

# Promises Made During the Hiring Process Can Expose Employers to Liability

By Katie Loberstein

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In a competitive job market, it may be tempting to say—or pay—anything to attract top talent. But employers should take care to ensure that what they tell applicants during the recruiting process, and any written offer or formal employment agreement, accurately reflects the realities of the job and doesn't overpromise authority or compensation. Otherwise, they could be on the hook for a breach of contract claim.

That was the lesson learned in *Bill & Melinda Gates Foundation v. Pierce*, which [was decided late last year in the Washington Court of Appeals](#). In that case, the Foundation spent months recruiting Pierce, a senior executive from Salesforce, to fill the newly created role of Chief Digital Officer (CDO). Prior to his acceptance, Pierce negotiated the scope of his role, which the parties agreed would be outward-facing, "far-reaching and transformational," and "not the role of a glorified IT operations manager."

Pierce assumed the role in April 2015 and was terminated 18 months later. He sued the Foundation for breach of contract based upon the offer letter and surrounding discussions, alleging that the job for which he bargained had never materialized. Instead, Pierce claimed that he was met with resistance from staff almost immediately, who wanted him to scale back his large-scale initiatives and instead "fix IT." Pierce also claimed that his supervisor had failed to lay the groundwork or facilitate the necessary transition to allow him to fill the promised "far-reaching and transformational" position. For its part, the Foundation argued that a promise of a "transformational" role was too vague to be enforceable, and in any event, Pierce's at-will employment status afforded it the discretion to modify his job duties.

The trial court sided with Pierce and held that the Foundation breached a binding promise to the executive. The Court of Appeals affirmed the ruling, explaining that the Foundation's promise of a "far-reaching and transformational" role may have been vague and unenforceable in other circumstances, but the Foundation "was uniquely situated to provide exactly that which it offered, but failed to do so." Further, although the at-will nature of the employment relationship allowed the Foundation to modify Pierce's job duties, it did not allow the Foundation to "fundamentally change what it meant to be the CDO." By making such a fundamental change to the role, the court found that the Foundation had breached the implied duty of good faith and fair dealing that underpins every bilateral agreement with respect to the terms and conditions of employment.<sup>1</sup> The Foundation was ultimately ordered to pay Pierce the difference in value between the job he was promised and the job he was provided.

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<sup>1</sup> As the court noted, there is no duty of good faith and fair dealing *as to termination* if the parties have agreed that employment is at-will.

*Disclaimer: This article is not legal advice. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps business must take under applicable laws.*

The *Pierce* case is an important reminder for employers to be careful not to over-commit during the hiring process, ensure that the job that is advertised is an accurate representation of the job that the organization needs, and make sure to have buy-in from the key stakeholders. Here are some specific takeaways to consider:

- **Communicate with key stakeholders prior to creating new roles.** When creating a new role within an organization, ensure that the individuals and departments who will regularly engage with that role provide input regarding their expectations and assumptions for what the role should entail. This will help ensure sufficient buy-in from key stakeholders at the outset.
- **Update job descriptions regularly.** Ideally, employers should view job descriptions as living documents that change over time. As the employer's needs change, so do employees' roles. Employers should update job descriptions annually (at minimum) and review any updates with their employees. This will help ensure that everyone is on the same page regarding the duties and expectations of the job.
- **Include appropriate disclaimers in job descriptions.** Consider incorporating a statement to job descriptions indicating that it is not intended to be comprehensive, and that job duties and responsibilities may change at any time, with or without prior notice.
- **Don't make promises you can't keep.** Employers and recruiters should communicate the goals, intentions, and expectations for a role, but they should take care not to use overly aspirational language that unintentionally promises a certain level of visibility and/or prestige, or guarantees a benefit that the employer cannot actually provide.

We hope this is helpful for employers as they navigate the hiring process. As always, employers should feel free to call on us if they have questions or need assistance with evaluating their agreements, policies, or practices.

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**Katie Loberstein** supports clients with their employment-related needs at every stage. She regularly advises employers on a range of day-to-day workplace matters, including employee policies, noncompete issues, employee investigations, performance issues, leave laws, and employee hiring and separation. She also prepares hiring and separation agreements, workplace policies and handbooks, and employee training materials.

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