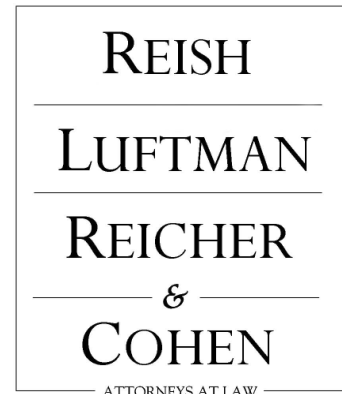


MARK E. TERMAN, ESQ.

MarkTerman@Reish.com



Managing Your Workplace to Avoid Employee Claims

PRESENTED TO

**Management of Accounting Practice (MAP)
Committee of the Los Angeles Chapter
California Society of CPAs**

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Mark Terman is a partner with Reish Luftman Reicher & Cohen where he heads the Firm's Employment Law Practice Group. He counsels employers and management in claim prevention, hiring, policy, crisis, and discipline and termination matters; and he represents them in federal and state court, arbitration and government agency litigation.

Mark was selected as a “Super Lawyer” lawyer by his peers in the 2004 and the recent 2005, California Super Lawyers Survey in which 65,000 California Lawyers were polled.

He serves as General Counsel for the UCLA Alumni Association and as a member of its Board of Directors, and he has served as a Superior Court appointed arbitrator, and a member of the Board of Directors of the Children's Nature Institute. He frequently speaks to and writes for client and industry groups on litigation avoidance and management, wage and hour issues, trade secret protection, and avoiding sexual harassment, among other employment law topics.

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Contents

I.	Recent Legislative and Regulatory Developments	3
II.	Recent Court Decisions	5
III.	Overtime Pay.....	8
IV.	Use and Abuse of Independent Contractor Status	8
V.	Technology and Privacy in the Workplace	8
VI.	Competition and Trade Secrets.....	15
VII.	Employment Law Basics	18
VIII.	Conducting Effective Performance Evaluations	19
IX.	Discipline And Termination.....	21
X.	Appendix.....	22

I. Recent Legislative and Regulatory Developments

- Please see the attached December 2004 article: *New Year Will Bring In New Laws*. (Reprinted with permission of California CPA Magazine).
- **Summary of 1999-2003 Labor and Employment Laws.** The California Labor Workforce Development Agency has prepared a 40-page summary of a 477 labor and employment laws passed by the Legislature and signed by former Governor Gray Davis from 1999 to 2003. The report is available on the LWDA's website: <http://www.labor.ca.gov/lwdalaborlaw99-03.pdf>.
- **No More Double Tax on Plaintiff's Attorneys fees.** The American Jobs Creation Act of 2004, signed into law in October 2004, contains a section ending the "double taxation" of attorneys' fees in employment discrimination cases. Previously, the attorneys' fees portion of an employment discrimination award or settlement has been taxable to the plaintiff and to the attorney. The new law allows the taxpayer to reduce his/her adjusted gross income by the amount of the attorneys' fees. The new deduction is allowed regardless of whether the plaintiff's attorneys' fees are paid by the employer under a statutory fee shifting provision, or by the plaintiff, or as part of a settlement. The bill is prospective and applies to judgments and settlements after the date of enactment. For prior years, the United States Supreme Court in *Commissioner of Internal Revenue v. Banks* and *Commissioner of Internal Revenue v. Banaitis*, Case Nos. 03-892 and 03-907 affirmed the prior rule.
- **Megan's Law Website.** California Penal Code Section 289.46(j)(2) now provides that the use of information disclosed on California Department of Justice's registered sex offender website for purposes relating to employment is prohibited unless the information will be used "only to protect a person at risk." A "person at risk" is defined as a person who "is or may be exposed to a risk of becoming a victim of a sex offense committed by the offender." The use of information disclosed on the website is also prohibited for purposes relating to health insurance, insurance, loans, credit, education, housing, or benefits, privileges or services provided by any business establishment. Certain employers required by law to have access to and use of sex offender registry information are also excepted from this prohibition.
- **Proposed Changes Meal and Rest Period Rules.** The California Labor Workforce and Development Agency recently completed a second public comment period regarding proposed regulation for non-exempt employee meal periods. If the rules take effect: (1) employers will not be at risk for penalties when employees choose to work through lunch as long as the employer has informed employees of their right to take meal periods; (2) rules regarding waiver of lunch periods for less than 8 hour days will be updated and clarified; and (3) the financial penalty for employers who violate the meal period rules will be clarified to be a "penalty," and not "wage," which insures that the statute of limitations to recover penalties is only one year instead of a longer statute for unpaid "wages." See, www.dir.ca.gov/dlse/MRPRegs.htm.
- **Sexual Harassment by Non-Employees.** A recent California Fair Employment and Housing Act amendment (Government Code § 12940(j)(1)) makes employers liable for

sexual harassment by non-employees if the employer knows or should have known of the incident and fails to take corrective action. This overturns the California Court of Appeal decision in *Salazar v. Diversified Paratransit*. Employee Handbook updates and workplace training are needed to protect employers.

- ***Paid Family Leave.*** As of July 1, 2004, California “Paid Family Disability Leave Insurance” permits employees to receive limited replacement wages for up to six weeks of leave in any 12 month period to care for a seriously ill child, spouse, parent, or domestic partner, or to bond with a new child by birth, adoptions or foster care placement. PFL deals only with compensation during the leave; it is not an entitlement to leave. Leave entitlement is still governed by FMLA/CFRA and employer policy/practices. PFL is funded by mandatory employee payroll deductions that started January 1, 2004 administered by the EDD. Employees must apply to the EDD for benefits and employers must give employees a PFL brochure published by the EDD. For information and brochures, call the California PFL information center at “1-877-BE-THERE.”
- ***Penalties for Inadequate Pay Stubs.*** Employers have long been required to provide each employee with an itemized statement with the paycheck of gross wages earned, total hours worked, number of piece-rate units earned, all deductions, net wages earned, start and end dates for the pay period, employee name and social security number. *Labor Code* Section 226(e) adds a new penalty for wage statement violations of (1) the greater of \$50 or actual damages for the initial pay period and (2) \$100 for each subsequent violation, up to a maximum of (3) \$4,000 per employee.
- ***Social Security Numbers on Pay Stubs.*** To help protect against identity theft, SB 1618 (Battin) will prohibit all employers from placing an employee's Social Security number on paychecks issued on or after January 1, 2008. At most, only the last four digits of the Social Security number may be included. This new law contradicts current law which requires Social Security numbers to be placed on employee paychecks, except for government employees.
- ***Even More Labor Code Penalties.*** Effective January 1, 2004, *Labor Code* Section 210 increased the penalties for an employer who unlawfully withholds wages to \$100 for a first violation and \$200 for subsequent or willful violations, plus 25% of the wage due. Minimum wage violations are \$100/\$250.
- ***Contractor “Police.”*** *Labor Code* Section 2810, effective January 1, 2004, requires that if your company contracts for construction, farm labor, garment, janitorial, or security guard labor, and knows or should have known that the contractor does not comply with all applicable labor regulations, the company is jointly liable to the affected employees of the contractor for any injury or labor violation. Liability may be avoided if all the disclosures and information listed in the statute are written into the services contract and then updated for material changes.
- ***Independent Contractors; EDD Employment Determination Guide (Form DE38).***
<http://www.edd.ca.gov/taxrep/de38.pdf>

