How to Create an Offer Letter Without Contractual Implications

When the recruiting phase has been completed and an employer has made a decision on the candidate it wishes to hire for a specific position, the employer typically makes a verbal offer and follows up with an employment offer letter. The candidate's signature on an offer letter confirms that the candidate has accepted the position and its terms. However, the employer should be mindful of the language used in the offer letter, or it may be construed as an employment contract or agreement.

In an effort to avoid creating a contractual agreement, the offer letter should contain a statement that the employment is at will (except in Montana; see its Wrongful Discharge from Employment Act for restrictions). Employment at will is a doctrine that means the employment relationship may be terminated by the employer or employee at any time and for any or no reason. When contract language is introduced, the employment-at-will relationship is negated. Eliminating verbiage regarding employment for a definite period of time or that makes promises about future earnings or bonuses is a consistent way to keep employers out of court. Employment contracts were historically reserved for executives; however, the effort to recruit and retain specialized professional and technical employees has made it necessary to use the offer letter at other levels.

An employer should be aware of what the provisions of an employment contract include so that it will not inadvertently add these elements to its offer letters. Common topics covered in an employment contract that should be avoided include the duration of the job (unless for a temporary or fixed-period assignment), job duties and requirements, and grounds for termination or resignation.

An employer should create a generic offer letter with a standard format that can be used for any position being filled by the company. The standard form should allow for the insertion of the applicable position, the Fair Labor Standards Act (FLSA) exemption status, start date, full- or part-time status and rates of pay.

Step 1: Opening and Basic Information

The offer letter should begin with a statement that includes information such as the position title, start date, orientation date, full- or part-time status and applicable shift. Employers should avoid using phrases that imply an indefinite future of employment, such as "job security," "we're a family company" or "in the future." Organizations may

also want to include language that the company has the discretion to alter or rescind information contained in the offer letter during the course of a worker's employment.

Step 2: Job-Specific Information

The offer letter should provide details on the salary and pay periods. Employee compensation should be stated in an hourly, a weekly or a per-pay-period salary amount to avoid the expectation of receiving the full annual salary if the employee is terminated midyear. An annualized equivalent may be mentioned, but only after pay is clearly stated in one of these increments. It is practical to include the supervisor or manager to whom the employee will report, as well as the performance development or evaluation periods for company employees.

Step 3: Benefits Information

Employers should add a summary of the applicable benefits and eligibility requirements for health care insurance, 401(k) plans, life insurance, educational assistance, flexible spending accounts, short- and long-term disability, and accidental death and dismemberment coverage.

Step 4: Paid Leave Information

The amount of leave that the employee is entitled to should be described next. This should include holidays, paid time off or vacation, sick and personal time.

Step 5: Terms of Employment

Another paragraph should include the conditions of employment. This section typically covers items such as successful completion of drug testing and background checks, signing of confidentiality agreements, compliance with immigration law and completion of a Form I-9. The conditions should never include statements about job security, promises of future employment or contractual agreements. The individual can attest via signature that he or she is not bound by any noncompete agreements or other restrictive covenants with former employers.

Step 6: At-Will Employment

A statement that the employment relationship is at will should to be added at this point. It allows the employer the right to terminate the employee at any time, with or without cause, and gives the employee the same right to resign from the position. A contract binds both the employer and the employee; an at-will statement may alleviate that commitment. If statements were made by the employer during the interview process, either orally or in writing (e.g., in an offer letter), that imply an employment agreement,

then the employer may have an obligation to uphold it as a contract. The employers should seek legal guidance in those matters.

Step 7: Closing

The offer letter should close with information regarding a point of contact for questions or concerns. An employer can include sentiments that express the organization's excitement in bringing the employee on board. The letter may also contain a few words about the company culture. Finally, the letter should end with a line for the employee's signature and date. Organizations may want to include a sentence that the offer letter is for informational purposes only and is not a binding contract.

Step 8: Legal Review

As with any document that an employer presents to its employees, it is imperative that the offer letter template be reviewed by legal counsel prior to implementation.

Examples

Scenario 1:
After an extensive interview process, an employer decided on a suitable candidate. The employer verbally offered the position to the candidate and followed up with an offer letter. This letter stated the company was financially sound and that the candidate "would have job security with the company even during these tough economic times." The candidate accepted the position and signed the offer letter. About two months after the hire, the employee was told that the company would need to lay him off as part of a reduction in force. The employee immediately sought legal guidance because the offer letter stated that there would be job security and did not include an at-will statement. Although the suit was a financial burden to the company, it taught the employer a lesson in how to prepare an offer letter using appropriate language that does not constitute an implied contract.

Scenario 2:
An offer letter was drafted after a candidate accepted an oral offer of employment. The letter confirmed an annual salary amount that was agreeable to the candidate, who then signed and returned this letter to the employer. Six months into the job, the employer felt the employee was not a good fit and decided to terminate the employee. The employment was at will; however, there was no statement of such in the offer letter. In addition, only the annual salary was quoted in the letter, which implied that the employment was guaranteed for a year. As a result, the employer could not terminate the employee due to the implied duration of employment unless the employer decided to pay out the remainder of the annual salary. This employer no longer adds annual

salary amounts to its offer letters, but quotes the pay on an hourly, a weekly or a monthly basis.