

CHAPTER 4

# Employment Agreements

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## CHAPTER 4

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### Scope Note

This chapter provides an overview of employment agreements for attorneys advising business clients. It begins by discussing the purposes of employment agreements and the circumstances under which they might be advisable. It then discusses particular terms of employment agreements, covering topics such as duties, compensation, benefits, and restrictive covenants. A sample employment agreement is attached as an exhibit.

## § 4.1 INTRODUCTION

This chapter presents an overview of employment agreement basics. The business lawyer will find this overview useful in counseling clients. It is important to keep in mind, however, that employment agreements should be tailored to the client's individual needs, objectives, and circumstances. For employment-related topics that fall beyond the scope of this chapter, see *Advising a Massachusetts Business* chs. 2, 3, 5, 6 (MCLE, Inc. 2011) (discussing proprietary information, labor and employment law, equity incentives, and employee stock ownership plans).

## § 4.2 WHY AN EMPLOYMENT AGREEMENT?

An employment agreement presents an opportunity for an employer to communicate and clarify expectations with the new hire or existing employee. In addition to setting forth the terms of employment, an employment agreement provides a vehicle for dialog about the employment relationship, both at the time of hire and throughout the relationship.

Employment agreements can contribute to the success of a business by supporting recruitment, employee morale, and employee retention. Employment agreements can also support success by protecting important business assets, including

the company's reputation, goodwill, trade secrets and confidential information, intellectual property, client and vendor relationships, and employment relationships.

### § 4.3 AT-WILL EMPLOYMENT OR EMPLOYMENT FOR A DEFINED PERIOD?

Massachusetts is an “at will” jurisdiction. In the absence of a contract to the contrary, this means that employers can terminate their employees at any time, with or without notice, for no reason or for any reason that is not in violation of the law or a clearly established public policy. When an employment contract contains a defined period of employment, however, the relationship is no longer at will. Rather, the employer and employee are obligated to maintain an employment relationship for the indicated time period.

#### **Practice Note**

Often, employers commit themselves to an employment relationship for a term of years or another defined period of time when they need not do so. An employer should enter into an agreement that “trumps” the automatic at-will nature of the employment relationship only when appropriate based on the business's needs and objectives and the circumstances of the employment relationship.

An employer would be wise to consider when a defined period is desirable. Providing a defined period of employment may be important for successful recruiting and for maintaining good morale. For example, an employer should consider what terms will attract the best candidate and encourage and support an effective working relationship. In the case of high-level executive positions, it is usually expected that an employment agreement will be for a defined period.

In addition, it is important to remember that at-will employment “goes both ways.” Sometimes an employer seeks to have a commitment from a new hire or existing employee for a specific time period, and it makes sense to include a defined period of time in the employment agreement. For example, following a merger or acquisition, certain key employees may be critical to the success of the business. Employers with a seasonal business, such as a business aligned with the academic year, will want a commitment from their employees for the duration of the season.

In the event a defined period is appropriate, it is advisable for the employment agreement to include an “escape clause” so that the employer can still terminate the relationship for cause if there is a problem with the employee. In addition, other circumstances may require termination of the relationship. For example, it

may be necessary to include an “escape clause” that is triggered by a change of control of the company or in the event of financial difficulties.

## **§ 4.4 TERMS OF THE EMPLOYMENT RELATIONSHIP**

The following sections provide an outline of terms appropriate for inclusion in an executive employment agreement. An employment agreement may or may not include all of these terms, and may include other terms. The employment agreement should be tailored to the individual situation your client presents, and appropriate terms should be included depending on the needs and objectives of your client, the circumstances of his or her business, and the nature of the particular employment relationship.

### **§ 4.4.1 Title and Reporting Relationship**

Depending on the circumstances of the new hire or promotion giving rise to the creation of an employment agreement, the title of the employee’s position may not be clear or may be negotiable. Sometimes a title that is perceived by the employee as more impressive can be helpful in the negotiation process. On the other hand, it is important that the title of the position accurately reflect the job description.

