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### Executive Employment Agreements in Tennessee: An Annotated Model Tennessee Executive Employment Agreement

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**EXECUTIVE EMPLOYMENT AGREEMENTS IN TENNESSEE:  
AN ANNOTATED MODEL  
TENNESSEE EXECUTIVE EMPLOYMENT AGREEMENT**

**JOAN MACLEOD HEMINWAY\* & TRACE BLANKENSHIP\*\***

**PRELIMINARY NOTE**

This Preliminary Note and the accompanying annotated model executive employment agreement (the “Tennessee Model Employment Agreement”) represent the most recent installment in a series of annotated model agreements for acquisition transactions in Tennessee.<sup>1</sup> The Tennessee Model Employment Agreement is designed to be used in connection with a middle-market or short-form asset purchase agreement governed by Tennessee law. Like the prior agreements in this series, this model agreement is annotated with explanatory footnotes and is best used as a reference point rather than as a first draft for the client.

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\*\* Member and General Counsel, Bone McAllester Norton PLLC, Nashville, Tennessee; B.A. 1989, Williams College; J.D. 1996, The University of Tennessee College of Law. Mr. Blankenship advises boards of directors, management, and entrepreneurs in the areas of corporate governance, mergers and acquisitions, and securities regulation and disclosure. He is grateful for the help of his legal assistant, Jennifer Frey, and paralegal, Tonya Mastin, for their diligent work and patient assistance with this article.

<sup>1</sup> See Terry W. Gentle, Jr. & Joan MacLeod Heminway, *Buying Stock in Tennessee: An Annotated Model Tennessee Stock Purchase Agreement*, 5 TRANSACTIONS: TENN. J. BUS. L. 211 (2004); Angela Humphreys Hamilton & Joan MacLeod Heminway, *Buying Assets in Tennessee: An Annotated Model Tennessee Asset Purchase Agreement*, 4 TRANSACTIONS: TENN. J. BUS. L. 209 (2003); Joan MacLeod Heminway & Timothy M. McLemore, *Acquisition Escrows in Tennessee: An Annotated Model Tennessee Acquisition Escrow Agreement*, 7 TRANSACTIONS: TENN. J. BUS. L. 273 (2006); Joan MacLeod Heminway et al., *Acquisition Licenses in Tennessee: An Annotated Model Tennessee Acquisition License Agreement*, 8 TRANSACTIONS: TENN. J. BUS. L. 359 (2007); Joan MacLeod Heminway & Jackie G. Prester, *Bank Mergers in Tennessee: An Annotated Model Tennessee Bank Merger Agreement*, 6 TRANSACTIONS: TENN. J. BUS. L. 247 (2005); Joan MacLeod Heminway & J. Allen Roberts, *Bills of Sale in Tennessee: An Annotated Model Tennessee Bill of Sale*, 9 TRANSACTIONS: TENN. J. BUS. L. 305 (2008).

As this publication goes to press, the national conversation regarding the compensation and employment terms offered to senior executives in the United States continues to gain greater attention and momentum, especially as the performance of many of the country's largest business organizations falters while handsome compensation is paid to executives irrespective of their results.<sup>2</sup> Some of these large pay packages are negotiated in connection with merger and acquisitions.<sup>3</sup> The public hue and cry has been loud, and public and private responses continue to be suggested and implemented. Recently, some chief executives seem to be concerned enough about perceptions of their diligence and hard work that they are resigning from well-paid positions on other corporate boards.<sup>4</sup>

While the Tennessee Model Employment Agreement is not expressly designed for chief executives of large companies that have reporting requirements to governmental regulatory authorities, the terms of a senior executive's employment are no less important to a company backed by private equity investors, to a closely held or family-owned company with a small (but curious) base of equity holders, or even to the local banker who provides the debt financing for the company's operations.<sup>5</sup> Indeed, there seem to be more and stronger suggestions that a company's approach to executive compensation bears a relationship not only to the interests of the company's equity holders but also to the national best interest.<sup>6</sup>

In this context, the authors offer a model agreement that is intended to provide a reasonable middle ground. The authors intend that the Tennessee Model Employment Agreement be useful in the planning and execution of the acquisition transaction and that it benefit counsel for the buyer, who is interested in retaining the acquisition target's best executive talent, and counsel for the prospective executive

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<sup>2</sup> See Gretchen Morgenson, *Gimme Back Your Paycheck*, N.Y. TIMES, Feb. 22, 2009, at BU1.

<sup>3</sup> See Randall S. Thomas, *Explaining The International CEO Pay Gap: Board Capture Or Market Driven?*, 57 VAND. L. REV. 1171, 1244-45 (2004) (describing the factors that lead to this phenomenon).

<sup>4</sup> See, e.g., John Greenwald, *CEOs to Boards: We're Outta Here*, CORP. BOARD MEMBER, First Quarter 2009, at 22 (reporting that many chief executive officers are stepping down from positions as outside directors for other corporations).

<sup>5</sup> See Ronald Bottano & Russell Miller, *Competitive Pay for Private Companies*, BUSINESSWEEK.COM, June 4, 2007, [http://www.businessweek.com/careers/content/jun2007/ca20070604\\_061560.htm?campaign\\_id=rs\\_s\\_null](http://www.businessweek.com/careers/content/jun2007/ca20070604_061560.htm?campaign_id=rs_s_null).

<sup>6</sup> See George M. Keller, *Slow Down the Gravy Train: Some Form of Special Leadership is Called For as Those at the Top of the Pyramid Continue to Pull Away from the Rest of the American People*, DIRECTORS AND BOARDS, Jan. 1, 2009, at 64; see also Jonathan Weisman & Joann S. Lublin, *Obama Lays Out Limits on Executive Pay*, WALL ST. J., Feb. 17, 2009, at A1.

employee. As a reference transaction for the Tennessee Model Employment Agreement, the authors have chosen to use the asset acquisition contemplated by the Annotated Model Tennessee Asset Purchase Agreement (an agreement in the previously referenced series of annotated model agreements for acquisition transactions in Tennessee) drafted and annotated by Angela Humphreys Hamilton and Joan MacLeod Heminway (the “Asset Purchase Agreement”).<sup>7</sup> Accordingly, the employer is assumed to be the buyer of a privately held Tennessee corporation, and Tennessee law applies to both the Asset Purchase Agreement and the ensuing employment relationship. As applicable, the Tennessee Model Employment Agreement reflects the authors’ stylistic preferences and has been drafted and annotated with an emphasis on Tennessee law and practice, although sources of general application (as well as those reflecting Tennessee law and practice) are cited in support of drafting choices, ideas, and perspectives. There is no clear lineage for the Tennessee Model Employment Agreement; the authors acknowledge that it is the product of the analysis, thoughts, and experiences of many practitioners.

Typically, if a business owner who is selling his or her company is interested in remaining with the new owner after the sale, the owner-seller will insist on negotiating and agreeing to, at least, the principal terms of employment at the inception of the transaction.<sup>8</sup> These principal employment terms would usually be included in a term sheet or letter of intent.<sup>9</sup> Sometimes, the formal employment agreement is entered into before the merger or acquisition agreement; other times,

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<sup>7</sup> Hamilton & Heminway, *supra* note 1. If the authors had chosen to use a merger or stock sale (rather than an asset sale) as the predicate acquisition transaction, then certain issues additional to or distinct from those highlighted here would need to be explored. For example, if the predicate acquisition were being completed by way of a federally regulated tender offer, then the authors would need to address the potential inclusion of the value of the relevant employment agreement or agreements in the tender offer consideration, in compliance with the “best price” provision in Rule 14d-10 under the Securities Act of 1934, as amended. 17 C.F.R. § 240.14d-10(a) (2009); *In re Digital Island Sec. Litig.*, 223 F. Supp. 2d 546, 556-59 (D. Del. 2002).

<sup>8</sup> Sometimes, the executive is not the owner of the business or is one of a number of owners. With modifications, the Tennessee Model Employment Agreement also can be used to employ an executive post-acquisition in these other circumstances.

<sup>9</sup> See Jason Scott Johnston, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation*, 85 VA. L. REV. 385, 403 (1999) (“In complex negotiations over the sale of a business, the extension of commercial loans, or executive employment contracts, it is not uncommon for the parties to reach an agreement on the major terms such as price and financing in a ‘letter of intent’ or ‘agreement-in-principle.’”).

the execution and delivery of the formal contract is a condition to the closing of the merger or acquisition.<sup>10</sup>

While some selling executives may want to move on to other adventures after selling their company, others believe that, with the right buyer in the position as new owner, the selling executive is the best person to manage the company's vendors, customers, and personnel, at least through the post-acquisition integration.<sup>11</sup> This may be especially important if some type of "earn-out" is a component of the purchase price for the company, in which the post-acquisition financial performance of the company dictates the amount of the "earn-out" payment made to the seller.<sup>12</sup> Or it may be equally important, for example, if the buyer is significantly larger than the target company and, in the perception of the selling executive, a strong, steady, familiar hand is required to smoothly guide the existing personnel into the new and different business culture of the buyer's

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<sup>10</sup> One seasoned corporate counsel writes (in reviewing a model stock purchase agreement produced by the American Bar Association):

[T]he *Model* provides, as a condition to closing, for the execution of employment agreements with key executives. In certain transactions, however, particularly those involving public companies (where it is important to the buyer that key employees be retained or at least execute noncompetition agreements), it is advisable that agreements be reached with key employees prior to the execution of a purchase agreement. Otherwise, there is the risk of enhancing the bargaining strength of such employees who will realize that they hold the key to satisfaction of certain essential closing conditions.

Kenneth J. Bialkin, *Model Stock Purchase Agreement With Commentary: Manual On Acquisition Review*, 52 BUS. LAW. 733, 738 n.22 (1997) (book review) (citation omitted). For an example of a closing condition providing for the execution of an executive employment agreement, see Heminway & Prester, *supra* note 1, at 303 (Section 6.01(e)).

