

Employment Contracts: When to Offer and What to Include

Protect Against

- **Executive Inflexibility**
- **Executive Malfeasance**
- **Misappropriation of Confidential Information**
- **Post-Employment Competition**
- **Misunderstandings Regarding Job, Compensation, and Benefits**
- **Inability to Fire for Cause**
- **Wrongful Termination Lawsuits**

Sample Employment Offer

Sample Employment Agreement

Grounds for Automatic Dismissal

All employment contracts should provide that the following actions by an executive/employee will automatically terminate employment:

- A breach of or material default under the provisions of the agreement or the employer's written employment policies.
- Engagement in any business in competition with the employer, either directly or indirectly, as an employee, owner, partner, director, consultant, agent, or other position.
- Dishonesty or conviction by a court of law for fraud, embezzlement, felony, or sexual harassment.
- Violation or disclosure of the company's trade secrets, inventions, patents, and other proprietary information, such as a marketing plan, customer list, or business plan.

Always build in an option to dismiss an employee with or without cause within the first three to six months of employment.

When to Offer an Employment Contract And What to Include

Smaller and mid-sized companies are particularly vulnerable to the loss, departure, or termination of a key person. That is especially true for sales and marketing executives, who can represent a good percent of the company's business and who have inside access to the company's products, customers, industry niche, and marketing and business plans.

Consider these actual events:

#1. One top sales executive, hired two years ago, increased company sales by more than 30% annually. He alone was responsible for about 40% of the company's total sales. At the end of the two years, he demanded a big salary increase and an option to buy 10% of the company at a bargain price. When the owner refused, this executive went into business for himself and is now one of the company's major competitors. *Problem:* There was no employment contract nor noncompete agreement with his original employer to prevent him from doing so.

#2. A second executive sued her employer for a full year's salary after she quit because she was asked to relocate. The relocation issue had been discussed with company management in an informal meeting that had taken place several years earlier. At that time, the executive indicated that because of family responsibilities she could never relocate. Her written memo of that earlier meeting's discussion led the court to rule in her favor. The employer was directed to pay the executive \$80,000 in lost wages plus her legal expenses. *Problem:* There was no written contract specifying the terms of her employment nor the company's rights and flexibility in changing her job assignment.

#3. Another executive decided to start his own company within 30 miles of his previous employer's offices. He is now in direct competition with the company, using the knowledge he gained when he had access to the company's customer list and marketing plan. Again, there was no employment contract nor noncompete agreement to keep him from doing so.

#4. An executive, who owned 20% of the business, was fired after the 80% owner became dissatisfied with his performance. The executive sued and the court ruled in his favor, ordering the company to pay him six months' salary and to buy his 20% ownership position. The company was given six months to determine the stock's value and negotiate payment terms satisfactory to both the executive and the court. *Problem:* There was no written contract specifying legitimate causes for dismissal, the procedure for termination, the process for buying back the stock, nor the formula for setting the buy-back price.

In all of these cases, there were no formal legal contracts nor memos of understanding specifying the terms of employment, protecting privileged "insider" company information, or preventing departed or dissatisfied executives from using their knowledge of a former employer in competing against that employer.

Providing Protection

An employment contract can help prevent misunderstandings between employees and their employers as to each party's rights and responsibilities by spelling out the details of employment and the penalties for nonperformance. It also offers important protection to both employee and employer. The employee is assured that he will receive the agreed-on salary and benefits and that he will be guaranteed certain notice and severance rights in case of termination. For the company, a contract provides specific procedures to follow in taking action against employees who don't perform or who perform in ways detrimental to the company and/or its reputation. These procedures can, in turn, form the company's basis for a legal defense or legal suit against the employee.

The important questions: When should a company use employment contracts? Which employees should they cover? The simple answer is that these contracts should be considered by any company with sensitive, confidential, or proprietary information that gives them a competitive advantage in the marketplace and that is important enough to be kept out of the hands of competitors. And they should cover any employees who (a) perform such important duties or contribute so much to revenues and profits that their nonperformance, betrayal, or departure could cause the company serious damage, or (b) occupy a position that gives them access to the company's sensitive, proprietary information.

The greater the potential for damage — either because of the nature of the

information being protected or the access of the employee being covered — the more important it is to use employment contracts and the more detailed the contract should be. The contract should be customized to the interests and priorities of the company and the role and responsibilities of the individual employee. Each contract should differ in specific provisions, depending on what potential actions they are protecting and by which employees.

A company with a heavy investment in its research and development operations, for example, may decide to use employment contracts only for the employees in that department. Another company may draft contracts only for its three top executives.

Standard Provisions

No matter what the industry or who the employee, it is generally agreed that the following provisions should be included in any employment contract or memorandum of understanding.

■ **Executive inflexibility.** Business needs and circumstances change and it may become necessary to switch an executive from one assignment to another. But he or she just might refuse, claiming that is not the job for which he was hired.

Contract provision: Describe the executive's responsibilities in detail, but in terms broad enough to allow you flexibility in assigning future projects and other responsibilities as they emerge and in relocating executives to departments or facilities where they are needed.

■ **Malfeasance.** Protect against a key person performing at lower-than-expected standards.

Contract provision: The employment contract should be quite clear in establishing the grounds for early or immediate termination and in defining severance pay and termination notice periods, e.g., two weeks' or one month's notice.

■ **Misappropriation of confidential information.** Most executives have access to trade secrets, customer lists, and other confidential data, such as the company's long-range marketing plans. Careless or deliberate leaking of this information to competitors or using it for personal gain can undermine a company's

sales and market position.

Contract provision: Include a clause in the contract that obligates the employee to refrain from using or disclosing *any* confidential information obtained while he is employed by the company and after he has left. *Note:* Regarding inventions and patents, stipulate that the employee should give prompt disclosure of all discoveries and assignment to the employer of all rights to any inventions and patents developed while employed by the company.

■ **Post-employment competition.** No business wants more competition, particularly from a former employee who can use the company's training and experience to sell competitive products, make inroads into your marketplace, or solicit your customers.

Contract provision: Insert a *covenant not to compete*. Do not make the clause so restrictive that a court could interpret it as eliminating the executive's means of livelihood. The covenant should not prohibit the executive from working in job functions, geographical territories, or product areas that are not in direct competition with you. In addition, the specific period during which the executive is prohibited from competing with a former employer should not be so long as to be unreasonable, e.g., more than five years. The geographical area covered also must be reasonable, e.g., not the entire United States if your company's sales are principally in the New England area.

■ **Automatic termination.** You want to be able to terminate employment *immediately* in the case of events or actions which can seriously injure the company or its reputation.

Contract provision: Indicate that the following events are grounds for *automatic* termination: (a) a material breach of the employment contract, (b) dishonesty or conviction by a court for fraud, embezzlement, or felony, (c) engagement and ownership in any business in competition with the company, and (d) disclosure of the company's trade secrets, inventions, and other proprietary information, such as a customer list or marketing plan, to persons outside the company.

Get Terms in Writing

An executive's compensation and benefits can be easily misunderstood in the verbal give-and-take of an employment interview. And any wrong assumptions can cause future dissension, dissatisfaction, and lawsuits.

What to do: Spell out all the facts in an employment letter or formal contract: compensation and how bonuses if any, are computed; retirement plan contributions and stock options; vacation pay, illness, medical, and disability coverage; expense reimbursement and documentation requirements; and severance pay if employment is terminated. If the executive is expected to travel extensively or work weekends, also include those facts in the letter or contract.

