* *Exercise 33A: Redraft an Employment Agreement*
  + *Instructions:*
    - 1st – Read the material included below on termination provisions in an employment agreement.
    - 2nd – Read the email from the client you are working with, Carrie Richards, which follows the material on termination provisions.
    - 3rd - Analyze the contract that follows the email below using the steps described in Chapter 33.
  + *Termination Provisions in an Employment Agreement:*

Parties negotiate carefully the termination provisions of an employment agreement. These provisions are usually broken down into at least these four main categories:

* + - Termination for cause
    - Termination without cause
    - Termination upon death
    - Termination because of a disability

This appendix provides an overview of each of these categories.

Whether an employer terminates an employee with or without cause matters because it affects how much money the employer pays the employee upon termination. If an employee is terminated for cause, the employer generally pays the employee only her accrued salary and any expenses. If, however, the employee is terminated without cause, then, the employer generally must pay the employee their accrued salary, any expenses, bonus, and severance. In other words, the employer pays a good deal more money. With this in mind, the negotiation of what acts constitute cause has much more meaning.

Typically, employers want the definition of cause to include as many matters as possible and for each matter to be drafted as broadly as possible and with as few qualifications as possible. Employees, of course, want just the opposite. Common acts that constitute cause include misconduct, dishonesty, breach of contract, fraud, a conviction or pleading guilty to a felony, insubordination, and conduct involving moral turpitude. Employers will often try to include incompetence and failure to perform satisfactorily as cause, but sophisticated employee lawyers will resist those attempts and instead argue that those issues should constitute termination without cause. Contracts will also include as cause matters specific to an employer’s business.

Two other common termination provisions are death and disability. Death is, of course, the ultimate termination provision. For junior level employees, their employer’s obligations generally end upon the date of the employee’s death. Companies are sometimes more gracious when dealing with the death of their senior executives. Then, the contract may provide that salary will continue to be paid through the last day of the month in which the executive dies, or some other period. The employment agreement typically provides that the employer will make their final salary payment according to its regular schedule. A senior executive might negotiate for the employer to pay their family a special death benefit payment. The parties will also need to negotiate whether the employer will pay a pro rata bonus, and when it should be paid.

Termination because of disability is more common than many people think. The issue of what constitutes disability is a difficult one. How many days absence: 30, 60, 90? Must they be consecutive? What if they occur within a five-month period? Any provision must be carefully drafted so that it complies with the Americans with Disabilities Act and the Family Medical Act. Once the definition of disability is negotiated, the payments (salary and pro rata bonus) must be determined, along with the timing of payments.

* + *Email from the Client:*

To: Lydia Wright, Esq

From: Carrie Richards

Date: November 10, 20\_5

Dear Lydia:

As I told you on the telephone, I landed the job with WXYZ, Channel 101, in New York. It’s cable, but a coup. To get a broadcast job fresh out of college is beyond exciting. I met with two people: Rashad Hampton, Senior Vice President of USA Television Communications, Inc. (USA), and Alex Schroeder, Station Manager of WXYZ, USA’s affiliate.

I’m going to be WXYZ’s consumer affairs reporter. This is a great beat. There is never an emergency, which means that I will always get my weekends, and three-day holidays will really be holidays. I have committed to airing, on average, two segments a week. If I average three segments or more a week, they will pay me a $25,000 bonus. My salary is $100,000.

Here is a list of the other points that we negotiated:

1. I’ve agreed to a two-year term. They asked that I promise to negotiate with them exclusively for a 30-day period before the end of the term. I was concerned about this, but I’m only promising to negotiate. It also seemed to be part of the price of admission, so I said, “yes.”
2. They asked for a one-year noncompete after the term. That seems very long, but they said that it was standard industry practice. I said that I needed to talk to my lawyer.
3. They will give me a car and up to $600 a month to pay for insurance, parking, and repairs. I’ve promised to use the car principally for business. They will reimburse me for the expenses upon presentation to them of an itemized account of the expenses.
4. They will indemnify me if I get sued for anything in connection with the performance of my duties.
5. I told them that I planned to do about 30 hours a month volunteer work for the American Society for the Prevention of Cruelty to Animals (ASPCA). They told me that was not a problem. Other broadcasters did similar volunteer work. They said we did not need to cover it in the contract; they never did for any of the other broadcasters.
6. Hampton said that the remainder of the contract would include their standard “boilerplate” clauses dealing with termination, confidentiality, adherence to company policy, etc.
7. They told me that they always investigate new employees, so I gave them my Social Security number, and I repeated what was on my resume: I graduated 10th in my class from Syracuse University in June 20\_5 with a major in communications and that, while at Syracuse, I successfully completed the Renée Crown University Honors Program. I also told them that I was an unpaid intern at WTVH, Channel 5, the CBS affiliate in Syracuse, during the summers of 20\_3 and 20\_4.

