



EMPLOYMENT AGREEMENT CHECKLIST[®]

Use this Checklist if:

- You just received the Employment Agreement for your new City Manager position. It most likely is a retread from your predecessor. You may wonder if it is “OK.” Does it comply with the law? Are its provisions good for *you*?
- You have been working under an Employment Contract for some time. You may wonder what provisions should now be added, eliminated, or revised.

TERM AND SEVERANCE ✓

Does the Contract’s Term “protect” the Manager’s severance by compliance with Government Code Section 53260(a)?

Government Code Section 53260(a) provides that the maximum severance legally available to a departing Manager is his/her monthly salary X the number of months remaining on the *unexpired Term of the Contract*.

Typically, a Manager’s Employment Agreement uses an “evergreen” Term, which automatically renews for extended periods. This is to insure that at least the selected number of months of severance (6, 9 or 12 months--up to a maximum of 18) will always be left on the unexpired Term, regardless of the date of separation.

Use of an Employment Agreement without a Term does not work. There must be a *Term* in order to have an “*unexpired Term of the Contract*.” Without a Term, calculation of severance, and compliance with Government Code Section 53260(a), are not possible.

CITY COUNCIL COMMITMENTS✓

Does the Council acknowledge, in the Manager's Contract, that the Council will only deal with subordinate City employees through the Manager? Does the Council acknowledge that it will not interfere with Manager's powers and duties, as specified in the City Charter, the Municipal Code or the Employment Contract?

The Manager's Contract should provide that, except for the purpose of inquiry, the City Council and its members shall deal with all subordinate City employees, officers, contractors, and consultants solely through the Manager or the Manager's designee. Neither the City Council nor any of its members shall give direction to any subordinate of the Manager, either publicly or privately.

Further, the Contract should provide that no member of the City Council will order the appointment, nor the removal, of any person to or from any office or employment under the supervision and control of the Manager.

SEVERANCE AT END OF TERM✓

Does the City's election not to extend the Contract's Term entitle the Manager to severance?

Typically, non-renewal of the Contract's Term means that the Manager walks away empty handed. Although it is aggressive, a Manager can negotiate that, except for termination for Cause, voluntary resignation, or separation due to death or disability, Manager *will* receive a severance package at his/her departure.

CAUSE✓

Is the definition of Cause sufficiently narrow so Manager will not be denied severance other

than for egregious, job-related conduct?

Termination for Cause should only be upon conduct such as:

- (i) a conviction (not just a charge) of a crime likely to have a material adverse impact on the City or on the Manager's reputation (not just for "any felony");
- (ii) proven failure to observe or perform any duties or obligations, *after* notice and a period to cure;
- (iii) conviction of a crime involving an "abuse of office or position" under Government Code Section 53243.4; or
- (iv) any grossly negligent action or inaction by Manager that materially and adversely:
 - (a) impedes or disrupts the operations of City;
 - (b) is detrimental to employees or public safety; or
 - (c) violates City's properly-established rules or procedures.

ELECTION BAR ON MANAGER'S TERMINATION ✓

Is Manager protected from termination within so many days, before or after an election to choose or recall a Council Member?

This protection may be found in the Municipal Code or the City Charter. If not there, it can be a stand-alone provision in the Contract, protecting Manager during election campaigning, and until a newly-seated Council Member has some time to personally evaluate Manager.

MANAGER'S TERMINATION DUE TO DISABILITY ✓

Is provision made for termination of Manager, due to disability, only after a reasonable period of incapacity?

Sometimes Manager's "disability" is defined to be in parallel with the City's long-term disability policy. Alternatively, "disability" may be defined as an absence of so many days within a larger number of days, such as a Manager's being unable to perform his/her duties for a total of sixty (60) days within a four (4) month period.

SEVERANCE UPON A DISABILITY TERMINATION ✓

Is a severance award made when Manager is terminated because of disability?

Termination due to a disability is typically a form of employment separation that is not associated with an award of severance. The time away from work due to the disability, during which salary and benefits continue, is the "reward" associated with this "becoming disabled" status. However, it is possible, although aggressive, to connect a severance with a disability termination.