Avoid more legal problems: Stipulate that the final terms of the signed employment agreement supercede all previous communications, negotiations, representations, and agreements. Specify that your company's domicile (state of incorporation) will be the jurisdiction to settle legal disputes. Indicate that any amendments, additions, or modifications to the agreement must be in writing and signed by each party.

Your right to terminate: Don't lock yourself into a long-term contract early on. Build in an option to sever the relationship after a trial period of three to six months. You also should specify that any termination during the trial period is *solely* at your option and *with* or *without* cause. After that period, the employee's rights to notice and severance kick in.

Cautions on Firing

Whether you have an employment contract or not, all employees and executives, including employed stockholders, have legal rights, so protect yourself by doing the following:

- Keep a detailed record of the employee's or executive's actions and non-actions which resulted in the termination. You may need this to support your case in a lawsuit.
- Don't hold back any part of an employee's salary without good reason and

only after consultation with your lawyer. Most states have laws that require employers to pay salaries promptly.

- Check your company's benefit plans and be sure to pay the terminated employee any accumulated money due.
- Before the employee leaves, make sure all property belonging to the company is returned. This can include such items as: customer list, financial statements, projections, legal contracts, and marketing plans.
- Review any employment contracts for potential problems (e.g., you must give three months' written notice) before terminating any employee.
- Check the company's bylaws and stockholder agreements for obligations. For example, the executive may have the right to sell his or her stock back to the company or you personally within a certain period of time. Pay attention to the time period and arrange for the cash needed to purchase the stock.
- If a terminated executive has signatory power over the company's bank accounts, withdraw that power immediately.
- When notifying your employees, suppliers, and/or customers that the employee is no longer with the company, be careful that your wording doesn't bring on a libel or slander suit.
- Check with your lawyer about enforcing any noncompete, confidentiality, or trade secret agreements signed by the employee, executive, or stockholder.
- Don't forget to ask the employee or executive for office keys, company credit cards, and his files on the company's business.

Before firing a hostile employee, particularly one with an employment contract, ask your lawyer to review your written memorandum of the reasons for the employee's dismissal as well as any legal documents or memos related to his or her employment.

In summary, an employment contract or memo of understanding is *not* a guarantee. But it does provide some protection for both the employer and employee in the case of misunderstandings, disagreements, or the disintegration or severing of the relationship.

* * *

Sample Employment Agreements. Please see *Exhibit 1* on page 10 for a sample Employment Offer and *Exhibit 2* on page 12 for a sample Employment Agreement. Keep in mind that these exhibits are only samples and should be used in consultation with your own lawyer to prepare a customized offer and agreement that reflects your company's special needs and circumstances. □

Sample Employment Offer

Here is a sample letter sent by an officer of a company to an individual offering him the position of comptroller. The letter should be used with your own lawyer to prepare a customized proposal that reflects your company's special needs.

John Smith
18 Aspen Street
Newtown, NY 11000

Dear Mr. Smith:

The continued growth of our company has generated increased needs for accurate and timely accounting and management information. In addition, proper control of the company's assets is mandatory to ensure the continued stability and liquidity of the company's operations. I am pleased to offer you the following:

Position: Comptroller

Responsibilities: Organize, staff, develop and administer the accounting function. Functional activities will cover accounts payable, receivables, general ledger, cost accounting, payroll and cash flow control. You will report to the Vice President, Finance and Administration.

Salary: The starting salary is \$60,000 per annum, paid on the fifteenth and thirtieth of each month at the rate of \$2,500.

Vacation: Paid vacation is allotted on the basis of one week for each six months worked. After three years of service, you are eligible for three weeks paid vacation.

Benefits: The company offers a fully paid hospitalization and insurance program for all employees. Individual dependent coverage is available at an additional cost of \$88 per month. The company also provides a program for: (a) retirement benefits through a 401(k) plan, (b) profit-sharing participation, and (c) disability insurance. Details are available in the enclosed benefit booklet.

Stock options: As a member of the management team, you will have the right to participate in the company's stock option plan. Specific allocations and participa-

tion will be determined, at our sole discretion, one year after commencement of service. In addition, at that time, your salary status also will be reviewed relative to your performance and overall contribution to the company.

Employment Agreement: Prior to actual employment, you will have to complete an Employment Agreement; a sample copy is enclosed.

Offer: This offer is firm for your acceptance within 10 business days of the date of this letter and subject to the completion of the Employment Agreement mentioned above.

If you have any questions, please contact me directly. I look forward to working with you.

Very truly yours,

Vice President
Finance and Administration

Enclosures: Benefit Booklet and Sample Employment Agreement.

Sample Employment Agreement

The Employment Agreement on the following pages is only a sample and should be used in consultation with your lawyer to prepare a customized agreement that reflects your company's special needs and circumstances.

Sample Employment Agreement

1. INTRODUCTORY PROVISIONS.

EMPLOYMENT AGREEMENT BETWEEN [NAME OF EMPLOYER]

— and —

[NAME OF EMPLOYEE]

This Agreement is entered into as of [DATE] between [NAME OF EMPLOYER], a [STATE] corporation, [ADDRESS] (the "Employer"), and [NAME] (the "Employee").

SUMMARY

The Employer transacts business in [DESCRIBE BUSINESS OF EMPLOYER]. The Employee is familiar with the businesses in which the Employer is engaged.

The Employer desires to employ the Employee; and the Employee desires employment with the Employer. Accordingly, in consideration of the mutual covenants and promises contained herein, and other good and valuable consideration, receipt of which is hereby acknowledged, the Employer and the Employee agree as follows:

COMMENTS:

The Introductory provisions will identify the parties and describe, preferably in some detail, the Business of the Employer. If the Employee has been employed previously and now is being offered a Contract, there should be a compensation increase made and recited to ensure that there is consideration for the Contract, although in many States the written contract itself will be deemed to constitute adequate consideration.

2. AGREEMENT OF EMPLOYMENT.

[General Provision]:

Section[]. Employment. The Employer hereby employs the Employee during the period commencing [DATE], and continuing until this Agreement is terminated, to serve as [TITLE] , and in such other position or positions with the Employer or its subsidiaries or affiliates as shall hereafter be designated by the Employer. The duties of the Employee shall be [DESCRIBE DUTIES IN DETAIL]. The Employee agrees to perform and discharge the Employee's duties and responsibilities in such manner as may be prescribed from time to time by the Employer, and the Employee agrees to abide by all of the written or unwritten policies of the Employer, as may be prescribed from time to time by, and be subject to the direction of, the Employer, except as specifically provided to the contrary in this Agreement. The Employee hereby accepts such employment and agrees to devote the Employee's full business time exclusively to the faithful and diligent performance of the duties provided for in this Agreement and agrees in connection with the performance of such duties to act in a manner consistent with the primary objective of maximizing the profitability of the Employer. The Employer reserves the right to relocate its principal office to a location within [NUMBER] miles of its present office.

COMMENTS:

The basic Employment provision should describe in as much detail as possible the duties of the Employee so as to provide better support for the Covenant Not to Compete. The more detailed, the more likely will be enforcement of the Covenant, since the Courts will consider the restriction more narrowly drawn and therefore less intrusive on the Employee's future livelihood.

