EMPLOYMENT CONTRACTS 101 [1]
Employment Roundtable

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I. INTRODUCTION TO EMPLOYMENT CONTRACTS

Beyond the rights and obligations defined by state and federal law, employment relationships are largely defined by contract.[2] Contracts determine most major employment events, such as when the employment relationship begins, the rights and duties of the parties during and after employment, the terms and conditions of employment (including compensation and benefits), and how and when the relationship ends.[3] Employers, however, are often unaware of the many ways in which a contract may be formed, modified, or breached due to a common misconception that contracts require an explicit written agreement signed by both parties. In fact, employment contracts may be formed in a variety of ways that may or may not require a written document.

In most instances, no written document is required to form a contract.[4] Contracts may be oral or written, and formed either by explicit agreement, conduct, practice, or course of dealing. For example, in the employment context, an employer may unintentionally commit itself to a contract obligation to employees through an oral discussion, a handbook or policy statement, correspondence, or practices and procedures. A contract may be formed simply by making terms or conditions of employment known to at-will employees who accept those terms by continuing employment in reliance on them.

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[1] This memorandum contains a summary of information obtained from laws, regulations, court cases, administrative rulings, and legal publications, and should not be viewed or relied upon as legal advice. Ater Wynne LLP urges readers of this memorandum to consult legal counsel regarding specific legal issues and factual circumstances.

[2] *Snow v. West*, 250 Or 114, 115, 440 P2d 864 (1968) ("The relationship of employer and employee now **** is basically one of contract.").

[3] *See generally Erickson v. American Golf Corp.*, 194 Or App 672, 680, 96 P3d 843 (2004) ("In general, 'an employer is free to set the terms and conditions of the work and of the compensation and the employee may accept or reject those conditions ****' Thus, the employment contract itself controls an employee's rights to compensation, including paid vacation, pension benefits, and periodic bonuses.")

[4] *Jones v. Herr*, 39 Or App 937, 940-941, 594 P2d 410 (1979); *but see, e.g.*, ORS 41.580(1) (statute of frauds, under which certain agreements (including an employment agreement that, by its terms, cannot be performed within one year) must be in writing, recite the agreed upon consideration, and be signed by the party against whom it is being enforced).

For the most part, employment contracts are subject to the same rules of contract formation, interpretation, and breach as other types of contracts.[5] However, in addition, there are special rules that apply to employment contracts generally, and to certain provisions of employment contracts, such as noncompete provisions. Moreover, certain remedies, such as specific performance (*e.g.*, an order requiring the other party to perform its duties under the contract) are unavailable in the employment context.[6]

II. ESSENTIAL ELEMENTS

To be binding, a contract must possess specific elements: (1) an offer; (2) acceptance; (3) mutual assent; and (4) consideration.[7]

A. Offer and Acceptance

To establish a contractual relationship, one party must make an offer and the other party must accept it (or make a counteroffer,[8] which is then accepted by the other party). This is equally true in the employment context.[9] For example, an employer's unilateral "offer" or promise of specific treatment or benefits becomes binding on the employer if an at-will employee accepts or continues employment with knowledge of the employer's promise.[10] At the point of acceptance, the promise becomes binding upon both parties.[11]

B. Mutual Assent

Mutual assent is also known as a "meeting of the minds." Essentially, the parties must be in agreement on all the essential terms to form a binding contract.[12] The manifestation of mutual assent may be written, oral, or through conduct. The standard is an objective one – the court looks at "'whether a reasonable person would construe a promise from the words and acts of the other.'"[13]

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[5] *Fleming v. Kids and Kin Head Start*, 71 Or App 718, 721-723, 693 P2d 1363 (1985) (also noting that "there is nothing about being an employer that gives a contracting party rights that it would not have if it were the buyer of widgets instead of labor.")

[6] *Pierce v. Douglas Sch. Dist. No. 4*, 297 Or 363, 371, 686 P2d 332 (1984).

[7] *See generally* CONTRACT LAW IN OREGON (Oregon CLE 2003) Ch. 6.

[8] A counteroffer means that the person receiving the original offer attempts to change, modify, add to or qualify the original offer. No contract is formed unless the counteroffer is accepted by the party making the original offer. *Id.* at §6.14.

[9] *State ex rel. Roberts v. Public Finance Co.*, 294 Or 713, 716, 662 P2d 330 (1983).

[10] *See, e.g., Sabin v. Willamette-Western Corp.*, 276 Or 1083, 1089, 557 P2d 1344 (1976) (employer's vacation policy made known to employee after he accepted employment was binding on employer); *Rose City Transit v. City of Portland*, 271 Or 588, 592-593, 533 P2d 339 (1975) (pension and disability plan created by employer constituted unilateral offer to at-will employee that was accepted by continued employment).

[11] *State ex rel. Roberts v. Public Finance Co.*, 294 Or at 718.

[12] *See generally* CONTRACT LAW IN OREGON (Oregon CLE 2003) §6.15.

[13] *Id.* at §6.16, quoting *Wooton v. Viking Distributing Co.*, 136 Or App 56, 60-61, 899 P2d 1219 (1995).

C. Consideration

Consideration is the inducement to enter into a contract or the promise that is exchanged; *i.e.*, "[s]ome right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given suffered, or undertaken by the other."[14] In the employment context, the employer generally offers compensation in exchange for the employee's service, thereby providing "consideration" for the underlying employment agreement. When the employment is at-will, continued employment is often sufficient consideration for a unilateral promise made by the employer. The courts essentially recognize that the employer is under no obligation to continue the employment of at-will employees at all, let alone under set terms and conditions. Therefore, employers are free to change the terms and conditions at any time.[15] The employee is free to reject such terms and conditions by leaving his or her employment.

An employer cannot rely on continued employment as consideration to impose a change in terms when the employee is not employed at-will. When the employee has an employment contract for a definite duration, a modification is requires mutual assent and new consideration, such a raise or promotion, to become binding.[16]

III. TYPES OF CONTRACTS

A. Express Contracts

An express contract is one in which the terms of which are openly declared, either orally or in writing, at the time of contracting. In contrast, an implied contract, discussed below, is one that is imposed by the law, based upon the conduct of the parties.

B. Implied Contracts

"An implied contract is no different in legal effect from an express contract."[17] However, the difference between them is the means by which the parties manifest their agreement. In an

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[14] *BLACK'S LAW DICTIONARY* (6th ed.); *see also generally*, CONTRACT LAW IN OREGON (Oregon CLE 2003) §6.17.

[15] However, the employer's unilateral change in terms will only apply prospectively. *Mail-Well Envelope Co. v. Saley*, 262 Or 143, 497 P2d 364, 368-69 (1972); *Page v. Thomas Kay Woolen Mill Co.*, 168 Or 434, 123 P2d 982, 984-85 (1942); *Brett v. City of Eugene*, 130 Or App 53, 880 P2d 937, 939 (1994); *see also Albrant v. Sterling Furniture Co.*, 85 Or App 272, 736 P2d 201, 203 (1987). A change in terms will not extinguish a right that is earned or vested prior to the modification . *Olson v. F & D Publ'g Co., Inc.*, 160 Or App 582, 982 P2d 556, 559-60 (1999); *Fish v. Trans-Box Sys., Inc.*, 140 Or App 255, 914 P2d 1107, 1109 (1996). Consequently, an employer cannot retroactively revoke benefits that have already vested in an employee at the time of the modification. *Olson*, 982 P2d at 560.

