

Employment Law Basics for HR Professionals Series

Odds and Ends: Offer Letters, Agreements, Employee Handbooks

June 15, 2023

PIERCE ATWOOD 

Different Types of “Agreements”

Offer letter

Employment
Agreement

Restrictive
Covenant
Agreement

Offer Letter

- Used for most employees
- Summarizes terms and conditions of employment
- Should be standardized across organization, but some different language depending on position
- All terms must be in writing
- If significant terms change, follow up in writing
- Best practice to get offer letter signed to have record of receipt of terms and conditions

Anatomy of an Offer Letter

- Clearly identify start date
- Job title and duties
 - › Include the job description as attachment
 - › Include job classification (exempt or nonexempt, part-time or full-time)
 - › Include reporting relationship
- Compensation and benefits
 - › Annualized vs annual
 - › Include pay frequency and amount per pay period
 - › Consider whether salary will be “increased” each year, or “adjusted”
 - › Option to include separate summary of benefits or list benefits in the offer letter
 - › Identify eligibility for bonus and/or stock
 - Important to have written details of bonus and stock programs referenced in the offer letter or attached as addendum

Anatomy of an Offer Letter

- Nature of employment
 - › At-will
 - › The offer letter is not a contract for any specified period of time
 - › Terms and conditions can be changed at any time with or without notice
- Conditions of employment
 - › Must sign restrictive covenant agreement
 - › Background check
 - › I-9 compliance
 - › Successful references
 - › Drug screening or medical screening?

Anatomy of Offer Letter

- Specifically state that the employer does not want the employee to bring another employer's confidential information onto the premises and require new hire to confirm that accepting employment will not violation any other agreements
- Include logistics regarding accepting offer
 - › Is the offer only good for a specified period
 - › Is there flexibility in start date
 - › Who should be contacted with questions

Reminders

Hiring managers should not make promises during the hiring process!

- “No one ever gets fired around here”
- “You can expect great raises and bonuses here”

Try to be consistent through negotiations

- If vacation is already planned, approve for that year rather than increase accrual forever
- Be careful with relocation and signing bonuses

“Signing” Bonuses

- Several considerations
 - › What is the purpose: retention; make employee whole if new salary is less than old salary; cover lost bonus from prior employment?
 - Tailor based on the purpose
 - › Claw back if employee leaves within first year?
 - › Timing of payment?
- Recommendation: if you plan to claw back any portion if the employee leaves, consider calling it something other than signing bonus (or refer to it as “conditional”) to strengthen ability to recover

Executive Employment Agreement

- Covers same issues as would be covered in offer letter but also addresses:
 - › Termination
 - Notice (by employer and by employee)
 - Pay in lieu of notice?
 - Severance
 - › Restrictive covenants
 - › Representations by executive
 - › May include at-will language, but make sure that makes sense given approach to termination
 - › Indemnification by company (if available)

Termination Provisions

- Death
- Disability
 - › What is the definition?
 - › Confirm compliance with applicable law
- Cause
 - › Is poor performance included in definition?
 - › Is there a cure period?
 - Tailor the cure period to only performance related issues
- Without cause
 - › This is generally trigger for severance

Termination Provisions

- By employee
 - › Must include notice period
 - › Consider including a “good reason” provision
 - This should be only situation in which employee receives severance in connection with voluntarily quit
 - Usually triggered by material decrease in status, duties, or compensation or a change in location of job
 - Carefully consider how to handle a change in control
 - Generally recommend a double trigger – change in control plus a material change in the job
- Mutual Agreement

Representations

- Employment does not violate any agreement
- Everything provided during hiring process is accurate and complete
- There are no pending lawsuits or criminal actions which could adversely impact performance of job duties
- No consent or approval from any governmental entity is required in connection with employment

Restrictive Covenant Agreements

Non-Disclosure

Intellectual Property
Assignment

Non-Solicitation

Non-Compete

Restrictive Covenant Agreements

- Carefully consider who should sign which agreements
 - › Everyone should sign NDA and intellectual property assignment
 - › All customer facing employees should also sign non-solicitation covenant
- Non-compete agreements governed by state law
 - › One size does not fit all!!
 - › Increasingly disfavored
 - › Save for the very small percentage of employees who would really hurt the company if they work for competitor

Non-Disclosure Agreements

- *Everyone* should sign!
 - › If someone doesn't sign, they should not be permitted to work
- Employment is sufficient consideration
- Carefully define confidential information
- Require compliance with all protocols designed to protect confidential information (passwords, two-factor authentication, etc.)
- Make it clear that confidential information is property of the company and must be returned at end of employment
- Prohibit disclosure and personal use
- Restrictions are indefinite
- Specifically prohibit use of third-party confidential information
- **Take action if departing employee takes confidential information!!**

Intellectual Property Assignment

- Important protection for company
- Typical to include with NDA, even if employee does not create intellectual property
- Employment is sufficient consideration
- If you are hiring a software developer or someone who does create intellectual property, it is imperative that they sign an IP assignment and disclose any IP they have already created before coming to the company!

