Baker resigned from Diskriter to work for a competitor, and Diskriter and Joansville slapped Baker with a lawsuit for violating the stock purchase/non-compete provisions. The court, however, dismissed the suit. Why? After the stock purchase/non-compete agreements were signed, Baker and Diskriter had entered into an employment contract, which also had non-compete and non-solicitation provisions, along with an integration clause specifying that the employment contract "superseded all prior agreements or understandings." "The plain language of the new employment agreement [stating] that it 'supersedes all prior agreements or understanding pertaining to the subject matter hereof,'" was enough to convince the court that the stock purchase agreement's non-compete provision was superseded by the new employment agreement, and the company failed to establish a right to injunctive relief under the stock purchase agreement.[2]

2 Note that Diskriter and Joansville did not allege that Baker was in violation of the new employment agreement.

Survival clauses

A boilerplate survival clause can create significant problems in an employment agreement. Survival clauses list which provisions of the employment agreement survive termination of the agreement — for example, confidentiality provisions are commonly included in a survival clause. The failure to list certain clauses could lead to a determination that they were intended to be excluded — in other words, *expressio unius est exclusion alterius*. To avoid problems, be sure to engage in a detailed review of survival clauses before they are recycled into a new agreement.

Survival clause didn't kill arbitration

While the failure to list certain contractual provisions in a survival clause will ordinarily mean the "death" of that provision, the US Sixth Circuit Court of Appeals recently upheld the continuing validity of arbitration and noncompetition provisions in an expired independent contractor agreement even though the employer did not include them in the survival clause.

In *Huffman v. The Hilltop Cos., LLC*, 747 F.3d 391 (6th Cir. 2014), the employer moved to compel arbitration of a post-termination lawsuit alleging independent contractor misclassification. The employer relied on a signed "professional services agreement" that contained both an arbitration clause and a survival clause. The plaintiffs countered that the arbitration clause was no longer enforceable because it was not among the contract provisions listed in the survival clause.

The Sixth Circuit, in a case of first impression, ruled that the survival clause should not be interpreted as a "clear implication" that the employer and plaintiffs intended that the arbitration clause would not be enforceable after the professional services agreement expired. Reading the contract as a whole — including a focus on a non-compete provision that by its terms was in force for 12 months following termination of the agreement — the Sixth Circuit concluded that "the parties did not clearly intend for the survival clause to serve as an exhaustive list of the provisions that would survive expiration of the agreement." Relying on the strong federal policy favoring arbitration, the court went on to resolve any ambiguity in favor of arbitration of the dispute.

The *Huffman* case is a victory for employers. However, if you are outside the Sixth Circuit, you may want to sidestep the litigation that arose in *Huffman* by exercising diligence to list an agreement's arbitration provision in a survival clause.

Severability clauses

Severability clauses can be one of the more dangerous types of boilerplate in an employment agreement. These clauses state that to the extent certain provisions in the agreement are unenforceable, those provisions can be severed and the remainder of the agreement will survive. The clauses can be a valuable tool in ensuring contract enforcement, for example when an agreement contains a noncompetition provision that is found to be unenforceable. But depending on the provisions in the agreement that may be most susceptible to attack, inclusion of a severability clause may also have unexpected results.

For example, a standard separation agreement will contain a release provision in which the employee agrees to waive claims, along with a consideration provision, which promises payment to the employee for that waiver. In this scenario, a severability clause would invite a court to find that the release clause — which is the most likely provision to come under attack — is unenforceable and can be severed from the agreement, but to enforce the remainder of the agreement, including the consideration provision.

Before automatically including a severability clause, think through which contractual obligations would continue in the event key provisions of the agreement are severed. You can also consider modifying a garden-variety severability clause by including a caveat that if certain key provisions are found unenforceable — such as release terms — the entire agreement will be unenforceable.

Separation agreements

Separation agreements are one of the more common types of employment-related agreements, or more accurately, end-of-employment agreements. Depending on the level of detail and complexity, your separation agreements may contain forum selection, choice-of-law, severability survival, integration and merger clauses — and all of the cautions and drafting tips with respect to each of those types of provisions apply equally in the context of using them in separation agreements. For example, pay attention to existing agreements or provisions in those agreements that may need to survive the termination, and be sure to call those out in the survival clause.