The employment agreement should specify to whom the employee is to report. In advising your business client, it is critical that an accurate and comprehensive job description be in place before the employment agreement is drafted. As the scope of duties and responsibilities of the job are considered, so too should the organizational chart be reviewed and revised as appropriate. The job description and organizational structure will support decision making with respect to title and reporting relationship.

### **§ 4.4.2 Duties and Responsibilities**

Often missed in the preparation of an employment agreement is an adequate analysis of the job description for the position. Again, it is essential that a well-developed job description be in place before the employment agreement is drafted. The job description should clearly state the requirements of the position, facilitate good communication between the employer and employee, and enable the drafter of the employment agreement to include a summary of the mutual expectations of the employer and employee.

The provision of the employment agreement describing duties and responsibilities should summarize the job description in general terms. It is advisable, however, that language be included to allow the employer flexibility in assigning duties to the employee. The provision should include, for example, a statement that “the job duties and responsibilities are subject to change from time to time at the discretion of the employer.” In addition, language in this section should refer to the level of commitment required of the employee, such as “full-time best efforts,” or “all of his or her work time.”

Assuming a complete and comprehensive job description is in place, the job description should be referenced in the employment agreement, as long as it is specified that the job description is subject to change at the discretion of the employer. Depending on the circumstances, it sometimes makes sense to attach the job description to the employment agreement.

### **§ 4.4.3 Performance Evaluations**

It is recommended that your client conduct regular performance appraisals of all employees. Generally, evaluations should be conducted on an annual basis. Initially, it may be advisable to review the performance of a new hire after three or six months. The employment agreement should include a commitment to regular performance appraisals if possible. As appropriate, this provision may be linked to reevaluation of the employee’s compensation.

### **§ 4.4.4 Time Period (or “Term of Employment”)**

An employment agreement can provide for termination by either party on an at-will basis, usually with a notice period required for the employer or employee to terminate. Alternatively, the employment agreement can provide a defined time period or an automatically renewing time period. The choice of term depends on many considerations, including the employer’s needs and the employment terms of comparable employees within the client’s organization. In the case of a new hire, considerations may include the expectations of candidates based on comparable positions or whether a particular desirable candidate is relocating a family to take the position.

### **§ 4.4.5 Compensation**

Compensation packages can be structured in innumerable ways. Typical forms of compensation are discussed below.

(a) *Base Pay*

Frequently, the amount of salary is established at the beginning of the employment relationship and is subject to discretionary increases based on future performance appraisals. Alternatively, in a multiyear or automatically renewing agreement, specific increases can be set in advance, subject to satisfactory performance or subject to the accomplishment by the employee of specific milestones, production, revenues, etc., depending on the position and the employer's goals. In some cases, it makes sense to set a minimum annual increase and allow for larger raises based on the employee's performance.

(b) *Incentive Compensation*

Individualized bonuses can be provided as appropriate based on the performance of the employee, of the company, or a combination of both. In the case of an employee who is responsible for a particular organization or group within the company, incentive pay, or bonuses, can be based on the performance of that organization or group. Incentive compensation provides an opportunity for the employer to establish goals and reward the employee when such goals are met.

**Practice Note**

Counsel should discuss with the client creative ways in which individualized incentive compensation can meet the needs of the employer and the employee.

Incentive compensation plans (or "bonus pay plans") may be in place or can be established to provide all employees or a subset of employees with incentive compensation based on individual performance, company performance, or a combination of both. If such a plan is in place, counsel should read the plan to determine if the employee in question is eligible to participate. If so, the plan should be referenced in the employment agreement.

(c) *Equity*

Equity or quasi-equity compensation can be provided on an individual basis or under the terms of an existing plan, on an incentive or nonincentive basis. Equity compensation may include stock ownership or stock options. Stock appreciation rights (SARs) can be structured such that the employee is entitled to compensation based on the increased value of shares but is not granted any actual ownership interest in the company. This type of compensation goes by many names and is often referred to colloquially as a "phantom stock" interest.

**(d) Profit Sharing**

Your client may provide employees with compensation through a traditional profit-sharing plan.