<sup>11</sup> Acquirors of the business often agree. See Ben Walther, Note, *Employment Agreements and Tender Offers: Reforming the Problematic Treatment of Severance Plans under Rule 14d-10*, 102 COLUM. L. REV. 774, 805 (2002) ("[E]mployment arrangements are often vital to an acquirer's plan to realize value from an acquired firm, because the employment agreements may be necessary to retain the services of target executives with highly valuable experience. . . . [S]ynergistic gains may be impossible to realize if the target management leaves the firm, thereby walking off with much of the accumulated expertise and knowledge of the organization.").

<sup>12</sup> See Scott Henderson, *Earnout Provisions Can Help Set Acquisition Price*, CHARLOTTE BUS. J., Feb. 1, 2008, available at <http://charlotte.bizjournals.com/charlotte/stories/2008/02/04/focus5.html>; see also, e.g., Anne Field, *How to Survive an Earnout*, BUSINESSWEEK.COM, June 20, 2005, [http://www.businessweek.com/magazine/content/05\\_25/b3938451.htm](http://www.businessweek.com/magazine/content/05_25/b3938451.htm).

organization.<sup>13</sup> Moreover, the buyer may recognize that the executive is needed for this or other purposes. In fact, the retention of target company executives in a merger or acquisition may be an essential component of the transaction.<sup>14</sup>

The Tennessee Model Employment Agreement anticipates that the executive would be employed by the buyer for a fixed duration that renews indefinitely unless either party provides the required notice prior to the commencement of the initial or any renewal term. In addition, post-termination restrictive covenants relating to competition and disclosure of confidential information are included in the Tennessee Model Employment Agreement, notwithstanding that the executive, if also a party to the acquisition agreement itself, may be subject to additional restrictive covenants supported by the purchase price consideration that buyer paid in connection with the acquisition.<sup>15</sup> The Tennessee Model Employment Agreement does not contemplate that the executive will be producing, in any serious quantity, patentable intellectual property while employed, although a more general provision relating to inventions and discoveries is included for reference purposes. None of the provisions in the Tennessee Model Employment Agreement are intended to suggest that the executive selling a company is precluded from negotiating terms that are more advantageous or

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<sup>13</sup> See, e.g., Brooks Barnes, *Disney and Pixar: The Power of the Prenup*, N.Y. TIMES, June 1, 2008, at BU1 (discussing Disney's acquisition of Pixar and the agreements in place to protect Pixar's culture and employees during the assimilation).

<sup>14</sup> Walther, *supra* note 11, at 774-75 (“[T]oday’s quintessential merger is motivated by strategic considerations or expectations of value-creating synergies, and depends for its success on the continued employment of target personnel. As a result, satisfactory resolution of post-merger employment issues (such as the compensation and retention of target executives) can often be the difference between a successful acquisition and a failed merger discussion.”).

<sup>15</sup> The acquisition agreement may, for example, include post-closing nondisclosure, noncompetition, and nonsolicitation covenants. Any covenants of the same kind in the employment agreement typically would supplement these acquisition agreement covenants and operate over a specified post-employment time period. It is important to review applicable state law in connection with these provisions. Legal standards governing the validity of these types of restrictive covenants vary from state to state, and the context of the covenants—i.e., whether they are incidental to employment or a business combination—may impact their enforceability. See *Palmer & Cay, Inc. v. Marsh & McLennan Cos.*, 404 F.3d 1297, 1303-06 (11th Cir. 2005) (describing the enforceability of noncompetition covenants under Georgia law); Don Benson & Stephanie Bauer Daniel, *New Race to Tennessee and Georgia Courthouses Over Non-competition Agreements*, 41 TENN. B.J. 18 (2005) (describing the analysis in *Palmer & Cay* and warning Tennessee employers with Georgia employees about the need to win the race to the courthouse if they desire to enforce noncompetition agreements after *Palmer & Cay*). Moreover, specialized state legislation also may impact the validity or enforceability of, in particular, noncompetition and nonsolicitation provisions. See, e.g., N.Y. LAB. LAW § 202-k (McKinney 2008) (known as the Broadcast Employees Freedom to Work Act, this law prohibits certain noncompetition agreements that restrict the employment of broadcast employees).



that the buyer is required to offer the full complement of compensation and fringe benefits that are included and described. The intent is to provide a basic framework for negotiations so that the buyer and the executive can work together toward completing a mutually beneficial acquisition transaction and, one hopes, an ongoing business organization characterized by continued growth and success.

We would be remiss if we did not take a moment to comment on the professional responsibility and ethics issues that arise in the negotiation, drafting, and execution of employment agreements, especially in a merger or acquisition context. For example, executives are often not represented by separate counsel when entering into an employment agreement with the firm. In fact, the executive may have a close, pre-existing professional relationship with the firm's counsel, from whom the executive may routinely seek advice in conducting the firm's business. In these circumstances, the firm's lawyer must be scrupulously careful to observe applicable professional responsibility rules relating to the identity of his or her client and the nature of the professional relationship,<sup>16</sup> and must refrain from offering legal advice to the executive.<sup>17</sup> As one practitioner-author notes:

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<sup>16</sup> MODEL RULES OF PROF'L CONDUCT R. 1.13 (2007) (regarding the organization as a client). Of special significance are the following parts of the rule:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

....

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

*Id.*; see also *id.* cmts 10 & 11.

<sup>17</sup> *Id.* R. 4.3 (regarding dealings with an unrepresented person). The Rule provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

*Id.*; see also *id.* cmts 1 & 2.

In representing his client, a lawyer may not give an unrepresented individual any advice other than advice to seek counsel. The attorney is allowed to discuss the subject matter of the dispute, but may not imply that he is a disinterested person; at all times the lawyer must clarify the exact nature of his role and interest in the dispute. As long as there is no overreaching or misrepresentation, the attorney may draft documents and submit them to the unrepresented party for signature. Although an attorney should not suggest specific counsel, he or she may suggest legal aid or other bar referral services approved by the bar. An attorney may not circumvent this rule by using the client or some third party as a medium to give advice to the unrepresented party.<sup>18</sup>

Of course, globalism also impacts professional responsibility and ethics.<sup>19</sup> U.S. firms are acquired by foreign firms and foreign firms are acquired by U.S. firms; employment agreements may be cross-border contracts. These cross-border transactions raise issues regarding, for example, the unauthorized practice of law (which is, of course, also an issue in multijurisdictional transactions within the United States).<sup>20</sup> In this connection, it is important to note that legal services outsourcing has become more commonplace.<sup>21</sup> Corporations should give serious consideration to the appropriateness of outsourcing the drafting of individual agreements. Most would agree that an acquisition-related employment agreement is not a good candidate for outsourcing.<sup>22</sup>

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<sup>18</sup> Dennis P. Duffy, *Selected Ethics and Professionalism Issues in Labor and Employment Law Cases*, ALI-ABA COURSE OF STUDY MATERIALS, ADV. EMP. L. & LITIG. 943, 1047-48 (Dec. 2005) (footnotes omitted).

<sup>19</sup> See generally Jamie Y. Whitaker, Note, *Remedying Ethical Conflicts in a Global Legal Market*, 19 GEO. J. LEGAL ETHICS 1079 (2006) (illustrating professional responsibility issues in a global context).

<sup>20</sup> See, e.g., Ronald A. Brand, *Uni-State Lawyers and Multinational Practice: Dealing with International, Transnational, and Foreign Law*, 34 VAND. J. TRANSNAT'L L. 1135, 1142-54 (2001) (describing issues relating to the unauthorized practice of law in multijurisdictional matters); see also MODEL RULES OF PROF'L CONDUCT R. 5.5 (2007) (regarding unauthorized and multijurisdictional law practice).

<sup>21</sup> See generally James I. Ham, *Ethical Considerations Relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States*, 27 PENN ST. INT'L L. REV. 323, 342-43 (2008) (regarding professional responsibility implications of legal outsourcing); Keith Woffinden, Comment, *Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3*, 2007 BYU L. REV. 483 (2007) (same).

<sup>22</sup> Ham, *supra* note 21, at 343 ("Highly fact-intensive matters that would require the overseas staff to become familiar with every minute detail of a matter may not be suitable for outsourcing. Examples might include merger and acquisition documentation, employment agreements for executives, and

Like the other installments in this series, this model agreement has been drafted using certain “plain English” drafting conventions.<sup>23</sup> Archaic language, including the words “hereof,” “thereof,” “whereof,” “hereunder,” “thereunder,” “hereby,” “thereby,” “wheretofore,” and “whereas,” has been avoided throughout.<sup>24</sup> Additionally, “under” is used instead of “pursuant to,”<sup>25</sup> and “such” is used as an adjective or as a demonstrative (referential) pronoun as infrequently as possible and only where the intended reference is clear.<sup>26</sup> Finally, where words are listed in series, the discretionary comma before the conjunction has been included.<sup>27</sup> These stylistic preferences have been employed to create a consistent, clearer, more readable form.

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joint venture agreements; fact-intensive pleadings where the United States lawyer has interviewed the client and is most familiar with the underlying facts; and matters requiring active negotiation.”).

<sup>23</sup> See, e.g., THOMAS R. HAGGARD & GEORGE W. KUNEY, *LEGAL DRAFTING IN A NUTSHELL* 6 (2007) (citing eight “Characteristics of Plain English”).

<sup>24</sup> See, e.g., HOWARD DARMSTADTER, *HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING* 5-6 (2002) (noting that for words of this kind, “their distance from common speech makes them prime candidates for the chop, and they are usually dispensed with”); BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES* 35 (2001) (classifying some of these words as “commonplace legalisms that skulk in every paragraph of listless legal writing”). See generally HAGGARD & KUNEY, *supra* note 23, at 6, 309 (noting that the “absence of overly legal jargon” is a characteristic of plain English and that words like these are archaic and constitute legalese).

<sup>25</sup> See KENNETH A. ADAMS, *A MANUAL OF STYLE FOR CONTRACT DRAFTING* 369 (2d ed. 2008) (classifying “pursuant to” as a “lawyerism” that can be replaced with “under, in accordance with, [and] as authorized by”); GARNER, *supra* note 24, at 35 (classifying “pursuant to” as a legalism that can be replaced with “under, by, in accordance with”).

