NOTE: In 2004, the author of the Boston Business Journal article on the right - *"Using terms of employment as executive recruiting tools"* became a partner at his present law firm, Engel & Schultz LLP.

Questions or inquiries on this article or other issues regarding executive employment, compensation or severance may now be made to the author, as follows:

Robert A. Adelson, Esq.
Engel & Schultz LLP
265 Franklin Street, Suite 1801
Boston, MA 02110
Tel: (617) 951-9980
E-mail: radelson@engelschultz.com
Website: www.engelschultz.com

Using terms of employment as executive recruiting tools

INSIDER VIEW

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ROBERT A. ADELSON

If you or your company are trying to recruit top talent or skills, and your prized hire says "show me the money" and you don't have it, you need to know the way out of the box.

It is important to know how to use the employment contract as a recruitment tool and still not give away the store.

For the executive, the best time to negotiate employment terms, including compensation, relocation, tax gross-ups, stock and options is before an offer is made or accepted.

By seeking fair treatment for both sides shown below, the company can gain a critical edge in executive recruitment and retention.

Signing bonus

Executives often resist switching jobs because of vesting options, bonus and other "Golden Handcuffs." Thus, your signing bonus may be the golden key to open the door to hiring.

This bonus also cements the bond between recruit and company and compensates for known or unforeseeable risks that may arise.

What a company pays up front can vary, depending on need and perceived immediate value the executive brings. Bonuses often include options, below-market stock, a retirement annuity, other cash and non-cash considerations or combinations.

Meaningful equity

Stock and options should be structured to reward loyalty, individual achievements and company success. The company can enhance its offer with a package of rights that deliver a real non-illusory equity stake. These include anti-dilution, registration cash-out, change of control and post-termination protections.

Tax-favored equity

To leverage future payout, the company should structure equity taxed as low as possible and boost executive take-home pay. Here, the rule of thumb is: options are the best for high-value equity; stock is best for low-value equity. Company and executive need to maximize potential use of the 33 percent to 67 percent tax rate reductions under lower rates for capital gains, and possible roll-over to defer all taxes after stocks are sold.

Tax advice needs to assure the right mix of equity, including stock, ISOs, nonequals, SARs, or Phantom Stock arrangements. Each must be carefully structured to avoid ruinous "tax surprises" down the road.

Position and responsibility

The executive needs to assure his authority and sufficient visibility, to keep known in industry. It is also in the interest of both parties to confirm officer and/or board positions, expected responsibilities, known performance targets, organizational authority and reporting structures, and level of support.

Non-competes and NDAs

Companies must protect existing and future trade secrets through non-disclosure agreements (NDA), but the NDAs should not reach to prior knowledge and publications and information generally known in the field. Non-compete agreements should be separately calibrated for three concerns: the executive taking a position with a competing firm; soliciting customers, prospects, grants or partners; or raiding employees after having moved on to a new position in another company.

The period should be measured by expected shelf-life of confidential information and time needed for the company to re-establish itself and integrate a successor executive into the prior relationships involved.

Ground rules

Companies should provide a fixed term contract and mutual early termination clauses, with and without cause. This too shows commitment.

For the executive, *the best time to negotiate employment terms, including compensation, relocation, tax gross-ups, stock and options is before an offer is made or accepted.*

Yet, each side enters the relationship knowing the rules on what happens if change occurs in the future. With-cause termination clauses should be based on matters under the offending party's control. Without-cause, termination should require each party to provide a notice and concede with-cause contract rights.

Severance

Severance protects the executive against the company's normal right to terminate without cause. However, severance also helps the company recruiting the reluctant executive and in providing a cash deterrent against the executive violating non-compete clauses on termination.

Severance terms vary and are often phased on period of service with the corporation. Severance pay, with binding arbitration, English rule on attorney's fees, and similar enforcement terms, add confidence the contract will be followed.

Good vibrations

Compatibility of executive and company, fit of skills and personality, as well as intelligence information on the company's current business status and potential, are key to the success of the executive/company partnership.

Each side's conduct in negotiating your terms of employment can offer you valuable insight into the party's decision-making process, motivations and flexibility, as well as your potential fit.

Never fear the word "no" in negotiations. Avoid a job or a hire if your negotiations reveal traits that warn of a bad fit. A good contract does not make a good job or a good hire. There is still no substitute for doing your homework.

But, by thoughtfully negotiating in these areas, both parties learn insights into the other and can lay a foundation conducive to getting the most from the relationship.

ROBERT A. ADELSON *is a corporate / tax attorney and partner at Lawson & Weitzen LLP in Boston.*