[16] *McPhail v. Milwaukie Lumber Co.*, 165 Or App 596, 601, 999 P2d 1144 (2000); *Bramhall v. ICN Medical Laboratories, Inc.*, 284 Or 279, 290-291, 586 P2d 1113 (1978).

[17] *Staley v. Taylor*, 165 Or App 256, 994 P2d 1220 (2000), citing RESTATEMENT (SECOND) OF CONTRACTS § 4 comment a (1979).

express contract, the parties manifest their agreement by their words, either orally or in writing. In an implied contract, the agreement is inferred, in whole or in part, from the parties' conduct.[18]

An employee's reasonable expectations based on an employer's promises are enforceable as implied contracts, notwithstanding the fact that the employee never expressly communicates acceptance. For example, an employer's promise of vacation pay upon termination of employment made known to employees is enforceable as an implied contract.[19] Even a contract for lifetime employment may be enforceable based on reasonable expectations, although proof of specific representations by the employer are generally required in such cases.[20] Therefore, employers who induce at-will employees to remain employed through promises of future benefits (*e.g.*, a raise, promotion, or ownership interest) will likely be liable for those benefits.[21]

Contracts may be formed unintentionally through oral representations or written statements, such as email or other written communications, policies, or handbooks. Whenever an employer communicates a unilateral promise of specific treatment or benefits, that promise becomes binding if an at-will employee continues employment with knowledge of the employer's promise. Consequently, employers should take precautions to prevent the unintended result and be careful about what they say orally and in writing.

One major concern of most employers is maintaining the "at-will" employment relationship. In Oregon, as in most states, private employment is at-will unless the parties agree otherwise.[22] Oregon employers are not required to have a good faith basis (or "cause") for terminating an at-will employee. Moreover, the employer's motives for terminating an at-will employee are irrelevant to a breach of contract claim.[23] However, oral or written promises can undermine or nullify the at-will nature of the employment relationship.[24] It is, therefore, important for at-will employers to adopt practices that do nothing to undermine their right to terminate employees at-will.

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[18] *Staley v. Taylor*, 165 Or App at 262.

[19] *See, e.g., Sabin v. Willamette-Western Corp.*, 276 Or 1083, 1089, 557 P2d 1344 (1976) (employer's vacation policy made known to employee after he accepted employment was binding on employer); *Rose City Transit v. City of Portland*, 271 Or 588, 592-593, 533 P2d 339 (1975) (pension and disability plan created by employer constituted unilateral offer to at-will employee that was accepted by continued employment).

[20] *See, e.g., Seibel v. Liberty Homes, Inc.*, 305 Or 362, 365, 752 P2d 291 (1988) (court found it reasonable for jury to find that employee reasonably understood he was promised lifetime employment when manager said he would have his job "as long as we have production to run"); *compare, Wooton v. Viking Distributing Co.,* 136 Or App 56, 60-61, 899 P2d 1219 (1995) (advertisement for "long-term" employee, did not create a reasonable expectation of lifetime or long-term employment).

[21] *Staley v. Taylor*, 165 Or App at 262.

[22] At-will employment means that either party may terminate the employment relationship at any time, with or without cause or advance notice. *See, e.g., Koepping v. Tri County Metropolitan Transp. Dist. of Oregon*, 120 F3d 998, 1002 (D Or 1997) (absent a contractual, statutory or constitutional requirement, an employer may discharge an employee at any time and for any reason); *Ewalt v. Coos-Curry Electric Cooperative, Inc*., 202 Or App 257, 262, 120 P3d 1288 (2005) (same).

[23] *Mobley v. Manheim Services Corp.*, 133 Or App 89, 94, 889 P2d 1342 (1995); *Lund v. Arbonne International, Inc.*, 132 Or App 87, 92, 887 P2d 817 (1994).

[24] *Bennett v. Farmers Ins. Co. of Oregon*, 332 Or 138, 26 P3d 785 (2001) (holding that employer may modify, waive, and/or be estopped from relying upon at-will provision).

C. Written Agreements

Written agreements provide a record of what the parties agreed to do. Written contracts are, therefore, desirable to avoid disputes over what was promised. However, when the parties fail to express the terms in a clear and concise manner (or exclude terms altogether), it may be difficult to determine what the parties intended. When those terms become the subject of a dispute, the meaning of the ambiguous terms is determined by the trier of fact (typically a judge, jury, or arbitrator),[25] who will often resolve the question based on the *employee's* reasonable expectations.[26]

In most cases, no specific formality is required for a writing to qualify as a contract. For example, simple offer letters may result in a contract, particularly if they convey a specific offer of employment on specific terms (*e.g.*, at-will or employment for a specific duration), consideration (typically compensation and benefits), and require a formal acceptance (signature).[27]

Promises in handbooks or written policies may also create binding contractual obligations.[28] This is true even if the handbook or policy is distributed long after the employment relationship begins.[29] Whether or not a handbook creates a contractual obligation is determined based on the same principles of construction as any other contract.[30]

The best way to avoid the risk that a judge or jury will get to determine what you intended to say and impose liability on your company for unintended benefits is to make clear that your handbook is not a contract. This can be accomplished through the use of a clear and conspicuous disclaimer. At a minimum, a disclaimer should include the following points:

- The policies are only guidelines.
- The handbook is not an express or implied contract for employment or benefits.
- The handbook does not guarantee employment for any definite period of time, and employment is at-will.
- The at-will nature of the employment relationship may not be modified except in a written agreement signed by a specified representative of the company.
- The policies and benefits in the handbook may be modified or revoked at any time.

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[25] *Domingo v. Copeland Lumber Yards*, 81 Or App 52, 56, 724 P2d 841 (1986).
[26] *See, e.g., Seibel v. Liberty Homes, Inc.*, 305 Or at 365.
[27] *Gaswint v. Amigo Motor Homes*, 265 Or 248, 254, 509 P2d 19 (1973).
[28] *Fox v. Bear Creek Corp.*, 99 Or App 90, 92, 781 P2d 378 (1989) ("Personnel policy statements can create contractual obligations between an employee and an employer **** They are subject to the same principles of construction as any other contract.")
[29] *See, e.g., Domingo v. Copeland Lumber Yards*, 81 Or App 52, 55, 724 P2d 841 (1986) (written warning in handbook distributed years after plaintiff's employment began was binding on employer); *citing Yartzoff v. Democratic Herald Publishing Co.*, 281 Or 651, 656-657, 576 P2d 356 (1978).
[30] *Swartout v. Precision Castparts Corp.*, 83 Or App 203, 206, 730 P2d 1270 (1986).

Oregon courts have consistently held that a disclaimer in an employee handbook or personnel policies manual is sufficient as a matter of law to retain an employee's at-will status.[31] Handbooks should include an at-will disclaimer at the front of the handbook, and in a written acknowledgment that the employee signs. The signed acknowledgment should be kept in the employee's personnel file.