I guess the contract must be fairly standard as I received a draft the day after I met with them. I would appreciate your giving me a call as soon as you have had a chance to look it over.

One last thing. Very strange. Hampton said that while it was usually not the practice for a commenting lawyer to give comments on style, their lawyer was new, so they would be delighted if we gave comments on style as well as substance.

Best,

Carrie

* + *Contract Attached to Email from the Client:*

**Employment Agreement**

**Employment Agreement**, dated as of November 15, 20\_5 between WXYZ, Channel 101, New York, New York (the “Station”), and Carrie Richards (the “Reporter”).

The parties agree to the following terms of employment:

1. **Employment**. The Station shall employ the Reporter, and the Reporter shall work for the Station, under the terms of this Agreement.
2. **Salary**. The Station shall pay the Reporter at a rate of $100,000 per year in approximately equal weekly installments. If in any year the Reporter airs on average more than three segments per week, the Station shall pay the Reporter a bonus of $25,000 no later than March 31 of the following year.
3. **Term and Termination**.
   1. **Term**. The term of the Reporter’s employment under this Agreement is from January 1, 20X6 until 8:00 p.m. December 31, 20X7 (the “**Term**”), unless terminated earlier in accordance with the provisions of this Agreement.
   2. **Extension of the Term**.
      1. **Notice**. If the Station wants to extend the Reporter’s employment beyond the end of the Term, then no later than 120 days before the end of the Term, the Station must notify the Reporter to that effect in writing.
      2. **Exclusive** **Negotiations**. If the Reporter receives the appropriate notice, then beginning 90 days before the end of the Term, the Reporter shall negotiate with the Station exclusively and in good faith for 30 days with respect to the contract terms for an extension of the Term. The Reporter shall not negotiate with any third party before this exclusive negotiating period.
      3. **The Parties’ Rights upon Failed Negotiations**. If the parties cannot reach an agreement during the exclusive negotiating period, the Reporter may negotiate with any third party during the remainder of the Term. If during the remainder of the Term a third party offers the Reporter a job that she wants to accept, she shall notify the Station in writing of the offer’s terms no later than three days after she receives the offer. No later than three days after the Station receives the terms of the third-party offer, the Station shall notify the Reporter in writing whether it will match the offer. If it matches the offer, the Station and the Reporter shall enter into a new agreement pursuant to the terms of the offer. If the Station does not match the offer, the Reporter may accept it.
   3. **The Station’s Right to Terminate**. The Station may terminate the Reporter’s employment at any time for “cause.” The following are illustrations of “cause,” but the Station is not limited or bound by these illustrations.
      1. Misconduct.
      2. Insubordination.
      3. Failure to perform assigned work in a satisfactory manner.
      4. Using, possessing, selling, or distributing intoxicants, illegal drugs, or controlled substances on the Station’s property or any other violation of the Station’s drug and alcohol abuse policy.
      5. Dishonesty or deceit.
      6. On-air obscenity or impropriety, oral or visual.
      7. Violation of any policy in the Station’s Employee Handbook.
      8. Conduct involving moral turpitude.
      9. Conduct punishable as a felony under state or federal law;
      10. Any action involving a breach of the terms of this Agreement.
      11. The Reporter’s failure to conduct herself with due regard to social conventions, public morals, and decency.
      12. Conduct that could jeopardize Station’s license to operate.
      13. Violation of any Federal Communications Commission rule or regulation.
      14. Incompetence.
      15. Violation of the Station’s absenteeism policy.

The Station shall decide in its sole discretion whether particular conduct constitutes “cause,” but it shall not exercise that discretion arbitrarily, capriciously, or in violation of law.

* 1. **The Reporter’s Right to Terminate**. The Employee may terminate this Agreement if the Station breaches this Agreement and has not cured the breach after notice and a 30-day opportunity to cure.
  2. **Death**. If the Reporter dies, her employment terminates, effective as of the date of her death, and the Station shall pay the Reporter’s representatives her salary through that date.