<sup>26</sup> See ADAMS, *supra* note 25, at 298 (noting that using *such* instead of the “pointing words” *the*, *this*, *that*, *these*, and *those*. . . “goes against the principle that in drafting you shouldn’t use one word to convey different meanings . . . and it also alienates non-lawyers.”); DARMSTADTER, *supra* note 24, at 3 (“Lawyers tend to use *any* instead of *a* and *such* instead of *the* . . .”); GARNER, *supra* note 24, at 35 (classifying “such” as a legalism that can be replaced with “that, this, those, [and] the”); HAGGARD & KUNEY, *supra* note 23, at 273, 309-10 (stating that “[i]n addition to being in bad style, using ‘such’ as a demonstrative pronoun often creates ambiguity” and directing that the drafter “[n]ever use ‘such’ as an adjective before a singular noun” and “[n]ever use ‘same’ or ‘such’ as a pronoun”).

<sup>27</sup> Although the more common—perhaps even the majority—rule in contract drafting is to omit the comma, the omission of the comma may create ambiguities. See HAGGARD & KUNEY, *supra* note 23, at 288-89. The most widely accepted grammatical and plain English rule is that the comma should be included. See GARNER, *supra* note 24, at 148 (“Use a comma to separate items in a series—including the last and next-to-last.”).

## EXECUTIVE EMPLOYMENT AGREEMENT

This Executive Employment Agreement (this “Agreement”), dated \_\_\_\_\_, 2009,<sup>28</sup> is by and between \_\_\_\_\_, a Tennessee corporation (the “Employer”), and \_\_\_\_\_, an individual residing in the State of Tennessee (“Executive”).

### RECITALS

The Employer engages in the business of \_\_\_\_\_ (the “Employer Business”).<sup>29</sup>

The Employer is acquiring all the assets of [insert name of target corporation] (the “Seller”) under the terms of an Asset Purchase Agreement among Seller, Employer, and Employee (the “Asset Purchase Agreement”).

Executive has been employed by Seller as its Chief Executive Officer.

The Employer wishes to offer employment to Executive, and Executive wishes to accept employment on the terms and conditions stated in this Agreement.

### AGREEMENT

In consideration of the above recitals and the mutual terms and conditions set out in this Agreement, the parties agree as set forth below.

**1. Employment and Term.** The Employer employs Executive as its Chief Operating Officer<sup>30</sup> to perform the services and duties that the Board of

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<sup>28</sup> The date of the Agreement typically will be the closing date of the related acquisition, unless the parties enter into the Agreement before the closing in anticipation of the acquisition. *See supra* note 10 and accompanying text.

<sup>29</sup> A general description of the employer’s business is necessary to put the agreement in context. To best guard the Employer’s interests in protecting its business through, in particular, the restrictive covenants in the Agreement, this definition should be as detailed as possible and should reflect time periods referenced in the Agreement (e.g., Section 8[a] of the Agreement, referencing “the Employer Business at any time during the two-year period preceding the termination or expiration of Executive’s employment by the Employer.”).

<sup>30</sup> We have chosen to draft the Model Tennessee Employment Agreement as an employment agreement between the acquiror and the Chief Executive Officer of the Seller. With modifications, however, the Model Tennessee Employment Agreement can be used for the employment of other target executive officers. For example, the reference to the Board of Directors later in the same

Directors of the Employer may from time to time designate during the term of this Agreement, and Executive accepts employment by the Employer on that basis, all subject to the terms and conditions of this Agreement. Executive's employment under the terms of this Agreement shall commence on the date of this Agreement<sup>31</sup> and shall continue for a term of \_\_\_\_ years (the "Term").<sup>32</sup> Executive's employment under this Agreement shall be extended automatically for successive, additional \_\_\_\_-year terms after the initial term, unless either party gives written notice to the contrary to the other at least 90 days prior to commencement of any renewal term.<sup>33</sup>

**2. Termination.** The Employer may terminate Executive's employment under this Agreement at any time during the Term [a] for Cause (as defined in Section 8[b]) or [b] in the event of Executive's Complete Disability (as defined in Section 8[d]). In addition, Executive may terminate his employment with the Employer for Good Reason (as defined in Section 8[i]). Executive's employment under this Agreement shall terminate automatically upon the death of Executive. Upon termination of Executive's employment in accordance with this Section 2, Executive shall not be entitled to receive any further compensation or benefits from the Employer, except as provided in Section 4[c] and except in the case of the death of Executive, in which event the Employer shall continue to pay to Executive's estate or personal representative his<sup>34</sup> Base Salary for a period of \_\_\_\_.<sup>35</sup>

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sentence as this footnote may be changed to a reference to the President of the corporation for lower-level executives.

<sup>31</sup> If the parties enter into the Agreement in advance of the closing date of the related acquisition, then the Agreement would not become effective until the closing date of the related acquisition (and the "start date" set forth here then would reflect that fact and, perhaps, indicate that the Agreement will be of no further force and effect if the acquisition is never consummated). *See supra* note 28.

<sup>32</sup> Typically, the term of an executive employment agreement is no more than five years. *See* Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 235 (2006) (noting, in a study of public-company executive contracts, "that the most frequent length of CEO contracts is three years and the second most common length is five years.").

<sup>33</sup> Commonly known as an "evergreen" provision, this fixed-term/automatic renewal combination may be useful to ensure compliance with certain state laws that limit the duration of employment contracts for certain purposes. *See, e.g.*, N.Y. INS. LAW § 4312(b) (McKinney 2000); *see also* Employment Agreement and N.Y. Ins. Law § 4312, Op. N.Y. State Ins. Dept. Gen'l Counsel, Feb. 18, 2005, *available at* <http://www.ins.state.ny.us/ogco2005/rg050224.htm>.

<sup>34</sup> Male pronouns are used throughout the Tennessee Model Employment Agreement for ease of reference.

3. **Duties.** Executive, during the term of this Agreement, will devote his full-time attention and energies to the diligent performance of his duties as an executive of the Employer. During the term of this Agreement, Executive will not accept employment with any other Person (as defined in Section 8[i]) or engage in any venture for profit that the Employer considers to be in conflict with its best interests or to be in competition with its business or that may interfere with Executive's performance of his duties under this Agreement. If Executive's employment is terminated for any reason, Executive shall resign as an officer or director of the Employer and each of its affiliates in which he is serving as an officer or director.

4. **Compensation.**<sup>36</sup>

[a] The Employer shall pay to Executive as compensation for the services to be performed by him under this Agreement an annual salary of \$\_\_\_\_\_ (the "Base Salary"), payable in equal installments no more often than twice monthly, subject to increase from time to time by the mutual agreement of the parties to this Agreement.

[b] As additional compensation, the Employer may pay to Executive an annual bonus in an amount, to be determined at the discretion of the Employer.

[c] If Executive's employment is terminated by the Employer without Cause or as a result of Complete Disability or death, or if Executive resigns for Good Reason, then during the 12-month period commencing on the date of termination, Executive shall be entitled to receive the annual Base Salary, in each

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<sup>35</sup> The benefit of a fixed period of continued salary payments after death, as provided here, may be negotiated between the parties. A more typical provision might call for the payment of accrued salary and cash (or cash-equivalent) benefits. See Wayne N. Outten, *Negotiating Employment Agreements: An Employee's Lawyer's Perspective*, July 11, 2000, at 10, available at <http://www.bna.com/bnabooks/ababna/annual/2000/outten2.pdf> ("Employment agreements typically provide that, when the employee dies, the employer's only obligation under the agreement is to pay to the employee's estate any accrued salary, and perhaps, accrued unused vacation pay. The employee's lawyer may try to add payment of any accrued but unpaid bonus and a prorated bonus for the final year of employment.").

<sup>36</sup> Employers should pay particular attention to the drafting of compensation provisions in employment agreements, since ambiguities in these provisions will be construed against employers. See *Hopmayer v. Aladdin Indus., LLC*, No. M2003-01583-COA-R3-CV, 2004 Tenn. App. LEXIS 364 (Tenn. Ct. App. June 9, 2004); see also Jennifer Rowlett, Case Commentary, *Employment Contract Ambiguities Construed against the Employer*, 7 TRANSACTIONS: TENN. J. BUS. L. 206, 206 (2005).

case payable by the Employer in regular installments in accordance with the Employer's general payroll practices (as in effect from time to time). Notwithstanding the foregoing, [i] Executive shall not be entitled to receive any severance payments under this Section 4[c] unless Executive has executed and delivered to the Employer a general release that is reasonably acceptable to Employer and [ii] Executive shall be entitled to receive such severance payments only so long as Executive has not breached the provisions of Section 9 of this Agreement. Except as otherwise expressly provided in this Section 4[c], Executive shall not be entitled to receive any severance payments from and after the date of termination.

If, within 12 months after the occurrence of a Change of Control (as defined in Section 8[c]), the Employer elects to terminate Executive's employment under this Agreement for any reason or Executive elects to terminate this Agreement by resignation, the Employer shall continue to pay Executive an amount equal to the total amount of cash compensation paid to Executive during the \_\_\_\_-month period<sup>37</sup> immediately prior to the date of termination.<sup>38</sup> This amount shall be paid to Executive in a lump sum within 30 days after the date of Executive's termination.<sup>39</sup>

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<sup>37</sup> The period that determines the amount of severance benefits must be carefully selected in light of significant penalties that may be imposed on corporations and executives under federal tax laws. *See* 26 U.S.C. § 280G (2007) (prohibiting corporate deductions for "any excess parachute payment"); *id.* at § 4999(a) (providing for the payment of an excise tax by the executive on any "excess parachute payment").

<sup>38</sup> The severance provided for in this subsection is an executive-friendly form of a double-trigger change-in-control provision. A double-trigger provision typically allows the executive to receive severance only upon the change of control and an involuntary termination (without cause or for good reason) or constructive termination; a single-trigger provision typically allows the executive to receive severance after a change of control of the corporation (defined to include most third-party business combination transactions). *See* Bruce A. Wolk, *The Golden Parachute Provisions: Time For Repeal?*, 21 VA. TAX REV. 125, 146-47 (2001) ("Most change-in-control benefits will only occur if the executive is actually terminated in connection with a change in control. These are commonly referred to as 'double trigger' provisions. But some change-in-control packages will provide certain benefits, usually limited to the accelerated vesting of stock options and restricted stock, upon a change in control even if the executive remains employed (so-called 'single trigger' provisions).") (footnotes omitted).