It is equally important that the handbook not contain language or promises of specific treatment that are inconsistent with at-will employment. For example, employers should avoid the use of the term "permanent" employee, or "cause" or "just cause" in connection with termination decisions. Try to express compensation in terms of hourly, weekly, or monthly intervals, as opposed to annual pay, which may imply employment duration of a year.

Progressive discipline policies may also cause unexpected problems. A progressive discipline policy that promises a lock step procedure will always be followed to address poor performance and misconduct is inconsistent with the notion that the employer can terminate employment at any time. A well-drafted disclaimer of at-will employment may be sufficient to retain an employee's at-will status even when other policies provide that a specific disciplinary procedure will be followed.[32] However, a less-than-perfect disclaimer may open the door to arguments that the meaning of the conflicting policies is ambiguous.[33]

While progressive discipline may be desirable in some cases, it should not be promised in all cases. A progressive discipline policy should reserve to the employer the discretion to skip steps in the procedure or proceed with termination in the first instance. However, consistency in the treatment of similarly-situated employees is desirable to avoid claims of unlawful discrimination.

In addition, unless they are used solely as a waiting period for benefit eligibility, maintaining "probationary" or "introductory" periods of employment may also conflict with the concept of at-will employment. Employers typically describe these periods as a time when the parties get to know each other and employment may be terminated at any time, with or without cause. As this is true of at-will employment generally, employees may get the impression that there is some permanency to the employment relationship once the probationary or introductory period is over.

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[31] *See, e.g., Mobley v. Manheim Servs. Corp.,* 133 Or App 89, 93-94, 889 P2d 1342, 1345 (1995); *Gilbert v. Tektronix, Inc.*, 112 Or App 34, 38-39, 827 P2d 919, 921 (1992).

[32] *See Bland v. Blount*, 2001 US Dist LEXIS 7823 (D Or 2001) (Oregon employer may provide a framework for discipline without disturbing "at-will" nature of employment relationship, particularly where handbook outlines exceptions to the progressive disciplinary model).

[33] *See Gilbert, supra*, 112 Or App at 37, 827 P2d at 920-921; *see also Lawson v. Umatilla County,* 139 F3d 690, 693 (9th Cir 1998) (handbook disclaimer retained at-will status even where handbook stated "no permanent employee shall be disciplined except for violation of established rules and guidelines"); *Burnett v. Ross Stores*, 857 F Supp 1434, 1440 (D Or 1994) ("The court finds that the [disclaimer] language of the Employee Handbook is unambiguous and does not as a matter of law create a contract between Ross Stores and Burnett."); *Clarke v. Boise Cascade Office Products Corp.*, 1999 US Dist. LEXIS 11905, 14 (D Or 1999) ("an employee cannot make out a claim for breach of an employment contract when the provisions of the employee handbook explicitly preserve the employment at-will relationship").

D. Oral Agreements

Most contracts do not require a writing to be enforceable. That means that employers may be held liable for oral promises.

For example, in *Seibel v. Liberty Homes, Inc.*,[34] a 55-year-old employee returning to work following a work-related injury was offered a light duty job. When asked whether the job was permanent, the manager said "as long as we have production to run." The employee was later fired for poor performance and sued for breach of a contract for lifetime employment. The court acknowledged that a jury could interpret the manager's statement as meaning that the employee would have work as long as a light duty job existed, not that the job was promised to plaintiff until he retired. However, the court found that a jury could also reasonably find, as this one did, the employee reasonably understood the manager's statement as an assurance that he would have work as long as the work he did was needed, and the job would otherwise last until he retired.

As the *Seibel* case demonstrates, oral contracts, by their very nature, are more difficult to prove, but also more difficult to refute. As long as the intent of the parties is ascertainable, an otherwise valid oral agreement is sufficiently definite for enforcement.[35]

Employers can minimize the likelihood that they will be bound by an oral contract by limiting the circumstances under which a contract may be formed. Both the offer letter and a handbook acknowledgment are useful for this purpose. Such documents can confirm the existence of the at-will relationship, limit the circumstances under which the at-will relationship can be modified (*e.g.*, "the at-will relationship may only be modified in a written document signed by the President and you"), and limit the authority of company representatives to alter policies or working conditions (*e.g.*, "No company representative is authorized to orally modify any company policies set forth in the handbook.").

IV. DEFENSES

A. At-Will Employment

As discussed above, Oregon courts have consistently held that a disclaimer in an employee handbook or personnel policies manual is sufficient as a matter of law to retain an employee's at-will status.[36] Handbooks should include a prominent disclaimer at the front of the handbook, and all employees should be required to sign a written acknowledgment of their at-will status. A signed offer letter is also an effective vehicle for documenting at-will employment. The signed acknowledgment and/or offer letter should be kept in the employee's personnel file.

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[34] *Seibel v. Liberty Homes, Inc.*, 85 Or App 261, 736 P2d 578 (1987), *aff'd in part, rev'd in part on other grounds*, 305 Or 362, 752 P2d 291 (1988).
[35] *Langendorf United Bakeries, Inc. v. Moore*, 327 F2d 592, 596 (9th Cir 1964).
[36] *See, e.g., Mobley v. Manheim Servs. Corp.*, 133 Or App 89, 93-94, 889 P2d 1342, 1345 (1995); *Gilbert v. Tektronix, Inc.*, 112 Or App 34, 38-39, 827 P2d 919, 921 (1992).

B. Statute of Frauds

Under Oregon's statute of frauds, an agreement that, by its terms, is not to be performed within one year must be in writing to be enforceable.[37] In other words, an employment agreement that is for a specified duration of more than one year must be in writing (although there are many exceptions to this rule). The statute does not apply if the employment contract, by its terms, *may* be rightfully terminated within a year from its inception.[38] Nor does the statute apply where the existence of the contracts is conceded.[39]

C. Lack of Consideration

Lack of consideration is a defense to a contract claim. For example, an employer that enters into an agreement with an employee for a specific term cannot modify the terms and conditions of employment in a material way (*e.g.*, by decreasing the employee's salary) without providing some additional consideration for the promise. Continued employment will not suffice as consideration because continued employment for a stated time has already been guaranteed.[40] In contrast, an at-will employee's continued employment after distribution of an employment handbook or policy is sufficient consideration for modification of the employment agreement.[41]

There are some exceptions to the need for consideration. For example, a contract may become binding despite a lack of consideration based upon a "promissory estoppel" or similar equitable theory to prevent unfairness. Promissory estoppel applies when the one party acts or refrains from acting in reliance on another party's promise, thereby substantially changing his or

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[37] ORS 41.580, provides, in part,

> In the following cases the agreement is void unless it, or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party to be charged, or by the lawfully authorized agent of the party; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents in the cases prescribed by law:
>
> (a) An agreement that by its terms is not to be performed within a year from the making.

"The primary purpose of the original statute was evidentiary—that is, to prevent injustice in enforcing alleged oral contracts established through false testimony." CONTRACT LAW IN OREGON (Oregon CLE 2003) §9.2.

