

Form: Checklist of Employment Agreement Issues From the Perspective of the Employee

Description: A checklist of issues for an employee to consider when negotiating an Employment Agreement

**CHECKLIST OF EMPLOYMENT AGREEMENT ISSUES
FROM THE PERSPECTIVE OF THE EMPLOYEE**

SUMMARY: This checklist is intended to outline the major issues associated with negotiating senior executive employment agreements. Portions of this list may not be applicable in particular circumstances and other matters not on this list may need to be addressed.

1. **Scope of Employment**
 - a. What is the title of the Employee's job?
 - b. What are the Employee's responsibilities?
 - c. Can the Employee be demoted? Can Employee's responsibilities be substantially modified, decreased, or increased?
 - d. Is Employee guaranteed a seat on the Board of Directors while an employee?
 - e. Where is the place of employment?
 - f. Can Employee be relocated unilaterally to another city, or only with the Employee's consent?
 - g. Is the Employee allowed to be involved in other activities (e.g., a directorship on other Boards, involvement in community activities)?
2. **Salary**
 - a. What is the base salary?
 - b. When is it payable?
 - c. Does the salary go up each year by a designated amount or by cost of living increases?
 - d. Are there designated times for performance reviews?
3. **Bonuses**
 - a. Does Employee get a signing bonus?
 - b. Is Employee entitled to a guaranteed bonus?
 - c. Are there bonuses to be tied to objective performance standards?
 - d. Are target bonus levels or minimum bonuses to be established?
4. **Benefits**
 - a. Will the Employee participate in all benefit plans of the Company?
 - b. Which of these plans should be in place for the Employee? Are all of the payments for the benefits the responsibility of the Company?
 - (1) Health and medical (including spouse and dependent coverage)
 - (2) Disability
 - (3) 401(k)
 - (4) Pension
 - (5) Cafeteria Plan
 - (6) Life insurance

- (7) Stock Option/Stock Grant
 - (8) Vision
 - (9) Dental
 - (10) Executive Financial Counseling
 - c. How much vacation per year is Employee entitled? Does unused vacation continue to accrue for the benefit of Employee and payable on termination of employment?
 - d. Is there a designated sick pay policy?
 - e. Any special loans or forgiveness arrangements?
 - f. Are some of the benefits taxable to the Employee? Should Employee be reimbursed for the tax?
5. Term and Termination
- a. How long is the employment term?
 - b. Is the Employee given the right to terminate at the Employee's discretion prior to the end of the term?
 - c. Is the employment "at will"?
 - d. What are the grounds on which employers can terminate?
 - e. What are the terms, if any, for compensation in the event of early termination?
 - f. What are the circumstances that the Employee can be fired "for cause", such as:
 - (1) Conviction of a felony or any act involving moral turpitude;
 - (2) Commission of any act of theft, fraud, dishonesty or falsification of an employment record;
 - (3) Material uncured breach of the Employment Agreement;
 - (4) Failure to perform reasonable assigned duties; and/or
 - (5) Improper disclosure of the Company's confidential information.
 - g. Employee needs to avoid "for cause" definitions that give the Company too much latitude for termination.
 - h. Is Employee entitled to severance pay on termination? How much?
 - i. If the Employee is terminated without cause, is it clear that Employee will get all salary and benefits that Employee would otherwise have been entitled to?
 - j. If terminated without cause, is the Company required to continue paying for benefits or COBRA benefits for some period of time?
6. Reimbursement of Expenses
- a. Will the Employee's business expenses be reimbursed promptly?
 - b. Is there a car or car allowance, cellular phone provided, or other such amenities?
 - c. Are moving expenses to be reimbursed?
 - d. Is there a relocation package available for Employee (e.g., the Company purchasing Employee's house on a move?)