- **Military Leave/Return to Work Guidance.** <http://www.dol.gov/vets/whatsnew/uguide.pdf>
See also: <http://www.dol.gov/elaws/userra0.htm>
- **Wage and Hour Orders:** <http://www.dir.ca.gov/IWC/WageOrderIndustries.htm>
- **What is the Status of Pending California Legislation?** Find out at: <http://www.leginfo.ca.gov/>
- **Layoffs and Plant Closings.** “Cal-WARN” 60 day pay or notice is required by employers with 75 or more employees, who layoff, relocate or terminate 50 or more employees within a 30 day window. Unlike the Federal WARN Act, California triggers WARN obligations on a Company that *relocates* more than 100 miles from its prior location. Stiff damages (e.g., pay and value of benefits for up to 60 days) and civil monetary penalties for non-compliance apply. See article, *Don't Forget to "WARN" in California*, www.reish.com/publications/article_detail.cfm?ARTICLEID=516
- **Required Workplace Notices and Pamphlets.** These requirements change at least once a year and sometimes more often. For example, as of August 1, 2004, all California employers must: (1) post a new version of a mandatory Worker's Compensation poster in all workplaces that matches up with recent Workers Comp law reforms; (2) distribute a new version of a revised employee pamphlet to all new employees by the end of their first payroll period; and (3) use a revised official Workers Comp claims form. Consider vendors such as the California Chamber of Commerce (e.g., “Required Notices Kit;” See, www.calchamberstore.com/Store/Products/PS1).

II. Recent Court Decisions

- **Officer and Director Liability for Unpaid Wages.** On June 1, 2005, the California Supreme Court heard oral argument and submitted for decision *Reynolds v. Bement*. This case includes the following issue: Can the officers and directors of a corporate employer personally be held civilly liable for causing the corporation to violate the statutory duty to pay minimum and overtime wages?
- **Prelitigation Jury Waiver.** On June 1, 2005, the California Supreme Court heard oral argument and submitted for decision *Grafton Partners LP v. Superior Court*. The question is whether a prelitigation jury trial waiver is enforceable. The Court of Appeal had held that a lawful prelitigation agreement for arbitration is still enforceable; but, that an employee cannot give up the right to a jury if the parties would litigate in court. As to jury waivers, this case conflicts with other cases, including *Trizec Properties, Inc., v. Superior Court (Thomas Partners)*, a case decided in 1991 by the Second District Court of Appeal (which covers the Los Angeles area).
- **Age Discrimination.** On March 30, 2005, the United States Supreme Court in *Smith v. City of Jackson* held that the federal Age Discrimination in Employment Act ("ADEA") permits an employee to proceed with, and recover under, a "disparate impact" theory of discrimination if the Plaintiff can isolate and identify the specific employment practice responsible for any manifest statistical disparities. More importantly for employers, the Court affirmed that summary judgment is appropriate where the Plaintiff cannot identify

such manifest statistical disparities and that an employer can defend on the basis that its decision was predicated on "*reasonable factors other than age*." Here, the Court found that the Plaintiff did "little more than point out that the pay plan at issue is relatively less generous to older workers than younger workers." The Court also accepted the employer's basic explanation that it thought it needed to raise the salaries of its more junior personnel to a level comparable with that of similar positions in surrounding communities and that the raises were based on seniority and rank as part of a legitimate effort to retain personnel.

- ***Background Checks and Investigations Using Public Records.*** In *Moran v. Murtaugh Miller Meyer & Nelson* (modified and rehearing denied March 2, 2005), the California Court of Appeal confirmed that the California Investigative Consumer Reporting Agencies Act requires employers who receive public records about job applicants and employees, whether in written or oral form, to provide a copy of that information to the subject of the background check within seven days after the employer's receipt of the information. *Civil Code* Section 1786.53(b)(1). Public records are defined by the Act as records documenting arrest, indictment, conviction, civil judicial action, tax lien and outstanding judgment. The Court also held that *Civil Code* Sections 1786.53(b)(3) and (b)(4) suspend the seven-day requirement when the employer is investigating "suspicion of wrongdoing or misconduct" by a current employee until completion of the investigation; then, the Court noted, the information must be provided within a reasonable time even if the results of the investigation are favorable to the employee.
- ***No Right to Co-worker in Discipline meeting.*** Reversing its own 2000 Decision, the National Labor Relations Board in a case involving IBM Corp., decided on June 9, 2004 that employees who work in a *non-union* workplace are not entitled to have a co-worker accompany them to an interview with their employer, even if the affected employee reasonably believes that the interview might result in discipline.
- ***Defenses to Damages in California Sexual Harassment Claims.*** In late November 2003, the California Supreme Court established in *McGinnis v. State Department of Health Services* an "avoidable consequences" defense to sex harassment cases where the alleged victim unreasonably fails to complain to stop the misconduct. The case encourages employers to consistently enforce policies against sex harassment, immediately investigate allegations, and take appropriate disciplinary action. Consider additions to your employee handbook to include: "The Firm [or Company] wants you to use these procedures so you can (a) help us put a stop to unlawful harassment and (b) avoid any further harm you may have suffered".... and "Employee confidentiality will be protected to the extent practical for the Firm[or Company] to investigate and take appropriate disciplinary action."
- ***Defenses to Federal Sexual Harassment Claims and Constructive Discharge Cases.*** On June 14, 2004, the United States Supreme Court, in an 8-1 decision applying only federal law in *Pennsylvania State Police v. Suders*, held that Employees who are compelled to quit because of an intolerable sexually harassing hostile work environment have a right to sue their employers under a constructive discharge theory. The Court also held that an employer may defend these cases by demonstrating that it exercised reasonable care to prevent and promptly correct the wrongful behavior and that the employee failed to take advantage of preventative or corrective measures. **Background:** In two 1998 decisions, *Faragher v. City of Boca Raton* and *Burlington Industries Inc. v. Ellerth*, the Supreme

Court held under federal law that if sexual harassment led to a hostile work environment but did not result in a tangible adverse employment action (e.g., demotion or termination), employers can avoid liability by showing they have an effective anti-harassment policy in place and the employee failed to take advantage of it. **The challenge in Suders** was that the employee alleged that the workplace was so intolerable that she had to quit and the question became whether the employer engaged in tangible adverse employment action that precipitated the employee's decision to leave. The affirmative defense will not be available if the employee quits "in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation," the Court stated. Examples would include "a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions." In "adverse action" cases where sexual harassment is proven, the employer would be strictly liable for the supervisor's conduct.