**(e) Deferred Compensation**

Business counsel should beware of considerable tax penalties associated with deferred compensation pursuant to I.R.C. § 409A. Tax counsel should be consulted to avoid such penalties.

**§ 4.4.6 Benefits****(a) Paid Time Off**

Paid time off typically includes vacation, sick, and personal time. Paid time off can be provided generically, including all three types of time off, or paid vacation, sick, and personal days can each be provided separately. It is advisable for employees to earn paid time off on an accrual basis.

**Practice Note**

Employers generally prefer to limit the amount of paid time off that can be “rolled over” from year to year. Policies that do not allow for paid time off to be carried from year to year are often referred to as “use it or lose it” policies.

Employment agreements should generally be consistent with the terms of the company’s paid time off policy. However, additional time off can be provided on an individual basis in an employment agreement. Provision of paid days off is not required by law.

All accrued and unused vacation time must be paid to the employee at the time of separation from employment. If the employer combines vacation time with sick and/or personal time to provide a total amount of paid time off, all accrued and unused paid time off must be paid to the employee at the time of separation.

**(b) Holidays**

It is up to the employer to determine which holidays will be provided as paid days off. Typically, the employment agreement will simply refer to an existing policy or employee handbook provision that lists paid holidays.

(c) ***Employee Welfare Benefit Plans***

Employee welfare plans include health insurance (medical, dental, optical, and prescription plans), short- and long-term disability insurance, life insurance, and cafeteria plans. Severance pay plans, which provide a fixed formula for calculating severance pay for all or a subset of employees, are also a type of employee welfare plan. Generally, it is good practice for an employment agreement to state that the employee will receive welfare benefits as provided by the existing plans, subject to any changes that may be made by the employer or the insurer. Your client should have an employee handbook or written benefits policy containing information about all available employee welfare plans and the amount of contribution required by the employee to participate in each.

**Practice Note**

In Massachusetts, all businesses with more than ten employees are required to have a health insurance plan or pay a per-employee fee to the Commonwealth.

(d) ***Retirement Plans***

Most businesses have in place some kind of retirement plan, most commonly a defined contribution plan such as a 401(k) plan. Smaller employers may have in place SEP-IRAs or other plans. Typically, the plan provides for employer and employee contributions. Defined benefit plans are less common. The employment agreement should reference any retirement plan in which the employee is eligible to participate.

(e) ***Other Benefits***

Other benefits may include relocation costs, provision of a laptop or smart phone, prepaid parking, health club membership, a car, or education reimbursement.

### **§ 4.4.7 Termination and Severance Benefits**

The employer must always retain the right to terminate the employment relationship as necessary. If the employment agreement does not include a defined time period, the agreement should be structured such that the employer and employee each have the option to terminate the employment relationship with appropriate notice. If the employment agreement provides a defined time period, the employer must have in the agreement “escape clauses” to enable the employer to terminate the employment relationship should the need arise.

The termination and severance provisions of the employment agreement are often vigorously negotiated between counsel for the employer and counsel for the employee.

**(a) *For Cause Termination by the Employer***

When severance benefits are provided in an employment agreement, the employer's obligation to provide the severance benefits is typically triggered by the employer's termination of the employee "without cause." Accordingly, it is important for your business client to retain as much discretion as possible to terminate the employee "for cause." This way, the client may be able to terminate the employment relationship if problems arise without being required to provide severance benefits.

The employment agreement should include a broad description of the grounds for a "for cause" termination by the employer to allow the employer as much flexibility as possible. Often, it makes sense to include a "cure provision," under which the employee is entitled to notice of grounds for termination and a period of time to remedy the problem if possible.

**(b) *Without Cause Termination by the Employer***

When severance benefits are provided in an employment agreement, termination of the employment relationship by the employer without cause gives rise to the obligation to provide severance benefits. Generally, "without cause" termination occurs in the absence of "cause" as defined in the employment agreement. Therefore, the definition of "cause" in the agreement is very important and should provide to the employer as much discretion as possible. Without cause termination also includes termination due to death or disability and termination due to a change of control of the business.

