



160 West Santa Clara St., Suite 700  
San Jose, CA 95113  
Tel: (408) 844-2350  
Fax: (408) 844-2351  
[www.foxwangmorgan.com](http://www.foxwangmorgan.com)

**John C. Fox, Esq.\***  
**Jay J. Wang, Esq.\*\***  
**Alexa L. Morgan, Esq.\*\*\***

## **A “BEST PRACTICES” EMPLOYEE HANDBOOK FOR THE NEW MILLENNIUM**

**July 2, 2010**

\* **John C. Fox, Esq.** is the President and a founder of Fox, Wang & Morgan P.C., headquartered in San Jose, California in the heart of the Silicon Valley. Mr. Fox is an across-the-board employment lawyer representing employers nationwide. He leads large and complex litigation matters in state and federal courts, in cases involving trade secrets, wage-hour and discrimination class actions, wrongful termination, corporate investigations, and the use of statistics in employment matters. He also provides strategic advice for a wide range of companies nationwide relating to their employment policies and practices and helps build employment systems in a way designed to minimize legal risk. Mr. Fox was previously Executive Assistant to the Director of OFCCP, where he was in charge of all policy and enforcement matters. Mr. Fox has a broad-based view of the many legal issues involved in discrimination law and Affirmative Action compliance.

\*\***Jay J. Wang, Esq.** is a founder of Fox, Wang & Morgan P.C. Mr. Wang is a 1999 graduate of the Georgetown University Law Center. Mr. Wang’s practice focuses on employment counseling and litigation, including civil claims involving wrongful termination, harassment, wage-hour issues, and trade secret misappropriation. Mr. Wang is a frequent lecturer on employment law matters with the Santa Clara County Bar Association, and provides seminar training for clients. Mr. Wang served on the Santa Clara County Bar Association’s Board of Trustees from 2005 through 2011. Mr. Wang has served as Chairman of the Santa Clara County Bar Association’s Labor & Employment Executive Committee, as well as Chairman of the Santa Clara County Bar Association’s Professionalism Committee.

\*\*\***Alexa L. Morgan, Esq.** is a founder and Partner of Fox, Wang & Morgan P.C. Her practice focuses on virtually all areas of employment law before both state and federal courts, as well as administrative agencies. She regularly handles employment litigation matters involving complex class action issues, workplace discrimination, sexual harassment, wrongful termination, and wage claims. Ms. Morgan also regularly counsels employers on various preventative measures in order to decrease their exposure to employment litigation. She is also active in the pro bono community, having successfully represented clients in employment, guardianship, unlawful detainer, and education-related matters. Prior to founding Fox, Wang & Morgan, Ms. Morgan was an Associate at Manatt, Phelps & Phillips, LLP and at Gibson, Dunn & Crutcher LLP.

**THIS OUTLINE IS MEANT TO ASSIST IN A GENERAL UNDERSTANDING OF THE CURRENT LAW RELATING TO EMPLOYMENT. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. COMPANIES OR INDIVIDUALS WITH PARTICULAR QUESTIONS SHOULD SEEK ADVICE OF COUNSEL.**

## TABLE OF CONTENTS

	Page
A. INTRODUCTION.....	1
B. SELECTED SPECIFIC CONTRACT CLAUSES OF INTEREST .....	2
1. Is the employee handbook a contract or “just information?” .....	2
2. Employers may find it prudent to explicitly reserve the right to unilaterally change the terms and conditions of employment upon reasonable notice and acceptance.....	4
3. At-will language.....	6
4. Integration Clause .....	8
5. Americans with Disabilities Act .....	9
6. Anti-Harassment Clauses.....	10
7. Trade secrets/inventions.....	14
8. Overtime .....	16
9. Conflicts of Interest.....	19
10. Company Property .....	21
 ATTACHMENT A: (Model) Request For Accommodation.....	 25
ATTACHMENT B: (Model) Employee Invention Assignment And Confidentiality Agreement.....	26
ATTACHMENT C: (Model) Overtime Approval Request .....	32
ATTACHMENT D: (Model) Electronic Mail Policy.....	33

## TABLE OF AUTHORITIES

**Page**

### Cases

<i>Al-Safin v. Circuit City Stores, Inc.</i> , 394 F.3d 1254 (9th Cir. 2005) .....	5
<i>Asmus v. Pacific Bell</i> , 23 Cal. 4th 1, 6 (2000) .....	4, 5
<i>Baker v. Kaiser Aluminum and Chemical Corp.</i> , 608 F. Supp. 1315, 1320-1321 (N.D.Cal. 1984)8	8
<i>Berry v. T-Mobile USA, Inc.</i> , 490 F.3d 1211, 1223 (10th Cir. 2007) .....	3
<i>Bos v. United States Rubber Co.</i> , 100 Cal. App. 2d 565, 569 (1950).....	7
<i>Brett v. City of Eugene</i> , 130 Ore. App. 53, 57 (1994).....	4
<i>Camp v. Jeffer, Mangels, Butler &amp; Marmaro</i> , 35 Cal. App. 4th 620, 639 (1995).....	22
<i>Campbell v. Regents of the University of California</i> , 2002 Cal. App. Unpub. LEXIS 11973 (2002).....	11
<i>Cf. Matagorda County Hospital District v. Burwell</i> , 49 Tex. Sup. Ct. J. 370 (February 24, 2006)3	3
<i>Cf. Valdez v. Church's Fried Chicken, Inc.</i> , 683 F. Supp. 596, 621 (W.D. Tex. 1988).....	12
<i>Chapin v. Fairchild Camera Etc. Corp.</i> , 31 Cal. App. 3d 192, 194 n. 2, 196-197 (1973).....	4
<i>Cheatwood v. Roanoke Industries</i> , 891 F. Supp. 1528 (N.D. Ala. 1995).....	10
<i>Davis v. Food Lion</i> , 792 F.2d 1274, 1275 (4th Cir. 1986).....	16
<i>Duldulao v. St. Mary of Nazareth Hospital Center</i> , 115 Ill.2d 482, 490 (1987) .....	2
<i>Faragher v. City of Boca Raton</i> , 524 U.S. 775 (1998) .....	12
<i>Foley v. Interactive Data Corp.</i> , 47 Cal.3d 654 (1988).....	2
<i>Forrester v. Roth's I.G.A. Foodliner, Inc.</i> , 646 F.2d 413 (9th Cir. 1981).....	16
<i>Fussell v. Georgia Ports Authority</i> , 906 F. Supp. 1561, 1569 (S.D. Ga. 1995) .....	9, 10
<i>Gaglidari v. Denny's Rests., Inc.</i> , 815 P.2d 1362, 1367 (Wash. 1991) .....	5
<i>Gary v. Long</i> , 59 F. 3d 1391, 1398 (D.C. Cir. 1995).....	12
<i>Guz v. Bechtel National, Inc.</i> , 24 Cal.4th 317, 339 (2000).....	8, 22
<i>Hill v. National Collegiate Athletic Assn.</i> , 7 Cal. 4th 1, 39-40 (1994) .....	23
<i>Hindman v. GTE Data Services, Inc.</i> , 1994 U.S. Dist. LEXIS 9522 (M.D. Fl. 1994).....	10
<i>In re Certified Question (Bankey v. Storer)</i> , 432 Mich. 438, 456 (1989) .....	4
<i>Kummetz v. Tech Mold, Inc.</i> , 152 F.3d 1153 (9th Cir. 1998).....	3
<i>Lewis v. Zilog</i> , 908 F. Supp. 931 (N.D. Ga. 1995) .....	9
<i>McKennon v. Nashville Banner Publishing Co.</i> (1995) 115 S. Ct. 879, 130 L. Ed. 2d 852, 863- 864.....	22
<i>Mears v. Gulfstream Aerospace Corp.</i> , 905 F. Supp. 1075 (S.D. Ga. 1995).....	10
<i>Meritor Savings Bank v. Vinson</i> , 477 U.S. 57, 72-73 (1986) .....	11
<i>Murphy v. Kenneth Cole Productions, Inc.</i> , 40 Cal.4th 1094 (2007) .....	19
<i>Newton v. City of Henderson</i> , 47 F. 3d 746, 747-8 (5th Cir. 1995).....	16
<i>O'Connor v. Ortega</i> , 480 U.S. 709 (1987).....	23
<i>Rochlis v. Walt Disney Co.</i> , 19 Cal. App. 4th 201 (1993) .....	7
<i>Rulon-Miller v. International Business Machines Corp.</i> , 162 Cal. App. 3d 241 (1984).....	22
<i>Satchwell v. Long John Silvers, Inc.</i> , 1992 U.S. App. LEXIS 9519 (U.S. App. , 1992) .....	8
<i>Schmidt v. Safeway</i> , 864 F. Supp. 991 (D.C. Or. 1994).....	10
<i>Shapiro v. Wells Fargo Realty Advisors</i> , 152 Cal. App. 3d 467 (1984).....	7, 8, 15
<i>Spitzer v. Good Guys, Inc.</i> , 80 Cal. App. 4th 1376 (Cal. App. , 2000) .....	10

## TABLE OF AUTHORITIES

(continued)

Page

<i>State Department of Health Services v. Superior Court (McGinnis)</i> , 6 Cal Rptr. 3d 441 (2003)	13
<i>Swentek v. USAir, Inc.</i> , 830 F. 2d 552 (4th Cir. 1987).....	12
<i>Witkowski v. Thomas J. Lipton</i> , 136 N.J. 385, 392 (1994) .....	3
<i>Woolley v. Hoffman LaRoche</i> , 99 N.J. 284, 285-286 (1985) .....	3

### Statutes

18 U.S.C. § 2510-20 .....	22
2 CCR 7285.1 .....	9
29 C.F.R. § 1630.9(a).....	9
29 C.F.R. §§ 785.11-785.13.....	16
29 U.S.C. § 203(g) .....	16
29 U.S.C. §§ 151-169 .....	22
42 U.S.C. § 12101, <i>et seq.</i> .....	9
42 U.S.C. § 12112(b)(5)(A) .....	9
42 U.S.C. §§ 12112(c)(2), (3) .....	22
Cal <u>Gov Code</u> § 12900, <i>et seq.</i> .....	9
Cal. <u>Gov. Code</u> § 12940(n) .....	9
Cal. <u>Labor Code</u> § 2870 .....	15
California <u>Government Code</u> § 12945.2(j) .....	11
California <u>Labor Code</u> § 1102.1 .....	11
California <u>Labor Code</u> § 226.7(b).....	19
California <u>Labor Code</u> § 2699 .....	18
California <u>Labor Code</u> § 512 .....	17
Consolidated Laws of New York Annotated, Sections 733-739 .....	23
Florida Statutes Annotated § 112.0455(1)-(16) .....	23
Michigan Compiled Laws Annotated Sec. 37.2205a.....	23

### Other Authorities

California Constitution, Article I, Section 1 .....	22
IWC Wage Order 4-2001(12)(A) (Rev. October 2006).....	19
Senate Report No. 101-116 at 23 (Committee on Labor and Human Resources) (1989) .....	10

### Rules

56 Fed. Reg. 35748 (1991).....	9
--------------------------------	---

## A. INTRODUCTION

We have created this paper based on our experience:

1. trying cases involving human resource documents we wish our clients had drafted more crisply;
2. with clients which, in retrospect, feel chagrined they did not compel employees to affirmatively request selected benefits and entitlements or impose an affirmative duty on employees to complain; and
3. that many human resource consultants advise against creating contract obligations in corporate writings (especially employee handbooks) which the company in fact intends to enforce as contracts.

