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Dealing with Damage Issues in Employment and Consulting Agreements

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Discussion Overview

- I. **Opening thoughts on negotiating damage issues in employment agreements**

- II. **Scenarios and approaches – from both sides**

- III. **Your questions & comments**

I. Thoughts on negotiating employment contracts

- Long-term, personal relationship
- Need to have some level of trust
- Employer approach –
 - “He who pays the piper . . .”
 - “Fair and balanced”
- Anticipate when things go sour
- Limit exposure for both sides
- Employee approach – choose your battles

II. Scenarios and Approaches

- **Wages are key damage issue**
 - Term
- **Equity**
- **Lost profits**
- **Recovery of debts, advances, etc.**
 - Side agreements on wage deductions, recovery

II. Scenarios and Approaches

- *Indemnification*
 - *Consulting agreements*
 - *Executive employment agreements*

II. Scenarios and Approaches

- **Injunctive relief**
 - Can you agree that breach entitles employer to injunctive relief?
- **What makes injunctive relief more likely?**
 - Clear and reasonable terms
 - Don't over-reach
 - Irreparable harm
 - Dirty hands

II. Scenarios and Approaches

- **Severance pay**
 - Reason for termination
- **Mitigation**
 - Duty to make reports
 - Assistance with outplacement?
 - References
- **Liquidated damages for breach**

II. Scenarios and Approaches

- **ADR**
 - **Be specific in terms**
 - **Must be mandatory & binding**
 - **Costs of arbitration**
 - **Unconscionability**
 - **Less to be awarded for emotional distress**
 - **Consider the consequences**
 - **No right to appeal**
 - **Bias of arbitrators**
 - **Won't seek punitive damages**

II. Scenarios and Approaches

- **Waiver of right to jury trial**
- **Choice of venue**
- **Choice of law**

III. Questions and Comments

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