[38] *Thompson v. Industrial Lumber,* 41 Or App 519, 521 522, 599 P2d 468 (1979) (one year employment contract subject to termination within 90 days not within statute of frauds); *see also Kaiser Foundation Health Plan v. Doe*, 136 Or App 566, 578, 903 P2d 375 (1995), *modified on other grounds*, 138 Or App 428 (1996) (promise not to seek reemployment and maintain confidentiality of settlement agreement for an indefinite period were not subject to the statute of frauds because the former employee could die within a year).

[39] *Vuylsteke v. Broan,* 172 Or App 74, 17 P3d 1072 (2001).

[40] *See Yartzoff v. Democrat Herald Publishing Co.*, 281 Or 651, 657, 576 P2d 356, 359 (1978); *Melton v. Philip Morris, Inc.*, 2001 US Dist Lexis 12601 (D Or); *McPhail v. Milwaukee Lumber Co.*, 165 Or App 596, 999 P2d 1144 (2000) (employee's right to job until retirement not modified by subsequent employee handbook providing for at-will employment; new policy not enforceable against employee due to lack of consideration).

[41] *See footnote 10, supra.*

her position, under circumstances where the promisor should have reasonably expected the promise to induce the other party's action or forbearance.[42]

D. Unilateral Modification

Generally, the terms and conditions of at-will employment may be unilaterally modified by the employer. An at-will employee impliedly accepts such modifications by continuing to work after the modification.[43] For example, in *Fish v. Trans-Box Systems*,[44] the employer hired the plaintiff as an at-will employee. At the time plaintiff was hired, defendant's office manager informed plaintiff that he would be entitled to benefits, including health insurance and sick pay, after a 90-day probationary period. At the end of the probationary period, plaintiff made multiple inquiries about the status of his health insurance. The office manager repeatedly told plaintiff that the information was in the mail from the company's headquarters, but eventually informed plaintiff that the information had never been sent and that the company was attempting to acquire less expensive coverage. Plaintiff nevertheless continued to work for the employer. He subsequently suffered an injury unrelated to work, which resulted in medical expenses and lost pay. Plaintiff then sued his employer for breach of contract, based on defendant's statements that it would provide health insurance benefits after 90 days and that the benefits were forthcoming. In rejecting the employee's claim, the court relied on the rule that an employer may unilaterally modify an at-will contract, and the employee accepts the new terms by continuing his or her employment.[45]

On the other hand, *earned, accrued,* or *vested* benefits may not be unilaterally taken away by the employer. This often comes up when employers decide to change vacation or other benefit policies. For example, in *Horton v. Prepared Media Laboratory, Inc.*,[46] an employee alleged that the employer failed to pay her three months' severance pay. The company policy, which the employer revoked prior to the employee's separation, specifically reserved the employer's right to eliminate any pay practice or policy without notice. The court held that the employee earned the severance pay benefits before the plan was revoked, and that her right to the benefits could not be revoked retroactively.[47]

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[42] *See generally* CONTRACT LAW IN OREGON (Oregon CLE 2003) §6.27; *Furrer v. Southwestern Oregon Community College,* 196 Or App 374, 103 P3d 118 (2004) (employees successfully asserted promissory estoppel claim where they relied upon an early retirement policy in entering into and maintaining their employment).

[43] *Fish v. Trans-Box Sys.,* 140 Or App 255, 259, 914 P2d 1107 (1996), citing *Elliott v. Tektronix, Inc.,* 102 Or App 388, 393, 796 P2d 361, *Albrant v. Sterling Furniture Co.,* 85 Or App 272, 275, 736 P2d 201 ("an at-will employer may make unilateral changes in employment terms, notwithstanding its previous representations, and not be subject to contract liability").

[44] 140 Or App 255, 259, 914 P2d 1107 (1996).

[45] *Id.* at 259; *see also Hand v. Starr-Wood Cardiac Group of Corvallis, P.C.,* 2001 WL 215803 (D Or) (Based on the *Fish* analysis, if plaintiff was an at-will employee, he had no right to rely on promises to provide bonuses and a salary increase, since he continued to work after learning that employer would not provide same); *Albrant v. Sterling Furniture Co.,* 85 Or App 272, 275, 736 P2d 201 (1987) (employee impliedly accepted modifications to her employment contract by continuing to work after being informed her commission would be lowered).

[46] 165 Or App 357, 997 P2d 864 (2000).

[47] *See also Wyss v. Inskeep,* 73 Or App 661, 667-669, 699 P2d 1161 (1985) (rejecting argument that

In addition to modifying employee rights and benefits, employers may unintentionally give up their rights under an employment contract.[48] For example, in *Bennett v. Farmers Ins. Co*., the court found that Farmer's direct and indirect assurances that it would not terminate Bennett's contract without cause, and Bennett's continued commitment to Farmer's was sufficient to support a modification of his at-will employment agreement.[49]

E. Preemption

Some contract claims are subject to preemption, in which the claim is resolved solely with reference to a specific body of statutory law which may provide for specific procedures or remedies, or limit the available remedies. For union employees, preemption may apply under the federal Labor-Management Relations Act (LMRA).[50] In the benefits context, claims are often preempted by the Employment Retirement Income Security Act (ERISA).[51]

F. Contractual Limitations on Remedies and Time for Bringing an Action

Contracts may provide or impose limits on available remedies, or shorten or lengthen the applicable statute of limitations. When such provisions are included in employment contracts, their enforceability is often challenged. As a result, employers should carefully examine the pros and cons of including them in an employment contract.

As an example, in *Fink v. Guardsmark, LLC,*[52] the Oregon federal district court enforced a six-month limitation period set forth in an at-will employment agreement. The agreement provided that any action arising from employment must be brought within six months of the date the cause of action arises, or it will be time-barred. Claims filed with the EEOC or arising under any statutes enforced by the EEOC were expressly excepted from this requirement.[53]

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bonus plan had no contractual force because employer had discretion whether to grant bonus and in what amount; emphasizing employer's obligations of good faith implied in all contracts); *Walker v. American Optical Corp.,* 265 Or 327, 330, 509 P2d 439 (1973) (". . . the bonus plan offered by the employer normally becomes binding as a unilateral contract when the employee begins performance of the terms of the proposed plan, in the sense that the plan cannot then be revoked by the employer")*; Swenson v. Legacy Health System,* 169 Or App 546, 554 n4, 9 P3d 145 (2000) ("[an] employee 's part performance precludes the employer from revoking what it offered in exchange for the employee's work"); *Olson v. F&D Publishing Co., Inc.,* 160 Or App 582, 587-88, 982 P2d 556 (1999) ("'[a]n employer cannot inform an employee that wages have been retroactively reduced ***. Wages for past work within the employment relationship are "earned" and "vested."'") (quoted authority omitted).

[48] A party may waiver any term of a contract, material or not, including a nonwaiver provision. *Bennett v. Farmers Ins. Co.*, 332 Or 138, 156, 26 P3d 785 (2001); *Moore v. Enumclaw Insurance Company,* 317 Or 235, 241, 855 P2d 626 (1993) (*en banc*).