In addition to these general concerns, separation agreements have their own unique issues that should be on your drafting radar. The US Equal Employment Opportunity Commission (EEOC) has honed in on covenants not to sue, in which the employee promises not to file a complaint or other action based on the released claims under the agreement, as well as non-disparagement and similar types of provisions in which the employee is limited in his or her ability to speak about the employer or matters relating to the employment. The EEOC, in several recent suits, takes the position that these clauses interfere with employee rights to file administrative charges, communicate voluntarily, and participate in EEOC investigations (*EEOC v. CVS Pharmacy Inc.*, No. 1:14-cv-00863 (N.D. Ill., Feb. 7, 2014)[3]; *EEOC v. CollegeAmerica Denver Inc.*, n/k/a Center for Excellence in Higher Education, Inc., d/b/a CollegeAmerica, No. 14-cv-01232-LTB (D. Colo., Apr. 30, 2014)).

3 On October 7, 2014, the District Court dismissed the EEOC's lawsuit against CVS on grounds that the EEOC had failed to engage in conciliation procedures as required under Title VII. *EEOC v. CVS Pharmacy Inc.*, – F.Supp.3d –, 2014 WL 5034657 (N.D. Ill., Oct.7, 2014).

For example, in the *EEOC v. CVS Pharmacy, Inc.* suit, the agency expressed concern that covenant not to sue language effectively prevented a settling employee from filing an administrative charge of discrimination, despite the EEOC's longstanding position that settling employees cannot be required to waive their right to file administrative charges of discrimination. The agency also focused on the CVS provision's explicit preservation of employee statutory rights: "Nothing in this paragraph is intended to or shall interfere with Employee's right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, nor shall this Agreement prohibit Employee from cooperating with any such agency in its investigation." The EEOC was troubled by the fact that this acknowledgement only appeared as a "single qualifying line" "not repeated elsewhere" in the "five-page single spaced" agreement. Thus, despite the carve-out language for discrimination proceedings, the EEOC contended that the separation agreement effectively interfered with an employee's right under Title VII to file an administrative charge or participate and cooperate in an agency investigation.

As a result of the EEOC's focus on separation agreements, it is prudent to review separation agreements — including form or recycled agreements — to reinforce provisions that acknowledge the employee's statutory rights to pursue and participate in administrative complaints. Agreements should also specify that nothing in the agreement is intended to interfere with employee access to the EEOC or other agencies (such as the National Labor Relations Board). Additionally, consider including this preservation of rights in a separate bolded paragraph, to help stave off potential arguments that an employee was unaware of their rights.

Cross-border conundrums

Multinational companies have their own issues to deal with when it comes to employment agreements and boilerplate. Namely, many countries have unique laws applicable to some of the standard provisions, be it forum selection or choice-of-law provisions, or even special requirements for severance agreements and releases. And certain countries require the inclusion (or exclusion) of certain language in employment agreements. What's more, depending on the circumstances, both the laws of the home country and the host country could apply. The outcome could also be different if, for instance, the employee is a local hire rather than an expat.

Choice-of-law clauses take on particular importance in a cross-border situation. Many employment contracts call for the law of the home country to apply. As a general matter, however, the host country may apply local laws to an employee who is working there, even if the contract specifies otherwise. On the other hand, some jurisdictions may recognize foreign choice-of-law provisions for expatriates. China, for example, has a different set of employment laws that apply to Chinese nationals, and therefore tends to be more lenient on choice-of-law matters when it comes to foreigners working in China. The United States has its own proclivities; some employment laws, such as Title VII of the Civil Rights Act of 1964, have extraterritorial reach and can be enforced by an employee working overseas despite a choice-of-law term to the contrary. Another point to keep in mind is that while it might not be possible to contract around mandatory employee protection laws in a country, there could be other employment terms, for example, regarding benefits and tax arrangements, where the parties may have more leeway to steer the choice-of-law.