By way of background, increasing numbers of employers are using employee handbooks (and/or policies) to create “best practices” embodying affirmative duties *employees* must undertake to activate statutorily or contractually granted rights. Such best practices do not condition access to statutorily granted rights, but merely create the procedure for the employee to activate a request for entitlement consideration. This development is particularly timely in light of modern legislative enactments causing many new employee rights (or employer liabilities) to trigger upon notice to the employer. Such statutes include, among others, the Americans With Disabilities Act, the Family and Medical Leave Act and state and federal sexual harassment laws. Moreover, case law developments allowing employers to immunize companies from potential liability where employees fail to comply with their contractual obligations to put management on notice (especially with respect to sexual harassment and overtime requirements) now require a fresh look at employee handbooks, and are galvanizing the use of numerous sharpened “employee notice” clauses.

At the same time, many employers are realizing the need to more clearly delineate which, if any, portion(s) of their employee handbooks and/or personnel policies the employer might wish to enforce as “contract” obligations as to non-union employees or limit what might otherwise be claimed as “rights.”

This outline catalogues and reviews *selected* areas of employment law which employers might find useful to convert employee handbooks into documents helpful to employees to explain what they might reasonably expect but to simultaneously minimize potential employment law risks to the employer. We discuss below, 11 “best practices” handbook clauses which employers may wish to insert into employer handbooks to: (a) make clear employee rights; (b) sharpen corporate procedures to effectively identify, process and delimit a number of important (relatively new) statutorily created employee entitlements; and (c) avoid ambiguity as to whether an employee has made an entitlement request to which the employer must respond. Moreover, we include specific contract clause language and policies for review.

Three specific themes of these clauses are to:

Allow and empower employees to know where their statutory and contract rights in the workforce begin and end;

Encourage or require employees (as appropriate) to complain or to request benefits, entitlements, privileges and rights in a prescribed, clear, common and business-like manner; and

Drive employees through clearly described and published “gateways” designated within the workplace (whether within the Human Resources Department or elsewhere) to avoid ambiguity as to whether requests were made and to put the requests in the hands of those trained to respond to such requests.<sup>1</sup>

## **B. SELECTED SPECIFIC CONTRACT CLAUSES OF INTEREST**

### **1. Is the employee handbook a contract or “just information?”**

A natural drafting tension confronts every employee handbook (or policy) architect: whether to make employer policies binding contracts with employees or to disclaim them, in whole or in part, as merely “information.”

This tension is most telling in the introduction to many employee policy handbooks which disclaim contract status immediately followed with “at-will” language. The employer undoubtedly intends the “at-will” language to be binding (allowing the employer to terminate the employee for any reason not unlawful) but has failed to draft language responsive to this intent.

Employee handbooks can be “implied” or “express” contracts depending on how they are written. In some states, employee handbooks can operate as express contracts and if the traditional requirements for contract formation are present. *Duldulao v. St. Mary of Nazareth Hospital Center*, 115 Ill.2d 482, 490 (1987). First, the language of the policy statement must contain a promise clear enough that an employee would reasonably believe that an offer has been made. *Id.* Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer. *Id.* Third, the employee must accept the offer by commencing or continuing to work after learning of the policy statement. *Id.* When these conditions are present, then the employee's continued work constitutes consideration for the promises contained in the statement, and under traditional principles a valid contract is formed. *Id.*

On the other hand, even if an employee handbook does not rise to the level of a contract, it may nonetheless be an “implied contract.” An “implied contract” is a policy or practice as to which the parties have a reasonable expectation. For example, in *Foley v. Interactive Data Corp.*, an employee brought a claim for breach of an implied-in-fact promise to discharge for good cause only.<sup>2</sup> The Supreme Court of California reversed the dismissal of the employee’s

---

<sup>1</sup> Experience shows that well-informed employees, clear in their mind as to their “rights” in the workplace, bring fewer claims and pester the Human Resources Department less about frivolous claims of “entitlement.”

<sup>2</sup> *Foley v. Interactive Data Corp.*, 47 Cal.3d 654 (1988).

claim stating that factors apart from consideration and express terms may be used to ascertain the existence and content of an employment agreement. Such other factors creating an employee's reasonable expectations and framing the content of such an "implied" contract *could* include the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.

Similarly, the United States Court of Appeals for the Tenth Circuit found that an employee handbook may create an "implied contract" if it contains mandatory termination procedures or requires "just cause" for termination. *Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211, 1223 (10th Cir. 2007). (Citation omitted.) "Even if the manual contains a disclaimer and includes language that makes use of the disciplinary procedures discretionary, the contract issue should be submitted to the jury if there is evidence that the employer's supervisors treat the disciplinary procedures as mandatory. A mandatory policy is demonstrated by evidence that the procedures were used in each instance of termination generally and the procedures were always used with reference to employees in plaintiff's department or at her level of management in the company." *Id.*

An employment manual providing terms and conditions of employment that include grounds and procedures for dismissal can create an employment contract in New Jersey. Absent a clear and prominent disclaimer, an implied promise contained in an employment manual that an employee will be fired only for cause may be enforceable against an employer even when the employment is for an indefinite term and would otherwise be terminable at will. *Witkowski v. Thomas J. Lipton*, 136 N.J. 385, 392 (1994) [quoting *Woolley v. Hoffman LaRoche*, 99 N.J. 284, 285-286 (1985)]<sup>3</sup>. In sum, the basic test for determining whether a contract of employment can be implied turns on the reasonable expectations of employees. *Id.* at 393.

Finally, in *Kummetz v. Tech Mold, Inc.*, 152 F.3d 1153 (9th Cir. 1998), another "implied contract" case, the employee sued his former employer in federal court for disability discrimination, even though the employer's handbook contained a clause which required employees to resolve disputes through arbitration instead of court litigation. The employee had signed an acknowledgment indicating he had read the handbook. The Ninth Circuit ruled, however, that the employer could not enforce the arbitration clause based in part on the fact that the acknowledgment stated the handbook "in no way constitutes an employee contract . . . ." Although the law does not allow an employee to avoid a contract term based upon mere ignorance of the term, the Ninth Circuit held this rule of law did not apply because the acknowledgment indicated the handbook was not a contract. Rather, the employer could establish only (but significantly through separate evidence) an "implied" contract based on the "reasonable expectations" of the parties.

---

<sup>3</sup> Cf. *Matagorda County Hospital District v. Burwell*, 49 Tex. Sup. Ct. J. 370 (February 24, 2006) (holding that language in an employee handbook stating that an employee "may be dismissed for cause," is not a specific agreement that an employee may be dismissed only for cause, which would alter the employee's at-will employment status) (emphasis added).

Employers may minimize potential employment law liabilities by creating a clear demarcation in employee handbooks (or policies) noting which portions are contractual, if any, and which portions are “informational” (and which, accordingly, do not create contracts binding on either employees or the employer). However, California courts are likely to conclude that any “informational” portions upon which the employee reasonably relied operate as “implied contracts.” Accordingly, employers should be prepared to stand behind and “live with” any representations made in their employee handbooks (otherwise, why did the employer make the representations?).

If an employer nonetheless wishes to seek to make some or all of the employee handbook not binding, as a contract, it could seek to encourage that result by inserting language similar to the following sample disclaimer:

“The following provisions of the handbook are intended to help acquaint employees with the Company and provide a general summary of some of its policies, procedures, practices, and benefits. We hope it will serve as a useful reference document throughout your employment with the Company, but please note that it is not intended to be a contract, express or implied, nor is it intended to otherwise create any legally enforceable obligations on the part of the Company or its employees.”

## **2. Employers may find it prudent to explicitly reserve the right to unilaterally change the terms and conditions of employment upon reasonable notice and acceptance**

Where the employee handbook (or policy) is construed as an enforceable employment contract, one method to maintain employer discretion to manage the non-unionized workplace is to expressly reserve the right to unilaterally make changes in the terms and conditions of employment. In some jurisdictions, employers are free to unilaterally change the terms and conditions of employment.<sup>4</sup> Other jurisdictions, like California, allow employers to unilaterally change written policies upon “reasonable notice” to affected non-union employees and their acceptance.<sup>5</sup>

In *Asmus v. Pacific Bell*, the Supreme Court of California followed the Michigan “reasonable notice” rule. Specifically, the *Asmus* court held that under California contract law, an employer could terminate a unilateral contract of indefinite duration, so long as its action occurred after a reasonable time, and was subject to prescribed or implied limitations, including

---

<sup>4</sup> See, e.g., *Brett v. City of Eugene*, 130 Ore. App. 53, 57 (1994) (an employer is free to set the terms and conditions of employment and by continuing to work for an employer after the employee is aware of the employer's change in policies, the employee impliedly accepts these changes).

<sup>5</sup> See, e.g., *In re Certified Question (Bankey v. Storer)*, 432 Mich. 438, 456 (1989) (employer may, without an express reservation of a right to do so, unilaterally change its written policy as to the terms and conditions of employment provided the employer gives reasonable notice and that such changes will not affect benefits already accrued or vested); *Chapin v. Fairchild Camera Etc. Corp.*, 31 Cal. App. 3d 192, 194 n. 2, 196-197 (1973) (employer not permitted to argue that policy on which employees brought suit had been modified, since modification had never been communicated to employees).

reasonable notice and preservation of vested benefits. In other words, employers in California may *unilaterally* alter the terms and conditions of employment as long as they provide *reasonable notice* of the change to its employees. The court concluded that the employer's announcement seven months before the policy change took effect gave its employees, in this case, reasonable notice of its intent to terminate the policy.<sup>6</sup>

Subsequently, the Ninth Circuit Court of Appeals clarified this legal theory by further defining what constitutes "reasonable notice" in the matter of *Al-Safin v. Circuit City Stores, Inc.* and requiring employee acceptance of any unilateral modification.<sup>7</sup> Specifically, in finding an arbitration provision procedurally unconscionable, the Ninth Circuit held that an employer's unilateral change in policy will not be effective until employees receive reasonable notice of the change and accept the change.<sup>8</sup> Thus, the posting of an amendment to the arbitration policy in the store could not constitute reasonable notice since Circuit City could not expect former employees to return to the store to check any posting or review Applicant Packets they received upon their hire to note that Circuit City had the right to amend the arbitration agreement.

More importantly, as the former employee did not continue his employment with Circuit City or sign an acceptance, there was no evidence that the arbitration amendment applied to him. Since contract modifications are subject to the general requisites of contract formation, offer, acceptance and consideration, an employer must establish that acceptance of any unilateral change exists. Employee acceptance is inferred, however, if the employee continues to work under the new rules. So long as the employee implicitly agrees to the amendment by continuing to work for the employer, a court will determine that the employee accepted any unilateral modification given with reasonable notice.

A reasonable question is whether a company even needs a "unilateral right to change" clause given that the law permits employers to change their employee contracts. We recommend an employee handbook clause permitting unilateral change of the terms and conditions of employment discussed in the employee handbook so as to remove this issue from legal doubt even in those employee handbooks which contain no affirmative statements that the terms and conditions of employment will remain unchanged. This suggestion is particularly compelling in the context of either benefits and/or privileges of employment which require employees to accrue the at-issue benefit or privilege by incremental service over time (i.e., stock options, sabbaticals or vacation entitlement) and which benefits and/or privileges might be adversely affected after the employee has accrued substantial service but has not yet vested in the benefit or privilege.

---

<sup>6</sup> *Asmus v. Pacific Bell*, 23 Cal. 4th 1, 6 (2000). Case decisions involving the "reasonable notice issue" have been few and far between since *Asmus*. Nonetheless, we believe the courts will fashion fact-specific rules. Specifically, we believe the courts will consider whether employees could have avoided any unwelcome change in the terms and conditions of employment by mitigating the result through alternative arrangements. In the case of a loss of benefits, for example, we believe the length of time "reasonable" before a change might be the length of time an employee could "cover" by procuring replacement coverage. In the case of perceived draconian employment terms, the "reasonable" notice period may be the length of time a person might reasonably mitigate by finding alternative employment.

