California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 84 INDEPENDENT CONTRACTORS

28-84 California Legal Forms--Transaction Guide 84.syn

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28-84 California Legal Forms--Transaction Guide Scope

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Scope

This chapter covers state and federal law regarding the performance of services by an independent contractor. The legal background defines the term "independent contractor" for various state and federal purposes and examines the factors considered in determining whether a worker is an independent contractor or an employee. It discusses the types of services that are usually performed by independent contractors, situations in which the distinction between "independent contractor" and "employee" is important, and the advantages and disadvantages of using independent contractors rather than employees. In addition, the legal background discusses the significant consequences of improperly designating employees as independent contractors, particularly the tax consequences.

The transaction guide provides checklists for determining whether a worker is an employee or independent contractor, a checklist for structuring the work relationship with an independent contractor, and a guide to drafting agreements with independent contractors. The forms include a sample contract with an independent contractor and an agreement between an agency acting as a general contractor and an independent contractor acting as a subcontractor to perform services for a third party. Also included are official forms used by state and federal agencies in performing an audit of a particular worker's status.

For discussion of related topics, see Ch. 16, *Starting a New Business;* Chs. 85, *Employment Agreements,* and 86, *Agreements for Professional Services;* and Ch. 92, *Service Contracts* . For extensive coverage of standard contractual provisions, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

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A. Primary Sources

28-84 California Legal Forms--Transaction Guide § 84.01

§ 84.01 California Sources

[1] Constitution

Person may not be disqualified from entering or pursuing business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin. *Cal. Const., art. I, § 8.*

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Principal responsible to third parties for torts of agent. *Civ. Code § 2338.*

Rebuttable presumption that worker who is performing services for which contractor's license is required, or who is performing such services for person required to obtain contractor's license, is employee. *Lab. Code § 2750.5.*

Rebuttable presumption that physician who contracts for performance of health services on behalf of licensed primary care clinic is independent contractor. *Lab. Code § 2750.6.*

Termination of employment.
Terminable at will. *Lab. Code § 2922.*
Terminable by employee. *Lab. Code § 2925.*

Workers' compensation. *Lab. Code §§ 3200-6002.*
"Employer" defined. *Lab. Code § 3300.*
"Employee" defined. *Lab. Code §§ 3351, 3351.5.*
Exclusions from term "employee." *Lab. Code § 3352.*
"Independent contractor" defined. *Lab. Code § 3353.*

Unemployment insurance. *Unemp. Ins. Code §§ 100-2113.*

"Employing unit" defined. *Unemp. Ins. Code § 135*.
"Employment" defined. *Unemp. Ins. Code § 601*.
"Employee" defined. *Unemp. Ins. Code § 621*.
"Employment" excludes services performed by licensed real estate, mineral, oil and gas, or cemetery brokers or salespersons under contract when remuneration is directly related to sales or other output. *Unemp. Ins. Code § 650*.
Rebuttable presumption that specified professional services are rendered by individuals as independent contractors except when contract establishes employer-employee relationship. *Unemp. Ins. Code § 656*.
"Employer" defined. *Unemp. Ins. Code § 675*.
Accrual and payment of employer contributions. *Unemp. Ins. Code § 976*.
Employer registration. *Unemp. Ins. Code § 1086*.

Income tax withholding. *Unemp. Ins. Code §§ 13000-13101*.
Coverage. *Unemp. Ins. Code §§ 13004, 13005, 13009, 13020, 13024*.

[3] Regulations

Division of Labor Standards Enforcement regulations. *8 Cal. Code Reg. §§ 11701-13662*.

Workers' compensation self-insurance. *8 Cal. Code Reg. §§ 15200-15463*.

Income tax withholding. 18 Cal. Code Reg. §§ 18801-18806.

Employment Development Department factors for determining status as employee or independent contractor. *22 Cal. Code Reg. §§ 4304-1-4304-7*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Constitutional LawState Constitutional OperationLabor & Employment LawEmployment RelationshipsIndependent Contractors

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§ 84.02 Federal Sources

[1] Statutes

Federal Insurance Contribution Act (FICA). *I.R.C. §§ 3101-3128*.
Duty to withhold and pay Social Security and Medicare taxes from employee wages. *I.R.C. §§ 3101, 3102*.

Federal Unemployment Tax Act (FUTA). *I.R.C. §§ 3301-3311*.
Duty to contribute unemployment insurance tax. *I.R.C. § 3301*.

Duty to withhold and pay income tax from employee wages. *I.R.C. § 3402*.

Fair Labor Standards Act (FLSA). *29 U.S.C. §§ 201-219*.

Age Discrimination in Employment Act (ADEA). *29 U.S.C. §§ 621-634*.

Occupational Safety and Health Act of 1970 (OSHA). *29 U.S.C. §§ 651-678*.

Civil Rights Act of 1964.
Prohibition on discrimination in federally assisted programs (Title VI). *42 U.S.C. §§ 2000d-2000d-4a*.
Equal employment opportunity (Title VII). *42 U.S.C. §§ 2000e-2000e-17*.

Americans With Disabilities Act of 1990 (ADA). *42 U.S.C. §§ 12101-12213*.

[2] Regulations

Employment taxes. *Treas. Reg. § 31.0-1* et seq.
Federal Insurance Contribution Act (Social Security) coverage. *Treas. Reg. §§ 31.3121(b)-1*-31.3121(d)-2.

Federal unemployment insurance coverage. *Treas. Reg. §§ 31.3306(c)-2*-31.3306(n)-1.
Employees subject to withholding. *Treas. Reg. § 31.3401(c)-1*.
Employer's withholding duties. *Treas. Reg. § 31.6071(a)-1(a)(1)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsIndependent ContractorsTax LawFederal Tax Administration & ProcedureGeneral Overview

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§ 84.05 Law Reviews and Periodicals

Louden & Hubbard, *Service Hopes to Issue Guidance on Classification of Workers, 56 Tax Notes 1541 (September 1992).*

McGarry, *Have J.D., Will Travel: Contract Lawyering Is the Day Job of the 90's, 12 Cal. Law. 27 (July 1992).*

Zeidner, *Subcommittee Chairman Pens Stricter Rules on Independent Contractors, 55 Tax Notes 1311 (June 1992).*

Zeidner & Marshall, *Worker Classification: an Uncertain High Stakes Game, 54 Tax Notes 788 (February 1992).*

Duhl & Shaw, *Keeping Independent Contractors From Being Reclassified, 19 Tax'n for Law. 210 (January 1991).*

Ginsberg, *Lawyer for Hire: You Too Can Practice Law as an Independent, 11 Cal. Law. 51 (March 1991).*

Glader, *A Harvest of Share: the Imposition of Independent Contractor Status on Migrant Farmworkers and its Ramifications for Migrant Children, 42 Hastings L.J. 1455 (July 1991).*

Mastromarco, *The Rekindling Independent Contractor Debate, 53 Tax Notes 601 (November 1991).*

Merritt, *Understanding and Mitigating the Consequences of Reclassification of Workers From Independent Contractors to Employees,* 43 University of Southern California Major Tax Planning 12-1 (1991)(Matthew Bender).

O'Neil & Saubert, *Statutory Employees, 50 Tax Notes 885 (February 1991).*

Oster, *IRS Broadens Attack on Independent Contractor Status,* 25 Beverly Hills B.A.J. 213 (Fall 1991).

Rocen, *Employee-Independent Contractor Issues, 22 Tax Adviser 225 (April 1991).*

Foley & Snyder, *Independent Contractor vs. Employee, 21 Tax Adviser 226 (April 1990).*

Kawasaki, *Liability of Attorneys, Accountants, Appraisers, and Other Independent Contractors Under the Financial Institutions Return, Recovery, and Enforcement Act of 1989, 42 Hastings L.J. 249 (November 1990).*

Note, *Similar Workers in Separate Trades May Be Contractors, 18 Tax'n for Law. 346 (May 1990).*

Windle, *Community for Creative Non-Violence v. James Earl Reid: a Clearer Picture for Artists, 20 Golden Gate U.L. Rev. 155 (Spring 1990).*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsIndependent Contractors

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§ 84.06 Annotations

Annot., "Dual Capacity Doctrine" as Basis for Employee's Recovery for Medical Malpractice From Company Medical Personnel, 73 A.L.R.4th 115 (1989).

Annot., Duty and Liability of Subcontractor to Employee of Another Contractor Using Equipment or Apparatus of Former, 55 A.L.R.4th 725 (1987).

Annot., Who Is "Employee," as Defined in § 701(f) of the Civil Rights Act of 1964, 42USCS § 2000e(f), 72 A.L.R. Fed. 522 (1985) .

Annot., What Constitutes Employer-Employee Relationship for Purposes of Federal Income Tax Withholding, 51 A.L.R. Fed. 59 (1981).

Annot., Determination of "Independent Contractor" and "Employee" Status for Purposes of § 3(e)(1) of the Fair Labor Standards Act (*29 USCS § 203(e)(1)*), 51 A.L.R. Fed. 702 (1981).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsIndependent Contractors

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§ 84.07 Text References

[1] Matthew Bender Sources

California Forms of Pleading and Practice (Matthew Bender)
Ch. 104, *Building Contracts.*
Ch. 421, *Premises Liability.*
Ch. 427, *Principal and Agent.*

California Points and Authorities (Matthew Bender)
Ch. 50, *Contracts.*
Ch. 182, *Principal and Agent.*

California Legal Forms (Matthew Bender)
Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .
Ch. 85, *Employment Agreements* .
Ch. 86, *Agreements for Professional Services* .
Ch. 89, *Home Improvement and Specialty Contracts* .
Ch. 91, *Contracts With Sales Representatives* .
Ch. 92, *Service Contracts* .

Fern, Warren's Forms of Agreements (Matthew Bender)
Ch. 4, *Employment.*
Ch. 4A, *Professional Services.*
Ch. 5, *Brokers and Agents.*
Ch. 13, *Miscellaneous* (service contracts).

Hanna, California Law of Employee Injuries and Workmen's Compensation (Matthew Bender).

Kheel, Labor Law, Ch. 20, *Mandatory Bargaining Subjects: Hours and Other Terms and Conditions of Employment* (Matthew Bender).

Rabkin & Johnson, Current Legal Forms (Matthew Bender)
Ch. 12, *Employment and Compensation.*
Ch. 12A, *Collective Bargaining.*
Ch. 16A, *Professional Corporations.*

Wilcox, California Employment Law (Matthew Bender)

[2] Additional Text References

Witkin, Summary of California Law, vol. 3, *Agency and Employment,* §§ 21-42 (10th ed. 2005).

Restatement (Second) of Agency, § 220.

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART II. LEGAL BACKGROUND
A. Independent Contractors Under California Law

28-84 California Legal Forms--Transaction Guide § 84.10

§ 84.10 "Independent Contractor" Defined

An "independent contractor" is a person who, in rendering services, exercises an independent employment or occupation and is under the control of the person for whom services are performed only with respect to the result of the work and not as to the means by which it is accomplished. The primary element, therefore, that establishes a worker as an independent contractor is that the person for whom services are rendered has no right of control over the manner and means of accomplishing the result [*Green v. Soule (1904) 145 Cal. 96, 99, 78 P. 337* ; *see Lab. Code § 3353* ("independent contractor" defined for purposes of workers' compensation)]. The right of the person for whom services are rendered to exercise control, rather than the actual exercise of that right, is the determinative factor [*Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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PART II. LEGAL BACKGROUND
A. Independent Contractors Under California Law

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§ 84.11 Factors Considered in Determining Whether Person Is Independent Contractor or Employee

[1] In General

In determining whether a person is an independent contractor or an employee, the following factors, based on the common law of agency, are considered [*Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 949, 88 Cal. Rptr. 175, 471 P.2d 975* ; *see* Restatement (Second) of Agency, § 220; *see also* 22 Cal. Code Reg. § 4304-1]:

- The extent of control that the one who ordered the work may, by the terms of the agreement, exercise over the details of the work.
- Whether or not the one performing the work is engaged in a distinct occupation or business.
- Whether in the particular locality the kind of work involved is usually done under the direction of the person for whom the work is performed or by a specialist without supervision.
- The skill required in the particular occupation.
- Whether the person for whom work is performed or the person performing the work supplies the instrumentalities, tools, and the place of work.
- The length of time for which the person is engaged.
- Whether or not regular working hours are set by the person for whom work is performed.
- Whether payment is by the hour or month or for the job.
- Whether or not the person performing the work is engaged full time by one person.

- Whether or not the work is performed in a specific area or over a fixed route.

- Whether or not the work is a part of the regular business of the person for whom the work is performed.

- Whether the parties believe they are creating an independent contract or an employer-employee relationship.

- Whether or not the person who ordered the work is in business.

- Whether or not the services are terminable without cause at the will of the person for whom the work is performed.

- Whether or not under the terms of the agreement the work may be delegated.

These factors are discussed in greater detail in [3] through [11], *below*.

In a case concerning the ownership of a copyright, the United States Supreme Court affirmed the use of the Restatement factors listed above in determining whether a person is an employee or an independent contractor under the common law of agency [*see Community for Creative Non-Violence v. Reid (1989) 490 U.S. 730, 752, 109 S. Ct. 2166, 104 L. Ed. 2d 811* .]

[2] Weight of Factors

Whether a person is an independent contractor or an employee is generally a question of fact [*Rogers v. Whitson (1964) 228 Cal. App. 2d 662, 672, 39 Cal. Rptr. 849]* . When conflicting inferences may reasonably be drawn, the determination of the jury, court, or administrative body will not be disturbed on appeal, if supported by substantial evidence [*S.G. Borello & Sons, Inc. v. Department of Indust. Rel. (1989) 48 Cal. 3d 341, 349, 256 Cal. Rptr. 543, 769 P.2d 399]* . However, if only one inference may reasonably be drawn from the facts, the question is one of law [*Fleming v. Foothill-Montrose Ledger (1977) 71 Cal. App. 3d 681, 684, 139 Cal. Rptr. 579* ; *see Isenberg v. California Emp. Stab. Com. (1947) 30 Cal. 2d 34, 40-41, 180 P.2d 11]* .

In determining whether a person is an independent contractor or an employee, the most important question is which party has the right to control the manner and means by which the work is accomplished [*Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686]* . If the person engaging the services of the other has the authority to exercise complete control over the details of performing the work, an employer-employee relationship exists [*Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686]* . If, on the other hand, the person performing the work has the right to control the manner and means by which the work is accomplished and is under the control of the person engaging his or her services only with respect to the desired result, the relationship is one of independent contractor [*Green v. Soule (1904) 145 Cal. 96, 99, 78 P. 337]* .

In some cases, courts have viewed the right to control the means by which the work is accomplished as the most significant test of the employment relationship and the other factors as secondary considerations [*see Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 950, 88 Cal. Rptr. 175, 471 P.2d 975* ; *Isenberg v. California Emp. Stab. Com. (1947) 30 Cal. 2d 34, 39, 180 P.2d 11]* . In other cases, courts have examined some or all of the other factors not as independent secondary elements, but as questions bearing on the issue of control [*see Press Publishing Co. v. Industrial Acci. Com. (1922) 190 Cal. 114, 119-120, 210 P. 820* .] The California Supreme Court has cautioned against a too-rigid application of the control factor and endorses consideration of secondary factors as well [*see S. G. Borello & Sons, Inc. v. Department of Indust. Rel. (1989) 48 Cal. 3d 341, 350, 256 Cal. Rptr. 543, 769 P.2d 399]* .

When conflicting inferences may be drawn from the facts, the decision of the lower court will be upheld on appeal [*Grant v. Woods (1977) 71 Cal. App. 3d 647, 652, 139 Cal. Rptr. 533]* . Hence, one person may be classified as an independent contractor, while a person engaged in similar work under similar conditions for a different employer may be classified as an employee. In addition, aside from the issue of control over the manner and means of performing the work, it is difficult to anticipate what weight a court will accord to the various other factors that are examined in resolving the question of whether a person is an independent contractor or an employee. An attorney drafting a "borderline" contract cannot be assured that use of the terminology of independent contractor will be upheld in the event of litigation. The label given to the relationship by the parties in an agreement is not dispositive [*see S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 349, 256 Cal. Rptr. 543, 769 P.2d 399]* . Rather, the parties' label for their relationship will be ignored if their actual conduct establishes a different relationship [*Estrada v. FedEx Ground Package System, Inc. (2007) 154 Cal. App. 4th 1, 11-13, 64 Cal. Rptr. 3d 327* (employer's control over every detail of workers' performance supported trial court's conclusion that workers were employees, not independent contractors, despite contractual recitations that manner and means of performing work were within workers' discretion)]. Accordingly, in an independent contractor agreement, it is essential to carefully draft the provisions that a court will consider most important in determining what type of relationship exists. For a drafting guide to an agreement with an independent contractor, see *Section 84.120*. For a form of independent contractor agreement, see *Section 84.200*.

[3] Right to Control Manner and Means of Work

The right to control the manner and means by which the work is performed is the most important consideration in determining whether a person is an independent contractor or an employee [*Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686]* . However, complete surrender of control by the person for whom work is performed is not essential to a finding of independent contractor status [*Bates v. Industrial Acci. Com. (1958) 156 Cal. App. 2d 713, 718, 320 P.2d 167]* . The person for whom work is performed may retain a certain measure of control directed toward securing satisfactory results without creating the relationship of employer- employee [*Pylon, Inc. v. Olympic Ins. Co. (1969) 271 Cal. App. 2d 643, 653, 77 Cal. Rptr. 72]* . Thus, the fact that a contract requires that the work be performed with care and skill does not of itself transform an independent contractor into an employee [*see* Restatement (Second) of Agency, § 220, Comment e]. For example, a demand that independent contractors comply with applicable safety regulations does not transform a principal into an employer responsible for furnishing a safe workplace [*Smith v. AC and S, Inc. (1994) 31 Cal. App. 4th 77, 91, 37 Cal. Rptr. 2d 457* (citing *Stanford v. City of Ontario (1972) 6 Cal. 3d 870, 878, 101 Ca. Rptr. 97, 495 P.2d 425*)]. On the other hand, the fact that a certain amount of freedom is inherent in the nature of the work does not require that one be characterized as an independent contractor [*Durae v. Industrial Acci. Com. (1962) 206 Cal. App. 2d 691, 700, 23 Cal. Rptr. 902]* .

In determining which party has the right to control the manner and means of performing the work, courts examine how much independent judgment is left to the person performing the work with respect to each task that must be undertaken in accomplishing the result. One case, for instance, involved contracts between television writers and a television producer. The television writers worked on their own time, at their own expense, in their own way, with their own instrumentalities, and at a place of their own selection. A distinct contract was executed for the writing of each teleplay. The employment terminated when the play was completed, and a writer could be compelled by the producer only to make two drafts of a teleplay. After the contract became operative, however, the desires, suggestions, requests, and directions of the producer's staff were, in effect, commands with which the writers had to comply, unless they could convince the producer that the suggested changes were inappropriate. Failure to comply resulted in forfeiting future employment. The trial court found that the writers were employees and the California Supreme Court affirmed [*Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 946, 88 Cal. Rptr. 175, 471 P.2d 975]* .

In another case, a model performed two hours work for a photographer. The model found work through an agent, who billed for the model's services, collected the payments, deducted his own fee, and sent the balance to the model. The model was found to be an employee of the photographer because the photographer controlled the model's every

movement, dress, hours, and place of work, and could fire him for disobedience [*Zaremba v. Miller (1980) 113 Cal. App. 3d Supp. 1, 5, 169 Cal. Rptr. 688]* .

A person who engages an independent contractor, however, may exercise a certain measure of control toward securing satisfactory results. For example, a mining company contracted with lessees to produce ore from various portions of its properties. Although the mining company was to have no part in the selection, employment, or direction of the lessee's employees, the lessee agreed to discharge any employee whom the mining company's superintendent designated as objectionable. The tramming, hoisting, storage, and milling operations of the ore produced by the lessee were to be carried out in accordance with schedules set by the company. In addition, the mining company reserved the right to enter the leased area to inspect work done in both underground and milling operations for the purpose of determining the grade of ore being mined, the size and location of veins, and the efficiency of milling operations. The court held that control of the manner and means of performing the work was vested in the lessee and, hence, that the lessee was an independent contractor [*Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 36-46, 168 P.2d 686]* .

[4] Custom of Community

The custom of the community as to the control ordinarily exercised in a particular occupation is relevant to the determination of whether the person performing the work is an independent contractor or an employee [*Isenberg v. California Emp. Stab. Com. (1947) 30 Cal. 2d 34, 37, 180 P.2d 11]* . Custom, combined with the skill required in the occupation, may be of nearly conclusive weight. Thus, unskilled labor is customarily performed by employees. Moreover, if the occupation is one that is ordinarily considered an incident of the business establishment or a function of the regular members of the staff of the person for whom services are rendered, the implication is that the relationship is one of employer-employee [Restatement (Second) of Agency, § 220, Comment i]. In contrast, independent truckers with their own trade association were deemed independent contractors based in part on industry recognition of the independent truckers as being engaged in a distinct occupation [*see State Comp. Ins. Fund v. Brown (1995) 32 Cal. App. 4th 188, 203, 38 Cal. Rptr. 2d 98]* .

[5] Effect of State Licensing Requirements

The fact that an independent authority, such as the state government, regulates the conduct of the person performing the work does not negate a finding that the person for whom services are rendered exercises sufficient control to create an employer-employee relationship [*Drillon v. Industrial Accident Com. (1941) 17 Cal. 2d 346, 354-356, 110 P.2d 64* ; *see* Restatement (Second) of Agency, § 220, Comment i]. Indeed, *Lab. Code § 2750.5* creates a rebuttable presumption that a worker performing services for which a contractor's license is required, or performing those services for a person who is required to obtain a contractor's license, is an employee rather than an independent contractor [*Lab. Code § 2750.5*; *see Bus. & Prof. Code § 7000 et seq.* (Contractors' State License Law)]. The presumption ordinarily is conclusive if the worker does not possess a valid contractor's license [*Lab. Code § 2750.5*; *see Sanders Constr. Co. v. Cerda (2009) 175 Cal. App. 4th 430, 433-436, 95 Cal. Rptr. 3d 911* (under *Lab. Code § 2750.5*, general contractor is treated as employer of unlicensed subcontractor's employees, who may assert wage claim against general contractor); *but see Chin v. Namvar (2008) 166 Cal. App. 4th 994, 1004, 83 Cal. Rptr. 3d 294* (notwithstanding presumption established by *Lab. Code § 2750.5*, one who misrepresents self as licensed contractor is estopped from asserting that unlicensed status makes him or her employee)]. Applying this presumption, the California Supreme Court has held that an unlicensed worker hired to remodel a homeowner's house, who became injured on the job, cannot be an independent contractor in the eyes of the law and is instead deemed the homeowner's employee at law for purposes of rendering him or her eligible for workers' compensation benefits under the homeowner's insurance policy [*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1985) 40 Cal. 3d 5, 15, 219 Cal. Rptr. 13, 706 P.2d 1146]* . It remains an open question, however, whether an unlicensed worker will be deemed a homeowner-hirer's employee under *Lab. Code § 2750.5* so as to impose vicarious tort liability on the homeowner for the worker's conduct that results in the worker's own injury [*Ramirez v. Nelson (2008) 44 Cal. 4th 908, 913, 920, 80 Cal. Rptr. 3d 728, 188 P.3d 659* (because no applicable statute created special duty owed by employer to employee, it was unnecessary to decide whether unlicensed

worker was homeowner-hirer's employee at law under *Lab. Code § 2750.5* so as to impose vicarious liability on homeowner for worker's death caused by worker's own conduct)].

There is also a rebuttable presumption that a physician who enters into a contract for the performance of health services on behalf of a licensed primary care clinic is an independent contractor [*Lab. Code § 2750.6*]. For unemployment insurance purposes, "employment" does not include professional services performed by a consultant working as an independent contractor. Moreover, there is a rebuttable presumption that services provided by an individual engaged in work requiring specialized knowledge and skills, including doctors and dentists, are rendered by an independent contractor. This rebuttable presumption does not apply to one who enters into a contract with a recipient of professional services if the contract establishes an employer-employee relationship. However, the existence of a contract between a nonprofit primary care clinic and a health care practitioner does not mean that there is an employer-employee relationship if the agreement stipulates that the professional services are rendered by a person acting as an independent contractor, not as an employee [*Unemp. Ins. Code § 656*].

[6] Ownership of Tools and Instrumentalities

Ownership of tools and instrumentalities also bears on the question of control. The fact that the person performing the work supplies the tools is some evidence that he or she is an independent contractor [*see, e.g., State Compensation Ins. Fund v. Brown (1995) 32 Cal. App. 4th 188, 203* (truckers had made significant capital investment in the trucks)]. If, on the other hand, the person for whom the work is performed supplies the tools, he or she is likely to instruct the worker as to their use, and, therefore, the implication is that the relationship is one of employer-employee [Restatement (Second) of Agency, § 220, Comment k; *but see Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 954, 88 Cal. Rptr. 175, 471 P.2d 975* (ownership of tools of little importance when service to be performed is intellectual endeavor)].

[7] Period of Employment and Manner of Payment

The period of employment and the method of payment are relevant in determining the amount of control exerted by the person for whom the work is performed. The shorter the period of employment, the less likely it is that the person performing the work will subject himself or herself to control as to details, and the more likely it is that the job will be considered the job of the person performing the work, as opposed to the job of the person for whom the work is performed. This is particularly true if payment is for the job rather than by the hour. If, however, the work is not skilled, or if the person for whom the work is performed supplies the tools and instrumentalities, the person performing the work may be considered an employee [*Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 949, 88 Cal. Rptr. 175, 471 P.2d 975* ; *see* Restatement (Second) of Agency, § 220, Comment j].

[8] Place Where Work Is Performed

The fact that the work is done on the premises of the person for whom the work is performed points toward an employer-employee relationship. This implication is strengthened if the person performing the work agrees to abide by general rules for the regulation of the conduct of employees [Restatement (Second) of Agency, § 220, Comment l; *but see Pylon, Inc. v. Olympic Ins. Co. (1969) 271 Cal. App. 2d 643, 652-653, 77 Cal. Rptr. 72* (general supervisory right to control work does not defeat independent contractor status)].

The fact that the work is performed on the employer's premises, however, is not determinative. Not only may the other relevant factors outweigh this (for example, supplying one's own tools or working according to one's own method), but the nature of the work may require that it be performed on the premises of the person for whom the services are rendered [*see California Emp. Stab. Com. v. Morris (1946) 28 Cal. 2d 812, 819-820, 172 P.2d 497* (real estate salesperson); *Walder v. Industrial Acci. Com. (1948) 85 Cal. App. 2d 473, 474-475, 193 P.2d 60* (carpenter); *Los Flores School Dist. v. Industrial Acci. Com. (1936) 13 Cal. App. 2d 180, 183-185, 56 P.2d 581* (painter)].

[9] Persons for Whom Services Are Performed

If an individual performs the same type of work for many persons, the implication is that he or she is an independent contractor [*see Yamaoka v. Diemer (1950) 15 Cal. Comp. Cases 77]* . On the other hand, devoting one's full time to performing work for one person points towards an employer-employee relationship [*Brown v. Industrial Acci. Com. (1917) 174 Cal. 457, 461, 163 P. 664]* .

[10] Belief and Practices of Parties

The belief of the parties as to whether the person performing the work is an independent contractor or an employee is relevant to the determination, but is not conclusive [*see Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 954, 88 Cal. Rptr. 175, 471 P.2d 975* ; *see also* Restatement (Second) of Agency, § 220, Comment m]. The intent of the parties is considered, but the label given to the relationship by the parties in an agreement is not dispositive [*see S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 349, 256 Cal. Rptr. 543, 769 P.2d 399]* . Rather, the parties' label for their relationship will be ignored if their actual conduct establishes a different relationship [*Estrada v. FedEx Ground Package System, Inc. (2007) 154 Cal. App. 4th 1, 11-13, 64 Cal. Rptr. 3d 327* (employer's control over every detail of workers' performance supported trial court's conclusion that workers were employees, not independent contractors, despite contractual recitations that manner and means of performing work were within workers' discretion)]. Custom in the community [*see* Restatement (Second) of Agency, § 220, Comment i] and whether or not the person for whom the services are rendered has deducted withholding taxes, obtained workers' compensation insurance, or paid unemployment insurance taxes [*see Mission Ins. Co. v. Workers' Comp. Appeals Bd. (1981) 123 Cal. App. 3d 211, 225, 176 Cal. Rptr. 439]* are pertinent inquiries in this regard.

[11] Right to Terminate Work Relationship

The right of the person for whom services are rendered to discharge the worker at will without cause is strong evidence in support of an employment relationship [*Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686]* . The power of the person for whom the work is performed to terminate the relationship at any time is incompatible with the full control of the work usually exerted by an independent contractor [*Press Publishing Co. v. Industrial Acci. Com. (1922) 190 Cal. 114, 119-120, 210 P. 820]* . However, the right of discharge alone is not conclusive evidence that a person performing work for another is an employee [*Bohanon v. James McClatchy Pub. Co. (1936) 16 Cal. App. 2d 188, 204, 60 P.2d 510]* . Thus, an independent contractor agreement can properly include an at-will clause giving the parties the right to terminate the agreement without cause, and such a clause does not by itself change the independent contractor relationship into an employer-employee relationship [*Varisco v. Gateway Sci. & Eng'g, Inc. (2008) 166 Cal. App. 4th 1099, 1107-1108, 83 Cal. Rptr. 3d 393* (worker was not controlled by hirer, and agreement provided mutual right to terminate, which was consistent with independent contractor relationship)].

On the other hand, while an at-will employee may quit at any time without incurring liability [*see Lab. Code § 2922*], an independent contractor is legally obligated to complete the contract [*Baugh v. Rogers (1944) 24 Cal. 2d 200, 206-207, 148 P.2d 633]* . Therefore, the presence of a contract requiring completion of certain tasks raises the implication that the person is an independent contractor.

[12] Employees of Independent Contractor

An independent contractor often has employees. Those employees may not be treated as employees of the other party to the contract (the principal). The independence arising from the contractual relationship between the contractor and the principal implicitly shields those employees from being subject to supervision or direction by the principal. For example, insurance companies commonly engage insurance agents as independent contractors to sell insurance policies. If such an independent agent has employees, the insurance company is not entitled to impose common terms of employment on those employees, such as an obligation to preserve the company's trade secrets (identities of

policyholders, for example) or an obligation not to solicit the company's existing customers to do business with a competitor. Such activity by the company would amount to a violation of the agency contract [*Patricia Adkins Ins. Agency, Inc. v. State Farm Mut. Auto. Ins. Co. (2007) 146 Cal. App. 4th 526, 533, 52 Cal. Rptr. 3d 882]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsIndependent Contractors

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28-84 California Legal Forms--Transaction Guide § 84.12

§ 84.12 Rebuttable Presumption for Unemployment Insurance Purposes

For the purpose of determining eligibility for unemployment insurance, the Unemployment Insurance Code provides a rebuttable presumption that services rendered by specified individuals engaged in work requiring specialized knowledge and skills attained through completion of recognized courses of instruction or experience are provided by these individuals as independent contractors. This rebuttable presumption applies to accountants, architects, attorneys, dentists, engineers, physicians, and the various types of physical, chemical, natural, and biological scientists. It does not apply, however, to a person who enters into an employment contract with the recipient of that person's professional services that establishes an employer-employee relationship [*Unemp. Ins. Code § 656*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationGeneral OverviewLabor & Employment LawDisability & Unemployment InsuranceUnemployment CompensationBurdens of ProofLabor & Employment LawEmployment RelationshipsIndependent Contractors

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§ 84.13 Types of Services Generally Performed by Independent Contractors

Persons engaged in the following types of services are generally considered independent contractors:

- News carriers and newspaper vendors [*see Fleming v. Foothill-Montrose Ledger (1977) 71 Cal. App. 3d 681, 685-689, 139 Cal. Rptr. 579]* .

- Construction contractors and subcontractors [*see Rogers v. Whitson (1964) 228 Cal. App. 2d 662, 671-672, 39 Cal. Rptr. 849]* .

- Craftspersons, such as carpenters [*see Walder v. Industrial Acci. Com. (1948) 85 Cal. App. 2d 473, 475, 193 P.2d 60]* .

- Entertainers [*see Mark Hopkins Inc. v. Cal. Emp. etc. Com. (1948) 86 Cal. App. 2d 15, 18, 193 P.2d 792]* .

- Well-drillers [*see Lillibridge v. Industrial Acci. Com. (1935) 4 Cal. App. 2d 237, 242, 40 P.2d 856]* .

- Mining lessees [*see Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686]* .

- Process servers [*see Becker v. Industrial Acci. Com. (1931) 212 Cal. 526, 531, 298 P. 979]* .

- Outside salespersons and solicitors [*see Cal. Emp. Stab. Com. v. Norins Realty Co. (1946) 29 Cal. 2d 419, 422-423, 175 P.2d 217]* .

- Professional persons engaged in an independent business, such as attorneys, accountants, and physicians (but not "in-house" professionals) [*see Merritt v. Reserve Ins. Co. (1973) 34 Cal. App. 3d*

858, 880-881, 110 Cal. Rptr. 511 (independent trial counsel); *Associated Indem. Corp. v. Industrial Acci. Com. (1943) 56 Cal. App. 2d 804, 807-810, 133 P.2d 698* (attorney under general retainer); *see also* Ch. 86A, *Agreements for Legal Services*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 84.14 Simultaneous Status as Independent Contractor and Employee

A person may simultaneously be an employee and an independent contractor either with respect to one person who engages his or her services (depending on the duties being performed at a given time) [*Guth v. Industrial Acci. Com. (1941) 44 Cal. App. 2d 762, 765-767, 112 P.2d 969]* or with respect to two or more persons [General Acc. Fire & Life Assur. Corp. Ltd. v. Industrial Acc. Comm. (1938) 3 Cal. Comp. Cas. 17, 18-19].

In addition, a person may simultaneously be an employee for one purpose, and an independent contractor for another purpose. For example, a real estate salesperson, for the purpose of administering the real estate law, is the employee and agent of the broker. For the purpose of establishing tort liability, a broker is liable under the doctrine of respondeat superior for the tortious acts of sales personnel during the course and scope of business because of that agency relationship [*see Grubb & Ellis Co. v. Spengler (1983) 143 Cal. App. 3d 890, 895, 192 Cal. Rptr. 637]* . However, a real estate salesperson is not an employee for the purpose of workers' compensation [*see Unemp. Ins. Code § 650*] or for the purpose of federal employment taxes [*see I.R.C. § 3508*]. In any case, the minimum wage law is not applicable to real estate salespersons, either because they are specifically excluded from coverage as "outside salespersons" [*see Lab. Code § 1171*] or because they are independent contractors under the traditional common law control rule [*see Grubb & Ellis Co. v. Spengler (1983) 143 Cal. App. 3d 890, 897, 192 Cal. Rptr. 637]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-84 California Legal Forms--Transaction Guide § 84.15

§ 84.15 Importance of Distinction Between Independent Contractor and Employee

[1] Overview

Whether an individual is an employee or an independent contractor can have important legal ramifications in a number of respects. For example, as discussed in [2] and [3], *below*, an individual's status as an employee or an independent contractor determines whether the person hiring him or her is required to provide workers' compensation benefits or make contributions for unemployment insurance. Furthermore, an individual's status as employee renders the employer potentially liable to third party's for the individual's torts under the doctrine of respondeat superior [*see* [2]-[4], *below*].

Employees of an independent contractor are not considered employees of the person or entity hiring the independent contractor (for example, the owner or lessor of the premises where the work is done). Hence, a landowner generally is not held liable for injuries to or negligence of the employee of a contractor [*see Widman v. Rossmoor Sanitation, Inc. (1971) 19 Cal. App. 3d 734, 743-744, 97 Cal. Rptr. 52* ; *State Compensation Ins. Fund v. Industrial Acci. Com. (1941) 46 Cal. App. 2d 526, 529-530, 116 P.2d 173* ; *see also Privette v. Superior Court (1993) 5 Cal. 4th 689, 702, 21 Cal. Rptr. 2d 72, 854 P.2d 721* ; *but see Kinsman v. Unocal Corp. (2005) 37 Cal. 4th 659, 674, 36 Cal. Rptr. 3d 495, 123 P.3d 931* (hirer as landowner may be independently liable to contractor's employee if it knows or reasonably should know of concealed pre-existing hazardous condition on its premises, contractor does not know and could not reasonably ascertain condition, and landowner fails to warn contractor)]. Nor is the hirer of a contractor liable for the injury of an independent contractor working for the contractor [*see Michael v. Denbeste Transportation Inc. (2006) 137 Cal. App. 4th 1082, 1095, 40 Cal. Rptr. 3d 777* (*Privette* doctrine, which limits the circumstances under which an injured employee of an independent contractor can sue the hirer of that contractor, is applicable where the injured party is an independent contractor who was working for a contractor)]. Similarly, a general contractor is generally not held liable with respect to a subcontractor's employee [*Widman v. Rossmoor Sanitation, Inc. (1971) 19 Cal. App. 3d 734, 743-744, 97 Cal. Rptr. 52]* .

[2] Workers' Compensation

Under the Workers' Compensation Act [*see Lab. Code § 3200 et seq.*], an employer is liable, without regard to negligence, for any injury proximately causing disability or death to an employee [*see Lab. Code § 3351* (definition)]

and arising out of and in the course of employment, with limited exceptions [*Lab. Code § 3600*; *see Lab. Code § 3600(a)(4)-(10)* (exceptions)]. Every individual or business entity (excluding the state) served by employees must either obtain workers' compensation insurance or secure a certificate of consent to self-insure from the Director of Industrial Relations [*Lab. Code § 3700*]. The right to recover workers' compensation is generally the exclusive remedy of an employee against an employer for injury or death [*see Lab. Code §§ 3602, 5300*].

For workers' compensation purposes, an "independent contractor" is a person who renders service for a specified compensation for a specified result, under the control of the principal as to the result of the work only and not as to the means by which the result is accomplished [*Lab. Code § 3353*]. An independent contractor is not covered by workers' compensation laws, because workers' compensation applies only to "employees" [*see Lab. Code § 3600(a)*], and therefore may bring a tort action for a work-related injury against a person who has engaged his or her services.

The person for whom services are rendered has the burden of proving that the injured person was an independent contractor rather than an employee [*Johnson v. Workmen's Comp. Appeals Bd. (1974) 41 Cal. App. 3d 318, 321, 115 Cal. Rptr. 871* ; *see Lab. Code §§ 3357* (presumption of employee status), 5705]. In determining the status of the injured person, the key determination is whether the principal exercised "all necessary control" over the operation [*S.G. Borello & Sons, Inc. v. Department of Indus. Relations (1989) 48 Cal. 3d 341, 350-351, 355-360, 256 Cal. Rptr. 543, 769 P.2d 399* (harvest workers were employees, since defendant employer exercised pervasive control over farming operation as a whole, including all *necessary* control over harvest operation); *JKH Enters., Inc. v. Department of Indus. Relations (2006) 142 Cal. App. 4th 1046, 1064-1066, 48 Cal. Rptr. 3d 563* (drivers hired by courier service were employees despite employer's lack of control over manner in which drivers covered their territories, because employer retained all *necessary* control over operation as whole, by obtaining clients in need of courier services and providing necessary workers to perform those services)]. In addition to the tests outlined in *§ 84.11[1]*, a court may also consider the following [*Johnson v. Workmen's Comp. Appeals Bd. (1974) 41 Cal. App. 3d 318, 322, 115 Cal. Rptr. 871* ; *see S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 352-354, 256 Cal. Rptr. 543, 769 P.2d 399]* :

- The purpose of the workers' compensation statute and the intention of the legislature.
- The persons sought to be protected.
- Whether the injured person is or is not of a class of persons generally intended to be protected.
- Whether there are any specific statutory exclusions.
- The relative bargaining positions of the parties mentally, economically, and educationally.

When a person is injured while performing work for another, various factors may enter into the attempt to characterize him or her as either an independent contractor or an employee. First, an independent contractor may sue for greater damages than might be awarded for the same injury under the Workers' Compensation Act. On the other hand, a person who suffers a work-related injury might prefer to be classified as an employee in order to collect the amount guaranteed for that type of injury under the workers' compensation scheme. Second, the Act imposes liability on the employer without regard to negligence [*Lab. Code § 3600*]. The defenses of assumption of risk and contributory/comparative negligence, and the fellow-servant rule, are inapplicable [*Lab. Code § 3708*; *see Logan v. Masters (1981) 120 Cal. App. 3d 145, 147, 174 Cal. Rptr. 465* (holding defense of comparative negligence unavailable to employer under Workers' Compensation Act)]. In a suit for negligence brought by an independent contractor against a person engaging his or her services, however, these affirmative defenses are available.

Because employees of independent contractors have workers' compensation coverage by virtue of that employment, the hirer of an independent contractor ordinarily is not liable to an employee of the contractor for injuries caused by the

negligence of the contractor [*Camargo v. Tjaarda Dairy (2001) 25 Cal. 4th 1235, 1244-1245, 108 Cal. Rptr. 2d 617* (no liability under negligent hiring theory); *Toland v. Sunland Housing Group, Inc. (1998) 18 Cal. 4th 253, 267, 955 P.2d 504* (no liability under "peculiar risk" doctrine even when hirer fails to require that special precautions be taken to avert peculiar risks of work); *Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 21 Cal. Rptr. 2d 72, 854 P.2d 721* (no liability under "peculiar risk" doctrine)]. However, the hirer may be liable if the hirer's own conduct contributes to an injury suffered by the contractor's employee [*Kinsman v. Unocal Corp. (2005) 37 Cal. 4th 659, 674, 36 Cal. Rptr. 3d 495, 123 P.3d 931* (hirer as landowner may be independently liable to contractor's employee if it knows or reasonably should know of concealed pre-existing hazardous condition on its premises, contractor does not know and could not reasonably ascertain condition, and landowner fails to warn contractor); *McKown v. Wal-Mart Stores, Inc. (2002) 27 Cal. 4th 219, 225, 115 Cal. Rptr. 2d 868* (hirer liable for negligently furnishing unsafe equipment); *Hooker v. Department of Transportation (2002) 27 Cal. 4th 198, 212, 115 Cal. Rptr. 2d 853* (hirer liable based on exercise of retained control over safety conditions at work site that affirmatively contributed to injury suffered by contractor's employee)].

For further discussion of coverage issues pertaining to workers' compensation law, see Wilcox, California Employment Law, Ch. 20 (Matthew Bender); California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation* (Matthew Bender); and Hanna, California Law of Employee Injuries and Workers' Compensation, Chs. 3, 4 (Matthew Bender).

[3] Unemployment Insurance

Every individual or entity that pays one or more employees [*see Unemp. Ins. Code § 621* (definition)] wages in excess of $100 during any calendar quarter must contribute to the California Unemployment Fund [*Unemp. Ins. Code §§ 976, 675*; *see Unemp. Ins. Code §§ 135, 2602(a)*]. A principal, however, does not have to contribute to the fund for services rendered by an independent contractor [*Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686]* . Therefore, for the purposes of unemployment insurance, it is beneficial to hire an independent contractor rather than an employee. If an unemployment insurance tax is assessed, the burden of proof is on the person engaging the services of another to prove that the person performing work is an independent contractor and, therefore, that the tax has been assessed illegally [*Isenberg v. California Emp. Stab. Com. (1947) 30 Cal. 2d 34, 37-38, 180 P.2d 11]* .

For discussion of the statutory rebuttable presumption for unemployment insurance purposes that services rendered by certain types of professional persons are provided by those persons as independent contractors, see *§ 84.13*. For further discussion of the meaning of the terms "employer" and "employee" for unemployment insurance purposes, see Wilcox, California Employment Law, Ch. 80 (Matthew Bender).

[4] Respondeat Superior

Under the doctrine of respondeat superior, an employer is vicariously liable (i.e., without regard to the employer's own lack of negligence or fault) to third parties for injuries caused by the torts of an employee acting within the scope of employment [*see Civ. Code § 2338*; *Hinman v. Westinghouse Elec. Co. (1970) 2 Cal. 3d 956, 959-960, 88 Cal. Rptr. 188, 471 P.2d 988]* . On the other hand, one who engages an independent contractor is not, as a general rule, vicariously liable for the torts of the contractor or the contractor's employees while acting within the scope of the contract [*Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 250, 66 Cal. Rptr. 20, 437 P.2d 508]* . There are some exceptions to this rule, particularly in the case of nondelegable duties or intrinsically dangerous work [*see Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 250-252, 66 Cal. Rptr. 20, 437 P.2d 508* ; *Widman v. Rossmoor Sanitation, Inc. (1971) 19 Cal. App. 3d 734, 743, 97 Cal. Rptr. 52]* . The exceptions to the general rule notwithstanding, when a third party attempts to hold a person who has engaged the services of another liable under the doctrine of respondeat superior, it is to the latter's advantage to contend that the relationship with the tortfeasor is one of independent contractor [*see, e.g., Armato v. Baden (1999) 71 Cal. App. 4th 885, 897-899, 84 Cal. Rptr. 2d 294* (rejecting claim by former patient of medical group, in action alleging negligent treatment by group's physician assistant, that conduct of independent contractor

doctors for medical group created "ostensible partnership" with group making them jointly liable)].

For more detailed discussion of tort liability under the respondeat superior doctrine, see Levy, Golden & Sacks, California Torts, Ch. 8 (Matthew Bender) and Wilcox, California Employment Law, Ch. 30 (Matthew Bender).

[5] Wage and Hour Laws

For most California wage and hour laws to be applicable to a worker, an employment relationship must exist [*see 8 Cal. Code Reg. § 11010 et seq.*]. No employment relationship exists if the person performing services is an independent contractor [*see Grubb & Ellis Co. v. Spengler (1983) 143 Cal. App. 3d 890, 897-898, 192 Cal. Rptr. 637]* . Therefore, independent contractors are not subject to most California laws regarding work hours, overtime compensation, and minimum wages, and business owners are afforded more flexibility in making arrangements regarding work that is to be performed by independent contractors.

For detailed discussion of the scope of coverage of California and federal wage and hour laws, see Wilcox, California Employment Law, Ch. 1 (Matthew Bender). For additional discussion of coverage under federal wage and hour laws, see Leader, Wages and Hours: Law and Practice, Ch. 2 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 84 INDEPENDENT CONTRACTORS
PART II. LEGAL BACKGROUND
A. Independent Contractors Under California Law

28-84 California Legal Forms--Transaction Guide § 84.16

§ 84.16 Problems With Using Independent Contractor Status as Subterfuge

[1] In General

In determining whether a person performing work is an independent contractor or an employee, courts will look beyond the language of the contract or agreement to the substance of the relationship between the parties [*Grant v. Woods (1977) 71 Cal. App. 3d 647, 654, 139 Cal. Rptr. 533* ; *Pacific Lbr. Co. v. Ind. Acc. Com. (1943) 22 Cal. 2d 410, 422, 139 P.2d 892* ; *see § 84.11*]. In general, the key factor in this determination is whether the employer has the right of control over the worker's methods and results [*see Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686]* . Employers who seek to skirt requirements of employment and tax laws by treating employees as independent contractors risk penalties, fines, and imprisonment for violations [*see*[2]-[5], *below*].

[2] Failure to Secure Workers' Compensation Insurance

It is a misdemeanor for an employer who knows (or because of his or her knowledge or experience is reasonably expected to know) of the obligation to secure the payment of workers' compensation to fail to secure that payment [*Lab. Code § 3700.5*]. Ordinarily, the right to recover workers' compensation is the exclusive remedy for an employee against an employer for injury or death on the job [*see Lab. Code §§ 3602, 5300*]. However, an injured employee or his or her dependents may sue for damages against an employer who fails to secure payment of workers' compensation as if the workers' compensation laws did not apply [*Lab. Code § 3706*]. In addition, a stop order prohibiting the use of employee labor will be served on an employer who has failed to secure the payment of workers' compensation. The stop order will be effective until the employer secures the payment of workers compensation [*Lab. Code § 3710.1*]. The employer must also pay an employee affected by a work stoppage for time lost, not to exceed 10 days [*Lab. Code § 3710.1*].

Regarding independent contractors, this situation may arise when an injured or killed "independent contractor," for whom the employer has not secured workers' compensation coverage, is determined to be an employee by a government audit [*see § 84.210* (EDD Form DE 1870)].

[3] Failure to Pay Employment Taxes

Most California employers must pay unemployment and employment training taxes based on wages paid to employees [*see Unemp. Ins. Code §§ 976, 976.6* (effective until Jan. 1, 2002), 977]. In addition, employers must withhold and contribute income and state disability insurance taxes from employees' wages [*Unemp. Ins. Code §§ 986, 1110, 13020(a)*]. These taxes are assessed based on employee wages, not compensation paid to independent contractors [*see, e.g., Garrison v. State of California (1944) 64 Cal. App. 2d 820, 824, 149 P.2d 711* (unemployment taxes)]. Employers are subject to past taxes, injunctions, fines, and imprisonment for failing to withhold and pay these employment taxes when due [*see Unemp. Ins. Code §§ 2101-2122.5, 13002*].

A business whose labor is performed solely by independent contractors is not subject to these tax laws. However, if the independent contractors are reclassified as employees following a government audit [*see § 84.210*], the business will have to comply with these employment tax requirements, and is subject to liability for past failures to do so.

[4] Failure to Comply With Wage and Hour Laws

As discussed in *§ 84.15[5]*, most California wage and hour laws do not apply to independent contractors. However, if the independent contractors are reclassified as employees following a government audit [*see § 84.210*], the business is likely to be held in past violation of labor laws and wage orders, and subject to civil penalties, injunctions, and criminal fines and imprisonment [*see Lab. Code 1194-1199*].

For a discussion of civil and criminal penalties and other enforcement procedures under California and federal wage and hour laws, see Wilcox, California Employment Law, Ch. 5 (Matthew Bender).

[5] Failure to Comply With Occupational Safety and Health Laws

California occupational safety and health laws protect employees, not independent contractors [*see Lab. Code §§ 3300, 6304, 6304.1*]. Employers are subject to injunctions, fines, and imprisonment for failing to maintain safe working places and conditions for their employees [*see Lab. Code §§ 6323, 6423-6436*]. Accordingly, a business whose labor is performed solely by independent contractors is not covered by OSHA laws. However, if the independent contractors are reclassified as employees following a government audit [*see § 84.210*], the business will have to comply with OSHA requirements, and is subject to liability for past failures to comply. For further discussion of workplace safety and health laws, see Wilcox, California Employment Law, Ch. 21 (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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DIVISION VI: PERFORMANCE OF SERVICES
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28-84 California Legal Forms--Transaction Guide § 84.30

§ 84.30 Federal Tax Considerations

[1] Liability for Federal Taxes

For federal tax purposes, a worker's characterization as an employee or an independent contractor has significant implications. An employer must withhold and remit federal income tax, FICA tax (Social Security), and FUTA tax (unemployment) on compensation paid to employees [*see I.R.C. §§ 3101, 3301, 3402*]. However, an employer need not withhold and remit these taxes on amounts paid to independent contractors. It is therefore an advantage to structure jobs so that workers can be treated as independent contractors rather than employees.

[2] "Independent Contractor" Defined

A person is generally an "independent contractor" if he or she is subject to control or direction merely as to the result to be accomplished, and not as to the means and methods for accomplishing the result [*Treas. Reg. § 31.3121(d)-1(c)(2)*]. An important factor in determining whether the worker is an independent contractor is a finding that he or she is operating his or her own business, assuming the risk of loss, and offering services to the general public [*see Rev. Rul. 74-412, 1974-2 C.B. 332*]. Accordingly, individuals engaged in the pursuit of an independent trade, business, or profession, such as doctors, lawyers, dentists, and construction contractors, are independent contractors [*Treas. Reg. § 31.3121(d)-1(c)(2)*]. For a list of factors to consider in determining whether a worker is an employee or an independent contractor for federal income tax purposes, see [4], *below.*

[3] "Employee" Defined

[a] In General

Under the Internal Revenue Code, an "employee" is anyone who has the status of employee under the usual common-law rules applicable to the employer-employee relationship [*I.R.C. § 3121(d)(2)*; *see Treas. Reg. § 31.3121(d)-1(c)*; *see also § 84.11* (common law factors)]. A person is generally an employee if the person for whom services are performed has the right to control and direct the person who performs the services. This control includes not only the result to be accomplished by the work, but also the manner in which the result is accomplished. The right to

discharge is an important factor indicating that an employer-employee relationship exists [*Treas. Reg. § 31.3121(d)-1(c)(2)*]. In difficult cases, the determination of whether a person is an employee or independent contractor depends on the particular circumstances of the case [*Treas. Reg. § 31.3121(d)-1(c)(3)*]. If the relationship of employer and employee exists, the parties' designation or description of the relationship as anything else is immaterial, and the IRS will reclassify the worker accordingly [*Treas. Reg. § 31.3121(d)-1(a)(3)*].

[b] Statutory Employees and Statutory Nonemployees

Some individuals are classified by statute as employees or nonemployees for federal tax purposes. For FICA purposes, all of the following are statutorily deemed "employees" if they are under a contract of service that contemplates they will perform substantially all services personally: (1) corporate officers, (2) agent-drivers and certain commission-drivers, (3) full-time insurance salespersons, (4) certain home workers, (5) traveling or city salespersons, and (6) any individual who performs services that are included under an agreement entered into under *42 U.S.C. § 418* (voluntary agreements with Commissioner of Social Security for coverage of state and local workers) [*I.R.C. § 3121(d)(1), (3), (4)*]. For FUTA purposes, only agent-drivers, certain commission-drivers, and traveling and city salespersons are considered statutory employees [*I.R.C. § 3306(i)*].

Qualified real estate agents and direct sellers [*see I.R.C. § 3508(b)* (definitions)] are statutorily deemed nonemployees, and compensation paid to them is not subject to income tax withholding or FICA or FUTA taxes [*I.R.C. § 3508(a)*].

[4] Factors Employed in Determining Status

With the exception of statutory employees and statutory nonemployees [*see* [3][b], *above*], the determination of whether a particular relationship is an independent contractor or employment relationship is on a case-by-case basis. In general, an individual is an employee for federal employment tax purposes if he or she has the status of an employee under common law rules applicable to employment relationships [*see I.R.C. §§ 3121(d), 3306(i), 3401(c)*]. The Treasury Regulations provide guidelines for determining that status [*see Treas. Reg. §§ 31.3121(d)-1(c),* 31.3306(i)-1, 31.3401(c)-1].

Many factors must be considered in determining whether a worker is an independent contractor. The key factor is whether the employer has the right to control and direct the individual performing the services, both as to the result to be accomplished and the means by which the result is accomplished. In *Revenue Ruling 87-41* , the IRS identified the 20 factors, listed below, that help indicate whether sufficient control is present to establish an employment relationship. *Revenue Ruling 87-41* applies specifically to certain technical jobs in the computer industry, but its method of analysis, and the factors used in making the status determination, apply to all work situations. The relative importance of each factor will vary depending on the particular occupation and the factual context [*Rev. Rul. 87-41*]:

(1) Is the worker required to comply with others' instructions about when, where, and how to work?

(2) Is the worker required to be trained?

(3) Are the worker's services integrated into the business operation?

(4) Must the worker's services be rendered personally by the worker?

(5) Does the person for whom services are performed hire, supervise, and pay assistants?

(6) Does a continuing relationship exist between the worker and the person for whom services are performed?

(7) Are the worker's hours set by the person for whom services are performed?

(8) Must the worker devote substantially full time to the business?

(9) Must the work be performed on the premises of the person for whom services are performed?

(10) Must the worker perform the work in a particular order or sequence?

(11) Must the worker submit oral or written reports?

(12) Is the worker paid on a periodic basis, such as by the hour, week, or month?

(13) Does the person for whom services are performed normally pay the worker's business and travel expenses?

(14) Does the person for whom services are performed furnish the worker's tools?

(15) Does the worker invest in the facilities used to perform the services?

(16) Can the worker realize a profit or loss as a result of performing the services?

(17) Can the worker perform services for more than one person or firm at a time?

(18) Can the worker make his or her services available to the general public?

(19) Does the person for whom services are performed have the right to discharge the worker?

(20) Does the worker have the right to end his or her relationship with the person for whom services are performed?

Positive responses to items (1) through (14) and (19) tend to indicate that an employment relationship exists. Positive responses to items (15) through (18) and (20) tend to indicate that an independent contractor relationship exists [*Rev. Rul. 87-41, 1987-1 C.B. 296*]. For further discussion of the application of these factors, see *Section 84.110[2]*.

[5] Consequences of Improper Classification

The parties to an independent contractor agreement contract for a particular relationship, not a particular status. The fact of the relationship, and not the terms of the agreement, results in the status of independent contractor or employee. The parties may designate the status of the relationship in the agreement, but the IRS is not bound by the label the parties give to the relationship [*see, e.g., Treas. Reg. § 31.3121(d)-1(a)(3)*].

Employers who fail to withhold and pay federal taxes from employee wages as a result of improperly treating employees as independent contractors are liable to the IRS for the full amount of unpaid taxes of both the employer and employee, penalties, and interest [*see I.R.C. §§ 3509, 6672*]. Willful violators are also subject to criminal fines and imprisonment [*see I.R.C. §§ 7201-7206*]. This generally occurs a result of an IRS tax audit [*see § 84.211 [1]*] and subsequent reclassification of independent contractors as employees, based on IRS evaluation of the relevant factors [*see* [4], *above*]. In certain circumstances, liability may be abated [*see I.R.C. §§ 3402(d), 3509*], or tax adjustments may be made without paying interest [*see I.R.C. § 6205(a)*]. On request, the IRS will determine whether a worker is an employee or an independent contractor [*see § 84.211* (IRS Form SS-8)].

[6] Safe Haven Rules

Several safe havens work to minimize the uncertainties taxpayers face concerning treatment of workers as employees or independent contractors. For example, under the "Section 530" safe haven, a worker who has consistently not been treated as a common-law employee for any period beginning after 1977 will not be reclassified as an employee if (1) the taxpayer did not treat the worker as an employee; (2) the taxpayer filed all required federal tax returns for the period (including providing Form 1099 to the worker); (3) the taxpayer had a reasonable basis for not treating the worker as an employee; and (4) the taxpayer did not treat similarly situated workers as employees [Pub. L. No. 95-600, 95th Cong., 2nd Sess., § 530(a), 92 Stat. 2885; *see Rev. Proc. 85-18, 1985-1 C.B. 518* (implementation)]. Compliance with Section 530 relieves the employer of liabilty for all employment taxes under Subtitle C of the Internal Revenue Code [*see I.R.C. §§ 3101-3509*] for the relevant period [Pub. L. No. 95-600, 95th Cong., 2nd Sess., § 530(c)(1), 92 Stat. 2886]. Other relief programs are available [*see I.R.C. §§ 3402(d), 3509, 6521*]. For further discussion of safe havens, see Bender's Federal Tax Service, Volume 4, Topic B:17, *Income and Employee Tax Withholding.*

[7] Business Expenses

[a] In General

An independent contractor may deduct all the ordinary and necessary expenses paid or incurred during a tax year in carrying on a trade or business, including salaries and other compensation for personal services actually rendered, travel expenses while away from home in the pursuit of the trade or business, and rental or other payments for property in which the contractor has neither title nor equity [*I.R.C. § 162(a)*; *see I.R.C. § 212*; *but see I.R.C. § 280A* (disallowance of deduction)]. For detailed discussion of the deductibility of business expenses, see Bender's Federal Tax Service, Volume 6, Topic G, *Business Expenses, Deductions and Credits.*

[b] Home Office Deduction

In general, no deduction is allowed, even if otherwise allowed by the Internal Revenue Code, for maintenance of a dwelling unit [*see I.R.C. § 280A(f)* ("dwelling unit" defined)] used by an individual taxpayer as a residence during the tax year [*I.R.C. § 280A(a)*; *see I.R.C. § 280A(d)* (use of dwelling unit as residence)]. However, this disallowance rule is subject to exceptions for permitted business use of the residence. The exception limits the maximum deduction to the income derived from the qualified use, less deductions otherwise allowable [*I.R.C. § 280A(c)*]. "Permitted business use" includes the portion of the dwelling unit exclusively used on a regular basis as the principal place of business, as a place of business that is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his or her trade or business, or a separate structure not attached to the dwelling unit, used in connection with the taxpayer's trade or business [*I.R.C. § 280A(c)(1)*]. For discussion of what constitutes qualifying "exclusive use" on a "regular basis," see Bender's Federal Tax Service, Volume 6, Topic G:9, *Residential Property Used for Business and Vacation Homes.*

In determining whether a home office was the principal place of business under *Internal Revenue Code Section 280A(c)(1)(A)*, the United States Supreme Court held that the two primary considerations are (1) the relative importance of the activities performed at each business location, and (2) the time spent at each place. The place where goods and services are delivered must be given great weight in determining the place where the most important functions are performed. This determination depends on the particular facts of each case [*Commissioner v. Soliman (1993) 506 U.S. 168, 93 Daily Journal D.A.R. 528, 530]* . The Court indicated that, in many instances, no principal place of business may exist, and the IRS should not strain to conclude that a home office qualifies as a principal place of business simply because no other place qualifies [*Commissioner v. Soliman (1993) 506 U.S. 168, 93 Daily Journal D.A.R. 528, 531]* . If an independent contractor cannot meet these stated criteria, no deduction for a home office under *Internal Revenue Code Section 280A(c)(1)(A)* is available, even if maintenance of the home office is essential to the contractor's trade or business [*see Commissioner v. Soliman (1993) 506 U.S. 168, 93 Daily Journal D.A.R. 528, 531]* .

If a deduction is sought for use of a residence as a place of business that is used by patients, clients, or customers in meeting or dealing with the taxpayer in the normal course of his or her trade or business [*see I.R.C. § 280A(c)(1)(B)*], the deduction is allowed whether or not the home office is also the principal place of business [*Commissioner v. Soliman (1993) 506 U.S. 168, 93 Daily Journal D.A.R. 528, 530]* .

[8] Reporting Amounts Paid to Independent Contractors

[a] Filing Return With IRS

Any person who, in the course of his or her trade or business, pays $600 or more for services received from another person during a calendar year must file an information return with the IRS [*see I.R.C. §§ 6041(a), 6041A(a)*]. Payments made to service providers who are not employees must be made on Form 1099-MISC [*see § 84.212*]. Payments required to be reported include fees, commissions, and other compensation for services rendered, including fees for professional services, fees to independent contractors, and payments for materials used in rendering services [*see* Instructions for Forms 1099, 1098, 5498, and W-2G].

Form 1099-MISC must be provided to the IRS by March 1 of the year following the calendar year in which payment was made [*see* Instructions for Forms 1099, 1098, 5498, and W-2G].

For further discussion of filing requirements regarding information returns, see Bender's Federal Tax Service, Chapter P:3, *Filing Requirements--Information Returns.*

[b] Providing Statement to Payee

Every person required to file a return with the IRS [*see* [a], *above*] must also provide the payee named in the return with a written statement containing the name and address of the person required to file the return and the aggregate amount of payments made [*I.R.C. § 6041(d)*]. The statement may be a copy of the return filed with the IRS or a separately prepared statement. In either case, the preparer must inform the recipient that the information is being provided to the IRS [*see* Instructions for Forms 1099, 1098, 5498, and W-2G].

The statement must be provided to the payee by January 31 of the year following the calendar year for which the return was required to be filed [*I.R.C. § 6041(d)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 84.31 Considerations Regarding Federal Wage and Hour Laws

An employment relationship must exist for the Federal Labor Standards Act (FLSA) [*see 29 U.S.C. §§ 201-219*] to be applicable to a worker [*see Rutherford Food Corp. v. McComb (1947) 331 U.S. 722, 723-729, 67 S. Ct. 1473, 91 L. Ed. 1772]* . Persons who are not employees are not covered by the FLSA [*Walling v. Portland Terminal Co. (1947) 330 U.S. 148, 152, 67 S. Ct. 639, 91 L. Ed. 809]* . Independent contractors are not "employees" under the FLSA, and therefore are not subject to its provisions, affording business owners increased flexibility [*Rutherford Food Corp. v. McComb (1947) 331 U.S. 722, 729, 67 S. Ct. 1473, 91 L. Ed. 1772]* . For further discussion of state and federal wage and hour laws, see California Employment Law, Chapter 1, *Overview of Wage and Hour Laws* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsIndependent ContractorsLabor & Employment LawWage & Hour LawsGeneral Overview

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28-84 California Legal Forms--Transaction Guide § 84.32

§ 84.32 Relationship Between Independent Contractor Status and Ownership of Copyright

[1] Author of Copyrighted Work

Under the federal Copyright Act [*see 17 U.S.C. §§ 101-914*], copyright in a protected work vests in the author of the work [*17 U.S.C. § 201(a)*]. Absent an agreement about copyright ownership or an employment relationship resulting in a "work made for hire" [*see* [2], *below*], an independent contractor will normally be the author of a work created for a principal, and will therefore own the copyright in the work when created. It is likely that the person for whom any copyrightable work is created would want to require in the agreement with the independent contractor that the contractor assign his or her rights in any copyrightable works to the principal [*see § 84.200 [2]*, P 7.01]. Although independent contractor agreements sometimes provide that any works created by the contractor will be deemed "works made for hire," giving the "employer" immediate ownership of copyright [*see 17 U.S.C. § 201(b)*], use of this term is discouraged [*see* [3], *below*].

[2] Author of "Work Made for Hire"

A "work made for hire" is a work prepared by an employee within the scope of his or her employment, or a specially ordered or commissioned work pursuant to a written, signed agreement [*see 17 U.S.C. § 101*]. The employer or other person for whom a work was prepared is considered the author for copyright ownership purposes of a "work made for hire." Unless the parties have otherwise agreed in a signed writing, the person for whom the work was prepared owns all rights comprised in the copyright [*17 U.S.C. § 201(b)*]. While this type of arrangement might seem useful in an agreement with an independent contractor, use of the term "work made for hire" can raise the undesirable implication of an employer-employee relationship [*see* [3], *below*].

To determine whether a work is made for hire, a court must first use principles of general common law of agency to determine whether the work was prepared by an employee or an independent contractor. After making this determination, the court then applies the appropriate subsection of Section 101 of the Copyright Act [*Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989)* ; *see 17 U.S.C. § 101*].

[3] Consequence of Improper Designation of Work as "Work Made for Hire"

The types of works included within the term "work made for hire" are specifically enumerated. A work made for hire is (1) a work prepared by an employee within the scope of his or her employment, or (2) a work specially ordered or commissioned pursuant to a written, signed agreement for use in a collective work, as part of a motion picture, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas [*17 U.S.C. § 101*]. If the work created is described as a "work made for hire," and does not fit in one of the categories of specially ordered or commissioned works, use of that term creates an undesirable implication of an employer-employee relationship. The United States Supreme Court has indicated that in determining whether an employment relationship exists, the general common law of agency is used [*see Community for Creative Non-Violence v. Reid, 490 U.S. 730, 741, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989)]* . Accordingly, if the agreement states or implies that a work made for hire has been created, the implication is that an employer-employee relationship exists [*see Community for Creative Non-Violence v. Reid, 490 U.S. 730, 743, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989)* (works by employees and commissioned works by independent contractors viewed as separate entities)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawOwner RightsGeneral OverviewLabor & Employment LawEmployment RelationshipsIndependent Contractors

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[Reserved]

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28-84 California Legal Forms--Transaction Guide § 84.40

§ 84.40 Advantages of Using Independent Contractors

The advantages of engaging the services of an independent contractor as opposed to an employee include the following:

(1) The person for whom work is performed is not required to pay unemployment insurance taxes [*see I.R.C. § 3306(c), (i)*; *Unemp. Ins. Code §§ 675, 976*; *Unemp. Ins. Code §§ 135, 2602(a)*].

(2) The person for whom work is performed is not required to pay Social Security (FICA) taxes [*see I.R.C. § 3111*].

(3) The person for whom work is performed need not withhold taxes from an independent contractor's compensation [*see I.R.C. §§ 3102, 3401(a)*; *Unemp. Ins. Code § 13020*; *see Unemp. Ins. Code §§ 13005, 13009*].

(4) The person for whom work is performed generally is not liable for the torts of an independent contractor under the doctrine of respondeat superior [*see Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 250-252, 66 Cal. Rptr. 20, 437 P.2d 508* ; *see also § 84.15[4]*].

(5) The relationship with the independent contractor may be terminated for reasons specified in the agreement [*see Mountain Meadow Creameries v. Industrial Acci. Com. (1938) 25 Cal. App. 2d 123, 127, 76 P.2d 724]* .

(6) The employer need not furnish tools, instrumentalities, or a work place for the independent contractor.

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-84 California Legal Forms--Transaction Guide § 84.41

§ 84.41 Disadvantages of Using Independent Contractors

The disadvantages of engaging an independent contractor as opposed to an employee include the following:

(1) Although a person engaging the services of an independent contractor may exert some supervisory control over the details of performing the work [*see Pylon, Inc. v. Olympic Ins. Co. (1969) 271 Cal. App. 2d 643, 653, 77 Cal. Rptr. 72]* , he or she does not enjoy total control.

(2) Because of the lack of control over the independent contractor's work methods, it is difficult to monitor the progress of the work or to ensure ahead of time that work will be completed on schedule.

(3) A person who discharges an independent contractor for reasons other than those specified in the agreement commits breach of contract.

(4) A person who engages the services of an independent contractor is subject to tort liability for injuries or death to the independent contractor during the course of the contract.

(5) A person who engages the services of an independent contractor does not necessarily enjoy the contractor's exclusive services.

(6) In situations where numerous independent contractors are routinely utilized, the employer is not assured of uniformity in the quality of work.

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-84 California Legal Forms--Transaction Guide § 84.42

§ 84.42 Utilizing Independent Contractors in Labor Disputes

[1] California Law

Under California law, a person who advertises for or seeks employees through newspapers, posters, letters, or otherwise, or who solicits or communicates by letter or otherwise with persons to work at a shop, plant, or establishment while a strike, lockout, or other trade dispute is in active progress, must mention explicitly in the advertisement, solicitation, or communication that a strike, lockout, or other labor disturbance exists [*Lab. Code § 973*]. Failure to comply with this requirement is a misdemeanor [*Lab. Code § 974*]. While the statute refers to advertisement for or solicitation of "employees," the class of persons it is intended to protect is the workers solicited [*see People v. Smith (1955) 133 Cal. App. 2d Supp. 777, 782, 284 P.2d 203]* .

Therefore, to avoid possible liability under *Labor Code Sections 973* and *974*, a person advertising for or soliciting independent contractors while a strike, lockout, or other trade dispute is in progress should mention explicitly in the advertisement, solicitation, or communication that a labor disturbance exists.

[2] Federal Law

The National Labor Relations Act [*see 29 U.S.C. §§ 151-169*] provides that when employees are members of an existing bargaining unit, an employer's refusal to bargain collectively with the employees' representatives is an unfair labor practice [*29 U.S.C. § 158(a)(5)*]. The "contracting out" of work previously performed by members of an existing bargaining unit is a subject about which the National Labor Relations Act requires employers and the employees' representatives to bargain collectively [*Fibreboard Corp. v. NLRB (1964) 379 U.S. 203, 209, 85 S. Ct. 398, 13 L. Ed. 2d 233]* .

However, after a strike has begun, an employer is under no duty to offer to bargain about a decision to hire replacements for strikers, even on a permanent basis [*National Labor Rel. Bd. v. Mackay Radio & T. Co. (1938) 304 U.S. 333, 345-346, 58 S. Ct. 904, 82 L. Ed. 1381]* . A decision to subcontract, taken at the time an economic strike occurs, and made for the purpose of keeping a plant operating, does not constitute a failure to bargain as required by the National Labor Relations Act [*Hawaii Meat Company v. N.L.R.B. (9th Cir. 1963) 321 F.2d 397, 399-400* ; *see 29 U.S.C. §*

158(a)(5)]. For further discussion, see T. Kheel, Labor Law, Chapter 20, *Mandatory Bargaining Subjects: Hours and Other Terms and Conditions of Employment* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawCollective Bargaining & Labor RelationsStrikes & Work StoppagesLabor & Employment LawEmployment RelationshipsIndependent Contractors

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 84 INDEPENDENT CONTRACTORS
PART II. LEGAL BACKGROUND
C. Considerations in Deciding Whether to Use Independent Contractors

28-84 California Legal Forms--Transaction Guide §§ 84.43-84.99

[Reserved]

§§ 84.43[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 84 INDEPENDENT CONTRACTORS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

28-84 California Legal Forms--Transaction Guide § 84.100

§ 84.100 Facts

1. Name, address, and telephone number of person for whom work is to be performed, and, if different, address of principal place of business.

2. If person for whom work is to be performed is not individual, name, title, and office address of person authorized to enter into contracts on its behalf.

3. Nature of business activities of person for whom work is to be performed.

4. Name, address, and telephone number of person who is to be engaged as independent contractor under written agreement.

5. General type of work to be performed by independent contractor.

6. Complete description of each task to be performed by independent contractor, including:

    a. All details involved in each task.

    b. Method to be used in performing each task.

    c. Means to be employed in performing each task.

    d. Which party has right to determine each of above.

7. Nature of any special skills possessed by independent contractor.

8. Type of occupation or business in which prospective independent contractor is normally engaged.

9. Nature and amount of compensation to be paid to independent contractor:

a. Whether compensation is to be paid per job or per hour.

b. Fringe benefits to which independent contractor may be entitled.

10. Nature and amount of compensation, including fringe benefits, paid by person engaging independent contractor to employees performing same or similar work.

11. Types of employee benefit plans offered by person engaging independent contractor to employees, and requirements for participation; for example:

a. Medical and dental plans.

b. Life insurance.

c. Pension or profit-sharing plans.

d. Other forms of deferred compensation.

12. Duration of contract.

13. Time and place where services are to be performed under contract.

14. Tools or instrumentalities to be furnished by person engaging independent contractor.

15. Uniqueness of independent contractor's services.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsIndependent Contractors

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 84 INDEPENDENT CONTRACTORS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

28-84 California Legal Forms--Transaction Guide § 84.101

§ 84.101 Documents

1. Previous employment contracts or other contracts between parties.

2. Contracts between independent contractor and other parties for whom contractor has performed same or similar work.

3. Contracts between person engaging independent contractor's services and other independent contractors engaged in same or similar work.

4. Contracts between person engaging independent contractor's services and employees engaged in same or similar work.

5. Written benefit plans offered by person engaging independent contractor's services covering employees engaged in same or similar work.

6. Correspondence between parties concerning contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsIndependent Contractors

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 84 INDEPENDENT CONTRACTORS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

28-84 California Legal Forms--Transaction Guide §§ 84.102-84.109

[Reserved]

§§ 84.102[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 84 INDEPENDENT CONTRACTORS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

28-84 California Legal Forms--Transaction Guide § 84.110

§ 84.110 Tests for Determining Independent Contractor or Employee Status

[1] California Law

NOTE:

The following factors are considered by California courts in determining whether a person is an independent contractor or an employee. The amount of control that the person for whom the work is performed may exercise over the manner and means of accomplishing the result is considered the determinative factor. In evaluating this factor, courts consider whether the person for whom the work is performed directs the actions of the person performing the work, in which case there is an employment relationship, or whether the details of accomplishing the work are left to the independent judgment of the person performing the work, in which case there is a contract relationship. The other factors are secondary and are not by themselves determinative [*Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 950, 88 Cal. Rptr. 175, 471 P.2d 975]* . On request, the Employment Development Department (EDD) will perform an audit of an actual working relationship to determine if a particular worker is an employee or independent contractor [***see*** *§ 84.210* (EDD Form DE 1870)].

1. Does person for whom work is performed dictate which tasks must be performed to accomplish result and how each task should be done, or is this left to judgment of person performing work?

NOTE:

The primary factor that establishes one as an independent contractor is that the person for whom services are rendered has no right of control over the manner and means of accomplishing the result [*Green v. Soule (1904) 145 Cal. 96, 99, 78 P. 337* ; ***see*** *Lab. Code § 3353* ("independent contractor" defined)].

2. Is person performing work engaged in distinct occupation or business?

NOTE:

If the person performing the work is engaged in a distinct occupation or business, this is a factor indicating that he or she is an independent contractor [***see*** *Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686]* .

3. Is specific type of work in that locality usually done by independent contractor or employee?

NOTE:

The custom in the community has some weight in determining whether a person engaged in a particular occupation is an independent contractor or an employee [*Isenberg v. California Emp. Stab. Com. (1947) 30 Cal. 2d 34, 37, 180 P.2d 11]* .

4. How much skill is required?

NOTE:

The more skill that is required, the more likely the person is to be classified as an independent contractor [***see*** *S. G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 356-357, 256 Cal. Rptr. 543, 769 P.2d 399* ; ***see also*** Restatement (Second) of Agency, § 220, Comment i].

5. Will person engaging services or person performing work supply tools, instrumentalities, and place of work?

NOTE:

The fact that the person performing the work supplies the tools is some evidence that he or she is an independent contractor. If, on the other hand, the person for whom the work is performed supplies the tools, the implication is that the relationship is one of employer and employee [Restatement (Second) of Agency, § 220, Comment k].

6. For how long will person's services be engaged?

NOTE:

If the person's services are engaged for a long period of time with regular hours, this indicates that he or she is an employee [*Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 949, 88 Cal. Rptr. 175, 471 P.2d 975* ; ***see*** Restatement (Second) of Agency, § 220, Comment j].

7. Will payment be by job or by time period?

NOTE:

If payment is by job, the implication is that the relationship is one of independent contract. If payment is by the hour, the implication is that the relationship is one of employment [*Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 949, 88 Cal. Rptr. 175, 471 P.2d 975* ; ***see*** Restatement (Second) of Agency, § 220, Comment j].

8. Is work part of regular business of person engaging services?

NOTE:

If the work is part of the regular business of the person for whom the work is performed, this implies that the person doing the work is an employee [*Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 949, 88 Cal. Rptr. 175, 471 P.2d 975* ; ***see***

Restatement (Second) of Agency, § 220, Comment h].

9. Is person engaging services in business?

NOTE:

If the person engaging the services of the other is in business, the implication is that the relationship is one of employer-employee [*Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 950, 88 Cal. Rptr. 175, 471 P.2d 975* ; ***see*** Restatement (Second) of Agency, § 220(2)(j)].

10. Is person performing work engaged by one or several persons?

NOTE:

If an individual performs the same type of work for numerous persons, the implication is that he or she is an independent contractor [Yamaoka v. Diemer (1950) 15 Cal. Comp. Cases 77, 77] . Devoting one's full time to one person points towards an employer-employee relationship [*Brown v. Industrial Acci. Com. (1917) 174 Cal. 457, 461, 163 P. 664]* .

11. Is work to be performed in specific area or over fixed route?

NOTE:

If work is to be performed in a specific area or over a fixed route, this implies that the person performing the work is an employee [Restatement (Second) of Agency, § 220, Comment h].

12. May work be delegated?

NOTE:

An agreement between the parties that the work cannot be delegated indicates an employer-employee relationship [Restatement (Second) of Agency, § 220, Comment h].

13. May services be terminated at will or only under certain specified conditions?

NOTE:

The right of the person for whom services are performed to discharge at will without cause is strong evidence in support of an employment relationship [*Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 954, 88 Cal. Rptr. 175, 471 P.2d 975]* .

14. Will person engaging services withhold taxes from compensation, obtain workers' compensation insurance, or contribute to unemployment fund?

NOTE:

Whether the person for whom the services are performed has deducted withholding taxes, obtained workers' compensation insurance [***see*** Westerfield v. Industrial Acc. Comm. (1940) 5 Cal. Comp. Cases 205, 206] , or paid unemployment insurance taxes [***see*** *Mission Ins. Co. v. Workers' Comp. Appeals Bd. (1981) 123 Cal. App. 3d 211, 225, 176 Cal. Rptr. 439]* is relevant to determining the status of the person performing the work [***see*** *§ 84.16*].

15. Do parties believe they are creating relationship of employer-employee or of principal-independent contractor?

NOTE:

The belief of the parties about whether the person performing the work is an independent contractor or an employee is relevant to the determination, but is not conclusive [***see*** *Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 954, 88 Cal. Rptr. 175, 471 P.2d 975* ; ***see also*** Restatement (Second) of Agency, § 220, Comment m].

[2] Federal Law

NOTE:

As under California law, the key federal factors in determining a worker's status are (1) whether the employer has the right to control and direct the individual performing the services, and (2) whether the employer has the right to discharge the worker [***see*** *Treas. Reg. § 31.3121(d)-1(c)(2)*]. The IRS has identified 20 factors that help indicate whether sufficient control is present to establish an employment relationship. The relative importance of each factor will vary depending on the particular occupation and the factual context [*Rev. Rul. 87-41, 1987-1 C.B. 296*].

Positive responses to Paragraphs 1 through 14 and 19 tend to indicate that an employment relationship exists. Positive responses to Paragraphs 15 through 18 and 20 tend to indicate that an independent contractor relationship exists [***see*** *Rev. Rul. 87-41, 1987-1 C.B. 296*]. On request, the IRS will perform an evaluation of whether a particular worker is an employee or independent contractor [***see*** *§ 84.211* (IRS Form SS-8)].

1. Is worker required to comply with others' instructions about when, where, and how to work?

NOTE:

A worker who is required to comply with others' instructions is ordinarily an employee. This control factor is present if the person for whom the services are performed has the right to require compliance with instructions [*Rev. Rul. 87-41, 1987-1 C.B. 296, 298]* .

2. Is worker required to be trained?

NOTE:

A worker who is trained by working with a more experienced employee, by correspondence, by attending meetings, or other methods is ordinarily an employee [*Rev. Rul. 87-41, 1987-1 C.B. 296, 298]* .

3. Are worker's services integrated into business operation?

NOTE:

A worker whose services are integrated into the business operation is ordinarily an employee. If the success of the business depends on the performance of certain services, the workers who perform those services are necessarily subject to control by the owner of the business [*Rev. Rul. 87-41, 1987-1 C.B. 296, 298]* .

4. Must worker's services be rendered personally by worker?

NOTE:

If the worker's services must be rendered personally, the person for whom services are performed is interested in the methods used as well as the results, indicating a high degree of control [*Rev. Rul. 87-41, 1987-1 C.B. 296, 298]* .

5. Does person for whom services are performed hire, supervise, and pay assistants?

NOTE:

If the person for whom services are performed hires, supervises, and pays assistants, this shows control over employees. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract in which the worker agrees to provide materials and labor, and in which the worker is responsible only for a particular result, this indicates independent contractor status [*Rev. Rul. 87-41, 1987-1 C.B. 296, 298]* .

6. Does continuing relationship exist between worker and person for whom services are performed?

NOTE:

A continuing relationship indicates an employment relationship, even if work is performed at frequent, irregular intervals [*Rev. Rul. 87-41, 1987-1 C.B. 296, 298]* .

7. Are worker's hours set by person for whom services are performed?

NOTE:

Fixed hours normally indicate an employment relationship because of the high degree of control [*Rev. Rul. 87-41, 1987-1 C.B. 296, 298]* .

8. Must worker devote substantially full time to business?

NOTE:

A worker who must devote substantially full time to a business is likely to be an employee. An independent contractor is usually free to work when and for whom he or she chooses [*Rev. Rul. 87-41, 1987-1 C.B. 296, 299]* .

9. Must work be performed on premises of person for whom services are performed?

NOTE:

If the work must be performed on the premises, that shows control, indicating an employment relationship. Work done off the premises indicates freedom from control, although the importance of this factor depends on the nature of the services performed [*Rev. Rul. 87-41, 1987-1 C.B. 296, 299]* .

10. Must worker perform work in particular order or sequence?

NOTE:

If the work must be performed in a particular order or sequence, that shows that the worker is not free to follow his or her own pattern of work, and is therefore an employee [*Rev. Rul. 87-41, 1987-1 C.B. 296*].

11. Must worker submit oral or written reports?

NOTE:

A requirement that a worker submit regular or written reports to the person for whom services are performed indicates a degree of control [*Rev. Rul. 87-41, 1987-1 C.B. 296, 299]* .

12. Is worker is paid on periodic basis, such as by hour, week, or month?

NOTE:

Payment by the hour, week, or month tends to show an employment relationship, as long as this payment method is not simply a convenient way of paying a lump sum agreed to be the total cost of the job. Payment made by the job or on a straight commission indicates that the worker is an independent contractor [*Rev. Rul. 87-41, 1987-1 C.B. 296, 299]* .

13. Does person for whom services are performed normally pay worker's business and travel expenses?

NOTE:

If the person for whom services are performed pays for business and travel expenses, the worker is ordinarily an employee [*Rev. Rul. 87-41, 1987-1 C.B. 296, 299]* .

14. Does person for whom services are performed furnish worker's tools?

NOTE:

The furnishing of tools, materials, and other equipment by the person for whom services are performed tends to indicate that the worker is an employee [*Rev. Rul. 87-41, 1987-1 C.B. 296, 299]* .

15. Does worker invest in facilities used to perform services?

NOTE:

Investment by the worker in facilities that are not normally maintained by employees, such as building rental payments, indicates that the worker is an independent contractor [*Rev. Rul. 87-41, 1987-1 C.B. 296, 299]* .

16. Can worker realize profit or loss as result of performing services?

NOTE:

A worker who can realize a profit or suffer a loss as a result of his or her services is generally an independent contractor. Risk of economic loss due to significant investments or a bona fide liability for expenses indicates the worker is an independent contractor [*Rev. Rul. 87-41, 1987-1 C.B. 296, 299]* .

17. Can worker perform services for more than one person or firm at same time?

NOTE:

If a worker performs services for multiple persons or firms at the same time, he or she is likely to be an independent contractor. However, a worker who performs services for more than one person may be an employee of each person, especially when the persons are part of the same service arrangement [*Rev. Rul. 87-41, 1987-1 C.B. 296, 299]* .

18. Can worker make his or her services available to general public?

NOTE:

A worker who makes his or her services available to the general public on a regular and consistent basis is generally an independent contractor [*Rev. Rul. 87-41, 1987-1 C.B. 296, 299]* .

19. Does person for whom services are performed have right to discharge worker?

NOTE:

The right of the person for whom services are performed to discharge a worker is strong evidence of an employment relationship. An employer exercises considerable control over the employee by the threat of dismissal, causing the employee to obey the employer. On the other hand, an independent contractor cannot be fired as long as he or she produces results that meet the contract specifications [*Rev. Rul. 87-41, 1987-1 C.B. 296, 299]* .

20. Does worker have right to end his or her relationship with person for whom services are performed?

NOTE:

If a worker has the right to end his or her relationship with the person for whom services are performed at any time without incurring liability, that tends to indicate an employment relationship [*Rev. Rul. 87-41, 1987-1 C.B. 296, 299]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsIndependent ContractorsLabor & Employment LawWage & Hour LawsCoverage & DefinitionsEmployees

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DIVISION VI: PERFORMANCE OF SERVICES
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PART III. TRANSACTION GUIDE
B. Preliminary Determinations

28-84 California Legal Forms--Transaction Guide § 84.111

§ 84.111 Structuring Work Relationship

1. Do parties contemplate that person performing services will be classified as independent contractor or employee [*see § 84.110*]?

2. Would it be more advantageous to person procuring services to have person performing services classified as independent contractor or employee?

a. Advantages of independent contractors [*see § 84.40*]:

(1) Person engaging services of independent contractor is not required to pay unemployment insurance taxes [*see I.R.C. § 3306(c), (i)*; *Unemp. Ins. Code §§ 135, 675, 976, 2602(a)*].

(2) Person engaging services of independent contractor need not withhold taxes from independent contractor's compensation [*see I.R.C. §§ 3102, 3401(a)*; *Unemp. Ins. Code §§ 13020, 13005, 13009*].

(3) Person engaging services of independent contractor is not required to pay Social Security (FICA) taxes [*see I.R.C. § 3111*].

(4) Person engaging services of independent contractor need not secure workers' compensation [*see Lab. Code § 3700*].

(5) Person engaging services of independent contractor generally is not liable for independent contractor's torts under respondeat superior [*see Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 250-252, 66 Cal. Rptr. 20, 437 P.2d 508* ; *see also § 84.15[4]*].

(6) Services may be terminated for reasons specified in contract [*see Mountain Meadow Creameries v. Industrial Acci. Com. (1938) 25 Cal. App. 2d 123, 127, 76 P.2d 724]* .

(7) Person engaging services of independent contractor need not furnish tools, instrumentalities, or work place.

b. Disadvantages of independent contractors [*see § 84.41*]:

(1) Person engaging services of independent contractor may not control details of performing work [*Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686]* .

(2) Person engaging services of independent contractor may not easily monitor progress of work or ensure ahead of time that work will be completed on schedule.

(3) Person who discharges independent contractor for reasons other than those specified in contract commits breach of contract.

(4) Person who engages services of independent contractor is subject to tort liability for injuries to or death of independent contractor during course of contract.

(5) Person who engages services of independent contractor does not necessarily enjoy independent contractor's exclusive services.

(6) Person routinely engaging services of numerous independent contractors is not guaranteed continuity in quality of work.

3. If work relationship is structured as contemplated by parties, will it be possible to obtain the desired classification?

NOTE:

For lists of factors indicating whether the person performing services is likely to be classified as an independent contractor or an employee for federal or state purposes, see *Section 84.110*. On request, the IRS will perform an evaluation of whether a particular worker is an employee or independent contractor and give a ruling [***see** § 84.211* (IRS Form SS-8)]. This ruling can be requested before commencement of the relationship. For California purposes, no advance ruling procedure exists, but on request, the Employment Development Department (EDD) will evaluate an existing working relationship [***see** § 84.210* (EDD Form DE 1870)].

4. If independent contractor status is preferable, can any features of work relationship be modified to achieve independent contractor status:

NOTE:

In order to answer this question, the attorney must consider the circumstances surrounding the services to be rendered, as well as the various factors considered in classifying an individual as an independent contractor or an employee.

a. Reducing overall control over methods used to perform work.

b. Providing that person performing work will be responsible for delivering finished product meeting

stated specifications.

c. Providing that work will be performed at place of independent contractor's choosing, not at workplace of person procuring services.

NOTE:

If the independent contractor is required to pay for a workplace, supplies, or materials furnished by or obtained from the person for whom the services are to be performed, that fact may be regarded as indicative of an employer-employee relationship [*Smith v. Department of Employment (1976) 62 Cal. App. 3d 206, 212, 132 Cal. Rptr. 874]* .

d. Providing that person performing work will supply his or her own tools, materials, and equipment (for increased compensation, if necessary).

e. Providing that person performing work may hire employees and delegate duties as he or she sees fit.

f. Ensuring person procuring services does not have right to discharge worker at will.

5. If classification of worker is questionable, is it worth risks to person engaging services?

NOTE:

For a discussion of minimizing risks by having a classification audit performed, see Paragraph 3 NOTE, ***above.*** On audit, the issue is always whether a person treated by an employer as an independent contractor is in fact an employee and should be reclassified, never the reverse. For discussion of the consequences of reclassification, see *Sections 84.16* and *84.30[5]*.

a. Liability for failing to obtain workers' compensation insurance [*see § 84.16[2]*; *see also* California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation* (Matthew Bender)].

b. Liability for failing to pay employment training and unemployment insurance taxes [*see §§ 84.16 [3], 84.30[1], [5]*; *see also* California Forms of Pleading and Practice, Ch. 564, *Unemployment Insurance* (Matthew Bender)].

c. Liability for failing to withhold income tax, disability tax, and Social Security tax from employees' wages [*see §§ 84.16[3], 84.30[1], [5]*].

d. Liability for negligence of person performing work under doctrine of respondeat superior [*see Civ. Code § 2338*; *see also § 84.15[4]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsIndependent Contractors

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DIVISION VI: PERFORMANCE OF SERVICES
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28-84 California Legal Forms--Transaction Guide §§ 84.112-84.119

[Reserved]

§§ 84.112[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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C. Drafting Guide

28-84 California Legal Forms--Transaction Guide § 84.120

§ 84.120 Drafting Guide to Agreements With Independent Contractors

NOTE:

This guide is intended as an aid for drafting an agreement between an independent contractor and the person for whom services will be performed [***see** § 84.200*]. However, it can also be used to draft an agreement between an independent contractor and an employment agency. For a form designed to be to used in this situation, see *Section 84.201*.

[1] Introductory Provisions

1. Specify date of agreement.

2. State name of each party to agreement.

3. State address of each party.

4. Identify parties.

NOTE:

The independent contractor agreement illustrated in Section 84.200 [2] identifies the parties as "Client" and "Independent Contractor." Use of the term "Employer" instead of "Client" is not recommended, as it creates the undesirable implication that an employer-employee relationship is intended.

5. Specify term of agreement [*see § 84.200[2],* P 1.01].

[2] Services to Be Rendered by Independent Contractor

1. Describe services to be rendered by independent contractor [*see § 84.200[2]*, P 2.01].

NOTE:
The description of the services to be rendered should specify the desired end product of the independent contractor's work, rather than the individual tasks to be performed. This is important in that a detailed description of the tasks to be performed could be construed as instructions to the person performing the work. Such a construction would defeat the parties' intention of creating an independent contractor relationship because control of the manner and means of performing the work would be deemed vested in the person for whom the work was performed [***see** § 84.11[3]*].

2. Specify that contractor will determine method, details, and means of performing services [*see § 84.200[2]*, P 2.02].

3. State clearly that contractor has status of independent contractor [*see § 84.200[2]*, P 2.03].

4. State that independent contractor is responsible for paying his or her own income tax [*see § 84.200[2]*, P 2.04].

5. If appropriate, include provision authorizing contractor to employ assistants to perform services [*see § 84.200[2]*, P 2.05].

[3] Compensation of Independent Contractor

1. Include provision specifying how independent contractor will be compensated [*see § 84.200[2]*, P 3.01].

a. Flat rate for services.

b. Hourly or per diem compensation.

NOTE:
Payment by the hour, week, or month generally indicates an employment relationship, unless this payment method is simply a convenient way of paying a lump sum agreed to as the total cost of a job. Payment made by the job or on a straight commission indicates that the worker is an independent contractor [*Rev. Rul. 87-41, 1987-1 C.B. 296, 299]* . For this reason, it is prudent to structure payment on other than on a periodic basis.

c. Retainer.

d. Payment by commission.

e. Contingent fee.

f. Percentage.

g. Royalty.

2. Include provision specifying manner of payment and dates on which compensation is due [*see § 84.200[2],* P 3.02].

3. If appropriate, include provision governing vacation, illness, and leaves of absence.

4. If appropriate, include provision governing reimbursement of expenses incurred by independent contractor [*see § 84.200[2],* P 3.03]:

NOTE:

If the person for whom services are performed pays for business and travel expenses, this shows a significant degree of control over costs, and the worker is likely to be classified as an employee [*Rev. Rul. 87-41, 1987-1 C.B. 296, 299]* . Therefore, the parties may wish to include payment for expenses simply as part of the total fee, and not separately itemized and reimbursed as expenses.

On the other hand, making the contractor responsible for payment of expenses places a certain amount of economic risk on the contractor. Risk of economic loss due to significant investments or a bona fide liability for expenses indicates the worker is an independent contractor [*Rev. Rul. 87-41, 1987-1 C.B. 296*].

a. Reimbursement for specified items and expenses.

b. Reimbursement for all items and expenses reasonably incurred.

c. Requirement that independent contractor furnish receipts or other documents substantiating expenses.

d. Requirement that person for whom services are being performed make specified sum available for business expenses.

[4] Obligations of Independent Contractor

1. Include provision governing time required to be spent by independent contractor in performance of duties, such as:

a. Requirement that minimum number of hours per week or month be devoted to work [*see § 84.200[2],* P 4.01].

b. Agreement that independent contractor need not devote entire work time to services required by agreement [*see § 84.200 [2],* P 4.01].

c. Specific hours during which work is to be performed [*see § 84.200[2],* P 4.03].

2. Specify that relationship between independent contractor and person for whom work is to be performed is nonexclusive, allowing independent contractor to work for others [*see § 84.200[2],* P 4.02].

3. Specify place where independent contractor will render services, either [*see § 84.200[2],* P 4.03]:

a. Place specified by person for whom services are to be performed; or

NOTE:

Requiring that the work be done on the premises of the person for whom the work is performed points toward an employer-employee relationship [***see*** *Rev. Rul. 87-41, 1987-1 C.B. 296, 299* ; ***see also*** *§ 84.11[8]*]. However, certain types of services, such as housepainting, can only be done on the premises of the person for whom the work is performed.

b. Any location selected by independent contractor.

4. Specify which party will furnish tools and instrumentalities to be used in performing work, either:

a. All tools and instrumentalities to be furnished by independent contractor [*see § 84.200[2]*, P 4.04];

b. All tools and instrumentalities to be furnished by party for whom services will be performed; or

NOTE:

Although it is not determinative, if the person for whom the work is performed supplies the tools and instrumentalities, this implies that the relationship is one of employer and employee [***see*** *Rev. Rul. 87-41, 1987-1 C.B. 296, 299* ; ***see also*** *§ 84.11[6]*].

c. Each party to furnish specifically itemized tools and other materials.

5. Include any other appropriate provisions governing manner of performance, such as:

a. Provision requiring adherence to general rules, regulations, and policies of person for whom services are to be performed.

b. Provision requiring submission of written reports to person for whom services are to be rendered.

NOTE:

Requiring a worker to submit regular or written reports to the person for whom services are performed indicates a degree of control, making it more likely the worker will be classified as an employee [*Rev. Rul. 87-41, 1987-1 C.B. 296, 299]* .

6. Include provision requiring independent contractor to procure workers' compensation coverage for contractor's employees and agents [*see § 84.200[2]*, P 4.05].

7. Include provision indemnifying person for whom services are to be rendered against losses caused by acts or omissions of independent contractor [*see § 84.200[2]*, P 4.06].

8. Include provision listing qualifications and skills of independent contractor [*see § 84.200[2]*, P 4.07].

9. Include provision indemnifying person for whom services are to be rendered against losses caused by independent contractor's false representations regarding qualifications and skills [*see § 84.200[2]*, P 4.08].

10. Include provision prohibiting independent contractor from assigning duties or obligations under agreement without prior written consent [*see § 84.200[2]*, P 4.09].

NOTE:

This type of provision may give the person for whom services are performed such a degree of control

that an employment relationship will be established.

11. If appropriate, include provision prohibiting independent contractor from competing with person for whom services are to be performed [*see* Ch. 85, *Employment Agreements*].

[5] Obligations of Person for Whom Services Are to Be Performed

1. Include provision requiring that person for whom services are to be performed cooperate with independent contractor [*see § 84.200 [2]*, P 5.01].

2. If appropriate, include provisions requiring that person for whom services are to be performed provide:

a. Workplace [*see § 84.200[2]*, P 5.02].

