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## **Lexis Practice Advisor Labor & Employment**

### **Social Media and Settlement and Separation Agreements: Reining in the Impulse to “Share”**

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Common features of settlement and separation agreements include confidentiality provisions. These provisions aim to prevent bad publicity or exposure to future lawsuits on the same basis by disallowing public communications regarding the details of a dispute. These agreements also often typically include a non-disparagement clause that prohibits the employee from making negative comments about the employer (and, rarely, vice versa). Although the interaction between social media and the law is in flux, confidentiality or non-disparagement provisions are enforced under contract law, which applies whether or not social media is involved. Nevertheless, social media adds a layer of practical complexity that every lawyer should understand. This practice note addresses the legal issues surrounding social media and settlement or separation agreements and offers strategies for avoiding these pitfalls.

For additional guidance on settlement and severance agreements, see Understanding, Drafting, and Negotiating Separation Agreements; Negotiating Separation Agreements on Behalf of Employees; Drafting Common Provisions in an Executive Separation Agreement; Strategies for Negotiating Executive Separation Agreements for Employers; Strategies for Negotiating Executive Separation Agreements for Executives; Understanding, Drafting, and Negotiating Settlement and Release Agreements; and Negotiating Settlement Agreements on Behalf of Employees.

#### **Recent Developments Exemplifying the Danger of Social Media**

Few cases have dealt directly with the issue of social media and settlement or separation agreements. But the two cases discussed in this section offer lessons on the power of social media and the importance of a well-drafted agreement.

In *Gulliver Schools, Inc. v. Snay*, 2014 Fla. App. LEXIS 2595 (Fla. Dist. Ct. App. Feb. 26, 2014), a former prep school headmaster (Snay) settled his lawsuit against the school after filing suit alleging the school did not renew his contract due to age discrimination and retaliation. The settlement included compensation for back pay and attorney’s fees, as well as an additional \$80,000 payment. *Id.* at \*2. The confidentiality provision prevented Snay from “directly or indirectly” disclosing to “any person except his attorneys or other professional advisors or spouse any information whatsoever regarding the existence or terms of the settlement agreement.” *Id.* at \*2-\*3. Snay and his wife told their daughter that the case settled and that they were happy with the result. Snay’s daughter then announced on Facebook that “Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT.” *Id.* at \*3. The post appeared on the Facebook pages of 1,200 people, many of whom were current or past Gulliver students. *Id.* The court determined that the Facebook post advertised to the school community that Snay had

succeeded in his suit against the school, which was exactly what Snay promised he would not do and what the confidentiality provision was designed to prevent. *Id.* at \*6-\*7. Consequently, Snay forfeited his \$80,000 payment.

A different outcome resulted in *Coupons, Inc. v. Stottlemire*, 2009 U.S. Dist. LEXIS 35110 (N.D. Cal. Apr. 9, 2009). In *Stottlemire*, the court absolved the defendant of liability for any damages even though he not only blogged about the resolution of the case, but *Wired.com* also published a story entitled “Coupons Hacker Defeats DMCA Suit,” which quoted *Stottlemire* as saying “[w]ithout being defended by an attorney, I defended myself in federal court against a company who solicited the services of two separate law firms, and in my opinion, I kicked their ass.” *Id.* at \*4, \*11-\*12. The confidentiality provision stated only that “[t]he terms of the settlement will remain confidential.” The court noted that *Wired.com* did not mention the terms of the agreement in its online publications. Moreover, *Stottlemire*’s blog only revealed that the case would be dismissed with prejudice, which was already public information. *Id.* at \*3, \*12-\*13.

As illustrated by Snay and *Stottlemire*, social media makes it all too easy for litigants to succumb to their impulses to share personal details with others in their social networks. Understandably, people who reach a favorable settlement (or receive a favorable severance) feel an urge to boast to others about the outcome, while others may have the impulse to vent their frustration if the agreement does not entirely go their way. Thus, when drafting a settlement or separation agreement, keep in mind the following social media risks:

- *Social media amplification.* In the past, a conversation with a family member or close friend may have technically violated a confidentiality or non-disparagement provision, but the opponent was unlikely to ever discover the breach. Social media amplifies these otherwise discreet communications into content viewable by thousands of people, greatly increasing the possibility of full public disclosure.
- *False sense of privacy.* Many people do not recognize that social media is a public forum because they do not fully understand the consequences of posting information. A privacy setting on a social media platform is actually an agreement by the user to give away certain rights of privacy. If a user incorrectly sets a privacy permission, certain information may become public by default, and even the highest privacy setting usually does not prevent recipients from revealing the information to the broader public. The user frequently has no control over the distribution of a post.
- *Underestimated risk of disclosure.* The informality of social media sites and their business models are designed to generate as much participation and information out of users as possible. Consequently, accidental disclosure of confidential information poses a real danger and users routinely make the mistake of commenting on legal or private matters. An “innocent” breach of confidentiality may have dramatic consequences.

A properly drafted agreement will limit a client’s exposure and will also prevent unnecessary payment whenever a breach has occurred.

### **Confidentiality and Non-disparagement Provisions that Reduce Social Media Risks**

In light of perils of social media, you should adhere to the following best practices when drafting a settlement or separation agreement:

- *Make confidentiality a priority.* Before embarking on a settlement discussion, you should understand what sort of confidentiality requirements your client will need. During settlement talks, you should explicitly raise these requirements to your adversary.
- *Tailor the scope of protection to the situation.* Consider whether to protect select portions of the settlement or separation agreement (such as the settlement amount), all terms of the settlement, or the very existence of the settlement. Keep in mind that it may not be practical to make the existence of a settlement confidential if a party has already filed a lawsuit. In tailoring confidentiality or non-disparagement provisions to the circumstances of each dispute, you should:
  - *Specifically define what information is confidential.* Clearly articulate what the agreement prohibits—and does not prohibit—the parties from disclosing or discussing. Do not assume that a court will protect your information or reputation after the other party discusses the case online simply because a confidentiality provision protects the *terms* of the agreement. You may better serve your client’s interest if confidentiality protection extends beyond the

- terms of the agreement and into negotiations surrounding the agreement, the underlying dispute, or subsequent discussions of fault.
- *Clarify who will need access to confidential information, and carve out an exception for each of those individuals.* For instance, should the confidentiality be so strict as to be limited to spouses, or can the parties share information with immediate family? Also, while an employer generally will and should refuse to agree to a mutual non-disparagement clause due to the difficulty of monitoring it, sometimes the employee has enough leverage to insist upon a mutual non-disparagement agreement. In this case, avoid agreeing to terms with which the employer would find difficult or impossible to comply. It may not be practical to enforce a non-disparagement clause against every employee, so the employer may need to limit the non-disparagement provision of an agreement to a certain division of the company, a certain level of management, or even specific individuals.
  - *Spell out the consequences of third-party disclosure.* Consider including language that holds the signatories responsible even if third parties who are permitted access to confidential information subsequently disclose that information to others in violation of the agreement. This language will offer added security against inadvertent disclosures over social media.
  - *Indicate when a party may disclose confidential information.* Specify the circumstances under which the parties may disclose otherwise confidential information, such as when disclosure is required by a subpoena. A former employee would need to be able to speak honestly if subpoenaed for a deposition, even if he or she is subject to a non-disparagement provision.
  - *Dictate the parties' response to inquiries about the dispute.* Provide specific language directing the parties how to respond if queried about the settlement or dispute.
- *Give the confidentiality or non-disparagement provision "teeth."* For all its risks, social media does increase your ability to prove a breach of confidentiality, making enforcement easier and less costly. Ensure that the confidentiality provision has the power of enforceability by stating explicitly the penalty for violating the provision, such as conditioning settlement or severance payments on compliance with the applicable confidentiality provision. In addition, you may want to include specific reference to injunctive relief, which may allow you to remove social media posts that violate the agreement before the information goes viral. It can be difficult to quantify damages for a leak of confidential information that goes viral over social media, so you may want to include a liquidated damages provision as well.

After the settlement agreement is finalized and executed, you should advise your client to monitor public posts on social media or through periodic online searches to ensure that the parties are abiding by their confidentiality or non-disparagement obligations.

### **Sample Settlement and Separation Agreement Provisions Containing Social Media Language**

The following sections address settlement and separation agreement clauses—including sample, alternate, and optional language—that incorporate the above considerations.