<sup>39</sup> Under Tennessee law, this payment may, under certain circumstances, be viewed as liquidated damages rather than severance, since payment may result from the Employer's termination of Executive in breach of the Agreement. *See* *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 96-98 (Tenn. 1999). If the payment is in the nature of liquidated damages, then recovery of the lump sum may be "conditioned upon a showing . . . that the amount of recovery was a reasonable estimation of damages." *Id.* at 96.

## 5. Other Benefits.

[a] The duties to be performed by Executive under this Agreement require the regular use of an automobile, and the parties agree that Employer shall, in lieu of furnishing Executive with a company car or reimbursing Executive for expenses incurred for use of his personal automobile, pay Executive a monthly automobile allowance of \$\_\_\_\_\_.<sup>40</sup> Neither the payments to Executive nor any other terms of this Agreement are intended to or shall make the Employer the owner, bailor, bailee, lessor, or lessee of any automobile utilized by Executive.<sup>41</sup>

[b] The Employer will reimburse Executive for expenses incurred in the course and scope of the Employer's business (other than for automobile use), upon the presentation by Executive, from time to time, of an account of these expenditures, setting forth the amount of each expenditure and the purpose(s) for which it was incurred, together with receipts showing payments (to the extent that the Executive has reasonably been able to obtain and retain them). All reimbursable expenses must comply with the policies and procedures of the Employer<sup>42</sup> and any applicable budget limitations.

[c] The Employer shall provide Executive with health, life, and disability insurance under its group insurance plan as now or later in effect. In

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<sup>40</sup> The amount of the allowance is negotiated between the parties and constitutes additional compensation to the Executive. This perquisite recognizes that travel may be a significant part of the Executive's activities. However, company cars are relatively extravagant perquisites and raise issues for corporate employers in terms of cost (lease/purchase, repairs/maintenance, insurance, etc.) and logistics (retirement and return of the car) that are avoided by offering an allowance in lieu of a car. The employer may want to specify (either in the employment agreement or in a referenced corporate policy) the expenses for which the car allowance may be used (e.g., a specific make/model of car, limited lease payment, repairs and maintenance, fuel, etc.) or, as we have done here, treat the payment as the equivalent of additional salary. The financial benefits of either option to an employee depend on the circumstances, but an open-ended car allowance benefit gives the employee more choice as to the vehicle he or she will use (although many employers with company car programs do offer employees some choice as to the make/model of the vehicle).

<sup>41</sup> This sentence clarifies that the Employer bears no responsibility, contractual or otherwise, for the vehicle that is the subject of the automobile allowance.

<sup>42</sup> The Employer should ensure that policy and procedure documentation does not contain provisions that are inconsistent with the Agreement since, as a result of the reference here and the operation of Section 21 of the Agreement, these policies and procedures are incorporated by reference into and become part of the Agreement.



addition, Executive shall receive vacation and holiday benefits in accordance with the Employer's policies as now or later in effect.<sup>43</sup>

[d]      The Employer will pay the reasonable cost of a \_\_\_\_\_ membership<sup>44</sup> for Executive and any related recurring periodic fees.

**6.      Stock Options.**<sup>45</sup> The Employer is granting to Executive qualified incentive stock options (as defined by the Internal Revenue Code of 1986, as

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<sup>43</sup> This section effectively puts Executive in the same position as other employees of the Employer who have implicit, rather than explicit, employment contracts. *See* Dayna Bowen Matthew, *Controlling the Reverse Agency Costs of Employment-Based Health Insurance: Of Markets, Courts, and a Regulatory Quagmire*, 31 WAKE FOREST L. REV. 1037, 1049 (1996) (“[T]here is almost never any ex ante communication of the health insurance terms . . . . The terms of the health insurance agreement are unilaterally provided by the employer in almost all cases.”). The provisions of this section do not offer certainty to Executive in the form of a base-minimum level of benefits. As the Employer's plans change, Executive's coverage changes, even if the changes reduce coverage. *See id.* (“[S]pontaneous, unilateral novations in the [implicit employment] contract occur each time the employer revises the terms of the health policy provided. . . . Indeed, an employer may, in some instances, completely eliminate health insurance coverage from the employment relationship without any apparent ‘breach’ in the agreement.”). An executive who is unwilling to surrender total control of his or her welfare and other insurance benefits to the acquiror may bargain, at a minimum, for the acquiror to afford him or her the same level of benefits provided to the executive by the target corporation before consummation of the acquisition.

<sup>44</sup> This paragraph is designed to cover any trade or professional association, country club, luncheon club, or health club membership for which the Employer is assuming financial responsibility.

<sup>45</sup> “Providing up-front equity compensation is generally considered desirable because it immediately links the executive's compensation with company performance and offers favorable long-term capital gains treatment if the company shares are held by the executive for at least 12 months.” Jonathan M. Ocker & Gregory C. Schick, *Practice Tips: Employment Agreements for New Economy Chief Executives*, 23 L.A. LAWYER 21, 22 (2000). The Employer and Executive both should understand that this section of the Agreement interfaces with federal (and potentially state) securities laws. *See, e.g.*, *Yoder v. Orthomolecular Nutrition Inst., Inc.*, 751 F.2d 555, 556 (2d Cir. 1985) (finding that an agreement to issue stock to seller/executive in connection with acquisition constitutes a sale of stock under the federal securities laws). Options to purchase stock are securities under the federal definitions in the Securities Act of 1933, as amended (“1933 Act”), and the Securities Exchange Act of 1934, as amended (“1934 Act”). 15 U.S.C. § 77b(1) (2007) (1933 Act definition); *id.* § 78c(a)(10) (1934 Act definition). Although the Tennessee statute is not as clear, stock options also appear to be securities under Tennessee law. TENN. CODE ANN. § 48-2-102(16) (2008). Accordingly, issuers should be concerned about registering the issuance of the options (or using an existing applicable registration statement) under the 1933 Act or finding an applicable exemption and, under federal law, registering the options as a class of securities under the 1934 Act.

The proliferation of broad-based employee incentives . . . has created a crisis for many privately held companies under an otherwise unremarkable provision of the federal securities laws. The Commission has taken the position that the over-the-counter registration requirements of the . . . [1934 Act] can cause a privately held

amended)<sup>46</sup> to purchase \_\_\_\_\_ shares of the Employer's Common Stock, \$\_\_\_\_\_ par value per share, at an exercise price of \$\_\_\_\_\_ per share,<sup>47</sup> in a separate, fully executed stock option agreement dated as of the date of this Agreement, signed by the Employer, and delivered to Executive with this Agreement. Under the terms of the option agreement: [a] if Executive resigns other than for Good Reason or the Employer terminates the employment of Executive for Cause (as defined in Section 8[b]), Complete Disability, or death, all of Executive's rights with respect to any unvested options shall terminate; and [b] if Executive resigns within 12 months after the occurrence of a Change of Control or the Employer terminates the employment of Executive at any time for any reason other than for Cause, Complete Disability, or death, all of Executive's rights with respect to unvested options shall vest as of the date of termination.

#### **7. No Conflicting Agreement; Understanding; Right to Counsel.**

Executive represents and warrants to the Employer that Executive is not a party to or subject to the provisions of any other employment agreement, non-compete agreement, or other agreement with any other Person, the terms of which would be breached in any respect by his execution of this Agreement or performance of his duties as the Chief Operating Officer of the Employer contemplated in this Agreement. Executive has read this Agreement, was encouraged and afforded sufficient opportunity to obtain independent legal advice prior to executing this

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company to actually "go public" granting stock options to too many employees. The Commission asserts that a company with five hundred or more holders of employee stock options, like a company with five hundred or more holders of common stock, must register under Section 12(g) of the Exchange Act. Section 12(g) registration would mean the private company would have essentially the same reporting burdens as a company that had completed an initial public offering.

Robert Anderson IV, *Employee Incentives and the Federal Securities Laws*, 57 U. MIAMI L. REV. 1195, 1195-96 (2003) (footnotes omitted).

<sup>46</sup> Under Sections 421 and 422 of the Internal Revenue Code of 1986, as amended, if the option terms comply with established rules for an incentive stock option (e.g., a duration of no more than 10 years and an option price that is at or out of the money) and the requisite holding period is met, the exercise of the option does not result in compensation income to the optionee or related compensation deductions to the corporation granting the option. 26 U.S.C. §§ 421, 422 (2007). The optionee typically recognizes capital gain upon the sale of the underlying shares. See David I. Walker, *Is Equity Compensation Tax Advantaged?*, 84 B.U. L. REV. 695, 702-03 (2004).

<sup>47</sup> The option price typically would be set at the fair market value of the underlying stock on the date of the grant/issuance of the option to avoid public disclosure conundrums, adverse accounting effects, and tax issues (especially for incentive stock options, like those issued to Executive here). Cf. Victor Fleischer, *Options Backdating, Tax Shelters, and Corporate Culture*, 26 VA. TAX REV. 1031, 1034 (2007) (noting that these issues arise out of options backdating).

Agreement, and fully understands all of the terms and conditions in this Agreement.<sup>48</sup>

**8. Definitions.**<sup>49</sup> For purposes of this Agreement, the terms set forth below have the meanings specified in this Section 8.

[a]      “*Accounts*” means all Persons to whom any employee or agent of the Employer (including Executive) has earlier offered or sold or later offers or sells any of the Employer’s products or services, or with whom any employee or agent of the Employer has developed a relationship relating to the Employer Business at any time during the two-year period preceding the termination or expiration of Executive’s employment by the Employer.<sup>50</sup> For purposes of this

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<sup>48</sup> See *supra* notes 16-18 and accompanying text.

