

**EMPLOYMENT CONTRACTS AND LEGAL
ISSUES FOR ASSOCIATION EXECUTIVES**

Delaware Valley Society of Association Executives
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I. EMPLOYMENT CONTRACT BASICS

It is essential to the relation of employer and employee that the employee be subject to the employer's control or right of control, not only with regard to work to be done, but also with regard to the manner of performance. An "independent contractor" is one who, in rendering services, exercised independent employment or occupation and represents his employer only as to the means or methods by which it is accomplished. Whether the parties intend an employment or an independent contractor relationship will have significant consequences for taxes, benefits, liability and insurance issues. In either case, the relationship between an Association Executive and the Association should be memorialized in a written contract to reflect the intention of the parties.

A contract of employment arises out of an offer on the part of one and acceptance on the part of the other. The term "contract" does not necessarily imply a written contract. So long as the terms and duration are agreed upon, parties may enter into an oral employment contract. Upon agreement on all terms, a contract of employment cannot be modified except by mutual consent of the parties. While oral contracts are enforceable, establishing the terms of agreement in case of dispute will result in a "swearing contest" in court. Therefore, it is far preferable to reduce the agreement to writing.

A contract of employment which does not specify a definite time period is presumed to be a hiring "at will" in the absence of circumstances showing a different intention. "At will" employment means that either party may modify the terms of employment or terminate at any time without limitation.

II. ISSUES TO BE CONSIDERED IN AN EMPLOYMENT CONTRACT

ISSUE	ASSOCIATION PERSPECTIVE	EXECUTIVE PERSPECTIVE
WRITTEN CONTRACT	<ul style="list-style-type: none"> - Certainty of duties - Certainty of rights 	<ul style="list-style-type: none"> - Certainty of duties - Certainty of rights
COMPENSATION	<ul style="list-style-type: none"> - Clearly defined - Opportunity for incentive 	<ul style="list-style-type: none"> - Clearly defined - Opportunity for incentive - Reduces disputes over basis for compensation
EXCLUSIVITY	Keep executive from moonlighting	-Want ability to do non-competitive work
LENGTH	Term eliminates need for dismissal	-Provides a measure of security if termination provisions are reasonable
TERMINATION	<ul style="list-style-type: none"> -Can define grounds for termination -can be for any reason with notice and or defined reasons “for cause” 	-Want to limit termination to “for cause” and define cause as narrowly as possible
REMEDIES FOR BREACH	<ul style="list-style-type: none"> -Can tailor to reason for termination; -If no cause termination allowed will may include severance and some continuation of benefits; -If for cause may be no severance or benefits 	<ul style="list-style-type: none"> -Want have most liberal severance package: -long pay out; -continuation of medical and other benefits;

BENEFITS	<ul style="list-style-type: none"> -Clearly define benefits, particularly expense reimbursement policies -Some benefits may be less costly than salary 	<ul style="list-style-type: none"> -Will want moving and relocation expenses -Participation in health, retirement and other plans -Clear guidelines for reimbursement for travel & entertainment -Can reduce taxable earnings
DISABILITY	<ul style="list-style-type: none"> -Should define disability and its effect upon the agreement -Advance agreement on term of continuing salary and benefits -Impact of partial disability should be defined 	<ul style="list-style-type: none"> -Defined terms of disability and salary continuation will give Executive some security
AUTHORITY	<ul style="list-style-type: none"> -Can define the limits of the executive's authority; can be expansive or narrow; -Identify areas which must be approved by Board or Executive Committee 	<ul style="list-style-type: none"> -Defined authority prevents arguments among Board member over actions taken by Executive
LIABILITY ISSUES	<ul style="list-style-type: none"> -Can limit responsibility to areas of authorized conduct and provide for indemnity for unauthorized conduct 	<ul style="list-style-type: none"> -Association will indemnify for authorized Executive conduct. -Written confirmation of scope and amount of insurance for D&O coverage and general liability

<p>CONFIDENTIALITY</p>	<ul style="list-style-type: none"> -Provides a means to identify confidential information and means to protect it; -May protect inventions, trade secrets, copyrights and other intellectual property rights -May define remedies for breach 	<ul style="list-style-type: none"> -Intellectual property created by employee is usually owned by employer -Although Executive is a fiduciary, but may want to put limits on confidentiality, particularly for programs or ideas developed by the Executive.
<p>NON COMPETITION</p>	<ul style="list-style-type: none"> -May prevent Executive from going to work for competing association or entity with interests adverse to the Association -May prevent Executive from competing in a reasonable geographic area for a reasonable period of time; -May define remedies for breach 	<ul style="list-style-type: none"> -Executive may bargain for narrow restrictions so that means of livelihood and business opportunities are not unduly limited following contract
<p>POST EMPLOYMENT SERVICES FOR ASSOCIATION</p>	<ul style="list-style-type: none"> -Association may want Executive to be available on consulting basis following amicable termination or retirement - May condition other payouts or benefits on continuing cooperation at defined rate 	<ul style="list-style-type: none"> -Provide for terms of consulting in advance of termination

DISPUTE RESOLUTION	<ul style="list-style-type: none"> -May specify arbitration or other private dispute resolution which will have the benefit of being private, less time consuming and less expensive -Confidentiality of private ADR proceedings may be attractive to Association 	<ul style="list-style-type: none"> -Court resolution may offer more upside but tends to be slow and expensive; -ADR will provide quick and private resolution of issues which you may not want made public
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III. ASSOCIATION COUNSEL - WHOSE ATTORNEY ARE YOU ANYWAY?

In most situations, the Association Executive and legal counsel for the association work hand in hand to further the interests of the association. However, in some situations, counsel and the executive may disagree on how to handle a particular matter. In those cases, it is important to understand who is the client of legal counsel.

In most cases, counsel is hired pursuant to a written engagement letter. In Pennsylvania, lawyers are required by the Disciplinary Rules and Code of Professional Responsibility to have a written fee agreement. While the Association Executive may have recommended counsel, the client is the association, and counsel has a legal duty to the association as an entity. Where the engagement is so structured, the attorney must and will provide its services for the benefit of the association.

On the other hand, if the Association Executive retains an attorney to provide advisory services to him or her personally to advise the Executive

concerning issues relating to the Executive providing services to the association, then the attorney would be considered counsel for the Association Executive. Fees would have to be paid by the Association Executive. Since the Association Executive has a fiduciary duty to the association, the Executive cannot retain counsel for his or her own benefit and charge the cost to the association.

The issue may be complicated where the Executive has interviewed and retained counsel for the association and had most of the direct communication with counsel throughout the course of the legal representation. While the Association Executive may view counsel as “his” or “her” counsel, the attorney is mandated by the Disciplinary Rules and Code of Professional Responsibility to regard the association as the client for all purposes. To the extent that there is a conflict between the position of the association and the Executive, counsel must maintain its allegiance to the association or withdraw from the representation if he or she does not believe that he or she can adequately represent the association’s interests.