Beware the temptation to skirt the choice-of-law conundrum at the outset by including a provision applying the home country's law even if the employee will be working in a country with mandatory employment protections that does not recognize the choice-of-law. This setup could have the unintended effect of allowing the employee to "cherry pick" the country's legal protections he or she prefers. Employment release provisions are another tricky area for companies with multinational and mobile workforces. Consider, for example, a US citizen who is age 60 and has been working abroad in the UK for a US-based company. The employee is fired and asked to sign a separation agreement and release that complies with the UK's specific requirements around termination releases. What the employer overlooked is that claims under the US Age Discrimination in Employment Act, which applies extraterritorially, can be waived only if the release contains specific language and terms pursuant to the US Older Workers' Benefits Protection Act. If the same employee was working in Brazil, that country's law would generally prohibit a prelawsuit release of employment claims.

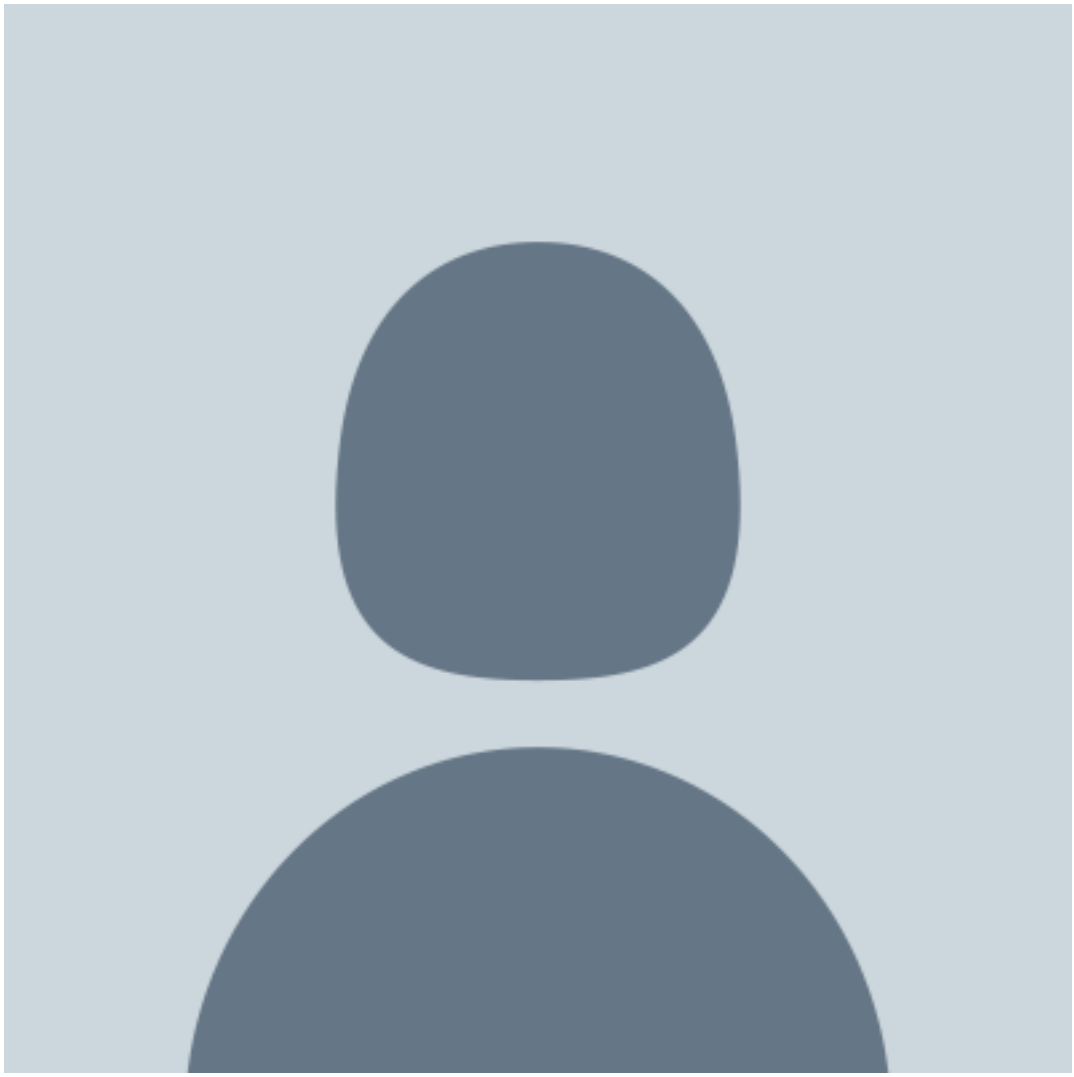
Given the array of possible variations in a cross-border scenario, it is critical to analyze which law or laws apply, and to fine-tune employment agreement provisions accordingly.