The General Provision above seeks to obligate the Employee to devote full time to duties, and as a general rule Courts are *far* more prone to enforce a provision against competition during the Term of an Employee's agreement than during a restrictive period following the conclusion of the Term.

This Provision also seeks to require the Employee's adherence to all written and unwritten policies of the Employer; the enforceability of this Provision will depend on the facts. If there are written Employment Policies and Manuals, this should be

recited and the Employee should specifically agree to be bound by them. Future changes in policies, if reasonable, should be legally binding on the Employee, but this provision would not be interpreted to give the Employer carte blanche to change the Employee's duties or other terms of employment, particularly if the changes are inconsistent with the Employee's contract.

[No Conflicting Agreements]:

Section []. No Conflicting Obligations. The Employee represents that the Employee is under no obligation to any former employer or other party which is in any way inconsistent with, or which imposes any restriction upon, the Employee's acceptance of employment under this Agreement with the Employer. The Employee is not in default under, or in breach of, any agreement requiring the Employee to preserve the confidentiality of any information, client lists, trade secrets or other confidential information; and neither the execution and delivery of this Agreement nor the performance by the Employee of the Employee's obligations under this Agreement will conflict with, result in a breach of, or constitute a default under, any employment or confidentiality agreement to which the Employee is a party or to which the Employee may be subject.

COMMENTS:

If the Employee leaves employment while subject to a contract known to the subsequent Employer, a claim might be made by the prior employer against the new Employer for inducing the breach of contract and therefore the no conflicting Agreement provision is generally advisable if there is any doubt.

[No Relocation]:

Section []. No Relocation. Anything contained in this Agreement to the contrary notwithstanding, the Employee shall not be required to perform any of the services which the Employee is required to perform under this Agreement outside of the [CITY] Metropolitan Area (other than business travel undertaken in the normal course of the Employee's employment), and the Employee shall not be required, for any reason, to change the Employee's place of residence to any area outside the [CITY] Metropolitan Area. For purposes of this Agreement, the [CITY]

Metropolitan Area shall mean the area within a radius of [NUMBER] miles of [SPECIFIC LOCATION IN CITY].

[Relocation]:

Section []. Relocation. From time to time during the Term, the Employee agrees, at the request and expense of the Employer, and subject to reasonable notice and to the Employer's obligation to relocate the Employee at the Employer's expense to [CITY] at the end of the Term, to relocate to another present or future office of the Employer in another City, State, or Country.

COMMENTS:

With the world now being a three-time center economy in the Financial Services Business, it is increasingly common for Employees to be transferred from one time zone to another as circumstances require. From the Employer's perspective a relocation clause is therefore advisable and, if an Employee does not want to move, then a no relocation clause would be in the Employee's best interest.

[Maintenance of Records]

Section []. Maintenance of Records. During the period that the Employee is employed by the Employer, the Employee shall maintain proper files and records relating to work performed by the Employee in accordance with good business practice and the standard procedures of the Employer or as otherwise specified by the Employer orally or in writing from time to time. All such files and records are the exclusive property of the Employer or, as the case may be, any subsidiary or affiliate of the Employer. Upon termination of the Employee's employment with the Employer for any reason, the Employee will deliver to the Employer all files, computer discs, CD ROMs and other records (including all copies) of any nature which are in the Employee's possession or control and which relate in any manner to the Employee's employment or to the activities of the Employer or any subsidiary or affiliate of the Employer.

[Work Product]:

Section []. Work Product. The Employee agrees that all ideas, creations, improvements and other works of authorship created, developed, written or conceived by the Employee at any time during the Term and which are within the scope of the Employee's duties for the Employer are works for hire within the scope of the Employee's employment and shall without further compensation to the

Employee be the property of the Employer free of any claim whatsoever by the Employee or any person claiming any rights or interests from, through or under the Employee.

COMMENTS:

The Maintenance of Records and Work Product Clauses could be extremely useful in the inevitable attempt to recover documents and customer notes from a departed Employee.

[Business Conduct]:

Section []. Business Conduct.

[](a) **Professionalism and Courtesy.** In order to maintain and enhance the Employer's standing and integrity in the business community, the business and personal conduct of the Employee must be totally professional and above reproach and the Employee must at all times observe the highest standards of professionalism and courtesy in the Employee's behavior with the public, with colleagues, with customers and with competitors. The Employee is required to well and faithfully serve the Employer and to the best of Employee's ability use the Employee's best efforts at all times to promote the development and enhancement of the Employer's business and reputation.

[](b) **Honesty and Fair Dealing.** The Employee must maintain the highest standards of honesty and fair dealing in the Employee's work for the Employer and any subsidiary or affiliate. Great importance is attached to the observance of the Employer's policies and procedures as expressed in any personnel or compliance manual, all Federal and State laws and regulations, and any applicable self-regulatory organization. Breach of any of these obligations may be regarded as misconduct and may result in summary dismissal for cause.

[](c) **Solicitation for Employment.** If at any time the Employee is, directly or indirectly, approached or solicited by a third party, with a view to or with the intention of taking up employment or entering into some other business relationship, whether directly or indirectly, with any party including without limitation any party which is involved in a business which is competitive with the current or then contemplated business of the Employer or any subsidiary or affiliate, and the Employee is seriously contemplating such solicitation, the Employee shall disclose that fact immediately in writing to the Employee's immediate superior.

[](d) **Acceptance of Prospective Employment.** Provided that the Employer has not notified the Employee in writing of the Employer's intention not to extend

this Agreement, then the Employee shall not, prior to the end of the Term, without the written consent of the Employer, enter into any agreement, whether oral, written or otherwise, with any person, firm or corporation providing for the Employee's future employment by such or any other person, firm or corporation.

COMMENTS:

A good conduct clause such as the above Section is strongly favored by some Employers. The provisions requiring notice to the Employer of a possible poach, and prohibiting subsequent discussions prior to expiration of the Agreement, are probably not of substantial substantive assistance in the event an Employee is approached or decides to leave employment at the end of the Term.

3. TERM OF EMPLOYMENT.

[Fixed Term]

Section []. Term. Subject to the termination provisions provided below, the term of this Agreement (the "Term") and the Employee's employment shall be for a period of [TERM], commencing [DATE], and terminating as of the close of business on [DATE].

[Evergreen]

Section []. Term. Subject to the termination provisions provided below, the term of this Agreement (the "Term") and the Employee's employment shall commence on [DATE] and shall continue thereafter until terminated by the Employer on [PERIOD] written notice or by the Employee on [PERIOD] written notice.

[Fixed Term Plus Evergreen]

Section []. Term. Subject to the termination provisions provided below, the term of this Agreement (the "Term") and the Employee's employment shall be for a period of [TERM] commencing on [DATE], and terminating as of the close of business on [DATE], provided that if the Employee's employment continues after such termination date, then this Agreement shall continue thereafter until terminated by the Employer on [PERIOD] written notice or by the Employee on [PERIOD] written notice.

COMMENTS:

The Term is of course a critical provision for negotiation, and the Evergreen, or fixed Term plus Evergreen, are increasingly popular. The Fixed Term plus Evergreen also cures the common situation of the hold-over Employee who simply continues working after the termination of a Fixed Term Contract.

4. COMPENSATION.

[Fixed Salary]

Section []. Compensation.

[](a) **Salary.** The Employer shall compensate the Employee with an annual base salary of **[\$[AMOUNT]]** (the "Base Salary"). Payment of the Employee's Base Salary shall be made in 26 semi-monthly installments of **[\$[AMOUNT]]** each, less all applicable payroll withholding taxes.

