
memorandum

TO:
Search Committee

FROM:
Caryn G. Pass, Esq

RE:
Preparation for Drafting of Head of School Contract

DATE:
March 17, 2013

With the increasing competitive nature of the search for a head in the independent school industry, prudent Boards approach the search process and the development of an employment contract with the maximum amount of information available to them. Nationwide, Boards are creating and entering into comprehensive employment agreements with their heads of school in an effort to clearly outline the expectations of both sides and address the issues of best practice in the independent school arena.

The employment agreement is a valuable document and the drafting and negotiation process can serve as the foundation of the relationship between the Board and the head. The Board's approach and interaction in the negotiations will send the first messages to the head as to the Board's philosophy on Board – head relations. This is not lost on the head and should be wisely considered by the Board. Likewise, the employment agreement can serve as a tool for achieving the Board's goals as well as providing the Board the ability to act quickly and effectively should the need to make change occur. As example, if the Board's goal is to secure the head for a fixed or extended period of time in order to avoid the undesired departure of talent, the Board can build into the agreement deferred compensation which only becomes available to the head after the fixed period of time has been served. This incentivizes the head to satisfy the contract term or forfeit the deferred compensation.

The other consideration is the needs of the employee. As example, tuition remission may be a valuable benefit to a head with small children but would be of little attraction to the candidate without such need. Likewise, the creation of additional methods for deferring compensation is appealing to the head whose focus is the planning for retirement.

One effective strategy is to first identify the Board's desires as it relates to the head. The next step is to review, prior to beginning the negotiations with a new head of school, an interim head of school as well as the re-negotiation with a sitting head of school, the various options that can be included in the agreement and develop a framework for the agreement. Once this is

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determined, a term sheet that includes the elements of the agreement is drafted and delivered to the head for consideration and execution. After the basic terms are agreed upon, they are incorporated into the employment agreement. The benefit of reaching agreement on the basic terms is that it is often accomplished quicker than agreement upon the full employment contract. The execution of the term sheet allows the school to expedite the selection of a candidate announcement. In general, the drafting and finalization of an employment agreement is a longer process.

What follows is a general overview of terms for consideration and recommendations for designing an effective employment agreement:

Term of Contract

In general, the trend in creating employment agreements with a new head has been to establish an initial three year term. An additional one, two or three year extension at the end of the initial term is increasingly popular. The rollover provision provides additional security to the head. Since it is becoming increasingly difficult to secure a seasoned head, five-year contracts are becoming more common and while not common, occasionally schools are offering ten year contracts of employment.

When determining the tenure that would best serve the School it is prudent to review the School's strategic plan and assess the senior administrator's role in that long range consideration. In institutions where a construction project, major campaign or other significant objective is underway or about to begin it is not uncommon to have the term mirror the undertaking. Other considerations are the past tenure of the individual at the School or other Schools, the employee's performance, goals and talents and the School's need for consistency and stability in the leadership of the institution.

In addition to the above referenced considerations, and perhaps most significant is the message the Board intends to send to the head. The term of the agreement speaks volumes to the head and should not be taken lightly. In cases where the head is much beloved and considered a substantial part of the School's appeal, Boards are wise to send a message of security and appreciation by establishing a tenure that is commensurate with this perspective. Likewise, a new head is encouraged and empowered to make change and possibly make both popular as well as unpopular decisions. The security provided by a multi year agreement assists the head by establishing a level of security.

Contract Termination

The ending of the employment relationship is perhaps the most difficult but significant part of the contract for all parties. While parties are reluctant to address such an unpleasant

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situation, it is wise to develop a process when all sides are in agreement as opposed to when conflict or differences exist. As with all provisions of the agreement, both parties should hope for the best and plan for the worst. Included in this section is the amount of notice each side gives the other prior to departure or termination. The range of notice is commonly between six and eighteen months. One possible consideration in the drafting of the departure/termination provisions is to determine the length of time needed to conduct the search for a new head of school. Assuming a search firm is used, industry standard at this point in time is 18 months.