<sup>7</sup> *Al-Safin v. Circuit City Stores, Inc.*, 394 F.3d 1254 (9th Cir. 2005).

<sup>8</sup> *Id.* at 1260 (quoting *Gaglidari v. Denny's Rests., Inc.*, 815 P.2d 1362, 1367 (Wash. 1991)).

A sample clause reserving the right to unilaterally change the terms and conditions of employment follows:

“Because the Company is a growing and changing organization, it reserves full discretion to unilaterally add, modify, delete, or otherwise change provisions of this handbook, or the policies or procedures on which they may be based, at any time. Company shall provide reasonable notice to employees of any addition, modification, deletion, or other change to this handbook. Employee’s continued employment shall constitute acceptance and sufficient consideration related to any such change. For this reason, we urge you to contact the Vice President for Human Resources to obtain current information regarding the status of any particular policy, procedure, or practice. Only the Vice President for Human Resources has authority to modify Company policy and may only do so in writing.”

### 3. At-will language

Perhaps the most common language employers insert into employee contracts is “at-will” language so as to make clear the employer’s right to immediately terminate an employee.<sup>9</sup> Several sample at-will clauses follow<sup>10</sup>:

a. Sample at-will clauses

(i) Blunt “At-Will” Clause:

“Employee agrees that employee is employed at-will and that employer has, and expressly reserves, the right to discharge the employee at any time for any reason whatsoever, with or without cause, and with or without notice. Nothing in this employment contract or the Company’s policies, practices, or procedures shall confer upon the employee any right to continued employment.”

(ii) Diplomatically Couched “At-Will” Clause:

“Employee may be terminated at the sole discretion of management, and may resign his/her employment, at any time. Termination will generally fall into the following categories: (However, this list is not exhaustive. Management reserves the right to change this list.)

“(a) resignation or retirement of employee;

---

<sup>9</sup> For several reasons, at-will language is best installed in (at least) the employee’s offer of employment letter.

<sup>10</sup> Many employers confuse the employer’s contract *right* to terminate an employee with the economic *consequences* of that decision. For example, even though an employer may terminate an at-will employee, the employer may have agreed to provide severance benefits. If so, the termination is not “cost free.”

- “(b) termination due to lack of work, where, in the discretion of management, the services of the employee are no longer required;
- “(c) termination due to performance which is deemed not up to the high standards expected by the company;
- “(d) termination for violation of company rules, policies, or procedures;
- “(e) No Fault Terminations: Employee may be released on a 'no fault' basis at any time, in the sole discretion of management. Where management designates the termination to be 'no fault,' and the employee has more than two years of service with the company, the company shall provide the employee with two weeks' notice of termination or, at the option of either party, two weeks' pay in lieu of notice. Upon mutual agreement of the employee and the company, such termination may be characterized as a 'voluntary resignation.'

“Where appropriate and requested by the employee, the Company will provide assistance to the employee in seeking other employment. Such assistance may include the provision of office, telephone and secretarial assistance, and an appropriate letter of recommendation.

“Employees who are terminated for any reason may seek and obtain a review of the termination decision by submitting within ten days of termination a written request for review to the Vice President, Human Resources. Such request must include any and all reasons why the employee believes the decision was unlawful or otherwise should be reversed.”

- b. Employers may use “at-will” language in documents other than employee handbooks and policy manuals

While it is commonplace to observe “at-will” statements in employee offer (of employment) letters, handbooks and policy manuals, statements in documents other than employee handbooks and policy manuals that employment is “at-will” may also be enforced.<sup>11</sup>

---

<sup>11</sup> See, e.g., *Rochlis v. Walt Disney Co.*, 19 Cal. App. 4th 201 (1993) (court finds as a matter of law that plaintiff was an at-will employee where **stock option agreement** signed by plaintiff expressly provided that the company reserved the right to discharge the employee at any time and for any reason whatsoever and negotiations for employment for a specified term failed) [overturned by subsequent decision on other grounds]; *Shapiro v. Wells Fargo Realty Advisors*, 152 Cal. App. 3d 467 (1984) (jury not entitled to reach issue of whether cause was required for termination when a statement in a **stock option agreement** signed by the employee expressly provided that employment was at-will) [disapproved by subsequent case on other grounds]; *Bos v. United States Rubber Co.*, 100 Cal. App. 2d 565, 569 (1950) (**pension agreement** that disclaimed any right of service for any

[Footnote Continued On Next Page]

Including a recitation that employment is at-will in documents such as stock option agreements and pension agreements serves to reduce expectations of vesting guarantees by further reinforcing any at-will language set out in statute or in an employer handbook, provided that no evidence exists of an employer's contrary intent.<sup>12</sup> Adding "at-will" language to employment applications and/or offer letters may also serve to reduce risk should an applicant change his or her current position in detrimental reliance on an offer of employment which, due to changed circumstances, does not materialize.

A sample at-will provision from a stock option agreement follows:

"Nothing in this Stock Option Agreement shall confer upon the employee any right to continue in the employment of the Company or shall interfere with or restrict in any way the rights of the Company, which are hereby expressly reserved, to discharge the employee at any time for any reason whatsoever, with or without good cause."

#### **4. Integration Clause**

Unresolved in many states is whether and how written employment agreements containing express "at-will" language may be modified by subsequent conduct, practice, or oral representations. In an unpublished opinion, the Ninth Circuit Court of Appeal allowed an employment dispute to survive summary judgment because the writing did not contain an integration clause. The court allowed the employee to introduce "parol evidence" as to the terms of his employment.<sup>13</sup>

To further strengthen a written employment agreement and to help foreclose or at least abbreviate litigation over the scope of the contract, many employers use an "integration clause" in conjunction with an "at-will clause." An "integration clause" example follows:

"Employer and employee agree that the foregoing represents and expresses their complete agreement regarding the terms and conditions of employment, and

---

[Footnote Continued From Previous Page]

employee and reserved to the employer the right to discharge any employee at any time did not create a contractually enforceable expectation that the employee would remain with the company until retirement age); *Baker v. Kaiser Aluminum and Chemical Corp.*, 608 F. Supp. 1315, 1320-1321 (N.D.Cal. 1984) (a "patent agreement" created a binding terminable-at-will employment arrangement).

<sup>12</sup> See, e.g., *Shapiro*, 152 Cal. App. 3d at 482 (jury not entitled to reach issue of whether cause was required for termination when a statement in a stock option agreement requiring the employee to continue in his employment for one year to be entitled to stock options expressly provided that employment was at-will); c.f. *Guz v. Bechtel National, Inc.*, 24 Cal.4th 317, 339 (2000) (at-will provisions in personnel handbooks, manuals, or memoranda do not bar, or necessarily overcome, other evidence of the employer's contrary intent) [citations omitted].

<sup>13</sup> *Satchwell v. Long John Silvers, Inc.*, 1992 U.S. App. LEXIS 9519 (U.S. App. , 1992). Parol evidence is any evidence other than the at-issue contract documents. Anything outside of a written contract is parol evidence, whether it is testimony about what was said during contract negotiations or recorded in proposals or letters memorializing conversations. Parol evidence may be used in limited circumstances to infer the parties' intentions at the time of contract formation, typically when the contract language is unclear or ambiguous.

further agree that this written contract may not be modified or changed except in a writing signed by the employee and a competent official of the company.”

## 5. Americans with Disabilities Act

The Americans with Disabilities Act (“ADA”) is a comprehensive civil rights statute for the disabled which includes prohibitions against discrimination in employment based on disability.<sup>14</sup> California state law is similar, but goes beyond the substantive federal law.<sup>15</sup> Among the requirements the ADA and FEHA place on a covered employer is the obligation to reasonably accommodate the known physical or mental limitations of an otherwise qualified individual with a disability, unless the accommodation would impose an undue hardship on the operation of the employer’s business.<sup>16</sup> Furthermore, the California statute requires that an employer engage in an interactive process with the employee in determining what constitutes a reasonable accommodation.<sup>17</sup> There are also requirements contained in the statute with which an employee must comply to take advantage of the ADA’s and FEHA’s protections.

- a. Employers may require employees to request a reasonable accommodation

An employer is only obligated to furnish a reasonable accommodation to the physical or mental limitations resulting from a disability known to the employer.<sup>18</sup> Thus, if the employer does not know of the disability, the employer is not expected to accommodate the individual with a disability.<sup>19</sup> The EEOC deems it the primary responsibility of the individual with a disability to request an accommodation.<sup>20</sup> An employer may also, following a request for accommodation, request documentation of the need for accommodation when such need is not readily apparent.<sup>21</sup>

---

<sup>14</sup> 42 U.S.C. § 12101, *et seq.*

<sup>15</sup> *See* Cal Gov Code § 12900, *et seq.*; 2 CCR 7285.1.

<sup>16</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>17</sup> *See* Cal. Gov. Code § 12940(n).

<sup>18</sup> 42 U.S.C. § 12112(b)(5)(A).

<sup>19</sup> 29 C.F.R. § 1630.9(a). *See also* *Fussell v. Georgia Ports Authority*, 906 F. Supp. 1561, 1569 (S.D. Ga. 1995) (burden is on non-obviously disabled employee to alert employer to disability).

<sup>20</sup> Appendix to Part 1630 - Interpretive Guidance on Title I of the Americans with Disabilities Act (hereinafter “Appendix”), 56 Fed. Reg. 35748 (1991); *see also* *Lewis v. Zilog*, 908 F. Supp. 931 (N.D. Ga. 1995), (Plaintiff’s disability unknown to employer; “Under the ADA, Plaintiff must offer Defendant a suggestion of a *reasonable accommodation* which would allow her to perform the essential functions of her job” (*emphasis added*)); *Fussell v. Georgia Ports Authority*, 906 F. Supp. at 1569 (burden is on non-obviously disabled employee to alert employer to *disability*).

<sup>21</sup> Appendix at 35748.

Generally, the duty to accommodate a disability is triggered by a request from an employee for such an accommodation.<sup>22</sup> Although courts interpreting the ADA are split on the issue of whether an employee must request an accommodation or whether the employer's duty to accommodate arises once it merely has knowledge of an employee's disability, the weight of the case law supports the former position.<sup>23</sup>

Adopting and disseminating a policy which reminds employees of their obligation to notify the company of any disability which requires accommodation and to request such an accommodation, should one be necessary, will likely help ensure the company's compliance with the ADA and may serve as part of a defense to any subsequent ADA charge or lawsuit. A sample ADA/FEHA policy follows:

“The Company is committed to provide a workplace free from discrimination based on disability. In accordance with the Americans with Disabilities Act and the California Fair Employment and Housing Act, the Company does not discriminate against any employees or applicants on the basis of disability. It is the responsibility of the employee or applicant to request an accommodation by completing a Request for Accommodation Form (**Attachment “A”**) of any physical or mental disability of the employee or applicant. In accordance with the ADA and FEHA, the Company will take all such requests seriously and will promptly determine whether the employee or applicant is disabled and whether a reasonable accommodation exists which would allow the employee or applicant to perform the essential functions of the job without imposing an undue hardship on the Company or other employees.”

## 6. Anti-Harassment Clauses

- a. Require employee to report any harassment of or by any employee or third party?

Should you *require* your employees to report harassment perceived to be in violation of company policy? This is very controversial, but is a concept gaining increasing favor in human resources circles. Prevention of harassment is the most effective and cost efficient means to deal with the reality of workplace relationships. Once offense is taken and a charge or lawsuit is filed,

---

<sup>22</sup> Senate Report No. 101-116 at 23 (Committee on Labor and Human Resources) (1989).