**(c) *Good Reason Termination by the Employee***

Provision of severance benefits may also be triggered by the employee's termination of the employment relationship for "good reason." The employment agreement need not include a "good reason" provision. However, a sophisticated employee or experienced counsel for the employee will often require this term.

Should the employment agreement include a "good reason" provision, the grounds for the employee to terminate the relationship for good reason should be as limited as possible. Generally, the employment agreement should not provide the employee with the opportunity to elect to resign and be entitled to severance

benefits unless the basis for resignation seriously impacts the employee and is attributable to the employer. A common basis for “good reason” resignation, triggering the employee’s right to severance pay, is relocation of the workplace more than a fixed distance away from its original location (sixty miles, for example), creating an unreasonable hardship for the employee.

**Practice Note**

If an employee insists on a “good reason” provision, it is wise to include a “cure provision” requiring the employee to provide your client with advance notice of the alleged “good reason” for termination. This enables the employer to address the stated grounds and remedy the situation, if possible, before the employee resigns and claims entitlement to severance benefits.

**(d) Severance Benefits**

Severance benefits typically include some amount of lump sum pay or salary continuation over a period of time following separation. Should salary continuation be provided, it may be appropriate to require the employee to report any income from other employment or consulting work during the severance period. Such amounts earned by the employee will be deducted from or “offset” the amount of severance pay.

In addition, the employer may provide continued payment of the employer’s share of monthly health insurance premiums to assist the employee in covering the cost of benefits continuation under COBRA or “Mini COBRA.”

Depending on the employee’s equity compensation, the employee may request acceleration of vesting or other favorable arrangements.

The employment agreement should require that the employee sign a general release in order to receive severance benefits.

**§ 4.4.8 Intellectual Property/Proprietary Rights**

All employees should be required to agree in writing that any intellectual property they create while employed by your client belongs to your client, including, for example, inventions, formulas, creative work, systems, and analysis. One must not assume that work performed by the employee while employed by your client will be considered “work for hire” in the absence of an explicit written agreement. This agreement can be included as a provision of the individual employment agreement or prepared as a separate document that is attached to or incorporated by reference in the employment agreement.

### § 4.4.9 Restrictive Covenants

#### (a) *Confidentiality/Nondisclosure/Trade Secrets*

All employees should be required to sign a confidentiality agreement in order to protect your client's business. The agreement should be drafted thoughtfully, and should include all confidential and trade secret information. Be sure to advise your business client that all information considered confidential and subject to the confidentiality agreement must be handled in a secure fashion in the day-to-day operations of the business. Locked drawers, pass codes, and access only on a "need-to-know" basis will help ensure that the confidentiality agreement will be enforced. The confidentiality agreement can be included as a provision of the individual employment agreement or prepared as a separate document that is attached to or incorporated by reference in the employment agreement.

#### (b) *Nonsolicitation*

Often, it is appropriate to require employees to agree that they will not solicit your business client's customers or clients after their separation from employment. Typically, a nonsolicitation agreement provides that the employee will not directly or indirectly solicit business from your business client's customers or clients or in any way induce such customers or clients to terminate their relationships with your client. Such agreements should be crafted as appropriate based on the role of the employee and his or her access to customers or clients. For example, nonsolicitation agreements are essential for sales staff, but may not be appropriate for other employees.

Nonsolicitation agreements often encompass nonsolicitation of the company's other employees. This prevents the former employee from inducing other employees to leave the company.

Typically, nonsolicitation agreements have a one-year posttermination duration. This period may be more or less, based on circumstances. As a rule of thumb, the shorter the duration, the more likely the nonsolicitation agreement will be enforced.

On occasion, it makes sense to provide for nonsolicitation during employment. While the employee's common law duty of loyalty prohibits conduct during employment that undermines the employer's best interest, depending on the circumstances it may be appropriate for your client to explicitly prohibit solicitation during employment. Counsel your client to determine if this provision should be in an employee handbook, a separate document, or the employment agreement.

**Practice Note**

As with all restrictive covenants, nonsolicitation agreements should be as narrowly tailored as possible to adequately protect your client's legitimate business interests without being overly restrictive to the employee.

