

Demystifying Common Terms in Employment Agreements

A few key provisions can explain a lot about your contract.

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Does your employment agreement contain an evergreen provision? What about a further assurances clause? Can you define these terms? If the answer is no, you're not alone. Contract terms like these are often confusing to non-attorneys, but they needn't be. Employment agreements generally contain similar language, so familiarizing yourself with just a few terms will help you decipher most contracts. Here are several you should know.

Evergreen provisions

An agreement that contains an evergreen provision automatically renews after a specified time period, usually one year. The contract language will look something like this: "This agreement shall last for a period of one year from January 1, 200__ through December 31, 200__, and shall continue from year to year thereafter."

Evergreen provisions are useful because they prevent you from having to renegotiate your entire agreement each year. However, if your contract doesn't provide for an annual salary review, you may want to make a note to yourself to talk to your employer about a raise before your contract automatically renews. Otherwise, you may be stuck with the same salary for another year.

Without cause

People often fail to realize that if their contract contains a without-cause termination provision, it changes the terms of the agreement dramatically. Consider the following example: "Notwithstanding anything contained to the contrary herein, either party hereto may terminate this

agreement for any reason or no reason, with or without cause, by providing 60 days prior written notice to the other of its intention to so terminate this agreement." If this language were appended to the evergreen provision quoted previously, your one-year (or multi-year) contract ostensibly becomes a 60-day employment agreement that can be terminated without cause by you or your employer.

What can you do? If you're relocating to accept a position or if you have some negotiation leverage (e.g., you are weighing several offers), you can try asking to increase the notice period from 60 days up to 180 days. You'll be paid for the entire notice period, so this change will give you more time to find another job.

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Increasing the length of the notice period is a double-edged sword, however, since you will also be required to give the same amount of notice to your employer should you decide to leave. If you fail to give proper notice, you leave yourself open to a breach-of-contract lawsuit for the damages incurred by the employer.

Sole discretion

Employment agreements often include language stating that certain provisions (such as the benefits you'll receive or the expenses your employer will reimburse) are to be determined by the employer "in its sole discretion." If your contract contains this language, your employer can modify these terms at any time without your consent. As such, you may want to negotiate to have this provision removed or have certain benefits and expenses specifically exempted from it.

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Compensation can also be subject to these terms, although sometimes your contract may not specifically state it. For example: “Your base annual salary shall be equal to \$125,000 per year, subject to annual modification by the employer’s board of directors.” Essentially, if your contract contains this language, your base salary is only guaranteed for one year and is subject to change – for better or worse – annually without your consent.

What can you do? At a minimum, you should negotiate with your employer to amend the contract to prevent your compensation from being changed without your written consent. If you have a multi-year agreement, you should try to lock in your base salary and add reasonable increases each year. However, if your agreement contains a without-cause termination provision, be careful. Your employer could threaten to terminate your agreement without cause as leverage to induce you to accept the compensation it’s offering.

Nonsolicitation clauses and restrictive covenants

Nonsolicitation clauses and restrictive covenants are often confused, maybe because they’re both included in employment agreements. Here’s the difference: A nonsolicitation provision may restrict you from soliciting patients, employees and referral sources if you leave your current practice, whereas a restrictive covenant prohibits you from practicing within a specified area of that practice. [For more information, see “Understanding Confidentiality and Nonsolicitation Clauses,” *FPM*, July/August 2000, page 73, and “Evaluating Restrictive Covenants: Four Key Areas,” *FPM*, November/December 2000, page 52.]

Depending on your state’s laws, your employer may be able to file an injunction against you and seek damages should you violate a restrictive covenant. An injunctive relief provision (e.g., “Employer shall be entitled to preliminary and permanent injunctive relief for a violation or threatened violation of the restrictive covenants contained herein ...”) may allow an employer to obtain a court order to prevent you from practicing in a certain area. Your contract may state how much you’ll have to pay in damages for violating the restrictive covenant. In general, it’s a fixed amount that, by signing the contract,

KEY POINTS

- Although employment agreements are individualized to a certain extent, they also contain many standard provisions.
- Familiarizing yourself with just a few of these standard provisions can take you a long way toward understanding your contract.
- Don’t overlook the language at the end of a contract. Just because these “boilerplate provisions” are repeated from one contract to the next doesn’t mean they aren’t important.

you and your employer have agreed is reasonable compensation for damages.

