

Buchalter

Responsible Onboarding and Offboarding of Residential Mortgage Loan Officers

Presented by

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Make Full Use of Employment Agreements with Loan Officers

A. Employment Agreement - with covenants given during and after the end of employment tenure. Commonly found covenants are:

- Covenant to uphold the Employers' Privacy Policy, to not disclose or make use of in any unauthorized way consumer non-public financial information, and to take every reasonable step to preserve the confidentiality of said information in accordance with Employer's Privacy Policy.
- A Covenant not to take, misuse or, destroy any of the Employer's Confidential and Proprietary Information.
- After employment termination, a covenant not to recruit or solicit away any employee of the previous employer for employment with any person or business that competes with the employer's business activities. For a limited period of time.
- A Covenant to return all business equipment owed by previous employer. Equipment is commonly made available to employees in order to fulfill their duties but with the understanding that such equipment is to be returned to the employer upon termination of employment or change in duties.
- Once employment ends, the terminated employee must continue to abide by terms for up to one year.

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B. Confidentiality (Non-Disclosure) Agreement - This Agreement is key to identifying what information and categories of information are the property of the Employer and must be left behind and not shared with outside third parties without the prior consent of the Employer (and, as discussed later, the customer). The Agreement will define both generally and specifically what of the Employer's property is to be treated as "Confidential Information" and as "Proprietary information." The following are commonly included in these categories:

- Customer Lists
- Loan applications, files
- Loan Prequalification and Preapproval files
- Marketing plans
- Operating budgets
- Branch Profit & Loss Statements, Financial statements
- Employee lists
- Regulatory filings and examination reports
- Lenders' credit algorithms
- Account numbers
- Employee Work Product that was prepared by lateral LO hire or others during their employment with previous employer.

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C. Compliance Agreement is a key document for hiring lateral Loan Officers and best protect your mortgage company. If you don't have one or find that yours is not up to speed, use this document to enhance your "best practices" in on boarding and off boarding LOs.

- It informs the lateral hire to go back and re-read any and all Employment and Confidentiality Agreements they entered into with previous residential mortgage lending and/or consumer financial services employers. The lateral hire is expected to fully abide by previous employer's HR contracts as well as current employer's contracts as a condition of new and continued employment with your mortgage company.
- It establishes the expectation placed on the lateral hire to comply fully with all agreements, covenants and restrictions imposed on them by a previous mortgage employer. Including but not limited to:
 - Unauthorized disclosure or use of previous employer's confidential and/or proprietary information;
 - Unauthorized disclosure or use of previous employer customers' non-public financial information;
 - Unauthorized recruitment or solicitation of any employee of the previous employer and their affiliates for a certain time period (up to one year).
- It requires that the lateral hire declare they are not aware of any agreements, covenants or restrictions that would preclude, conflict with or compromise the hire from performing and competently fulfilling their job duties with new employer.
- It requires the lateral hire to inform the new employer's HR Department and their Supervisor immediately upon learning or becoming aware that the current job duties being fulfilled are or may be violating a previous employer's agreements, covenants or restrictions.

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D. Consumer Financial Privacy Policy. Lateral hires are expected to know and fully comply with their new employer's consumer financial privacy policy covering:

- Federal Gramm-Leach-Bliley Act - defining what is protected consumer non-public financial information; general prohibition on sharing and disclosing that information with non-affiliates third parties; and instances where sharing and disclosure are emitted and under what conditions.
- Federal Fair Credit Reporting Act provisions on sharing consumer non-public financial information with Affiliates, under what circumstances and conditions.
- State laws covering consumer financial information privacy, particularly those states that require a consumer's consent (opt in) to begin engaging in the sale, sharing and joint marketing of consumer NPFI (ie, California, Vermont).
- Starting January 1, 2020, the California Consumer Privacy Act that adds greater consumer rights, protections and transparency of use of "Personal Information."

E. Data Security, Information and Cybersecurity Policies and Procedures. Lateral hires are also expected to know and fully comply with new employer policies on how to keep consumer and company electronic data safe and protected from unauthorized access and use.