NOTE:
If the work is done on the premises of the person for whom the work is performed, this is a factor pointing toward an employer-employee relationship [***see*** *Rev. Rul. 87-41, 1987-1 C.B. 296, 299* ; ***see also*** *§ 84.11[8]*]. However, certain types of services, such as housepainting, can only be done on the premises of the person for whom the work is performed.

b. Any other specified items agreed on by the parties.

3. If desired, include provision prohibiting assignment of contract without independent contractor's consent [*see § 84.200[2]*, P 5.03].

[6] Termination of Agreement

1. Include provision specifying when agreement will terminate, such as:

a. Termination at end of specified term if not renewed before that time [*see § 84.200[2]*, P 6.01].

b. Termination on completion of all work called for by contract [*see § 84.200[2]*, P 6.01].

c. Termination by either party on written notice [*see § 84.200[2]*, P 6.01].

NOTE:
An independent contractor agreement can properly include an at-will clause giving the parties the right to terminate the agreement without cause, and such a clause does not by itself change the independent contractor relationship into an employer-employee relationship [*Varisco v. Gateway Sci. & Eng'g, Inc. (2008) 166 Cal. App. 4th 1099, 1107-1108, 83 Cal. Rptr. 3d 393* (worker was not controlled by hirer, and agreement provided mutual right to terminate, which was consistent with independent contractor relationship)].

2. Include provision for automatic termination of agreement on occurrence of specified events [*see § 84.200[2]*, P 6.02], such as:

a. Bankruptcy or insolvency of either party.

b. Sale of either party's business.

c. Death of either party.

d. Other events on which parties wish agreement to terminate automatically.

3. Include provisions giving parties right to terminate agreement for material breach of contract, such as [*see § 84.200[2]*, P 6.03]:

a. Failure to pay independent contractor compensation due.

b. Failure to complete services specified in agreement.

c. Independent contractor's material breach of any representation or agreement regarding qualifications and skills.

d. Material breach of any representation or agreement contained in agreement.

e. Other situation constituting material breach.

[7] Property Rights of Parties

1. If appropriate, include provision specifying rights of parties to copyrights, inventions, and patents:

a. Rights assigned by independent contractor to person for whom work is performed [*see § 84.200[2]*, P 7.01].

b. Ownership by person for whom work is performed [*see* Ch. 85, *Employment Agreements*].

NOTE:
Use of this type of provision is discouraged, as property created by the contractor for another person may be considered a "work made for hire" [***see*** *17 U.S.C. § 101* ("work made for hire" defined)]. A work made for hire, by definition, is created by an employee for an employer, except in limited enumerated circumstances [*17 U.S.C. §§ 101, 201(b)*; ***see*** *Community for Creative Non-Violence v. Reid, 490 U.S. 730, 741, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989)]* . Accordingly, if the agreement states or implies that a work made for hire has been created, the implication is that an employer-employee relationship exists.

c. Ownership by independent contractor [*see* ch. 85, *Employment Agreements*].

2. If appropriate, include provision governing ownership of confidential information, such as [*see § 84.200[2]*, P 7.02]:

a. Trade secrets.

b. Customer lists.

c. Other property.

NOTE:
For forms regarding ownership and use of trade secrets, customer lists, and similar property, see Chapter 85, ***Employment Agreements*** **.**

3. If appropriate, include provision prohibiting independent contractor from soliciting customers and employees of person for whom work is performed [*see § 84.200[2],* P 7.03].

[8] General Provisions

1. Include provision specifying manner of giving notice [*see § 84.200[2],* P 8.01].

2. State that contract contains entire agreement of parties [*see § 84.200[2],* P 8.02].

3. If desired, provide for modification of contract only by written agreement [*see § 84.200[2],* P 8.02].

4. Provide that agreement will be severable in event of partial invalidity [*see § 84.200[2],* P 8.03].

5. Specify manner of payment of funds due to deceased independent contractor [*see § 84.200[2],* P 8.04].

6. If desired, include provision for arbitration of disputes arising under agreement [*see § 84.200[2],* P 8.05].

7. If desired, include provision for liquidated damages [*see § 84.200[2],* P 8.06].

8. Include provision for award of attorneys' fees [*see § 84.200[2],* P 8.07].

9. Specify governing law [*see § 84.200[2],* P 8.08].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsIndependent Contractors

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 84 INDEPENDENT CONTRACTORS
PART III. TRANSACTION GUIDE
C. Drafting Guide

28-84 California Legal Forms--Transaction Guide §§ 84.121-84.199

[Reserved]

§§ 84.121[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 84 INDEPENDENT CONTRACTORS
PART IV. FORMS
A. Agreements for Independent Contractor Services

28-84 California Legal Forms--Transaction Guide § 84.200

§ 84.200 Agreement for Performance of Services by Independent Contractor

[1] Comment

[a] Use of Form

This form is a basic agreement between an independent contractor and the party for whom the independent contractor will perform specified services. It is intended as a general drafting aid and will require modification according to the particular circumstances and the intentions of the parties. To avoid characterizing the parties as "Employer" and "Employee," which could contribute to an undesirable finding of an employment relationship, this form uses the terms "Contractor" and "Client."

[b] Drafting Considerations

An attorney drafting an independent contractor agreement must exercise care that its terms establish as clearly as possible that the person performing the work is an independent contractor, not an employee. Due to the inconsistent manner in which courts and the IRS have weighed the various relevant factors [*see § 84.110*], an attorney drafting a "borderline" contract cannot be assured that the terminology of an independent contract will be upheld in the event of litigation [*see § 84.11[2]*].

[c] Control Over Performance of Work

The most important consideration in creating or preserving independent contractor status is to vest control of the manner and means of accomplishing the result in the person performing the work [*see Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686* ; *see also § 84.11[3]*]. The other factors weighed in determining whether an independent contract or an employer-employee relationship exists are considered secondary elements and are discussed in the legal background [*see §§ 84.11, 84.30[4]*].

Paragraph 2.02 of this form expressly vests control of the method, details, and means of performing the services in the independent contractor. Because the right to control is the key factor in creating independent contractor status, if

litigation or a tax audit should occur, this type of provision is helpful in demonstrating the parties' intention to create independent contractor status. Paragraph 2.05 is intended to reinforce this provision by providing that the contractor may employ assistants and giving the contractor sole control over their activities.

[d] Place Where Work Is to Be Performed

Paragraph 4.03 of this form provides that the contractor will perform the work on the premises of the person engaging his or her services, and Paragraph 5.02 requires that the person for whom the work is being performed will make work space available.

Performing work on the premises of the person for whom the services are rendered is a factor tending to show an employment relationship rather than an independent contract [*see § 84.11[8]*]. However, this factor alone is not determinative, and therefore does not necessarily defeat independent contractor status [*see California Emp. Stab. Com. v. Morris (1946) 28 Cal. 2d 812, 819-820, 172 P.2d 497* (real estate salespersons); *Walder v. Industrial Acci. Com. (1948) 85 Cal. App. 2d 473, 474-475, 193 P.2d 60* (carpenter); *Los Flores School Dist. v. Industrial Acci. Com. (1936) 13 Cal. App. 2d 180, 183-185, 56 P.2d 581* (painter)]. These provisions might be used when the nature of work or the convenience of the parties requires that the work be performed only on the premises of the person for whom the work is performed, such as in a contract for the painting of a building. When the contractor will perform the work in his or her own workplace, the contract should contain a provision to that effect.

[e] Other Factors in Determining Status

For further discussion of the factors that are considered when determining whether a particular worker is an employee or an independent contractor, see *Sections 84.11* and *84.30[4]*. For a checklist of these factors, see *Section 84.110*.

[f] Ownership of Intellectual Property

This form provides that the independent contractor will assign the rights to any new developments, copyrights, patents, or other intellectual property to the person for whom services are performed [*see* [2], P 7.01, *below*]. The form intentionally avoids providing that the contractor is creating a "work made for hire" [*see 17 U.S.C. § 101* ("work made for hire" defined)]. A work made for hire, by definition, is created by an employee for an employer, except in limited enumerated circumstances [*17 U.S.C. §§ 101, 201(b)*; *see Community for Creative Non-Violence v. Reid, 490 U.S. 730, 741, 109 S. Ct. 2166, 104 L. Ed. 2d 811 (1989)]* . Accordingly, if the agreement states or implies that a work made for hire has been created, the implication is that an undesirable employer-employee relationship exists. For this reason, it is advisable to avoid use of the term "work made for hire," and provide either that the independent contractor will assign his or her rights to the person for whom services are performed (as in this form), or that the independent contractor will retain all or specified proprietary rights [*see* Ch. 85, *Employment Agreements*].

For further discussion of copyright considerations when drafting an agreement with an independent contractor, see *Section 84.32*.

[2] FORM

Agreement for Performance of Services by Independent Contractor

CONTRACT FOR SERVICES

This Agreement is made on _____[*date*], between [*name of person or firm engaging independent contractor's services*] ("Client"), with a principal place of business at _____[*address*], and [*name of independent contractor*] ("Contractor"), an independent contractor, with a principal place of business at _____[*address*].

ARTICLE 1. TERM OF CONTRACT

1.01. This agreement will become effective _____[on the date stated above *or* on _____ (*date*)], and will continue in effect _____[until the services provided for in this agreement have been performed *or* until terminated as provided in this agreement *or* for a period of _____ (*specify*) _____ (months *or* years) unless terminated earlier].

ARTICLE 2. SERVICES TO BE PERFORMED BY CONTRACTOR

Specific Services

[*Choose one of the following:*]

2.01. Contractor agrees to [*describe in detail the services to be performed*].

[*OR*]

2.01. Contractor agrees to perform the services specified in the "Description of Services" attached to this agreement and incorporated into this agreement by reference.

[*Continue with the following:*]

Method of Performing Services

2.02. Contractor will determine the method, details, and means of performing the above-described services.

Status of Contractor

2.03. Contractor enters into this agreement, and will remain throughout the term of the agreement, as an independent contractor. Contractor agrees that _____[he *or* she] is not and will not become an employee, partner, agent, or principal of Client while this agreement is in effect. Contractor agrees _____[he *or* she] is not entitled to the rights or benefits afforded to Client's employees, including disability or unemployment insurance, workers' compensation, medical insurance, sick leave, or any other employment benefit. Contractor is responsible for providing, at _____[his *or* her] own expense, disability, unemployment, and other insurance, workers' compensation, training, permits, and licenses for [himself *or* herself] and for _____[his *or* her] employees and subcontractors.

Payment of Income Taxes

2.04. Contractor is responsible for paying when due all income taxes, including estimated taxes, incurred as a result of the compensation paid by Client to Contractor for services under this agreement. On request, Contractor will provide Client with proof of timely payment. Contractor agrees to indemnify Client for any claims, costs, losses, fees, penalties, interest, or damages suffered by Client resulting from Contractor's failure to comply with this provision.

Use of Employees or Subcontractors

2.05. Contractor may, at Contractor's own expense, use any employees or subcontractors as Contractor deems necessary to perform the services required of Contractor by this agreement. Client may not control, direct, or supervise Contractor's employees or subcontractors in the performance of those services.

ARTICLE 3. COMPENSATION

[*Choose one of the following:*]

Flat Rate

3.01. In consideration for the services to be performed by Contractor, Client agrees to pay Contractor $ _____.

[*OR*]

3.01. Client agrees to pay Contractor according to the schedule of payments in the "Description of Services" attached to this agreement and incorporated into this agreement by reference.

[*OR*]

Hourly or Per Diem Compensation With Maximum and Minimum Stated

3.01. In consideration for the services to be performed by Contractor, Client agrees to pay to Contractor [*e.g.*, $70 per hour *or* $500 per day]. In no event will the compensation paid to Contractor be less than $ _____ per month or more than $ _____ per month.

[*OR*]

Retainer

3.01. Client agrees to pay Contractor for the services set forth in Article 2, above, the sum of $ _____ as a retainer at the time of execution of this agreement. In addition to the retainer, Client agrees to pay monthly all reasonable and necessary expenses incurred by Contractor on behalf of Client in connection with the services described in Article 2 of this agreement.

[*Continue with the following:*]

Date for Payment of Compensation

[*For a flat rate contract, include the following provision:*]

3.02. For services rendered under this agreement, Client agrees to pay Contractor the sum set forth in Paragraph 3.01 of this agreement _____[*e.g.*, on completion of work *or* at the rate of $1,000 per month, payable on the first day of each month, until the entire sum has been paid *or*$ _____ on the commencement of this agreement and the balance in monthly installments of $ _____, payable on the first day of each month].

[*OR*]

[*For an hourly or per diem contract, include the following provision:*]

3.02. Contractor will submit to Client a statement of services rendered at the end of each month. Client agrees to pay the amount due to Contractor for services within 15 days of receipt of the statement.

[*Continue with the following:*]

Payment of Expenses

[*Use if contractor will pay for expenses:*]

3.03. Contractor will be responsible for all expenses incurred in performing services under this agreement.

[*OR*]

[*Use if client will reimburse contractor for expenses:*]

3.03. Client will reimburse Contractor for all reasonable expenses incurred in performing services under this agreement. The term "expenses" includes [*e.g.*, costs of travel, telephone bills, supplies, and the services of subcontractors]. Contractor will provide Client with receipts for all expenses [*add if applicable:* in excess of $25].

[*Continue with the following:*]

ARTICLE 4. OBLIGATIONS OF CONTRACTOR

Minimum Amount of Service

4.01. Contractor agrees to devote a minimum of _____ hours per month to performing the above-described services.

Non-Exclusive Relationship

4.02. Contractor may represent, perform services for, and contract with as many additional clients, persons, or companies as Contractor, in _____[his *or* her] sole discretion, sees fit.

Time and Place of Performing Work

[*Use if contractor may choose place of work:*]

4.03. Contractor may perform the services under this agreement at any suitable time and location _____[he *or* she] chooses.

[*OR*]

[*Use if nature of work requires that contractor work at client's premises:*]

4.03. Contractor will perform the services under this agreement on Client's premises [*specify time, e.g.,* during Client's regular business hours *or* between the hours of 9:00 A.M. and 5:00 P.M each weekday]. The services must be performed on Client's premises and during these hours because [*specify, e.g.,* the painting of Client's house can only be performed during daylight hours when Client is not at home].

[*Continue with the following:*]

Tools, Materials, and Equipment

4.04. Contractor will supply all tools, materials, and equipment required to perform the services under this agreement.

Workers' Compensation

4.05. Contractor agrees to provide workers' compensation insurance for Contractor's employees and agents and agrees to hold harmless and indemnify Client for any and all claims arising out of any injury, disability, or death of any of Contractor's employees or agents.

[*Choose one of the following:*]

Liability Insurance

4.06. Contractor agrees to maintain a policy of insurance in the minimum amount of $ _____ to cover any negligent acts or omissions committed by Contractor or Contractor's employees or agents during the performance of any duties under this agreement. Contractor further agrees to indemnify and hold Client free and harmless from any and all claims arising from any such negligent act or omission.

[*OR*]

Limited Liability

4.06. Contractor will not be liable to Client, or to anyone who may claim any right due to a relationship with Client, for any acts or omissions in the performance of services under the terms of this agreement or on the part of the employees or agents of Contractor unless those acts or omissions are due to willful misconduct. Client will indemnify and hold Contractor free and harmless from any obligations, costs, claims, judgments, attorneys' fees, and attachments arising from, growing out of, or in any way connected with the services rendered to Client under the terms of this agreement, unless Contractor is judged by a court of competent jurisdiction to be guilty of willful misconduct.

[*Continue with the following:*]

Contractor's Qualifications

4.07. Contractor represents that _____[he *or* she] has the qualifications and skills necessary to perform the services under this agreement in a competent, professional manner, without the advice or direction of Client. This means Contractor is able to fulfill the requirements of this agreement. Failure to perform all the services required under this agreement constitutes a material breach of the agreement. Contractor has complete and sole discretion for the manner in which the work under this agreement will be performed.

Indemnity

4.08. Contractor agrees to indemnify, defend, and hold Client free and harmless from all claims, demands, losses, costs, expenses, obligations, liabilities, damages, recoveries, and deficiencies, including interest, penalties, attorneys' fees, and costs, that Client may incur as a result of a breach by Contractor of any representation or agreement contained in this agreement.

Assignment

4.09. Neither this agreement nor any duties or obligations under this agreement may be assigned by Contractor without the prior written consent of Client.

ARTICLE 5. OBLIGATIONS OF CLIENT

Cooperation of Client

5.01. Client agrees to comply with all reasonable requests of Contractor [*add if applicable:* and provide access to all documents reasonably] necessary to the performance of Contractor's duties under this agreement.

[*Use if contractor will work at client's premises:*]

Place of Work

5.02. Client agrees to furnish space on Client's premises for use by Contractor while performing the above-described services.

[*Continue with the following:*]

Assignment

5.03. Neither this agreement nor any duties or obligations under this agreement may be assigned by Client without the prior written consent of Contractor.

ARTICLE 6. TERMINATION OF AGREEMENT

[*Choose one of the following:*]

Expiration of Agreement

6.01. Unless otherwise terminated as provided in this agreement, this agreement will continue in effect [*specify length corresponding with that set forth in P 1.01, e.g.,* for a period of _____ (*specify*) _____ (months *or* years) *or* until the services provided for in this agreement have been fully and completely performed] and shall then terminate unless renewed in writing by both parties.

[*OR*]

Termination on Notice

6.01. Notwithstanding any other provision of this agreement, either party may terminate this agreement at any time by giving [*specify reasonable notice based on type of services to be rendered by contractor, e.g.,* 30 days'] written notice to the other party. Unless otherwise terminated as provided in this agreement, this agreement will continue in force [*specify length corresponding with that set forth in P 1.01, e.g.,* for a period of _____ (*specify*) _____ (months *or* years) *or* until the services provided for in this agreement have been fully and completely performed].

[*Continue with the following:*]

Termination on Occurrence of Stated Events

6.02. This agreement will terminate automatically on the occurrence of any of the following events:

(a) Bankruptcy or insolvency of either party.

(b) Sale of the business of either party.

(c) Death of either party.

(d)

_____ [*specify other event on which agreement will terminate, e.g.,* Assignment of this

agreement by either party without the consent of the other party].

Termination for Default

6.03. If either party defaults in the performance of this agreement or materially breaches any of its provisions, the non-breaching party may terminate this agreement by giving written notification to the breaching party. Termination will take effect immediately on receipt of notice by the breaching party or five days after mailing of notice, whichever occurs first. For the purposes of this paragraph, material breach of this agreement includes, but is not limited to, the following:

(a) Client's failure to pay Contractor any compensation due within 30 days after written demand for payment.

(b) Contractor's failure to complete the services specified in _____ [Paragraph 2.01, above *or* the Description of Services].

(c) Contractor's material breach of any representation or agreement contained in Paragraph 4.07.

(d) Client's material breach of any representation or agreement contained in this Agreement.

(e) _____ [*specify other situation constituting material breach*].

ARTICLE 7. PROPRIETARY RIGHTS

New Developments

7.01. Contractor agrees that all designs, plans, reports, specifications, drawings, inventions, processes, and other information or items produced by Contractor while performing services under this agreement will be assigned to Client as the sole and exclusive property of Client and Client's assigns, nominees, and successors, as will any copyrights, patents, or trademarks obtained by Contractor while performing services under this agreement. On request and at Client's expense, Contractor agrees to help Client obtain patents and copyrights for any new developments. This includes providing data, plans, specifications, descriptions, documentation, and other information, as well as assisting Client in completing any required application or registration.

Confidential Information

7.02. Any written, printed, graphic, or electronically or magnetically recorded information furnished by Client for Contractor's use are the sole property of Client. This proprietary information includes, but is not limited to, customer requirements, customer lists, marketing information, and information concerning Client's employees, products, services, prices, operations, and subsidiaries.

Contractor will keep this confidential information in the strictest confidence, and will not disclose it by any means to any person except with Client's approval, and only to the extent necessary to perform the services under this agreement. This prohibition also applies to Contractor's employees, agents, and subcontractors. On termination of this agreement, Contractor will return any confidential information in _____[his *or* her] possession to Client.

Non-Solicitation

7.03. For a period of [*specify, e.g.*, two years] following the termination of this agreement, Contractor will not do either of the following: (1) call on, solicit, or take away any of Client's customers or potential customers Contractor became aware of as a result of performing services under this agreement; or (2) solicit or hire away any of Client's employees or contractors Contractor became aware of as a result of performing services under this agreement.

ARTICLE 8. GENERAL PROVISIONS

Notices

8.01. Any notices required to be given under this agreement by either party to the other may be effected by personal delivery in writing or by mail, registered or certified, postage prepaid with return receipt requested. Mailed notices must be addressed to the parties at the addresses appearing in the introductory paragraph of this agreement, but each party may change the address by giving written notice in accordance with this paragraph. Notices delivered personally will be deemed communicated as of actual receipt; mailed notices will be deemed communicated as of [*e.g.*, the day of receipt or the fifth day after mailing, whichever occurs first].

Entire Agreement of the Parties

8.02. This agreement supersedes any and all agreements, either oral or written, between the parties with respect to the rendering of services by Contractor for Client and contains all of the representations, covenants, and agreements between the parties with respect to the rendering of those services. Each party to this agreement acknowledges that no representations, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not contained in this agreement, and that no other agreement, statement, or promise not contained in this agreement will be valid or binding. Any modification of this agreement will be effective only if it is in a writing signed by the party to be charged.

Partial Invalidity

8.03. If any provision of this agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions will continue in full force and effect without being impaired or invalidated in any way.

Payment of Moneys Due Deceased Contractor

8.04. If Contractor dies before completing the services under this agreement, any moneys due Contractor from Client under this agreement as of the date of death will be paid to the Contractor's executors, administrators, heirs, personal representatives, successors, and assigns.

Arbitration

[*Choose one of the following:*]

8.05. Any controversy between the parties to this agreement involving the construction or application of any of the terms, covenants, or conditions of this agreement will, on the written request of one party served on the other, be

submitted to arbitration. The arbitration will comply with and be governed by the provisions of the California Arbitration Act, *Sections 1280 through 1294.2 of the California Code of Civil Procedure.*

The parties will each appoint one person to hear and determine the dispute. If those two persons are unable to agree, then they will select a third impartial arbitrator whose decision will be final and conclusive on both parties. The cost of arbitration will be borne in a proportion the arbitrators determine.

[*OR*]

8.05. Any controversy or claim arising out of or relating to this agreement or the breach of the agreement will be settled by arbitration in accordance with the rules of the American Arbitration Association. Judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction over the award.

[*Continue with the following:*]

[*Use to provide for liquidated damages:*]

Liquidated Damages

8.06. The parties agree that in the event of a breach of this agreement by either party, it would be impracticable or extremely difficult to fix the actual damage and, therefore, the breaching party will pay to the non-breaching party as liquidated damages and not as a penalty the sum of $ _____, which represents a reasonable compensation for the loss incurred because of the breach.

[*Continue with the following:*]

Attorneys' Fees

8.07. If any [legal action *or specify more limited provision, e.g.,* legal action based in contract law], including an action for declaratory relief, is brought to enforce or interpret the provisions of this agreement, the prevailing party will be entitled to reasonable attorneys' fees, which may be set by the court in the same action or in a separate action brought for that purpose, in addition to any other relief to which that party may be entitled.

Governing Law

8.08. This agreement will be governed by and construed in accordance with the laws of the State of California.

Executed at _____[*city*], California, on _____[*date*].

CLIENT

[*typed name of client*]
By: _____ [*signature*]
[*typed name and title*]

CONTRACTOR

_____ [*signature of independent contractor*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsIndependent Contractors

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 84 INDEPENDENT CONTRACTORS
PART IV. FORMS
A. Agreements for Independent Contractor Services

28-84 California Legal Forms--Transaction Guide § 84.201

§ 84.201 Contract Between Agency-General Contractor and Subcontractor

[1] Comment

[a] Use of Form

This form is a contract between an agency acting as a general contractor, and an independent contractor acting as a subcontractor, to perform services for a third party. The agency will then contract with the third party to provide the services, and the subcontractor will perform the work. This form is illustrative only, and individual provisions may be modified, omitted, or added to reflect the particular circumstances and the intentions of the parties. This form should not be used if the agency charges the subcontractor a fee [*see Civ. Code § 1812.504(a)*; *see also* [b], *below*].

[b] Employment Agency Contracts

An employment agency that charges a subcontractor/jobseeker a fee or other consideration, directly or indirectly, for procuring work must comply with the applicable provisions of the Employment Agency, Employment Counseling, and Job Listing Services Act [*Civ. Code §§ 1812.501(a), 1812.504(a)*; *see Civ. Code §§ 1812.500-1812.533*]. Any person who provides babysitting or domestic employment for others must also comply with the Act [*see Civ. Code § 1812.502(a)*]. The Act requires that the agency give a written contract containing specified disclosures to each jobseeker [*Civ. Code § 1812.504(a)*].

However, if the employment fee is paid by a third party (the employer) and not the subcontractor/jobseeker, the Act does not apply [*see Civ. Code § 1812.501(a)*]. Because this form does not comply with the requirements of the Employment Agency, Employment Counseling, and Job Listing Services Act, it should be used only by an agency that charges fees exclusively of the party for whom work will be performed. It should not be used by an agency that charges the subcontractor/jobseeker a fee, or an agency that provides babysitting or domestic employment for others [*see Civ. Code §§ 1812.501(a), 1812.502(a)*]. For further discussion and a form of contract that meets the requirements of the Employment Agency, Employment Counseling, and Job Listing Services Act, see Chapter 92, *Service Contracts* . If the independent contractor will contract directly with the party for whom the services are to be performed, use the form illustrated in Section 84.200 instead of this form.

[c] Drafting Considerations

An attorney drafting a contract between an agency and a subcontractor must exercise caution to ensure that the terms of the agreement do not characterize the subcontractor as an employee of the person for whom services will be rendered. To avoid characterizing the parties as "Employer" and "Employee," which could contribute to an undesirable finding of an employment relationship, this form uses the terms "Agency" and "Subcontractor." Other terms can be used, as long as they do not indicate an employment relationship.

The principal drafting requirement to help avoid reclassification of an independent contractor as an employee is to vest control of the manner and method of performing the work in the contractor [*see Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43, 168 P.2d 686* ; *see also § 84.11 [3]*]. The factors considered in determining whether an independent contract or an employer-employee relationship exists are discussed in *Sections 84.11 [1]* and *84.30[4]*.

[2] FORM

Contract Between Agency-General Contractor and Subcontractor

CONTRACT FOR SERVICES

This Agreement is made on _____[*date*], between _____[*name of agency*] ("Agency"), with a principal place of business at _____[*address*], and [*name of subcontractor*] ("Subcontractor"), an independent contractor, with a principal place of business at _____[*address*].

ARTICLE 1. TERM OF CONTRACT

1.01. This agreement will become effective _____[on the date stated above *or* on _____ (*date*)], and will continue in effect _____[until the services provided for in this agreement have been performed *or* until terminated as provided in this agreement *or* for a period of _____ (*specify*) _____ (months *or* years) unless terminated earlier].

ARTICLE 2. SERVICES TO BE PERFORMED BY SUBCONTRACTOR

Specific Services

[*Choose one of the following:*]

2.01. Subcontractor agrees to [*describe in detail the services to be performed*] [*add if applicable:* for _____ (*name of principal*)].

[*OR*]

2.01. Subcontractor agrees to perform the services specified in the "Description of Services" attached to this agreement and incorporated into this agreement by reference [*add if applicable:* for _____ (*name of principal*)].

[*Continue with the following:*]

Method of Performing Services

2.02. Subcontractor will determine the method, details, and means of performing the above-described services.

Status of Subcontractor

2.03. Subcontractor enters into this agreement, and will remain throughout the term of the agreement, as an independent contractor. Subcontractor agrees that _____[he *or* she] is not and will not become an employee, partner, agent, or principal of Agency while this agreement is in effect. Subcontractor agrees _____[he *or* she] is not entitled to the rights or benefits afforded to Agency's employees, including disability or unemployment insurance, workers' compensation, medical insurance, sick leave, or any other employment benefit. Subcontractor is responsible for providing, at _____[his *or* her] own expense, disability, unemployment, and other insurance, workers' compensation, training, permits, and licenses for [himself *or* herself] and for _____[his *or* her] employees and subcontractors.

Payment of Income Taxes

2.04. Subcontractor is responsible for paying when due all income taxes, including estimated taxes, incurred as a result of the compensation paid by Agency to Subcontractor for services under this agreement. On request, Subcontractor will provide Agency with proof of timely payment. Subcontractor agrees to indemnify Agency for any claims, costs, losses, fees, penalties, interest, or damages suffered by Agency resulting from Subcontractor's failure to comply with this provision.

Use of Employees or Subcontractors

2.05. Subcontractor may, at Subcontractor's own expense, use any employees or sub-subcontractors as Subcontractor deems necessary to perform the services required of Subcontractor by this agreement. Agency may not control, direct, or supervise Subcontractor's employees or sub-subcontractors in the performance of those services.

ARTICLE 3. COMPENSATION

[*Choose one of the following:*]

Flat Rate

3.01. In consideration for the services to be performed by Subcontractor, Agency agrees to pay Subcontractor $ _____.

[*OR*]

3.01. Agency agrees to pay Subcontractor according to the schedule of payments in the "Description of Services" attached to this agreement and incorporated into this agreement by reference.

[*OR*]

Hourly, Daily, or Monthly Compensation

3.01. In consideration for the services to be performed by Subcontractor, Agency agrees to pay to Subcontractor [*e.g.,* $70 per hour *or* $500 per day *or* $15,000 per month].

[*Continue with the following:*]

Date for Payment of Compensation

[*For a flat rate contract, include the following provision:*]

3.02. For services rendered under this agreement, Agency agrees to pay Subcontractor the sum set forth in Paragraph 3.01 of this agreement _____[*e.g.,* on completion of work *or* at the rate of $15,000 per month, payable on the first day of each month, until the entire sum has been paid *or*$ _____ on the commencement of this agreement and the balance in monthly installments of $ _____, payable on the first day of each month].

[*OR*]

[*For an hourly or per diem contract, include the following provision:*]

3.02. Subcontractor will submit to Agency a statement of services rendered at the end of each month. Agency agrees to pay the amount due to Subcontractor for services within 15 days of receipt of the statement.

[*Continue with the following:*]

Payment of Expenses

[*Use if subcontractor will pay for expenses:*]

3.03. Subcontractor will be responsible for all expenses incurred in performing services under this agreement.

[*OR*]

[*Use if agency will reimburse subcontractor for expenses:*]

3.03. Agency will reimburse Subcontractor for all reasonable expenses incurred in performing services under this agreement. The term "expenses" includes [*e.g.,* costs of travel, telephone bills, supplies, and the services of sub-subcontractors]. Subcontractor will provide Agency with receipts for all expenses [*add if applicable:* in excess of $25].

[*Continue with the following:*]

ARTICLE 4. OBLIGATIONS OF SUBCONTRACTOR

Minimum Amount of Service

4.01. Subcontractor agrees to devote a minimum of _____ hours per month to performing the above-described services.

Non-Exclusive Relationship

4.02. Subcontractor may represent, perform services for, and contract with as many additional agencies, clients, persons, or companies as Subcontractor, in _____[his *or* her] sole discretion, sees fit.

Time and Place of Performing Work

[*Use if subcontractor may choose place of work:*]

4.03. Subcontractor may perform the services under this agreement at any suitable time and location _____[he *or* she] chooses.

[*OR*]

[*Use if nature of work requires that subcontractor work at premises of agency's principal:*]

4.03. Subcontractor will perform the services under this agreement on premises of Agency's principal [*specify time, e.g,* during principal's regular business hours *or* between the hours of 9:00 A.M. and 5:00 P.M. each weekday], as specified in the contract between Agency and Agency's principal. The services must be performed on these premises and during these hours because [*specify, e.g.,* the painting of the principal's house can only be performed during daylight hours when the principal is not at home].

[*Continue with the following:*]

Tools, Materials, and Equipment

4.04. Subcontractor will supply all tools, materials, and equipment required to perform the services under this agreement.

Workers' Compensation

4.05. Subcontractor agrees to provide workers' compensation insurance for Subcontractor's employees and agents and agrees to hold harmless and indemnify Agency for any and all claims arising out of any injury, disability, or death of any of Subcontractor's employees or agents.

[*Choose one of the following:*]

Liability Insurance

4.06. Subcontractor agrees to maintain a policy of insurance in the minimum amount of $ _____ to cover any negligent acts or omissions committed by Subcontractor or Subcontractor's employees or agents during the performance of any duties under this agreement. Subcontractor further agrees to indemnify and hold Agency free and harmless from any and all claims arising from any such negligent act or omission.

[*OR*]

Limited Liability

4.06. Subcontractor will not be liable to Agency, or to anyone who may claim any right due to a relationship with Agency, for any acts or omissions in the performance of services under the terms of this agreement or on the part of the employees or agents of Subcontractor unless those acts or omissions are due to willful misconduct. Agency will indemnify and hold Subcontractor free and harmless from any obligations, costs, claims, judgments, attorneys' fees, and attachments arising from, growing out of, or in any way connected with the services rendered to Agency under the terms of this agreement, unless Subcontractor is judged by a court of competent jurisdiction to be guilty of willful misconduct.

[*Continue with the following:*]

Subcontractor's Qualifications

4.07. Subcontractor represents that _____[he *or* she] has the qualifications and skills necessary to perform the services under this agreement in a competent, professional manner, without the advice or direction of Agency. This means Subcontractor is able to fulfill the requirements of this agreement. Failure to perform all the services required under this agreement constitutes a material breach of the agreement. Subcontractor has complete and sole discretion for the manner in which the work under this agreement will be performed.

Indemnity

4.08. Subcontractor agrees to indemnify, defend, and hold Agency free and harmless from all claims, demands, losses, costs, expenses, obligations, liabilities, damages, recoveries, and deficiencies, including interest, penalties, attorneys' fees, and costs, that Agency may incur as a result of a breach by Subcontractor of any representation or agreement contained in this agreement.

Assignment

4.09. Neither this agreement nor any duties or obligations under this agreement may be assigned by Subcontractor without the prior written consent of Agency.

ARTICLE 5. OBLIGATIONS OF AGENCY

Cooperation of Agency

5.01. Agency agrees to comply with all reasonable requests of Subcontractor necessary to the performance of Subcontractor's duties under this agreement.

Procurement of Contracts

5.02. Agency agrees to exert a reasonable effort to procure contracts for Subcontractor [*describe type of work subcontractor seeks, e.g.,* involving bricklaying work] and capable of being performed by Subcontractor.

Assignment

5.03. Neither this agreement nor any duties or obligations under this agreement may be assigned by Agency without the prior written consent of Subcontractor.

ARTICLE 6. TERMINATION OF AGREEMENT

[*Choose one of the following:*]

Expiration of Agreement

6.01. Unless otherwise terminated as provided in this agreement, this agreement will continue in effect [*specify length corresponding with that set forth in P 1.01, e.g.,* for a period of _____ (*specify*) _____ (months *or* years) *or* until the services provided for in this agreement have been fully and completely performed] and shall then terminate unless renewed in writing by both parties.

[*OR*]

Termination on Notice

6.01. Notwithstanding any other provision of this agreement, either party may terminate this agreement at any time by giving [*specify reasonable notice based on type of services to be rendered by contractor, e.g.,* 30 days'] written notice to the other party. Unless otherwise terminated as provided in this agreement, this agreement will continue in force [*specify length corresponding with that set forth in P 1.01, e.g.,* for a period of _____ (*specify*) _____ (months *or* years) *or* until the services provided for in this agreement have been fully and completely performed].

[*Continue with the following:*]

Termination on Occurrence of Stated Events

6.02. This agreement will terminate automatically on the occurrence of any of the following events:

(a) Bankruptcy or insolvency of either party.

(b) Sale of the business of either party.

(c) Death of either party.

(d)

_____ [*specify other event on which agreement will terminate, e.g.,* Assignment of this agreement by either party without the consent of the other party].

Termination for Default

6.03. If either party defaults in the performance of this agreement or materially breaches any of its provisions, the non-breaching party may terminate this agreement by giving written notification to the breaching party. Termination will take effect immediately on receipt of notice by the breaching party or five days after mailing of notice, whichever occurs first. For the purposes of this paragraph, material breach of this agreement includes, but is not limited to, the following:

(a) Agency's failure to pay Subcontractor any compensation due within 30 days after written demand for payment.

(b) Subcontractor's failure to complete the services specified in

_____ [Paragraph 2.01, above *or* the Description of Services].

(c) Subcontractor's material breach of any representation or agreement contained in Paragraph 4.07.

(d) Agency's material breach of any representation or agreement contained in this Agreement.

(e)

_____ [*specify other situation constituting material breach*].

ARTICLE 7. GENERAL PROVISIONS

Notices

7.01. Any notices required to be given under this agreement by either party to the other may be effected by personal delivery in writing or by mail, registered or certified, postage prepaid with return receipt requested. Mailed notices must be addressed to the parties at the addresses appearing in the introductory paragraph of this agreement, but each party may change the address by giving written notice in accordance with this paragraph. Notices delivered personally will be deemed communicated as of actual receipt; mailed notices will be deemed communicated as of [*e.g.,* the day of receipt or the fifth day after mailing, whichever occurs first].

Entire Agreement of the Parties

7.02. This agreement supersedes any and all agreements, either oral or written, between the parties with respect to the rendering of services by Subcontractor for Agency and contains all of the representations, covenants, and agreements between the parties with respect to the rendering of those services. Each party to this agreement acknowledges that no representations, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not contained in this agreement, and that no other agreement, statement, or promise not contained in this agreement will be valid or binding. Any modification of this agreement will be effective only if it is in a writing signed by the party to be charged.

Partial Invalidity

7.03. If any provision of this agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions will continue in full force and effect without being impaired or invalidated in any way.

Payment of Moneys Due Deceased Subcontractor

7.04. If Subcontractor dies before completing the services under this agreement, any moneys due Subcontractor from Agency under this agreement as of the date of death will be paid to the Subcontractor's executors, administrators, heirs, personal representatives, successors, and assigns.

Arbitration

[*Choose one of the following:*]

7.05. Any controversy between the parties to this agreement involving the construction or application of any of the terms, covenants, or conditions of this agreement will, on the written request of one party served on the other, be submitted to arbitration. The arbitration will comply with and be governed by the provisions of the California Arbitration Act, *Sections 1280 through 1294.2 of the California Code of Civil Procedure.*

The parties will each appoint one person to hear and determine the dispute. If those two persons are unable to agree, then they will select a third impartial arbitrator whose decision will be final and conclusive on both parties. The cost of arbitration will be borne in a proportion the arbitrators determine.

[*OR*]

7.05. Any controversy or claim arising out of or relating to this agreement or the breach of the agreement will be settled by arbitration in accordance with the rules of the American Arbitration Association. Judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction over the award.

[*Continue with the following:*]

[*Use to provide for liquidated damages:*]

Liquidated Damages

7.06. The parties agree that in the event of a breach of this agreement by either party, it would be impracticable or extremely difficult to fix the actual damage and, therefore, the breaching party will pay to the non-breaching party as liquidated damages and not as a penalty the sum of $ _____, which represents a reasonable compensation for the loss incurred because of the breach.

[*Continue with the following:*]

Attorneys' Fees

7.07. If any [legal action *or specify more limited provision, e.g.*, legal action based in contract law], including an action for declaratory relief, is brought to enforce or interpret the provisions of this agreement, the prevailing party will be entitled to reasonable attorney's fees, which may be set by the court in the same action or in a separate action brought for that purpose, in addition to any other relief to which that party may be entitled.

Governing Law

7.08. This agreement will be governed by and construed in accordance with the laws of the State of California.

Executed at _____[*city*], California, on _____[*date*].

AGENCY

[*typed name*]
By: _____ [*signature*]
[*typed name and title*]

SUBCONTRACTOR
_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsConstruction ContractsLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsIndependent Contractors

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 84 INDEPENDENT CONTRACTORS
PART IV. FORMS
A. Agreements for Independent Contractor Services

28-84 California Legal Forms--Transaction Guide §§ 84.202-84.209

[Reserved]

§§ 84.202[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 84 INDEPENDENT CONTRACTORS
PART IV. FORMS
B. Tax Forms

28-84 California Legal Forms--Transaction Guide § 84.210

§ 84.210 Determination of Employment Work Status for Purposes of California Employment Taxes and Personal Income Tax Withholding [EDD Form DE 1870]

[1] Comment

[a] Use of Form

This California Employment Development Department (EDD) form [Form DE 1870] is to be used by businesses who would like to obtain a determination as to whether a worker is an employee for purposes of California unemployment insurance, employment training tax, state disability insurance, and personal income tax withholding.

The form can be obtained from any Employment Tax Customer Service Office of the EDD or online from the EDD website. On completion, the form should be returned to the EDD at the following address:

State of California,
Employment Development Department
Audit Section, MIC 94
P.O. Box 826880, Sacramento, CA 94280-0001.

The form should be completed for one individual who is representative of the class of workers whose status is in question. If a written determination is desired for any other class of workers, a separate form should be completed.

[b] Factors Used in Making Determination

Under the common law of agency, a variety of factors are considered in determining whether a person is an independent contractor or an employee [*Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 949, 88 Cal. Rptr. 175, 471 P.2d 975* ; *Empire Star Mines Co. v. Cal. Emp. Com. (1946) 28 Cal. 2d 33, 43-44, 168 P.2d 686* ; *see* Restatement (Second) of Agency, § 220; *see also § 84.11[1]*]. In evaluating a worker's status, the key determination is whether the principal has the right to control the manner and means of accomplishing a desired result. The principal's right to discharge at will, without cause, is strong evidence of that right to control [22 Cal. Code Reg. § 4304-1]. If it cannot be

determined whether the principal has the right of control, the EDD will take the following factors into consideration [*see* 22 Cal. Code Reg. § 4304-1(a)]:

- Whether the worker is engaged in a separate occupation or business.
- Whether this kind of work in the locality is usually done under the direction of a principal without supervision.
- The skill required in performing the work.
- Whether the worker supplies the instrumentalities, tools, and the place of work.
- The length of time for which the work is performed.
- The method of payment, whether by time, piece rate, or by job.
- Whether the work is a part of the regular business of the principal.
- Whether the parties believe they are creating an independent contract or an employer-employee relationship.
- The extent of actual control exercised by the principal over the manner and means of performing service.
- Whether the principal is engaged in business or whether the services are being performed for the principal's benefit as an individual.

[2] FORM

Determination of Employment Work Status for Purposes of California Employment Taxes and Personal Income Tax Withholding [EDD Form DE 1870]

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsIndependent ContractorsTax LawFederal Tax Administration & ProcedureGeneral OverviewTax LawState & Local TaxesGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 84 INDEPENDENT CONTRACTORS
PART IV. FORMS
B. Tax Forms

28-84 California Legal Forms--Transaction Guide § 84.211

§ 84.211 Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding [IRS Form SS-8]

[1] Comment

[a] Use of Form

This form is an official questionnaire used to evaluate whether a particular worker is or was an employee. It is used for purposes of federal employment taxes and income tax withholding. Form SS-8 may be completed and submitted by either a business or a worker seeking a determination of the worker's status. It can be obtained from any Internal Revenue Service (IRS) office. When completed, the form should be returned to the IRS district director. In addition, the IRS may ask a business or worker to complete this form. In that case, the form should be returned to the IRS office that provided the form [IRS Form SS-8, Instructions].

[b] IRS Ruling Procedure

The IRS will rule on the status of a worker when an employer cannot clearly determine whether the worker is an employee or independent contractor, even with the aid of common law agency factors and tests [*see § 84.110 [2]*] and IRS rulings [IRS Pub. 937, Business Reporting, Employment Taxes, Information Returns, p. 3]. Information gathered from employers and workers on Form SS-8 is used to make that determination. Information must be provided concerning the services of one person selected as the representative of the class of workers whose status is in question. A ruling made about one worker applies to other workers of the same class if the facts are not materially different from those of the worker on whose status the ruling is made. When a ruling is sought for more that one class of worker, a separate Form SS-8 must be provided for one worker of each class whose status is typical of that class [IRS Form SS-8, Instructions]. The IRS will not rule on the status of a worker without a site inspection.

For a list of factors the IRS will consider in making a determination on a worker's status, see *Section 84.30[4]*.

[2] FORM

Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding [IRS Form SS-8]

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Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsIndependent ContractorsTax LawFederal Tax Administration & ProcedureGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 84 INDEPENDENT CONTRACTORS
PART IV. FORMS
B. Tax Forms

28-84 California Legal Forms--Transaction Guide § 84.212

§ 84.212 Miscellaneous Income [IRS Form 1099-MISC]

[1] Comment

[a] Use of Form

This form is an official IRS information return for reporting payments made to nonemployees for services rendered. It should be prepared by a person for whom services are rendered by an independent contractor. It is used to report payments of $600 or more to the IRS and to the independent contractor [*see*[b], [c], *below*]. Form 1099-MISC can be obtained from any IRS office.

[b] Persons Required to File Return With IRS

Any person who, in the course of his or her trade or business, pays $600 or more for services received from another person during a calendar year must file an information return with the IRS [*see I.R.C. §§ 6041(a), 6041A(a)*]. Payments made to service providers who are not employees must be made on Form 1099-MISC. Payments required to be reported include fees, commissions, and other compensation for services rendered, including fees for professional services, fees to independent contractors, and payments for materials used in rendering services [*see* Instructions for Forms 1099, 1098, 5498, and W-2G].

Form 1099-MISC must be provided to the IRS by March 1 of the year following the calendar year in which payment was made [*see* Instructions for Forms 1099, 1098, 5498, and W-2G]. Form 1096 is used to transmit Forms 1099 to the IRS.

For further discussion of filing requirements regarding information returns, see Bender's Federal Tax Service, Chapter P:3, *Filing Requirements--Information Returns.*

[c] Providing Statement to Payee

Every person required to file a return with the IRS [*see* [b], *above*] must also provide the payee named in the return

with a written statement containing the name and address of the person required to file the return and the aggregate amount of payments made [*I.R.C. § 6041(d)*]. The statement may be a copy of the return filed with the IRS or a separately prepared statement. In either case, the preparer must inform the recipient that the information is being provided to the IRS [*see* Instructions for Forms 1099, 1098, 5498, and W-2G].

The statement must be provided to the payee by January 31 of the year following the calendar year in which the return was required to be filed [*I.R.C. § 6041(d)*].

[d] Information Required to be Provided

The information required to be provided on Form 1099-MISC for payments to independent contractors includes [*see* Instructions for Forms 1099, 1098, 5498, and W-2G]:

(1) The names, addresses, and taxpayer identification numbers of the payer and payee.

(2) Amounts of any backup withholding tax.

(3) Amounts paid as nonemployee compensation, including fees, commissions, prizes, awards, and other forms of compensation for services rendered to the payer's trade or business.

(4) State income tax withheld, the name of the state, and the payer's state tax identification number (this state tax information is optional).

[e] Filing Information Return With Franchise Tax Board

Under California law, a person who pays compensation of $600 or more to an independent contractor must provide a copy of Form 1099-MISC to the Franchise Tax Board (FTB) and to the payee [*see Rev. & Tax. Code §§ 18002*, 18002.2]. Copy 1 of Form 1099-MISC is to be filed with the FTB, accompanied by the state transmittal form, Form 596. For further discussion, see California Taxation 2d, Chapter 21, *Administrative Procedures.*

[2] FORM

Miscellaneous Income [IRS Form 1099-MISC--Copy A, 1, B]

Click here to view image.

Click here to view image.

Miscellaneous Income [IRS Form 1099-MISC--Copy 2, C]

Click here to view image.

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Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsIndependent ContractorsTax LawFederal Tax Administration & ProcedureGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS

28-85 California Legal Forms--Transaction Guide 85.syn

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.syn Synopsis to Chapter 85: EMPLOYMENT AGREEMENTS

§ 85.01 California Sources

[1] Constitution

[2] Statutes

[3] Regulations

§ 85.02 Federal Sources

[1] Statutes

[2] Regulations

§§ 85.03-85.04 [Reserved]

§ 85.05 Law Reviews and Periodicals

§ 85.06 Annotations

§ 85.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 85.08-85.09 [Reserved]

§ 85.10 Classification of Worker as Employee

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[a] Common-Law Definitions

[b] Definitions for Workers' Compensation Purposes

[c] Definitions for Unemployment and Disability Compensation Purposes

[d] Definitions for Fair Employment Purposes

[2] Employee Distinguished From Agent

[3] Employee Distinguished From Independent Contractor

[a] Significance of Distinction

[b] Relevant Factors

[i] Common-Law Factors

[ii] IRS Factors

[iii] EDD Factors

[iv] Workers' Compensation Factors

[c] Employee-Independent Contractor Distinction in Particular Industries

[i] Persons Working for or as Building Contractors

[ii] Physicians and Surgeons

[4] Employee Distinguished From Partner

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[1] Duty to Comply With Employer's Directions

[2] How Duties Are to Be Performed

[3] Accounting of Transactions and Delivery of Things Received

[4] Duty to Give Preference to Employer's Business

§ 85.12 Obligations of Employer

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[2] Payment of Wages on Termination of Employment

[a] Wages Generally

[b] Compensation for Accrued Vacation

[3] Liability for Losses and Expenses

§§ 85.13-85.19 [Reserved]

§ 85.20 Nature of Employment Contracts

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[2] Express and Implied Contracts

[3] Term of Contract

[a] Specified Term

[b] "At-Will" Contract

§ 85.21 Essential Elements of Employment Contract

[1] Formation of Contract

[2] Essential Terms

[3] Typical Employment Contract Provisions

[4] Modification of Employment Contract

[5] Special Requirements for Minor's Employment Contract

§ 85.22 When Employment Contract Must be Written

[1] Deciding Whether to Have Written Employment Contract

[2] Statute of Frauds

[a] Contract Not to Be Performed Within One Year

[b] Contract Involving Sale or Purchase of Real Estate

[3] Certain Commission Contracts

[4] Authority to Enter Into Contracts That Must Be Written

[5] Estoppel to Assert Statute of Frauds

§ 85.23 Enforcement of Employment Contract

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[1] Comment

[a] Use of Form

[b] Drafting Considerations

[i] In General

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[a] Use of Form

[b] Compensation of Employee

[2] FORM

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[1] Comment

[a] Use of Form

[b] At-Will Provision

[c] Bonus Provisions

[2] FORM

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[1] Comment

[a] Use of Form

[b] Drafting Considerations

[i] In General

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[iii] Profit-Sharing Provisions

[iv] Obligations of Employee

[2] FORM

Contract for Employment of Retail Store Branch Manager--Payment of Moving Costs

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[1] Comment--Use of Form

[2] FORM

Manager of Overseas Department

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[1] Comment

[a] Use of Form

[b] Drafting Considerations

[2] FORM

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[1] Comment

[a] Use of Form

[b] Drafting Considerations

[i] Duties of Employee

[ii] Commission Compensation

[c] Property Rights of Parties and Limitations on Competitive Activity After Termination of Employment

[2] FORM

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[1] Comment

[a] Use of Form

[b] Drafting Considerations

[i] In General

[ii] Duties of Employee

[iii] Employee Benefits

[c] Contracts to Assign Employee's Work Product

[d] Competitive Activities and Disclosure of Trade Secrets

[2] FORM

Contract for Employment of Technical Professional--Protection of Employer's Intellectual Property

§ 85.222 Employment Contract Between Computer Software Publisher and Programmer

[1] Comment

[a] Use of Form

[b] Drafting Considerations in General

[c] Compensation of Employee

[d] Contracts to Assign Employee's Work Product

[e] Competitive Activities and Disclosure of Trade Secrets

[2] FORM

Employment Contract Between Computer Software Publisher and Programmer

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[1] Comment

[a] Use of Form

[b] Drafting Considerations

[2] FORM

Employment Contract Between Temporary Help Agency and Employee of Agency

§§ 85.224-85.229 [Reserved]

§ 85.230 Agreement Continuing Previous Employment--Incorporation of Prior Contract With Agreed-Upon Modifications

[1] Comment

[a] Use of Form

[b] Enforcement of Long-Term Employment Contracts

[c] Compensation Due Upon Continuation of Long-Term Contract

[2] FORM

Agreement Continuing Previous Employment--Incorporation of Prior Contract With Agreed-Upon Modifications

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[1] Comment--Use of Form

[2] FORM

Contract Employing Former Officer as Consultant-Employee

§§ 85.232-85.239 [Reserved]

§ 85.240 Provision for Lifetime Employment

[1] Comment

[a] Use of Form

[b] Enforcement of Long-Term Employment Contracts

[i] In General

[ii] "Lifetime" Contract

[c] Considerations Applicable to Corporate Employer

[2] FORM

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§ 85.241 Provisions Governing Seasonal Employment

[1] Comment

[a] Use of Form

[b] Drafting the Compensation Provision

[2] FORM

Provisions Governing Seasonal Employment

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[1] Comment

[a] Use of Form

[b] Referring to Job Description Maintained by Employer

[2] FORM

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[1] Comment--Use of Form

[2] FORM

Provision Permitting Employer to Specify Duties From Time to Time When Contract Does Not Specify Duties

§ 85.261 Provision Obligating Employee to Perform Additional Duties Assigned by Employer

[1] Comment--Use of Form

[2] FORM

Provision Obligating Employee to Perform Additional Duties Assigned by Employer

§ 85.262 Provision Permitting Employer to Change Employee's Duty Assignments

[1] Comment

[a] Use of Form

[b] Employer's Right to Change Employee's Duty Assignments

[2] FORM

Provision Permitting Employer to Change Employee's Duty Assignments

§ 85.263 Provision for Change of Duties by Mutual Consent

[1] Comment

[a] Use of Form

[b] Methods of Modifying a Written Contract

[2] FORM

Provision for Change of Duties by Mutual Consent

§ 85.264 Provision for Reasonable Accommodations If Employee Becomes Disabled

[1] Comment--Use of Form

[2] FORM

Provision for Reasonable Accommodations If Employee Becomes Disabled

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§ 85.270 Provision That Duties Are to Be Performed Loyally and Conscientiously

[1] Comment

[a] Use of Form

[b] Employee's Obligation to Employer

[2] FORM

Provision That Duties Are to Be Performed Loyally and Conscientiously

§ 85.271 Provision That Duties Must Be Performed to Employer's Satisfaction

[1] Comment

[a] Use of Form

[b] Criteria for Employer's Satisfaction

[2] FORM

Provision That Duties Must Be Performed to Employer's Satisfaction

§ 85.272 Provision Permitting Employee to Engage in Other Specified Employment

[1] Comment

[a] Use of Form

[b] Performance of Part-Time Work for Another Employer

[2] FORM

Provision Permitting Employee to Engage in Other Specified Employment

§ 85.273 Provision That Employee Cannot Bind Employer Without Employer's Written Consent

[1] Comment

[a] Use of Form

[b] Actual and Ostensible Authority

[c] Need for Written Authority to Enter Into Contracts

[2] FORM

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§ 85.274 Provision for Adherence to Employer's Rules

[1] Comment

[a] Use of Form

[b] Duty to Comply With All Directions of Employer

[c] Function of Employer Rules as Part of Contract

[2] FORM

Provision for Adherence to Employer's Rules

§ 85.275 Provision That Duties Be Performed at Places Other Than Originally Designated

[1] Comment--Use of Form

[2] FORM

Provision That Duties Be Performed at Places Other Than Originally Designated

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[1] Comment

[a] Use of Form

[b] Number of Hours Constituting a Work Day

[c] Number of Days Constituting a Workweek

[2] FORM

Provision Specifying Length of Work Day and Week

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[1] Comment

[a] Use of Form

[b] Minimum Wage and Overtime Requirements

[i] Generally

[ii] Effect of Hourly Wage on Employee's Exempt Status

[iii] Effect of Contract Provisions in Violation of FLSA

[iv] Other Federal Minimum Wage and Maximum Hour Requirements

[c] Semimonthly Payment of Wages

[i] Requirement

[ii] Effect of Semimonthly Payment Requirement

[2] FORM

Provision for Payment of Hourly Wage

§ 85.291 Provisions for Overtime Work and Compensation

[1] Comment

[a] Use of Form

[b] Compensating Time Off

[2] FORM

Provisions for Overtime Work and Compensation

§§ 85.292-85.299 [Reserved]

§ 85.300 Provision for Annual Increase in Salary

[1] Comment--Use of Form

[2] FORM

Provision for Annual Increase in Salary

§ 85.301 Provision for Adjustment of Salary Based on Increase in Cost of Living Index

[1] Comment

[a] Use of Form

[b] Consumer Price Index

[2] FORM

Provision for Adjustment of Salary Based on Increase in Cost of Living Index

§ 85.302 Provision for Increase in Compensation at Employer's Discretion

[1] Comment--Use of Form

[2] FORM

Provision for Increase in Compensation at Employer's Discretion

§ 85.303 Provision for Compensation During Training Period

[1] Comment--Use of Form

[2] FORM

Provision for Compensation During Training Period

§§ 85.304-85.309 [Reserved]

§ 85.310 Provision for Payment on Piecework Basis

[1] Comment

[a] Use of Form

[b] Provision for Minimum Hourly Compensation

[2] FORM

Provision for Payment on Piecework Basis

§ 85.311 Payment of Commission--Percentage of Gross Sales

[1] Comment

[a] Use of Form

[b] Effect of Commission Provision

[c] Applicability of Minimum Wage or Overtime Compensation Laws

[d] Limitations on Competitive Activity

[i] In General

[ii] Legitimate Post-Employment Restraints

[iii] Restraints Imposed During Employment

[2] FORM

Payment of Commission--Percentage of Gross Sales

§ 85.312 Provision for Drawing Account in Connection With Commission Compensation

[1] Comment

[a] Use of Form

[b] Repayment of Amounts Advanced

[2] FORM

Provision for Drawing Account in Connection With Commission Compensation

§ 85.313 Provision for Commission on Subsequent Sales

[1] Comment

[a] Use of Form

[b] Commissions on Sales Procured by Employee

[2] FORM

Provision for Commission on Subsequent Sales

§ 85.314 Provision for Commission in Addition to Salary

[1] Comment--Use of Form

[2] FORM

Provision for Commission in Addition to Salary

§§ 85.315-85.319 [Reserved]

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[1] Comment

[a] Use of Form

[b] Purpose of Deferred Compensation

[c] Tax Consequences of Deferred Compensation

[2] FORM

Provision for Fixed Annuity if Employee Remains Until Retirement

§ 85.321 Provision for Payments Equal to Percentage of Salary at Predetermined Age if Employee Remains Until Retirement

[1] Comment--Use of Form

[2] FORM

Provision for Payments Equal to Percentage of Salary at Predetermined Age if Employee Remains Until Retirement

§ 85.322 Provision for Lump-Sum Deferred Compensation Payable Over Term of Years

[1] Comment--Use of Form

[2] FORM

Provision for Lump-Sum Deferred Compensation Payable Over Term of Years

§ 85.323 Provision for Payment of Pension

[1] Comment

[a] Use of Form

[b] Effect of Absence of Express Pension Provision

[c] Validity of Noncompetition Covenants

[2] FORM

Provision for Payment of Pension

§ 85.324 Payment of Lump Sum on Death of Employee

[1] Comment

[a] Use of Form

[b] Federal Income Tax Consequences of Death Benefits

[2] FORM

Payment of Lump Sum on Death of Employee

§ 85.325 Payment of Annuity to Surviving Spouse of Employee or Lump Sum to Estate

[1] Comment--Use of Form

[2] FORM

Payment of Annuity to Surviving Spouse of Employee or Lump Sum to Estate

§ 85.326 Continuation of Salary to Surviving Spouse or Designee for Balance of Employment Term if Employee Dies During Employment

[1] Comment--Use of Form

[2] FORM

Continuation of Salary to Surviving Spouse or Designee for Balance of Employment Term if Employee Dies During Employment

§§ 85.327-85.339 [Reserved]

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[1] Comment

[a] Use of Form

[b] Nature and Effect of Vacation Pay

[c] Vested Rights in Vacation Pay

[d] Validity of "No Additional Accrual" Clause

[e] Invalidity of "Use It or Lose It" Clause

[2] FORM

Provision for Vacation Leave With Pay

§ 85.341 Provision for Holiday Pay

[1] Comment

[a] Use of Form

[b] Federal Public Holidays

[c] California Holidays

[2] FORM

Provision for Holiday Pay

§ 85.342 Provision for Military Training Leave

[1] Comment

[a] Use of Form

[b] Reemployment Rights of Employees Called to Active Military Duty

[2] FORM

Provision for Military Training Leave

§ 85.343 Provision for Severance Pay

[1] Comment

[a] Use of Form

[b] Nature of Severance Pay

[2] FORM

Provision for Severance Pay

§§ 85.344-85.349 [Reserved]

§ 85.350 Health Care Benefits--Insured or Self-Insured Plans

[1] Comment

[a] Use of Form

[b] Taxation of Medical Benefits

[c] Requirement for Notice of Discontinuation of Coverage

[d] Discriminatory Use of Pregnancy Benefits

[2] FORM

Health Care Benefits--Insured or Self-Insured Plans

§ 85.351 Group-Term Life and Accidental Death and Dismemberment Insurance

[1] Comment

[a] Use of Form

[b] Taxation of Group-Term Life Insurance Costs

[2] FORM

Group-Term Life and Accidental Death and Dismemberment Insurance

§ 85.352 Insurance or Guaranteed Payment Upon Premature Death or Dissolution of Employer

[1] Comment--Use of Form

[2] FORM

Insurance or Guaranteed Payment Upon Premature Death or Dissolution of Employer

§§ 85.353-85.359 [Reserved]

§ 85.360 Provision for Bonus Conditioned on Level of Profits--Payable After End of Fiscal Year

[1] Comment

[a] Use of Form

[b] Nature of Bonuses

[c] Provision for Indeterminate Bonus

[d] Effect of Requirement That Employee Be Employed at End of Year

[e] Employer's Deduction for Payment to Shareholder-Employee

[2] FORM

Provision for Bonus Conditioned on Level of Profits--Payable After End of Fiscal Year

§ 85.361 Provision for Bonus Conditioned on Length of Employment--Payable at the End of Employment Year

[1] Comment--Use of Form

[2] FORM

Provision for Bonus Conditioned on Length of Employment--Payable at the End of Employment Year

§ 85.362 Provision for Bonus Payable at End of Calendar Year--Bonus Prorated for Termination Before End of Year

[1] Comment--Use of Form

[2] FORM

Provision for Bonus Payable at End of Calendar Year--Bonus Prorated for Termination Before End of Year

§§ 85.363-85.369 [Reserved]

§ 85.370 Provision for Share of Profits as Sole Compensation

[1] Comment

[a] Use of Form

[b] Nature of Profit Sharing

[c] Definition of "Net Profits"

[2] FORM

Provision for Share of Profits as Sole Compensation

§ 85.371 Provision for Share of Profits Exceeding Specified Level

[1] Comment

[a] Use of Form

[b] Tax Consequences of Profit-Sharing Plans

[2] FORM

Provision for Share of Profits Exceeding Specified Level

§ 85.372 Provision for Decreasing Share of Higher Profits

[1] Comment--Use of Form

[2] FORM

Provision for Decreasing Share of Higher Profits

§§ 85.373-85.379 [Reserved]

§ 85.380 Stock Bonus--Stock Valued at Fair Market Value

[1] Comment

[a] Use of Form

[b] Taxation of Stock Bonuses

[c] Employee Stock Ownership Plans

[2] FORM

Stock Bonus--Stock Valued at Fair Market Value

§ 85.381 Stock Bonus Plus Cash Bonus--Stock Valued at Book Value

[1] Comment--Use of Form

[2] FORM

Stock Bonus Plus Cash Bonus--Stock Valued at Book Value

§ 85.382 Restricted Stock Bonus--Transfer Subject to Substantial Risk of Forfeiture

[1] Comment

[a] Use of Form

[b] Taxation of Restricted Stock Bonuses

[2] FORM

Restricted Stock Bonus--Transfer Subject to Substantial Risk of Forfeiture

§ 85.383 Incentive Stock Option Agreement

[1] Comment

[a] Use of Form

[b] Taxation of Incentive Stock Options

[i] In General

[ii] Holding Period

[iii] Employee Status

[iv] Exercise of Option After Death

[c] Requirements for "Incentive Stock Option"

[i] In General

[ii] Option Price

[iii] Stock Ownership

[iv] Aggregate Fair Market Value

[d] Securities Law Requirements

[e] Disclosure Requirements After Exercise of Option

[2] FORM

Incentive Stock Option Agreement

§ 85.384 Nonstatutory Stock Option--Options Granted at Commencement of Employment Term

[1] Comment

[a] Use of Form

[b] Taxation of Stock Options

[2] FORM

Nonstatutory Stock Option--Options Granted at Commencement of Employment Term

§ 85.385 Nonstatutory Stock Option--Options Granted Each Year During Employment Term--Stock Subject to Restriction

[1] Comment--Use of Form

[2] FORM

Nonstatutory Stock Option--Options Granted Each Year During Employment Term--Stock Subject to Restriction

§ 85.386 Provision for Continuation of Stock Options Granted Prior to Execution of Employment Agreement

[1] Comment--Use of Form

[2] FORM

Provision for Continuation of Stock Options Granted Prior to Execution of Employment Agreement

§§ 85.387-85.399 [Reserved]

§ 85.400 Provision Giving Employee Right to Purchase Interest in Business After Certain Number of Years With Employer

[1] Comment

[a] Use of Form

[b] Tax Treatment

[2] FORM

Provision Giving Employee Right to Purchase Interest in Business After Certain Number of Years With Employer

§ 85.401 Agreement Giving Employee Option to Purchase Business on Employer's Death or Decision to Sell

[1] Comment

[a] Use of Form

[b] Tailoring the Payment Provision

[2] FORM

Agreement Giving Employee Option to Purchase Business on Employer's Death or Decision to Sell

§§ 85.402-85.409 [Reserved]

§ 85.410 Provision for Reimbursement of Business Expenses Incurred by Employee; Requirement for Substantiating Records

[1] Comment

[a] Use of Form

[b] Employee's Duty to Render Accounts to Employer

[c] Employer's Duty to Indemnify Employee for Expenses in Discharging Duties

[d] "Trade or Business" Expenses

[i] Deductible Expenses

[ii] Deductibility of Entertainment Expenses

[iii] Gifts

[iv] Awards to Employees

[v] Travel Expenses

[vi] Nondeductible Expenses

[e] Substantiation Required

[i] In General

[ii] Substantiation by Adequate Records

[iii] Substantiation of Business Purpose

[iv] Supporting Documents for Expenses of Seventy-Five Dollars or More

[v] Substantiation by "Other Sufficient Evidence"

[vi] Reporting of Expenses

[vii] Per Diem and Mileage Allowances

[2] FORM

Provision for Reimbursement of Business Expenses Incurred by Employee; Requirement for Substantiating Records

§ 85.411 Provision Specifying That Employee Use Employer's Credit Cards for Business Expenses

[1] Comment--Use of Form

[2] FORM

Provision Specifying That Employee Use Employer's Credit Cards for Business Expenses

§ 85.412 Provision for Payment to Employee of Specified Amount Monthly to Cover Business Expenses

[1] Comment

[a] Use of Form

[b] Reporting of Business Expenses When Employee Not Required to Make Adequate Accounting to Employer

[2] FORM

Provision for Payment to Employee of Specified Amount Monthly to Cover Business Expenses

§ 85.413 Provision That "Business Expenses" Are Limited to Those Specified in Employer's Rules

[1] Comment

[a] Use of Form

[b] Employee's Duty to Comply With Rules Concerning Expenses

[2] FORM

Provision That "Business Expenses" Are Limited to Those Specified in Employer's Rules

§§ 85.414-85.419 [Reserved]

§ 85.420 Provision for Payment by Employer of All Moving Expenses Deductible by Transferred Employee

[1] Comment

[a] Use of Form

[b] Contents of Form

[c] Employee's Deduction of Moving Expenses

[d] Minimum Distance of Move

[e] Minimum Period of Employment After Move Is Made

[2] FORM

Provision for Payment by Employer of All Moving Expenses Deductible by Transferred Employee

§ 85.421 Provision for Payment of Moving Expenses Only if Authorized in Advance by Employer

[1] Comment

[a] Use of Form

[b] Advantages of Form to Employer

[2] FORM

Provision for Payment of Moving Expenses Only if Authorized in Advance by Employer

§ 85.422 Provision for Payment of Specified Amount for Moving Expenses of New Employee Moving to Initial Place of Employment

[1] Comment--Use of Form

[2] FORM

Provision for Payment of Specified Amount for Moving Expenses of New Employee Moving to Initial Place of Employment

§§ 85.423-85.429 [Reserved]

§ 85.430 Provision Assigning Employee's Inventions and Intellectual Property to Employer

[1] Comment

[a] Use of Form

[b] Rights of Employee-Inventor in Absence of Contract

[c] Rights of Employee Not Hired to Invent

[d] "Shop Right" of Employer in Absence of Agreement

[e] Contracts to Assign Inventions and Patents

[2] FORM

Provision Assigning Employee's Inventions and Intellectual Property to Employer

§ 85.431 Provisions for Payment to Employee of Royalties Received

[1] Comment--Use of Form

[2] FORM

Provisions for Payment to Employee of Royalties Received

§ 85.432 Provision Giving Employer Perpetual Royalty-Free License to Use Employee's Invention

[1] Comment--Use of Form

[2] FORM

Provision Giving Employer Perpetual Royalty-Free License to Use Employee's Invention

§ 85.433 Provision Excluding Specified Inventions From Coverage of Employment Agreement

[1] Comment

[a] Use of Form

[b] Drafting Considerations

[2] FORM

Provision Excluding Specified Inventions From Coverage of Employment Agreement

§§ 85.434-85.439 [Reserved]

§ 85.440 Provision Maintaining Confidentiality of Trade Secrets

[1] Comment

[a] Use of Form

[b] Definition of "Trade Secret"

[c] Factors Used in Determining Trade Secret Status

[d] Protection of Trade Secrets

[i] In General

[ii] California Action for Misappropriation

[iii] Contract Actions

[iv] Action for Unfair Competition From Unauthorized Use of Trade Secret

[2] FORM

Provision Maintaining Confidentiality of Trade Secrets

§ 85.441 Provision Designating Particular Information as Trade Secret

[1] Comment--Use of Form

[2] FORM

Provision Designating Particular Information as Trade Secret

§ 85.442 Ownership of Customer Records

[1] Comment

[a] Use of Form

[b] Duty of Employee

[c] Reimbursement for Employee-Purchased Record Supplies

[2] FORM

Ownership of Customer Records

§ 85.443 Provision Maintaining Confidentiality of Client or Patient Information

[1] Comment--Use of Form

[2] FORM

Provision Maintaining Confidentiality of Client or Patient Information

§§ 85.444-85.449 [Reserved]

§ 85.450 Provision for Immediate Return of Employer's Property

[1] Comment

[a] Use of Form

[b] Duty of Employee

[2] FORM

Provision for Immediate Return of Employer's Property

§ 85.451 Provision Giving Employer Right to Use Employee's Name as Part of Trade Name or Trademark

[1] Comment

[a] Use of Form

[b] Trade Name

[c] Trademark

[2] FORM

Provision Giving Employer Right to Use Employee's Name as Part of Trade Name or Trademark

§§ 85.452-85.459 [Reserved]

§ 85.460 Provision That Employer Indemnify Losses of Employee in Discharging Duties

[1] Comment

[a] Use of Form

[b] Employer's Obligation to Indemnify Employee for Losses in Discharging Duties

[2] FORM

Provision That Employer Indemnify Losses of Employee in Discharging Duties

§ 85.461 Provision Permitting Employee to Examine Books Relating to Compensation

[1] Comment

[a] Use of Form

[b] Right of Employee to an Accounting

[2] FORM

Provision Permitting Employee to Examine Books Relating to Compensation

§§ 85.462-85.469 [Reserved]

§ 85.470 Provision for Noncompetition by Employee During Term of Contract

[1] Comment

[a] Use of Form

[b] Drafting of Exclusions From This Provision

[c] Competition Constituting Breach of Contract

[2] FORM

Provision for Noncompetition by Employee During Term of Contract

§ 85.471 Provision Prohibiting Unfair Competition After Termination of Employment

[1] Comment

[a] Use of Form

[b] Purpose and Effect of Form

[c] Validity of Provisions Limiting Competition After Termination of Employment

[i] In General

[ii] Indirect Prohibitions

[iii] Trade Secret and Narrow Restraint Exception

[iv] Severance of Void Provisions

[d] Hazards of Using Prohibition Against Post-Employment Competition

[2] FORM

Provision Prohibiting Unfair Competition After Termination of Employment

§ 85.472 Provision Prohibiting Solicitation of Customers or Fellow Employees After Termination of Employment

[1] Comment

[a] Use of Form

[b] Drafting Considerations

[c] Restraining Solicitation of Former Employer's Customers

[i] Customer Lists Constitute Trade Secrets

[ii] Protection of Customer List From Unfair Competition

[iii] Informing Former Customers of Change of Employment

[2] FORM

Provision Prohibiting Solicitation of Customers or Fellow Employees After Termination of Employment

§ 85.473 Additional Provision for Liquidated Damages for Breach of Noncompetition Clause

[1] Comment

[a] Use of Form

[b] Validity of Liquidated Damages Provision

[c] Disadvantages of Liquidated Damages Provision

[2] FORM

Additional Provision for Liquidated Damages for Breach of Noncompetition Clause

§§ 85.474-85.479 [Reserved]

§ 85.480 Provision Indemnifying Employer From Loss Caused by Employee's Negligence or Misconduct

[1] Comment

[a] Use of Form

[b] Liability of Employee to Employer

[c] Liability of Employer for Torts of Employee

[2] FORM

Provision Indemnifying Employer From Loss Caused by Employee's Negligence or Misconduct

§ 85.481 Provision That Employee Be Covered by Surety Bond

[1] Comment--Use of Form

[2] FORM

Provision That Employee Be Covered by Surety Bond

§ 85.482 Provision for Deposit as Security for Performance of Agreement by Employee

[1] Comment

[a] Use of Form

[b] Applicability of Security Deposit Provision

[2] FORM

Provision for Deposit as Security for Performance of Agreement by Employee

§§ 85.483-85.489 [Reserved]

§ 85.490 Provision for Regular Physical Examinations of Employee

[1] Comment

[a] Use of Form

[b] Payment of Examination Cost

[c] Restrictions on Employer's Right to Require Medical and Physical Examinations

[i] Constitutional Privacy Issues

[ii] Contractual Waiver of Constitutional Privacy Rights

[iii] Equal Employment Opportunity Laws

[2] FORM

Provision for Regular Physical Examinations of Employee

§ 85.491 Provision for "Morality Clause"

[1] Comment

[a] Use of Form

[b] Validity of Morality Clause

[c] Effect of Constitutional Right to Privacy

[d] Effect of Equal Employment Law

[2] FORM

Provision for "Morality Clause"

§ 85.492 Provision for Searches of Employee's Person and Effects

[1] Comment

[a] Use of Form

[b] Right of Privacy

[2] FORM

Provision for Searches of Employee's Person and Effects

§ 85.493 Provision Consenting to Drug and Alcohol Testing

[1] Comment--Use of Form

[2] FORM

Provision Consenting to Drug and Alcohol Testing

§§ 85.494-85.499 [Reserved]

§ 85.500 Provision for Termination by Employer of Employment Contract for Breach or Neglect of Duty or Continued Incapacity to Perform

[1] Comment

[a] Use of Form

[b] Drafting Considerations

[c] Grounds for Termination of Contract for Specified Term

[i] Willful Breach of Duty

[ii] Habitual Neglect of Duty

[iii] Continued Incapacity to Perform

[d] Other Grounds for Termination of Employment Contracts

[i] Operation of Law

[ii] Employer's Death or Legal Incapacity

[iii] Breach of Employer's Obligations to Employee

[iv] Dissolution of Partnership

[2] FORM

Provision for Termination by Employer of Employment Contract for Breach or Neglect of Duty or Continued Incapacity to Perform

§ 85.501 Provision for Termination on Statutory Grounds

[1] Comment

[a] Use of Form

[b] Drafting Considerations

[2] FORM

Provision for Termination on Statutory Grounds

§ 85.502 Provision for Termination of Employment Upon Good-Faith Dissatisfaction of Employer

[1] Comment

[a] Use of Form

[b] Use of Grounds Other Than Statutory Grounds for Termination

[c] Employment Terminable Upon Employer's Dissatisfaction With Performance

[d] Implied Covenant of Good Faith and Fair Dealing

[2] FORM

Provision for Termination of Employment Upon Good-Faith Dissatisfaction of Employer

§ 85.503 Provision Stating When Garnishment of Employee's Wages Constitutes Grounds for Termination by Employer

[1] Comment

[a] Use of Form

[b] Protection Against Discharge for Garnishment

[2] FORM

Provision Stating When Garnishment of Employee's Wages Constitutes Grounds for Termination by Employer

§§ 85.504-85.509 [Reserved]

§ 85.510 Provision for Termination of Contract At Will of Either Party

[1] Comment--Use of Form

[2] FORM

Provision for Termination of Contract At Will of Either Party

§ 85.511 Acknowledgment of At Will Status

[1] Comment--Use of Form

[2] FORM

Acknowledgment of At Will Status

§§ 85.512-85.519 [Reserved]

§ 85.520 Provision for Termination on Discontinuance of Employer's Business

[1] Comment

[a] Use of Form

[b] Termination Upon Extinction of Subject Matter

[c] Statutory Requirements for Mass Layoffs

[2] FORM

Provision for Termination on Discontinuance of Employer's Business

§ 85.521 Provision for Termination at Option of Employer Upon Revocation or Suspension of Liquor License

[1] Comment--Use of Form

[2] FORM

Provision for Termination at Option of Employer Upon Revocation or Suspension of Liquor License

§ 85.522 Provision Governing Termination Upon Merger, Transfer of Assets, or Dissolution of Corporate Employer

[1] Comment

[a] Use of Form

[b] Merger of Corporations

[2] FORM

Provision Governing Termination Upon Merger, Transfer of Assets, or Dissolution of Corporate Employer

§ 85.523 Provision Governing Termination in Event of Bankruptcy or Similar Proceeding Involving Other Party

[1] Comment--Use of Form

[2] FORM

Provision Governing Termination in Event of Bankruptcy or Similar Proceeding Involving Other Party

§§ 85.524-85.529 [Reserved]

§ 85.530 Provision That Employee's Right to Compensation Ends as of Date of Termination

[1] Comment

[a] Use of Form

[b] Payment of Wages Due

[2] FORM

Provision That Employee's Right to Compensation Ends as of Date of Termination

§ 85.531 Provision Specifying Type of Compensation Forfeited Upon Termination

[1] Comment

[a] Use of Form

[b] Drafting Considerations

[c] Vested Vacation Pay Cannot Be Forfeited

[d] Vesting of Retirement Benefits

[2] FORM

Provision Specifying Type of Compensation Forfeited Upon Termination

§§ 85.532-85.539 [Reserved]

§ 85.540 Provision for Liquidated Damages for Breach of Employee's Obligation to Work for the Employer

[1] Comment

[a] Use of Form

[b] Disadvantages of Liquidated Damages Provision

[2] FORM

Provision for Liquidated Damages for Breach of Employee's Obligation to Work for the Employer

§§ 85.541-85.549 [Reserved]

§ 85.550 Provision for Arbitration of Matters in Controversy at Request of Either Party

[1] Comment

[a] Use of Form

[b] Drafting Considerations

[c] Validity of Arbitration Agreement

[2] FORM

Provision for Arbitration of Matters in Controversy at Request of Either Party

§ 85.551 Provision for Compulsory Arbitration of Matters in Dispute

[1] Comment--Use of Form

[2] FORM

Provision for Compulsory Arbitration of Matters in Dispute

by
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FOOTNOTES:

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CHAPTER 85 EMPLOYMENT AGREEMENTS

28-85 California Legal Forms--Transaction Guide Scope

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

Scope

by
Edward Baskauskas, J.D.n*
Lori A. M. Middlehurst, J.D.,n** Practice Consultant Scope

This chapter covers the elements and uses of written employment agreements other than collective bargaining agreements. The Legal Background discusses the employment relationship and employment contracts in general. The forms include formal written employment agreements and contract provisions with pertinent explanatory comment for use in most situations in which employment agreements are required or desirable.

This chapter covers only those aspects of the employer-employee relationship that ordinarily affect the content of employment contracts or are generally governed by contract terms. Thus, state and federal statutes regulating working conditions, workers' compensation requirements, and the like, which ordinarily have little or no direct effect on the contents of a written employment contract, are not discussed in detail in this chapter. For an overview of these subjects, see Ch. 1C, *Regulation of Employers* . Similarly, the forms in this chapter include provisions for employee participation in pension and profit-sharing plans, but the instruments that discussed in Ch. 1D, *Overview of Employee Benefits* . For an employment agreement between a professional corporation and a professional person such as an attorney or physician (typically used in connection with the incorporation of a professional practice), and related benefit provisions, see Ch. 12A, *Professional Corporations* . For detailed discussion of California and related federal employment laws, see Wilcox, California Employment Law (Matthew Bender).

Independent contractors are not employees. Thus, the employment agreements in this chapter generally are not suitable for use in engaging the services of independent contractors, although some of the individual provisions may be incorporated into agreements with independent contractors without altering the character of the independent contractor relationship. For coverage of the law governing independent contractors, and general forms for agreements with independent contractors, see Ch. 84, *Independent Contractors* .

Several other chapters cover specialized agreements with various types of independent contractors. Ch. 87, *Entertainment Contracts* and Ch. 87A, *Athlete Agents* , contain agreements for entertainment-related services, including the services of entertainers, agents, personal managers, and athletes' agents. Agreements between

professionals (attorneys, consultants, advisors, analysts, and accountants) and their clients for services are set forth in Ch. 86, *Agreements for Professional Services* . Ch. 89, *Home Improvement and Specialty Contracts* , discusses home improvement and swimming pool contracting and home solicitation contracts. Ch. 90A, *State Government Contracts* , and Ch. 90B, *Federal Government Contracts* , cover federal, state, and local government contract practices and procedures. Ch. 91, *Contracts With Sales Representatives* , covers agreements with manufacturers' or suppliers' agents, distributors, consignees, and commission merchants. Ch. 92, *Service Contracts* , deals with contracts for product servicing and for personal services.

Finally, this chapter discusses contract law only in the context of specific provisions and problems encountered in employment contracts. For general coverage of contract law, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

FOOTNOTES:

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A. Primary Sources

28-85 California Legal Forms--Transaction Guide § 85.01

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§ 85.01 California Sources

[1] Constitution

Individuals entitled to privacy. *Cal. Const., art. I, § 1*.

Individuals may not be disqualified from entering or pursuing employment because of sex, race, creed, color, or national or ethnic origin. *Cal. Const., art. I, § 8*.

[2] Statutes

Contracts in restraint of trade.
Void contracts. *Bus. & Prof. Code § 16600*.
Sale of goodwill or ownership interest in business entity. *Bus. & Prof. Code § 16601*.
Dissolution of partnership. *Bus. & Prof. Code § 16602*.
Customer list of telephone answering service. *Bus. & Prof. Code § 16606*.

Specific and injunctive relief from unfair competition. *Bus. & Prof. Code § 17200 et seq.*

Statute of frauds. *Civ. Code § 1624*; *Com. Code § 2201*.

Fixing liquidated damages for breach of contract. *Civ. Code § 1671*.

Grounds for rescission of contract. *Civ. Code § 1689*.

Modification of written contract. *Civ. Code § 1698*.

Effect of contractual provision for attorneys' fees and costs. *Civ. Code § 1717*.

Authority of agent.
Written authority required for agent to enter into contract legally required to be written. *Civ. Code § 2309*.
Extent of authority. *Civ. Code § 2315*.
Actual authority. *Civ. Code § 2316*.
Ostensible authority. *Civ. Code § 2317*.
Authority as to persons having notice of restrictions. *Civ. Code § 2318*.
General statutory authority. *Civ. Code § 2319*.

Principal's responsibility for torts of agent. *Civ. Code § 2338*.

Specific performance of obligations either to render personal service or to employ another person to render personal service. *Civ. Code § 3390*.

Injunctions to prevent breach of contract for personal services. Civ. Code § 3423, *Code Civ. Proc. § 526*.

Statutes of limitations.

Four years for actions on written contracts. *Code Civ. Proc. § 337*.

Two years for actions on oral contracts. *Code Civ. Proc. § 339*.

Arbitration. *Code Civ. Proc. §§ 1280-1294.2*.

Unlawful employment practices.

Employment discrimination based on race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, age, or sexual orientation (or based on perception that employee has, or is associated with one who has, any of those characteristics). *Gov. Code §§ 12926(m), 12940(a)*.

Directly or indirectly subjecting employee or job applicant to test for presence of genetic characteristic. *Gov. Code § 12940(o)*.

Compulsory retirement of certain persons attaining retirement age. *Gov. Code § 12942*.

Nondiscrimination programs requirement for contractors and subcontractors for state contracting. *Gov. Code § 12990*.

Payment of wages. *Lab. Code §§ 200-272*.

"Wages" and "labor" defined. *Lab. Code § 200*.

Payment of discharged employee. *Lab. Code § 201*.

Payment of quitting employee. *Lab. Code § 202*.

Payment of vested vacation wages upon termination. *Lab. Code § 227.3*.

Employer prohibited from requiring employee to refrain from disclosing (or waive right to disclose) amount of wages,

and from disciplining or otherwise discriminating against employee who discloses amount of wages. *Lab. Code § 232*.

Employer prohibited from requiring employee to refrain from disclosing (or waive right to disclose) working conditions, and from disciplining or otherwise discriminating against employee who discloses information about working conditions. *Lab. Code § 232.5*.

Temporary restraining order preventing operation of business by employer violating wage payment laws. *Lab. Code § 243*.

Tips and gratuities. *Lab. Code §§ 350-356*.

Working hours. *Lab. Code §§ 500-558*.

Prohibition on soliciting employees by misrepresentation. *Lab. Code §§ 970-972*.

Employer may not prevent employees from participation in politics or attempt to control or direct their political activities. *Lab. Code § 1101*.

Employer prohibited from threatening loss of employment to coerce employees' political activities. *Lab. Code § 1102*.

Employer may not retaliate against employees who in current or former employment have disclosed, or have refused to participate in, violation or noncompliance with state or federal law, rule, or regulation. *Lab. Code § 1102.5*

Employee wages, hours, and working conditions of minors. *Lab. Code § 1171 et seq.*

Equal Pay Act. *Lab. Code § 1197.5*.

Employee's right to inspect personnel records that employer maintains relating to employee's performance or to any grievance concerning employee. *Lab. Code § 1198.5*.

Employment of minors. *Lab. Code §§ 1285 et seq., 1390 et seq.*

"Contract of employment" defined. *Lab. Code § 2750*.

Requirement for writing when payment under contract of employment involves commissions. *Lab. Code § 2751*.

Obligations of employers.

Indemnification of employees for losses caused by employer's negligence. *Lab. Code § 2800*.

Limitations on employer's defenses to actions by employees. *Lab. Code § 2801*.

Indemnification of employees for expenses and losses in discharge of duties. *Lab. Code § 2802*.
Wrongful death action by deceased employee's personal representative. *Lab. Code § 2803*.
Waiver of employer's obligations by employee is void. *Lab. Code § 2804*.
Notice of discontinuation of medical benefits. *Lab. Code § 2806*.

Obligations of employees.
Gratuitous service. *Lab. Code §§ 2850-2852*.
Degree of care and diligence. *Lab. Code §§ 2853, 2854*.

Enforcement of contract for personal service. *Lab. Code § 2855*.
Compliance with employer's directions. *Lab. Code § 2856*.
Performance in conformity to usage. *Lab. Code § 2857*.
Required degree of skill. *Lab. Code §§ 2858, 2859*.
Ownership of things acquired. *Lab. Code § 2860*.
Rendition of accounts. *Lab. Code § 2861*.
Delivery of employer's property. *Lab. Code § 2862*.
Preference of employer's business. *Lab. Code § 2863*.
Responsibility for employment of substitute. *Lab. Code § 2864*.
Liability for culpable negligence. *Lab. Code § 2865*.
Completion of joint service by survivor. *Lab. Code § 2866*.

Inventions made by employees.
Employment agreement provisions assigning rights to employer. *Lab. Code § 2870*.
Disclosure of inventions to employer. *Lab. Code § 2871*.
Notice to employee concerning assignment of rights. *Lab. Code § 2872*.

Termination of employment.
How terminated. *Lab. Code § 2920*.
Death or legal incapacity of employer. *Lab. Code § 2921*.
When terminable at will. *Lab. Code § 2922*.
Continuance of service after employer's death or incapacity. *Lab. Code § 2923*.
Willful breach or habitual neglect. *Lab. Code § 2924*.
Garnishment. *Lab. Code §§ 2922, 2924*.
Termination by employee. *Lab. Code § 2925*.
Compensation on dismissal. *Lab. Code § 2926*.
Compensation on quitting. *Lab. Code § 2927*.
Wage deductions for tardiness. *Lab. Code § 2928*.

Apprentice agreements. *Lab. Code §§ 3070-3099.5*.
"Apprentice" defined. *Lab. Code § 3077*.
Contents of agreements. *Lab. Code § 3078*.
Approval of agreements. *Lab. Code § 3079*.
Execution of agreements. *Lab. Code § 3080*.

Duty of employer with 50 or more employees to provide training and education regarding sexual harassment to all California supervisory employees. *Gov. Code § 12950.1*.

Disclosure of duty to report incidents of child abuse or neglect required as prerequisite to employment in certain occupations such as teacher, peace officer, firefighter, health care practitioner, employee of child care institution, child visitation monitor, animal control officer, humane society officer, alcohol and drug counselor, and clergy. *Penal Code §§ 11165.7, 11166, 11166.5*.

"Employment" for unemployment insurance purposes does not include service as transcriber of proceedings performed for transcript firm. *Unemp. Ins. Code § 630*.

[3] Regulations

Wage Orders. *8 Cal. Code Reg. § 11000 et seq.*

Division of Labor Standards Enforcement Regulations. *8 Cal. Code Reg. § 11701 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.02

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.02 Federal Sources

[1] Statutes

Income-tax provisions.
"Adjusted gross income" defined. *I.R.C. § 62*.
Moving expenses. *I.R.C. §§ 82, 217*.
Restricted property, including stock options, transferred in connection with performance of services. *I.R.C. § 83*.
Trade or business expenses. *I.R.C. § 162*.
Expenses for production of income. *I.R.C. § 212*.
Disallowance of certain entertainment, gift, and travel expenses. *I.R.C. § 274*.
Qualified pension, profit-sharing, and stock bonus plans. *I.R.C. §§ 401-404*.
Employer's deduction for payments of deferred compensation. *I.R.C. § 404*.
Inclusion in employee's gross income of deferred compensation under nonqualified deferred compensation plan. *I.R.C. § 409A*.
General rules for stock options. *I.R.C. § 421*.
Incentive stock options. *I.R.C. § 422*.
Employee stock purchase plans. *I.R.C. § 423*.
Definitions and special rules for stock options. *I.R.C. § 424*.
Qualified pension and profit-sharing plans for S Corporations. *I.R.C. § 1379*.

Fair Labor Standards Act. *29 U.S.C. §§ 201-219*.
"Commerce" defined as interstate commerce. *29 U.S.C. § 203(b)*.
Minimum wage to be paid by employers in commerce. *29 U.S.C. § 206*.
Maximum hours to be required by employers in commerce. *29 U.S.C. § 207*.
Exemptions. *29 U.S.C. § 213*.

Inventions patentable. *35 U.S.C. § 101*.

Equal Employment Opportunity Act of 1972. *42 U.S.C. §§ 2000e-2000e-17*.
Unlawful employment practices. *42 U.S.C. § 2000e-2*

[2] Regulations

Income tax provisions.
Taxation of nonqualified stock options. *Treas. Reg. § 1.83-7*.
Business expenses. *Treas. Reg. § 1.162-1*.
Deduction for moving expenses. *Treas. Reg. §§ 1.217-1*, 1.217-2.
Disallowance of certain entertainment, gift, and travel expenses. *Treas. Reg. § 1.274-1*.
Disallowance of deductions for certain expenses for entertainment, amusement, recreation, or travel. *Treas. Reg. § 1.274-2*.
Disallowance of deduction for gifts. *Treas. Reg. § 1.274-3*.
Disallowance of certain foreign travel expenses. *Treas. Reg. § 1.274-4*.
Substantiation requirements. Temp. Treas. Reg. §§ 1.274-5T, 1.274-6T.
Qualified pension, profit-sharing, and stock bonus plans. *Treas. Reg. § 1.401-1*.

Fair Labor Standards Act exemptions for executive, administrative, professional, computer, and outside sales employees. *29 C.F.R. § 541.0 et seq.*

Requirements of bona fide profit-sharing plan or trust. *29 C.F.R. § 549.0 et seq.*

Equal pay for equal work under Fair Labor Standards Act. 29 C.F.R. §§ 800.0-800.166.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewTax LawFederal Tax Administration & ProcedureGeneral OverviewTax LawState & Local TaxesGeneral Overview

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§ 85.05 Law Reviews and Periodicals

Newman, *Limitations on Arbitration Clauses in Employment Agreements*, 12 C.E.B. Cal. Bus. L. Prac. 42 (Spring 1997).

Meaning of Just Cause for Termination When an Employer Alleges Misconduct and the Employee Denies It, 44 Hastings L.J. 399 (1993).

Frierson, *An Analysis of ADA Provisions on Denying Employment Because of a Risk of Future Injury*, 17 Empl. Rel. L.J. 603 (1992).

Epperson & Mahn, *Protecting Intellectual Property Rights With Employment Agreements, 35 Prac. Law. 25 (Jan. 1989).*

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsArbitration ProvisionsGeneral OverviewLabor & Employment LawWrongful TerminationGeneral Overview

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AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.06 Annotations

Annot., Liability for Breach of Employment Severance Agreement, 27 A.L.R.5th 1 (1995) .

Annot., When Statute of Limitations Commences to Run as to Cause of Action for Wrongful Discharge, 19 A.L.R.5th 439 (1994) .

Annot., Effectiveness of Employer's Disclaimer of Representations in Personnel Manual or Employee Handbook Altering At-Will Employment Relationship, 17 A.L.R.5th 1 (1994) .

Annot., Employee's Protection Under § 15(a)(3) of Fair Labor Standards Act (*29 U.S.C. § 215(a)(3)*), *101 A.L.R. Fed. 220 (1991)* .

Annot., Modern Status of Rule That Employer May Discharge At-Will Employee for Any Reason, 12 A.L.R.4th 544 (1982) .

Annot., Liability For Discharging At-Will Employee for Refusing to Participate in, or for Disclosing, Unlawful or Unethical Acts of Employer or Co-Employees, 9 A.L.R.4th 329 (1981) .

Annot., Validity and Duration of Contract Purporting to Be for Permanent Employment, 60 A.L.R.3d 226 (1974) .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment

RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.07

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.07 Text References

[1] Matthew Bender Sources

Wilcox, California Employment Law (Matthew Bender).
Ch. 4, *Payment of Wages*.
Ch. 40, *Overview of Equal Employment Laws*.
Ch. 41, *Substantive Requirements Under Equal Employment Laws*.
Ch. 43, *Civil Actions Under Equal Employment Laws*.
Ch. 62, *Avoiding Wrongful Termination Claims*.
Ch. 70, *Trade Secrets, Unfair Competition, and Related Issues*.

California Legal Forms, Ch. 1C, *Regulation of Employers* (Matthew Bender).

California Forms of Pleading and Practice (Matthew Bender).
Ch. 249, *Employment Law: Termination and Discipline*.
Ch. 250, *Employment Law: Wage and Hour Disputes*.

[2] Additional Text References

Witkin, Summary of California Law, vol. 3, *Agency and Employment* (10th ed. 2005).

Advising California Employers, Ch. 10, *Employment Contacts* (Cal. C.E.B. 2d ed. 1996).

Employment Law Compliance for New Businesses, Ch. 3, *Employment Agreements* (Cal. C.E.B. 1997).

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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PART II. LEGAL BACKGROUND
A. The Employment Relationship

28-85 California Legal Forms--Transaction Guide § 85.10

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.10 Classification of Worker as Employee

[1] Definitions of "Employer" and "Employee"

[a] Common-Law Definitions

An "employer" for purposes of the common law is generally defined as any person engaged in any business or enterprise who has one or more persons in service under any oral or written, express or implied appointment, contract of hire, or apprenticeship [*Lab. Code § 350(a)*]. One becomes an "employer" by hiring a person to perform any type of service, whether for the benefit of the hirer or for a third person [*see Lab. Code § 2750*]. "Employing" includes any type of contracting for the services of an employee [*Lab. Code § 350(c)*]. An "employee" is any person who renders actual service in any business for an employer [*Lab. Code § 350(b)*], that is, any person who is hired to do something for the benefit of the employer or a third person [*see Lab. Code § 2750*].

More than a mere hiring is required to create an employment relationship, however. Depending on the circumstances, a person who has been hired could be classified as an independent contractor rather than as an employee [*see § 85.10[3]*]. The distinction between an independent contractor and an employee has important tax and insurance consequences for the employer [*see § 85.10[3][a]*]. The key factor in an employer-employee relationship is the employer's right to control and direct the activities of the employee or the manner or method in which the work is performed, whether exercised or not [*see Industrial Indem. Exchange v. Industrial Acci. Com. (1945) 26 Cal. 2d 130, 135, 156 P.2d 926* ; *see also Clackamas Gastroenterology Assocs., P.C. v. Wells (2003) 538 U.S. 440, 444-450, 123 S. Ct. 1673, 155 L. Ed. 2d 615* (common law element of control is "principal guidepost" in determining whether employment relationship exists between professional corporation and shareholder-director for purposes of Americans With Disabilities Act, *42 U.S.C. § 12111(5)*)]. The employer-employee relationship is created when the person employed to render a service remains entirely under the control and direction of the employer [*Oxford v. Signal Oil & Gas Co. (1970) 12 Cal. App. 3d 403, 408, 90 Cal. Rptr. 700* ; *see Crooks v. Glens Falls Indem. Co. (1954) 124 Cal. App. 2d 113, 121, 268 P.2d 203]* .

Although the common law makes "control" a key factor in establishing an employer-employee relationship, an individual corporate agent who exercises control over the wages, hours, or working conditions of a corporate employee does not thereby become an "employer" who is personally liable for unpaid wages. It is well established that corporate agents and employees acting for and on behalf of a corporation cannot be held liable for a breach of the corporation's contractual or statutory duty to pay wages [*Reynolds v. Bement (2005) 36 Cal. 4th 1075, 1087, 32 Cal. Rptr. 3d 483, 116 P.3d 1162* (in absence of statutory provision specially defining "employer," common law tests for employment and liability of corporate agents apply in interpreting *Lab. Code § 1194*, which provides employee cause of action for unpaid minimum wage); *Jones v. Gregory (2006) 137 Cal. App. 4th 798, 803-805, 40 Cal. Rptr. 3d 581* (unlike federal Fair Labor Standards Act, California statutes governing duty to pay wages look to common-law definition of employer, which precludes personal liability for corporate agents)].

