

Miscellaneous Provisions in a Contract: A Drafter's Perspective

Presentation for:

Executive Compensation Webinar Series
December 8, 2016

Presented by:

Anthony J. Eppert
713.220.4276
AnthonyEppert@AndrewsKurth.com

ANDREWSKURTH
KENYON

andrewskurthkenyon.com

Housekeeping: Technical Issues and Questions

- Technical issues
 - If you are having difficulty viewing this presentation, please call Cisco WebEx Tech Support toll free at 866.229.3239

- Questions during this presentation
 - We encourage questions (even though your audio lines are muted)
 - To submit a question, simply type the question in the blank field on the right-hand side of the menu bar and press return
 - If time permits, your questions will be answered at the end of this presentation. And if there is insufficient time, the speaker will respond to you via e-mail shortly after this presentation

Housekeeping: Recording, CE Credits and Disclaimer

- Recording
 - This presentation is being recorded for internal purposes only

- Continuing education credits
 - A purpose of the webinar series is to provide FREE CE credits
 - To that end, each presentation is intended to provide 1 credit hour in the following areas:
 - CLE: 1 credit hour (Texas)
 - CPE: 1 credit hour (Texas)
 - HRCI: This activity has been approved for 1 (HR (General)) recertification credit hours toward California, GPHR, PHRi, SPHRi, PHR, and SPHR recertification through the HR Certification Institute
 - SHRM: This program is valid for 1 PDC for the SHRM-CPSM or SHRM-SCPSM
 - If you have any questions relating to CE credits, please direct them to Anthony Eppert at AnthonyEppert@AndrewsKurth.com or 713.220.4276

- Disclaimer
 - This presentation is intended for informational and educational purposes only, and cannot be relied upon as legal advice
 - Any assumptions used in this presentation are for illustrative purposes only
 - No attorney-client relationship is created due to your attending this presentation or due to your receipt of program materials

Housekeeping: About Anthony "Tony" Eppert



Anthony Eppert

Partner

Andrews Kurth Kenyon LLP

Tel: +1.713.220.4276

Email: AnthonyEppert@AndrewsKurth.com

- Tony practices in the areas of executive compensation and employee benefits

- Before entering private practice, Tony:
 - Served as a judicial clerk to the Hon. Richard F. Suhrheinrich of the United States Court of Appeals for the Sixth Circuit
 - Obtained his LL.M. (Taxation) from New York University
 - Obtained his J.D. (Tax Concentration) from Michigan State University College of Law
 - Editor-in-Chief, Journal of Medicine and Law
 - President, Tax and Estate Planning Society

Our Compensation Practice – What Sets Us Apart

- Compensation issues are complex, especially for publicly-traded companies, and involve the substantive areas of:
 - Tax,
 - Securities,
 - Accounting,
 - Governance,
 - Surveys, and
 - Human resources

- Historically, compensation issues were addressed using multiple service providers, including:
 - Tax lawyers,
 - Securities/corporate lawyers,
 - Labor & employment lawyers,
 - Accountants, and
 - Survey consultants

Our Compensation Practice – What Sets Us Apart (cont.)

- At Andrews Kurth Kenyon LLP, we have a holistic and full-service approach to compensation matters, that considers all substantive areas of compensation, including:



Housekeeping: Upcoming 2017 Webinars

- Upcoming 2017 webinars:
 - Compensation: ISS Concerns & Mandates (Annual Program) (1/19/2017)
 - Equity Plans & Award Agreements: The Training Course (2/9/2017)
 - Compensation Committees: A Look at Liability & Fiduciary Issues (3/9/2017)
 - Compensatory Arrangements within Partnerships and LLC (4/13/2017)
 - Designing Equity Compensation Abroad (5/11/2017)
 - Expatriate & Secondment Agreements: Top 10 Issues to Consider (6/8/2017)
 - Pay Ratio Disclosure Rules: The A-Z Training Course (7/13/2017)
 - Trends in Designing Performance-Based Equity Awards (8/10/2017)
 - Preparing for Proxy Season: Start Now (Annual Program) (9/14/2017)
 - How to Properly Design a Nonqualified Deferred Compensation Plan (10/12/2017)
 - Navigating Employee v. Independent Contractor Classifications (11/9/2017)
 - Sharing the Dream: M&A Transactions & Retaining Key Employees (12/14/2017)

