

# **EFFECTIVE NEGOTIATION OF EMPLOYMENT CONTRACTS—AN EMPLOYEE'S PERSPECTIVE**

## **I. NEGOTIATION SKILLS**

### **A. Negotiating skills**

1. Assume that the negotiation is a two way street.
2. How much leverage do you have?
3. What can you do to increase leverage?
4. Ask questions about similarly situated employees.
5. Conduct your own research regarding employer, talk to people about their experiences.

### **B. Common mistakes**

1. Failing to pursue more favorable terms in Agreement.
2. Failing to understand fully the terms of Agreement.
3. Failing to ask important questions.

### **C. Timing of the negotiation**

1. At beginning of employment relationship
2. After employment has started

## **II. COMMON TERMS OF AN EMPLOYMENT CONTRACT**

### **A. Term of employment –**

1. Absent an employment contract setting a term of employment, employees are considered "at-will employees." Employer is free to terminate employee at any time for any reason (except for an unlawful reason such as gender, pregnancy, race, religion, age)
2. Is there a specific term?
3. Is the employment "at-will"?
4. If a term is specified, is it what you want? Is there an automatic renewal provision? (As the employee, you should seek an automatic renewal provision).

5. If continued employment is dependent upon attaining tenure or obtaining a particular grant, contract should spell out alternatives in event tenure/funding is denied.

B. Employment status (employee, independent contractor)

C. Job title and duties—

1. Duties should be specific
2. Resources that employee will have available should be detailed (i.e., lab space, research assistants, other support staff, grants or other funds).
3. Ownership of work product, intellectual property. It will usually be deemed the property of the employer.

D. Compensation

1. Salary: How to maximize salary.
  - a. Usually described by annual salary.
  - b. Ask for pay scale or salaries of similarly situated employees.
  - c. Issues of discrimination in pay and how to avoid same.
  - d. Women often paid less when salary is dependent upon salary at previous employer (institutionalizing discriminatory pay structures).
  - e. Information on salaries by industry is available on internet (e.g. [www.indeed.com](http://www.indeed.com))
2. Bonus:
  - a. Is there a bonus program?
  - b. Include language that indicates you are eligible for same bonus plans as your peers
  - c. Tie bonus into specific performance goals. (This may be particularly important when salary and/or the term of the agreement is non-negotiable).

3. **Benefits:**

Want to include health, vacation, 401(k), short term disability and long term disability. Disability insurance is particularly important if you are planning on future pregnancy.

4. **Stock options**

E. **Location of employment.** Seek to negotiate flexibility for the location from which you will conduct your work.

F. **Termination**

1. **With cause:** want a specific definition of termination for cause: typically includes

- a. employee's conviction of crime
- b. employee's action resulting in criminal or civil charges against employer
- c. employee's neglect of duties (at a minimum, ask for notice and right to cure provision)\*\*\*
- d. employee's failure to perform duties (at a minimum, ask for notice and right to cure provision)\*\*\*
- e. employee's commitment of fraud, embezzlement, or misappropriation

2. **Without cause:**

- a. Employer terminates without cause—Employee will be eligible for severance if contractually provided (see below)
- b. Employee terminates without cause—Employee will not be entitled to any further benefits or pay

3. **Constructive termination:** The employee will typically be eligible for certain benefits and pay if the employer engages in conduct that results in a "constructive termination." Contract should define constructive termination. Definition of "constructive termination" is usually:

- a. any material adverse change in title, status, responsibilities or authority of employee.
- b. any material reduction in employee's salary or bonus

- c. relocation of Employee's office more than [50] miles from its location as of date of Agreement

**Here is where you should address failure to obtain tenure and/or failure to obtain continued funding.**

G. **Severance:** In most instances, employee is not entitled to severance after termination unless there is a contractual right to it. The employee is typically entitled to severance payments only if the employee is terminated as a result of one of three instances:

- a. termination without cause
- b. change in control (which should be defined in the contract)
- c. constructive termination

H. Restrictive covenants

- a. non-compete clauses
  - 1. Do not assume that you have no room to negotiate.
  - 2. Do not assume that the clause is unenforceable. Courts will enforce a non-compete that is narrowly tailored to protect a legitimate business interest.
  - 3. At a minimum, try to limit the time, geographic scope and jobs that the clause covers.
  - 4. Consider defining competitors as a way to limit the non-compete clauses.
- b. non-solicitation clauses
  - 1. Consider carve-outs.
- c. confidential information
  - 1. "Confidential information" is usually a defined term in the contract. Make sure it is not overbroad and that there are specific carve-outs for information you brought with you or learned through other sources.

I. Arbitration clauses.

- a. Employer to pay arbitration fees.
- b. Mutuality.

- c. All terms of contract bound by arbitration, including the non-compete provisions.
  - J. Choice of law/venue clauses
    - a. Look at venue provision—employers often use home state even if it is not where you are employed.
- III. LOOK AT SAMPLE CONTRACTS
- A. Employer-sided contract
  - B. Employee-sided contract
  - C. Discuss variations in language and the ramifications

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