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NONDISPARAGEMENT CLAUSES: WHAT WORKS FOR CONAN O'BRIEN MAY NOT WORK FOR YOU.

For employers and employees both: Before you request or submit to a "nondisparagement clause," consider whether it is really a "noncompete" clause that restricts an employee from future employment in his or her field.

Do you remember the story from the front page in last January 22's *Wall Street Journal*? It was about television network NBC and late-night star Conan O'Brien: *"Mr. O'Brien and his team are walking away from NBC with a whopping \$45 million settlement, but there's a condition: 'The Tonight Show' host can't badmouth the Peacock Network and its top brass."*

So, NBC paid Conan O'Brien and his team \$45 million to leave NBC, on condition that they abide by a nondisparagement clause until this-coming September. The point of the *WSJ* article was that it could be hard for Mr. O'Brien to hang onto the \$45 million. After all, disparagement is part of his normal job description. Maybe it's part of his state of mind. But, according to the journal, *"In September, Mr. O'Brien will be free to let rip."* Now it's almost September. A brief check on Google indicates that Mr. O'Brien is active, with a comedy tour, two comedy albums, and a TBS show starting in November, but no controversies with NBC so far.

Would you take \$45 million, and promise not to badmouth a former employer for nine months? Sure you would. Too bad that it's so hard to find an employer who will pay that much.

But would you make that nondisparagement promise for little or no



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compensation at all? Many employers offer only normal severance compensation for a nondisparagement promise, not the extraordinary amount paid to Mr. O'Brien.

You say you're not the disparaging type? So why worry? Because even someone who is not the disparaging type might violate a nondisparagement clause. Disparagement prohibitions may have broader consequences than you would first predict.

To make a living, exiting employees may need to continue working in the same field or market. That often means going to work for a competitor, which may be a worry for the former employer. Or it may mean opening a consulting practice, where their knowledge will be most valuable. Former employees will blog and write regular articles for trade journals in their field of expertise, to enhance a job search or market their skills to clients. These activities may involve commenting on a former employer's products, services, or other attributes, often indirectly and sometimes directly.

New employers often want to review whether an applicant's performance in a new job will be hampered by a nondisparagement clause. Existence of a nondisparagement clause may tip the balance against an applicant, in favor of another applicant without such a restriction.

Nondisparagement clauses offered in severance or employment agreements are worded in many different ways. Often they are broadly written to prohibit the expression of true, but critical, remarks. Laws from one state to another may differ about whether truth is a defense. Even where truth is a defense, an honest mistake may violate, or appear to violate, a disparagement clause. The consequences can include (1) loss of severance benefits; (2) lawsuits seeking damages or injunctions; (3) threatening cease-and-desist letters, sent to new employers or customers. Any of these can be a much greater burden on the former employee seeking employment than on the former employer. If poorly handled, these consequences can lead to a counterclaim by an employee against the former employer.

What to do? If employment or severance terms must include nondisparagement language, work with counsel to optimize it for both parties. Be prepared to consider negotiating options such as:

- Narrow the language to explicitly permit
 - Honest, "good faith" statements
 - True statements
 - Commercially reasonable statements
 - Nonpublic statements

- Adjust the time period to compensate for narrowing or broadening of the language

- Balance the amount of severance payment offered against the

potential impact on someone's future livelihood

- Make sure that the related impact of confidentiality and nondisclosure obligations is considered along with the disparagement obligation

For those who can pay or receive \$45 million for nine months of such self-control, congratulations! What a deal! For the rest of us, let's be careful out there.

For more information, on this and other matters, please contact:

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