

PUBLICATION

Employee Repayment Agreements – Tips for Protecting Your Investment

Authors: Angie Davis

December 19, 2019

In today's society, companies often make substantial investments to recruit and relocate top talent – the same talent is often a target for competitors. In order to ensure that this talented employee doesn't allow the company to move them across the country only to leave in six months to work for a competitor, you need an Employee Repayment Agreement. A Repayment Agreement is a legally enforceable contract stating that if the employee resigns or is terminated by the Company within a certain time frame following relocation, the employee agrees to repay the company any relocation expenses that were paid by the company. Here are the top ten tips for having a valid and enforceable Employee Repayment Agreement:

1. Have a **written** agreement that the employee signs **before** employment begins. If using a recruiter or headhunter, advise them of the employee repayment obligations on the front end so there are no surprises.
2. **Prorate** the repayment based on length of service. Most employers use some sliding scale reduction in the amount of payback. For example, require 100 percent repayment if employee leaves in less than 6 months, 75 percent if the employee is employed for 6 months but less than 12 months, 50 percent if employed 12-18 months, and 25 percent if employed 18-24 months.
3. Make the Agreement **simple** and **clear** – the employee should acknowledge the specific amount of the investment and agree to the repayment formula.
4. Make sure that the Agreement contains **at-will** employment language.
5. If you plan on withholding part or all of this repayment from the employees final paycheck, make sure you **comply with the Fair Labor Standards Act and any state or local laws!** You need written authorization for any such deduction and remember that you can never reduce their pay below minimum wage. "Employee agrees that the Company may deduct any relocation expenses which Employee may owe the Company from any sums the Company owes the Employee including, but not limited to, wages, bonuses, sick and vacation pay."
6. Don't forget **taxes!** This counts as income so it must be taxed to the employee. The flip side of this is the Company must take any deduction it took for the reimbursement back into income when the employee repays it. Repayment tax issues are tricky, so check with your tax lawyer!
7. Include an **Entirety Clause**. "The parties acknowledge that the Agreement constitutes the parties' entire agreement with respect to the subject matter hereof and supersedes all prior agreements or promises, whether oral or written, with respect to the subject matter hereof. This Agreement may not be amended, altered or modified except by a writing signed by the parties." This way there can be no claims as to prior or subsequent oral modifications or promises.

8. **Consistently enforce** these Agreements with all employees.
9. **Do not disperse** any relocation benefits until you have the signed Agreement in hand!
10. If you use a recruiter, consider including in the contract a **replacement guarantee** provision whereby the recruiter repays all or a portion of their fee if the employee leaves within a certain time frame (usually 30-90 days), or have them offer to find a replacement free of charge or at a discounted rate.