<sup>49</sup> Typically, definition sections in business contracts appear at the front or the back of the agreement. The form chosen by the authors for the Tennessee Model Employment Agreement instead includes the definition section in the middle of the contract, proximate to the sections in which most of the defined terms in the Agreement are used. In particular, most of the defined terms in Section 8 relate to the restrictive covenants in Section 9. Although one of the authors admits to some discomfort over this placement, the authors determined to leave the definition section in this intermediate position in the Agreement. See ADAMS, *supra* note 25, at 123-25 (articulating rules for the cross-referencing of defined terms, placement of definition sections, and other related definitions questions).

<sup>50</sup> This is a relatively broad definition of customers or clients in that it covers both those to whom offers were made and those with whom the Employer has developed a business relationship, as opposed to merely those to whom sales were made, over a two-year period. As noted in the provision, that two-year period may extend to include offers and sales made before the commencement of Executive’s employment with the Employer. If challenged, the reasonableness of this definition in the context of the restrictive covenants in which it is used presumably will be determined based on the facts in existence at the time, including the number of possible customers or clients not encompassed within the definition. Some states have expressed a willingness to enforce provisions with a breadth similar to that apparent in this definition.

An employer has a legitimate interest in limiting not only a former employee’s ability to take advantage of personal relationships the employee has developed while representing the employer to the employer’s established client, but also in preventing a former employee from using his former employer’s customer lists or contacts to solicit new customers. . . . In addition, an employer has a legitimate interest in preventing a former employee from using the skill, experience, training, and confidential information the former employee has acquired during the employee’s tenure with his employer in a manner advantageous to a competitor in attracting business, regardless of whether it was an already established customer of the former employer.

UZ Engineered Prods. Co. v. Midwest Motor Supply Co., 770 N.E.2d 1068, 1080 (Ohio Ct. App. 2001) (citations omitted); see also FLA. STAT. § 542.335(1)(b) (2009) (articulating similar factors as

Agreement, an Account shall be deemed to be located at the address of the Account with which the Employer regularly deals.

[b] “Cause” means any one of the following:<sup>51</sup>

[i] Executive commits an act of dishonesty, embezzlement, or fraud against the Employer;

[ii] Executive competes with the Employer in a manner prohibited by this Agreement;

[iii] Executive fails to use his best efforts on behalf of the Employer or conducts himself in a manner substantially detrimental to the Employer (including without limitation by breaching any of his obligations under this Agreement and failing or refusing to comply with the provisions of this Agreement within five days after receipt of written notice from the Employer to Executive detailing the failure or refusal and the steps necessary to remedy that failure);<sup>52</sup>

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“legitimate business interest[s]” of an employer in the adjudication of the enforceability of a noncompetition agreement).

<sup>51</sup> Definitions of “cause” are very fact-specific, although core events (e.g., commission of a fraud, conviction of a felony, and legal incapacity to serve) are common to many agreements. *See generally* J. Benjamin Earthman, *Illusory Protection: The Treatment of Severance Packages in Business Bankruptcies*, 5 U. PA. J. LAB. & EMP. L. 33, 39 (2002) (“A majority of employment contracts contain a list of enumerated circumstances that constitute ‘cause’ for terminating an employee. These so-called ‘bad boy’ clauses-or where they govern the employee’s post-termination activities, ‘golden handcuffs’-vary from the extremely specific to the overly broad often within each individual contract.”); *see also* Michelle M. Matiski, *Employment Agreement, Representing the Growing Business: Tax, Corporate, Securities, and Accounting Issues*, ALI-ABA COURSE OF STUDY MATERIALS, Feb. 2008 (including a sample definition of “cause.”). The employer may want to consider whether the definition of “cause” should include the employer’s reasonable belief that the executive’s conduct constitutes “cause,” even if the employer ultimately turns out to be wrong. Some jurisdictions support an employer’s good faith belief and adequate investigation as a sufficient basis for termination, but an employer is more likely to prevail in asserting a termination right under these circumstances if the employment agreement explicitly addresses reasonable belief. *See Cotran v. Rollins Hudig Hall Intern., Inc.*, 948 P.2d 412, 421-22 (Cal. 1998) (“The proper inquiry for the jury...is not, ‘Did the employee *in fact* commit the act leading to dismissal?’ It is ‘Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that that are not arbitrary or pretextual?’”).

<sup>52</sup> This is a relatively employer-friendly provision. An executive may want to narrow the type of activity that constitutes “cause” to the behaviors described in the parentheses or similar, clear violations of the terms of the executive’s employment or written rules and policies of the employer.

[iv] Executive is convicted of a misdemeanor involving dishonesty, breach of trust or moral turpitude, or is convicted of any felony;

[v] Executive engages in the illegal use of any drug;

[vi] Executive's representation and warranty in Section 7 of this Agreement is determined to be [materially] inaccurate; or

[vii] any state or federal regulatory agency or court of competent jurisdiction issues an order requiring Executive's removal from any duties or responsibilities for the Employer.

[c] A "*Change of Control*"<sup>53</sup> means the occurrence of any of the following events:

[i] any "person" or "group" (as these terms are used in Sections 13(d) and 14(d) of the Exchange Act) is or becomes the "beneficial owner" (as defined in Rule 13d-3 under the Exchange Act), directly or indirectly, of more than 50% of the voting power of the Common Stock of the Employer;

[ii] the Employer, either individually or in conjunction with one or more Subsidiaries, sells, assigns, conveys, transfers, leases or otherwise disposes of, or the Subsidiaries sell, assign, convey, transfer, lease or otherwise dispose of, all or substantially all of the properties of the Employer and the Subsidiaries, taken as a whole (either in one transaction or a series of related transactions), including capital stock of the Subsidiaries, to any Person (other than the Company or a Subsidiary);

[iii] during any consecutive two-year period, individuals who at the beginning of the period constituted the Board of Directors of the Employer (together with any new directors whose election by the Board of Directors or whose nomination for election by the shareholders of the Employer was approved by a vote of a majority of the directors then still in office who were either directors at the beginning of the period or whose election or nomination for election

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<sup>53</sup> The parties must include in this definition all transactions and events—and only those transactions and events—that predicate payment of the severance provided for in Section 4[c] of the Agreement. Accordingly, both the Employer and Executive should focus significant attention on this definition. See Ocker & Schick, *supra* note 45, at 48 ("The definition of change of control must be drafted with care so that enhanced severance benefits are only triggered under the intended circumstances.").

was previously so approved) cease for any reason to constitute a majority of the Board of Directors of the Employer then in office; or

[iv] the Employer is liquidated or dissolved or adopts a plan of liquidation or dissolution.<sup>54</sup>

[d] “*Complete Disability*” means Executive’s inability, due to illness, accident, or any other physical or mental incapacity, to perform the duties provided for in this Agreement for an aggregate of 90 days within any period of 240 consecutive days.

[e] “*Confidential Information*”<sup>55</sup> means

[i] names, addresses, telephone numbers, contact persons, and other identifying information relating to Accounts and information with respect to the needs and requirements of Accounts;

[ii] rate and price information on products and services provided by the Employer to its Accounts;

[iii] all business records and personnel data relating to the Employer’s employees, including compensation arrangements of the employees;

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<sup>54</sup> This is an employee-friendly provision not routinely included in employment agreement definitions of a “Change of Control.”

<sup>55</sup> Definitions of “Confidential Information” vary, but certain key items are typically included. For example, one employer’s agreement provides the following similar definition of “Confidential Information:”

All information belonging to or used by Compuware or Compuware’s customers relating to internal operations, procedures and policies, business strategies, pricing, billing information, financial information, customer contacts, clients, sales lists, employee lists, technology, software source code, software documentation, programs, costs, employee compensation, marketing plans, developmental plans, computer programs, computer systems, inventions, developments, and trade secrets of any kind and character.

Scott M. Kline & Matthew C. Floyd, *Managing Confidential Relationships in Intellectual Property Transactions: Use Restrictions, Residual Knowledge Clauses, and Trade Secrets*, 25 REV. LITIG. 311, 318 n.17 (2006). Employers are well advised to carefully tailor the definition to their specific reasonable interests, since the definition’s application in the restrictive covenants is likely to be judged based on a reasonableness standard. See Peter C. Quittmeyer, *Trade Secrets and Confidential Information under Georgia Law*, 19 GA. L. REV. 623, 668 n.195 (1985) (“In order to avoid overbreadth, an employer should limit the types of business information claimed to be confidential.”).

[iv] any trade secrets<sup>56</sup> or other confidential information licensed to, obtained, developed, purchased, or otherwise possessed by the Employer or licensed by the Employer to others;

[v] any [A] other trade secrets or confidential information used by Executive in the course of his employment under this Agreement or obtained by Executive in the course of his employment under this Agreement from any officer, employee, agent, or representative of the Employer or any division, Subsidiary, or affiliate of the Employer or otherwise, [B] information contained in any confidential documents prepared by or for the Employer and its employees or agents at the Employer's expense, on Employer time, or otherwise in furtherance of the Employer Business, and [C] other similar information used or obtained by Executive in the course of his employment with the Employer;

[vi] financial information with respect to the Employer Business; and

[vii] information with respect to the Employer's suppliers and the source and availability of the supplies, equipment, and materials used in the Employer Business;

provided, however, that Confidential Information shall not include:<sup>57</sup> [x] any information that shall become generally known to the industry through no fault of Executive; [y] any information that shall be disclosed to Executive by a third party (other than an officer, employer, agent, or representative of the Employer or any division, Subsidiary, or affiliate of the Employer or Seller<sup>58</sup>) having legitimate and

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<sup>56</sup> Under Tennessee law, a "trade secret" is

information, without regard to form, including, but not limited to, technical, nontechnical or financial data, a formula, pattern, compilation, program, device, method, technique, process, or plan that:

(A) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

TENN. CODE ANN. § 47-25-1702(4) (2009) (Tennessee Uniform Trade Secrets Act).

<sup>57</sup> The exclusions set forth in this paragraph are customary.