Training

A. Educate Production Staff, Recruiters about your company's HR agreements. These personnel are not authorized to make promises to new LO recruits that conflict with these agreements.

- B. Educate Lateral Hires when Onboarding.** Lateral hires are expected to know their HR contracts with previous employers.
- Advise them to consult with an attorney if: (i) experiencing difficulty accessing their employment file and the contracts entered into with previous employer, or (ii) if not sure what their responsibilities are to their previous employer under the terms of those contracts, or (iii) whether business activities under new employer places the lateral hire at risk of a breach of contract claim asserted by a previous employer (or customer).
 - Lateral hires can only bring with them consumer data and information that is either (i) in the public domain at the time it is acquired, or (ii) that became public through no unauthorized act or omission of the lateral hire or any other persons involved in the new employer's operation. Acceptable: home address and how much is owed on the home, employment address, email address, publicly available phone numbers.
 - Leave behind previous employer's Confidential and Proprietary Information. Bring only publicly available consumer data such as home address, employer address, how much is owed on their home, phone number, social media contact information.

Training

C. **Educate Terminated (Outgoing) Loan Officers.** Review HR contracts with LOs before they leave. Highlight the risk of liability for a breach after employment terminates. Make outgoing LO's understand that they and potentially their new employer (with evidence of complicity) will be held responsible for post-termination breaches of these contracts.

D. **All Must Understand:**

- There is a high degree of certainty that a previous employer will find out if the former employee engages in business activities that are in violation of these contracts.
- Both the former employee and their new employer will face "cease and desist" demand letters as a precursor to filing civil litigation seeking injunctive relief and monetary damages, as well as consumer complaints (directly and through regulatory agencies) leading to regulatory investigation and enforcement actions taken.
- "Cease and Desist" letters can also come from consumers/customers whose nonpublic financial information has been taken, without their prior written consent, from the previous job for use at the new job. Loan applications and loan files in pipeline, are not freely transferable from one lender to another.

When Offboarding a Loan Officer, Communications with Customers Must Be Top of Mind

When a Loan Officer's employment terminates, the Employer must be proactive in communicating with their loan customer what is going to happen in the transition of the production team, what is being done to secure the safekeeping of their non-public financial information, and to what degree the event will affect the customer's loan application in process, if at all.

1. The Employer owns the customer relationship, loan pre-approval and pre-qualification file prepared for the customer, and the loan application file. **Federal and State Record Retention Laws** dictate this position.
2. **Federal and State Privacy Laws** hold the Employer responsible for the safekeeping of all electronic and hardcopy non-public financial information supplied by the customer. **Data Security and Cybersecurity Policies and Procedures** are there to reduce the risk of unauthorized access and tampering of company and consumer electronic files alike by unauthorized persons. The Employer must take measures to ensure that its own company privacy policy is fully adhered to in the off boarding process.
3. **Fair Credit Reporting Act** limits the sharing of consumer credit reports with outside third parties through its "permissible use" and "reseller" rules. CRA service contracts with lenders also preclude the sharing of reports with outside third parties, without the CRA's prior consent. Counsel the outgoing LO of these legal and contract restrictions that prohibit the re-use of a consumer credit report pulled under the Employer's CRA services account.
4. **HMDA Reform Rule.** The Loan Application identifies the lender by NMLS #. The loan number assigned to that application is referred to under HMDA as a Unique Loan Identifier (ULI) that contains that lender's own registered Loan Entity Identifier (LEI). A loan file cannot be transferred to another lender without securing applicant's signature to a loan brokerage agreement or written consent to withdraw the application and start over with the LO and their new employer.

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Melissa Richards, CMB is a California licensed attorney with a national practice specializing in federal and multistate compliance, licensing and enterprise risk management for the financial services industry. Her clients are engaged in residential and commercial mortgage, fintech, licensed non-depository and depository institution consumer and commercial lending, either directly or in supporting vendor roles. Ms. Richards has both outside counsel experience as well as general counsel experience. From 2012-2018, Ms. Richards served as the Chief Legal & Risk Officer of a mid-size independent mortgage company ranked as one of Scotsman Guide's Top 15 Mortgage Lenders in 2018-2019.

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