

DANISH-AMERICAN BUSINESS FORUM: NEGOTIATING PROFITABLE CONTRACTS WITH US COMPANIES

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KEY ELEMENTS OF NEGOTIATING AN AGREEMENT

The American practices regarding the NEGOTIATION of a business agreement are vastly different from the Danish tradition.

- ▶ The American party does not expect its draft agreement to be accepted.
- ▶ Contrarily: A strong counter draft from the opposing party is expected.
- ▶ Remember: There is always a lawyer involved. She may not surface, but she is there.

KEY ELEMENTS OF NEGOTIATING AN AGREEMENT

▶ The following negotiation structure is advisable when the agreement is complex:

1. Initial negotiations to determine if the key elements can be agreed upon.
2. Drafting of Letter of Intent (Memorandum of Understanding) and Confidentiality Agreement.
3. Exchange of information.
4. Negotiation of the final Agreement.

KEY ELEMENTS OF NEGOTIATING AN AGREEMENT

NOTE!

An American Agreement is often not binding unless it is in writing and signed by the parties. This follows from the doctrine on STATUTE of FRAUDS.



KEY ELEMENTS OF NEGOTIATING AN AGREEMENT

- ▶ The American practices regarding the CONTENTS of a business agreement are vastly different from the Danish tradition.
- ▶ *An American Agreement is generally much more detailed than a Danish Agreement.*
- ▶ A detailed Agreement is not necessarily a good Agreement.
- ▶ Standard agreements are good for inspirational purposes only.

A good Agreement focuses on the specific operational factors relevant for the parties' situation.

KEY ELEMENTS OF NEGOTIATING AN AGREEMENT

REMEMBER!

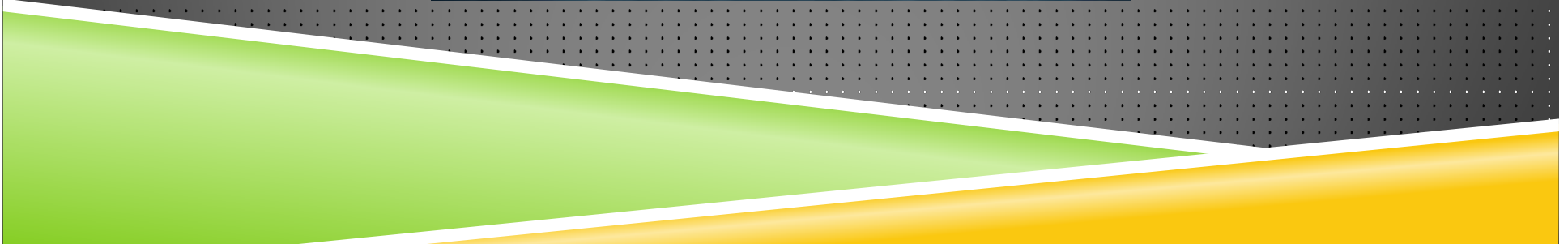
A good and detailed Agreement should **always be in place**.

Thus: Always draft a detailed and operative Agreement targeted specifically towards the parties' situation. This is the best way to secure a long lasting good business relationship and to guard against expensive dispute resolution.

KEY ELEMENTS OF NEGOTIATING AN AGREEMENT

- ▶ Key operative elements always to be included in detail:
 - ▶ The parties' rights and obligations
 - ▶ What constitutes a party's default
 - ▶ Consequences of a party's default
 - ▶ Term and termination provisions
 - ▶ When to re-negotiate and what procedures to follow
 - ▶ Exit provisions
 - ▶ Dispute resolution clause (will be covered by Ed Wright)
 - ▶ Choice of law clause (will be covered by Ed Wright)

EMPLOYMENT AGREEMENTS



The legislature and the courts in the United States are a complex matrix of 50 individual state systems and the federal system.

They don't always agree. In no place is this more apparent than in the area of employment.



FOR INSTANCE, A NON-COMPETE
PROVISION IN AN EMPLOYMENT
AGREEMENT MAY BE ENFORCEABLE IN
ONE STATE AND UNENFORCEABLE IN
ANOTHER:

GENERALLY NCAS ARE ENFORCEABLE IF:

REASONABLE IN SCOPE, GEOGRAPHY, AND DURATION AND ARE
NARROWLY TAILORED TO PROTECT A LEGITIMATE BUSINESS INTEREST

State	Enforceability	Notes
California	Unenforceable	Except with regards to the sale of a business, or as related to trade secret (i.e. client list).
Florida	Enforceable	Prior to 1990 they were enforceable, amendments to the law in 1990 and 1996 have broadened enforceability
New York	Enforceable	Strictly construed
Texas	Enforceable	Moving towards a broader level of enforceability
Virginia	Enforceable	If narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and is not against public policy
Delaware	Enforceable	Reasonable in scope and duration

Federal law does not require employer's in the United States to offer their employees paid vacation.



VACATION

- ▶ If an employer does offer their employees vacation, state laws will dictate:
 - ▶ How that vacation accrues,
 - ▶ Whether it must be rolled over from year to year (i.e. use it or lose it)
 - ▶ Whether the employer must pay the employee for accrued, but unused vacation, upon termination.

