

**SO YOU HAVE BEEN GIVEN AN OFFER Points To Consider When Presented With An
Employment Offer Or An Employment Contract**

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This paper contains points to consider when reviewing an employment offer or contract. It is not legal advice. It doesn't deal with every contract clause. As well, every offer or contract is different and your personal circumstances may dictate a different negotiation or strategy. Therefore, it is very important that you obtain legal advice from a lawyer specializing in employment law before you accept an employment offer or sign back an employment contract.

An employment offer or employment contract is a legal document. It binds you and your prospective employer, once you reach an agreement. It has been drafted by your prospective employer, likely with the assistance of a lawyer, and you can be certain that it has been created to protect your employer and not you. For that reason, it is very important that you review any offer or contract with your lawyer with a view firstly, to understanding what it says and, secondly, to ensuring that you have protections during your employment and in the event that your employment is terminated.

1. The Form of the Offer/Contract

There is nothing magical in the form in which the document has been presented. It can be a simple hiring letter or a lengthy legal document. Do not be lulled into any sense of complacency or comfort if the offer is in the form of a welcoming, friendly letter. Once the terms have been agreed to, it is a contract of employment and its terms will govern your relationship with your new employer.

2. Can the Terms be Negotiated?

Most offers are subject to negotiation. You will likely have negotiated the business points already, such as salary, vacation, title, position and responsibilities. However, the terms of the document are still subject to negotiation.

There is one caution with respect to negotiating offers. An offer, until accepted, can be revoked. Similarly, a counteroffer operates legally as a rejection of the offer on the table, with the result that you cannot insist on the offer being put back on the table for acceptance. It is exceedingly rare for an offer to be lifted in the face of a counteroffer, but this has occurred.

Your ability to negotiate your employment offer is directly related to the amount of bargaining power you have. Does the employer need your services? Will you be an essential component to the organization moving forward? Do your skills meet an existing need? All of these issues will figure greatly in your ability to negotiate the employment offer or contract that has been presented to you.

3. Some Common Terms:

(a) **Start date:** Every offer should contain some reference to a start date. Many rights that you have as an employee flow from the date you commence working. However, other considerations may arise. For example, does the start date provide you with time to give your existing employer proper notice of resignation? Have you left a place of employment where you were working for a long time? Perhaps there should be some consideration to giving you some credit for your past service with your previous employer. This becomes especially relevant for vacation and pension purposes and, most importantly, in the negotiation of the termination clause, as described below.

(b) **Probationary period:** Normally, a probationary clause will provide that the employer can terminate your employment on very short notice if there is not a fit. Some employees believe that there is an implied probationary period of three months. This is not the case. There is no implied right for an employer to suggest a probation for any period of

time, but a probationary period can be specified in the contract along with your entitlement in the event you do not successfully pass the probationary period.

For senior positions, the employers will have done their due diligence, checked references and put you through several or many interviews. Many employees refuse a probationary period on the basis that the employer should have done proper homework before the offer is given. If you are leaving a secure place of employment, a probationary period may be inappropriate, unless the termination provision during the probationary period is very generous.

(c) **Change in duties:** Many employment contracts permit the employer to make changes in your duties, reporting and/or compensation as the business requires. This looks very innocuous in the contract, but in fact if you sign it on this basis you may be prejudicing your right to claim constructive dismissal if there is a fundamental change to your employment. The contract should be amended to indicate that any change in your duties/reporting should be in keeping with your position and your title and skill set.

(d) **End date:** Some contracts are for a fixed term of, for example, a year. They expire on a defined end date. This means that the employer will not have to give you any severance or notice of termination if he/she chooses to end the contract on its stated end date. By corollary, if the contract is ended during the term, then you should be paid out to the end date of the contract, subject to deduction of any money you may earn in a new position after the contract has been terminated. To protect against this eventuality, employers who use fixed term contracts also add a termination clause allowing them to terminate the contract during the term on, for example,

30 or 60 days' notice. This type of clause should be reviewed and negotiated, as it significantly affects your rights on a termination of a fixed term contract.

- (e) **Bonus/option plans:** Contracts routinely refer to bonus or option plans and provide that the employee will receive options or a bonus of up to a certain percentage of salary. It is important to review the option plan document or the bonus plan itself to determine eligibility requirements. Most importantly, you should understand what happens to these compensation items on termination. For example, many bonus plans provide that you have to be employed at the end of the fiscal year or on the payment date to receive your bonus. This could result in a situation where you have worked for 11 months of the fiscal year, your employment is terminated because of a downsizing, and you do not receive your bonus for the 11 months you have worked. This type of clause is often the subject of negotiation.