[49] 332 Or at 148-149. The court found this same evidence was sufficient for the jury to find a waiver. *Id.* at 157. This same evidence of waiver, plus evidence that Bennett changed position by continuing to invest in the business in reliance on the representation that he would not be terminated without cause, also estopped Farmers from relying on the at-will provision to support termination of the contract.

[50] 29 USCA §185, *et seq.*

[51] 29 USCA §1001, *et seq.*

[52] 2004 WL 1857114 (D Or).

[53] *See also Badgett v. Federal Express Corp.,* 378 F Supp 2d 613, 624 (MD NC 2005) (court enforced a

G. Waiver, Estoppel, Modification

Waiver, estoppel, and modification are related but distinct defenses to contract enforcement, each of which requires proof of different elements. Waiver is the intentional relinquishment or abandonment of a known right or privilege.[54] Waiver applies when it can be shown that a party had a contractual right, but voluntarily elected to forego or relinquish it.

In contrast, "[t]he doctrine of *** estoppel is employed to prevent a party from alleging a crucial fact to be other than what by act or omission that party previously led another party justifiably to believe."[55] For estoppel to apply, the party alleging it as a theory must provide evidence of "(1) a promise, (2) which the promisor, as a reasonable person, could foresee would induce conduct of the kind which occurred, (3) actual reliance on the promise, [and a] (4) resulting in a substantial change in position."[56]

For example, the court in *Furrer v. Southwestern Oregon Community College*[57] held that the employees successfully asserted an estoppel claim where they relied upon an early retirement policy in becoming employed and maintaining their employment, stating:

> We conclude that plaintiffs have adequately alleged each of the required elements. Plaintiffs alleged that defendant promised that it would consider in good faith whether their requests for early retirement were mutually beneficial; that defendant reasonably could foresee that its pre-2002 policy would induce plaintiffs to become employed and maintain their employment; that plaintiffs relied on defendant's promise; and that the 2002 policy amounted to a substantial change in defendant's position that worked to the detriment of employees otherwise eligible for early retirement benefits under the pre-2002 policy.[58]

The related concept of modification occurs when parties expressly or implicitly change the contract through some method, whether orally, through conduct or via a written document.[59] For example, "an employer has the right to modify benefits unilaterally and prospectively; by

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six-month contractual limitation period against plaintiff's §1981, emotional distress, and FMLA claims, rejecting the contention that the contractual limitation interfered with employees' rights under the FMLA, or was unenforceable under a regulation prohibiting employees from waiving their rights under the FMLA).

[54] *Moore v. Mut. of Enumclaw Ins. Co.*, 317 Or 235, 240 (1993); *see Erickson v. American Golf Corp.*, 194 Or App 672, 680, 96 P3d 843 (2004) (employer argued that employee waived bonus provisions in employment agreement by subsequently accepting lower amounts).

[55] *In the Marriage of Menard*, 180 Or App 181, 186, 42 P3d 359 (2002).

[56] *Bixler v. First National Bank*, 49 Or App 195, 199-200, 619 P2d 895 (1980).

[57] 196 Or App 374, 103 P3d 118 (2004).

[58] 196 Or App at 382-383.

[59] *See Bennett v. Farmers Ins. Co. of Oregon*, 332 Or 138, 147 n7, 26 P3d 785 (2001) ("parties may modify a written contract orally even if the writing contains an express provision against nonwritten modifications") (*citing to Yartzoff v. Democrat-Herald Publishing Co.*, 281 Or 651, 657, 576 P2d 356 (1978) (jury decides if statements in employee handbook modify original employment contract).

continuing to work after learning of it, an employee impliedly accepts that modification [of the employment contract]."[60]

V. PROVISIONS YOU ARE LIKELY TO SEE IN MOST CONTRACTS

A. Dispute Resolution

A dispute resolution clause allows the parties to determine in advance certain conditions applicable to resolving the dispute. Within limitations, the parties can designate the governing law, the forum, the law to be applied, procedures to be followed, and whether or not attorney fees and costs are recoverable.

Parties to a contract may designate which state's law will apply, although the chosen law must usually bear some relationship to the parties or the dispute. Such a provision provides greater certainty to the parties about the law that will be applied to govern disputes. Notwithstanding the desirability of a choice of law provision, Oregon law requires the application of Oregon law to employment contracts performed primarily in Oregon by a resident.[61]

A forum selection clause specifies a specific court or forum, such as an arbitration service, in which an action or proceeding must be brought. It is advisable to use a forum selection clause in conjunction with a choice of law provision to insure that the chosen forum will apply the parties' designated choice of law. Otherwise, the forum is likely to apply its own law to the dispute.[62] It should also be noted that if the public policy of the forum hearing the case conflicts with the law the parties have chosen to govern their dispute, the forum may elect to apply the law applicable in that forum (*i.e.*, the state or federal law in which the forum is located, including the forum's choice of law rules).[63]

B. Successors and Assigns

A successors and assigns clause[64] may be used to prohibit or consent to assignment of one or both of the parties' rights and duties under the contract. In the absence of a successors and assigns clause, most contracts are deemed assignable, but personal services typically are not assignable.[65] A noncompete in the employment context is considered a personal services

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[60] *Swenson v. Legacy Health System*, 169 Or App 546, 554, 9 P3d 145 (2000).
[61] ORS 81.105.
[62] *See, e.g., Swenson v. T-Mobile USA, Inc.*, 415 F Supp 2d 1101 (S D Cal 2006) (California federal court granted motion to dismiss based upon Washington state forum selection clause in noncompetition case).
[63] *See, e.g., Application Group, Inc. v. Hunter Group, Inc.*, 61 Cal App 4th 881, 72 Cal Rptr2d 73 (1998) (applying California law to hold Maryland noncompetition agreement unenforceable despite Maryland choice of law provision).
[64] A typical clause may read as follows: "This Agreement shall be binding upon the parties' heirs, executors, administrators, and other legal representatives and may be assigned and enforced by the parties, their successors and assigns."
[65] *See Perthou v. Stewart*, 243 F Supp 655, 659 (DC Or 1965); *Mail-Well Envelope Co. v. Saley*, 262 Or 143, 149-150, 497 P2d 364 (1972).

contract and, therefore, is generally not enforceable by an employer's successor-in-interest without a contract provision authorizing assignment by the employer.[66]

C. Severability

A severability clause[67] is used to insure that if one or more provisions are found unenforceable for any reason, the remainder of the contract will remain intact.

D. Waiver

A waiver[68] provision is used to avoid a defense that the failure to enforce a contract provision on any one occasion results in a waiver of the right to enforce that provision in the future.

E. Merger Clause

A merger clause[69] is used to clarify that all of the relevant terms and conditions of the parties' agreement are embodied in the identified written document(s), which supersedes and extinguishes all prior discussions, negotiations, and agreements on the same subject. Although parties often intend that the merger clause will prevent the introduction of evidence of prior negotiations or agreements, such evidence is often admissible to explain what the parties intended.