- Upcoming 2018 webinars
 - To be determined

Purpose of this Presentation

- The purpose of this presentation is to set forth and discuss the various “miscellaneous” or “boilerplate” clauses commonly found in executive contracts, equity award agreements and bonus arrangements

- To that end, this presentation covers (in no particular order):
 - Clause No. 1 – administration, interpretation, and binding decisions
 - Clause No. 2 – construction and captions
 - Clause No. 3 – choice of law and governing law
 - Clause No. 4 – forum/venue selection
 - Clause No. 5 – waiver of jury trial
 - Clause No. 6 – arbitration
 - Clause No. 7 – attorneys’ fees
 - Clause No. 8 – merger clause/integration clause/entire agreement
 - Clause No. 9 – successors and assigns
 - Clause No. 10 – no assignment
 - Clause No. 11 – counterparts
 - Clause No. 12 – severability
 - Clause No. 13 – source of payments
 - Clause No. 14 – no waiver
 - Clause No. 15 – survival
 - Clause No. 16 – no guarantee of service provider status

Purpose of this Presentation (cont.)

- Please note that this discussion:
 - Is from the view point of an executive compensation attorney (*i.e.*, not the perspective of a litigator),
 - Addresses general legal principles (as opposed to a specific state or federal law), and
 - Is intended to have a little fun as we conclude the 2016 webinar series

Clause No. 1 – Administration/Interpretation/Binding Decisions

- Purpose
 - This section of a contract answers the question of which party’s interpretation should prevail if there is a dispute (*i.e.*, whether the dispute is about an ambiguous term or otherwise) over the contract

- Example
 - “Any determination by the Committee in connection with any question or issue arising under the Notice, the Plan or this Award Agreement shall be final, conclusive and binding on the Participant, the Company and all other persons. Any question or dispute regarding the interpretation of this Award Agreement or the receipt of the Covered Shares or shares hereunder shall be submitted by the Participant to the Committee. The resolution of such a dispute by the Committee shall be final and binding on all parties.”

- Thoughts
 - The company is typically the drafter of the contract, and since ambiguous terms could be construed against the drafter, it is important to have the above provision to protect the employer
 - Additionally, the foregoing standard could make it more difficult for an employee to prevail on a claim (especially when the contract has a “prevailing party” provision, addressed in a later Slide)

Clause No. 2 – Construction and Captions

- Purpose
 - Construction clauses provide general guidelines for the interpretation of the contract
 - Captions should be used for reference only and not have any effect on the interpretation of the agreement

- Example
 - “Whenever the context so requires herein, the masculine shall include the feminine and neuter, and the singular shall include the plural. The words "include", "includes" and "including" as used in this Agreement shall be deemed to be followed by the phrase "without limitation." The word "or" is not intended to be exclusive, unless the context clearly requires otherwise. The captions used in this Agreement are inserted for convenience and shall not be deemed to be a part of this Agreement for construction or interpretation.”

- Thoughts
 - The above is helpful in instances where a contract is hastily prepared, and after-the-fact, it is noticed that a heading/caption contradicts the language contained within the clause

Clause No. 3 – Choice of Law/Governing Law

- Purpose
 - The parties are mutually agreeing upon which jurisdictional law will govern the interpretation and enforcement of the contract

- Example
 - “This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, without regard to conflict of laws principles thereof.”

- Thoughts
 - Generally, courts will respect the parties selection
 - Venue and choice of law need not be the same

Clause No. 4 – Forum/Venue Selection

- Purpose
 - A forum selection clause (also known as a jurisdiction or venue clause) addresses “where” a dispute will be litigated, such as a specific state, county or city

- Example
 - “The Company, the Participant and the Participant's assignees agree that any suit, action or proceeding arising out of or related to the Notice, this Award Agreement or the Plan shall be brought in the United States District Court for the Southern District of Texas (or should such court lack jurisdiction to hear such action, suit or proceeding, in a Texas state court in Harris County) and that all parties shall submit to the jurisdiction of such court. The parties irrevocably waive, to the fullest extent permitted by law, any objection the party may have to the laying of venue for any such suit, action or proceeding brought in such court. If any one or more provisions of this Section [___] shall for any reason be held invalid or unenforceable, it is the specific intent of the parties that such provisions shall be modified to the minimum extent necessary to make it or its application valid and enforceable.”
 - “Each party to this Agreement hereby irrevocably submits to the exclusive jurisdiction of the state and federal courts in Houston, Texas for the purposes of any proceeding arising out of or based upon this Agreement.”

