

NEGOTIATING SENIOR EXECUTIVE CONTRACTS – PITFALLS AND TIPS

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Negotiating Senior Executive Contracts – Pitfalls and Tips

With bonus season behind us and restrictions beginning to lift, many people are beginning to rethink their career or plan their next job move. We are often approached by clients asking: “how do I negotiate my contract?” or “*can* I negotiate my contract?”. At BDBF, as well as regularly negotiating exits, we are expert in providing bespoke and tailored advice

to senior executives at the point of entering new employment contracts. BDBF Partner Paula Chan and Associate Blair Wassman offer some guidance below on negotiating your contract.

The first rule of negotiation: negotiate

Many believe employers will not deviate from their standard form contract, and as a result they simply accept the terms on offer. This can be the case, but it does not reflect our experience across the board. Many employers will welcome proposals and we often successfully negotiate more favourable terms for executives and professionals joining small and large organisations, including listed companies. We commonly do this by assisting in the background rather than dealing with your new employer directly.

You are in the best position to negotiate beneficial terms before your employment commences. Securing talent at a senior level is rarely an easy task for employers and they are likely to be as eager as you to secure your start. Your negotiating leverage is therefore likely better than you think.

Do not assume restrictive covenants are unenforceable

Restrictive covenants can limit what an employee can do after employment ends. They can prevent an employee from working for a competitor, from soliciting or dealing with clients or potential clients or from poaching or moving with key employees. Many individuals do not pay attention to these restrictions until they wish to move on, mistakenly believing that covenants, particularly non-competes are unenforceable. The drafting and scope of the restrictions may mean they are unenforceable but, where drafted properly, they can prevent an employee working in their desired role on termination of employment.

You should consider with care the duration and scope of any proposed restrictions. They may be too widely drafted and go beyond what is required to protect an employer's legitimate

business interests. Consider how they interact with any notice and garden leave clauses. Often garden leave clauses provide that the duration of restrictive covenants will be reduced by any period spent on garden leave.

Check whether you are restriction free

You may be subject to onerous restrictions in your last employment contract, as well obligations to notify your existing employer about offers of employment you have received or to provide a prospective employer with a copy of your restrictions.

Check whether your new employment contract states that your employment is conditional on you not being bound by any restrictions preventing you from taking up the role. This means that if you are subject to restrictions, your new employer may be able to withdraw their offer or terminate your employment immediately. This can be particularly disastrous for employees who lose deferred compensation on the giving or expiry of notice in order to take up a new role, especially if they are relying on a guaranteed or sign on bonus from their new employer to cover that loss.

If you are concerned about the impact of restrictions on your existing or new employment relationship , it is important to seek legal advice at an early stage before you resign or accept an offer of employment, especially if you are planning on working for a competitor.

If you breach an existing restriction, you (and your new employer) may be subject to costly and time-consuming legal proceedings. You could be ordered by a Court not to commence or to cease employment with your new employer or to make a payment on account of profits to your former employer. Even if legal proceedings do not materialise, it is our experience that a letter from a former employer threatening legal action can be incredibly disruptive to the stability and success of a

new employment relationship.

Read the small print

It is important to read the whole contract, as some employer-friendly provisions may be hidden in places you may not expect.

For example, consider whether there is an option for the employer to make a payment in lieu of notice. Does it include benefits and bonus? Is it subject to certain conditions, i.e. does it allow the employer to make payments in instalments, or is there a requirement for you to mitigate your loss? Check whether your employer can make changes to your benefits or place of work without your consent. This has never been more important given the move towards greater flexibility and more home working with some senior executives moving out of the City whilst retaining City roles. If you have been led to believe that your role will allow for homeworking does the contract reflect that?

Pay attention to probationary periods

Check whether you will be subject to a probationary period, and whether the employer has the option to unilaterally extend this period. Many probationary clauses will also allow the employer to terminate your employment with very little notice, and some contractual benefits may not commence until you have completed your probation. As unfair dismissal rights only arise once you have two years' service, the contractual terms surrounding probation and corresponding notice period are crucial.

Do not proceed without a clear understanding of variable remuneration

You may happily be entitled to receive a bonus, incentive or other form of deferred compensation. However, such benefits often come with strings attached. They may be subject to

stringent conditions and plan documents external to your employment contract.

It is essential that you understand exactly what you will be entitled to, how awards will be made, and any conditions attached to incentives. You should ask for copies of the plan documents so that you understand vesting periods, the nature of your employer's discretion, additional restrictive covenants (which may go beyond those in your contract), and the leaver provisions. Will you lose any unvested awards or bonuses if your employment ends before the awards vest or bonuses are paid?

Further, if you will lose out on variable remuneration as a result of having to leave your previous job, you may want to consider whether your new employer will buy you out and if so, at a guaranteed level.

Avoid relying on promises not contained in the contract

All elements of the deal should be expressly incorporated into the contract. We often advise against relying on verbal or email assurances as employment contracts may contain entire agreement clauses, which state that the contract records the entire agreement between the parties and replaces any previous agreements or representations.

Look out for "agreements to agree". These may include a promise of equity or cash bonus 'to be determined' on joining. All terms should be clear and should avoid giving the employer the luxury of being able to default on promises at a later stage.

Pick your battles

This is a new relationship. We recommend that clients pick their battles and focus on the most important elements of the deal when negotiating to get things off to a good start and to maximise the prospects of securing what matters most to them.

We can provide you with strategic advice on which employment provisions should receive focus and how best to approach discussions.

If you would like to know more, or you need advice regarding your contractual terms, please contact Paula Chan (paulachan@bdbf.co.uk), Blair Wassman (blairwassman@bdbf.co.uk) or your usual BDBF contact.

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