CEO Employment Contracts:
What to Know and What to Avoid

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Foley & Lardner LLP

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• Strong commitment to women both internally and externally
• Women Business Owners’ Resource Guide
  – Information/resources on legal topics when both starting and growing a business
  – Visit: www.womenlegalresource.com
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”

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
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

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
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

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
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

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
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

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
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

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
Common Provisions in Employment Agreements

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

Possible Issues

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

Questions & Answers
Next Web Conference

Mark Your Calendars!

• Topic
  – Keeping It Real: Managing and Protecting Your Intellectual Property (IP)

• Date
  – September 12th, 2007

Survey