OFFER LETTERS AND EMPLOYMENT AGREEMENTS are often critical components to the recruitment and retention of qualified employees. From an employer’s perspective, primary goals in the use of these agreements are to define the terms and conditions of employment and preserve as much latitude as possible when doing so. Frequently, employers raise the following questions:

Q. Why should an employer have written agreements with employees?
A. Written agreements memorialize certain terms of employment. Disputes with employees may be minimized with reference to terms that have been agreed upon in writing by the parties.

Q. What is the difference between offer letters and employment agreements?
A. Offer letters are essentially short employment agreements that describe the basic terms upon which the position is offered by the employer and accepted by the prospective employee. Employment agreements are typically more formal documents that define employment arrangements in greater detail.

Q. Which employees should be given offer letters vs. employment agreements?
A. Generally, offer letters are given to mid- and lower-level employees, while employment agreements are entered into with employees holding higher-level positions. Senior-level employees commonly have more complex employment arrangements that are described in formal agreements. Such agreements may be necessary to induce the employee to join the company, enhance performance and loyalty, and increase the likelihood that restrictive covenants can be obtained. But, in exchange, the employer may lose the latitude to change the terms of employment and to terminate the relationship.

Q. What terms are included in offer letters?
A. Here's what is included:

- **“At-Will” Employment.** Most mid- and lower-level employees are employed “at-will.” To ensure that there is a clear understanding at the inception of the relationship, offer letters should state that employment is “at-will,” meaning both employer and employee have the right to terminate employment with or without cause or notice.

- **Position and Duties.** The initial position and duties should be defined; however, the right to change the position, assign additional duties, and/or eliminate duties should be reserved.

- **Compensation.** Base salary (expressed on a pay-period or annualized basis) should be stated. Bonus or commission compensation must be clearly defined, but employers should reserve their right to alter or rescind these arrangements. If the bonus or commission structure is complex, an employment agreement or schedule should be considered.

- **Benefits.** Current employee benefits are often briefly described. Again, employers should reserve their right to amend or rescind benefit plans and programs and alter employee cost contribution levels.

- **Restrictive Covenants.** Offer letters do not typically include certain restrictive covenants (i.e., non-solicitation of employees and customers, and non-competition), but should include confidential information and non-disclosure clauses. Additionally, employees must represent that they are not bound by restrictive covenants that may conflict with their employment.

- **Conditions to Employment.** Offer letters should indicate that employment is contingent upon satisfactory reference checks, proof of authorization to work in the United States, and any other employer-specific conditions (i.e., drug screens, valid licenses, and the execution of a covenants agreement).
Q. If an employment agreement is used, what additional terms should be included?

A. Consider the following:

**Term.** Employment agreements for a specific term must express the duration of employment and mechanism for renewal, if any. If the employment relationship is “at-will,” a clear “at-will” statement must be included.

**Termination and Severance.** If employment is for a term, employers must reserve the right to terminate employment upon the employee’s death or disability (to the extent permitted by law) or for “cause.” Typically, “cause” includes the employee’s (a) breach of the employment agreement; (b) conviction of a felony, (ii) fraudulent, illegal or dishonest act, (iii) misconduct or negligence, (iv) violation of employer’s policies, and (v) failure to perform duties. Employers also should have the right to terminate without “cause”; however, if employment is for a term, employers generally will provide for notice and/or severance (subject to the employee’s execution of a general release).

**Compensation and Benefits.** Compensation arrangements described in employment agreements are typically more complex than those in offer letters. For example, terms relating to the increase or decrease of base salary may be included, and bonus and commission structures (if applicable) are more sophisticated. For the most senior-level executives, provisions relating to non-cash compensation (i.e., stock grants, stock options, and phantom stock) are often included. These employees also may receive perquisites and benefits enhancements in addition to benefits generally offered to employees.

**Change in Control (Golden Parachutes).** Employment agreements with high-level executives may provide for payments upon certain conditions following a change in control or ownership of the employer.

**Employee Restrictive Covenants.** Restrictive covenants are often included in employment agreements.

**Indemnification.** Employment agreements may specify the circumstances under which employees will be indemnified by the employer and the circumstances, if any, under which the employee will indemnify the employer.

As with all employment-related documentation, complex issues can arise. Careful drafting is often necessary to protect an employer’s most valuable asset—its human capital.

Martha L. Lester, Esq., is Chair of Lowenstein Sandler’s Employment Law Practice Group. Jeri L. Abrams, Esq., is a member of the Employment Law Practice Group.