[b] Definitions for Workers' Compensation Purposes

For workers' compensation purposes, "employer" includes every person that has any natural person in service [*see Lab. Code § 3300*]. "Employee," for purposes of workers' compensation, means every person in the service of an employer under any appointment, contract of hire, or apprenticeship, whether express or implied, oral or written, and whether lawful or unlawful [*Lab. Code § 3351*], including certain employment trainees, domestics, and persons engaged to create copyrightable works for hire [*Lab. Code § 3351.5*], but excluding certain other persons [*see Lab. Code § 3352*]. For instance, a person performing community service as punishment for a traffic offense is also an employee for workers' compensation purposes [*Arriaga v. County of Alameda (1995) 9 Cal. 4th 1055, 1062-1063, 40 Cal. Rptr. 2d 116, 892 P.2d 150]* . For detailed discussion of what constitutes an employment relationship for purposes of workers' compensation law, see Hanna, California Law of Employee Injuries and Workers' Compensation, Ch. 3, *Employment Relationships Covered by Workers' Compensation* (Matthew Bender).

[c] Definitions for Unemployment and Disability Compensation Purposes

For unemployment and disability compensation purposes, an "employer" is an employing unit that employs one or more employees [*see Unemp. Ins. Code § 675*] or commissions a work for hire [*see Unemp. Ins. Code § 686*]. An "employing unit" is any individual or organization that has in its employ one or more individuals performing services for it [*see Unemp. Ins. Code § 135*]. "Employment" means service performed by an employee for wages or under any contract of hire [*see Unemp. Ins. Code § 601*; *see also Unemp. Ins. Code §§ 601.5, 625, 629-655*].

"Employees" include any individuals who qualify as employees under common-law rules [*Unemp. Ins. Code § 621(b)*], certain other specifically designated individuals [*see Unemp. Ins. Code § 621(c)(1)*], and persons hired to perform services for wages or under contract or commissioned to produce works for hire [*Unemp. Ins. Code § 621(d)*]. Persons who have an investment in the facilities used in connection with the performance of their services are not considered employees for unemployment and disability compensation purposes [*see Unemp. Ins. Code § 621(c)(2)*].

Whether an individual or entity is the employer of a particular employee for unemployment and disability compensation purposes is ordinarily determined under the common-law rules that define the employer-employee relationship for general purposes [*Unemp. Ins. Code § 606.5(a)*]. However, special statutory rules apply in determining whether a particular worker is the employee of a temporary services employer or a leasing employer [*see Unemp. Ins. Code § 606.5(a)*]. A "temporary services employer" or a "leasing employer" is an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and performs all of the following functions [*Unemp. Ins. Code § 606.5(b)*]:

- Negotiates with clients or customers for such matters as time, place, and type of work, working conditions, and quality and price of the services.

- Determines assignments or reassignments of workers, even though workers retain the right to refuse

specific assignments.

- Retains the authority to assign or reassign a worker to other clients or customers when a worker is determined unacceptable by a specific client or customer.

- Assigns or reassigns the worker to perform services for a client or customer.

- Sets the rate of pay of the worker, whether or not through negotiation.

- Pays the worker from its own account or accounts.

- Retains the right to hire and terminate workers.

If a temporary services employer or a leasing employer contracts to supply a worker to a client or customer, the temporary services employer or leasing employer is the employer of the worker [*Unemp. Ins. Code § 606.5(c)*].

If an employee is lent from one employer to another, and the direction and control of the manner and means of performing the services is transferred to the second employer, then the lending employer continues to be the employer of the worker so long as the lending employer continues to remunerate the worker, whether or not reimbursed by the second employer. If the second employer remunerates the worker for services performed, then the second employer is the employer for purposes of the remuneration paid, regardless of whether the lending employer also remunerates the employee [*Unemp. Ins. Code § 606.5(d)*].

[d] Definitions for Fair Employment Purposes

For purposes of the Fair Employment and Housing Act, "employer" generally includes persons who regularly employ five or more persons, as well as persons acting as an employer's agent [*see Gov. Code § 12926(d)*; *see also Jones v. Lodge at Torrey Pines P'ship (2008) 42 Cal. 4th 1158, 1162-1173, 72 Cal. Rptr. 3d 624, 177 P.3d 232* (supervisor or other individual is not personally liable for participation in retaliation prohibited by Act); *Reno v. Baird (1998) 18 Cal. 4th 640, 647, 663, 76 Cal. Rptr. 2d 499, 957 P.2d 1333* (supervisor, although acting as agent of employer, cannot be held individually liable for discriminatory conduct that violates Act)]. For purposes of the Act, a parent corporation is not treated as an employer of its subsidiary's employees unless the two corporations form an "integrated enterprise," based on interrelation of operations, common management, centralized control, and common ownership or financial control [*Laird v. Capital Cities/ABC, Inc. (1998) 68 Cal. App. 4th 727, 737-741, 80 Cal. Rptr. 2d 454* (centralized control of labor relations is most important factor); *see Lambert v. Ackerley (1999) 180 F.3d 997, 1011-1012* (en banc)(for purposes of federal Fair Labor Standards Act, individual who exercises control over corporate employer may be treated as employer)].

The Fair Employment and Housing Act definition of "employer" generally excludes any religious association or corporation not organized for private profit [*Gov. Code § 12926(d)*; *see Gov. Code § 12926.2(a)* ("religious corporation" refers to corporations formed under *Corp. Code § 9110 et seq.* (Nonprofit Religious Corporation Law) or under *Corp. Code § 10000 et seq.*, as well as to foreign nonprofit religious corporations); *see also McKeon v. Mercy Healthcare Sacramento (1998) 19 Cal. 4th 321, 325-331, 79 Cal. Rptr. 2d 319, 965 P.2d 1189* (nonprofit religious organization need not be incorporated at all to qualify for FEHA exemption under *Gov. Code § 12926(d)*, which is available to unincorporated associations as well as to corporations)]. Nevertheless, for most purposes a religious association or corporation is treated as an employer subject to the Act with respect to persons employed to perform nonreligious duties at a health care facility operated by the association or corporation for the provision of health care that is not restricted to adherents of the religion that established the association or corporation [*Gov. Code § 12926.2(c)*]. Even at such a health care facility, however, a religious corporation is exempt from the Act in the employment (including promotion) of an individual of a particular religion or in the application of particular religious

beliefs in any work connected with the provision of health care [*Gov. Code § 12926.2(d)*].

A nonprofit public benefit corporation created to provide health care on behalf of a religious organization under the Nonprofit Public Benefit Corporation Law [*Corp. Code § 5110 et seq.*] is also exempt from the Act with respect to the employment (including promotion) of an individual of a particular religion in an executive or pastoral-care position connected with the provision of health care [*Gov. Code § 12926.2(e)*]; and the corporation may restrict employment (including promotion) in any or all employment categories to individuals of a particular religion [*Gov. Code § 12926.2(f)(1)*]. However, the corporation is subject to the Act in all other respects [*Gov. Code § 12926.2(f)(1)*].

"Employee" under the Act is defined to exclude only individuals employed by their parents, spouse, or child or persons employed under a special license in a nonprofit sheltered workshop or rehabilitation facility [*see Gov. Code § 12926(c)*].

Generally, compensation of some sort is indispensable to the formation of an employment relationship; accordingly, a volunteer worker ordinarily is not an "employee" for purposes of the Fair Employment and Housing Act [*Mendoza v. Town of Ross (2005) 128 Cal. App. 4th 625, 634-637, 27 Cal. Rptr. 3d 452]* .

PRACTICE TIP:

The Equal Employment Opportunity Commission has promulgated enforcement guidelines in which it states that the equal employment laws apply to a broad category of "employees," including temporary employees and leased employees and excluding only bona fide independent contractors. Employers of these individuals may find that they now have to actively defend administrative charges brought against them by individuals who are not their "employees" for all other purposes, whereas previously they could have had such charges dismissed simply by informing the agency that the claimant was not an employee [*see* EEOC Notice 915.002, Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, 12/3/97]. *Commentary by Lori A.M. Middlehurst*.

[2] Employee Distinguished From Agent

There is a close similarity between the services rendered by an employee and those rendered by an agent. An agent is a person who represents another person (the principal) in dealings with third persons [*Civ. Code § 2295*]. The same person can act as both employee and agent [*Fiol v. Doellstedt (1996) 500 Cal. App. 4th 1318, 1328, 58 Cal. Rptr. 2d 308* ; *Ingle v. Bay Cities Transit Co. (1945) 72 Cal. App. 2d 283, 286, 164 P.2d 508*]. However, an agent need not be an employee, and not all employees are agents. Thus, an employee who is not authorized to represent the employer in dealings with third persons is not an agent [*see Fiol v. Doellstedt (1996) 50 Cal. App. 4th 1318, 1328, 58 Cal. Rptr. 2d 308* ; *Gipson v. Davis Realty Co. (1963) 215 Cal. App. 2d 190, 205-206, 30 Cal. Rptr. 253* ; *Wallace v. Sinclair (1952) 114 Cal. App. 2d 220, 230, 250 P.2d 154* ; *Civ. Code § 2295*].

Most of the rules relating to the authority, duties, and liabilities of the respective parties apply equally to employees and agents. The rules set forth in the Restatement of Agency that are generally applicable to principal and agent in the creation of the relationship, ability to delegate authority, and capacity of the parties, also apply to employer and employee [Restatement (Second) of Agency, § 25; *see* Restatement (Second) of Agency, § 2 cmt. d].

[3] Employee Distinguished From Independent Contractor

[a] Significance of Distinction

The classification of a worker as an employee or as an independent contractor has important consequences for both the employer and the worker. For example, an employer is required to withhold income tax and make unemployment insurance and Social Security contributions for employees, but not for independent contractors [*see I.R.C. §§ 3102,*

3111, 3401(a), 306(c); *Unemp. Ins. Code §§ 135, 675, 976, 2602, 2652, 13005*]. Further, under the doctrine of *respondeat superior*, an employer may be vicariously liable for torts committed by an employee against third parties, but a person who hires an independent contractor generally is not vicariously liable for the torts of the contractor [*Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 250-252, 66 Cal. Rptr. 20, 437 P.2d 508]* . Thus, the hirer of an independent contractor ordinarily is not liable to an employee of the contractor for injuries caused by the negligence of the contractor [*Camargo v. Tjaarda Dairy (2001) 25 Cal. 4th 1235, 1244-1245, 108 Cal. Rptr. 2d 617* (no liability under negligent hiring theory); *Toland v. Sunland Housing Group, Inc. (1998) 18 Cal. 4th 253, 267, 955 P.2d 504* (no liability under "peculiar risk doctrine" even when hirer fails to require that special precautions be taken to avert peculiar risks of work); *Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 21 Cal. Rptr. 2d 72, 854 P.2d 721* (no liability under "peculiar risk doctrine")]. However, the hirer may be liable if the hirer's own conduct contributes to an injury suffered by the contractor's employee [*Kinsman v. Unocal Corp. (2005) 37 Cal. 4th 659, 674, 36 Cal. Rptr. 3d 495, 123 P.3d 931, 2005 Cal. LEXIS 13684* (hirer as landowner may be independently liable to contractor's employee if it knows or reasonably should know of concealed pre-existing hazardous condition on its premises, contractor does not know and could not reasonably ascertain condition, and landowner fails to warn contractor); *McKown v. Wal-Mart Stores, Inc. (2002) 27 Cal. 4th 219, 225, 115 Cal. Rptr. 2d 868* (hirer liable for negligently furnishing unsafe equipment); *Hooker v. Department of Transportation (2002) 27 Cal. 4th 198, 212, 115 Cal. Rptr. 2d 853* (hirer liable based on exercise of retained control over safety conditions at work site that affirmatively contributed to injury suffered by contractor's employee)].

PRACTICE TIP:

Failure to correctly classify workers may have significant economic consequences for an employer. In addition to administrative exposure, employers may risk disqualification of ERISA plans and may be required to pay those employees back benefits including the increase they might have realized had they been eligible for stock options or employee stock purchase plans [*see Vizcaino v. Microsoft Corp. (9th Cir. 1997) 120 F. 3d 1006, 1010-1014*]. *Commentary by Lori A.M. Middlehurst.*

[b] Relevant Factors

[i] Common-Law Factors

An independent contractor generally is one who, in rendering services, exercises an independent occupation and deals with the "employer" only with respect to the results of the work, not the means by which it is to be accomplished. The chief factor in determining that one is an independent contractor is that the employer of an independent contractor has no right of control over the mode of performing the work involved [*Green v. Soule (1904) 145 Cal. 96, 99, 78 P. 337*], while the key element of the employer-employee relationship is that the employer has the right to control and direct the activities of the employee [*see Industrial Indem. Exchange v. Industrial Acci. Com. (1945) 26 Cal. 2d 130, 135, 156 P.2d 926*].

Under particular circumstances, determining whether a person is an employee or an independent contractor can be difficult. At common law, the following factors are all relevant in making the determination, [*see* Restatement (Second) of Agency, § 220(2) & cmt. h; *Tieberg v. Unemployment Ins. App. Bd. (1970) 2 Cal. 3d 943, 949, 88 Cal. Rptr. 175, 471 P.2d 975* ; *Empire Star Mines Co. v. California Employment Com. (1946) 28 Cal. 2d 33, 43-44, 168 P.2d 686* ; *see also* Ch. 84, *Independent Contractors*]:

- The extent of control which, by the terms of the agreement, the one who ordered the work may exercise over the details of the work.

- Whether the one employed is engaged in a distinct occupation or business.

- Whether in the particular locality the kind of work involved is usually done under the direction of the

person for whom the work is done or by a specialist without supervision.

- The skill required in the particular occupation.

- Whether the instrumentalities, tools, and place of work are supplied by the employer or the worker.

- The length of time for which the person is employed.

- Whether regular working hours are set by the person for whom work is performed.

- Whether payment is by the hour or month or for the job [*see Ali v. L.A. Focus Publication (2003) 112 Cal. App. 4th 1477, 1485-1486, 5 Cal. Rptr. 3d 791* (payment by job, small amount of payment, and failure to withhold taxes are indicative of independent contractor status but are not dispositive if other factors are indicative of employee status)].

- Whether the person performing the work is engaged full time by one person.

- Whether the work is performed in a specific area or over a fixed route.

- Whether the work is a part of the regular business of the person for whom the work is performed.

- Whether the parties believe they are creating a hirer-independent contractor relationship or an employer-employee relationship.

- Whether the person who ordered the work is in business.

- Whether the services are terminable without cause at the will of the person for whom the work is performed but see *Varisco v. Gateway Sci. & Eng'g, Inc. (2008) 166 Cal. App. 4th 1099, 1107-1108, 83 Cal. Rptr. 3d 393* (independent contractor agreement can properly include at-will clause giving parties mutual rights to terminate agreement without cause, and such clause does not by itself change independent contractor relationship into employer-employee relationship)]

- Whether under the terms of the agreement the work may be delegated.

Different government agencies may apply slightly different definitions and tests in determining whether a worker is an employee or an independent contractor, depending on the purpose for which the determination is made [*see, e.g., Rev. Rul. 87-41, 1987-1 C.B. 296* (20 factors used by IRS to determine whether taxpayer is employee); 22 Cal. Code Reg. § 4304-1 (10 factors considered in determining whether individual is employee for purposes of state income-tax withholding)]. For discussion of factors considered by the Internal Revenue Service, see [ii], below. For discussion of factors considered by the California Employment Development Department, see [iii], *below.*

[ii] IRS Factors

In determining employee status for federal income tax purposes, the Internal Revenue Service (IRS) recognizes that, as under common law, the critical element of an employer-employee relationship is the employer's right to control the means as well as the result of the employee's services [*Rev. Rul. 87-41, 1987-1 C.B. 296, 298]* . In determining the existence of sufficient control, the IRS has identified 20 relevant factors. The degree of importance of each factor varies depending on the factual context in which the services are performed. The 20 factors are as follows [*Rev. Rul. 87-41, 1987-1 C.B. 296*]:

Instructions:

if the employer has the right to require the worker to comply with the employer's instructions, the worker ordinarily will be deemed an employee.

- Training: if the employer trains the worker (for example, by assigning an experienced worker to work with the worker, by corresponding with the worker, or by requiring the worker to attend meetings), that indicates that the employer wants the services performed in a particular manner.

- Integration: integration of the worker's services into the business operations of the employer generally shows that the worker is subject to the employer's direction and control.

- Services rendered personally: if the services are to be rendered personally, presumably the employer is interested not only in the results of the work but also in the methods used to accomplish the work.

- Hiring, supervising, and paying assistants: if the employer hires, supervises, and pays assistants, that generally shows that the employer controls the workers on the job. On the other hand, if one worker hires, supervises, and pays assistants under a contract that requires the worker to provide labor and materials and under which the worker is responsible only for the results of the work, the worker ordinarily will be deemed an independent contractor.

- Continuing relationship: a continuing relationship between the employer and the worker indicates an employee relationship.

- Set hours of work: the establishment of set hours of work is a factor indicating control by the employer.

- Requirement of full-time work: if the worker must devote essentially full time to the employer's business, that indicates control by the employer.

- Working on employer's premises: if the work is performed on the employer's premises, that indicates control by the employer, especially if the work could be done elsewhere. However, work done off-premises does not by itself mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and whether an employer generally would require such services to be performed on the employer's premises. For example, control over the place of work is indicated when the employer has the right to direct that the worker travel a designated route, cover a territory within a certain time, or to work at specific places as required.

- Order or sequence of work: if the employer has the right to set the order or sequence of services to be performed by the worker, that indicates that the employer has the right of control.

- Reports: a requirement that the worker submit oral or written reports to the employer indicates a degree of control by the employer.

- Payment by hour, week, or month: periodic payments generally indicate that the worker is an employee, unless the method of payment is just a convenient way of paying off a lump sum agreed upon as the cost of a job. Payment by the job or on a straight commission generally indicates that the worker is an independent contractor.

- Payment of business or travel expenses: if the employer ordinarily pays the worker's expenses, the

worker is ordinarily an employee.

- Furnishing tools and materials: the furnishing of tools, materials, and other equipment by the employer tends to show that the worker is an employee.

- Significant investment: an investment made by the worker in facilities that are used to perform services and that are not typically maintained by employees tends to show that the worker is an independent contractor. Conversely, a lack of such investment tends to show that the worker is an employee.

- Realization of profit or loss: if the worker can realize a profit or loss as a result of his or her services, the worker generally is an independent contractor; if the worker cannot realize such a profit or loss, he or she is an employee.

- Working for multiple employers: if a worker performs more than minimal services for more than one employer at a time, that generally indicates that the worker is an independent contractor. However, a worker may be employed by more than one employer, especially where the employers are part of the same service arrangement.

- Offering services to general public: a worker who makes his or her services available to the general public on a regular and consistent basis usually is an independent contractor.

- Right to discharge: the right to discharge a worker indicates that the worker is an employee.

- Right to terminate: if the worker has a right to terminate his or her relationship with the employer at any time without incurring liability, that indicates that the worker is an employee.

[iii] EDD Factors

The California Employment Development Department (EDD) has formulated its own test for determining whether a worker is an employee for state income-tax withholding purposes. Under the EDD test, if the employer has the right to control the manner and means of accomplishing the desired result of the worker's services, then the worker is an employee. The employer's right to discharge the worker at will without cause is strong evidence of such control by the employer [22 Cal. Code Reg. § 4304-1]. If it cannot be determined whether the employer has such control, the following 10 factors are to be considered in determining whether the worker is an employee [22 Cal. Code Reg. § 4304-1(a)]:

- Whether the worker is engaged in a separately established occupation or business from that of the employer [*see* 22 Cal. Code Reg. § 4304-1(b)(7)].

- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of an employer without supervision.

- The skill required in performing the services and accomplishing the desired result. Unskilled workers usually are employees [22 Cal. Code Reg. § 4304-1(b)(2)].

- Whether the employer or the worker supplies the instrumentalities, tools, and place of work. This factor is irrelevant, however, in determining whether the worker is an employee for purposes of personal income-tax withholding [22 Cal. Code Reg. § 4304-1(b)(1), (4)].

- The length of time for which the services are performed, to determine whether the performance is an isolated event or continuous in nature [*see* 22 Cal. Code Reg. § 4304-1(b)(3)].

- The method of payment, whether by the time, a piece rate, or by the job.

- Whether the work is part of the regular business of the employer [*see* 22 Cal. Code Reg. § 4304-1(b)(6)].

- Whether the parties believe they are creating an employer-employee relationship [*see* 22 Cal. Code Reg. § 4304-1(b)(5)].

- The extent of actual control exercised by the employer over the manner and means of performing the services.

- Whether the employer is engaged in a business enterprise or whether the services are being performed for the benefit or convenience of the employer as an individual.

The EDD has issued regulations applying the foregoing guidelines to specific kinds of occupations or industries, including artists [22 Cal. Code Reg. § 4304-5], amateur athletic officials [22 Cal. Code Reg. § 4304-10], the real estate industry [*22 Cal. Code Reg. § 4304.2*], the home health-care industry [*22 Cal. Code Reg. § 4304.3*], the computer services industry [22 Cal. Code Reg. § 4304-4], the newspaper distribution industry [22 Cal. Code Reg. § 4304-6], the product demonstrator industry [22 Cal. Code Reg. § 4304-7], the security dealer industry [22 Cal. Code Reg. § 4304-8], and the language interpreter industry [22 Cal. Code Reg. § 4304-9].

[iv] Workers' Compensation Factors

In determining whether a hiree is an employee or independent contractor for purposes of the requirement that an employer provide workers' compensation insurance [*see Lab. Code § 3700*], the common-law emphasis on the hirer's degree of control over the details of the work in the determination of an employment relationship remains significant [*see* [1], *above*]. However, it is not the only factor to be considered in the workers' compensation context, because the question of a hiree's status must be considered in light of the history and remedial and social purposes of the Workers' Compensation Act [*S.G. Borello & Sons, Inc. v. Department of Indus. Relations (1989) 48 Cal. 3d 341, 351-356, 256 Cal. Rptr. 543* ; *JKH Enters., Inc. v. Department of Indus. Relations (2006) 142 Cal. App. 4th 1046, 1062-1063, 48 Cal. Rptr. 3d 563* ; see *Lab. Code § 3600 et seq.*].

The policies behind the Workers' Compensation Act are not concerned with whether an employer should be liable for an injury caused by a hiree (typically the focus of a common-law inquiry), but rather whether the employer should be required to insure against an injury to the hiree [*S.G. Borello & Sons, Inc. v. Department of Indus. Relations (1989) 48 Cal. 3d 341, 352-353, 256 Cal. Rptr. 543, 769 P.2d 399* ; *JKH Enters., Inc. v. Department of Indus. Relations (2006) 142 Cal. App. 4th 1046, 1063, 48 Cal. Rptr. 3d 563]* . Accordingly, in the workers' compensation context, the nature of the work and the overall arrangement between the parties must be examined to determine whether they come within the history and fundamental purposes of the Act [*S.G. Borello & Sons, Inc. v. Department of Indus. Relations (1989) 48 Cal. 3d 341, 353-354, 256 Cal. Rptr. 543* (fundamental purposes of Workers' Compensation Act are (1) to ensure that cost of industrial injuries will be part of cost of goods rather than burden on society; (2) to guarantee prompt, limited compensation for employee's work injuries, regardless of fault, as inevitable cost of production; (3) to spur increased industrial safety; and (4) to insulate employer from tort liability for employee's injuries); *JKH Enters., Inc. v. Department of Indus. Relations (2006) 142 Cal. App. 4th 1046, 1063, 48 Cal. Rptr. 3d 563]* . To accomplish its goal of comprehensive coverage of injuries in employment, the Act defines "employment" broadly in terms of "service [to] an employer" and by including a general presumption that any person "performing service for the alleged employer" is a covered employee [*Lab. Code §§ 3351, 5507(a)*; *see S.G. Borello & Sons, Inc. v. Department of Indus. Relations*

(1989) 48 Cal. 3d 341, 354, 256 Cal. Rptr. 543 ; *JKH Enters., Inc. v. Department of Indus. Relations (2006) 142 Cal. App. 4th 1046, 1063, 48 Cal. Rptr. 3d 563]* .

Thus, in the workers' compensation context, the relevant factors in determining whether a hiree is an employee include the following [*S.G. Borello & Sons, Inc. v. Department of Indus. Relations (1989) 48 Cal. 3d 341, 350-355, 256 Cal. Rptr. 543* ; *JKH Enters., Inc. v. Department of Indus. Relations (2006) 142 Cal. App. 4th 1046, 1064 n.14, 48 Cal. Rptr. 3d 563]* :

- Whether there is a right to fire at will without cause.
- Whether the one performing services is engaged in a distinct occupation or business.
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision.
- The skill required in the particular occupation.
- Whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work.
- The length of time for which the services are to be performed.
- The method of payment, whether by the time or by the job.
- Whether the work is a part of the regular business of the principal.
- Whether the parties believe they are creating an employer-employee relationship.
- Whether the classification of independent contractor is bona fide and not a subterfuge to avoid employee status.
- The hiree's degree of investment other than personal service in his or her own business and whether the hiree holds himself or herself out to be in business with an independent business license.
- Whether the hiree has employees.
- The hiree's opportunity for profit or loss depending on his or her managerial skill.
- Whether the service rendered is an integral part of the alleged employer's business.

The individual factors are not to be applied mechanically as separate tests. They are intertwined, and each factor's weight may depend the particular combination of circumstances in a given case [*S.G. Borello & Sons, Inc. v. Department of Indus. Relations (1989) 48 Cal. 3d 341, 350-351, 354-355, 256 Cal. Rptr. 543, 769 P.2d 399* ; *JKH Enters., Inc. v. Department of Indus. Relations (2006) 142 Cal. App. 4th 1046, 1063-1064, 48 Cal. Rptr. 3d 563]* .

The nondispositive nature of the control factor in the workers' compensation context was illustrated by the California Supreme Court in a case in which the Court concluded that the particular hirees were employees and not independent contractors. The Court found that the hirees were employees even though the employer did not exercise significant control over the details of the work, which was the growing and harvesting of cucumbers for the production of pickles. The minimal degree of control that the employer exercised over the details of the work was not considered dispositive,

because the work did not require a high degree of skill and was an integral part of the employer's business. The employer was thus determined to be exercising all necessary control over the operation as a whole [*S.G. Borello & Sons, Inc. v. Department of Indus. Relations (1989) 48 Cal. 3d 341, 350-351, 355-360, 256 Cal. Rptr. 543, 769 P.2d 399]* .

Similarly, a court of appeal concluded that drivers hired by a courier service were employees, despite the employer's lack of control over the manner in which the drivers covered their territories and the drivers' written acknowledgment of independent contractor status. The court found that the functions performed by the drivers--pickup and delivery of papers or packages and driving in between--did not require a high degree of skill, and the functions constituted the integral heart of the employer's courier-service business. By obtaining the clients in need of the service and providing the workers to conduct it, the employer retained all necessary control over the operation as a whole [*JKH Enters., Inc. v. Department of Indus. Relations (2006) 142 Cal. App. 4th 1046, 1064-1066, 48 Cal. Rptr. 3d 563* (noting that employer was corporation formed as subterfuge to avoid effects of previous stop work order issued against predecessor sole proprietorship that had not secured workers' compensation insurance)].

[c] Employee-Independent Contractor Distinction in Particular Industries

[i] Persons Working for or as Building Contractors

There is a rebuttable presumption that a worker performing services for which a license is required under the Contractors License Law (or who is performing such services for a person who is required to obtain such a license) is an employee rather than an independent contractor [*Lab. Code § 2750.5*; *see* *Sanders Constr. Co. v. Cerda (2009) 175 Cal. App. 4th 430, 433-436, 95 Cal. Rptr. 3d 911* (under *Lab. Code § 2750.5*, general contractor is treated as employer of unlicensed subcontractor's employees, who may assert wage claim against general contractor)]. The burden of proof for establishing independent contractor status is met if the person can satisfactorily show that:

- The individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for [*Lab. Code § 2750.5(a)*];

- The individual is customarily engaged in an independently established business [*Lab. Code § 2750.5(b)*];

- The individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. Good faith is evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for one's self, and bargaining for a contract to complete a specific project for compensation by project rather than by time. It is also shown by supplying the tools used in the work (other than tools normally provided by employees), hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, or holding a license under the Business and Professions Code. Other factors are the intent of the parties that an independent contractor relationship exists or that the relationship is not terminable at will, but gives rise to an action for breach of contract if terminated [*Lab. Code § 2750.5(c)*].

In addition, the person performing the services must possess a valid contractor's license as a condition to having independent-contractor status [*Lab. Code § 2750.5*]. Thus, if a worker does not possess a valid contractor's license, the presumption of employee status ordinarily is conclusive [*Lab. Code § 2750.5*]. However, notwithstanding the presumption, a worker who misrepresents himself or herself as a licensed contractor will be estopped from asserting that his or her unlicensed status makes him or her an employee [*Chin v. Namvar (2008) 166 Cal. App. 4th 994, 1004, 83 Cal. Rptr. 3d 294]* .

If the statutory presumption is not rebutted, a property owner who hires an unlicensed building contractor will be the presumptive employer not only of the contractor, but also of the workers hired by the building contractor, at least for purposes of workers' compensation eligibility [*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (1985) 40 Cal. 3d 5, 15, 219 Cal. Rptr. 13, 706 P.2d 1146* ; *Cedillo v. Workers' Comp. Appeals Bd. (2003) 106 Cal. App. 4th 227, 233, 130 Cal. Rptr. 2d 581]* . However, for purposes of claiming workers' compensation benefits, a worker does not qualify as a presumptive employee unless he or she has worked for the employer at least 52 hours during the 90 calendar days preceding the date of the work-related injury (or, in the case of a cumulative injury, the date of the last employment) [*Lab. Code § 3352(h)*]. Thus, a worker hired by an unlicensed building contractor and injured on the job will not be deemed an employee of the property owner if the worker has worked less than 52 hours on the owner's property. In such a case, however, the worker may have worked enough hours for the unlicensed contractor to qualify as a presumptive employee of the contractor [*Cedillo v. Workers' Comp. Appeals Bd. (2003) 106 Cal. App. 4th 227, 234-237, 130 Cal. Rptr. 2d 581]* .

It remains an open question, however, whether an unlicensed worker will be deemed a homeowner-hirer's employee under *Lab. Code § 2750.5* so as to impose vicarious *tort* liability on the homeowner for the worker's conduct that results in the worker's own injury [*Ramirez v. Nelson (2008) 44 Cal. 4th 908, 913, 920, 80 Cal. Rptr. 3d 728, 188 P.3d 659* (because no applicable statute created special duty owed by employer to employee, it was unnecessary to decide whether unlicensed worker was homeowner-hirer's employee at law under *Lab. Code § 2750.5* so as to impose vicarious liability on homeowner for worker's death caused by worker's own conduct)].

[ii] Physicians and Surgeons

There is a rebuttable presumption that a licensed physician and surgeon who enters into a contract to perform health services on behalf of a licensed primary care clinic [*see Health & Safety Code § 1204(a)*] is an independent contractor rather than an employee [*Lab. Code § 2750.6*].

[4] Employee Distinguished From Partner

A partnership generally is an association of two or more persons to carry on a business for profit as co-owners [*Corp. Code § 16101(9)*]. Unlike the employer-employee relationship, a partnership is characterized by a community of interest in a particular business and a sharing of profits from that business [*People v. Park (1978) 151 Cal. Rptr. 146]* . "Community of interest" implies joint participation in management, control, profits and losses of the business [*Constans v. Ross (1951) 106 Cal. App. 2d 381, 386, 235 P.2d 113]* . For further discussion of partnership, see Ch. 15, *General Partnerships* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentEmployeesLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART II. LEGAL BACKGROUND
A. The Employment Relationship

28-85 California Legal Forms--Transaction Guide § 85.11

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.11 Obligations of Employee

[1] Duty to Comply With Employer's Directions

An employee must substantially comply with those directions of the employer that concern the services to be performed, unless obedience to the direction is impossible, unlawful, or would impose new and unreasonable burdens on the employee [*Lab. Code § 2856*]. It has been held that while the employee will be protected from harsh treatment, the employee must nevertheless obey the employer's orders in all matters that cannot be considered a departure from the contract [*May v. New York Motion Picture Corp. (1920) 45 Cal. App. 396, 402-403, 187 P. 785]* . Thus, for example, an order requiring an actress to report to the studio each morning at 8:30 was held not unreasonable [*May v. New York Motion Picture Corp. (1920) 45 Cal. App. 396, 405-409, 187 P. 785]* . On the other hand, an order forbidding an actress from leaving the employer's studio for lunch hour was held unreasonable, so that disobedience did not constitute a breach [*Mason v. Lyl Productions (1968) 69 Cal. 2d 79, 84-85, 69 Cal. Rptr. 769, 443 P.2d 193]* .

[2] How Duties Are to Be Performed

The employee must perform the work in accordance with the methods and rules that govern at the place of performance, unless it is otherwise directed by the employer, or it is impractical to do so, or it would obviously be injurious to the employer for the employee to do so [*see Lab. Code § 2857*]. An employee must exercise a reasonable degree of skill, unless before employing him or her the employer had notice of his or her lack of skill [*Lab. Code § 2858*]. The employee must use all the skill he or she possesses to the extent required to perform the job specified by the employer [*Lab. Code § 2859*].

[3] Accounting of Transactions and Delivery of Things Received

On demand, an employee must render to the employer a full and honest account of all transactions that occurred in the course of the employment as often as is reasonable. However, the employee must give prompt notice to the employer of everything received for the employer's account without any prior demand from the employer [*see Lab. Code § 2861*],

even though the employee need not actually deliver those things until demanded by the employer and need not send them to the employer from a distance by a method involving greater risk than their retention by the employee unless that is required by the employer [*see Lab. Code § 2862*].

[4] Duty to Give Preference to Employer's Business

An employee has a duty to serve the employer faithfully during working hours [*see Charles T. Powner Co. v. Smith (1928) 91 Cal. App. 101, 102, 266 P. 833]* . If an employee has any business to transact on his or her own account similar to that entrusted to him or her by the employer, the employee must always give preference to the employer's business [*Lab. Code § 2863*].

An employee must devote his or her efforts to the employer's interests and may not engage in any business that is detrimental to the employer's business [*see Western Electro-Plating Co. v. Henness (1960) 180 Cal. App. 2d 442, 448, 4 Cal. Rptr. 434]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentEmployeesLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART II. LEGAL BACKGROUND
A. The Employment Relationship

28-85 California Legal Forms--Transaction Guide § 85.12

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.12 Obligations of Employer

[1] Payment of Wages

"Wages" is the broad term used by the Labor Code to denote all types of compensation due an employee from an employer for labor performed [*Lab. Code § 200(a)*]. "Wages" include not only the periodic monetary earnings of an employee but also other benefits to which the employee is entitled as part of his or her compensation, including vacation pay and severance pay [*Suastez v. Plastic Dress-Up Co. (1982) 31 Cal. 3d 774, 780, 183 Cal. Rptr. 846, 647 P.2d 122* ; *Triad Data Servs., Inc. v. Jackson (1984) 153 Cal. App. 3d Supp. 1, 10, 200 Cal. Rptr. 418]* .

Wages earned are generally due and payable twice a month. Payment for work performed up to the 15th day of any month must be made between the 16th and 26th day of the month; payment for work performed between the 16th and last day of the month must be made between the first and 10th day of the following month [*Lab. Code § 204(a)*].

Alternatively, an employee may be paid on a weekly basis, on a regular day designated by the employer in advance of the rendition of services as the regular payday. Wages for work performed by a weekly-paid employee during any calendar week and prior to or on the regular payday must be paid not later than the regular payday falling during the following calendar week; wages for work performed by the employee during any calendar week and subsequent to the regular payday must be paid not later than seven days after the regular payday falling during the following calendar week [*Lab. Code § 204b*].

Executive, administrative, and professional personnel generally may be paid once a month within seven days of the close of their monthly payroll period. If these personnel (as defined in the Fair Labor Standards Act [*see 29 U.S.C. § 213(a)(1)*; *see also McGuire v. City of Portland (9th Cir. 1998) 159 F.3d 460, 462-464* (exemption for executive, administrative, and professional employees applies only if employee is paid on salary basis, without significant likelihood of pay reduction for disciplinary reasons or because of variations in quality or quantity of work performed)]) are subject to the Fair Labor Standards Act because they are employed in interstate commerce, their salaries may be

paid once monthly on or before the 26th day of the month during which the work was performed [*see Lab. Code §§ 204(a), 204.2*]. If an executive, administrative, or professional employee is not subject to the Fair Labor Standards Act, is not covered by a collective bargaining agreement, is paid monthly remuneration that does not include overtime pay, and is paid within seven days of the close of his or her monthly payroll period, there is no requirement for semimonthly payment or payment on or before the 26th day of the month during which the work was performed [*Lab. Code § 204c*].

Special requirements apply to the payment of wages to employees of a temporary service employer that provides workers for its clients or customers [*see Lab. Code § 201.3(a)(1),(2)* ("temporary services employer" defined)]. If an employee of a temporary services employer is assigned to work for a client, that employee's wages are due and payable no less frequently than weekly, regardless of when the assignment ends, and wages for work performed during any calendar week are due and payable not later than the regular payday of the following calendar week [*Lab. Code § 201.3(b)(1)*]. If an employee of a temporary services employer is assigned to work for a client on a day-to-day basis, the employee's wages are due and payable at the end of each day, regardless of when the assignment ends, if (1) the employee reports to or assembles at the office of the temporary services employer or other location; (2) the employee is dispatched to a client's worksite each day and returns to or reports to the office of the temporary services employer or other location on completion of the assignment; and (3) the employee's work is not executive, administrative, professional, or clerical [*Lab. Code § 201.3(b)(2)*]. If an employee of a temporary services employer is assigned to work for a client engaged in a trade dispute, that employee's wages are due and payable at the end of each day, regardless of when the assignment ends [*Lab. Code § 201.3(b)(3)*]. If an employee of a temporary services employer is assigned to work for a client and is discharged by the temporary services employer or leasing employer, wages are due and payable as provided in *Labor Code Section 201* (*see* [2][a], *below*) [*Lab. Code § 201.3(b)(4)*]. If an employee of a temporary services employer is assigned to work for a client and quits his or her employment with the temporary services employer, wages are due and payable as provided in *Labor Code Section 202* (*see* [2][a], *below*) [*Lab. Code § 201.3(b)(5)*]. If an employee of a temporary services employer is assigned to work for a client for over 90 consecutive calendar days, the foregoing requirements do not apply unless the temporary services employer pays the employee weekly [*Lab. Code § 201.3(b)(6)*]. A temporary services employer who violates the foregoing requirements is subject to the civil penalties provided for in *Labor Code Section 203* (*see* [2][a], *below*) and to any other penalties available at law [*Lab. Code § 201.3(c)*].

[2] Payment of Wages on Termination of Employment

[a] Wages Generally

If an employer discharges an employee, the wages earned and unpaid at the time of discharge ordinarily are due and payable immediately [*Lab. Code § 201(a)*]. "Discharge," in this context, occurs not only when an employee is involuntarily terminated from an ongoing employment relationship, but also when an employee is released after completing the particular job assignment or time duration for which he or she was hired [*Smith v. Superior Court (2006) 39 Cal. 4th 77, 82-94, 45 Cal. Rptr. 3d 394, 137 P.3d 218]* .

If the discharge is part of a group layoff by reason of the termination of seasonal employment in the curing, canning, or drying of any variety of perishable fruit, fish, or vegetables, payment will be deemed "immediate" if it is made within a reasonable time, not to exceed 72 hours, as necessary to compute and pay the wages. In such a case the employer must mail the payment if the employee has requested payment by mail and has designated a mailing address [*Lab. Code § 201(a)*].

Special provisions apply to the payment of a discharged state employee's accumulated vacation and leave time that was earned by working overtime. The state employee may elect to have such accumulated "compensating time" deferred to the following calendar year or paid into the employee's state-sponsored supplemental retirement plan [*Lab. Code § 201(b), (c)*].

If an employee resigns and does not have a definite term of employment specified in a written contract, the wages earned and unpaid at the time of resignation generally are due and payable within 72 hours of resignation [*Lab. Code § 202(a)*]. However, if the employee has given at least 72 hours' notice of his or her intention to resign, the wages earned and unpaid at the time of resignation are payable at the time of resignation [*Lab. Code § 202(a)*]. An employee who resigns without giving 72-hour notice is entitled to payment by mail if he or she so requests and designates a mailing address. In such a case, the time of mailing will be considered the time of payment [*Lab. Code § 202(a)*]. Special provisions apply to the payment of a quitting or retiring state employee's accumulated vacation and leave time that was earned by working overtime. The state employee may elect to have for such accumulated "compensating time" deferred to the following calendar year or paid into the employee's state-sponsored supplemental retirement plan [*Lab. Code § 202(b), (c)*].

An employer that willfully fails to comply with the foregoing requirements for the payment of wages on an employee's termination, or that imposes an abatement or reduction on those wages, is liable for post-termination wages as a penalty. Such post-termination wages accrue until they are paid or until the employee commences an action to recover them, up to a maximum of 30 days [*Lab. Code § 203*]. This "waiting time" penalty is computed by calculating the employee's daily wage rate, which is then multiplied by the number of days of nonpayment, up to 30 days. Thus, the penalty can exceed one month's wages, because the unpaid wages continue to accrue not only on days that the employee might have worked, but also on nonworkdays. This method of calculating the penalty furthers public policy by providing a strong disincentive to employers who are reluctant to make timely payment of wages due on termination of employment [*Mamika v. Barca (1998) 68 Cal. App. 4th 487, 491-494, 80 Cal. Rptr. 2d 175* (although limited to 30 days, penalty can exceed one month's wages; wrong targeted by statute is delay in payment, which continues on nonworkdays as well as workdays as long as payment is not made)].

The requirement that earned, unpaid wages be paid on termination or resignation [*Lab. Code §§ 201, 202*] is not violated by an employee incentive compensation plan under which employees can elect to receive, in lieu of a portion of their compensation, shares of company stock with restricted rights during a vesting period, with forfeiture of the restricted stock on an employee's resignation or termination for cause before the stock fully vests [*Schachter v. Citigroup, Inc. (2009) 47 Cal. 4th 610, 618-623, 101 Cal. Rptr. 3d 2, 9-13, 218 P.3d 262, 268-271* (because restricted stock had value--immediately exercisable voting and dividend rights, and contingent rights of full ownership--employee's bargained-for wages had been paid in full, and forfeiture of unvested shares did not constitute denial of compensation)].

[b] Compensation for Accrued Vacation

If an employment contract provides for paid vacations and an employee's employment is terminated before he or she takes the vacation time that has vested to that date, all vested vacation pay must be paid at the final rate of pay pursuant to the contract or the employer's policy concerning eligibility or time served [*Lab. Code § 227.3*; *see* Owen v. Macy's, Inc. (2009) 175 Cal. App. 4th 462, 468, 96 Cal. Rptr. 3d 70 (*Lab. Code § 227.3* does not require that employer provide its employees with any paid vacation at all; rather, statute imposes certain requirements "whenever" employer provides vacation benefits)].

An employment contract or an employer's policy may not provide for the forfeiture of vested vacation time upon termination [*Lab. Code § 227.3*]. An employer may adopt a policy of deducting from a salaried employee's vacation-leave bank whenever the employee takes four hours off; such a policy does no more than regulate the timing of the exempt employee's use of vacation time [*Conley v. Pacific Gas & Electric Co., (2005) 131 Cal. App. 4th 260, 269-270, 31 Cal. Rptr. 3d 719]* . A contract or an employer's policy that allows an employee to accumulate vacation time and take it whenever the employee chooses is not considered to exact a forfeiture, so long as the employer does not require the employee to "use or lose" accrued vacation.

It is an open question whether a terminated employee's action to recover compensation for vested but unused vacation

time is subject to the statute of limitations for claims based on statutory liability, or the statutes of limitations for contract claims [*Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1577, 50 Cal. Rptr. 3d 166* (finding it unnecessary to decide which statute of limitations applied, because complaint had been filed within all potentially applicable limitation periods); *see Code Civ. Proc. §§ 337(1)* (written contracts--four years), 338(a)(liability created by statute--three years), 339(1)(oral contracts--two years); *but see Sequeira v. Rincon-Vitova Insectaries, Inc. (1995) 32 Cal. App. 4th 632, 634, 38 Cal. Rptr. 2d 264* (applying four-year limitation for actions based on written contract, *Code Civ. Proc. § 337(1)*)].

Whichever statute of limitations governs the time for suing to recover vested vacation, the courts of appeal are split on the question whether the statute also should be applied to limit the years for which vested vacation must be paid upon termination. The Second District has held that if the employment relationship was governed by a written contract, the four year statute of limitations [*see Code Civ. Proc. § 337(1)*] would limit the right to vacation pay to that which vested within four years prior to the termination of the employment relationship [*Sequeira v. Rincon-Vitova Insectaries, Inc. (1995) 32 Cal. App. 4th 632, 637, 38 Cal. Rptr. 2d 264]* . The Fifth District, in contrast, has held that the statute of limitations only limits the time for filing suit after accrual of the terminated employee's cause of action (i.e., the employer's failure to pay vested vacation upon termination). Under the Fifth District's view, the limitations period should not also be applied "in reverse" to limit the years for which vested vacation may be claimed. Rather, because "all vested vacation shall be paid to [a terminated employee] as wages" [*Lab. Code § 227.3*], the Fifth District holds that there is no limit on the years of vested, unused vacation time that a terminated employee may claim [*Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1577-1583, 50 Cal. Rptr. 3d 166]* . The Fifth District's analysis seems preferable. The First District's view--that claims for vacation time vested more than four years prior to the date of termination are barred as "stale" claims [*see Sequeira v. Rincon-Vitova Insectaries, Inc. (1995) 32 Cal. App. 4th 632, 637, 38 Cal. Rptr. 2d 264]* --ignores the general principle that a statute of limitations does not begin to run until the cause of action accrues (which, in this context, could not happen before the termination of employment) [*see Church v. Jamison (2006) 143 Cal. App. 4th 1568, 1582-1583, 50 Cal. Rptr. 3d 166]* .

[3] Liability for Losses and Expenses

Employers are liable for the losses of their employees that are caused by the employer's lack of ordinary care [*Lab. Code § 2800*]. The employer cannot assert assumption of risk or the fellow servant rule in defending any action for those losses, and the employee's contributory negligence cannot bar recovery although it can diminish the amount of the employee's recovery [*Lab. Code § 2801*]. The personal representative of an employee whose death results from the lack of ordinary or reasonable care of the employer or any of its employees can bring an action for wrongful death [*Lab. Code § 2803*].

An employer must indemnify its employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties or obedience to the directions of the employer. This obligation to indemnify applies even if the directions of the employer are unlawful, unless the employee at the time of obeying the directions believed them to be unlawful [*Lab. Code § 2802(a)*]. However, the duty to indemnify does not arise when the employee's conduct, though alleged to be in the scope of employment, is so unusual or startling that it would be unfair to include indemnification in the employer's cost of doing business [*Devereaux v. Latham & Watkins (1995) 32 Cal. App. 4th 1571, 1583, 38 Cal. Rptr. 2d 849* (citing *Rodgers v. Kemper Constr. Co. (1975) 50 Cal. App. 3d 608, 619, 124 Cal. Rptr. 143*)].

Expenses subject to indemnification include attorneys' fees incurred by the employee not only in defending against claims arising from the employee's discharge of duties, but also in proceedings against the employer to enforce the employee's right to indemnification [*Lab. Code § 2802(c)*; *O'Hara v. Teamsters Union Local #856 (9th Cir. 1998) 151 F.3d 1152, 1157, 1160-1161, 158 L.R.R.M. (BNA) 2908]* . For this purpose, a claim against an employee arises from the employee's discharge of duties if (1) the employee's actions giving rise to the claim are within the scope of employment; and (2) the claim is proven to be unfounded, that is, without merit [*O'Hara v. Teamsters Union Local #856 (9th Cir.*

1998) 151 F.3d 1152, 1158-1160, 158 L.R.R.M. (BNA) 2908 (third party's claim against employee is unfounded as matter of law if third party dismisses claim with prejudice; that dismissal was part of settlement did not mean claim had merit, since settlement did not include any admission of liability by employee)].

When an employee has recurring business expenses subject to reimbursement, several methods of reimbursement are permissible. Under the "actual expense method," the employee maintains records of actual expenses necessarily incurred in the performance of employment tasks, and the employer issues a reimbursement separate from the employee's regular compensation. This is the most accurate method, but it can be burdensome for both the employer and the employee. For example, if the employee is required to use his or her own automobile for business purposes, under the actual expense method, the employee must keep detailed records of expenditures for fuel, maintenance, repairs, insurance, registration, and depreciation and must apportion those expenses between personal and business uses of the automobile; then, the employer must make a determination of whether each of those expenses was reasonably necessary [*see Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 67 Cal. Rptr. 3d 468, 478-479, 169 P.3d 889]* . For this reason, few employers use the actual expense method to determine reimbursement for work-required use of employees' own automobiles. Instead, many employers use the "mileage reimbursement method," under which, the employee need only keep a record of the miles driven to perform job duties, and the employer reimburses the employee a predetermined amount per mile. Many employers use the mileage rate calculated by the Internal Revenue Service based on national average expenses for fuel, maintenance, repairs, depreciation, and insurance [*see Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 67 Cal. Rptr. 3d 468, 479, 169 P.3d 889]* . The mileage reimbursement method is inherently less accurate than the actual expense method, and if the employee can show that the reimbursement amount paid as a mileage reimbursement is less than the actual expenses necessarily incurred, the employer must make up the difference [*Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 67 Cal. Rptr. 3d 468, 479-480, 169 P.3d 889]* .

Another method of reimbursement is to use a lump-sum payment. Under this method, the employee need not submit any information; the employer simply pays a fixed amount as reimbursement for the employee's recurring automobile expenses (or other expenses subject to reimbursement). A lump-sum reimbursement may take various forms and have various labels, such as "per diem" or (in the automobile-reimbursement context) "car allowance" or "gas stipend." Lump-sum reimbursement is permissible so long as the amount paid is sufficient to provide full reimbursement for actual expenses necessarily incurred. Thus, if the employee can show that the lump sum is less than the actual expenses necessarily incurred, the employer must make up the difference [*Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 67 Cal. Rptr. 3d 468, 480-481, 169 P.3d 889]* . A lump-sum reimbursement need not be segregated from the employee's other compensation and may take the form of an increase to the employee's base salary or commissions, so long as the employer provides a method or formula to identify what part of the combined compensation amount is intended to provide expense reimbursement [*Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 67 Cal. Rptr. 3d 468, 481-484, 169 P.3d 889]* . For a form of a contractual provision calling for lump-sum reimbursement of business expenses, see *§ 85.412*.

If the employee brings an action against the employer to enforce the employee's right to indemnification, an award for the reimbursement of the employee's expenditures or losses must carry interest at the same rate as judgments in civil actions, accruing from the date on which the employee incurred the expenditures or losses [*Lab. Code § 2802(b)*]. For further discussion, see *§ 85.460[1][b]*.

These statutory obligations cannot be waived by the parties [*Lab. Code § 2804*]. Thus, an agreement between an employer and employee for reimbursement by a method that approximates the employee's actual expenses (e.g., a mileage reimbursement or a lump-sum reimbursement) does not relieve the employer of the statutory obligation to pay full reimbursement, and such an agreement does not preclude the employee from suing to recover full reimbursement [*Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 67 Cal. Rptr. 3d 468, 479-481, 169 P.3d 889]* . A contract provision in which an employee releases "any and all" claims against the employer does not encompass nonwaivable statutory protections such as the employee indemnity protection described above [*Edwards v. Arthur*

Andersen LLP (2008) 44 Cal. 4th 937, 950-955, 81 Cal. Rptr. 3d 282, 292-296, 189 P.3d 285 (because provision releasing "any and all" claims does not waive employee's right to indemnity under *Lab. Code § 2802(a)*, it is not void under *Lab. Code § 2804*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentEmployersLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral Overview

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[Reserved]

§§ 85.13[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART II. LEGAL BACKGROUND
B. Employment Contracts

28-85 California Legal Forms--Transaction Guide § 85.20

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.20 Nature of Employment Contracts

[1] Applicable Law

An "employment contract" is a contract by which an employer engages an employee to do something for the benefit of the employer or a third person [*Lab. Code § 2750*; *see Civ. Code § 1549* ("contract" is an agreement to do or not do something)]. Employment contracts give rise to legally enforceable obligations [*see Civ. Code §§ 1427, 1428*] and are governed by the rules applicable to any other type of contract [*Reynolds Elec. Etc. Co. v. Workmen's Comp. App. Bd. (1966) 65 Cal. 2d 429, 433, 55 Cal. Rptr. 248, 421 P.2d 96]* . For discussion of contract requirements generally, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

The rules for the interpretation of contracts generally apply to the interpretation of employment contracts [Restatement (Second) of Agency § 32]. An employment contract is considered to be made in the light of, and to incorporate, the provisions of existing law [*Lockheed Aircraft Corp. v. Superior Court (1946) 28 Cal. 2d 481, 486, 171 P.2d 21]* . Terms will be implied in an express employment contract only when (1) the express terms of the contract fail to cover necessary matters, so that the contract cannot be effectively performed in the absence of the implied term; and (2) the term sought to be implied is not inconsistent with an express term of the contract [*Stevens v. National Broadcasting Co. (1969) 270 Cal. App. 2d 886, 890, 76 Cal. Rptr. 106]* .

[2] Express and Implied Contracts

An employment contract is either express or implied [*see Civ. Code § 1619*]. An express employment contract is one whose terms are expressed in words [*Civ. Code § 1620*], either in writing or orally [*see Civ. Code § 1622*; *see also § 85.22*]. An implied contract is one the existence and terms of which are manifested by conduct [*Civ. Code § 1621*]. Given the fundamental nature of the employment relationship, and the fact that its essential elements [*see § 85.21[2]*] are such that they are ordinarily agreed on at the commencement of employment rather than manifested solely by conduct, an employment contract that was entirely implied would be highly unusual. A far more common situation is the existence of implied *terms* in an express oral or written employment contract.

An implied contract must be founded on the agreement of the parties as ascertained from the circumstances. The law implies that a party made such an agreement as, under the circumstances, he or she should have made, applying the principles of honesty, justice, and fairness [*Silva v. Providence Hospital of Oakland (1939) 14 Cal. 2d 762, 773, 97 P.2d 798* (dictum)]. An implied agreement on a contract term may be shown by the acts and conduct of the parties, interpreted in the light of the subject matter and the surrounding circumstances [*Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917* (implied promise of continued employment); *see Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 680, 254 Cal. Rptr. 211, 765 P.2d 373]* . For example, in determining whether the parties have impliedly promised that employment will continue absent good cause to terminate it, such facts as the personnel policies or practices of the employer or the industry, the employee's length of service, any conduct of the employer assuring the employee of continued employment or indicating the contrary, any promotions or praise given the employee, any criticism by the employer, and any evidence tending to negate such an implied promise can be considered [*Youngman v. Nevada Irrigation Dist. (1969) 70 Cal. 2d 240, 246-247, 74 Cal. Rptr. 398, 449 P.2d 462* ; *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 327, 329, 171 Cal. Rptr. 917* ; *see Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 680-682, 254 Cal. Rptr. 211, 765 P.2d 373* ; *but see Davis v. Consolidated Freightways (1994) 29 Cal. App. 4th 354, 368, 34 Cal. Rptr. 2d 438* (raises and promotions natural incidents of employment over a substantial length of time and do not in themselves change "at-will" status to an agreement to discharge only for cause)].

[3] Term of Contract

[a] Specified Term

Employment contracts are categorized as being either for a specified term or "at will." Employment for a specified term is employment for a designated period greater than one month [*Lab. Code § 2922*].

A specified-term contract can provide for employment for any length of time. However, employment contracts for specified terms usually are made for periods of less than seven years, because generally no contract to render personal services (other than a contract of apprenticeship) can be enforced against the employee beyond seven years from the commencement of service under it [*Lab. Code § 2855*]. If the contract is for personal services in the production of phonorecords in which sound is first fixed (that is, if the employee is a recording artist), the seven-year limit on enforcement does not apply until the employee gives the employer written notice that the employee will no longer render service after a stated date [*Lab. Code § 2855(b)(1)*; *see Code Civ. Proc § 1020* (service of notice); *17 U.S.C. § 101*]. For detailed coverage of recording industry contracts, see Ch. 87, *Entertainment Contracts* .

[b] "At-Will" Contract

The great majority of employment contracts have no specified term. Such a contract is presumed to be terminable at the will of either party on notice to the other [*Lab. Code § 2922*]. "Termination at will" means that either party can terminate the employment for any reason or no reason at all, provided that the reason is not in violation of law [*Wilson v. Red Bluff Daily News (1965) 237 Cal. App. 2d 87, 90* ; *see also Reeves v. Hanlon (2004) 33 Cal. 4th 1140, 1147-1154, 17 Cal. Rptr. 3d 289, 294-300, 95 P.3d 513* (although third party generally incurs no liability to employer for soliciting or hiring at-will employee, liability may be imposed if third party engaged in independently wrongful act that induced at-will employee to leave employer); *cf. Toscano v. Greene Music (2004) 124 Cal. App. 4th 685, 694-695, 21 Cal. Rptr. 3d 732* (employee may recover damages under equitable theory of promissory estoppel against third party who induces employee to terminate at-will employment in reliance on unfulfilled job offer)].

The employment of a corporate officer without a specified term of employment is subject to essentially the same at-will presumption that applies to employees generally [*Bell v. Superior Court (1989) 215 Cal. App. 3d 1103, 1108-1110, 263 Cal. Rptr. 787* ; *see Corp. Code § 312(b)*]. A corporation retains the authority to enforce at-will employment contract provisions through bylaws, resolutions, and express contracts with individual officers [*Bell v. Superior Court*

(1989) 215 Cal. App. 3d 1103, 1110, 263 Cal. Rptr. 787 ; *American Center for Education, Inc. v. Cavnar (1978) 80 Cal. App. 3d 476, 493, 145 Cal. Rptr. 736]* .

The power to unilaterally terminate an at-will employment contract includes the power to modify the terms of the contract, for example, by demoting the employee or reducing the employee's wage. In effect, any such modification is a termination of the original contract and an offer of a new, unilateral employment contract under the modified terms [*DiGiacinto v. Ameriko-Omserv Corp. (1997) 59 Cal. App. 4th 629, 634-639, 69 Cal. Rptr. 2d 300]* .

The presumption that a contract with no specific term is terminable at will may be overcome by evidence that the parties expressly or impliedly agreed the employer's power to terminate would be limited in some way, such as employment for an indefinite term with a requirement that termination can be based only on good cause [*DiGiacinto v. Ameriko-Omserv Corp. (1997) 59 Cal. App. 4th 629, 634, 69 Cal. Rptr. 2d 300* ; *see Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 324-326, 171 Cal. Rptr. 917]* . Whether the parties have made an implied contract not to terminate except for good cause is a question of fact [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 677, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Luck v. Southern Pacific Transportation Co. (1990) 218 Cal. App. 3d 1, 14, 267 Cal. Rptr. 618]* .

A number of factors are considered when ascertaining the existence and content of an employment agreement and whether the employee had a reasonable expectation that he or she would not be discharged except for cause. Those factors include consideration; any express contract terms; the employer's personnel policies and practices, including written employee handbooks; the employee's length of service; the entire relationship of the parties, including the employer's actions or communications reflecting assurances of continued employment; and industry practices [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 675-682, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Luck v. Southern Pacific Transportation Co. (1990) 218 Cal. App. 3d 1, 14, 267 Cal. Rptr. 618]* . Thus, for example, facts establishing lengthy duration of employment; proper performance; commensurate compensation; the existence of an implied agreement against termination in the absence of good cause based on longevity, promotions, praise, pay increases and bonuses; and the employer's policy acknowledging an obligation to deal fairly and in good faith have been held to be sufficient to overcome the presumption of at-will employment [*Luck v. Southern Pacific Transportation Co. (1990) 218 Cal. App. 3d 1, 14, 267 Cal. Rptr. 618* ; *Bell v. Superior Court (1989) 215 Cal. App. 3d 1103, 1110-1111, 263 Cal. Rptr. 787]* .

On the other hand, at least two courts of appeal have held that several years of favorable performance evaluations, merit-based salary increases, and general assurances that the employee has a future with the company are insufficient to create a triable issue of fact as to whether there is an implicit agreement to change the at-will nature of employment [*Horn v. Cushman & Wakefield W., Inc. (1999) 72 Cal. App. 4th 798, 817-819, 85 Cal. Rptr. 2d 459* (summary judgment for employer was appropriate, despite evidence offered by employee, based on statutory presumption and express statement of at-will employment in employee handbook); *Kovatch v. California Casualty Management Co. (1998) 65 Cal. App. 4th 1256, 1275-1277, 77 Cal. Rptr. 2d 217* (positive performance reviews, commendations, salary increases, and vague assurances of future employment were simply natural occurrences for long-time employee, and were insufficient to overcome statutory presumption, which was supported by express statements of at-will employment in employee handbook and in employee's signed job application)]. Similarly, an employer's grant of a bonus payable on a specified future date, provided the employee is still employed on that date, does not constitute a promise of continued employment [*Kelly v. Stamps.com, Inc. (2005) 135 Cal. App. 4th 1088, 1102-1103, 38 Cal. Rptr. 3d 240]* . In such a situation, however, if the employer terminates the at-will employment for an unlawfully discriminatory reason, the employee may claim breach of the promise to pay the bonus, with the employee's performance excused because of the discriminatory termination [*Kelly v. Stamps.com, Inc. (2005) 135 Cal. App. 4th 1088, 1103, 38 Cal. Rptr. 3d 240]* .

Although the statutory presumption of at-will employment [*Lab. Code § 2922*] may be overcome by an implied agreement, the parties cannot have a valid express contract and a valid implied contract that contradict each other. The express term is controlling even if it is not contained in an integrated contract. For example, in one case a written employment agreement clearly and unambiguously stated that the employment was at will and that only an affirmative

act by the employer's board of directors could change the at-will nature of the employment. The court of appeal held that any contrary oral statements by the employee's supervisor could not create an implied agreement in the face of the written provision directly addressing that issue. That result was not changed by the fact that the supervisor's oral assurances were made subsequent to the signing of the written agreement. The supervisor's assurances could not serve as a modification of the contract, because the written agreement expressly limited the manner in which modifications could be made [*Starzynski v. Capital Pub. Radio, Inc. (2001) 88 Cal. App. 4th 33, 37-39, 105 Cal. Rptr. 2d 525* ; *see Tomlinson v. Qualcomm, Inc. (2002) 97 Cal. App. 4th 934, 943-947, 118 Cal. Rptr. 2d 822* (express contractual provision for at-will employment precludes existence of implied agreement to contrary)]. Similarly, another court of appeal held that an express contractual provision that the employer "is an 'at will' employer" is sufficient to establish at-will employment, and the provision cannot be overcome by proof of implied contrary understanding. Moreover, the contract need not expressly state that the employee is "at will" or that the employer can fire the employee without good cause [*Agosta v. Astor (2004) 120 Cal. App. 4th 596, 603-605, 15 Cal. Rptr. 3d 565*].

An employment contract stating that the employment is "at will" and terminable "at any time" unambiguously creates an at-will employment relationship, even if it does not also state that termination can be without cause. Because there is no ambiguity about the at-will nature of the employment, additional contractual provisions regarding a probationary period and annual reviews ordinarily will not expressly or impliedly create a right to be terminated only for cause [*Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 391-392, 46 Cal. Rptr. 3d 668]* .

If the employment contract expressly provides for at-will employment, an action for fraudulent inducement of an employment contract may not be maintained on the basis of an alleged false representation regarding the duration of employment; in such a case the employee will be unable to show justifiable reliance on the false representation [*Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 391-392, 46 Cal. Rptr. 3d 668]* . However, the employee may have a cause of action for fraudulent inducement to accept employment based on false representations about other aspects of the employment, such as compensation terms [*Agosta v. Astor (2004) 120 Cal. App. 4th 596, 606, 15 Cal. Rptr. 3d 565]* .

The ability to terminate an employment contract at will is limited by statute in some cases and emerging public policy considerations in others. For discussion, see *§ 85.24[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsFormation

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
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28-85 California Legal Forms--Transaction Guide § 85.21

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.21 Essential Elements of Employment Contract

[1] Formation of Contract

Both offer and acceptance are essential to the formation of employment contracts [*see Reynolds Elec. Etc. Co. v. Workmen's Comp. App. Bd. (1966) 65 Cal. 2d 429, 433, 55 Cal. Rptr. 248, 421 P.2d 96]* . Like other types of contracts, they must be consented to by parties capable of contracting [*see Civ. Code §§ 1556-1558* (capacity of parties), *1565-1589* (consent)] and have a lawful object [*see Civ. Code §§ 1595-1599*] among other matters [*see Civ. Code § 1550*]. In addition, sufficient consideration [*see Civ. Code §§ 1605-1615*] is essential [*Civ. Code § 1550*]. In some cases, an employment contract must be written to be valid; for further discussion of this issue, see *§ 85.22*.

PRACTICE TIP:
Employers should proceed with caution in bringing actions against employees for breach of contract. Employees who would not otherwise be likely to bring a wrongful termination, discrimination, or tort claim may be induced to bring such claims in their defense. The result is a much more expensive suit than a straightforward breach of contract claim. *Commentary by Lori A.M. Middlehurst.*

[2] Essential Terms

An employment contract need not detail every condition of the employment. The fact that the parties fail to provide for particular terms and conditions of the employer-employee relationship does not render the contract invalid for uncertainty. The essential terms of an employment contract are the parties, the time and place of employment, the compensation, and the general category of employment (i.e., the duties of the employee) [*Travelers Ins. Co. v. Workmen's Comp. App. Bd. (1967) 68 Cal. 2d 7, 17, 64 Cal. Rptr. 440, 434 P.2d 992* (oral agreement)].

[3] Typical Employment Contract Provisions

An employment contract that contains only the essential terms [*see* [2], *above*] would not be a very useful document. In

additional to the essential terms, provisions typically used in employment contracts to govern the employer-employee relationship can be generally characterized as relating to the following:

- Term of employment--defining the period of employment and including the mutual agreement of the parties to employ and to be employed.

- Duties of the employee--including the employee's job title, a description of his or her duties, provisions relating to change of duties, change in place of performance of duties, time required to be spent in performance of duties, manner of performance, uniqueness of the employee's services, and provisions limiting the employee's authority (such as provisions prohibiting the employee from binding the employer without the employer's written consent).

- Compensation of the employee--providing not only for a base salary or commission or both, sick pay, paid vacations and leaves of absence, death benefits, withholding of taxes and other deductions, and payment of deferred compensation, but also for changes in the rate of compensation either upon periodic review, in the form of cost of living increases, or computed under other formulae.

- Incentives--including both short-term and long-term, such as annual stock, cash, or other bonus plans; profit-sharing plans; stock options; appreciation rights; performance share awards; and other incentives, such as an option permitting the employee to purchase the employer's business under specified conditions.

- Employee benefits--fringe benefits such as medical, dental, and life insurance, and use of company-provided transportation or facilities.

- Reimbursement of expenses incurred by the employee--provisions governing reimbursement of business expenses and moving expenses paid or incurred by the employee.

- Property rights of the parties--provisions governing the rights of the parties to inventions, patents, trade secrets, customer lists, and other property, and preserving confidential information.

- Obligations of the employer--provisions describing any obligation that the parties agree should be imposed on the employer other than for employee compensation.

- Obligations of the employee--including noncompetition obligations, provisions governing continued employment beyond the initial contractual period, and protecting the employer against losses caused by the employee.

- Termination of employment--provisions detailing grounds for termination for cause (including death or disability, for example), permitting termination without cause (i.e., at-will employment), or governing voluntary termination by the employee; and provisions specifying the effect of termination (including its effect on employee compensation and rights to severance pay). Although an employment is presumed to be terminable at the will of either party unless otherwise agreed [*Lab. Code § 2922*], the better practice is to include an express provision preserving the right to terminate at will, at any time and without cause, if that is what the parties intend [*cf. Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 391-392, 46 Cal. Rptr. 3d 668* (employment contract stating that employment was "at will" and terminable "at any time" unambiguously created at-will employment relationship, even though it did not also state that termination could be without cause)].

- Resolution of disputes--provisions for arbitration, mediation, or another form of alternative dispute

resolution (ADR) of all or only specifically defined disputes, waiver of court enforcement of matters subject to ADR, and reservation of employer's right to an injunction in disputes involving competitive activities or breach of confidentiality by the employee. For detailed coverage of arbitration, mediation, and other types of ADR, including contractual provisions for each type of ADR, see California Forms of Pleading and Practice, Ch. 30, *Alternative Dispute Resolution* , through Ch. 38, *Reference* (Matthew Bender).

[4] Modification of Employment Contract

The fact that an employment contract which contains the essential elements [*see* [2], *above*] leaves other terms unstated does not render the contract invalid for uncertainty. Later agreement on the unspecified terms does not rescind the original contract; a later alteration of the details of a contract which leaves undisturbed its general purpose is a modification rather than a rescission of the contract [*Travelers Ins. Co. v. Workmen's Comp. App. Bd. (1967) 68 Cal. 2d 7, 17, 64 Cal. Rptr. 440, 434 P.2d 992* (oral agreement)].

Nevertheless, a properly drafted employment contract should include specific provisions regarding any situation that might reasonably be expected to arise. Doing this will tend to result in better employer-employee relations by reducing misunderstandings over the terms of the employment, and may help avoid the expenses of litigation.

[5] Special Requirements for Minor's Employment Contract

Although minors can enter into employment contracts, most such contracts are subject to the minor's power to disaffirm them [*see Fam. Code § 6700*] either before majority or within a reasonable time afterwards [*Fam. Code § 6710*]. However, a minor cannot disaffirm a contract to render any of the following types of services if the contract has been approved by the superior court of the county in which the minor resides or is employed or in which any party to the contract has its principal California office [*see Fam. Code §§ 6750, 6751*]:

- Artistic or creative services (rendered either directly or through a third party such a personal services corporation) as an actor, actress, dancer, musician, comedian, singer, stunt person, voice-over artist, or other performer or entertainer, or as a songwriter, musical producer or arranger, writer, director, producer, production executive, choreographer, composer, conductor, or designer [*Fam. Code § 6750(a)(1)*].

- Services as a participant or player in a sport [*Fam. Code § 6750(a)(3)*].

If the minor is employed or agrees to render any of the foregoing services directly for any person or entity, that person or entity is considered the minor's employer [*Fam. Code § 6750(b)(1)*]. If the minor's services are being rendered through a third-party individual or personal services corporation (a "loan-out company"), the person or entity to which that third party is providing the minor's services is considered the minor's employer [*Fam. Code § 6750(b)(2)*]. If the minor renders services as an extra, background performer, or in a similar capacity through an agency or service that provides one or more of those performers for a fee (a "casting agency"), the agency or service is considered the minor's employer [*Fam. Code § 6750(b)(3)*].

A parent or guardian entitled to the physical custody, care, and control of a minor entering into one of these contracts must provide a certified copy of the minor's birth certificate to the other parties to the contract [*Fam. Code § 6752(a)* (guardian must also provide certified copy of court document appointing him or her as minor's legal guardian)]. Fifteen percent of the minor's gross earnings under such a contract must be set aside by the employer in trust for the benefit of the minor (a "Coogan Trust Account") [*Fam. Code §§ 6752(b)-(i), 6753*; *see Fam. Code § 6750(c)* (minor's "gross earnings" defined)].

For forms used in petitioning for court approval of a contract for the services of a minor [*see Fam. Code § 6751(b)*], see *California Forms of Pleading and Practice, Ch. 365, Minors: Contract Actions, §§ 365.180, 365.181* (Matthew Bender).

Minors must obtain work permits prior to full-time [*Educ. Code §§ 49130-49135*] or part-time [*Educ. Code §§ 49110-49119*] employment [*but see Lab. Code §§ 1308, 1310* (employment of minors in entertainment and allied industries)]. Permits to employ are also required [*see Educ. Code §§ 49110, 49111, 49113, 49130*]. In general, the employment of a minor cannot supplant compulsory school attendance [*see Educ. Code §§ 48200, 48400*; *Welf. & Inst. Code § 17.1*]. For coverage of the law governing the employment of minors, the work permit requirements, minors' involvement in workers' compensation proceedings, and state and federal standards for minors' working conditions, see Ch. 100B, *Contracts and Employment of Minors* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.22

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§ 85.22 When Employment Contract Must be Written

[1] Deciding Whether to Have Written Employment Contract

The general rule is that an employment contract must be in writing if application of the statute of frauds [*Civ. Code § 1624*] would render it invalid [*see* [2], *below*]. Certain types of commission contracts must also be in writing [*Lab. Code § 2751*; *see* [3], *below*]. Moreover, one way to satisfy the "equal dignities rule," which requires that any employee who acts as an agent for the employer must have written authority to enter into a contract that is legally required to be written [*Civ. Code § 2309*], is to include such authority in a written employment contract [*see* [4], *below*].

Because at-will employment contracts generally are not within the statute of frauds [*White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 344, 66 Cal. Rptr. 697, 438 P.2d 345]* , there is usually no need for rank-and-file employees to have individual written employment contracts. In such cases, the usual procedure is for the employee to sign an acknowledgment of "at-will" status and any applicable nondisclosure agreements [*see §§ 85.440, 85.510* (forms)]. Traditionally, complete written employment agreements have been used for upper level employees and technical staff, whose compensation arrangements and other employment terms are relatively complex and individualized. It is also generally advisable that any temporary employees (i.e., those with a limited term of employment) sign employment agreements, to ensure that there is no confusion about the temporary nature of their employment.

[2] Statute of Frauds

[a] Contract Not to Be Performed Within One Year

A contract that by its terms is not to be performed within a year from the time of its making is invalid ("within the statute of frauds") unless the contract or a memorandum thereof is in writing and signed by the party to be charged, or by that party's agent [*Civ. Code § 1624(a)(1); but see Civ. Code § 1624(b)* ("qualified financial contract," as defined, need not be in writing if certain requirements are met)]. However, an oral employment agreement is valid ("not within the statute of frauds") unless, under its terms, the employee *cannot possibly perform it completely* within one year from

the making of the contract [*see White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 343, 66 Cal. Rptr. 697, 438 P.2d 345]* .

If a termination of employment is authorized by the contract language used by the parties, a termination is permissible and the exercise of the right of termination is not a breach of the contract. If a termination is not a contract breach, it is performance; if the contract can be terminated within one year, the contract is outside the statute of frauds [*Plumlee v. Poag (1984) 150 Cal. App. 3d 541, 551, 198 Cal. Rptr. 66* ; *see White Lighting Co. v. Wolfson (1968) 68 Cal.2d 336, 343-344, 66 Cal. Rptr. 697, 438 P.2d 345]* . This narrow interpretation of the statute of frauds has been affirmed by the California Supreme Court. The court stated that to bring an employment contract within the statute of frauds, the contract must appear to be necessarily incapable of performance within one year. The applicability of the statute of frauds must be analyzed prospectively, based on the intentions of the parties and the terms of the agreement at the time when the agreement was made [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 674-675, 254 Cal. Rptr. 211, 765 P.2d 373]* .

The foregoing rule removes most at-will employment contracts from the statute of frauds. An oral contract of employment that the parties agreed could be terminated at will by either party but that otherwise would have required more than one year to perform has been held not within the statute and hence enforceable because it was terminable at any time. Similarly, an oral contract for "permanent" employment is not within the statute of frauds and thus is valid since it can conceivably be performed within one year by termination at the will of either party [*White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 344, 66 Cal. Rptr. 697, 438 P.2d 345*].

A contingency in an oral agreement of employment for one year that may extend the period of employment for more than one year does not invalidate the contract under the statute. Hence, an oral agreement between an employer and its employee for the latter's services for one year, in which the parties also agreed that the employer was to have an option to extend the contract for additional terms of one year each for six successive years at increasing rates of compensation, has been held enforceable [*Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 759, 161 P.2d 217]* .

[b] Contract Involving Sale or Purchase of Real Estate

An agreement authorizing or employing an agent to purchase or sell real estate for compensation or a commission comes within the statute of frauds and is unenforceable unless it is in writing or there is the prescribed note or memorandum [*Civ. Code § 1624(a)(4)*; *see Seck v. Foulks (1972) 25 Cal. App. 3d 556, 566, 102 Cal. Rptr. 170]* . An agreement for the sale of real property or for leasing real property for a period longer than one year, if made by an agent of the party sought to be charged, is invalid unless the agent's authority is in writing and subscribed by the party to be charged [*Civ. Code § 1624(a)(3)*]. This requirement may be important, for example, in the case of an employee who is authorized to represent an employer with respect to the execution of leases or deeds.

[3] Certain Commission Contracts

When an employer who does not have a permanent and fixed place of business in California enters into an employment contract for services to be rendered in California by the employee and the method of compensating the employee involves commissions, the contract must be in writing and must set forth the method by which the commissions are computed and paid. Moreover, the employer must give the employee involved a signed copy of the contract and obtain a receipt therefor from the employee. "Commission," for this purpose, does not include productivity bonuses or bonus and profit-sharing plans, unless there has been an offer by the employer to pay a fixed percentage of sales or profits as compensation for work to be performed [*Lab. Code § 2751*]. Any employer who fails to comply with these requirements is liable to the employee in a civil action for triple damages [*Lab. Code § 2752*].

[4] Authority to Enter Into Contracts That Must Be Written

Under the "equal dignities" rule, the authority of an agent to enter into a contract required by law to be in writing can only be given by an instrument in writing [*Civ. Code § 2309*]. Although any form of valid written authority will suffice, one method of satisfying this requirement is to provide such authority in the employment contract.

The equal dignities rule requires written authority if the employee will be authorized to enter into contracts on behalf of the employer that cannot by their terms be performed within a year from the making of the contract [*Civ. Code § 1624(a)(1)*; *but see Civ. Code § 1624(b)* ("qualified financial contract," as defined, need not be in writing if certain requirements are met)] or involve a special promise to answer for the debt, default, or miscarriage of another *Civ. Code § 1624(a)(2)*; *but see Civ. Code § 2794* (exceptions)]. Written authority is also required if the employee will enter into contracts on behalf of the employer that involve leases for periods longer than one year or sales of real property or interests therein [*Civ. Code § 1624(a)(3), (4)*] or authorize or employ an agent to buy or sell real estate for compensation or a commission [*Civ. Code § 1624(a)(4)*], or if the contract is not to be performed within the promisor's lifetime [*Civ. Code § 1624(a)(5)*]. Written authority is necessary if the employee will enter into contracts on behalf of the employer that constitute agreement by a real estate purchaser to pay a debt secured by the property [*Civ. Code § 1624(a)(6)*] or if the contract is for the sale of goods for a price of $500 or more [*see Com. Code § 2201*; *but see Com. Code § 2201(4)* ("qualified financial contract," as defined in *Civ. Code § 1624(b)*, need not be in writing if certain requirements are met)] or for the payment of commissions by an out-of-state employer [*see Lab. Code § 2751*]. Additionally, certain contracts, promises, undertakings, or commitments to lend money or to grant or extend credit, in an amount greater than $100,000, must be in writing [*Civ. Code § 1624(a)(7)*; *see § 85.111*].

An initial lack of written authority can be cured by a written ratification [*see Civ. Code § 2310*; *see also McGirr v. Gulf Oil Corp. (1974) 41 Cal. App. 3d 246, 256 n.5, 115 Cal. Rptr. 902]* . Since it is a relatively simple matter for an employer to ratify the actions of an employee after the fact, the "equal dignities rule" has been invoked primarily by employers attempting to disavow contracts entered into on their behalf by their employees rather than by third parties attempting to invalidate such contracts. Nevertheless, as a matter of prudent practice, counsel should advise an employer-client either to use employment agreements that specify the extent of the employee's authority to execute contracts and bind the employer, or to provide another form of written authorization. Failure to do this can lead to uncertainty over the employee's authority on the part of third parties as well as the employee.

An employer may be estopped to raise the equal dignities rule against a contracting third party if the employer, by its own conduct, lulls the third party into believing that the person acting on its behalf had written authority to enter the contract, or had no need of written authority [*see Kerner v. Hughes Tool Co. (1976) 56 Cal. App. 3d 924, 934, 128 Cal. Rptr. 839]* . The equal dignities rule also does not apply when the agent's authority is ministerial rather than discretionary, when the agent signs the contract in the presence and at the direction of the principal, or when the agent is an executive officer of the principal [*see McGirr v. Gulf Oil Corp. (1974) 41 Cal. App. 3d 246, 256 n.5, 115 Cal. Rptr. 902]* .

[5] Estoppel to Assert Statute of Frauds

Under the doctrine of promissory estoppel, a promise that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and that does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise [*see Drennan v. Star Paving Co. (1958) 51 Cal. 2d 409, 413, 333 P.2d 757]* . The doctrine precludes reliance on the statute of frauds as a defense against an oral contract of employment when the promisor represents by words or conduct that he or she will stand by his or her oral agreement and the promisee, in reliance on the representation, changes his or her position to his or her detriment [*Associated Creditors' Agency v. Haley Land Co. (1966) 239 Cal. App. 2d 610, 617, 49 Cal. Rptr. 1* (oral agreement to transfer liquor license if promisee would sell its bar and work in promisor's premises)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART II. LEGAL BACKGROUND
B. Employment Contracts

28-85 California Legal Forms--Transaction Guide § 85.23

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§ 85.23 Enforcement of Employment Contract

[1] Enforcement by Employer

No contract to render personal service (other than a contract of apprenticeship) may be enforced against the employee beyond seven years from the commencement of service under the contract [*Lab. Code § 2855(a)*; *see Lab. Code § 2855(b)* (exception for certain recording industry contracts); *see also* Ch. 87, *Entertainment Contracts*]. Even if otherwise enforceable, a contract to render personal services is generally not enforceable by specific performance [*Civ. Code § 3390(1), (2)*]. However, a court may grant an injunction to prevent the breach of a contract to perform a service of a special, unique, unusual, extraordinary, or intellectual character that gives it peculiar value, and the loss of which cannot be reasonably or adequately compensated in damages in an action at law, provided that the agreed minimum compensation meets statutory requirements [*see Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*].

[2] Enforcement by Employee

[a] Action for Violation of Contract

An employee whose employer has violated or threatens to violate the terms of the employment contract may seek rescission of the contract and recovery in quantum meruit of the reasonable value of past services less any amounts received from the employer. In such a case, the employee's recovery may exceed the contractual compensation, except that for services for which compensation is apportioned by the contract, the employee is entitled to receive the contractual compensation and no more [*Lessing v. Gibbons (1935) 6 Cal. App. 2d 598, 607, 45 P.2d 258]* . The employee may also bring an action for damages, the proper amount of which is the contractual compensation for the entire period of service less the amount which the employee has earned or with reasonable effort might have earned from other employment [*Downs v. Sherry (1949) 90 Cal. App. 2d 1, 5, 202 P.2d 101]* .

[b] Action for Compensation

An unpaid employee or former employee has a cause of action for recovery of the amount due [*Percival v. National Drama Corp. (1919) 181 Cal. 631, 633, 185 P. 972* ; *Haggerty v. Warner (1953) 115 Cal. App. 2d 468, 475, 252 P.2d 373* ; *see Lab. Code § 218* (individual wage claimant may file civil action to recover wages due, either directly or through assignee)]. An employer must pay all compensation that has been earned up to the time that the employer-employee relationship is terminated [*Lab. Code §§ 201, 202*; *see Smith v. Superior Court (2006) 39 Cal. 4th 77, 82-94, 45 Cal. Rptr. 3d 394, 137 P.3d 218* (employee is "discharged" for purposes of *Lab. Code § 201* not only when employee is involuntarily terminated from ongoing employment relationship, but also when employee is released after completing particular job assignment or time duration for which he or she was hired)] without setoff for any debts owed by the employee [*Barnhill v. Robert Saunders & Co. (1981) 125 Cal. App. 3d 1, 6, 177 Cal. Rptr. 803]* . If the employee is entitled to share in profits under the terms of the employment contract, the employer has a duty to account to the employee for that share [*Nelson v. Abraham (1947) 29 Cal. 2d 745, 751, 177 P.2d 931* ; *see* Restatement (Second) of Agency §§ 455-463].

In addition to the foregoing amounts, an employee may be entitled to double damages. It is a misdemeanor for any person to directly or indirectly influence, persuade, or engage another to change from one place to another (to, from, or within California) for employment purposes by means of knowingly false representations concerning, for example, the kind, character, existence, or duration of work or the amount of compensation [*Lab. Code §§ 970, 971*]. The employee may recover an award of double the damages caused by a misrepresentation that violates this prohibition [*Lab. Code § 972*; *see Seubert v. McKesson Corp. (1990) 223 Cal. App. 3d 1514, 1521-1523, 273 Cal. Rptr. 296 , disapproved on other grounds by Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 394, 46 Cal. Rptr. 3d 668]* .

In any action brought for the nonpayment of wages, the court must award interest on all due and unpaid wages, at an annual rate of 10 percent, accruing from the date the wages were due and payable [*Lab. Code § 218.6*; *see Civ. Code § 3289(b)*]. The statute imposing this interest requirement is to be applied retroactively; thus, interest must be awarded at the statutory rate even as to unpaid wages that became payable before the statute was enacted [*Bell v. Farmers Ins. Exchange (2006) 135 Cal. App. 4th 1138, 1146-1150, 38 Cal. Rptr. 3d 306* ; *see Lab. Code § 218.6* (eff. Jan. 1, 2001)].

In an action brought by an employee or former employee to recover unpaid wages, fringe benefits, or health and welfare or pension contributions, the court generally must award the prevailing party reasonable attorneys' fees and costs, if any party has requested attorneys' fees and costs at the initiation of the action [*Lab. Code § 218.5*; *see On-Line Power, Inc. v. David Mazur (2007) 149 Cal. App. 4th 1079, 1085-1086, 57 Cal. Rptr. 3d 698* (fees under *Lab. Code § 218.5* are available not just in action to recover unpaid hourly wages, but also in action by executive to recover unpaid salary); *see also Tipton-Whittingham v. City of Los Angeles (2004) 34 Cal. 4th 604, 609-610, 21 Cal. Rptr. 3d 371, 101 P.3d 174* (interpreting similar "prevailing party" language in *Gov. Code § 12965(b)* as authorizing fee award to plaintiff who does not obtain favorable judgment but whose lawsuit was catalyst motivating defendant to provide primary relief sought)]. This provision does not apply, however, in an action to recover the unpaid balance of the legal minimum wage or overtime compensation. Rather, in an action for minimum wages or overtime pay, a prevailing employee is entitled to attorneys' fees and costs, but if the employer prevails, the employer has no right to recover attorneys' fees [*Lab. Code §§ 218.5, 1194(a)*; *Earley v. Superior Court (2000) 79 Cal. App. 4th 1420, 1426-1431, 95 Cal. Rptr. 2d 57]* . Punitive damages are not available, however, for a violation of the wage laws [see *Brewer v. Premier Golf Props. (2008) 168 Cal. App. 4th 1243, 1252, 86 Cal. Rptr. 3d 225* ("[P]unitive damages are not recoverable when liability is premised solely on the employer's violation of the Labor Code statutes that regulate meal and rest breaks, pay stubs, and minimum wage laws.")].

Aside from the foregoing provisions, under the Labor Code Private Attorneys General Act of 2004 [*see Lab. Code § 2698 et seq.*], a civil penalty to be assessed and collected for a violation of the Labor Code [*see Lab. Code § 2699.5*; *see, e.g., Lab. Code § 2699* (civil penalty for failure to pay less than minimum wage)] may be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees [*Lab. Code § 2699(a)*; *see Lab. Code § 2699.3* (procedures for employee's civil action); *see* Amalgamated Transit Union, Local 1756 v. Superior Court (2009) 46 Cal. 4th 993, 1001-1005, 195 Cal. Rptr. 3d 605, 209 P.3d 937 (plaintiff has

standing to bring action under Labor Code Private Attorneys General Act of 2004 only if plaintiff suffered injury from unlawful action, so labor union lacks standing to sue as assignee or association of injured members); *see also Arias v. Superior Court (2009) 46 Cal. 4th 969, 975, 980-988, 95 Cal. Rptr. 3d 588, 209 P.3d 923* (employee's representative action under Labor Code Private Attorneys General Act of 2004 need not satisfy class-action requirements)]. Any employee who prevails in such an action will be entitled to an award of reasonable attorney's fees and costs, and the employee will ordinarily be entitled to retain 25 percent of any civil penalties recovered [*Lab. Code § 2699(g), (i), (j)*]. An enforcement action under this provision may be combined with other remedies the employee may have under state or federal law [*Lab. Code § 2699(g)*].

[c] Claim Filed With Labor Commissioner

An employee who has not been paid wages may file a complaint with the Division of Labor Standards Enforcement, which is headed by the Labor Commissioner [*Lab. Code § 98*]. The Labor Commissioner may investigate the claim, conduct a hearing, and make an award [*Lab. Code §§ 98, 98.1*]. If the award is not appealed, the superior court may enter judgment on the award [*Lab. Code § 98.2(d), (e)*]. If the award is appealed to the superior court, the matter will be tried by the court de novo [*Lab. Code § 98.2(a)*]. A wage claimant's right to appeal and obtain a de novo trial applies whenever the Labor Commissioner has conducted a hearing on the wage claim (sometimes called a "Berman" hearing), even if the commissioner's award consists of a dismissal of the wage claim for lack of jurisdiction, based on a finding that the claimant is not an employee. Under the statutory scheme, the commissioner's refusal to accept a wage claim in the first instance would not be subject to appeal, and the claimant's remedy in such a case would be to file a civil lawsuit rather than an appeal. However, such a summary dismissal can be made by the commissioner only within 30 days after the filing of the wage claim; thereafter, the commissioner must conduct a Berman hearing and issue an order, decision or award that will be subject to de novo appeal [*Post v. Palo/Haklar & Associates (2000) 23 Cal. 4th 942, 948-951, 98 Cal. Rptr. 2d 671, 4 P.3d 928* ; *see Lab. Code §§ 98, 98.1, 98.2(a)*].

If the employer appeals the commissioner's award to the superior court, the employer must post an appeal bond in the amount of the award [*Lab. Code § 98.2(b)*]. On the employer's appeal, the commissioner will provide counsel for the employee at the de novo trial, if the employee is not contesting any part of the award and cannot afford counsel [*Lab. Code § 98.4*]. At the de novo trial, the court has discretion to allow the employee to raise new wage claims not raised in the Berman hearing. In deciding whether to allow such new claims, the trial court will weigh considerations such as whether the new claims are sufficiently related to the claims raised before the Labor Commissioner, whether the interests of judicial economy will be served, and whether the employer will be prejudiced [*Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 1118]* . Similarly, the employer is not bound by the defenses it raised in the Berman hearing, and it may abandon, change, or add defenses not raised before the Labor Commissioner [*Murphy v. Kenneth Cole Prods., Inc. (2007) 40 Cal. 4th 1094, 1118* ; *Jones v. Basich (1986) 176 Cal. App. 3d 513, 518-519, 222 Cal. Rptr. 26]* .

If the party that sought review in superior court is unsuccessful at the de novo trial, the superior court must order that party to pay the costs and attorneys' fees incurred by the other parties [*Lab. Code § 98.2(c)*; *Lolley v. Campbell (2002) 28 Cal. 4th 367, 372-379, 121 Cal. Rptr. 2d 571, 48 P.3d 1128* (indigent employee represented without charge by Labor Commissioner has nevertheless "incurred" fees within meaning of *Lab. Code § 98.2(c)*)]. For this purpose, an employee is "successful" at the de novo trial if the court awards an amount greater than zero [*Lab. Code § 98.2(c)* (legislative intent to overrule *Smith v. Rae-Venter Law Group (2002) 29 Cal. 4th 345, 370, 127 Cal. Rptr. 2d 516, 58 P.3d 367* , which held that "successful" appellant must obtain judgment more favorable than administrative award)]. The statute authorizing the recovery of attorney's fees incurred in a "civil action" for unpaid minimum wages or legal overtime compensation [*see Lab. Code § 1194(a)*] does not apply in the context of an administrative Berman hearing, which is not a "civil action" [*Sampson v. Parking Serv. 2000 Com, Inc. (2004) 117 Cal. App. 4th 212, 217-230, 11 Cal. Rptr. 3d 595* (civil action is one filed in court)].

The Labor Commissioner may also prosecute a civil action to recover wages on behalf of an employee who cannot

afford counsel [*Lab. Code § 98.3(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.24

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§ 85.24 Termination of Employment Contract

[1] Contract for Specified Term

Any employment contract for a specified term is terminated by expiration of the term stated in the contract [*Lab. Code § 2920*]. A premature termination may be justified at any time that the employee commits a willful breach of duty in the course of his or her employment, habitually neglects his or her duty, or demonstrates continued incapacity to perform it [*Lab. Code § 2924*]. In addition, termination of such a contract can be justified if the contract specifies the conditions under which termination can occur and those conditions do occur [*see R.J. Cardinal Co. v. Ritchie (1963) 218 Cal. App. 2d 124, 143, 32 Cal. Rptr. 545* ; *see also Pecarovich v. Becker (1952) 113 Cal. App. 2d 309, 317-318, 248 P.2d 123]* .

If premature and unjustified termination takes place, since the employment relationship is contractual [*Lab. Code § 2750*; *see § 85.20*], the wrongfully discharged employee may sue for damages for breach of contract [*see Westwater v. Grace Church (1903) 140 Cal. 339, 341, 73 P. 1055]* .

[2] Contract at Will

[a] Generally Terminable for Any or No Reason

An employment contract that has no specified term is presumed to be terminable at the will of either party on notice to the other [*Lab. Code § 2922*; *see § 85.20[3][b]*]. However, the fact that an employment contract is terminable at will does not give the employer the absolute right to terminate it in all cases. Restrictions on the employer's right to terminate the contract may be imposed by statute [*see* [b], *below*], by public policy [*see* [c], *below*], or by express or implied contractual provisions [*see* [d], *below*].

[b] Statutory Limitations on Terminability

A number of statutes expressly prohibit discharge or discipline of an employee on various specific grounds. For example, under the Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900 et seq.*], an employer generally may not discharge an employee based on factors such as race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition, marital status, sex, age, or sexual orientation (or based on a perception that an employee has, or is associated with one who has, any of those characteristics) [*Gov. Code §§ 12926(m)*, *12940(a)*; *see Gov. Code § 12941* (use of salary as criterion when terminating employees may constitute age discrimination if use of that criterion adversely affects older workers)]. For purposes of FEHA antidiscrimination provisions, "age" refers to age 40 or above [*Gov. Code § 12926(b)*]. "Sex" includes, but is not limited to, pregnancy, childbirth, medical conditions related to pregnancy or childbirth, and gender [*Gov. Code § 12926(p)*]. "Gender" means an employee's or applicant's actual sex or the employer's perception of the employee's or applicant's sex, including the employer's perception of the employee's or applicant's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the employee's or applicant's sex at birth [*Gov. Code § 12926(p)*; *Penal Code § 422.76*]. However, FEHA does not prevent an employer from requiring an employee to adhere to reasonable workplace appearance, grooming, and dress standards that are not precluded by other provisions of state or federal law, as long as the employer allows an employee to appear or dress consistently with the employee's gender identity [*Gov. Code § 12949*].

Discrimination in violation of FEHA is an unlawful employment practice that may be enjoined under the Unfair Competition Law [*Bus. & Prof. Code § 17200 et seq.*] if it provides the employer with a competitive advantage. For example, an employer that practices age discrimination may have an unfair competitive edge over employers that comply with FEHA. Therefore, an employee who is the victim of age discrimination may sue to enjoin the employer from engaging in unlawful age discrimination [Herr v. Nestle *U.S.A., Inc. (2003) 109 Cal. App. 4th 779, 788-790, 135 Cal. Rptr. 2d 477]* .

The Moore-Brown-Roberti Family Rights Act (CFRA), which is part of FEHA, prohibits covered employers from discharging employees for exercising the right to take family care and medical leave under CFRA [*Gov. Code § 12945.2(l)(1)*; *see Dudley v. Department of Transp. (2001) 90 Cal. App. 4th 255, 261-265, 108 Cal. Rptr. 2d 739* (recognizing cause of action for retaliation in violation of CFRA); *but see Tomlinson v. Qualcomm, Inc. (2002) 97 Cal. App. 4th 934, 939-943, 118 Cal. Rptr.2d 822* (CFRA's guaranty of reinstatement after family care and medical leave does not preclude employer from terminating employee as part of workforce reduction)]. However, an employer may terminate an employee who misuses leave and is untruthful about it [*McDaneld v. Eastern Mun. Water Dist. Bd. (2003) 109 Cal. App. 4th 702, 705-708, 135 Cal. Rptr. 2d 267* (employee who took leave to care for father spent substantial amount of leave time playing golf and working on lawn sprinklers)].

An employee may not be discharged for attending jury duty [*Lab. Code § 230(a)*], for attending court as a witness in compliance with a subpoena or other court order [*Lab. Code § 230(b)*], or for engaging in political activity [*Lab. Code §§ 1101, 1102*].

An employer may not discharge an employee who is a victim of domestic violence or sexual assault for taking time off from work to obtain or attempt to obtain judicial relief (such as a temporary restraining order, restraining order, or other injunctive relief) to help ensure the health, safety, or welfare of the victim or his or her child [*Lab. Code § 230(c)*; *see Lab. Code § 230(h)* ("domestic violence" is defined by *Fam. Code § 6211*; "sexual assault" is any crime set forth in *Penal Code §§ 261, 261.5, 262, 265, 266, 266a, 266b, 266c, 266g, 266j, 267, 269, 273.4, 285, 286, 288, 288a, 288.5, 289, 311.4*)]. Further, no employer with 25 or more employees may discharge an employee who is a victim of domestic violence or sexual assault for taking time off from work for any of the following purposes [*Lab. Code § 230.1(a)*]:

- To seek medical attention for injuries caused by domestic violence or sexual assault;

- To obtain services from a domestic violence shelter, program, or rape crisis center as a result of domestic violence or sexual assault;

- To obtain psychological counseling related to an experience of domestic violence or sexual assault; or

- To participate in safety planning and take other actions to increase safety from future domestic violence or sexual assault, including temporary or permanent relocation.