- ***Ignorance Is Not a Defense.*** On July 29, 2004, the California Court of Appeal in *Reeves v. Safeway Stores* held that that a manager's limited knowledge of underlying facts does not necessarily shield an employer from liability for an unlawful termination. Plaintiff claimed that his discharge was in retaliation for his sexual harassment complaints, Safeway's defense was that the manager who made the decision had no knowledge of prior sexual harassment complaints and therefore could not have terminated Plaintiff for making them. The Court rejected what it called the "defense of ignorance." It observed that a multi-layered organization cannot protect itself from liability by claiming the final decision maker's action was innocent.
- ***I'm an Equal Opportunity Abuser.*** In a 2004 unpublished decision, *Lee v. Intel Corp*, the California Court of Appeal upheld the dismissal of race and gender discrimination claims where a supervisor targeted all employees for harassment and did not single out anyone or any protected characteristic. While this defense can occasionally work, this is no way to manage a workplace and build a great organization.
- ***I Would Not Have Taken That Job If You Had Not Lied To Me...*** On July 7, 2004, the California Court of Appeal in *Agosta v. N. Arthur Astor, et. al.*, held that written "at-will" statement does not absolve an employer who induces a candidate to quit a job and accept new employment based on promises the new employer does not intend to keep.
- ***You Can be Sued for Inducing a Competitor's At-Will Employees to Quit and Join Your Company.*** On August 12, 2004, the California Supreme Court in *Reeves v. Hanlon* unanimously ruled that a defendant may be held liable for intentional interference with the employment relationship for inducing an at-will employee to quit working for another if the interference is accompanied by an independent act of wrongdoing. The Supreme Court ruled that an employer has the right to induce a competitor's employee to leave; however the new employer cannot use illegal or wrongful methods to do so (i.e., an act that violates some constitutional, statutory, regulatory, common law, or other legal standard). The Court said that allowing such suits: (1) respect "both the right of at-will employees to pursue opportunities for economic betterment and the right of employers to compete for talented workers;" and (2) strike "the proper balance between society's interest in fostering robust competition in the job market and its interest in protecting against unlawful methods of competition." **Bad facts, ...:** In this instance, the court found that the defendant lawyers who quit the plaintiff law firm to start their own firm, engaged in an unlawful and unethical

campaign to deliberately disrupt plaintiff's business. They deleted and destroyed files, misappropriated confidential information, and improperly solicited clients. The Court found that defendants did more than simply extend offers to at-will employees of another company; they "purposely engaged in unlawful acts that crippled plaintiff's business operations."

- **Arbitration.** In many of the "pre-dispute mandatory arbitration agreement" cases interpreting *Armendariz v. Foundation Health Psychcare Services Inc.*, most courts seem to prefer to compel arbitration and to strike-out parts that only favor the employer as long as the clause is not so one sided as to make any enforcement "unconscionable." In one case, the court struck out the portion of an arbitration clause that permitted appeals only if an award exceeded \$50,000; the Court found that provision one-sided because an Employer rarely has a claim against an employee in the range of \$50,000. Other cases, however, continue to find arbitration agreements unenforceable where the agreements, for example, preclude discovery, required costs to be shared, and certain court remedies are reserved for the employer only (e.g., *Abramson v. Juniper Networks*; *O'Hare v. Municipal Resource Consultants*; *Ingle v. Circuit City Stores, Inc.*). In *Little v. Auto Steigler, Inc.*, however, the Court held that in cases where the arbitration agreement is silent as to costs, the agreement can be enforced and the employer must pay the costs.
- **More Arbitration.** On April 8, 2005, the California Court of Appeal in *Cummings v. Future Nissan* has affirmed an arbitration award in favor of the employer on a former employee's wrongful discharge and sexual harassment claims and held that the Plaintiff could not challenge the arbitration agreement as unconscionable after participating in the arbitration.

III. Overtime Pay

Please see the attached November 2003 article: *Sorting it Out: Missing the Mark on Employee Classification Can Cost You*. (Reprinted with permission of *California CPA Magazine*).

IV. Use and Abuse of Independent Contractor Status

Please see the attached November 2004 article: *Contractor Traction; The Use and Abuse of Independent Contractor Status*. (Reprinted with permission of *California CPA Magazine*).

V. Technology and Privacy in the Workplace

- A. **How we work today vs. 5 or 10 years ago.**
 - 1. Computers, e-mail, Internet, voice-mail are essential business tools.
- B. **Challenges for employers**
 - 1. Right to manage workplace.

2. Protect property and information of employer and its clients.
3. Protect employees.
4. Aid employer investigations.
5. Employee productivity.
6. Evidence.

C. Employer monitoring of employee communications.

1. American Management Association 2001 Survey on workplace surveillance. <http://www.amanet.org/index.htm>
 - a. Three quarters of major U.S. companies responding.
 - b. Nearly 78 % monitor employees' telephone calls, e-mail, internet connections, and/or computer files – twice as much as reported in AMA's 1997 survey.
 - c. What is monitored?

i.	Internet connections	62.8 %
ii.	E-mail	46.5 %
iii.	Video Security	35.3 %
iv.	Computer files	36.1 %
v.	Computer use	19.4 %
vi.	Video of work performance	15.2 %
vii.	Voice-mail	7.8 %
 - d. Monitoring purposes include: performance reviews and training, legal compliance, security, legal risk management, and productivity.
 - e. Nearly 31% have terminated employees for misuse of the employer's technology - telecommunications equipment.
2. American Management Association 2003 E-mail Rules, Policies and Practices Survey.
 - a. Over 50% of U.S. companies engage in some form of e-mail monitoring versus 47% in 2001. The number could be higher since 13% of respondents did not know if they are monitored.

