

This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

Offer Letter vs. Employment Agreement – Which Form Should You Use in Hiring?

By Nell Schiller, Counsel, King & Spalding

What is the difference between an offer letter and an employment agreement? This is a common question that employers have when deciding how to document the employment of a new hire. Understanding the difference may help you choose the right form for your nonprofit, but please be aware that, in most cases, offer letters are best suited for your nonprofit employees.

Both offer letters and employment agreements serve the same general purpose, which is to describe the terms and conditions of employment, and employers have significant discretion about what to include in either of these forms. However, there are some key differences. Offer letters are typically shorter and simpler than employment agreements and provide employers with greater flexibility in managing the employment relationship. An offer letter commonly includes these terms:

- Title;
- Start date;
- Work location and hours;
- Compensation, such as annual base salary or hourly rate, which is subject to applicable tax withholding;
- Classification as exempt or nonexempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA);
- Eligibility for benefits, subject to the terms of the employee benefit plans;
- Conditions of employment, such as eligibility to work in the U.S. as demonstrated by Form I-9, successful completion of background and reference checks and signing the employer's standard confidentiality agreement; and
- Acknowledgement that employment is "at-will" and may be terminated by the employer or the employee at any time and for any reason.

Employment agreements are not often used for nonprofit employees in Georgia, although some organizations do use employment agreements for their Executive Directors. An employment agreement with a senior executive, like an Executive Director, may contain terms designed to help retain the senior executive and to protect the employer's business. Employment agreements may specify an employer's ownership of intellectual property and other restrictive covenants (e.g., non-solicitation and non-compete obligations) given the senior executive's key role in the business. Unlike offer letters which provide for "at-will" employment and grant significant flexibility to employers, employment agreements typically contain a fixed term of employment and promise that if the executive is involuntarily terminated before the end of the term, then the executive will be compensated with severance. The employment agreement will specify the circumstances under which the employee is entitled to severance (e.g., a termination by the employer without "cause" or by the employee for "good reason"), define the relevant terms, and specify what is included in the severance pay (e.g., continued base salary, a bonus payment, payment of COBRA premiums, etc.). The terms in an employment agreement, such as severance, often create a significant financial obligation on the employer that the employer may not be able to meet later when the obligation becomes due.

Employment agreements can be complex, are often heavily negotiated, and legal assistance is typically needed to ensure that the employer is properly protected and the agreement complies with applicable law. Once severance is included in an employment agreement, legal review is also needed, for example, to confirm it complies with Section 409A of the Internal Revenue Code, which governs the payment of deferred compensation, including severance.

When deciding between an offer letter and employment agreement, you should carefully consider which document best suits the needs of your nonprofit. As indicated above, in most cases, offer letters are best suited to memorialize the terms and conditions of employment for your nonprofit. The complexity of an employment agreement creates the potential for mistakes and violations of applicable law, which could lead to disagreements and costly corrections. In addition as outlined above, having an employment agreement can commit your organization to obligations with which it may not be willing or able to comply, such as set time periods for employment and payments after employment ends.

As a best practice, consider developing an offer letter template that is used as a starting point for the offer letters for all new hires so that your nonprofit's employment documents are consistent.

Please reach out to your PBPA attorney with any questions or for assistance creating a form offer letter.