SIMILAR TO NON-COMPETE AGREEMENTS, THE STATES DO DIFFER

State	Use it or lose it enforceable?	Pay Accrued Vacation at Termination?	Notes
California	No	Yes	Employer can place a reasonable cap on vacation benefits
Florida	Yes	No	Unless an employment agreement or company handbook provided otherwise.
Oregon	Yes	Yes	
New York	Yes	Yes*	* Unless written policy in place that says otherwise

THE BOTTOM LINE IS WHAT MAY WORK IN ONE STATE MAY NOT WORK IN ANOTHER

- ▶ When entering into a new jurisdiction, an employer should have their employment contracts and policies reviewed by an attorney to ensure they are appropriate for that state.

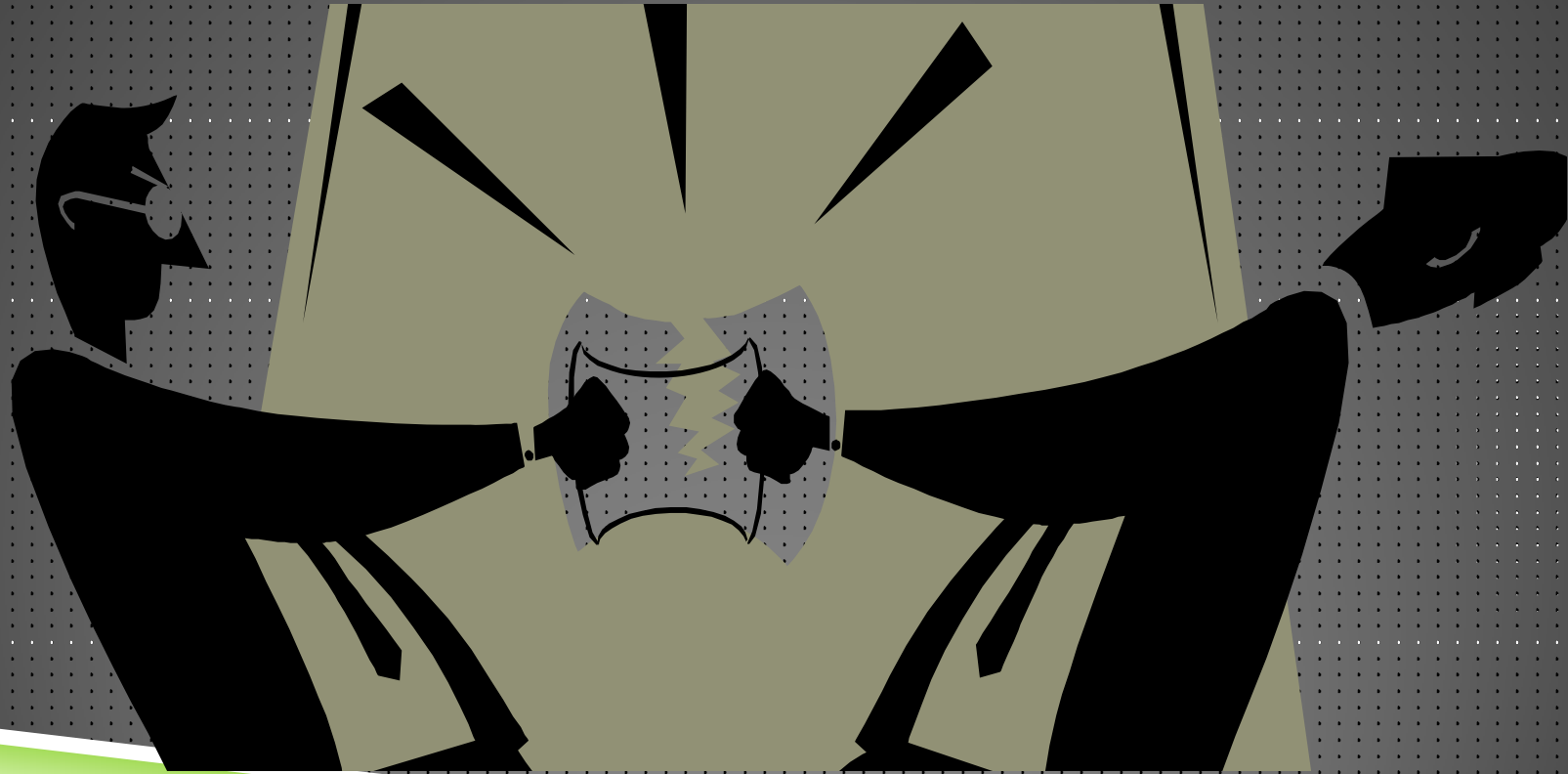
POTENTIAL PITFALLS FOR EMPLOYERS IN THE US

- ▶ Wage & Hour Laws
 - ▶ As previously mentioned, these laws differ from state to state
- ▶ Sexual Harassment and Discrimination Claims
- ▶ Terminating an Employee

LITIGATION IN THE UNITED STATES

- ▶ To be avoided if at all possible.
- ▶ It is very expensive.
- ▶ Discovery is very broad and can be invasive.
- ▶ Can be disruptive to business
- ▶ Can linger for years . . .

ALTERNATIVE DISPUTE RESOLUTION: AVOIDING THE COURTROOM



TYPES OF ALTERNATIVE DISPUTE RESOLUTION

- ▶ Mediation
- ▶ Binding Arbitration
- ▶ Non-Binding Arbitration

BENEFITS OF ALTERNATIVE DISPUTE RESOLUTION

- ▶ Typically lower cost
- ▶ Quicker
 - ▶ Some court cases can linger 2-3 years, or longer
- ▶ Greater party control
 - ▶ The parties are free to determine what process to use and how that process will be conducted.
- ▶ Confidentiality
 - ▶ Court proceedings are public and their judgments are public.