The right to time off for these purposes may be exercised if the employee gives the employer reasonable advance notice of the intention to take time off. But if advance notice is not feasible, the employee must provide the employer, within a reasonable time after the absence, with a certification (such as a police report or court or medical records) documenting that the employee was a victim of domestic violence or sexual assault or has appeared in court [*Lab. Code §§ 230(d), 230.1(b)*].

An employer may not discharge an employee for taking time off from work to attend judicial proceedings related to a crime perpetrated against the employee, a member of employee's immediate family, the employee's domestic partner [*see Fam. Code § 297 et seq.*], or the domestic partner's child, if the crime is a serious or violent felony [*see Penal Code §§ 667.5(c),* 1193.7(c)] or a violation of a felony provision of law proscribing theft or embezzlement [*Lab. Code § 230.2(a), (b), (f), (g)*]. For this purpose, the employee's "immediate family" includes the employee's spouse, child, stepchild, brother, stepbrother, sister, stepsister, mother, stepmother, father, and stepfather [*Lab. Code § 230.2(a)(1)*]. To be entitled to time off for this purpose, the employee must give the employer a copy of the notice of each scheduled proceeding that is provided to the crime victim by the agency responsible for providing notice, unless advance notice is not feasible. If advance notice is not feasible or an unscheduled absence occurs, the employer may not take any action against the employee if the employee, within a reasonable time after the absence, provides the employer with documentation evidencing the judicial proceeding from (1) the court or government agency setting the hearing, (2) the district attorney or prosecuting attorney's office, (3) or the victim/witness office that is advocating on behalf of the victim [*Lab. Code § 230.2(c)*].

An employer with 50 or more employees may not discharge an employee who is a volunteer firefighter for taking time off to engage in fire or law enforcement training [*Lab. Code § 230.4*].

An employee who has custody of a child may not be discharged for taking off up to 40 hours a year to participate in the child's school or day-care activities, if the employer has at least 25 employees at the same location [*Lab. Code § 230.8*].

An employer may not discharge an employee as a result of a single garnishment [*Lab. Code § 2929*].

An employee may not be discharged for complaining about occupational safety matters [*Lab. Code §§ 6310(a)(1), 6311*], for instituting or testifying in any proceeding concerning his or her rights [*Lab. Code § 6310(a)(2)*], or for participating in a lawfully established occupational health and safety committee [*Lab. Code § 6310(a)(3)*; *see Lab. Code § 6401.7*]. Similarly, an employee may not be discharged or disciplined for reporting or refusing to engage in illegal activity [*Lab. Code § 1102.5(a)-(c)*; *see Lab. Code § 1102.5(e)* (public employee's disclosure to employing agency qualifies for protection); *see also Gardenhire v. Housing Auth. (2000) 85 Cal. App. 4th 236, 241-243, 101 Cal. Rptr. 2d 893]* , or for reporting industrial injuries [*Lab. Code § 132a*].

An employee may not be discharged or subjected to adverse employment action for opposing discriminatory conduct that violates the Fair Employment and Housing Act, or filing a complaint, testifying, or assisting in a formal proceeding relating to such conduct under the Act [*Gov. Code § 12940(h)*]. Under this provision, for example, an employee's refusal to follow a supervisor's order that he or she reasonably believes to be discriminatory is a protected activity. Accordingly, the employer may not retaliate by discharging the employee or taking an adverse employment action against the employee on the basis of the employee's refusal to follow the order, when the employer knows that the employee believes the order to be discriminatory, even if the employee does not explicitly state that he or she believes

the order to be discriminatory [*Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1043, 32 Cal. Rptr. 3d 436, 116 P.3d 1123]* . In this context, an "adverse employment action" is any action that materially affects the terms and conditions of employment [*Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal. 4th 1028, 1036, 1052-1054, 1059, 32 Cal. Rptr. 3d 436, 116 P.3d 1123* (in determining whether employee has been subjected to treatment that materially affects terms and conditions of employment, it is appropriate to consider totality of circumstances and to consider acts taking place outside limitations period if sufficiently linked to acts within limitations period)].

For a detailed listing and discussion of statutes expressly limiting the grounds for termination and discipline of employees, see Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline* (Matthew Bender).

[c] Employee's Action for Wrongful Termination

[i] Basis and Elements of Action

An employer may not terminate an employment contract, even an at-will contract, if doing so would violate public policy [*Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 170, 176, n.11, 164 Cal. Rptr. 839, 610 P.2d 1330* ; *Petermann v. International Brotherhood of Teamsters (1959) 174 Cal. App. 2d 184, 188, 344 P.2d 25]* . Public policy imposes limits to prevent the threat of termination from resulting in actions taken that are harmful to the public [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 665, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Newman v. Emerson Radio Corp. (1989) 48 Cal. 3d 973, 975-976, 258 Cal. Rptr. 592, 772 P.2d 1059* ; *Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 172, 164 Cal. Rptr. 839, 610 P.2d 1330]* .

To establish that an employer violated public policy, the plaintiff employee must demonstrate the following:

- The termination implicated a fundamental public policy that is well established, as expressed in a constitutional provision or a statute [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 887-890, 66 Cal. Rptr. 2d 888, 941 P.2d 1157]* . The public policy allegedly violated must derive from constitutional or statutory authority; reliance on judicial or other nonlegislative sources is insufficient to support this cause of action [Gantt v. Sentry Insurance (1992) 1 Cal. 4th 1083, 1094, 4 Cal. Rptr. 2d 874, 824 P.2d 680] . However, an important public policy embodied in administrative regulations that are authorized by statute is considered to be supported by the statutory provisions [*Green v. Ralee Engineering Company (1998) 19 Cal. 4th 66, 71-72, 80-90, 78 Cal. Rptr. 2d 16, 960 P.2d 1046* (regulations issued by Federal Aviation Administration pursuant to Federal Aviation Act, *49 U.S.C. § 40101 et seq.*)]; and

- The policy involved benefits the public at large, rather than a purely personal or proprietary interest of the particular employer or employee [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 889-890, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* ; *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 668-670, 254 Cal. Rptr. 211, 765 P.2d 373]* .

There are four categories of employee conduct that are protected by the fundamental public policy rule [*Green v. Ralee Engineering Company (1998) 19 Cal. 4th 66, 76, 80-90, 78 Cal. Rptr. 2d 16, 960 P.2d 1046* ; *Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 887-889, 66 Cal. Rptr. 2d 888, 941 P.2d 1157]* :

- Refusing to violate a statute or administrative regulations authorized by statute.

- Performing an obligation imposed by statute or by administrative regulations authorized by statute.

- Exercising a constitutional or statutory right or privilege.

- Reporting an alleged violation of a statute of public importance or of administrative regulations authorized by the statute.

Thus, for example, public policy protects an employee who is terminated because he or she refuses to commit a crime, reports criminal activity, or discloses other illegal, unethical, or unsafe practices [*see Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 665, 254 Cal. Rptr. 211, 765 P.2d 373* ; *see, e.g., Tameny v. Atlantic Richfield Co. (1980) 27 Cal. 3d 167, 176, 164 Cal. Rptr. 839, 610 P.2d 1330* (employee refused to participate in employer's illegal price fixing)].

Similarly, an employee may not be discharged from a job as an inspector of airplane components in retaliation for complaining to the employer that the employer's inspection practices violated regulations issued by the Federal Aviation Administration pursuant to the Federal Aviation Act [*Green v. Ralee Engineering Company (1998) 19 Cal. 4th 66, 80-83, 78 Cal. Rptr. 2d 16, 960 P.2d 1046* ; *see 49 U.S.C. § 40101 et seq.*]. On the other hand, a claim that an employer committed fraud against an employee in discharging the employee does not involve fundamental public policy, since the claim is essentially a private dispute that does not seek to vindicate a broader public interest [*Hunter v. Up-Right, Inc. (1993) 6 Cal. 4th 1174, 1186, 26 Cal. Rptr. 2d 8]* .

[ii] Limitations on Public Policy

When a plaintiff relies on a statutory prohibition to support a common-law tort cause of action for wrongful termination in violation of public policy, the common-law claim is subject to statutory limitations affecting the nature and scope of the statutory prohibition [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 904, 66 Cal. Rptr. 2d 888, 941 P.2d 1157]* . Thus, a public policy cause of action cannot be stated against an employer if the employer is expressly exempt from the statute on which the public policy is based [Jennings v. Marralle (1994) 8 Cal. 4th 121, 135-136, 32 Cal. Rptr. 2d 275, 876 P.2d 1074] . For example, if an employer is exempt from FEHA'S substantive age discrimination prohibition because the employer has fewer than five employees [*see Gov. Code §§ 12926(d), 12940(a)*], an employee who is terminated because of his or her age cannot base a claim of wrongful discharge on a violation of the public policy embodied in FEHA [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 892-894, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* ; *see LeBourgeois v. Fireplace Mfrs., Inc. (1998) 68 Cal. App. 4th 1049, 1056-1057, 80 Cal. Rptr. 2d 660* (individual supervisor cannot be sued for wrongful discharge in violation of policy embodied in FEHA, since nonemployer supervisors are exempt from liability under FEHA)]. In such a case, however, the employee may rely on alternative sources of fundamental public policy in support of the claim of wrongful discharge [*Phillips v. St. Mary Reg'l Med. Ctr. (2002) 96 Cal. App. 4th 218, 230-238, 116 Cal. Rptr. 2d 770* (although employer was expressly exempt from FEHA, plaintiff alleging race and sex discrimination could rely on Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*, and on *Cal. Const., art. I, § 8*, as sources of public policy to support claim of wrongful discharge in violation of public policy)].

The plaintiff need not personally benefit from the public policy that he or she seeks to enforce [*see, e.g., Gould v. Maryland Sound Industries Inc. (1995) 31 Cal. App. 4th 1137, 1149, 37 Cal. Rptr. 2d 718* (employee protested failure to pay overtime wages to other employees)]. In addition, the public policy that is alleged to have been contravened must be a policy about which reasonable persons can have little disagreement [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 668, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Luck v. Southern Pacific Transportation Co. (1990) 218 Cal. App. 3d 1, 28-29, 267 Cal. Rptr. 618* (no consensus as to employee drug testing cases)]. The public policy also must be firmly established at the time of termination [*Stevenson v. Superior Court (1997) 16 Cal. 4th 880, 887-889, 66 Cal. Rptr. 2d 888, 941 P.2d 1157* ; *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 668, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Luck v. Southern Pacific Transportation Co. (1990) 218 Cal. App. 3d 1, 29, 267 Cal. Rptr. 618]* . Thus, a wrongful-discharge claim cannot be based on a fundamental public policy created by a statute that was enacted after the plaintiff's termination [*Silo v. CHW Med. Found. (2002) 27 Cal. 4th 1097, 1110, 119 Cal. Rptr. 2d 698, 45 P.3d 1162* (employer cannot be held liable for violating public policy that was not manifest at time alleged tort was committed); *Phillips v. St. Mary Reg'l Med. Ctr. (2002) 96 Cal. App. 4th 218, 229, 116 Cal. Rptr. 2d 770]* . However, a

long-established general public policy can be sufficient to support a wrongful discharge claim even though a statute enacted after the plaintiff's termination addresses the specific kind of conduct involved in the plaintiff's case [*Casella v. Southwest Dealer Servs., Inc. (2007) 157 Cal. App. 4th 1127, 1138-1143, 69 Cal. Rptr. 3d 445* (claim that plaintiff was terminated because he reported employer's participation in car dealers' fraudulent scheme was viable because scheme violated long-established policy of *Penal Code § 487*, which prohibits theft by misrepresentation, even though another statute specifically proscribing car dealers' scheme was enacted after plaintiff's termination)].

In some cases, a fundamental public policy is counterbalanced by another fundamental public policy so as to shield the employer from liability for discharging the employee. For example, the California Supreme Court has held that the public policy against religious discrimination in employment [*see Cal. Const., art. I, § 8*] must be qualified by the public policy of permitting religious employers considerable discretion to choose employees who will not interfere with their religious mission or message [*see U.S. Const., Amend. I*; *Cal. Const., art. I, § 4*]. Construing the two policies together, along with the FEHA's formerly unqualified general exemption for religious employers [*see Gov. Code § 12926(d)*; *now see Gov. Code § 12926.2(c)* (effective January 2000, FEHA exemption for religious employers generally does not apply to persons employed to perform nonreligious duties at health-care facilities that are not restricted to adherents of religion that established employer)], the Court stated that it could not find a fundamental and substantial public policy prohibiting a religious employer from terminating an employee because of the employee's objectionable religious speech in the workplace [*Silo v. CHW Med. Found. (2002) 27 Cal. 4th 1097, 1108-1109, 119 Cal. Rptr. 2d 698, 45 P.3d 1162]* .

[iii] Activities Protected by Public Policy

Termination of an employee for exercising rights protected by law is a violation of public policy. Rights protected by law include the right to a safe workplace [*Hentzel v. Singer Co. (1982) 138 Cal. App. 3d 290, 298-300, 188 Cal. Rptr. 159* (protests against smoking in workplace based on *Lab. Code § 6310* definition of safe workplace); *see Cabesuela v. Browning-Ferris Industries of Cal., Inc. (1998) 68 Cal. App. 4th 101, 109, 80 Cal. Rptr. 2d 60* (employee is protected against discharge for complaining in good faith about working conditions he or she reasonably believes to be unsafe, whether or not they actually are unsafe)]; the right to organize [*see Glenn v. Clearman's Golden Cock Inn (1961) 192 Cal. App. 2d 793, 796-797, 13 Cal. Rptr. 769* ; *see also Lab. Code § 923*]; and the right to prompt payment of wages, free from the employer's withholding of pay [*see Phillips v. Gemini Moving Specialists (1998) 63 Cal. App. 4th 563, 571-574, 74 Cal. Rptr. 2d 29* ; *see also Lab. Code §§ 201, 202, 216, 221, 222, 223, 224, 1175*; *Code Civ. Proc. § 487.020*]. Similarly, terminating an employee for refusing to sign an employment agreement that contains an illegal noncompetition covenant is a violation of public policy [*D'Sa v. Playhut, Inc. (2000) 85 Cal. App. 4th 927, 929, 931-935, 102 Cal. Rptr. 2d 495* ; *see Bus. & Prof. Code § 16600* (except as provided by statute, any contract that restrains anyone from engaging in any lawful profession, trade, or business is to that extent void); *see also Hill Medical Corp. v. Wycoff (2001) 86 Cal. App. 4th 895, 901-908, 103 Cal. Rptr. 2d 779* (noncompetition covenant is invalid under *Bus. & Prof. Code § 16600* even if covenant is part of employee's sale of shares in corporate employer, unless corporate goodwill is component of sale price under *Bus. & Prof. Code § 16601*); *Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 945-950, 955, 81 Cal. Rptr. 3d 282, 288-292, 296, 189 P.3d 285* (noncompetition agreement is invalid under *Bus. & Prof. Code § 16600*, even if narrowly drawn, unless it falls within one of statutory exceptions provided by *Bus. & Prof. Code §§ 16601*, *16602*, *16602.5*); *but see Thompson v. Impaxx, Inc. (2003) 113 Cal. App. 4th 1425, 1429-1430, 7 Cal. Rptr. 3d 427* (antisolicitation covenant may be enforceable if designed to protect employer's confidential, proprietary, or trade-secret customer information); *Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 946 n.4, 81 Cal. Rptr. 3d 282, 289 n.4, 189 P.3d 285* ("[W]e do not here address the applicability of the so-called trade secret exception to [*Bus. & Prof. Code § 16600*], as Edwards does not dispute that portion of his agreement or contend that the provision of the noncompetition agreement prohibiting him from recruiting Andersen's employees violated [*Bus. & Prof. Code § 16600*].")]. The termination of an employee for exercising a constitutional or statutory right does not violate public policy, however, unless the termination undermines a clearly mandated policy embodied in the provision from which that right emanates. For example, an employer may terminate an at-will employee for refusing to drop a lawsuit against the employer's customer, even though access to courts is guaranteed by

the federal and state Constitutions, because there is no clearly mandated policy against such a termination [*Jersey v. John Muir Med. Ctr. (2002) 97 Cal. App. 4th 814, 820-829, 118 Cal. Rptr. 2d 807]* .

An in-house counsel may state a claim for termination in violation of public policy if he or she alleges and proves that his or her acts in reporting certain regulatory violations by his or her employer were required by the Code of Professional Responsibility, which is a reflection of public policy. Even though an attorney-client relationship is usually severable by a client at will, in-house counsel is dependent on a single employer and entitled to the same protections as other executive employees [*General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 1173, 1182, 1192, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* . When the in-house attorney's conduct in reporting the employer-client's malfeasance is ethically permissible, but not mandatory, the Court suggested that the viability of a claim for termination in violation of public policy would depend on an analysis of whether (1) similar conduct by a nonattorney would support a claim for termination in violation of public policy, and (2) whether statutes or ethical rules permit departure from the usual requirement of client confidentiality to permit the "nonfiduciary" conduct [*General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 1189, 32 Cal. Rptr. 2d 1, 876 P.2d 487]* . However, a former in-house counsel's wrongful termination suit must be dismissed if it cannot be fully established without the public disclosure of confidential information protected by the attorney-client privilege [*General Dynamics Corp. v. Superior Court (1994) 7 Cal. 4th 1164, 1190, 32 Cal. Rptr. 2d 1, 876 P.2d 487* ; *Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 Cal. App. 4th 294, 308-315, 106 Cal. Rptr. 2d 906]* . For this purpose, "public disclosure" does not include the plaintiff's disclosure of employer confidences *to his or her own attorney*, if they are relevant to the wrongful termination suit [*Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 Cal. App. 4th 294, 308-315, 106 Cal. Rptr. 2d 906]* .

[iv] Drug Testing

Under California law, an employer may require preemployment drug tests and take illegal drug use into consideration in making employment decisions [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 882-883, 59 Cal. Rptr. 2d 696, 927 P.2d 1200]* .

The Compassionate Use Act of 1996 (Proposition 215) [*Health & Safety Code § 11362.5*] does not establish a public policy against terminating employees who use marijuana for medical purposes. The Act does provide an exemption from criminal liability under two specific California statutes for a person who possesses or cultivates marijuana for medical purposes on the recommendation or approval of a physician [*Health & Safety Code § 11362.5(d)* (providing defense against prosecution under *Health & Safety Code §§ 11357, 11358* for person who possesses or cultivates marijuana for medical purposes on recommendation or approval of physician)]. However, marijuana possession remains illegal under federal law, even for medical use [*21 U.S.C. §§ 812, 844(a)*; *Gonzales v. Raich (2005) 545 U.S. 1, 26-29, 125 S. Ct. 2195, 162 L. Ed. 2d 1]* . Moreover, the Compassionate Use Act is limited in scope: it merely exempts medical users and their primary caregivers from criminal liability under two specified state statutes. Nothing in the Act's text or history indicates that the electorate intended the Act to articulate any policy concerning marijuana in the employment context, let alone a fundamental public policy requiring employers to accommodate marijuana use by employees [*Ross v. RagingWire Telecomms., Inc. (2008) 42 Cal. 4th 920, 931-933, 70 Cal. Rptr. 3d 382, 391-393, 174 P.3d 200]* .

It is not clear whether a termination based on a refusal to submit to a random drug test may form the basis of a cause of action for wrongful termination in violation of public policy [*compare Semore v. Pool (1990) 217 Cal. App. 3d 1087, 1096-1098, 266 Cal. Rptr. 280 , with Luck v. Southern Pacific Transportation Co. (1990) 218 Cal. App. 3d 1, 17-19, 267 Cal. Rptr. 618]* . In *Semore v. Pool*, the court held that when a private sector employee is terminated for refusing to take a random drug test, the ex-employee may invoke the public policy exception to the at-will termination doctrine to assert a violation of the constitutional right of privacy [*Semore v. Pool (1990) 217 Cal. App. 3d 1087, 1096-1098, 266 Cal. Rptr. 280]* . The California Constitution's privacy guarantee [*see Cal. Const. art. I, § 1*] reaches both governmental and nongovernmental conduct [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 20, 26 Cal. Rptr. 2d 834, 865 P.2d 633* ; *Luck v. Southern Pacific Transportation Co. (1990) 218 Cal. App. 3d 1, 17-19, 267 Cal. Rptr. 618* ; *Wilkinson v. Times Mirror Corp. (1989) 215 Cal. App. 3d 1034, 1040-1043, 264 Cal. Rptr. 194]* . The court saw the

right of privacy as constituting a fundamental societal interest and a legitimate public policy concern, rather than a right that solely benefits the individual. The assertion of the constitutional right of privacy is an assertion of a fundamental principle of public policy that is sufficient to state a cause of action for wrongful termination [*Semore v. Pool (1990) 217 Cal. App. 3d 1087, 1096-1098, 266 Cal. Rptr. 280]* .

In contrast, in *Luck v. Southern Pacific Transportation Co.*, the court held that the right to privacy is, by its very name, a private right, not a public one [*Luck v. Southern Pacific Transportation Co. (1990) 218 Cal. App. 3d 1, 28, 267 Cal. Rptr. 618]* . The court relied on the rationale set forth in *Foley*, which explained that the absence of a distinctly public interest is apparent if the employer and employee expressly agree that the employee has no duty to take the disputed action and no public policy would render the agreement void [*Luck v. Southern Pacific Transportation Co. (1990) 218 Cal. App. 3d 1, 28, 267 Cal. Rptr. 618]* . Stated differently, if the employer and employee can lawfully make an agreement as to the disputed action, a termination based on a violation of the agreement cannot be said to violate a fundamental duty imposed on all employees for the protection of the public interest [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 670-671 n.12, 254 Cal. Rptr. 211, 765 P.2d 373]* . The court in *Luck* concluded that, under the *Foley* standard, a termination based on a refusal to submit to urinalysis does not violate public policy [*Luck v. Southern Pacific Transportation Co. (1990) 218 Cal. App. 3d 1, 28, 267 Cal. Rptr. 618]* .

In a case decided after *Semore* and *Luck*, the California Supreme Court held that, for a nongovernmental defendant to violate the constitutional right of privacy, the plaintiff must show (1) a legally protected privacy interest, (2) a reasonable expectation of privacy, and (3) a serious invasion of the privacy interest [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 35-37, 26 Cal. Rptr. 2d 834, 865 P.2d 633]* . Even if the plaintiff makes this showing, the invasion of a privacy interest is not a violation of the state constitutional right to privacy if the invasion is justified by a competing interest; the respective interests are subject to a "balancing test" [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 37-38, 26 Cal. Rptr. 2d 834, 865 P.2d 633]* . The Court rejected the contention that every assertion of a privacy interest under the state constitution must be overcome by a "compelling interest" [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 34-35, 26 Cal. Rptr. 2d 834, 865 P.2d 633]* . Presumably, the test set forth in *Hill* will be applied to any particular employment situation, and the respective interests of the employer and employee will be balanced. If the result of the balancing test favors the employer, the employee cannot prevail on a contract cause of action because the failure to submit to testing constitutes insubordination and good cause for termination [*Semore v. Pool (1990) 217 Cal. App. 3d 1087, 1101 n.8, 266 Cal. Rptr. 280]* .

[v] Effect of After-Acquired Evidence

One California court of appeal has held that when the employer has clearly violated the law or public policy in terminating an employee, but the employee is later found to have committed misconduct that would have resulted in a justifiable termination had it been known, the discovery of such misconduct does not necessarily preclude the plaintiff from all relief [*Cooper v. Rykoff-Sexton, Inc. (1994) 24 Cal. App. 4th 614, 617-618, 29 Cal. Rptr. 2d 642]* . However, in a case involving a violation of the federal Age Discrimination in Employment Act, the U.S. Supreme Court has held that the trial court must address both the employer's violation and the employee's misconduct in assessing damages to be awarded to the employee [*McKennon v. Nashville Banner Publ. Co. (1995) 513 U.S. 352, 358-362, 115 S. Ct. 879, 130 L. Ed. 2d 852* (termination in clear violation of ADEA; back pay award was not precluded, but discovery of employee misconduct in removing company property precluded reinstatement and front pay remedies)]. Citing the U.S. Supreme Court's decision, a California court of appeal has held that even if the employer presents after-acquired evidence that would have justified termination of the employee, it remains a question of fact whether the employer would have *actually* terminated the employee on the basis of the after-acquired evidence. Thus, depending on the circumstances of the particular case, a jury might reasonably find that the employee would have been subjected to less-harsh disciplinary action, or no adverse action at all. In such a case the trial court would be justified in refusing to bar or reduce the plaintiff's recovery of damages for the wrongful termination [*Thompson v. Tracor Flight Sys., Inc. (2001) 86 Cal. App. 4th 1156, 1172-1174, 104 Cal. Rptr. 2d 95* (record, including after-acquired evidence, supported jury's finding that employee had not engaged in wrongdoing that would have resulted in termination)]. In any case,

after-acquired evidence is admissible to support the employer's originally proffered reason for termination [*Finegan v. County of Los Angeles (2001) 91 Cal. App. 4th 1, 10-13, 109 Cal. Rptr. 2d 762* (when employee alleges unlawful discrimination after termination for purported inability to perform job, employer may offer after-acquired evidence to establish that employee was in fact unable to do job)].

If an employee who is disqualified from employment by government-imposed requirements nevertheless obtains a job by misrepresenting the pertinent qualifications, the employee will have no recourse for an alleged wrongful termination of employment [*Camp v. Jeffer, Mangels, Butler & Marmaro (1995) 35 Cal. App. 4th 620, 638-639, 41 Cal. Rptr. 2d 329* ; *see, e.g., Murillo v. Rite Stuff Foods, Inc. (1998) 65 Cal. App. 4th 833, 845, 77 Cal. Rptr. 2d 12* (because federal law prohibits employers from knowingly hiring or continuing to employ unauthorized aliens, employee's misrepresentation of his or her entitlement to work in United States goes to heart of employment relationship and deprives employee of any right to complain about termination); *see 8 U.S.C. § 1324a(a), (b), (e), (f)* (Immigration Reform and Control Act of 1986); *see also Hoffman Plastic Compounds, Inc. v. NLRB (2002) 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271, 283-284* (federal immigration policy embodied in Immigration Reform and Control Act precludes award of back pay under National Labor Relations Act, *29 U.S.C. § 151 et seq.*, to undocumented alien who had never been legally authorized to work in United States)]. However, in such a case the employee's misrepresentation does not void the employment contract; it merely renders it voidable should the employer seek to rescind it. While employed, the employee is entitled to all the protections available under employment law. Therefore, the employee is not barred from pursuing federal or state employment discrimination claims that are not tied to the employee's discharge. The employer will not be permitted to escape the consequences of discriminatory conduct that is not caused or justified by the employee's misrepresentation [*Murillo v. Rite Stuff Foods, Inc. (1998) 65 Cal. App. 4th 833, 842, 77 Cal. Rptr. 2d 12]* .

The statutory provisions applicable to discrimination claims made by undocumented aliens embody the principle that an employer may not escape the consequences of discrimination if it is not caused by the employee's misrepresentation. These provisions declare that all protections, rights, and remedies available under California law, except any reinstatement remedy prohibited by federal law, are available to all individuals who are or have been employed in California, regardless of immigration status [*Civ. Code § 3339(a)*; *Gov. Code § 7285(a)*; *Lab. Code § 1171.5(a)*]. Thus, for purposes of enforcing California labor, employment, and civil rights laws, a person's immigration status is irrelevant to the issue of liability, although the remedy of reinstatement will not be available to an unauthorized alien [*Civ. Code § 3339(b)*; *Gov. Code § 7285(b)*; *Lab. Code § 1171.5(b)*]. Further, in proceedings or discovery undertaken to enforce California labor, employment, and civil rights laws, no inquiry may be made into a person's immigration status unless the person seeking to make the inquiry has shown by clear and convincing evidence that the inquiry is necessary in order to comply with federal immigration law [*Civ. Code § 3339(b)*; *Gov. Code § 7285(b)*; *Lab. Code § 1171.5(b)*].

[vi] Exhaustion of Administrative Remedies

If a statute, such as the Fair Employment and Housing Act [*see Gov. Code § 12900 et seq.*] provides an administrative process for the resolution of grievances, exhaustion of those administrative remedies is a precondition to bringing a civil suit on a statutory cause of action, but not for seeking judicial relief on a common-law tort claim for wrongful termination in violation of public policy [*Palmer v. Regents of Univ. of Cal. (2003) 107 Cal. App. 4th 899, 904, 132 Cal. Rptr. 2d 567]* .

On the other hand, if an employer establishes an *internal* grievance mechanism, a failure to exhaust those internal remedies precludes a subsequent nonstatutory civil action [*Palmer v. Regents of Univ. of Cal. (2003) 107 Cal. App. 4th 899, 903-906, 132 Cal. Rptr. 2d 567]* . Similarly, an employer's internal remedy generally must be exhausted before the employee sues under a statutory provision that does not contain its own administrative remedy [*see Campbell v. Regents of Univ. of Cal. (2005) 35 Cal. 4th 311, 25 Cal. Rptr. 3d 320, 333-335, 106 P.3d 976* (public employee must exhaust employer's internal remedy before suing for retaliation for statutorily protected "whistleblowing" activity under *Lab. Code § 1102.5*, which is silent on administrative remedy or exhaustion requirement)]. The exhaustion of internal

grievance procedures is required not because of any contractual obligation but because of compelling policy considerations. If an employer is given the opportunity quickly to determine through the operation of its internal procedures that it has committed error, it may be able to minimize, and sometimes eliminate, any monetary injury to the employee by immediately reversing its initial decision. An employee should not be permitted to increase damages by forgoing available internal remedies. Moreover, an exhaustion requirement reflects the courts' recognition of the "expertise" of the employer's quasi-judicial tribunal, permitting it to adjudicate the merits of the plaintiff's claim in the first instance [*Campbell v. Regents of Univ. of Cal. (2005) 35 Cal. 4th 311, 25 Cal. Rptr. 3d 320, 327-328, 106 P.3d 976* (requirement that internal remedy be exhausted serves salutary function of mitigating damages, recognizes quasi-judicial tribunal's expertise, and promotes judicial economy by unearthing relevant evidence and providing record should there be judicial review of case); *Palmer v. Regents of Univ. of Cal. (2003) 107 Cal. App. 4th 899, 905, 132 Cal. Rptr. 2d 567]* .

An employer will be equitably estopped from asserting a defense that the employee failed to exhaust the employer's internal administrative remedy if the employer's actions negligently or intentionally led the employee to believe that no administrative recourse was available [*Shuer v. County of San Diego (2004) 117 Cal. App. 4th 476, 486-487, 11 Cal. Rptr. 3d 776]* . Moreover, exhaustion of an employer's internal procedures is not a prerequisite for a civil action asserting a claim under the FEHA or another statutory scheme that contains its own exhaustion prerequisite. Thus, an employee who has exhausted the FEHA administrative process and obtained a right-to-sue letter from the DFEH need not also exhaust internal administrative procedures provided by the employer prior to filing an FEHA claim in superior court [*Schifando v. City of Los Angeles (2003) 31 Cal. 4th 1074, 1082, 6 Cal. Rptr. 3d 457, 79 P.3d 569]* . Similarly, an employee who asserts both FEHA claims and related nonstatutory claims for wrongful termination in violation of public policy need not exhaust the internal administrative remedy provided by the employer with respect to those nonstatutory claims before filing a civil action, if the resolution of those claims would have a preclusive impact on the FEHA claim [*Williams v. Housing Auth. (2004) 121 Cal. App. 4th 708, 727-731, 17 Cal. Rptr. 3d 374]* . However, if the employee elects to pursue an employer's internal administrative process to a decision that is of a sufficiently judicial character to support collateral estoppel, the employee must pursue that process to completion, including exhausting any available judicial avenues for reversal of adverse findings. A failure to do so will result in any quasi-judicial administrative findings having binding, preclusive effect in later judicial proceedings [*McDonald v. Antelope Valley Cmty. Coll. Dist. (2008) 45 Cal. 4th 88, 113, 84 Cal. Rptr. 3d 734, 194 P.3d 1026]* .

[vii] Contractual Restrictions on Wrongful Termination Action

A contractual provision that shortens the statute of limitations for a wrongful-termination action is not unconscionable and will be enforced if it provides for a reasonable limitations period, even if it is a nonnegotiable adhesive provision [*see Soltani v. Western & S. Life Ins. Co. (9th Cir. 2001) 258 F.3d 1038, 1042-1045* (contractual six-month limitation reasonable under standard of unconscionability used by California Supreme Court in analyzing mandatory arbitration clause in *Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669*); *but see Martinez v. Master Protection Corp. (2004) 1992-1 Trade Cas. (CCH) P69877, 118 Cal. App. 4th 107, 117-118, 12 Cal. Rptr. 3d 663* (arbitration agreement imposing six-month period for asserting any statutory or common-law claim was unconscionable under *Armendariz* standard)]. However, a nonmutual contractual provision requiring that an employee give the employer 10 days' notice before filing suit is unconscionable and will not be enforced to bar an employee's action, at least if the provision is unaccompanied by a corresponding requirement to exhaust intra-company grievance procedures [*Soltani v. Western & S. Life Ins. Co. (9th Cir. 2001) 258 F.3d 1038, 1045-1047* (10-day period not justified, because it is too short to allow employer to investigate or attempt to resolve claim, and it does not prevent stale claims, because 10-day period not measured from accrual of claim)].

[d] Contractual Limitations on Terminability

[i] Agreement to Terminate Only for Good Cause

If the employer and employee have made an express or implied covenant to terminate only for good cause, the statutory presumption of at-will employment does not apply [*Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 324, 115 L.R.R.M. (BNA) 4002, 171 Cal. Rptr. 917* ; *see Lab. Code § 2922*]. The employee may maintain a civil action for breach of the contract by showing that the termination was not for a fair and honest reason regulated by the good faith of the employer [*Cotran v. Rollins Hudig Hall Int'l, Inc. (1998) 17 Cal. 4th 93, 100, 69 Cal. Rptr. 2d 900, 948 P.2d 412* ; *Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 329, 115 L.R.R.M. (BNA) 4002, 171 Cal. Rptr. 917]* . Similarly, in an appropriate case an employee may maintain a cause of action based on breach of an implied agreement not to demote without good cause [*see Scott v. Pacific Gas & Elec. Co. (1995) 11 Cal. 4th 454, 463-464, 46 Cal. Rptr. 2d 427, 904 P.2d 834]* .

An implied covenant not to terminate without good cause may be found where the employer's conduct gives rise to an implied promise that it will not act arbitrarily in dealing with its employees [*Pugh v. See's Candies, Inc. (1981) 116 Cal. App. 3d 311, 329, 171 Cal. Rptr. 917]* . In addition, an employee's length of service, when taken together with the employer's employment policies or regulations, can operate as a form of estoppel that would preclude the discharge of that employee without good cause [*see Cleary v. American Airlines, Inc. (1980) 111 Cal. App. 3d 443, 456, 168 Cal. Rptr. 722* ; *Bell v. Superior Court (1989) 215 Cal. App. 3d 1103, 1108-1110, 263 Cal. Rptr. 787]* . Longevity alone is not the determining factor in finding an implied agreement to terminate only for good cause; however, longevity of service is relevant to show the duration of the existence of other conduct pointing to the existence of such an agreement [*see Gould v. Maryland Sound Industries, Inc. (1995) 31 Cal. App. 4th 1137, 1151, 37 Cal. Rptr 2d 718]* .

A contractual provision for a performance review after 12 months employment is not by itself sufficient to overcome the presumption of at-will employment, especially if other circumstances show that the parties contemplated at-will employment [*Lenk v. Total-Western, Inc. (2001) 89 Cal. App. 4th 959, 969-970, 108 Cal. Rptr. 2d 34* (employee signed employment application confirming that employment would be at will and acknowledged receipt of employee manual with express at-will provision)]. Thus, when an employment contract expressly provides that the employment is "at will" and terminable "at any time," there is no ambiguity about the at-will nature of the employment, and any additional contractual provisions regarding a probationary period and annual reviews do not expressly or impliedly create a right to be terminated only for cause [*Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 391-392, 46 Cal. Rptr. 3d 668]* .

What constitutes "good cause" to terminate employment depends on the circumstances of each case [*Walker v. Northern San Diego County Hospital Dist. (1982) 135 Cal. App. 3d 896, 898-900, 185 Cal. Rptr. 617]* . However, the general meaning of the right to terminate for "good cause" is the right to terminate on reasonable grounds that are assigned in good faith [*R.J. Cardinal Co. v. Ritchie (1963) 218 Cal. App. 2d 124, 146, 32 Cal. Rptr. 545]* . "Good cause" may consist of factors unrelated to an employee's performance, such as the business decision to divest or close part of an employer's business operations [*see Joanou v. Coca-Cola Co. (9th Cir. 1994) 26 F.3d 96, 99-100]* . If the employee is a manager or holds a confidential position, the employer is given substantial latitude in exercising its judgment on the question of good cause to terminate the employee [*Cotran v. Rollins Hudig Hall Int'l, Inc. (1998) 17 Cal. 4th 93, 100-101, 69 Cal. Rptr. 2d 900, 948 P.2d 412]* .

For further discussion of what constitutes "good cause" for termination of employment, see Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline* (Matthew Bender).

[ii] Implied Covenant of Good Faith and Fair Dealing

A covenant of good faith and fair dealing is implied in every employment contract [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 683, 254 Cal. Rptr. 211, 765 P.2d 373]* . The covenant generally obligates each party to a contract not to do anything to prevent the other party from receiving the benefits of the contract [*Nelson v. Abraham (1947) 29 Cal. 2d 745, 751-754, 177 P.2d 931]* .

The precise nature and extent of the duty imposed by the covenant of good faith and fair dealing depends on the contract and the parties' justified expectations [*Egan v. Mutual of Omaha Ins. Co. (1979) 818, 157 Cal. Rptr. 482, 598 P.2d 452]* . A breach of the covenant in an employment contract is established whenever the employer engages in bad faith action extraneous to the contract, combined with an intent to frustrate the employee's enjoyment of contract rights [*see, e.g., Sheppard v. Morgan Keegan & Co. (1990) 218 Cal. App. 3d 61, 67, 266 Cal. Rptr. 784* (employer hired employee, caused employee to sever former employment and move across country, and then terminated employee before employee commenced new job; employer's conduct also governed by doctrine of promissory estoppel)]. A termination may constitute a breach of this covenant if, for example, the employer asserts the existence of good cause for termination without probable cause and without a good faith belief that good cause exists [*Pugh v. See's Candies, Inc., (1988) 203 Cal. App. 3d 743, 770, 250 Cal. Rptr. 195]* . A finding that an employee was discharged solely for instituting a lawsuit against the employer also has been held to provide substantial support for a finding of bad faith [*Khanna v. Microdata Corp. (1985) 170 Cal. App. 3d 250, 263-264, 215 Cal. Rptr. 860]* .

However, the implied covenant of good faith and fair dealing, standing alone, is not sufficient to impose a good cause requirement for the termination of an at-will employee. The implied covenant only acts to protect the parties' right to receive the benefits of their agreement, and in an at-will relationship there is no agreement to terminate only for good cause [*Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 698 n.39, 254 Cal. Rptr. 211, 765 P.2d 373* ; *Horn v. Cushman & Wakefield W., Inc. (1999) 72 Cal. App. 4th 798, 819-820, 85 Cal. Rptr. 2d 459* (if there is no underlying contract or agreement changing at-will nature of employment, there is no good faith duty to terminate only for good cause)].

If the contract conditions the continuation of employment on the employer's continued satisfaction with the employee's performance, the employer's dissatisfaction must be exercised in good faith. This rule applies regardless of whether a reasonable person would have been dissatisfied. The good faith determination of the employer that it is dissatisfied is conclusive on the employee [*Tiffany v. Pacific Sewer Pipe Co. (1919) 180 Cal. 700, 703, 182 P. 428* ; *Crillo v. Curtola (1949) 91 Cal. App. 2d 263, 271, 204 P.2d 941]* .

If an employer breaches the implied covenant of good faith and fair dealing in an employment contract, the employee's remedy is a civil suit for breach of the contract. The employee cannot assert a tort cause of action and therefore cannot recover damages, such as punitive damages, that would be available only in a tort action [*Freeman & Mills, Inc. v. Belcher Oil Co. (1995) 11 Cal. 4th 85, 88-102, 44 Cal. Rptr. 2d 420* ; *Foley v. Interactive Data Corp. (1988) 47 Cal. 3d 654, 698 n.39, 254 Cal. Rptr. 211, 765 P.2d 373]* .

For further discussion of the implied covenant of good faith and fair dealing in employment contracts, see Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-85 California Legal Forms--Transaction Guide §§ 85.25-85.29

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§§ 85.25[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART II. LEGAL BACKGROUND
C. Tax Considerations

28-85 California Legal Forms--Transaction Guide § 85.30

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.30 Taxation of Employee's Income

Payment of cash compensation for personal services results in the realization of ordinary income to the employee [*I.R.C. § 61(a)*]. "Gross income" includes compensation for services, including fees, commissions, fringe benefits, and similar items [*I.R.C. § 61(a)(1)*]. If the employee is a cash-basis taxpayer, as is the usual case with individuals, the compensation is recognized and taxable in the year it is actually paid to or is constructively received by the employee, even if it is an advance payment that is required to be repaid to the employer if the employee does not render the services that entitle him or her to that compensation [*see U.A. Lavery (1945) 5 T.C. 1283, 1289 , aff'd, 158 F.2d 859 (7th Cir. [T.C.] 1946)]* .

Compensation is considered "constructively" received when it is made unqualifiedly subject to the employee's demand for payment, even if actual receipt is postponed by the employee until a later year [*Hyland v. Commissioner of Internal Revenue (2d Cir. [T.C.] 1949) 175 F.2d 422, 424]* . It is the fact that the time of receipt of the compensation was within the employee's control that determines the time when compensation is includible in income [*see Ross v. Commissioner (1st Cir. [T.C.] 1948) 169 F.2d 483, 491*]. Under certain circumstances, recognition of income may be avoided on the receipt of compensation. Advance payments of commissions, when repayable if unearned, are treated as loans and are not considered income until actually earned [*Rev. Rul. 69-465*].

The compensation package offered an employee often consists of noncash elements in addition to a salary or wage. Noncash compensation may be attractive to both the employer and employee for a number of reasons, not the least of which is that many types of benefits do not result in taxable income to the employee, and it may be more economical for the employer to provide such benefits rather than pay the employee a larger amount of cash compensation.

The cost of employer-paid group-term life insurance, up to $50,000, is not taxable to the employee. However, the proportionate cost of the premiums paid by the employer for coverage in excess of $50,000 is includible in the employee's income [*I.R.C. § 79(a)*]. For further discussion, see *§ 85.351[1][b]*.

The Internal Revenue Code excludes from income the cost of services of a type ordinarily provided to the public if provided to the employee at no substantial additional cost [*I.R.C. § 132(a)(1), (b)*], discounts offered to employees [*I.R.C. § 132(a)(2), (c)*], fringe benefits that are de minimis [*I.R.C. § 132(a)(4)*], qualified transportation fringe benefits [*I.R.C. § 132(a)(5), (f)*], qualified moving expense reimbursement [*I.R.C. § 132(a)(6), (g)*], qualified retirement planning services [*I.R.C. § 132(a)(7), (m)*], qualified military base realignment and closure fringe benefits [*I.R.C. § 132(a)(8), (n)*], and on-premises athletic facilities [*see I.R.C. § 132(j)*]. Also excluded are working condition fringes [*I.R.C. § 132(a)(3), (d)*], defined as property or services provided to the employee to the extent that, if the employee paid for them, the payments would be deductible as trade or business expenses [*see I.R.C. § 162*] or as depreciation [*see I.R.C. § 167*].

Amounts received through accident or health insurance are not included in an employee's income to the extent that those amounts are attributable to employer contributions not includible in the employee's gross income or paid by the employer [*I.R.C. § 104(a)(3)*]. The employee is not taxed on the amounts reimbursed or directly paid by the employer for medical expenses incurred by the employee [*see I.R.C. § 105(b)*], except for medical reimbursement payments made to "highly compensated employees" under a plan that is a "discriminatory employee benefit plan" [*see I.R.C. § 89*].

The value of meals or lodging furnished to the employee and family can be excluded from the employee's gross income if provided for the employer's convenience. This exclusion applies to meals furnished on the employer's premises or lodging on those premises when required as a condition of employment [*I.R.C. § 119(a)*].

If the employee has a deferred compensation arrangement, the inclusion of the compensation in the employee's gross income may be delayed until it is actually received, if the arrangement meets the requirements for a nonqualified deferred compensation plan [*see I.R.C. § 409A*]. For detailed discussion of the requirements for a nonqualified deferred compensation plan, see *§ 85.320[1][c]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsCompensationTax LawFederal Income Tax ComputationCompensation & Welfare BenefitsGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.31

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.31 Compensation Deduction for Employer

[1] Requirements for Deduction

An employer reporting his or her income on the cash basis of accounting must actually make payment to the employee to be allowed the deduction [*I.R.C. § 162*; *Martinus & Sons v. Commissioner of Internal Revenue (9th Cir. [B.T.A.] 1940) 116 F.2d 732, 733* ; *see Anthony P. Miller, Inc. v. Commissioner of Int. Rev. (3d Cir. [T.C.] 1947) 164 F.2d 268, 270 , cert. denied, 333 U.S. 861 (1947)]* . If the employer is on the accrual basis of accounting, the compensation deduction is generally allowable at the time compensation is earned by the employee [*Martinus & Sons v. Commissioner of Internal Revenue (9th Cir. [B.T.A.] 1940) 116 F.2d 732, 733]* .

If the taxpayer-employer and an employee are "related taxpayers" [*see I.R.C. § 267(b)* (definition)] at the end of the taxpayer's taxable year, and the payment to the employee is not includible in his or her gross income for that year (by reason of the accounting method used by the employee), the taxpayer's compensation deduction may be taken only as of the day on which the amount paid is includible in the employee's income [*see I.R.C. § 267(a)(2)*].

If the employee's compensation is deferred, the employer generally may not deduct the amount of deferred compensation until it is included in the employee's gross income [*I.R.C. § 404(a)(5)*]. The inclusion of the compensation in the employee's gross income may be delayed until it is actually received, if the deferred compensation arrangement meets the requirements for a nonqualified deferred compensation plan [*see I.R.C. § 409A*]. For detailed discussion of the requirements for a nonqualified deferred compensation plan, see *§ 85.320[1][c]*.

[2] Reasonableness of Compensation

Reasonable compensation is deductible by the employer [*I.R.C. § 162(a)(1)*]. The test of deductibility is whether the payments are reasonable and made purely for services [*Treas. Reg. § 1.162-7(a)*]. Whether compensation is reasonable for this purpose is a question of fact. The courts have looked at such things as the amounts paid by similar enterprises for like services, the type and extent of services rendered by the employee, the scarcity of qualified employees for the

position, the prior earning capacity of the employee, the peculiar characteristics of the employer's business, and the general economic conditions of the period in determining whether an employee's compensation is reasonable [*Charles McCandless Tile Service v. United States (Ct. Cl. 1970) 422 F.2d 1336, 1338, 191 Ct. Cl. 108]* . The courts have also considered the employee's particular abilities, the employer's need for a person with those abilities, and the demands of the job. Other factors considered are (1) the employer's previous salary policies; (2) the profits, sales, and payment of dividends by the employer; (3) total compensation paid to the particular employee in previous years; and (4) time and energy devoted to the work as well as the past record, training, and experience of the particular employee [*see Lucas v. Ox Fibre Brush Co. (1930) 281 U.S. 115, 117-118, 50 S. Ct. 273, 74 L. Ed. 733* (dictum)].

Even if a payment is found to be reasonable, it will not be deductible to the extent that it is in reality a distribution of earnings rather than compensation for services rendered. Thus, for example, when return on equity is conspicuous by its absence, the purported compensation necessarily contains a distribution of corporate earnings that is not deductible compensation [*see McCandless Tile Service v. United States (Ct. Cl. 1970) 422 F.2d 1336, 1339-1340, 191 Ct. Cl. 108*]. Similarly, a combination of salaries and commissions paid to officer-shareholders of a closely-held corporation could be viewed as arrangements for drawing off corporate profits rather than compensation for personal services actually rendered. Substantial increases in compensation in a year in which sales increased only slightly warranted an inference that compensation was based on other factors than compensation for personal services rendered [*see United States v. Giles Industries, Inc. (Ct. Cl. 1974) 496 F.2d 556, 563, 204 Ct. Cl. 202]* .

[3] Treatment of Bonuses

Bonuses to employees are deductible when they are made in good faith for services actually rendered [*Treas. Reg. § 1.162-9*]. However, compensation in the form of bonuses is more suspect than regular compensation, especially if paid in relation to stock holdings or if paid after the year end when earnings are known and the bonus absorbs substantially all of the corporate earnings. The fact that bonuses are paid in direct relation to the employee's holdings in the company as a shareholder are not necessarily fatal [*see* Safety Engineering & Supply Co. v. United States (D.C. Ala. 1965) 65-2 U.S.T.C. P 9721 , *aff'd, 374 F.2d 885 (5th Cir. 1967)]* . However, while a bonus paid to a non-shareholder may be reasonable, the same bonus paid to a large shareholder-officer might not be because a bonus incentive might be unnecessary to call forth that person's best efforts [*see Giles Industries, Inc. v. United States (Ct. Cl. 1974), 563, 204 Ct. Cl. 202*].

[4] Treatment of Contingent Compensation

Contingent compensation is deductible if [*Treas. Reg. § 1.162-7(b)(2)*]:

- The contingent compensation was bargained for between the employer and employee;
- The formula for the contingent compensation was determined before services are rendered; and
- The contingent compensation was not influenced by considerations other than securing services of the employee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsCompensation

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28-85 California Legal Forms--Transaction Guide §§ 85.32-85.99

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§§ 85.32[Reserved]

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A. Client Interview--Facts and Documents

28-85 California Legal Forms--Transaction Guide § 85.100

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.100 Facts

1. Name, address, and telephone number of person to be employed.

2. Name of employer, and address and telephone number of:

a. Employer's principal place of business.

b. Location of employment, if other than employer's principal place of business.

3. Person authorized to enter into employment contracts on employer's behalf:

a. Name.

b. Title.

c. Office address.

d. Source of authority, either:
(1) Resolution of board of directors or partners.

(2) Authority that is expressly or implicitly conferred under employment contract.

4. Nature or description of employer's business activities, including:

a. Number and locations of offices.

b. Number of employees.

5. Nature or description of any trade secrets proprietary to employer to be protected under employment contract, such as:

a. Customer lists or contracts.

b. Financial data.

c. Cost and sales data.

d. Formulae or processes.

e. Devices or models.

f. Drawings.

g. Plans or information that particular matters are being planned or discussed.

h. Supply sources or contracts.

i. Business plans.

j. Intellectual property.

k. Employee information.

6. Duration of employment contract term, either:

a. Specified term, including:

(1) Length of initial term.

(2) Dates on which initial term is to begin and end.

(3) Length of renewal term or terms, if desired.

b. At will.

7. Title of position employee will have.

8. Description of duties employee will perform:

a. During employment under contract.

b. Following employment under contract, e.g., as a consultant, if applicable.

9. Limitations on employee's authority, such as:

a. Matters that will require prior approval of employer's board of directors or partners, if applicable.

b. Matters that will require prior approval of employee's superiors, and names or titles of those persons, if applicable.

c. Power to hire or fire.

d. Matters requiring exercise of employee's discretion.

10. Limitations on employee's personal conduct desired by employer, such as:

a. Off-duty business activities.

b. Passive personal investments in competing businesses.

c. Need for morality clause in contract.

d. Need for provision permitting search of employee's person and effects in contract.

e. Need for personal appearance and grooming clause in contract.

11. Amount and nature of salary and other compensation arrangements for salaried personnel [*see* Paragraph 11, *below* for questions concerning commission compensation]:

a. Prevailing salaries for similar services in area for similarly situated organizations.

NOTE:
The employer should be asked to obtain this type of information from a local association of employers if it has not already determined the amount and nature of the salary and compensation arrangements it desires to make.

b. Employer's capacity to pay.

c. Frequency of payment.

d. Basis for future adjustments.

12. Amount and nature of commission and drawing-account arrangements, if employee will be nonsalaried personnel (such as salesperson):

a. Prevailing arrangements for similar services in area for similarly situated organizations.

NOTE:
See NOTE to P 10(a), above.

b. Employer's capacity to pay.

c. Frequency of payment.

d. Drawing account to be minimum compensation or deducted from net commissions due.

e. Basis for commissions (*e.g.*, net sales dollar volume after returns and adjustments for defective products or services).

13. Continuation of salary or drawing account during periods of disability.

a. Conditions precedent, such as:

(1) Length of service.

(2) Prior record of productivity or other standard.

(3) Position with employer at time of disability.

b. Rate or amount.

c. Cut-off point:

(1) End of contract term; or

(2) When disability becomes permanent.

14. Arrangements for deferred compensation, including:

a. Conditions precedent:

(1) Employment until specified age.

(2) Earlier retirement by mutual consent.

(3) Continued profitability.

(4) Establishment and maintenance of reserve fund or annuity to cover deferred obligation.

b. Annual rate or amount.

15. Bonus plans.

a. Basis, for example:

(1) Productivity; or

(2) Net or operating profitability.

b. Type:

(1) Cash bonuses.

(2) Stock bonuses, either restricted or nonrestricted.

16. Profit-sharing plans:

a. Basis, e.g.:

(1) Net profit.

(2) Net profit in excess of specified dollar amount.

(3) Net profit a specified percent in excess of prior year.

b. Formula for determination of net profit.

c. When payment is to be made.

d. Entitlement if termination occurs prior to time for payment.

17. Stock option plans.

a. Basis for award [*see* P 15(a), *above*].

b. Type of stock:

(1) Common.

(2) Preferred.

(3) Units consisting of combination of common or preferred stock and warrants.

18. Fringe benefits, such as:

a. Office and administrative or secretarial support.

b. Automobile, with or without:

(1) Periodic replacement by employer, and, if so, how often.

(2) Gasoline and oil paid by employer.

(3) Maintenance paid by employer.

(4) Insurance paid by employer.

c. Business expense allowances:

(1) Use of employer's credit card.

(2) Entertainment fund.

(3) Expense account.

d. Life insurance.

e. Health and accident insurance.

f. Medical payment insurance.

g. Dental care coverage.

h. Eye care coverage.

19. Annual vacation.

20. Sick leave with pay.

21. Death benefits payable to employee's surviving spouse or estate.

22. Severance pay.

23. Ownership or disposition of employee's inventions, writings, or creations.

a. Assignment to employer with or without royalties payable to employee; or

b. Title retained by employee.

24. Payments to be made upon transfer within or outside of United States:

a. Moving expenses.

b. Transportation of employee and employee's spouse and children.

c. Purchase of employee's residence.

25. Grounds or methods for termination of contract by employer:

a. Willful breach.

b. Habitual neglect of duties.

c. Dishonesty, fraud, misrepresentation, or other acts of moral turpitude.

d. Notice of termination.

e. Failure to meet specified profit standard.

f. Death of employee or employer, if applicable.

g. Employee's physical or mental disability.

h. Garnishment of employee's wages (in excess of first garnishment).

26. Effect of merger, transfer of assets, or dissolution of employer on employment contract.

27. Right of employee to terminate contract.

28. Requirement that employee qualify for surety bond.

29. Requirement that employee submit to periodic physical examination.

30. Right of employee to purchase interest in employer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.101

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.101 Documents

1. Any previous employment or other contract between parties.

2. Any written fringe benefit plans covering other employees.

3. Correspondence between parties concerning employment.

4. Contracts entered into with employees performing same or similar duties.

5. Collective bargaining agreements containing fringe benefit, seniority, or other terms similar to those bargained for by prospective employer and employee.

6. Employer's rules, personnel manuals, and personnel policy statements.

7. Documents pertaining to employer's financial stability, including:

    a. Employer's financial statements for preceding three fiscal years.

    b. Employer's business plan.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment

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28-85 California Legal Forms--Transaction Guide §§ 85.102-85.109

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§§ 85.102[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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PART III. TRANSACTION GUIDE
B. Preliminary Determinations

28-85 California Legal Forms--Transaction Guide § 85.110

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.110 Relationship Between the Parties

NOTE:

The attorney who is employed to draft an employment contract should first consider what the relationship between the parties is or should be, and whether it might be better from the standpoint of the client to limit the relationship to one other than that of employer-employee.

1. Determine whether potential employment situation is more like independent contractor relationship than employer-employee relationship, judged by following factors that indicate independent contractor status [*see § 85.10[3]*].

NOTE:

An affirmative answer to the following questions tends to indicate an independent contractor relationship. For complete coverage of these factors (and appropriate agreements, if necessary) see Ch. 84, ***Independent Contractors*** .

a. Can hirer do without control of day-to-day function of hiree?

NOTE:

Control is the major determinant of one's status as an employee or independent contractor. The hirer of an independent contractor has no right of control over the mode of performance [*Green v. Soule (1904) 145 Cal. 96, 99, 78 P. 337]* , while an employer has the right to control and direct the activities of an employee [***see*** *Industrial Indem. Exchange v. Industrial Acci. Com. (1945) 26 Cal. 2d 130, 135, 156 P.2d 926]* .

b. Is hiree engaged in distinct occupation or business?

c. Is work usually done by a specialist without supervision?

d. Are tools and place of work supplied by hiree?

e. Is contemplated work likely to be one-time?

f. Are irregular working hours contemplated?

g. Will payment be by the job?

h. Will hiree be engaged part time?

i. Can hiree delegate performance to others?

2. If hiree could conceivably be classified as independent contractor, determine whether it is to employer's advantage that hirer should be classified as independent contractor rather than employee, considering following matters:

a. Income tax withholding.

NOTE:
Income taxes need not be withheld from compensation of independent contractor [*I.R.C. § 3401(a)*; *Unemp. Ins. Code §§ 13020, 13009*].

b. Payment of unemployment insurance taxes.

NOTE:
Unemployment insurance taxes need not be paid for independent contractor [***see*** *I.R.C. § 3306(c), (i)*; *Unemp. Ins. Code §§ 135, 2602(a)*].

c. Tort liability for acts of employees.

NOTE:
A hirer is generally not liable for the torts of an independent contractor [***see*** *Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 250-252, 66 Cal. Rptr. 20, 437 P.2d 508]* .

d. Ability to terminate relationship.

NOTE:
The independent contractor relationship is subject to termination in accordance with the independent contractor's contract [***see*** *Mt. Meadow, Etc. v. Indus. Acc. Comm. (1938) 25 Cal. App. 2d 123, 127, 76 P.2d 724]* . The "at will" employer-employee relationship is subject to termination under the terms of the contract between the parties or upon notice in most cases [*Lab. Code § 2922*]. Certain types of terminations, including those in contravention of public policy and those in violation of the implied covenants of good faith and fair dealing, are excepted [***see*** *§ 85.24[2][c], [d]*]. A contract for a specified term is subject to termination on various statutory grounds or the terms of the contract [***see*** *§ 85.24[1]*].

e. Need or ability of employer to furnish tools and workplace.

NOTE:
The hirer of independent contractor need not furnish capital, tools, or work place, while the employer generally does.

f. Need of employer to protect intellectual property.

NOTE:
Since an independent contractor may have simultaneous projects for competitive entities, the hirer's ability to control access to confidential information may be compromised.

g. Cost.

NOTE:
Even taking into account the cost of benefits, independent contractors may be more expensive than hiring an employee.

3. Consider whether partnership or joint venture be more suitable relationship [*see* Ch. 15, *General Partnerships*].

4. Ascertain whether contemplated relationship is that of professional rendering services to client [*see* Ch. 86, *Agreements for Professional Services*].

5. Determine whether contemplated relationship is that of professional employed by his or her professional corporation [for employment contract, *see* Ch. 12A, *Professional Corporations*].

6. If individual is to act in representative capacity:

a. Consider whether granting that person power of attorney would suffice to accomplish parties' objectives [*see* Ch. 98, *Powers of Attorney*].

b. Consider whether individual should be given authority to act as employer's agent.

7. Assess employer's need for this particular employee, in order to determine negotiating position regarding various contractual provisions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

28-85 California Legal Forms--Transaction Guide § 85.111

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.111 Need for Written Employment Contract

1. Determine whether Statute of Frauds [*Civ. Code § 1624*] requires employment contract to be in writing.

a. Consider whether contemplated contract will provide that it is not be performed within one year from the time of its making.

NOTE:
Such a contract is invalid unless it or a memorandum thereof is in writing and signed by the party to be charged [*Civ. Code § 1624(a)(1)*].

b. Consider whether contemplated contract will be such that it cannot possibly be performed within one year.

NOTE:
Such a contract is within the statute of frauds if, under its terms, the employee cannot possibly perform it completely within one year from the making of the contract [*Civ. Code § 1624(a)(1)*; ***see*** *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 343, 66 Cal. Rptr. 697, 438 P.2d 345]* . For discussion, see *§ 85.22[2][a]*.

c. Determine whether parties intend employment to be terminable at will.

NOTE:
An oral contract at will, even one that requires more than one year to perform, is enforceable because it is terminable at any time [*White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 344, 66 Cal. Rptr. 697,*

438 P.2d 345 ; ***see*** *Civ. Code § 1624(a)(1)*]. An oral contract for "permanent" employment is valid since it can conceivably be performed within one year by termination at the will of either party [*White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 344, 66 Cal. Rptr. 697, 438 P.2d 345* ; ***see*** *Civ. Code § 1624(a)(1)*].

d. Determine whether contract will specify term of one year or less, with option for extension.

NOTE:

Such a contract is not invalid under the statute of frauds, even if oral [*Civ. Code § 1624(a)(1)*; *Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 759, 161 P.2d 217]* .

e. Determine whether employee will act as employer's agent in sale of real property, or in lease for period longer than one year.

NOTE:

This type of agreement, if made by an agent of the party sought to be charged, is invalid unless the agent's authority is in writing and subscribed by the party to be charged [*Civ. Code § 1624(a)(3), (4)*].

2. Ascertain whether contract contemplates commission compensation to be paid by out-of-state employer for work performed in California.

NOTE:

Such a contract must be written and must set forth the method by which the commissions are computed and paid [*Lab. Code § 2751*].

3. Determine whether contract will give employee authority to enter into contracts that must be written, such as following:

NOTE:

The authority of an agent to enter into a contract required by law to be in writing can only be given by an instrument in writing [*Civ. Code § 2309*]. One way of providing this written authority is to state it in the employment contract itself. It may, however, be provided in any other valid written form. Lack of written authority can also be cured by ratification after the fact [***see*** *Civ. Code § 2310*; ***see also*** *McGirr v. Gulf Oil Corp. (1974) 41 Cal. App. 3d 246, 256 n.5, 115 Cal. Rptr. 902]* . For additional discussion, see *§ 85.22[4]*.

a. Contracts that cannot by their terms be performed within a year from their making [*Civ. Code § 1624(a)(1)*; *but see Civ. Code § 1624(b)* ("qualified financial contract," as defined, need not be in writing if certain requirements are met)].

b. Contracts that involve promise to answer for another person's debt, default, or miscarriage [*Civ. Code § 1624(a)(2)*].

NOTE:

See *Civ. Code § 2794* for a list of suretyship obligations that need not be in writing see also Ch. 79, ***Suretyship, Guaranty, and Indemnity*** .

c. Contracts that involve [*Civ. Code § 1624(a)(3), (4)*]:

(1) Leases for periods longer than one year of real property or interests therein; or

(2) Sales of real property or interests therein.

d. Contracts that are not to be performed within promisor's lifetime [*Civ. Code § 1624(a)(5)*].

e. Contracts that constitute agreement by real estate purchaser to pay debt secured by the property [*Civ. Code § 1624(a)(6)*].

f. Contracts, promises, undertakings, or commitments to lend money or to grant or extend credit, in amount greater than $100,000, made by person engaged in business of lending or arranging for lending of money or extending credit [*Civ. Code § 1624(a)(7)*].

NOTE:
This requirement does not apply to those transactions primarily for personal, family, or household purposes. Contracts, promises, undertakings, or commitments to loan money secured solely by residential property consisting of one to four dwelling units are considered to be made for personal, family, or household purposes [*Civ. Code § 1624(a)(7)*].

g. Contracts for sale of goods for $500 or more [*Com. Code § 2201*; *but see Com. Code § 2201(4)* ("qualified financial contract," as defined in *Civ. Code § 1624(b)*, need not be in writing if certain requirements are met)].

h. Contracts for payment of commissions by out-of-state employer [*Lab. Code § 2751*].

4. Even if contract need not be written, consider whether it would be advantageous to client to specify any of following in writing:

NOTE:
Since many employers are reluctant or unwilling to use written agreements, they should be apprised of reasons that affirm the need for them. Some or all of the following should be in writing in order to make specific and memorialize the bargain of the parties and avoid the need for litigation that might arise in the absence of specificity. If only a few of the following items need to be memorialized in writing, counsel should consider having the employee execute a simple, stand-alone document acknowledging or agreeing to each of the particular items. This can be done in an offer letter that requires the employee's written assent. For example, it is common practice for rank-and-file employees simply to sign an acknowledgment of at-will status and a nondisclosure agreement to protect the employer's confidential business information [***see*** *§§ 85.440*, *85.443*, *85.511*].

a. Term of employment.

b. Duties of employee.

c. Compensation to be paid.

d. Benefits to be given.

e. Details of profit-sharing and/or bonus plans to be offered.

f. Methods of allocating the burden of business expenses between employer and employee.

g. Property rights of the parties to:

(1) Patents or copyrights on works created by employee during employment.

(2) Trademarks.

(3) Trade secrets, including:
(a) Customer lists.

(b) Processes or formulas.

(c) Business methods.

(d) Business plans.

(e) Unregistered patentable inventions.

(f) Unregistered copyrightable creations.

h. Protection of employer from competitive activities of employee during term of employment.

i. Protection of employer from unfair competition by employee during or after term of employment.

j. Other obligations of parties.

k. Grounds and procedures for terminating contract.

5. Ascertain whether employee requires written agreement to:

a. Guarantee employment to him or her as one of employer's organizers or principals (whether employer is a corporation, professional corporation, association, or partnership).

b. Protect employee who is a minority shareholder of closely held corporation from freeze-out.

c. Ensure job security for specific period.

d. Ensure specific compensation and or retirement provisions.

e. Protect his or her rights to intellectual property not created with employer's assets or during on-duty hours.

6. Consider whether employer needs employment agreement as means of:

a. Controlling employee.

b. Ensuring availability of employee's skill or knowledge during term of employment.

c. Ensuring continuing availability of employee's knowledge and assistance after employment.

NOTE:
For example, the employee may be needed to participate in patent prosecutions regarding patents with which he or she was involved during the term of the employment contract.

7. Determine whether need for writing is outweighed by any of following disadvantages:

a. Time and expense of preparing written employment agreement for each employee.

b. Possibility that specificity of formal contract may unduly limit employer, by taking away flexibility in dealing with employee.

8. Consider whether some document other than employment agreement might serve employer's purpose; for example:

a. Offer letter requiring employee's written assent.

b. Written acknowledgment of employer's at-will policy.

c. Written agreement of nondisclosure of trade secrets.

d. Written assignment of intellectual property rights concerning projects worked on by employee in course of employment.

9. Consider having employment agreement incorporate by reference certain matters that are fully set forth in employer policy documents or handbooks.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

28-85 California Legal Forms--Transaction Guide § 85.112

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.112 Corporate, Partnership, or Association Formalities Necessary for Entry Into Employment Agreement

1. If corporation, partnership, or association ("organization") is to be employer, determine whether its basic organizational documents (i.e., articles or partnership agreement or bylaws) contain provisions governing or bearing on:

a. Appointment (including election or selection) of officers.

b. Employment of other personnel.

c. Duties of officers or other employees.

d. Compensation of officers or other employees.

e. Tenure of officers or other employees.

2. Determine whether bylaws or other basic organizational documents contain any other provision governing or bearing on:

NOTE:
Basic organizational document provisions bearing on these subjects may have an influence on the description of or limitations on the duties of its officers as well as on other terms of an employment contract.

a. Management of business; or

b. Conduct of organization's affairs.

c. Authority of employee to bind employer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPartnership AgreementsLabor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide §§ 85.113-85.119

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[Reserved]

§§ 85.113[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART III. TRANSACTION GUIDE
C. Drafting Guide

28-85 California Legal Forms--Transaction Guide § 85.120

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§ 85.120 Drafting Guide for Employment Contracts

NOTE:

In approaching the task of drafting an employment contract, counsel should first ascertain the client's desires with respect to the basic subjects the contract should cover. §§ 85.100 and 85.101 list the basic subjects common to most contract situations. For discussion of the essential elements and terms of employment contracts, see *§ 85.21*.

This Drafting Guide indicates the various provisions covering particular elements of an employment contract and indicates their location. This will aid counsel in finding the particular provision, whether it is located within a complete form [***see** §§ 85.200-85.231*] or one of the separate provisions [***see** §§ 85.240-85.551*].

[1] Introductory Matters

1. Specify date and place of agreement.

NOTE:

The date and place is commonly set forth above the signature block as "Executed on _____ [***date***], at _____ [***place***]."

2. Include designation of parties and their addresses.

NOTE:

This information is commonly set forth in an introductory paragraph at the beginning of a contract [***see** § 85.200*].

a. Name of each party.

b. Address of each party.

c. Designation of parties as "employer" and "employee."

d. Description of employer as corporation, partnership or sole proprietor.

3. Consider including recitals of such matters as [*see § 85.223*]:

a. Employer's trade or business.

b. Employer's reasons for employing the employee, e.g.:
(1) Employee's special skill, background, or expertise.

(2) Employee's position as major shareholder, principal, or partner of employer.

4. State that employer hires employee and employee accepts employment [*see § 85.200,* Section 1.01].

NOTE:
This type of statement is generally included in the provision specifying the term of the contract, but may be separately stated.

[2] Term of Contract

1. If contract is to be for a specified period:

a. State that employer employs employee and that employee accepts employment for specified period [*see § 85.200,* Section 1.01].

NOTE:
This period should be greater than one month and less than seven years [*Lab. Code §§ 2922, 2855*; ***see*** *§ 85.200[1][c]*].

b. Specify dates on which period of employment begins and ends [*see § 85.200,* Section 1.01].

c. If contract is to be renewable for additional periods, specify method, length of renewal period, and conditions to which renewal is subject, e.g. [*see § 85.200,* Section 1.02]:

(1) Automatically.

(2) For succeeding terms of stated length.

(3) Subject to specified condition (e.g., unless either party gives notice to the other within specified time before expiration of any term of intention not to renew).

d. Consider including provision defining "employment term" as entire period of employment of

employee by employer [*see § 85.200*, Section 1.03].

e. Consider providing that contract is subject to earlier termination under other provisions [*see § 85.201*, Section 1.02].

2. If contract is to be at will, state that employer employs employee and that employee accepts employment, but do not specify any period [*see § 85.210*, P 1].

3. If desired, specify that employment is for employee's lifetime [*see § 85.240*].

4. If seasonal employment is involved [*see § 85.241*]:

a. Include provision describing term as stated number of months each year beginning and ending on specified dates.

b. State whether employee has right to be employed elsewhere during remainder of year.

c. Specify that employee is entitled to payment for each month of actual employment.

5. Whether contract is for specified term or at will, consider stating that it is subject to termination as provided elsewhere in the contract [*see § 85.201*, Section 1.02].

[3] Duties of Employee

NOTE:
Duties are to be distinguished from obligations. The former describe the way in which the work is to be conducted; the latter (which are outlined in [10], ***below***) cover legal or ethical requirements.

1. Set forth title of employee [*see § 85.200*, Section 2.01].

2. Describe employee's duties:

a. In general terms; or

b. With greater particularity but with qualifications such as:

NOTE:
A provision that attempts to describe an employee's duties in detail should avoid the trap of literal interpretation that would limit the scope of the employee's duties too narrowly and thus unduly limit the rights of the employer by qualifying the description.

(1) Phrase stating that the duties include, without limitation, those described; or

(2) Clause stating that in addition to duties described, employee will do such other work as may be assigned, subject to instructions, directions, and control of employer [*see § 85.222*, Section 2.02]; or

(3) Clause stating that duties include such other work as may be required in connection with employer's business [*see § 85.210*, P 3].

(4) Clause stating that duties are to be conducted in accordance with employer's policies as established by management [*see § 85.211*, Section 2.01].

c. Consider using one of following provisions governing duties of specific categories of employees:

(1) President or chief executive officer of an organization [*see § 85.200*, Section 2.01].

(2) Vice president, secretary-treasurer, or other senior executive [*see § 85.201*, Section 2.01].

(3) Mid-level or department manager [*see § 85.210*, P 3].

(4) Retail store branch manager [*see § 85.211*, Section 2.01].

(5) Salesperson with assigned territory [*see §§ 85.220*, Section 2.01; *85.250*, eighth alternative].

(6) Technician (e.g., an engineer) [*see § 85.221*, Section 2.01].

(7) Computer programmer [*see § 85.222*, Section 2.01].

(8) Employee of temporary help agency [*see § 85.223*, § 2].

(9) Appraiser [*see § 85.250*, first alternative].

(10) Bookkeeper [*see § 85.250*, second alternative].

(11) Consultant [*see §§ 85.231*, *85.250*, third alternative].

(12) Investigator [*see § 85.250*, fourth alternative].

(13) Inventor [*see § 85.250*, fifth alternative].

(14) Service manager [*see § 85.250*, sixth alternative].

(15) Person hired to recruit other employees or to establish a sales or service organization [*see § 85.250*, seventh alternative].

3. Set forth limitations on employee's exercise of duties:

a. For chief executive officer, specify matters requiring consent of board of directors for actions by chief executive officer [*see § 85.200*, Section 2.02].

b. For other senior executives, specify that employee's exercise of duties is subject to direction of superior officer and or board of directors [*see § 85.201*, Section 2.01].

4. Consider stating name or title of person to whom employee reports [*see § 85.210*, P 3].

5. State place where duties are to be performed:

a. Initial place of employment [*see §§ 85.221*, Section 2.01(b); *85.222*, Section 2.01(c)].

NOTE:
For a provision assigning a salesperson to a particular territory, see *§ 85.220*, Section 2.02.

b. Reserve employer's right to transfer employee [*see § 85.275*].

NOTE:
For a provision permitting the employer to change a salesperson's assigned territory, see *§ 85.220*, Section 2.03.

6. Consider including promise by employee to make his or her advice and counsel available to employer after retirement, in capacity of consultant [*see § 85.200*, Section 2.08].

7.

a. Require employee to give priority to employer's business [*see § 85.200*, Section 2.03(a)].

b. Require employee:

(1) Not to engage in any competing or conflicting business pursuits or any business, commercial, or professional nature services of the type provided to employer without employer's prior consent [*see § 85.200*, Section 2.03(b)]; and/or

(2) Not to engage in other pursuits except for non-conflicting non-competitive pursuits during off-duty hours and off-premises [*see § 85.272*].

c. Consider allowing expenditure of reasonable amounts of time for specified outside activities (*e.g.*, educational, charitable, or professional activities) [*see § 85.200*, Section 2.03(b)].

d. Consider allowing passive personal investments or conduct of private business affairs and if used, consider adding conditions that [*see § 85.200*, Section 2.03(c)]:

(1) Activities may not materially interfere with required services.

(2) Investments or private business be limited to those not in competition with employer.

8. Include provision requiring employee to perform loyally and conscientiously all duties and obligations specified in contract [*see § 85.270*].

9. Consider adding or using, in lieu of duties provision, a provision stating that employee's duties will be those determined from time to time by employer [*see § 85.260*].

NOTE:
Although it is generally best to set forth in the employment contract the duties to be performed by the employee, the provision suggested here has the advantage of giving the employer complete freedom in

determining the duties to be performed by the employee.

10. Consider adding provisions governing changes in duties:

a. Requiring employee to perform other duties as assigned at later date [*see § 85.261*].

b. Reserving employer's right to assign employee to performance of duties that differ from those originally assigned [*see § 85.262*].

c. Allowing parties to modify duties upon mutual consent [*see § 85.263*].

d. Permitting change of duties when employee becomes disabled [*see § 85.264*].

11. Consider use of provision requiring employee's performance to be rendered to employer's satisfaction [*see § 85.271*].

12. Consider including agreement that employee has neither right nor authority to contract on behalf of employer without employer's written consent [*see § 85.273*].

NOTE:

Although this type of provision makes it clear to the employee that he or she has no authority to make any legal commitments on behalf of the employer without the employer's express written consent, the attorney for the employer should make it clear to the client that this provision is binding only as between the employer and the employee, and is not necessarily binding between the employer and third persons. Regardless of any provision in the employment agreement, the employer can be bound by unauthorized commitments made by the employee if the employee had ostensible authority to do so. For discussion, see *§ 85.273[1][b]*.

13. Include provision requiring employee to adhere to employer's rules, policies and procedures [*see § 85.274*].

NOTE:

This type of provision should be used at least in contracts under which non-executive personnel are employed, if not all employment agreements, in order to make it clear that there are rules to which the employee must adhere. For discussion, see *§ 85.274[1][c]*.

14. If appropriate, specify length of employee's work day and week [*see § 85.276*].

NOTE:

This type of provision should be included in the employment contract when the parties wish to guard against future misunderstandings by precisely defining the number of hours the employee must devote to the employer's business each week.

[4] Compensation

1. Specify employee's initial compensation:

NOTE:

Executive compensation may include deferred compensation, profit sharing, stock options, and cash or stock bonuses. Generally, executive compensation is directly related

to company profits in order to give the executive the incentive necessary for success of the organization. For a thorough discussion, see Cavitch, Tax Planning for Corporations and Shareholders, Ch. 5, ***Methods of Compensating the Executive*** (Matthew Bender). The compensation for general employees, and to some extent, for executives as well, can be based on the going rate for similar employees in the area.

a. Annual salary [*see § 85.200*, Section 4.01(a)]:
(1) In terms of lump sum per annum.

NOTE:
If the agreement is for the employment of a person to a position outside the United States, it should specify that the salary is payable in United States dollars, either directly to the employee or by deposit to the employee's credit in a bank designated by the employee. It should also state that if the employee desires payment in the currency of the place of employment, payment will be made at the then current rate of exchange [***see*** *§ 85.212*, P 5].

(2) Payable on specified schedule.

b. Commission payments:

(1) Specified percentage of net sales [*see § 85.220*, Section 3.01; *see also § 85.311*].

(2) With provision for:

(a) Drawing account [*see § 85.220*, Section 3.04; *see also § 85.312*]; or

(b) Salary in addition to commission [*see § 85.314*].

(3) Include definition of "net sales" [*see § 85.220*, Section 3.02].

(4) Specify when commissions are deemed earned [*see § 85.220*, Section 3.03].

(5) Set forth terms governing payment of commissions on sales to customers initially procured by employee [*see § 85.313*].

2. If appropriate, use provision for payment of salary plus commission [*see § 85.314*]:

a. Base salary plus commission on sales; or

b. Base salary plus commission if sales exceed specified level or quota.

3. Provide for changes in salary:

a. Annual increases in salary [*see §§ 85.200*, Section 4.01(b) (chief executives); *85.201*, Section 4.01(b) (senior executives); *see also § 85.530*]:

(1) In sole discretion of person or body named as having authority to determine increases

[*see § 85.302*].

(2) Indicating approximately when increases can be expected.

b. Periodic cost of living adjustment [*see § 85.301*].

4. If deferred compensation is to be provided for, specify:

a. Subject to condition that employee remain with employer until specified age, or earlier retirement with consent of parties [*see §§ 85.200*, Section 4.02, *85.201*, Section 4.02, *85.320* (fixed annuity)].

b. Amount of compensation expressed as:

(1) Percentage of compensation employee is receiving at specified date (usually date of retirement) [*see § 85.321*,]; or

(2) Lump sum [*see § 85.201*, Section 4.02(a)].

c. Payment schedule (usually equal monthly installments).

d. How long payments are to continue [*see § 85.322* (predetermined sum payable over specified term)].

e. Whether, and if so, how, payments are to continue after employee's death [*see § 85.201*, Section 4.02(b)].

5. If salary is to continue during disability, specify [*see § 85.200*, Section 4.03]:

a. Agreement to pay stated percent of employee's annual salary.

b. Payment schedule.

c. Period during which payments will continue.

6. Include employee's promise that if part of employee's compensation is disallowed as income tax deduction for employer, employee will repay that portion [*see § 85.200*, Section 4.05].

7. Consider providing for severance pay in event employee's services are terminated for reasons other than cause [*see §§ 85.221*, Section 4.02, *85.343*].

8. If compensation is to be expressed in terms of hourly wage, provide for payment of hourly wage [*see § 85.290*].

9. If overtime work is to be separately compensated, provide for overtime compensation [*see § 85.291*].

10. If employee starts in training position, include provision for compensation during training period [*see § 85.303*].

11. Consider use of provision guaranteeing payment of pension [*see § 85.323*].

12. Consider death benefit provisions:

a. Lump sum payment to surviving spouse or person to be designated by employee [*see § 85.324*]; or

b. Annuity to surviving spouse or lump sum to estate [*see § 85.325*].

c. Continuing salary to surviving spouse for balance of employment term [*see § 85.326*].

13. Provide for vacation pay [*see § 85.340*].

NOTE:
Vacation pay can be provided for in either the compensation or benefits portion of an employment contract.

14. Provide for sick leave with pay [*see § 85.200*, Section 6.02].

NOTE:
Sick leave with pay can be provided for in either the compensation or benefits portion of an employment contract. If the employer provides compensated sick leave, the employer must permit the employee to use his or her accrued sick leave, in an amount not less than the sick leave that would be accrued during six months at the employee's then-current rate of entitlement, to attend to an illness of the employee's child, parent, spouse, or domestic partner [*Lab. Code § 233(a)*]. An employer's absence-control policy violates this requirement if it counts sick leave taken for this purpose as an absence that may lead to or result in discipline, discharge, demotion, or suspension [*Lab. Code § 234*].

15. Consider specifying which holidays employee can take with pay [*see § 85.341*].

16. If employee is in armed forces reserve or national guard, consider including provision for military training leave [*see § 85.342*].

[5] Employee Fringe Benefits

NOTE:
While vacation, sick leave, holiday, severance, and military leave pay might be considered benefits, they are also compensation items and, thus, are included in [4], above.

1. Provide for health care benefits [*see § 85.350*].

a. Under health and accident insurance plan; or

b. Under employer's self-insured plan.

c. With provision for notice of discontinuation of any coverage.

2. Provide for group-term life and accidental death and dismemberment insurance [*see § 85.351*].

3. Consider including provision under which employee will receive compensation upon premature death or dissolution of employer [*see § 85.352*]:

a. Uninsured payment from individual employer's estate or other employer's cash assets upon dissolution (with individual employer's promise to make adequate provision in his or

her will to cover obligation); or

b. Funded by insurance on life of individual employer.

4. If appropriate, include provision for automobile:

a. State who will be responsible for supplying automobile [*see § 85.200*, Section 6.03(a); *see also § 85.220*, Section 7.01].

b. Specify when replacements will be made if supplied by employer [*see § 85.200*, Section 6.03].

c. Specify who will be responsible for maintenance [*see § 85.200*, Section 6.03(b)].

d. Specify who will be responsible for purchase and maintenance of insurance [*see § 85.200*, Section 6.03(c), *85.20*, Section 7.02].

e. Specify termination if employee has suspended license.

5. For executive employee, consider provision for life insurance policy paid by employer [*see § 85.200*, Section 6.06].

[6] Employee Incentives

NOTE:

Employee incentives take the form of cash or stock bonuses (***i.e.***, compensation payable in definite amounts), profit-sharing (***i.e.***, additional compensation expressed as a percentage of net profits), or "buy-in" guarantees (***i.e.***, provisions permitting the employee to purchase an interest in the business).

1. Consider use of cash bonus:

a. Based on profitability (either gross receipts or net profits) [*see § 85.360*]; or

NOTE:

Deducting the employer's expenses from its gross receipts to calculate net profits for purposes of a supplemental profit-sharing program does not run afoul of the statutory and regulatory prohibitions against deducting or recapturing unauthorized amounts from wages [***see*** *Lab. Code §§ 221-224, 400-410, 3751(a)*; *8* Cal. Code Reg. § 11070(8)], so long as the employees' ***regular*** wages are not subject to any unauthorized deductions for the employer's operating expenses [*Prachasaisoradej v. Ralphs Grocery Co. (Aug. 23, 2007) 42 Cal. 4th 217, 64 Cal. Rptr. 3d 407, 165 P.3d 133, 2007 Cal. LEXIS 8909, at *34-*56]* .

b. Simple cash bonus in lump sum [*see § 85.361*]:

(1) Based on length of service.

(2) Payable after completion of specified term.

(3) Payable at end of employment year if employee remains an employee until that time.

c. Cash bonus payable at end of year, with proration if contract terminated prior to end of year [*see § 85.362*].

2. Consider use of cash and stock bonus combination [*see § 85.381*].

3. Consider straight stock bonus:

a. Stock bonus with stock valued at fair market value [*see § 85.380*, second alternative]; or

b. Restricted stock bonus [*see § 85.382*].

4. Consider provision agreeing to include employee as participant in employee stock ownership plan established by employer [*see § 85.380*, second alternative].

5. Consider profit-sharing provisions:

a. Profit-sharing as sole compensation based on performance measured by net profits of employer or branch managed by employee [*see § 85.370*].

b. Profit-sharing based on performance:

(1) Profits in excess of specified sum [*see § 85.200*, Section 5.01(a)]; or

(2) Profits that exceed net profits from prior year by specified percentage [*see § 85.200*, Section 5.01(a)].

(3) Subject to:
(a) Loss of entitlement upon termination of contract before end of entitlement year [*see § 85.200*, Section 5.01(b)]; or

(b) Discretionary adjustment upon termination of contract before end of entitlement year [*see § 85.371*].

(4) With right of employee to examine employer's books [*see § 85.371*].

c. Decreasing share of each level of profits as profits increase, in addition to salary [*see § 85.372*].

6. Consider use of stock options:

a. Incentive stock option agreement granting employee right to purchase stock for fair market value of stock when option is granted [*see § 85.383*].

b. Option granted at commencement of employment [*see § 85.384*]:

(1) Granting employee right to purchase specified amount of stock in lots at stated price.

(2) With right to exercise unexercised rights if terminated.

c. Options granted during each year of employment to purchase stock subject to resale to employer upon termination [*see § 85.385*].

7. If employee had stock options prior to employment contract, consider use of provision for continuation of those stock option rights [*see § 85.386*].

8. Consider use of provision giving employee right to purchase an interest in employer's business:

a. Provision giving employee an option to purchase specified interest after completion of stated number of years of employment [*see § 85.400*].

b. Agreement giving employee an option to purchase business upon employer's death or decision to sell [*see § 85.401*].

[7] Reimbursement of Expenses Incurred by Employee

1. Include provision for reimbursement of business expenses:

NOTE:
If the agreement is for the services of an employee outside the United States, the business expense clause should state whether reimbursement is to be made in United States dollars or local foreign currency [***see*** *§ 85.212*, P 11].

a. Consider defining "business expenses" as those specified in agreement or in employer's rules, policies and procedures [*see § 85.220*, Section 4.04].

b. Require employee to maintain substantiating records and submit them to employer [*see § 85.410*; *see also § 85.220*, Section 4.03].

2. Consider use of provision requiring employee use of employer credit cards to extent possible for business expenses [*see § 85.411*].

3. Consider provision for payment to employee of specified amount periodically to cover business expenses (as an alternative to provisions for reimbursement of business expenses) [*see § 85.412*].

4. Define "business expenses" as those specified in employer's rules, policies and procedures [*see § 85.413*].

5. Provide for reimbursement of moving expenses:

NOTE:
For pertinent provisions to include in the contract employing a person for a position outside the United States, see *§ 85.212*, P 6.

a. Consider use of provision reimbursing employee for all deductible moving expenses [*see § 85.420*]; or

b. Consider limiting reimbursement of moving expenses to costs of moving employee and family and their household goods and personal effects to new work location [*see § 85.421*]; or

c. Provide only that transferred employee's moving expenses will be paid if authorized in advance by the employer [*see § 85.421*]; or

d. Provide for payment of specified amount of moving expenses of new employee [*see § 85.422*].

[8] Property Rights of Parties

1. If employee is hired to perform research and development work, include provision:

a. Assigning inventions of employee to employer [*see § 85.430*]; and/or

b. Excluding specified inventions from coverage of employment agreement [*see § 85.433*].

2. If desired, include provision for payment of royalties to employee on inventions assigned to employer [*see § 85.431*]:

a. Percentage royalty; or

b. Varying percentage royalty.

3. If employee retains ownership of inventions, consider provision giving employer perpetual royalty-free license for use thereof [*see § 85.432*].

4. If employee will have access to employer's trade secrets, include provisions restricting employee's use of those secrets:

NOTE:
For extensive discussion of an employer's rights in trade secrets, see *§ 85.440[1]*. Provisions restricting an employee's use, misappropriation, or misuse of an employer's trade secrets can be combined into one provision [***see*** *§ 85.200*, Section 2.07] or separated into distinct provisions [***see*** *§§ 85.440, 85.471*].

a. State that during course of employment, employee will have access to and become acquainted with employer's trade secrets, and include general description [*see § 85.440*, P (a); *see also § 85.200*, Section 2.07(a)].

NOTE:
For an alternate provision describing an employer's trade secrets, see *§ 85.441*.

b. Specify that all files, records, documents, and other items pertinent to the particular contract situation are and remain employer's property and limit employee's ability to remove them from employer's premises [*see § 85.440*, P (b); *see also § 85.200*, Section 2.07(d)].

c. Set forth employee's promise and agreement not to misuse, misappropriate, or disclose employer's trade secrets [*see § 85.451*, P (c); *see also § 85.200*, Section 2.07(b)].

d. Include employee's agreement not to engage in unfair competition with respect to employer's trade secrets [*see § 85.471*; *see also § 85.200*, Section 2.07(c)]:

(1) Employee's acknowledgment and agreement that sale or unauthorized use or disclosure of employer's trade secrets constitute unfair competition.

(2) Employee's promise and agreement not to engage in any unfair competition with employer either:
(a) During term of agreement; or

(b) At any time thereafter.

5. Protect employer's customer lists from unfair competition by:

NOTE:
These provisions are specifically designed for use in agreements with salespersons. See Paragraph 6, below, for a description of a similar provision for use in other types of employment situations.

a. Defining customer lists as employer's trade secrets, stating that unauthorized use constitutes unfair competition, and stating employee's promise not to engage in unfair competition [*see § 85.472*, P (a)].

b. Restraining employee from soliciting employer's customers following termination of employer-employee relationship [*see § 85.472*].

c. Restraining employee from soliciting employer's other employees following termination of employer-employee relationship [*see § 85.472*].

d. Specifically providing that all records and books relating to customers of employer and/or transactions encountered in conduct of employment [*see § 85.442*]:

(1) Are employer's exclusive property; and

(2) Are to be returned to employer upon termination of employment.

6. Include provision requiring employee to return to employer all of employer's property upon termination of employment or when requested by employer [*see § 85.450*].

7. If employee's name is to be used, or is likely to be used, in employer's name, include provision governing use of employee's name as part of employer's trade name or trademark [*see § 85.451*]:

NOTE:
This type of provision is commonly included in agreements between a professional corporation and one of the principals; however, it may be used by any employer whose name will include the name of the employee.

a. Grant employer right to use employee's name in its trade name or trademark.

b. Limit use of employee's name in connection with any other enterprise.

[9] Obligations of Employer

1. If desired, state that employer will provide employee with compensation, incentives, benefits, and business expense reimbursement specified elsewhere [*see § 85.200*, Section 3.01].

NOTE:
Use of this type of provision is not essential; however, when an agreement is divided into separate articles, as are most of the forms in this chapter, obligations such as compensation, incentives, benefits, and business expense reimbursement are generally found in other articles, while certain statutory and other unclassified obligations of employers are stated in the article entitled "Obligations of Employer."

2. If appropriate, include employer's promise to provide employee with private office, stenographic help, office equipment and supplies, and other facilities and services, suitable to employee's position and adequate for performance of employee's duties [*see § 85.200*, Section 3.02].

3. Include provision obligating employer to indemnify employee for all necessary expenditures or losses incurred by employee as direct result of discharge of employee's duties on employer's behalf [*see § 85.460*; *see also § 85.200*, Section 3.03].

4. Include provision permitting employee to examine books relating to compensation, if agreement permits employee to share in profits or otherwise appropriate [*see § 85.461*; *see also § 85.220*, Section 6.02 (salesperson's contract)].

5. If employee is hired for overseas position, specify employer's obligation to maintain workers' compensation insurance [*see § 85.212*, P 8].

[10] Obligations of Employee

1. Prohibit competitive activities on part of employee against employer during term of employment [*see § 85.470*; *see also § 85.200*, Section 2.04].

NOTE:
Certain activities, such as ownership of minor stockholdings in competing businesses, might be construed as competitive activities and should be specifically excluded from the general prohibition against competition. Thus, *§ 85.470* excludes such minor interests.

2. Include provision prohibiting employee from engaging in unfair competition after termination of employment [*see § 85.471*].

NOTE:
This type of provision is commonly used as part of a provision designed to protect the

property rights of the employer to its trade secrets [***see*** [8], ***above***]. However, it can be stated separately in the contract article governing the obligations of the employee.

3. Consider use of provision for liquidated damages for breach of noncompetition clause [*see § 85.473*].

NOTE:
Although a liquidated damages provision may seem attractive as a deterrent to the employee, it can have undesirable effects on the employer; for discussion, see *§ 85.473[1][c]*.

4. Set forth provision indemnifying employer from losses caused by employee's negligence or misconduct [*see § 85.480*].

5. Include provision requiring employee to be covered by surety bond [*see § 85.481*]:

NOTE:
This type of provision should be used when an employee will handle substantial sums of money that belong either to the employer or to customers of the employer in order to protect the employer from any loss caused by wrongful acts of the employee.

a. Either require employee to:
(1) Qualify for bond and pay bond premiums; or

(2) Furnish bond and pay bond premiums.

b. Specify that failure of employee to qualify for bond within specified period will result in termination.

6. If desired, include provision requiring employee to make deposit as security for his or her performance [*see § 85.481*].

7. If appropriate to protect key personnel or for policy reasons, require employee to undergo regular physical examination [*see § 85.490*].

8. If necessary to protect employer's goodwill and ability to maintain profitable operation, consider including "morality clause" [*see § 85.491*].

9. If necessary to protect employer from theft or other illegal activities on part of employee, consider inclusion of grant of permission by employee to search his or her person and effects, including desk, locker, e-mail and voicemail [*see § 85.492*].

10. If employee is hired for overseas position, specify employee's liability for payment of United States and foreign taxes [*see § 85.212*, P 7].

11. If employee is a salesperson, consider including requirement that employee:

a. Assist in collection of sums due from customers [*see § 85.220*, Section 2.06].

b. Submit periodic written reports [*see § 85.220*, Section 2.07].

12. If employee must be licensed or certified to perform his or her job, include:

a. Provision requiring current licensing or certification as a condition of continued employment.

b. Provision specifying whether employer or employee will pay licensing fees and costs of any mandatory continuing education associated in maintaining license.

[11] Termination of Employment

1. Consider use of provision for termination only for [*see § 85.500*]:

NOTE:
This type of provision states the three grounds for termination of an employment contract for a specified term [*Lab. Code § 2924*] and is therefore appropriate for inclusion in any such contract. Since a contract that has no specified term can be terminated at the will of either party on notice to the other [*Lab. Code § 2922*], this provision is not appropriate for inclusion in contracts at will.

a. Breach of duty.

b. Neglect of duty.

c. Continued incapacity to perform.

2. Alternatively, consider use of provision for termination based on any of the statutory grounds [*see § 85.501*]:

NOTE:
This type of provision states all of the statutory grounds for termination of an employment contract, whether for a specified term or at will [*Lab. Code §§ 2920-2924*].

a. Death of employee.

b. Loss by employee of legal capacity.

c. Loss by employer of legal capacity to contract.

d. Willful breach of duty by employee in course of employment, unless waived by employer.

e. Habitual neglect by employee of employment duties, unless waived by employer.

f. Continued incapacity on part of employee to perform duties, unless waived by employer.

g. Willful or permanent breach of obligations of employer to employee under agreement, unless waived by employee.

h. Death or dissolution of employer or any partner in business operated by employer.

i. Circumstances making continuation of employment impossible or impracticable.

NOTE:
For provisions spelling this ground out in greater detail, see *§§ 85.520-85.523*, see also Paragraph III(K)(7), below.

3. Consider use of provision for termination upon good faith dissatisfaction of employer [*see § 85.502*; *see also § 85.220*, Section 2.09 (employment continues as long as services are satisfactory)].

4. If employee is in top-level managerial position, consider provision terminating agreement for failure to meet specified profit standard and designating termination as one for cause [*see § 85.200*, Section 8.02].

5. Consider including provision for termination at employer's option if employee becomes permanently disabled [*see § 85.503*].

6. If appropriate, include provision stating when garnishment of employee's wages constitutes grounds for termination [*see* § 85.504].

NOTE:
Generally, this type of provision should not be necessary in the case of top- or mid-level executives or managerial personnel; nor would it be practical for use with respect to an employee whose services are needed, regardless of his or her personal problems. However, counsel may find cases in which the employer may desire to limit the administrative burden caused by garnishments, in which case this provision could be used.

Use of this provision is limited by law. The mere threat of garnishment is not grounds for discharge. Moreover, no employer may discharge an employee because the employee's wages have been subjected to garnishment for the payment of one judgment. Any contravening provision of an employment contract is void as against public policy [*Lab. Code § 2929(b)*].

7. Include provision for termination upon notice from terminating party to other party [*see § 85.510*; *see also § 85.200*, Section 8.06].

8. Consider use of provisions for termination upon extinction of subject matter of employment contract:

a. Termination on discontinuance of employer's business [*see § 85.520*].

b. Termination on revocation or suspension of employer's liquor license [*see § 85.521*].

c. Provision governing termination upon merger, transfer of assets, or dissolution of corporate employer [*see § 85.522*].

d. Provision governing termination in event of bankruptcy or similar proceeding involving other party [*see § 85.523*].

9. Provide for effect of termination:

a. Consider use of provision that employee's right to compensation (other than vested rights) ends as of date of termination [*see § 85.530*]; or

b. Consider use of provision stating which rights to compensation are forfeited upon termination [*see § 85.531*]; or

c. Consider "golden parachute" provision, i.e., agreement to pay terminated executive specified number of years annual salary at rate of compensation current in year of termination [*see § 85.200*, Section 8.05].

[12] Effect of Breach of Contract

1. Consider use of provision for liquidated damages in event that employee refuses to work or to continue to work for employer as agreed [*see § 85.540*].