[Guaranteed Bonus]

Section []. Guaranteed Bonus. In addition to the Base Salary, the Employee will receive a guaranteed bonus of **[\$[AMOUNT]]** per annum, to be paid **[QUARTERLY] [ANNUALLY/SEMIANNUALLY] [MONTHLY] [SEMI-MONTHLY]**. The Employee will not be entitled to receive any unpaid bonus amount under this section if the Employee terminates this Agreement pursuant to Section [] (Termination Without Cause by Employee) or if the Employer terminates this Agreement pursuant to Section [] (Termination For Cause by Employer).

[Discretionary Bonus]

Section []. Discretionary Bonuses. In addition to Base Salary, the Employer may also compensate the Employee with bonuses in the discretion of the Employer.

[Forgivable Loan]

Section []. Forgivable Loan. In addition to Base Salary, the Employer shall, within **[NUMBER]** days of the commencement of the Term, lend the Employee, in return for a promissory note in form and substance satisfactory to the Employer, the amount of **[\$[AMOUNT]]**; the Company will forgive repayment of the principal and

interest on such loan on [DATE] if and only if the Employee is continuously employed by the Company through such date. The Employee shall be responsible for taxes on such forgiveness unless, in the Employer's sole discretion, the Employer elects as a supplemental bonus to gross up the amount of such forgiveness to compensate the Employee for the taxes payable on such forgiveness.

[Payment of Compensation]

Section []. Payment of Compensation. All compensation shall be payable only if the Employee is employed by the Employer or a subsidiary or affiliate at the time payment is made. Any compensation paid to the Employee subsequent to the termination of the Employee's employment with the Employer shall only be paid upon execution by the Employee of a general unconditional release in favor of the Employer in a form satisfactory to the Employer.

[Payment of Bonuses]

Section []. Payment of Bonuses. All bonuses under this Agreement shall be payable to the Employee within [NUMBER] days following the later of the end of the period in respect of which such bonus applies or the date of receipt and approval by the Employer of audited financial statements for the business of the Employer with respect to which such bonus is computed; provided, however, that no bonuses shall be payable if, prior to the actual payment date of any such bonus:

[](a) **Resignation.** The Employee has resigned or has otherwise terminated the Employee's employment in breach of the Employee's obligations under this Agreement; or

[](b) **Discharge or Breach.** The Employee has been or is subject to discharge for cause or the Employer reasonably believes that the Employee has committed any material breach of this Agreement.

COMMENTS:

There has been substantial litigation regarding the enforceability of provisions requiring the Employee's continued employment as a condition to the payment of a previously earned-bonus. In general, if the period for which the bonus has been calculated has concluded, the Courts are far more likely to require payment.

[Benefits]

Section []. Benefits. In addition to the compensation provided for in this

Agreement, the Employee shall also receive benefits payable or otherwise extended in accordance with the normal benefits policies of the Employer, including **[specify benefits, which may include pension plans, 401(k) plans, group health, accident or life insurance plans, group medical and hospitalization plans, and other similar benefits]**, as may hereafter be available to the employees of the Employer after meeting all applicable eligibility requirements. The Employer does not by reason of this Agreement obligate itself to make any such benefits available to the Employee or to its employees generally, or to fund the cost of any such benefits. The Employer may, in its sole discretion, change, amend or terminate any of the benefits provided to its employees, at any time in a manner which does not discriminate between the Employee and other employees of the Employer who are eligible to participate in such benefits.

COMMENTS:

As a general rule, current compensation is the focus of the Employee's attention rather than deferred plans or pensions. However, the usual benefit plans are typically available including good medical coverage and disability programs.

[Reimbursement of Expenses]:

Section []. Reimbursement of Expenses. The Employer shall reimburse the Employee, on a fully-accountable basis, for any ordinary, necessary and reasonable travel, maintenance and entertainment expenses incurred by the Employee in the course of the Employee's duties under this Agreement in accordance with the Employer's customary policies and practices in effect from time to time, upon submission to the Employer of appropriate vouchers and receipts evidencing such expenses.

— OR —

Section []. Reimbursement of Expenses. The Employer shall pay or reimburse the Employee for all expenses reimbursed by the Employer in accordance with its policies and reasonably incurred by the Employee in furtherance of the Employee's duties hereunder, upon submission by the Employee of appropriate documentation of such expenses, approved by the Employer and prepared in compliance with such rules relating thereto as the Employer may, from time to time, adopt and as may be required in order to permit such payments as proper deductions to the Employer under, among other regulations and rules, the Internal Revenue Code of 1986, as amended, and the rules and regulations adopted pursuant thereto now or hereafter in effect. The Employer shall pay or reimburse the Employee for such expenses up to an amount equal to **[NUMBER]** percent of the revenues generated by the Employee. The Employer reserves the right to refuse to

pay or reimburse the Employee for such expenses in excess of [NUMBER] percent of the revenues generated by the Employee.

COMMENTS:

It is increasingly common to provide that expenses will be reimbursed only up to a certain percentage of the revenues generated by the Employee or by the Employee's operating area.

[Withholding Taxes]:

Section []. Withholding Taxes and Other Deductions. Payments made under this Agreement shall be subject to reduction by the amount of any applicable withholding and any other taxes or similar deductions which the Employer may be required or authorized by law to deduct and such other deductions as may be required under the Employer's employee benefit plans.

COMMENTS:

The withholding tax and other deductions provision is a typical provision and does no harm to include.

[Vacation]:

Section []. Vacation. The Employee shall be entitled to [NUMBER] weeks vacation per year during the Term.

— OR —

Section []. Vacations. During the Term, the Employee shall be entitled to paid vacations, to be taken at times mutually agreed between the Employer and the Employee, as may be provided from time to time under the Employer's employee vacation policy now or hereafter in effect. The Employer shall not pay the Employee any additional compensation for any vacation time not used by the Employee, and unused vacation time may not be carried over.

COMMENTS:

The second provision above is really preferred because of the possible argument

for carryover of vacation time or compensation for unused vacation, and the common requirement for staggered vacations to accommodate adequate desk staffing.

5. TERMINATION BY EMPLOYER.

Section []. Termination by Employer. This Agreement shall be terminated at the end of the Term (unless extended) or earlier upon the Employer's termination (at the Employer's option) of this Agreement for cause. Cause within the meaning of this Agreement shall include, without limitation, any of the following:

[](a) **Death or Disability.** The death or Disability of the Employee. "Disability" shall mean an illness or other incapacity (whether physical or mental) which [, in the reasonable judgment of a physician appointed by the Employer,] has prevented the Employee from performing the Employee's regular duties on a full time basis for [NUMBER] consecutive days, or [NUMBER] days in any twelve-month period, but only if within [NUMBER] days after written notice is given to the Employee, the Employee shall not have returned to the performance of the Employee's duties under this Agreement on a full-time basis.

[](b) **Breach; Performance.** A material breach by the Employee of any provision of this Agreement [,provided that if such breach is curable, there shall have been notice to the Employee and a reasonable opportunity to cure such breach], or the failure of the Employee to act subject to, and in accordance with, the internal rules and policies laid down by the Company as published and delivered, or otherwise communicated, to the Employee from time to time; or the Employee's failure to perform duties to the [reasonable] satisfaction of the Employer; the Employee's association with gamblers or persons of ill repute; the Employee's failure to secure, or loss or suspension of, any license or regulatory approval required for the Employee to perform the Employee's assigned duties.