7. Liability Protection for the Employee
- a. Does the Company have Directors' & Officers' ("D&O") insurance coverage? Is the Company required to maintain a minimum amount of such coverage?
 - b. Do the Company Bylaws provide for indemnification protection for officers and employees?
 - c. Does the Company's Articles of Incorporation limit the liability of officers and directors to the maximum extent permitted by law?
 - d. Is there an Indemnification Agreement that protects the employee, covering:
 - (1) Indemnification protection for claims
 - (2) Automatic advancement of legal expenses
 - (3) Protection even if the Employee is no longer employed by the Company?(Note statutory limitations on indemnification.)
8. Stock Option Grants
- a. Will Employee get stock options?
 - b. What percent of the Company do the options represent?
 - c. What is the exercise price for the options?
 - d. Are any options deemed automatically vested upon grant?
 - e. How long will unvested options vest? monthly? yearly cliff vesting?
 - f. How long is the option exercisable?
 - g. Does the option exercise period terminate 90 days after termination of employment or can it be longer under certain circumstances?
 - h. Are the shares obtained upon exercise of an option subject to repurchase on termination of employment? If so, at what price? (From the Employee's perspective, repurchase rights should not be included or should be limited.)
 - i. Are the shares obtained upon exercise of an option subject to a right of first refusal? If so, on what terms?
 - j. Is the option a tax advantaged Incentive Stock Option?
 - k. Does vesting of some options accelerate on a change of control of the Company? Or, on other events such as termination of employment by the Company without cause?
9. Stock Grants
- a. Will the Employee be granted stock?
 - b. Is this stock subject to vesting? What is the vesting period?
 - c. Is this stock subject to repurchase rights or rights of first refusal?
 - d. Should Employee file a § 83(b) IRC election?
 - e. Does some vesting accelerate on a change of control of the Company? Or, other event such as termination of employment by the Company without cause?
 - f. Does Employee have to pay anything for the grant?
 - g. What tax will the Employee have to pay for the Grant? Will the Company also pay Employee an amount to cover the tax?
 - h. Does Employee have a right of first refusal for future Company stock issuances to avoid dilution?

10. Confidentiality Restrictions
- a. What restrictions have been imposed on the Employee by the prior employer?
 - b. The Employee must be careful not to use or divulge confidential information of a prior employer -- the new employer will often want a covenant from the Employee prohibiting such use or disclosure.
 - c. If there are confidentiality restrictions on the Employee, are the following excluded from the definition of "confidential information"?:
 - (1) Information that is or was publicly known, or which becomes publicly known through no fault of Employee
 - (2) Information that is or was obtained from a third party who had the right to disclose the information without restriction
 - (3) Information independently derived by the Employee without reference to the confidential information
 - (4) Information that was already lawfully in Employee's possession or knowledge prior to the disclosure of the confidential information
 - d. How long do the confidentiality restrictions last? Indefinitely? A set number of years after disclosure to the Employee?
11. Invention Assignment Issues
- a. What is the scope of the Company's rights to the Employee's development of new inventions, trade secrets, and ideas? Are these the Company's only if they specifically relate to Company business and developed during Company time?
 - b. Do the invention assignment provisions comply with the California Labor Code or other applicable law?
12. Breach of Agreement
- a. Is the Company required to give notice to the Employee of any alleged breaches of the Agreement and an opportunity to cure?
13. Disability and Death
- a. What is a disability event?
 - b. What happens on disability? Does the Employee continue to receive salary and benefits?
 - c. What happens on death? Can medical and other benefits continue for some period for the spouse and children?
14. Post-Employment Limitations
- a. Are there limitations on the Employee soliciting Company employees? For what period?
 - b. Is there a covenant not to compete after termination of employment?
 - (1) For what geographic regions?

Note: Many companies have a separate form of employer Confidentiality and Invention Assignment Agreement that can be incorporated by reference.

- (2) For what period?
- (3) How can the covenant be limited?
- (4) Are the restrictions enforceable under applicable law? (Generally not permitted in California.)

15. Dispute Resolution

- a. How are disputes to be resolved?
- b. Should arbitration be considered?
- c. In what city must disputes be brought if litigated or arbitrated?

16. Golden Parachute

- a. In the event of a change of control of the Company, is Employee entitled to terminate employment and receive a "golden parachute" payment (e.g., two or three times the yearly salary)?
- b. What are the tax implications of the golden parachute payment? Will the Company also gross up the parachute payment to cover the tax?
- c. Will the Company reimburse the Employee's expenses in connection with an IRS audit claiming additional tax?

17. Representations and Warranties of the Company

- a. Are there specific representations and warranties of the Company that should be set forth (e.g., financial resources, venture capital backing)?
- b. Has Employee been promised something orally that should be reflected in the Employment Agreement?

18. Miscellaneous Provisions

- a. Is the Company prohibited from assigning the Agreement?
- b. Is there an attorneys' fees clause where the prevailing party in a dispute would be entitled to recoup its attorneys' fees incurred?
- c. Choice of Law
- d. Integration Clause