2. Consider use of provision stating that [*see § 85.200*, Section 2.05]:

a. Services to be performed are of special character that gives them peculiar value.

b. Loss of services cannot be reasonably or adequately compensated in damages in action at law.

c. Employee expressly agrees that employer is entitled to injunctive and other equitable relief to prevent or remedy breach of contract by employee.

[13] Arbitration or Other Resolution of Disputes

1. Consider use of provision under which either party may request arbitration of matters in controversy [*see § 85.550*].

2. Alternatively, consider use of provision for compulsory arbitration of matters in controversy [*see § 85.551*].

3. Consider providing for other forms of alternative dispute resolution, such as mediation.

NOTE:
For detailed coverage of arbitration, mediation, and other types of alternative dispute resolution (ADR), including forms of contractual provisions for each type of ADR, see California Forms of Pleading and Practice, Ch. 30, ***ADR: Using Alternative Dispute Resolution*** through Ch. 38, ***ADR: Reference*** (Matthew Bender).

[14] General Provisions

1. Specify manner of giving notice to the other party [*see § 85.200*, Section 9.01].

NOTE:

For discussion of this type of provision, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions*** .

2. Provide for attorneys' fees and costs [*see § 85.200,* Section 9.03].

NOTE:
For discussion of this type of provision, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions*** .

3. State that contract contains entire agreement of the parties [*see § 85.200,* Section 9.04]

NOTE:
For discussion of this type of provision, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions*** .

4. Provide for modification of contract only by subsequent written agreement [*see § 85.200,* Section 9.05].

NOTE:
For discussion of such modifications, see *§ 85.21[4]*.

5. Specify the effect of any waiver [*see § 85.200,* Section 9.06].

6. Provide for event that part of contract is declared invalid, either [*see § 85.200,* Section 9.07]:

NOTE:
For discussion of this type of provision, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions*** .

a. Remaining provisions of contract to continue in full force and effect [*see Civ. Code § 1670.5(a)* (if contract contains unconscionable provision, court may sever or limit application of that provision, and enforce remainder of contract)].

b. Invalid provision to be deemed amended as court or arbitrator finds reasonable.

NOTE:
Generally, the courts lack the power to reform unenforceable contract provisions (as opposed to merely severing or limiting them). However, if an employment agreement contains a clause in which the parties expressly agree to allow the court or an arbitrator to sever or modify any unreasonable or unenforceable provisions, the arbitration provision as so modified may be enforceable [*Blake v. Ecker (2001) 93 Cal. App. 4th 728, 743-746, 113 Cal. Rptr. 2d 422]* .

7. State that California law governs agreement [*cf. Olinick v. BMG Entertainment (2006) 138 Cal. App. 4th 1286, 1296-1300, 42 Cal. Rptr. 3d 268* (enforcing choice-of-law and forum-selection provisions subjecting all causes of action arising from employment agreement to New York law and jurisdiction of New York courts); *see § 85.200,* Section 9.08].

NOTE:
For discussion of this type of provision, see Ch. 75, ***Formation of Contracts and Standard Contractual***

Provisions .

8. Provide for payment of sums due deceased employee [*see § 85.200*, Section 9.09].

9. Include provision governing assignment of contract by employee, if appropriate.

NOTE:

In most cases, contracts for personal services can be performed only by the contracting employee. It is obviously appropriate in such contracts to prohibit assignment by the employee. A provision that prohibited assignment of a newspaper dealer's contract "voluntarily, by operation of law, or otherwise" has been held enforceable and the phrase "by operation of law" has been held to mean that the contract did not survive the employee's death [*Miller v. San Francisco Newspaper Agency (1985) 164 Cal. App. 3d 315, 317, 210 Cal. Rptr. 159]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART III. TRANSACTION GUIDE
C. Drafting Guide

28-85 California Legal Forms--Transaction Guide § 85.121

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.121 Drafting Guide for Agreements Continuing Employment

[1] Agreement Continuing Previous Employment

1. Draft new agreement to employ and be employed rather than continuing on under former agreement [*see § 85.230*, P 1].

2. Include new term unless contract is at will [*see § 85.230*, P 1].

3. Specify terms of employment, either:

a. Draft entirely new agreement; or

b. State that parties agree to continue under former agreement except for specified changes, stating that specified provision of former agreement is amended to read as set forth immediately below that statement [*see § 85.230*, P 2].

[2] Agreement Employing Former Officer as Consultant

1. Designate parties [*see § 85.230*].

a. Name of each party.

b. Address of each party.

c. Designation of party as either "employer" or "employee."

d. Description of employer as corporation, partnership or sole proprietor.

2. Add recitals if desired [*see § 85.223*]:

a. Employer's trade or business.

b. Employer's reasons for employing employee:
(1) Employee's special skill, background, or expertise.

(2) Employee's position as major shareholder, principal, or partner of employer.

(3) Other reasons.

3. State that employer hires employee and employee accepts employment [*see § 85.231*, P 1].

4. Specify employment period [*see § 85.231*, P 1]:

a. Specified term;

NOTE:
This period generally should be greater than one month and less than seven years [*Lab. Code §§ 2922, 2855*]. It may specify the dates on which the period of employment begins and ends.

b. Employee's lifetime [*see § 85.240*]; or

c. At will.

5. Describe duties of consultant [*see § 85.231*, P 2].

6. Set forth salary agreed upon between parties [*see § 85.231*, P 3(a)].

7. Specify method of increasing salary [*see § 85.231*, P 3(b)].

8. Include prohibition against competitive activity and unfair competition [*see § 85.231*, P 4].

9. State whether merger, transfer of assets, or dissolution of employer will or will not terminate agreement [*see § 85.231*, P 4].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDuration of EmploymentGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART III. TRANSACTION GUIDE
C. Drafting Guide

28-85 California Legal Forms--Transaction Guide § 85.122

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.122 Drafting Guide for Apprentice Agreements

NOTE:

An "apprentice" is a person who is at least 16 years of age and who has entered into a written apprentice agreement with an employer, employers' association, employees' organization, or a joint committee representing both employees and employers. The term of an apprenticeship must be approved by the California Director of Industrial Relations acting as the Administrator of Apprenticeship (the Administrator) [*Lab. Code § 3077*]. Apprentice agreements must include the provisions listed below [*Lab. Code §§ 3077, 3078*].

[1] Introductory Matters

1. Set forth names of contracting parties [*Lab. Code § 3078(a)*].

2. Include apprentice's date of birth [*Lab. Code § 3078(b)*].

3. State the trade, craft, or business which apprentice is to be taught [*Lab. Code § 3078(c)*].

NOTE:

The apprentice agreement must provide for participation by the apprentice in an approved program of training through employment and through education in related and supplemental subjects [*Lab. Code § 3077*].

4. Specify time when apprenticeship will begin and end [*Lab. Code § 3078(c)*].

5. Include statement showing [*Lab. Code § 3078(d)*]:

a. Number of hours to be spent by apprentice in work.

NOTE:
An apprentice agreement must provide for not less than 2,000 hours of reasonably continuous employment [*Lab. Code § 3077*].

b. Learning objectives to be accomplished through related and supplemental instruction.

[2] Type of Employment, Wages, and Termination

1. Set forth schedule of [*Lab. Code § 3078(e)*]:

a. Those processes in trade or industry divisions in which apprentice is to be taught.

b. Approximate time to be spent in each process.

2. Include statement of graduated scale of wages to be paid [*Lab. Code § 3078(f)*].

3. Specify whether apprentice will be paid for attending school [*Lab. Code § 3078(f)*].

4. Provide for termination [*Lab. Code § 3078(g)*]:

a. By program sponsor at written request of either party during probationary period of not more than 1,000 hours of employment and not more than 72 hours of related instruction.

b. By Administrator upon mutual agreement of all parties.

c. Through cancellation by Administrator for good and sufficient reason.

5. Provide that all controversies or differences concerning the agreement that cannot be adjusted locally (or are not covered by collective-bargaining agreement) must be submitted to Administrator for determination under provisions of *Lab. Code § 3081*.

6. Provide that contract can be transferred to another employer if initial employer is unable to fulfill its obligation under apprenticeship agreement, and if [*Lab. Code § 3078(i)*]:

a. Approved by Administrator.

b. Apprentice consents.

c. Other employer agrees to assume obligations under apprentice agreement.

7. Include clause disclaiming liability on part of other contracting party for injury sustained by apprentice engaged in schoolwork after termination of apprentice's employment [*Lab. Code § 3078(k)*].

8. Include other terms that are approved or prescribed by California Apprenticeship Council [*Lab. Code § 3078(j)*; *see 8 Cal. Code Reg. § 200 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDuration of EmploymentGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
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C. Drafting Guide

28-85 California Legal Forms--Transaction Guide §§ 85.123-85.199

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[Reserved]

§§ 85.123[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
A. Complete Employment Contracts
1. Executive Employment Agreements

28-85 California Legal Forms--Transaction Guide § 85.200

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.200 Contract for Employment of Chief Executive of Business Organization

[1] Comment

[a] Use of Form

This form is a contract that may be used to employ a chief executive of a business organization. It is drafted for use between a corporation and its president; however, it may be adapted for use by any type of business organization.

For an agreement to use in the employment of other senior executives, see *§ 85.201*. Contracts for use in the employment of mid-level managerial personnel are set forth in §§ 85.210-85.213. For contracts that may be used in hiring non-executive personnel, see *§§ 85.220-85.223*. Agreements continuing previous employment are set forth in *§§ 85.230-85.231*.

[b] Drafting Considerations

[i] In General

Employment contracts for executive personnel differ generally in two respects from those typically used for non-executive employees. First, the provisions relating to duties are usually very general and brief, stating little more than the title of the office held by the employee involved. Second, the provisions dealing with compensation and other employee benefits are designed to give the executive incentive to exert the best possible efforts for the development and expansion of the business of the corporation and to remain with the firm, as well as to reduce the impact of income taxes on the executive to the extent that this is possible.

[ii] Using Additional or Alternative Provisions

The attorney should bear in mind that this form represents only one of the infinite number of ways such a contract might be drafted. The attorney preparing an agreement for the employment of an executive employee should carefully consider the needs of the firm and the desires of the prospective executive. Some of these can be ascertained by asking the client the questions indicated in the Client Interview [*see § 85.100*]. With the answers to these questions, the attorney should consult the Drafting Guide set forth in *§ 85.120* and tailor the agreement so that it will best fit the circumstances of the particular situation.

The Drafting Guide describes the particular provisions included in this chapter and indicates their location, either in the other complete contracts or the particular additional or alternative contract provisions set forth in *§§ 85.240-85.551*. If individual provisions used in this form do not fit the particular factual problem confronting the attorney, the other forms referred to in the Drafting Guide may be more suitable. The comments to those forms discuss the various legal problems relevant to the provisions dealing with each particular subject.

[iii] Compliance With Organizational Formalities

Before an employment contract involving an officer of a corporation or other organization is executed, the attorney should make certain that all provisions of the articles of incorporation or partnership agreement, shareholders' agreement (if any), bylaws, and applicable statutes have been complied with. Counsel should also be sure that the board of directors or its equivalent has authorized the hiring and granted its representative authority to enter into the employment agreement. For a general discussion of this matter, see Ch. 5, *Directors' Meetings, Actions, and Resolutions* . The usual procedure is for the board of directors or its equivalent to pass a resolution authorizing its chairman to execute a contract with the president and another authorizing the president to execute employment contracts on behalf of the firm with subsidiary officers [*see* Ch. 5, *Directors' Meetings, Actions, and Resolutions*]. For a corporate shareholders' agreement providing for and authorizing the employment of all shareholders as officers, see *Ch. 8C, Close Corporaation Shareholder Agreements, § 8C.200[2],* Section 1.05.

[c] Term of Employment in Contract for Personal Services

[i] Specified Term

An employment contract that contains no specified term may be terminated at the will of either party on notice to the other. Employment for a specified term means employment for a period greater than one month [*Lab. Code § 2922*]. "Termination at will" generally means that the parties can terminate the employment for any reason or no reason at all; however, this rule is subject to a number of important limitations and exceptions [*see § 85.24*]. This agreement provides for employment for a specified term [*see* Section 1.01 of Form].

From the employer's point of view, if an employment period is stipulated in an employment contract, the period ordinarily should not exceed seven years because most contracts for personal services may not be enforced by the employer against the employee beyond seven years from the commencement of service under the agreement [*Lab. Code § 2855* (apprenticeship contracts excluded)]. This seven-year period is measured from the time the employee commences service. Thus, if a contract calls for intermittent services to be rendered by the employee, it cannot be enforced against the employee after seven years from the commencement of service even though the amount of time that services were actually rendered by the employee total less than seven years [*De Haviland v. Warner Bros. Pictures (1944) 67 Cal. App. 2d 225, 230-232, 153 P.2d 983]* .

[ii] Lifetime Contract

If an employment contract states a term defined by the employee's lifetime, it binds the employee for only the first seven years of its duration. After that time the employee can discontinue services without any contractual liability [*see Lab. Code § 2855*]. On the other hand, the employer is bound by a lifetime contract. An agreement for services to be rendered during the entire lifetime of an employee has been held to be enforceable against the employer despite an

attempted cancellation by the employer eight years after the commencement of the employment. The contract was not fatally defective merely because it did not provide a presently definite time for its termination because a contract having a duration that depends on an event that must inevitably occur, namely death, is definite and certain [*Bradner v. Vasquez (1951) 102 Cal. App. 2d 338, 342, 344, 227 P.2d 559]* . For an alternate contract clause providing for a lifetime term, see *§ 85.240*.

[d] Duties of Employee

[i] In General

An employee must substantially comply with each direction of the employer concerning the services to be performed, unless obedience of the direction is impossible, unlawful, or would impose new and unreasonable burdens on the employee [*Lab. Code § 2856*]. The employee must perform in accordance with the methods and rules in force at the place of performance unless otherwise directed by the employer, it is impractical to do so, or it would be manifestly injurious to the employer for the employee to do so [*see Lab. Code § 2857*].

An employee must exercise a reasonable degree of skill unless, before employing him or her, the employer had notice of the employer's lack of skill [*Lab. Code § 2858*]. The employee must use all the skill that he or she possesses to the extent required to perform the service specified by the employer [*Lab. Code § 2859*].

If an employee has any business to transact on his or her own account similar to that entrusted by the employer, the employee must always give preference to the employer's business [*Lab. Code § 2863*]. Reflecting this requirement, and the duties of loyalty and fidelity [*see § 85.11[4]*], Section 2.03 of this form obligates the employee to devote his or her entire time and energy to the employer's business. That provision makes it clear that the employee's other obligations cannot interfere with the duties specified in the contract.

For further discussion of an employee's obligations to the employer in general, see *§ 85.11*.

[ii] Drafting Considerations

Although the usual contract states the duties of the president in very general terms [*see* [2], Section 2.01, *below*], it is important to specify what actions, if any, cannot be taken by the president without the prior approval of the organization's governing body. Section 2.02 of this form specifies those actions requiring board approval and illustrates one possible way to handle this matter. It is suggested that the attorney discuss this problem with the organization's governing body or principals before drafting the contract.

For alternate or additional provisions relating to duties, see *§§ 85.250-85.276*.

[iii] Competitive Activities and Disclosure of Trade Secrets

This form contains a provision prohibiting the employee from engaging in any type of direct or indirect competition with the employer during the term of the employment contract, or from soliciting any fellow employees to engage in competitive activities [*see* [2], Sections 2.03(b), 2.04, *below*]. In a particular situation it may be desirable to include certain specified exceptions, such as ownership of a small amount of stock in a corporation that competes with the employer.

This form also contains a provision designed to protect the employer's trade secrets and prevent the employee from disclosing them during or after employment [*see* [2], Section 2.07, *below*]. It does this by characterizing any unauthorized disclosure as unfair competition and requiring the employee not to engage in any acts of unfair competition. For discussion of the use of such a provision, and its effects, see *§ 85.440[1]*.

[iv] Indemnification of Employee for Losses From Performing Duties

This form includes an indemnification provision requiring the employer to indemnify the employee for all necessary expenditures or losses incurred by the employee as a direct consequence of the discharge of his or her duties [*see* [2], Section 3.03, *below*]. Although this type of provision merely states an obligation imposed by statute [*Lab. Code § 2802(a)*], the attorney representing the employee may desire to have this provision included so that the client will be aware at all times of the employer's obligation in this respect. The attorney for the employer can hardly object to the inclusion of this provision, particularly since the statutory obligation cannot be waived by the parties [*Lab. Code § 2804*; *see Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 67 Cal. Rptr. 3d 468, 479-481, 169 P.3d 889* (agreement between employer and employee for reimbursement by method that approximates employee's actual expenses does not relieve employer of statutory obligation to pay full reimbursement and does not preclude employee from suing to recover full reimbursement); *see also Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 950-955, 81 Cal. Rptr. 3d 282, 292-296, 189 P.3d 285* (contract provision in which employee releases "any and all" claims against employer does not waive employee's right to indemnity under *Lab. Code § 2802(a)*)].

The employer must indemnify an employee for all necessary expenditures or losses incurred by the employee as a direct consequence of the discharge of his or her duties or as a result of following the employer's directions. This obligation to indemnify applies even if the directions of the employer are unlawful, unless the employee believed them to be unlawful at the time he or she obeyed them [*Lab. Code § 2802(a)*].

This obligation applies only to losses incurred in direct consequence of the discharge of the duties of the employee and not to losses suffered incidentally to the employment. In other words, there must be a direct, unbroken connection between the loss and the discharge of the duties of the employee. Thus, for example, the statute has been held inapplicable to the loss of tools destroyed by fire after normal business hours. The tools were not then being used in the discharge of the duties of the employee or in obedience to the instructions of the employer, and the employee was not required to leave the tools at the place of employment [*Earll v. McCoy (1953) 116 Cal. App. 2d 44, 46, 253 P.2d 86]* .

Expenses subject to indemnification include attorneys' fees incurred by the employee not only in defending against claims arising from the employee's discharge of duties, but also in proceedings against the employer to enforce the employee's right to indemnification [*Lab. Code § 2802(c)*; *O'Hara v. Teamsters Union Local #856 (9th Cir. 1998) 151 F.3d 1152, 1157, 1160-1161, 158 L.R.R.M. (BNA) 2908]* . For this purpose, a claim against an employee arises from the employee's discharge of duties if (1) the employee's actions giving rise to the claim are within the scope of employment; and (2) the claim is proven to be unfounded, that is, without merit [*O'Hara v. Teamsters Union Local No. 856 (9th Cir. 1998) 151 F.3d 1152, 1158-1160* (third party's claim against employee is unfounded as matter of law if third party dismisses claim with prejudice; that dismissal was part of settlement did not mean claim had merit, since settlement did not include any admission of liability by employee)].

If the employee brings an action against the employer to enforce the employee's right to indemnification, an award for the reimbursement of the employee's expenditures or losses must carry interest at the same rate as judgments in civil actions, accruing from the date on which the employee incurred the expenditures or losses [*Lab. Code § 2802(b)*].

For further discussion of the employer's duty to reimburse the employee's work-related expenses, including permissible methods of reimbursement of recurring expenses, see *§ 85.12[3]*.

[e] Compensation of Employee

[i] Contents of Form

Compensation includes periodic monetary earnings as well as all other benefits to which an employee is entitled under an employment agreement [*see Wise v. Southern Pac. Co. (1970) 1 Cal. 3d 600, 607, 83 Cal. Rptr. 202, 463 P.2d*

426] . Thus, this form distinguishes or separates executive compensation into four separate categories: "regular" compensation, incentive compensation, employee benefits, and reimbursement of business expenses. Regular compensation includes annual salary with provisions for annual adjustments [*see Section 4.01* of Form]. For an alternative form of payment--the hourly wage--see *§ 85.290*. For a provision for overtime compensation to use in conjunction with the basic salary provision, see *§ 85.291*. For provisions changing the rate of compensation, see §§ 85.300 to 85.303. For compensation based on sales or work produced, see *§§ 85.310* to 85.304.

"Compensation" also includes deferred compensation, and this form provides for such compensation payable in monthly sums commencing upon retirement [*see Section 4.02* of Form]. For other deferred compensation provisions, see *§§ 85.320-85.326*. For discussion of deferred compensation, see *§ 85.320[1]*.

Incentive compensation can include provisions for an annual cash profit-sharing bonus tied to productivity [*see Section 5.01* of Form] and designed to give the employee additional incentives for productivity, induce him or her to remain with the firm, and lessen the impact of income taxes [*see Prachasaisoradej v. Ralphs Grocery Co. (Aug. 23, 2007) 42 Cal. 4th 217, 64 Cal. Rptr. 3d 407, 165 P.3d 133, 2007 Cal. Lexis 8909, at *34-*56* (deduction of employer's expenses from gross receipts to calculate net profits for purposes of profit-sharing program does not run afoul of statutory and regulatory prohibitions against unauthorized deductions from salary [*see Lab. Code §§ 221-224, 400-410, 3751(a)*; *8* Cal. Code Reg. § 11070(8)], so long as no unauthorized deductions are made from employee's *regular* salary)]. Incentive compensation can also include stock bonus [*see Section 5.02* of Form] and stock option provisions [*see* Section 5.03 of Form]. The purpose of providing stock to a corporate executive is to make sure that the executive has an ownership interest and thus a further incentive to see that the corporation remains profitable.

For alternative or additional cash bonus and profit-sharing provisions, see *§§ 85.360-85.372*; other stock bonus and stock option provisions are set forth in *§§ 85.380-85.386*. Provisions granting the employee the right to purchase an interest in the employer's business are contained in §§ 85.400-85.401.

The employee benefits provided by this form are annual vacation [*see Section 6.01* of the Form], sick leave [*see Section 6.02* of the Form], use of a company-owned automobile [*see* Section 6.03 of the Form], death benefits [*see* Section 6.04 of the Form], medical coverage [*see Section 6.05* of the Form], and company-purchased life insurance [*see Section 6.06* of the Form]. Other vacation and sick pay, leave of absence, and severance pay provisions are set forth in *§§ 85.340-85.343*. Alternative fringe benefit provisions are contained in §§ 85.350-85.352.

The range of benefits included in this form may be greater than generally provided in the typical chief executive's employment contract. However, these provisions are included in order to illustrate the types of benefits that can be given such an employee. Again, it is suggested that the attorney discuss the benefits issue with the prospective chief executive as well as the governing body or principals before drafting the contract.

The provision in this form making a specified sum per annum available to the president for entertainment expenses [*see Section 7.01* of Form] is unusual. Such a provision, if used at all, is generally only made applicable to a president or top executive of a large corporation. It is included in this form to illustrate the type of provision that can be used if authorized in advance by the board of directors.

[ii] Necessity for Compensation Provision

A compensation provision is an essential element of the employment contract. It is always present, whether expressly or impliedly [*McInerney v. Mack (1917) 34 Cal. App. 153, 157, 166 P. 867]* . The attorney should take special care to be sure that the compensation package selected will meet the needs of the client and comply with any applicable federal or state laws governing the amount, manner, or time of payment [*see § 85.12[1]*].

[iii] Periodic Payment of Wages

The general rule is that wages are due and payable twice during each calendar month on days designated in advance by the employer as the regular paydays [*Lab. Code § 204*]. However, in general, executive, administrative, and professional personnel may be paid once a month within seven days of the close of their monthly payroll period [*Lab. Code § 204, 204.2, 204c*]. For discussion, see *§ 85.12[1]*. In addition, wages earned and unpaid at the time of discharge of an employee are generally due and payable immediately [*Lab. Code § 201*; *see Smith v. Superior Court (2006) 39 Cal. 4th 77, 82-94, 45 Cal. Rptr. 3d 394, 137 P.3d 218* (employee is "discharged" for purposes of *Lab. Code § 201* not only when employee is involuntarily terminated from ongoing employment relationship, but also when employee is released after completing particular job assignment or time duration for which he or she was hired); *see also § 85.12[2][a]*]. For further discussion of these matters, see *§ 85.290[1]*.

[iv] Reimbursement of Excessive Salary

This form includes a provision [*see* Section 3.06 of Form] that has the effect of limiting the employee's salary to the amount that the employer may legitimately deduct for income tax purposes. An employer may deduct reasonable salaries or other compensation for personal services actually rendered [*I.R.C. § 162(a)(1)*]. Although the disallowance of excessive salaries generally arises in the case of a closely held corporation in which the shareholders are the key employees [*see Treas. Reg. § 1.162-7(b)(1)*], excessive salary may also arise with highly paid executives in publicly held organizations. This clause not only limits salary to an amount that is deductible by the employer, but also gives the employee a deduction for any amounts repaid by the employee [*see Berger v. Commissioner (1962) 37 T.C. 1026* (voluntary repayment not deductible because not pursuant to preexisting contract)].

[v] Reimbursement of Disallowed Business Expense Deduction

This form includes a provision requiring the employee to repay the employer for business expenses incurred by and reimbursed to the employee and later disallowed as an income tax deduction [*see* Section 7.03 of Form]. Such a provision can benefit the employer beyond the simple repayment of the disallowed deduction for business expenses--by providing the employee with an incentive to insure that all business expenses claimed to have been incurred on behalf of the employer will be deductible.

If a business expense is disallowed as a tax deduction, the reason generally is either that there was no statutory basis for the deduction or that the deduction was not substantiated by adequate records and other sufficient evidence [*see I.R.C. § 274*]. For discussion of the deduction of business expense deductions, see *§ 85.410[1]*.

[f] Termination of Employment

[i] Statutory Grounds

Willful breach or habitual neglect of duty by the employee, or continued incapacity to perform that duty, constitute grounds for termination of an employment contract for a specified term [*Lab. Code § 2924*]. Every employment contract is terminated by expiration of the term specified in the contract, extinction of the subject of the contract, the death of the employee, or the legal incapacity of the employee to act as an employee [*Lab. Code § 2920*]. If the employer lacks legal capacity to contract, and if the power of the employee is not coupled with an interest in its subject (*e.g.*, the employee is not also a major shareholder in the employer), the employment is terminated by notice to the employee of the employer's lack of capacity [*see Lab. Code § 2921*]. A power coupled with an interest is referred to as a "power given as security" [Restatement (Second) of Agency, § 138].

An employee can terminate an employment for a specified term whenever the employer commits a willful or permanent breach of its obligations to the employee [*Lab. Code § 2925*].

For further discussion of the law governing the termination of employment contracts, see *§§ 85.24, 85.500[1][c], [d]*.

Separate and alternative termination provisions are contained in §§ 85.500-85.523.

[ii] Contents of Form

This form includes a standard provision terminating the contract for breach or neglect of duty on the part of the employee (two of the statutory grounds for termination [*Lab. Code § 2924*]) and designating the termination as "for cause" [*see* Section 8.01 of Form]. It also includes a provision giving the employer the option to terminate the employment of the president "for cause" if the corporate net profits are less than a specified sum [*see* Section 8.02 of Form] and a provision permitting termination of the agreement other than for cause [*see* Section 8.03 of Form].

This form includes a clause that specifies whether or not the contract is terminated by the merger, transfer of all of the assets, or dissolution of the employing corporation [*see* Section 8.04 of Form]. This provision is used because failure to deal with the issue can lead to a difficult problem of interpretation in determining whether the contract is terminated by the occurrence of any of those events. Because of the importance of this matter from the standpoint of the employee, the employer, any prospective merging corporation, and any prospective purchaser of the assets of the employing corporation, and in order to reduce the possibility of litigation, it is strongly suggested that every employment contract involving the president of a corporation include a provision specifically covering this point.

[2] FORM

Contract for Employment of Chief Executive of Business Organization

EMPLOYMENT CONTRACT FOR CHIEF EXECUTIVE

_____[*name of employer*] ("Employer") [, a _____ (California corporation *or* partnership *or* sole proprietorship)], located at_____[*address of principal place of business*], and_____[*name of employee*] ("Employee"), of_____[*address*], in consideration of the mutual promises made herein, agree as follows:

ARTICLE 1. TERM OF EMPLOYMENT

Specified Period

Section 1.01. Employer employs Employee and Employee accepts employment with Employer for a period of [*specify term greater than one month and less than seven years, e.g.*, three years] beginning on_____[*date*] and terminating on_____[*date*].

Automatic Renewal

Section 1.02. This agreement shall be renewed automatically for succeeding terms of [*specify period, e.g.*, three years each] unless either party gives notice to the other at least [*specify notice period, e.g.*, 60] days prior to the expiration of any term of_____[his *or* her *or* its] intention not to renew [pursuant to Employer's bylaws].

"Employment Term" Defined

Section 1.03. "Employment term" refers to the entire period of employment of Employee by Employer, whether for the periods provided above, or whether terminated earlier as hereinafter provided or extended by mutual agreement between Employer and Employee.

ARTICLE 2. DUTIES AND OBLIGATIONS OF EMPLOYEE

General Duties

Section 2.01. Employee shall serve as the President of_____[*name of employer*]. In_____[his *or* her] capacity as President of_____[*name of employer*], Employee shall do and perform all services, acts, or things necessary or advisable to manage and conduct the business of Employer, including the hiring and firing of all employees other than the officers of Employer, subject at all times to the policies set by Employer's Board of Directors, and to the consent of the Board when required by the terms of this contract.

Matters Requiring Consent of Board of Directors

Section 2.02. Employee shall not, without specific approval of Employer's Board of Directors, do or contract to do any of the following:

(1) Borrow on behalf of Employer during any one fiscal year an amount in excess of $_____.

(2) Permit any customer of Employer to become indebted to Employer in an amount in excess of $_____.

(3) Purchase capital equipment for amounts in excess of the amounts budgeted for expenditure by the Board of Directors.

(4) Sell any single capital asset of Employer having a market value in excess of $_____ or a total of capital assets during a fiscal year having a market value in excess of $_____.

(5) Terminate the services of any other officer of Employer or hire any replacement of any officer whose services have been terminated.

[(6) Commit Employer to the expenditure of more than $_____ in the development and sale of new _____ (products *or* services).]

Devotion to Employer's Business

Section 2.03. (a) Employee shall devote_____[his *or* her] entire productive time, ability, and attention to the business of Employer during the term of this contract.

(b) Employee shall not engage in any other business duties or pursuits whatsoever, or directly or indirectly render any services of a business, commercial, or professional nature to any other person or organization, whether for compensation or otherwise, without the prior written consent of Employer's Board of Directors. [However, the expenditure of reasonable amounts of time for _____ (*describe permissible outside activities, e.g.,* educational, charitable, or professional activities) shall not be deemed a breach of this agreement if those activities do not materially interfere with the services required under this agreement (*Optional:* and shall not require the prior written consent of Employer's Board of Directors).]

(c) This agreement shall not prohibit Employee from making passive personal investments or conducting private

business affairs if those activities do not materially interfere with the services required under this agreement. However, Employee shall not directly or indirectly acquire, hold, or retain any interest in any business competing with or similar in nature to the business of Employer.

Competitive Activities

Section 2.04. (a) During the term of this contract Employee shall not, directly or indirectly, either as an employee, employer, consultant, agent, principal, partner, stockholder, corporate officer, director, or in any other individual or representative capacity, engage or participate in any business that is in competition in any manner whatsoever with the business of Employer.

(b) Employee agrees that during the term of this contract and for a period of [*reasonable period, e.g.*, one year] after termination of this agreement, Employee shall not directly or indirectly solicit, hire, recruit, or encourage any other employee of Employer to leave Employer.

Uniqueness of Employee's Services

Section 2.05. Employee represents and agrees that the services to be performed under the terms of this contract are of a special, unique, unusual, extraordinary, and intellectual character that gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law. Employee therefore expressly agrees that Employer, in addition to any other rights or remedies that Employer may possess, shall be entitled to injunctive and other equitable relief to prevent or remedy a breach of this contract by Employee.

Indemnification for Negligence or Misconduct

Section 2.06. Employee shall indemnify and hold Employer harmless from all liability for loss, damage, or injury to persons or property resulting from the negligence or misconduct of Employee.

Trade Secrets

Section 2.07. (a) The parties acknowledge and agree that during the term of this agreement and in the course of the discharge of_____[his *or* her] duties hereunder, Employee shall have access to and become acquainted with financial, personnel, sales, scientific, technical and other information regarding formulas, patterns, compilations, programs, devices, methods, techniques, operations, plans and processes that are owned by Employer, actually or potentially used in the operation of Employer's business, or obtained from third parties under an agreement of confidentiality, and that such information constitutes Employer's "trade secrets."

(b) Employee specifically agrees that_____[he *or* she] shall not misuse, misappropriate, or disclose in writing, orally or by electronic means, any trade secrets, directly or indirectly, to any other person or use them in any way, either during the term of this agreement or at any other time thereafter, except as is required in the course of_____[his *or* her] employment.

(c) Employee acknowledges and agrees that the sale or unauthorized use or disclosure in writing, orally or by electronic means, of any of Employer's trade secrets obtained by Employee during the course of_____[his *or* her] employment under this agreement, including information concerning Employer's actual or potential work, services, or products, the facts that any such work, services, or products are planned, under consideration, or in production, as well as any descriptions thereof, constitute unfair competition. Employee promises and agrees not to engage in any unfair

competition with Employer, either during the term of this agreement or at any other time thereafter.

(d) Employee further agrees that all files, records, documents, drawings, specifications, equipment, software, and similar items whether maintained in hard copy or on line relating to Employer's business, whether prepared by Employee or others, are and shall remain exclusively the property of Employer and that they shall be removed from the premises or, if kept on-line, from the computer systems of Employer [*specify procedure, e.g.*, only with the express prior written consent of Employer's Board of Directors].

Services as Consultant

Section 2.08. Following [the employment term *or* Employee's retirement], and if the employment term has not been terminated for cause, Employee shall make_____[his *or* her] advice and counsel available to Employer for [*specify period, e.g.*, such a period as Employer may desire]. The parties agree that this advice and counsel shall not entail full time service and shall be consistent with Employee's retirement status.

Use of Employee's Name

Section 2.09. (a) Employer shall have the right to use the name of Employee as part of the trade name or trademark of Employer if it should be deemed advisable to do so. Any trade name or trademark, of which the name of Employee is a part, that is adopted by Employer during the employment of Employee may be used thereafter by Employer for as long as Employer deems advisable.

(b) Employee shall not, either during the term of this agreement or at any time thereafter, use or permit the use of_____[his *or* her] name in the trade name or trademark of any other enterprise if that other enterprise is engaged in a business similar in any respect to that conducted by Employer, unless that trade name or trademark clearly indicates that the other enterprise is a separate entity entirely distinct from and not to be confused with Employer and unless that trade name or trademark excludes any words or symbols stating or suggesting prior or current affiliation or connection by that other enterprise or its employees with Employer.

ARTICLE 3. OBLIGATIONS OF EMPLOYER

General Description

Section 3.01. Employer shall provide Employee with the compensation, incentives, benefits, and business expense reimbursement specified elsewhere in this agreement.

Office and Staff

Section 3.02. Employer shall provide Employee with [*list specific equipment, e.g.*, ISDN line, laptop, cellular telephone], office space, and administrative support suitable to Employee's position and adequate for the performance of_____[his *or* her] duties.

Indemnification of Losses of Employee

Section 3.03. Employer shall indemnify Employee for all necessary expenditures or losses incurred by Employee in direct consequence of the discharge of_____[his *or* her] duties on Employer's behalf.

ARTICLE 4. COMPENSATION OF EMPLOYEE

Annual Salary

Section 4.01. (a) As compensation for the services to be performed hereunder, Employee shall receive a salary at the rate of $_____ per annum, payable not less than [once each month, on or before the 26th day of each month *or specify more frequent pay periods per month*] during the employment term.

(b) Employee shall receive such annual increases in salary as may be determined by Employer's Board of Directors in its sole discretion at its [*specify which meeting, e.g.,* annual December] meeting.

Deferred Compensation

Section 4.02. If Employee remains in the employ of Employer until age [*specifiy, e.g.*, 65], or on earlier retirement on mutual written consent of both Employee and Employer, Employer agrees to pay to Employee additional compensation, commencing with_____[his *or* her] first full month of retirement, at the annual rate of _____ percent of the annual salary which_____[he *or* she] is receiving at age [*specify, e.g.,* 65], payable in equal monthly installments on the last day of each month during Employee's entire lifetime.

Salary Continuation During Disability

Section 4.03. If Employee for any reason whatsoever becomes permanently disabled so that_____[he *or* she] is unable to perform the duties prescribed herein, Employer agrees to pay Employee [*specify rate or amount, e.g.,* 50 percent of Employee's annual salary], payable [*specify manner in which payable, e.g.,* in the same manner as provided for the payment of salary herein], for [*specify period payable, e.g.*, the next ten fiscal years *or* the remainder of the employment term provided for herein].

Repayment of Disallowed Salary

Section 4.04. In the event that any portion of the compensation paid by Employer to Employee is disallowed as an income tax deduction on an income tax return of Employer, Employee agrees to immediately repay to Employer the full amount of that portion.

ARTICLE 5. EMPLOYEE INCENTIVES

Profit-Sharing Based on Performance

Section 5.01. (a) For each fiscal year of Employer in which [the net profits of Employer exceed $_____ *or* the net profits of Employer for that fiscal year exceed the net profits of Employer for the previous fiscal year by _____ percent], Employer agrees to pay Employee, within [*specify reasonable time for determination of net profits, e.g.,* two and one-half months after the close of that fiscal year], an annual profit-sharing payment equal to _____ percent of that excess [, provided, however, that the total amount of this payment shall not exceed _____ ($_____ *or specify a figure equal to all or a portion of employee's salary*)].

(b) If the employment term is terminated by Employer for cause, Employee shall not be entitled to any portion of the annual profit-sharing payment for the fiscal year in which that termination occurs.However, if this contract should expire or be terminated for reasons other than cause, Employee shall be entitled to a percentage of the annual profit-sharing payment equal to the percentage of the fiscal year worked.

(c) For the purpose of determining the amount of the annual profit sharing bonus, the net profits of Employer shall be determined by the firm of independent certified accountants then employed by Employer.

Stock Bonus

Section 5.02. (a) Employer agrees to transfer to Employee each year during the employment term, within two and one-half months after the close of each fiscal year during all of which the Employee served as President of the Employer, the number of shares of Employer's stock equal in value to_____[$_____ *or state an amount equal to specified portion of employee's annual salary*].

(b) For the purpose of determining the number of shares to be transferred to Employee, the shares shall be valued, as of the close of each fiscal year, [at book value *or set forth other manner of valuation*].

Stock Option

Section 5.03. (a) Employer hereby grants Employee an option to purchase [*number*] shares of Employer's [common *or other type of stock*] stock at a purchase price of $_____ per share. This option may be exercised in whole or in part, but may only be exercised in lots of [*number*] shares or more. Employee shall not have any of the rights of, nor be treated as, a shareholder with respect to the shares subject to this option until_____[he *or* she] has exercised the option and has become the shareholder of record of those shares.

(b) This option is not assignable.

(c) This option may only be exercised by Employee during the term of_____[his *or* her] employment hereunder. However, in the event that the employment term is terminated by Employer for reasons other than cause, Employee shall retain the right to exercise any unused portion of the option until_____[*date specified for end of term of employment*].

ARTICLE 6. EMPLOYEE BENEFITS

Annual Vacation

Section 6.01. Employee shall be entitled to [*specify, e.g.,* 30 days] vacation time each year with full pay. Employee may be absent from_____[his *or* her] employment for vacation only at such times as Employer's Board of Directors shall determine from time to time. If Employee is unable for any reason to take the total amount of authorized vacation time during any year,_____[he *or* she] [may accrue that time and add it to vacation time for any following year *or* may receive a cash payment in an amount equal to the amount of annual salary attributable to that period *or* will not earn vacation time in any subsequent year until the earned vacation time is used].

[*For alternative vacation provisions, see § 85.340.*]

Illness

Section 6.02. Employee shall be entitled to_____[*specify, e.g.,* _____ (*number*) days] per year as sick leave with full pay. [Sick leave may be accumulated up to a total of _____ (*number*) days.]

Use of Automobile

Section 6.03. (a) Employer shall provide Employee with the use of a [*make of automobile*] or comparable automobile with optional equipment of Employee's selection. The automobile provided hereunder shall at no time be older than [*e.g.,* two] years.

(b) Employer shall pay all operating expenses of the automobile.

(c) Employer shall procure and maintain an automobile liability insurance policy on the automobile, with coverage including Employee [and Employee's spouse and those of _____ (his *or* her) children who qualify as Employee's dependents under *Section 152 of the Internal Revenue Code*] in the minimum amounts of
$_____ for bodily injury or death to any one person in any one accident, and
$_____ for property damage in any one accident.

(d) If Employee is prohibited by order of any court from holding or using a driver's license, Employee will no longer be entitled to this benefit.

Death Benefits

Section 6.04. If Employee should die during the employment term or after_____[his *or* her] retirement and if Employee has a surviving spouse at that time, Employer agrees to pay the spouse the sum of $_____ per month for the remainder of the spouse's lifetime. If Employer does not have a surviving spouse at that time, Employer agrees to pay Employee's designee or estate the sum of $_____.

Medical Coverage

Section 6.05. Employer agrees to include Employee in the coverage of its [*specify insurance coverage, e.g.,* medical, major medical, hospital, dental, and eye care] insurance. Employer further agrees to reimburse Employee for all medical and dental expenses incurred by Employee,_____[his *or* her] spouse, and those of_____[his *or* her] children who qualify as_____[his *or* her] dependents under *Section 152 of the Internal Revenue Code of 1986*; provided, however, that those reimbursements shall be limited to the expenses, or portions thereof, not covered by insurance.

Life Insurance

Section 6.06. (a) Employer agrees to obtain a life insurance policy on the life of Employee in the face amount of $_____. Employer further agrees to make that insurance policy payable to the beneficiary or beneficiaries designated by Employee. Employer agrees to pay all premiums on the policy during the term of employment provided herein.

(b) Employee agrees to submit to any physical examination that may be required for the purpose of Employer's obtaining life insurance on the life of Employee for the benefit of Employer; provided, however, that Employer shall

bear the entire cost of that examination.

ARTICLE 7. BUSINESS EXPENSES

[*First alternative; use if business and entertainment expenses are to be paid by credit card:*]

Use of Credit Card

Section 7.01. All business expenses reasonably incurred by Employee in promoting the business of Employer, including expenditures for entertainment, gifts, and travel, are to be paid for, insofar as possible, by the use of credit cards in the name of Employer which will be furnished to Employee.

[*OR*]

[*Second alternative; use if executive is to pay entertainment costs out of pocket:*]

Lump-Sum Entertainment Fund

Section 7.01. (a) It is understood and agreed by the parties that the services required by Employer will require Employee to incur entertainment expenses on behalf of Employer. Employer hereby agrees to and shall make available to Employee for this purpose the sum of $_____ per annum, payable in such amounts and at such times as Employee shall request.

(b) Employee shall, however, furnish to Employer adequate records and other documentary evidence required by federal and state statutes and regulations for the substantiation of each such expenditure as an income tax deduction.

[*Continue with the following:*]

Reimbursement of Other Business Expenses

Section 7.02. (a) Employer shall promptly reimburse Employee for all other reasonable business expenses incurred by Employee in connection with the business of Employer.

(b) Each such expenditure shall be reimbursable only if it is of a nature qualifying it as a proper deduction on the federal and state income tax return of Employer.

(c) Each such expenditure shall be reimbursable only if Employee furnishes to Employer adequate records and other documentary evidence required by federal and state statutes and regulations issued by the appropriate taxing authorities for the substantiation of each such expenditure as an income tax deduction.

Repayment of Disallowed Expenses

Section 7.03. In the event that any expenses paid for Employee or any reimbursement of expenses paid to Employee shall, on audit or other examination of Employer's income tax returns, be determined not to be allowable deductions

from Employer's gross income, and in the further event that this determination shall be acceded to by the Employer or made final by the appropriate federal or state taxing authority or a final judgment of a court of competent jurisdiction, and no appeal is taken from the judgment or the applicable period for filing notice of appeal has expired, Employee shall repay to Employer the full amount of the disallowed expenses.

ARTICLE 8. TERMINATION OF EMPLOYMENT

Termination for Cause

Section 8.01. (a) Employer reserves the right to terminate this agreement if Employee willfully breaches or habitually neglects the duties which_____[he *or* she] is required to perform under the terms of this agreement; or commits such acts of dishonesty, fraud, misrepresentation or other acts of moral turpitude as would prevent the effective performance of_____[his *or* her] duties.

(b) Employer may at its option terminate this agreement for the reasons stated in this Section by giving written notice of termination to Employee without prejudice to any other remedy to which Employer may be entitled either at law, in equity, or under this agreement.

(c) The notice of termination required by this section shall specify the ground for the termination and shall be supported by a statement of [all] relevant facts.

(d) Termination under this section shall be considered "for cause" for the purposes of this agreement.

Failure to Meet Profit Standard

Section 8.02. (a) If the net operating profits of Employer for any [*specify accounting period, e.g.,* annual *or* semi-annual *or* quarterly] accounting period of Employer [*specify prior performance base or standard, e.g.,* shall be less than $_____ *or* in the previous fiscal year Employer exceeded the net operating profits of Employer for the current comparable period by _____percent], Employer at its option may terminate this agreement by giving written notice of termination to Employee.

(b) The term "net operating profits," as used herein, means the net operating profits after taxes as determined and certified by the independent certified public accountants regularly retained by Employer in accordance with sound accounting principles and in accordance with the past accounting practices of Employer.

(c) Termination under this section shall be considered "for cause" for the purposes of this agreement.

Termination Without Cause

Section 8.03. (a) This agreement shall be terminated upon the death of Employee.

(b) Employer reserves the right to terminate this agreement_____[within *or* not less than _____ (*number*) months after] Employee suffers any physical or mental disability that would prevent the performance of_____[his *or* her] essential job duties under this agreement, unless reasonable accommodation can be made to allow Employee to continue working. Such a termination shall be effected by giving [*specify period, e.g.,* 10 days'] written notice of termination to Employee. Termination pursuant to this provision shall not prejudice Employee's rights to continued compensation pursuant to Section 4.03 of this agreement.

(c) Termination under this section shall not be considered "for cause" for the purposes of this agreement.

Effect of Merger, Transfer of Assets, or Dissolution

Section 8.04. (a) This agreement shall [*or* shall not] be terminated by any voluntary or involuntary dissolution of Employer resulting from either a merger or consolidation in which Employer is not the consolidated or surviving corporation, or a transfer of all or substantially all of the assets of Employer.

[*If agreement will not be terminated under preceding circumstances, add:*]

(b) In the event of any such merger or consolidation or transfer of assets, Employer's rights, benefits, and obligations hereunder [shall *or* may] be assigned to the surviving or resulting corporation or the transferee of Employer's assets.

[*Or, if agreement will be terminated, add:*]

(b) Termination under this section shall not be considered "for cause" for the purposes of this agreement.

[*Continue with the following:*]

Payment On Termination

[*First alternative; use to provide "golden parachute" if insisted on by employee:*]

Section 8.05. Notwithstanding any provision of this agreement, if Employer terminates this agreement, it shall pay Employee an amount equal to [*number*] years annual salary at the then current rate of compensation.

[*OR*]

[*Second alternative; use to limit "golden parachute" to termination without cause:*]

Section 8.05. Notwithstanding any provision of this agreement, if Employer terminates this agreement without cause, it shall pay Employee an amount equal to [*number*] years annual salary at the then current rate of compensation.

Termination by Employee

Section 8.06. Employee may terminate_____[his *or* her] obligations under this agreement by giving Employer at least [*number*] months notice in advance.

ARTICLE 9. GENERAL PROVISIONS

Notices

Section 9.01. Any notices to be given hereunder by either party to the other shall be in writing and may be transmitted by personal delivery or by mail, registered or certified, postage prepaid with return receipt requested. Mailed notices shall be addressed to the parties at the addresses appearing in the introductory paragraph of this agreement, but each party may change that address by written notice in accordance with this section. Notices delivered personally shall be deemed communicated as of the date of actual receipt; mailed notices shall be deemed communicated as of_____[*specify, e.g.*, the date of mailing].

Arbitration

Section 9.02. (a) Any controversy between Employer and Employee involving the construction or application of any of the terms, provisions, or conditions of this agreement shall on the written request of either party served on the other be submitted to arbitration. Arbitration shall comply with and be governed by the provisions of the California Arbitration Act.

(b) Employer and Employee shall each appoint one person to hear and determine the dispute. If the two persons so appointed are unable to agree, then those persons shall select a third impartial arbitrator whose decision shall be final and conclusive upon both parties.

Attorneys' Fees and Costs

Section 9.03. If any [legal action *or specify more limited provision, e.g.*, legal action based in contract law] is necessary to enforce or interpret the terms of this agreement, the prevailing party shall be entitled to reasonable attorneys' fees, costs, and necessary disbursements in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire contract.

Entire Agreement

Section 9.04. This agreement supersedes any and all other agreements, either oral or in writing, between the parties hereto with respect to the employment of Employee by Employer and contains all of the covenants and agreements between the parties with respect to that employment in any manner whatsoever. Each party to this agreement acknowledges that no representation, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not embodied herein, and that no other agreement, statement, or promise not contained in this agreement shall be valid or binding on either party.

Modifications

Section 9.05. Any modification of this agreement will be effective only if it is in writing and signed by the party to be charged.

Effect of Waiver

Section 9.06. The failure of either party to insist on strict compliance with any of the terms, covenants, or conditions of this agreement by the other party shall not be deemed a waiver of that term, covenant, or condition, nor shall any waiver or relinquishment of any right or power at any one time or times be deemed a waiver or relinquishment of that right or power for all or any other times.

Partial Invalidity

[*Use one of following provisions (see § 85.120[14], P 6):*]

Section 9.07. If any provision in this agreement is held by a court [*if appropriate, add:* or arbitrator] of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

[*OR*]

Section 9.07. If any provision in this agreement is held by a court [*if appropriate, add:* or arbitrator] of competent jurisdiction to be unreasonable, invalid, void, or unenforceable, then this agreement shall be deemed amended to provide for the modification of the unreasonable, invalid, void, or unenforceable provision to the extent that the court [*if appropriate, add:* or arbitrator] finds reasonable, and the remaining provisions of this agreement shall continue in full force without being impaired or invalidated in any way.

[*Continue:*]

Law Governing Agreement

Section 9.08. This agreement shall be governed by and construed in accordance with the laws of the State of California.

Sums Due Deceased Employee

Section 9.09. If Employee dies prior to the expiration of the term of_____[his *or* her] employment, any sums that may be due [him *or* her] from Employer under this agreement as of the date of death shall be paid to Employee's executors, administrators, heirs, personal representatives, successors, and assigns.

Executed on_____[*date*] at_____[*city*], California.

EMPLOYER
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]

EMPLOYEE
_____ [*signature of employee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral

Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
A. Complete Employment Contracts
1. Executive Employment Agreements

28-85 California Legal Forms--Transaction Guide § 85.201

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.201 Employment Contract for Senior Executive

[1] Comment

[a] Use of Form

This form is designed as a complete employment contract for the vice president or secretary-treasurer of a corporation, although it may be adapted for use by any other type of entity or for any other senior management executive. This form represents just one of many methods for drafting such an employment contract.

For a discussion of the general matters to be considered before drafting any employment contract, see *§ 85.200[1]*. An attorney preparing an agreement for the employment of an executive employee should carefully consider the needs of the firm and the desires of the prospective executive. Some of these can be ascertained by asking the client the questions indicated in the Client Interview [*see § 85.100*]. With the answers to these questions, the attorney should consult the Drafting Guide in § 85.120 and tailor the agreement so that it will best fit the circumstances of the particular situation.

[b] Compensation of Employee

In addition to a regular annual salary, this contract gives the executive an annual cash bonus of a specified amount each year that the corporate profits exceed a certain sum [*see* Section 5.01 of Form] and deferred compensation (provided the employee completes the term of employment specified in the agreement) in monthly installments commencing when the employee reaches a specified age [*see* Section 4.02 of Form]. The purpose of the annual cash bonus is to induce greater productivity and longevity of service with the employer [*see Prachasaisoradej v. Ralphs Grocery Co. (Aug. 23, 2007) 42 Cal. 4th 217, 64 Cal. Rptr. 3d 407, 165 P.3d 133, 2007 Cal. Lexis 8909, at *34-*56* (deduction of employer's expenses from gross receipts to calculate net profits for purposes of profit-sharing program does not run afoul of statutory and regulatory prohibitions against unauthorized deductions from salary [*see Lab. Code §§ 221-224, 400-410, 3751(a)*; *8* Cal. Code Reg. § 11070(8)], so long as no unauthorized deductions are made from employee's *regular*

salary)]. Other cash bonus provisions are set forth in *§§ 85.360-85.362*. The purpose of deferred compensation is to influence the employee to complete the term of employment specified in the contract and to reduce the overall income taxes to be paid. Other deferred compensation, pension, and death benefit provisions are set forth in *§§ 85.320-85.326*.

This form also contains a provision relating to a restricted stock bonus [*see* Section 5.02 of Form]; for relevant discussion, see *§ 85.382[1]*. Other stock bonus and stock option provisions are set forth in *§§ 85.380-85.386*.

[2] FORM

Employment Contract for Senior Executive

EMPLOYMENT CONTRACT FOR SENIOR EXECUTIVE

_____[*Name of employer*] ("Employer")[, a _____ (partnership *or* California corporation *or* sole proprietorship)], located at _____ [*address of principal place of business*], and_____[*name of employee*] ("Employee"),_____[*address*], in consideration of the mutual promises made herein, agree as follows:

ARTICLE 1. TERM OF EMPLOYMENT

Specified Term

Section 1.01. The Employer employs Employee, and Employee accepts employment with Employer, for a period of [*any period more than one month and less than seven years*] beginning on_____[*date*].

Earlier Termination

Section 1.02. This agreement may be terminated earlier as hereinafter provided.

ARTICLE 2. DUTIES AND OBLIGATIONS OF EMPLOYEE

Title and Description of Duties

Section 2.01. Employee shall serve as [*set forth title, e.g.,* Vice President for Sales *or* Secretary-Treasurer] of_____[*name of employer*]. In that capacity, Employee shall do and perform all services, acts, or things necessary or advisable to fulfill the duties of a [corporate] [*specify job or occupation, e.g.,* secretary and treasurer]. However, Employee shall at all times be subject to the direction of the President, and to the policies established by the Board of Directors, of Employer.

Loyal and Conscientious Performance of Duties

Section 2.02. Employee agrees that to the best of_____[his *or* her] ability and experience_____[he *or* she] will at all times loyally and conscientiously perform all of the duties and obligations required of [him *or* her] either expressly or implicitly by the terms of this agreement.

Devotion of Entire Time to Employer's Business

Section 2.03. (a) Employee shall devote_____[his *or* her] entire productive time, ability, and attention to the business of Employer during the term of this contract.

(b) During the term of this agreement, Employee shall not engage in any other business duties or pursuits whatsoever. Furthermore, during the term of this agreement, Employee shall not, whether directly or indirectly, render any services of a commercial, or professional nature to any other person or organization, whether for compensation or otherwise, without the prior written consent of Employer's President. [However, the expenditure of reasonable amounts of time for _____ (*describe permissible outside activities, e.g.,* educational, charitable, or professional activities) shall not be deemed a breach of this agreement if those activities do not materially interfere with the services required under this agreement (*Optional:* and shall not require the prior written consent of Employer's President).]

(c) This agreement shall not be interpreted to prohibit Employee from making passive personal investments or conducting private business affairs if those activities do not materially interfere with the services required under this agreement. However, Employee shall not, directly or indirectly, acquire, hold, or retain any interest in any business competing with or similar in nature to the business of Employer.

Competitive Activities

Section 2.04. During the term of this contract Employee shall not, directly or indirectly, either as an employee, employer, consultant, agent, principal, partner, stockholder, corporate officer, director, or in any other individual or representative capacity, engage or participate in any business that is in competition in any manner whatsoever with the business of Employer.

Uniqueness of Employee's Services

Section 2.05. Employee represents and agrees that the services to be performed under the terms of this contract are of a special, unique, unusual, extraordinary, and intellectual character that gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law. Employee therefore expressly agrees that Employer, in addition to any other rights or remedies that Employer may possess, shall be entitled to injunctive and other equitable relief to prevent or remedy a breach of this contract by Employee.

Indemnification for Negligence or Misconduct

Section 2.06. Employee shall indemnify and hold Employer harmless from all liability for loss, damage, or injury to persons or property resulting from the negligence or misconduct of Employee.

Trade Secrets

Section 2.07. (a) The parties acknowledge and agree that during the term of this agreement and in the course of the discharge of_____[his *or* her] duties hereunder, Employee shall have access to and become acquainted with financial, personnel, sales, scientific, technical and other information regarding formulas, patterns, compilations, programs, devices, methods, techniques, operations, plans and processes that are owned by Employer, actually or potentially used in the operation of Employer's business, or obtained from third parties under an agreement of confidentiality, and that such information constitutes Employer's "trade secrets."

(b) Employee specifically agrees that_____[he *or* she] shall not misuse, misappropriate, or disclose in

writing, orally or by electronic means, any trade secrets, directly or indirectly, to any other person or use them in any way, either during the term of this agreement or at any other time thereafter, except as is required in the course of_____[his *or* her] employment.

(c) Employee acknowledges and agrees that the sale or unauthorized use or disclosure in writing, orally or by electronic means, of any of Employer's trade secrets obtained by Employee during the course of_____[his *or* her] employment under this agreement, including information concerning Employer's actual or potential work, services, or products, the facts that any such work, services, or products are planned, under consideration, or in production, as well as any descriptions thereof, constitute unfair competition. Employee promises and agrees not to engage in any unfair competition with Employer, either during the term of this agreement or at any other time thereafter.

(d) Employee further agrees that all files, records, documents, drawings, specifications, equipment, software, and similar items whether maintained in hard copy or on line relating to Employer's business, whether prepared by Employee or others, are and shall remain exclusively the property of Employer and that they shall be removed from the premises or, if kept on-line, from the computer systems of Employer [*specify procedure, e.g.,* only with the express prior written consent of Employer's Board of Directors].

ARTICLE 3. OBLIGATIONS OF EMPLOYER

General Description

Section 3.01. Employer shall provide Employee with the compensation, incentives, benefits, and business expense reimbursement specified elsewhere in this agreement.

Office and Staff

Section 3.02. Employer shall provide Employee with [*list specific equipment, e.g.,* ISDN line, laptop, cellular telephone], office space, and administrative support suitable to Employee's position and adequate for the performance of_____[his *or* her] duties.

Indemnification of Losses of Employee

Section 3.03. Employer shall indemnify Employee for all necessary expenditures or losses incurred by Employee in direct consequence of the discharge of_____[his *or* her] duties on Employer's behalf.

ARTICLE 4. COMPENSATION OF EMPLOYEE

Annual Salary

Section 4.01. (a) As compensation for the services to be rendered by Employee hereunder, Employer shall pay Employee an annual salary at the rate per annum_____[specified in Schedule A is attached to and made part of this Agreement *or* of $_____], payable in equal semi-monthly installments of $_____ on the 15th and final days of each month during the period of employment, prorated for any partial employment period.

(b) Employee shall receive such annual increases in salary as may be determined by Employer's [*specify person or body, e.g.,* president *or* Executive Compensation Committee *or* Board of Directors] in_____[his *or* her

or its] sole discretion [*specify when, e.g.,* at least annually on or about each anniversary of the execution of this contract *or* at the _____ (*specify which meeting of the designated body*)].

Deferred Compensation

Section 4.02. (a) If Employee fulfills all the obligations imposed on [him *or* her] under this agreement, Employer agrees to pay to Employee the sum of $_____, payable in equal monthly installments of $_____, on the last day of each month, commencing with the first full month after_____[he *or* she] attains the age of _____ for a period of [*number*] months, until that sum has been paid in full.

(b) In the event of Employee's death prior to the completion of the above payments, Employer shall continue those payments to Employee's surviving spouse, designee, or estate, until the entire sum is paid in full.

Salary Continuation During Disability

Section 4.03. If Employee for any reason whatsoever becomes permanently disabled so that_____[he *or* she] is unable to perform the duties prescribed herein, Employer agrees to pay Employee [*specify rate or amount, e.g.,* 50 percent of Employee's annual salary], payable [*specify manner in which payable, e.g.,* in the same manner as provided for the payment of salary herein], for [*specify period payable, e.g.,* the next 10 fiscal years *or* the remainder of the employment term provided for herein].

Repayment of Disallowed Salary

Section 4.04. In the event that any portion of the compensation paid by Employer to Employee is disallowed as an income tax deduction on an income tax return of Employer, Employee agrees to immediately repay to Employer the full amount of that portion.

ARTICLE 5. EMPLOYEE INCENTIVES

Cash Bonus Based on Profitability

Section 5.01. (a) In any fiscal year in which the net profits of Employer equal or exceed $_____, Employee shall receive a bonus of $_____ for_____[his *or* her] services in addition to any other compensation which_____[he *or* she] is entitled to receive hereunder. This bonus shall be paid within two and one-half months after the close of Employer's fiscal year, but only if Employee's services hereunder have not been terminated prior to the end of that fiscal year.

(b) For the purposes of this provision, the net profits of Employer are defined as [*set forth definition of net profit, e.g.,* net income after expenses but before taxes as determined by the firm of certified public accountants retained by Employer in accordance with sound accounting principles and consistent with the prior accounting practices of Employer].

Restricted Stock Bonus

5.02. (a) As additional compensation, Employer agrees to transfer to Employee each year during the employment term,

within two and one-half months after the close of Employer's fiscal year, the number of shares of Employer's [*type of stock, e.g.,* common] stock equal in value to $[*specify amount equal to predetermined portion of annual salary*].

(b) For the purpose of determining the number of shares to be transferred to Employee, the shares shall be valued [*set forth manner of valuation, e.g.,* at the book value computed for outstanding shares of the same type of stock as of the close of the relevant fiscal year].

(c) All shares transferred to Employee pursuant to this section shall be subject to the restriction that they must be sold back to Employer at book value immediately if the employment term is terminated for any reason whatsoever, except the death of Employee, prior to the completion of the term of the employment specified herein.

ARTICLE 6. EMPLOYEE BENEFITS

Annual Vacation

Section 6.01. Employee shall be entitled to [*specify, e.g.,* 30 days] vacation time each year with full pay. Employee may be absent from_____[his *or* her] employment for vacation only at such times as Employer's President shall determine from time to time. If Employee is unable for any reason to take the total amount of authorized vacation time during any year,_____[he *or* she] [may accrue that time and add it to vacation time for any following year *or* may receive a cash payment in an amount equal to the amount of annual salary attributable to that period *or* will not earn vacation time in any subsequent year until the earned vacation time is used].

[*For alternative vacation provisions, see § 85.340.*]

Illness

Section 6.02. On completion of [*specify time period, e.g.,* three months *or* one year] in the service of Employer, Employee shall be entitled to [*specify number*] days per year as sick leave with full pay. [Sick leave may be accumulated up a total of _____ (*number*) days].

Death Benefits

Section 6.03. If Employee should die during the term of_____[his *or* her] employment hereunder, Employer agrees to pay_____[his *or* her] surviving spouse, designee, or estate the sum of $_____ at the time of_____[his *or* her] death. If Employee remains in the employ of Employer until age _____ *e.g.,* 65], or earlier retirement with the mutual written consent of both parties, Employer agrees to pay to_____[his *or* her] surviving spouse, designee, or estate the sum of $_____ at the time of_____[his *or* her] death.

Use of Employer-Supplied Automobile

Section 6.04. (a) During the term of employment hereunder, Employee shall be entitled to the full use of a [*specify make*] or comparable automobile of_____[his *or* her] own choice in the price range of $_____ to $_____.

(b) Every [*specify, e.g.,* two] years, on return to Employer of Employer's automobile then being used by Employee, Employee shall be entitled to the full use of new automobile in the same price range.

(c) Employer also agrees to pay all operating expenses of any nature whatsoever with regard to the aforementioned automobile, and to procure and maintain in force an automobile liability insurance policy on the automobile, with coverage including Employee, in the minimum amounts of $_____ for bodily injury or death to one person in any one accident, and $_____ for property damage in any one accident.

(d) If Employee is prohibited by order of any court from holding or using a driver's license, Employee will no longer be entitled to this benefit.

Group Life Insurance

Section 6.05. Employer agrees to include Employee under Employer's group term life insurance coverage in an amount equal to [$_____ *or* _____ (*number*) percent of Employee's gross annual salary].

Group Medical Insurance

Section 6.06. Employer agrees to include Employee under Employer's group medical insurance coverage.

Dental Coverage

Section 6.07. The Employer agrees to provide Employee with dental coverage during the employment term by obtaining dental insurance covering Employee or by directly paying [all *or* _____ percent of the] dental costs incurred by Employee.

ARTICLE 7. BUSINESS EXPENSES

Business Expenses

Section 7.01. (a) Employer shall promptly reimburse Employee for all reasonable business expenses incurred by Employee in promoting the business of Employer, including expenditures for entertainment, gifts, and travel.

(b) Each such expenditure shall be reimbursable only if it is of a nature qualifying it as a proper deduction on the federal and state income tax return of Employer.

(c) Each such expenditure shall be reimbursable only if Employee furnishes to Employer adequate records and other documentary evidence required by federal and state statutes and regulations issued by the appropriate taxing authorities for the substantiation of that expenditure as an income tax deduction.

Repayment by Employee of Disallowed Business Expenses

Section 7.02. In the event that any expenses paid for Employee or any reimbursement of expenses paid to Employee shall, on audit or other examination of Employer's income tax returns, be determined not to be allowable deductions from Employer's gross income, and in the further event that any such determination is acceded to by the Employer or made final by the appropriate federal or state taxing authority or a final judgment of a court of competent jurisdiction, and no appeal is taken from the judgment or the applicable period for filing notice of appeal has expired, Employee shall repay to Employer the amount of the disallowed expenses.

ARTICLE 8. TERMINATION OF EMPLOYMENT

Termination for Cause

Section 8.01. (a) Employer reserves the right to terminate this agreement if employee (1) willfully breaches or habitually neglects the duties which_____[he *or* she] is required to perform under the terms of this agreement, or (2) commits acts of dishonesty, fraud, misrepresentation, or other acts of moral turpitude, that would prevent the effective performance of_____[his *or* her] duties.

(b) Employer may at its option terminate this agreement for the reasons stated in this section by giving written notice of termination to Employee without prejudice to any other remedy to which Employer may be entitled either at law, in equity, or under this agreement.

(c) The notice of termination required by this section shall specify the ground for the termination and shall be supported by a statement of [all] relevant facts.

(d) Termination under this section shall be considered "for cause" for the purposes of this agreement.

Termination Without Cause

Section 8.02. (a) This agreement shall be terminated upon the death of Employee.

(b) Employer reserves the right to terminate this agreement_____[within *or* not less than _____ (*number*) months after] Employee suffers any physical or mental disability that would prevent the performance of _____[his *or* her] essential job duties under this agreement, unless reasonable accommodation can be made to allow Employee to continue working. Such a termination shall be effected by giving [*specify period, e.g.*, 10 days'] written notice of termination to Employee.

(c) Termination under this section shall not be considered "for cause" for the purposes of this agreement.

Effect of Merger, Transfer of Assets, or Dissolution

Section 8.03. (a) This agreement shall [*or* shall not] be terminated by any voluntary or involuntary dissolution of Employer resulting from either a merger or consolidation in which Employer is not the consolidated or surviving corporation, or a transfer of all or substantially all of the assets of Employer.

[*EITHER, if agreement will not be terminated under preceding circumstances:*]

(b) In the event of any such merger or consolidation or transfer of assets, Employer's rights, benefits, and obligations hereunder [shall *or* may] be assigned to the surviving or resulting corporation or the transferee of Employer's assets.

[*OR, if agreement will be terminated:*]

(b) Termination under this section shall not be considered "for cause" for the purposes of this agreement.

[*Continue with the following:*]

Termination by Employee

Section 8.04. Employee may terminate_____[his *or* her] obligations under this agreement by giving Employer at least [*number*] months notice in advance or tendering to Employer a total amount aggregating [*number*] months of_____[his *or* her] annual salary.

Effect on Compensation

Section 8.05. In the event that this agreement is terminated prior to the completion of the term of employment specified herein, Employee shall be entitled to the compensation earned by and vested in [him *or* her] prior to the date of termination as provided for in this agreement, computed pro rata up to and including that date. Employee shall be entitled to no further compensation as of the date of termination.

ARTICLE 9. GENERAL PROVISIONS

Notices

Section 9.01. Any notices to be given by either party to the other shall be in writing and may be transmitted either by personal delivery or by mail, registered or certified, postage prepaid with return receipt requested. Mailed notices shall be addressed to the parties at the addresses appearing in the introductory paragraph of this agreement, but each party may change that address by written notice in accordance with this section. Notices delivered personally shall be deemed communicated as of the date of actual receipt; mailed notices shall be deemed communicated as of_____[*specify, e.g.*, the date of mailing].

Arbitration

Section 9.02. (a) Any controversy between Employer and Employee involving the construction or application of any of the terms, provisions, or conditions of this agreement shall on the written request of either party served on the other be submitted to arbitration. Arbitration shall comply with and be governed by the provisions of the California Arbitration Act.

(b) Employer and Employee shall each appoint one person to hear and determine the dispute. If the two persons so appointed are unable to agree, then those persons shall select a third impartial arbitrator whose decision shall be final and conclusive upon both parties.

Attorneys' Fees and Costs

Section 9.03. If any [legal action *or specify more limited provision, e.g.*, legal action based in contract law] is necessary to enforce or interpret the terms of this agreement, the prevailing party shall be entitled to reasonable attorneys' fees, costs, and necessary disbursements in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire contract.

Entire Agreement

Section 9.04. This agreement supersedes any and all other agreements, either oral or in writing, between the parties hereto with respect to the employment of Employee by Employer, and contains all of the covenants and agreements between the parties with respect to that employment in any manner whatsoever. Each party to this agreement acknowledges that no representations, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not embodied herein, and that no other agreement, statement, or promise not contained in this agreement shall be valid or binding.

Modifications

Section 9.05. Any modification of this agreement will be effective only if it is in writing signed by the party to be charged.

Effect of Waiver

Section 9.06. The failure of either party to insist on strict compliance with any of the terms, covenants, or conditions of this agreement by the other party shall not be deemed a waiver of that term, covenant, or condition, nor shall any waiver or relinquishment of any right or power at any one time or times be deemed a waiver or relinquishment of that right or power for all or any other times.

Partial Invalidity

Section 9.07. If any provision in this agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

Law Governing Agreement

Section 9.08. This agreement shall be governed by and construed in accordance with the laws of the State of California.

Sums Due Deceased Employee

Section 9.09. If Employee dies prior to the expiration of the term of_____[his *or* her] employment, any sums that may be due [him *or* her] from Employer under this agreement as of the date of death shall be paid to Employee's executors, administrators, heirs, personal representatives, successors, and assigns.

Executed on_____[*date*], at_____[*city*], California.

EMPLOYER
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]
EMPLOYEE
_____ [*signature of employee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDirectors & OfficersGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
A. Complete Employment Contracts
1. Executive Employment Agreements

28-85 California Legal Forms--Transaction Guide §§ 85.202-85.209

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.202[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
A. Complete Employment Contracts
2. Agreements for Employment of Managerial Personnel

28-85 California Legal Forms--Transaction Guide § 85.210

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.210 Contract for Employment of Mid-Level or Department Manager--Bonus Based on Sales or Operating Profit

[1] Comment

[a] Use of Form

This form is an agreement for the employment of a mid-level manager; that is, a person employed as a general or department manager. This form is shorter and less formal than those set forth in this chapter for executive personnel because the general practice is to use less extensive contracts in the employment of "middle managers" (and often none at all in the employment of supervisory personnel).

Because mid-level managers are often subject to most of the same employment terms and conditions that apply to other employees, it is a common practice to have a mid-level manager's employment contract refer to an employee handbook for the details of many terms of employment. For example, this form refers to the employer's handbook for employees regarding details of the employee's vacation benefit.

For discussion of the matters to consider in drafting an employment agreement, see *§ 85.200[1]*. The attorney preparing an agreement for the employment of a managerial employee should carefully consider the needs of the firm and the desires of the prospective employee. Some of these can be ascertained by asking the client the questions indicated in the Client Interview [*see § 85.100*]. With the answers to these questions, the attorney should consult the Drafting Guide in § 85.120 and tailor the agreement so that it will best fit the circumstances of the particular situation.

[b] At-Will Provision

This form includes an optional "at-will" provision, allowing either party to terminate the contract at any time, with or without cause. The provision reaffirms the statutory presumption that an employment contract with no specified term

may be terminated at the will of either party on notice to the other [*see Lab. Code § 2922*]. "Termination at will" generally means that either party can terminate the employment for any reason or no reason at all; however, this rule is subject to a number of important limitations and exceptions [*see § 85.24[2]*].

[c] Bonus Provisions

This form contains two alternative bonus provisions based on sales or operating profit and obviously designed as incentive provisions [*see* P 6 of Form]. The first alternative is for use if the contract will be used for sales-oriented managers and is tied to the amount of product sold; the second is for use in operations-oriented situations and expresses the bonus in terms of a percentage of operating profit [*see Prachasaisoradej v. Ralphs Grocery Co. (Aug. 23, 2007) 42 Cal. 4th 217, 64 Cal. Rptr. 3d 407, 165 P.3d 133, 2007 Cal. Lexis 8909, at *34-*56* (deduction of employer's expenses from gross receipts to calculate net profits for purposes of profit-sharing program does not run afoul of statutory and regulatory prohibitions against unauthorized deductions from salary [*see Lab. Code §§ 221-224, 400-410, 3751(a)*; *8* Cal. Code Reg. § 11070(8)], so long as no unauthorized deductions are made from employee's *regular* salary)]. An additional optional provision guarantees an annual minimum bonus [*see* P 7 of Form]. Other cash bonus provisions are set forth in *§§ 85.360-85.362*. Profit-sharing provisions are contained in §§ 85.370-85.372.

[2] FORM

Contract for Employment of Mid-Level or Department Manager--Bonus Based on Sales or Operating Profit

DEPARTMENT MANAGER
EMPLOYMENT AGREEMENT

_____[*Name of employer*] ("Employer") [, a _____ (California corporation *or* partnership *or* sole proprietorship)], located at_____[*address of principal place of business*], and_____[*name of employee*] ("Employee"), of_____[*address*], in consideration of the mutual promises made herein, agree as follows:

Employment and Title

1. Employer employs Employee and Employee accepts employment as _____ [*state job title, e.g.,* manager *or* general manager] in charge of_____[*specify field, e.g.,* operations *or* sales *or name of department*] for Employer.

[*Use following provision if contract is at will:*]

Employment at Will

2. Either Employer or Employee may terminate this agreement at any time on notice to the other, with or without cause. Employer reserves the right to modify, add, or eliminate any term or condition of this employment at any time on notice to Employee, with or without cause. The rights and duties set forth in this paragraph may not be modified in any way except by written agreement between the parties.

[*OR*]

[*Use following provision if contract is for specific term:*]

Term

2. The term of employment under this agreement shall be for period of [*any period more than one month and less than seven years*], beginning on_____[*date*].

[*Continue:*]

Duties

3. Employee shall report to Employer's [*specify, e.g.,* President *or* Vice President for Operations *or* Vice President for Sales]. Employee shall supervise and direct the [*specify department by name or function, e.g.,* Pismo Beach area Operations Department *or* Book Sales Division] of Employer and in that capacity [perform all duties incidental thereto, including supervision of employees within that _____ (department *or* division) and such other work as may be required of _____ (him *or* her) in connection with the business of Employer *or* perform all of the duties specified in the attached and incorporated job description].

Trade Secrets

4. (a) The parties acknowledge and agree that during the term of this agreement and in the course of the discharge of_____[his *or* her] duties hereunder, Employee shall have access to and become acquainted with financial, personnel, sales, scientific, technical and other information regarding formulas, patterns, compilations, programs, devices, methods, techniques, operations, plans and processes that are owned by Employer, actually or potentially used in the operation of Employer's business, or obtained from third parties under an agreement of confidentiality, and that such information constitutes Employer's "trade secrets."

(b) Employee specifically agrees that_____[he *or* she] shall not misuse, misappropriate, or disclose in writing, orally or by electronic means, any trade secrets, directly or indirectly, to any other person or use them in any way, either during the term of this agreement or at any other time thereafter, except as is required in the course of_____[his *or* her] employment.

(c) Employee acknowledges and agrees that the sale or unauthorized use or disclosure in writing, orally or by electronic means, of any of Employer's trade secrets obtained by Employee during the course of_____[his *or* her] employment under this agreement, including information concerning Employer's actual or potential work, services, or products, the facts that any such work, services, or products are planned, under consideration, or in production, as well as any descriptions thereof, constitute unfair competition. Employee promises and agrees not to engage in any unfair competition with Employer, either during the term of this agreement or at any other time thereafter.

(d) Employee further agrees that all files, records, documents, drawings, specifications, equipment, software, and similar items whether maintained in hard copy or on line relating to Employer's business, whether prepared by Employee or others, are and shall remain exclusively the property of Employer and that they shall be removed from the premises or, if kept on-line, from the computer systems of Employer [*specify procedure, e.g.,* only with the express prior written consent of Employer's Board of Directors].

Annual Salary

5. Employer shall pay Employee an annual salary of $_____, payable in equal amounts on every other Friday.

Bonus

[*Use or adapt following for sales-oriented managers:*]

6. Employer shall pay Employee a bonus on each new_____[*name or type of employer's product*] above the first [*number, e.g.,* 1,000] sold by Employee's department during any twelve-month period covered by this agreement, computed as follows: $_____ per item in excess of [*number, e.g.,* 1,000] and less than [*number, e.g.,* 5,000], and $_____ per item in excess of the latter number. This bonus shall be computed on the basis of final figures for each month and paid on the [*specify day*] of the following month.

[*OR*]

[*Use or adapt following for operations-oriented employment situations:*]

6. (a) Employer shall pay Employee a bonus of _____ percent of the operating profit derived by Employer from Employee's department.

(b) The term "operating profit" means all gross income from the operations specified above (other than capital gains) less all expenses, deductions, and credits of employer attributable to the operations specified. In computing operating profit, federal and state income taxes and payments made under this agreement or other bonus or incentive plans of Employer [shall *or* shall not] be taken into account. The operating profit shall be determined in accordance with sound principles of accounting by the certified public accountants regularly employed by Employer and their determination shall be binding and conclusive on the parties.

(c) Payment of this bonus shall be made no later than [*specify, e.g.,* annually], [*state reasonable period for determining operating profit, e.g.,* within two and one-half months after the close of Employer's previous fiscal year].

Annual Minimum Bonus

7. Employer shall pay Employee an annual minimum bonus of $_____, regardless of Employer's [sales *or* operating profit] no later than [*specify reasonable period, e.g.,* within two and one-half months after the close of the previous fiscal year of Employer].

Vacation

[*Use one of following provisions, as appropriate:*]

8. Employee shall be entitled to [*specify, e.g.,* 30 days] vacation time each year with full pay. Scheduling of vacation shall be at the complete discretion of Employee's immediate supervisor. If Employee is unable for any reason to take the total amount of authorized vacation time during any year, Employee [may accrue that time and add it to vacation time

for any following year *or* may receive a cash payment in an amount equal to the amount of annual salary attributable to that period *or* will not earn vacation time in any subsequent year until the earned vacation time is used].

[*OR*]

8. Employee shall be entitled to a vacation each year with full pay in accordance with Employer's vacation policy as more specifically defined in Employer's "Handbook for Employees," a copy of which has been provided to Employee.

[*For alternative vacation provisions, see § 85.340.*]

Illness

[*Use one of following provisions, as appropriate:*]

9. Employee shall be entitled to_____[*specify, e.g.,* _____ (*number*) days] per year as sick leave with full pay. [Sick leave may be accumulated up a total of _____ (*number*) days].

[*OR*]

9. Employee shall be entitled to sick leave with full pay in accordance with Employer's sick-leave policy as more specifically defined in Employer's "Handbook for Employees," a copy of which has been provided to Employee.

Business Expenses

10. Employee shall be entitled to receive, within [*number*] days after delivery to Employer of an itemized statement thereof, reimbursement for all justified and reasonable expenses incurred in connection with the performance of Employee's duties.

Outside Employment

11. Employee shall not engage in other employment that interferes with_____[his *or* her] performance of the duties under this contract.

Competitive Activities

12. During the term of this agreement, Employee shall not, directly or indirectly, own, manage, operate, join, control, be employed by, or participate in the ownership, management, operation, or control of, or be connected in any manner with, any business that is competitive to the business of Employer.

Termination for Disability

13. (a) If Employee is unable to perform_____[his *or* her] duties by reason of illness or disability for a

continuous period of [*number greater than 90*] days, Employer may terminate this agreement and the employment under this agreement without further notice. Termination for this reason shall not be deemed "for cause" as that term is used in this section.

(b) In the event of termination under this section, Employer's obligations to Employee under this agreement shall cease except for annual salary accrued to the date on which termination becomes effective and, if termination is not for cause, Employer shall be obligated to pay Employee all bonuses due as of that date as well as severance pay in the amount of $_____.

Notices

14. Any notices to be given by either party to the other shall be in writing and may be transmitted by personal delivery or by mail, registered or certified, postage prepaid with return receipt requested. Mailed notices shall be addressed to Employer at_____[*address*] and to Employee at_____[*address*], but each party may change that address by written notice in accordance with this section. Notices delivered personally shall be deemed communicated as of the date of actual receipt; mailed notices shall be deemed communicated as of_____[*specify, e.g.,* the date of mailing].

Arbitration

15. (a) Any controversy between Employer and Employee involving the construction or application of any of the terms, provisions, or conditions of this agreement shall on the written request of either party served on the other be submitted to arbitration. Arbitration shall comply with and be governed by the provisions of the California Arbitration Act.

(b) Employer and Employee shall each appoint one person to hear and determine the dispute. If the two persons so appointed are unable to agree, then those persons shall select a third impartial arbitrator whose decision shall be final and conclusive upon both parties.

Attorneys' Fees and Costs

16. If any [legal action *or specify more limited provision, e.g.,* legal action based in contract law] is necessary to enforce or interpret the terms of this agreement, the prevailing party shall be entitled to reasonable attorneys' fees, costs, and necessary disbursements in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire contract.

Entire Agreement

17. This agreement supersedes any and all other agreements, either oral or in writing, between the parties with respect to the employment of Employee by Employer and contains all of the covenants and agreements between the parties with respect to that employment in any manner whatsoever. Each party to this agreement acknowledges that no representation, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not embodied herein, and that no other agreement, statement, or promise not contained in this agreement shall be valid or binding on either party. Any modification of this agreement will be effective only if it is in writing and signed by the party to be charged.

Effect of Waiver

18. The failure of either party to insist on strict compliance with any of the terms, covenants, or conditions of this agreement by the other party shall not be deemed a waiver of that term, covenant, or condition, nor shall any waiver or relinquishment of any right or power at any one time or times be deemed a waiver or relinquishment of that right or power for all or any other times.

Partial Invalidity

19. If any provision in this agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

Law Governing Agreement

20. This agreement shall be governed by and construed in accordance with the laws of the State of California.

Sums Due Deceased Employee

21. If Employee dies prior to the termination or expiration of this employment, any sums that may be due [him *or* her] from Employer under this agreement as of the date of death shall be paid to Employee's executors, administrators, heirs, personal representatives, successors, and assigns.

Executed on_____[*date*] at_____[*city*], California.

EMPLOYER
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]
EMPLOYEE
_____ [*signature of employee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
A. Complete Employment Contracts
2. Agreements for Employment of Managerial Personnel

28-85 California Legal Forms--Transaction Guide § 85.211

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.211 Contract for Employment of Retail Store Branch Manager--Payment of Moving Costs

[1] Comment

[a] Use of Form

This form is a contract for the employment of the manager of a retail store operated by a chain organization. It can be adapted for use in employing a manager for any type of business branch operation.

[b] Drafting Considerations

[i] In General

This form represents only one of the many ways such a contract might be drafted. If used as the basis for a store manager employment agreement, the attorney should first determine how the particular type of store operates and the needs of the parties involved. Some of these can be ascertained by asking the client the questions indicated in the Client Interview [*see § 85.100*]. With the answers to these questions, the attorney should tailor the agreement so that it will best fit the circumstances of the particular situation.

For a discussion of the general matters to be considered before drafting any employment contract, see *§ 85.200[1]*.

[ii] Duties of Employee

The provision describing the duties of the employee simply provides that he or she is employed as manager of a specified branch and that, as manager, he or she will operate the store in accordance with the policies of the management [*see § 85.211[2]*, Section 2.01]. The use of such general terms is generally better in this type of situation than attempting to spell out detailed duties. For discussion of the function of an employer's rules as part of an

employment contract, see *§ 85.274[1][c]*.

The provision stating that the employee may be transferred to the managership of another store [*see 85.211[2]*, Section 2.02] is most important because managers of stores of this type are frequently transferred. The provision regarding the uniqueness of the employee's services [*see* Section 2.05 of Form] is important because at a later date it may assist the employer in obtaining equitable relief to prevent a breach of the contract by the employee.

[iii] Profit-Sharing Provisions

This form gives the employee a prescribed percentage of the net profits in excess of a certain amount [*see* Section 3.02 of Form]. Although there are various methods by which a branch manager can be compensated, most branch managers are compensated in a manner that depends in some way on the results they achieve with regard to the particular store involved. The purpose of such a commission arrangement is to motivate the manager to make the store as productive as possible.

Different methods are used to permit a manager to share in profits. As noted above, this form gives the manager a percentage of the excess over a certain amount. Another approach would be to give the manager a percentage of all the profits. In this form the percentage of net profits given to the manager remains constant. Still another method is to change the percentage based on the amount of profit. Increasing the applicable percentage as profits go up can be a tremendous incentive, particularly since this will tend to counterbalance the increase in the manager's personal income tax rate as his or her income increases. For additional profit-sharing provisions, see *§§ 85.370-85.372*.

Since store managers are transferred frequently, the contract should specify how the amount of additional compensation due the manager from the profits of a store should be determined if the manager acted in that capacity for less than a year. The simplest solution would be to determine that amount on a straight pro rata basis depending on the fractional part of the year the store was managed by the employee in question. The difficulty with that method is that the business of most retail stores is subject to wide seasonal fluctuations. Instead, this form provides that the employer at its sole discretion may adjust the amount of the additional compensation to reflect the actual time each store in question was managed by the particular employee and the results accomplished by him or her during each such time. Although the employer is given discretion, it is in the employer's best interest to treat the manager fairly, particularly if previous performance demonstrates that he or she has been successful. The attorney should discuss this problem thoroughly with the client.

[iv] Obligations of Employee

This form requires the employee to qualify for a surety bond [*see* Section 2.06 of Form] because the manager of a branch store is responsible for the receipt and disposition of large amounts of cash. For discussion, see *§ 85.481[1]*.

The employer may wish to add a "morality clause" to the contract, requiring the employee to conduct himself or herself with due regard to public conventions and morals. This type of provision may be reasonable and necessary to prevent harm to the employer's business, if it is likely that the manager of a branch store will have extensive visibility to the public and represent the employer in the community. For a form of morality clause, see *§ 85.491*.

[2] FORM

Contract for Employment of Retail Store Branch Manager--Payment of Moving Costs

BRANCH MANAGER
EMPLOYMENT AGREEMENT

_____[*name of employer*], [a _____(California corporation *or* partnership *or* sole

proprietorship)], located at_____[*address of principal place of business*], hereinafter referred to as Employer, and_____[*name of employee*],_____[*address*], hereinafter referred to as Employee, in consideration of the mutual promises made herein, agree as follows:

ARTICLE 1. TERM OF EMPLOYMENT

Employment

Section 1.01. Employer employs Employee and Employee accepts employment with the Employer [*omit following provision if contract is at will:* for a period of _____ (*any period more than one month and less than seven years*)], beginning on_____[*date*].

Earlier Termination

Section 1.02. This agreement may be terminated earlier as hereinafter provided.

ARTICLE 2. DUTIES AND OBLIGATIONS OF EMPLOYEE

Description of Duties

Section 2.01. Employee is employed as Manager of Employer's branch store located at_____[*location, e.g.*, The Mall, _____ (*address*)] and shall conduct the operation of that branch store in accordance with the policies established from time to time by the management of Employer.

Transfer of Employee

Section 2.02. Employee, at the sole discretion of Employer, may [upon _____ (*number*) days' notice] be transferred to and be employed as the manager of any other branch store operated by Employer.

Loyal and Conscientious Performance of Duties

Section 2.03. Employee agrees that to the best of_____[his *or* her] ability and experience_____[he *or* she] will at all times loyally and conscientiously perform all of the duties and obligations required either expressly or implicitly by the terms of this agreement.

Outside Employment

Section 2.04. Employee shall not engage in outside employment that interferes with_____[his *or* her] duties for Employer or competes with Employer's business. Employee shall not directly or indirectly render any services of a business, commercial, or professional nature to any other person or organization, whether for compensation or otherwise, without the prior written consent of Employer.

Uniqueness of Employee's Services

Section 2.05. Employee hereby represents that_____[his *or* her] services to be performed under this contract are of a special, unique, unusual, extraordinary, and intellectual character that gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law. Employee therefore expressly agrees that Employer, in addition to any other rights or remedies that Employer may possess, shall be entitled to injunctive and other equitable relief to prevent a breach of this contract by Employee.

Qualification for Surety Bond

Section 2.06. Employee agrees that_____[he *or* she] will furnish all information and take any other steps necessary to enable Employer to obtain a fidelity bond conditioned on the rendering of a true account by Employee of all moneys, goods, or other property that may come into the custody, charge, or possession of Employee during the term of this employment. The surety company issuing the bond and the amount of the bond must be acceptable to Employer in the sole discretion of Employer. All premiums on the bond are to be paid by Employer. Failure by Employee to qualify for that bond within [*number*] days from the date of this agreement will result in immediate termination of this contract.

ARTICLE 3. COMPENSATION OF EMPLOYEE

Basic Salary

Section 3.01. As compensation for the services rendered by [him *or* her] under this agreement, Employee shall be entitled to an annual salary of $_____, payable in equal semi-monthly installments on the fifteenth and final days of each month during the period of employment, prorated for any partial employment period.

Profit-Sharing

Section 3.02. (a) As additional compensation in any year in which the net profits of the branch store managed by Employee exceed [$_____ *or* the net profits of that store for the previous fiscal year by _____ percent], Employee shall be entitled to receive an amount equal to _____ percent of the net profits in excess of $_____[, provided, however, that the total amount of this bonus shall not exceed _____ ($_____ *or specify a figure equal to all or a portion of employee's salary*)].

(b) This additional compensation shall be computed and paid to Employee within [*specify reasonable period, e.g.,* 60 days] after the end of Employer's fiscal year.

(c) For any fiscal year in which Employee has not managed a branch store for a full twelve months,_____[*state formula or other method of apportionment, e.g.,* Employer at its sole discretion may adjust the additional compensation payable, if any, regarding any branch store or stores managed during the fiscal year by Employee, to reflect the actual time worked at each store or stores by Employee during that fiscal period and the results accomplished].

(d) If the employment term is terminated by Employer for cause, Employee shall not be entitled to any portion of the additional compensation provided for in this section for the fiscal year in which that termination occurs. However, if this contract should expire or be terminated for reasons other than cause, Employee shall be entitled to that portion of the additional compensation that the number of months during the fiscal year that_____[he *or* she] was employed hereunder bears to 12 months.

(e) As used herein, "net profits" shall be defined as net income from operations after expenses but before taxes as determined according to sound accounting principles by the firm of certified public accountants retained by Employer and consistent with the prior accounting practices of Employer.

ARTICLE 4. BUSINESS EXPENSES

Business Expense Payment and Accounting

Section 4.01. (a) All business expenses reasonably incurred by Employee in promoting the business of Employer, including expenditures for entertainment, gifts, and travel, are to be paid for, insofar as possible, by the use of credit cards in the name of Employer, which will be furnished to Employee. Any reasonable business expenses that cannot be charged on a credit card shall be paid by Employee, and Employer shall reimburse Employee for those expenses upon substantiation as required by this section.

(b) Employee shall keep an account book listing all business expenditures, whether paid for by credit card or not, in which Employee shall record, at or near the time that each expenditure is made, the amount of the expenditure; the time and place of the entertainment, travel, or other expense, or the date and description of the gift; the business reason for the expenditure and the nature of the business benefit derived or expected to be derived as a result of the expenditure; and the names, occupations, addresses, and other information sufficient to establish a business relationship to Employer, concerning each person who was entertained or given a gift. Gifts made to any one individual shall not exceed a total of [*specify limitation, e.g.,* $25 in any taxable year].

(c) Employee shall provide detailed receipts for each travel expenditure of $25 or more (except for transportation charges if not readily available). Each receipt must include the date the expense was incurred and a description of the expenditure.

(d) Employer may audit the account book at any time.

Initial Moving Expenses

Section 4.02. Employer shall pay to Employee the sum of $_____ for moving expenses incurred by Employee in moving from [*place of employee's former residence*] to [*place where employee will initially work*]. This sum is the total amount Employer will pay in conjunction with this move.

Subsequent Moving Expenses

Section 4.03. If Employee is transferred by Employer to a new principal place of work at a branch store at least [*specify, e.g.,* 50; *see I.R.C. § 217(c)(1)*] miles away from the branch store that is then Employee's principal place of work, and accordingly Employee decides to move_____[his *or* her] residence, Employer will reimburse Employee for all reasonable expenses incurred for the following:

(a) Making a one-way trip, including lodging, by Employee and Employee's spouse and minor children from their existing residence to the new place of residence selected by Employee; and

(b) Moving the household goods and personal effects of Employee and Employee's spouse and minor children from their existing residence to the new place of residence selected by Employee.

Purchase of Employee's Home by Employer

Section 4.04. (a) If Employee is transferred to another principal place of work during the term of this agreement and that place is at least [*specify distance, e.g.,* 500] miles from Employee's former principal place of work, Employee shall have the option of selling to Employer any residence owned and occupied by Employee at that time.

(b) The sales price shall be the fair market value of the residence as determined by an appraiser selected by Employer, less the amounts of any real estate broker's commission and other costs of sale customarily paid by the sellers of residences of like value in the area where the residence is located. The appraisal shall be made within [*number*] days after the date Employee is notified of the transfer.

(c) After Employee is notified of the sales price and the amounts to be deducted for commission and costs, Employee shall have [*e.g., 1* 0] days to decide whether to exercise this option to sell. The net sales price shall be paid to Employee in full in cash by Employer within [*e.g.,* 30] days after Employer is notified that Employee is exercising this option to sell.

ARTICLE 5. TERMINATION OF EMPLOYMENT

Termination for Cause

Section 5.01. If Employee willfully breaches this agreement or habitually neglects the duties that_____[he *o* r she] is required to perform under the terms of this agreement, Employer may terminate this agreement by giving written notice of termination to Employee without prejudice to any other remedy to which Employer may be entitled at law, in equity, or under this agreement.

Effect of Employer's Merger, Transfer of Assets, or Dissolution

Section 5.02. This agreement shall be terminated by any merger or consolidation in which either (1) Employer is not the consolidated or surviving corporation, (2) all or substantially all of the assets of Employer are transferred, or (3) there is a voluntary or involuntary dissolution of Employer.

Option to Terminate if Employee Becomes Permanently Disabled

Section 5.03. If Employee becomes permanently disabled because of sickness, physical or mental disability, or any other reason, so that it reasonably appears that_____[he *or* she] will be unable to complete the essential job duties prescribed by this agreement, Employer shall have the option to immediately terminate this agreement by giving written notice of termination to Employee. Such a termination shall be without prejudice to any right or remedy to which Employer or Employee may be entitled either at law, in equity, or under this agreement.

Effect of Termination on Compensation

Section 5.04. Subject to Section 3.02(d) of this agreement, in the event of the termination of this agreement prior to the completion of the term of employment specified herein, Employee shall be entitled to any compensation earned by and vested in [him *or* her] prior to the date of termination as provided for in this agreement, computed pro rata up to and including that date. Employee shall be entitled to no further compensation as of the date of termination.

ARTICLE 6. GENERAL PROVISIONS

Notices

Section 6.01. Any notices to be given by either party to the other may be effected either by personal delivery in writing or by mail, registered or certified, postage prepaid with return receipt requested. Mailed notices shall be addressed to the parties at the addresses appearing in the introductory paragraph of this agreement, but each party may change address by written notice in accordance with this paragraph. Notices delivered personally shall be deemed communicated as of actual receipt; mailed notices shall be deemed communicated as of_____[*specify, e.g.,* the date of mailing].

Entire Agreement

Section 6.02. This agreement supersedes any and all other agreements, either oral or in writing, between the parties hereto with respect to the employment of Employee by Employer and contains all of the covenants and agreements between the parties with respect to such employment in any manner whatsoever. Each party to this agreement acknowledges that no representations, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not embodied herein, and that no other agreement, statement, or promise not contained in this agreement shall be valid or binding.

Modifications

Section 6.03. Any modification of this agreement will be effective only if it is in writing and signed by the party to be charged.

Arbitration

Section 6.04. (a) Any controversy between Employer and Employee involving the construction or application of any of the terms, provisions, or conditions of this agreement shall be submitted to arbitration. Arbitration shall comply with and be governed by the provisions of the California Arbitration Act.

(b) Employer and Employee shall each appoint one person to hear and determine the dispute. If the two appointed persons are unable to agree, then those persons shall select a third impartial arbitrator whose decision shall be final and conclusive upon both parties.

Attorneys' Fees and Costs

Section 6.05. If any [legal action *or specify more limited provision, e.g.,* legal action based in contract law] is necessary to enforce or interpret the terms of this agreement, the prevailing party shall be entitled to reasonable attorneys' fees, costs, and necessary disbursements in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire contract.

Partial Invalidity

Section 6.06. If any provision in this agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

Law Governing Agreement

Section 6.07. This agreement shall be governed by and construed in accordance with the laws of the State of California.

Sums Due Deceased Employee

Section 6.08. If Employee dies prior to the expiration of the term of_____[his *or* her] employment, any sums that may be due _____[him *or* her] from Employer under this agreement as of the date of death shall be paid to Employee's executors, administrators, heirs, personal representatives, successors, and assigns.

Executed on_____[*date*], at_____[*city*], California.

EMPLOYER
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]

EMPLOYEE
_____ [*signature of employee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
A. Complete Employment Contracts
2. Agreements for Employment of Managerial Personnel

28-85 California Legal Forms--Transaction Guide § 85.212

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.212 Manager of Overseas Department

[1] Comment--Use of Form

This form is an agreement for the employment of the manager of an overseas department of a United States-based organization. It is similar to the agreement for the employment of a department manager [*see § 85.210*], however, it contains numerous provisions that are specially applicable to foreign employment.