Non-Solicitation Agreements

- Appropriate for everyone who is customer facing
- Employment is sufficient consideration
- Customer non-solicit
 - › Include “transact business with”?
 - › Customers of the individual employee vs customers of the company
 - › Be on the lookout for departing employees who download customer database!!
- Employee non-solicit
 - › Include prohibition on “hiring” in addition to non-solicit

Restrictions on Non-Competes

Massachusetts

- Must be in writing
- Cannot exceed 1 year
- Must be provided with the offer or 10 days prior to start of employment, whichever is earlier
- For new employees, must include garden leave or mutually agreed upon consideration
- For current employee, must be supported by fair and reasonable consideration independent from continued employment

Restrictions on Non-Competes

Maine

- Cannot require non-compete for employees who make less than 400% of federal poverty level
 - › As of 2020, threshold was \$49,960
- Effective date of agreement is delayed to one year from start of employment or six months after signing, whichever is later
 - › Employee who leaves within first year will not be subject to non-compete restrictions even if signed agreement
- If non-compete is required, employer must disclose that prior to making job offer

Restrictions on Non-Competes

New Hampshire

- Cannot require non-compete for low wage earner
 - › Low wage earner = employee making less than or equal to 200% of federal minimum wage
 - › \$14.50 per hour or \$30,160 per year
- Must provide copy of the non-compete agreement before applicant accepts the offer

RCA Best Practices

- Create a matrix identifying which positions require which restrictive covenant agreements
- Confirm that offer letter indicates which agreements are required as condition of employment
- If non-compete is included, comply with state notice requirements
- Can include restrictive covenant provisions in Executive Employment Agreement
- No exceptions – if a new hire doesn't sign, then they must not be permitted to work
- Generally important to enforce agreements, at least through a cease and desist letter

Employee Handbooks

- Of course, they are boring -- but they are SO IMPORTANT
- Accept that they are long
 - › This is the company's chance to set expectations
- Focus on ease of use
 - › Short policies
 - › Use "you" for a more informal vibe
 - › Clear table of contents
 - › Organization that makes sense
 - › Don't assume it will be read like a book, assume it will be used like a reference manual
 - › Focus on whether questions can be easily answered

Employee Handbooks

- Critical policies
 - › Introductory Statement
 - › Conflict of interest
 - › Confidentiality
 - › Anti-harassment
 - › Whistleblower protection
 - › EEO/Non-Discrimination
 - › Accommodations
 - › Open Door
 - › Conduct standards
 - › Disciplinary action
 - Try to avoid progressive discipline
 - › Overtime approval

Employee Handbooks

Leave

- Vacation
 - › Accrual
 - › Notice/approval
 - › Use prior to accrual?
 - › What happens to unused time
 - › State laws regarding payout upon termination
- Consider PTO v vacation/sick
- Sick time
 - › Accrual?
 - › Approval/notice
 - › Payout upon termination?
 - › Covered reasons

Employee Handbooks

Leave

- FMLA
 - › How to handle leave as ADA accommodation if FMLA does not apply
- Parental leave
- Personal leave
- State leaves
- Holidays
 - › Pay for worked holidays?
 - › Recommend floating holiday for religious observance

State Supplements

- Strongly recommend using state supplements
 - › Human rights agency contact information
 - › Variations in EEO protected characteristics
 - › Differences in vacation, overtime pay requirements
 - › Significant differences in leave laws

Employee Handbooks

- Confirm that every single employee has signed the Handbook, acknowledging receipt
- Update every 2-3 years
- If a new policy is implemented, send it out ASAP as a stand-alone and get acknowledgement of receipt
 - › No need to wait for handbook update cycle
- Train managers on the importance of compliance with and enforcement of handbook policies

How would you respond?

Alice joined the company a few months ago. You received a letter from Alice's former employer threatening to sue the company because Alice took confidential customer information on her last day.

- Review offer letter, confidentiality agreement – any violations?
- Check with IT – any documents from former employer on your system?

How would you respond?

Stan, a very senior and successful sales employee, abruptly quit last month. Your Director of IT sent you an email this morning with a list of confidential documents that Stan sent to his personal Gmail account the week before he left.

- Review NDA
- What are your processes when someone leaves?
- Usually send a letter noting the breach and asking for documents back

How would you respond?

You rolled out a new Handbook last month and have been gathering everyone's signed acknowledgements of receipt. Jack has not responded to any of your emails. When you pressed him on it, he said, "I don't agree with the drug and alcohol policy so I am not signing the Handbook."

- Try to resolve his concern
- If he does not agree to abide by the Handbook, he should not be employed
- Does offer letter mention obligation to comply with Handbook?

How would you respond?

You have a small staff and do not have the bandwidth to get every employee to sign an NDA. You are not worried about it, though, because you have a strong policy in your Handbook regarding confidential information.

- A stand-alone agreement is MUCH better than a Handbook policy!

Questions?



Presenters

Suzanne W. King

sking@pierceatwood.com

100 Summer Street
22nd Floor
Boston, MA 02110

One New Hampshire Avenue
Suite 350
Portsmouth, NH 03801
PH / 617.488.8159