A Dozen Negotiating Mistakes Everyone Makes and How To Avoid Them

By **Alan Levine**

HAVING REPRESENTED EXECUTIVES at every level of seniority in a wide range of industries over the past 17 years, I have witnessed many common mistakes that executives and their recruiters make when negotiating employment agreements, nearly all of which will influence the executive's experience with a company.

In an effort to help guide executives and their recruiters through the negotiating process, I have compiled a baker's dozen list of mistakes to avoid:

1. **Rushing:** Rushing is the enemy of a well-reasoned and well-crafted agreement. Executives and their recruiters must carefully consider not just the material terms of a proposal, but also how each provision of the agreement itself interacts with the others. Needlessly rushing to signature may result in a sub-optimal agreement.

2. **Trust:** When joining a company, executives often rely on a handshake as a substitute for specificity in the employment agreement. This approach can be problematic when an executive finds that he or she lacks enforceable contractual rights.

3. **Bonuses:** Because bonuses are one of the most significant elements of compensation, it is critical to have clearly delineated bonus metrics, timing and form(s) of payment, and clawbacks. These issues must be negotiated before accepting an offer, when an executive's leverage is greatest.

4. **Severance:** While severance payments are almost always negotiated, their triggers can often be neglected. Failing to adequately understand the triggers and their inter-relationships with other provisions, including, most importantly, the "term," can result in an executive losing apparently bargained-for severance in the event of non-renewal or a change of control, among other events.

5. **Definition of Cause:** Related to the severance payment triggers is the "cause" definition; if an executive is terminated for cause, he or she will not receive severance and will typically forfeit both vested and unvested equity. With much riding on this definition, executives negotiate hard to reduce its scope. Walking a fine line is critical here, however; an executive does not want to be arguing that it is acceptable to engage in bad behavior. Against that backdrop, concern over the definition's scope can be managed with procedural safeguards.

6. **Constructive Termination/Change of Control Protection:** Executives should also remember to negotiate for "good reason" and enhanced change of control severance protection. "Good reason" provisions trigger severance where a company materially breaches the employment relationship, so that the executive does not have to suffer the uncertainties of a lawsuit to recover for the company's breach. Enhanced severance following a change of control protects an executive against the uncertainties of the deal process and throughout the post-transaction integration.

7. **Equity:** Another critically important element is an executive's equity package, as this typically represents the bulk of an executive's total compensation. However, too often executives fail to negotiate these arrangements up-front, instead relying on the company's pre-existing company-

wide plans. This can result in granting delays and lost value for the executive. It also can result in unfavorable vesting and termination provisions, among others.

8. **Perquisites:** Today, perquisites (such as the personal use of company aircraft, first class air travel, and coverage for dependents' expenses) are offered less and less frequently. However, executives sometimes continue to believe in their entitlement to such perks, and can negotiate too hard for them. This can work to an executive's detriment, giving a company the wrong impression. Walking that proverbial fine line is again important.

9. **Restrictive Covenants:** The restrictions on an executive's post-termination activities are also critical. Failing to negotiate the scope of these provisions can severely restrict an executive's ability to subsequently join a new company of his or her choosing or work with long-time clients, among other restrictions. These provisions are often enforceable and must be adequately vetted up-front.

10. **Taxes:** Taxation is another area that should not be overlooked. Often, executives fail to adequately understand the special tax issues and restrictions placed on deferred compensation,

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equity arrangements, and change of control payments. Mistakes can be costly and, with the advice of experienced counsel, usually minimized.

11. **Indemnification:** Executives also often fail to secure contractual indemnification, instead relying on a company's by-laws that can be amended without consent. Securing post-termination coverage under the company's directors' and officers' liability insurance is also important, ensuring that if a company fails, the executive may look to the insurance carrier for protection.

12. **Dispute Resolution:** Dispute resolution procedures are also given short shrift in the negotiating process. Failing to properly delineate the process for mediation, arbitration and lawsuits can ultimately result in a negative outcome for an executive.

13. **Proper Representation:** Because much of the above is technical or dependent on market practice, retaining an experienced lawyer who practices in the field will ensure that an executive will have enhanced protections and that his political capital will be spent appropriately. **TFL**

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