OR

Violation of specific written or oral directions of the Board of Directors, Executive Committee or any of the directors or executive officers of the Employer relating to services to be rendered by the Employee or the scope of the Employee's duties to the Employer as contemplated by this Agreement, which violation continues for [NUMBER] business days following receipt by the Employee of a written notice of such violation; failure or refusal to adequately perform the duties that would normally be expected of an employee in accordance with the standards of the business, which failure or refusal is not cured within [NUMBER] business days of receipt by the Employee of a written notice of such failure or refusal;

OR

misconduct, insubordination or incompetence in connection with or affecting the business of the Employer or its subsidiaries or affiliates and, to the extent such misconduct, insubordination or incompetence is curable, the Employee has not cured such misconduct, insubordination or incompetence within [NUMBER] business days following receipt of written notice; failure to comply with the Employer's internal written policies or procedures and which conduct continues following receipt by the Employee of a written notice of such violation; repeated negligence or gross negligence in the performance of the Employee's duties;

OR

in the reasonable belief of the Employer, unauthorized or illegal use, possession or sale of narcotics, illegal drugs or controlled substances; excessive use of alcoholic beverages or gambling in such a manner as, in the judgement of the Employer, to negatively and adversely affect the Employee's performance hereunder or the Employee's reputation with customers or in the business community as a whole; excessive absenteeism or constant tardiness;

[](c) **Competition; Confidential Information**. The Employee's engaging or assisting in any business in competition with the Employer or any subsidiary or affiliate, either directly or indirectly, as employee, owner, partner, director, officer, stockholder, consultant or agent; any violation of Section [](Confidentiality) of this Agreement.

[](d) **Employee Voluntary Termination**. The Employee's voluntary termination of his employment with the Employer without the consent of the Employer. If this Agreement is terminated pursuant to this subsection, the Employee shall continue to be subject to the provisions of Sections [](Covenant Not to Compete and [](Confidentiality) of this Agreement.

[](e) **Dishonesty; Violation of Law; Conviction**. The Employee's fraud or other dishonesty, or the Employee's acting in any manner inconsistent with the utmost good faith and loyalty in the performance of the Employee's duties; or the violation by the Employee of any federal or state statute or regulation governing the Employer's business or of any rules or regulations promulgated by any regulatory body governing the Employer's business [provided, however, that the Employee shall not be deemed to have violated this subsection if the Employee has acted (a) at the specific direction of the Board of Directors or officers, (b) in accordance with written guidelines established by the Board of Directors or officers, or (c) in reliance on the advice of independent counsel to the Employer]; if an allegation of racial, sexual or other material harassment is upheld against the Employee by a court or tribunal having jurisdiction to hear such an allegation or by an internal inquiry by the Employer in accordance with the Employer's internal written policies. The Employee's conviction by a court of law of competent jurisdiction of fraud, misappropriation, embezzlement, or any felony.

OR

conviction in a court of law or the entry of a plea of nolo contendere with respect to (A) any crime of offense involving misuse or misappropriation of money or other property of the Employer, (B) any felony, (C) any crime for which the sentence is incarceration, or (D) any crime involving an act of moral turpitude.

OR

the Employee's violation of any federal or state statute or rule governing the Employer or any of its subsidiaries' or affiliates' businesses or of any rules or regulations promulgated by any regulatory body governing the Employer or any of its subsidiaries' or affiliates' businesses.

COMMENTS:

The above provision is a fairly typical termination clause, perhaps more broad than most, and several variations of various of its provisions are set out below. The Disability provision is fairly standard and the improvement on the usual provision in the above paragraph is to supplement the consecutive period, which is common, with a further test of Disability for nonconsecutive periods within any twelve-month period.

OR

Section []. Termination by Employer. The Employer shall have the right to terminate this Agreement and to discharge the Employee at any time for "cause," which shall mean termination in the event of (i) the Employee's breach (whether by willful act, omission or through gross neglect), of any term or provision of this Agreement, (ii) the Employee's failure to act in accordance with any proper and lawful direction of the Employer, as outlined in the Employer manual, (iii) the Employee's being convicted of a felony under the laws of the United States, or (iv) the Employee's violation of any applicable Federal or State laws or regulations governing the Employer's business, (v) if there is gross neglect on the part of the Employee to perform the Employee's duties, or (vi) if the Employee is required to hold a trading license in order to perform the Employee's duties and the license is suspended by the regulating authorities.

COMMENTS:

This is a fairly straightforward and pleasantly brief provision which sets out the

essential elements of the termination for cause without overly complicating the area which might prompt concern on the Employee's behalf.

6. NOTICE AND EFFECT OF TERMINATION.

Section []. Notice and Effect of Termination. In the event the Employer elects to terminate this Agreement pursuant to Section [](Termination by the Employer), such termination shall become effective immediately upon written notice. In the event the Employee's employment is terminated for Cause (as defined below) or the Employee voluntarily terminates the Employee's employment during the term of this Agreement without the Employer's consent, the Employee will be entitled to receive the Employee's Base Salary through the date of such termination and the Employer will have no further obligations to the Employee under this Agreement. The post-employment restrictions, obligations and commitments contained in Sections [] of this Agreement (Covenant Not to Compete) and [](Confidentiality) shall survive termination except that they shall not survive termination of this Agreement pursuant to subsections (a), (b) and (d) of this Section [].

COMMENTS:

A simple notice provision of this type could easily replace the cumbersome notices provided in many modern contracts.

[]. **Termination by Employee for Cause.** The Employee may by written notice to the Employer terminate this Agreement for cause, which shall include any material breach of this Agreement by the Employer after reasonable notice to the Employer and an opportunity to cure such claimed breach.

COMMENTS:

A termination provision for the Employee's benefit specifically in the Agreement is extremely rare.

7. TERMINATION BY EMPLOYEE WITHOUT CAUSE; BUY OUT PROVISION.

Section []. Termination by Employee Without Cause. The Employer and

the Employee have considered in good faith the approximate damages which would be suffered by the Employer in the event the Employee terminates employment under this Agreement prior to the expiration of the Term without the consent of the Employer, and have agreed, as liquidated damages and not as a penalty, that if the Employee, without the prior written consent of the Employer, terminates active employment prior to the expiration of the Term, the Employee shall pay to the Employer, immediately upon such termination, an amount equal to **[AMOUNT OR FORMULA PROVISION]**. In the event that the Employee, prior to the expiration of the Term, terminates active employment without the prior written consent of the Employer and accepts successive employment with another employer, who has actual knowledge of the existence of this Agreement, prior to the expiration of such Term, then such successor employer, by employing the Employee, shall be deemed to have agreed to be jointly and severally liable with the Employee to make the payment to the Employer required by the preceding sentence.

OR

Section [] . Liquidated Damages.

