

MEMORANDUM

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Subject: Key Terms of Employment Agreement

Presented below is a template for use as a starting point for determining the key terms of an employment agreement (“**Agreement**”) for a new executive. To the extent a common practice is discernible for senior executives, it is noted in italicized bold print with brackets. Note that what follows is not legal advice, and that any terms sheet needs to be developed based on a careful evaluation of individual and corporate circumstances and their relative bargaining power.

Effective Date _____, _____

Term _____ years. < **3 years** > Automatic annual extensions unless the company provides written notice of nonrenewable more than _____ months before the expiration date. <yes>

Base Salary \$_____ annually, subject to annual increases of less than _____% <or only per Board discretion>.

Annual Cash The Board will commit to develop a formula by _____, _____ <a date within _____ days of signing Agreement> that will determine annual cash bonuses < and stock awards >. The formula will be based on corporate performance, and target amounts that make overall compensation competitive on a peer group basis. The principal performances goals will be: _____.

Better for Executive: set out the formula within the Agreement – covering cash and future stock awards.

Better for Company: retain broad discretion, without formula.

Stock Option Grant (one-time? annual?) On _____, _____ < date of hire >, the executive will receive a stock option to purchase _____ shares at an exercise price equal to their fair market value. **Other terms: vesting? expiration? cashless exercise? net settlement?**

[Better for the executive, not company: The option will be an ISO to the extent possible under applicable tax laws.]

Stock Award
(one-time? annual?)

On _____, _ < *date of hire* >, the executive will receive a restricted stock unit [**OR: deferred share unit?**] award for _____ shares (to vest over the next ___ years) [**FOR DSU: to be held for transfer to executive according to an election executive makes more than one year before terminating employment**]. <**Net settlement?**>

Claw-back Protection

Executive will forfeit all [**some**] stock awards, and any proceeds or shares received through vesting or exercise will be recoverable by the company, if (i) executive violates the loyalty covenants below during employment term or for ___ <**one**> year after, or (ii) a financial restatement arises from executive's fraud or misconduct.

Other Perks

Reimbursement for moving expenses up to \$_____.

Country Club? Automobile? Life Insurance? LTD? Attendance at specified annual or industry conferences?

[limit to critical and justifiable ones]

Termination
Of Employment

Due to just cause or resignation without Good Reason: compensation and benefit accruals would cease immediately, and stock awards and unvested benefits will be forfeited.

Due to termination without Just Cause or resignation for Good Reason (e.g. demotion): salary, average past bonuses, and benefits will continue [___] through the expiration date of the agreement (as extended), but for not less than ___ months [**OR** ___ for ___ months post-termination]. [**Accelerated vesting on stock awards? Lump sum payout of bonus component?**]

Better for company: delete good reason trigger.

Due to death or disability: same as termination without Just Cause but paid in a lump sum. [**Other, e.g. same but no accelerated vesting on stock awards?**]

Just Cause means _____. [For Employer: copy from an existing agreement or plan.] [For executive: be careful to narrow to objectively determinable events, e.g. conviction.]

Good Reason means ___ Code 409A safe harbor; ___ customize to be more favorable to executive.

Change in Control – same as _____ Plan (normally select a commonly used definition, or update all to be consistent).

Change in Control	<p>The executive will receive _____ < 2.99 > times the highest W-2 income that the executive has received, plus accelerated vesting on all awards. Such payments will be made if - -</p> <p>(1) the executive resigns from employment for any reason other than just cause within a window period of __ [30] days beginning __ [6] months after a change in control, or</p> <p>(2) the executive's employment terminates involuntarily or for good reason within __ months before or __ months after a change in control.</p>
280G Parachute Taxes	<p><i>Favorable to executive:</i> The company will make an additional payment if needed to hold executive harmless from taxes imposed under the Code's golden parachute rules.</p> <p><i>Favorable to company:</i> 280G cutback under all circumstances.</p> <p><i>Middle Ground:</i> Modified cut-back. <Alternative: no provision.></p>
Funding of Rabbi Trust	<p><i>Favorable to executive:</i> Within __ [30] days after a change in control, the company will fund a rabbi trust with assets sufficient to pay all severance and deferred benefits.</p>
Loyalty Protections	<p>Non-compete? Non-solicit? Non-disclosure? Non-disparagement? How long for each after termination of employment???</p>
Claims Release	<p>Required for any severance payments. Attach form to agreement?</p>
Litigation	<p>_____ law would govern, and the company will reimburse the executive for legal expenses incurred to successfully enforce the agreement. [OR: successful party recovers fees.]</p> <p>[ALTERNATIVE: mandatory arbitration]</p>
Private Co. Only	<p><u>Executive Protection:</u> During the period of __ months that begins six months after the executive's termination of employment for any reason, the executive may surrender to the company all or some of the vested company shares that the executive owns, and the company will pay executive the then fair market value for such shares. [Appraisal? Installment payment?]</p> <p><u>Company Protection:</u> company shares issued to the executive will be subject to (i) company repurchase rights, rights of first refusal, and/ or terms of a shareholder's agreement.</p>

< The End >