1. **Duties**. The Reporter shall render personal services in the WXYZ designated market area as an on-the-air reporter. She shall diligently perform those duties that the Station reasonably assigns and that relate to on-the-air services, including planning, preparing, and broadcasting various news segments. The Employee shall air one to two segments per week on an average weekly basis. Nothing in this Agreement requires the Station to assign the Reporter any specific duties.
2. **Extent of Service**. The Reporter shall devote her entire professional time, attention, and energies to the performance of her duties for the Station.
3. **Insurance and Other Employee Benefits**. Employee is entitled to receive insurance, vacation, holidays, and other employee benefits as provided to other Station employees and as set out in the Station’s Personnel Manual. The Station shall provide the Reporter with the use of a mid-size car of her choice for use during the Term.
4. **Working Facilities**. The Station shall give the Reporter an office suitable to her position and adequate for the performance of her duties.
5. **Scripts, Creative Material, Promotional Material**. The Reporter acknowledges that all scripts and creative material created by or performed by her are “work made for hire” as that term is used in the copyright laws of the United States, as set forth in 17 U.S.C. Section 101, et seq. In addition, all programs, program segments, titles and formats, scripts and outlines, and ideas and concepts, conceived and created for any program are the sole and exclusive property of the Station. The Reporter shall take all actions the Station requests to confirm ownership of the intellectual property in the Station. The Station may make or cause to be made likenesses, portraits, pictures, sketches, and caricatures of the Reporter and may use such likenesses, portraits, sketches, and caricatures of the Reporter as well as the Reporter’s recorded voice and name in all forms of media for the purpose of publicizing, promoting, and advertising the Station and programs broadcast by the Station.
6. **Adherence to the Station’s Policies**. The Reporter shall comply with the Station’s Code of Business Conduct and any other policies, rules, or directives that the Station establishes.
7. **Confidentiality**. During the Term and thereafter, Employee shall keep secret and inviolate the terms of this Agreement, including without limitation the provisions of Paragraph 3 respecting compensation and all knowledge and information of a confidential nature that the Reporter knows now or subsequently comes to know as a result of her employment at the Station.
8. **Noncompetition**.
   1. **Covenant Not to Compete**. The Reporter is familiar with
      1. the business of the Station;
      2. the commercial and competitive nature of the industry and its dependence upon public acceptability;
      3. the substantial commitment the Station makes in developing the Reporter as a personality with her extraordinary and unique services and abilities that enable him to seek and obtain similar employment outside the Station’s market.

The Reporter further recognizes that the value of the Station’s business would be injured if the Reporter obtained comparable employment in the Station’s market and that such injury could not be reasonably or adequately compensated by monetary compensation. For these reasons, upon the expiration or earlier termination of this Agreement, the Employee shall not, for a period of one year, perform services for, or otherwise be publicly identified with, any other television or cable television station, located in WXYZ’s designated market area.

* 1. **Remedies**. The Reporter acknowledges that it is impossible to measure in monetary terms the damages that will accrue to the Station because of the Reporter’s failure to perform the noncompetition covenant set forth in this Agreement. Accordingly, the Reporter acknowledges that if the Station institutes any litigation to enforce the noncompetition covenant, the Station is entitled to injunctive or other equitable relief to prevent the violation of the noncompetition covenant, in addition to damages, attorneys’ fees, and costs.

1. **Content of Performance and Indemnification**. The Reporter shall not publicly disseminate or broadcast, or submit to others for that purpose, any material that a Station supervisor has not first approved. The Reporter shall not materially deviate from the script or other material furnished to her in connection with performance of her services. Except as provided below, the Station shall indemnify the Reporter from any and all claims, liabilities, and losses, including reasonable attorneys’ fees, as a result of acts of the Reporter performed in the course and within the scope of the Reporter’s employment. The Station’s obligation under this paragraph shall not apply if the Reporter violates any of the Station’s policies, if the Reporter has failed to promptly notify the Station of any claim made or litigation filed against him or the Reporter has settled or compromised the claim or litigation as to him without the Station’s prior written consent.
2. **Representations and Warranties**. The Reporter represents and warrants as follows:
   1. She graduated from Syracuse University in 20X5 with a major in communications and that while at Syracuse University, she successfully completed the course of study in the Renée Crown University Honors Program.
   2. She was an employee at WTVH, Channel 5, the CBS affiliate in Syracuse, New York, during the summers of 20X3 and 20X4.
3. **General Provisions**.
   1. **Assignment** **and** **Delegability**. The Station may assign its rights and delegate its performance under this Agreement. The Reporter shall not assign its rights or delegate its performance under this Agreement.
   2. **Governing Law**. The laws of New York shall govern all matters arising under or relating to this Agreement.
   3. **Severability**. If any provision of this Agreement is illegal or unenforceable, the other provisions of this provision remain in effect, if the essential provisions of this Agreement for each party remain valid, binding, and enforceable.
   4. **Merger**. This Agreement contains the complete and final understanding of the parties and supersedes all other agreements, either oral or in writing, between the parties.
   5. **Amendments**. This Agreement may be amended only by an agreement in writing signed by both parties.

To evidence the parties’ agreement to this Agreement, they have executed and delivered it on the date set forth in the preamble.

**WXYZ, Channel 101**

Alex Schroeder, Station Manager

Carrie Richards