VI. REMEDIES

A. Compensatory Damages

Damages for breach of contract are intended to make the non-breaching party whole. In other words, "[r]ecovery for breach of contract is intended to put the plaintiff in the position he or she would have been had there been no breach."[70] Where an employment contract is breached by a wrongful termination, damages "are measured by the accrued wages to the time of trial plus the present value of the total future lost wages for the unexpired term of the employment term, less amounts actually earned in other employment or amounts which could have been earned in other employment by the exercise of reasonable effort."[71] Obviously, such amounts will vary

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[66] *Id.*

[67] A typical clause might read as follows: "The provisions of this agreement are severable. If any provision of this Agreement or its application is held invalid, the invalidity shall not affect other obligations, provisions, or applications of this Agreement which can be given effect without the invalid obligations, provisions, or applications."

[68] A typical waiver provision might read as follows: "The failure of either party to demand strict performance of any provision of this Agreement shall not constitute a waiver of any provision, term, covenant, or condition of this Agreement or of the right to demand strict performance in the future."

[69] A typical merger clause might read as follows: "Except as otherwise provided in this section, this Agreement constitutes the entire agreement between the parties and supersedes all prior or contemporaneous oral or written understandings, statements, representations or promises with respect to its subject matter.

[70] *See, e,g, Seibel v. Liberty Homes, Inc.*, 305 Or 362, 372, 752 P2d 291 (1988).

[71] *Id.*

based upon such criteria as whether the employee was employed for a fixed duration status or at-will.

B. Emotional Distress and Punitive Damages

Damages for emotional distress are typically unavailable for breach of contract.[72] Similarly, punitive damages are generally not recoverable.[73]

C. Attorney Fees

Attorney fees and costs are only available for breach of contract if the contract or a statute provides for it.[74] Therefore, many contracts contain explicit attorney fee and cost provisions. Oregon law requires reciprocal entitlement to contractual attorney fees, meaning that if one party is entitled to attorney fees as the prevailing party, the opposing party is also entitled to such fees.[75]

VII. EMPLOYMENT CONTRACTS REQUIRING SPECIAL ATTENTION

A. Noncompetition Agreements

Covenants not to compete, also known as noncompetition agreements, are used to protect an employer's trade secrets, confidential business and customer information, and customer relationships. However, of the states that permit such restrictions, many impose specific requirements for enforcing them.

Oregon regulates by statute noncompetition agreements entered into in the employment context.[76] Pursuant to the Oregon statute, noncompetition agreements are void and unenforceable unless the agreement is entered into upon initial employment or a subsequent

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[72] LABOR AND EMPLOYMENT: PRIVATE SECTOR (Oregon CLE 2002) §2.33.
[73] *Id.* at §2.34.
[74] *Domingo v. Anderson*, 325 Or 385, 388, 938 P2d 206 (1997).
[75] ORS 20.096.
[76] ORS 653.295 provides in relevant part:

> (1) A noncompetition agreement entered into between an employer and employee is void and shall not be enforced by any court in this state unless the agreement is entered into upon the:
>
> (a) Initial employment of the employee with the employer; or
>
> (b) Subsequent bona fide advancement of the employee with the employer.
>
> (2) Subsection (1) of this section applies only to noncompetition agreements made in the context of an employment relationship or contract and not otherwise.
>
> * * *
>
> (6) As used in this section:
>
> ***
>
> (b) "Employee" and "employer" have the meaning provided for those terms in ORS 652.310; and
>
> (c) "Noncompetition agreement" means an agreement, written or oral, express or implied, between an employer and employee under which the employee agrees that the employee, either alone or as an employee of another person, shall not compete with the employer in providing products, processes or services, that are similar to the employer's products, processes or services for a period of time or within a specified geographic area after termination of employment.

bona fide advancement.[77] Nonsolicitation agreements that restrict solicitation of customers or employees are also generally considered noncompetition agreements and must meet the requirements of the statute.[78]

"Initial employment" means when the employee starts work.[79] Employers can avoid a dispute on this issue by notifying prospective employees that a noncompete agreement is required as a condition of employment and providing a copy of the agreement with the offer letter. The candidate should be required to return the signed agreement prior to starting work. The effective date of the agreement should be the day the employee starts work.

There is no reported Oregon state appellate decision construing the term "*bona fide* advancement."[80] However, the federal courts that have considered it all agree that an "advancement" requires more than just an increase in pay. In one case, the court explained:

> **** it is apparent that the legislature intended to permit employers to require existing employees to agree to a noncompete agreement, so long as the employee's job content and responsibilities materially increased and the employee's status within the company likewise improved. Otherwise, the employer would merely be imposing a new condition for the "same job." Thus, an advancement would ordinarily include such elements as new, more responsible duties, different reporting relationships, a change in title and higher pay.[81]

The use of a merger clause (*i.e.*, a contract provision that says the contract supersedes and replaces the prior agreement, negotiations, and/or oral representations on the same subject) effectively extinguishes the prior agreement.[82] Therefore, signing successive employment

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[77] ORS 653.295(1).
[78] *Dymock v. Norwest Safety Protective Equip. for Or. Indus.*, 172 Or App 399, 19 P3d 934 (2001); *aff'd*, 334 Or 55; 45 P3d 114 (2002).
[78] ORS 653.295(1).
[79] *Compare, Bouska v. Wright*, 49 Or App 763, 768, 621 P2d 69 (1980) (upholding jury's finding that an agreement executed three days after an employee started work was entered into upon initial employment); *Olsten Corp. v. Sommers*, 534 F Supp 395, 398 (D Or 1982) (non-competition agreement mailed to employee in packet with employment contract and signed six days later was executed when employee "started work"); *Perthou v. Stewart*, 243 F Supp 655, 659 (D Or 1965) (lapse of six days between the start of employment and the execution of noncompete agreement rendered it unenforceable); *IKON Office Solutions, Inc. v. American Office Products, Inc.*, 178 F Supp2d 1154 (2001) (invalidating noncompetition agreement executed 17 days after employment commenced), *aff'd*, 61 Fed Appx 378 (9th Cir 2003).
[80] *See Nike v. McCarthy*, 379 F3d 576 (9th Cir 2004).
[81] *Id.* at 582 (employee received a *bona fide* advancement where he was given a new title, new duties, in a new supervisory role, and received a higher salary); *see also, First Allmerica Financial Life Ins. Co. v. Sumner*, 212 F Supp2d 1235, 1241 (D Or 2002) ("a 'bona fide advancement' necessarily requires an increase or improvement in job status or responsibilities that justifies a change in the way the employer entrusts client contacts and business related information with the employee. Simply offering the employee more money, a more favorable compensation package or certain benefits is insufficient to constitute a bona fide advancement, absent some proof of a change in actual job status or responsibilities.").
[82] *Eagle Industries, Inc. v. Thompson*, 321 Or 398, 406, 900 P2d 475 (1995); *cf., Bikee Corp. v. Giant*

agreements that contain noncompete and merger clauses will invalidate an otherwise valid noncompete signed upon initial employment.