i.	Monitor incoming e-mail	51%
ii.	Monitor outgoing	39%
iii.	Monitor internal e-mail	19%
iv.	No monitoring	35%
v.	Don't know	13%

- vi. Some form of e-mail monitoring 15.2 %
- b. 14% of respondents say their company has been ordered by a court of regulatory body to produce e-mail vs. 9% in 2001. The number could be higher since 20% of respondents “didn’t know.”
- c. 34% of respondents say that their company has written e-mail retention and deletion policies. Only 6% “don’t know”. About the same response as in 2001, despite S.E.C. and other regulatory actions on regulated industries and their professional advisors.
- d. Respondent Profile
 - i. 100 or less employees 25%
 - ii. 100 to 500 employees 31%
 - iii. Manufacturing 25%
 - iv. Business and Professional Services 19%
 - v. Financial Services 11%
- 3. American Society for Industrial Security Survey (325 U.S. based companies responding).
 - a. Known/reported information piracy jumped 323% between 1992 and 1995.
 - b. Estimated loss to U.S. industry at \$2 billion a month from corporate security breaches.
 - c. Three-fourths of the incidents involved company insiders -- insiders are not just officers and employees. Insiders also include independent contractors, vendors and consultants.

D. Legal framework -- employee privacy rights balanced against employer’s need to know.

- 1. Constitutional Law
 - a. Federal Constitution -- Only government employees have a reasonable expectation of privacy at work.
 - b. California Constitution -- All employees have a right to privacy; however, the courts must balance:
 - i. the employee’s expectation of privacy at work against the employer’s need to regulate the conduct of its employees at work; and
 - ii. whether less intrusive means you can accomplish the employer’s legitimate objectives.

2. Common Law Privacy Rights. -- E.g., unreasonable intrusion upon seclusion, public disclosure of private facts, false light privacy, appropriation of name and likeness.
3. Contracts. -- Employer policies that certain information will be kept confidential or used for limited purposes. E.g., Employment agreements, non-disclosure and confidentiality agreements, collective bargaining agreements, and employee handbooks.
4. Statutes. -- Transit vs. Storage.
 - a. *California Privacy Act (Cal. Penal Code § 631, et. seq.)* prohibits eavesdropping and recording of confidential communications by means of an electronic amplifying or recording device.
 - i. Prohibits listening in on a phone call unless all parties consent.
 - ii. Has not been held to by the court to restrict employer access to gather information recorded on its own computers, e-mail, voice mail systems.
 - b. *Federal Electronic Communications Privacy Act (18 USC § 2510, et seq.)*. Employers who provide the communications service (i.e., computers and phones) are exempt from the Act's prohibition of unauthorized access to or retrieval of electronic communication while it is in storage.
 - c. The federal *Wiretap Act* and *Patriot Act* do not prevent the employer from access to stored email, data and voicemail either.

E. How the Courts are balancing competing employer and employee interests.

1. Legitimate work related reasons for monitoring or search.
2. Employers need to know increases with severity of alleged misconduct.
3. Employer's published policies will usually defeat an employee's expectation of privacy.

F. Employer's written technology and internet policy.

1. Why employers should have one.
 - a. Not required by law; but, probably will be soon.
 - b. Deterrence of misconduct.
 - c. Public relations with employees.

- d. Will give employer the best defense against a claim of invasion of privacy.
2. Key elements.
 - a. The computers and everything on the system - files and software are the employer's property.
 - b. Use is permitted for work purposes only or personal use is limited purposes/times.
 - c. Employer's right to inspect and monitor at any time and employee's passwords do not ensure privacy and employers can override the passwords.
 - d. No reasonable expectation of privacy when using employer owned equipment.
 - e. The policy against discrimination and sexual harassment applies – no defamatory, profane, obscene, discriminatory or harassing materials are to be sent or received.
 - f. Treat e-mail as if it is a permanent record – think about the contents before it is sent.
 - g. Confidential, proprietary or trade secret information should not be sent unless necessary to carry out the employer's business.
 - h. Violation of policy will lead to serious discipline up to and including termination.
 3. Sample at Appendix 2.
 4. Train management and employees.

G. Electronic data in litigation

1. Not just financial and accounting information.
2. Includes e-mail, voicemail, video mail, word processing, groupware systems, spreadsheets, databases, CAD, websites, and security systems.
3. Discovery of electronic evidence in litigation is becoming more common, not just in high-profile cases.
4. Some attributes of electronic evidence.
 - a. Much more of it than paper documents and files.

- b. E-mail volume and candor.
 - c. More opportunity to find a “smoking gun.”
 - d. Prior consistent or inconsistent versions and drafts.
 - e. Date/time stamps versions, record creation, edit and access.
 - f. The delete button does not mean it’s gone forever.
 - i. Electronic information and versions are stored in multiple places inside and outside company walls.
 - ii. Information thought to be deleted or lost can often be retrieved by experts.
5. Shield and Sword – a litigant can oppress and be oppressed with the time and expense of electronic discovery.
6. Record Management
- a. Retention policies must include all forms of electronic information.
 - b. Ensure that delete means delete in appropriate cases.
 - c. Every business will be hit with a discovery request or subpoena that includes electronic records - be prepared.
 - d. Litigation risks from not suspending routine record destruction policy when info is relevant to imminent or pending litigation.
 - i. *California Evidence Code* § 413 permits the trier of fact to consider a party’s “willful suppression of evidence,” when it determines “what inferences to draw from the evidence or facts in the case against a party.”
 - ii. Standard “BAJI” jury instruction No. 2.03 (8th ed. 2001 Revision) permits the jury to “consider the fact that a party willfully suppressed, altered, damaged, concealed, or destroyed evidence to prevent its being presented in this trial when determining what inferences to draw from the evidence.”
 - iii. Trial courts may adapt the instruction “to fit the circumstances of the case, including the egregiousness of the spoliation and the strength and nature of the inference arising from the spoliation” [*Cedars-Sinai Med. Ctr. v. Superior Ct.* (1998) 18 Cal. 4th 1.12].

