5 Things to Do when Your Bonus Comes with Strings Attached

March 20, 2020 • Legal Updates & Insights

This article was originally published in Business Insider. See original

5 THINGS TO DO WHEN YOUR BONUS COMES WITH STRINGS ATTACHED

By Lawrence M. PearsonAcross the financial sector and in many other industries, annual bonuses are paid out over the first few months of the year. Companies will often use this time as an opportunity to ask their workers to sign off on new policies and employment agreements, often just by checking a box on their computer screen.

A prime example of these "fine print" agreements is an arbitration policy, which waives a person's right to sue their employer in civil court and requires lawsuits to be filed in private arbitration instead. Other important examples include non-compete and non-solicitation agreements, which place restrictions on the employee's future employment after leaving the company, such as by prohibiting work for competitors or with clients of the company.

Oftentimes, there's not be much leeway to negotiate the terms of these agreements should you wish to receive your bonus, but it's critical that you fully understand whether there is any flexibility, how the agreement impacts your job, whether the terms are legally enforceable, and whether you can "opt out" of the agreement entirely.

Before you agree to any new employment terms, make sure to do these five things:

1. Read everything before you sign

This applies whenever you receive any policy or agreement that affects the terms and conditions of your employment. It's common for employees to receive a mountain of paperwork and employment policies on their first day at a new job, but you should still read all of these documents carefully, even if a signature is not required.

New policies sometimes get introduced or updated, and they may be more restrictive or edited to make them easier to enforce legally. You should thoroughly read all of these materials to make sure you understand them. If you have time to take the documents home and read them at your own pace before you sign, do it.

If you don't understand some of the language in a particular policy, consider having a legal professional look at it (and always consider doing so with a new employment contract or independent contractor agreement).

Even if you didn't read an employment policy, you can still end up being legally obligated to follow rules

and terms that you weren't even aware you signed.

2. Ask for a copy of the agreement

In general, you should have your own copy of every employment agreement and policy that you have been required to sign or follow.

Make sure that you have copies of all documents explaining the terms of your compensation or pay, that you understand all the terms of your contracts, and that you know what would happen to you if your employment ends in different ways, such as during a layoff, termination "without cause," termination for "cause," or resignation.

It is especially important that you have copies of policies that apply after your employment ends. These may include non-compete or non-solicitation agreements, which affect where and with whom you can work in the future. You should also have a copy of any documents about deferred compensation, forgivable loans, securities or other equities — you need to know whether such things are forfeited, when they vest, and any other factors.

It can be difficult to get these documents after a termination or within a short time span if a job opportunity suddenly comes up. It's almost always easier to explain to your employer why you need them up front at the time of signing:

- You want to be sure that you are in compliance with everything
- You need to know how your compensation works for purposes of budgeting and financial planning
- Anyone should have a copy of whatever they have signed that someone else believes is legally binding

Again, ask for these things in advance of an emergency.

3. Find out if you can opt out

When you get an email, pop-up notice, or paper document asking you to accept a new employment policy or agreement, look carefully to see whether you have the option to "opt out" or decline to sign. Some companies will offer this option, especially when it comes to arbitration policies.

After reading the policy, if you're not completely convinced that it's in your best interest, consider opting out.

If you do opt out, the company will almost certainly let you sign it later if you change your mind. But trying to convince your employer to waive an agreement you've already signed is not likely, especially if it's an arbitration agreement and you may have legal claims to assert. Employers typically hold a stronger hand in legal negotiations when a dispute is subject to arbitration, for various reasons.

Of course, if your job, bonus or other compensation is contingent upon your signing the policy, you may just have to sign. But try asking HR or a manager you trust if you have the option to "opt out" of that policy. If there's no opt out option and you're concerned about the policy or agreement, it's possible they

can explain how the company generally enforces the policy, especially if it's a non-compete and non-solicit agreement. At a minimum, you will come away with a better understanding of the company policy, which may help you plan and anticipate issues down the road.

Whatever you do, don't wait it out in hopes that a failure to sign will go unnoticed. This rarely works, especially if the policy requires an electronic signature. You can, however, seek guidance from a legal professional if you're unsure how to proceed with your individual situation.

The company may take the position that you have to sign the policy or your employment may be terminated, so take that into account. And again, talk with a legal professional if you think that your employment may be under threat.

4. Look out for these red flags

Employment agreements that are overly broad or place burdensome restrictions on employees may be considered unenforceable in a court of law. If you spot any of the following red flags, you may be in a better position to negotiate the terms of the agreement or have them challenged in court as legally unenforceable down the line:

- An arbitration agreement that requires an employee to pay the full cost of the arbitration
- An arbitration policy that sets deadlines for filing complaints that are shorter than what the law allows for certain legal claims, such as discrimination or harassment claims
- A non-compete or non-solicitation agreement covering an unreasonably long period of time (generally more than one year)
- A non-compete or non-solicitation agreement covering geographic areas beyond where the employer actually does business
- A non-compete agreement that would effectively prevent an employee from finding a new job in his or her field
- A non-solicitation agreement that restricts a former employee from soliciting customers that he or she knew prior to working for that employer

Non-compete and non-solicit agreements also may not be fully legally enforceable depending on the state where you live and work. California is particularly hostile to such agreements, for example.

It's worth mentioning that if you're suddenly asked to sign an arbitration agreement without receiving anything new in return (such as a bonus, salary increase, promotion, or additional benefits), it may be a sign that the employer is preemptively trying to shield itself from what it perceives to be an imminent court battle, such as a class action lawsuit.

If a dispute comes up later on, it may be possible to challenge the legal validity of the new policy due to a "lack of consideration" for the new contract, agreement or restriction.

5. Check for a release of claims

Some employers will take a corporate reorganization or acquisition, year-end compensation, or other change to an employee's status as an opportunity to ask them to sign a release of legal claims. These documents, often known as a "general release," wipe the slate clean, legally speaking, and waive an employee's possible legal claims against the employer.

For this reason, it's very important to review the fine print of all documents you are asked to sign. This obviously goes double if you're aware of any potential legal claims against the company, or if known disputes have already come up or may be coming to a head soon.

Pay special attention to any documents regarding equities or securities you are given as an employee. Equity in a company, particularly if it's privately held and not publicly held, can also come with serious obligations or liabilities. Make sure that, in the agreements, you are insulated from or indemnified for liability for any wrongdoing by the company.

Bottom line: Employment contracts and policies are loaded with legal jargon that can be confusing or unsettling. Taking the time to read, assess, and collect all the agreements and policies relating to your employment may put you in a much stronger position in the event that you must leave or negotiate with your employer down the line.

Lawrence M. Pearson
Partner
WIGDOR LLP
85 Fifth Avenue, New York, NY 10003
T: (212) 257-6800 | F: (212) 257-6845
lpearson@wigdorlaw.com
wigdorlaw.com