In addition to the statutory criteria, Oregon courts impose three additional requirements to enforce a noncompete: (1) the agreement must be limited in its application as to time and geographic scope, (2) the agreement must be in exchange for good consideration, and (3) the employer must have had a legitimate, protectible interest.[83] The courts are concerned primarily with protecting confidential information, trade secrets, and business relationships established by an employer or seller, which may be used by an employee or buyer to compete.[84]

It is sometimes difficult to predict in advance whether or not a court will enforce a particular noncompetition agreement because the standard for enforcement is one of reasonableness, which depends on all the facts and circumstances.[85] In other words, a change in the facts could result in a court enforcing a noncompete in one instance and denying enforcement of the same agreement in another.

Most states have their own statutes and/or common law restrictions on covenants not to compete. Therefore, multi-state employers or employers with significant out-of-state competition should also familiarize themselves with other states' requirements for such agreements. Some courts, such as those in California, are not likely to enforce such agreements, even if the employment contract designates that Oregon law should apply to all disputes.[86] In addition, noncompetes applicable to certain professions, such as lawyers and physicians, may trigger additional concerns.[87]

Mfg. Co., Ltd., 2005 WL 3478173 (Slip Op, D Or 2005) (supplier agreement with merger clause that contained no reference to noncompete expressly superseded and extinguished prior oral agreement not to compete).

[83] *Olsten Corp v. Sommers*, 534 F Supp 398, 395 (D Or 1982); *see also Eldridge v. Johnston*, 195 Or 379, 403, 245 P 2d 239 (1952).

[84] *See, e.g., Kelite Products, Inc. v. Brandt*, 206 Or 636, 656, 294 P2d 320 (1956); *Cascade Exchange v. Reed*, 278 Or 749, 755-756, 565 P 2d 1095 (1977). These concepts and the requirement that the restraint be reasonable are codified only in the "bonus restriction" section of ORS 653.295(6)(A) and (B), but are applicable to noncompetition agreements generally.

[85] *Compare, e.g., North Pacific Lumber v. Moore*, 275 Or 359, 551 P2d 431 (1976) (court enforced noncompetition agreement against employee), and *North Pacific Lumber v. Oliver*, 286 Or 639, 596 P2d 931 (1979) (court refused to enforce noncompetition agreement similar to that enforced in *Moore* where employer had unclean hands).

[86] *But see, e.g., Swenson v. T-Mobile USA, Inc.*, 415 F Supp 2d 1101 (S D Cal 2006) (granting motion to dismiss based upon Washington state forum selection clause).

[87] *See* Oregon Rule of Professional Responsibility 5.6 (prohibiting agreements that restrict the right of an attorney to practice law after termination of the relationship)*; American Medical Association*, Council of Ethical and Judicial Affairs, Current Opinion E9.02 "Restrictive Covenants and the Practice of Medicine," posted at http://www.ama-assn.org:

> Covenants-not-to-compete restrict competition, disrupt continuity of care, and potentially deprive the public of medical services. The Council on Ethical and Judicial Affairs discourages any agreement which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of an employment, partnership, or corporate

B. Assignment of Rights Agreements

Employers use assignment of rights agreements to clarify and protect their ownership of intellectual property created by employees hired specifically for that purpose, or by employees who use the employer's confidential information, trade secrets, time, and/or resources to create the intellectual property. Some states impose restrictions on the circumstances under which employees can be required to assign their rights to employers. For example, in Washington and California, employers may not require employees to assign their rights to intellectual property that is developed entirely on their own time without using the employer's equipment, supplies, facilities, or trade secret information except for those inventions that either (1) relate at the time of conception or reduction to practice to the employer's business, research, or development, or (2) result from any work the employee performs for the employer.[88]

C. Arbitration Agreements

There are both significant benefits and potential drawbacks to mandatory arbitration agreements, which require one or both parties to the agreement to bring all disputes to an arbitrator, rather than pursuing a lawsuit in court. If such an agreement is desired, careful drafting and practices are important to increase the likelihood that it will actually be enforced. While both federal and Oregon law generally favor arbitration,[89] the enforceability of any employment arbitration agreement is subject to challenge.

Courts have held that arbitration agreements that are not "knowingly" made, that fail to insure minimal standards of due process, or that limit employees' substantive rights, run contrary to the underlying intent of certain statutory schemes such as Title VII and, therefore, are void.[90] In addition, the Federal Arbitration Act § 2 provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Employees may raise state contract defenses such as unconscionability, lack of mutual assent, lack of consideration, fraud, duress, and breach of contract to avoid arbitration. Finally, even if employee arbitration agreements overcome these

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agreement. Restrictive covenants are unethical if they are excessive in geographic scope or duration in the circumstances presented, or if they fail to make reasonable accommodation of patients' choice of physician.

But see also Ladd v. Hikes, 55 Or App 801, 805-806, 639 P2d 1307 (1981) (refusing to enforce the Oregon Medical Association's statement discouraging noncompetition agreements).

[88] California Labor Code §§ 2870-2872; RCW 49.44.140.

[89] *See generally Federal Arbitration Act* (FAA), 9 USCA §§ 1 to 16; *Southland Corp. v. Keating*, 465 US 1, 15-16 (1984) (FAA evidences Congressional intent to strongly favor arbitration agreements); *Seller v. Salem Women's Clinic, Inc.*, 154 Or App 522, 526, 963 P2d 56 (1998) (Oregon courts construe arbitration agreements liberally in favor of arbitrability).

[90] *See Prudential Insurance Co. of America v. Lai*, 42 F3d 1299, 1304 (9th Cir 1994) (holding there must be "at least a knowing agreement to arbitrate employment disputes"); *Cole v. Burns Int'l Security Services*, 105 F3d 1465, 1482 (DC Cir. 1996) (holding that based on Title VII, arbitration agreement must provide employees with a minimum standard of procedural due process as well as all substantive rights).

hurdles, they are not binding on the EEOC, and the EEOC may seek employee-specific relief if it chooses to bring a suit against the employer.[91]

A contract may be "unconscionable" on the basis of either procedural or substantive grounds. A contract is procedurally unconscionable if there is "oppression" or "surprise" in the conditions of contract formation. However, unequal bargaining power alone is insufficient to prove procedural unconscionability. A contract is substantively unconscionable if the terms of the contract are unreasonably one-sided, such that their effect makes the parties' respective obligations "so unbalanced as to be unconscionable."[92]

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[91] *Equal Employment Opportunity Commission v. Waffle House, Inc.*, 534 US 279, 122 S Ct 754, 766 (2002).

[92] *See, e.g., Motsinger v. Lithia Rose-Ft, Inc.*, http://www.publications.ojd.state.or.us/A128192.htm (Or App 2007), in which the plaintiff challenged an arbitration clause as procedurally unconscionable based on unequal bargaining power between the parties, pointing to evidence of her relatively young age; the fact that the arbitration clause was contained in a packet of approximately 70 new hire forms, 50 of which she had to read and sign; she allegedly was provided less than two hours to review all the documents; and she would not have been hired if she had refused to sign any of the documents. However, the employer's regional personnel coordinator testified as follows:

> A. When [employees] are hired, they come into the local personnel office. We go over our--what we call a registration packet. It's a book of forms. We go over each form with them and explain it in detail.
>
> They then watch a video pertaining to those documents and -- just sort of giving them a general idea how to complete the forms.
>
> They sign all the documents in that registration packet. * * * And then we give them an employee handbook and give them back their copy, any informational papers that they would receive back. And then they go to work.
>
> Q. How long does that process take, this signing documents process?
>
> A. On average I would say about two hours. Sometimes it's shorter; sometimes it's longer, just depending on how long it takes each individual person to read through the documents and sign them. But on average, it's about two hours.
>
> Q. Are employees given the opportunity to completely read through the documents before they sign them?
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> A. Yeah. We not only encourage them to do so when we are going over the papers, but then also on our videotape it states don't -- you know, make sure you understand. We tell them, if you don't understand any document, come back to us and ask us questions.

