

## Legal Updates

### Head Of School Employment Agreements: What Independent Schools Should Know

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Extending an offer to a new Head of School is an important and exciting step for an independent school – generally, the culmination of a long search process, and the beginning of a new stage in the school's life.

The next step in the process, however – formalizing the offer through a written employment agreement – is equally important. In part, because a school's contractual relationship with its Head is so different from its relationships with its other employees, it is critical that the employment agreement be negotiated and drafted in a careful, thoughtful and thorough manner. Among other considerations, the agreement needs to protect the school against the possibility that its relationship with its new Head does not prove as successful – or as long-term – as the parties hope.

Following is an outline of some key provisions that independent schools should consider carefully in structuring employment agreements with their Heads. Indeed, as many of these topics often come up during the interview process, before the successful candidate is chosen, we recommend that a school begin thinking about these issues even before it commences its formal search for a new Head.

#### *Term Of Agreement*

Unlike most other employees at independent schools – who generally work under either "at will" offer letters or annual letter agreements – Heads of School are usually hired for multi-year terms. Thus, a critical threshold issue for a school is the duration of the Head's employment agreement.

A variety of factors come into play in considering this issue. In particular, the new Head's experience level – both in equivalent roles at prior schools and in the education field generally – is likely to be a significant consideration. On this point, an experienced Head who is being courted by a number of different schools may have bargaining power to insist on a longer term.

A school should also carefully consider the respective advantages and disadvantages of longer versus shorter terms of employment. A longer term may help to "lock up" a desirable candidate for a greater length of time, but also may lead to an uncomfortable situation if the employment relationship does not turn out as anticipated. Conversely, hiring a new Head for a shorter term can help to preserve flexibility to make a change, if necessary, but can also create instability.

Another important issue is whether the Head's employment agreement should renew automatically from year to year (absent an official notice of non-renewal by one of the parties). Many schools favor such renewal provisions, since they obviate the need to negotiate a new agreement for as long as both sides remain satisfied with the arrangement. Other schools, however, prefer that their Heads' employment agreements be limited to fixed durations, thereby ensuring that the employment terms will be regularly reviewed and updated.

### *Compensation*

The appropriate compensation package for a new Head of School depends upon a wide range of factors, including a school's size, geographic location and financial resources, compensation levels at peer schools, and the successful candidate's qualifications and expectations.

Not surprisingly, the annual salary is virtually always the major component of the compensation package. However, employment agreements for Heads often include other forms of compensation as well, such as allowances for car expenses and club dues, as well as deferred-compensation payments (particularly as part of final contracts for Heads who are nearing retirement).

The employment agreement should also address the employee benefits for which the Head will be eligible. Many of these benefits – such as health, life and disability insurance, 403(b) retirement plan contributions, and tuition remission for children attending the school – may be standardized for all regular, full-time employees. Others – such as relocation benefits and expenses for attendance at professional conferences – are likely to be individually tailored for the Head.

Independent schools need to be aware that the Internal Revenue Service prohibits non-profits from paying their executives "excess compensation" – *i.e.*, compensation deemed to go beyond what is "fair and reasonable." Paying excess compensation to an executive may cause a non-profit to face large fines or even potential loss of its tax-exempt status.

Thus, it is critical for a school to engage in benchmarking – *i.e.*, analyzing the proposed compensation package for its Head against the compensation provided to Heads of peer schools – to ensure that the proposed compensation package is reasonable. Notably, if a school engages outside counsel to conduct the benchmarking, this creates a "rebuttable presumption" of reasonability, thereby providing the school with additional legal protection against a potential IRS challenge.

### *Housing*

Many independent schools – both boarding and day – provide housing on or near campus for their Heads, typically on a rent-free or reduced-rent basis. The terms of any housing arrangement should be spelled out clearly in the Head's employment agreement, including not only the monthly rent (if any) but also terms such as who bears responsibility for utility and upkeep expenses, a description of the fixtures and furnishings that are considered part of the home, and the length of time the Head will be given to move out of the home following the end of his or her employment.

### *Duties*

While the job duties of a Head of School might seem self-evident, in fact there can be significant variation from one institution to another. Thus, an employment agreement should spell out the Head's responsibilities fairly specifically. Topics frequently covered include student development, curriculum development, hiring and management of faculty and staff, and fundraising.

The duties section should also address the Head's right to engage in outside professional activities (such as consulting work and charitable endeavors), as well as whether the Head will be a member of the school's Board of Trustees/Directors.

### *Evaluation*

We recommend that a Head of School employment agreement include language establishing a process for the Board to conduct annual evaluations of the Head's

performance. A formal evaluation process assists the Board in maintaining appropriate oversight, while at the same time ensuring that the Head is made aware of any performance concerns.

#### *Early Termination And Severance*

While both parties obviously hope that their relationship will be a long one, the reality is that not every Head of School hiring works out as anticipated. Thus, it is critical for the Head's employment agreement to specify how each party may terminate the relationship before the end of the term of the agreement, as well as the legal consequences of early termination.

Typically, an employment agreement provides for the Head to receive severance compensation – generally, continued salary payments (and often health insurance benefits) for some defined period of time – if he or she is terminated without cause. (While the definition of "cause" varies somewhat from agreement to agreement, it generally encompasses serious misconduct and/or grossly deficient job performance by the Head.) It is important that the agreement condition payment of the severance compensation on the Head's signing a release of claims.

Conversely, the agreement should make clear that if the Head is terminated for cause, or voluntarily resigns, his or her compensation ends immediately. In the case of resignation, the agreement should require the Head to provide ample notice, so that the school has sufficient time to search for a successor.

Finally, a Head's employment agreement typically includes language permitting the school to terminate the relationship if the Head experiences a lengthy disability. In that event, the agreement may provide for the Head to receive severance compensation, or he or she may be limited to disability benefits under the school's disability insurance plans.

#### *Intellectual Property, Confidentiality, Non-Solicitation*

A Head of School employment agreement should include clear provisions relating to intellectual property, confidentiality, and non-solicitation. The intellectual property section defines the school's ownership rights with regard to concepts, publications, research materials, and other types of intellectual property developed during the Head's tenure at the school. Along similar lines, the confidentiality provision describes the types of sensitive, non-public information to which the Head is likely to be privy and obligates the Head not to use or disclose such information except in the course of his or her employment, and for the benefit of the school.

Finally, non-solicitation covenants are an important means of protecting a school's relationships with its employees, students, and donors. Such covenants prohibit a Head from soliciting the school's employees, students, or donors – typically on behalf of another school that the Head has joined – for a defined period of time following the end of his or her employment. State law may limit the enforceability of such provisions, so it is important to consult legal counsel on these points.

#### **Conclusion**

A school's employment agreement with its Head serves as the legal foundation for the school's relationship with its most important employee. As such, the agreement should reflect thoughtful consideration of the subjects outlined above, as well as other important matters not addressed in this article.

Our attorneys have significant experience assisting independent schools (as well as individual Heads) with negotiating and drafting Head of School employment agreements, and we would be pleased to assist you with this vital process.