- iv. *California Code of Civil Procedure* § 2023 (h) permits courts to impose various sanctions “against anyone engaging in conduct that is a misuse of the discovery process,” including:
 - (1) A monetary sanction;
 - (2) An issue sanction ordering that designated facts shall be taken as established in the action in accordance with the adversely affected party’s claim.
- e. Courts base decisions regarding the wrongfulness of evidence destruction on the “temporal proximity between the destruction and the litigation interference and the foreseeability of the harm to the nonspoliating litigant resulting from the destruction” [*Willard v. Caterpillar, Inc.*, (1995) 40 Cal. App. 4th 892, 922-923].
- f. A party guilty of intentionally destroying relevant evidence can be subjected to criminal prosecution with maximum punishment of six months in jail and \$1,000 fine [*California Penal Code* § 135].
- g. The existence of a routine document retention policy can influence whether a court gives the jury an adverse inference instruction when a company destroys potentially relevant evidence pursuant to the policy. Several factors are relevant to that inquiry [*Willard v. Caterpillar, Inc.* (1995) 40 Cal. App. 4th 892, 922-923]:
 - i. Whether the policy’s retention times were reasonable, considering the facts and circumstances surrounding the relevant documents;
 - ii. Whether the policy was instituted in bad faith;
 - iii. Whether lawsuits concerning a complaint or related complaints have been filed; and
 - iv. The frequency and magnitude of such complaints.
- h. Document Retention Policies:
 - i. actually involve the routine destruction of documents.
 - ii. establish reasonable timetables for retaining documents before destruction based on legal and practical.
 - iii. must be written, widely disseminated and known by employees, and regularly enforced.

- iv. if properly followed, can shield a company from negative inferences or defaults due to destruction of documents.
- v. if the party knows or should know that particular documents will become material at some point in the future, such documents should be preserved. (e.g., documents related to “complaints” should be retained for a longer period because of the potential for litigation, relevant to the documents).

VI. Competition and Trade Secrets

- A. **GENERAL RULE RE COVENANTS NOT TO COMPETE.** “Every contract by which anyone is restrained from engaging in a lawful trade or business of any kind is to that extent void.” *Cal. Bus. & Prof.Code* §16600.
- B. **STATUTORY EXCEPTIONS.**
 - 1. Employee of a Corporation. Sale of goodwill of the business, all of the stockholder's stock, or substantially all assets of a corporation. *Cal. Bus. & Prof.Code* §16601.
 - 2. Employee of a Partnership. Sale of partnership interest or dissolution of the partnership. *Cal. Bus. & Prof. Code* §16602.
 - 3. Must be reasonable under the circumstances of each case. Geographic scope, duration of covenant, and activities precluded.
 - 4. Covenant is strictly construed. Courts will not enforce “sham covenants.”
- C. **CASE LAW EXCEPTIONS.** Partial restraints which limit, but do not preclude competitive activities or employment, may be enforceable. Employer generally cannot preclude employee from working for a competitor, but may limit how that employee may compete.
 - 1. Confidentiality agreements prohibiting unauthorized disclosure or use of confidential and proprietary information or trade secrets.
 - a. Public policy protects:
 - i. Legitimate trade secrets of the employer.
 - ii. Employee's right to earn a living in his or her business, trade or profession.
 - b. Important provisions: (1) an identification, at least by category, of the information the company claims to be confidential and proprietary; and (2) the employee's acknowledgment of the company's designation of its trade secrets, the employer's effort to

assemble the information, and the economic value of ensuring that the information is not known outside the company.

- c. California's enactment of the Uniform Trade Secrets Act defines a "trade secret" as: Information, including a formula, pattern, compilation, program, device, method, technique or process that:
(a) Derives actual or potential economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. *Cal. Civil Code §3426*, et seq.
 - d. Examples of confidential and proprietary information that may be a trade secret: research and development of new products, marketing and business plans, customer lists, pricing research and strategies, sales sources and other data, and manufacturing processes. This work product may not yet be developed fully enough to warrant patent or copyright protection.
 - e. Customer list cases are among the most common.
 - f. Trade secret protection programs.
2. Covenants prohibiting solicitation of customers. [But note, mailing announcements of new employment or business affiliation without asking for business is permissible because it is not a "solicitation."]
 3. Covenants prohibiting "employee raiding."
 4. Covenants limiting employee's preparations for a competing business while still employed. Similar to employee's fiduciary duty of loyalty to employer.
 5. Covenants prohibiting only a limited or small part of a business, trade or profession, but not all business activities.
 6. Why use agreements if the unfair competition and other laws may already provide a remedy for such conduct?
 - a. Deterrence before the conduct occurs.
 - b. Evidence after the conduct occurs.
 7. Should be signed as a condition of initial employment. Post employment issues - consideration.
 8. Do not include a covenant not to compete in agreements with non-owner employees – it may invalidate the entire agreement.

9. Stock Option Agreements:

- a. “bad boy” clause
- b. non-compete provisions -- federal or state court?

10. Personal Service Contracts.

- a. Special, unique, unusual, extraordinary or intellectual character that gives the employee “peculiar value”.
- b. Generally limited to “one-of-a-kind” entertainers.

11. Post-termination consulting agreements.

D. KEY STEPS TO DEVELOP A TRADE SECRET PROTECTION PROGRAM.

1. Identify “real” trade secrets and their value.
 - a. Evaluate confidential and proprietary information and answer two questions: (1) What information, if taken by a competitor, could damage or destroy your business? and (2) How much money has or will the company spend to develop this information?
2. Identify and place legend key documents.
 - a. Mark key documents containing trade secrets with legend: “TRADE SECRET. This document contains confidential and proprietary information of QRS, Inc. Do not copy or circulate.”
 - b. Avoid dilution of protection and loss of credibility by stamping as “confidential” documents that are clearly not confidential.
3. Pre-hire investigation of criminal and employment history and other information, subject to applicable law governing such inquiry.
4. Use confidentiality/trade secret agreements with every employee whose duties bring them into contact with trade secrets. (See, Appendix 3).
5. Restrict access to those who need to know.
6. Update the employee handbook. (See, Appendix 1-2).
 - a. State company policy and deterrence; grounds for termination of employment, civil action and criminal prosecution.
 - b. Limit employees' expectation of privacy in their use of the company's telephones, computers, and work areas.
7. Update computer security. Use a computer consultant who first signs a confidentiality agreement.

8. Document controls. Examples: locked and/or guarded single depository, sign-in and sign-out procedure, access limited to those who need to know, limit or restrict photocopies, shred discarded confidential documents, limit faxes.
9. Consider other security measures. Examples: security guards, logbook of all persons entering or leaving the company's premises, briefcases and handbags subject to inspection by exit guards.
10. Effective exit interview procedures to remind departing employees of confidentiality. (See, Appendix 4).
 - a. Consider use of acknowledgment of prior and continuing confidentiality obligations; a severance benefit may be useful to obtain employee's signature.
 - b. Require return of company equipment and documents.
11. Include independent contractors and other outsiders as part of the program.
12. Sue to enforce employer's confidentiality rights. Deterrence and credibility issues.