<sup>23</sup> See, e.g., *Fussell*, 906 F. Supp. at 1569 (burden is on non-obviously disabled employee to alert employer to disability and afford employer opportunity to make reasonable accommodation); *Mears v. Gulfstream Aerospace Corp.*, 905 F. Supp. 1075 (S.D. Ga. 1995) (plaintiff's responsibility was to inform her employer of need for reasonable accommodation); *Cheatwood v. Roanoke Industries*, 891 F. Supp. 1528 (N.D. Ala. 1995) (burden is on the employee to inform the employer that an accommodation is needed and to request a specific accommodation); but see, e.g., *Hindman v. GTE Data Services, Inc.*, 1994 U.S. Dist. LEXIS 9522 (M.D. Fl. 1994) (court implies that employer has an affirmative duty to seek out reasonable accommodation remedies once it is aware of the employee's disability); *Schmidt v. Safeway*, 864 F. Supp. 991 (D.C. Or. 1994) (“magic words” not necessary to trigger employer's obligations under the ADA; knowledge of plaintiff's disability was sufficient). Similarly, see, e.g. *Spitzer v. Good Guys, Inc.*, 80 Cal. App. 4th 1376 (Cal. App. , 2000) (employee bears the burden of giving employer notice of disability).

adverse publicity and a degradation of workplace morale will likely follow. Maintenance and dissemination of and adherence to the provisions of a written policy against harassment are of vital importance to both prevent and defend against a charge of harassment. Indeed, under a variety of circumstances, California courts require employees to exhaust internal remedies before bringing a civil action. A California Court of Appeal decision upheld dismissal of a civil action because the employee failed to exhaust her administrative remedies and had not shown justification for that failure.<sup>24</sup>

Adoption of a policy against harassment may help prevent harassment, may provide a defense against claims of sexual harassment by co-workers and non-employees, and may help minimize exposure even in supervisory harassment cases. A comprehensive policy against harassment will specifically target all bases of harassment for which an employee could make a charge or state a cause of action.<sup>25</sup> An effective policy against harassment will therefore specifically prohibit sexual harassment and harassment based on factors such as race, color, religion, national origin, age, disability, sexual orientation, gender identity or marital or protected veteran status, as well as any other categories or status protected by applicable state or federal laws.<sup>26</sup>

An effective policy against harassment will provide a confidential complaint procedure, which all employees should be strongly encouraged to use. The policy should be calculated to encourage victims of harassment to come forward, should designate the specific person within the company to whom complaints of harassment should be addressed (generally the employee's supervisor or company Human Resources or EEO manager), and should provide for alternative means of reporting a complaint of harassment should the contact person designated by the policy be the alleged harasser.<sup>27</sup>

Explicitly stating that all complaints of harassment will be taken seriously and investigated promptly in a confidential manner will likely further encourage employees to come forward with complaints of harassment. An effective policy will also explicitly state that the company will not tolerate any retaliatory action taken against any employee for making a complaint or for cooperating in an investigation subsequent to a complaint. Finally, a statement in the policy against harassment that any employee violating the policy will be subject to prompt

---

<sup>24</sup> See *Campbell v. Regents of the University of California*, 2002 Cal. App. Unpub. LEXIS 11973 (2002).

<sup>25</sup> See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72-73 (1986) (defendant bank's policy held not to be a defense to an employee's sexual harassment charge, but Supreme Court based its decision on the fact that the policy "did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination.").

<sup>26</sup> See, e.g., California Labor Code § 1102.1 (prohibiting sexual orientation discrimination); California Government Code § 12945.2(j) (prohibiting discrimination against individuals for taking family care or medical leave).

<sup>27</sup> See *Vinson*, 477 U.S. at 73 (defendant bank's argument that plaintiff employee's failure to use the complaint procedure, which required the complaint to go through immediate supervisor (and alleged harasser in this case), should shield it from liability "might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.").

disciplinary action, up to and including immediate termination, may further encourage employees to come forward with complaints.

Establishing and implementing an effective, comprehensive, and responsive policy against harassment incorporating the provisions discussed above may relieve an employer from liability for hostile work environment claims by both co-employees and supervisors.<sup>28</sup> Although an employer will likely be held strictly liable for quid pro quo harassment by supervisors where the supervisor had actual authority to carry through the threatened adverse employment action,<sup>29</sup> should a court in the future choose to apply general agency principles to this situation, the presence of an effective, comprehensive, and responsive policy against harassment will likely weigh in the employer's favor.

Requiring employees to report harassment, or at least giving them the opportunity to do so, is especially important in light of federal and California case law establishing various affirmative defenses to sexual harassment claims. In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and in its companion case *Burlington Industries v. Ellerth*, the United States Supreme Court created what is now known as the "*Faragher/Ellerth affirmative defense*" to claims of sexual harassment. The defense is comprised of two parts:

(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and

(b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Accordingly, under Title VII, proof that an employee complaining of sexual harassment had failed to avail himself/herself of an opportunity to complain and thus take advantage of preventive or corrective opportunities would help prove up the "*Faragher/Ellerth affirmative defense*" (even apart from *potentially* raising gnawing questions for the jury about the Plaintiff's true motives in failing to complain).

In a significant similar development for California employers, California law now provides a mechanism to limit—or even preclude—damages for supervisor harassment even while maintaining “strict liability” for managerial misconduct under California’s Fair Employment and

---

<sup>28</sup> See, e.g., *Gary v. Long*, 59 F. 3d 1391, 1398 (D.C. Cir. 1995) (“[A]n employer may not be held liable for a supervisor's hostile work environment harassment if the employer is able to establish that it had adopted policies and implemented measures such that the victimized employee either knew or should have known that the employer did not tolerate such conduct and that she could report it to the employer without fear of adverse consequences.”); *Swentek v. USAir, Inc.*, 830 F. 2d 552 (4th Cir. 1987) (employer not liable for sexual harassment perpetrated by co-employees where employee did not give notice of harassing activity to employer or employer took effective action to end harassment upon receiving notice); Cf. *Valdez v. Church's Fried Chicken, Inc.*, 683 F. Supp. 596, 621 (W.D. Tex. 1988) (employer's posted policy was meaningless because employees complaining of sexual harassment did not use grievance procedures).

<sup>29</sup> See *Gary*, 59 F. 3d at 1396 (“[I]t takes more than mere saber rattling alone to impose quid pro quo liability on an employer; the supervisor must have wielded the authority entrusted to him to subject the victim to adverse job consequences as a result of her refusal to submit to unwelcome sexual advances.”).

Housing Act (FEHA). In *State Department of Health Services v. Superior Court (McGinnis)*<sup>30</sup>, the California Supreme Court held that sexual harassment plaintiffs may not recover damages they could have *avoided* by timely reporting incidents of harassment to the company.

The California Supreme Court concluded that although the company remains strictly liable for sexual harassment by a supervisor, “a plaintiff’s own conduct may limit the amount of damages recoverable or bar recovery entirely” based on the doctrine of “avoidable consequences.” This defense applies if “(1) the employer took reasonable steps to prevent and correct workplace harassment; (2) the employee unreasonably failed to use the preventive and corrective measures the employee provided; and (3) reasonable use of the employer’s procedures would have prevented at least some of the harm that the employee suffered.” The defense allows companies to escape liability for damages that the employee “could have prevented with reasonable effort and without undue risk, expense, or humiliation” by taking advantage of the company’s internal anti-harassment policies and reporting procedures. The court recognized that some delay by employees in reporting harassment may be reasonable if a company does not have an adequate anti-harassment policy and enforcement mechanism that it communicates to employees, or if employees reasonably fear retaliation.

In light of the *McGinnis* decision, California employers have an added incentive to prominently feature their harassment policies and procedures in company handbooks and to invite complaint. An employer’s ability to make use of the *avoidable consequences* defense will depend in large part on whether the employer provided adequate notice of its anti-harassment policy and enforcement mechanisms and carried out prompt and thorough investigations and stopped harassing acts..

A sample “Policy Against Harassment” embodying employee notice requirements to the employer follows:

“The Company is committed to providing a workplace free of sexual harassment, as well as harassment based on such factors as race, color, religion, national origin, age, disability, sexual orientation, gender identity or marital or Vietnam veteran status. The Company strongly disapproves of and will not tolerate harassment of employees by managers, supervisors, or coworkers.

“Harassment includes verbal, physical, and visual conduct that creates an intimidating, offensive, or hostile working environment or that interferes with work performance. Some examples include racial slurs, ethnic jokes, posting of offensive statements, posters, or cartoons, or other similar conduct.

“Sexual harassment refers to behavior of a sexual nature which is unwelcome and personally offensive to its recipient. Sexual harassment is a form of employee misconduct which is demeaning to another person and undermines the integrity of the employment relationship.

---

<sup>30</sup> See *State Department of Health Services v. Superior Court (McGinnis)*, 6 Cal Rptr. 3d 441 (2003).

“Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute “sexual harassment” when:

1. submission to such conduct is made explicitly or implicitly a condition of an individual's employment;
2. submission to or rejection of such conduct is used as a basis for an employment decision affecting the employee; or
3. the harassment has the purpose or effect of unreasonably interfering with the employee's work performance or creating an environment which is intimidating, offensive, or hostile to the employee.

“For example, unwanted physical contact, foul language, sexually oriented propositions, jokes, or remarks, obscene gestures or the display of sexually explicit pictures, cartoons, or other materials may be considered offensive to another employee and should therefore not occur.

“You are strongly requested to immediately report any incident of harassment, including work-related harassment by any Company personnel or any other person, promptly to your supervisor or manager (or to any other member of management) or to the Human Resources Manager, who is responsible to investigate the matter. Managers who receive complaints or who observe harassing conduct will inform the Human Resources Manager immediately. The Company emphasizes that you are *not* required to complain first to your supervisor or manager if your supervisor or manager is the individual who you believe is harassing you.

“Every complaint of harassment reported to the Human Resources Manager will be investigated thoroughly, promptly, and in a manner as confidential as the circumstances permit. In addition, the Company will not tolerate retaliation against any employee for cooperating in an investigation or for making a complaint to such person's supervisor, manager, or to the Human Resources Manager.

“If harassment in violation of this policy is established, the Company will take actions reasonably necessary to stop the harassment, including potential discipline of the offender. Disciplinary action for a violation of this policy can range from oral or written warnings up to and including immediate termination.”

## **7. Trade secrets/inventions**

Many companies engage in business which includes a program of research and development, production, or marketing, all or some part of which may enjoy protection as intellectual property pursuant to copyright and/or patent law, trade secret rights, mask work rights, rights of priority, or other intellectual property rights. To protect these intellectual property rights and to prevent an inadvertent violation of the intellectual property rights of others,

employer's often require employees (and especially independent contractors) to enter into an “Inventions Assignment and Confidentiality Agreement,” often colloquially known as Non-Disclosure Agreements (NDAs) as a condition of interview and/or employment.

Such an agreement may require employees to give prompt notice to management of *all* inventions, whenever developed, even if the employee feels the inventions may not be protected as intellectual property. It is prudent for any such agreement to further require the employee to agree that his or her duties with the company will not breach any invention assignment or violate any confidentiality agreements or similar agreements with any current or former employer, or other party. In addition, within the bounds of the intellectual property laws and any applicable state legislation, the agreement ideally would require all workers to assign all inventions developed during his or her service to the company (and include a Power of Attorney to allow the company to assign a recalcitrant inventor employee’s invention to the company).<sup>31</sup> Finally, such agreements commonly require the employee to keep confidential any proprietary and/or trade secret information of the company which the employee may learn during the course of his or her employment.