Before using this form, counsel should consult with local counsel in the country in which the employee will work. Although the form includes a provision that the contract be construed according to California law, the country in which the employee works may not recognize such a choice-of-law provision, and portions of the contract may be unenforceable under local law. This could cause problems if employer is sued or seeks to enforce the contract in the other country [*cf. Olinick v. BMG Entertainment (2006) 138 Cal. App. 4th 1286, 1296-1300, 42 Cal. Rptr. 3d 268* (enforcing choice-of-law and forum-selection provisions subjecting all causes of action arising from employment agreement to New York law and jurisdiction of New York courts)].

[2] FORM

Manager of Overseas Department

OVERSEAS MANAGER EMPLOYMENT AGREEMENT

_____[*Name of employer*] ("Employer") [, a _____ (California corporation *or* partnership *or* sole proprietorship)], located at_____[*address of principal place of business*], and_____[*name of employee*] ("Employee"), of_____[*address*], in consideration of the mutual promises made herein, agree as follows:

Employment and Title

1. Employer employs Employee and Employee accepts employment as _____ [*state job title, e.g.,* manager *or* general manager] in charge of its _____ [*specify foreign location and type of operation, e.g.,* London office *or* Singapore plant] [*or any other place and (managerial) capacity in which Employer may hereafter direct*].

[*Omit following provision if contract is at will:*]

Term

2. The term of employment shall be _____ [*any period more than one month and less than seven years*], beginning on_____[*date*].

Duties

3. (a) Employee shall report to and be under the supervision and control of Employer's Vice President for Foreign Operations.

(b) Employee shall supervise and direct the [plant *or* office] specified herein and in that capacity perform all duties incidental to that position, including supervision of employees within that [plant *or* office] and any other work that may be required of [him *or* her] in connection with the business of Employer.

Trade Secrets

4. (a) The parties acknowledge and agree that during the term of this agreement and in the course of the discharge of_____[his *or* her] duties hereunder, Employee shall have access to and become acquainted with financial, personnel, sales, scientific, technical and other information regarding formulas, patterns, compilations, programs, devices, methods, techniques, operations, plans and processes that are owned by Employer, actually or potentially used in the operation of Employer's business, or obtained from third parties under an agreement of confidentiality, and that such information constitutes Employer's "trade secrets."

(b) Employee specifically agrees that_____[he *or* she] shall not misuse, misappropriate, or disclose in writing, orally or by electronic means, any trade secrets, directly or indirectly, to any other person or use them in any way, either during the term of this agreement or at any other time thereafter, except as is required in the course of_____[his *or* her] employment.

(c) Employee acknowledges and agrees that the sale or unauthorized use or disclosure in writing, orally or by electronic means, of any of Employer's trade secrets obtained by Employee during the course of_____[his *or* her] employment under this agreement, including information concerning Employer's actual or potential work, services, or products, the facts that any such work, services, or products are planned, under consideration, or in production, as well as any descriptions thereof, constitute unfair competition. Employee promises and agrees not to engage in any unfair

competition with Employer, either during the term of this agreement or at any other time thereafter.

(d) Employee further agrees that all files, records, documents, drawings, specifications, equipment, software, and similar items whether maintained in hard copy or on line relating to Employer's business, whether prepared by Employee or others, are and shall remain exclusively the property of Employer and that they shall be removed from the premises or, if kept on-line, from the computer systems of Employer [*specify procedure, e.g., o* nly with the express prior written consent of Employer's Board of Directors].

Annual Salary

5. Employer shall pay Employee an annual salary of $_____ in United States dollars, payable [directly to Employee *or* by deposit to Employee's credit in any bank designated by Employee] in equal amounts every other Friday. If Employee desires payment of all or part of_____[his *or* her] salary in the currency of the place of employment, Employer shall make payment at the rate of exchange prevailing at the end of the day preceding the date on which payment is due.

Transportation Expenses

6. (a) Employer shall reimburse the following expenses for the transportation of Employee and Employee's spouse and minor children to the place of employment:

(1) The costs and fees associated with the acquisition of the necessary passports and visas.

(2) The cost of required immunizations.

(3) All _____ [*specify class*] airline tickets and tickets on any connecting transportation required in connection with the transportation of Employee and Employee's spouse and minor children from _____ [*specify place*] to the city of employment specified herein.

(4) All associated transportation expenses, including the cost of transporting luggage [up to $_____ (*specify maximum sum*)], the cost of meals while in transit to the place of employment, expenses while in transit for hotels, transfers, and incidentals.

(5) All customs duties imposed by the country of destination on Employee's household goods and personal effects.

(b) Upon completion of the full term specified herein, or upon the termination of this agreement by Employer for any reason other than cause, Employer shall pay all expenses of the type indicated in Paragraph 6(a) necessarily incurred in the return of Employee and Employee's spouse and minor children from the place of employment to the place where this agreement was executed.

(c) In the event that Employee terminates this contract prior to the expiration of the term set forth above, Employee shall repay a share of the costs incurred under paragraph 6(a) proportional to the share of the term still remaining and will not be entitled to the benefits set forth in Paragraph 6(b).

Tax Liability

7. Employee is subject to and liable for the payment of all applicable taxes imposed by the United States. Employer shall deduct all income tax, social security, and other taxes required by law. [Employer *or* Employee] shall be responsible for and pay all taxes imposed by the government of [*country where place of employment is located*].

Workers' Compensation

8. Employer shall maintain workers' compensation insurance required under the laws of the State of California, in addition to any similar insurance required by law in the country of assignment, in full force and effect to cover Employee during the entire term of employment under this agreement.

Vacation

9. Employee shall be entitled to the greater of the minimum legally required vacation in the country of assignment or [*specify, e.g.,* 30 days] vacation time each year with full pay. Scheduling of vacation is at the complete discretion of Employee's immediate supervisor. If Employee is unable for any reason to take the total amount of authorized vacation time during any year,_____[he *or* she] [may accrue that time and add it to vacation time for any following year *or* may receive a cash payment in an amount equal to the amount of annual salary attributable to that period *or* will not earn vacation time in any subsequent year until the earned vacation time is used *or* will accrue vacation as otherwise provided by the laws of the country of assignment].

[*For alternate vacation provisions, see § 85.340.*]

Illness

10. Employee shall be entitled to the greater of the minimum amount of sick leave mandated by the laws of the country of assignment or_____[*specify, e.g.,* _____ (*number*) days] per year as sick leave with full pay.

Business Expenses

11. Employee shall be entitled to receive, within [*number*] days after delivery to Employer of an itemized statement thereof, reimbursement for all justified and reasonable expenses incurred in connection with the performance of Employee's duties. [All itemized expense statements shall be submitted to the _____(*title of financial officer, e.g.,* Comptroller) of Employer's _____ (*name of foreign location, plant, or office, e.g.,* London office) and reimbursed to Employee in _____ (*specify whether United States dollars or local foreign currency*)].

Entire Time and Efforts

[*If allowed in the country of assignment:*]

12. During the term of this agreement, Employee shall devote_____[his *or* her] entire time and efforts to the business and affairs of Employer and do_____[his *or* her] utmost to promote its interests.

Competitive Activities

13. During the term of this agreement, Employee shall not, directly or indirectly, own, manage, operate, join, control, be employed by, or participate in the ownership, management, operation, or control of, or be connected in any manner with, any business that is competitive to the business of Employer.

Termination

14. (a) Employer may terminate this agreement and the employment hereunder for cause at any time on [*number*] days written notice to Employee.

(b) If Employee should be prevented from performing_____[his *or* her] essential job duties by reason of illness or disability for a continuous period of [*number, e.g.,* 180] days, Employer may terminate this agreement and the employment hereunder without further notice. Termination for this reason shall not be deemed for "cause" as that term is used in this contract.

(c) In the event of termination under this section, Employer's obligations to Employee under this agreement shall cease except for annual salary accrued to the date upon which termination becomes effective. [*Optional; add if this form is modified to provide for profit-sharing, bonuses, deferred compensation, or other incentive pay:* However, Employee shall be entitled to all _____ (profit-sharing *or* bonuses *or* deferred compensation *or other incentive pay*) vested in _____ (him *or* her) as of the date of termination hereunder.]

Notices

15. Any notices to be given by either party to the other shall be in writing and may be transmitted by personal delivery or by mail, registered or certified, postage prepaid with return receipt requested. Mailed notices shall be addressed to Employer at_____[*address*] and to Employee at_____[*address*], but each party may change that address by written notice in accordance with this paragraph. Notices delivered personally shall be deemed communicated as of the date of actual receipt; mailed notices shall be deemed communicated as of_____[*specify, e.g.,* the date of mailing].

Arbitration

16. (a) Any controversy between Employer and Employee involving the construction or application of any of the terms, provisions, or conditions of this agreement shall be submitted to arbitration. Arbitration shall comply with and be governed by the provisions of the California Arbitration Act.

(b) Employer and Employee shall each appoint one person to hear and determine the dispute. If the two appointed persons are unable to agree, then those persons shall select a third impartial arbitrator whose decision shall be final and conclusive on both parties.

Attorneys' Fees and Costs

17. If any [legal action *or specify more limited provision, e.g.,* legal action based in contract law] is necessary to enforce

or interpret the terms of this agreement, the prevailing party shall be entitled to reasonable attorneys' fees, costs, and necessary disbursements in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire contract.

Entire Agreement

18. This agreement supersedes any and all other agreements, either oral or in writing, between the parties hereto with respect to the employment of Employee by Employer and contains all of the covenants and agreements between the parties with respect to that employment in any manner whatsoever. Each party to this agreement acknowledges that no representation, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not embodied herein, and that no other agreement, statement, or promise not contained in this agreement shall be valid or binding on either party. Any modification of this agreement will be effective only if it is in writing and signed by the party to be charged.

Effect of Waiver

19. The failure of either party to insist on strict compliance with any of the terms, covenants, or conditions of this agreement by the other party shall not be deemed a waiver of that term, covenant, or condition, and no waiver or relinquishment of any right or power at any one time or times shall be deemed a waiver or relinquishment of that right or power for all or any other times.

Partial Invalidity

20. If any provision in this agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

Law Governing Agreement

21. This agreement shall be governed by and construed in accordance with the laws of the State of California.

Sums Due Deceased Employee

22. If Employee dies prior to the expiration of the term of_____[his *or* her] employment, any sums that may be due [him *or* her] from Employer under this agreement as of the date of death shall be paid to Employee's executors, administrators, heirs, personal representatives, successors, and assigns.

Executed on_____[*date*], at_____[*city*], California.

EMPLOYER
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]

EMPLOYEE
_____ [*signature of employee*]

[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
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28-85 California Legal Forms--Transaction Guide § 85.213

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.213 Letter Agreement for Employment of Manager

[1] Comment

[a] Use of Form

This form is a letter-style employment contract. Some employers prefer the personal tone of a letter as opposed to a formal contract style of agreement. This form contains all of the requirements for a valid employment contract: identification of the parties, term and place of employment, compensation to be paid, and description of the duties to be performed by the employee [*see Travelers Ins. Co. v. Workmen's Comp. App. Bd. (1967) 68 Cal. 2d 7, 17, 64 Cal. Rptr. 440, 434 P.2d 992]* . For further discussion of the essential and typical elements for a valid employment contract, see *§ 85.21*.

This form is designed to be executed by the employer and then mailed to the employee. Upon receipt, the employee should review the contract and, if the terms are acceptable, sign it and return the fully executed document to the employer. The employee should be provided with a copy of the contract for his or her records.

[b] Drafting Considerations

Generally, the attorney who drafts an employment agreement is retained by the employer. Most letter style agreements, like the one contained in this form, are relatively informal and do not contain much detail covering contingencies that may arise during the term of employment. Consequently, the attorney should consider including additional provisions for the protection of the employer.

It is always advisable to specify the conditions under which the employer may terminate the employment contract. This form provides for the employer's termination rights by combining the provision included in *§ 85.271* with the paragraph designating the term of employment. For further discussion, see *§ 85.271[1]*.

This form includes a provision conditioning the offer of employment on the employee's passing a drug and alcohol test. For discussion of restrictions on an employer's right to require medical and physical examinations, including drug testing, see *§ 85.490[1][c]*.

[2] FORM

Letter Agreement for Employment of Manager

LETTER EMPLOYMENT AGREEMENT
[*Letterhead of Employer*]

_____[*date*]
_____[*name of employee*]
_____[*address*]
_____[*city, state, zip*]
Dear _____:

We are pleased to make you the following offer of employment:

Title and Duties

1. We will employ you as_____[*designate, e.g.*, manager of our store in King City, California], in which capacity you will [*describe duties, e.g.*, take entire charge of the store, its stock and fixtures, employ such help as may be necessary and desirable, and supervise the sale of its merchandise, subject at all times to the directions and orders given you by our regional headquarters]. You will report to _____[*e.g.*, our Central California regional manager].

Reassignment

2. This company reserves the right, however, in its discretion to assign you to perform duties [at any other location or] that may differ in any manner whatsoever from those described above.

Compensation

3. As compensation for your services, you will be paid an annualized salary of $_____ payable in equal installments on [*e.g.*, the fifteenth and final days of each month].

[*Use one of following provisions:*]

Term

4. The term of your employment shall be for a period of [*e.g.*, two years] beginning on_____[*date*] except that this term shall continue only as long as the services rendered by you are satisfactory to this company; the President of this company shall be the sole judge of whether your services are satisfactory.

[*OR*]

Employment at Will

4. Either you or this company may terminate your employment at any time on notice to the other, with or without cause. You further agree that this company retains the right to modify, add, or eliminate any term or condition of your employment at any time on notice to you, with or without cause. The provisions of this paragraph may not be modified in any way except by a written agreement signed by the President of this company.

[*Continue:*]

Legal Right to Work

5. This offer of employment is contingent on you having a legal right to work in the United States. You will be required to provide us with proof of your legal right to work on your first day of work.

[*If appropriate, add:*]

Additional Terms and Conditions of Employment

6. Your employment will be subject to all of the applicable terms and conditions of employment set forth in full in this company's Employee Handbook, a copy of which will be provided to you with this letter. By accepting this offer of employment, you agree that the Employee Handbook is a binding part of your employment contract as if it were set forth in full in this letter.

[*Continue:*]

[*If appropriate, add following (see § 85.490[1][c]):*]

Pre-Employment Drug and Alcohol Test

7. This offer of employment is conditioned on you passing a pre-employment drug and alcohol test. By accepting this offer of employment, you consent to allow this company to collect urine and blood specimens from you, for testing for drugs, alcohol, and controlled substances. You also consent to the disclosure of the test results to appropriate management personnel of this company, and you waive any and all claims for any damages on account of such testing. Your refusal to provide the necessary urine and blood specimens shall be cause for immediate withdrawal of this offer of employment.

[*Continue:*]

Acceptance

8. If this offer of employment is acceptable to you, please sign the enclosed copy of this letter in the space provided below for your signature and return it to us in the enclosed self-addressed envelope.

Very truly yours,
[*typed name of employer*]
By: _____ [*signature*]
[*typed name and title*]
Accepted and approved:
_____ [*signature of employee*]
[*typed name*]
_____ [*date*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-85 California Legal Forms--Transaction Guide §§ 85.214-85.219

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.214[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
A. Complete Employment Contracts
3. Agreements for Employment of Nonexecutive Personnel

28-85 California Legal Forms--Transaction Guide § 85.220

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.220 Contract for Employment of Salesperson--Assigned Territory--Commission Compensation

[1] Comment

[a] Use of Form

This form is an employment contract for use in hiring a salesperson with an assigned territory who is to be compensated on a commission basis. This form represents only one of the many ways such a contract might be drafted. The attorney should carefully select the particular provisions that will best suit the needs and desires of the employer and the employee.

For a discussion of the general matters to be considered before drafting any employment contract, see *§ 85.200[1][b]*.

[b] Drafting Considerations

[i] Duties of Employee

The provision outlining the duties of a salesperson should be specific enough to inform the employee of what is expected. If it is too vague, it may be difficult, if litigation becomes necessary, to prove that the employee breached the contract. On the other hand, the contract need not spell out in precise detail everything that the employee is expected to do since the employer has the right to issue any order to an employee that will not impose a new and unreasonable burden [*see Lab. Code § 2856*]. For discussion, see *§ 85.11[1]*.

[ii] Commission Compensation

This form provides for compensation in the form of a commission expressed as a fixed percentage of the "net sales" made in the assigned territory, whether made by the employee or others [*see* Section 3.01 of Form]. If sales to certain

types of customers (*e.g.*, designated chain stores or governmental agencies) are to be excluded, the contract should state that fact. "Net sales" is defined in this form as the dollar amount of gross sales for which commissions are payable, less any returns and allowances attributable to those gross sales [*see* Section 3.02 of Form]. The attorney should make certain that the definition used is clear and unambiguous in relation to the client's business practices. This form entitles the employee to a commission when payment for the goods sold is actually received by the employer from the respective customers [*see* Section 3.03 of Form]. For a provision specifying commissions as a percentage of gross sales, see *§ 85.311*. Other provisions for commission compensation are set forth in *§§ 85.312-85.314*.

This form also gives the employee a drawing account [*see* Section 3.04 of Form]. When this is done, the contract should clearly indicate whether or not the employee, on termination of the agreement, is liable to the employer for drawing an amount in excess of earned commissions. For an alternate drawing account provision, and relevant comment, see *§ 85.312*.

[c] Property Rights of Parties and Limitations on Competitive Activity After Termination of Employment

Section 5.01 of this form prohibits the employee from using or disclosing customer names and addresses insofar as they constitute trade secrets. Limitations on competitive activity generally are prohibited under *Bus. & Prof. Code § 16600*. However, the California courts recognize a "trade secret exception" to the general rule, under which the courts will enforce a covenant not to compete to the extent necessary to protect an employer's trade secrets and confidential information [*Whyte v. Schlage Lock Co. (2002) 101 Cal. App. 4th 1443, 1462, 125 Cal. Rptr. 2d 277* ; *Muggill v. Reuben H. Donnelley Corp. (1965) 62 Cal. 2d 239, 242, 42 Cal. Rptr. 107, 398 P.2d 147* ; *Gordon v. Landau (1958) 49 Cal. 2d 690, 694, 321 P.2d 456]* . The restrictions in Section 5.01 of this form are based on misuse and nondisclosure of confidential information and are intended to qualify for the trade secret exception as recognized by California courts.

The California Supreme Court has held that a noncompetition agreement is invalid under *Bus. & Prof. Code § 16600*, even if narrowly drawn, unless expressly authorized by statute [*Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 945-950, 955, 81 Cal. Rptr. 3d 282, 288-292, 296, 189 P.3d 285* ; *see Bus. & Prof. Code §§ 16601, 16602, 16602.5* (authorizing noncompetition agreement in connection with sale of goodwill of business or dissolution of partnership or limited liability company)]. However, the Court left open the question of the applicability of a "trade secret exception" to *Bus. & Prof. Code § 16600* [*Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 946 n.4, 81 Cal. Rptr. 3d 282, 289 n.4, 189 P.3d 285* ("[W]e do not here address the applicability of the so-called trade secret exception to [*Bus. & Prof. Code § 16600*], as Edwards does not dispute that portion of his agreement or contend that the provision of the noncompetition agreement prohibiting him from recruiting Andersen's employees violated [*Bus. & Prof. Code § 16600*].")]. For more detailed discussion of the legal issues relating to limitations on competitive activity, noncompetition clauses, and protection of particular information as trade secrets, see *§§ 85.440[d], 85.471*.

[2] FORM

Contract for Employment of Salesperson--Assigned Territory--Commission Compensation

CONTRACT FOR EMPLOYMENT OF SALESPERSON

_____[*Name of employer*] ("Employer") [, a _____ (partnership *or* California corporation *or* sole proprietorship)], located at_____[*address of principal place of business*], and_____[*name of employee*] ("Employee"), of_____[*address*], in consideration of the mutual promises made herein, agree as follows:

ARTICLE 1. EMPLOYMENT

Term

Section 1.01. Employer employs Employee and Employee accepts employment with Employer [*omit following if employment is at will:* for a period of _____ (*any period more than one month and less than seven years*),] beginning on_____[*date*].

Agreement Subject to Termination

Section 1.02. This agreement may be terminated earlier as hereinafter provided [notwithstanding the provisions of Section 1.01, above].

ARTICLE 2. DUTIES OF EMPLOYEE

Employment as Salesperson

Section 2.01. Employee is hired as a salesperson and in that capacity to sell_____[*specify, e.g.:* the goods and merchandise _____(manufactured *or* distributed)] by Employer in the territory described herein to _____ [*describe customers, e.g.:* the general public *or* dealers in _____ (*describe goods or merchandise*)] exclusively.

Assignment of Territory

Section 2.02. Employee shall perform Employee's duties as a salesperson in the territory described as follows: _____ [*set forth description of territory or specify territorial boundaries*]. Employee shall not make any sales outside of the assigned territory.

Change in Assigned Territory

Section 2.03. Employer may change the territory at any time in its sole discretion.

Outside Employment

Section 2.04. Employee shall not engage in outside employment that interferes with any of the duties under this contract.

Competitive Activities

Section 2.05. During the term of this contract Employee shall not, directly or indirectly, either as an employee, employer, consultant, agent, principal, partner, stockholder, corporate officer, director, or in any other individual or representative capacity, engage or participate in any business that is in competition in any manner whatsoever with the business of the Employer.

Collections and Adjustments

Section 2.06. Employee shall assist in the collection of all sums due from persons to whom the goods and merchandise of Employer are sold and in the adjustment of any complaints or disputes that may arise in connection with any sales Employee makes.

Written Reports of Sales

Section 2.07. On the last working day of each _____ [*specify reporting period, e.g.:* week *or* month], Employee shall complete and submit to Employer a written report, on a form provided by Employer, stating _____ [*specify, e.g.,* the names and addresses of each customer and prospective customer called on by Employee, the hour and day on which those calls were made, the quantity and description of all goods ordered by each customer, the nature of any complaints made by any customer, any suggestions made by any customer as to improvements that may be made in the goods and services provided by Employer, and any other information or data that may from time to time be requested by Employer].

Adherence to Rules

Section 2.08. Employee at all times during the performance of this contract shall strictly adhere to and obey all the rules and regulations now in effect or as subsequently modified governing the conduct of employees of Employer.

Satisfactory Performance of Duties

Section 2.09. The employment of Employee shall continue only as long as the services rendered by Employee are satisfactory to Employer, notwithstanding any other provision contained in this agreement. Employer shall be the sole judge as to whether the services of Employee are satisfactory.

ARTICLE 3. COMPENSATION OF EMPLOYEE

Commissions

Section 3.01. As compensation for the services rendered by Employee under this agreement, Employee shall be entitled to a commission of _____ percent of the net sales of all goods and merchandise of Employer sold to customers in Employee's assigned territory _____ [by Employee *or* whether those sales were procured through the efforts of Employee, other employees of Employer, or Employer itself].

"Net Sales" Defined

Section 3.02. "Net sales," as used herein, shall mean the dollar amount of gross sales for which commissions are payable pursuant to Section 3.01, less any returns and allowances attributable to those gross sales.

Accrual of Commissions

Section 3.03. Commissions hereunder shall be deemed earned when payment for the goods and merchandise sold is received by Employer from the respective customers.

Payment of Commissions With Drawing Account

Section 3.04. (a) Employee shall be entitled to receive in advance the sum of $_____ per _____ [*designate pay period, e.g.:* week] as an advance on the commissions to be earned under this agreement, and the amount so advanced shall be deducted from commissions deemed to have been earned.

(b) Accrued commissions earned in excess of amounts advanced and/or advances shall be paid to Employee on _____ [*specify when, e.g.:* Friday of each week].

(c) If, upon termination of this agreement, the amount advanced exceeds the amount of commissions earned, Employee _____ [shall *or* shall not] retain the sum advanced and _____ [shall *or* shall not] be required to reimburse Employer for any amount by which those advances exceed commissions earned. [*If employee will not retain amounts advanced, add:* Employee agrees and consents that any amounts owed to Employer may be deducted from any amounts owed by Employer to Employee at termination, including commissions, expense reimbursements and accrued vacation.]

ARTICLE 4. BUSINESS EXPENSES

Travel, Entertainment, and Other Expenses

Section 4.01. It is recognized and agreed by the parties to this agreement that in connection with the services to be performed for Employer, Employee will be obliged to expend money for travel, entertainment of customers, gifts, and similar business expenses. Employee is authorized to incur reasonable business expenses for promoting the business of Employer.

Reimbursement

[*First alternative; expense account reimbursement:*]

Section 4.02. Employer shall reimburse Employee from time to time for all business expenses incurred by Employee, provided that Employee presents adequate contemporaneous documentation to Employer.

[*OR*]

[*Second alternative; use following to provide for lump sum as total periodic expense payment without adjustments:*]

Section 4.02. (a) In order to reimburse employee for all business expenses, Employer shall pay Employee the sum of $_____ per month in addition to the compensation provided for herein. This additional amount shall be paid on the last day of each month during the term of this agreement.

(b) Employer shall not be liable to Employee, except as herein provided, for the repayment of any business expenses incurred by Employee in any particular month in excess of the monthly amount paid by Employer.

(c) Employee shall present to Employer adequate contemporaneous documentation for all business expenses.

(d) If the actual business expenses incurred by Employee in any particular month are less than the sum herein agreed to be paid by Employer, Employee shall be entitled to retain that excess.

"Adequate Contemporaneous Documentation"

Section 4.03. (a) "Adequate contemporaneous documentation" includes an account book in which Employee recorded at or near the time each expenditure was made: the amount of the expenditure; the time, place, and designation of the type of the entertainment and travel or other expenses, or the date and description of the gift; the business reason for the expenditure and the nature of the business benefit derived or expected to be derived as a result of the expenditure; and the names, occupations, addresses, and other information, sufficient to establish a business relationship to Employer, concerning each person who was entertained or given a gift. Gifts made to any one individual shall not exceed a total value of $_____ [*e.g.,* $25] in any taxable year.

(b) "Adequate contemporaneous documentation" also includes documentary evidence (such as a receipt or paid bill), which states sufficient information to establish the amount, date, place, and the essential character of the expenditure, for each expenditure: of $_____ [*specify dollar amount*] or more (except for transportation charges if not readily available); and for lodging while traveling away from home. It also includes any other documentation required in the future by the Internal Revenue Service.

"Business Expenses" Defined in Employer's Rules

Section 4.04. "Business expenses" means only those expenditures specified in the rules and regulations issued by Employer now in effect or as subsequently modified, notwithstanding anything else to the contrary in this agreement. Any subsequent modification of those rules and regulations with regard to business expenses shall not be effective until _____ [*number*] days after issuance by Employer.

ARTICLE 5. PROPERTY RIGHTS OF THE PARTIES

Protection of Trade Secrets

Section 5.01. (a) The parties acknowledge and agree that during the term of this agreement and in the course of the discharge of Employee's duties hereunder, Employee shall have access to and become acquainted with financial, personnel, sales, scientific, technical and other information regarding formulas, patterns, compilations, programs, devices, methods, techniques, operations, plans and processes that are owned by Employer, actually or potentially used in the operation of Employer's business, or obtained from third parties under an agreement of confidentiality, and that such information constitutes Employer's "trade secrets."

(b) Employee specifically agrees not to misuse, misappropriate, or disclose in writing, orally or by electronic means, any trade secrets, directly or indirectly, to any other person or use them in any way, either during the term of this agreement or at any other time thereafter, except as is required in the course of Employee's employment.

(c) Employee acknowledges and agrees that the sale or unauthorized use or disclosure in writing, orally or by electronic means, of any of Employer's trade secrets obtained by Employee during the course of Employee's employment under this agreement, including information concerning Employer's actual or potential work, services, or products, the facts that any such work, services, or products are planned, under consideration, or in production, as well as any descriptions thereof, constitute unfair competition. Employee promises and agrees not to engage in any unfair competition with Employer, either during the term of this agreement or at any other time thereafter.

(d) Employee further agrees that all files, records, documents, drawings, specifications, equipment, software, and similar items whether maintained in hard copy or on line relating to Employer's business, whether prepared by Employee or others, are and shall remain exclusively the property of Employer and that they shall be removed from the premises or, if kept on-line, from the computer systems of Employer _____ [*specify procedure*, *e.g.*, only with the express prior written consent of Employer's Board of Directors].

(e) Employee acknowledges and agrees that the names and addresses of Employer's customers constitute trade secrets of Employer and that the sale or unauthorized use or disclosure of any of Employer's trade secrets obtained by Employee during Employee's employment with Employer constitutes unfair competition. Employee promises and agrees not to engage in any unfair competition with Employer.

Ownership of Customer Records

Section 5.02. (a) All records of the accounts of customers, route books, and any other records and books relating in any manner whatsoever to the customers of Employer, whether prepared by Employee or otherwise, shall be the exclusive property of Employer regardless of who actually purchased the original book or record.

(b) All such books and records shall be immediately returned to Employer by Employee on any termination of employment.

(c) If Employee purchases any record book, ledger, or similar item to be used for record keeping, Employee shall immediately notify Employer, and Employer shall then immediately reimburse Employee.

ARTICLE 6. OBLIGATIONS OF EMPLOYER

Indemnification of Losses of Employee

Section 6.01. Employer shall indemnify Employee for all necessary expenditures or losses incurred by Employee in direct consequence of the discharge of Employee's duties.

Examination of Books

Section 6.02. Employee shall have the right, either personally or by an accountant retained and paid by Employee, to examine the books and accounts of Employer, insofar as they relate to transactions affecting the amount of Employee's compensation. Employee's right to examine Employer's books and accounts shall be exercised at times mutually convenient to Employer and Employee and may be exercised at least once during each half of the calendar year.

ARTICLE 7. OBLIGATIONS OF EMPLOYEE

Employee Transportation

7.01. (a) Employee shall supply an automobile or other vehicle for use in traveling throughout Employee's designated territory and making calls on current and prospective customers. Employer shall reimburse Employee on a monthly _____ [*or specify other period*] basis at the rate of _____ cents per mile for all reasonable and necessary automobile travel expenses incurred by Employee in using Employee's automobile for travel in connection with sales calls and the discharge of Employee's other duties under this Agreement [*or substitute other reimbursement provision*].

(b) At all times during the term of this agreement, Employee shall hold and maintain in force a valid California driver's license.

Qualification for Surety Bond

Section 7.02. (a) Employee agrees to will furnish all information and take any other steps necessary to enable Employer to obtain a fidelity bond conditioned on the rendering of a true account by Employee of all moneys, goods, or other property that may come into the custody, charge, or possession of Employee during the term of employment.

(b) The surety company issuing the bond and the amount of the bond must be acceptable to Employer in the sole discretion of Employer.

(c) All premiums on the bond are to be paid by Employer.

(d) Failure by Employee to qualify for such a bond within _____ [*number*] days from the date of this agreement will result in immediate termination of this employment contract.

ARTICLE 8. TERMINATION

Events Causing Termination

Section 8.01. This agreement shall terminate immediately on the occurrence of any of the following events:

(a) The occurrence of circumstances that make it impossible or impracticable for the business of Employer to be continued.

(b) The death of Employee.

(c) The loss by Employee of legal capacity.

(d) The death of any partner in the business operated by Employer.

(e) The loss by Employer of legal capacity to contract.

(f) The willful breach of duty by Employee in the course of this employment, unless waived by Employer.

(g) The habitual neglect by Employee of Employee's employment duties, unless waived by Employer.

(h) The continued incapacity on the part of Employee to perform_____[his *or* her] duties in excess of 90 days, unless waived by Employer.

(i) The willful or permanent breach of the obligations of the Employer to Employee under this agreement, unless waived by Employee.

Effect of Garnishment

Section 8.02. The Employer shall not terminate this agreement by reason of the fact that garnishment of Employee's earnings of Employee have been threatened or by reason of the fact that Employee's earnings have been subjected to garnishment [*if power to terminate is to be subjected only to statutory minimum, add:* for one indebtedness].

Effect of Termination on Compensation

Section 8.03. Subject to any other provision of this Article, in the event of the termination of this agreement prior to the completion of the term of employment specified herein, Employee shall be entitled to the compensation earned prior to the date of termination as provided for in this agreement, computed pro rata up to and including that date. Employee shall be entitled to no further compensation as of the date of termination.

Limitation on Claims for Commissions After Termination

Section 8.04. All claims of Employee for commissions on sales, whether the sales are made by Employee or others, are waived by Employee if not made within _____ [*specify time period sufficient to allow determination of commissions earned*] from the date of the termination of Employee's employment with Employer.

[*Optional; add if this form is modified to provide for profit-sharing, bonuses, deferred compensation, or other incentive pay:*]

Effect of Termination on Particular Compensation

Section 8.05. In the event of the termination of this agreement prior to _____ [*if contract is for specified term, use:* the completion of the term of employment specified herein *or*, if contract is at will, specify, the accrual of any of the following rights], _____ [Employee shall be entitled to all _____ (profit-sharing *or* bonuses *or* deferred compensation *or* other incentive pay) vested in Employee as of the date of termination hereunder] *or* Employee shall automatically and completely forfeit any rights that Employee may have_____[*specify, e.g.,* to a Christmas bonus *or* under the bonus plan established by Employer].

ARTICLE 9. GENERAL PROVISIONS

Notices

Section 9.01. Any notices to be given by either party to the other may be effected either by personal delivery in writing

or by mail, registered or certified, postage prepaid with return receipt requested. Mailed notices shall be addressed to the parties at the addresses appearing in the introductory paragraph of this agreement, but each party may change address by written notice in accordance with this paragraph. Notices delivered personally shall be deemed communicated as of actual receipt; mailed notices shall be deemed communicated as of_____[*e.g.*, the date of mailing].

Arbitration

Section 9.02. Any controversy or claim arising out of or relating to this agreement, or the breach thereof [*optional:*, except _____ (*e.g.*, controversies involving less than $1,500)], shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment on the award rendered may be entered in any court having jurisdiction.

Attorneys' Fees and Costs

Section 9.03. If any _____ [legal action *or specify more limited provision, e.g.*, legal action based in contract law] is necessary to enforce or interpret the terms of this agreement, the prevailing party shall be entitled to reasonable attorneys' fees, costs, and necessary disbursements in addition to any other relief to which that party may be entitled. This provision shall be construed as applicable to the entire contract.

Entire Agreement

Section 9.04. This agreement supersedes any and all other agreements, either oral or in writing, between the parties with respect to the employment of Employee by Employer and contains all of the covenants and agreements between the parties with respect to that employment in any manner whatsoever. Each party to this agreement acknowledges that no representations, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not embodied herein, and that no other agreement, statement, or promise not contained in this agreement shall be valid or binding. Any modification of this agreement will be effective only if it is in writing signed by the party to be charged.

Partial Invalidity

Section 9.05. If any provision in this agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

Law Governing Agreement

Section 9.06. This agreement shall be governed by and construed in accordance with the laws of the State of California.

Payment of Sums Due Deceased Employee

Section 9.07. If Employee dies prior to the expiration of the term of employment, any moneys that may be due Employee from Employer under this agreement as of the date of death shall be paid to such person or persons as Employee may designate in a written instrument delivered to Employer, or, in default of such a designation, to

Employee's executors, administrators, heirs, personal representatives, successors, and assigns.

Executed on_____[*date*], at_____[*city*], California.

EMPLOYER
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]

EMPLOYEE
_____ [*signature of employee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
A. Complete Employment Contracts
3. Agreements for Employment of Nonexecutive Personnel

28-85 California Legal Forms--Transaction Guide § 85.221

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.221 Contract for Employment of Technical Professional--Protection of Employer's Intellectual Property

[1] Comment

[a] Use of Form

This form is a complete employment contract for a technical professional person, specifically a research and development engineer. For an agreement between a professional corporation and one of the principals of the corporation (such as a lawyer, physician, or engineer), see Ch. 12A, *Professional Corporations* .

[b] Drafting Considerations

[i] In General

This form illustrates only one of the many forms in which such a contract might be drafted. Before drafting such a contract, the attorney should be fully informed as to the general operation of the business of the employer and the nature of the work to be done by the employee. The attorney should also consider the matters the parties desire to cover in the contract so that he or she can draw up an agreement that will best suit the needs of the particular situation. Some of these can be ascertained by asking the client the questions indicated in the Client Interview [*see § 85.100*]. With the answers to these questions in hand, the attorney should tailor the agreement so that it will best fit the circumstances of the particular situation.

The Drafting Guide describes the particular provisions included in this chapter and indicates their location, either in the other complete contracts or the separate contract provisions set forth in *§§ 85.240-85.551*. In any event, the comments to the latter discuss the various legal problems involved.

For a discussion of the general matters to be considered before drafting any employment contract, see *§ 85.200[1]*.

[ii] Duties of Employee

The general duties of this type of employee should be described in broad terms. Because a technical person may also be working on his or her own time on problems unrelated to the employer's business, a provision permitting the employee to engage in certain specified other employment is included [*see* Section 2.02 of Form]. Many employment contracts provide that the employer alone can at any time change the duties to be performed by the employee; however, since technical employees have knowledge, experience, skills, and interests that are limited to particular areas, this form provides that such a change can be made only with the mutual consent of both parties [*see* Section 2.03 of Form].

For general discussion of the duties of an employee, see *§ 85.11*.

[iii] Employee Benefits

The provisions in this form for annual bonuses after two years of service [*see* Section 5.01 of Form] and for severance pay [*see* Section 4.02 of Form] are unusual but are illustrative of the special inducements that may be required for this type of employee. This form makes pension rights a specific contractual obligation [*see* Section 5.02 of Form], in contrast to the usual situation in which the pension is provided as part of the usage of the workplace (the function of an employer's rules and usages of the workplace as contract obligations is discussed in *§ 85.274[1][c]*). Again, it is made a contractual obligation because of the need to provide special inducements to technical personnel. For an alternative pension provision and relevant legal discussion, see *§ 85.323*.

[c] Contracts to Assign Employee's Work Product

This form includes a provision governing the ownership of the employee's work product and assigning all rights therein to the employer [*see* Section 7.02 of Form]. It also includes a provision governing the distribution of the royalties received by the employer from others for the use of any inventions conceived by the employee or other employees working under his or her supervision [*see* Section 7.03 of Form]; for an alternate royalty provision, see *§ 85.201*.

A provision for assignment of the rights to "inventions" developed by employees is enforceable only if the invention is made with the employer's assets, supplies, facilities, equipment, trade secret information, or time, relates to the employer's business including actual or anticipated research or development, or results from work performed for the employer by the employee [*see Lab. Code § 2870*].

If an employee uses only his or her own time, resources, and ideas, and the invention is completely unrelated to the employer's business, any provision in an employment contract requiring assignment of that invention is void [*see Lab. Code § 2870*] and may not be used [*Lab. Code § 2871*].

If an employment agreement contains a provision requiring the employee to assign or offer to assign any of his or her rights in any invention to the employer, the employer must also provide written notification to the employee that the agreement does not apply to inventions developed outside the scope defined above. The notification must be given at the time the employment agreement is made [*Lab. Code § 2872*]. Section 7.02(e) of this form states these matters in contract language. Since the statute does not expressly preclude giving the required notice in the employment contract itself, the statement in this form would appear to constitute adequate compliance with the notice requirement. However, a separate additional notice may be used if desired.

For discussion of this and other aspects of the assignment of an employee's inventions to the employer, and an alternate provision, see *§ 85.430[1]*.

[d] Competitive Activities and Disclosure of Trade Secrets

This form contains a provision prohibiting the employee from engaging in any type of direct or indirect competition with the employer during the term of the employment contract [*see* Section 7.09 of Form]. For discussion of the legal issues involved in such a provision, see *§ 85.470*.

This form also contains a provision that specifies what information is considered to be the employer's trade secrets [*see* Section 7.04 of Form] and a provision designed to protect those trade secrets and prevent the employee from disclosing them during or after his or her employment [*see* Section 7.08 of Form]. It does this by describing any unauthorized disclosure as unfair competition and requiring the employee not to engage in any acts of unfair competition. For relevant discussion, see *§ 85.440[1]*.

[2] FORM

Contract for Employment of Technical Professional--Protection of Employer's Intellectual Property

EMPLOYMENT CONTRACT

_____[*name of employer*] ("Employer") [, a _____ (California corporation *or* partnership *or* sole proprietorship)], located at_____[*address of principal place of business*], and_____[*name of employee*] ("Employee"), of_____[*address*], in consideration of the mutual promises made herein, agree as follows:

ARTICLE 1. EMPLOYMENT

Term

Section 1.01. Employer employs Employee and Employee hereby accepts employment with Employer [*omit following if employment is at will:* for a period of _____ (*any period more than one month and less than seven years*),] beginning on_____[*date*].

Agreement Subject to Termination

Section 1.02. This agreement may be terminated earlier as provided below [notwithstanding the provisions of Section 1.01, above].

ARTICLE 2. EMPLOYEE'S DUTIES

General Description

Section 2.01. (a) Employee is hired by Employer as a [*describe branch of profession, e.g.,* civil *or* mechanical *or* research and development] engineer to [*describe duties, e.g.,* research and discover, invent, develop, or improve methods, formulas, machines, and devices relating in any manner whatsoever to _____ (*specify, e.g.,* the manufacture of transistors and semiconductors *or* terminal access application systems for data processing)].

(b) Employee shall perform services at [*specify place, e.g.,* any laboratory, research facility, or manufacturing plant operated or designated by Employer].

Other Employment

Section 2.02. Employee [may *or* may not]_____[*specify nature of other employment, e.g.*, engage in any other professional activity *or* continue _____ (his *or* her) present work as a consultant for XYZ Corporation] [*if employee may engage in other activity, add:*, provided that none of it is done during normal working hours or at the place of business of Employer, and it does not interfere in any way with the performance of his duties under this contract].

Mutual Consent for Change of Duties

Section 2.03. The duties of Employee may be changed from time to time by the mutual consent of Employer and Employee without resulting in a rescission of this contract. Notwithstanding any such change, the employment of Employee shall be construed as continuing under this agreement as modified.

Indemnification for Negligence or Misconduct

Section 2.04. Employee shall indemnify and hold harmless Employer from all liability for loss, damage, or injury to persons or property resulting from the negligence or misconduct of Employee.

ARTICLE 3. OBLIGATIONS OF EMPLOYER

Office and Equipment

Section 3.01. Employer shall provide Employee with [*list specific equipment, e.g.*, ISDN line, laptop, cellular telephone], office space and administrative support suitable to Employee's position and adequate for the performance of_____[his *or* her] duties [*specify any other prerequisites, e.g.*,, and the use of an automobile, all the expenses of operation and maintenance of which are to be paid by Employer].

Indemnification of Losses of Employee

Section 3.02. Employer shall indemnify Employee for all necessary expenditures or losses incurred by Employee in direct consequence of the discharge of_____[his *or* her] duties on Employer's behalf.

ARTICLE 4. COMPENSATION OF EMPLOYEE

Section 4.01. As compensation for services rendered under this contract, Employee shall be entitled to an annualized salary of $_____, payable in equal biweekly installments of $_____ on Friday of every other week during the period of employment, prorated for any partial employment period.

Severance Pay

Section 4.02. In the event that Employee's services under this contract are terminated by Employer [*use following if contract states a specified term:* prior to the end of the employment term specified herein] for reasons other than cause against Employee, Employee shall be entitled to, as severance pay, the sum of $_____ if_____[his *or* her] services are terminated without cause in the first year of employment, $_____ if_____[his *or* her] services are terminated without cause in the second year of employment, and $_____ if_____[his *or* her] services are terminated without

cause in any year thereafter.

ARTICLE 5. EMPLOYEE BENEFITS

Bonus

Section 5.01. (a) After completion of [*number*] years of service under this contract, Employee shall be entitled to receive, in addition to_____[his *or* her] regular salary as provided above, an annual bonus in the amount of $_____, payable at the end of each employment year, for each full year thereafter that Employee remains employed with Employer under this contract.

(b) If the employment term is terminated for a reason other than cause against Employee, Employee shall be entitled to a prorated portion of_____[his *or* her] annual bonus equal to one-twelfth of the annual bonus for each month that_____[he *or* she] has been employed during the employment year (including the month in which the employment terminated).

(c) If the employment term is terminated for cause, Employee shall not be entitled to any portion of_____[his *or* her] annual bonus for that year.

Pension

Section 5.02. As additional compensation for services rendered under this agreement and after completion of [*number*] years of service to Employer, Employee shall be entitled to a pension in accordance with the pension plan and trust agreement established by Employer for the purpose of providing pensions for its employees. For this purpose, Employee shall execute, in the form provided by Employer, an agreement to enter into the pension plan.

ARTICLE 6. REIMBURSABLE EMPLOYEE EXPENSES

Moving Expenses

Section 6.01. In the event that during the term of this agreement Employee is transferred by Employer to a new principal place of work at least 50 miles farther from_____[his *or* her] residence at the time of the transfer ("current residence") than_____[his *or* her] principal place of work at the time of the transfer, Employer shall reimburse Employee for all reasonable expenses incurred for:

(1) Moving the household goods and personal effects of Employee [and Employee's spouse and minor children] from the current residence to the new place of residence.

(2) The expenses of a one-way trip, including lodging, by Employee [and Employee's spouse and minor children] from the current residence to the new place of residence.

Purchase of Employee's Home by Employer

Section 6.02. If Employee is transferred during the term of this agreement to another principal place of work that is at least [*e.g.*, 100] miles from the previous principal place of work of Employee, Employee shall have the option of selling to Employer any residence owned and occupied by Employee at that time. The sales price shall be the fair market value

of the residence as determined by an appraiser selected by Employer, less the amounts of a real estate broker's commission and other costs of sale customarily paid by sellers of residences of like value in the area where the residence is located. This appraisal shall be made within [*e.g.*, 15 days] after the date Employee is notified of the transfer. After Employee is notified of the sales price and the amounts to be deducted for commission and costs, Employee shall have [*e.g.*, 10 days] to decide whether to exercise this option to sell. The net sales price shall be paid to Employee in full in cash by Employer within [*specify reasonable time to permit employer to obtain financing, e.g.*, 30 days] after Employer is notified that Employee is exercising this option to sell. Repayment in Event of Early Resignation

Section 6.03. If Employee resigns_____[his *or* her] employment prior to the end of the term of this contract, Employee shall be required to repay to Employer that amount of moving expenses equal to the percentage of the contract term remaining.

ARTICLE 7. PROPERTY RIGHTS OF THE PARTIES

Disclosure of Inventions and Discoveries

Section 7.01. (a) Employee promises and agrees that_____[he *or* she] will promptly and fully inform Employer of and disclose to Employer all inventions, designs, improvements, discoveries, developments, formulas, patterns, devices, processes, software programs, technical data, customer and supplier lists, and compilations of information, records, and specifications, and other matters constituting trade secrets as defined under *California Civ. Code Section 3426.1*, that_____[he *or* she] makes during the term of this agreement, whether individually or jointly in collaboration with others [, and that pertain or relate to the actual or potential business of Employer or to any experimental work carried on by Employer], whether or not conceived during regular working hours.

(b) Employee shall make full disclosure to Employer immediately after creating or making any of the items described in (a), above, and shall thereafter keep Employer fully informed at all times of all progress in connection therewith.

Ownership of Work Product

Section 7.02. (a) Employee agrees that any and all intellectual properties, including, but not limited to, all inventions, designs, improvements, discoveries, developments, formulas, patterns, devices, processes, software programs, technical data, customer and supplier lists, and compilations of information, records, and specifications, and other matters constituting trade secrets as defined under *California Civ. Code § 3426.1*, that are conceived, developed, or written by Employee, either individually or jointly in collaboration with others, pursuant to this agreement, shall belong to and be the sole and exclusive property of Employer.

(b) Employee further agrees to submit any dispute regarding whether any such intellectual property was conceived, developed, or written pursuant to this agreement to a review process pursuant to Employer's rules and policies.

(c) Employee agrees that all rights in all intellectual properties prepared by [him *or* her] pursuant to this agreement, including patent rights and copyrights applicable to any of the intellectual properties described in Section 7.02(a) *above*, shall belong exclusively to Employer, shall constitute "works made for hire," and shall be assigned promptly by Employee to Employer. Employee further agrees to assist Employer in obtaining patents on all such inventions, designs, improvements, and discoveries that are patentable or copyright registration on all such works of creation that are copyrightable, and shall execute all documents and do all things necessary to obtain patent or copyright registration, vest Employer with full and exclusive title, and protect against infringement by others.

(d) This Section shall not apply to intellectual properties or rights therein derived from Employee's activities or employment prior to the time_____[he *or* she] entered into an employer-employee relationship with Employer ("preexisting rights"). Employer agrees that those preexisting rights are and shall continue to be the exclusive property of Employee and disclaims any claim of rights of any nature whatsoever thereto. [*If appropriate, add:* A schedule of these preexisting intellectual properties or rights is attached to this agreement.]

(e) This Section shall not apply to assign to Employer any of Employee's rights in any invention that Employee develops entirely on his or her own time without using Employer's equipment, supplies, facilities, or trade secret information, except for inventions that either (1) relate, at the time that the invention is conceived or reduced to practice, to Employer's business or to actual or demonstrably anticipated research or development of Employer; or (2) result from any work performed by Employee for Employer.

[*Optional; use following provision if employee compensation is to include part of royalties on properties conceived by employee:*]

Distribution of Royalties

Section 7.03. (a) If Employer licenses others to use any of the intellectual properties to which Section 7.02 is applicable, Employer shall pay to Employee a portion of the money royalties received as follows: [*set forth schedule, e.g.:* Of the first $2,000 or any part thereof received in any one calendar year, _____ (*e.g.,* 40 percent); of the next $2,000 or any part thereof received in any one calendar year, _____ (*e.g., 3* 0 percent); and of all further sums collected in any one calendar year, _____ (*e.g.,* 20 percent)].

(b) All questions of whether, when, how, and to whom licenses are to be granted shall be determined in the sole discretion of Employer.

[*Continue with the following:*]

Confidentiality of Trade Secret Data

Section 7.04. (a) Employee agrees that all information communicated to [him *or* her] with respect to the work conducted by or for Employer, whether or not that information was directly or intentionally communicated, is confidential. Employee also agrees that all information, conclusions, recommendations, reports, advice, or other documents generated by Employee pursuant to this agreement, whether maintained in hard copy or in an electronic medium, is confidential. Employee further acknowledges and agrees that all confidential data described herein is and constitutes trade secret information that belongs wholly to and is the exclusive property of Employer.

(b) Employee promises and agrees that_____[he *or* she] shall not disclose any confidential information of Employer or any third party, as long as that information is subject to a Confidential Disclosure Agreement, to any other person, orally, in writing or via electronic communication, unless specifically authorized in writing by Employer to do so. If Employer gives Employee written authorization to make any disclosures, Employee shall do so only within the limits and to the extent of that authorization.

(c) Employee shall use_____[his *or* her] best efforts to prevent inadvertent disclosure of any confidential information to any third party by using the same care and discretion that_____[he *or* she] uses with similar data_____[he *or* she] designates as confidential.

(d) Employee acknowledges and agrees that all information concerning the work conducted by Employer and any potential products of Employer is and constitutes an exceptionally valuable trade secret of Employer. That information includes, among other matters, the facts that any particular work or project is planned, under consideration, or in production, as well as any descriptions of any existing, pending, or proposed work.

Use and Disclosure of Confidential Data

Section 7.05. Employee shall not use any confidential information or circulate it to any other person or persons, except when specifically authorized in advance by Employer and then only to the extent necessary for any of the following:

(a) Conducting negotiations, discussions, and/or consultations with designated Employer representatives.

(b) Supplying Employer with goods or services at its order.

(c) Preparing confidential estimates, bids or proposals, and invitations for bids or requests for proposals for submission to Employer.

(d) Accomplishing any purpose Employer may later specify in writing.

Copies of Confidential Information

Section 7.06. Employee agrees that copying of confidential information shall be done only in accordance with Employer's policy on handling and reproducing confidential information as set forth in Employer's "Employee Manual," a copy of which has been provided to Employee. Employee further agrees that copies of confidential information shall be treated with the same degree of confidentiality as the original information and shall be subject to the restrictions *set forth in Section 7.05* of this agreement.

Return of Materials

Section 7.07. Employee shall return to Employer, promptly at Employer's request, all confidential materials. Any materials the return of which is specifically requested shall be returned promptly at the conclusion of the work on, or consideration of work on, the project to which the materials relate.

Unfair Competition

Section 7.08. Employee acknowledges and agrees that the sale or unauthorized use or disclosure, orally, in writing, or via electronic medium, of any of Employer's confidential information obtained by Employee during the course of_____[his *or* her] employment under this agreement, including information concerning Employer's current or any future and proposed work, services, or products, the facts that any such work, services, or products are planned, under consideration, or in production, as well as any descriptions thereof, constitute unfair competition. Employee promises and agrees not to engage in any unfair competition with Employer at any time, whether during or following the completion of_____[his *or* her] employment with Employer.

Competitive Activities During Employment

Section 7.09. Employee promises and agrees that during the term of this Agreement,_____[he *or* she] shall not, directly or indirectly, either as an employee, employer, consultant, agent, principal, partner, stockholder, corporate officer, director, or in any other individual or representative capacity, engage or participate in any competitive activity relating to the subject matter of_____[his *or* her] employment with Employer.

ARTICLE 8. TERMINATION OF EMPLOYMENT

Termination by Employer

Section 8.01. This agreement may be terminated by Employer for cause by giving [*specify number*] days written notice of termination to Employee. Termination pursuant to this Section shall not prejudice any remedy that Employer may have either at law, in equity, or under this agreement.

Effect of Employer's Merger, Transfer of Assets, or Dissolution

Section 8.02. (a) This agreement shall not be terminated by any merger or consolidation in which Employer is not the consolidated or surviving corporation, by the transfer of all or substantially all of the assets of Employer, or by the voluntary or involuntary dissolution of Employer.

(b) In the event of any merger or consolidation or transfer of assets, the surviving or resulting corporation or the transferee of Employer's assets shall be bound by and shall have the benefit of the provisions of this agreement. Employer shall take all actions necessary to insure that such a corporation or transferee is bound by the provisions of this agreement.

Effect of Termination on Compensation

Section 8.03. In the event of the termination of this agreement [*use following if contract states a specified term:* prior to the completion of the term of employment specified herein], Employee shall be entitled to the compensation earned prior to the date of termination as provided for in this agreement computed pro rata up to and including that date. Employee shall also be entitled to the benefits provided for in Article Five of this agreement computed pro rata up to and including that date.

ARTICLE 9. GENERAL PROVISIONS

Notices

Section 9.01. Any notices to be given by either party to the other may be effected either by personal delivery in writing or by mail, registered or certified, postage prepaid with return receipt requested. Mailed notices shall be addressed to the parties at the addresses appearing in the introductory paragraph of this agreement, but each party may change address by written notice in accordance with this section. Notices delivered personally shall be deemed communicated as of the date of actual receipt; mailed notices shall be deemed communicated as of_____[*e.g.*, the date on which they are mailed].

Entire Agreement

Section 9.02. (a) This agreement supersedes any and all other agreements, either oral or in writing, between the parties

with respect to the employment of Employee by Employer, and contains all of the covenants and agreements between the parties with respect to that employment in any manner whatsoever.

(b) Each party to this agreement acknowledges that no representations, inducements, promises, or agreements, orally or otherwise, other than those set forth herein, have been made by any party, or anyone acting on behalf of any party, and that no other agreement, statement, or promise not contained in this agreement shall be valid or binding.

(c) Any modification of this agreement will be effective only if it is in writing signed by the party to be charged.

Attorneys' Fees and Costs

Section 9.03. If any [legal action *or specify more limited provision, e.g.*, legal action based in contract law] is necessary to enforce or interpret the terms of this agreement, the prevailing party shall be entitled to reasonable attorneys' fees, costs, and necessary disbursements in addition to any other relief to which_____[he *or* she] may be entitled. This provision shall be construed as applicable to the entire contract.

Partial Invalidity

Section 9.04. If any provision in this agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

Law Governing Agreement

Section 9.05. This agreement shall be governed by and construed in accordance with the laws of the State of California.

Payment of Moneys Due Deceased Employee

Section 9.06. If Employee dies prior to the expiration of the term of employment, any moneys that may be due from Employer under this agreement as of the date of Employee's death shall be paid to Employee's executors, administrators, heirs, personal representatives, successors, and assigns.

Executed on_____[*date*], at_____[*city*], California.

EMPLOYER
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]
EMPLOYEE
_____ [*signature of employee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions &

TermsGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
A. Complete Employment Contracts
3. Agreements for Employment of Nonexecutive Personnel

28-85 California Legal Forms--Transaction Guide § 85.222

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.222 Employment Contract Between Computer Software Publisher and Programmer

[1] Comment

[a] Use of Form

This form is a complete employment contract between a software publisher and a programmer. Computers, which are either sold or leased by the manufacturers, are referred to as "hardware." "Software" is the term used to describe the programs or electronic instructions that tell the hardware what to do or how to perform the tasks the software is designed to perform. For further discussion of these terms, see Ch. 57, *Computer-Related Transactions* .

A software publisher either provides systems analyses, programming, application design and development, installation evaluation, and the like to the owner or lessee of larger computers or publishes and "sells" (licenses) software to the general public for use on personal or professional computers. In the former case, the work involved may be performed at the offices of the publisher or the customer or both; in the latter, the work will be performed at the publisher's premises.

[b] Drafting Considerations in General

This form represents one of the many ways of drafting an agreement for the employment of a computer programmer. In preparing such an agreement, the attorney should carefully consider the needs of the firm or the desires of the programmer and the matters the parties desire to cover in the contract. Some of these can be ascertained by asking the client the questions indicated in the Client Interview [*see § 85.100*]. With the answers to these questions in hand, the attorney should consult the Drafting Guide set forth in *§ 85.120* and tailor the agreement so that it will best fit the circumstances of the particular situation.

The Drafting Guide describes the particular provisions included in this chapter and indicates their location, either in the

other complete contracts or the separate contract provisions set forth in *§§ 85.240-85.551*. In any event, the comments to the latter discuss the various legal problems involved.

For a discussion of the general matters to be considered before drafting any employment contract, see *§ 85.200[1]*. For a software design study or consultation agreement, plus agreements between a software developer, acting as an independent contractor, and an end-user of the software to be produced, see Ch. 57, *Computer-Related Transactions* .

[c] Compensation of Employee

This agreement provides that the employee is salaried. This means that the employer is exempt from statutory requirements for higher overtime pay [for discussion, *see § 85.290[1]*]. If it is anticipated that a programmer, or any other type of employee who is salaried but not highly salaried, may have to work overtime, it is suggested, so that there will be no misunderstanding, that the employment contract provide whether overtime compensation will be paid and, if so, how much. This form specifically provides for an increased rate of compensation for overtime work [*see* Section 3.02 of Form]; however, it need be included only if the parties have agreed that the basic salary provision must be supplemented in this manner. Generally, this sort of employee is rewarded for extraordinary effort and long hours by the payment of completion and project bonuses. For relevant discussion, see *§ 85.291[1]*.

This form includes a provision adjusting the employee's compensation quarterly to reflect the increase, if any, of the cost of living [*see* Section 3.03 of Form]. It is a typical cost of living provision sometimes used in employment contracts. For relevant discussion, see *§ 85.301[1]*.

[d] Contracts to Assign Employee's Work Product

This form includes a provision governing the ownership of the employee's work product and assigning all rights therein to the employer [*see* Section 4.02 of Form]. It also includes a provision governing the distribution of the royalties received by the employer from others for the use of any inventions conceived by the employee or other employees working under his or her supervision [*see* Section 4.03 of Form]; for alternate royalties provisions, see *§ 85.431*.

The Labor Code makes any provision for assignment of the rights to an "invention" developed by an employee enforceable only if the invention is made with the employer's assets, supplies, facilities, equipment, trade secret information, or time, relates to the employer's business including actual or anticipated research or development of the employer, or results from work performed for the employer by the employee [*see Lab. Code § 2870*]. While the work of a computer programmer may not result in an "invention," that term is subject to judicial interpretation and could be construed to include computer program designs or discoveries. Thus, Section 4.02 of this form is drafted to comply with the Labor Code restrictions, including the further limitation that if an employee uses only his or her own time, resources, and ideas, and the invention is completely unrelated to the employer's business, any provision in an employment contract requiring assignment of that invention is void [*see Lab. Code § 2870*] and may not be used [*Lab. Code § 2871*].

If an employment agreement contains a provision requiring the employee to assign or offer to assign any of his or her rights in any invention to the employer, the employer must also give the employee written notification that the agreement does not apply to inventions developed outside the scope defined above. The notification must be given at the time the employment agreement is made [*Lab. Code § 2872*]. The basic information that must be included in that notice appears in Section 4.02(e) of the form. Since the statute does not expressly preclude giving the required notice in the employment contract itself, Section 4.02(e) would appear to constitute adequate compliance with the notice requirement. However, a separate additional notice or schedule may be used if desired.

For discussion of this and other aspects of the assignment of an employee's inventions to the employer, and an alternate provision, see *§ 85.430[1]*.

[e] Competitive Activities and Disclosure of Trade Secrets

This form contains a provision prohibiting the employee from participating in any business that is in competition with the business of the employer [*see* Section 5.02 of Form]. For discussion of the legal issues involved in such a provision, see *§ 85.470*.

This form also contains a provision designed to protect the employer's trade secrets and prevent the employee from disclosing them during or after the employment [*see* Section 5.01 of Form]. It does this by describing any unauthorized disclosure as unfair competition and requiring the employee not to engage in any acts of unfair competition. For relevant discussion, see *§ 85.440[1]*.

[2] FORM

Employment Contract Between Computer Software Publisher and Programmer

EMPLOYMENT CONTRACT

AGREEMENT made this _____ day of_____[*date*] between [*name of employer, e.g.*, Basic Data Processing Service, Inc., a California corporation] ("Employer"), having a principal place of business at_____[*address*], and_____[*name of employee*] ("Employee"), of_____[*address*]:

ARTICLE 1. EMPLOYMENT

Term

Section 1.01. The Employer employs Employee and Employee accepts employment with Employer for a period of_____[*omit following if employment is at will:* for a period of _____ (*any period more than one month and less than seven years*),] beginning on_____[*date*].

Agreement Subject to Termination

Section 1.02. This agreement may be terminated earlier as hereinafter provided [notwithstanding the provisions of Section 1.01, above].

ARTICLE 2. DUTIES OF EMPLOYEE

Basic Duties

Section 2.01. (a) Employee is hired as a computer programmer. Acting in that capacity, Employee shall [*describe duties, e.g.*, design and create source and application code versions of computer programs for use by Employer's customers]. [*Add if employee is also to work directly with employer's clients:* Employee shall also assist Employer's customers in conjunction with the installation and subsequent evaluation and any necessary modification of any computer programs _____ (he *or* she) has produced pursuant to this agreement].

(b) Employee shall also write or assist other employees in the writing of manuals and other documentation describing the use and/or function of any computer programs upon which_____[he *or* she] works under this agreement.

(c) In performing_____[his *or* her] basic duties, Employee shall work at_____[*specify place, e.g.*, home *or* the main office of Employer located at _____ (*address*) *or* at the offices of customers of Employer, and at such other place or places as may be directed by Employer] under the supervision and control of Employer at all times.

Other Duties of Employee

Section 2.02. In addition to the foregoing duties, Employee shall do such other work as may be assigned to [him *or* her], subject to the instructions, directions, and control of Employer at all times.

Outside Employment

Section 2.03. Employee shall not directly or indirectly render any services of a business, commercial, or professional nature to any other person or organization, whether for compensation or otherwise, that interferes with the performance of the duties under this contract.

ARTICLE 3. COMPENSATION

Basic Salary

Section 3.01. Employee shall receive an annualized salary of $_____, payable in equal biweekly installments on every other Friday during the calendar year and prorated for any partial employment period.

Additional Compensation

Section 3.02. Whenever Employee is called upon to work more than forty hours during a workweek or on Saturday or Sunday in order to complete a project,_____[he *or* she] shall be entitled to additional compensation at the rate of $_____ per hour for hours in excess of forty or Saturdays, whether or not those hours exceed the 40, and $_____ per hour for time worked on Sundays and holidays.

Cost of Living Adjustment

Section 3.03. (a) The basic salary provided herein shall be adjusted annually to reflect the increase, if any, in the cost of living by adding to the then current basic salary an amount obtained by multiplying the then current basic salary by the percentage by which the level of the Consumer Price Index for the [*specify statistical reporting area, e.g.*, San Francisco-Oakland Metropolitan Area], as reported for the last day of that quarterly period by the Bureau of Labor Statistics of the United States Department of Labor, has increased over its level on the date this agreement commenced for the first such adjustment or over its level as of the date of each subsequent adjustment.

(b) Following the end of each year, and within 10 days after the release by the Bureau of Labor Statistics of the figures for that year, Employer shall pay to Employee the amount of additional compensation to which_____[he *or* she] is entitled on account of the adjustment made to_____[his *or* her] salary pursuant to this paragraph.

Vacation and Sick Pay

Section 3.04. After the completion of six months of service in the employ of Employer, Employee shall be entitled to an annual paid vacation of two weeks with full pay. Vacation shall be taken at a time selected by Employee and approved by Employer. In addition, Employee shall be entitled to six days per year as sick leave with pay. Neither vacation time nor sick leave may be accumulated, and, if not used during the year in which it is granted, it shall be deemed to have been waived by Employee.

ARTICLE 4. PROPERTY RIGHTS OF THE PARTIES

Disclosure of Creations, Designs, and Improvements

Section 4.01. Employee promises and agrees that_____[he *or* she] will promptly and fully inform and disclose to Employer all computer program designs, creations, improvements, and discoveries that_____[he *or* she] makes during the term of this agreement that pertain or relate to the business of Employer or to any experimental work carried on by Employer, whether conceived by Employee alone or with others and whether or not conceived during regular working hours.

Ownership of Work Product

Section 4.02. (a) Employee agrees that any and all intellectual properties, including, but not limited to, all ideas, concepts, themes, inventions, designs, improvements, and discoveries conceived, developed, or written by Employee, either individually or jointly in collaboration with others, pursuant to this agreement, shall belong to and be the sole and exclusive property of Employer.

(b) Employee further agrees to submit any dispute as to whether any intellectual property was conceived, developed, or written pursuant to this agreement to a review process pursuant to Employer's rules and policies.

(c) Employee agrees that all rights in all intellectual properties prepared by [him *or* her] pursuant to this agreement, including patent rights and copyrights applicable to any of the intellectual properties described in Section 4.02(a) above, shall belong exclusively to Employer, shall constitute "works made for hire," and shall be assigned promptly by Employee to Employer.

(d) Employee further agrees to assist Employer in obtaining patents on all inventions, designs, improvements, and discoveries that are patentable or copyright registration on all works of creation that are copyrightable, and to execute all documents and do all things necessary to vest Employer with full and exclusive title and protect against infringement by others.

(e) This section shall not apply to intellectual properties or rights therein derived from Employee's activities or employment prior to the time_____[he *or* she] entered into an employer-employee relationship with Employer ("preexisting rights"). Employer agrees that those preexisting rights are and shall continue to be the exclusive property of Employee and disclaims any claim of rights of any nature whatsoever thereto.

(f) This Section shall not apply to assign to Employer any of Employee's rights in any invention that Employee develops entirely on his or her own time without using Employer's equipment, supplies, facilities, or trade secret information, except for inventions that either (1) relate, at the time that the invention is conceived or reduced to practice, to Employer's business or to actual or demonstrably anticipated research or development of Employer; or (2) result from any work performed by Employee for Employer.

[*Optional; use following provision if employee compensation is to include part of royalties on properties conceived by employee:*]

Distribution of Royalties

Section 4.03. (a) If Employer licenses others to use any of the intellectual properties to which Section 4.02 is applicable, Employer shall pay to Employee a portion of the money royalties received as follows: [*set forth schedule, e.g.:* Of the first $2,000 or any part thereof received in any one calendar year, _____ (*e.g.*, 40 percent); of the next $2,000 or any part thereof received in any one calendar year, _____ (*e.g.*, 30 percent); and of all further sums collected in any one calendar year, _____ (*e.g.*, 20 percent)].

(b) All questions of whether, when, how, and to whom licenses are to be granted shall be determined in the sole discretion of Employer.

[*Continue with the following:*]

Trade Secrets of Employer

Section 4.04. Employee during the term of employment under this agreement will have access to and become acquainted with various trade secrets, consisting of devices, secret inventions, computer programs, processes, and compilations of information, records, and specifications that are owned by Employer and that are regularly used in the operation of the business of Employer. Employee shall not disclose orally, in writing or via electronic medium, any of these trade secrets, directly or indirectly, or use them in any way, either during the term of this agreement or at any time thereafter, except as required in the course of this employment. All files, records, documents, drawings, specifications, equipment, and similar items relating to the business or potential business of Employer, whether prepared by Employee or otherwise coming into_____[his *or* her] possession, shall remain the exclusive property of Employer and shall not be removed physically or electronically from the premises where the work of Employer is being carried on without the prior written consent of Employer.

Confidential Data of Customers of Employer

Section 4.05. In the course of the duties described herein, Employee will be handling financial, accounting, statistical, and personnel data of customers of Employer. All such data is confidential and shall not be disclosed, directly or indirectly, or used by Employee in any way, either during the term of this agreement or at any time thereafter, except as required in the course of this employment.

ARTICLE 5. OBLIGATIONS OF EMPLOYEE

Unfair Competition

Section 5.01. Employee acknowledges and agrees that the sale or unauthorized use or disclosure of any of Employer's trade secrets obtained by Employee during the course of_____[his *or* her] employment under this agreement, including information concerning Employer's current or any future and proposed work, services, or products, the facts that any such work, services, or products are planned, under consideration, or in production, as well as any descriptions thereof, and information provided by third parties pursuant to any Confidential Disclosure

Agreement, constitute unfair competition. Employee promises and agrees not to engage in any unfair competition with Employer at any time, whether during or following the completion of_____[his *or* her] employment with Employer.

Competitive Activities During Employment

Section 5.02. During the term of this contract Employee shall not, directly or indirectly, either as an employee, employer, consultant, agent, principal, partner, stockholder, corporate officer, director, or in any other individual or representative capacity, engage or participate in any business that is in competition in any manner whatsoever with the business of Employer.

Indemnification

Section 5.03. Employee shall indemnify and hold Employer harmless from all liability from loss, damage, or injury to persons or property resulting from the negligence or misconduct of Employee.

ARTICLE 6. TERMINATION OF EMPLOYMENT

Termination by Employer for Cause

Section 6.01. If Employee willfully breaches or habitually neglects the duties which_____[he *or* she] is required to perform under the terms of this agreement, Employer may at its option terminate this agreement by giving written notice of termination to Employee without prejudice to any other remedy to which Employer may be entitled either at law, in equity, or under this agreement.

Termination of Agreement on Discontinuance of Business

Section 6.02. If Employer ceases the operation of all its business, this agreement shall terminate as of the effective date that operations cease.

Effect of Termination on Compensation

Section 6.03. In the event of the termination of this agreement [prior to the completion of the term of employment specified herein], Employee shall be entitled to the compensation earned by and vested in [him *or* her] prior to the date of termination as provided for in this agreement, computed pro rata up to and including that date. Employee shall be entitled to no further compensation as of the date of termination.

ARTICLE 7. GENERAL PROVISIONS

Notices

Section 7.01. Any notices to be given by either party to the other may be effected either by personal delivery in writing, or by mail, registered or certified, postage prepaid with return receipt requested. Mailed notices shall be addressed to Employee at_____[*address*] or to Employer at_____[*address*], but each party may change address by written notice in accordance with this section. Notices delivered personally shall be deemed

communicated as of the date of actual receipt; mailed notices shall be deemed communicated as of the date of mailing.

Entire Agreement

Section 7.02. This agreement supersedes any and all other agreements, either oral or in writing, between the parties with respect to the employment of Employee by Employer, and contains all of the covenants and agreements between the parties with respect to that employment in any manner whatsoever. Each party to this agreement acknowledges that no representations, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not embodied herein, and that no other agreement, statement, or promise not contained in this agreement shall be valid or binding. Any modification of this agreement will be effective only if it is in writing signed by the party to be charged.

Attorneys' Fees and Costs

Section 7.03. If any [legal action *or specify more limited provision, e.g.,* legal action based in contract law] is necessary to enforce or interpret the terms of this agreement, the prevailing party shall be entitled to reasonable attorney's fees, costs, and necessary disbursements in addition to any other relief to which_____[he *or* she] may be entitled. This provision shall be construed as applicable to the entire contract.

Partial Invalidity

Section 7.04. If any provision in this agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall nevertheless continue in full force without being impaired or invalidated in any way.

Law Governing Agreement

Section 7.05. This agreement shall be governed by and construed in accordance with the laws of the State of California.

Sums Due Deceased Employee

Section 7.06. If Employee dies prior to expiration of the term of employment, any sums that may be due [him *or* her] from Employer under this agreement as of the date of death shall be paid to Employee's executors, administrators, heirs, personal representatives, successors, and assigns.

Executed on_____[*date*], at_____[*city*], California.

EMPLOYER
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]
EMPLOYEE
_____ [*signature of employee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
A. Complete Employment Contracts
3. Agreements for Employment of Nonexecutive Personnel

28-85 California Legal Forms--Transaction Guide § 85.223

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.223 Employment Contract Between Temporary Help Agency and Employee of Agency

[1] Comment

[a] Use of Form

This form is a contract between a firm that specializes in furnishing temporary workers to others (that is, a "temporary help agency") and the temporary worker. Under this type of agreement, the temporary worker is the employee of the agency and it is the agency that receives the wage paid for the worker's efforts and pays the worker a lesser sum for those efforts.

A temporary help agency is an employment agency since it offers to (and does) procure employment for individuals [*see Civ. Code § 1812.501(a)(1)*]. Employment agencies must comply with the requirements of the Employment Agency, Employment Counseling, and Job Listing Services Act [*see Civ. Code §§ 1812.500-1812.533*]. An employment agency must give an employee or job seeker a written contract containing certain specified disclosures and, if applicable, a fee schedule [*see Civ. Code §§ 1812.504, 1812.505*]. The contract in this form complies with the minimum disclosure requirements. For further discussion of the Act and the required contract provisions contained in this form, see Ch. 92, *Service Contracts* .

[b] Drafting Considerations

This form represents one of the many methods by which this type of a contract might be drafted. Before drafting this contract, the attorney should be fully informed as to the matters the agency desires to cover in the contract so that he or she can draw up an agreement that will best suit the client's needs. Some of these can be ascertained by asking the client the questions indicated in the Client Interview [*see § 85.100*]. With the answers to these questions, the attorney should consult the Drafting Guide contained § 85.120 and tailor the agreement so that it will best fit the particular situation. Except for the provisions required under the Employment Agency, Employment Counseling, and Job Listing Services

Act, the Drafting Guide describes the provisions included in this chapter and indicates their location, either in the other complete contracts or the separate contract provisions contained in §§ 85.240-85.551. In any event, the comments to the latter discuss the various legal problems involved.

When a temporary agency is providing workers into a high-tech environment, additional provisions regarding confidentiality, use of computer systems, security clearance, and building access may be required by the customer. Accordingly, the agency may need to modify its contract with its employees to reflect those requirements. In that case the agency should work with its customer to ensure that its contract adequately meets its client's needs.

For a discussion of the general matters to be considered before drafting any employment contract, see *§ 85.200[1]*.

[2] FORM

Employment Contract Between Temporary Help Agency and Employee of Agency

EMPLOYMENT OF WORKER BY TEMPORARY HELP AGENCY
_____[*name of agency*]
_____[*address*]
_____[*city, state, zip*]
[*telephone number*]
Date: _____
Contract Number: _____

_____[*name of temporary help agency*] (Employer), located at_____[*principal address*] and_____[*name of employee*] (Employee),_____[*address*], in consideration of the promises made herein, agree as follows:

Recitals

Employer engages in the business of furnishing temporary help in [*specify types of occupations, e.g.,* industrial, office, health care, and domestic] occupations. As part of its business,_____[*describe mode of operation, e.g.,* Employer shall assign Employee to work for one of its customers on a full-time basis, for a period of time not to exceed _____ [months], receive payment for that work from its customer and pay Employee for that work pursuant to the terms of this agreement].

Conditions of Employment

1. Employment of the type specified in Paragraph 3 is offered to Employee on the following conditions and for the specified compensation:

(a) Hours per day: _____.

(b) Rate of wages: $_____ per _____ [hour *or* day].

(c) Additional Benefits:
(1) Health benefits: _____ [*describe benefits*].

(2) Vacation time: _____ [*specify*].

(3) Other benefits: _____ [*specify*].

(d) (1) Fee required from Employee: $_____. If Employee is required to pay a fee for any employment accepted under the terms of this Agreement, on termination of employment that fee must not exceed Employee's gross earnings in that employment.

(2) Amount of fee, if any, paid by customer: $_____. Name of person paying fee: _____.

(3) Amount of fee, if any, advanced by customer: $_____. Name of person advancing fee: _____.

(e) Additional terms of employment: _____.

Job Order Information

2. The job order on which Employee's employment is based is as follows:

(a) Job order made by:_____[*name of person requesting help*] of_____[*address*].

(b) Number and date of order: _____.

(c) Method of transmission: [*specify, e.g.*, phone, messenger, etc.].

Duties

3. Employee's duties shall include [*describe duties*] together with all other duties that are commonly associated with the position of [*specify job title*] or that may be assigned orally or in writing by [Employer *or* Customer]. Employee shall report to:_____[*name of supervisor at customer's premises*] at_____[*address*].

[*Add, if appropriate (see Civ. Code § 1812.509(b)):*]

A labor contract is in force at the customer's establishment and union membership [is *or* is not] required.

Outside Employment

4. Employee agrees not to engage in outside employment that interferes in any way with the performance of_____[his *or* her] duties under this contract.

Termination

5. (a) Employee understands and agrees that Employer may terminate this agreement and_____[his *or* her] employment for cause at any time without notice. "Cause" shall mean and include any request by the customer that the Employee be removed from the assignment, breach of this agreement, violation of any law, dishonesty,

insubordination, gross misconduct, or aiding a competitor during the term of this agreement.

(b) Either party may terminate this agreement and the employment relationship between them: at any time without notice during the first [*specify period, e.g.,* 60] days of the employment contemplated under this agreement; on [*specify period, e.g.,* seven days] prior notice during the next [*specify period, e.g.,* ten months]; and on [*specify period, e.g.,* 14 days] prior notice after the first full year of employment.

(c) Employer may satisfy these notice requirements by distributing pay to Employee in lieu of notice, in which case the date of payment shall be the date on which termination of employment shall be effective.

(d) On termination of_____[his *or* her] employment by Employer for any reason, Employee shall only be entitled to any bonus, commission, or incentive earnings provided for herein that are due as of the date of Employer's notice of termination.

[*If temporary help agency is any agency other than a domestic agency operating as a registry:*]

(e) Unless terminated in accordance with the above provisions, this Agreement shall expire on [*specify date not later than 180 days from referral or signing of contract, whichever is first* (*see Civ. Code § 1812.504(a)(9)*; *see also Civ. Code § 1812.504(e)* ("domestic agency operating as a registry" defined))].

[*Or, if temporary help agency is a domestic agency operating as a registry:*]

(e) Unless terminated in accordance with the above provisions, this Agreement shall be ongoing, subject to termination by written notice by either the Employee or the Employer.

[*Continue with the following:*]

Competitive Activities

6. (a) Employee agrees that during the term of this agreement_____[he *or* she] will not, either directly or indirectly, for [himself *or* herself] or any third party, divert or attempt to divert any existing business of Employer or any customer of Employer, or engage in any business or activity that is in competition with Employer's or its customers' business.

(b) Employee further agrees that the sale or unauthorized use or disclosure of any of Employer's trade secrets_____[he *or* she] obtains pursuant to this agreement, including lists containing the names or names and addresses of Employer's customers and employees, the contents or details of any written or oral contract or understanding between Employer and any third party, constitute unfair competition. Employee promises and agrees not to engage in any unfair competition with Employer.

PRACTICE TIP

For technical employees or employees in a high-tech company, a more detailed confidentiality provision may be expected by the customer, as well as an assignment of intellectual property rights to the temporary agency with the understanding that those will be assigned to the customer; the temporary agency will need to consult with its customer to assure that its needs are met.

[*Include the following four paragraphs with the caption in no less than 10-point boldface type in full capitals and the text of the paragraphs in italics or boldface type of a size similar to that used in the other parts of the contract (see Civ. Code § 1812.504(a)(11)):*]

RIGHT TO REFUND

7. If you pay all or any portion of a fee and fail to accept employment, the employment agency shall, on your request, return the amount paid to you within 48 hours after your request for a refund.

If you leave employment for just cause or are discharged for reasons other than misconduct connected with your work within 90 days from the starting date of employment, the agency shall reduce your fee to that payable for temporary employment and shall refund any excess paid within 10 days of your request for a refund.

No fee larger than that for temporary employment may be charged to you for employment lasting 90 days or less unless the agency's fee schedules, contracts, and agreements provide for a further charge if you leave employment without just cause or are discharged for misconduct in connection with your work.

If any refund due is not made within the time limits set forth above, the employment agency shall pay you an additional sum equal to the amount of the refund.

[*Add the following if labor trouble exists at the place of employment (see Civ. Code §§ 1812.504(a)(8), 1812.509(c)):*]

Labor Disputes

8. The place of employment at which you will perform the duties specified in Paragraph 3 is currently subject to a labor dispute between its regular employees and the management.

Executed on_____[*date*], at_____[*city*], California.

EMPLOYER
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]
EMPLOYEE
_____ [*signature of employee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
A. Complete Employment Contracts
3. Agreements for Employment of Nonexecutive Personnel

28-85 California Legal Forms--Transaction Guide §§ 85.224-85.229

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.224[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
A. Complete Employment Contracts
4. Agreements Continuing Employment

28-85 California Legal Forms--Transaction Guide § 85.230

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.230 Agreement Continuing Previous Employment--Incorporation of Prior Contract With Agreed-Upon Modifications

[1] Comment

[a] Use of Form

This form is a short agreement that has the effect of continuing or extending an employee's employment under a prior contract with any amendments the parties may agree to make. It is intended to serve as a memorandum of the agreement of the parties to continue the employment under the terms of the prior agreement and thus comply with any requirement that the contract be in writing [*see § 85.22*].

[b] Enforcement of Long-Term Employment Contracts

This contract is written as a separate contract with a new term and new commencement date in order to permit its enforcement by the employer within the limits of the general statutory rule that a contract to render personal services (except with respect to certain recording industry contracts or apprenticeships) may not be enforced against the employee beyond seven years from the time services commences under the contract [*Lab. Code § 2855*]. For discussion of the special rules governing exceptions with respect to certain recording industry contracts [*see Lab. Code § 2855(b)(1)*], see Ch. 87, *Entertainment Contracts* . For further discussion of the enforceability of contracts that continue beyond a seven-year period, see generally *§ 85.240[1]*.

[c] Compensation Due Upon Continuation of Long-Term Contract

If an employee voluntarily continues service under an existing employment contract for more than seven years, the contract affords a presumptive measure of the compensation due the employee during the continuation period [*see Lab. Code § 2855*]. To avoid the presumption that could apply, any contract that continues a prior employment or has that

effect should specifically state any new salary arrangement.

[2] FORM

Agreement Continuing Previous Employment--Incorporation of Prior Contract With Agreed-Upon Modifications

CONTINUATION OF EMPLOYMENT

_____[*Name of employer*] ("Employer") [, a _____ (partnership *or* California corporation *or* sole proprietorship)], located at_____[*address of principal place of business*], and_____[*name of employee*] ("Employee"), of_____[*address*], in consideration of the mutual promises made herein, agree as follows:

Employment and Term

1. The Employer agrees to employ Employee and Employee agrees to be employed by Employer [*specify period unless employment at will is intended, e.g.,* for a period of not more than seven years], beginning on_____[*date*].

Terms of Employment

2. The parties agree that the employment is governed by the terms and conditions of the_____[*date*] agreement, under which Employee was employed by Employer up to [*date of day immediately prior to date of this agreement*], a copy of which is attached and incorporated by reference, except that [*set forth new terms by amending and restating any changed provision, e.g.:* Section 3.01 thereof is amended to read as follows]:

"Section 3.01. Employee shall receive an annualized salary of _____ [*specify new salary:* $_____], payable in equal biweekly installments on every other Friday during the calendar year and prorated for any partial employment period."

Executed on_____[*date*], at_____[*city*], California.

EMPLOYER
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]
EMPLOYEE
_____ [*signature of employee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDuration of EmploymentGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
A. Complete Employment Contracts
4. Agreements Continuing Employment

28-85 California Legal Forms--Transaction Guide § 85.231

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.231 Contract Employing Former Officer as Consultant-Employee

[1] Comment--Use of Form

This form is a contract under which a retiring officer or an officer of a firm that has been sold is continued in employment with his or her former organization or the new organization, but in a new status as consultant. The employee-consultant arrangement is often used as a means of assuring continuity for the organization, and often serves as a method of compensating (or continuing the compensation of) the former executive. In this context the term "consultant" is used to describe the scope of duties and does not imply an independent contractor relationship: the officer remains an employee of the company.

[2] FORM

Contract Employing Former Officer as Consultant-Employee

EMPLOYMENT OF CONSULTANT

_____[*Name of employer*] ("Employer") [, a _____ (partnership *or* California corporation *or* sole proprietorship)], located at_____[*address of principal place of business*], and_____[*name of employee*] ("Employee"), of_____[*address*], in consideration of the mutual promises made herein, agree as follows:

Employment and Term

1. Employer hereby employs Employee and Employee accepts employment with Employer [*omit following if employment is at will:* for a period _____ (of _____ *any period more than one month*

and less than seven years or consisting of the entire lifetime of Employee),] beginning on_____[*date*].

Duties of Consultant

2. Employee is hired to perform services as a [*specify duties, e.g.,* consultant with respect to corporate policy in the areas of finance, sales, management, and customer relations]. In that capacity, Employee shall [to the extent permitted by _____ (his *or* her) mental and physical health and other business commitments] [and at _____ (his *or* her) convenience] provide advice and counsel to Employer's [*specify parties whom employee should advise, e.g.,* Board of Directors *or* Executive Committee *or* President and other officers] on those or other general managerial matters.

Salary

3. (a) As compensation for the services to be performed hereunder, Employee shall receive a salary at the rate of $_____ per annum, payable in equal installments [on or before the 26th day of each month *or specify more frequent pay periods per month*] during the employment term.

(b) Employee shall receive such annual increases in salary as may be determined by Employer's Board of Directors in its sole discretion.

Competitive Activities

4. (a) The parties acknowledge and agree that during the term of this agreement and in the course of the discharge of_____[his *or* her] duties hereunder, Employee shall have access to and become acquainted with financial, personnel, sales, scientific, technical and other information regarding formulas, patterns, compilations, programs, devices, methods, techniques, operations, plans and processes that are owned by Employer, actually or potentially used in the operation of Employer's business, or obtained from third parties under an agreement of confidentiality, and that such information constitutes Employer's "trade secrets."

(b) Employee specifically agrees that_____[he *or* she] shall not misuse, misappropriate, or disclose in writing, orally or by electronic means, any trade secrets, directly or indirectly, to any other person or use them in any way, either during the term of this agreement or at any other time thereafter, except as is required in the course of_____[his *or* her] employment.

(c) Employee acknowledges and agrees that the sale or unauthorized use or disclosure in writing, orally or by electronic means, of any of Employer's trade secrets obtained by Employee during the course of_____[his *or* her] employment under this agreement, including information concerning Employer's actual or potential work, services, or products, the facts that any such work, services, or products are planned, under consideration, or in production, as well as any descriptions thereof, constitutes unfair competition. Employee promises and agrees not to engage in any unfair competition with Employer, either during the term of this agreement or at any other time thereafter.

(d) Employee further agrees that all files, records, documents, drawings, specifications, equipment, software, and similar items whether maintained in hard copy or on line relating to Employer's business, whether prepared by Employee or others, are and shall remain exclusively the property of Employer and that they shall be removed from the premises or, if kept on-line, from the computer systems of Employer [*specify procedure, e.g.,* only with the express prior written consent of Employer's Board of Directors].

(e) Employee further promises and agrees that during the term of this agreement,_____[he *or* she] shall not, directly or indirectly, either as an employee, employer, consultant, agent, principal, partner, stockholder, corporate officer, director, or in any other individual or representative capacity, engage or participate in any competitive activity relating to the matters specified in Paragraph 4(a).

Effect of Merger, Transfer of Assets, or Dissolution

5. (a) This agreement [shall *or* shall not] be terminated by any voluntary or involuntary dissolution of Employer resulting from any merger or consolidation in which Employer is not the consolidated or surviving corporation, or any transfer of all or substantially all of the assets of Employer.

[*If agreement will not be terminated, add:*]

(b) In the event of any such merger or consolidation or transfer of assets, Employer's rights hereunder [shall *or* may] be assigned to the surviving or resulting corporation or the transferee of Employer's assets, in which case the assignee shall have the benefit of the provisions of this agreement.

Executed on_____[*date*] at_____[*city*], California.

EMPLOYER
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]
EMPLOYEE
_____ [*signature of employee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
A. Complete Employment Contracts
4. Agreements Continuing Employment

28-85 California Legal Forms--Transaction Guide §§ 85.232-85.239

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

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§§ 85.232[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
B. Separate Provisions for Term of Employment

28-85 California Legal Forms--Transaction Guide § 85.240

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.240 Provision for Lifetime Employment

[1] Comment

[a] Use of Form

This form is designed for use when the period of employment is to be stated in terms of the employee's lifetime. A lifetime contract, although unusual, can be used if the employee has sufficient bargaining power to force its use or the employer demands it. Despite the "lifetime" language, however, a lifetime contract generally is enforceable by both parties only during the first seven years of the employment. Thereafter, only the employee can enforce it [*Lab. Code § 2855*].

[b] Enforcement of Long-Term Employment Contracts

[i] In General

The general rule is that a contract to render personal service (other than apprenticeship) may not be enforced against the employee beyond seven years from the time service commences under the contract [*Lab. Code § 2855*]. Thus, if a contract calls for intermittent services to be rendered by the employee, it cannot be enforced against the employee after seven years, measured from the time service commences, even if the amount of time that services were actually rendered by the employee totals less than seven years [*De Haviland v. Warner Bros. Pictures (1944) 67 Cal. App. 2d 225, 230-232, 153 P.2d 983]* .

Enforcement by injunction is available if the contract is for the performance of services of a special, unique, unusual, extraordinary, or intellectual character that gives it peculiar value and the loss of which cannot be reasonably or adequately compensated in damages [*Civ. Code § 2423*; *Lab. Code § 2855*]. However, injunctive relief is available only if the contract is in writing, provides for annual compensation of $6,000 or more, and cannot be specifically enforced [*Civ. Code § 2423*].

A contract to render personal services may not be enforced by specific performance [*Civ. Code § 3390(1)*]. It follows that the breach of a contract for personal services may not be enjoined unless it is within the statutory exception discussed above [*Foxx v. Williams (1966) 244 Cal. App. 2d 223, 235, 52 Cal. Rptr. 896]* . The injunction would be negative in effect, that is, it would forbid the employee from accepting new employment [*see Foxx v. Williams (1966) 244 Cal. App. 2d 223, 236, 52 Cal. Rptr. 896]* .

[ii] "Lifetime" Contract

If an employment contract states a term defined by the employee's lifetime, it binds the employee for only the first seven years of its duration (or until that person dies if that event occurs before the end of the seven-year period [*Lab. Code § 2920(c)*]). After that time the employee can discontinue services and the contract cannot be enforced against him or her [*see Lab. Code § 2855*].

On the other hand the employee can enforce a lifetime contract, even if enforcement is asserted later than seven years after his or her services commence. There are two reasons for this result: first, the statutes govern only enforcement against an employee [*see Civ. Code § 2423*; *Lab. Code § 2855*]; and second, such a contract is for a specific term rather than at will [*Bradner v. Vasquez (1951) 102 Cal. App. 2d 338, 342, 344, 227 P.2d 559]* .

A lifetime employment contract is not to be interpreted as one at will merely because it does not provide a time for its termination that is definite at the present moment. Words that specify an ascertainable event by which the term can be determined make the contract definite and certain with respect to its term, and if duration depends on an event that must inevitably occur in the course of nature it is definite and certain. Thus a lifetime contract can be and has been enforced by the employee against his or her employer, even after expiration of seven years after the commencement of the employment [*Bradner v. Vasquez (1951) 102 Cal. App. 2d 338, 342, 344, 227 P.2d 559]* .

[c] Considerations Applicable to Corporate Employer

If a lifetime contract is to be entered into between a corporation and an employee, counsel should check both the articles of incorporation and the by-laws to verify that the corporation has the actual or implied power to enter into such a contract. In addition, the board of directors should be advised to pass a resolution specifically authorizing the lifetime contract before its execution.

Because contracts for lifetime employment are so unusual, the authority of an executive officer of the corporation to enter into such a contract will not be implied. Plain language of the board of directors, clearly showing an intention to make the particular contract for the employee's lifetime, and actual or implied power vested in the corporation itself to enter into such a contract, must both be present to make a lifetime contract binding on the corporation [*Bene v. LaGrande (1937) 22 Cal. App. 2d 512, 517, 71 P.2d 351* ; *Mannion v. Campbell Soup Co. (1966) 243 Cal. App. 2d 317, 323, 52 Cal. Rptr. 246]* . See Ch. 5, *Directors' Meetings, Actions and Resolutions* , for a resolution authorizing execution of an employment contract with a corporate officer.

[2] FORM

Provision for Lifetime Employment

Lifetime Employment

Employer employs Employee, and Employee accepts employment with Employer, for a period consisting of the entire lifetime of Employee commencing on_____[*date*] [*add if agreement provides for earlier termination under particular circumstances:*, subject, however, to prior termination of this agreement as hereinafter provided].

[*OR*]

Employer employs Employee and Employee accepts employment with Employer. This contract shall terminate upon the death of Employee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDuration of EmploymentPermanent Employment

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
B. Separate Provisions for Term of Employment

28-85 California Legal Forms--Transaction Guide § 85.241

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.241 Provisions Governing Seasonal Employment

[1] Comment

[a] Use of Form

This form is designed for use when the employment will only be for certain designated months during each year of the employment term. It contains three separate provisions that bear on the subject. The first specifies the season during each year and the years that the employee will be employed; the second specifically permits the employee to take employment elsewhere during the off season period; and the third states the salary to which the employee will be entitled while employed under the seasonal contract. Each of these provisions are designed to be inserted into a complete contract. These types of provisions are used in contracts for the employment of a manager of a seasonal resort, a harvest manager, or other type of employee whose services are required only on a seasonal basis.

[b] Drafting the Compensation Provision

When a provision for seasonal employment is used, particular care should be taken with the provision for compensation so as to make it very clear what payments are to be made. A provision that the seasonal employee is to be paid $1,000 a month without qualification could be interpreted to require 12 such payments each year.

[2] FORM

Provisions Governing Seasonal Employment

[*Use following provision in place of a specified term provision:*]

Term of Seasonal Employment

Employer employs Employee, and Employee accepts employment with Employer, for [*number*] months each year beginning with [*e.g.*, the first day of May] and ending on [*e.g.*, the last day of October] of each year during this year ([*year, e.g.*, 2001]) and the next [*number*] years ([*year, e.g.*, 2002] through [*year, e.g.*, 2006]) [*add if agreement provides for earlier termination under particular circumstances:*, subject, however, to prior termination of this agreement as hereinafter provided].

[*Add following to other provisions relating to term of contract if desired:*]

Right to Be Employed Elsewhere

During the remainder of each of the years of employment covered by this contract, Employee shall not be in the employ of Employer; Employee shall have the right to take other employment with other employers; and Employee shall be exclusively entitled to all compensation received by [him *or* her] for such other employment.

[*Use following provision in place of annual salary provision:*]

As compensation for services rendered under this contract, Employee shall be entitled to a salary of $_____ per month for each month during which Employee is actually employed under this contract. This salary shall be payable in equal biweekly installments of $_____ on Friday of every other week during the period of employment, prorated for any partial employment period.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
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B. Separate Provisions for Term of Employment

28-85 California Legal Forms--Transaction Guide §§ 85.242-85.249

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.242[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
C. Separate Provisions for Employee's Duties
1. Specific Duty Descriptions

28-85 California Legal Forms--Transaction Guide § 85.250

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.250 Miscellaneous Alternative Duties Provisions--Various Types of Employees

[1] Comment

[a] Use of Form

This form sets forth numerous samples of employee duties provisions. These are, in the order of their appearance in the form, the duties of an appraiser, a bookkeeper, a consultant, an investigator, an inventor, a service manager, a person hired to recruit other employees or to establish a sales or service organization, and a traveling salesperson.

A provision stating the duties of the president of an organization is contained in *§ 85.200*. For the duties of a vice president or secretary-treasurer, see *§ 85.201*. The duties of a mid-level or department manager appear in *§ 85.210*, and those of a retail store branch manager in *§ 85.211*. For a provision stating the duties of a salesperson, see *§ 85.220*. Duties of a technical person such as an engineer are stated in *§ 85.221* and those of a computer programmer are set forth in *§ 85.222*.

These duties provisions may be inserted into a complete employment contract. Examples of complete contracts are set forth in *§§ 85.200 through 85.223*. For a discussion of the general matters to be considered before drafting any employment contract, see *§ 85.200[1]*.

[b] Referring to Job Description Maintained by Employer

Specific job duties vary from employer to employer, and counsel should refer to an employee manual or internal documentation, such as job descriptions prepared to comply with the Americans with Disabilities Act [*42 U.S.C. § 12001 et seq.*], maintained by the employer to ascertain the precise duties for the position involved. The following form provisions should then be modified to fit the particular situation.

Instead of setting forth a full job description, the contract may simply incorporate by reference a job description contained in the employer's documents. This alternative gives the employer the flexibility to change the job duties without necessitating a change in the contract.

[2] FORM

Miscellaneous Alternative Duties Provisions--Various Types of Employees

[*First alternative; use to specify duties of land or building appraiser:*]

Duties of Appraiser

Employee shall be employed to inspect, appraise, and evaluate land or buildings when directed to do so by Employer and, in that capacity, to determine the highest and best use of the land or buildings involved, and the current market value thereof for income tax, real property tax, sales, purchase, loan, or other purpose directed by Employer.

[*OR*]

[*Second alternative; duties of a bookkeeper or accountant:*]

Duties of Bookkeeper

Employee is hired as a bookkeeper and shall work at_____[*specify, e.g.,* the main office of Employer located at _____ (*address*) and at such other place or places as may be directed by Employer]. Employee shall_____[*set forth duties, e.g.,* carefully and accurately prepare and keep books of account and balance sheets and perform all duties commonly discharged by bookkeepers and such other duties of a similar nature as may be required from time to time by Employer].

