

▶ Negotiating Executive Employment Agreements: Basic Principles

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Reminder

- Please note, nothing in this presentation constitutes legal advice. The information is offered only for informational and educational purposes, and it should not be relied upon as, or substituted for, legal advice.

What Do Executive Employment Agreements Do?

- Specify the terms of employment
- Outline pay and benefits both during and post-termination
- Impose restrictions on competition both during and post-termination

Does My Client Need an Executive Employment Agreement?

- At-will employment vs. contractual employment

Benefits of Executive Employment Agreement

- Sets expectations
- Restricts post-termination competition
- Binds the employee to service
- Creates predictability in terms of costs of severance
- Can be used as a recruitment incentive

Anatomy of an Executive Employment Agreement

- Term
- Position and Duties
- Compensation and Benefits
- Payments and benefits upon termination
- Type and amount of severance
- Restrictive Covenants
- Enforcement

Compensation and Benefits

Key factors shaping the compensation and benefits negotiations

- Employer's business and personnel needs
- Employer's business sector
- Size and organizational structure of employer; private or public
- Position being hired
- Employer's need to attract and retain executive
- Job market; executive's position within market

Compensation and Benefits: Three Basic Considerations in Negotiation

- The Deal: areas of greatest flexibility and negotiation
 - Time, form and amount of compensation
 - Role of the two primary parties to the negotiation
- Documents: often flexibility combined with specific restraints
 - Need to determine constraints imposed
 - Role of Human Resources
- Legal: specific requirements which must be met: federal, state and even local
 - Role of in-house and/or outside counsel

Deal Considerations

- Base salary
 - Fixed or with raises (automatic or discretionary)
- Bonuses and incentive payments
 - Signing or inducement bonus
 - Annual award or bonus
 - Determining the schedule of payments
 - Guaranteed payments or performance requirements or a mix
 - Long-term incentive
 - Spread over two or more years
 - Performance-based

Deal Considerations

- Equity incentive awards
 - Type of award
 - Incentive or nonqualified stock options, restricted stock, restricted stock units (RSUs), phantom stock awards, other
 - Amount of award: method for determination
 - Vesting and other features
 - Source of award: outside or inside a plan

Deal Considerations

- Benefits and Perquisites
 - Employee's right to participate in employee benefits generally available within the company: 401(k) plan, health insurance and others
 - Types of benefits not offered by company that the executive might want: e.g., long-term disability plan; caution necessary for health and welfare plans (e.g., possible nondiscrimination requirements)
 - Executive perks: relocation expenses, legal expenses for negotiating the contract, car and/or travel allowances and others

Deal Considerations

- Special forms of deferred compensation: salary deferral plan, supplemental executive retirement plan ("SERP") or others
- Severance and employment termination triggers
 - Severance pay
 - Address various scenarios: termination with cause, termination with good reason, death, disability, change in control

Document Considerations

- Determine the documents: plan document, summary plan description, health insurance contracts, provider contracts, investment materials
- Determine provisions and the constraints and requirements they impose
- Importance of Human Resources and/or legal counsel

Legal Considerations

- Internal revenue code section 409A: nonqualified deferred compensation
 - What parts of the agreement does it affect?
 - What constraints and requirements does it impose?
- Internal revenue code section 280G: golden parachutes
 - Anticipate problems
 - Basic approaches
- Nondiscrimination requirements applicable to certain ERISA retirement and health and welfare plans