<sup>58</sup> The exclusion would be overbroad without the reference to both Employer and Seller, since Employer is continuing Seller's business.

unrestricted possession of that information and the unrestricted right to make the disclosure to Executive; or [z] any information that Executive can demonstrate was within his legitimate and unrestricted possession prior to the time of his employment by the Employer or Seller. All Confidential Information shall be contractually subject to protection under this Agreement whether the Confidential Information would otherwise be regarded or legally considered “confidential” and without regard to whether the Confidential Information constitutes a trade secret under applicable law or is separately protectable at law or in equity as a trade secret.

[f] “*Employer Business*” has the meaning assigned to it in the recitals of this Agreement.<sup>59</sup>

[g] The “*Employer’s Territory*” is \_\_\_\_\_.<sup>60</sup>

[h] “*Exchange Act*” means the Securities Exchange Act of 1934, as amended, and the regulations adopted under it.

[i] “*Good Reason*” means [i] any decision by the Employer’s governing board that results in the primary business of the Employer being a business other than the Employer Business, [ii] any substantial change in the positions or responsibilities of Executive without the consent of Executive, [iii] any decision resulting in Executive’s fringe benefits under the employee benefit or health or welfare plans or programs of the Employer being materially decreased in the aggregate (excluding reductions due to general benefit plan changes applicable to the Employer’s employees generally), [iv] any failure by the Employer to pay Executive’s Base Salary or to provide for Executive’s annual bonus if and when due, [v] any relocation of Executive’s primary place of employment to a location which is more

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<sup>59</sup> This definition is particularly important to the noncompetition agreements and other restrictive covenants in Section 9. *See also supra* note 29. It is important to note that noncompetition agreements in certain businesses may be subject to special rules, including those set forth in statutory provisions. *See, e.g.*, TENN. CODE ANN. § 63-1-148 (2008) (governing covenants not to compete signed by healthcare providers).

<sup>60</sup> The reasonableness of the geographical scope of the business that the Employer intends to protect through the restrictive covenants is a litigable issue. Accordingly, the Employer should clearly define this scope and appropriately tailor this definition to reasonably protect its interests, without overreaching. *See* Brian Kingsley Krumm, *Covenants Not to Compete: Time for Legislative and Judicial Reform in Tennessee*, 35 U. MEM. L. REV. 447, 464 (2005) (“[T]he territorial restriction should only be as broad as necessary to allow the employer to protect its customers from appropriation by its former employee. As a practical matter, this should limit the territorial scope to those areas where the employee had customer contact. This is based on the customer-contact theory of the employer’s protectable interests.” (footnotes omitted)).



than 60 miles from the city limits of \_\_\_\_\_, Tennessee, if any of the actions described in the foregoing clauses [i] through [v] are not cured by the Employer (if capable of cure or remedy) within 15 days after receiving notice from Executive.

[j]      “*Person*” means any individual, corporation, limited liability company, partnership, unincorporated organization, joint venture, association, bank, trust, governmental authority, or other entity.

[k]      “*Subsidiary*” has the meaning assigned to it in the Asset Purchase Agreement.

## 9.      **Covenants Against Post-Termination Conduct.**<sup>61</sup>

[a]      *Covenant Against Disclosure or Use of Confidential Information.*<sup>62</sup> Executive agrees that, for a period of \_\_\_ years<sup>63</sup> immediately after the termination or expiration of his employment under this Agreement, he will not:

[i]      disclose any Confidential Information to any Person;

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<sup>61</sup> The enforceability of the restrictive covenants included in this Section 9 (like all nondisclosure and noncompetition agreements) may be subject to legal challenge. Should a judge determine that any part of the covenants is unenforceable,

[t]he “rule of reasonableness,” which was adopted by Tennessee in *Ingram*, allows the courts to enforce covenants not to compete to the extent necessary to protect the employer’s interest without imposing an undue hardship on the employee or adversely affecting the public. In the absence of bad faith by the employer, this approach, in theory, allows for partial enforcement of the terms that the parties intended. This is particularly true when the agreement contains a severability clause and specifically allows for judicial modification. This rule, however, does not provide an employee with any prospective guidance on how a particular covenant not to compete will be enforced absent litigating the issue.

Krumm, *supra* note 60, at 473.

<sup>62</sup> In Tennessee, courts will enforce reasonable restrictions on the disclosure of confidential information in employment agreements as a legitimately protectable interest of the employer. *See Vantage Tech., LLC v. Cross*, 17 S.W.3d 637, 645 (Tenn. Ct. App. 1999) (“An employer has a legitimate business interest in keeping its former employees from using the former employer’s trade or business secrets or other confidential information in competition against the former employer.”).

<sup>63</sup> “When the focus of protection is confidential information or trade secrets, it should be limited in time by the business significance of the covenant.” Krumm, *supra* note 60, at 464.

[ii] use any Confidential Information in soliciting the patronage of any Person for the purpose of providing products or services of the kind provided in the Employer Business; or

[iii] otherwise use any Confidential Information for his own purposes;

provided, however, that Executive may make disclosures required by a valid order or subpoena issued by a court or administrative agency of competent jurisdiction. In that event, Executive will promptly notify the Employer of the order or subpoena to provide the Employer an opportunity to protect its interest. Executive shall not be bound by the restrictive covenants in this Section if: the Employer is not current in meeting its obligations to Executive under Section 4[c]; Executive has notified the Employer in writing of that default; and the Employer has not cured the default within 30 days after the date the Executive sends the written notice of default.

[b] *Covenant Against Post-Termination Competition*.<sup>64</sup> Executive agrees that, for a period of \_\_\_ years<sup>65</sup> immediately after the termination or

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<sup>64</sup> Courts ruling on the enforceability of noncompetition covenants in employment agreements have variously stated the applicable legal standard, but the focus in each articulation is the reasonableness of the restrictions imposed in response to legitimate business interests of the employer.

Covenants not to compete, because they are in restraint of trade, are disfavored in Tennessee. As such, they are construed strictly in favor of the employee. However, when the restrictions are reasonable under the circumstances, such covenants are enforceable. The factors that are relevant in determining whether a covenant not to compete is reasonable include “the consideration supporting the agreements; the threatened danger to the employer in the absence of such an agreement; the economic hardship imposed on the employee by such a covenant; and whether or not such a covenant should be inimical to public interest.”

*Vantage Tech.*, 17 S.W.3d at 644 (citations omitted).

It is the general rule in Tennessee that a covenant restraining future competition is valid if it is reasonable as to time and space. “\* \* \* There is no inflexible formula for deciding the ubiquitous question of reasonableness, insofar as noncompetitive covenants are concerned \* \* \* [rather,] \* \* \* each case must stand or fall on its own facts. \* \* \*” “\* \* \* It is generally agreed that, before a noncompetitive covenant will be upheld as reasonable and therefore enforceable, the time and territorial limits involved must be no greater than is necessary to protect the business interests of the employer. \* \* \*” In making such determination the Court may consider such factors as the consideration supporting it, the threatened danger to the employer in the absence of such an agreement, the economic hardship imposed on the employee, and the public interest.

expiration of his employment under this Agreement, he will not, directly or indirectly, individually or on behalf of any Person:

[i]            solicit any Account for the purpose of selling or providing to the Account products or services of the same kind as provided by the Employer during Executive's employment by the Employer;<sup>66</sup> or

[ii]           provide services of the type provided by Executive to the Employer to any Person then engaged in the Employer Business within the Employer's Territory; or

[iii]          enter into the employ of, render any service to, or act in concert with any Person engaged in the Employer Business within the Employer's Territory;

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Standard Forms Co. v. Nave, 422 F. Supp. 619, 622-23 (E.D. Tenn. 1976) (citations omitted). Tennessee will not enforce a noncompetition agreement merely to prevent an employee from competing with an employer.

[A]ny competition by a former employee may well injure the business of the employer. An employer, however, cannot by contract restrain ordinary competition. In order for an employer to be entitled to protection, there must be special facts present over and above ordinary competition. These special facts must be such that without the covenant not to compete the employee would gain an unfair advantage in future competition with the employer.

Hasty v. Rent-A-Driver, Inc., 671 S.W.2d 471, 473 (Tenn. 1984) (citations omitted). As noted *supra* note 61, Tennessee uses the "rule of reasonableness" in modifying unenforceable covenants not to compete. Central Adjustment Bureau, Inc. v. Ingram, 678 S.W.2d 28, 37 (Tenn. 1984) ("The most recent trend, therefore, has been to abandon the 'blue pencil' rule in favor of a rule of reasonableness. This rule provides that unless the circumstances indicate bad faith on the part of the employer, a court will enforce covenants not to compete to the extent that they are reasonably necessary to protect the employer's interest 'without imposing undue hardship on the employee when the public interest is not adversely affected.'" (citations omitted)). For practical tips on drafting noncompetition agreements and clauses, see RICHARD A. BALES ET AL., UNDERSTANDING EMPLOYMENT LAW 127-33 (2007); Mark Rettinger, *Covenants Not To Compete in Tennessee*, 3 TRANSACTIONS: TENN. J. BUS. L. 25 (2001).

<sup>65</sup> Krumm, *supra* note 60, at 464 ("Where the objective is to protect customer relationships, the period should be limited to that required to replace the employee and allow the employers to prove their effectiveness to their customers. . . . In deciding the reasonableness of the duration of the restriction, courts will also determine the length of time necessary to diminish the risk of harm from competition to the former employer." (footnotes omitted)).

<sup>66</sup> This provision expressly protects the Employer's customer associations. Under Tennessee law, "[a]n employer may also have a legitimate protectable interest in the relationships between its employees and its customers." *Vantage Tech.*, 17 S.W.3d at 645.

[iv] become interested in a firm engaged in the Employer Business, as a proprietor, partner, shareholder, director, officer, principal, agent, employee, or consultant or in any other relationship or capacity; provided, that Executive may own up to one percent of the outstanding shares of any firm that has a class of securities registered under Section 12 of the Exchange Act;<sup>67</sup> or

[v] induce or attempt to induce any employee of the Employer or its affiliates to leave that employment or employ, or otherwise engage as an employee, independent contractor, or otherwise, any employee of the Employer or its affiliates.