[*OR*]

[*Third alternative; duties of an employee serving as a consultant:*]

Provision for Duties of Employee as Consultant

(a) For a period of [months *or* years] following_____[his *or* her] retirement [, beginning on_____[*date*], Employee shall render services to Employer as a consultant and adviser. While acting in that capacity Employee shall be responsible only to the Board of Directors and shall not be required to follow a regular daily or weekly work schedule.

(b) Employee shall be available to provide consultation services to Employer's [*specify, e.g.,* Board of Directors *or* Executive Committee *or* President and Vice Presidents] on all policy or technical questions within the scope of_____[his *or* her] training and experience by electronic mail, or at the office of Employer when necessary.

(c) The services rendered by Employee are not to exceed an average of [*e.g.,* 20] hours per month.

[*OR*]

[*Fourth alternative; duties of investigator:*]

Duties of Investigator

Employee shall be employed to investigate [*specify, e.g.,* insurance claims made by fire insurance claimants] and in that capacity shall make inspections, conduct audits and surveys, and do all things necessary to determine the facts needed by Employer as a basis for action.

[*OR*]

[*Fifth alternative; duties of an employee serving as an inventor:*]

Duties of Inventor

(a) Employee is hired and employed by Employer to invent, discover, develop, and improve methods, formulas, machines, and devices relating in any manner whatsoever to [*specify, e.g.,* the manufacture of semiconductors *or* the manufacture of petroleum products *or* terminal access application systems for data processing].

(b) Employee shall devote_____[his *or* her] entire productive time, ability, and attention to the business of Employer during the term of this contract.

(c) The services of Employee shall be performed at any laboratory, research facility, or manufacturing plant operated by Employer as determined solely by Employer.

(d) Upon inventing, discovering, developing, or improving any of the aforesaid methods, formulas, machines, or devices, Employee shall immediately make a full disclosure to Employer and thereafter shall keep Employer fully informed at all times of all progress in that connection.

[*OR*]

[*Sixth alternative; duties of repair service manager:*]

Duties of Service Manager

Employee shall be employed as the service manager for Employer. In that capacity, Employer shall meet customers at Employer's place of business, diagnose the problem described by the customer, schedule the necessary repairs, assign the work to the necessary personnel, and be responsible for all communications between Employer and its customers.

[*OR*]

[*Seventh alternative; duties of employee who recruits other employees:*]

Recruiting Duties

Employee shall build and maintain a [sales *or* service] organization by recruiting other employees [who are trained, skilled, experienced, and qualified in _____ (*describe field of experience*) *or* and train them to perform duties as _____ (*describe field of experience*)]. In that capacity, Employee shall direct all such employees in the performance of their duties, including assigning those employees to their duties and supervising their performance, and shall perform all related administrative tasks with respect to their employment, including timekeeping and payroll reporting.

[*OR*]

[*Eighth alternative; duties of a traveling salesperson:*]

Duties of Traveling Salesperson

(a) Employee is hired as a salesperson to [*describe sales method, e.g.,* sell *or* solicit and take orders for sales of] the merchandise of Employer in the States of_____[*names of states*]. In the course of_____[his *or* her] employment, Employee shall [travel *or* drive *or specify other means of transportation*] from place to place for the purpose of making sales presentations and demonstrations [*describe customer relations functions, if desired, e.g.,* and maintaining positive relations with Employer's customers].

(b) Employee shall not make any sales in any States other than those named above._____[*Set forth any exclusions from salesperson's territory, e.g.,* Furthermore, chain stores owned and operated by _____ (*name of owner or chain*) in any of the aforementioned States are specifically excluded from Employee's territory and Employee shall not sell the merchandise of Employer to those stores.]

(c) Employee shall forward all [sales agreements *or* orders] to Employer immediately after their execution by customers for acceptance or rejection by Employer.

(d) Employee shall devote all_____[his *or* her] time, attention, and energy as Employer's salesperson, subject to the direction and control of Employer, and shall to the best of_____[his *or* her] ability make every effort to sell the merchandise of Employer in the aforementioned territory.

(e) Employee shall make [weekly *or other period*] reports to Employer indicating:

(1) The calls _____ [he *or* she] made during the period concerned, including the name, address, and telephone number of the prospect.

(2) Current developments in Employee's assigned territory, including developments that bear on future marketing considerations, Chamber of Commerce, and other local civic and industrial group reports that may bear on future marketing conditions.

(3) All comments, questions, or complaints concerning Employer's _____ [goods *or* services].

(4) Copies of all orders given by, and copies of all correspondence between, Employee and _____ [his *or* her] customers.

(5) Credit data and other information on _____ [any customers determined by Employee or Employer to be a questionable credit risk *or* all customers].

(f) Employee shall assist in the collection of all sums due from persons to whom the [goods *or* services] of Employer are sold and in the adjustment of any complaints or disputes that may arise in connection with any sales made by Employee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsAt-Will EmploymentEmployeesLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
C. Separate Provisions for Employee's Duties
1. Specific Duty Descriptions

28-85 California Legal Forms--Transaction Guide §§ 85.251-85.259

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.251[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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C. Separate Provisions for Employee's Duties
2. Change or Addition of Duties

28-85 California Legal Forms--Transaction Guide § 85.260

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.260 Provision Permitting Employer to Specify Duties From Time to Time When Contract Does Not Specify Duties

[1] Comment--Use of Form

This form is a provision that permits the employer to specify an employee's duties from time to time and is primarily for use in an employment agreement that does not initially specify the employee's duties. Although it is generally best to set forth in the employment contract the duties to be performed by the employee, this form is designed to serve on the occasions when the employer desires complete freedom in determining the duties to be performed by the employee. This can arise when the employer may desire to assign the employee to various departments to see how he or she fits into the organization before making a regular assignment.

This form provides for a later designation of duties rather than a change in duties previously enumerated. §§ 85.261-85.264 serve the latter purpose. *§ 85.261* permits the employer to require the employee to perform additional duties that may be prescribed from time to time. *§ 85.262* permits the employer to require the employee to perform completely different (rather than additional) duties at a later time. § 85.263 permits the employee some discretion by permitting a change of duties by mutual consent. For a provision covering changes in duties when an employee is disabled, see *§ 85.264*.

[2] FORM

Provision Permitting Employer to Specify Duties From Time to Time When Contract Does Not Specify Duties

Duties of Employee to Be Specified From Time to Time

The duties to be performed by Employee shall be determined from time to time by the [*e.g.* President *or* Board of

Directors] of Employer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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2. Change or Addition of Duties

28-85 California Legal Forms--Transaction Guide § 85.261

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.261 Provision Obligating Employee to Perform Additional Duties Assigned by Employer

[1] Comment--Use of Form

This form is a provision obligating the employee to perform additional duties when assigned by the employer. It is designed for use when the employer desires to reserve the right to assign the employee additional duties (that is, duties other than those specified in the contract). For a provision to use when the contract does not initially assign the employee specific duties, see *§ 85.260*. For a selection of provisions governing the right of an employer to change an employee's duties, see *§§ 85.262-85.264*.

This form includes a proviso that the additional duties are to be performed during the hours and at the place of employment specified elsewhere in the contract. Thus, when this provision is inserted into an employment agreement, care should be taken to insure that other provisions in the agreement specify the hours [*see § 85.276*] and the place of employment.

[2] FORM

Provision Obligating Employee to Perform Additional Duties Assigned by Employer

Additional Duties Assigned Later

In addition to the foregoing duties, Employee shall perform any other duties that may be assigned to [him *or* her], subject to the instructions, directions, and control of Employer, [provided only that all such additional duties shall be during the hours and at the place of employment specified in this contract].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentEmployeesLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.262

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.262 Provision Permitting Employer to Change Employee's Duty Assignments

[1] Comment

[a] Use of Form

This form is a provision permitting the employer to assign the employee to perform completely different duties at any time. It is designed to assure that the employer will have the freedom to change duty assignments. It is an optional clause that should be used in a contract with a professional or other type of employee whose reputation would suffer if not allowed to practice his or her profession [*see* [b], *below*].

This form differs from the form in *§ 85.260* in that this form assumes that the contract contains a provision defining the employee's initial duties, while the orm in *§ 85.260* does not. This form differs from *§ 85.261* in that the latter form pertains to additional duties, while this form permits the assignment of completely different duties. For a provision for a change in duties by mutual consent, see *§ 85.263*. A provision for change in duties if the employee becomes disabled is set forth in *§ 85.264*.

[b] Employer's Right to Change Employee's Duty Assignments

In most cases, an employer can change an employee's duty assignments at will unless the contract provides otherwise. The common law general rule is that an employer may utilize the employee's services in any manner it chooses and has no duty to provide any particular type of work [*see Colvig v. RKO General (1965) 232 Cal. App. 2d 56, 66, 42 Cal. Rptr. 473]* . An exception to this rule exists when the employee's reputation will suffer if he or she is not allowed to practice his or her profession. This exception rests on the rationale that the parties are deemed to have contracted with the assumption that the employee was to be given an opportunity to exercise his or her abilities during a reasonable portion of the contract period [*Colvig v. RKO General (1965) 232 Cal. App. 2d 56, 66-67, 42 Cal. Rptr. 473]* . The Restatement of Agency states that if compensation does not depend on the amount of work done (*i.e.,* if there is a fixed

salary), a promise by the principal to furnish work is inferred from the promise to employ if the anticipated benefit to the agent from doing the work is a material part of the advantage to be received by the agent from the employment. This anticipated benefit may be the acquisition of (1) skill by the employee; (2) enhanced reputation by the employee; or (3) other subsidiary pecuniary advantages (as in the case of public performers whose reputation would be diminished by a failure to appear) [Restatement (Second) of Agency, § 433].

[2] FORM

Provision Permitting Employer to Change Employee's Duty Assignments

Other Duties of Employee

Employer shall have the right at any time during the term of this contract to assign Employee, in the sole discretion of Employer, to perform duties that differ [in any manner whatsoever] from the duties originally assigned and specified herein [*add following in contracts with entertainers, sports figures, or professionals:*; provided, however, that Employee shall be assigned only to duties consistent with _____ (his *or* her) professional skills and abilities].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAssignmentGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.263

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.263 Provision for Change of Duties by Mutual Consent

[1] Comment

[a] Use of Form

This form is a provision permitting an employer to change an employee's duties with the latter's consent. The purpose of this form is to make it clear that such a mutually agreed change is only a modification, not a rescission, of the written contract. It is not uncommon for the parties to an employment contract at some point during the term of employment to mutually agree that the duties of the employee will be changed from those specified in the contract.

[b] Methods of Modifying a Written Contract

A written employment contract, like any other written contract, may be modified by either (1) another written contract; (2) an oral agreement, to the extent that the oral agreement is executed by the parties; or (3) unless the original contract provides otherwise, by an oral agreement satisfying the statute or frauds and supported by new consideration [*Civ. Code § 1698(a)-(c)*; for discussion, *see § 85.22[1]*].

[2] FORM

Provision for Change of Duties by Mutual Consent

Change of Duties

The duties of Employee may be modified from time to time by the mutual consent of Employer and Employee without resulting in a rescission of this contract. The mutual consent of Employer and Employee shall constitute execution of that modification. Notwithstanding any such change, the employment of Employee shall be construed as continuing

under this agreement as modified.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.264

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.264 Provision for Reasonable Accommodations If Employee Becomes Disabled

[1] Comment--Use of Form

The first part of this form is a provision that obligates the employer to make reasonable accommodations so that the employee can continue working if he or she becomes disabled under the Americans with Disabilities Act (ADA) [*42 U.S.C. § 12001 et seq.*] or the California Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900 et seq.*]. This provision essentially restates the employer's obligations under those laws [*see 42 U.S.C. § 12112(b)(5)* (reasonable accommodation required unless it would cause employer undue hardship); *Gov. Code § 12940(m)* (reasonable accommodation required unless it would cause employer undue hardship)]. For detailed coverage of employers' obligations to make reasonable accommodations for disabled employees under the ADA and FEHA, see California Forms of Pleading and Practice, Ch. 115 (Matthew Bender), and Wilcox, California Employment Law, Ch. 41 (Matthew Bender).

An employee with a disability covered under the ADA or FEHA is entitled to accommodation if he or she can, with reasonable accommodation, perform the essential functions of his or her job [*42 U.S.C. § 12112(a)*; *Gov. Code § 12940(a)(1)*; *see Green v. State (Aug. 23, 2007) 42 Cal. 4th 254, 64 Cal. Rptr. 3d 390, 165 P.3d 118, 2007 Cal. LEXIS 8910, at *9-*18* (employee has burden of establishing his or her ability, with reasonable accommodation, to perform essential functions)].

The second part of this form addresses the situation in which either (1) the employee's disability prevents him or her from performing the essential duties of his or her position, even with reasonable accommodation, or (2) the employee's disability results from a condition or cause that is not covered by the ADA or FEHA. In such a case, the form provides that any modification of the employee's duties and compensation is in the employer's sole discretion. However, the employee is given the right to reject any proposed modification and thus terminate the contract either immediately or after a specified period of time.

[2] FORM

Provision for Reasonable Accommodations If Employee Becomes Disabled

Accommodation for Disability

(a) If Employee at any time during the term of this agreement should become disabled as defined under the Americans with Disabilities Act (ADA) or the California Fair Employment and Housing Act (FEHA), Employer shall take affirmative steps to make reasonable accommodations so that Employee can continue working. Such accommodations may include, but are not limited to, making facilities readily accessible to and usable by Employee, allowing Employee to work on a part-time or modified work schedule, modifying equipment, and placing the employee in an existing vacant position that the employee is qualified for and able to perform. This provision shall not be construed to require Employer to make an accommodation that would impose an undue hardship on the operation of Employer's business.

(b) If Employee at any time during the term of this agreement should become unable to perform the duties required by this contract because of any condition or cause that does not render Employee a qualified worker with a disability for purposes of ADA or FEHA, Employer may in its sole discretion assign Employee to other duties, and the compensation to be paid thereafter to Employee shall be determined by Employer in its sole discretion. If Employee is unwilling to accept the modification in duties and compensation made by Employer, this contract shall terminate_____[immediately *or* within _____ (*specify time period*) thereafter].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationDisability DiscriminationEmployment PracticesGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide §§ 85.265-85.269

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.265[Reserved]

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3. Performance of Duties

28-85 California Legal Forms--Transaction Guide § 85.270

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.270 Provision That Duties Are to Be Performed Loyally and Conscientiously

[1] Comment

[a] Use of Form

This form is a provision stating that the employee will loyally and conscientiously perform all of his or her duties. A provision such as this is often included in employment contracts. One reason for its use is to make certain that the employee understands that loyal and conscientious performance is expected. Another reason is to provide a firm contractual basis both for termination of the contract in the event that the employee is found to be acting carelessly or disloyally (such as by giving information about the employer's operation to competitors), as well as for a suit for breach of contract. Still another reason is to provide a defense against a suit for wrongful termination if the employee is terminated for disloyalty or non-conscientious performance.

[b] Employee's Obligation to Employer

An employee, by the nature of the employer-employee relationship is required to use ordinary care and diligence [*Lab. Code § 2854*], exercise a reasonable degree of skill, unless the employer had prior notice of the employee's lack of skill [*Lab. Code § 2858*], and use the skill he or she possesses insofar as required by the work to be done [*Lab. Code § 2859*]. For further discussion of an employee's duties, see *§ 85.11*.

[2] FORM

Provision That Duties Are to Be Performed Loyally and Conscientiously

Employee agrees that to the best of_____[his *or* her] ability and experience_____[he *or* she] will at all times loyally and conscientiously perform all of the duties and obligations either expressly or

implicitly required of _____[him *or* her] by the terms of this agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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3. Performance of Duties

28-85 California Legal Forms--Transaction Guide § 85.271

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.271 Provision That Duties Must Be Performed to Employer's Satisfaction

[1] Comment

[a] Use of Form

This form is a provision requiring that the employee's performance of his or her duties must meet the employer's satisfaction. It is intended for use when the employer desires to have the right to terminate the services of the employee at any time that those services are not satisfactory in the judgment of the employer [*see § 85.502*]. For discussion of an employee's duties, see *§ 85.11*.

[b] Criteria for Employer's Satisfaction

The rule in California is that a contract requiring performance to the employer's satisfaction is breached by the employee when his or her performance is such that the employer is in good faith dissatisfied, regardless of whether a reasonable person would have been dissatisfied. The good faith determination of the employer that it is dissatisfied is conclusive on the employee [*Crillo v. Curtola (1949) 91 Cal. App. 2d 263, 271, 204 P.2d 941]* . A contract that requires one party to perform services to the satisfaction of the other party to the contract is not illusory and is binding since California imposes a duty of good faith on the party for whom the services are to be performed [*Mattei v. Hopper (1958) 51 Cal. 2d 119, 124, 330 P.2d 625]* .

[2] FORM

Provision That Duties Must Be Performed to Employer's Satisfaction

Satisfactory Performance of Duties

Employee's performance of_____[his *or* her] duties hereunder shall, at all times, be rendered to Employer's [reasonable] satisfaction. Employee expressly agrees that Employer shall be the sole judge as to whether the services of Employee are satisfactory.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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3. Performance of Duties

28-85 California Legal Forms--Transaction Guide § 85.272

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.272 Provision Permitting Employee to Engage in Other Specified Employment

[1] Comment

[a] Use of Form

This form is a provision that specifies the conditions under which an employee may engage in other employment. It can be added to any employment agreement that requires the employee to devote his or her entire time and energy to the work of the employer to provide for and define the exceptions to that general type of provision. It should be used when the parties contemplate that the employee will engage in other employment during the contract term.

If this provision is used and the contract contains either the "entire time" provision referred to above or a provision that the employee will perform loyally and conscientiously [*see § 85.270*], it should include a clause indicating its effectiveness notwithstanding any other provision of the contract.

[b] Performance of Part-Time Work for Another Employer

Unless expressly prohibited in the employment contract, part-time work can properly be performed by an employee for another employer if it does not interfere with the employee's obligations to the full-time employer [*see Hermann v. Littlefield (1895) 109 Cal. 430, 432]* . However, the employee breaches the employment contract by engaging in competition with the employer, even when the contract contains no provision prohibiting such competition, unless the contract clearly permits it [*see § 85.470[1]*]. Therefore, if this form is to be used and the other employment authorized might be competitive in any way with the business of the principal employer, the fact that the other employment authorized is or might be competitive should be clearly stated in the contract and any noncompetition clause should be appropriately modified.

[2] FORM

Provision Permitting Employee to Engage in Other Specified Employment

Engaging in Other Employment

During the term of this contract, [and notwithstanding any other provision of this agreement,] Employee may_____[*specify nature of other employment, e.g.*, engage in any other business or professional activity provided that none of it is done during normal working hours or at the place of business of Employer *or* act as a sales representative for any other person or organization that does not compete with the business of Employer in any manner whatsoever *or* continue _____ (his *or* her) present work as a consultant for XYZ Corporation].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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3. Performance of Duties

28-85 California Legal Forms--Transaction Guide § 85.273

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.273 Provision That Employee Cannot Bind Employer Without Employer's Written Consent

[1] Comment

[a] Use of Form

This form is a provision withholding from the employee any right or authority to make any contract or binding promise on behalf of the employer. It is intended to make it clear to the employee that he or she has no authority to make any legal commitments on behalf of the employer without the employer's express written consent.

When this form is used, the attorney for the employer should make it clear to the client that this provision is binding only as between the employer and the employee and is not necessarily binding between the employer and third persons. Regardless of any provision in the employment agreement, the employer can be bound by unauthorized commitments made by the employee if the employee had ostensible authority to do so [*see* [b], *below*].

[b] Actual and Ostensible Authority

An employee, while acting in the capacity of the employer's agent, has whatever authority is conferred on him or her by the employer either actually or ostensibly [*Civ. Code § 2315*]. Actual authority is conferred either intentionally (*e.g.*, under the terms of an employment contract) or by allowing the employee, either intentionally or by want of ordinary care, to believe he or she possesses it [*Civ. Code § 2316*].

Ostensible authority, also referred to as apparent authority, is whatever authority an employer, either intentionally or by want of ordinary care, causes or allows a third party to believe the employee to possess [*Civ. Code § 2317*]. Ostensible authority rests on the doctrine of estoppel. The essential elements of ostensible authority are: (1) representation by the employer; (2) justifiable reliance by the third party; and (3) change of position or injury resulting from that reliance [*Freitas v. Marsh (1945) 70 Cal. App. 2d 711, 713, 161 P.2d 565]* .

[c] Need for Written Authority to Enter Into Contracts

Under the "equal dignities" rule, the authority of an agent to enter into a contract required by law to be in writing can only be given by an instrument in writing [*Civ. Code § 2309*; for discussion of the effect of the rule, *see § 85.22[4]*].

[2] FORM

Provision That Employee Cannot Bind Employer Without Employer's Written Consent

Need for Employer's Written Consent to Contract

It is expressly agreed that Employee shall have no right or authority at any time to make any contract or binding promise of any nature on behalf of Employer, whether oral or written, without the express written consent of Employer [*optional:* notwithstanding anything in this agreement to the contrary].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
C. Separate Provisions for Employee's Duties
3. Performance of Duties

28-85 California Legal Forms--Transaction Guide § 85.274

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.274 Provision for Adherence to Employer's Rules

[1] Comment

[a] Use of Form

This form is a provision requiring adherence to the employer's rules and regulations. It includes an option subjecting the employee either to all of the employer's rules or limiting compliance to the rules governing clothing and grooming. This type of provision should be used at least in contracts under which non-executive personnel are employed, if not all employment agreements, in order to make it clear that there are rules to which the employee must adhere.

If the employee is to meet the public, it is suggested that the employer be consulted to determine whether it perceives a need for the clothing and grooming option contained in this form. In many cases, the employer has an interest in how its employees represent it to the public, and it is beneficial to specify this type of obligation in the contract so that the employee understands at the outset the fact that it is a requirement.

For a related provision specifying that business expenses for expense account purposes are limited to those specified in the employer's rules, see *§ 85.413*.

[b] Duty to Comply With All Directions of Employer

The statutory general rule is that an employee is generally obligated to perform in conformance with the usage (i.e., rules) of the employer unless otherwise directed by the employer or unless it is impracticable or manifestly injurious to the employer to do so [*see Lab. Code § 2857*]. In addition, an employee must substantially comply with all of the employer's directions concerning the employment, unless that obedience is impossible, unlawful, or imposes new and unreasonable burdens on the employee [*Lab. Code § 2856*].

An employee has the duty to obey all reasonable orders of the employer that are not inconsistent with the employment contract [*May v. New York Motion Picture Corp. (1920) 45 Cal. App. 396, 402-409, 187 P. 785]* . It is particularly important that the clothing and grooming option be included, when appropriate, to preclude any later claim that a new rule requiring adherence to a particular standard is "new and unreasonable" [*see Thornton v. Department of Human Resources Development (1973) 32 Cal. App. 3d 180, 185-186, 107 Cal. Rptr. 892]* . In that case, the court stated that an order to shave would be reasonable if motivated by evidence that the beard was detrimental to the employer's business interests or was unsanitary but that it would be unreasonable if motivated solely by a personal distaste for the beard or if it were merely a ruse to fire the employee [*see Thornton v. Department of Human Resources Development (1973) 32 Cal. App. 3d 180, 186, 107 Cal. Rptr. 892]* . For a discussion of what orders are reasonable, see *§ 85.11[1]*.

[c] Function of Employer Rules as Part of Contract

An employer's policies or rules are enforceable by an employee as part of his or her contract when the employer issues them, the employee knows of them, relies on them as terms of his or her employment, and continues that employment [*Hepp v. Lockheed-California Co. (1978) 86 Cal. App. 3d 714, 718-720, 150 Cal. Rptr. 408]* . In the absence of a contract provision requiring adherence to the employer's rules, the obligation has been implied [Pugh v. See's *Candies, Inc. (1981) 116 Cal. App. 3d 311, 327, 171 Cal. Rptr. 917]* or treated as a contract created when the employer's offer of the rule is accepted by the employee's act of continuing in employment [*Chinn v. China National Aviation Corp. (1955) 138 Cal. App. 2d 98, 99-100, 291 P.2d 91]* .

[2] FORM

Provision for Adherence to Employer's Rules

Adherence to Employer's Rules

(a) At all times during the performance of this contract, Employee shall strictly adhere to and obey all of Employer's policies, procedures, rules, and regulations governing the conduct of its employees now in effect or as subsequently modified.

[*Add if adherence to clothing and grooming standards is to be required:*]

(b) Employee shall during all the working hours of employment under this contract be clothed and groomed in strict accordance with the policies, procedures, rules, and regulations now in effect or as subsequently modified.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.275

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.275 Provision That Duties Be Performed at Places Other Than Originally Designated

[1] Comment--Use of Form

This form is a provision specifying that the duties detailed in the initial employment agreement may be performed at places other than the place originally designated. It is intended for use when it is contemplated that the employee will commence work at a particular location but may thereafter be assigned to any other location where the employer does business. This type of provision is commonly used by employers of salespersons or companies having various locations, such as chain stores, large banks, insurance companies, manufacturing companies with various plants, oil companies, and construction companies doing work at many different sites.

[2] FORM

Provision That Duties Be Performed at Places Other Than Originally Designated

Place of Performance of Duties

Employee shall perform_____[his *or* her] duties at_____[*specify, e.g.*, the _____ (*describe territory*) *or* the office of Employer located at _____ (*address*)]. However, Employer reserves the right to transfer Employee to any other place or places determined by Employer at any time deemed necessary or advisable by Employer [for business purposes].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor &

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28-85 California Legal Forms--Transaction Guide § 85.276

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.276 Provision Specifying Length of Work Day and Week

[1] Comment

[a] Use of Form

This form specifies the number of hours per day and days per week to be worked by the employee. It should be included in the employment contract when the parties wish to guard against future misunderstandings by precisely defining the number of hours the employee must devote to the employer's business each week.

[b] Number of Hours Constituting a Work Day

For most adult employees, eight hours of labor constitutes a day's work unless the employment contract expressly provides otherwise. Time spent commuting to and from the first place at which the employer requires the employee's presence is not included as part of a day's work, even when the employee commutes in a vehicle owned, leased, or subsidized by the employer for ride-sharing purposes [*Lab. Code § 510(b)*; *see Veh. Code § 522*]. However, an employee is entitled to compensation for the period that starts when the employee commences the principal activities of the job and ends when the employee ceases performance of the last principal activity of the job [*29 U.S.C. § 254(a)*; *29 C.F.R. § 790.6(a)*]. Thus, time spent walking to a production area after performing the first principal activity and before the end of the last principal activity is part of the compensable workday. "Principal activities" for this purpose include activities that are integral and indispensable to the employee's work, such as donning and doffing required protective gear) [*IBP, Inc. v. Alvarez (2005) 546 U.S. 21, 126 S. Ct. 514, 523-525, 163 L. Ed. 2d 288, 299-302]* .

The law limits the number of hours that a minor may be employed during a workday or workweek [*see Lab. Code § 1391*]. In addition, state or federal statutes and regulations may limit the number of hours of employment in certain occupations for safety reasons. Counsel should consider any special regulations applicable to the client's business when drafting a provision specifying hours of work. For a discussion of legal limitations on hours of work for minors and for

adults, see Wilcox, California Employment Law, Chs. 3, 6 (Matthew Bender).

Even when the law does not place an absolute limit on the number of hours that may be worked, the employer may be required to pay overtime premiums to employees who work more than a specified number of hours in a day or week, unless the employee is exempt from this requirement [*see 29 U.S.C. § 207*; *Lab. Code § 510(a)*]. For discussion, see *§ 85.290[1][b]*.

[c] Number of Days Constituting a Workweek

Forty hours of labor constitutes a regular workweek [*see Lab. Code § 510(a)*]. Every employee is entitled to one day of rest in seven [*Lab. Code § 551*]. Generally, no employer may require an employee to work more than six days in seven [*Lab. Code § 552*; *but see Lab. Code §§ 554, 556* (exemptions from six-day limit)]. The failure to observe these requirements is a misdemeanor [*see Lab. Code § 553*].

[2] FORM

Provision Specifying Length of Work Day and Week

Hours of Employment

Employee shall work _____ hours per day during the periods to be designated by Employer, five days each week for a total of _____ hours per week actually devoted to the business of Employer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide §§ 85.277-85.289

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[Reserved]

§§ 85.277[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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D. Separate Provisions for Compensation of Employees
1. Fixed Compensation

28-85 California Legal Forms--Transaction Guide § 85.290

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.290 Provision for Payment of Hourly Wage

[1] Comment

[a] Use of Form

This form is an employment contract provision stating that the employee's compensation will be paid on the basis of a specified hourly rate rather than on a salary basis. It makes clear that payment will be made only for hours of service actually rendered by the employee. It may or may not contain a requirement that a minimum number of hours per week be worked by the employee. The inclusion of this additional provision may depend on whether the employee is hired on a part-time or full-time basis.

For provisions compensating the employee by means of an annual salary annual salary provisions, see *§§ 85.200-85.211*. For a discussion of common law considerations relating to compensation in general, see *§ 85.200[1][e]*.

[b] Minimum Wage and Overtime Requirements

[i] Generally

The federal Fair Labor Standards Act (FLSA) [*29 U.S.C. § 201 et seq.*] regulates the wages and hours of persons engaged in interstate commerce or in the production of goods for interstate commerce [*see 29 U.S.C. §§ 206, 207*]. Wages, hours, and working conditions are also regulated by California statutes and by wage orders issued by the California Industrial Welfare Commission (IWC) [*see Lab. Code §§ 510-558*; *8 Cal. Code Reg. § 11000 et seq.*]. Although the California Legislature has de-funded the IWC (effective July 1, 2004), the IWC wage orders remain in effect, and the Division of Labor Standards Enforcement will continue to enforce them [*see Lab. Code § 61*; *see, e.g.,* Singh v. Superior Court (2006) 140 Cal. App. 4th 387, 397-400, 44 Cal. Rptr. 3d 348 (construing Wage Order No. 5-2001, 8 Cal. Code Reg. § 11050, as providing that for healthcare workers on 3-day, 12-hour alternative workweek

schedule, overtime pay begins only after 40 hours); *but see* Bearden v. U.S. Borax, Inc. (2006) 138 Cal. App. 4th 429, 434-440, 41 Cal. Rptr. 3d 482 (Wage Order No. 16-2001, 8 Cal. Code Reg. § 11160, P 10(E), exceeded IWC's authority because it created exemption from meal-period requirements for certain collective bargaining agreements that was inconsistent with exemptions expressly set forth in Lab. Code § 512)].

Both the FLSA and California law require employers to pay a minimum wage and overtime to nonexempt employees [*see 29 U.S.C. §§ 206, 207*; *Lab. Code § 510(a)*; *8 Cal. Code Reg. § 11000 et seq.*]. Under California law, any work in excess of eight hours in one day or in excess of 40 hours in one week or any time worked on the seventh workday in a week must be compensated as overtime [*Lab. Code § 510(a)*; *see Advanced-Tech Sec. Servs., Inc. v. Superior Court (2008) 163 Cal. App. 4th 700, 706-707, 77 Cal. Rptr. 3d 757* (premium holiday pay voluntarily offered by employer may be credited against amount due employee for overtime work); *Huntington Mem'l Hosp. v. Superior Court (2005) 131 Cal. App. 4th 893, 902-911, 32 Cal. Rptr. 3d 373* (employer may not engage in subterfuge or artifice designed to evade overtime requirements, such as manipulation or reduction of pay for regular hours to make up for overtime rate that will have to be paid)].

Exempt from the FLSA overtime compensation requirements are a variety of workers, including the following:

- Executive, administrative, professional, computer, and outside sales employees [*29 C.F.R. § 541.0 et seq.*].
- Employees covered by a collective bargaining agreement [*see 29 U.S.C. § 207(b)(1), (2)*].
- Employees in the transportation industry [*29 U.S.C. § 213(b)(1)-(3), (6)*].

Many other FLSA exemptions exist [*see 29 U.S.C. § 213(b)*]. California statutory exemptions exist for employees who are on alternative workweek schedules [*Lab. Code § 510(a)*; *see Lab. Code §§ 511, 514, 554*; *see also Lab. Code § 515.5* (exemption for certain employees in computer software field)]. IWC wage orders also contain numerous exemptions from the minimum wage and maximum hour provisions [*see 8 Cal. Code Reg. § 11000 et seq.*; *see also Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal. 4th 785, 796-798, 85 Cal. Rptr. 2d 844, 978 P.2d 2* (California defines "outside salespersons" who are exempt from overtime pay in way that provides, at least in some cases, greater protection for employees than under FLSA; California definition depends on how much time employee spends on outside selling, whereas federal definition depends on employee's primary duty)].

In some areas an employer is subject to stricter standards under California law than under federal law; in such an instance the employer must follow California law [*see 29 U.S.C. § 218(a)*]. For example, an employer may use an "averaging" method to establish compliance with the minimum wage imposed by the FLSA. Under that method, an employer may compensate some hours at less than the minimum rate so long as the average compensation for the relevant pay period equals or exceeds the minimum rate [*see Medrano v. D'Arrigo Bros. Co. of Cal. (N.D. Cal. 2004) 336 F. Supp. 2d 1053, 1057]* . California's minimum wage law, in contrast, requires that an employee be paid at the statutory rate (or, if higher, the applicable contractual rate) for *every* hour worked [*see Lab. Code §§ 221, 222, 223, 1194(a)*]. Thus, an employer may not use the "averaging" method to establish compliance with California's minimum wage law, because it would effectively reduce employees' hourly rate and would contravene the clear legislative intent that every hour be paid at the statutory or contractual rate [*Armenta v. Osmose, Inc. (2005) 135 Cal. App. 4th 314, 321-324, 37 Cal. Rptr. 3d 460]* .

For a detailed description of the minimum wage and overtime compensation requirements and the exemptions from those requirements, see Wilcox, California Employment Law, Chs. 2, 3 (Matthew Bender).

[ii] Effect of Hourly Wage on Employee's Exempt Status

Although a detailed treatment of exemptions from wage and hour laws is beyond the scope of this comment, one issue concerning exemptions warrants special attention in connection with the drafting of a provision for an hourly wage. Under both the FLSA and the IWC wage orders, persons employed in a bona fide executive, administrative, or professional capacity are exempt from the minimum wage and overtime requirements [*see 29 U.S.C. § 213(a)(1)*; *8 Cal. Code Reg. § 11000 et seq.*]. However, federal regulations interpreting the executive, administrative, or professional exemption under the FLSA set forth detailed criteria for application of the exemption, one of which is that the exempt person must be employed on a "salary basis" or, unless the exempt person is an executive, on a "fee basis" [*see 29 C.F.R. §§ 541.100(a)(1), 541.200(a)(1), 541.300(a)(1), 541.600(a)*]:

- "Salary basis"--If the employee regularly receives, on a weekly or less-frequent basis, a predetermined amount constituting all or part of the employee's compensation, without regard to the number of days or hours worked, and with no reductions because of variations in the quality or quantity of the work performed, except as provided by the regulations [*29 C.F.R. § 541.602*], payment is on a salary basis.

- "Fee basis"--If an administrative or professional employee is paid an agreed sum for a single job regardless of the time required for its completion [*29 C.F.R. § 541.605(a)*, payment if on a fee basis. (Fee payments to administrative or professional employees resemble piecework payments, but are made for jobs that are unique rather than for series of jobs repeated indefinite number of times with identical repeated payments)]. Payments based on the number of hours or days worked, and not on the accomplishment of a given single task, are not considered payments on a fee basis [*29 C.F.R. § 541.605(a)*].

A provision for payment of wages on an hourly basis would undoubtedly be regarded as inconsistent with payment on a salary basis or fee basis and should not be included in an employment contract for an individual whom the employer wishes to classify as an exempt executive, administrative, or professional employee, unless the employer is prepared to pay that individual overtime premiums in compliance with the FLSA.

[iii] Effect of Contract Provisions in Violation of FLSA

Since the provisions of the FLSA are mandatory for the employer, an employee will be able to bring an action for the minimum compensation even though paid the lesser amount provided in the contract and even if he or she made no claim for additional compensation at the time of payment [*Travis v. Ray (D. Ky. 1941) 41 F. Supp. 6]* . Furthermore, the employer may be liable for various civil and criminal penalties for a violation of the FLSA [*see 29 U.S.C. §§ 215, 216*]. In applying the FLSA, the courts have construed its provisions liberally in favor of the employee in order to accomplish the declared policy of Congress to correct conditions in industry detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers [*see 29 U.S.C. § 202*; *Coomer v. Durham (D. Va. 1950) 93 F. Supp. 526]* . To further this objective, therefore, any claimed exemption will be given strict construction [*Harrison v. Preston Trucking Co. (D. Md. 1962) 201 F. Supp. 654]* .

For discussion of procedures for enforcing minimum wage and overtime requirements under both federal and California law, see Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under the Wage and Hour Laws* (Matthew Bender).

[iv] Other Federal Minimum Wage and Maximum Hour Requirements

In addition to the wage and hour provisions of the FLSA, there are the more stringent wage and hour provisions contained in the Public Contracts Act, which apply to firms and businesses producing goods under contract with the federal government [*see 41 U.S.C. §§ 35-45*]. These requirements are spelled out in the invitation for bids or request for proposals given to prospective bidders on government contracts and generally apply to the types of employment or

employment agreements not covered by this chapter. For coverage of federal government contract bidding procedures, see Ch. 90B, *Federal Government Contracts* .

[c] Semimonthly Payment of Wages

[i] Requirement

The general rule under California law is that wages are due and payable twice during each calendar month on days designated in advance by the employer as the regular paydays [*Lab. Code § 204(a)*]. However, the salaries of executive, administrative, and professional employees may generally be paid once a month within seven days of the close of their monthly payroll period. Executive, administrative, and professional employees who are exempt from the FLSA [*see 29 U.S.C. § 213(a)(1)*] may be paid once monthly on or before the 26th day of the month during which the work was performed [*Lab. Code §§ 204(a), 204.2*]. If an executive, administrative, or professional employee is not subject to the FLSA, not covered by a collective bargaining agreement, is paid monthly remuneration that does not include overtime pay, and is paid within seven days of the close of his or her monthly payroll period, there is no requirement for semimonthly payment or payment on or before the 26th day of the month during which the work was performed [*Lab. Code § 204c*].

For other employees, labor performed between the 1st and the 15th of the month must be paid for between the 16th and the 26th of that month, whereas labor performed between the 16th and last days of the month must be paid for between the 1st and 10th day of the following month [*Lab. Code § 204(a)*]. Exempted from the operation of this section are commission wages paid to persons employed by an employer licensed as a vehicle dealer by the Department of Motor Vehicles, which are due and payable once during each calendar month on a day designated in advance by the employer as the regular payday [*Lab. Code § 204.1*]; wages earned and unpaid at the time of discharge of an employee, which generally are payable immediately [*Lab. Code § 201*; *see Smith v. Superior Court (2006) 39 Cal. 4th 77, 82-94, 45 Cal. Rptr. 3d 394, 137 P.3d 218* (employee is "discharged" for purposes of *Lab. Code § 201* not only when employee is involuntarily terminated from ongoing employment relationship, but also when employee is released after completing particular job assignment or time duration for which he or she was hired)]; and wages due to an employee not having a written contract for a definite period and who quits employment, which generally are due and payable not later than 72 hours thereafter [*Lab. Code § 202*].

Special requirements apply to the payment of wages to employees of a temporary service employer that provides workers for its clients or customers [*see Lab. Code § 201.3*]. For detailed discussion, see *§ 85.12[1]*.

[ii] Effect of Semimonthly Payment Requirement

The provision for the payment of wages on a semimonthly basis establishes the minimum frequency for payment of employees covered by the provision, but it does not in any way limit or prohibit the payment of wages at more frequent intervals than semimonthly, or in greater amounts than provided by statute, or in full when or before due [*Lab. Code § 219(a)*]. Since the provisions of the Labor Code concerning the payment of wages cannot in any way be contravened or set aside by private agreement, whether written, oral, or implied [*Lab. Code § 219*], the attorney who is drafting an employment contract should be certain that the compensation provisions comply with the statutory requirements, when applicable.

[2] FORM

Provision for Payment of Hourly Wage

Hourly Compensation

As compensation for the hours of service actually rendered under this agreement, Employee shall be entitled to payment

from the Employer at the rate of $_____ per hour, to be computed and paid _____ [*specify time interval, e.g.,* weekly *or* semimonthly] on _____ [*specify payment date or dates, e.g.,* Friday of each week *or* the fifteenth and final days of each month]. [*Optional minimum hour provision:* During the effective term of this agreement, Employee shall devote a minimum of _____ (*specify number, e.g.,* 40) hours per week to the business of the Employer.]

Legal Topics:

For related research and practice materials, see the following legal topics:
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DIVISION VI: PERFORMANCE OF SERVICES
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D. Separate Provisions for Compensation of Employees
1. Fixed Compensation

28-85 California Legal Forms--Transaction Guide § 85.291

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.291 Provisions for Overtime Work and Compensation

[1] Comment

[a] Use of Form

This form contains provisions under which an employee agrees to work overtime whenever required by the nature of the work or the needs of the employer, and setting forth the formula by which compensation for those overtime hours can be calculated for a given work week. The provision requiring the employee to work overtime is for use in a contract when the nature of the work is such that there is a likelihood that overtime will be required and the employer desires that the employee be contractually bound to render additional service when needed. The provision for the payment of overtime compensation may be included whether or not a provision binding the employee to work overtime is used.

Both the FLSA and California law require employers to pay overtime compensation to nonexempt employees, regardless of whether the employment contract provides for such overtime [*29 U.S.C. § 207*; *Lab. Code § 510(a)*; *8 Cal. Code Reg. § 11000 et seq.* (IWC wage orders); *see Lab. Code § 61* (despite de-funding of IWC, effective July 1, 2004, Wage Orders remain in effect and are enforced by Division of Labor Standards Enforcement); *Advanced-Tech Sec. Servs., Inc. v. Superior Court (2008) 163 Cal. App. 4th 700, 706-707, 77 Cal. Rptr. 3d 757* (premium holiday pay voluntarily offered by employer may be credited against amount due employee for overtime work); *Huntington Mem'l Hosp. v. Superior Court (2005) 131 Cal. App. 4th 893, 902-911, 32 Cal. Rptr. 3d 373* (employer may not engage in subterfuge or artifice designed to evade overtime requirements, such as manipulation or reduction of pay for regular hours to make up for overtime rate that will have to be paid); *see also § 85.290[1][b]*]. If overtime provisions are included in the contract, counsel should be sure that they comply with both federal and state law.

Both the FLSA and California law contain numerous exemptions from the minimum wage and overtime compensation provisions [*see 29 U.S.C. § 213*; *Lab. Code §§ 510(a), 511, 514, 554* (alternative workweek schedules); *8 Cal. Code Reg. § 11000 et seq.* (IWC wage orders); *see also § 85.290[1][b]*]. For a complete description of the minimum wage

and overtime compensation requirements and the exemptions from those requirements, see Wilcox, California Employment Law, Ch. 2, *Minimum Wages* , and Ch. 3, *Overtime Compensation and Regulation of Hours Worked* (Matthew Bender).

When this form is used, the attorney should advise the client that all wages earned for labor in excess of the normal workweek must be paid no later than the payday for the payroll period [*Lab. Code § 204(b)(1)*].

[b] Compensating Time Off

This form includes an optional provision allowing the employee to receive time off from work in lieu of monetary compensation for overtime work. An employee may receive such compensating time off, at the rate of not less than one and a half hours for each hour of overtime worked, if all of the following conditions are met [*Lab. Code § 204.3(a), (b)*]:

- The compensating time off is provided pursuant to a collective bargaining agreement or a written agreement entered into between the employer and employee before the performance of the work.
- The employee has not accrued compensating time in excess of 240 hours [*see Lab. Code § 204.3(c)*].
- The employee has requested, in writing, compensating time off in lieu of overtime compensation.
- The employee is regularly scheduled to work no less than 40 hours in a workweek.

The foregoing provisions for compensating time off are not applicable to any employee who is exempt from overtime-pay requirements or to employees in certain industries specified by statute [*Lab. Code § 204.3(h), (i)*; *see § 85.290[1][b]*].

If the employer and employee are covered by the Fair Labor Standards Act (FLSA) [*29 U.S.C. § 201 et seq.*], the following provision for compensating time off should not be used, because FLSA requires the payment of overtime compensation in monetary form [*see 29 U.S.C. § 207(a)(1)*].

[2] FORM

Provisions for Overtime Work and Compensation

Overtime Work Requirement

In addition to the regular _____ [*number, e.g.,* eight] hours per day, Employee shall work as many hours in a single workday as is reasonably necessary to complete the work assigned by the Employer. Employee shall work the necessary additional hours whenever the nature of his/her work so requires or the Employer so requests. Under no circumstances shall Employee be required to work more than _____ [*maximum number*] hours in any single day.

Overtime Compensation

The compensation agreed upon herein is for a workweek of _____ [*number, e.g.,* 40] hours. If Employee is required to work for more than _____ [*number, e.g.,* 40] hours in any workweek_____[he *or* she] shall be compensated at the rate of 11/2 times_____[his *or* her] regular rate of pay for all hours actually devoted to that overtime employment. If Employee is required to work more than 8 hours on the seventh day of work in any one workweek,_____[he *or* she] shall be compensated at the rate of twice_____[his *or* her] regular rate of pay for the hours actually worked in excess of 8 hours on the

seventh workday of that workweek.

[*OR*]

The compensation agreed upon herein is for a workweek of _____ [*number, e.g.,* 40] hours and a workday of _____ [*specify, e.g.*, eight] hours. If Employee is required to work for more than _____ [*number, e.g.*, 40] hours in any workweek or _____ [*specify, e.g.*, eight hours] in any workday,_____[he *or* she] shall be compensated at the premium rate established by state and federal law.

[*If appropriate, add:*]

Compensating Time Off

In lieu of monetary compensation for overtime work, Employee may request to receive time off from work, at the rate of one and one-half hours for each hour of overtime worked, provided that Employee makes the request in a writing submitted to Employer, specifying the amount of compensating time to be taken. Employer will permit Employee to use the time within a reasonable period after receipt of the request, if the use of the compensating time will not unduly disrupt the operations of Employer, Employee may not receive compensating time during any week in which Employee is not regularly scheduled to work at least 40 hours, and Employee may not accumulate more than 240 hours of compensating time.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsOvertime & Work Period

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
D. Separate Provisions for Compensation of Employees
1. Fixed Compensation

28-85 California Legal Forms--Transaction Guide §§ 85.292-85.299

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.292[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
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D. Separate Provisions for Compensation of Employees
2. Changes in Rate of Compensation

28-85 California Legal Forms--Transaction Guide § 85.300

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.300 Provision for Annual Increase in Salary

[1] Comment--Use of Form

This form provides a schedule showing the annual salary increases agreed on in advance for each of the following years during the employment term. Such a provision assures the employee of annual increases in salary. If either party desires additional protection against inflation, a cost-of-living adjustment provision can be used [*see § 85.301*].

If the contract creates an at will employment [*see § 85.510*], a provision for future compensation increases might be viewed as conflicting with the employer's right to terminate the contract for any reason at any time [*see Lab. Code § 2922*; *but see Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 391-392, 46 Cal. Rptr. 3d 668* , (when employment contract expressly provides for "at will" employment terminable "at any time," any additional contractual provisions regarding probationary period and annual reviews do not expressly or impliedly create right to be terminated only for cause); *Miller v. Pepsi-Cola Bottling Co. (1989) 210 Cal. App. 3d 1554, 1559, 259 Cal. Rptr. 56* (salary increases should not change status of at will employee to one dischargeable only for good cause)]. Therefore, this form includes a provision clarifying that the references to future compensation increases are not to be construed as changing the at will nature of the employment [*see Kovatch v. California Casualty Management Co. (1998) 65 Cal. App. 4th 1256, 1275-1277, 77 Cal. Rptr. 2d 217* (positive performance reviews, commendations, salary increases, and vague assurances of future employment are insufficient to overcome statutory presumption of at will employment, supported by express statements of at will employment in employee handbook and in employee's signed job application)].

[2] FORM

Provision for Annual Increase in Salary

Salary Increase

As compensation for services rendered under this agreement, Employee shall be entitled to compensation from the Employer at the rate of $ _____ per annum during the first year, $ _____ per annum during the second year [*add increases for other intervening employment years, if any*], and $ _____ per annum during the _____ [*number of last year of contract, e.g.,* third and final] year of employment under this agreement. The compensation during each such employment year shall be payable in equal _____ [*specify time period, e.g.,* weekly *or* semimonthly] installments on the _____ [*date of payment, e.g.,* Friday of each week *or* the fifteenth and final days of each month] during the period of employment, prorated for any partial employment period. [*If employment is at will, add:* Nothing in this paragraph shall be construed to restrict or limit the Employer's right to terminate this at will employment agreement as provided in Paragraph _____ of this agreement.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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D. Separate Provisions for Compensation of Employees
2. Changes in Rate of Compensation

28-85 California Legal Forms--Transaction Guide § 85.301

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.301 Provision for Adjustment of Salary Based on Increase in Cost of Living Index

[1] Comment

[a] Use of Form

This form includes two alternative provisions for the periodic adjustment of an employee's basic salary to reflect increases in the cost of living as determined from changes in the Consumer Price Index published by the Bureau of Labor Statistics of the United States Department of Labor. The first alternative provides for cost of living salary increases to be added to regular salary payments, while the second alternative provides for a lump-sum cost of living increase payment.

If the contract creates an at will employment [*see § 85.510*], a provision for future salary adjustments might be viewed as conflicting with the employer's right to terminate the contract for any reason at any time [*see Lab. Code § 2922*; *but see Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 391-392, 46 Cal. Rptr. 3d 668* (when employment contract expressly provides for "at will" employment terminable "at any time," any additional contractual provisions regarding probationary period and annual reviews do not expressly or impliedly create right to be terminated only for cause); *Miller v. Pepsi-Cola Bottling Co. (1989) 210 Cal. App. 3d 1554, 1559, 259 Cal. Rptr. 56* (salary increases should not change status of at will employee to one dischargeable only for good cause)]. Therefore, this form includes a provision clarifying that the references to future salary adjustments are not to be construed as changing the at will nature of the employment [*see Kovatch v. California Casualty Management Co. (1998) 65 Cal. App. 4th 1256, 1275-1277, 77 Cal. Rptr. 2d 217* (positive performance reviews, commendations, salary increases, and vague assurances of future employment are insufficient to overcome statutory presumption of at will employment, supported by express statements of at-will employment in employee handbook and in employee's signed job application)].

[b] Consumer Price Index

The Consumer Price Index is computed by the Bureau of Labor Statistics and indicates the relative level of prices to the consumer of a typical sampling of goods and services as compared to the level of prices of the base year. In addition to a national figure, several regional figures are available. Current figures are contained in monthly publications available free of charge from either the national or any of the regional offices of the Bureau of Labor Statistics.

[2] FORM

Provision for Adjustment of Salary Based on Increase in Cost of Living Index

COST OF LIVING INCREASE

[*First alternative; cost of living salary increase.*]

Salary Increase

(a) The basic salary provided herein shall be adjusted quarterly [*or* monthly *or* annually] to reflect the increase, if any, in the cost of living during the previous _____ [*specify period, e.g.,* quarter] by adding to that basic salary an amount obtained by multiplying the basic salary by the percentage by which the level of the Consumer Price Index [for the _____ (*e.g.,* San Francisco-Oakland) Metropolitan Area], as reported for the last day of that quarterly [*or* monthly *or* annual] period by the Bureau of Labor Statistics of the United States Department of Labor, has increased over its level as of_____[*date*] [*or* the date of the commencement of this agreement].

(b) Following the end of each quarter [*or* month *or* year] of this agreement, and within _____ [*e.g.,* 10 days] after the release by the Bureau of Labor Statistics of the figures for that quarter [*or* month *or* year], the Employer shall pay to Employee the amount of any additional compensation to which Employee is entitled by reason of the adjustment provided above.

[*If employment is at will, add:* (c) Nothing in the foregoing Paragraphs (a) and (b) shall be construed to restrict or limit the Employer's right to terminate this at will employment agreement as provided in Paragraph _____ of this agreement.]

[*OR*]

[*Second alternative; cost of living lump sum payment.*]

Cost of Living Lump Sum Payment

In addition to the salary herein provided, Employee shall be entitled to a cost of living lump sum payment which shall be computed quarterly [*or* monthly *or* annually] and which shall equal the amount obtained by multiplying that salary by the percentage by which the level of the Consumer Price Index, published by the Bureau of Labor Statistics of the United States Department of Labor [for the _____ (*e.g.,* San Francisco-Oakland Metropolitan Area)] as of the last day of that quarterly [*or* monthly *or* annual] period, has increased over its level as of_____[*date of the agreement or other appropriate date*]. The amount of that lump sum payment, if any, shall be paid to Employee within [*e.g.,* ten days] after the release of the figures for a given quarter [*or* month *or* year] by the Bureau of Labor Statistics. [*If employment is at will, add:* Nothing in this paragraph shall be construed to restrict or limit the Employer's right to terminate this at will employment agreement as provided in Paragraph _____ of this agreement.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & Definitions

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D. Separate Provisions for Compensation of Employees
2. Changes in Rate of Compensation

28-85 California Legal Forms--Transaction Guide § 85.302

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.302 Provision for Increase in Compensation at Employer's Discretion

[1] Comment--Use of Form

This form provides that each year's increase in compensation, if any, will be determined by the employer in its discretion. This provision gives little, if anything, to the employee since an employee is entitled only to that compensation specified in the contract [*see Hamilton v. Salopek (1945) 71 Cal. App. 2d 104, 106, 161 P.2d 955]* . While a court will not remake a contract provision leaving compensation to the discretion to the employer [*see Delafield v. Searle Aero Industries (1946) 76 Cal. App. 2d 862, 871, 174 P.2d 455]* , it has been held that a provision for discretionary reduction in compensation required that the exercise of an employer's decision to reduce compensation be free from fraud or mistake [*Wortman v. Mack Inter. Motor T. Corp. (1935) 10 Cal. App. 2d 445, 447, 51 P.2d 1101]* .

[2] FORM

Provision for Increase in Compensation at Employer's Discretion

Discretionary Increase in Compensation

Employer shall pay Employee such additional compensation, if any, for services rendered under this contract, as may be determined in the sole discretion of_____[*name or title of officer or* Employer's Board of Directors].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor &

Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-85 California Legal Forms--Transaction Guide § 85.303

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.303 Provision for Compensation During Training Period

[1] Comment--Use of Form

This form is a provision for the payment of a specified compensation during a preliminary instruction or training period, with the regular salary to commence on completion of the course of instruction in a manner satisfactory to the employer. For discussion of "satisfactory," see *§ 85.271[1][b]*.

This form is intended for use when it is necessary for the employee to complete preliminary instruction or training in order to be able to perform the services required under the employment contract.

This form is not intended for use in an apprenticeship contract; for coverage of the contents of such a contract, see *§ 85.122*.

[2] FORM

Provision for Compensation During Training Period

Compensation During Instruction

(a) It is understood by and between the parties that in order for Employee to be able to perform the work required under this agreement, it is necessary for Employee to complete a preliminary period of [instruction *or* training] which will continue for a period of [*specify period, e.g.,* five weeks]. During this period of [instruction *or* training] Employee shall be entitled to and paid the sum of $_____ per week.

(b) In the event that after the completion of the period of [instruction *or* training], Employee does not, in the opinion of the Employer, show sufficient aptitude to enable him or her to perform the work required under this contract in a

satisfactory manner, the Employer shall have the option of terminating this contract or requiring that Employee complete an additional period of [instruction *or* training].

(c) Upon the successful completion of [instruction *or* training] and upon the determination of the Employer that Employee is competent to perform the work required hereunder in a satisfactory manner, this contract shall take effect for the period specified and Employee shall be compensated for services rendered at the rate herein provided.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsGeneral Overview

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28-85 California Legal Forms--Transaction Guide §§ 85.304-85.309

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.304[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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D. Separate Provisions for Compensation of Employees
3. Commission and Percentage Compensation

28-85 California Legal Forms--Transaction Guide § 85.310

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.310 Provision for Payment on Piecework Basis

[1] Comment

[a] Use of Form

This form is a provision for payment on a piecework basis. It is for use in a contract when the amount of compensation is to be directly related to the output or productivity of the employee. Payment on a piecework basis is most useful when the employee is engaged in the production of identifiable units of work. Such a method of compensation is often a better measure of the value of the services rendered by the employee and has a tendency to encourage greater productivity than payment based on the time expended.

[b] Provision for Minimum Hourly Compensation

If a federal or state minimum wage law is applicable [*see § 85.290[1][b]*], it may be necessary to include a provision for a minimum hourly payment, as provided in the form. If no such law is applicable, the provision may be deleted. For purposes of calculating overtime, when applicable, the piece rate payment must first be reduced to an hourly rate by dividing the total earnings in the workweek by the number of hours worked [*see 29 C.F.R. § 778.111*]. Any hours worked in excess of 40 in the week must be compensated at one and one-half times the regular rate [*29 U.S.C. § 207(a)*].

[2] FORM

Provision for Payment on Piecework Basis

Piecework Pay

As compensation for work performed under this agreement, Employee shall be entitled to receive $[*specify amount of compensation*] per [*specify unit or incident, e.g.,* each widget completed to the satisfaction of the Employer], or $[*specify amount, must be at least equal to any applicable minimum wage*] per hour, whichever is higher. That compensation shall be paid [*specify period, e.g.,* weekly] on [*specify payment date or dates, e.g.,* the last day of the week].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral Overview

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3. Commission and Percentage Compensation

28-85 California Legal Forms--Transaction Guide § 85.311

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.311 Payment of Commission--Percentage of Gross Sales

[1] Comment

[a] Use of Form

This form provides that the employee will be paid a commission, expressed as a percentage of gross sales, on all goods and merchandise he or she sells during the term of employment. It may also be used to provide for a commission based on a percentage of the receipts under contracts procured by the employee, and to specify whether the employee will be entitled to such a commission on sales made after termination of employment on contracts originally procured by the employee [*see Nein v. HostPro, Inc. (2009) 174 Cal. App. 4th 833, 850, 95 Cal. Rptr. 3d 34* (terminated employee had no right to claim commission on transaction finalized after termination, because employment contract unambiguously provided that he would be eligible for commissions only while he remained employed by employer)]. Finally, it includes an optional provision, for use if the contract allows commissions on sales made after the termination of employment, stating that the employee will not be entitled to receive commission payments after severance of the employment relationship if he or she engages in any act that would injure the employer in its relationship with its customers or induces those customers to discontinue their business relationship with the employer. This optional provision has been drafted to comply with limitations against restraints of trade [*see* [d], *below*].

A provision for commissions based on net sales is *set forth in § 85.220*. A provision for commissions on all sales originating in the territory assigned to the employee, regardless of who is the procuring cause, is *set forth in § 85.220* as well. For language governing payment of a commission based on purchases by customers originally procured by the employee, see *§ 85.313*. For a provision for salary and commission combined, see *§ 85.314*.

This form of compensation is most commonly used with sales personnel or brokers who are to be compensated in direct proportion to the amount of their sales. Such a provision is advantageous to the employer since there is no liability for compensation, except a minimum wage in some cases, until the sales are actually made, and compensation generally

can be made out of the proceeds of the sales. From the employee's standpoint, such a provision is desirable since it rewards increased efforts expended to produce additional sales.

[b] Effect of Commission Provision

The right of a salesperson or other employee to receive a commission in a given circumstance will depend on the terms of the contract for compensation [*Commeford v. Baker (1954) 127 Cal. App. 2d 111, 118, 273 P.2d 321]* . It is therefore desirable, in order to avoid later disputes, that the terms of the commission provision clearly cover the situations that may be expected to arise. In the usual contract, which provides for the payment of a commission on sales made by an employee, the employee will be entitled to a commission on all sales of which he or she was the "procuring cause," regardless of the fact that the employer or some other person intervened to complete the sale [*see Inglis v. Humphries (1960) 180 Cal. App. 2d Supp. 928, 930, 4 Cal. Rptr. 838]* . The term "procuring cause" has been variously defined as the originating cause that ultimately led to the conclusion of the transaction [*Willson v. Turner Resilient Floors, Inc. (1949) 201 P.2d 406]* , and as the cause originating a series of events that, without break in their continuity, result in the accomplishment of the prime object of the employment [*Rose v. Hunter (1957) 155 Cal. App. 2d 319, 323, 317 P.2d 1027]* .

[c] Applicability of Minimum Wage or Overtime Compensation Laws

For a general discussion of federal and California minimum wage and maximum hour laws, see *§ 85.290[1]*. For purposes of applying the provisions of the Fair Labor Standards Act [*29 U.S.C. §§ 201-219*], it may be necessary to distinguish between inside and outside salespersons, since only outside salespersons are exempted outright from the minimum wage and maximum hour requirements of the Act [*see 29 U.S.C. § 213(a)(1)*].

An "outside" salesperson is any employee whose primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer, and who is customarily and regularly engaged away from the employer's place or places of business in performing that primary duty [*29 C.F.R. § 541.500(a)*; *see 29 C.F.R. § 541.700* ("primary duty" defined); *but see Ramirez v. Yosemite Water Co., Inc. (1999) 20 Cal. 4th 785, 796-798, 85 Cal. Rptr. 2d 844, 978 P.2d 2* (California wage orders provide different definition of "outside salespersons" who are exempt from overtime pay; California definition depends on how much time employee spends on outside selling, whereas federal definition depends on employee's primary duty); *see also 8 Cal. Code Reg. § 11000 et seq.* (wage orders)]. Work performed incidental to and in conjunction with the employee's own outside sales or solicitations is regarded as exempt outside sales work, including: incidental deliveries and collections, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries, and attending sales conferences (i.e., work that furthers the employee's sales efforts) [*29 C.F.R. § 541.500(b)*]. Inside salespersons, that is, employees of retail or service establishments, who are paid on a commission basis, need not be paid overtime if their regular rate of pay is more than one and one-half times the minimum wage and more than half of their compensation represents commissions [*29 C.F.R. § 779.412*].

[d] Limitations on Competitive Activity

[i] In General

A contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind generally is to that extent void [*Bus. & Prof. Code § 16600*; *see D'Sa v. Playhut, Inc. (2000) 85 Cal. App. 4th 927, 929, 931-935, 102 Cal. Rptr. 2d 495* (discharging employee for refusing to sign employment agreement containing provision that violates *Bus. & Prof. Code § 16600* is violation of public policy). However, the general prohibition against noncompetition contracts is inapplicable to a contractual restraint that is incidental to (1) a sale of the goodwill of a business, or of an ownership interest in a business entity, when the sale of goodwill is involved [*Bus. & Prof. Code § 16601*; *see Hill Medical Corp. v. Wycoff (2001) 86 Cal. App. 4th 895, 901-908, 103 Cal. Rptr. 2d 779* (noncompetition covenant is invalid under *Bus. & Prof. Code § 16600* even if covenant is part of employee's sale of shares in corporate

employer, unless corporate goodwill is component of sale price under *Bus. & Prof. Code § 16601*)]; (2) the dissolution of a partnership [*Bus. & Prof. Code § 16602*]; or (3) under specified circumstances, the dissolution of a limited liability company [*Bus. & Prof. Code § 16602.5*]. If these exceptions apply, the promise not to compete must be limited to a specified county or counties, city or cities, or a part thereof, in which the business, corporation, or partnership conducted business, and for only as long as the buyer carries on a like business therein [*Bus. & Prof. Code §§ 16601*,16602.5

In addition to the statutory exceptions noted above, the California courts recognize a "trade secret exception" to the general rule, under which the courts will enforce a covenant not to compete to the extent necessary to protect an employer's trade secrets and confidential information [*Whyte v. Schlage Lock Co. (2002) 101 Cal. App. 4th 1443, 1462, 125 Cal. Rptr. 2d 277* ; *Muggill v. Reuben H. Donnelley Corp. (1965) 62 Cal. 2d 239, 242, 42 Cal. Rptr. 107, 398 P.2d 147* ; *Gordon v. Landau (1958) 49 Cal. 2d 690, 694, 321 P.2d 456]* . Thus, a covenant not to solicit the employer's customers may be enforceable if it is designed to protect the employer's confidential, proprietary, or trade-secret customer information, but not if the identity of the customers is not confidential and therefore not a trade secret [*see Thompson v. Impaxx, Inc (2003) 113 Cal. App. 4th 1425, 1429-1430, 7 Cal. Rptr. 3d 427* (complaint's allegation that customer lists were not confidential taken as true for purposes of judgment on the pleadings)].

The California Supreme Court has held that a noncompetition agreement is invalid under *Bus. & Prof. Code § 16600*, even if narrowly drawn, unless expressly authorized by statute [*Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 945-950, 955, 81 Cal. Rptr. 3d 282, 288-292, 296, 189 P.3d 285* ; *see Bus. & Prof. Code §§ 16601, 16602, 16602.5* (authorizing noncompetition agreement in connection with sale of business goodwill or corporate shares, or dissolution of partnership or limited liability company)]. However, the Court left open the question of the applicability of a "trade secret exception" to *Bus. & Prof. Code § 16600* [*Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 946 n.4, 81 Cal. Rptr. 3d 282, 289 n.4, 189 P.3d 285* ("[W]e do not here address the applicability of the so-called trade secret exception to [*Bus. & Prof. Code § 16600*], as Edwards does not dispute that portion of his agreement or contend that the provision of the noncompetition agreement prohibiting him from recruiting Andersen's employees violated [*Bus. & Prof. Code § 16600*].")].

[ii] Legitimate Post-Employment Restraints

Paragraph (d) of this form is an optional provision denying post-employment payments to the salesperson if he or she engages in any act that would injure the employer in its relationship with its customers or induces those customers to discontinue their business relationship with the employer. On its face, this provision might appear to be an invalid restraint on the salesperson's future occupation under the general rule discussed above. However, that is not the case. A provision in an employment contract forfeiting an employee's future rights if he or she goes to work for a competitor after retirement restrains that employee from engaging in a lawful business and is therefore void [*Muggill v. Reuben H. Donnelley Corp. (1965) 62 Cal. 2d 239, 242-243, 42 Cal. Rptr. 107, 398 P.2d 147* (rights to pension); *see Bus. & Prof. Code § 16600*]. However, it has been held that a provision in the employment contract of a life insurance agent, which conditioned the right of the agent to receive accrual commissions after severance of the employment relationship on the agent (1) refraining from any act that would injure the employer in its relationship with financial institution customers and (2) not inducing those customers to discontinue cooperation with the employer in the sale of insurance, was not in restraint of trade because the former employee was not thereby prevented from engaging in a trade, business, or profession [*Buskuhl v. Family Life Ins. Co. (1969) 271 Cal. App. 2d 514, 522, 76 Cal. Rptr. 602]* . The court commented that other provisions in the employment contract terminating the employee's right to renewal commissions if the employee obtained a license to represent another insurance company or became employed by another insurance company might be invalid under *Business and Professions Code § 16600* [*Buskuhl v. Family Life Ins. Co. (1969) 271 Cal. App. 2d 514, 523, 76 Cal. Rptr. 602]* .

[iii] Restraints Imposed During Employment

A provision in an employment contract between a life insurance company and a salesman entitling the salesman to certain "service fees" only "so long as this contract remains in force" has been held not to violate *Bus. & Prof. Code § 16600* [*Bach v. Curry (1968) 258 Cal. App. 2d 676, 681, 66 Cal. Rptr. 220]* . This resulted from the fact that the contract did not purport to regulate the salesman's conduct after the termination of his employment and did not restrain him from working for a competitor or in any way overtly limit his freedom to seek other employment. The loss of the service fees came about on the lawful termination of the contract, not on the finding of competitive employment by the salesman. Therefore, the provision in question did not operate as a restraint on trade and was valid [*Bach v. Curry (1968) 258 Cal. App. 2d 676, 681, 66 Cal. Rptr. 220]* .

[2] FORM

Payment of Commission--Percentage of Gross Sales

Commission Based on Gross Sales

(a) Employer shall compensate Employee for the services rendered under this contract by paying a commission of _____ percent of the gross sales price of all goods and merchandise sold by him or her [*or* _____ percent of the receipts under contracts procured by Employee] during the term of this agreement. Those commissions shall not become due and payable to Employee until payment for the goods has been received from the respective purchasers. Accrued commissions shall be paid _____ [*specify time interval, e.g.,* weekly *or* monthly] on _____ [*specify payment date or dates, e.g.,* the last day of the month].

(b) Employee _____ [shall *or* shall not] be entitled to commissions on sales made under contracts procured by Employee that are made after expiration of this agreement or termination of the employment relationship in any other manner.

[*Optional; add if contract is with an inside salesperson:*]

(c) Employer guarantees that the minimum amount of compensation paid to the Employee for his or her services shall be _____ [*specify minimum, e.g.,* $5 per hour actually worked] during any given pay period, regardless of whether or not the amount of earned commissions during that pay period would otherwise equal that minimum.

[*Optional; add if contract allows commissions on sales made after termination of contract, if employer desires protection from injurious activity by employee:*]

(d) Employee shall not be entitled to receive payments under this provision after severance of the employment relationship hereunder if Employee engages in any act that would injure the employer in its relationship with its customers or induces those customers to discontinue their business relationship with Employer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
D. Separate Provisions for Compensation of Employees
3. Commission and Percentage Compensation

28-85 California Legal Forms--Transaction Guide § 85.312

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.312 Provision for Drawing Account in Connection With Commission Compensation

[1] Comment

[a] Use of Form

This form is a provision for a drawing account. It is intended for use in conjunction with a general commission provision such as § 85.311 when it is desired that the employee who is paid on a commission basis be able to draw a specified amount in advance of earning a commission. This type of provision may require the employee to reimburse the employer for any amounts by which the sums drawn exceed the commissions subsequently earned, or may permit the employee to retain those sums as a minimum guaranteed payment. This latter alternative may be useful when the employee is of a type subject to the requirements of a minimum wage law.

For a general discussion of commission provisions, see *§ 85.311[1]*. A discussion of minimum wage and maximum hours laws is *set forth in § 85.290[1]*.

[b] Repayment of Amounts Advanced

A salesperson is required to repay the excess of advances made over commissions earned when he or she has expressly agreed to do so. However, when the employment contract provides for advances that are to be deducted from commissions earned, the employer cannot recover excess advances from the employee in the absence of an express or implied agreement or promise to repay any excess of advances over commissions. Thus, in the absence of an express requirement or convincing circumstances indicating a contrary arrangement, advances to an employee are presumed to constitute payment in lieu of salary and to fix the employee's minimum compensation [*Agnew v. Cameron (1967) 247 Cal. App. 2d 619, 622-624, 55 Cal. Rptr. 733]* . Accordingly, if it is desired that the employee reimburse the employer for amounts advanced but not earned, it is necessary to include an express provision to that effect in the agreement. Such a provision would not violate the statutory prohibition against an employer collecting from an employee any part

of wages already paid [*see Lab. Code § 221*], because an amount advanced against commissions does not constitute a "wage" until the commission itself is earned [*see Steinhebel v. Los Angeles Times Communications (2005) 126 Cal. App. 4th 696, 704-706, 24 Cal. Rptr. 3d 351* ; *see also* Koehl v. Verio, Inc. (2006) 142 Cal. App. 4th 1313, 1329-1337, *48 Cal. Rptr. 3d 749* (Lab. Code § 221 is not violated by employer's contract with its sales employees to pay commission on sale immediately, subject to chargeback if sale later falls through or does not generate agreed-upon level of revenue)].

[2] FORM

Provision for Drawing Account in Connection With Commission Compensation

Drawings Against Commissions

(a) Employer agrees to pay in advance to Employee the sum of $_____ per week on account of the commissions to be earned by Employee under this agreement, and the amount so advanced shall be deducted from any amounts due to Employee in the form of commissions hereunder.

(b) In the event that in any one week the amount advanced exceeds the amount of commissions earned, Employee shall _____ repay to the Employer an amount equal to that excess *or* not be required to repay that excess but may retain the full amount of the advance as a guaranteed minimum compensation].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-85 California Legal Forms--Transaction Guide § 85.313

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.313 Provision for Commission on Subsequent Sales

[1] Comment

[a] Use of Form

This form provides for the payment of a commission to a salesperson on all sales made to customers who were originally procured by that salesperson. This form is primarily for use by employers whose business involves a substantial volume of repeat or continuing orders from customers once they have been secured by a salesperson. For a discussion of commission provisions in general, see *§ 85.311[1]*.

This form includes an optional provision terminating the right to a commission if, after severance of the employment relationship, the salesperson engages in activity injurious to the employer. For discussion of this type of provision, see *§ 85.311[1][d]*.

[b] Commissions on Sales Procured by Employee

When an employee is the procuring cause of the transaction for which commission compensation was payable, that person is entitled to the commission even if the employment terminates and other persons intervene and complete the transaction [*Willson v. Turner Resilient Floors, Inc. (1949) 89 Cal. App. 2d 589, 595, 201 P.2d 406]* .

[2] FORM

Provision for Commission on Subsequent Sales

Commissions When Employee Is Procuring Cause

[*Insert the provisions of § 85.311 and add one or both of the following provisions:*]

[*Use following to provide for commissions on sales to customers procured by salesperson when sales are consummated after termination of employment.*]

Employee shall [*or* shall not] be entitled to commissions on sales made under contracts procured by Employee that continue in force after the expiration of this agreement or termination of the employment relationship in any other manner.

[*AND/OR*]

[*Use following to provide for payment of continuing commissions on sales to customers procured by salesperson.*]

In the event that Employer sells its merchandise directly to customers whose business has been procured for the Employer by Employee, Employee shall be entitled to commissions at the rate specified herein [until _____ (*specify any period to which this clause should be limited, if desired, e.g.,* for a period of five years after that customer's business was procured by Employee)]. [*Optional:* However, Employee shall not be entitled to receive payments under this provision after severance of the employment relationship if he or she engages in any act that would injure the employer in its relationship with its customers or induces those customers to discontinue their business relationship with Employer.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-85 California Legal Forms--Transaction Guide § 85.314

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.314 Provision for Commission in Addition to Salary

[1] Comment--Use of Form

This form sets forth the two most common arrangements for the payment of a commission in addition to a basic salary. The first alternative provides for such a commission on all goods sold by the employee. The second is more commonly used and provides for the payment of a commission in addition to the basic salary only if sales exceed a predetermined level or sales quota. This latter type of compensation is frequently referred to as a "quota bonus."

For a general discussion of the subject of commission payments as a form of compensation, see *§ 85.311[1]*.

[2] FORM

Provision for Commission in Addition to Salary

Commission and Salary Compensation

[*First alternative; salary plus commission on goods sold by employee:*]

Employee shall be entitled to an annual salary of $_____ payable at the rate of $_____ per [*specify time interval, e.g.*, week *or* month] on_____ [*specify payment date or dates*], and in addition Employee shall receive a commission of _____ percent on all sales procured by _____ [him *or* her] for Employer during the term of this agreement. These commissions shall become due as payments are received from the respective customers and shall be paid to Employee monthly on the last day of each month.

[*OR*]

[*Second alternative; commission in addition to basic salary if sales exceed predetermined quota:*]

(a) Employee shall be entitled to an annual salary of $_____, payable in equal _____ [*specify period, e.g.*, weekly *or* semimonthly *or* monthly] installments of $_____ on_____ [*specify date or dates of payment*].

(b) Employee shall also be entitled to a commission of _____ percent of the gross selling price of the goods sold by Employee to the extent that the gross selling price exceeds the sum of $_____ in any month. This commission shall become due upon receipt by Employer of payment for the goods and payable to Employee on_____ [*specify date or dates of payment, which may or may not coincide with salary payment dates*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-85 California Legal Forms--Transaction Guide §§ 85.315-85.319

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.315[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
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4. Deferred Compensation

28-85 California Legal Forms--Transaction Guide § 85.320

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.320 Provision for Fixed Annuity if Employee Remains Until Retirement

[1] Comment

[a] Use of Form

This form provides for deferred compensation of a fixed amount to be paid to the employee after retirement for the remainder of the employee's life. It includes an optional provision for continuation of deferred compensation payments during the lifetime of the employee's surviving spouse. Another optional provision specifies that deferred compensation payments will be terminated if the employee engages in any act during retirement that would injure the employer. For discussion of the latter type of provision, see *§ 85.311[1][d]*.

A fixed sum annuity is not advantageous to the employee because it does not take inflation into account; thus, this type of deferred compensation is not used as often as the provision measuring deferred compensation as a percentage of the salary received at some future time [*§ 85.321*]. Another method for deferred compensation is to provide the payment of a predetermined sum to the employee in installments over a given number of years [*§ 85.322*]. For other types of deferred and long-term compensation provisions, see Rabkin & Johnson, Current Legal Forms, Ch. 12, *Employment and Compensation* , Forms 12.14-12.31 (Matthew Bender).

[b] Purpose of Deferred Compensation

The purpose of deferred compensation is to provide that a portion of the employee's compensation will be paid to the employee during retirement when he or she is not in a high tax bracket [*see* [c], *below*]. Deferred compensation is generally limited to highly paid executives, whereas pension plans are required to include almost all employees of the employer when the pension plan is a qualified pension plan [*I.R.C. § 401*]. There are limitations on the deductions an employer can take for federal income tax purposes for contributions to multiple benefit plans that include annuity plans [*I.R.C. § 404(a)(7)*; *see I.R.C. § 404(a)(1)-(3)*]. Moreover, a benefit plan may not be "top-heavy" (*i.e.*, may not

discriminate in favor of key employees) [*I.R.C. § 416(g)(1)(A)*]. For further discussion of these issues and other rules related to employee pension, profit-sharing, and other deferred compensation plans, see Ch. 1D, *Overview of Employee Benefits* .

[c] Tax Consequences of Deferred Compensation

The American Jobs Creation Act of 2004 [Pub. L. No. 108-357] enacted *I.R.C. § 409A*, which governs the tax treatment of deferred compensation under a nonqualified deferred compensation plan. Section 409A applies to income amounts deferred after December 31, 2004 [Pub. L. No. 108-357, § 885(b)]. Under Section 409A, a "nonqualified deferred compensation plan" is any plan that provides for the deferral of compensation, other than a qualified employer plan or a bona fide vacation leave, sick leave, compensatory time, disability pay, or death benefit plan [*I.R.C. § 409A(d)(1)*]. A "qualified employer plan" includes (1) any nongovernmental retirement plan, contract, pension, account, or trust described in *I.R.C. § 219(g)(5)(A)* or *(B)*; (2) any eligible deferred compensation plan established by a employer that is a state governmental unit or a tax-exempt organization [*see I.R.C. § 457(b)*]; and (3) any qualified governmental excess benefit arrangement described in *I.R.C. § 415(m)* [*I.R.C. § 409A(d)(2)*]. An arrangement or agreement that includes only one employee constitutes a "plan" in this context [*I.R.C. § 409A(d)(3)*].

In general, compensation deferred under a nonqualified deferred compensation plan for the current taxable year and all preceding taxable years will be included in the employee's gross income for the current taxable year, to the extent that it has not previously been included in the employee's gross income and is not subject to a substantial risk of forfeiture (i.e., if the employee's rights to the compensation are conditioned on the future performance of services [*see I.R.C. § 409A(d)(4)*]). However, this treatment will be avoided, and the compensation will be included in the employee's gross income in the year it is actually received [*see I.R.C. § 404(a)(5)*], if the nonqualified deferred compensation plan meets (and is operated in accordance with) the following three requirements specified by Section 409A(a) [*I.R.C. § 409A(a)(1)(A)*]:

- The plan must provide that compensation deferred under the plan may not be distributed earlier than the occurrence of one of the following [*I.R.C. § 409A(a)(2)(A)*]:
  - Separation from service as determined by Treasury Regulations [*see I.R.C. § 409A(e)* (requiring issuance of regulations]. For a "specified employee," that is, a key employee [*see I.R.C. § 416*(*i*)] of a corporation whose stock is publicly traded, distribution must be deferred at least 6 months after separation from service [*I.R.C. § 409A(a)(2)(B)(i)*];
  - The date the employee becomes disabled [*see I.R.C. § 409A(a)(2)(C)* (disability defined)];
  - The death of the employee;
  - A specified time (or pursuant to a fixed schedule) specified under the plan at the date of the deferral of the compensation;
  - To the extent provided by Treasury Regulations [*see I.R.C. § 409A(e)(2)* (requiring issuance of regulations)], a change in the ownership or effective control of the corporate employer, or in the ownership of a substantial portion of the assets of the corporation; or
  - An unforeseeable emergency [*see I.R.C. § 409A(a)(2)(B)(ii)* (unforeseeable emergency defined)].
- The plan must not permit the acceleration of the time or schedule of any payment under the plan,

except as provided in Treasury Regulations [*I.R.C. § 409A(a)(3)*; *see also I.R.C. § 409A(e)* (requiring issuance of regulations)].

- The plan must provide generally that compensation for services performed during a taxable year may be deferred at the participant's election only if the election to defer the compensation is made not later than the close of the preceding taxable year (or at such other time as provided in Treasury Regulations) [*I.R.C. § 409A(a)(4)(B)(i)*; *see also I.R.C. § 409A(e)* (requiring issuance of regulations)]. The timing of the election is subject to the following qualifications:

    - In the case of the first year in which an employee becomes eligible to participate in the plan, the election may be made with respect to services to be performed subsequent to the election within 30 days after the date the employee becomes eligible to participate in the plan [*I.R.C. § 409A(a)(4)(B)(ii)*].

    - In the case of any performance-based compensation based on services performed over a period of at least 12 months, the election may be made no later than 6 months before the end of the period [*I.R.C. § 409A(a)(4)(B)(iii)*].

    - In the case of a plan that permits an employee to make a subsequent election to delay a payment or change the form of payment, the plan must require (1) that such an election may not take effect until at least 12 months after the date on which the election is made; (2) that the payment with respect to which such an election is made be deferred for a period of not less than 5 years from the date the payment would otherwise have been made, except in cases of the employee's death, disability, or unforeseeable emergency; and (3) that any election related to a payment whose date is specified or scheduled by the plan may not be made less than 12 months prior to the date of the first scheduled payment [*I.R.C. § 409A(a)(4)(C)*].

In addition to the foregoing, I.R.C. § 409A(b) provides that under certain circumstances compensation deferred under a nonqualified deferred compensation plan will be treated as a transfer of assets in connection with the performance of services, and therefore subject to *I.R.C. § 83*, whether or not the assets are available to satisfy claims of the employee's general creditors [*I.R.C. § 409A(b)*]. Under I.R.C. § 83, transferred assets are taxable to the employee to the extent of the excess of their fair market value (at the earlier of the time the employee's rights in the assets become transferable or are not subject to a substantial risk of forfeiture) over any amount the employee paid for the assets [*I.R.C. § 83(a)*]. For further discussion of the application of I.R.C. § 83 in the context of stock bonuses and stock options, see *§§ 85.380[1][b], 85.382[1][b],* and *85.384[1][b]*. I.R.C. § 409A(b) provides that compensation deferred under a nonqualified deferred compensation plan will be treated as a transfer of assets within the meaning of *I.R.C. § 83* when [I.R.C. § 409A(b)(1)-(3); *see* I.R.C. § 409A(e)(iv)("employer's financial health" to be defined by Treasury Regulations)]:

- The deferred compensation consists of assets set aside in an offshore trust;

- Assets are restricted, or the plan provides that assets will become restricted, to the provision of benefits under the plan in connection with a change in the employer's financial health; or

- (a) During a restricted period, assets with respect to a single-employer defined-benefit plan are set aside or placed in a trust for purposes of paying deferred compensation of an applicable covered employee [*see* I.R.C. § 409A(b)(3)(D)("applicable covered employee" defined)], or (b) a nonqualified deferred compensation plan of the sponsor of the defined-benefit plan provides that assets will become restricted to the provision of benefits to an applicable covered employee under the defined-benefit plan

in connection with the restricted period. For this purpose, a "restricted period" is any period during which the plan is in at-risk status [*see* I.R.C. § 430(i)]; any period during which the plan sponsor is a debtor under federal bankruptcy law (or other similar federal or state law); and the 12-month period beginning 6 months before the termination date of the plan if, as of the termination date, the plan is not sufficient for benefit liabilities [I.R.C. § 409A(b)(3)(B); *see* 29 U.S.C. § 1341(d)(1)(single-employer plan is sufficient for benefit liabilities if there is no amount of unfunded benefit liabilities under plan)].

For each taxable year that assets treated as transferred remain set aside in a trust or other arrangement subject to I.R.C. § 409A(b), any increase in value in, or earnings with respect to, the assets will be treated as an additional transfer of property subject to these rules [*I.R.C. § 409A(b)(4)*].

If any deferred compensation is included in the employee's taxable income because of the plan's failure to meet the requirements of I.R.C. § 409A(a) or (b), the tax is increased by 20 percent of the amount included in gross income, plus interest (measured from the taxable year in which the compensation was first deferred or, if later, the first taxable year in which the amount is not subject to a substantial risk of forfeiture) [*I.R.C. § 409A(a)(1)(B), (b)(5)*].

Other Internal Revenue Code provisions may be applied to require the inclusion of amounts in the employee's gross income earlier than the time provided by I.R.C. § 409A. However, any amount included in an employee's gross income under I.R.C. § 409A may not be required by any other provision or law to be included in gross income at a later time [*I.R.C. § 409A(c)*].

The employer generally can deduct the amount of deferred compensation in the year in which it is included in the employee's gross income [*I.R.C. § 404(a)(5)*]. For discussion of deferred compensation as it relates to employees of professional corporations, see Ch. 12A, *Professional Corporations* .

The form provided in [2], *below*, meets the requirements of a nonqualified deferred compensation plan, because it does not permit the payment of deferred compensation until after the employee retires [*I.R.C. § 409A(a)(2)(A)(i)*].

[2] FORM

Provision for Fixed Annuity if Employee Remains Until Retirement

Deferred Compensation

(a) If Employee remains in the employ of Employer until retirement at age _____ [*e.g.*, 65], or upon earlier retirement by agreement of Employer and Employee, Employee shall be entitled to receive from Employer the sum of $_____ per month, payable on the first day of each month, commencing with the _____ [first full month *or, if employee is "specified employee" under I.R.C. § 409A(a)(2)(B)(i),* seventh full month] after Employee retires, and continuing for the remainder of Employee's life.

[*Optional:* (b) In the event that Employee has a surviving spouse, the surviving spouse shall be entitled to the sum of $_____ per month, payable on the first day of each month, commencing with the first full month after Employee's death and continuing for the remainder of the surviving spouse's life].

[*Optional:* (c) Employee shall not be entitled to receive payments under this provision after severance of this employment relationship if_____[he *or* she] engages in any act that would injure the employer in its relationship with its customers or induces those customers to discontinue their business relationship with Employer.]

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Participation & VestingAnnuities

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28-85 California Legal Forms--Transaction Guide § 85.321

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.321 Provision for Payments Equal to Percentage of Salary at Predetermined Age if Employee Remains Until Retirement

[1] Comment--Use of Form

This form provides for deferred compensation to be paid at a rate equal to a percentage of the employee's salary at a given age. That age may be the retirement age, but in some cases an earlier age is used. The compensation may also be continued during the life of a surviving spouse. The form provides that the compensation is payable only if the employee remains with the employer until retirement.

This provision is more favorable to the employee than the predetermined payment provision in § 85.320, in which the deferred compensation payments are determined at the time of execution of the employment agreement. In the predetermined payment provision, the deferred compensation may seem attractive at the time the employment contract is executed, but subsequent inflation may cause the payments to be inadequate for the employee's retirement.

[2] FORM

Provision for Payments Equal to Percentage of Salary at Predetermined Age if Employee Remains Until Retirement

Deferred Compensation Based on Specified Salary

(a) If Employee remains in the employ of Employer until retirement at age _____ [*e.g.,* 65], or on earlier retirement by agreement of Employer and Employee, Employee shall be entitled to receive from Employer a sum equal to _____ [*fraction, e.g.,* one-half] of the annual salary that Employee is receiving at age _____ [*retirement or earlier age, e.g.,* 60], payable in equal monthly installments on the first day of each month, commencing with the _____ [first full month *or, if employee is "specified employee" under I.R.C. § 409A(a)(2)(B)(i) ,* seventh full month] after

Employee retires, and continuing for the remainder of Employee's life.

[*Optional:* (b) If Employee has a spouse who survives Employee, the surviving spouse shall be entitled to any deferred compensation payments due hereunder (*or* one-half of any deferred compensation payments due hereunder), commencing with the first full month after Employee's death and continuing for the remainder of the surviving spouse's life].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Participation & VestingAnnuities

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DIVISION VI: PERFORMANCE OF SERVICES
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28-85 California Legal Forms--Transaction Guide § 85.322

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.322 Provision for Lump-Sum Deferred Compensation Payable Over Term of Years

[1] Comment--Use of Form

This form provides for deferred compensation expressed as a lump sum, payable in installments over a given number of years either before or after retirement. The provision is often used when the employee will only be employed for a given number of years with the employer.

This kind of arrangement can be used in lieu of higher compensation in the years of employment, thereby reducing the employee's overall tax liability by stretching compensation out over a longer period (and conceivably into years when the employee will be in a lower tax bracket). However, to ensure that the deferred compensation will not be included in the employee's gross income before it is actually received, the deferred compensation arrangement must meet the requirements for a nonqualified deferred compensation plan [*see I.R.C. § 409A*]. The form provided in [2], *below*, meets the requirements of a nonqualified deferred compensation plan, because it does not permit the payment of deferred compensation earlier than a specified time (the employee's attainment of a specified age) or the termination of the employment [*I.R.C. § 409A(a)(2)(A)(i), (iv)*]. For further discussion of the tax treatment of nonqualified deferred compensation plans, see *§ 85.320[1][c]*.

[2] FORM

Provision for Lump-Sum Deferred Compensation Payable Over Term of Years

Deferred Compensation in Limited Number of Installments

(a) If Employee faithfully performs all of the obligations hereunder, Employer agrees to pay to Employee, as additional compensation, the sum of $_____, payable in equal monthly installments of $_____ on the last day of each month commencing with _____ [*choose one:* the first full month after the employee has attained age

_____ *or* _____ (*either* the first full month after termination of the employment term hereunder *or, if employee is "specified employee" under I.R.C. § 409A(a)(2)(B)(i)* , the seventh full month after termination of the employment term hereunder)] and continuing for a period of _____ [*number*] months until that sum has been paid in full.

(b) In the event of Employee's death prior to the completion of the above payments, Employer shall pay the balance of the remaining payments, in the manner provided above, to the surviving spouse of Employee, if any. If Employee does not have a surviving spouse, the entire remaining balance of that sum shall be payable immediately to Employee's estate.

[*Optional; use only if payments are to be made during employment period.*]

(c) Payment hereunder shall be terminated immediately if, during _____[his *or* her] employment by Employer, Employee directly or indirectly renders any services of a business, commercial, or professional nature to any other person or organization, whether for compensation or otherwise, without the prior written consent of Employer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral OverviewTax LawFederal Income Tax ComputationRetirement PlansTax-Sheltered Annuities (IRC sec. 403)

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DIVISION VI: PERFORMANCE OF SERVICES
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28-85 California Legal Forms--Transaction Guide § 85.323

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.323 Provision for Payment of Pension

[1] Comment

[a] Use of Form

This form provides for payment of a pension. It is intended to be included in an employment contract when the parties desire to specify that the employee will be able to participate in a pension plan established by the employer.

This form does not create a pension plan; it merely incorporates the employer's existing plan and requires the employee to abide by the terms of the pension plan in order to participate. Conditions for qualification, such as the length of service required before the employee will be eligible for the pension and the age at which the pension payments will commence will be specified in the plan. For coverage of pension plans themselves, see Ch. 1D, *Overview of Employee Benefits* .

[b] Effect of Absence of Express Pension Provision

An express provision for participation in an employer's pension plan is not absolutely essential since an employee may enforce his or her right to a pension even without an express contractual provision if he or she can prove that the employer had a pension plan, that he or she knew of the plan, and that he or she continued in employment in the honest belief that he or she would be a beneficiary of the plan [*see West v. Hunt Foods, Inc. (1951) 101 Cal. App. 2d 597, 603, 225 P.2d 978]* . In addition, plans that fail to meet applicable eligibility requirements are subject to penalties under federal pension plan law [*see* Ch. 1D, *Overview of Employee Benefits*].

[c] Validity of Noncompetition Covenants

A contract provision providing for the forfeiture of pension rights if the employee obtains employment with a

competitor after leaving the services of the employer is invalid under *Bus. & Prof. Code § 16600*, which voids any contractual provision that restrains anyone from engaging in a lawful profession, trade, or business [*see Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 945-950, 955, 81 Cal. Rptr. 3d 282, 288-292, 296, 189 P.3d 285* (noncompetition agreement is invalid under *Bus. & Prof. Code § 16600*, even if narrowly drawn, unless it falls within one of statutory exceptions provided by *Bus. & Prof. Code §§ 16601, 16602, 16602.5*); *Muggill v. Reuben H. Donnelley Corp. (1965) 62 Cal. 2d 239, 242, 42 Cal. Rptr. 107* (*Bus. & Prof. Code § 16600* "invalidates provisions in employment contracts prohibiting an employee from working for a competitor after completion of his employment or imposing a penalty if he does so [citations], unless they are necessary to protect the employer's trade secrets [citation]"); *D'Sa v. Playhut, Inc. (2000) 85 Cal. App. 4th 927, 929, 931-935, 102 Cal. Rptr. 2d 495* (discharging employee for refusing to sign employment agreement containing provision that violates *Bus. & Prof. Code § 16600* is violation of public policy); *Hill Medical Corp. v. Wycoff (2001) 86 Cal. App. 4th 895, 901-908, 103 Cal. Rptr. 2d 779* (noncompetition covenant is invalid under *Bus. & Prof. Code § 16600* even if covenant is part of employee's sale of shares in corporate employer, unless corporate goodwill is component of sale price under *Bus. & Prof. Code § 16601*); *see also § 85.311[1][d][ii]*].

[2] FORM

Provision for Payment of Pension

Pension

As a part of the compensation for services rendered under this agreement, Employee shall be entitled to participate in the pension plan specified and described in the pension plan and trust agreement established by Employer for the purpose of providing pensions for its employees, on the terms and conditions stated therein.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
D. Separate Provisions for Compensation of Employees
4. Deferred Compensation

28-85 California Legal Forms--Transaction Guide § 85.324

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.324 Payment of Lump Sum on Death of Employee

[1] Comment

[a] Use of Form

This form provides for the payment of a lump sum on the death of an employee to the employee's surviving spouse or a person designated by the employee. In the event of the spouse's death or failure to designate a beneficiary, the employee's estate will be the beneficiary. For a death benefit in the form of an annuity to the surviving spouse, see *§ 85.325*. For a death benefit in the form of a continuing payment of all or part of the employee's salary to the surviving spouse for the balance of the employment term, see *§ 85.326*.

[b] Federal Income Tax Consequences of Death Benefits

An employer is entitled to a federal income tax deduction for ordinary and necessary expenses, including a reasonable allowance for compensation for personal services actually rendered [*I.R.C. § 162(a)(1)*]. No deduction is allowable for gifts in excess of $25 [*I.R.C. § 274(b)(1)*]. However, a payment by an employer to a deceased employee's surviving spouse is not a gift to the extent that the payment constitutes an employee's death benefit excludable by the recipient [*Treas. Reg. § 1.274-3(a)*].

[2] FORM

Payment of Lump Sum on Death of Employee

Death Benefit Payable in Lump Sum

In the event that Employee should die during the employment term [*or* during _____ (his *or* her)

retirement when _____ (he *or* she) has been employed with Employer until retirement], Employer agrees to immediately pay the sum of $_____ to [Employee's surviving spouse *or* the person or persons designated by Employee in a written instrument delivered to Employer prior to Employee's death, in such portions as Employee may designate]. If Employee [does not have a surviving spouse at the time of death *or* fails to make any written designation as provided *above*], the entire sum shall be immediately paid to Employee's estate.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral OverviewPensions & Benefits LawEmployee Benefit PlansGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.325

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.325 Payment of Annuity to Surviving Spouse of Employee or Lump Sum to Estate

[1] Comment--Use of Form

This form provides for a death benefit in the form of an annuity payable to and during the life of the employee's surviving spouse. It further provides that if the deceased employee is not survived by a spouse, a lump sum is payable to the employee's estate. For a form that provides for a lump sum to be payable to the surviving spouse or other person designated by the employee, with discussion of the federal income tax consequences of death benefit provisions, *see § 85.324*.

[2] FORM

Payment of Annuity to Surviving Spouse of Employee or Lump Sum to Estate

Death Benefit Payable as Annuity

On the death of Employee during the employment term, or during Employee's retirement if Employee has been employed with Employer until Employee's retirement, Employer agrees to pay Employee's surviving spouse, if any, the sum of $_____ per month during the remainder of the surviving spouse's lifetime, payable on the first day of each month, commencing with the first full month after Employee's death; provided, however, that if, at the time of death, Employee does not have a surviving spouse, Employer agrees to pay Employee's estate the sum of $[*e.g.*, $5,000] immediately upon Employee's death.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstate AdministrationGeneral OverviewLabor & Employment LawEmployment

RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewPensions & Benefits LawEmployee Benefit PlansGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)Participation & VestingAnnuities

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28-85 California Legal Forms--Transaction Guide § 85.326

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.326 Continuation of Salary to Surviving Spouse or Designee for Balance of Employment Term if Employee Dies During Employment

[1] Comment--Use of Form

This form provides that if the employee dies during the term of employment, the employer will pay all or part of the employee's salary to his or her surviving spouse or other designee for the balance of the employment term specified in the contract. This type of death benefit is generally used only for highly paid executives in contracts that provide for payment of salary during the entire employment term even if the employee dies or becomes permanently disabled during that time. For a discussion of the federal income tax consequences of death benefits, see *§ 85.324[1][b]*.

[2] FORM

Continuation of Salary to Surviving Spouse or Designee for Balance of Employment Term if Employee Dies During Employment

Death Benefit in Form of Continued Salary

In the event of Employee's death during the employment term specified herein, Employer agrees to pay Employee's [surviving spouse *or* designee] $[*set forth an amount equal to all or portion of annual salary*] per annum, payable [*state same manner of payment as that used to pay Employee's salary, e.g.,* in equal monthly installments on the last day of each month], from the date of Employee's death until_____[*date specified for end of employment term*]. If, at the time of death, [Employee does not have a surviving spouse *or* Employee's designee is deceased], Employer agrees to pay the amount specified above in a lump sum to [Employee's estate *or* the estate of the designee].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsGeneral Overview

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28-85 California Legal Forms--Transaction Guide §§ 85.327-85.339

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[Reserved]

§§ 85.327[Reserved]

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28-85 California Legal Forms--Transaction Guide § 85.340

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.340 Provision for Vacation Leave With Pay

[1] Comment

[a] Use of Form

This form is a provision for paid vacation, with two alternative clauses governing when the vacation may be taken. The first alternative provides for a mutually agreed annual period of paid vacation that increases with the amount of time the employee has worked, while the second provides for a vacation to be taken only during a specified period. The provision continues with an optional clause that specifies whether vacation must be taken, or whether the employee may elect to receive payment instead. Finally, the provision includes an optional clause providing that vacation time is accrued in a new year only if substantially all the employee's vacation is used in the year when earned.