#### ***Confidentiality of Agreement Clause***

As discussed above, a well-drafted confidentiality of agreement clause should define what information is confidential. Specifically, it should clearly articulate what the parties are and are not prohibited from disclosing or discussing. Do not assume that a court will protect the employer's information or reputation after the other party discusses the case online simply because the terms of the agreement are protected by a confidentiality provision.

In delineating the information that is confidential, you should consider whether to protect select portions of the settlement or separation agreement (such as the settlement amount), all terms of the settlement, or the very existence of the settlement. Once again, keep in mind that it may not be practical to make the existence of a settlement confidential if a party has already filed a lawsuit. Tailor the clause to the circumstances of each dispute.

The sample confidentiality clause set forth below extends the confidentiality protection beyond the terms of the agreement and into negotiations surrounding the agreement, the underlying dispute, or subsequent

discussions of fault. In contrast, the alternate clause does *not* extend the confidentiality protection beyond the terms of the agreement and into negotiations surrounding the agreement, the underlying dispute, or subsequent discussions of fault. The more protective sample confidentiality clause is generally more favored than the alternate clause.

#### ***Sample Confidentiality of Agreement Clause (More Protective)***

Confidentiality of Agreement. The Parties expressly understand and agree that the terms and conditions of this [Settlement/Separation] Agreement [as set forth in Paragraph(s) X] and its contents including, but not limited to the fact of payment, the amounts to be paid hereunder, any negotiations prior to settlement, the existence of the settlement agreement itself, and the existence of the dispute [where the underlying dispute is not based on a filed complaint] (defined herein as “Confidential Matters”) shall remain CONFIDENTIAL in nature.

#### ***Alternate Confidentiality of Agreement Clause (Less Protective)***

Confidentiality of Agreement. The Parties expressly understand and agree that the terms and conditions of this [Settlement/Separation] Agreement [as set forth in Paragraph(s) X] and its contents including, but not limited to, the fact of payment and the amounts to be paid hereunder (defined herein as “Confidential Matters”) shall remain CONFIDENTIAL in nature.

#### ***Non-disclosure Clause***

The non-disclosure clause should clarify who will need access to confidential information, and carve out an exception for each of those individuals. For instance, you and the employer must decide whether to strictly limit confidentiality to spouses, or whether the parties can share information with immediate family.

The clause should also specify the circumstances under which the parties may disclose otherwise confidential information, such as when disclosure is required by a subpoena to enforce the agreement.

You should also consider including the optional non-disclosure paragraph, which holds the signatories responsible even if enumerated third parties—whom the agreement permits access to confidential information—subsequently disclose that information to others in violation of the agreement. This will offer added security against inadvertent disclosures over social media.

#### ***Sample Non-disclosure Clause***

Non-disclosure. The Parties therefore agree for themselves, their agents, attorneys, successors, heirs, administrators, representatives and assigns, and all related or affiliated persons, that they shall not directly or indirectly disclose, divulge, communicate, display, publish, or reveal the Confidential Matters defined herein through any medium, either orally or in writing, including, but not limited to, electronic mail, television or radio, computer networks or Internet bulletin boards, blogs, social media, such as Facebook, LinkedIn, or Twitter, or any other form of communication to any third party whatsoever including without limitation, any past, present or future employee of, or any applicant for employment of [Party A], any party to an administrative action, arbitration, mediation, or litigation against [Party A or Party B] and any attorney to any such party, customer, or partner of [Party A or Party B], except as follows: the Parties’ counsel, immediate family, spouse, accountants, financial advisors, tax professionals retained by them, any federal, state, or local governmental taxing or regulatory authority, any governmental agency when such disclosure is required by federal, state, or local law, including tax laws, any party when such disclosure is required by a subpoena issued by a court of competent jurisdiction, any professional advisors and attorneys retained by any of the Parties, the Parties’ management, officers, and Board of Directors, and except as required by law or order of court.

#### ***Optional Non-disclosure Paragraph (Holding Signatories Responsible for Third Parties’ Disclosures)***

Non-disclosure. With respect to each of the limited exceptions set forth above, the Parties shall inform the [entity and/or person(s)] to whom the Parties disclose information regarding this

[Settlement/Separation] Agreement of the confidential nature of this [Settlement/Separation] Agreement and shall use reasonable efforts to ensure that such entity and/or person(s) (as applicable)] agree to maintain the confidentiality of such information in accordance with the terms hereof. The disclosing party shall be liable for any breaches of confidentiality by any [entity and/or person(s)] identified in the limited exceptions set forth above to whom information concerning this Agreement is disclosed.