[c] *Enforceability of Section 9 Covenants.* It is agreed that a special and confidential relationship exists between the Employer and Executive because of Executive's knowledge, expertise, and judgment and the reliance of the Employer upon these attributes. The Executive agrees that the remedy at law for the breach or the threatened breach of the covenants set forth in this Section 9 is inadequate and that any breach or attempted breach of these covenants would cause immediate and irreparable harm to the Employer, the exact amount of which would be impossible to ascertain. Executive acknowledges that the limitations contained in this Section 9 are reasonable and properly required for the adequate protection of the Employer, and in the event that any one or more of the limitations are found to be invalid in any jurisdiction, in whole or in part, the parties agree that such limitations will be held valid in all other jurisdictions. If any court determines that any provision of this Section 9 is unenforceable because of the duration or scope of the provision, the court shall have the power to reduce the scope or duration of the provision, as the case may be, and, in its reduced form, the provision shall remain in full force and effect.<sup>68</sup>

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<sup>67</sup> The ownership of an insignificant percentage (typically one or two percent) of a firm's publicly traded securities is not considered to be enough of an ownership interest to constitute competition with a former employer.

<sup>68</sup> This sentence may be seen by some as an unwarranted assertion of the Employer's bargaining power in light of its negotiation to the outer limits of enforceability and may be repugnant to Executive and his counsel. The authors have included this language here because they believe the sentence is somewhat less problematic for an executive under Tennessee law, which does not allow "blue penciling" but instead relies on the "rule of reasonableness" for judicial modifications of covenants not to compete. *See supra* notes 61 & 64.

## 10. Inventions, Discoveries and Improvements.<sup>69</sup>

[a] *Disclosure to Employer.* Executive shall promptly disclose in writing to the Employer any and all inventions, discoveries, and improvements, directly or indirectly related to the Employer Business, whether conceived, made, or developed solely by Executive or jointly with others during the period of Executive's employment under this Agreement.<sup>70</sup> All of Executive's right, title, and interest in and to inventions, discoveries, and improvements referenced in the preceding sentence that are conceived, made, or developed by Executive during the period of his employment under this Agreement shall be the sole property of the Employer.

[b] *Documents of Assignment.*<sup>71</sup> At the Employer's request and expense, both during and subsequent to Executive's employment under this

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<sup>69</sup> In Tennessee, the enforceability of the inventions clauses in this Section 10 is a matter of common law. However, in California, Illinois, Minnesota, North Carolina, and Washington, for example, statutory provisions are applicable. See CAL. LAB. CODE §§ 2870, 2871 (2008); 765 ILL. COMP. STAT. 1060/2 (2009); MINN. STAT. § 181.78 (2008); N.C. GEN. STAT. § 66-57.1 (2008); WASH. REV. CODE § 49.44.140 (2008).

<sup>70</sup> This provision assumes that Executive has already disclosed to the Employer, in connection with the negotiation and execution of the Asset Purchase Agreement, any and all inventions, discoveries, and improvements, directly or indirectly related to the Seller's business, whether conceived, made, or developed solely by Executive or jointly with others during the period of Executive's employment with the Seller and that any desired restrictions on those inventions, discoveries, and improvements are handled elsewhere.

<sup>71</sup> "Employment agreements requiring an employee to assign to the employer rights to inventions designed or conceived during the period of employment have been upheld. . . . The determining factor of whether assignment-of-rights-agreements are enforceable seems to be one of reasonableness." *Revere Transducers, Inc. v. Deere & Co.*, 595 N.W.2d 751, 761-62 (Iowa 1999); see also *Ingersoll-Rand Co. v. Ciavatta*, 542 A.2d 879, 886, (N.J. 1988) ("[C]ontracts requiring an employee to assign to the employer inventions designed or conceived during the period of employment are valid."). An obligation on the part of Executive to assign inventions, discoveries and improvements to the Employer may be implied under certain circumstances where an express covenant does not exist. The Colorado Court of Appeals summarizes:

If an employee's job duties include the responsibility for inventing or for solving a particular problem that requires invention, any invention created by that employee during the performance of those responsibilities belongs to the employer. Hence, such an employee is bound to assign to the employer all rights to the invention. This is so because, under these circumstances, the employee has produced only that which he was employed to produce, and the courts will find an implied contract obligation to assign any rights to the employer.

*Scott Sys., Inc. v. Scott*, 996 P.2d 775, 778 (Colo. Ct. App. 2000) (citations omitted); see also *City of Cocoa v. Leffler*, 762 So. 2d 1052, 1056 (Fla. Dist. Ct. App. 2000) ("When an employer undertakes to establish a claim to a patent or a patentable object as against his employee who is the inventor, *he must*

Agreement, Executive shall promptly execute a specific assignment of title to the Employer of each invention, discovery, or improvement belonging to the Employer and shall perform all other acts reasonably necessary to enable the Employer to secure a patent for the invention, discovery, or improvement in the United States and in foreign countries and to maintain, defend, and assert the patent once it has been obtained.

[c] *Prior Inventions.* Any inventions, discoveries, or improvements, patented or unpatented, that Executive can demonstrate were conceived or made by him prior to the date of this Agreement shall be excluded from the provisions of this Section.

**11. Return of Client Lists, Other Documents and Equipment.**

Upon the termination or expiration of his employment under this Agreement, Executive shall deliver promptly to the Employer all Employer files, customer lists, memoranda, research, drawings, blueprints, Employer forms, and other documents supplied to or created by him in connection with his employment under this Agreement (including all copies of the foregoing) in his possession or control and all Employer equipment and other materials in his possession or control. Executive acknowledges that all items described in this Section 11 are and will remain at all times the sole and exclusive property of the Employer.

**12. Survival of Restrictions and Other Provisions.**

Notwithstanding the breach of any of the provisions of this Agreement by either party, all of the provisions of Sections 4, 5, 6, 8, 9, 10, 11, 12, 13, 15, 16, 17, 21, 22, and 23 of this Agreement<sup>72</sup> shall survive the termination or expiration of Executive's employment with the Employer for any reason and shall continue in full force and effect in the same manner and to the same extent as if they were set forth in a separate agreement between the Employer and Executive, and these provisions shall be binding on the heirs, legatees, and legal representative(s) of Executive.

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*show beyond question that the employment was for that specific purpose of making the invention.* If the employment was general and was an incident to that, the employer cannot claim the patent.”). However, the general rule is that inventions are owned by the inventor. *See id.* at 1055 (“The common law generally regards an invention as the property of the inventor who conceived, developed, and perfected it. Thus, the general rule is that employees own the patent rights to their inventions, even though the inventions are conceived or reduced to practice during employment.” (citations omitted)).

<sup>72</sup> It is always important to remember to provide for the survival of the section in which survival is provided for.

**13. Hold Harmless.**<sup>73</sup> Executive and the Employer covenant and agree that each shall indemnify and hold harmless the other from [a] any and all losses, damages, liabilities, expenses, or claims resulting from or arising out of any nonfulfillment by the defaulting party of any material provision of this Agreement and [b] any and all losses, damages, liabilities, expenses, or claims resulting from or arising out of the defaulting party's malfeasance or gross negligence. The indemnification provided for in this Section 13 shall not apply to losses, damages, liabilities, expenses, or claims suffered or asserted by the Employer against Executive or losses, damages, liabilities, expenses, or claims suffered or asserted by Executive against the Employer.

**14. Contract Nonassignable.**<sup>74</sup> The parties acknowledge that this Agreement has been entered into due to, among other things, the special skills of Executive, and agree that this Agreement may not be assigned or transferred by Executive, in whole or in part, without the prior written consent of the Employer. This Agreement shall be binding on and shall inure to the benefit of Executive, the Employer, and their respective successors and assigns.

**15. Notices.**<sup>75</sup> All notices or other communications required or permitted under this Agreement shall be in writing and may be given or made by hand, by facsimile transmission, by registered or certified mail, postage pre-paid, or by courier or overnight carrier, to the persons at the addresses set forth below (or at another address provided under this Agreement) and shall be deemed to have been delivered as of the date of delivery in the case of delivery by hand or facsimile

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<sup>73</sup> This Section 13 includes a bare-bones indemnification provision covering losses, damages, liabilities, expenses, or claims resulting from or arising out of any nonfulfillment by the defaulting party of any material provision of this Agreement and losses or damages arising from the defaulting party's malfeasance or gross negligence. This type of indemnification is possible, if allowed under state corporate law. See TENN. CODE ANN. § 48-18-507 (2008).

<sup>74</sup> Typically, "[t]he employer should reserve the right to assign the employment agreement so that a successor employer may benefit from the employee's services in the event of a merger, consolidation, asset purchase or other business transaction. The employment agreement should not be assignable by the employee, however, because the employee's unique ability to do the job is not transferable." See Peter M. Panken & Jeffery D. Williams, *Drafting Executive Employment Agreements that Work for Employers: An Annotated Model Contract*, ALI-ABA COURSE OF STUDY MATERIALS, 3 ADV. EMP. L. & LITIG. (2000). "[S]ome jurisdictions view the covenant not to compete as independently assignable regardless of the assignability of the employment contract." Adam Schneid, Note, *Assignability of Covenants Not to Compete: When Can a Successor Firm Enforce a Noncompete Agreement?*, 27 CARDOZO L. REV. 1485, 1497 (2006); see also Reynolds & Reynolds Co. v. Tart, 955 F. Supp. 547, 556-58 (W.D.N.C. 1997).

<sup>75</sup> For more information on notice provisions, see DARMSTADTER, *supra* note 24, at 109-13.