VII. Employment Law Basics

A. At-Will Employment

1. Statutory presumption. *California Labor Code § 2922*.
2. Employee may be terminated for any reason or no reason; “good cause” not required

B. Exceptions To At-Will Employment

1. Express contract – *e.g.*, not to terminate or demote without “good cause.” *Cal. Labor Code § 2924* (defining cause as “willful breach of duty, habitual neglect of duty, or continued incapacity to perform”).
 - a. Written promises
 - i. express employment agreement
 - ii. offer letter and other correspondence
 - iii. employment handbook, personnel policies, other writings
 - iv. collective bargaining agreement
 - b. Oral promises – assurances of continued employment absent “good cause”
2. Implied contract
 - a. Examine “totality of circumstances,” including written and oral statements

- b. Factors may include duration of employment, performance evaluations, employee's practices, promotions, oral statements and written materials
- 3. Public Policy Exceptions – Examples
 - a. Anti-discrimination statutes – California and federal law: *e.g.*, race, sex national origin, religion, age, disability
 - b. Discharge, discipline or retaliation for asserting legal right
 - i. filing claim of discrimination, or acting as witness in support of claim.
 - ii. filing workers' compensation claim, or acting as witness in support of claim.
 - iii. union activity
 - iv. filing for bankruptcy
 - v. making bona fide complaint regarding safety or health violation, or hazard
 - vi. missing work to attend school disciplinary meeting for child required by Education Code or, after reasonable notice and for limited hours, to attend school activities of a K-12 child
 - vii. jury duty
 - viii. military service
 - ix. political affiliation
 - x. complaining about workplace safety
 - xi. disclosing his or her wage information
 - xii. whistleblower statutes
 - c. Employee's refusal to commit unlawful act – *e.g.*, cannot discharge employee for refusing to violate anti-trust laws, or for complaining about other illegal activities

VIII. Conducting Effective Performance Evaluations

- A. **Why Performance Appraisals Are Critical To Your Organization's Continued Success**
 - 1. Increase employee/company productivity
 - 2. Impact employees' opportunities within the organization
 - 3. Risk management
- B. **Preparation of Performance Appraisals**
 - 1. Do your homework
 - a. Create a file for each employee

- b. Document performance over the course of the review period
 - c. Be fact specific - Record what the employee is doing, not just your opinions
 - d. Review documentation periodically to ensure the file records achievements and problems
 - e. Avoid surprises
 - f. Consider obtaining input from coworkers, subordinates, other managers - 360° review
2. Be honest
- a. Be up front about employee's shortcomings
 - b. Don't let friendship/animosity get in the way
 - c. Risks in not being honest
 - i. mislead employees
 - ii. promote mediocrity
 - iii. insulate poor performers
 - iv. damage productivity
3. Solicit employee input
- a. Requires employee to identify issues and/or accomplishments important to him/her
 - b. Reinforces the concept that employees are responsible for their own successes
 - c. Employee acknowledges areas of needed improvement
 - d. Gain insight into employee's expectations/aspirations
4. Good housekeeping
- a. Be neat/legible
 - b. Be specific
 - c. Remember who your audience might be (judge, jury, arbitrator)

C. Delivery of the Review

1. Engage in a dialogue
- a. Don't just talk at the employee
 - b. Open-ended questions
 - c. Spend more time listening than talking
 - d. Allow employee to respond
 - i. Verbally
 - ii. in writing

2. Steps can be taken to avoid emotional fallout
 - a. Coach and encourage employees
 - b. Identify successes and deficiencies
 - c. Establish plans of improvement
 - d. Set goals
3. Create a road map for future success
 - a. Establish realistic goals
 - b. Development of action plans
 - c. Promise to be accessible

IX. Discipline And Termination

A. Pre-Discipline Considerations

1. Practice progressive discipline.
2. Investigate before taking action.
3. Apply company standards and policies uniformly.
4. Exercise discipline consistently throughout workforce.
5. Discipline commensurate with the problem.
6. Patience is usually a virtue.
7. Act quickly with “zero tolerance” conduct.
8. Document all of the foregoing.
9. Consider contractual obstacles.
10. Consider statutory obstacles.

B. Disciplinary Action

1. Progressive steps may help a valuable employee whose performance is deficient or warn a problem employee whose actions have been found to violate the company’s standards of conduct.
2. Severity of the action will depend on the nature of the violation and the employee’s previous record.
3. Can the company deviate from the outlined discipline procedures?
4. Progressive Steps
 - a. Counseling and coaching
 - b. Verbal warning
 - c. Written warning
 - d. Discretionary Performance Review

- e. Suspension
 - f. Termination
5. Do not alter or modify the “at-will” employment policy.

C. Employee Separations

- 1. Resignation
 - a. Employee notice vs. at-will
 - b. Arrange for an exit interview
 - c. “Failure to report to work for three (3) consecutive, scheduled workdays without notice to or approval by an employee’s supervisor or manager shall be considered to be a voluntary termination of employment with the Company.”
- 2. Termination/Discharge
 - a. Where lesser disciplinary actions are not sufficient and termination is appropriate
 - b. At-will employment
 - c. Violations of standards of conduct or unsatisfactory job performance
- 3. Layoff
- 4. Medical Termination
- 5. Retirement

D. Exit Interview

- 1. Schedule as soon as a final workday has been established.
- 2. Opportunity for the employee to discuss the reason(s) for separating from the company, and to give constructive feedback to Human Resources regarding relationships with management and employees, company policies, departmental procedures and other issues impacting company performance.
- 3. Opportunity to discuss such issues as employee benefits, unused vacation.
- 4. Opportunity to learn of and plan to resolve employee claims.
- 5. Last paycheck – resignation vs. involuntary termination.
- 6. Company keys, equipment, passwords, documents, building access cards, ID badges and any other company property are to be returned.

X. Appendix

APPENDIX 1 – SAMPLE CONFIDENTIALITY POLICY

CONFIDENTIALITY

Information about [Company Name], its Employees, customers, suppliers, and vendors is to be kept confidential and divulged only to individuals within the Company with both a need to

receive and authorization to receive the information. If in doubt as to whether information should be divulged, err in favor of not divulging information and discuss the situation with your Manager.