In consideration for the promise by the Employer not to terminate the Employee other than for Cause, the Employer and the Employee agree that it would be extremely difficult to calculate the damage to be caused to the Employer by the Employee should the Employee breach this Agreement by leaving the service of the Employer (other than as a result of the Employee's death or by termination of this Agreement by the Employer) without the Employer's consent prior to the expiration of the full Term (a "Liquidated Damages Breach"). Therefore, the Employee and the Employer have made a good faith effort to pre-estimate the damages, costs, losses and injuries the Employer will sustain by reason of such Liquidated Damages Breach. Such effort has resulted in the following so as to fix, liquidate and determine the Employer's damages: (i) a sum equal to **[NUMBER]**% of the Employee's total compensation during the prior calendar year in the event of a Liquidated Damages Breach at a time when more than one year remains of the Term, or (ii) a sum equal to **[NUMBER]**% of the Employee's total compensation during the prior calendar year in the event of a Liquidated Damages Breach at a time when one year or less remains of the Term, as extended, as the case may be ("Liquidated Damages").

The Employee acknowledges that the Liquidated Damages are not a penalty and are not unreasonable or disproportionate to the probable loss to be suffered by the Employer in the event of a Liquidated Damages Breach. However, nothing in this Agreement shall prevent the Employer from recovering its actual damages should such actual damages exceed the Liquidated Damages. In the event the Liquidated Damages provision is determined to be void or otherwise inapplicable or unenforceable, the Employer shall have the right to avail itself of any and all other remedies without limitation.

COMMENTS:

The Employee buy out or liquidated damages provisions have become increasingly popular. These provisions offer both the current and future Employer grounds for negotiations with respect to an Employee moving and typically result in payment by the new Employer of the agreed amount to the old Employer as a buy out fee if the Employee leaves prior to the end of a contract.

There have been cases dealing with the enforceability of these provisions toward the end of an Employee's term, and from the current Employer's perspective, the provisions run the risk of putting a value on an Employee which then becomes merely an economic decision for the future Employer. It is unusual for a liquidated damages provisions to be supplemented by other damage recoveries, but the second provision above does admit of this possibility.

8. CONFIDENTIALITY.

[General Provision]

Section []. Confidential Information. The Employee acknowledges that during the Employee's employment the Employee will have access to and possession of non-public information, such as confidential and proprietary information, data and documents belonging to the Employer and its affiliates. The Employee recognizes that all of such confidential information, other than information generally known to the public, is a unique asset of the business of the Employer, the disclosure of which would be damaging to the Employer. The Employee agrees that the Employee will not at any time, whether during or after the termination or cessation of the Employee's employment, except as authorized by the Employer and for its benefit, divulge (or enable anyone else to use, divulge or disclose) to any person, association or Employer any confidential information which the Employee presently possesses or which the Employee may obtain during the course of the Employee's employment with respect to the business, finances, customers or affairs of the Employer or trade secrets, developments, methods or other information and data pertaining to the Employer's business. "Confidential information" shall include without limitation customer names, confirmation details, direct telephone numbers and the customer's history of trading practices. The Employee shall keep strictly confidential all matters and information entrusted to the Employee and shall not

use or attempt to use any such confidential information in any manner which may injure or cause loss or may be calculated to injure or cause loss, whether directly or indirectly, to the Employer. The Employee further agrees that upon the termination of the Employee's employment (irrespective of the time, manner or cause of termination) the Employee will surrender and deliver to the Employer all customer or other lists, computer discs and records, books, records, notes, memoranda and data or other materials of every kind relating to any matter, and all copies thereof, within the scope of the Employer's business or related in any way to the Employer's customers which remains in the possession or control of the Employee. The Employee will give immediate written notice to the Employer of any disclosure requirement by a court or government agency in order to allow the Employer the opportunity to respond to such a request.

This Agreement and the terms and conditions recited herein are confidential and non-public. The Employee agrees not to disclose the contents of this Agreement to any person or entity, including, but not limited to the press, other media, any public body, or any competitor of the Employer, except to the Employee's legal counsel or immediate family or as may be required by law.

— OR —

Section []. Confidentiality; Other Employees

[](a) The Employee shall not at any time during the period of the Employee's employment hereunder and for [PERIOD] thereafter use, outside the scope of the Employee's employment hereunder, or disclose to any person, corporation, firm, partnership or other entity whatsoever other than the Employer or any of its subsidiaries or affiliates, or to any officer, director, stockholder, partner, associate, employee, agent or representative of any thereof, any confidential information or trade secrets of or relating to the Employer or its business.

COMMENTS:

The confidentiality provisions have become particularly frustrating for Employers who have tested the clauses in litigation. Typically, customer lists, including detailed personal contact numbers and direct fax numbers with specific confirmation instructions, are not considered confidential by New York Courts, on the theory that they can easily be reconstructed by the departing Employee once the Employee reaches the new Employer's premises.

To be enforceable, the information must be truly confidential, must have been

treated with care by the current Employer, and must be substantively beyond the normal business records which can either be recalled by the Employee from memory or can be easily recreated after the Employee's departure.

9. COVENANT NOT TO COMPETE.

[General Provision]

Section []. Noncompetition and Nonintervention.

[](a) **Noncompetition During Employment.** During the Term, and any agreed extensions of the Term, the Employee agrees to devote substantially all of the Employee's entire time, attention and energies to the performance of the business of the Employer and the Employee shall not, directly or indirectly, alone or as an employee, partner, officer, director, stockholder, consultant or agent of any other corporation, partnership or other business organization, be actively engaged in or concerned with any other duties or pursuits which interfere with the performance of the Employee's duties as an employee of the Employer, or which, even if noninterfering, may be contrary to the best interests of the Employer.

[](b) **Noncompetition Following Employment.** Upon termination of the employment of the Employee, whether because of the expiration of this Agreement or cause invoked pursuant to Section [](Termination by Employer), or because of total disability as provided in Section [](Death or Disability), or because of voluntary termination of employment by the Employee pursuant to Section [](Employee Voluntary Termination), the Employee agrees that the Employee will not engage in any businesses of the Employer in which the Employee was engaged at any time during the Term of this Agreement in competition with the Employer as a representative, agent, or on the Employee's own behalf, for direct sale to others, either as an officer, director, stockholder, employee, agent or consultant of a corporation or other business organization engaged in such business, or as an employee or as a partner or a co-venturer or in any other capacity, directly or indirectly in competition with the Employer with respect to customers located within a [NUMBER]-mile radius of [CITY] (the "Restriction Area") during a period measured by the longer of the remainder of the Term or a period of [PERIOD] from the date of any termination of the Employee's employment (the "Restriction Period"). Competition as used herein includes, but is not limited to, solicitation of the Employer's customers or doing business with the Employer's customers who are located within the Restriction Area, regardless of the location of the Employee at the time any such solicitation occurs or business is transacted. The Employee acknowledges that the Restriction Period and geographical restriction of this Section are reasonable under the circumstances of the Employee's employment.

[](c) Acknowledgment by Employee.

The Employee acknowledges that the Employee's skills and position in this industry are unique and, that the breach, or threatened breach, by the Employee of the provisions of this Section will cause irreparable harm to the Employer. The Employee also acknowledges that business competitive with that of the Employer or of any of its affiliates may be carried on anywhere within the United States as a result of the use of telephonic and other communications techniques. Therefore, the Employee acknowledges that the geographical and term restrictions of this Section are reasonable under the circumstances.