The employment agreement may contain a nonsolicitation provision. If the nonsolicitation agreement is contained in a separate document, that document should be attached to or incorporated by reference in the employment agreement.

**(c) *Noncompetition***

Depending on the nature of the employee's position, a noncompetition agreement may be very important to protect your client's business after the employee's departure. Typically, noncompetes are appropriate for the highest-level employees. Noncompetes may also be appropriate for sales staff.

As with other restrictive covenants, noncompetition agreements should be used sparingly and tailored as narrowly as possible to adequately protect your client's legitimate business interests without being overly restrictive to the employee.

Generally, a one-year duration is considered to be reasonable. Depending on circumstances, it may be possible to protect your client with a noncompete that has a shorter time period. Again, as a rule of thumb, the shorter the time period, the more likely the noncompete will be enforced.

It may also make sense to explicitly prohibit noncompetition during employment. While the employee's common law duty of loyalty prohibits conduct during employment that undermines the employer's best interest, depending on the circumstances, counsel your client to determine if a noncompetition during employment provision should be in an employee handbook, a separate document, or the employment agreement.

The employment agreement may contain a noncompetition provision. If the noncompetition agreement is contained in a separate document, that document should be attached to or incorporated by reference in the employment agreement.

**(d) *Equitable Relief***

Restrictive covenants should always be accompanied by a provision specifying that equitable relief, including a temporary restraining order or preliminary injunction, will be necessary and available to your client in the event of a breach by the employee.

**Practice Note**

It is recommended that this provision include acknowledgment by the employee that breach of certain terms (in particular, the restrictive covenants, confidentiality, etc.) will cause irreparable harm to the employer for which a remedy at law (a monetary remedy) will be inadequate.

**§ 4.4.10 Other Terms****(a) *Indemnification***

It may be appropriate to indemnify certain high-level employees in the event legal claims arise from their conduct while acting on behalf of your client. If an indemnification provision is considered, be sure to review your client's insurance policies to confirm coverage for the indemnified employee.

**(b) *Arbitration***

The Supreme Judicial Court has determined that mandatory arbitration provisions contained in employment agreements are enforceable. Business counsel should discuss with the client whether arbitration is preferable to conventional litigation should a dispute arise from the employment relationship.

**(c) *Costs of Litigation***

It is helpful to clarify in the employment agreement that the employer and employee each agree to be responsible for their own costs in the event of litigation (or arbitration) arising from the employment relationship.

**Practice Note**

It is recommended that the employer obtain the employee's agreement to pay the employer's attorney fees and costs in the event the employee's breach causes irreparable harm to the employer and gives rise to injunctive relief. This requirement is intended to deter the employee from breaching the confidentiality provision and other restrictive covenants after separation from employment. Moreover, obtaining injunctive relief is very expensive. Should the employee's misconduct require your client to seek and obtain injunctive relief, it is appropriate for the employee to be responsible for the client's costs.

**§ 4.5 CONCLUSION**

Putting in place individual employment agreements as appropriate, particularly for high-level employees, can be a significant benefit to your business client. As business counsel, you can assist your client in determining for which positions it makes sense to have individual employment agreements. You can assure your client that a well-considered and carefully drafted employment agreement will support his or her business's success.

*Robert DeN. Cope is gratefully acknowledged for his contributions to the chapter on employment agreements appearing in Massachusetts Business Lawyering (MCLE, Inc. 1991).*

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## **EMPLOYMENT AGREEMENTS**

### **EXHIBIT 4A—Employment Agreement**

This Employment Agreement (“Agreement”) dated as of the \_\_\_\_ day of \_\_\_\_\_, 20\_\_, is by and between \_\_\_\_\_, a \_\_\_\_\_ (the “Company”), having a principal place of business at \_\_\_\_\_, and \_\_\_\_\_ (the “Employee”), residing at \_\_\_\_\_.