The secondary issue with respect to bonuses relates to signing bonuses. Employers sometimes offer employees signing bonuses of varying amounts. Specifically, have you left any money on the table with your old employer? Have you been forced to move or will you have increased travel expenses? These may be payment terms which you can negotiate in the employment letter/agreement.

You should also review the stock option plan. Again, what happens to options on termination? Some plans provide that very short exercise periods for vested options on termination without cause and you may be able to negotiate more favourable treatment of options at the time you are hired.

- (f) **Non-Competition Clauses:** Many employment offers and employment contracts contain non-solicitation and non-competition clauses. A non-

competition clause will prevent you from competing in your employer's business for a set period of time in a defined geographical area. Its little sister, the non-solicitation clause, will prevent you from soliciting customers or clients of your employer for a set period of time following termination or from poaching employees of your old employer following termination. Often non-competition clauses are in the guise of non-solicitation clauses. Careful review with your lawyer is required to understand the restrictions on your post-termination activities.

Courts generally do not like non-competition clauses (and to a lesser degree, non-solicitation clauses) because they are, by nature, a restraint of trade. However, you should assume that whatever restrictive clause you sign will be enforceable. You should never sign a contract on the theory that any one clause will not be enforced: you should review it with your lawyer for reasonableness. A restrictive clause is enforceable if it is no wider than is necessary to protect the legitimate interests of the employer and is not overreaching. In other words, the scope of activities covered, time period and the geographical area all have to be reasonable. For example, an employer who does business only in the province of Ontario should not be asking for a non-competition clause applying to Canada or North America. The restriction may be unreasonable in the context of the employer's business.

- (g) **Termination clauses:** This is possibly the most important clause in your employment contract and often the subject of much negotiation. Here are some important points:
- Some employers add a clause in the contract to the effect that your employment will be governed by the terms of the **Employment Standards Act, 2000**, and that the statute will limit

what you are entitled to receive on termination. This is a significant and draconian limitation on what you will be entitled to receive on termination. The **Employment Standards Act** generally provides that you will be entitled to notice or termination pay of one week per year of service to a maximum of eight weeks and severance of one week per year of service to a maximum of 26 weeks, but severance pay only applies if your employer has an annual payroll of more than \$2.5 million and then only if you have been employed for more than 5 years. This is far less than the common law notice to which most employees are entitled on termination.

- Many lawyers will recommend some sort of formula for a termination clause, based on the circumstances of your hiring, your position, length of service, compensation, and the marketplace. For example, you might negotiate severance of a set number of months if your employment is terminated during the first two years and then to increase by one month per year of service thereafter, to a maximum as agreed.
 - Your severance should also be based on total compensation including estimated bonus to the date of termination and bonus on your severance period. Indeed, all aspects of your compensation, including options should be addressed in the termination clause. Again, this is a hotly negotiated provision in many employment contracts. Sometimes past service for a previous employer can be factored in. Unfortunately, there is no set formula that we can provide as it really depends on the employee, the circumstances of his or her employment and leverage in the negotiations.
- (h) **Side Deals:** Some hiring managers are very keen to sign you up, but they may have little discretion to change the standard terms of the employer's contract. Beware of the side deal. Some managers will give you a

handshake and a wink and say don't worry, we will take care of you on termination or in some other circumstance. Many employment contracts contain a provision that it is the entire contact between the parties and any variations must be in writing, duly signed. This will effectively void your side deal. Even if the contract does not contain this clause, there are evidentiary rules which may prevent the side deal from being brought into evidence if a dispute regarding the contract occurs. You are much better off with the side deal as part of the contract. If you cannot do this, at the very least, it should be confirmed in writing with the hiring manager in a proper manner.

Employment contracts are complicated legal documents which may appear simple on their face. Your lawyer can explain the contract to you, even if you have no room or no desire to negotiate it. You should go into a new employment relationship with your eyes open, understanding what you are signing.

If a negotiation ensues, it is useful to have a lawyer as a negotiator or a coach. Often, you will be doing the negotiation, but you should understand your legal rights and your negotiating strategies. Your lawyer can also be the "bad cop", proposing clauses from which you can retreat to a compromised position. This is often an effective strategy.

Don't forget, you never have more negotiating power than you do going into a new job. Especially with respect to the termination clause, do not hope to negotiate it on an exit. At that point, the employment relationship has broken down and you will have very little power to change what is in the contract. Negotiate going in, but negotiate fairly and amicably. You want the end of the negotiation to be a win-win, for both you and your prospective employer, to set the employment relationship on a proper basis when it starts.