The full agreement should recite that it is entered into in consideration of and as a condition of employment with the company and should contain an introductory paragraph setting forth the purposes of the agreement. The agreement should include a provision reiterating that the agreement is *not* a contract of employment, does not obligate the company to employ the employee for any stated period of time, and does not affect the employee's status as an at-will employee.<sup>32</sup> Many prudent employers also include “choice of law” and “severability” clauses as well as clauses which require the employee to assist the company to obtain any legal protections for inventions which the company may seek, authorize the company to notify others of the terms of the agreement, and allow the company to seek an injunction (including costs and attorney's

---

<sup>31</sup> Some states have enacted specific legislation controlling the breadth and enforceability of such an assignment clause in an employment agreement. *See, e.g.*, Cal. Labor Code § 2870 (“Any provision in an employment agreement which provides that an employee shall assign, or offer to assign, any of his or her rights in an invention to his or her employer shall not apply to an invention that the employee developed entirely on his or her own time without using the employer's equipment, supplies, facilities, or trade secret information except for those inventions that either: (1) relate at the time of conception or reduction to practice of the invention to the employer's business, or actually or demonstrably anticipated research or development of the employer, or (2) result from any work performed by the employee for the employer. To the extent a provision in an employment agreement purports to require an employee to assign an invention otherwise excluded from being required to be assigned under Cal. Labor Code Section 2870(A), the provision is against the public policy of this state and is unenforceable.”) Where such legislation exists, assignment clauses should specifically refer to and be drafted in accordance with such legislation.

<sup>32</sup> Such a provision will further buttress the employee's at-will status with the company. Employees may seek to otherwise argue that execution of the Inventions Agreement evidenced an intent for the employee to remain employed for the duration of any specific research and development project for which they were hired (*i.e.* getting a space shuttle to Mars). *See* Section 3b, above. Courts have enforced statements that an employee is “at-will” when such statements are included in documents other than policy manuals or employee handbooks when those statements are signed by the employee or published in such a manner as to provide actual notice to the employee. *See, e.g., Shapiro*, 152 Cal. App. 3d at 482 (jury not entitled to reach the issue of whether cause was required to terminate an employee, where the employee signed a stock-option agreement expressly providing that employment was at-will).

fees) for violation of the agreement. **Attachment “B”** is a model “Inventions Assignment and Confidentiality Agreement.”

## 8. Overtime

- a. Require employee to obtain permission prior to working overtime

To limit overtime costs, many policy manuals require employees to obtain permission prior to working overtime. Employers often implement this policy by requiring employees to complete a form authorizing the anticipated overtime work subject to supervisor countersignature.<sup>33</sup> Including such a provision in a policy manual or employee handbook will both likely serve to increase employee awareness of the need to obtain authorization for overtime work and discourage employees from taking unauthorized overtime. It will not, however, by itself relieve an employer of the obligation for overtime compensation if an employee works unauthorized overtime hours *and* such work is known to the employer.<sup>34</sup> Should an employee later claim to be owed compensation for unauthorized overtime work, however, the employer's policy against unauthorized overtime will be a persuasive fact in the employer's favor to permit it to lawfully deny compensation at premium rates.<sup>35</sup>

The federal Fair Labor Standards Act (“FLSA”) requires an employer to count as hours worked for purposes of computing overtime any hours it “suffered or permitted” an employee to work, regardless whether the employee required, requested, or authorized the employee to work. Courts have interpreted the term “suffer and permit” to mean “with the knowledge of the employer.”<sup>36</sup> Only when an employer prohibits overtime work without prior approval and has no knowledge (and should have had no knowledge) an employee is working overtime does the FLSA relieve the employer from overtime compensation liability.<sup>37</sup> A sample “Overtime Authorization” clause follows:

“No non-exempt employee may work overtime without the express prior written approval of his or her supervisor. Any employee or supervisor requesting

---

<sup>33</sup> See sample Overtime Approval Request Form (**Attachment “C”**).

<sup>34</sup> See 29 U.S.C. § 203(g); 29 C.F.R. §§ 785.11-785.13.

<sup>35</sup> See, e.g., *Newton v. City of Henderson*, 47 F. 3d 746, 747-8 (5th Cir. 1995); *Davis v. Food Lion*, 792 F.2d 1274, 1275 (4th Cir. 1986).

<sup>36</sup> See, e.g., *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413 (9th Cir. 1981) (employer not liable for overtime compensation where employee did not notify employer of overtime hours worked prior to filing of lawsuit and deliberately omitted the inclusion of his overtime hours from timesheets).

<sup>37</sup> See, e.g., *Newton*, 47 F. 3d at 749-50 (employer not liable for overtime compensation employee claimed upon resignation where employer denied request for overtime and overtime hours were not reported on employee's timesheets); *Davis*, 792 F.2d at 1277-78 (employee's claims that employer had constructive knowledge of his overtime work due to implementation of stringent Effective Scheduling system fail; employer therefore not liable for overtime compensation where employer also had no actual knowledge of overtime work because employee did not record overtime on time cards).

any overtime work must complete and sign an Overtime Approval Request Form for all overtime.”

b. Require employees to take meal and rest periods

In the wake of the Internet Bubble, and driven by the loss of economic value in vested employee equity offerings, many California employees are now seeking to hold their employers strictly accountable for wage-hour violations, including (recently) even missed meal periods. However, missed meal periods not only create their own set of liabilities, but increase the possibility of overtime claims should employees extend their work day beyond eight hours by working through their meal and/or rest periods. Exacerbating the lack of widespread education about these requirements is the widespread lack of employer recordkeeping documenting meal breaks (required in California by most Wage Orders) and rest periods (documentation not required, but highly desirable). Such documentation is very difficult and expensive to compile years after, or even weeks, after the work is done.

(i) Meal Periods

California Industrial Wage Order No. 4-2001 (revised October 2006) [Professional, Technical, Clerical, Mechanical And Similar Occupations], for example, provides in part:

“(A) No employer shall employ any person for a work period of more than five (5) hours without a meal period of not less than 30 minutes, except that when a work period of not more than six (6) hours will complete the day’s work the meal period may be waived by mutual consent of the employer and the employee. Unless the employee is relieved of all duty during a 30 minute meal period, the meal period shall be considered an "on duty" meal period and counted as time worked. (Emphasis added). An "on duty" meal period shall be permitted only when the nature of the work prevents an employee from being relieved of all duty and when by written agreement between the parties an on-the-job paid meal period is agreed to. The written agreement shall state that the employee may, in writing, revoke the agreement at any time.

(B) If an employer fails to provide an employee a meal period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation (emphasis added) for each workday that the meal period is not provided.”

The IWC Wage Orders thus appears to describe the meal period requirement for non-exempt employees only. However, California Labor Code § 512 appears to require employers to provide a meal period for all employees (exempt and non-exempt) working for a specific number of hours.<sup>38</sup> In a curious turn of events leading to much confusion about this obligation, the

---

<sup>38</sup> California Labor Code § 512(A) provides in part, “An employer may not employ an employee for a work period of more than five hours per day without providing the employee with a meal period of not less than 30 minutes, except that if the total work period per day of the employee is no more than six hours, the meal period may be waived by mutual consent of both the employer and employee. An employer may not employ an employee for a work period of more than 10 hours per day without providing the employee with a second meal period of not  
[Footnote Continued On Next Page]

California Industrial Wage Orders issued pursuant to the California Labor Code appear to dilute the meal period requirement and seem to imply that employers need not provide meal periods to exempt employees. While there are no case law decisions interpreting Labor Code section 512's apparent requirement that employers provide even exempt employees meal period allowances or interpreting the contrary Wage Orders, most employers allow exempt employees to take or not take meal periods as they please and, of course, rarely have systems to document whether "exempt employees" have taken meal breaks.

Furthermore, because the Labor Code notes that an employer need only "provide" a meal period, while the Wage Orders appear to require the employee take a meal period, the question facing employers is whether an employee is required to take a meal period (thus having the employer serve as a "meal policeman" and force employees to stop working), or whether merely providing an employee a meal period that the employee can voluntarily skip is sufficient. Unfortunately for employers, existing regulations and case law does not define the term "provide." Without a clear definition to follow, both employees and employers are confused as to the requirements regarding meal periods and as to which option is legally sufficient. This confusion has resulted in an increase in lawsuits concerning meal periods.

It appears that since the Labor Code does not authorize the Labor Commission to override the Code through Wage Orders, there is potential legal risk to employers who do not document that exempt employees are taking their meal periods. In short, because the Labor Code "trumps" contrary Wage Orders (which may not be inconsistent with law...and the courts have stricken down many Labor Commissioner positions found inconsistent with authorizing statutes), Plaintiff lawyers are positioned to argue that California employers must provide all employees working at least five hours in a day with a meal period.

All sides now agree that failure to provide a meal period to non-exempt employees will result in the one-hour premium pay penalty set forth in the Wage Order (for each separate violation). Failure to provide a meal period to any employee may also result in a private attorney general action under California Labor Code § 2699 (the "Private Attorney General Act," i.e., "Bounty Hunter" law). In the absence of reformation of the regulation, the approach with less legal risk, but with much greater administrative burden, is to require lunch be taken and employees to complete timecards which the employee affirms are accurate (showing the employee took lunch).<sup>39</sup>

The reason that this question regarding what constitutes an appropriate meal period is of such importance is because of the potential damages that may result from failing to provide a

---

*[Footnote Continued From Previous Page]*

less than 30 minutes, except that if the total hours worked is no more than 12 hours, the second meal period may be waived by mutual consent of the employer and the employee only if the first meal period was not waived..."

<sup>39</sup> On January 14, 2006, Governor Arnold Schwarzenegger's administration withdrew proposed regulations for meal periods that would have defined the phrase "provide" under the Labor Code and clarify that employers need only inform the employee of his or her right to take a meal period and provide such opportunity each day, whether the employee takes the meal period or not. In withdrawing the proposed regulation, the Governor's administration determined that "The previous rule making became too adversarial. We want to approach it differently with advisory groups and fully talk it out." (Gov. Schwarzenegger spokesman, Rick Rice).

meal period. In addition to the potential wages that exist from an employee working through missed meal periods, the recent case of *Murphy v. Kenneth Cole Productions, Inc.*, the California Supreme Court held that the "penalties" for failing to provide a meal or rest period found in California Labor Code § 226.7(b) and California Wage Order section 11(b) are actually "wages," and thus an employee is entitled to up to four years of these penalties instead of the one year statute of limitations for penalties found in the California Civil Code.<sup>40</sup>

(ii) Rest Periods

Wage Order No. 4, for example, also permits rest periods to apparently only non-exempt employees working for a specific number of hours, as outlined below (see emphases added as to exempt/non-exempt entitlement issue).

“(A) Every employer shall authorize and permit all employees to take rest periods, which insofar as practicable shall be in the middle of each work period. The authorized rest period time shall be based on the total hours worked daily at the rate of ten (10) minutes net rest time per four (4) hours or major fraction thereof. However, a rest period need not be authorized for employees whose total daily work time is less than three and one-half (3 ½) hours. Authorized rest period time shall be counted as hours worked for which there shall be no deduction from wages. (Emphasis added.)

(B) If an employer fails to provide an employee a rest period in accordance with the applicable provisions of this order, the employer shall pay the employee one (1) hour of pay at the employee’s regular rate of compensation (emphasis added) for each workday that the rest period is not provided.”<sup>41</sup>

It is important to note that it is not the employee’s burden to request his/her meal and/or rest periods. Even if the employee insists on waiving such periods (for example, to complete a pending project), the approach with the least legal risk, but with great administrative burden, is to require employees to take their meal and rest periods or risk potential economic liability as a result of not supplying them. Such waiver of meal and/or rest periods would also increase the amount of hours worked such that the employee may incur overtime hours. Thus, it is prudent to require employees to sign timecards acknowledging both that they took their meal breaks and rest periods and that their timecards are accurate.