The Company and the Employee agree as follows:

1. **Employment.** The Company hereby employs Employee and Employee accepts employment upon the terms and conditions hereinafter set forth. Employee warrants that Employee is free to enter into and fully perform this Agreement and is not subject to any employment, confidentiality, noncompetition or other agreement to the extent that other agreement may restrict his ability to perform its duties and/or comply with his obligations and covenants to the Company described in this Agreement.
2. **Duties.** During the term of this Agreement, Employee’s services shall be completely exclusive to the Company and Employee shall devote substantially all of Employee’s time, attention and energies to the performance of services as President of the Company, the business of the Company and such other duties as [the Company’s Manager or Board of Managers (“Manager”)] shall assign him from time to time, including without limitation, the duties and authorizations set forth in Exhibit [D] below. Employee agrees to perform Employee’s services well and faithful and to the best of Employee’s ability and to carry out the policies and directives of the Company. Employee agrees to take no action knowingly prejudicial to the interests of the Company during Employee’s employment hereunder.
3. **Term.** This Agreement shall begin as of the execution date of this Agreement and shall end two years from such date, provided however that this Agreement shall continue in full force and effect until such time as (i) the Employee shall deliver written notice to [the Manager] of Employee’s election to terminate this Agreement, and for one hundred twenty (120) days thereafter (the “Term”) or (ii) the Company shall give Employee notice as described in Section 5 below.
4. **Compensation and Benefits.** In consideration for this Agreement, Company agrees to provide Employee with compensation, bonuses and severance pay described below. Employee understands that Employee’s base pay and bonuses shall be determined by the Company at [the Manager’s] sole discretion and may be adjusted from time to time based on a variety of factors, including by way of example and without limitation, the Employee’s performance, the Company’s financial position and/or the Company’s business strategy.

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(a) **Base Salary.** As of the date of this Agreement, the Employee's annual base salary is \$\_\_\_\_\_ payable in accordance with the Company's payroll policy, as in effect from time to time, and as may be periodically adjusted upward or downward by [the Manager] in its discretion during any review of base salaries (as adjusted, the "Base Salary"); provided, however, that any reduction of Employee's Base Salary is proportionate to and part of a general downward adjustment of the compensation and benefits of the Company's senior management personnel.

(b) **Bonuses.** Employee may be entitled to certain bonuses, described in Exhibit [B] and Exhibit [C] below, in such amounts and subject to targets, conditions, calculation formulae and other factors as may be determined from time to time in the sole discretion of [the Manager].

(c) **Severance Pay.** If Employee's employment is terminated by the Company other than for Cause (as defined in Section 5(a) below) or is terminated by the Company in connection with a Change in Control (as defined below in subsection 4(d)) or by the Employee for Good Reason (as defined below). Employee shall be eligible for severance pay provided that Employee executes a general release satisfactory to the Company. Severance Pay shall be in the lump sum amount equal to six (6) months of Employee's Base Salary at the time of termination, subject to all lawful and applicable withholdings and deductions. Such amount shall be due and payable within thirty (30) days following execution of the general release. For the purpose of this Agreement, "Good Reason" shall mean that the business location where Employee regularly reports is moved farther than fifty (50) miles.

(d) **Change in Control.** For the purposes of this Agreement, a "Change in Control" shall be deemed to be (i) a sale of all or substantially all of the assets of the Company, (b) a merger, consolidation or similar transaction of the Company with or into any other person after which the equity holders of the Company (immediately prior to the transaction) fail to own at least: fifty percent (50%) or more of the voting power of the surviving entity, or (c) a sale (whether through one sale or multiple sales to a single person or group of related persons during any period of time after the date hereof) by the equity holders of the Company (immediately prior to the transaction) of an aggregate of at least fifty percent (50%) or more of the equity interests (by voting power) of the Company owned by such equity holders in the aggregate (immediately prior to the transaction).

(e) **Expenses.** Employee shall be entitled to reimbursement for expenses (including without limitation Employee's cell phone and internet access charges) reasonably incurred in connection with the performance of

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Employee's duties hereunder in accordance with such procedures as the Company may establish from time to time.

(f) Vacation during Employment. Employee shall be entitled to such reasonable vacations as may be allowed by the Company in accordance with the Company's personnel policies.