Three sections should be included in the termination section: a) employee initiated departure; b) School initiated departure; and, c) agreement by both parties to end the relationship. Within the School initiated departure provision, it is best to include a termination for cause as well as a termination without cause provision. This allows the School to establish the "cause" in situations that warrant such action but also a termination without cause action which allows for a less confrontational and generally more gracious ending to the agreement. In all sections the relevant factors are the notice period, severance considerations, and treatment of benefits, salary and other matters upon the termination. Often, in the cases of termination without cause a severance payment is made to the departing head in exchange for a release of claims. The severance period ranges from six to eighteen months most commonly but can be as short as three or as long as two years.

Salary

With regard to establishing the head's salary the strategy often depends on the school's financial comfort and philosophy as it relates to the intent and message the Board wishes to send to the new employee. Boards often establish the salary for the first year of the agreement and subsequent salary amounts are established by the Board Chair/head's Evaluation Committee prior to the beginning of the next contract year. Another option is to establish the base salary for each year of the term. Other options are to provide the head an increase equivalent to the percent amount distributed to faculty for the given year or to establish a floor for the various contract years, which can be based on a percentage or a fixed number.

One challenge in establishing the head's salary is the timing of the increase for inclusion in the budget process. Since budgets are often established in February, March or April, it is necessary to estimate and build in the head's increase. A percent estimate equivalent to that provided in the previous year is often the calculation used for this purpose but can also create an expectation not intended by the Board.

Finally, it is common to include language which prevents the reduction of the head's salary from the previous year of the contract. It should be noted that in this "drafting cycle" an increasing number of Boards are opting to exclude such language in order to provide maximum flexibility in response to the difficult economic times.

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Bonus

While Boards are increasingly considering language addressing some form of a bonus, formal bonus structures are rarely included in independent school employment agreements. Common in the for-profit world, the idea of a bonus based on a fixed matrix or other performance based criteria are difficult to create and often inconsistent with the philosophy of the school mission and culture as well as the purpose of the non-profit status. While the bonus may be tied to performance and or the achievement of goals and objectives, it is often difficult to determine appropriate criteria for the bonus, which is why many schools opt out of such an option. If a bonus is included, however, the contract should specify whether it will be awarded annually or otherwise. The contract should also define whether the bonus is fixed or discretionary and whether it is one time or considered each year of the contract.

Benefits General

At a minimum, the head should be eligible to receive the same benefits as other employees of the School, in addition to any benefits designated by the Board. This would include vacation, sick leave or other advantages.

Health Insurance Premium Payments

While the head should receive benefits commensurate with those provided to other staff, it is not uncommon for the School to cover additional percentages of premium payments. For example, the School may pay the total premium for family coverage when only a portion of such premium is provided to other staff. While this is a common benefit, it does have tax implications.

Additional Insurance

If disability insurance is purchased on behalf of the head, the premiums should be paid by the head and not by the School as there are substantial tax implications to the head. The School may also wish to consider offering the head a long-term care or supplemental life insurance policy. Care should be taken when offering such additional insurance. When such plans are purchased the cost is impacted by the statistics of the head. As example, the cost of additional life insurance varies with the age and health of the candidate.

Retirement Account 403(b)

The head should be provided with the same rights as all other employees to participate in the School's 403(b) plan. It is important to consider the details of the plan prior to negotiating and or drafting the contract. For example, often a 403(b) plan will prevent an employee from

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participation prior to the first anniversary of the individual's tenure. These limitations cannot be waived for a single employee, even the head of School.