## 9. Conflicts of Interest

- a. Require employee to notify employer of any actual or potential conflicts of interest

Employers may contractually bind their employees to disclose any actual or potential conflicts of interest which may arise due to other business or personal relationships. Although various legal doctrines -- such as trade secret protection, unfair competition prohibitions, and

---

<sup>40</sup> *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094 (2007).

<sup>41</sup> IWC Wage Order 4-2001(12)(A) (Rev. October 2006).

securities regulations -- protect employers against employee conflicts of interest or competition to some degree, a Conflicts of Interest clause may provide additional protection. A Conflicts of Interest clause educates employees regarding areas which may present possible conflicts of interest. By requiring the employee to discuss with his or her supervisor any existing or potential conflicts of interest, such a clause also serves as an early warning system which may alert an employer to potential problems and allow an employer to diffuse such situations before they develop.

The sample “Conflicts of Interest” clause below includes a number of specific types of conflicts of interest which might arise in the workplace. The list of examples is not meant to be exhaustive. You may wish to tailor it to the specific nature of your business and workforce. Non-fraternization, “anti-moonlighting,” and confidentiality policies are among the most common conflicts of interest clauses. You may emphasize some of these by their adoption as separate policies, rather than to include them in a general Conflicts of Interest clause. The employer’s specific type of business, workforce, and corporate culture will dictate the specific result.

Many employers request employees at the time of hire to certify they do not know of any facts constituting a conflict of interest and to require employees to disclose any subsequent conflict of interest. A sample “Conflicts of Interest” clause follows:

“We expect our employees to devote their best efforts and attention to the full-time performance of their jobs. Employees are expected to use good judgment, adhere to high ethical standards, and to avoid situations that create an actual or potential conflict between an employee's personal interests and those of the Company. A conflict of interest exists when the employee's loyalties or actions are divided between the Company's interests and those of another, such as a competitor, supplier, or customer. We require that you avoid both the fact and the appearance of a conflict of interest. We request employees unsure as to whether a certain transaction, activity, or relationship constitutes a conflict of interest to discuss it with their immediate supervisor for clarification. You must seek and obtain any exception to this guideline in writing signed by the Company President.

“This guideline does not attempt to provide an exhaustive list of all possible conflicts of interest that could develop. Some of the more common conflicts from which employees should refrain, however, include:

- “(1) Accepting expensive personal gifts or entertainment from competitors, customers, suppliers, or potential suppliers;
- “(2) Working for a competitor, supplier, or customer;
- “(3) Engaging in self-employment in competition with the Company;
- “(4) Using proprietary or confidential Company information for personal gain or to the Company's detriment;

“(5) Having a direct or indirect financial interest in, or relationship with, a competitor, customer, or supplier;

“(6) Using Company assets or labor for personal use;

“(7) Acquiring any interest in property or assets of any kind for the purpose of selling or leasing it to the Company;

“(8) Developing a personal relationship with a subordinate employee of the Company that might interfere with the exercise of impartial judgment in decisions affecting the Company or any employees of the Company.

“If an employee or someone with whom an employee has a close relationship (a family member or close companion) has a financial or employment relationship with a competitor, customer, supplier, or potential supplier, the employee must disclose this fact in writing to the Personnel Manager. Employees should be aware that if they enter into a personal relationship with a subordinate employee or with an employee of a competitor, supplier, or customer, a conflict of interest may exist that requires full disclosure to the Company.

“A part-time employee may engage in outside employment, provided that he or she discloses this fact to his or her immediate supervisor and obtains the supervisor's written approval.

“Failure to adhere to this guideline, including failure to disclose any conflicts or to seek a written exception from the Company President as provided above, may result in discipline, up to and including termination.”

## **10. Company Property**

### **a. Prohibit removal of company property, where feasible**

Many employers fail to contractually bind their employees to prohibit the removal of company property without prior authorization. While some states decree any documents produced at the company or received in connection with employment to be company documents, such a provision aids the company to protect its proprietary information in those states lacking a clear policy on this important property issue, and serves to reduce employee expectations of privacy in or ownership of any company property.

By specifically including records, documents and files, including hard or magnetic copies, as company property which may not be removed absent express authorization, an employer may also gain a tactical advantage in any subsequent employment litigation. If the discharged employee attempts to bolster his or her claim with documents removed from the company without authorization, this “after-acquired evidence” of employee misconduct which would have justified the employee’s discharge may be used to limit any damages awarded to the discharged

employee.<sup>42</sup> Moreover, the employer may be able to effectively seek both evidentiary and monetary sanctions for such improper removal of company property in any ensuing employment litigation. A sample clause prohibiting removal of company property follows:

“To ensure its ability to efficiently conduct business and to protect valuable Company Information, the Company prohibits the removal of any Company property, including equipment, records, documents, hard copy or electronic files, or copies thereof, without prior authorization from the Company. Violation of this policy may result in discipline, up to and including termination.”

b. Searches and Inspections of Company Property

To ensure its ability to efficiently conduct business and maintain a safe workplace, many employers limit employee expectations of privacy so as to permit business-related searches and inspections on company property. Such a provision must be drafted with care: a search too broad in scope relative to the employer’s privacy policy, or applicable law, or an intrusion not accomplished for a sufficient business purpose, may expose an employer to liability for violating any applicable employee privacy rights.<sup>43</sup>

Employees enjoy privacy rights pursuant to some state constitutions<sup>44</sup>, various state and federal privacy laws<sup>45</sup>, and common law tort actions.<sup>46</sup> Privacy right protections state and federal

---

<sup>42</sup> After-acquired evidence of employee misconduct will not bar a *discrimination* law plaintiff from securing a liability finding; However, such “after acquired” evidence is relevant to the scope of relief available and generally will preclude reinstatement or front pay as a remedy, while limiting the amount of back pay to that amount measured from the date of unlawful discharge to the date of discovery of the employee’s misconduct. *McKennon v. Nashville Banner Publishing Co.* (1995) 115 S. Ct. 879, 130 L. Ed. 2d 852, 863-864. Falsification of information at hire may, however, bar an employee’s claims of termination in violation of public policy. *Camp v. Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 620, 639 (1995) (after-acquired evidence of employee misrepresentations on application regarding prior felony convictions justifies termination where misrepresentation caused employer to violate government contract requiring employer to ensure none of its employees were convicted felons).

<sup>43</sup> *See, e.g., Rulon-Miller v. International Business Machines Corp.*, 162 Cal. App. 3d 241 (1984) (employer liable for compensatory and punitive damages for wrongful discharge where employer violated policy giving employees the right to be free from inquiries concerning their personal lives when supervisor asked about and discharged the employee for dating a competitor). While the legal analysis underpinning the *Rulon-Miller* decision was subsequently overruled in *Guz v. Bechtel National, Inc.*, 24 Cal.4<sup>th</sup> 317, 350-351 (2000) [where the employment contract itself allows the employer to terminate at will, its motive and lack of care in doing so are, in most cases at least, irrelevant], there may still be liability against an employer for overly intrusive searches in violation of an employee’s privacy rights.

<sup>44</sup> *See, e.g.,* California Constitution, Article I, Section 1 (“All people are by nature free and independent and have inalienable rights. Among these are . . . privacy.” This section creates a right of action against private, non-government entities).

<sup>45</sup> *See, e.g.,* National Labor Relations Act (29 U.S.C. §§ 151-169, affecting employer surveillance, etc.), Americans with Disabilities Act (42 U.S.C. §§ 12112(c)(2), (3), concerning prohibition and/or regulation of pre- and post-employment medical examinations and inquiries); Omnibus Crime Control and Safe Streets Act (18 U.S.C. § 2510-20, covering interception and monitoring of wire and oral communications). Many other federal  
[Footnote Continued On Next Page]

law afford employees vary from public to private sector, and from state to state. In general, however, employers may reduce potential unlawful invasions of privacy by: (1) contractually reducing employee expectations of privacy so much as the employer desires or to the limit applicable law allows, and (2) not intruding beyond that necessary to achieve a legitimate business purpose.<sup>47</sup> The employee handbook or policy manual is often an essential tool to both establish an employer's legitimate business purposes to conduct a search or inspection and reduce employee expectations of privacy in office property.

Company policies regarding searches or inspections of company premises, property, or equipment should include a paragraph clearly setting forth its legitimate business purposes for conducting workplace searches. Although these purposes may vary depending on the type of business conducted by the company, such purposes may include safeguarding the employer's property, assuring the employer's right to retrieve its property in the event an employee entrusted with that property is not available, and preventing the introduction of drugs, alcohol, or other prohibited materials into the workplace.

Including a provision regarding workplace searches and inspections in a company policy manual or employee handbook reduces employees' expectation of privacy in company property by putting them on notice of the employer's ability to conduct searches or inspections.<sup>48</sup> An employee may have a greater expectation of privacy in areas that are exclusive to him or her or protected by a lock, such as a locked office or desk, or by a password, or access code, such as most e-mail and voice mail systems. To reduce employees' expectation of privacy in such areas, the employer should retain keys, passwords, and access codes to these areas, inform the employee that these have been retained, and include a provision in its search and inspection policy which explicitly reserves the right to inspect such areas. Finally, to further reduce employees' expectation of privacy in the workplace, the employer should include a provision in its search and inspection policy which specifically discourages employees from bringing into the workplace any personal items or property which they do not wish to reveal, as searches or inspections conducted pursuant to the policy might reveal such personal items. Because of the

---

[Footnote Continued From Previous Page]

statutes also offer some degree of privacy protection to employees. *See also* Florida Statutes Annotated § 112.0455(1)-(16) (governing alcohol and drug testing), Michigan Compiled Laws Annotated Sec. 37.2205a (governing arrest records), Consolidated Laws of New York Annotated, Sections 733-739 (governing lie-detector tests). Many other state statutes also offer some degree of privacy protection to employees.

<sup>46</sup> Torts actions involved in employment privacy litigation may include invasion of privacy, defamation, false imprisonment, intentional infliction of emotional distress, negligent maintenance or disclosure of employment records, fraudulent misrepresentation, intentional interference with contractual relations, and public policy.

<sup>47</sup> *See, e.g., Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 39-40 (1994) (right of privacy available under the California Constitution is not absolute and must be based on a reasonable expectation of privacy which in turn must be balanced against the interest in conducting the search or inspection); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (similar analysis based on reasonableness applied to public employer subject to the requirements of the First and Fourteenth Amendments to the U. S. Constitution).

<sup>48</sup> Employer's may further reduce employees' expectation of privacy by providing employees with a separate copy of the policy before any search or inspection is conducted and by posting a copy of the policy in locations where other notices to employees are generally posted.

enormous recent specific interest in e-mail access, we enclose as **Attachment “D”** a model generic e-mail policy. Sample language regarding searches and inspections of company property follows:

“To ensure its ability to efficiently conduct business, the Company intends to assure its access at all times to Company property, equipment, records, documents, and files, and to protect against the unauthorized use and removal of Company property. Accordingly, the Company has established this policy concerning inspections and searches on Company premises. This policy applies to all employees of the Company.

---

“To assure access at all times to Company property, and because you may not always be available to produce Company property or information related to company business properly in your possession when needed in the ordinary course of the Company’s business, the Company reserves the right to conduct a routine inspection or search at any time for Company property or Company-related information. In addition, the Company reserves the right to access at all times information and communications stored in Company computer files, on Company disk-drives, and in Company-provided e-mail and voice mail.

---

“Routine searches or inspections on Company property may include your office, desk, file-cabinet, closet, computer files, e-mail, voice mail, or similar places where you may place or store Company property or Company-related information, whether or not such places are locked or protected by passwords or access codes.

---

“Because a routine search on and of Company property might result in the discovery of your personal possessions or those of others, you are encouraged not to bring into the workplace any item of personal property you do not want to reveal to the Company.”

