

The Interview, Part 7: The Contract

An increasing number of executives and candidates are asking me if they should request a contract with their next employer. Specifically, they are most interested in having their severance spelled out in writing. The instability of our present business environment, the collapse of the “dot.coms”, the tech bubble, the mass layoffs and the Enron debacle cause employees to feel less than confident that they will get a fair severance deal unless they have the equivalent of a pre-nuptial agreement. However, in many businesses, contracts are offered only to the most senior executives. I doubt that companies will change this policy any time soon. Why should they accept increased financial exposure, especially when there are many people who will assume the risk of not having an employment contract? The potential liability of offering everyone at the mid and senior management levels a guaranteed severance could be financially devastating, if the company was forced to reduce headcount. On the other hand, the judgment exercised by boards of directors who award poorly performing CEO’s severances worth tens of millions of dollars boggles my mind. It is hard for me to imagine any company dealing with such liability. That amount of money, and other severance packages like it, would go a long way toward funding modest but appropriate golden parachutes for a larger group of people. Will we ever get there? I doubt that we will, until the people in the boardroom realize that they have broader responsibilities that transcend making an inner circle of people richer than some small countries. I’m not holding my breath waiting for this to happen and neither should you. I am now stepping down off my soapbox.

When I built my first house twenty-four years ago, I asked an attorney to review the builder’s contract before I signed it. He stated that it was a standard builder’s contract and recommended some changes that would make it more favorable to me. His best and most unforgettable advice was his comment that no contract could protect me from an unscrupulous builder, no matter how many details I added or changes I made. He said that if you don’t trust the builder to deliver on his promises, then avoid doing business with him altogether. I think that this advice is relevant to any contractual relationship, and is directly related to the bond that is established or not established during the interview process. If you feel less than comfortable with the executive or team who wish to hire you, no contract will completely protect you.

If you are about to enter into a contractual relationship with your next employer, you may have many questions as to what details the contract includes and how they should be worded. The specifics and minutiae are best left to an attorney who specializes in labor and employment law. If you don’t know one, you can either seek a referral from an attorney you may know who is outside this specialty. Other potential sources of good referrals would be any senior-level Human Resources executive whom you may know, as many of them will have contacts with outside legal firms. In addition, any acquaintances

in your present or former company's legal department might also be able to offer referrals.

In this newsletter, I will offer you many of the basic essentials that should be included in the typical employment contract. Please do not use my suggestions in lieu of proper legal advice and evaluation of any contract you receive. I am offering only a broad and general guideline. Much of what is contained in an employment contract is referred to as "boiler plate" in the legal vernacular and is included to protect the hiring company. An employment contract will include many of the following elements:

- It will name all parties who are subject to the agreement and who therefore must sign it.
- It may have a paragraph describing the company, a brief discussion of the nature of its business, and a sentence or two describing you and why it is hiring you.
- It will specify your position title and title of your immediate superior.
- It will specify the term of the agreement, which typically is one year. Longer periods of 2 or 3 years are acceptable. It will also state that the contract may be terminated prior to the end of this term and will include a section explaining how this may be executed. It will also spell out whether or not the contract is renewable, unless it is terminated under specific terms, which should also be included.
- It will specify your duties. In fact, this section should include a very detailed job description, possibly allocating by percentage of time, where you will focus your efforts. It will more than likely include a provision that allows top management to assign other unspecified and presently unknown initiatives and projects that it deems fit for you to do. It should also enumerate your position objectives that not only define your success during the contract term, but which also tie in to your incentive compensation. Each objective should be very specific, measurable, time-based and action-oriented. This portion that relates to your incentive compensation may have to be inserted as an addendum after you commence employment, since you may not establish all of your objectives until you sit down with your new boss for the first time.
- Some contracts will include a statement about working facilities, office space, administrative support, use of a laptop, etc.
- A compensation section will describe in detail your base salary, and all incentive compensation, including bonuses, commissions, stock, options and the like. It should specify the pay period intervals (e.g. bi-weekly), when incentive compensation is paid and relate that component to your management objectives.
- The contract should summarize the employee benefits you will receive and any costs you will incur to use them. Many companies will refer you to an employee handbook or an employee only Intranet site for the significant details, due to plan complexity. It should also include information concerning your life insurance coverage.
- Your contract may include a paragraph on what business related expenses would be reimbursed to you. If you are eligible, it may include such perquisites as car, auto allowance, club memberships and cash loans.

- It will spell out your vacation plan, company holidays, personal time, sick time and how much of it may be rolled ahead to the next year.
- Your contract should offer a detailed explanation of termination and severance procedures. Here it should spell out what and when you would be paid if terminated by the company and what you would receive if you leave voluntarily. This should explain in detail not only what you would receive of your salary, but also unpaid bonuses, commissions, stock awards and options. It should also spell out what compensation your next of kin would receive should you die while employed. Due to the terrorist events of last year, this topic will assume greater importance if you will be working for a large corporation in a metropolitan office tower or if you travel on business. Obviously, the time to negotiate is before you sign the contract.
- The company will include a confidentiality section that enumerates how you will handle confidential data concerning the company's business. It will also spell out ownership of any patents you obtain or inventions you create.
- Your contract will more than likely include some kind of non-compete or restrictive covenant clause. If you have spent most or all of your career in one industry and are restrained from seeking employment in that industry for a lengthy period of time following your termination, this could seriously impact your ability to earn a living. Non-compete periods can last from six months to five years follow employee termination. Their duration is linked directly to the company secrets you may know (client lists, processes, inventions and other proprietary information). Some courts have been known to throw out such restrictions, but testing a former employer's resolve after you have violated a restrictive covenant is not in your best interests. Since virtually all companies have greater legal and financial resources than you do, it would be costly for you to endure a lengthy court battle and be simultaneously forbidden to work with your new employer. You now have no income and a major legal expense. If your new employer insists on having you sign a non-compete contract or other restrictive covenant, try to bargain with them. Ask if they will include a clause that waives it if you are terminated, fired or laid off, or have them reduce its time period, or have them pay your salary to you while it is in force. If the company has a rigid non-compete contract and will not negotiate, give serious consideration to rejecting their offer. They were probably burned by a previous employee and are doing everything they can imagine to prevent future recurrence. Restrictive covenants exist to protect companies only. Attorneys who want to protect their corporate clients and their contractual relationships with them write these documents. They could care less about you.
- Ask for an arbitration clause in the event of a dispute. Many companies will not include this to protect themselves. It should spell out the steps in the arbitration process, who appoints the arbitrators and when the decision is final and binding.
- The contract will also include paragraphs on assignment of the contract, what portions are binding, validity of contract provisions, modification and discharge, proper notice by one party to another, and the state whose laws govern the contract. These are the boiler-plate sections that appear in most contracts.

Some contracts will be limited to a page or two, while others will be ten or more pages in length. It is very important that you have an attorney review any employment contract before you sign it. If you can't find a labor and employment attorney, then use a generalist whom you trust. If an employment contract seems to be harsh or rigid or if your prospective employer pressures you to sign one without legal advice, refuse the offer. Perhaps the company will modify it to meet your needs.

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