OR

Section []. Covenant Not to Compete. During the Term, and for a period of [PERIOD] thereafter, the Employee will not accept employment with any business, whether as an employee, consultant, director, partner, or shareholder, that is in competition with the business of the Employer or any subsidiary or affiliate. For this purpose, a business located in the United States, the United Kingdom, Japan, or in any other country in which the Employer is actively engaged in business shall be deemed to be in competition with the Employer if such business involves the same or economically equivalent businesses as the businesses of the Employer. Anything in this Section to the contrary notwithstanding, ownership of less than one percent of the outstanding common stock of a publicly traded corporation shall not constitute engaging in a business in competition with the business of the Employer. Prior to the termination of this Agreement or the Employee's earlier termination with Cause, the Employee will not, directly or indirectly, (i) solicit any customer of the Employer or (ii) solicit any person who is or was employed by the Employer within 180 days of such solicitation to (A) terminate the Employee's employment with the Employer, (B) accept employment with anyone other than the Employer, or (C) in any manner interfere with the business of the Employer. In the event of a violation of any of the provisions of this paragraph, the Employee acknowledges that the Employer will be subject to irreparable harm entitling it to immediate injunctive or other equitable relief. None of the foregoing restrictions of this Section shall continue if the Employee is terminated without Cause.

[](b) **Exceptions from Covenant Not to Compete.** The collective ownership, directly or indirectly, by the Employee (which for this purpose shall include any members of a group with which the Employee is required to report pursuant to Section 13(d) of the Securities Exchange Act of 1934) of not more than 5% of the issued and outstanding voting stock of any corporation the shares of which are regularly traded on a national securities exchange or on the over-the-counter markets shall not be deemed to be a violation of the provisions of this Section. Nothing herein contained shall be deemed to limit or prohibit the Employee from trading in stocks, securities, stock options, commodities, commodities futures instruments or similar instruments for the Employee's own account or any exchange or over-the-counter market; provided that no such trading shall involve a violation of applicable regulatory provisions or securities of a corporation of which the

Employee (which for this purpose shall include any members of a group with which the Employee is required to report pursuant to Section 13(d) of the Securities Act of 1934) owns 5% or more of the issued and outstanding voting stock.

10. NO POACH

Section [](a) No Solicitation of Employees. During the Term and for a period of [PERIOD] thereafter, the Employee shall refrain, unless the Employee first obtains the Employer's written consent, from directly or indirectly soliciting, inducing, or recruiting, or attempting to solicit, induce or recruit, any person who, at any time during the Term and for a period of [PERIOD] thereafter, is or was an employee of the Employer or any subsidiary or affiliate thereof, to apply for or accept employment with any other person or entity, including without limitation the soliciting or recruiting of an entire brokerage desk.

[](b) No Solicitation of Customers. During the Term and for a period of [PERIOD] thereafter, the Employee shall refrain, unless the Employee first obtains the Employer's written consent, from directly or indirectly, whether for the Employee's own account or for the account of any other person or entity, interfering, or attempting to interfere, with the relationship of the Employer or any subsidiary or affiliate thereof, with any entity which, at any time during the Term and for a period of [PERIOD] thereafter is or was a customer or client of the Employer or any subsidiary or affiliate.

OR

Section [](b) No Solicitation of Employees. During the term of this Agreement and for a period of [PERIOD] hereafter, the Employee shall not, whether for the Employee's own account or for the account of any other individual, partnership, firm, corporation or other business organization (other than the Employer or any of its affiliates), intentionally endeavor to entice away from the Employer or any of its affiliates, or otherwise intentionally interfere with the relationship of the Employer or any of its affiliates with, any person who is employed by the Employer or any of its affiliates, provided that this subsection shall not prevent the Employee from assisting former employees of the Employer in finding employment once they have ceased to provide services to the Employer.

COMMENTS:

The covenants not to compete set forth above are fairly standard. It used to be the Horn Book law that these covenants were enforceable if reasonable in time and geographic area, but the law today has shifted dramatically in favor of the Employee

in seeking to enforce these covenants in all but the most egregious cases. Typically, Courts have resisted in forcing the covenants unless there is a corresponding payment obligation, which may include Base Salary and bonuses as well, by the Employer seeking to enforce the covenant. Even in such cases, if the Employee can demonstrate through hardship in the sense of an inadequate salary at the current Employer, then chances for enforcement diminish. The covenant must be fairly specific and must be as limited in geographic area and in time as is truly required to satisfy the legitimate concerns of the Employer.

[Additional Consideration for Covenant Not to Compete]

(c) Additional Consideration. As additional consideration for the restrictions upon the Employee under the provisions of this Section, the Employer shall, during the Restriction Period, continue to pay the Employee the Base Salary and basic benefits (as described above) being paid to the Employee on the date of termination of this Agreement in the same manner as such Base Salary and basic benefits had been paid to the Employee prior to the termination of this Agreement, but with respect to benefits only to the extent that the Employer's various insurance policies and plans permit coverage or participation for inactive or terminated employees. Upon any breach by the Employee during the Restriction Period of the Employee's obligations under this Section, the Employer's obligation to pay the Base Salary and benefits shall immediately cease, but the Employee's obligations under this Section shall continue throughout the Restriction Period.

(d) Survival. This Section shall survive the termination of this Agreement and the Employee's employment hereunder.

11. OPTION TO WAIVE COVENANT AND AVOID ADDITIONAL PAYMENTS

(e) Option to Waive. The Employer has the option, exercisable in the sole discretion of the Employer, to waive the operation of this Section and the restrictions on the conduct of the Employee herein contained. The Employer shall have such option upon the termination of the employment of the Employee, whether because of the expiration of this Agreement, for cause invoked pursuant to Section (Termination by Employer), because of the total disability of the Employee as provided in Section (Death or Disability), or the Employee's own voluntary termination or resignation pursuant to Section (Employee Voluntary Termina-

tion). This option, should the Employer elect to exercise it, shall be exercised by written notice to the Employee and shall be given to the Employee not earlier than the first day following the date of the termination of this Agreement, and not later than the fifteenth day following the date of the termination of this Agreement. Furthermore, the Employer has the option, exercisable in the sole discretion of the Employer, to waive the operation of this Section, and the restrictions on the conduct of the Employee herein contained, if at any time during the Restriction Period the Employer determines that the competitive restrictions upon the Employee are no longer necessary. This option shall be exercised by written notice to the Employee in accordance with the provisions of Section)(Notices) of this Agreement.

[](f) **Exercise of Option to Waive.** If the Employer exercises the option pursuant to this Section, the payment obligations of the Employer pursuant to this Section shall terminate and shall be without force or effect. The termination of the Employer's obligations as provided in this subparagraph shall be effective on the date such notice is given to the Employee.

12. INJUNCTIVE RELIEF.

Section []. Right to Injunction. The Employee acknowledges that the Employee's skills and position are unique and, therefore, that the breach, or threatened breach, by the Employee of the provisions of this Agreement, including, without limitation, the Employee's obligations under Sections [](Covenant Not to Compete) and [](Confidentiality) hereof, shall cause irreparable harm to the Employer, which harm cannot be fully redressed by the payment of damages to the Employer. Accordingly, in the event of any breach or threatened breach of the provisions of this Agreement by the Employee, the Employer shall be entitled, in addition to any other right or remedy it may have, at law or in equity, to such equitable and injunctive relief as may be available to restrain the Employee and any firm, partnership, individual, corporation, entity or other business organization participating in such breach or threatened breach from the violation of the provisions hereof, including an injunction, without the posting of any bond or other security, enjoining or restraining the Employee from any such violation or threatened violation of this Agreement. Nothing herein shall be construed as prohibiting the Employer from pursuing any other remedies available at law or in equity for such breach or threatened breach, including the recovery of damages and the immediate termination of the employment of the Employee hereunder.