**ATTACHMENT "A"**

**(MODEL)  
REQUEST FOR ACCOMMODATION**

Name: \_\_\_\_\_ Job Title: \_\_\_\_\_

Dept./Supervisor: \_\_\_\_\_

What is your disability? \_\_\_\_\_

What part(s) of your job do you feel you are unable to perform due to your disability? \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

What do you feel the Company can do that will enable you to perform those parts of your job that you cannot perform because of your disability? \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**NOTE:** Upon receipt of your Request for Accommodation, your supervisor may want to meet with you to discuss the limitations you describe above, as well as any reasonable methods of accommodating these limitations. The Company will then determine whether the accommodation(s) you requested will enable you to do your job and whether it is feasible for the Company to provide you with the accommodation(s) requested.

Signature: \_\_\_\_\_

Date: \_\_\_\_\_

## **ATTACHMENT “B”**

(MODEL)

### **EMPLOYEE INVENTION ASSIGNMENT AND CONFIDENTIALITY AGREEMENT**

In consideration of, and as a condition of my employment with \_\_\_\_\_  
[ADD COMPANY NAME HERE], a California [Delaware] corporation (the “Company”), I hereby represent to, and agree with the Company as follows:

1. **Purpose of Agreement.** I understand that the Company is engaged in a continuous program of research, development, production and marketing in connection with its business and that it is critical for the Company to preserve and protect its “*Proprietary Information*” (as defined in Section 7 below), its rights in “*Inventions*” (as defined in Section 2 below) and in all related intellectual property rights. Accordingly, I am entering into this Employee Invention Assignment and Confidentiality Agreement (this “*Agreement*”) as a condition of my employment with the Company, whether or not I am expected to create inventions of value for the Company.

2. **Disclosure of Inventions.** I will promptly disclose in confidence to the Company all inventions, improvements, designs, original works of authorship, formulas, processes, compositions of matter, computer software programs, databases, mask works and trade secrets [YOU MAY WANT TO CONSIDER UPDATING THIS LIST, AS APPLICABLE, FOR PARTICULAR INVENTIONS THAT SPECIFICALLY APPLY TO THIS COMPANY] that I make or conceive or first reduce to practice or create, either alone or jointly with others, during the period of my employment, whether or not in the course of my employment, and whether or not patentable, copyrightable or able to be protected as trade secrets (the “*Inventions*”).

3. **Work for Hire; Assignment of Inventions.** I acknowledge and agree that any copyrightable works prepared by me within the scope of my employment are “works for hire” under the Copyright Act and that the Company will be considered the author and owner of such copyrightable works. I agree that all Inventions that (i) are developed using equipment, supplies, facilities or trade secrets of the Company, (ii) result from work performed by me for the Company, or (iii) relate to the Company’s business or current or anticipated research and development (the “*Assigned Inventions*”), will be the sole and exclusive property of the Company and are hereby irrevocably assigned by me to the Company. [OPTIONAL LANGUAGE IF EMPLOYEE HAS INVENTIONS THAT ARE NOT TO BE ASSIGNED TO THE COMPANY. IF YOU USE, REMEMBER TO ADD EXHIBIT A AT THE END. Attached hereto as Exhibit A is a list describing all inventions, original works of authorship, developments and trade secrets which were made by me prior to the date of this Agreement, which belong to me and which are not assigned to the Company (“*Prior Inventions*”). I acknowledge and agree that if I use any of my Prior Inventions in the scope of my employment, or include them in any product or service of the Company, I hereby grant to the Company a perpetual, irrevocable, nonexclusive, world-wide, royalty-free license to use, disclose, make, sell, copy, distribute, modify and create works based on, perform or display such Prior Inventions and to sublicense third parties with the same rights.]

**[DO NOT DELETE SECTION 4 IN AGREEMENTS WITH CALIFORNIA EMPLOYEES.  
FOR EMPLOYEES LOCATED OUTSIDE CALIFORNIA, REPLACE WITH APPROPRIATE  
LANGUAGE FROM THAT STATE LAW.]**

4. Labor Code Section 2870 Notice. I have been notified and understand that the provisions of Sections 3 and 5 of this Agreement do not apply to any Assigned Invention that qualifies fully under the provisions of Section 2870 of the California Labor Code, which states as follows:

*ANY PROVISION IN AN EMPLOYMENT AGREEMENT WHICH PROVIDES THAT AN EMPLOYEE SHALL ASSIGN, OR OFFER TO ASSIGN, ANY OF HIS OR HER RIGHTS IN AN INVENTION TO HIS OR HER EMPLOYER SHALL NOT APPLY TO AN INVENTION THAT THE EMPLOYEE DEVELOPED ENTIRELY ON HIS OR HER OWN TIME WITHOUT USING THE EMPLOYER'S EQUIPMENT, SUPPLIES, FACILITIES, OR TRADE SECRET INFORMATION EXCEPT FOR THOSE INVENTIONS THAT EITHER: (1) RELATE AT THE TIME OF CONCEPTION OR REDUCTION TO PRACTICE OF THE INVENTION TO THE EMPLOYER'S BUSINESS, OR ACTUAL OR DEMONSTRABLY ANTICIPATED RESEARCH OR DEVELOPMENT OF THE EMPLOYER; OR (2) RESULT FROM ANY WORK PERFORMED BY THE EMPLOYEE FOR THE EMPLOYER. TO THE EXTENT A PROVISION IN AN EMPLOYMENT AGREEMENT PURPORTS TO REQUIRE AN EMPLOYEE TO ASSIGN AN INVENTION OTHERWISE EXCLUDED FROM BEING REQUIRED TO BE ASSIGNED UNDER CALIFORNIA LABOR CODE SECTION 2870(a), THE PROVISION IS AGAINST THE PUBLIC POLICY OF THIS STATE AND IS UNENFORCEABLE.*

5. Assignment of Other Rights. In addition to the foregoing assignment of Assigned Inventions to the Company, I hereby irrevocably transfer and assign to the Company: (i) all worldwide patents, patent applications, copyrights, mask works, trade secrets and other intellectual property rights, including but not limited to rights in databases, in any Assigned Inventions, along with any registrations of or applications to register such rights; and (ii) any and all "Moral Rights" (as defined below) that I may have in or with respect to any Assigned Inventions. I also hereby forever waive and agree never to assert any and all Moral Rights I may have in or with respect to any Assigned Inventions, even after termination of my work on behalf of the Company. "Moral Rights" mean any rights to claim authorship of or credit on an Assigned Inventions, to object to or prevent the modification or destruction of any Assigned Inventions [or Prior Inventions licensed to Company under Section 3], or to withdraw from circulation or control the publication or distribution of any Assigned Inventions [or Prior Inventions licensed to Company under Section 3], and any similar right, existing under judicial or statutory law of any country or subdivision thereof in the world, or under any treaty, regardless of whether or not such right is denominated or generally referred to as a "moral right." [OPTIONAL LANGUAGE IF NEEDED: Notwithstanding the foregoing, I will have the right to claim participation in the development, creation, or modification of the Assigned Inventions on my resume or in my curriculum vita. [ADDITIONAL OPTIONAL CLAUSE IF THE INVENTIONS ARE LIKELY TO BE SENSITIVE:; provided that I obtain Company's approval for such disclosures before providing the disclosure to any third-party.]]

6. Assistance. I agree to assist the Company in every proper way to obtain for the Company and enforce patents, copyrights, mask work rights, trade secret rights and other legal protections for the Company's Assigned Inventions in any and all countries. I will execute any documents that the Company may reasonably request for use in obtaining or enforcing such patents, copyrights, mask work rights, trade secrets and other legal protections. My obligations under this paragraph will continue beyond the termination of my employment with the Company,

provided that the Company will compensate me at a reasonable rate after such termination for time or expenses actually spent by me at the Company's request on such assistance.

7. Power of Attorney. In the event that Company is unable for any reason to secure Employee's signature to any document required to file, prosecute, register, or memorialize the assignment of any patent, copyright, mask work or other applications or to enforce any patent, copyright, mask work, moral right, trade secret or other proprietary right under any Proprietary Information (including improvements thereof) or any Innovations (including derivative works, improvements, renewals, extensions, continuations, divisionals, continuations in part, continuing patent applications, reissues, and reexaminations thereof), Employee hereby irrevocably designates and appoints Company and Company's duly authorized officers and agents as Employee's agents and attorneys-in-fact to act for and on Employee's behalf and instead of Employee, (i) to execute, file, prosecute, register and memorialize the assignment of any such application, (ii) to execute and file any documentation required for such enforcement, and (iii) to do all other lawfully permitted acts to further the filing, prosecution, registration, memorialization of assignment, issuance, and enforcement of patents, copyrights, mask works, moral rights, trade secrets or other rights under the Proprietary Information, or Innovations, all with the same legal force and effect as if executed by Employee.

8. Proprietary Information. I understand that my employment by the Company creates a relationship of confidence and trust with respect to any information of a confidential or secret nature that may be disclosed to me by the Company or a third party that relates to the business of the Company or to the business of any parent, subsidiary, affiliate, customer or supplier of the Company or any other party with whom the Company agrees to hold information of such party in confidence (the "*Proprietary Information*"). Such Proprietary Information includes, but is not limited to, Assigned Inventions, marketing plans, product plans, business strategies, financial information, forecasts, personnel information, customer lists and data, and domain names [YOU MAY WANT TO CONSIDER MODIFYING AND/OR ADDING TO THIS LIST PARTICULAR PROPRIETARY INFORMATION THAT SPECIFICALLY APPLIES TO THIS COMPANY].

9. Confidentiality. At all times, both during my employment and after its termination, I will keep and hold all such Proprietary Information in strict confidence and trust. I will not use or disclose any Proprietary Information without the prior written consent of the Company, except as may be necessary to perform my duties as an employee of the Company for the benefit of the Company. Upon termination of my employment with the Company, I will promptly deliver to the Company all documents and materials of any nature pertaining to my work with the Company [and, upon Company request, will execute a document confirming my agreement to honor my responsibilities contained in this Agreement]. I will not take with me or retain any documents or materials or copies thereof containing any Proprietary Information.

10. No Breach of Prior Agreement. I represent that my performance of all the terms of this Agreement and my duties as an employee of the Company will not breach any invention assignment, proprietary information, confidentiality or similar agreement with any former employer or other party. I represent that I will not bring with me to the Company or use in the performance of my duties for the Company any documents or materials or intangibles of a former

employer or third party that are not generally available to the public or have not been legally transferred to the Company.

11. Efforts; Duty Not to Compete. I understand that my employment with the Company requires my undivided attention and effort during normal business hours. While I am employed by the Company, I will not, without the Company's express prior written consent, provide services to, or assist in any manner, any business or third party if such services or assistance would be in direct conflict with the Company's business interests.

12. Notification. I hereby authorize the Company to notify third parties, including, without limitation, customers and actual or potential employers, of the terms of this Agreement and my responsibilities hereunder.

13. Non-Solicitation of Employees/Consultants. During my employment with the Company and for a period of one (1) year thereafter, I will not directly or indirectly solicit away employees or consultants of the Company for my own benefit or for the benefit of any other person or entity.

14. Non-Solicitation of Suppliers/Customers. During my employment with the Company and after termination of my employment, I will not directly or indirectly solicit or take away suppliers or customers of the Company if the identity of the supplier or customer or information about the supplier or customer relationship is a trade secret or is otherwise deemed confidential information within the meaning of California law.

