



Are No-poaching Provisions the Right Choice for Your Executive Search?

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It is no secret that organizations often hire executive search firms to help fill their top positions. What may surprise you is how this practice could impact your career mobility.

Frequently, agreements between executive search firms and hiring organizations contain “no-poaching” or “hands-off” provisions. ACC recently spoke with several executive recruiters and chief legal officers (CLOs) about these no-poaching provisions and how they may impact your career and your organization.

About executive search firm agreements

Organizations typically use one of two forms of executive search firm agreements: retained and contingent. Retained agreements require payment in advance and are generally the preferred format for executive-level searches, such as for the CLO position. The industry-standard fee arrangement is one-third of the position’s first year base and bonus compensation. Additionally, payments may be staggered for employment milestones (for example, when the candidate has been at the hiring organization for six months). With contingent agreements, payment occurs only when the firm identifies a winning candidate who is then hired for the open position.

According to the CLOs and recruiters we spoke with, typically the human resources (HR) department initiates the relationship with an executive search firm, and then the legal departments of the hiring company and the search firm negotiate the specific terms of the contract. However, there can be variation in this process depending on the organizations’ practices and long-standing relationships

between search firms and organizations.

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About no-poaching provisions

Most executive search firm agreements have some form of a no-poaching or hands-off provision. Broadly speaking, a no-poaching provision represents an agreement between two entities not to solicit employees from one another. In the context of executive search firm agreements, the term has a somewhat different meaning. No-poaching or hands-off provisions in executive search firm agreements prohibit the recruiter from soliciting employees from the client organization for open positions elsewhere.

Generally, recruiters will only work with an individual once, but an organization many times. They are careful not to "re-hire" a person they have previously placed.

The recruiters we spoke with noted that there's an important ethical consideration — their clients are the hiring organization, not the individual selected for that position. This is especially true when the recruiter placed the potential candidate in their current role. If recruiters were to routinely poach from their prior clients to fill positions for new clients, the recruiter runs the risk of alienating those prior clients, significantly limiting opportunities for repeat business. One recruiter noted that if recruiters routinely used the same candidates again and again, the talent pool would become smaller. "There is enough good talent out there that it should not be necessary to use the same candidate again and again," one recruiter said.

Justifications for no-poaching

The recruiters we spoke with explained that no-poaching provisions are viewed as protecting the organization's investment in hiring a new executive. In most cases, the organization pays the recruiting firm a significant amount for their services, which cannot be recouped if the candidate leaves soon after arrival. When asked whether any client companies they've worked with have removed the provision from their agreements, recruiters told us no, although one CLO we spoke with reported that their organization removes no-poaching provisions from hiring contracts. At the other end of the spectrum, some companies retain recruiters at multiple firms to extend the "hands-off" status of their employees.

When no-poaching becomes a problem

For in-house counsel seeking to transition to a new company, no-poaching provisions can be a burdensome hurdle that prevents recruiting firms from contacting them when new opportunities arise. In-house counsel, especially at the deputy general counsel and CLO/GC levels, may struggle to be considered for employment opportunities because of no-poaching provisions.

This situation is exacerbated where no-poaching provisions extend beyond a department and impact all senior-level positions company-wide. For example, a no-poaching provision contained in an executive search firm agreement executed when hiring a CFO covers not just the finance department, but all divisions within the organization, including the legal department.

Another potential concern with no-poaching provisions comes from a seemingly unrelated third party: government regulators. Some trade and competition regulators have found that certain employment restrictions, such as no-poaching provisions, violate antitrust or anticompetition laws in that jurisdiction. While not all no-poaching provisions are suspect under anticompetition principles, it is an important consideration for all parties when drafting or agreeing to the inclusion of no-poaching provisions in executive search firm agreements.

Key insights to remember with no-poaching provisions

CLOs and recruiters shared several insights for in-house counsel navigating no-poaching provisions both in the context of their organizations and their own career mobility.

1. Awareness is key.

Both recruiters and CLOs noted that many lawyers are not aware of no-poaching provisions in executive search firm agreements, especially if there is a long-standing relationship between the hiring organization and the recruiter. Instead, lawyers only learn of these provisions when they are told that a recruiter can't speak to them about a career opportunity. Having an awareness that these provisions exist and how they are generally structured allows in-house lawyers to be proactive and ensure that these provisions continue to meet the organization's needs. Awareness also allows lawyers to ask the right questions in their career searches.

2. Drafting (and interpretation) matters.

The way a no-poaching provision is written can significantly expand or constrict its applicability. As mentioned above, no-poaching provisions can be limited to a certain timeframe and/or to a specific division/subsidiary of the organization. Other potential limitations can be implemented to help balance a company's interest in protecting its investment in a new hire with their executives' interests in career and professional mobility.

No-poaching provisions, as with all contracts, legally apply only to the parties that enter into them — here, the hiring organization and the recruiting firm. Individuals not a party to this contract are free to approach the recruiter or company directly to express interest in a position. One of the recruiters we spoke with said that individuals will reach out periodically to the search firm as a proactive way of learning about new opportunities that the search firm may or may not be able to bring to them.

3. Philosophies on succession planning influence the use of no-poaching provisions

The CLOs we spoke with shared that the organizations and leaders with which they have experience often possess a variation of two categories of succession strategies which can heavily influence their use of no-poaching provisions. Some leaders ascribe to a philosophy that employee retention is best accomplished by incorporating no-poaching provisions to ensure that talent is not recruited out of the organization by recruiting firms hired to fill other positions. This philosophy focuses on the preservation of the team, believing that having a stable workforce benefits the organization.

Other leaders instead believe that their staff should be encouraged to develop their careers and be open to all opportunities for growth, even if those opportunities lead to other companies. Under this philosophy, the belief is that happy employees will better serve an organization and that, by

developing talent that may move to other positions, you create a cache of lawyers that will serve the best interest of the organization in other ways, such as through business partnerships, re-hires, and other practices.

Understanding no-poaching provisions is key

Hiring at the executive level brings a host of considerations, especially for lawyers who seek to become a CLO/GC and advance in that role. Understanding the nature and ramifications of no-poaching provisions is critical for best serving organizations as well as fostering an environment of career development and professional growth.

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Amy Chai serves as associate general counsel and director of advocacy initiatives at ACC. In this role, she

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