Based upon this evidence, as well as evidence that the agreement itself was clear and conspicuous, the Oregon Court of Appeals found that the arbitration agreement was not unconscionable. It also rejected plaintiff's arguments that the agreement was unconscionable because it did not guarantee that the plaintiff would not have to pay any of the fees or costs associated with arbitration, and because it requires plaintiff to submit all of her claims to arbitration without a corresponding obligation on the defendant's part to

An arbitration agreement in which the employee is required to relinquish substantive statutory protections is unenforceable because it violates federal law. The Supreme Court has held that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA, because "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial forum." [93] In *Circuit City v. Adams*,[94] the Ninth Circuit held that employees must be given the opportunity to "effectively pursue their statutory rights." Agreements that limit the amount of compensatory damages, punitive damages or attorney's fees an employee may receive are unenforceable.[95] Moreover, an agreement that limits the statute of limitations or prohibits employees from participating in or bringing class actions (either in the judicial or arbitral forum) may be void.[96] Arbitration agreements must afford employees an opportunity to bring the same substantive claims and pray for the same remedies that they could have in a judicial forum.

D. Releases

Release agreements can be a powerful tool in managing potential liability arising from employment terminations. However, to waive certain types of claims, releases must meet specific requirements. In addition, some claims cannot be waived or released at all. For example:

- While it is permissible to require an employee to waive the right to file a lawsuit or collect monetary damages as a condition of receiving severance, the EEOC's position is that it is impermissible to condition benefits upon the waiver of the right to file an EEOC charge.[97]

- A release that prohibits an employee from asserting any type of action or proceeding against the employer (e.g., a broad covenant not to sue) is not enforceable to the extent it purports to prohibit employees from filing charges with the EEOC.[98]

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arbitrate any claims that it may have against plaintiff. Further, the court emphasized that the agreement did not impose y limits on the type or amount of recovery that can be awarded under the arbitration (*e.g.*, punitive damages or attorney fees), nor did it restrict discovery or admissible evidence or impose "tight deadlines on the filing of claims."

[93] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 US 614, 628, 105 S Ct 3346 (1985).

[94] 279 F3d 889, 895 (9th Cir 2002).

[95] *See Adams*, 279 F3d at 894, 895 (limiting back pay, front pay, compensatory damages, and punitive damages); *Ramirez III v. Circuit City Stores, Inc.*, 76 Cal App 4th 1229, 1236, 90 Cal Rptr 2d 916 (1999) (limitation on punitive damages, costs and attorney fees); *Kinney v. United Healthcare Svs., Inc.*, 70 Cal App 4th 1322, 83 Cal Rptr 2d 348 (1999) (limitation on contract damages and compensatory and punitive damages for employment discrimination).

[96] *Adams*, 279 F3d at 895 (statute of limitations); *Ramirez*, 76 Cal App 4th at 1236 (class actions); *but see Fink v. Guardsmark, LLC*, 2004 WL 1857114 (D Or) (upholding six-month limitations period for bringing employment claims).

[97] *See* Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) enforced statutes; http://www.eeoc.gov/policy/docs/waiver.html; *see also*, *EEOC v. SunDance Rehabilitation Corp.*, 328 F Supp 2d 826 (ND Ohio 2004).

[98] *EEOC v. Lockheed Martin Corporation*, 444 F Supp 2d 414 (D MD 2006) (employer unlawfully

- FMLA regulations provide that "employees cannot waive, nor may employers induce employees to waive, their rights under FMLA."99 At least two courts have interpreted this regulation as invalidating a release of claims to the extent it purported to waive the employee's right to assert a claim for a FMLA violation.[100]

- For a release of wage claims to be valid under Oregon law, the release must apply to a "known and identified claim."[101] The release cannot require the employee to relinquish a claim for additional or future violations of the wage statutes.[102] The statute does not address what makes a claim "known and identified," but a conservative approach would require the existence of a dispute over wages that is identified in the release agreement. A general release of "all claims for unpaid wages" would probably not be effective.[103]

- The standard for enforceability of a release in the employment context is that the employee entered into it "knowingly and voluntarily." A number of considerations may be relevant in this inquiry including: (1) the employee's experience, background, and education; (2) the amount of time the employee had to consider whether to sign the waiver, including whether the employee had an opportunity to consult with a lawyer; (3) the clarity of the waiver; (4) the consideration provided in exchange for the waiver; as well as (5) the totality of the circumstances.[104]

- Like any other part of a release, a covenant not to sue must be clear and understandable to the employee or it will be invalid, at least as it pertains to age claims. For example, IBM had its employees sign a general release that included "claims arising from the Age Discrimination in Employment Act." The release also included a covenant "[to] never institute a claim of any kind against [the employer]," that also said "[t]his covenant not to sue does not apply to actions based solely under the Age Discrimination in Employment Act." The court found that the covenant was confusing and, therefore, unenforceable. As a result, employees who had signed the release and received severance pay and benefits

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retaliated against employee by requiring her to dismiss discrimination charge filed with EEOC as a condition of receiving severance and including in release a broad prohibition on pursuing any "charges" against employer).

[99] 29 CFR 825.220(d).

[100] *Dierlam v. Wesley Jensen Corp.*, 222 F Supp 2d 1052 (ND Ill 2002); *Dougherty v. Teva Pharmaceuticals USA*, 2006 WL 2529632 (ED Pa 2006).

[101] ORS 652.360.

[102] *Id.*

[103] *Vento v. Versatile Logic Systems Corp.*, 167 Or App 272, 3 P3d 176 (2000) (payment of $1,000 to terminated employee in exchange for general release of all claims was not effective as waiver of employee's claims for unpaid overtime, liquidated damages and statutory penalty under state law that exceeded $1,000).

[104] These standards originated in the Age Discrimination in Employment Act (ADEA) and EEOC regulations applicable to the waiver of an age claim. *See* 29 USC § 626(f); 29 CFR 1625.22. However, many of the requirements have been held applicable to a release of employment claims generally. *See, e.g., Adams v. Philip Morris*, 67 F3d 580 (6th Cir 1996).

were nevertheless allowed to go forward with age discrimination claims.[105]

E. Collective Bargaining Agreements

Collective bargaining agreements (CBAs), which govern the unionized workforce, are subject to a wide variety of special requirements beyond the scope of this article. They are, however, a very common type of employment agreement. CBAs are generally subject to the Labor-Management Relations Act.[106]

[105] *Syverson v. International Business Machines Corporation*, 461 F3d 1147 (9th Cir 2006).
[106] 29 USCA § 185, *et seq.*