15. Name & Likeness Rights. I hereby authorize the Company to use, reuse, and to grant others the right to use and reuse, my name, photograph, likeness (including caricature), voice, and biographical information, and any reproduction or simulation thereof, in any form of media or technology now known or hereafter developed (including, but not limited to, film, video and digital or other electronic media), both during and after my employment, for [*SELECT ONE: [whatever purposes the Company deems necessary] OR [any purposes related to the Company's business, such as marketing, advertising, credits, and presentations.]*] [**NOTE: EMPLOYEES MAY OBJECT TO THIS PROVISION. IT CAN BE REMOVED.**]

16. Injunctive Relief. I understand that in the event of a breach or threatened breach of this Agreement by me the Company may suffer irreparable harm and will therefore be entitled to injunctive relief to enforce this Agreement.

17. Governing Law; Severability. This Agreement will be governed by and construed in accordance with the laws of the State of California, without giving effect to its laws pertaining to conflict of laws. If any provision of this Agreement is determined by any court or arbitrator of competent jurisdiction to be invalid, illegal or unenforceable in any respect, such provision will be enforced to the maximum extent possible given the intent of the parties hereto. If such clause or provision cannot be so enforced, such provision shall be stricken from this Agreement and the remainder of this Agreement shall be enforced as if such invalid, illegal or unenforceable clause or provision had (to the extent not enforceable) never been contained in this Agreement.

18. Counterparts. This Agreement may be executed in any number of counterparts, each of which when so executed and delivered will be deemed an original, and all of which together shall constitute one and the same agreement.

19. Entire Agreement. This Agreement and the documents referred to herein constitute the entire agreement and understanding of the parties with respect to the subject matter of this Agreement, and supersede all prior understandings and agreements, whether oral or written, between or among the parties hereto with respect to the specific subject matter hereof.

20. Amendment and Waivers. This Agreement may be amended only by a written agreement executed by each of the parties hereto. No amendment of or waiver of, or modification of any obligation under this Agreement will be enforceable unless set forth in a writing signed by the party against which enforcement is sought. Any amendment effected in accordance with this section will be binding upon all parties hereto and each of their respective successors and assigns. No delay or failure to require performance of any provision of this Agreement shall constitute a waiver of that provision as to that or any other instance. No waiver granted under this Agreement as to any one provision herein shall constitute a subsequent waiver of such provision or of any other provision herein, nor shall it constitute the waiver of any performance other than the actual performance specifically waived.

21. Successors and Assigns; Assignment. Except as otherwise provided in this Agreement, this Agreement, and the rights and obligations of the parties hereunder, will be binding upon and inure to the benefit of their respective successors, assigns, heirs, executors, administrators and legal representatives. The Company may assign any of its rights and obligations under this Agreement. No other party to this Agreement may assign, whether voluntarily or by operation of law, any of its rights and obligations under this Agreement, except with the prior written consent of the Company.

22. Further Assurances. The parties agree to execute such further documents and instruments and to take such further actions as may be reasonably necessary to carry out the purposes and intent of this Agreement.

23. “At Will” Employment. I understand that this Agreement does not constitute a contract of employment or obligate the Company to employ me for any stated period of time. I understand that I am an “at will” employee of the Company and that my employment can be terminated at any time, with or without notice and with or without cause, for any reason or for no reason, by either the Company or myself. I acknowledge that any statements or representations to the contrary are ineffective, unless put into a writing signed by the Company. I further acknowledge that my participation in any stock option or benefit program is not to be construed as any assurance of continuing employment for any particular period of time. This Agreement shall be effective as of the first day of my employment by the Company, which is \_\_\_\_\_, \_\_\_\_\_ [COMPLETE DATE AS FIRST DATE OF EMPLOYMENT SO THIS AGREEMENT REACHES BACK TO THE START OF THE RELATIONSHIP, EVEN IF SIGNED LATER].

**[ADD COMPANY'S NAME HERE]:**

**Employee:**

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

\_\_\_\_\_  
Signature

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

\_\_\_\_\_  
Name [Please Print]

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

Signature Page to Employee Invention Assignment and Confidentiality Agreement

**ATTACHMENT "C"**

**MODEL OVERTIME APPROVAL REQUEST**  
(TO BE COMPLETED FOR ALL OVERTIME TO BE WORKED)

Employee Name: \_\_\_\_\_ Requesting Manager: \_\_\_\_\_

Date Work To Be Performed \_\_\_\_\_

Requested Overtime Hours To Be Worked: From \_\_\_\_\_ to \_\_\_\_\_

Project Description: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Employee Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Approved By: \_\_\_\_\_ Date: \_\_\_\_\_

**ATTACHMENT “D”**  
**(MODEL)**  
**ELECTRONIC MAIL POLICY**

**Network Security**

**Last Updated:** \_\_\_\_\_

**ELECTRONIC MAIL POLICY**

1. PURPOSE

This electronic mail (“e-mail”) policy is designed to advise [COMPANY] employees regarding appropriate use of the company’s e-mail facilities. All employees are annually requested to return a signed copy to the Employee Services Department and keep a copy for their files.

2. STANDARD POLICY

A. Applicability

[COMPANY] provides its employees with access to computers on either a shared or stand-alone basis. These computers are company property, including all information contained on their storage systems. Computers, their contents, and archival information are open to inspection by the company at any time. All employees who use company systems agree by such to comply with the requirements of this policy. The company reserves the right to change this policy at any time.

Use of the [COMPANY’S] computer systems is a privilege that may be revoked in the sole discretion of the company for any reason. This privilege automatically terminates for any given employee when that employee is no longer employed by the company.

B. Ownership of e-mail messages

The company maintains e-mail systems to improve the communications of its employees, as well as selected suppliers and clients. These systems are maintained exclusively for the benefit of the company, and the mail sent and received on these systems is open to inspection by the company both at the time of creation and after the fact. All e-mail messages transmitted, received, or stored using computer hardware, Internet service providers, and/or software paid for in whole or in part by the company are the property of the company. The company reserves the right to monitor, access, retrieve, print out, read, and disclose all such communications at any time.

C. No presumption of privacy

Employees have no presumption of privacy in e-mail messages, whether personal or company-related, that are transmitted, received, or stored using computer hardware, Internet service providers, and/or software paid for in whole or in part by the company. Authorized personnel may need to view employee e-mail for legitimate business purposes, and other people may inadvertently receive an employee e-mail message. An e-mail message is analogous to a postcard, and therefore employees should always assume that someone other than its intended recipient could read any e-mail communication.

**Employees may not encrypt e-mail messages without company authorization.**

D. Use of e-mail

The company's e-mail is primarily for business use, but limited personal use is permitted. Personal use that threatens to impair employee productivity or otherwise damage the company in any way may result in disciplinary actions including, but not limited to, revocation of the employee's e-mail privileges.

**Employees should recognize that e-mail documents marked for deletion when the computer user presses the "delete" key may not be gone forever; part or all of the document may remain until the entire document is overwritten by the computer. Computer experts (and even some sophisticated users with over-the-counter utility programs) can recover the supposedly "deleted" information. Additionally, most e-mail systems automatically save all messages on back-up tapes for certain amounts of time, and individuals receiving e-mail messages may save the messages on their own computers' local hard disks. For all practical purposes, therefore, access to any given e-mail message cannot be controlled.**

Given the potential wide availability of e-mail messages, employees should not use e-mail to send informal or candid messages that may be inappropriate to put "in writing." *If a message would not be appropriate as an interoffice memo or formal letter, it is not appropriate as e-mail.*

The company expressly prohibits employees from using its e-mail systems for any of the following purposes:

- Conducting private business not related to the employee's work at the company
- Participating in football pools, baby pools, or any other type of gambling
- Receiving or distributing pornography
- Political activities
- Religious activities

- Solicitations or advertisements for non-company purposes
- Transmitting comments, images, or jokes that would offend on the basis of any person's race, gender, sexual orientation, religious affiliation, ethnic background, national origin, or physical or mental disability
- Transmitting without company authorization copyrighted materials; trademarked materials; patented materials; trade secrets; or other confidential, private, or proprietary information or materials
- Damaging, altering, or disrupting remote computers or systems in any way
- Using without authorization someone else's code or password
- Disclosing without authorization anyone's code or password, including the employee's own
- Enabling unauthorized third parties to access or use the company's systems
- Jeopardizing the security of the company's systems
- Sending anonymous e-mail messages (all e-mail messages must be signed by the sender)
- Transmitting messages using forged or fictitious names
- Transmitting as true information or messages known to be false
- Use of deceptive e-mail routing to validate sender's identity

E. Retention of e-mail messages

E-mail messages stored on the company's computer network will be retained as part of the regular system back-up procedures.

F. Caution in e-mail use

It is the company's policy to not send or receive sensitive financial information regarding customers and partners without their prior approval.

It is easy for someone to fake or alter a sender's name and/or routing on messages sent to us. Therefore, any suspicious messages received should be referred to someone else in the company familiar with the client or business before any response is sent. The addresses on e-mail sent to customers and partners should be checked against our internal database prior to sending (i.e., we should not automatically respond to the address in the header without confirming it).

## COMPUTER AND ELECTRONIC EQUIPMENT POLICY

Computers, desks, and electronic devices are the property of [COMPANY] and must be maintained according to [COMPANY'S] regulations. These are to be used only for work related purposes. [COMPANY] reserves the right to inspect all computer property to ensure compliance with its regulations without notice to any employee and in any employee's absence.

[COMPANY'S] technical resources, such as its computer systems, voice mail and e-mail, are provided for company business and are to be reviewed, monitored, and used only for company business, except as provided in this guideline. As a result, computer data, voice mail messages, and e-mail transmissions are readily available to many people. If, during the course of your employment, you perform or transmit work on [COMPANY'S] computer systems or other technical resources, your work may be subject to the investigation, search and review of others in accordance with this guideline. [COMPANY] reserves the right to access and review electronic files, messages, mail, etc., and to monitor the use of electronic communications as is necessary to ensure that there is no misuse or violation of company policy or any law.

Employees are not permitted to access the electronic communications of other employees or third parties unless directed to do so by company management.

You may use [COMPANY'S] equipment for occasional, non-work purposes only with permission from your manager. Nevertheless, you have no right of privacy as to any information or file maintained in or on [COMPANY'S] property or transmitted or stored through [COMPANY'S] computer systems, voice mail, e-mail, or other technical resources. All documentation related to company equipment or properties are [COMPANY'S] property and may be reviewed and used for purposes that [COMPANY] considers appropriate.

You may access only files or programs, whether computerized or not, that you have permission to enter. Unauthorized review, duplication, dissemination, removal, damage to or alteration of files, passwords, computer systems or programs, or other [COMPANY] property, or improper use of information obtained by unauthorized means, may be grounds for disciplinary action, up to and including terminating employment.

## INTERNET USAGE POLICY

The company maintains the ability to grant Internet access to all employees to improve the communications and research for its employees, as well as selected suppliers and clients. These systems are maintained exclusively for the benefit of the company, and the Internet traffic sent and received on these systems is open to inspection by the company both at the time of creation and after the fact. All Internet traffic transmitted, received, or stored using computer hardware, Internet Service Providers (ISP's), and/or software paid for in whole or in part by the company are the property of the company. The company reserves the right to monitor, access, retrieve, print out, read, and disclose all Internet traffic at any time.

## SECURITY POLICY

The company maintains the ability to grant access to the companies suite and all remote offices. Office and after hours access is granted to all employees upon date of hire through a key for the suite as well as a \_\_\_\_\_ access card. These systems are maintained exclusively for the benefit of the company, and the entry and exiting on these systems is open to inspection by the company both at the time of account creation and after the fact. The access methods are maintained and owned by the company. Upon termination or dismissal of an employee the office key and \_\_\_\_\_ access card are to be returned to Employee Services. The company reserves the right to monitor, access, retrieve, print out, read, and disclose all office access at any time.

Physical security (On site – after hours security) is provided after hours for the safety and security of company employees. On site security is offered as a means of extra protection and allows personnel to be safely escorted to cars after hours.