(g) Additional Benefits. During the Term and subject to any contribution therefore generally required of employees of the Company, Employee shall be entitled to participate in any and all employee benefit plans from time to time in effect for employees of the Company generally, but the Company shall not be required to establish any such program or plan. Such participation shall be subject to (i) the terms of the applicable plan documents, (ii) generally applicable Company policies and (iii) the discretion of [the Manager] or any administrative or other committee provided for in or contemplated by such plan. The Company may alter, modify, add to or delete its employee benefit plans at any time as it, in its sole judgment, determines to be appropriate, without recourse by the Employee.

5. Termination and Termination Benefits. Notwithstanding the provisions of Section 3, Employee's employment under this Agreement shall terminate under the following circumstances set forth in this Section 5:

(a) Termination by the Company for Cause. Employee's employment under this Agreement may be terminated for Cause without further liability (including no obligation to pay severance) on the part of the Company and shall be effective on the date set for termination in the written notice to Employee. The following shall constitute "Cause" for such termination:

(i) the conviction of Employee for a crime involving moral turpitude, deceit, dishonesty or fraud that has caused or is reasonably likely to cause harm to the Company or any affiliate of the Company; or

(ii) Employee's gross negligence or willful misconduct of Employee with respect to the Company or any affiliate of the Company which causes harm; or

(iii) Employee's willful and continued failure to substantially perform (other than by reason of disability) Employee's duties and responsibilities assigned or delegated under this Agreement; or

(iv) any intentional act of dishonesty, deceit, fraud, moral turpitude, misconduct, breach of trust or acts intentionally against the fi-

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nancial or business interests of the Company by the Employee, or Employee's use or possession of illegal drugs in the workplace; or

(v) the material breach by Employee of any of Employee's obligations under this Agreement, and if such breach is capable of a reasonable and timely cure (in the Company's sole discretion), after Employee has been given a notice of such breach in writing and a reasonable opportunity to cure it.

(b) Termination by the Company without Cause. Employee's employment under this Agreement may be terminated without Cause upon written notice to Employee, subject to the obligation to provide Severance Pay as described in Section 4(c) above, but otherwise without any further liability on the part of the Company.

(c) Termination by Employee. Employee's employment under this Agreement may be terminated by Employee upon no less than four (4) months' prior written notice to the Manager.

6. Proprietary Information and Inventions. As a condition of employment, Employee shall be required to sign the Proprietary Information and Inventions Agreement attached hereto as Exhibit [A] incorporated herein and made a part hereof.

7. Solicitation of Employees. Employee agrees that he/she shall not for a period of twelve (12) months following termination of employment with the Company for any reason, whether with or without cause, either directly or indirectly, solicit or encourage any employee, independent contractor or business associate of the Company to end or diminish in any way his or her employment or other relationship with the Company.

8. Covenants Against Competition.

(a) For the purpose of this Section:

(i) "Competing Product" means any product, process, or service of any person or entity other than the Company in existence or under development, (A) which is identical to, substantially the same as, or an adequate substitute for any product, process, or service of the Company, in existence or under development, on which the Employee works during the time of employment with the Company or about which the Employee acquires Confidential Information and (B) which is (or could reasonably be anticipated to be) marketed or distributed in

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such a manner and in such a geographic area as to actually compete with such, product, process or service of the Company.

(ii) “Competing Entity” means any person or entity, including the Employee, engaged in, or about to become engaged in, research on or the acquisition, development, production, distribution, marketing, or providing of a Competing Product.

(b) In order to protect the Company’s confidential information and good will, Employee agrees to the following stipulations:

(i) For a period of twelve (12) months following termination of employment with the Company for any reason, whether with or without cause, Employee will not directly or indirectly solicit or divert, or attempt to solicit or divert, or accept business relating in any manner to Competing Products or to products, processes or services of the Company from any of the customers or accounts of the Company with which Employee had any contact during employment by the Company.

(ii) For a period of twelve (12) months following termination of employment with the Company for any reason, whether with or without cause, Employee will not render services, directly or indirectly, as an employee, consultant or otherwise, to any Competing Entity in connection with research on or the acquisition, development, production, distribution, marketing or providing of any Competing Product.