### ***Joint Statement of Resolution***

You should provide specific language directing the parties how to respond if they are asked about the settlement or dispute. Accidental disclosure of confidential information via social media poses a real danger because users routinely make the mistake of commenting on legal or private matters. An “innocent” breach of confidentiality may have dramatic consequences. Providing explicit instruction on what language to use when responding to third parties about the nature of the agreement or dispute decreases the risk of breach.

You should use the first alternate clause if the agreement concludes an action that was pending in court.

Use the second alternate clause for a separation or settlement agreement where the employer wants to document a neutral reference policy, which generally provides protection for the employer against potential defamation suits. For more information on job references, see *Avoiding Pitfalls in Providing Job References*.

### ***Sample Joint Statement of Resolution Clause***

Joint Statement of Resolution. The Parties agree that any statement or response to an inquiry concerning the Agreement made to any third party through any medium, either orally or in writing, including, but not limited to, electronic mail, television or radio, computer networks or Internet bulletin boards, blogs, social media, such as Facebook, LinkedIn, or Twitter, or any other form of communication (excluding those specifically identified in Section X who may be told of the [Settlement/Separation] Agreement) will be limited to the substance of the following: that the Parties have “amicably resolved all differences.” The Parties shall not disclose any of the Confidential Matters defined herein.

### ***First Alternate Joint Statement of Resolution Clause (Resolving Lawsuit)***

Joint Statement of Resolution. The Parties agree that any statement or response to an inquiry concerning the Agreement made to any third party through any medium, either orally or in writing, including, but not limited to, electronic mail, television or radio, computer networks or Internet bulletin boards, blogs, social media, such as Facebook, LinkedIn, or Twitter, or any other form of communication, (excluding those specifically identified in Section X who may be told of the [Settlement/Separation] Agreement) will be limited to the substance of the following: “We have reached a resolution to the litigation filed by Party A against Party B. We are not at liberty to comment further on this matter.” The Parties shall not disclose any of the Confidential Matters defined herein.

### ***Second Alternate Joint Statement of Resolution Clause (with Neutral Reference Language)***

Joint Statement of Resolution. The Parties agree that any statement or response to an inquiry concerning the Agreement made to any third party through any medium, either orally or in writing, including, but not limited to, electronic mail, television or radio, computer networks or Internet bulletin boards, blogs, social media, such as Facebook, LinkedIn, or Twitter, or any other form of communication, including but not limited to a customer, client, partner, or employee (excluding those specifically identified in Section X who may be told of the [Settlement/Separation] Agreement) will be limited to the substance of the following: that the Parties have “amicably resolved all differences.” The Parties agree that any statement or response to any inquiry regarding [Party A’s] employment of [Party B] or the termination of that employment will be limited to the substance of [Party B’s] length

of employment and that [Party A], by practice, does not provide any additional information. The Parties shall not disclose any of the Confidential Matters defined herein.

### ***Non-disparagement***

Typically, non-disparagement provisions restrict the employee from disparaging the employer but not vice versa.

Sometimes employees request mutual non-disparagement clauses, but unless the employee has a lot of leverage, the employer should not agree to this request. It is impractical for the employer to monitor comments made by employees. Also, a mutual non-disparagement provision may interfere with the employer honestly disclosing the former employee's bad conduct or performance. Before acceding to a request for a mutual non-disparagement clause, you should counsel the employer that it may not be practical to enforce a non-disparagement clause against every employee. Thus, the employer may need to limit the non-disparagement provision of an agreement to a certain division of the company, level of management, or even specific individuals.

Regardless of the provision's mutuality, you should specify the circumstances in which the parties subject to the provision may disclose otherwise confidential information. For instance, a former employee would need to be able to speak honestly if subpoenaed for a deposition, even if he or she is subject to a non-disparagement provision.

