



# Legal:GPS

Growth and Protection Strategies to Help Navigate Your Business Success

## CEO Employment Contracts: *What to Know and What to Avoid*

May 3, 2007




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## Housekeeping Details

- Today's program will last one hour
- A recording and summary of the program will be available in the next few weeks on **Foley.com** and via a link on Springboard's Web site
- To view the presentation in full screen mode, please go to **View** on your Toolbar and select **"Full Screen Mode"**

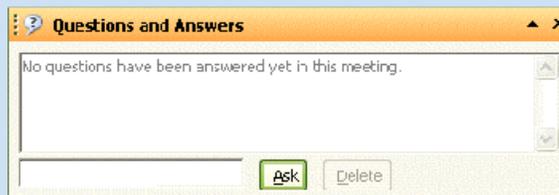


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## To Ask a Question

- Enter your question into the text area of the Question Pane, and select **Ask**
- Time permitting, we will address Questions at the end of the presentation



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## Today's Panelists

### Pamela Contag

- Current Chairman and CEO of Cobalt Technologies Inc
- Past President and Founder of Xenogen
- Earned her MS and Ph.D. in Microbiology from the University of Minnesota Medical School and completed her post-doc at Stanford School of Medicine
- Named one of the “Top 25 Women in Small Business” by *Fortune* magazine



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## Why and When is an Agreement Necessary?

- Founding the company: valuing your role and contribution
  - Are you working for free?
  - Have you given up your day job?
  - How much stock do you have?
- As part of an executive compensation package
- The exit



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## Why Both Employment and Severance?

- The investors may or may not ask about an employment or severance agreement. Make it part of the diligence package
- Investors who are interested in retaining you will insist on an agreement; if not, severance matters
- The document serves to codify board and management expectations of roles and responsibilities
- A CEO/founder should craft an agreement to protect stock compensation in the case of either involuntary termination, voluntary termination or a change of control
- It also accords you the freedom to do what is best for company



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## What Type Of Agreement Is Appropriate and What Should Be Included?

### Employment vs severance agreements

- At will employee
- An agreement that contains both components
- Two separate agreements

### The necessary components:

- IP ownership
- Outside responsibilities
- Job title and description
- Reporting structure
- Termination definition
- Acceleration of stock
- Severance
- Non-compete



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## If You Don't Have An Agreement Now What To Do Next

- Three things to do now
  - Consult a personal attorney that is looking out for your interests not the company's interests to get the best agreements
  - Compose the words in the agreement to be clear today and in 10 years
  - Revisit the agreements at each stage of the company



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## Today's Panelists

### Leigh Riley

- Partner in Foley's Tax & Individual Planning and Tax & Employee Benefits Practices, as well as the firm's Insurance Industry Team
- Focuses practice on employee benefits and executive compensation
- Earned her law degree from the University of Pennsylvania Law School



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## Today's Panelists

### Dabney Ware

- Partner in Foley's Labor & Employment Practice
- Extensive experience in employment-related litigation
- Counsels clients on all aspects of compliance with the numerous federal, state and local laws
- Earned her law degree from the University of Florida College of Law



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## Document the Economics of Employment

- If it's not in writing, you don't have the right to get it!
  - Base pay (no decrease)
  - Bonus or bonus opportunity
  - Vacation
  - Expense reimbursement
  - Miscellaneous (i.e. car allowance)
  - Equity arrangements



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## Document the Economics of Termination

- Severance pay – lump sum or over time
- Bonus – payout in whole or pro rata
- Continued benefits after termination
- Different results for different types of termination
- Legal fees
- Interest on late payments



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## Equity Arrangements

- Be specific (ideally, attach equity award agreement)
- Keep lack of liquidity of mind (cashless exercise and tax withholding rights)
- Review stockholders agreement
- Registration rights upon an IPO



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## Know the Tax Consequences

- *Code Section 280G* – If aggregate change of control payments exceed 3 times compensation, amount in excess of 1 times compensation is subject to 20% excise tax
- *Code Section 409A* – If have nonqualified deferred compensation arrangement that does not comply in form or operation, subject to 20% excise tax at time of vesting



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## Common Provisions in Employment Agreements

- Confidential information
- Trade secrets/intellectual property
- Arbitration
- Non-solicitation (may be directed at customers/client or employees)
- Non-competition



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## Possible Issues

- Ensure you can take out what you brought in
  - Customers
  - Employees
  - Confidential information (including development or marketing strategies)



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## Possible Issues

- Non-compete provisions
  - Requirements vary greatly by state law
  - Is restriction reasonable? Necessary to protect business interests of company?
  - Time limit? How does time restriction compare to severance period? Does it match product life cycle?
  - Are limits based on customer or geography? Based on actual or potential contacts?



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## Questions & Answers



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## Next Web Conference

### Mark Your Calendars!

- Topic
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- Date
  - September 12<sup>th</sup>, 2007



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