

# Understanding Executive Employment Agreements

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# Big Picture

- More than contract law or drafting
- Employment and tax laws, regulations and court rulings impact significantly
- Industry-specific regulations, laws or practices also impact
- Significant risks of recycling forms or examples without modification
- Know origins of form/template

# Overview

- Review some common sections/provisions
- Share drafting tips
- Identify traps
- Highlight selected laws, regulations
- Questions

# Preamble

- Tip: check exact legal name of employer
- Trap:
  - New hire's consideration = initial employment
  - Existing employee's consideration = ?
- Best practice: Recite new consideration whenever executive is existing employee

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  - *Initial* job
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  - *Initial* duties
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  - Modification by employer

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- Trap – attaching job description without reserving employer right to update, change
- Limitations on outside activities

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  - Executive may accept, provided agreement specifies performance and compensation periodically reviewed
- Specific period = only terminable for cause prior to end, unless otherwise provided
- Tip – anticipate what happens if continue in employment beyond term without extension or new agreement
- Trap – will notice to renegotiate trigger severance in event negotiations unsuccessful?



# Compensation – Base Salary

- Base salary = dollar amount per specified pay period, *less required/agreed upon deductions*
  - Trap – avoid “*not less than*”
- In accordance with employer’s *regularly established* pay days
- Less *agreed or required* deductions
  - WA state law limits certain deductions without employee’s consent See WAC 296-126-025 and -028
- Administered in accordance with employer’s usual practices
  - Tip – “administered” could mean increases or decreases

# Bonuses, Incentive or Deferred Compensation

- Specify criteria to be used and who decides
  - Complete vs. limited employer discretion
- Tip – Refer to plan or carefully detail all conditions precedent
  - Continued employment on payment date?
  - Pro-rate for partial year?
  - Payment on other than regular pay day?
- Section 409A considerations
- Section 162(m) considerations

# Insured Employee Benefits & ERISA Plans

- Best practice – “in accordance with Employer’s plans sponsored for its other employees”
- Tip – reserve right to modify unilaterally
- Trap – promising insurance coverage different from or on different terms than rest of workforce
- Trap – promising early eligibility for employer contributions or vesting

# Other Uninsured Employee Benefits

- Best practice – on same terms as rest of workforce and subject to unilateral modification by employer
- Vacation/PTO – determine if agreement modifies any standard practices as to earning, accrual, carryover, and/or payment at termination
  - Tip – limit carryovers and cash outs if unlikely executive will account for personal absences
  - WA state law does not require cash out unless employer obligated by contract, policy or established practice

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- Tip – Board Compensation Committee’s review of any unique reimbursable expenses
- Trap - Car or car allowance; accounting personal use
- Relocation assistance – repay if terminate within specified period from hire date?
  - Expressly authorize deduction from compensation to repay
- Indemnification – Incorporate by-law provisions
  - Possible trap – Incorporate RCW 23B.08.500 to .590
  - Another trap – Promises regarding D&O insurance/policy terms

# Confidential Information

- Customizing definition significantly enhances enforceability; evidence of consideration, too
- Trade secrets should always be one non-exhaustive example
- No temporal limit, if truly confidential
- Tip – watch for unusual state laws, and try to limit applicability with choice of law
- Breaches exempt from arbitration

# Non-competition

- Recite protectable interests
- Scope - no greater than needed to protect legitimate interests
  - Always customize Ask if nonsolicitation of customers/coworkers suffice?
- Temporal limit – no longer than necessary to protect legitimate interests
- Geographic limits vs. customer-focused restrictions
- Traditional remedies: actual damages; injunctive relief; possibly liquidated damages
- Self-help remedies: forfeiture or cancellation of severance benefits, deferred compensation, stock options or other equity
- Watch for more restrictive state laws; manage risk with choice of law and mandatory forum selection provisions
- Exempt from arbitration



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- Specify if severance will be paid in lump sum(s) or through salary continuation
- Pre-condition on signing severance & release agreement and recite features of standard agreement: 21 days to consider; 7 days to revoke; effective date is 8<sup>th</sup> day after signed; specify date severance paid or begins

# Termination for Cause

- Usually no severance when employer terminates
  - Usually triggers loss of bonus, deferred compensation, stock options, etc.
- Immediate or effective after short notice/opportunity to cure
- Tip – pay attention to definition of “cause” – often heavily negotiated
  - Any other act or omission that constitutes Cause under the common law of Washington
  - Bankruptcy, financial insolvency, etc.
  - Unsatisfactory performance or misconduct
  - Death (but not disability?)

# Overview of Section 409A Issues – Severance

- Payment upon disability or death
- “Good Reason” definition
- Using available exceptions vs. compliance
  - Six-month delay
  - Timing of release
- COBRA assistance – 409A and tax issues

# Change of Control – Overview

- Single or Double Trigger?
  - Single trigger requires 409A definition
  - Double trigger—if can leave voluntarily, also must comply with 409A—does not fit exceptions
- Golden Parachute limits—Cut back? Gross up? Best net of taxes?

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- Integration clause should expressly provide handbooks and policies are not contracts and preserve employer's right to modify
- Notices: will email = written notice?
- Amendments in writing, except?
- Consider Section 409A saving clause