COMMENTS:

Counsel for Employees resist provisions such as those above specifically permitting injunctive relief. These provisions are often insisted upon by the cautious Employer, but Courts give them little force as a practical matter.

13. MISCELLANEOUS PROVISIONS.

Section []. Entire Agreement, Governing Law; Amendments; Binding Effect. This Agreement constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes all prior agreements, oral or written, between the parties hereto with respect to the subject matter hereof. This Agreement shall be governed by and construed in accordance with the laws of the State of [STATE]. No waiver or modification of the terms or conditions of this Agreement shall be valid unless in writing signed by both parties and only to the extent therein set forth. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their successors, assigns, heirs, administrators and executors.

Section []. Arbitration.

Any disputes, differences or controversies arising under this Agreement shall be settled and finally determined by arbitration before a panel of three arbitrators in New York, New York, according to the rules of the American Arbitration Association now in force and hereafter adopted. The arbitrators shall make their award in accordance with and based upon all provisions of this Agreement and judgment upon any award rendered by the arbitrators shall be entered in any court having jurisdiction thereof. However, it is understood and agreed that the arbitrators are not authorized or entitled to include as part of any award rendered by them, special, exemplary or punitive damages or amounts in the nature of special, exemplary or punitive damages regardless of the nature or form of the claim or grievance that has been submitted to arbitration, except that the arbitrators shall be authorized and entitled to include as part of any award rendered by them in favor of the Employer Liquidated Damages (as herein defined) provided for in this Agreement.

COMMENTS:

There is a fairly substantial difference of opinion regarding the relative merits of Arbitration versus Court House litigation, with very skilled advocates on both sides of the issue. Arbitration can be faster, cheaper, and less intrusive on management time, but it can also and often does result in the Arbitrator's "cutting the baby" and reaching a compromised decision which satisfies neither side. Clients believe that Arbitration is faster and cheaper and they have to be convinced to avoid

it.

Since injunctive relief and other ancillary remedies are available in Arbitration, that is not a reason to avoid the cause.

[Indemnity Provision]

Section []. Indemnity.

In the event that the Employee receives a demand for payment or becomes a party to legal action brought by a former employer, arising solely from the Employee's entering into this Agreement the Employer agrees to indemnify the Employee and hold the Employee harmless from attorneys' fees, costs and other payments actually incurred in connection with such action or demand for payment, provided, that the Employer shall have the opportunity to be the sole director of the Employee's defense and/or settlement (including choice of counsel) in the event of such action.

The indemnification obligations of the Employer set forth in this Section shall survive the expiration or other termination of this Agreement, provided that such indemnification obligations shall not survive if the Employee in breach of this Agreement leaves the employ of the Employer or any affiliate during the Term and engages in a business activity in competition with The Employer or any affiliate.

The invalidity or unenforceability of any particular provision of this Agreement shall not affect the other provisions and this Agreement shall be construed in all respects as if such invalid or unenforceable provisions were omitted. In the event that a court of competent jurisdiction shall determine that any covenant set forth in this Agreement is impermissibly broad in scope, duration or geographical area, or is in the nature of a penalty, then the parties intend that such court should limit the scope, duration or geographical area of such covenant or reduce the amount of Liquidated Damages to the extent, and only to the extent, necessary to render such covenant reasonable and enforceable, and enforce the covenant as so limited.

The Employee agrees that if the Employee brings an action, claim or proceeding against the Employer or any affiliate, or any partner, stockholder, officer, director or employee of any of them (each, a "Party") that relates to or implicates this Agreement, whether as to its validity, efficacy or otherwise, and in the event that such Party(ies) should prevail in such action, the Employee shall pay the reasonable attorneys' fees of such Party or Parties.

COMMENTS:

The prudent Employee will not leave an Employer where there is any risk of

litigation without an indemnity of this type from the new Employer.

Section []. Assignment.

This is a personal services Agreement and the Employee may not assign this Agreement to any third party. The Employer may assign this Agreement and the benefits hereunder without the consent of the Employee without being relieved from any liability hereunder, to any of its direct or indirect "affiliates" or "associates" (as such terms are defined in Rule 405 of the Rules and Regulations promulgated under the Securities Act of 1933). The Employer may also assign this Agreement and the benefits hereunder to any corporation into or with which the Employer may be merged or consolidated, but nothing herein contained shall relieve the Employer of any of its obligations hereunder.

Section []. Entire Agreement. This Agreement contains the entire agreement and understanding of the parties with respect to the subject matter hereof, supersedes any prior agreements and understandings with respect thereto and cannot be modified, amended or waived, in whole or in part, except in writing signed by the party to be charged. Any such purported modification, amendment, or waiver shall be null and void. A discharge of the terms of this Agreement shall not be deemed valid unless by full performance of the parties hereto or by writing signed by the parties hereto. A waiver by the Employer of any breach by the Employee of any provision or condition of this Agreement to be performed by the Employee shall not be deemed a waiver of similar or dissimilar provisions or conditions at the same or any prior or subsequent time.

Section []. Notices. All notices provided for by this Agreement shall be in writing and shall be deemed to have been given at the time when mailed at any general or branch United States Post Office enclosed in a registered or certified postpaid envelope addressed to the addresses of the respective parties stated below or to such changed address as such parties may have fixed by notice:

To the Employer:

To the Employee:

provided, however, that any notice of change of address shall be deemed given upon receipt.

Section []. Binding Effect. This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the Employer (whether resulting from any reorganization, consolidation or merger of the Employer or any business to

which all or substantially all of the assets of the Employer are sold), but no interest herein shall be transferable in any manner by the Employee, except to the extent that heirs or beneficiaries of the Employee may receive benefits pursuant to the provisions of the Employer's benefit plans in the event of the death of the Employee.

Section []. Governing Law. This Agreement shall be governed in all respects by the laws of the State of [STATE] without regard to the conflict of laws principles thereof

Section []. Severability. If any section, term or provision of this Agreement shall be held or determined to be unenforceable, the balance of this Agreement shall nevertheless continue in full force and effect unaffected by such holding or determination. In addition, in any such event, the parties agree that it is their intention and agreement that any such section, term or provision which is held or determined to be unenforceable as written shall nonetheless be enforced and binding to the fullest extent permitted by law as though such paragraph, term or provision had been written in such a manner and to such an extent as to be enforceable under the circumstances.

Section []. Counterparts. This Agreement may be executed in two or more counterparts, and by each party on separate counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

14. SIGNATURES.

The Employee acknowledges that the Employee has carefully read this Agreement, including Sections [](Covenant Not to Compete) and [](Confidentiality), that the Employee has been advised by the Employer to consult with independent counsel, and that the Employee understands the provision contained herein including the restrictions on post-employment competition for which the Employee has received additional and adequate consideration.

The parties have caused this Agreement to be executed as of the date first above written.

[NAME]
(Employee)

[NAME OF EMPLOYER]

By _____
Name:
Title:

*** * * Please Note * * ***

This Employment Agreement is only a sample and should be used in consultation with your lawyer to prepare a customized agreement that reflects your company's special needs and circumstances.

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Tricia Walsh, Publishing Director
The Business Library
180 Melody Court, Eastport, NY 11941
631-325-1133 • Fax: 631-325-1145
E-mail: triciawalsh@yourbusinesslibrary.com

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