Deferred Compensation

The School may consider providing additional income to the head by means of Deferred Compensation. While this option allows the School to assist in the head's long term financial health it may also serve other goals of the Board. If designed strategically, deferred compensation can be used as a means of incentivizing the head to continue his or her tenure at the School or meet an established goal critical to the School. While a number of options exist many are controversial and others are simply too difficult to administer or too risky and or expensive to recommend. The most common plans we use are the 457(b) plan and the 457(f) plan. As with everything, each plan has its strengths and weaknesses. The 457 (b) plan is attractive in that either the head or the Board are allowed to fund the plan. Annually, the IRS establishes the maximum allowable contribution for the (b) plan. At present the total amount that may be made in the plan is \$17, 500.00 (unlike the 403(b) plan, the 457 (b) plan does not allow for a 50 or older "catch up.") The other benefit of the 457 (b) is it is not considered taxable income until distribution, which is not tied to the head's departure or other risk of forfeiture. Unlike the 457(b) plan, an unlimited amount may be contributed to a 457(f) plan; however, it must be drafted in a manner that creates a "substantial risk of forfeiture" should specific conditions not be met. In addition to the limitation that only the Board is allowed to contribute to the plan, upon satisfaction of the condition, the amount in the plan becomes taxable income to the head.

Car

A car allowance can be established by a fixed payment each month or per contract year. Alternatively, the School may allow the head to use a car it leases or owns. There are tax ramifications associated with both options.

Cell Phone, Blackberry, and Laptop

The School can provide the employee with the technology or an allotted amount of money to cover the cost of the technology.

Housing

If living in on-campus housing is mandatory, the requirement should be included in the contract, as should any type of service provided to the head, such as cleaning services. Careful attention must be given to the drafting of this provision in order to avoid unintended tax obligations on the head. Other options include providing the head a housing loan used to

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purchase a home which can either be forgiven over time or upon receipt in the first year. If the head owns a home it is reasonable to grant the head a housing allowance, on a monthly or per contract year basis. It is not uncommon to assist in the sale of the head's former home in situations when the head relocates, or is in the process of moving to a larger home, a home that is closer to the school, or more appropriate for entertaining.

Vacation

The amount of vacation should be included in the contract, as should the policy with regard to what occurs if the head does not use all of the leave that he or she is provided. Four weeks has been the industry standard of recent.

Tuition Remission

If the head has children, the School may choose to allow the head's children to attend the School at no cost and/or pay the tuition of another independent school in the area. If tuition remission is a benefit offered to other employees, the head may avoid tax implications if the same percentage is provided to the head. However, if the head is granted greater benefits than that allowed under the general policy at the School, the *total amount* granted to the head becomes taxable income; not just the difference between the general policy and the head's additional benefit. Periodically, the School will continue the payments when a child moves to a higher grade not offered by the School or even on to higher education.

Relocation Assistance

Industry standard has been to include in a new head's contract the payment of moving expenses. We are now seeing provisions that offer, at the end of the head's tenure, payment to relocate the head, if in fact the head is moving, up to an amount equal to what was spent in the head's original move to the School.

Gym or Other Clubs

If dues, fees, or other payments are made to clubs or other associations on behalf of the head, such organizations may be specifically identified, or a "type" of organization may be defined.

Financial Advisor

The challenge presently faced by many independent schools is the situation of a long standing head of school that is unable or unwilling to retire as a result of a failure to plan for the end of his or her career. Educators are notorious for failing to consider their own financial

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future. In an effort to avoid this challenge, the School may wish to provide for the services of a financial advisor for the head's use to assist in his or her planning for the future. This service also helps with the drafting of the contract in that it gives a framework for the allocation of funds. Payment for these services may be capped.

Executive Coach

The provision of an executive coach to a head, especially a head who is either new to "headship" or who comes to the job with limited experience, has become more common and strongly recommended. The other situation where a coach is beneficial is in areas of weakness for a long standing or experienced head or where the head is facing new challenges in the institution. As example, should the head need to increase his or her fund raising efforts or efforts in a new and or different manner the use of a coach has proven greatly helpful. The School may opt to provide the services of an executive coach for a certain number of years or up to a certain amount of fees charged. We strongly encourage this service in transition planning for a new head to the School.