MANAGER'S RESIGNATION ✓

Does the Contract permit Manager to voluntarily resign?

Some Contracts don't. Make sure yours does. Without a provision allowing voluntary resignation, typically on so many days' notice, the City may seek damages from the Manager who quits without completing the Term of his Contract.

MANAGER'S COMPENSATION ✓

Do provisions in Manager's Contract address all compensation-related matters?

In addition to stating an initial annual Base Salary, Manager may wish to ensure inclusion of compensation elements such as these:

- (i) pay increases may be effective any time in Council's discretion;
- (ii) a performance bonus of a fixed dollar number, or in a range of percentages of Base Salary, may be awardable;
- (iii) a term life policy with Manager-selected beneficiaries;
- (iv) a monthly car allowance;
- (v) a Section 457 deferred compensation program; and
- (vi) benefits at an executive level per City policies.

Also subject to negotiation, and inclusion in Manager's Contract, are: use of a City vehicle, a City cell-phone or cell-phone allowance, a technology allowance for home installation of computer, printer/scanner/fax, and a Toll Roads transponder.

VACATION AND SICK PAY ✓

If the Manager will receive vacation and sick leave, does the Contract spell out the particulars?

As to *both* vacation and sick pay, what is the rate of accrual, and is there a cap on accrual?

Is cash out of vacation available, and on what terms?

When Manager leaves employment, is he/she entitled to compensation for a percentage of the accumulated but unused sick leave? Is a certain amount of sick leave subject to conversion to retirement credit, according to PERS rules and regulations?

Manager can be deemed to commence employment with an accrual of a certain number of days of vacation or sick. This is a matter of pre-employment negotiation.

REDUCTION OF SALARY OR BENEFITS AS TERMINATION ✓

Does the Contract provide that if the City reduces Manager's salary or benefits by a percentage greater than the average reductions for all executive Managers, the action constitutes a termination without Cause, and with severance?

HEALTH INSURANCE ✓

In the Contract, or in referenced Resolutions, are the health plans (medical, dental, and vision) provided to Manager, the levels of participation (executive or rank and file), and contribution rates, set out?

PHYSICAL EXAMINATION ✓

If an annual examination will be provided, are its cost, provider, and site of the physical, referenced?

There is no obligation for the City to provide this benefit, but Manager may convince the City Council that it is prudent.

MANAGER'S PERFORMANCE EVALUATION ✓

Does the Contract provide for at least an annual performance evaluation where mutually agreed-upon objectives are reviewed?

Managers have found that requiring, in the Contract, that the performance evaluation be held in a specific month of the year increases the likelihood of its happening.

BUSINESS AND PROFESSIONAL EXPENSES ✓

Does the Contract provide for City to budget, pay or reimburse certain expenses, for City Manager's travel, meetings, professional dues, and subscriptions?

The amount of this benefit is subject to negotiations, and may vary widely depending on the City Council's philosophy on professional participation, and on development of its chief executive officer.

ABUSE OF OFFICE OR POSITION ✓

Does the Contract comply with Government Code Sections 53243 through 53243.3?

By law, Employment Agreements must provide for forfeiture and reimbursement by a City Manager of certain administrative leave pay, funds provided for criminal legal defense, and severance pay and benefits, where he/she has been convicted of a crime involving an abuse of office or position. Abuse of office or position means either:

- (i) an abuse of public authority, including waste, fraud, and violation of the law under color of authority; or

- (ii) a crime against public justice, including bribery and corruption, forgery, perjury, and money laundering.

ENFORCEMENT OF CONTRACT ✓

Does the Agreement provide for final resolution of any disputes by arbitration, instead of civil litigation?

In weighing the advisability of arbitration, consider:

- (i) arbitration, in theory, brings resolution cheaper and faster than litigation (although selection/scheduling of an arbitrator/arbitration can often take considerable time); and
- (ii) all costs of the arbitrator and the arbitration, except a sum equivalent to a civil filing fee, can be pushed on to the City.