What to do now?

Begin by reviewing the employment agreements used by your organization. Assess how the agreements are being used and whether they serve the purpose for which they were drafted. Focus on the boilerplate provisions to ensure that they work in harmony with other provisions to achieve the desired results — and make any necessary modifications so that they do.

Once you have a standard agreement that you believe meets your company's needs in most situations, identify those situations in which it may not. In those cases, don't be afraid to modify the standard agreement as needed to achieve the desired results — including making changes to the boilerplate. The bottom line is that there are no sacred cows that cannot be sacrificed in drafting agreements. The end goal should be standard, consistent and desired results, not standard agreements.

Lisa Haas



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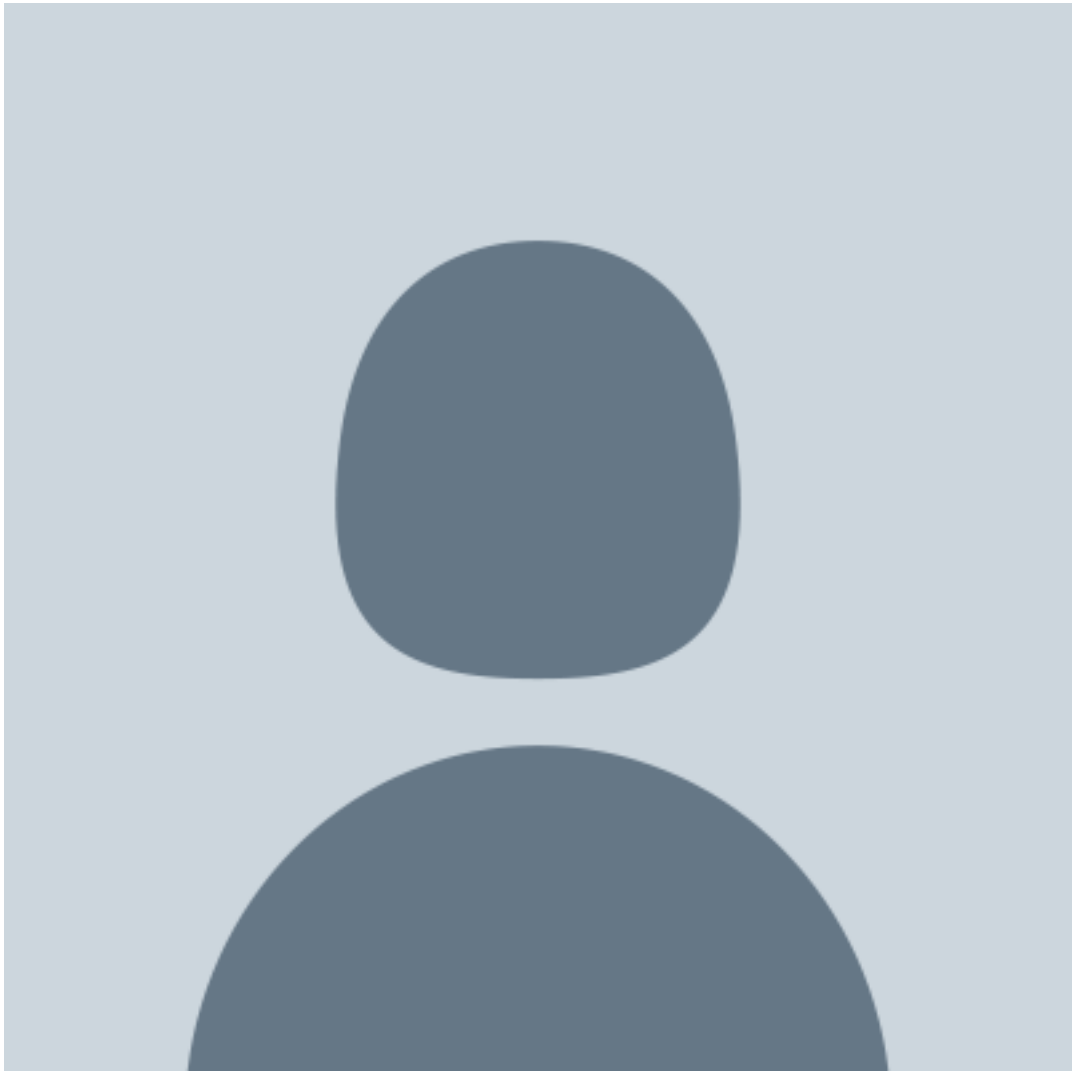