- Thoughts
 - Is it the employee that is most likely to instigate any lawsuit?
 - Is the venue selected convenient to the employer?

Clause No. 5 – Waiver of Jury Trial

- Purpose
 - The parties agree to have the dispute heard by a judge, but waive their right to a jury trial

- Example
 - “Each party irrevocably waives its rights to a trial by jury in any action or proceeding arising out of or relating to this agreement or the transactions relating to its subject matter.”

- Thoughts
 - Is the judge likely to be more favorable than a jury?
 - We do not typically use this type of provision in our compensatory agreements because, where this issue is important, we instead tend to use arbitration provisions

Clause No. 6 – Arbitration Provisions

- Purpose
 - To agree that certain disputes or all disputes arising out of or related to the contract will be resolved by an arbitrator instead of a court

- Example (of an extremely bare bones arbitration provision)
 - “All disputes, controversies, or claims arising out of or relating to this contract shall be submitted to binding arbitration with the applicable rules of the American Arbitration Association then in effect.”

- Thoughts
 - A substantially tailored clause could save time and expense (e.g., amount of discovery, time for resolution, etc.)
 - Specific qualifications/expertise of the arbitrator could be required
 - Can help to protect confidentiality
 - Evidentiary rules are not as constricting
 - The result tends to be “split the baby” approach

Clause No. 7 – Attorneys’ Fees

- Purpose
 - To expressly define which party will pay legal fees and costs arising from any dispute under the contract
 - Typically, the provision obligates the losing party to pay the prevailing party’s attorneys’ fees, if any

- Example
 - “In any proceeding by which one party either seeks to enforce its rights under this Agreement or seeks a declaration of any rights or obligations under this Agreement, the prevailing party shall be awarded its reasonable attorneys’ fees, and costs and expenses incurred.”
 - See an additional example on next Slide that also contains guiding principles

- Thoughts
 - Who is more likely to sue?
 - Who has deeper financial pockets?

Clause No. 7 – Attorneys’ Fees (cont.)

- Another example of a more robust provision is as follows:

“The Company and each Participant hereby agrees and stipulates as follows:

(i) Recovery of Attorneys’ Fees, Costs and Expenses. If there is any suit, action, or proceeding pursuant to Section 8(j) of this Plan alleging a breach of this Plan, then the prevailing party in any such suit, action, or proceeding, on trial or appeal, shall be entitled to recover from the non-prevailing party, in addition to any other relief awarded, its reasonable and necessary attorneys’ fees, costs, and expenses incurred in such suit, action, or proceeding. If there is no prevailing party, each party will pay its own attorneys’ fees, costs, and expenses. Whether a prevailing party exists shall be determined solely by the court on a claim-by-claim basis and the court, in its sole discretion, shall determine the amount of reasonable and necessary attorneys’ fees, costs, and/or expenses, if any, for which a party is entitled.

(ii) Guiding Principles. The following guiding principles shall be applied by a court in any determination of a prevailing party: (i) the intent of the parties is to avoid any suit, action, or proceeding arising from a breach of this Plan, and therefore, the parties will work together to resolve any such dispute; (ii) none of the parties will proceed with a suit, action, or proceeding arising from a breach of this Plan until after exhausting all reasonable efforts to resolve such dispute using best efforts, and an impasse has resulted and a satisfactory result cannot be reached without moving forward with such suit, action, or proceeding; and (iii) none of the parties will bring any suit, action, or proceeding or claim (including cross-claims) arising from a breach of this Plan until after such party has fully evaluated the merits of such purported claim or cause of action and made a determination that such party has a good-faith basis to move forward with such suit, action, proceeding or claim (including cross-claims).

(iii) Appeals. In any appeal from the award or denial of attorneys’ fees, the court reviewing the award may not modify the decision of the court making or denying an award, or the decision of the court as to the amount of the award, except upon a finding of an abuse of discretion.”