There are several ways to narrow the scope of your restrictive covenant or non-solicitation provision. For example, you can negotiate with your employer to limit the geographic area or the length of time the provisions apply. Or you can try to limit the circumstances under which the provisions apply (e.g., the provisions do not apply if you terminate the agreement for cause). You can also ask to have exclusions added to your contract. For example, you may want outside work that you currently perform to be excluded from the restrictive covenant. Or you may want to add information to your contract about activities that do not violate the nonsolicitation clause, such as placing an advertisement in the newspaper. [For more information, see “Limiting Restrictive Covenants,” *FPM*, April 2001, page 50.]

Waiver

You will generally find a waiver provision at the end of your contract. This provision enables your employer to enforce a term of your employment agreement that it may have previously allowed you to breach. For example, your employment agreement may state that you must work a minimum of 32 office hours per week, but your employer may only require you to work 30 hours. If, down the road, your employer decides to add the two extra hours to your schedule, it could point to the waiver provision in your contract to claim that it did not waive its right to require you to work the additional hours.

A waiver provision will usually be worded as follows: “Neither the failure nor any delay on the part of any party to exercise any right, remedy, power or privilege (“Right”) under this agreement shall operate as a waiver

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Contract terminology can be difficult to decipher. Often the name of the term doesn’t help to clarify the meaning.



This article explains the provisions commonly included in employment agreements.



A without-cause termination provision means you or your employer can terminate the agreement without cause by providing prior written notice.



If your contract contains this provision, try to get the notice period extended. That way, if you’re terminated, you’ll be paid for a longer period of time.



A sole discretion clause enables your employer to change the terms of your contract (and possibly your compensation) without your consent.



If your contract includes a controlling law provision, the terms of your agreement are subject to the state where the company is headquartered.



An assignment provision prohibits you from assigning your contract to someone else. Less often it will limit your employer from assigning your contract to another entity.



Understanding these common contract provisions should put you in a stronger position to negotiate an employment agreement or comply with the one you already signed.

er thereof, nor shall any single or partial exercise of any Right preclude any other or further exercise of the same or of any other Right, nor shall any waiver of any Right with respect to any occurrence be construed as a waiver of such Right with respect to any other occurrence.”

Don't be misled into thinking a waiver provision or any other term appearing at the end of your contract isn't important. They are. Here are some other “boilerplate provisions” you should pay attention to:

Controlling law

If you are employed by a national company or a company with locations in several states, you should take note of your contract's controlling law provision, which basically subjects the terms of your agreement to the laws of the state where the company is headquartered. It generally reads as follows: “This agreement and all questions relating to its validity, interpretation, performance and enforcement should be governed by and construed in accordance with the laws of the state of [_____].”

If your contract contains a controlling law provision, the terms of your agreement are subject to the laws of the state named in the agreement. To determine how your contract may be affected, familiarize yourself with that state's laws or consult an attorney. You may also want to get the agreement changed to the laws of the state in which you're located.

Notice

Most contracts state that any notice given by one party to the other (such as notice of termination, notice of new employment policies or notice of an increase in base salary or change in benefits) must be provided in writing. Return receipt is generally required to confirm that the notice has been successfully delivered. It is extremely important to send formal written notice according to the terms of your employment agreement. If for some reason you don't, your employer could argue that notice was not given properly. This could cost you valuable time, as you would then have to resend the notice and reset the clock on the action you were initiating.

Assignment

Employment agreements will also often contain an assignment provision to prohibit you from assigning your contract to someone else. This clause is included for your employer's protection. Less often, a contract will contain language limiting your employer's ability to assign your contract to another entity. When a contract doesn't include this clause, the issue is left up to state law. Limiting your employer's ability to assign your contract to another entity may be important to you if you don't want to work for someone else. This limitation may also be important should the entity to which you're assigned want to enforce a restrictive covenant against you if you decide to terminate your employment as a result of that assignment.

Further assurances

A further-assurances clause may read something like this: “Each party hereto shall cooperate and take such action as may be reasonably requested by the other party in order to carry out the terms and purposes of

this agreement and any other transactions contemplated herein.” For example, if your employer is permitted to bill for your services,

you would be expected to cooperate by completing the forms necessary for third-party payers to reimburse your practice. Your contract wouldn't specifically outline everything you'd need to do in this regard, but the further-assurances clause would hold you (and your employer) responsible for completing documents, forms and applications related to services you perform on behalf of your employer.

Comprehension is key

The meaning of many contract provisions is not apparent from either the name of the provision or the language it contains. By explaining the substance of the provisions that are commonly included in employment agreements, this article should better position you to negotiate your contract or, if you've already signed on the dotted line, to comply with it. **FPM**

Don't be misled into thinking any term appearing at the end of your contract isn't important.

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