All records and files maintained by the Company are confidential and remain the property of the Company. Records and files are not to be disclosed to any outside party without the express permission of the [appropriate management]. Confidential information includes, but is in no way limited to: financial records; business, marketing, and strategic plans; personnel and payroll records regarding current and former Employees; the identity of, contact information for, and any other account information on customers, vendors, and suppliers; inventions, programs, trade secrets, formulas, techniques, and processes; and any other documents or information regarding the Company's operations, procedures, or practices. Confidential information may not be removed from Company premises without express authorization.

Confidential information obtained during or through employment with the Company may not be used by any Employee for the purpose of furthering current or future outside employment or activities or for obtaining personal gain or profit. The Company reserves the right to avail itself of all legal or equitable remedies to prevent impermissible use of confidential information or to recover damages incurred as a result of the impermissible use of confidential information.

Employees may be required to enter into written confidentiality agreements confirming their understanding of the Company's confidentiality policies.

APPENDIX 2 – SAMPLE TECHNOLOGY/INTERNET POLICY

USE OF TECHNOLOGY AND THE INTERNET

The Company's technical resources--including desktop and portable computer systems, fax machines, voice mail, electronic mail (e-mail), Internet and World Wide Web access, electronic bulletin boards, and its intranet--enable Employees quickly and efficiently to access and exchange information throughout the Company and around the world. When used properly, we believe these resources greatly enhance Employee productivity and knowledge. In many respects, these new tools are similar to other Company tools, such as stationery, file cabinets, photocopiers, and telephones. Because these technologies are both new and rapidly changing, it is important to explain how they fit within the Company and within your responsibilities as an Employee.

This policy applies to all technical resources that are owned or leased by the Company, that are used on or accessed from Company premises, or that are used on Company business. This policy also applies to all activities using any Company-paid accounts, subscriptions, or other technical services, such as Internet and World Wide Web access, voice mail, and e-mail, whether or not the activities are conducted from Company premises.

NOTE: As you use the Company's technical resources, it is important to remember the nature of the information created and stored there. Because they seem informal, e-mail messages are sometimes offhand, like a conversation, and not as carefully thought out as a letter or memorandum. Like any other document, an e-mail message or other computer information can

later be used to indicate what an Employee knew or felt. You should keep this in mind when creating e-mail messages and other documents. Even after you delete an e-mail message or close a computer session, it may still be recoverable and may even remain on the system.

1. Acceptable Uses

The Company's technical resources are provided for the benefit of the Company and its customers, vendors, and suppliers. These resources are provided for use in the pursuit of Company business and are to be reviewed, monitored, and used only in that pursuit, except as otherwise provided in this policy.

Employees are otherwise permitted to use the Company's technical resources for occasional, non-work purposes with permission from their direct Manager. Nevertheless, Employees have no right of privacy as to any information or file maintained in or on the Company's property or transmitted or stored through the Company's computer, voice mail, e-mail, or telephone systems.

2. Unacceptable Uses

The Company's technical resources should not be used for personal gain or the advancement of individual views. Employees who wish to express personal opinions on the Internet are encouraged to obtain a personal account with a commercial Internet service provider and to access the Internet without using Company resources.

Solicitation for any non-Company business or activities using Company resources is strictly prohibited. Your use of the Company's technical resources must not interfere with your productivity, the productivity of any other Employee, or the operation of the Company's technical resources. Employees may not play games on the Company's technical resources.

You should not send e-mail or other communications that either mask your identity or indicate that they were sent by someone else. You should never access any technical resources using another Employee's password. Similarly, you should only access the libraries, files, data, programs, and directories that are related to your work duties. Unauthorized review, duplication, dissemination, removal, installation, damage, or alteration of files, passwords, computer systems or programs, or other property of the Company, or improper use of information obtained by unauthorized means, is prohibited.

Sending, saving, or viewing offensive material is prohibited. Messages stored and/or transmitted by computer, voice mail, e-mail, or telephone systems must not contain content that may reasonably be considered offensive to any Employee. Offensive material includes, but is not limited to, sexual comments, jokes or images, racial slurs, gender-specific comments, or any comments, jokes or images that would offend someone on the basis of his or her race, color, creed, sex, age, national origin or ancestry, physical or mental disability, veteran status, marital status, medical condition, sexual orientation, as well as any other category protected by federal, state, or local laws. Any use of the Company's technical resources to harass or discriminate is unlawful and strictly prohibited by the Company. Violators will be subject to discipline, up to and including discharge.

[Company Name] does not consider conduct in violation of this policy to be within the course and scope of employment or the direct consequence of the discharge of one's duties.

Accordingly, to the extent permitted by law, the Company reserves the right not to provide a defense or pay damages assessed against Employees for conduct in violation of this policy.

3. Access to Information

The Company asks you to keep in mind that when you are using the Company's computers you are creating Company documents using a Company asset. The Company respects the individual privacy of its Employees. However, that privacy does not extend to an Employee's work-related conduct or to the use of Company-provided technical resources or supplies.

The Company's computer, voice mail, e-mail, or telephone systems, and the data stored on them are and remain at all times the property of the Company. As a result, computer data, voice mail messages, e-mail messages, and other data are readily available to numerous persons. If, during the course of your employment, you perform or transmit work on the Company's computer system and other technical resources, your work may be subject to the investigation, search, and review of others in accordance with this policy.

All information, including e-mail messages and files, that is created, sent, or retrieved over the Company's technical resources is the property of the Company, and should not be considered private or confidential. Employees have no right to privacy as to any information or file transmitted or stored through the Company's computer, voice mail, e-mail, or telephone systems. Any electronically stored information that you create, send to, or receive from others may be retrieved and reviewed when doing so serves the legitimate business interests and obligations of the Company. Employees should also be aware that, even when a file or message is erased or a visit to an Internet or Web site is closed, it is still possible to recreate the message or locate the Web site. The Company reserves the right to monitor your use of its technical resources at any time. All information including text and images may be disclosed to law enforcement or to other third parties without prior consent of the sender or the receiver.

4. Copyrighted Materials

You should not copy and distribute copyrighted material (e.g., software, database files, documentation, articles, graphics files, and downloaded information) through the e-mail system or by any other means unless you have confirmed in advance from appropriate sources that the Company has the right to copy or distribute the material. Failure to observe a copyright may result in disciplinary action by the Company as well as legal action by the copyright owner. Any questions concerning these rights should be directed to your Manager.

5. Confidential Information

E-mail and Internet/Web access are not entirely secure. Others outside the Company may also be able to monitor your e-mail and Internet/Web access. For example, Internet sites maintain logs of visits from users; these logs identify which company, and even which particular person, accessed the service. If your work using these resources requires a higher level of security, please ask your Manager or the MIS Department for guidance on securely exchanging e-mail or gathering information from sources such as the Internet or World Wide Web.

