

# 5 Must-Haves in an Executive Director's Employment Agreement

Despite claims to the contrary, non-profits and their executive directors both benefit from the existence of an employment contract. The employment agreement should clearly spell out the terms of the employment relationship and leave no surprises. The executive director's salary should not be the determining factor in whether or not to enter into a contract. Rather, a desire to minimize and manage risk by both parties and to avoid a bitter and costly end, makes having an employment contract a smart idea.

1. Compensation. Salary, benefits and other compensation should be spelled out since the compensation of your non-profit's executive director may be subject to excess benefit scrutiny. The IRS imposes sanctions for transactions that provide an "excess benefit" in terms of salary and other compensation. This is particularly true where the benefit conferred upon the executive director in terms of salary is greater than the value of the services provided. When determining the executive director's compensation, it is common for board members to look at the salary of similarly situated executive directors who manage a non-profit of like size, similar purpose, job duties, geographic area, although this is not an inclusive list of factors. For example, an executive director's salary at a non-profit corporation in a rural Midwestern town will differ from that of one in a large East Coast city, even if the purpose and services provided are the same. [Under IRS regulations, the IRS can slap fines onto non-profits and board members who approve excessive compensation for its executive director. Any fees, bonuses, taxable and non-taxable fringe benefits may be subject to scrutiny in the event of termination.](#)

2. Term of Years & Frequency of Evaluations. The contract between the governing board and the executive director should include a term of years. However, it should still allow the board to exercise its fiduciary duties to the corporation in the event the executive director is not performing to the stated standards. The employment contract also should specify when evaluations would take place – for example, annually or bi-annually – and the factors to be considered in the evaluation along with clear terms for termination. Including a term of years in the contract, benefits both the board and the executive director. Absent other circumstances, it allows the board to keep talent for a period of time and provides the executive director with a sense of job security. Specifying a term of years, also provides a natural opportunity to revisit whether the relationship is working out at the end of the term.

3. For Cause or Without Cause Termination. A provision of this type will clarify the expectations and relationship between the parties. The employment contract should define "cause". In instances where there is a without cause termination provision in exchange for severance payments, the terms of the severance payments should be specifically stated. Usually, if an executive director is terminated for cause, or if the employment agreement is not renewed at the end of its term, severance is not payable.

4. Non-Disparagement Clause- A non-disparagement clause, typically contained in a separation or settlement agreement, states that an executive director cannot say anything bad about the

employer even if the commentary is true. Non-disparagement clauses are enforceable, except when the executive director is subpoenaed. If the terms of the employment contract condition severance payments on compliance with the non-disparagement clause or unequivocally state that a breach of the non-disparagement clause will result in a forfeiture of severance or other benefits- the clause is optimized if the payments or benefits paid out to the executive director are paid out over a period of time. A court given the task of deciding whether a violation has occurred, has to determine if the statements made were in fact disparaging and whether the disparaging statements had or are likely to have any damaging effect on a non-profit's reputation.

5. Confidentiality & Return of Property Clauses. In addition to a confidentiality clause, that would protect client and donor lists, you should add a clause requiring the executive director to return all property owned by the non-profit employer at the end of the executive's employment term, if not then face a consequence for failure to do so.

Because an employment agreement is a contract and can be subject to contract defenses, you will need to meet with an attorney who can properly draft and/or negotiate the contract with your prospective executive director. While this list is not exhaustive, it will get you on the road to creating a workable and responsible contract with your new executive.

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