Clause No. 8 – Merger Clause/Integration Clause/Entire Agreement

- Purpose
 - This provision provides that the agreement represents the entire agreement between the parties, and that such agreement has been fully memorialized in this contract
 - The purpose of this provision is to prohibit a party from later claiming that there were additional agreements or representations about the contract at the time the contract was entered into (*e.g.*, negates oral promises that were not incorporated into the written contract)

- Example (incorporated within an executive contract)
 - “This Agreement, the Exhibits attached hereto, the agreements specifically incorporated herein, and any indemnification agreement or policy for the benefit of the Executive contain the entire agreement and understanding of the parties hereto with respect to the matters covered herein and supersedes all prior or contemporaneous negotiations, commitments, agreements and writings with respect to the subject matter hereof; and all such other negotiations, commitments, agreements and writings shall have no further force or effect, and the parties to any such other negotiation, commitment, agreement or writing shall have no further rights or obligations thereunder.”

- Thoughts
 - Consider adding an exhibit to equity awards that lists all outstanding equity awards. Such an exhibit, when combined with the merger clause, could act to negate allegations that more equity was owned as of the time such contract was entered into

Clause No. 9 – Successors and Assigns

- Purpose
 - To bind the parties and their successors and assigns

- Example
 - “Except as provided herein to the contrary, this Award Agreement shall be binding upon and inure to the benefit of the parties to this Award Agreement, their respective successors and permitted assigns.”

- Thoughts
 - If the contract has a No Assignment provision (see next Slide), then this provision could be deleted

Clause No. 10 – No Assignment

- Purpose
 - To address whether rights and obligations under the contract, in whole or in part, could be assigned to another

- Example
 - “Neither this Agreement nor any of the Executive's rights and duties hereunder, shall be assignable or delegable by the Executive. Any purported assignment or delegation by the Executive in violation of the foregoing shall be null and void ab initio and of no force and effect. This Agreement may be assigned by the Company to a person or entity which is an affiliate or a successor in interest to substantially all of the business operations of the Company. Upon such assignment, the rights and obligations of the Company hereunder shall become the rights and obligations of such affiliate or successor person or entity.”
 - “Except as otherwise provided in this Award Agreement, the Participant shall not assign any of his or her rights under this Award Agreement without the prior written consent of the Company, which consent may be withheld in its sole discretion. The Company shall be permitted to assign its rights or obligations under this Award Agreement, but no such assignment shall release the Company of its obligations hereunder.”

- Thoughts
 - An anti-assignment clause is important in instances where the services to be performed are particular to a specific individual
 - Should anti-assignment apply to all rights under the contract, or instead, could some rights be assignable

Clause No. 11 – Counterparts

- Purpose
 - To avoid requiring parties sign the same copy of an agreement

- Example
 - “This Agreement may be signed in counterparts, each of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument.”

- Thoughts
 - Necessary given that facsimile signatures are often used
 - Consider too adding an electronic signature clause (e.g., clicking the “I Agree” button)

Clause No. 12 – Severability

- Purpose
 - To address what happens to the agreement if a portion of it is declared unenforceable by a court

- Example
 - “In the event that any one or more of the provisions of this Agreement shall be or become invalid, illegal or unenforceable in any respect, the validity, legality and enforceability of the remaining provisions of this Agreement shall not be affected thereby.”

- Thoughts
 - The above is an example of a savings clause to preserve the remainder of the agreement
 - Consider too whether the above should include reformation language, so that the otherwise unenforceable part could be modified to the extent enforceable
 - This provision is extremely important to contracts containing restrictive covenants such as confidentiality, non-solicitation, and non-competition provisions

Clause No. 13 – Source of Payments

- Purpose
 - To ensure the employer does not have to fund or set aside monies to satisfy future financial obligations under the contract

- Example
 - “All payments provided under this Agreement, other than payments made pursuant to a plan or agreement which provides otherwise, shall be paid in cash from the general funds of the Company, and no special or separate fund shall be established, and no other segregation of assets shall be made, to assure payment. The Executive shall have no right, title or interest whatsoever in or to any investments which the Company may make to aid the Company in meeting its obligations hereunder. To the extent that any person acquires a right to receive payments from the Company hereunder, such right shall be no greater than the right of an unsecured creditor of the Company.”

- Thoughts
 - This clause is typically used in any contract between an employer and an employee where severance or other monies could be owed to the employee

Clause No. 14 – No Waiver

- Purpose
 - To ensure that a failure to enforce a contractual right, intentional or otherwise, does not result in a waiver of such rights and remedies

- Example
 - “The failure of a party to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver of such party's rights or deprive such party of the right thereafter to insist upon strict adherence to that term or any other term of this Agreement.”