Head's Discretionary Account

An amount may be established for use by the head and is often included in the contract. However, it is not always a provision included in the document. Schools also opt to include this in their budgets without noting it in the contract.

Head's Professional Growth Account

An annual amount may be established for use by the head and may be included in the contract. Like the Discretionary Account, Schools are also able to simply note this in the budget without reference in the contract.

Duties of the Head

The head's duties should be included in the contract. This may be done in a broad or a detailed manner.

Evaluations

The process for evaluation of the head may be described with some detail in the contract, including who is responsible for the evaluation, what is evaluated, whether goals and objectives are set, if there is a specific tool utilized, how the evaluation is presented to the head and when the head is evaluated. It should also be noted whether the salary increase is impacted by the evaluation.

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Other Activities

The contract should include whether the head can participate in other associations, clubs, entities, and attend certain meetings. It should also address whether, in the event that the head is compensated for other work or activities, such income must be returned to the School.

Other Services

In order to assist the head with obligations that could limit the ability to focus on the job at hand, contracts also include providing the head with other services. These services include child care, dry cleaning, cleaning service and pet sitting.

Sabbatical

Often schools will provide a time for rest and rejuvenation. In general this is not offered till later in a head's tenure. These are often for a period of one semester and are intended to allow the head to take time away from the school. On occasion the Board will designate that the time should be spent in a pursuit that is relevant to the head's position and to benefit the School.

Non Disparagement

It is uncommon to find a head speaking in a negative manner about the institution that he leads during his or her tenure however, we want to assure that should the employment relationship end in a less than amicable manner, the head is precluded by the agreement from making comments or statements that would have negative impact on the School.

Use of Pictures and Images

While common sense would dictate that employees would refrain from the unauthorized use of pictures or images of students, common sense does not always prevail. Especially in these days of the instant distribution of images on the internet it is increasingly important to remind all employees that such actions are inappropriate. Often the offense is non intended but the result is that a child may be exposed to injury. In order to avoid even the possibility of doubt we include this language increasingly in the head's employment agreement.

Copyright and other Materials Created during Employment

As Schools look to other sources of revenue, many are considering the use and sale of curriculum, programs and published materials. Since many a head is directly connected to many of these efforts it is important to establish clearly the owner of the materials such that the School is able to continue to receive remuneration from their efforts.

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No Solicitation of Faculty, Staff and Students

It is not uncommon for a head to move to a new institution following his or her tenure at the existing School. During the course of the head's employment close relationships develop with faculty, staff as well as students. To limit a head's ability to drain the School of good talent as well as students, it is prudent to establish a time frame for when the head is prevented from "soliciting" from the School.

Return of Property

In general, during the amicable departure of a head the return of property is not an issue. It is not uncommon during an unpleasant separation between the head and the School for the School's property to become an issue of conflict. Often there are limited or minor School belongings in the possession of the head but on occasion there are items of substantial value including technology.

Force Majeure

The purpose of a force majeure clause is to make clear what may occur in the case of a natural or unnatural disaster that requires the School to close for all or a part of the academic year. Language of this nature is included in tuition agreements, employee contracts with faculty and staff and should be a part of the head's agreement.

Section 409A of the Internal Revenue Code

Section 409 A of the Internal Revenue Code impacts the tax treatment of many of the sections normally included in the employment agreement. This provision describes and establishes the procedures to be followed by the School which thereby protects the remuneration from the possible negative impact of the regulation. It is standard language that should be included in the Agreement.

Privacy and Confidentiality

Heads are privy to a substantial amount of private and confidential information related to the School's finances, private lives of faculty and staff as well as information related to students and their families. The ethical code of an educator should serve as sufficient motivation for avoiding the dissemination of such information but unfortunately this is not always the case especially following a difficult separation. To avoid such a breach of confidentiality and privacy we include this language in the Agreement.