

OFFER LETTERS - A PRIMER

With the economy beginning to turn around, and employers starting to consider adding staff, this may be an opportune time for employers to examine their offer letters. While a letter offering employment may seem innocuous, it is often one of the most critical employment-related documents and thus should be drafted with care.

WHY ARE OFFER LETTERS SO IMPORTANT?

Typically, an offer letter documents a new employment relationship. It is important that the offer letter accurately and appropriately establishes the employer's expectations and obligations—including the nature of the employment (*e.g.*, at-will or for a term), position, duties and compensation. Indeed, offer letters usually constitute an employment *contract*, and an employer's breach of promises contained in an offer letter often results in litigation, such as claims for breach of contract or even fraud. Further, offer letters sometimes become critical evidence in discrimination claims based on alleged unfair treatment (such as offer letter promises not being kept). A good offer letter can help *protect* an employer from these types of claims by clearly defining expectations and by including protective language.

ELEMENTS OF A GOOD OFFER LETTER

A well-drafted offer letter contains several components:

Definition of the position and reporting structure

It is important to clearly define the position offered and the reporting structure involved. We routinely see cases where a disappointed employee claims that certain promises were made but not kept regarding the offered position, duties and responsibilities, and to whom that employee would report. A clear offer letter can avoid such claims. The employer should also state that it may change duties/responsibilities and reporting structures as business needs dictate.

Duty of loyalty/anti-moonlighting

An offer letter is a good place to note that the employer expects a full-time commitment by the employee to further the employer's business and that side work is not permitted without prior approval by the company.

Compensation

A well-drafted offer letter reduces the risk of disputes over compensation by clearly delineating the compensation package. Base salary should be referenced in weekly amounts, not annual, as annual figures sometimes are used to argue that a renewable, one-year contract was intended. When bonuses are offered, it should be clear what the bonus opportunity is, *i.e.*, whether the employee will receive a set amount, or is eligible to receive "up to" a certain amount based on individual or company performance. When bonuses are based on individual performance, be specific about what targets must be achieved. Alternatively, make it clear that the bonus is discretionary, based on management's view of the employee's performance. Additionally, any equity compensation (such as a stock option or stock grant) should be clearly defined. To avoid subsequent disputes, any relevant agreements, such as a stock option agreement and the stock option plan, should be included with the offer letter.

At-will statement

Unless an employee is to be offered an alternative arrangement (such as a specific term of employment or termination only for specified reasons), the offer letter should contain an "at-will disclaimer" making it clear that the employee is employed "at-will" and that both the employer and employee can terminate employment at any time, with or without notice, reason or cause.

Severance

If an employer intends to provide severance to an employee, it should define under what circumstances it is willing to do so. Typically, an employer will provide that severance is available when it terminates employment "without cause"; "cause" is often defined relatively narrowly (and thus favorably to the employee) as: (i) conviction of a felony or misdemeanor; (ii) breach of fiduciary duty; (iii) fraud or embezzlement; (iv) material breach of employment agreements. Although a "cause" definition can also be drafted much more broadly (which would be more employer-friendly), in the absence of a stated definition of "cause", note that Massachusetts case law defines the term relatively favorably to employers. Consequently, if an offer letter states simply that if the employer terminates the employee's

employment and the employee is to receive severance unless terminated for "cause", the employer's severance obligation is limited and arguably arises only if the employer did not have a legitimate business reason for the termination.

Whatever definition of "cause" is used, we recommend that any severance obligation be made contingent on the employee signing a general release of all claims against the employer. This contingency should be clearly stated in the offer letter as well.

Non-compete agreement or other restrictive covenants

If an employer requires an employee to sign a non-compete agreement or other restrictive covenants, such as a non-solicit agreement (*e.g.*, an agreement not to solicit the employer's customers post-termination), a non-disclosure agreement or an inventions agreement, this requirement should be disclosed in the offer letter. We also suggest that the required agreements be included with the offer letter. By disclosing the requirement of restrictive covenants prior to hiring, an employer increases its ability to enforce such agreements by minimizing any employee claim of unfair surprise. Moreover, disclosure up front will reduce the potential for a disappointed or angry new hire feeling misled into accepting the job.

Representation that employment does not conflict with current/prior employment

Given the increase in non-compete litigation, which often involves claims against the hiring employer by the former employer, a hiring employer is well-advised to take steps to protect itself. It should determine whether the applicant has any form of employment agreement with a current or former employer that might hinder the employee's ability to work with the hiring employer. To further protect itself, the hiring employer should also have the applicant represent in writing that he/she has no agreements with a prior employer that would preclude or impair the applicant's employment with the hiring employer. By doing so, the hiring employer will substantially reduce its risk of a claim by a former employer that the hiring employer knowingly and

wrongfully interfered with a contract between the applicant and the former employer.

Expiration

Employers should also include a provision that identifies how long the offer will remain open. Without including an expiration date, an offer of employment arguably will remain open for an undetermined length of time, which can have unintended consequences.

CONSIDER IMPLEMENTING "CUTTING EDGE" AGREEMENTS

The review of an offer letter provides a good opportunity to consider agreements designed to minimize exposure to employee litigation, such as arbitration agreements or jury waiver clauses. Briefly, an arbitration agreement is an agreement whereby both the employer and employee agree to resolve any disputes before a neutral third-party arbitrator, rather than through the court system. This option is generally viewed as more employer-friendly because it is quicker, less expensive, private and does not expose the employer to the risk of an overly sympathetic "runaway" jury punishing an employer through a huge damages award. A jury waiver clause is more limited and simply states that, in the event of litigation between the employer and the applicant, the dispute will be resolved in court by a judge, not a jury. This provision likewise eliminates the risk of an outrageous jury award. Arbitration programs or jury waiver clauses, however, often constitute substantial policy changes for employers, and involve a number of issues (including legal challenges) that are beyond the scope of this article. We will address these issues in a future edition of the *Employment Law Advisor*.

TONE

While some employers may feel somewhat uncomfortable about making the "tone" of an offer letter too formal and legalistic, "legalese" can be minimized by using simple language. Moreover, "tone" issues can be addressed by including appropriate welcoming language in both the opening and closing of the offer letter.

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Robert M. Shea – rms@mbbp.com ♦ Mark H. Burak – mhb@mbbp.com

Donald W. Parker – dwp@mbbp.com ♦ Sandra E. Kahn – sek@mbbp.com ♦ Scott J. Connolly – sjc@mbbp.com

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Reservoir Place ♦ 1601 Trapelo Road ♦ Waltham, MA 02451 ♦ (p)781-622-5930 ♦ (f)781-622-5933 ♦ www.mbbp.com