All Employees should safeguard the Company's confidential information, as well as that of customers and others, from disclosure. Do not access new voice mail or e-mail messages with others present. Messages containing confidential information should not be left visible while you are away from your work area.

E-mail messages containing confidential information should include the following statement, in all capital letters, at the top of the message: CONFIDENTIAL: UNAUTHORIZED USE OR DISCLOSURE IS STRICTLY PROHIBITED.

6. Security of Information

Although you may have passwords to access computer, voice mail, and e-mail systems, these technical resources belong to the Company, are to be accessible at all times by the Company, and are subject to inspections by the Company with or without notice. The Company may override any applicable passwords or codes to inspect, investigate, or search an Employee's files and messages. All passwords must be made available to the MIS Department upon request. You should not provide a password to other Employees or to anyone outside the Company and should never access any technical resources using another Employee's password.

In order to facilitate the Company's access to information on its technical resources, you may not encrypt or encode any voice mail or e-mail communication or any other files or data stored or exchanged on Company systems without the express prior written permission from the MIS Department and your Manager. As part of this approval, the MIS Department will indicate a procedure for you to deposit any password, encryption key or code, or software with the MIS Department so that the encrypted or encoded information can be accessed in your absence.

7. [Company Name]'s Software Policy

If you want to install software on Company computers, you must contact the MIS Department and request to have the software installed. Employees are prohibited from installing any software on any Company technical resource without the express prior written permission from the MIS Department.

Involving the MIS Department ensures that the Company can manage the software on Company systems, prevent the introduction of computer viruses, and meet its obligations under any applicable software licenses and copyright laws. Computer software is protected from unauthorized copying and use by federal and state law; unauthorized copying or use of computer software exposes the Company and the individual Employee to substantial fines and exposes the individual Employee to imprisonment. Therefore, Employees may not load personal software onto the Company's computer system and may not copy software from the Company for personal use.

8. Your Responsibilities

Each Employee is responsible for the content of all text, audio, or images that they place or send over the Company's technical resources. Employees may access only files or programs, whether computerized or not, that they have permission to enter.

Violations of any guidelines in this policy may result in disciplinary action up to and including termination. In addition, the Company may advise appropriate legal officials of any illegal violations.

**APPENDIX 3 – SUMMARY OF KEY PROVISIONS TO
CONFIDENTIALITY AND NON-SOLICITATION AGREEMENT
WITH NON-OWNER EMPLOYEE**

R E C I T A L S

Recitals include that: the Company has developed and will continue to develop proprietary and confidential information and Trade Secrets; Employee would not be given access to this information if not employed; the Employee's execution of the Agreement is a condition of employment; and that it is not intended to unfairly restrict Employee's ability to earn a living after the employment ends.

A G R E E M E N T

Proprietary and Confidential Information and Trade Secrets. Definition of "Trade Secrets" for purposes of this Agreement to include information which derives independent economic value for not being generally known in the industry and for which the Company takes reasonable efforts to maintain secrecy. Include multiple examples of Company Trade Secrets. Acknowledgment that these items constitute Trade Secrets which are the sole and exclusive property of the Company.

Nondisclosure. Strict non-disclosure provisions that apply both during and after employment ends.

Employee's Further Obligation. No copying or removal of Trade Secrets and confidential information. Take reasonable precautions to prevent unauthorized use by others. Disclose and transfer to Company any improvements, discoveries and inventions developed during employment. No personal financial gain using Company Trade Secrets and confidential information. Must show a copy of this Agreement to any future employers.

Prior Knowledge and Relationships. Acknowledgment that Employee has not taken and will not use any Trade Secrets belonging to any prior employer.

Noncompetition During Employment. Employee will not directly or indirectly compete against Company while employed by Company.

Non-Solicitation of Employees. Prohibition on soliciting or pirating Employees and consultants away from Company.

Non-Solicitation of Clients. For a period after employment ends, prohibition on soliciting clients or customers away from Company.

Ownership of Copyrights and Inventions. Acknowledgment that anything created by Employee during the scope of employment is a "work made for hire" that belongs to the Company. Requirement that Employee assist Company in securing patents copyrights or similar protections of such works. Written notification to Employee required by the California Labor Code regarding Employee Inventions.

Term of Agreement. Usually beyond the end of employment.

Default; Cumulative Remedies. Company may seek injunctive and other relief against Employee in addition to money damages in the event of a breach.

Entire Agreement. Acknowledgment that this Agreement contains everything regarding the subject matter and supersedes any prior agreements or discussions. Provision that nothing in this Agreement is intended to vary or modify the “at will” nature of Employee’s employment with Company.

Amendment. Any changes need to be in writing.

Applicable Law and Jurisdiction. Agreement to submit to personal jurisdiction in California and selection of specific court geographic venue within California for any lawsuit.

Benefit and Burden. The Agreement is binding on the respective successors and assigns.

Waiver. No party can waive the requirements/protections of the Agreement unless it is in writing.

Severability. If a court finds certain provisions of the Agreement to be unenforceable, the court and enforce the balance of the Agreement.

Interpretation. Guidance for interpretation of the Agreement.

APPENDIX 4 – SAMPLE TERMINATION CERTIFICATION

XYZ Company

TERMINATION CERTIFICATION

This is to certify that I do not have in my possession nor have I failed to return any devices, records, data, notes, reports, proposals, lists, correspondence, specifications, drawings, blueprints, sketches, materials, equipment, or any other documents or property or any reproductions of any aforementioned items belonging to the Company, its subsidiaries, affiliates, successors or assigns (together, the “Company”).

I further certify that I have complied with all the terms of the Company’s Employment, Confidential Information, Invention Assignment and Arbitration Agreements signed by me, including the reporting of any inventions and original works of authorship (as defined therein), conceived or made by me (solely or jointly with others) covered by that agreement.

I further agree that, in compliance with the Employment, Confidential Information, Invention Assignment, and Arbitration Agreement, I will preserve as confidential all trade secrets, confidential knowledge, data or other proprietary information relating to products, processes, know-how, designs, formulas, developmental or experimental work, computer programs, data bases, other original works of authorship, customer lists, business plans, financial information or other subject matter pertaining to any business of the Company or any of its employees, clients, consultants or licensees.

I further agree that for twelve (12) months from this date I will not hire any employees of the Company and I will not solicit, induce, recruit or encourage any of the Company's employees to leave their employment.

Date:

(Employee's Signature)

(Type/Print Employee's Name)

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