

## EMPLOYMENT AGREEMENTS: GOLDEN HANDCUFFS FOR KEY EXECUTIVES

Contracts must be structured realistically--including "outs" for both parties

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Whether the bank is hiring a brand-new CEO, or seeking to retain a top lender after a merger or acquisition, the investment made in recruiting, training, and developing talent needs protecting with an employment contract.

But senior staff contracts cut both ways:

• The employer's direction: While the bank wants to "lock in" the employee for a time period sufficient to realize its investment, it also needs escape clauses, so it can end the relationship if necessary.

• The employee's direction: The employee is also looking for flexibility--the maximum financial security with the minimum of conditions.

### Key Provisions To Include In Employment Contracts

Let's look at some of the most important provisions to include in employment contracts. I'll include some "typical" provisions, bearing in mind that every contract must be individually negotiated to suit the situation. The contract should reflect market realities and the bank's philosophy, as well as the particular position being filled.

#### Position

The job title, location, and essential duties should be described, as well as any required qualifications; who the position reports to; and who reports to it. If there are particular performance requirements, for example, periodic travel, these should be noted.

## Term

Be specific: "Effective March 1, 2012, for an initial term of three years, automatically renewable for successive one year periods, unless either party gives 120 days' notice of nonrenewal."

## Compensation

This provision should state the base annual salary, bonus pay, and other incentive compensation, deferred compensation, stock, stock options, etc. Performance measures that must be attained to secure incentives should be briefly described, along with the conditions for "clawbacks." If a signing bonus is to be given, include here.

## Benefits

Healthcare, pension, disability, and life insurance; paid vacation and sick leave; relocation expenses; car; cell phone, etc. Be aware that health and pension benefits are governed by ERISA's non-discrimination provisions, so these benefits should be the same as offered to other executives.

## Termination

This is the tricky one, most often the subject of litigation. The bank should retain the ability to terminate the employee for "good cause":

"Good Cause is defined as:

- Willful failure to perform employment duties, subject to notice and 30-day cure period
- Willful and material breach of the employment agreement, subject to notice and 30-day cure period
- Illegal conduct or gross misconduct that is materially injurious to the employer
- Indictment for, or plea of guilty or no contest to a felony or a crime involving moral turpitude, fraud, forgery, embezzlement, or similar conduct"

The employee should also be able to get out of the contract for "good reason":

"Good Reason is defined as:

- Material reduction in authority, duties, or responsibilities
- Relocation increasing the executive's commute by at least 50 miles
- Material breach of the employment agreement by the bank
- The foregoing subject to notice and cure procedures"

Other reasons for termination are death and disability.

"Disability is defined as incapacity due to mental or physical illness causing the executive's absence for 120 consecutive days, or 180 days in any 12-month period."

### Severance

If employment is terminated by the employer without good cause, or by the employee with good reason, severance payments will be triggered. Severance could be a lump sum, employer-subsidized COBRA coverage, accelerated vesting of sign-on restricted stock grants, etc. Severance in these circumstances is usually conditioned on the executive agreeing to sign a release of claims against the employer at termination.

Severance may also be paid on termination due to death or disability.

### Change of Control

"If the executive is terminated by the employer other than for good cause, death, or disability, or the employee resigns for good reason, either before a change of control (but after an agreement that would result in a change of control is executed) and in connection with or in anticipation of the change of control, or within 12 months following a change of control, then the executive receives: &hellip;&hellip;&hellip;(enhanced severance.)

## Trade Secrets and Confidential Information

Often the subject of a stand-alone agreement, trade secrets and confidential information are also included in the employment agreement. The Uniform Trade Secrets Act defines what can be protected from disclosure for as long it remains a trade secret, but the definition of Confidential Information can be tailored to the particular information the bank wants to protect. Remember that the bank must actually take steps to protect that information if it wants to enforce the agreement. Like other restrictive covenants below, the question of how long after termination the former executive must keep the information confidential depends on state law.

## Restrictive Covenants

The law on post termination restrictions varies widely from state-to-state. Here is a menu of restrictions that may be allowed in your jurisdiction:

- Non-compete: the executive agrees not to work in the same capacity for a competitor for a period of time in a particular geographic area. The scope of activity, time period, and geographic area must be "reasonable" to protect the bank's legitimate business interests
- Non-solicitation of customers: the executive is restricted from soliciting customers of the bank whose identity he learned through his employment with the bank
- Non-solicitation of fellow employees
- Non-disparagement of former employer

## Arbitration

To avoid the expense and delay of litigation, you will probably want to include an agreement that any dispute arising out of the agreement be subject to final and binding arbitration. The American Arbitration Association has developed rules and procedures for employment disputes, and is the resource-of-choice most often named in employment agreements.

However, the bank will probably want to carve out an exception for the enforcement of restrictive covenants, which usually require emergency action (temporary restraining orders or preliminary injunctions), which only a court can order.

## Looking Into The Future

Contracts attempt to anticipate the unknown. We can't really know how the new employee will measure up to our hopes, or what changing circumstances might impinge on the employment relationship. So it is a task to be approached with great care.

Too much trouble? Maybe, for lower level employees. But definitely worthwhile for your key executives, if for no other reason than because you will really get to know them during the negotiation process. The relationship will get off to a better start based on more realistic expectations on both sides.

Disclaimer: This article does not provide, nor is it intended to substitute for, professional legal advice.

### About the author

Marian Exall (marian.exall@gmail.com) is an employment lawyer and HR professional with 25 years' experience advising banks and other employers on compliance issues. She is a principal and co-founder of Employment Law Compliance, Inc. which provides HR compliance solutions to banks exclusively through the American Bankers' Association. She is a frequent speaker and writer on human resources compliance in the banking industry, including in ABA Banking Journal, on ABA Telephone Briefings and at national and state bankers' association conferences.

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