

Lawyer Insights

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Why Not Having an Employment Contract With Bank Officers Will Hurt You

by Alan Marcuis and Amber Rogers
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Yesterday, John Smith, the president of ABC Bank, announced to the board of directors that he intended to resign to go work for XYZ Bank, a local competitor. Smith also intends to take some of the bank's most important customers, and several top officers with him to XYZ Bank. Upset and panicked, the chair of the board contacted the bank's employment attorney to determine what could be done to stop the president from leaving and taking customers and employees with him. "Send me a copy of John's employment agreement," the lawyer said. "Employment agreement? The board did not think John needed one. We never imagined he would quit."

In today's business environment, **officers are heavily recruited by competitors**, and these competitors offer opportunities for promotion and higher salaries and benefits. If a bank decides against entering into an employment agreement with its officers, it needs to ask: What are the legal ramifications of an officer departing to work for a competitor when he does not have an employment agreement?

One of the primary benefits of an employment agreement is that it provides for business continuity. Most employment agreements contain provisions for a term of employment, a notice provision regarding the desire to terminate employment (for both parties), and the grounds for termination. The employment agreement can protect the bank's investment in time and money spent training high level officers and important personnel, and can limit the reasons that an employee can use to leave the financial institution. Of course, an employee cannot be forced to stay with the bank, but having an employment agreement can make an officer think twice before just walking out the door to a competitor, or attempting to start a competing business.

Another benefit to an employment agreement is that it can contain specific covenants that prevent officers from leaving to work for a competitor and taking the bank's customers and employees. Having a non-compete agreement can prevent competitor institutions from attempting to poach your bank's top talent. Your institution has a significant interest in protecting its goodwill, time and money spent in building customer relationships, and training employees.

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Bank Director | May 2016

A confidentiality clause is another provision that should be included in an employment agreement. The bank can prevent an officer from taking and using confidential information, such as customer lists and pricing information and disclosing that information to a new employer to the detriment of the bank. The provision can also require that the departing officer return all bank property, documents and information upon termination. Banks should also consider adding in a non-disparagement clause in an employment agreement, which can prohibit an officer from making negative public statements about the bank or its directors, investors and personnel upon departure.

Because the most likely ground for contention in the employment agreement is how the contract can be terminated, an employment agreement should **spell out what reasons either party may have to terminate the agreement**, and what financial ramifications follow. For instance, does there have to be “cause” to terminate the officer, and what exactly does “cause” mean? Does the officer need “good reason” to terminate the employment agreement, or can the officer just provide two weeks’ notice? If he does not have “good reason,” are severance provisions triggered? Employment agreements are a beneficial method to remove ambiguity and uncertainty surrounding these issues.

Even though our hypothetical bank president does not have an employment agreement, he still has some legal obligations to the bank as one of its officers. For example, he owes the bank a duty of loyalty. Accordingly, while employed by the bank, he is required to act primarily for the benefit of the bank in matters connected to his job. He cannot actively compete with ABC Bank while employed. However, it is important to note that he can prepare to compete while still employed by ABC Bank. Again, this is where having an employment agreement could possibly prohibit such actions.

Having **an employment agreement with an officer and other key employees is advisable**, as it is the easiest way to protect the bank’s interest when an officer departs. With proper planning and preparation, any financial institution can proactively prevent the disruptive event and potential loss of business that can be caused by the announcement of an officer’s resignation. A well-drafted employment agreement can limit the issues in dispute for both sides, minimize ambiguities, and cut down on potential litigation expenses.

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Alan Marcuis is a partner at Hunton & Williams LLP. He focuses on representation of management in complex labor and employment law matters, including contract, trade secret and post-employment restrictive covenants, EEO litigation, collective bargaining, and labor relations. He also serves as co-head of the Unfair Competition & Information Task Force.

Amber Rogers is a senior attorney at Hunton & Williams LLP. She focuses on representing management in all aspects of labor and employment matters in federal and state court, and before administrative agencies. Amber also represents clients in matters related to EEO litigation, collective bargaining, labor relations, non-compete agreements, housing discrimination, breach of contract, and tort claims. She may be reached at (214) 468-3308 or arogers@hunton.com