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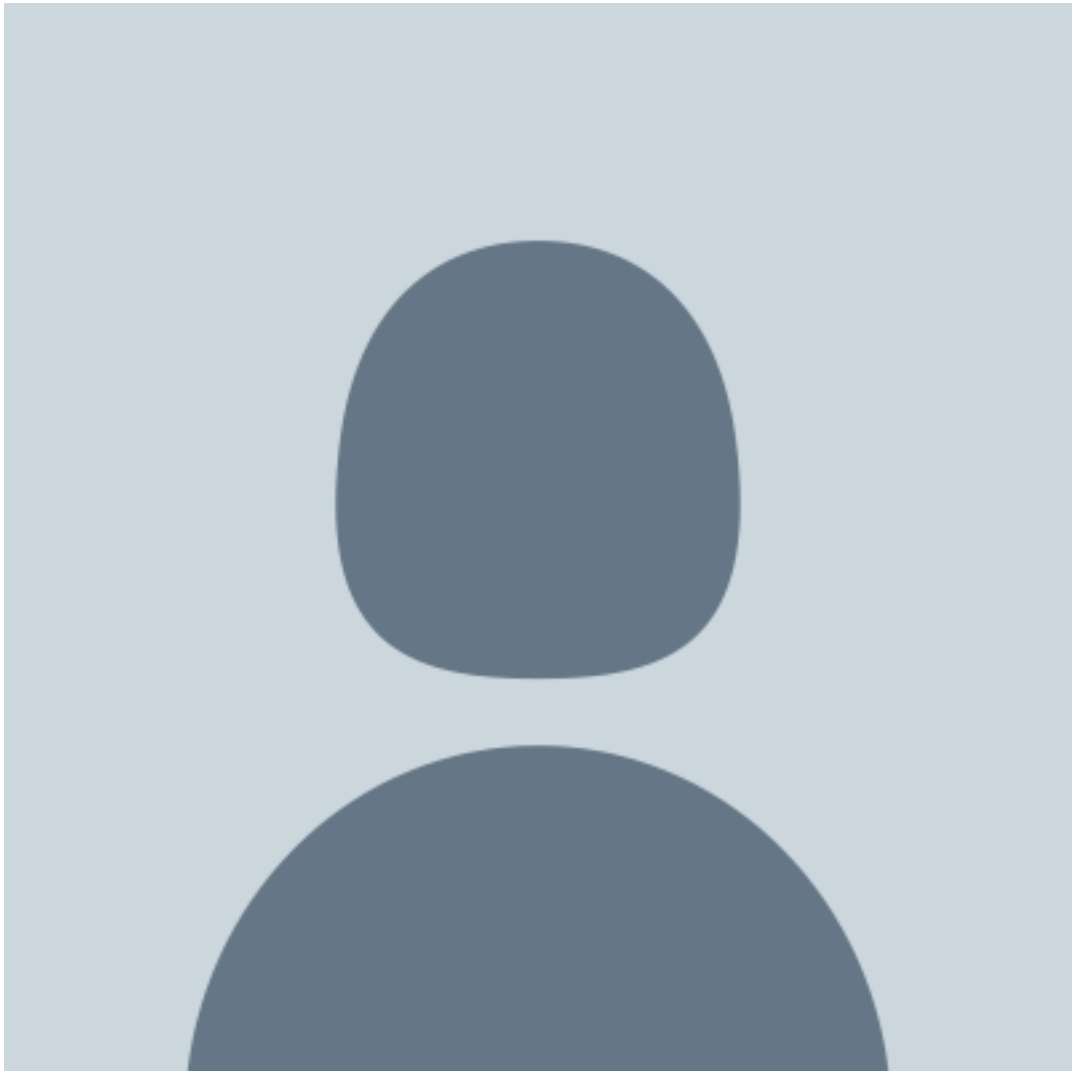

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