



WAIT! DON'T SIGN THAT CONTRACT: The Effect of the Liquidated Damages Clause

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“Liquidated damages” - You've probably heard about it or vaguely recall glancing over that clause in your employment contract, but chances are you probably never appreciated the significant effect it has on your contractual rights and remedies.

That is, unless of course, you've been burned by it.

What are Liquidated Damages?

Generally speaking, liquidated damages (also referred to as “stipulated damages” or “agreed damages”) refer to a contract provision in which your employer asks that you agree to a fixed amount of damages in the event you breach your contract. Liquidated damages clauses are found in many types of contracts and are particularly favored by management in the broadcasting industry.

Why These Clauses Are Used

The primary and most obvious reason why news stations insert these clauses in contracts is to deter talent from breaching the contract. In other words, liquidated damages clauses are intended to discourage talent from just packing up and leaving the station before the end of the contract term by imposing stiff financial obligations for such conduct. Since stations anticipate spending significant money and resources training and promoting talent, they generally want some guarantee that talent will stay as long as he or she has agreed to stay.

Another reason why stations frequently insert these clauses in contracts is because of the high litigation costs and the difficulty involved in quantifying the amount of damages that are incurred in the event the contract is breached. Liquidated damages clauses avoid that expense and burden by fixing or pre-setting the amount of damages, usually based on a percentage of the talent's salary.

Finally, liquidated damages clauses are a way to ensure that monies invested in talent are recouped in the event talent prematurely ends his or her employment.

Don't Just "Sign Off"!

But, whatever the reason, neither you nor your representative should passively agree to include such a clause in your contract simply because it's considered a "standard" contract provision. Contract negotiations should mean just that - you give and take when it comes to the language and provisions of the agreement. So, when faced with a liquidated damages clause, you and/or your lawyer or agent can either insist that the clause be entirely removed from the contract, or you can negotiate the amount to a more reasonable or manageable figure.

While it may not be reasonable to expect that these clauses will be completely eliminated from the contract, it is reasonable to expect that the amount will be reduced, especially if it is excessively high.

While any skilled lawyer or agent should automatically take issue with the terms of these clauses, especially if they appear to be unreasonably punitive, pay close attention to these clauses and do not hesitate to ask your lawyer or agent to explain their impact on your contract. Unfortunately, more often than not, talent do not appreciate the true implication that these clauses have on their livelihoods until they are faced with a situation where continued performance of the contract has become so economically disadvantageous that they consider breaching the contract. These issues are worth exploring before you sign your employment contract because of the significant financial obligations imposed.

Is it Too Late?

Now if you've already signed a contract that has a liquidated damages provision that was never negotiated by you or your lawyer or agent, all hope is not necessarily lost. Generally, contract law abhors liquidated damages clauses that act as an excessive penalty - that is, clauses that set a damage amount above anticipated or actual compensatory damages - on the basis of public policy or fairness grounds. So, if your liquidated damages clause is unreasonably punitive and/or provides an unfair windfall for the station, there's a chance a court will find the clause unenforceable. That determination, however, is highly fact-sensitive and generally varies upon the state law governing the contract.

We cannot emphasize just how important it is to really understand the terms of your employment contract. You should not be shy to ask your lawyer or agent to explain each clause in layman's terms. Such an explanation will help you understand the implication that each term has on your rights and remedies, and the repercussions of breaching the agreement - a decision not to be taken lightly especially in the absence of a fair liquidated damages clause.

This article is written to provide readers with a very general overview of the topic discussed. The information contained herein should not be construed as providing legal advice and it should not be relied on for that purpose. If you have specific legal questions, the author suggests seeking the advice of a qualified attorney.

About the Author

Fernando M. Pinguelo is a trial lawyer licensed to practice law in New York, New Jersey, and Washington, D.C. He devotes his practice to entertainment law, complex litigation, and employment matters. Fernando has extensive experience in all facets of litigation in both the federal and state courts. In the area of entertainment law, Fernando counsels a host of diverse talent. He also serves as a regular article contributor for the National Association of Television Arts and Sciences (New York Chapter), *TVSpy*, *Next Generation TV*, and *Shop Talk*. Fernando has published several articles and lectures on a variety of topics including copyright, contracts, entertainment, employment law, and information technology. He has appeared on television several times as a legal commentator on various high-profile trials, and has been quoted in many newspapers and magazines, and on radio and television broadcasts regarding high-impact cases he has handled.

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