(c) Employee agrees that the restrictions set forth in this Section are fair and reasonable and are reasonably required for the protection of the interests of the Company. However, should an arbitrator or court nonetheless determine at a later date that such restrictions are unreasonable in light of the circumstances as they then exist, then Employee agrees that this Section shall be construed in such a manner as to impose on said Employee such restrictions as may then be reasonable and sufficient to assure Company of the intended benefits of this Section.

9. Insurance. The Company may, at its election and for its benefit, insure the Employee against accidental loss or death, and Employee shall submit to a reasonable physical examination and supply such information as may be reasonably required in connection therewith.

10. Consent to Jurisdiction. To the extent that any court action is permitted consistent with or to enforce any provision of this Agreement, the parties hereby consent to the jurisdiction of the state and federal courts of Massachusetts. Accordingly, with respect to any such court action, Employee and Company each

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(a) submits to the personal jurisdiction of such courts; (b) consents to service of process, and (c) waives any other requirement (whether imposed by statute, rule of court, or otherwise) with respect to personal jurisdiction or service of process.

11. Integration. This Agreement (including any schedules or exhibits attached hereto, properly executed) constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all prior agreements between the parties.

12. Assignment; Successors and Assigns. etc. Employee may not make any assignment of this Agreement or any interest herein, by operation of law or otherwise, without the prior written consent of Company. This Agreement shall inure to the benefit of and be binding upon the Company and Employee, their respective successors, executors, administrators, heirs and permitted assigns.

13. Enforceability. If any portion or provision of this Agreement (including, without limitation, any portion or provision of any section of this Agreement) shall to any extent be declared illegal or unenforceable by a court of competent jurisdiction, then the remainder of this Agreement, or the application of such portion or provision in circumstances other than those as to which it is so declared illegal or unenforceable, shall not be affected thereby, and each portion and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

14. Injunctive Relief and Litigation Costs. It is agreed and understood that Company shall be entitled to all appropriate relief, including, without limitation, injunctive and other equitable relief to enforce the provisions of this Agreement. In particular, the Employee acknowledges that breach of his or her obligations under Paragraphs 6, 7 or 8 of this Agreement will cause irreparable injury to the Company such that a remedy at law will be inadequate and the Company will be entitled to preliminary and other injunctive relief. In the event the Company obtains such injunctive relief, the Employee agrees that the Company will be entitled to recover any attorney fees and costs incurred in obtaining such relief. Otherwise, in connection with any action to enforce the terms of this Agreement, each party shall bear such party's own costs and expenses, including without limitation, attorney's fees related to such enforcement.

15. Waiver. No waiver of any provision hereof shall be effective unless made in writing and signed by the waiving party. The failure of any party to require the performance of any term or obligation of this Agreement, or the waiver by any party of any breach of this Agreement, shall not prevent any subsequent enforcement of such term or obligation or be deemed a waiver of any subsequent breach.

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16. Notices. Any notices, requests, demands and other communications provided for by this Agreement shall be sufficient if in writing and delivered in person or sent by a nationally recognized overnight courier service or by registered or certified mail, postage prepaid, return receipt requested, to Employee: at the last address Employee has filed in writing with the Company or, in the case of the Company, at its main offices, attention of the Chief Executive Officer and the Manager, and shall be effective on the date of delivery in person or by courier or three (3) days after the date mailed.

17. Amendment. This Agreement may be amended or modified only by a written instrument signed by Employee and by a duly authorized representative of the Company.

18. Governing Law. This Agreement shall be construed under and be governed in all respects by the laws of the Commonwealth of Massachusetts, without giving effect to the conflict of laws principles of such state.

19. Counterparts. This Agreement may be executed in any number of counterparts, each of which when so executed and delivered shall be taken to be all original; but such counterparts shall together constitute one and the same document.

IN WITNESS WHEREOF, this Agreement has been executed as a sealed instrument by the Company, by its duly authorized officer, and by Employee, as of the Effective Date.

[COMPANY]:

By: \_\_\_\_\_

Title: \_\_\_\_\_

Dated: \_\_\_\_\_

Employee:

\_\_\_\_\_

Dated: \_\_\_\_\_

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