

Employment and Labor

Executive Employment Agreements

There are several important issues that many executive employees and employers must deal with when negotiating and drafting executive employment agreements. The following checklist contains several key issues and provisions that are instrumental to effective executive employment agreements:

Noncompetition and Restrictive Covenants. Many executive employment agreements include employer restraints or restrictive covenants, including covenants not to compete with the employer and non-solicitation of employer customers and employees, during and for a period of time after the contract term. Most state laws regulate noncompetition agreements and restrictive covenants and base enforceability on different standards and definitions of reasonableness.

Compensation. The executive employment agreement should detail the executive's salary, commissions, bonuses, incentive compensation, stock options, deferred compensation, and any other compensation. It's particularly important that both parties check with their tax and financial advisors regarding Internal Revenue Code §409A provisions, if applicable, as there are very specific rules with regard to deferred compensation for key employees of public companies.

Benefits. Most employers detail bonus, pension, profit-sharing, stock option and severance benefits in separate benefit plan documents. If such benefit plans are documented, but not detailed in the executive employment agreement, the benefit plan documents should be included in the agreement by reference to avoid potential problems that could arise if the employer benefit plans are later amended. Employee handbooks typically cover leave, health, disability and life insurance benefit details unless the executive receives additional or different benefits that should be detailed in the employment agreement. Travel and expense reimbursement details may also be detailed in the employment agreement.

Termination. Termination clauses should be very carefully detailed in executive employment agreements. Consider all of the potential problems that could arise in the employment relationship, including potential disability, death, termination with or without cause (as defined by the agreement, including whether severance could be offered in either case), employer bankruptcy, and employee termination for good reason (as defined by the agreement).

Contract Term. Executive employment agreements typically specify the length of the agreement's term. The employment agreement's duration can generally range from one to up to three or more years. The agreement should always specify whether the contract term will automatically renew unless the applicable governing state law implies automatic renewal absent a specific term.

Position Description. While most executive employee titles sufficiently imply or identify the executive's basic job duties (e.g., Chief Financial Officer), some executive employment

agreements specify that additional job duties may be assigned by the employer from time to time. The potential concern is that, under some agreements, the future change in job duties or title could potentially amount to a contract breach by the employer or “good reason” for the executive employee to resign.

Conflict of Interest. Executive employment agreements almost always require that the executive employee avoid conflicts of interest with the employer and abide by the employer’s rules and regulations.

Intellectual Property Ownership. Executive employment agreements should detail the ownership rights in inventions, copyrights, or trademarks that an executive employee may produce as an employee.

Governing Law. Executive employment agreements should further specify the state law under which the agreement will be enforced. Parties typically agree that one state’s law will govern the agreement and often take into consideration the connection that the employment relationship has to that state.

Generally, the more attractive the executive employee is as a candidate to the employer, the more likely the employer may be willing to compromise on certain contract terms. On the other hand, the employer will typically always attempt to structure a deal that aims to give the employer the most protection possible.

Our law firm represents and advises employees and employers in drafting and negotiating executive employment agreements and other employment-related matters. If you need legal assistance regarding an employment issue, please [contact us](#) to schedule a consultation.