- Thoughts
 - There are many reasons why a party might not require strict compliance with a contract
 - And too, any past waiver should not act to preclude the party from enforcing strict compliance in the future

Clause No. 15 – Survival

- Purpose
 - Specifies which provisions of the contract will remain in effect after the contract expires or is terminated

- Example
 - “This Agreement shall terminate upon the termination of employment of the Executive; however, the following shall survive the termination of the Executive's employment and/or the expiration or termination of this Agreement, regardless of the reasons for such expiration or termination: Section 3 (Compensation and Benefits) and the corresponding Exhibit A ("Restricted Stock Award Agreement"), Section 4 ("Termination of Employment") and the corresponding Exhibit B ("Waiver and Release"), Section 5 ("Change in Control"), Section 7(a) ("Defense of Claims"), Section 7(b) ("Non-Disparagement"), Section 7(e) ("Entire Agreement"), Section 7(f) ("Governing Law/Venue"), Section 7(k) ("Successors; Binding Agreement"), Section 7(l) ("Notices").”

- Thoughts
 - The most common and important provisions that must survive a termination of the contract relate to restrictive covenants (e.g., non-solicitation, non-competition, confidentiality, duty to defend, etc.)
 - And from an executive’s perspective, the requirement to pay severance and benefits should survive the termination of the contract

Clause No. 16 – No Guarantee of Service Provider Status

- Purpose
 - To document that the individual has no right to continued employment or service

- Example
 - “The Participant acknowledges and agrees that the vesting of Shares pursuant to the Vesting Schedule hereof is earned only by continuing as a Service Provider at the will of the Company (not through the act of being hired or acquiring Shares hereunder). The Participant further acknowledges and agrees that this Award Agreement, the Covered Shares granted hereunder, the transactions contemplated hereunder and the Vesting Schedule set forth herein do not constitute an express or implied promise of continued engagement as a Service Provider for the vesting period, for any period, or at all, and shall not interfere in any way with the Participant’s right or the Company’s right to terminate the Participant’s relationship as a Service Provider at any time, with or without Cause.”

- Thoughts
 - Helps to document that the award agreement does not change the at-will nature of the employment

Don't Forget Next Month's Webinar

- Title:
 - Compensation: ISS Concerns & Mandates (Annual Program)

- When:
 - 10:00 am to 11:00 am Central
 - January 19, 2017

Firm Locations

AUSTIN

111 Congress Avenue
Suite 1700
Austin, TX 78701
P +1.512.320.9200
F +1.512.320.9292

BEIJING

Room 2007, Capital Mansion
No. 6 Xin Yuan Nan Lu
Chao Yang District
Beijing, China 100004
P +86.10.8486.2699
F +86.10.8486.8565

DALLAS

1717 Main Street
Suite 3700
Dallas, TX 75201
P +1.214.659.4400
F +1.214.659.4401

DUBAI

Andrews Kurth (Middle East) DMCC
45th Floor
Mazaya Business Avenue, BB2
Jumeirah Lakes Towers
P.O. Box 118273
Dubai, UAE
P +971.4.567.0767
F +971.4.567.0768

HOUSTON

600 Travis Street
Suite 4200
Houston, TX 77002
P +1.713.220.4200
F +1.713.220.4285

LONDON

Andrews Kurth (UK) LLP
16 Old Bailey
London EC4M 7EG
United Kingdom
P +44.20.3053.8300
F +44.20.3053.8299

NEW YORK – BATTERY PARK

One Broadway
New York, NY 10004
P +1.212.425.7200
F +1.212.425.5288

NEW YORK – MIDTOWN

450 Lexington Avenue
New York, New York 10017
P +1.212.850.2800
F +1.212.850.2929

RESEARCH TRIANGLE PARK

4505 Emperor Boulevard Suite
330 Durham, NC 27703 P
+1.919.864.7200

SILICON VALLEY

1801 Page Mill Road
Suite 210
Palo Alto, CA 94304
P +1.650.384.4700
F +1.650.384.4701

THE WOODLANDS

Waterway Plaza Two
10001 Woodloch Forest Dr.
Suite 200
The Woodlands, TX 77380
P +1.713.220.4800
F +1.713.220.4815

WASHINGTON, DC

1350 I Street, NW
Suite 1100
Washington, DC 20005
P +1.202.662.2700
F +1.202.662.2739