(provided confirmation of delivery is obtained), on the next business day if sent by overnight courier or mail service, or the third business day following mail deposit in the case of regular mail delivery:

To the Employer:

[insert full name and address of the Employer, including both P.O. box and street address (if applicable), telephone number, and facsimile number; then insert the same information for the Employer's counsel, if desired]

To Executive:

[insert full name and address of Executive, including both P.O. box and street address (if applicable), telephone number, and facsimile number; then insert the same information for Executive's counsel, if desired]

**16. Cumulative and Severable Nature of Rights and Agreements.**

Executive acknowledges and agrees that the Employer's various rights and remedies in this Agreement are cumulative and nonexclusive of one another and that Executive's several undertakings and agreements contained in this Agreement, including those contained in Sections 9, 10, and 11 of this Agreement, are severable covenants independent of one another and of any other provision or covenant of this Agreement. Executive agrees that the existence of any claim by him against the Employer, whether predicated on this Agreement or otherwise, shall not constitute a defense to enforcement by the Employer of any or all of Executive's undertakings and agreements under this Agreement. If any provision or covenant of this Agreement, in its entirety or in part, should be held by any court to be invalid, illegal or unenforceable, the remaining provisions, covenants, or parts of provisions or covenants, shall remain in full force and effect.<sup>76</sup>

**17. Waiver.** Failure of either party to insist, in one or more instances, on performance by the other in strict accordance with any term or condition of this Agreement shall not be deemed a waiver or relinquishment of any right granted in this Agreement or of the future performance by either party of its obligations under

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<sup>76</sup> See *supra* notes 61 and 64 for a description of Tennessee's "rule of reasonableness" in enforcing partial noncompetition provisions.



the same or any other term or condition of this Agreement, unless the waiver is contained in a writing signed by the party making the waiver.

**18. Amendments and Modifications.** This Agreement may be amended or modified only by a writing signed by both parties to this Agreement.

**19. Execution in Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument.

**20. Headings.** The headings used in this Agreement are for convenience of reference and shall not be deemed a part of this Agreement and shall not affect the meaning or construction of any of the provisions in this Agreement.

**21. Entire Agreement.** This Agreement (including the documents referred to in this Agreement) constitutes the entire agreement among the parties and supersedes any prior understandings, agreements, or representations by or among the parties, written or oral, to the extent they related in any way to the subject matter of this Agreement.

**22. Governing Law.** This Agreement shall be governed by and construed in accordance with the domestic laws of the State of Tennessee without giving effect to any choice or conflict of law provision or rule (whether of the State of Tennessee or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Tennessee.<sup>77</sup>

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<sup>77</sup> A court's application of public policy and state interest may override even an abundantly clear choice of law provision. *See, e.g.,* *Nasco, Inc. v. Gimbert*, 238 S.E.2d 368, 369 (Ga. 1977) ("Although the plaintiff and the defendant had agreed that the contract would be construed pursuant to the law of Tennessee, the trial court applied the law of Georgia. We find no error. The law of the jurisdiction chosen by parties to a contract to govern their contractual rights will not be applied by Georgia courts where application of the chosen law would contravene the policy of, or would be prejudicial to the interests of, this state.").

### 23. Dispute Resolution.<sup>78</sup>

[a] In the event any claim, dispute, or controversy arises in connection with this Agreement or the interpretation or enforcement of any provision of this Agreement and the claim, dispute, or controversy is not resolved within 30 days through informal, good faith negotiations between the parties, the claim, dispute, or controversy shall be referred to non-binding mediation. It is agreed that any mediation shall be conducted in [insert name of city], Tennessee (or some other location upon mutual consent of the parties involved) at a time and place convenient to the mediator and the parties involved. The parties shall, in good faith, select a mediator who is mutually agreeable to both sides. Each party shall bear his or its own costs and attorneys' fees associated with the mediation and shall share equally the responsibility for paying the mediator's fee.

[b] Should any claim, dispute, or controversy remain in existence between the parties after the completion of the two-step resolution process set forth in Section 23[a] above, the parties shall promptly submit the claim, dispute, or controversy to arbitration<sup>79</sup> administered by one arbitrator mutually agreeable to the

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<sup>78</sup> This is a very simple form of dispute resolution provision. Employment agreements often include an agreement to use alternative dispute resolution to settle some or all issues arising between the parties under the agreement. Many of these contractual alternative dispute resolution provisions take advantage of the opportunity to define the scope of those issues and procedural aspects of the dispute resolution process.

For decades, attorneys have encouraged their clients to incorporate language providing for arbitration and mediation into contractual agreements, including joint venture, purchase or sales agreements, licensing agreements, executive employment contracts, partnerships, franchise, and loan agreements. Through contractual provisions, parties designing [ ] ADR clauses may control the range of issues to be resolved, the scope of the relief to be awarded, the qualifications of the neutral and many of the procedural aspects of the process.

William K. Slate II, *Alternative Dispute Resolution in a Global Village*, THE METROPOLITAN CORP. COUNSEL, Aug. 1996, at 44. As an alternative, the parties could provide for a choice of venue for a legal action. It is important to include in the agreement an alternative dispute resolution mechanism or a choice of venue provision, as well as a choice of law provision, because the enforceability of the restrictive covenants may differ from state to state. *See supra* note 15. Without one provision or the other, the parties will be encouraged to forum-shop, and enforcement is uncertain. *Palmer & Cay, Inc. v. Marsh & McLennan Cos.*, 404 F.3d 1297, 1310 (11th Cir. 2005) (validating the application of Georgia law to the enforceability of an employment agreement that did not include a choice of law or choice of venue provision and ruling that the related declaratory relief is not limited to Georgia); *see also* DLA Piper, *Another Hurdle to Enforcing Restrictive Covenants*, NEWS & INSIGHTS, Nov. 18, 2005, available at [http://www.dlapiper.com/restrictive\\_covenant\\_nov05/](http://www.dlapiper.com/restrictive_covenant_nov05/) (noting the potential for forum-shopping created by the ruling in *Palmer & Cay*). Although the parties may be tempted to rely on a broadly drafted arbitration clause in the Asset Purchase Agreement, the intent to subject disputes

parties in accordance with the rules and procedures of the American Arbitration Association. It is agreed that any arbitration shall be conducted in [insert name of city], Tennessee (or some other location upon mutual consent of the parties involved) at a time and place convenient to the arbitrator and the parties. The arbitrator shall have the power to decree any and all relief of an equitable nature, including but not limited to specific performance and shall have the power to award damages, except punitive damages.<sup>80</sup> The arbitrator [shall determine how all expenses relating to the arbitration shall be paid, including the respective expenses of each party, the fees of the arbitrator, and the administrative fee of the American Arbitration Association] [shall make an appropriate monetary award to the prevailing party so that all expenses relating to the arbitration, including the respective expenses of the prevailing party, the fees of the arbitrator, and the administrative fee of the American Arbitration Association shall be paid by the non-prevailing party].<sup>81</sup> The

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under the Agreement to arbitration is more clear if it is set forth expressly in the Agreement. *See* Frounfelker v. Identity Group, Inc., No. M2001-02542-COA-R3-CV, 2002 Tenn. App. LEXIS 390, at \*9-\*11 (Tenn. Ct. App. June 5, 2002) (declining to apply an arbitration provision in an acquisition agreement to a claim under an ancillary employment agreement because the parties' intent to arbitrate was not clear); Patrick V. Fiel, Jr., Case Commentary, *Employment agreement providing judicial remedies for dispute supercedes asset purchase agreement's arbitration clause*, 4 TRANSACTIONS: TENN. J. BUS. L. 283, 283-84 (2003) (commenting on *Frounfelker*).

<sup>79</sup> Employment arbitration may be faster and less expensive than litigation and may give the employee greater "access to dispute resolution forum." BALES ET AL., *supra* note 64, at 33-34. However, employment arbitration also has disadvantages, especially where the drafting is done by, and the bargaining power is weighted in favor of, the employer. *Id.* at 34.

<sup>80</sup> The authors determined not to afford the arbitrator the power to award punitive damages. The Revised Uniform Arbitration Act allows for arbitral awards of punitive damages, but provides that "[i]f an arbitrator awards punitive damages or other exemplary relief . . . , the arbitrator shall specify in the award the basis in fact justifying and the basis in law authorizing the award and state separately the amount of the punitive damages or other exemplary relief." UNIF. ARBITRATION ACT § 21(e) (2000).

<sup>81</sup> Two alternatives are offered here for delineating the power of the arbitrator to allocate expenses between the parties or award expenses to a party. A third possibility is for the Agreement to provide that the Employer pays all arbitral expenses. *See* Edward Brunet, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts*, 23 BERKELEY J. EMP. & LAB. L. 107, 130 (2002) ("Numerous CEO contracts permit the arbitrator to award the payment of attorneys' fees to the prevailing party. In contrast, many CEO contracts call for all costs and fees of arbitration to be borne by the employer company."). In this regard, the Revised Uniform Arbitration Act provides:

(b) An arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

...

(d) An arbitrator's expenses and fees, together with other expenses, must be paid as provided in the award.

arbitrator's decision shall be final and binding and may be entered and judicially enforced by any court having jurisdiction over the parties.

[c] Notwithstanding the foregoing, the parties shall have the right to resolve by court action, rather than negotiation, mediation, or arbitration, any claim, dispute, or controversy involving the ownership, misappropriation, or infringement of intellectual property, intellectual property rights, or Executive's breach of any restrictive covenant in this Agreement (including those in Section 9). Nothing in this Agreement is intended to prevent the parties from obtaining injunctive relief in court to prevent irreparable harm pending the conclusion of any claim, dispute, or controversy under this Agreement.<sup>82</sup>

The parties have executed this Agreement, and by their execution of this Agreement, the parties represent to one another that they have read this Agreement, understand its terms and conditions, and intend to be bound by them.

**EMPLOYER:**

\_\_\_\_\_

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

Name: \_\_\_\_\_

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

**EXECUTIVE:**

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

Name: \_\_\_\_\_

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UNIF. ARBITRATION ACT § 21 (2000). The authors were attentive to balance in drafting the arbitration provision of the Agreement in an effort to enhance enforceability. *See* BALES ET AL., *supra* note 64, at 31 ("Courts generally have agreed that egregiously lopsided agreements should not be enforced, but often disagree on whether a given arbitration agreement is fair or not."). In choosing a provision on the arbitrator's power to allocate expenses, drafters should consider the effect of the expense provision on the overall balance of the arbitration provision. For a brief history and commentary on employment arbitration, see *id.* at 28-33.

<sup>82</sup> Without this language, either party may claim that a temporary restraining order or injunction is not available for, e.g., actions relating to post-employment competition.