But, if arbitration is selected, City Managers lose both the opportunity to tell their stories to juries, and the possibility of appeal (which is almost universally unavailable after an arbitration award).

“PREVAILING PARTY” PROVISION ✓

Can the prevailing party, in an arbitration or a civil action to resolve a dispute or controversy under the Employment Agreement, recover his/her/its reasonable attorneys’ fees and costs?

The answer needs to be “Yes!” Without a so-called “prevailing party” provision, a City Manager might find himself/herself having successfully sued a City, for example, to recover

severance, but having spent considerable sums in unrecoverable attorneys' fees to do so. Although a Manager runs the risk of losing, and having to pay a City's attorneys' fees, presumably a Manager will be wise enough not to initiate a suit or arbitration he/she will not win.

PENSION ✓

Is City's commitment to Manager's retirement referenced in the Contract?

Reference should be made to the governing City Resolutions providing for Manager's enrollment in PERS, the percentage of the employee pension contribution to be made by City, and to any applicable supplemental retiree health coverage.

COMMUNICATIONS UPON MANAGER'S SEPARATION ✓

In case of the City Manager's separation, for any reason, have the City and the Manager agreed in advance that no member of the City Council, the City Management staff, nor the Manager, shall make any written, oral or electronic statement to any member of the public, the press, or any City employee concerning the Manager's termination, except in the form of a joint press release or statement, the content of which is mutually agreeable to the City and the Manager?

When a City Manager's employment is terminated, the all-too-common Council Members' dash to talk with reporters, staff, and constituents has been successfully stayed in a number of cities. There, the requirement is in the Manager's Contract authorizing only the use of carefully-considered, mutually-agreeable, highly-limited communications. The joint press release or statement must contain no text or information that is disparaging to either party. Either party should be permitted to repeat the substance of the joint press release or statement in response to an inquiry.

RELEASE ATTACHED TO EMPLOYMENT AGREEMENT ✓

As a precondition to receipt of severance pay, is Manager required to sign a form of release that has been attached to the Employment Agreement?

Although under some Employment Agreements severance is awarded without requiring the Manager to release the City from all claims, enlightened City Councils and City Attorneys do not want departing Managers to bank their severance, and then sue their former employers.

Managers should expect that the price of severance is a general release of claims. The Manager should want a *negotiated* form of general release to be attached to the Employment Agreement. The Manager who secures acceptable release language going into employment avoids surprise over what release and other provisions he/she may be asked to agree to in the moment of separation.

RELEASE COMPLIANT WITH FEDERAL LAW ✓

Where a separating Manager is 40 years of age, or older, has the City complied with the federal Older Workers Benefit Protection Act (OWBPA)?

A City's compliance includes the Manager's:

- (i) receiving an Agreement written in plain English;
- (ii) being advised of his/her right to advice from an attorney concerning the release;
- (iii) being granted 21 days to consider the release (if the Manager is released alone; 45 days if he/she is released in a group); and
- (iv) being granted a seven-day period in which to change his/her mind, and revoke

the signed Agreement.

OWBPA compliance gives the City a complete release by the Manager of age discrimination claims under federal law.

RELEASE OF CLAIMS ✓

Does the parties' Agreement provide for the release of all known claims, and unknown claims (waiver of California Civil Code Section 1542), for all time periods prior to the signing of the separation Agreement?

Without providing a complete General Release of Claims, Manager cannot reasonably expect to receive severance. Manager may want to negotiate *mutual* general releases and *mutual* Civil Code Section 1542 waivers, so the releases run both ways, to the benefit of Manager and of the City.

INDEMNIFICATION ✓

Consistent with the California Government Code, does the Agreement provide that the City shall defend, hold harmless, and indemnify Manager for acts or omissions occurring within the course and scope of Manager's employment?

CONFLICTS WITH AGREEMENT ✓

In the event of a conflict between the provisions of the Agreement on the one hand, and the City personnel ordinances, resolutions, rules and policies, the City Charter or the Municipal Code on the other, does the Agreement provide which source of authority shall prevail?

Without a clear statement, the Manager and the City may be left to slug it out.