### **Sample Non-disparagement Clause**

Non-disparagement. [Party A] represents, covenants and agrees that [he/she] will not at any time after [date], through any medium, either orally or in writing, including, but not limited to, electronic mail, television or radio, computer networks or Internet bulletin boards, blogs, social media, such as Facebook, LinkedIn, or Twitter, or any other form of communication, disparage, defame, impugn, damage or assail the reputation, or cause or tend to cause the recipient of a communication to question the business condition, integrity, competence, good character, professionalism, or product quality of [Party B][or its stockholders, directors, officers, employees, services or business practices], as applicable, whether by virtue of the Agreement or any of the details covered by this Agreement, except as follows: [Party A's] counsel, immediate family, or spouse, when such disclosure is required by a subpoena issued by a court of competent jurisdiction, and except as required by law or order of court. Nothing in this provision shall be read to prohibit regular and commercially reasonable acceptable competitive business speech by [Party A].

### **Alternate Non-disparagement Clause (Mutual)**

Non-disparagement. The Parties mutually represent, covenant, and agree to each other that neither such Party nor any employee, agent, or representative of such Party who is aware of this Agreement will at any time after [date] on behalf of such party, through any medium, either orally or in writing, including, but not limited to, electronic mail, television or radio, computer networks or Internet bulletin boards, blogs, social media, such as Facebook, LinkedIn, or Twitter, or any other form of communication, disparage, defame, impugn, damage or assail the reputation, or cause or tend to cause the recipient of a communication to question the business condition, integrity, competence, good character, professionalism, or product quality of [Party A] or [Party B], as applicable, whether by virtue of the Agreement or any of the details covered by this Agreement, except as follows: the Parties' counsel, immediate family, spouse, any party when such disclosure is required by a subpoena issued by a court of competent jurisdiction, the Parties' management, officers and Board of Directors, and except as required by law or order of court. Nothing in this provision shall be read to prohibit regular and commercially reasonable acceptable competitive business speech by either Party.

### **Breach Clause**

You should give the confidentiality provision the power of enforceability by stating explicitly the penalty for its violation, such as conditioning settlement or severance payments on compliance with the applicable confidentiality provision. For all its risks, social media increases your ability to prove a breach of confidentiality, making enforcement easier and less costly.

In addition, you may want to include specific reference to injunctive relief, which may allow the employer to remove social media posts that violate the agreement before the information goes viral. It can be difficult to quantify damages for a leak of confidential information that goes viral over social media, so consider including a liquidated damages provision as well.

#### **Sample Breach Clause**

Breach. A breach of any of the terms set forth in [Paragraph(s) X] will result in the disgorgement of [Party X's] portion of the [settlement/severance] payments.

#### ***Alternate Breach Clause (Injunctive Relief)***

Breach. A breach of any of the terms set forth in [Paragraph(s) X] will result in the disgorgement of [Party X's] portion of the [settlement/severance] payments. [Party A] acknowledges that damages alone would not be an adequate remedy for the breach of any of the terms set forth in [Paragraph(s) X]. Accordingly, without prejudice to any other rights and remedies it may have, Party A acknowledges and agrees that Party B shall be entitled to the granting of equitable relief (including without limitation injunctive relief) concerning any threatened or actual breach of any of the terms set forth in [Paragraph(s) X] of this agreement, without any requirement to post a bond or other security.

#### ***Alternate Breach Clause (Liquidated Damages)***

Breach. A breach of any of the terms set forth in [Paragraph(s) X] will result in the disgorgement of [Party X's] portion of the [settlement/severance] payments. In addition, [Party A] acknowledges that a breach of any of the terms set forth in [Paragraph(s) X] will cause [Party B] to incur substantial economic damages and losses of types and in amounts which are impossible to compute and ascertain with certainty as a basis for recovery by [Party B] of actual damages because [Party B] cannot know in advance the impact of breach on [Party B's] reputation or business, nor can it readily ascertain what costs [Party B] will incur as a result. Accordingly, if [Party A] breaches any of the terms set forth in [Paragraph(s) X], [Party A] shall pay [Party B] [\$X or \$X per day that Party B remains in Breach], which represents a fair, reasonable and appropriate estimate thereof. The Parties further stipulate that the agreed upon sum is not a penalty, but rather a reasonable measure of damages, based upon the parties' experience in the [X] industry and given the nature of the losses that may result from breach.

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