[b] Nature and Effect of Vacation Pay

Vacation pay falls within the statutory definition of "wages" provided by *Lab. Code § 200* [*Boothby v. Atlas Mechanical, Inc. (1992) 6 Cal. App. 4th 1595, 1601, 8 Cal. Rptr. 2d 600]* . Vacation pay is similar to pension or retirement benefits as a form of deferred compensation. These benefits do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee [*Suastez v. Plastic Dress-Up Co. (1982) 31 Cal. 3d 774, 780, 183 Cal. Rptr. 846, 647 P.2d 122]* .

[c] Vested Rights in Vacation Pay

When an employment agreement or an employer's policy provides for paid vacations and employment is terminated before the employee has taken all vested vacation time, he or she is entitled to be paid for that time [*Lab. Code § 227.3*; *see* Owen v. Macy's, Inc. (2009) 175 Cal. App. 4th 462, 468, 96 Cal. Rptr. 3d 70 (*Lab. Code § 227.3* does not require that employer provide its employees with any paid vacation at all; rather, statute imposes certain requirements

"whenever" employer provides vacation benefits)]. An employment contract cannot provide for forfeiture of vested vacation time on termination of employment. In resolving any dispute relating to vested vacation time, the Labor Commissioner must apply the principles of equity and fairness [*Lab. Code § 227.3*].

Because the consideration for an annual vacation is the labor performed throughout the year, an employee whose employment is terminated midyear has not earned a full vacation. Nevertheless, the employee has earned some vacation as soon as substantial services have been performed. The right to some share of vacation pay vests, like pension rights, on acceptance of employment [*Suastez v. Plastic Dress-Up Co. (1982) 31 Cal. 3d 774, 780, 183 Cal. Rptr. 846, 647 P.2d 122]* . A proportionate right to a paid vacation vests as the labor is rendered. Once vested, the right to vacation pay is protected from forfeiture by *Lab. Code § 227.3* [*Suastez v. Plastic Dress-Up Co. (1982) 31 Cal. 3d 774, 784, 183 Cal. Rptr. 846, 647 P.2d 122]* . However, *Lab. Code § 227.3* does not limit an employer's right to control the *scheduling* of its employees' vacations. Therefore, an employer may establish a policy of deducting from an employee's vacation-leave bank whenever the employee takes four hours off on a workday. Such a policy does not prevent the employer from treating a salaried employee as exempt from overtime compensation requirements [*Conley v. Pacific Gas & Electric Co. (2005) 131 Cal. App. 4th 260, 269-270, 31 Cal. Rptr. 3d 719]* .

Nonperformance of a condition subsequent, such as an employer's requirement that the employee remain in employment for a specified period before being entitled to take the vacation, can, at most, result in forfeiture of the right to a vacation. However, it cannot prevent that right from vesting [*Suastez v. Plastic Dress-Up Co. (1982) 31 Cal. 3d 774, 780, 781, 183 Cal. Rptr. 846, 647 P.2d 122]* .

If vacation pay vests as it is earned, the employer's requirement that the employee be employed on some stated anniversary date in order to qualify for the vacation cannot prevent the right to pay from vesting. At most, the requirement is a condition subsequent that attempts to effect a forfeiture of vacation pay already vested. However, under *Lab. Code § 227.3*, such a forfeiture is forbidden [*Suastez v. Plastic Dress-Up Co. (1982) 31 Cal. 3d 774, 781, 183 Cal. Rptr. 846, 647 P.2d 122]* .

A contract or an employer's policy that allows an employee to accumulate vacation time and take it whenever the employee chooses is not considered to exact a forfeiture, so long as the employer does not require the employee to "use or lose" accrued vacation [*see* [e], *below*]. However, a four-year statute of limitations applies to an action to recover vacation pay that has accrued under such a policy [*see Code Civ. Proc. § 337*]. Therefore, a terminated employee will be barred from suing to recover accrued vacation pay that vested more than four years prior to his or her termination [*Sequeira v. Rincon-Vitova Insectaries, Inc. (1995) 32 Cal. App. 4th 632, 634-637, 38 Cal. Rptr. 2d 264* (statute of limitations was not equitably tolled, because employer did not have "use it or lose it" policy)].

[d] Validity of "No Additional Accrual" Clause

An employer may expressly limit the vesting of vacation time by establishing a "no additional accrual" vacation policy. This type of policy prevents an employee from accruing vacation time over a designated limit. Once the employee has accrued vacation time to the limit, the employee cannot earn more time until he or she uses some of the accrued vacation time. This type of vacation policy is permissible, because it does not involve a forfeiture of vested vacation time, but merely limits the amount of time that vests. However, the policy must be explicitly provided in the employment agreement; in the absence of an express provision, vacation time will accumulate without limit [*Boothby v. Atlas Mechanical, Inc. (1992) 6 Cal. App. 4th 1595, 1601-1602, 8 Cal. Rptr. 2d 600]* . Accumulation of earned vacation time does not depend on an agreement that expressly permits accumulation. Rather, unused vacation time accumulates unless the employment agreement legally prevents it [*Boothby v. Atlas Mechanical, Inc. (1992) 6 Cal. App. 4th 1595, 1598, 8 Cal. Rptr. 2d 600]* .

The law does not prevent an employer from announcing a level beyond which additional vacation time will no longer accrue. However, once vacation time has vested, it cannot be divested [*Boothby v. Atlas Mechanical, Inc. (1992) 6*

Cal. App. 4th 1595, 1602, 8 Cal. Rptr. 2d 600] .

This form contains an optional "no additional accrual" clause.

[e] Invalidity of "Use It or Lose It" Clause

A "use it or lose it" vacation policy provides for forfeiture of vacation pay if vacation time is not used within a designated period. This type of clause is impermissible because it requires the forfeit of vacation pay in which the employee is already vested [*Boothby v. Atlas Mechanical, Inc. (1992) 6 Cal. App. 4th 1595, 1601, 8 Cal. Rptr. 2d 600]* .

[2] FORM

Provision for Vacation Leave With Pay

Vacation Leave With Pay

[*Use to permit vacations at times mutually agreed by employee and employer:*]

(a) After completing [*specify length of time, e.g.,* one year] of employment, Employee will be entitled to an annual vacation leave of [*specify length, e.g.,* two weeks] at full pay. After completing [*specify length of time, e.g.,* three years] of employment, Employee will be entitled to an annual vacation leave of [*specify length, e.g.,* three weeks] at full pay. Vacations are arranged in advance by mutual consent between Employee and Employer.

[*OR*]

[*Use to prescribe vacation period:*]

(a) If Employee is employed by Employer at the start of the vacation period, as defined herein, Employee will be entitled to a [*specify length, e.g.,* two-week] vacation with full pay. All vacation must be taken during the vacation period. The vacation period will be between [*specify dates, e.g.,* June 1 and September 15], and Employer may elect to stagger the vacations of individual employees during that period or to close the place of employment for a specified vacation period.

[*Continue with the following:*]

(b) Although vacations will be granted at times most desired by Employee, Employer reserves the right to determine or approve the vacation time in order to ensure its efficient and orderly operation.

[*Use to provide for payment in lieu of vacation leave:*]

(c) [In lieu of vacation leave, Employee may elect to receive payment for all or any part of the vacation time to which Employee is entitled, in which case the vacation time will be valued at the amount of salary earned by Employee during an equivalent period *or* Employee must used earned vacation time, and is not entitled to vacation pay in lieu of vacation].

[*Use to prevent accrual of vacation time:*]

(d) Employee is expected to use all vacation time in the year earned. Employee will not accrue vacation time in any subsequent year until the earned vacation time for the current year is used in full. However, Employer may allow vacation days to be accumulated without affecting future vacation accrual if work schedules do not permit taking full vacation time or if Employee receives consent to accumulate vacation days for personal reasons.

[*OR*]

[*Use to limit accrual of vacation time:*]

(d) Employee is ordinarily expected to use all vacation time in the year earned. However, Employee may accumulate and carry over up to [*specify, e.g.,* five] days per year. Employee will not earn vacation time in a subsequent year if more than [*specify, e.g.,* five] days are carried over. When the accumulated number of vacation days drops below [*specify, e.g.,* five], Employee will again earn vacation time at the agreed rate. Employer may allow more than [*specify, e.g.,* five] vacation days to be accumulated without affecting future vacation accrual if work schedules do not permit taking full vacation time or if Employee receives consent to accumulate excess vacation days for personal reasons.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsHoliday, Sick & Vacation Pay

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28-85 California Legal Forms--Transaction Guide § 85.341

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.341 Provision for Holiday Pay

[1] Comment

[a] Use of Form

This form enumerates the days on which the employee will be entitled to a paid holiday. The holiday pay provision may be contained in a separate clause, or may be combined with other provisions such as the basic salary provision contained in the complete contract forms in this chapter [*see §§ 85.200-85.223*], the vacation pay provision [*see § 85.340*], or a sick-pay provision [*see § 85.201*, *§ 6.02*].

[b] Federal Public Holidays

Federal public holidays are observed on the following days [*5 U.S.C. § 6103(a)*]:

New Year's Day, January 1.
Dr. Martin Luther King, Jr., Day, the third Monday in January.
Washington's Birthday, the third Monday in February.
Memorial Day, the last Monday in May.
Independence Day, July 4.
Labor Day, the first Monday in September.
Columbus Day, the second Monday in October.
Veterans Day, November 11.
Thanksgiving Day, the fourth Thursday in November.
Christmas Day, December 25.

[c] California Holidays

The state holidays in California are [*Gov. Code § 6700*]:

Every Sunday.
January 1.
The third Monday in January, known as "Dr. Martin Luther King, Jr., Day."
February 12, known as "Lincoln Day."
The third Monday in February.
March 31, known as "Cesar Chavez Day."
The last Monday in May.
July 4.
The first Monday in September.
September 9, known as "Admission Day."
The second Monday in October, known as "Columbus Day."
November 11, known as "Veterans Day."
December 25.
Good Friday from 12:00 noon until 3:00 p.m.
Every day appointed by the President or Governor for a public fast, thanksgiving, or holiday.

[2] FORM

Provision for Holiday Pay

Paid Holidays

Employee shall be entitled to a holiday on the following days with full pay: [*specify holidays, e.g.*, New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsHoliday, Sick & Vacation Pay

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28-85 California Legal Forms--Transaction Guide § 85.342

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.342 Provision for Military Training Leave

[1] Comment

[a] Use of Form

This form provides for a paid leave of absence for employees who are members of military reserve or national guard units and who have a commitment to attend annual summer training camps. This type of provision may be desirable if the employer wishes to attract or retain the services of employees who have military obligations.

[b] Reemployment Rights of Employees Called to Active Military Duty

In the wake of the terrorist attacks of September 11, 2001, the Legislature acted to protect the rights of military reservists who are called to active duty. Among the protections enacted was an extension of reemployment rights to reservists who are called to active duty [2002 Stats., Ch. 60 (effective June 21, 2002)]. The California military leave law now provides that an officer or enlisted member of the California National Guard, or a member of the United States Military Reserve, who leaves a full- or part-time position in private employment to perform full-time active California or federal military service may obtain a certificate of satisfactory service, which entitles him or her to apply within 40 days after the completion of such service for reemployment with the same employer [*Mil. & Vet. Code § 395.06(a), (b)*; *see Mil. & Vet. Code § 400*; *see also 86 Ops. Cal. Atty. Gen. 12 (2003)* (employment-related benefits granted in *Mil. & Vet. Code §§ 389-395.8* are not available to employee who seeks leave of absence for service in militia of another state)].

The employer must restore the returning employee to the former position or to a position of similar seniority, status, and pay without loss of retirement or other benefits, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so [*Mil. & Vet. Code § 395.06(a), (b)*]. The returning employee may not be terminated without cause within one year after being restored to the position [*Mil. & Vet. Code § 395.06(a), (b)*]. In addition, any

employee of the state called up during time of war or national emergency has the right "to return and reenter upon the office or position within six months after the termination of his or her active service with the armed forces" [*Mil. & Vet. Code § 395.1(a)*].

If a private employer fails to provide reemployment benefits as required by the California military leave law, the person entitled to reemployment may obtain relief by filing a motion, petition, or similar pleading in the superior court for the county where the employer maintains a place of business. The court may specifically require the employer to comply with the reemployment law and compensate the person for any loss of wages or benefits caused by the employer's unlawful action [*Mil. & Vet. Code § 395.06(c)* (superior court to order speedy hearing and advance matter on calendar)]. The district attorney or city prosecutor of the county or city in which the employer maintains a place of business may appear and act as attorney for the person entitled to reemployment benefits; and no fees or court costs are required to be paid by the person applying for those benefits [*Mil. & Vet. Code § 395.06(c),(d)*].

Similar benefits are mandated for a volunteer member of the California Wing of the Civil Air Patrol (the civilian auxiliary of the United States Air Force) who has been employed for at least 90 days by an employer that has more than 15 employees [*Gov. Code § 1501 et seq.*; *see Gov. Code § 1501(a),(b),(d)* ("Civil Air Patrol leave," "employee," and "employer" defined)]. The employer generally must provide not less than 10 days per calendar year of unpaid leave to an employee responding to an emergency operational mission of the Civil Air Patrol [*Gov. Code § 1503(a)(1)*; *see also Gov. Code § 1503(d)* (employer may opt to provide paid leave); *Gov. Code § 1504(b)* (employer and employee may negotiate for employer to maintain employee's benefits at employer's expense during leave)]. Such leave for a single emergency operational mission must not exceed three days, unless an extension of time is granted by the governmental entity that authorized the emergency operational mission, and the extension of the leave is approved by the employer [*Gov. Code § 1503(a)(1)*; *but see Gov. Code § 1503(a)(2)* (employer is not required to grant such leave to employee who is required to respond to same or simultaneous emergency operational mission as first responder or disaster-service worker for local, state, or federal agency)]. The employee must give the employer as much notice as possible of the intended dates on which the leave will begin and end, and the employer may require certification from the Civil Air Patrol to verify the employee's eligibility for leave [*Gov. Code § 1503(b)*]. The employer may not require the employee to exhaust accrued vacation leave, personal leave, compensatory leave, sick leave, disability leave, or any other leave that may be available to the employee in order to take Civil Air Patrol leave [*Gov. Code § 1503(c)*]. On the expiration of the leave, the employer must restore an employee to the position held by him or her when the leave began or to a position with equivalent seniority status, employee benefits, pay, and other terms and conditions of employment [*Gov. Code § 1504(a)* (employer may decline to restore employee because of conditions unrelated to employee's exercise of leave rights)]. The employer must not discriminate against or discharge the employee because of his or her membership in the Civil Air Patrol and may not hinder or prevent the employee from performing service as part of the Civil Air Patrol during an emergency operational mission for which the employee is entitled to leave [*Gov. Code § 1502*; *see* Gov. Code § 1506; *see also Gov. Code § 1505(a)* (taking Civil Air Patrol leave must not result in loss of any employee benefit accrued before beginning of leave)].

Federal law provides similar reemployment benefits for service members. The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") [*38 U.S.C. § 4301 et seq.*] requires employers to provide leaves of absence to employees serving in the uniformed services and grants reemployment and job protection rights to such employees [*38 U.S.C. §§ 4304, 4312, 4313, 4316(c)*]. Affected employees generally are entitled to reemployment if they comply with the following requisites [*38 U.S.C. § 4312(a)(1)-(3)*]:

- They must give proper advance verbal or written notice of such service to their employer;
- They are not on leave for more than five years, except under limited exceptions, such as when the service is required for a national emergency; and
- They apply for reemployment within the periods prescribed by USERRA. For detailed coverage of

the USERRA.

For further discussion, see Wilcox, California Employment Law, Ch. 40, *Overview of Equal Employment Opportunity Laws* (Matthew Bender) [*see also* Tyler M. Paetkau, *Emerging Employment Law Considerations as a Result of the September 11th Terrorist Attacks*, California Employment Law Reporter (Matthew Bender, Dec. 2001)].

[2] FORM

Provision for Military Training Leave

MILITARY TRAINING LEAVE

If Employee is or becomes a member of a Military Reserve or California National Guard unit, _____ [he *or* she] shall be entitled to apply for and be granted a leave of absence for a period of 14 days plus travel time each year to attend training camp. During that leave, Employee shall receive full compensation less the amount of military base pay received. This leave shall be in addition to any vacation to which Employee may be entitled.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawLeaves of AbsenceMilitary LeaveMilitary & Veterans LawServicemembersGeneral OverviewMilitary & Veterans LawServicemembersActive Duty

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28-85 California Legal Forms--Transaction Guide § 85.343

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.343 Provision for Severance Pay

[1] Comment

[a] Use of Form

This form sets forth two alternative provisions for severance pay if employment is terminated for reasons beyond the employee's control. The first alternative provides simply for a cash payment upon termination for reasons other than cause. The second alternative provides a lump sum retirement payment when the employee voluntarily terminates employment after a specified number of years.

[b] Nature of Severance Pay

Severance pay is not provided for by statute in California. However, an employer can provide for severance pay, either in its policies--whether written or established by practice--or expressly in employment contracts. Severance pay provisions are identically construed whether contained in employer policies or contracts [*Chapin v. Fairchild Camera Camera & Instrument Corp. (1973) 31 Cal. App. 3d 192, 197, 107 Cal. Rptr. 111]* . Severance pay is a kind of accumulated compensation for past services and a material recognition of their past value. It concerns the past, not the future, and once earned, becomes payable thereafter [*see Chapin v. Fairchild Camera Camera & Instrument Corp. (1973) 31 Cal. App. 3d 192, 198, 199, 107 Cal. Rptr. 111]* .

[2] FORM

Provision for Severance Pay

Severance Pay

[*First alternative; severance pay upon dismissal without cause:*]

Upon dismissal other than for cause, Employee shall receive a cash severance payment in the amount equal to [*specify period, e.g.,* three months] salary. [*Optional additional provision:* Employee shall receive additional severance pay based upon length of service and computed at the rate of _____ (*specify rate, e.g.,* one-half month's pay) for every year of service.]

[*OR*]

[*Second alternative; lump sum severance pay at end of specified period, in the nature of retirement pay.*]

Upon [*specify conditions of entitlement, e.g.,* completion of _____ (*e.g.,* 20) years of service or retirement because of illness *or* reaching age 65], Employee may, upon written application to Employer, terminate _____[his *or* her] employment and receive a cash lump sum severance payment based on _____[his *or* her] length of service. The payment shall be computed at the rate of [*specify rate, e.g.,* one-half month's pay] for every year of service [and shall be in lieu of any other termination benefits provided elsewhere in this agreement].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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D. Separate Provisions for Compensation of Employees
5. Vacation and Sick Pay, Paid Leaves of Absence, and Severance Pay

28-85 California Legal Forms--Transaction Guide §§ 85.344-85.349

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.344[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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E. Fringe Benefits

28-85 California Legal Forms--Transaction Guide § 85.350

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.350 Health Care Benefits--Insured or Self-Insured Plans

[1] Comment

[a] Use of Form

This form contains two alternative provisions for employee health care benefits. "Health care" can include medical, dental, eye, surgical, hospital, and major medical coverage. It can be extended to the employee only or the employee's spouse and children. Dependent children are defined by incorporating the Internal Revenue Code definition of dependents, which requires that the parent provide over half of the support of the children for the calendar year in which the expenses arise [*I.R.C. § 152(a), (c)*]. Some employers extend coverage to same and opposite sex spouse-equivalents by requiring an Affidavit of Domestic Partnership. However, the benefits extended to these individuals are taxable income to the employee because the Internal Revenue Code does not recognize these individuals as legal dependents [*see Ensminger v. C.I.R. (4th Cir. 1979) 610 F.2d 189, 191 , cert. denied, 446 U.S. 941 (1980)]* .

This form illustrates provisions for the two existing types of medical reimbursement plans. The first alternative in this form specifies the "insured plan," that is, it provides that the employer will include the employee in the medical reimbursement plan previously adopted by the employer. The second alternative is for use when the employer is self-insured and the terms of the coverage are to be specified in the employment contract itself. A "self-insured" plan is one under which reimbursements are not provided under a health and accident insurance policy. If the self-insured plan contains detailed terms and conditions comparable to those in insured plans, the first alternative can be modified to accommodate this situation by simply referring to the plan documents for a description of the terms and conditions of coverage.

[b] Taxation of Medical Benefits

An employee's gross income does not include amounts paid directly or indirectly by the employer to the employee for reimbursement of medical expenses incurred by the employee or his or her spouse or dependents [*I.R.C. § 105(b)*].

Accordingly, the employee is not taxed on those amounts. An employee who is provided benefits to a domestic partner will be taxed on those amounts [*see Ensminger v. C.I.R. (4th Cir. 1979) 610 F.2d 189, 191 , cert. denied, 446 U.S. 941 (1980)]* .

However, any amounts received by an employee for personal injury or illness are included in gross income to the extent the amounts (1) are attributable to contributions by the employer that were not includible in the employee's gross income, or (2) are paid by the employer [*I.R.C. § 105(a)*].

[c] Requirement for Notice of Discontinuation of Coverage

If an employer provides coverage for medical, surgical, or hospital benefits for an employee, the employer may not discontinue coverage without notifying the employee at least 15 days in advance of the discontinuation. This applies to any discontinuation of coverage, including nonrenewal and cancellation, but it does not include employment termination or cases in which substitute coverage has been provided [*Lab. Code § 2806(a)*]. If coverage is provided by a third party, the employer's failure to give the necessary notice will not require the third party to continue coverage beyond the date on which it would otherwise terminate [*Lab. Code § 2806(b)*].

The foregoing provisions do not apply to any employee welfare benefit plan that is subject to the Employee Retirement Income Security Act of 1974 [*Lab. Code § 2806(c)*; *see 29 U.S.C. § 1001 et seq.*].

[d] Discriminatory Use of Pregnancy Benefits

An employee health insurance plan that provides fewer pregnancy benefits for the wives of men who are employees than for married women who are employees violates the Pregnancy Discrimination Act [*42 U.S.C. § 2000e(k)*]. Any discrimination based on a woman's pregnancy is discrimination based on gender [*but see AT&T Corp. v. Hulteen (2009), 129 S. Ct. 1962, 173 L. Ed. 2d 898, 2009 U.S. LEXIS 3470, at *13* ("Although adopting a service credit rule unfavorable to those out on pregnancy leave would violate Title VII today, a seniority system does not necessarily violate the statute when it gives current effect [in the calculation of pension benefits] to such rules that operated before the [Pregnancy Discrimination Act, which took effect on April 29, 1979].")]. The protection against discrimination in employment applies to men as well as to women. Thus, the discrimination in the coverage afforded to wives of men who are employees is also discrimination against those men [*Newport News Shipbldg. & Dry Dock v. EEOC (1983) 462 U.S. 669, 684, 103 S. Ct. 2622, 77 L. Ed. 2d 89]* .

[2] FORM

Health Care Benefits--Insured or Self-Insured Plans

Health Care Benefits

[*First alternative; use to cover employee under health and accident insurance plan:*]

Employer agrees to include Employee in the [*describe plan, e.g.*, hospital, surgical, and medical] benefit plan adopted by Employer on_____[*date*]. Employer reserves the right, in its discretion and in accordance with applicable law, to modify, add to, or eliminate any of the benefit plans offered to employees.

[*OR*]

[*Second alternative; use if employment contract will specify expenses that will be covered under self-insured plan:*]

Employer agrees to reimburse Employee for the [full amount *or* _____ (*number*) percent] of the costs incurred for [*describe plan, e.g.*, medical, dental, and hospital treatment] by_____[*specify, e.g.*, Employee, Employee's spouse or domestic partner, and children who qualify as Employee's dependents under the Internal Revenue Code]. [Employer shall not, however, reimburse Employee for costs incurred for _____ (*describe excluded types of treatment, e.g.*, cosmetic surgery for Employee's spouse or dependent children).] Employer further agrees to pay those bills directly, rather than to reimburse Employee for payment, on demand by Employee, but only if the bills are submitted in advance to Employer for approval. Provided, however, that all reimbursements or direct payments by Employer shall be limited to that portion of any such bills that will not be paid by insurance.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewPensions & Benefits LawEmployee Benefit PlansGeneral OverviewPensions & Benefits LawEmployee Retirement Income Security Act (ERISA)General Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-85 California Legal Forms--Transaction Guide § 85.351

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.351 Group-Term Life and Accidental Death and Dismemberment Insurance

[1] Comment

[a] Use of Form

This form provides that the employee will be included in the employer's group-term life insurance policy. It also provides for accidental death and dismemberment coverage since that type of coverage is generally part of the insurance package offered by insurers. In most situations, the cost of group-term life insurance is not taxable to the employee [*see* [b], *below*].

[b] Taxation of Group-Term Life Insurance Costs

The cost of employer-paid group-term life insurance, up to $50,000, is not taxable to the employee. However, the proportionate cost of the premiums paid by the employer for coverage in excess of $50,000 is includible in the employee's income [*I.R.C. § 79(a)*]. The computation of the cost of the premiums for any such excess coverage is based on uniform premiums prescribed in the Treasury Regulations [*I.R.C. § 79(c)*; *see Treas. Reg. § 1.79-3*]. These limitations do not apply to the cost of group-term life insurance on the life of an individual that is carried by the employer after the individual's employment has terminated [*see I.R.C. § 79(b)(1)*] or to the cost of group-term life insurance on the life of a current employee when the employer or a charity is named as beneficiary [*I.R.C. § 79(b)(2)*].

The income exclusion is not available to key employees if the insurance plan discriminates in favor of those employees either as to eligibility to participate or benefits provided [*I.R.C. § 79(d)(1), (2)*]. A plan will not be discriminatory if the insurance benefit bears a uniform relationship to compensation [*I.R.C. § 79(d)(5)*].

When a corporation's group-term life insurance plan is a "discriminatory employee benefit plan" [*see I.R.C. § 89(c)-(j)* (definition)], the employer-paid costs are partly or wholly includible in the gross incomes of all covered "highly compensated employees" [*I.R.C. § 89*]. This category includes every employee who at any time in the current or

preceding year was a 5-percent owner of the corporation [*I.R.C. § 414(q)(1)(A), (3)*]. It also includes every employee who in the preceding year received more than $75,000 in compensation from the corporation, or received more than $50,000 in compensation from the corporation and was in the top 20 percent of all employees ranked by compensation, or received more than $45,000 in compensation from the corporation and was an officer, and who in the current year again satisfies one (not necessarily the same one) of these three criteria; and every employee who in the current year is one of the 100 highest-compensated employees (ranked by compensation from the corporation) and also satisfies one of those three compensation-status criteria [*I.R.C. § 414(q)(1)(B)-(D), (2), (4)*; *see I.R.C. § 414(q)(5)-(9)* (maximum and minimum numbers of officers for purpose of this test, treatment of family-member employees, meaning of "compensation," exclusion of certain employees, and treatment of former-employee beneficiaries)].

[2] FORM

Group-Term Life and Accidental Death and Dismemberment Insurance

Group-Term Life Insurance

Employer agrees to include Employee under Employer's group-term life insurance policy_____[*specify coverage, e.g.,* on the terms and conditions stated therein *or* for an amount equal to twice the annual salary of Employee and including accidental death and dismemberment coverage in the amount of $_____]. Coverage shall begin with the first day of the employment term and shall continue throughout the employment term. Employer reserves the right, in its discretion and in accordance with applicable law, to modify, add to, or eliminate the group-term life insurance benefit offered to employees.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawDisability InsuranceGeneral OverviewInsurance LawLife InsuranceAccidental DeathGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewPensions & Benefits LawGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.352

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.352 Insurance or Guaranteed Payment Upon Premature Death or Dissolution of Employer

[1] Comment--Use of Form

This form contains two alternative provisions designed to induce an employee to accept employment by indemnifying the employee in the event of the premature death or dissolution of the employer. This form is for use when the employer is an individual and the business is solely dependent upon that person, or when the employer is a partnership or corporation.

The first alternative guarantees payment of a lump sum to the employee in the event of the employer's death or dissolution during the first few years of the employment term. The second alternative is for use only in the case of an individual employer, and gives the employer the option of obtaining term insurance or making his or her own estate liable for the face amount of the policy.

[2] FORM

Insurance or Guaranteed Payment Upon Premature Death or Dissolution of Employer

Payment Upon Premature Death or Dissolution of Employer

[*First alternative; use to provide uninsured payment whether employer is an individual, a partnership, or a corporation:*]

As an inducement to Employee to accept employment with Employer, Employer agrees that in the event of Employer's [death *or* dissolution] within _____ years from the commencement of Employee's employment, the sum of $_____ shall be payable to Employee from Employer's_____[estate *or* cash assets upon dissolution] at the time of Employer's [death *or* dissolution], but only if Employee has remained in the

employ of Employer until that time [unless the employment has been terminated by Employer for reasons other than cause]. [*Add if employer is an individual:* Employer shall make adequate provision in _____ (his *or* her) personal estate plan or last will for the fulfillment of this provision.]

[*OR*]

[*Second alternative; use to provide insured payment when employer is an individual:*]

Employer agrees to obtain a term insurance policy on_____[his *or* her] own life for a term of _____ years in the face amount of $_____, payable to Employee. Employer shall pay all premiums on that policy. In the event that Employer dies within _____ years from the commencement of Employee's employment without having such an insurance policy then in effect, and if the employment term has not been terminated for cause, Employer's estate shall be liable to Employee for the above amount.

Legal Topics:

For related research and practice materials, see the following legal topics:
Insurance LawGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewPensions & Benefits LawGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-85 California Legal Forms--Transaction Guide §§ 85.353-85.359

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.353[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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F. Employee Incentives
1. Cash Bonuses

28-85 California Legal Forms--Transaction Guide § 85.360

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.360 Provision for Bonus Conditioned on Level of Profits--Payable After End of Fiscal Year

[1] Comment

[a] Use of Form

This form provides for the payment of a lump sum bonus to an employee in addition to the stipulated salary. It is intended for use in conjunction with a general salary provision. It provides that the bonus is conditioned on the achievement of a specified level of sales or profits but it is not linked to or measured by sales or profits in any other way.

For a bonus provision making payment conditional upon completion of a specified length of service by the employee, see *§ 85.361*. For a simple end-of-year bonus provision, see *§ 85.362*.

Both this form and *§ 85.361* provide that the bonus will only be paid if the employee is employed at the end of the employment year or the fiscal year. *§ 85.362* provides for the payment of a pro rata portion of the bonus in the year of termination except when termination is for cause.

[b] Nature of Bonuses

Bonus plans, as incentives, are "wages" within the meaning of *Lab. Code § 200* [*see Lucian v. All States Trucking Co. (1981) 116 Cal. App. 3d 972, 975, 171 Cal. Rptr. 262]* . Bonus provisions differ from profit sharing provisions [*see §§ 85.370-85.372*] in that a bonus is expressed as a lump sum and is not measured by profits (although it might be conditioned upon the existence of profits as in this form), whereas the essence of profit sharing is both the existence of profits and expression of the payment formula in terms of a measure of profits. When a promise to give a bonus is made to a prospective employee to induce that person to become an employee, or to one who is already an employee to induce that person to remain as an employee, the promise is not one for a gift but one for which consideration is given if the

employment or continuation of employment is accepted [*Hunter v. Ryan (1930) 109 Cal. App. 736, 738, 293 P. 825* ; *Sabatini v. Hensley (1958) 161 Cal. App. 2d 172, 175, 326 P.2d 622]* .

This form provides an option to condition the payment of the bonus on the existence of net profits, which are defined as the net income after expenses (but before taxes) [*see* [2], P (c), *below*]. A bonus provision's requirement that the employer's expenses be deducted from gross receipts to determine the employer's net profits does not run afoul of the statutory and regulatory prohibitions against deducting or recapturing unauthorized amounts from salary [*see Lab. Code §§ 221-224, 400-410, 3751(a)*; *8* Cal. Code Reg. § 11070(8)], so long as the employee's *regular* salary is not subject to any unauthorized deductions for the employer's operating expenses [*see Prachasaisoradej v. Ralphs Grocery Co. (Aug. 23, 2007) 42 Cal. 4th 217, 64 Cal. Rptr. 3d 407, 165 P.3d 133, 2007 Cal. Lexis 8909, at *34-*56]* .

[c] Provision for Indeterminate Bonus

An employment contract could provide for the payment of a bonus without specifying the amount of the bonus or a formula by which the amount can be calculated. In such cases, the agreement to pay the bonus will be enforceable despite the omission. The amount of the bonus will be the excess, if any, of the reasonable value of the services rendered by the employee over the agreed salary [*Sabatini v. Hensley (1958) 161 Cal. App. 2d 172, 175, 326 P.2d 622]* . Obviously, however, the better practice is to specify clearly in the contract itself the amount of the bonus or the means by which it may be calculated.

[d] Effect of Requirement That Employee Be Employed at End of Year

An employment contract provision to the effect that the bonus will not be paid or that the employee will not be entitled to the bonus if he or she is not employed at the end of the employment year, as in this form, is not ambiguous. An employee who voluntarily leaves his or her employment before the bonus calculation date is not entitled to receive it [*Lucian v. All States Trucking Co. (1981) 116 Cal. App. 3d 972, 975, 976, 171 Cal. Rptr. 262]* .

[e] Employer's Deduction for Payment to Shareholder-Employee

An employer who is on an accrual basis for tax purposes will be entitled to a deduction in the amount of the bonus for the year in which the amount is determined even though the bonus is not paid in that year. In this form, the bonus is determined as of the end of the fiscal year when the amount of the profit is known (or can be determined), but is not payable until a predetermined subsequent date (the delay in payment is to allow the employer's accountants to determine the exact amount of the profits). This type of bonus is deductible to the employer in the fiscal year when the profits were earned, rather than the next fiscal year when the bonus is paid [*see I.R.C. § 267(a)(2)*] except for certain employees who are also shareholders of the corporation [*see I.R.C. § 267(b)(2)*].

[2] FORM

Provision for Bonus Conditioned on Level of Profits--Payable After End of Fiscal Year

Bonus Conditioned on Profits

(a) For each of Employer's fiscal years in which the _____ [gross receipts *or* net profits] of _____ [Employer *or* the division of Employer's business managed by Employee] equal or exceed $_____, Employer shall pay a bonus of $_____ in addition to any other compensation to which Employee may be entitled under this agreement, but only if Employee has been employed during that entire fiscal year.

(b) The bonus shall be paid within _____ [*specify number*] days after the end of the fiscal year.

(c) As used in this section, the term _____ [*set forth definition, e.g.*, "gross receipts" shall mean all sums received less all sums paid as adjustments for returns or damage or warranty claims *or* "net profits" shall mean net income from operations after expenses but before taxes, as determined according to sound accounting principles by the firm of certified public accountants retained by Employer and in conformity with the prior accounting practices of Employer].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral Overview

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1. Cash Bonuses

28-85 California Legal Forms--Transaction Guide § 85.361

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.361 Provision for Bonus Conditioned on Length of Employment--Payable at the End of Employment Year

[1] Comment--Use of Form

This form provides for the payment of a lump sum bonus to an employee conditioned on the employee remaining with the employer for a given number of years. The bonus is payable at the end of the employment year rather than at the end of the calendar or fiscal year, as in §§ 85.360 and 85.362.

This form specifies that the employee will not be entitled to any portion of the bonus for an employment year in which the employment terminated prior to the end of the employment year. For a provision prorating the bonus for intra-year termination, see *§ 85.362*.

For discussion of the law applicable to bonuses generally, see *§ 85.360[1]*.

[2] FORM

Provision for Bonus Conditioned on Length of Employment--Payable at the End of Employment Year

Bonus Beginning After Completion of Specified Term

(a) If Employee has remained in the employ of Employer under this agreement for at least _____ [*number, e.g.,* two] consecutive years, Employer agrees to pay to Employee at the end of the _____ [*year in which eligibility begins, e.g.,* third] employment year, and at the end of each employment year thereafter, a cash bonus of $_____.

(b) Employee shall not be entitled to the bonus, or any portion thereof, for an employment year in which the employment has been terminated for _____ [cause *or* any reason whatsoever] prior to the end of that

employment year.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsCompensationLabor & Employment LawWage & Hour LawsGeneral Overview

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1. Cash Bonuses

28-85 California Legal Forms--Transaction Guide § 85.362

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.362 Provision for Bonus Payable at End of Calendar Year--Bonus Prorated for Termination Before End of Year

[1] Comment--Use of Form

This form provides for a bonus to be paid at the end of the calendar year and includes a clause prorating the bonus if termination occurs prior to the end of the year for reasons other than cause. This form may be used when the employer is on a calendar year tax basis and wants the wage expense deduction in the current year. If the employer is on a fiscal year, this form should be modified to provide that the bonus is to be paid at the end of the employer's fiscal year [*see § 85.360*], in which case the employer obtains a deduction in the current fiscal year but the employee does not have to include the bonus as income until the calendar year in which the bonus is paid [*see I.R.C. § 267(a)(2)*].

[2] FORM

Provision for Bonus Payable at End of Calendar Year--Bonus Prorated for Termination Before End of Year

Bonus Payable at End of Year

(a) In addition to Employee's salary, Employer agrees to pay Employee a cash bonus of $_____ at the end of each calendar year during the period of employment, provided that the employment term has not been terminated prior to that year.

(b) On termination of employment, Employee shall be entitled to receive from Employer a bonus prorated to the proportion of the year the Employee was employed; except if the employment was terminated for cause [or the employment term was terminated by Employee for any reason whatsoever].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsCompensation

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DIVISION VI: PERFORMANCE OF SERVICES
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1. Cash Bonuses

28-85 California Legal Forms--Transaction Guide §§ 85.363-85.369

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.363[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
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F. Employee Incentives
2. Profit Sharing

28-85 California Legal Forms--Transaction Guide § 85.370

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.370 Provision for Share of Profits as Sole Compensation

[1] Comment

[a] Use of Form

This form provides for payment of a specified percentage of the net profits of a business or a branch of a business to an employee as his or her sole compensation for services under the employment agreement. It permits the employee to draw a weekly amount based on a quarterly estimate of net profits. It also provides for the payment of a minimum amount.

This form of compensation is for use as a means of inducing top level officers who have direct control over the operations of the employer's business to implement policies that will stimulate profits. This provision is inappropriate for "nonexempt" employees, that is, employees who are not exempt from federal and state laws imposing minimum wage and overtime compensation requirements [*see 29 U.S.C. §§ 206, 207*; *Lab. Code §§ 510(a)*; *8 Cal. Code Reg. § 11000 et seq.*].

The California Supreme Court has upheld an employer's supplementary profit-sharing program, even though the employer's profits for purposes of the program were determined by deducting the employer's expenses from its gross receipts. The Court held that such deductions in calculating profits for purposes of a supplemental compensation program do not run afoul of the statutory and regulatory prohibitions against deducting or recapturing unauthorized amounts from wages [*see Lab. Code §§ 221-224, 400-410, 3751(a)*; *8* Cal. Code Reg. § 11070(8)], at least so long as the employees' *regular* wages are not subject to any unauthorized deductions for the employer's operating expenses [*Prachasaisoradej v. Ralphs Grocery Co. (Aug. 23, 2007) 42 Cal. 4th 217, 64 Cal. Rptr. 3d 407, 165 P.3d 133, 2007 Cal. Lexis 8909, at *34-*56]* . The Court noted that it was clear from the program's inception that any compensation received by employees would depend on the extent to which the employer's revenues for the relevant period exceeded its operating expenses. Thus, the amounts calculated as a percentage of the employer's net profit were what constituted

"wages" for purposes of the statutory and regulatory prohibitions against improper deductions or recapture [*Prachasaisoradej v. Ralphs Grocery Co. (Aug. 23, 2007) 42 Cal. 4th 217, 64 Cal. Rptr. 3d 407, 165 P.3d 133, 2007 Cal. Lexis 8909, at *36-*37* (no improper deductions were made by employer after calculating each employee's percentage of net profits)]. Similarly, this form makes it clear that the executive employee is not promised any specific amount, but that his or her profit-sharing amount will be determined only after the employer's net profit is ascertained. Further, this form provides that in any event, the employee will be entitled to a specified minimum amount that will not be reduced by the employer's expenses [*see* [2], P (a), *below*], a provision that is analogous to the "regular" wages received by employees in the case before the Supreme Court.

[b] Nature of Profit Sharing

Payments under incentive plans such as profit sharing plans are "wages" within the meaning of *Lab. Code § 200* [*see Lucian v. All States Trucking Co. (1981) 116 Cal. App. 3d 972, 975, 171 Cal. Rptr. 262]* . Profit sharing provisions differ from bonus provisions [*see §§ 85.360-85.362*] in that a bonus is expressed as a lump sum and is not measured by profits (although it might be conditioned upon the existence of profits as in this form), whereas the essence of profit sharing is both the existence of profits and expression of the payment formula in terms of a measure of profits.

[c] Definition of "Net Profits"

Special care should be given to the selection of a definition of "net profits" that will fit the needs of the parties. It is important to define in the contract itself which items are to be included in or excluded from net profits. Various definitions have been used for the term "net profits," but no one definition can encompass every situation or need that might arise. It has, for example, been defined as the clear gains of the business venture after the expenses incurred in its conduct and the losses sustained in its prosecution [*Boradori v. Peterson (1927) 86 Cal. App. 753, 759-760, 261 P. 520]* .

[2] FORM

Provision for Share of Profits as Sole Compensation

Profit Sharing to Be Sole Compensation

(a) As the sole compensation for services rendered hereunder, Employee shall be entitled to receive _____ percent of the net profits of the business of Employer derived from the operations of _____ [Employer *or specify portion of business from which net profits are to be calculated, e.g.,* the branch managed by Employee]; provided, however, that Employee shall be entitled to a minimum compensation of $_____ per year.

(b) "Net profits" shall mean _____ [*define net profits, including or excluding any particular items desired, e.g.,* net income from operations after expenses but before taxes, as determined according to sound accounting principles by the firm of certified public accountants retained by Employer and in conformity with the prior accounting practices of Employer].

(c) The amount of net profits shall be estimated quarterly, and a statement containing that estimate shall be given to Employee.

(d) Employee shall be entitled to draw a weekly amount on account of _____[his *or* her] share of net profits, up to a maximum of $_____ per week.

(e) Payments to Employee shall be adjusted on a quarterly basis, using the quarterly estimates and year-end statement to determine the amount of compensation due, all payments to be made within 10 days after the issuance of the estimate or

year-end statement.

(f) Employee shall have the right to examine the books and records of Employer [but not Employer's income tax returns] upon _____ [*specify period*] days notice during reasonable business hours, and shall be entitled to an accounting to be accomplished by the firm of certified public accountants retained by Employer and in conformity with the prior accounting practices of Employer.

(g) Employee shall not be entitled to share in the profits for any quarter if Employee is not an Employee on the last day of that quarter, [if _____ (his *or* her) employment was terminated before the end of the quarter for cause, or if _____ (he *or* she) resigned before the end of that quarter].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.371

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.371 Provision for Share of Profits Exceeding Specified Level

[1] Comment

[a] Use of Form

This form provides for the payment of a share of profits to an employee in any year in which the profits exceed a predetermined level. This share of profits is in addition to the regular salary, which represents the primary form of compensation [*see Prachasaisoradej v. Ralphs Grocery Co. (Aug. 23, 2007) 42 Cal. 4th 217, 64 Cal. Rptr. 3d 407, 165 P.3d 133, 2007 Cal. Lexis 8909, at *34-*56* (deduction of employer's expenses from gross receipts to calculate net profits for purposes of profit-sharing program does not run afoul of statutory and regulatory prohibitions against unauthorized deductions from salary [*see Lab. Code §§ 221-224, 400-410, 3751(a)*; *8* Cal. Code Reg. § 11070(8)], so long as no unauthorized deductions are made from employee's *regular* salary)]. This type of provision is mainly used in employment contracts with employees in policy-making positions, and its main purpose is an incentive to the employee to use his or her best efforts to increase profits above the specified level.

[b] Tax Consequences of Profit-Sharing Plans

Employer contributions to a profit-sharing plan are deductible under *I.R.C. § 404(a)* to the extent that they are deductible under another section and are reasonable compensation for services actually rendered [*I.R.C. § 404(a)*; *see Treas. Reg. § 1.404(a)-1(b)*]. Contributions may only be deducted up to either 25 percent (15 percent for tax years beginning before 2002) of the compensation paid or accrued during the taxable year to all beneficiaries under the plan or the amount the employer is required to contribute to the plan trust under *I.R.C. § 401(k)(11)*, whichever is greater [*I.R.C. § 404(a)(3)(A)*]. For additional discussion, see Ch. 1D, *Overview of Employee Benefits* .

[2] FORM

Provision for Share of Profits Exceeding Specified Level

Percentage Share of Profits in Addition to Salary

(a) Employee also shall be entitled to receive from Employer, as additional compensation, in any fiscal year in which net profits exceed $_____, a sum equal to _____ percent of the net profits in excess of $_____.

(b) This additional compensation shall be computed and paid to Employee within _____ [*e.g.*, 30] days after the end of Employer's fiscal year.

(c) For any fiscal year in which Employee is not employed for a full 12 months, _____ [*specify adjustment, if any, e.g.*, Employer may at its discretion adjust the additional compensation payable to reflect the influence on net profits attributable to the efforts of Employee during the period actually worked]. However, Employee shall not be entitled to share in the profits for any fiscal year in which_____[his *or* her] employment has been terminated by Employer for cause or during which Employee resigned prior to the end of that period.

(d) "Net profits" shall be defined as _____ [*e.g.*, net income from operations after expenses but before taxes, as determined according to sound accounting principles by the firm of certified public accountants retained by Employer and in conformity with the prior accounting practices of Employer].

(e) Employee shall have the right to examine the books and records of Employer [but not Employer's income tax returns] on _____ [*specify period*] days' notice during reasonable business hours, and shall be entitled to an accounting to be performed by the firm of certified public accountants retained by Employer and in conformity with the prior accounting practices of Employer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral OverviewPensions & Benefits LawEmployee Benefit PlansProfit-Sharing Plans

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28-85 California Legal Forms--Transaction Guide § 85.372

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.372 Provision for Decreasing Share of Higher Profits

[1] Comment--Use of Form

This form provides that the employee will receive specified percentages of the net profits of the employer's business under a formula in which the amount of the percentage decreases as the profits increase [*see Prachasaisoradej v. Ralphs Grocery Co. (Aug. 23, 2007) 42 Cal. 4th 217, 64 Cal. Rptr. 3d 407, 165 P.3d 133, 2007 Cal. LEXIS 8909, at *34-*56* (deduction of employer's expenses from gross receipts to calculate net profits for purposes of profit-sharing program does not run afoul of statutory and regulatory prohibitions against unauthorized deductions from salary [*see Lab. Code §§ 221-224, 400-410, 3751(a)*; *8* Cal. Code Reg. § 11070(8)], so long as no unauthorized deductions are made from employee's *regular* salary)]. Although this form provides that the employee is to share in all of the profits, it can be revised to provide that the employee will only share in the profits above a certain level [*see § 85.371*] and that the percentage sharing will decrease in increments of profits above that level.

[2] FORM

Provision for Decreasing Share of Higher Profits

Percentage Share of Profits in Addition to Salary

(a) As additional compensation _____ [in each *or* beginning with the _____ (*specify, e.g.*, second)] year of employment hereunder, Employer agrees to pay to Employee _____ [*e.g.*, 5] percent of the net profits of Employer up to $_____, plus _____ [*e.g.*, 3] percent of the net profits up to $_____, plus [*e.g.*, 1] percent of the net profits exceeding $_____.

(b) "Net profits" in any fiscal year shall be determined in accordance with generally accepted accounting principles by the firm of independent certified public accountants then serving Employer. The computation as determined by that firm

shall be final and conclusive on both Employer and Employee. In making the computation, net profits shall not be reduced by state and federal income taxes, payments to qualified pension and profit-sharing plans, and items of nonrecurring or other extraordinary loss which, in the complete discretion of the Board of Directors, did not arise in the ordinary course of business; but the net profits shall be decreased (to the extent they were included in the computation of net profits) by all items of capital gain and nonrecurring profit, less expenses attributable to that gain or profit.

(c) Employee shall have the right to examine the books and records of Employer [but not Employer's income tax returns] upon _____ [*specify period*] days notice during reasonable business hours, and shall be entitled to an accounting to be performed by the firm of certified public accountants retained by Employer and in conformity with the prior accounting practices of Employer.

(d) Employee shall not be entitled to share in the profits for any fiscal year, or any portion thereof, in which_____[his *or* her] employment has been terminated for _____ [cause *or* any reason whatsoever] [*if desired, add:* or during which _____ (he *or* she) has resigned] prior to the end of that period.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral OverviewPensions & Benefits LawEmployee Benefit PlansProfit-Sharing Plans

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28-85 California Legal Forms--Transaction Guide §§ 85.373-85.379

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[Reserved]

§§ 85.373[Reserved]

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28-85 California Legal Forms--Transaction Guide § 85.380

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.380 Stock Bonus--Stock Valued at Fair Market Value

[1] Comment

[a] Use of Form

The first alternative set forth in this form is a provision for an annual bonus payable in the employer's stock. It specifies that for purposes of determining the number of shares to be transferred to the employee, the value of the stock is the fair market value of the shares. However, in a closely-held corporation, it may be difficult to determine the fair market value of the shares. In this situation, shares can be valued at their book value for the purpose of determining the number of shares to transfer [*see § 85.381*].

The second alternative set forth in this form provides for participation by the employee in the employer's employee stock ownership plan, although such a provision is not necessary since the plan must meet the antidiscrimination requirements outlined under [c], below.

[b] Taxation of Stock Bonuses

In general, a stock bonus is taxable to the employee to the extent of the excess of its fair market value (at the earlier of the time the employee's rights in the stock become transferable or are not subject to a substantial risk of forfeiture) over any amount the employee paid for the stock [*I.R.C. § 83(a)*]. Fair market value is determined without regard to any restriction on the stock other than one which, by its terms, will never lapse [*I.R.C. § 83(a)(1)*]. The employee can elect to include the amount indicated above in his or her income in the year in which the transfer was made, but the drawback to this is that if the stock rights are later forfeited, no deduction will be allowed with respect to that forfeiture [*I.R.C. § 83(b)*].

An employee's rights in stock are transferable only if not subject to a substantial risk of forfeiture [*I.R.C. § 83(c)(2)*].

Stock is subject to a substantial risk of forfeiture if the employee's right to the stock is conditioned on his or her continued employment with the employer [*see I.R.C. § 83(c)(1)*]. Moreover, if the employee is subject to suit under the Securities and Exchange Act with respect to certain corporate insider stock transactions within a six-month period, his or her rights to the stock are subject to a substantial risk of forfeiture and are not transferable [*I.R.C. § 83(c)(3)*].

The employer is entitled to a deduction under *I.R.C. § 162* for the value of the stock bonus that is taxable to the employee. The deduction is allowable in the taxable year in which the income is included in the employee's gross income [*I.R.C. § 83(h)*].

For a detailed discussion of the operation of *I.R.C. § 83*, see Field, *Payments in Restricted Property: Recent Developments*, 30 New York University Institute On Federal Taxation 385 (1972)(Matthew Bender).

[c] Employee Stock Ownership Plans

An employee stock ownership plan ("ESOP") is either a stock bonus plan or a combination stock bonus and money-purchase plan. They are "defined contribution plans," must be "qualified," and must be designed to invest primarily in securities issued by the employer [*I.R.C. § 4975(e)(7)*].

A defined contribution plan is one in which an individual account is set up for each covered employee and to which the employer's pre-defined contribution and any increase or decrease in value is contributed annually [*I.R.C. § 414(i)*]. A plan qualifies if it meets certain statutory antidiscrimination requirements, including minimum participation [*I.R.C. §§ 401(a)(3), 410*], minimum coverage [*I.R.C. §§ 401(a)(4), 410*], and does not discriminate in favor of highly compensated employees [*I.R.C. § 401(a)(4)*; *see I.R.C. § 414(q)* (defined)]. Other aspects of qualification are requirements for minimum vesting [*I.R.C. §§ 401(a)(7), 411*], minimum accrual of benefits [*I.R.C. §§ 401(a)(7), 411(b)*], and avoidance of "top-heavy" plans that discriminate in favor of highly placed executives [*I.R.C. §§ 401(a)(10)(B), 416*]. There are limitations on contributions and benefits [*I.R.C. §§ 401(a)(16), 415*], on annual compensation of employee participants [*I.R.C. §§ 401(a)(17)*], and on the aggregation of plans [*I.R.C. § 414(b), (c), (m), (n)*]. Qualified plans also are required to make certain specific distributions [*I.R.C. § 401(a)(9)*]. Defined contribution plans and the requirements for qualification are discussed in C. Scudere, Pension and Profit Sharing Plans Compliance Guide(Matthew Bender); H. Frutkin, Pension and Profit Sharing Plans: Forms and Practice(Matthew Bender); and Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 13, *Pension Plans and Other Exempt Employees' Plans* (Matthew Bender).

[2] FORM

Stock Bonus--Stock Valued at Fair Market Value

[*First alternative; use to provide traditional stock bonus:*]

Stock Bonus With Specified Value

As additional compensation, Employer agrees to transfer to Employee, each year during the employment term, within [*time limit, e.g.,* two and one-half months after the close of the fiscal year of Employer], the number of shares of Employer's common stock [*or other type of stock*] having an aggregate fair market value of $[*or* _____ percent of Employee's annual salary as of the end of that fiscal year]. For the purposes of this provision, the fair market value of the shares shall be [*set forth manner of determining value, e.g.,* the book value thereof] determined as of the end of that fiscal year.

[*OR*]

[*Second alternative; use to provide for inclusion of employee in ESOP:*]

Participation in Employee Stock Ownership Plan

Employer agrees to include Employee as a participant in the employee stock ownership plan established by Employer on_____[*date*]. Employee's rights in shares issued by Employer and contributed to that plan shall be governed by the terms of that plan.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsGeneral OverviewPensions & Benefits LawEmployee Benefit PlansEmployee Stock Ownership Plans

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28-85 California Legal Forms--Transaction Guide § 85.381

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.381 Stock Bonus Plus Cash Bonus--Stock Valued at Book Value

[1] Comment--Use of Form

This form provides for an annual bonus to be paid in the employer's stock and a cash bonus from which any withholding tax on the stock and the cash bonus will be paid. It differs from § 85.380 in that it provides that the stock will be valued at book value for the purpose of determining the number of shares to be transferred. The reason for using book value rather than fair market value is that fair market value can often be difficult to determine, especially in the case of stock of closely-held corporations. However, even if book value is used to determine the number of shares to be transferred to the employee, the employer's deduction, and the amount included in the employee's income will be determined by the fair market value of the stock [*see I.R.C. § 83(a)*; *see also § 85.380[1][b]*].

[2] FORM

Stock Bonus Plus Cash Bonus--Stock Valued at Book Value

Stock and Cash Bonus

(a) As additional compensation, Employee shall be entitled to receive from Employer, each year during the employment term, within [*time*] after the end of the fiscal year of Employer, the number of shares of Employer's common stock [*or other type of stock*] that have a total book value of $[*or* _____ percent of Employee's annual salary as of the end of that fiscal year].

(b) For these purposes, the book value of those shares shall be their book value as of the end of that fiscal year, as shown on the balance sheet of Employer as prepared and certified by the firm of accountants then serving Employer, and no adjustments in that book value shall be made for operations of Employer subsequent to the preceding fiscal year.

(c) In addition, Employee shall be entitled to receive from Employer, at the time of the transfer of those shares to Employee, a cash bonus of $_____, from which the withholding taxes on the stock bonus and the cash bonus shall be withheld.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawWage & Hour LawsCoverage & DefinitionsGeneral OverviewPensions & Benefits LawEmployee Benefit PlansEmployee Stock Ownership Plans

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28-85 California Legal Forms--Transaction Guide § 85.382

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.382 Restricted Stock Bonus--Transfer Subject to Substantial Risk of Forfeiture

[1] Comment

[a] Use of Form

This form is a provision for the annual payment of a restricted stock bonus to the employee. It includes a clause requiring that all shares transferred to the employee are subject to a restriction that they be immediately sold to the employer upon termination of the contract for any reason other than the employee's death.

The main reasons for use of a restricted bonus are to maintain control over the stock of a closely-held corporation and to induce the employee to remain employed for a specified number of years. The effect of these two restrictions is to delay the time when the value of the bonus is taxable to the employee and deductible by the employer [*see* [b], *below*].

[b] Taxation of Restricted Stock Bonuses

The general rule is that stock bonuses must be included in the employee's income on receipt unless the stock is subject to a restriction that is considered a "substantial risk of forfeiture" [*I.R.C. § 83(a)*]. Stock is subject to a substantial risk of forfeiture if the employee's right to it is conditioned on his or her continuing to remain employed with the employer [*see I.R.C. § 83(c)(1)*].

The stock bonus provided in this form is subject to a substantial risk of forfeiture because it requires the employee to sell back to the employer all stock the employee has received from the employer within a predetermined number of years after the termination of employment, except termination caused by the employee's death.

The employee will be taxed on each stock bonus when the forfeiture restriction no longer applies, which will be the predetermined number of years after receipt of the stock. The amount included in his or her income at that time will be

the fair market value of the stock at the time the restriction is removed or no longer applies [*I.R.C. § 83(a), (c); Treas. Reg. § 1.83-5(a)*]. The employer's ability to take a deduction for the bonus is also deferred until that time [*I.R.C. § 83(h)*]. This is contrasted with a non-restricted stock bonus, in which the employee's gross income includes the net value of the stock in excess of any amount he or she paid for it in the year of the transfer [*I.R.C. § 83(a)*] and the employer's deduction can be taken in the same year [*I.R.C. § 83(h)*].

[2] FORM

Restricted Stock Bonus--Transfer Subject to Substantial Risk of Forfeiture

Restricted Stock Bonus

(a) As additional compensation, Employer agrees to transfer to Employee each year during the employment term, within two and one-half months after the close of Employer's fiscal year, the number of shares of Employer's common stock having an aggregate book value equal to _____ percent of Employee's annual salary as of the end of that fiscal year. For purposes of the bonus, the book value of the shares shall be their book value as of the close of the fiscal year, as shown on Employer's balance sheet as prepared and certified by the firm of accountants then serving Employer.

(b) All shares that are transferred to Employee pursuant to this provision shall be subject to the restriction that they be immediately sold to Employer at book value (as defined below) if the employment term is terminated within _____ years from the date that the shares were transferred to Employee for any reason except the death of Employee.

(c) "Book value," for the purpose of the sale of the stock to Employer on termination of employment, is the book value of shares as of the close of Employer's fiscal year last ending prior to that termination, as shown on Employer's balance sheet prepared and certified by the firm of accountants then serving Employer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewPensions & Benefits LawEmployee Benefit PlansEmployee Stock Ownership Plans

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28-85 California Legal Forms--Transaction Guide § 85.383

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.383 Incentive Stock Option Agreement

[1] Comment

[a] Use of Form

This form is an incentive stock option agreement in which an employer grants an employee the option to purchase a specified number of shares in the corporation. This statutory option [*see I.R.C. § 422*] allows a shareholder to defer taxation of any gain from the shares, which would normally occur at the time of receipt or exercise of the option, until disposition of the stock [*see* [b][i], *below*]. Nonstatutory stock options are set forth in *§§ 85.384* and *85.385*.

For an article provision authorizing the adoption of a stock option plan and agreement, see *Ch. 3, Articles of Incorporation, § 3.262*. For bylaws authorizing the adoption of an incentive stock option plan and agreement, see Ch. 4, *Bylaws* . For a discussion and example of an incentive stock option plan authorizing this incentive stock option agreement, see *Ch. 6I, Issuance of Equity Securities, § 6I.240*. For a board of directors resolution adopting an incentive stock option plan, see *Ch. 6I, Issuance of Equity Securities, § 6I.241*. For a shareholders' resolution approving an incentive stock option plan, see *Ch. 6I, Issuance of Equity Securities, § 6I.242*.

[b] Taxation of Incentive Stock Options

[i] In General

Incentive stock options are advantageous to employees because any gain received from the exercise of the option is deferred. When a share of stock is transferred to an employee pursuant to an incentive stock option [*see I.R.C. § 422(b)* (definition)], no taxable event occurs [*I.R.C. § 422(a)*; *see I.R.C. § 421(a)*]. No income is received by the individual with respect to the difference between the option price and the share's value at exercise [*I.R.C. § 421(a)(1)*]; no deduction for a trade or business expense [*see I.R.C. § 162*] is allowable to the transferor corporation (or its parent,

subsidiary, or successor) for the share of stock transferred [*I.R.C. § 421(a)(2)*; *see I.R.C. § 424(a)* (successor in reorganization)]; and no amount other than the price paid under the option is received by the corporation for the share transferred [*I.R.C. § 421(a)(3)*]. Instead, any income realization is deferred until the employee disposes of the stock received from the option. Tax-free exercise of the option relieves the employee from financing a tax payment in addition to the exercise price [Colvin, *Qualified "Incentive Stock Options" Under the New Law: Requirements and Advantages, 55 J. Tax'n 202 (1981)*].

Furthermore, if holding period requirements are met, the difference between the exercise price of the option and the price of the stock upon disposition by the employee will be classified as long-term capital gain [*see I.R.C. §§ 1221, 1222*]. Another advantage of incentive stock options over nonstatutory options is that for the former, tax will be postponed until the stock is sold [*see I.R.C. § 83* (nonstatutory options taxable upon exercise)].

For purposes of computing alternative minimum tax liability, the realization of income on the exercise of an incentive stock option is not deferred [*I.R.C. § 56(b)(3)*; *see I.R.C. § 421*]. A taxpayer generally must report any excess of fair market value over option price as alternative minimum taxable income when the taxpayer's rights in the stock are freely transferable, or when those rights are not subject to a substantial risk or forfeiture [*I.R.C. §§ 56(b)(3), 83(a)*; *see also* S. Rep. 100-445, 100th Cong., 2d Sess. 96, 97 (1988)]. For a discussion of the alternative minimum tax, see Ch. 53, *Personal Property Leasing* .

[ii] Holding Period

The first requirement for tax deferral is that the employee must not make a disposition of the stock for at least two years from the date the option was granted, and for one year after the transfer of the share to the employee [*I.R.C. § 422(a)(1)*]. If the employee disposes of the stock during that period, he or she will realize ordinary income in the year of disposition as to any gain, up to the stock's value on the date the option was exercised [*I.R.C. § 421(b)*].

A relief provision limits the employee's income on a disposition during the holding periods [*see I.R.C. § 422(a)(1)*] if the selling price of the stock is lower than its value at the time of exercise. The amount includible in his or her gross income and the amount deductible from the corporation's income as compensation attributable to the exercise of the option will be limited to the amount realized in the sale or exchange over the adjusted basis of the share (the option price) [*I.R.C. § 422(c)(2)*; *see* Rabkin & Johnson, Federal Income, Gift and Estate Taxation, Ch. 14, *Employer and Employee* (Matthew Bender)].

If an insolvent individual holds a share of stock acquired by exercise of the option, and the share is subsequently transferred to a trustee, receiver, or any other similar fiduciary under a bankruptcy proceeding or similar insolvency proceeding, neither that transfer nor any other transfer of the share for the benefit of his or her creditors in that proceeding will constitute a "disposition" of the share for purposes of *I.R.C. § 422(a)(1)* [*I.R.C. § 422(c)(3)*].

[iii] Employee Status

The second requirement for tax deferral is that the individual must be an employee of the corporation (or its parent, subsidiary, or successor [*see I.R.C. § 424(a)*]) at all times during the period beginning on the date of the granting of the option, and ending on the day three months before the date the option is exercised [*I.R.C. § 422(a)(2)*]. If the employee is disabled [*see I.R.C. § 22(e)(3)* (definition)], that three-month post-employment period will be extended to one year [*I.R.C. § 422(c)(6)*; *see* P 2 of form].

[iv] Exercise of Option After Death

If an employee holds an unexercised option at death, the exercise of that option by the employee's estate, or by a person who acquires the option by bequest, by inheritance, or by reason of the employee's death, is governed by the same rules

that would have applied if the option had been exercised by the decedent, subject to certain exceptions [*I.R.C. § 421(c)(1)*]. First, the holding period requirement does not apply to stock acquired by an exercise after the employee's death [*I.R.C. § 421(c)(1)(A)*; *see I.R.C. §§ 422(a)(1), 423(a)(1)*]. Second, the estate or person exercising the option need not do so within three months after the employee's death. Moreover, although the employee must have satisfied the employment requirement at the time of death or within three months before that time, the estate or person exercising the option is not subject to that requirement [*I.R.C. § 421(c)(1)(A)*; *see I.R.C. §§ 422(a)(2), 423(a)(2)*].

If the option is exercised by a person other than the personal representative or one who acquires the option by bequest, inheritance, or the employee's death, the exercise does not qualify for tax deferral under these rules. For example, if the estate sells the option, the exercise of the option by the buyer does not qualify for tax deferral; if the option is distributed to an heir as a part of the estate, the heir's exercise of the option qualifies for that treatment [*Treas. Reg. § 1.421-2(c)(1)*]. For that reason, this form prohibits the transfer of the option other than by the laws of descent and distribution on the death of the employee [*see* P 6 of form].

[c] Requirements for "Incentive Stock Option"

[i] In General

In order to qualify as an "incentive stock option," an option must be for the purchase of stock of a corporation (or its parent or subsidiary), must be granted to an individual for any reason connected with his or her employment by the corporation (or its parent or subsidiary), and must meet all of the following requirements [*I.R.C. § 422(b)*; *see Ch. 6I, Issuance of Equity Securities, § 6H.240* (incentive stock option plan)]:

- It is granted pursuant to a plan that states the aggregate number of shares that may be issued under options and the employees (or class of employees) eligible to receive options, and that is approved by the stockholders of the granting corporation within 12 months before or after the date the plan is adopted [*I.R.C. § 422(b)(1)*];

- It is granted within 10 years from the date the plan is adopted, or the date the plan is approved by the stockholders, whichever is earlier [*I.R.C. § 422(b)(2)*];

- By its terms it is not exercisable after the expiration of 10 years from the date it is granted [*I.R.C. § 422(b)(3)*; *see* P 7 of form];

- The option price is not less than the fair market value of the stock [*see I.R.C. § 422(c)(7)* (determination of "fair market value")] at the time the option is granted [*I.R.C. § 422(b)(4)*; *see* P 1 of form];

- By its terms it is not transferable by the employee other than by will or the laws of descent and distribution, and is exercisable during the employee's lifetime only by him or her [*I.R.C. § 422(b)(5)*; *see* P 6 of form]; and

- At the time the option is granted, the employee does not own stock possessing more than 10 percent of the total combined voting power of all classes of stock of the employer corporation (or of its parent or subsidiary) [*I.R.C. § 422(b)(6)*].

An option does not qualify as an incentive stock option if its terms provide that it will not be treated as an incentive stock option [*I.R.C. § 422(b)*]. In addition, an option is not treated as an incentive stock option if the aggregate fair market value of stock with respect to which the option is exercisable for the first time by any individual during any calendar year exceeds $100,000. This restriction applies to options exercisable by an individual under all plans of the

individual's employer corporation and its parent and subsidiary corporations [*I.R.C. § 422(d)(1)*]. The fair market value of any stock must be determined as of the time the option to that stock is granted [*I.R.C. § 422(d)(3)*].

An option that meets all of these requirements will be treated as an incentive stock option even if the employee pays for the stock with stock of the corporation granting the option [*I.R.C. § 422(c)(4)(A)*], or if the option is subject to any condition that is not inconsistent with these requirements [*I.R.C. § 422(c)(4)(C)*]. Furthermore, an option meeting all of these requirements will be treated as an incentive stock option even if the employee has a right to receive property that is subject to inclusion in income under *I.R.C. § 83* (as property received for performance of services) at the time of the exercise of the option [*I.R.C. § 422(c)(4)(B)*]. Thus, the corporation may pay an unlimited taxable cash or stock bonus at time of exercise [Colvin, *Qualified "Incentive Stock Options" Under the New Law: Requirements and Advantages, 55 J. Tax'n 202, 205 (1981)*].

For further discussion of incentive stock option requirements, see J. Rabkin & M. Johnson, Federal Income, Gift and Estate Taxation, Volume 3, Chapter 14, *Employer and Employee*, § 14.16 (incentive options).

[ii] Option Price

If a share of stock is transferred pursuant to an employee's exercise of an option that would fail to qualify as an incentive stock option because the option price is less than the fair market value of the stock [*see I.R.C. § 422(b)(4)* (price requirement); *see also* [i], *above*], the stock price requirement will be deemed to be satisfied if there was a good faith attempt to accurately value the stock [*I.R.C. § 422(c)(1)*]. Whether a good faith attempt has been made is a question of fact.

[iii] Stock Ownership

If, at the time the option is granted, the employee owns more than 10 percent of the total combined voting power of all classes of stock of the employer corporation (or of its parent or subsidiary) [*see I.R.C. § 422(b)(6)* (ownership limitation); *see also* [i], *above*], the option must have a price of 110 percent of fair market value (instead of the usual 100 percent [*see I.R.C. § 422(b)(4)*; P 1 of Form]) and by its own terms must be exercisable within 5 years (instead of the usual 10 years [*see I.R.C. § 422(b)(3)*; P 7 of Form]) of the date of grant [*I.R.C. § 422(c)(5)*; *see* J. Rabkin & M. Johnson, Federal Income, Gift and Estate Taxation, vol. 3, Ch. 14, *Employer and Employee*, § 14.16[10]]. An employee is considered to own any stock owned by his or her brothers, sisters, spouse, ancestors, and lineal descendants, and to proportionately own any stock owned by a corporation, partnership, estate, or trust of which the employee is a shareholder, partner, or beneficiary [*I.R.C. § 424(d)*].

[iv] Aggregate Fair Market Value

If a share of stock is transferred pursuant to an employee's exercise of an option that would fail to qualify as an incentive stock option because, under the terms of the plan, the aggregate fair market value of the stock for which incentive stock options are exercisable for the first time by an individual in a calendar year exceeds $100,000 [*see I.R.C. § 422(d)* (value restriction); *see also* [i], *above*], the value requirement will be deemed satisfied if a good faith attempt was made to value the stock [*I.R.C. § 422(c)(1)*; Temp. Treas. Reg. § 14a.422A-1].

[d] Securities Law Requirements

Because an incentive stock option agreement involves the sale of securities by an issuer, the offer and sale of the option must comply with federal and state securities laws. Under federal law, the offer or sale of a security must be registered with the Securities and Exchange Commission [*see 15 U.S.C. § 77f*], unless the security or transaction is exempt [*15 U.S.C. §§ 77c, 77d*]. Under California law, the offer or sale of a security must be qualified with the Commissioner of Corporations, unless the security or the transaction is exempt from or not subject to qualification [*Corp. Code §§ 25110, 25120, 25130*]. Compliance is required at the time of the offer or sale of the stock option; neither the exercise of the

right to purchase stock nor the issuance of the securities pursuant to the option falls within the definition of "offer" or "sale" requiring separate qualification or exemption [*Corp. Code § 25017(e)*]. A special exemption applies to incentive stock options when requirements regarding registration of the issuer, stock subject to options, and shareholder approval are met [*see 10 Cal. Code Reg. § 260.105.8*].

If no exemption is available and the offer or sale must be qualified by permit [*see Corp. Code § 25113*], the Commissioner may refuse to issue a permit unless he or she finds the proposed issuance of the securities to be fair, just, and equitable [*Corp. Code § 25140(b)*]. The standards relating to a presumption of fairness require a stock option plan to (1) meet criteria similar to the requirements of *I.R.C. § 422(b)* (definition of "incentive stock option") [*see 10 Cal. Code Reg. § 260.140.41*]; (2) provide financial statements to security holders at least annually [*10 Cal. Code Reg. § 260.140.46*; *see 10 Cal. Code Reg. § 260.140.41(h)*]; and (3) limit the shares called for by all outstanding options, under any stock purchase, stock bonus, or similar plan, to 30 percent of the then-outstanding shares of the issuer (excluding shares subject to promotional waivers) unless a percentage higher than 30 percent is approved by at least two thirds of the outstanding securities entitled to vote [*10 Cal. Code Reg. § 260.140.45*].

For further discussion of the qualification and exemption of incentive stock options, see *Ch. 6I, Issuance of Equity Securities § 6I.240* et seq.

[e] Disclosure Requirements After Exercise of Option

A corporation must file a return for any calendar year in which it transfers to an employee a share of stock pursuant to the employee's exercise of an incentive stock option [*I.R.C. § 6039(a)(1)*]. In addition, the corporation must give the employee a written statement setting forth the information prescribed by regulations [*I.R.C. § 6039(b)*; *see Treas. Reg. § 1.6039-1(a)*]. The written statement generally must be given on or before January 31 of the year following the calendar year for which the return is made [*I.R.C. § 6039(b)*; *see Treas. Reg. § 1.6039-1(c)(2)* (extension available for good cause)]. The statement must include all of the following information [*Treas. Reg. § 1.6039-1*]:

- The name, address, and employer identification number of the corporation transferring the stock.
- The name, address, and identifying number of the person to whom the share or shares of stock were transferred.
- The name and address of the corporation the stock of which is the subject of the option (if other than the corporation transferring the stock).
- The date the option was granted.
- The date the shares were transferred to the person exercising the option.
- The fair market value of the stock at the time the option was exercised.
- The number of shares of stock transferred pursuant to the option.
- The type of option under which the transferred shares were acquired.
- The total cost of all the shares.

[2] FORM

Incentive Stock Option Agreement

INCENTIVE STOCK OPTION AGREEMENT

This AGREEMENT is made between_____[*name of employer*] ("Employer"), having a principal place of business at_____[*address*], and_____[*name of employee*] ("Employee"), of_____[*address*].

Option Granted

1. Employer grants Employee an option to purchase _____ [*number*] shares of _____ [*common or other type of stock in employer corporation, parent, or subsidiary corporation*] at a purchase price of $_____ [*specify at least fair market value of stock at time of grant, or 110 percent of fair market value if shareholder owns more than 10 percent of voting power*] per share.

Time of Exercise of Option

2. Employee may exercise_____[his *or* her] option to purchase _____[*number*] shares at any time, and from time to time until termination of the option as provided in Paragraph 7, below, so long as at all times, beginning with the date of the grant of this option and ending 3 months prior to the date of exercise, or 12 months prior to the date of exercise if the employee is disabled within the meaning of *Internal Revenue Code Section 22(e)(3)*, Employee remains employed. For purposes of this agreement, "employment" means that Employee is employed by Employer, a parent or subsidiary corporation of Employer, or a corporation, or a parent or subsidiary corporation of such a corporation issuing or assuming a stock option in a transaction to which *Internal Revenue Code Section 424(a)* applies.

Method of Exercise

3. This option shall be exercised by written notice delivered to Employer at its principal place of business, stating the number of shares for which the option is being exercised. The notice must be accompanied by a check [*or specify other acceptable methods of payment*] for the amount of the purchase price.

Capital Adjustments

4.(a) The existence of this option shall not affect in any way the right or power of Employer or its stockholders to make or authorize any or all adjustments, recapitalizations, reorganizations, or other changes in Employer's capital structure or its business, or any merger or consolidation of Employer or any issue of bonds, debentures, preferred or prior preference stocks ahead of or affecting the common stock or the rights thereof, or the issuance of any securities convertible into any common stock or of any rights, options, or warrants to purchase any common stock, or the dissolution or liquidation of Employer, any sale or transfer of all or any part of its assets or business, or any other corporate act or proceedings of Employer, whether of a similar character or otherwise.

(b) The shares with respect to which this option is granted are shares of the _____ [*common or other type of stock*] of _____ [*employer corporation, parent, or subsidiary corporation*] as presently constituted, but if and whenever, prior to the delivery by Employer of all the shares of the stock with respect to which this option is granted, Employer shall effect a subdivision or consolidation of shares or other capital readjustment, the payment of a stock dividend, or other increase or reduction of the number of shares of the stock outstanding without receiving compensation therefor in money, services, or property, the number of shares of stock then remaining subject to this option shall (a) in the event of an increase in the number of outstanding shares, be proportionately increased, and the

cash consideration payable per share shall be proportionately reduced; and (b) in the event of a reduction in the number of outstanding shares, be proportionately reduced, and the cash consideration payable per share shall be proportionately increased.

Merger and Consolidation

5.(a) Following the merger of one or more corporations into Employer or any consolidation of Employer and one or more corporations in which Employer is the surviving corporation, the exercise of this option shall apply to the shares of the surviving corporation.

(b) Notwithstanding any other provision of this agreement, this option shall terminate on the dissolution or liquidation of Employer, or on any merger or consolidation in which Employer is not the surviving corporation.

Transfer of Option

6. During Employee's lifetime, this option shall be exercisable only by Employee. This option shall not be transferable by Employee other than by the laws of descent and distribution upon Employee's death. In the event of Employee's death during employment or during the applicable period after termination of employment specified in Paragraph 2, above, Employee's personal representatives may exercise any portion of this option that remains unexercised at the time of Employee's death, provided that any such exercise must be made, if at all, during the period within _____ [*specify period set forth in plan, e.g.*, one year] after Employee's death, and subject to the option termination date specified in Paragraph 7(c).

Termination of Option

7. This option shall terminate on the earliest of the following dates:

(a) The expiration of three months from the date of Employee's termination of employment, as defined in Paragraph 2, above, except for termination due to death or permanent and total disability;

(b) The expiration of 12 months from the date on which Employee's employment, as defined in Paragraph 2, above, is terminated due to permanent and total disability, as defined in *Internal Revenue Code Section 22(e)(3)*; or

(c) _____ [*date within 10 years of grant of option, or 5 years if shareholder owns more than 10 percent of voting power*].

Rights as Shareholder

8. Employee will not be deemed to be a holder of any shares pursuant to the exercise of this option until Employee pays the option price and a stock certificate is delivered to Employee for those shares. No adjustment shall be made for dividends or other rights for which the record date is prior to the date the stock certificate is delivered.

Executed on_____[*date*] at_____[*city*], California.

EMPLOYER
_____ [*name of corporation*]

By _____ [*signature*]
[*typed name and title*]

EMPLOYEE
_____ [*signature of employee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewPensions & Benefits LawEmployee Benefit PlansEmployee Stock Ownership Plans

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DIVISION VI: PERFORMANCE OF SERVICES
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28-85 California Legal Forms--Transaction Guide § 85.384

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.384 Nonstatutory Stock Option--Options Granted at Commencement of Employment Term

[1] Comment

[a] Use of Form

This form provides an option to the employee to purchase a given number of shares of stock of the employer. The option may be exercised in whole or in part at any time during the employment term. For a form providing for the transfer of stock options to the employee every year during the employment term, see *§ 85.385*.

[b] Taxation of Stock Options

The stock option provided in this form is referred to as a nonstatutory stock option because it does not meet the restrictive criteria for the advantageous tax treatment accorded to incentive stock options [*see I.R.C. §§ 421-423*; *see also § 85.383[1][b]*]. Nonstatutory stock options are taxed under *I.R.C. § 83*, which governs the tax treatment of property transferred for the performance of services. Section 83 generally provides that such property is taxable to the employee to the extent of the excess of its fair market value (at the earlier of the time when the employee's rights in the property become transferable or when they are not subject to a substantial risk of forfeiture) over any amount the employee paid for the property [*I.R.C. § 83(a)* (fair market value determined without regard to any restriction on property other than one that, by its terms, will never lapse)]. In this context, a person's rights in property are subject to a "substantial risk of forfeiture" if conditioned on the future performance of substantial services, and a person's property rights are transferable only if any transferee's rights in that property would not be subject to a substantial risk of forfeiture [*I.R.C. § 83(c)(1), (2)*].

Section 83 will apply to a nonstatutory stock option when it is granted, if the option has a readily ascertainable fair market value at that time; otherwise, Section 83 will apply when the option is exercised or otherwise disposed of, even though the fair market value of the option may have become readily ascertainable before that time [*I.R.C. § 83(e)(3), (4)*

; *Treas. Reg. § 1.83-7(a)*]. In this context, a nonstatutory stock option has a "readily ascertainable value" if it is actively traded on an established market [*Treas. Reg. § 1.83-7(b)(1)*]. If the option is not actively traded on an established market, it does not have a readily ascertainable fair market value unless its fair market value can otherwise be measured with reasonable accuracy. Ordinarily, this means that an option not actively traded on an established market does not have a readily ascertainable fair market value when granted unless all of the following conditions exist [*Treas. Reg. § 1.83-7(b)(2)*]:

- The option is transferable by the optionee;
- The option is exercisable immediately in full by the optionee;
- The option or the property subject to the option is not subject to any restriction or condition (other than a lien or other condition to secure the payment of the purchase price) that has a significant effect on the fair market value of the option; and
- The fair market value of the option privilege is readily ascertainable.

The "option privilege" in the case of an option to buy stock is the opportunity to benefit during the option's exercise period from any increase in the value of the stock subject to the option during that period, without risking any capital [*Treas. Reg. § 1.83-7(b)(3)*]. Whether the value of the option privilege is readily ascertainable, and the amount of that value, are determined by considering (1) whether the value of the stock subject to the option can be ascertained, (2) the probability of any ascertainable value of the stock increasing or decreasing; and (3) the length of the period during which the option can be exercised [*Treas. Reg. § 1.83-7(b)(3)*].

Since the stock option provided in this form is not assignable, it does not have a readily ascertainable value at the time it is granted, and the employee therefore will not be taxed at that time [*see Treas. Reg. § 1.83-7(a), (b)(2)*]. However, the employee will have an unconditional right to receive the stock when the option is exercised and will be taxed at that time on the difference between the fair market value of the stock at the time of exercise less the option price [*see Treas. Reg. § 1.83-7(a)*].

[2] FORM

Nonstatutory Stock Option--Options Granted at Commencement of Employment Term

Nonstatutory Stock Option

The Employer hereby grants Employee an option to purchase [*number*] shares of common stock [*or other type of stock*] of Employer at a purchase price of $_____ per share. The number of shares subject to this option shall be proportionately adjusted for any change in the stock structure of Employer because of share dividends, recapitalizations, reorganizations, mergers, or otherwise. The option is not assignable and may only be exercised by Employee during the term of employment under this agreement; provided, however, that in the event that the employment term is terminated by Employer for reasons other than cause against Employee, Employee shall retain the right to exercise any unused portion of the option until [*date specified in contract for end of employment term*]. The option may be exercised in whole or in part but may only be exercised in lots of [*number*] shares or more. Employee shall not have any of the rights of, nor be treated as, a shareholder with respect to the shares subject to this option until he has exercised that option and has become the shareholder of record of those shares.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment

RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewPensions & Benefits LawEmployee Benefit PlansEmployee Stock Ownership Plans

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28-85 California Legal Forms--Transaction Guide § 85.385

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.385 Nonstatutory Stock Option--Options Granted Each Year During Employment Term--Stock Subject to Restriction

[1] Comment--Use of Form

This form grants an employee a nonstatutory stock option during each year of the employment term after the employee has completed a specified number of years of employment. The stock subject to the option contains a restriction requiring resale to the employer in the event of termination of the employment within a predetermined number of years after exercise of the option. For a provision granting a stock option for stock that is not restricted, see *§ 85.384*.

[2] FORM

Nonstatutory Stock Option--Options Granted Each Year During Employment Term--Stock Subject to Restriction

Annual Stock Options

(a) After Employee has been employed with Employer under this agreement for a period of [*e.g.*, two] complete years, Employer agrees to transfer to Employee, at the beginning of each employment year thereafter for as long as Employee remains employed with Employer under this agreement, an option to purchase [*number*] shares of the common stock of Employer.

(b) The options so transferred shall not be assignable. Each option may be exercised in whole or in part, but may only be exercised during the employment term.

(c) The number of shares subject to each option shall be proportionately adjusted for any change in the stock structure of Employer because of share dividends, recapitalizations, reorganizations, mergers, or otherwise.

(d) The price at which shares may be purchased under each option is the book value of the stock as of the end of the last fiscal year of Employer ending prior to the date that the option was granted, as shown on the balance sheet prepared and certified by the firm of accountants then servicing Employer, with no adjustments in book value for operations of Employer subsequent to that fiscal year.

(e) All shares acquired by exercise of these options shall be subject to the restriction that they be immediately resold to Employer at "book value" if the employment term is terminated for any reason, except for the death or retirement of Employee, within _____ years from the exercise of the option.

(f) For the purposes of resale to the corporation, "book value" is the book value of the shares as of the close of Employer's last fiscal year ending prior to the termination of employment, as shown on Employer's balance sheet as prepared and certified by the firm of accountants then servicing Employer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewPensions & Benefits LawEmployee Benefit PlansEmployee Stock Ownership Plans

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28-85 California Legal Forms--Transaction Guide § 85.386

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.386 Provision for Continuation of Stock Options Granted Prior to Execution of Employment Agreement

[1] Comment--Use of Form

This form is a provision stating that any stock options granted prior to execution of an employment agreement will continue in effect. Such options are generally granted under employee stock purchase plans [*I.R.C. § 423*] or incentive stock option plans [*I.R.C. § 422*].

Use of this provision may be desirable or necessary in a variety of situations. It may be useful, for example, in the case of an employee who originally was not employed under a written employment contract and who received stock options under the employer's plan, but who is subsequently promoted to a higher management position and given a written contract providing for a different compensation arrangement.

[2] FORM

Provision for Continuation of Stock Options Granted Prior to Execution of Employment Agreement

Continuation of Prior Stock Option Agreement

Employer agrees that this employment contract shall not terminate or revoke any rights that Employee has to purchase common stock of Employer under a stock option agreement executed by Employer and Employee on _____ [*date*] and that all rights that Employee has under that stock option agreement shall remain in full force and effect.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewPensions & Benefits LawEmployee Benefit PlansEmployee Stock Ownership Plans

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28-85 California Legal Forms--Transaction Guide §§ 85.387-85.399

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[Reserved]

§§ 85.387[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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4. Employee's Right to Purchase Interest in Business

28-85 California Legal Forms--Transaction Guide § 85.400

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.400 Provision Giving Employee Right to Purchase Interest in Business After Certain Number of Years With Employer

[1] Comment

[a] Use of Form

This form, used in addition to the normal compensation provision, gives the employee the right to purchase an interest in the employer's business. Such a provision is most useful in a small enterprise when the owner agrees with an important employee that after the successful completion of a specified number of years of service the employee will be able to purchase an interest in the business. The offer of future ownership acts as an additional incentive for the employee.

[b] Tax Treatment

The grant of an option such as this form does not constitute the transfer of the property [*Treas. Reg. § 1.83-3(a)(2)*]. The interest that the employee will receive upon the exercise of this option will not be taxable income to the employee until it is actually transferred to and substantially vested in him or her, and then only the difference between the fair market value of the interest and the price paid will be so treated [*I.R.C. § 83(a)*; *Treas. Reg. § 1.83-1(a)(1)*]. The transfer occurs when the employee acquires a beneficial ownership interest in the property [*Treas. Reg. § 1.83-3(a)(1)*]; substantial vesting occurs when it is transferable by the employee or not subject to any substantial risk of forfeiture [*Treas. Reg. § 1.83-3(b)*].

The rules of *I.R.C. § 83* do not apply to the transfer of an interest in the business pursuant to the exercise of an option that states a readily ascertainable fair market value at the time the option is granted [*I.R.C. § 83(e)(4)*]. Although the Treasury Regulations do not provide any guidance to the rules that do apply to such transfers, it would appear that the ordinary income rules would apply and that the transferee would be subject to taxation on the difference between the

stated fair market value and any lesser amount paid by the transferee.

[2] FORM

Provision Giving Employee Right to Purchase Interest in Business After Certain Number of Years With Employer

Option to Purchase Interest in Business

(a) After the completion of [*e.g.,* five years] of service in the employ of Employer, Employee shall have the right to purchase a [*specify interest, e.g.,* one-half *or* 20 percent] interest in the business of Employer for_____[*state current fair market value as the price or specify method of determining price, e.g.,* $_____ *or* an amount to be agreed on by the parties, and, in the event they cannot agree, the fair market value of that interest as determined by an independent appraiser selected by the parties], payable_____[*e.g., as follows:* $_____ in cash, plus a promissory note for $_____ secured by _____ (*security*) *or* on such terms and conditions as are agreed on by the parties].

(b) Employee may exercise this right by giving notice in writing to Employer within [*e.g.,* 30 days] after the date on which the right accrues.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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4. Employee's Right to Purchase Interest in Business

28-85 California Legal Forms--Transaction Guide § 85.401

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§ 85.401 Agreement Giving Employee Option to Purchase Business on Employer's Death or Decision to Sell

[1] Comment

[a] Use of Form

This form is a separate agreement that gives an employee the option of purchasing the employer's entire business when the employer dies or desires to sell the business. Since the purchasing capacity of most employees is limited, this type of agreement normally would be used only for smaller businesses that can be owned by one person. If desired, this form can be inserted as a separate provision in an employment agreement.

For discussion of the tax treatment of a transfer of the business interest pursuant to the option contained in this form, see *§ 85.400[1][b]*.

[b] Tailoring the Payment Provision

If the employer retires from the business or dies, it is likely that the proceeds from sale of the business would be used primarily to support the employer during retirement or the employer's survivors after his or her death. In such a case an installment payment arrangement might be satisfactory for both parties, since payment of the purchase price of the business could be made over a period of time out of the profits of the business without the need for and additional cost of conventional financing. These considerations and the amount of any necessary down payment should be weighed in advising the client and drawing up a payment plan for the purchase of the business.

[2] FORM

Agreement Giving Employee Option to Purchase Business on Employer's Death or Decision to Sell

OPTION TO PURCHASE EMPLOYER'S BUSINESS

AGREEMENT made this _____ day of_____[*date*], between_____[*name of employer*] ("Employer"), having a principal place of business at_____[*address*], and_____[*name of employee*] ("Employee"), of_____[*address*].

Purchase Option

1.(a) In the event of the death or retirement of Employer, or if Employer should desire to sell the business or any substantial portion of its assets, Employee shall have the option of purchasing the business from Employer or Employer's estate, together with its trade name and good will for [*if a predetermined cash price or formula for determining price based on net worth, inventory, accounts receivable, or other basis is to be used, specify cash price or formula, or, if amount is to be determined by mutual agreement, insert the following:* an amount agreed upon by Employee and Employer or Employer's representative].

[*If the employee is to be given a right of first refusal to purchase at the price offered by a prospective purchaser, add the following:* (b) Employee shall have a further option to purchase the business of Employer for an amount equal to the amount of any bona fide offer received by Employer or Employer's representative from a third party, and Employee shall have _____ (*time, e.g.*, 30 days) after receiving written notice of such a bona fide offer to exercise this option by giving written notice to Employer or Employer's representative].

Appraisal to Determine Price

2. In the event that the parties cannot agree, the purchase price shall be the fair market value of the business as determined by a panel of three appraisers, one each to be selected by the parties and the third to be selected by the first two. The decision of a majority of the panel shall be final and binding on the parties.

Time for Exercise of Option

3. Employee shall have [*specify time, e.g.*, 30 days] after receiving notice of Employer's decision to retire or sell the business, or, in the event of Employer's death, [*time, e.g.*, 30 days] after the appointment of an executor or administrator, in which to exercise this option by giving notice in writing to Employer or to Employer's executor or administrator.

Terms of Purchase

4. The terms of purchase shall be agreed upon by the parties, except that any portion of the purchase price not paid in cash shall be represented by a promissory note signed by Employee as maker and bearing a rate of interest and number and size of monthly installments as mutually agreed upon by the parties. The promissory note shall be secured by appropriate trust deeds and security agreements on the real and personal property of the business and shall contain a standard acceleration clause making the entire unpaid balance of the note due and payable at the option of the payee on a default of the maker.

Hold Harmless Agreement

5. In conjunction with the sale, Employee shall agree to indemnify and hold Employer or Employer's estate harmless from all claims arising from the conduct of the business by Employee.

Delivery of Bill of Sale

6. Upon the payment by Employee of the cash part of the purchase price and the delivery of a promissory note for the balance as provided herein, together with the indemnity agreement mentioned above, Employer or Employer's executor or administrator shall execute and deliver to Employee a bill of sale for the business and all of its tangible and intangible assets, including its good will and trade name. That bill of sale shall be effective as of the date of transfer if Employer is living or as of the date of Employer's death if not living.

Executed on_____[*date*] at_____[*city*], California.

EMPLOYER
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]
EMPLOYEE
_____ [*signature of employee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
F. Employee Incentives
4. Employee's Right to Purchase Interest in Business

28-85 California Legal Forms--Transaction Guide §§ 85.402-85.409

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.402[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
G. Reimbursement of Expenses Incurred by Employee
1. Business Expenses of Employee

28-85 California Legal Forms--Transaction Guide § 85.410

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.410 Provision for Reimbursement of Business Expenses Incurred by Employee; Requirement for Substantiating Records

[1] Comment

[a] Use of Form

This form provides that the employer will reimburse the employee for all reasonable business expenses paid or incurred by the employee. It specifies the type of information that must be entered by the employee in an account book at or near the time each expenditure is made, and the type of documentary evidence that must be obtained by the employee for certain expenditures. The requirements with regard to the account book and documentary evidence are those required by the Treasury Regulations [*see* Temp. Treas. Reg. § 1.274-5T].

For a form providing for monthly lump-sum payments to reimburse the employee's business expenses, see *§ 85.412*.

[b] Employee's Duty to Render Accounts to Employer

An employee's duty to render accounts of his or her business expenses derives not only from income tax law, which is discussed below, or contract provisions like the one set forth in this form, but also from the Labor Code, which requires that an employee must render just accounts of all transactions that arise in the course of the employment. These accountings must be made when demanded by the employer and as often as is reasonable. Moreover, the employee must give prompt notice of everything received for the employer's account without prior demand from the employer this would apply to receipts for business expenses [*Lab. Code § 2861*]. In addition, an employee who receives anything (such as a business expense receipt, for example) on behalf of the employer must deliver it upon demand [*see Lab. Code § 2862*].

[c] Employer's Duty to Indemnify Employee for Expenses in Discharging Duties

An employer must indemnify the employee for all that the employee necessarily expends in direct consequence of the discharge of his or her duties [*Lab. Code § 2802*; *see Automobile, Truck, Tractor and Implement Co. v. Salladay (1921) 55 Cal. App. 219, 224-227, 203 P. 163]* . Any agreement, express or implied, made by an employee to waive the benefits of *Lab. Code § 2802* is void [*Lab. Code § 2804*; *see Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 67 Cal. Rptr. 3d 468, 479-481, 169 P.3d 889* (agreement between employer and employee for reimbursement by method that approximates employee's actual expenses does not relieve employer of statutory obligation to pay full reimbursement and does not preclude employee from suing to recover full reimbursement); *see also Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 950-955, 81 Cal. Rptr. 3d 282, 292-296, 189 P.3d 285* (contract provision in which employee releases "any and all" claims against employer does not waive employee's right to indemnity under *Lab. Code § 2802(a)*)].

For further discussion of the employer's duty to reimburse the employee's work-related expenses, including permissible methods of reimbursement of recurring expenses, see *§ 85.12[3]*.

[d] "Trade or Business" Expenses

[i] Deductible Expenses

All "ordinary and necessary expenses" that are "paid or incurred" by a business, whether it is a sole proprietorship, a partnership, or a corporation, during the taxable year in carrying on any "trade or business" are deductible [*I.R.C. §§ 62, 162*; *Rev. & Tax. Code § 17201*]. *I.R.C. § 162* lists some types of trade and business expenses. These include a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made for the continued use, for trade or business purposes, of property in which the taxpayer has no ownership interest. However, the deduction is not limited to the foregoing expenses; any expense that is ordinary and necessary in carrying on any trade or business is deductible [*I.R.C. § 162(a)*; *Rev. & Tax. Code §§ 17072(a), 17201(a)*].

The reimbursement and reporting of business expenses and the federal documentation requirements are discussed in Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 12, *Employment and Compensation* (Matthew Bender).

[ii] Deductibility of Entertainment Expenses

An expenditure is generally not deductible as an entertainment expense unless the taxpayer establishes that (1) the expenditure was directly related to the active conduct of the taxpayer's trade or business; or (2) in the case of any expenditure preceding or following a substantial and bona fide business discussion (including business meetings at a convention or otherwise), the expenditure was associated with the active conduct of the taxpayer's trade or business [*I.R.C. § 274(a)(1)(A)*; *Treas. Reg. § 1.274-2(a)(1)*].

The term "entertainment" means any activity of a type generally considered to constitute entertainment, amusement, or recreation, such as entertaining at night clubs, cocktail lounges, theaters, country clubs, golf and athletic clubs, sporting events, and on hunting, fishing, vacation, and similar trips, including any such activity relating solely to the taxpayer or the taxpayer's family [*Treas. Reg. § 1.274-2(b)(1)(i)*].

An expenditure incurred in regard to an entertainment, recreational, or amusement facility is not deductible unless actively used in the conduct of the taxpayer's trade or business or used by employees [*I.R.C. § 274(a)(1)(B)*]. The types of facilities involved are yachts, hunting lodges, fishing camps, swimming pools, tennis courts, bowling alleys, and dues or fees paid to any social, athletic, or sporting club or organization. Fees paid to clubs are deductible if the facility is

used primarily for the furtherance of the taxpayer's trade or business and the expense is directly related to the active conduct of the trade or business [*I.R.C. § 274(a)(2)(C)*]. However, dues or other fees paid or incurred for membership in a club organized for business, pleasure, recreation, or other social purpose are not deductible [*I.R.C. § 274(a)(3)*]. There are also severe limitations on the deductions allowed for entertainment tickets and the cost of retaining a luxury box (for more than one event) at a stadium or sports arena, theater, or similar place of entertainment [*see I.R.C. § 274(l)*].

There is a general 50-percent limitation on specified entertainment and meal deductions, so that the taxpayer may claim only half of the deduction that could otherwise be claimed for the expenses in question [*I.R.C. § 274(n)*; *see I.R.C. § 274(n)(3)* (higher percentage deductible by certain individuals who are subject to federal Department of Transportation hours-of-service limits)].

The following entertainment expenses are expressly deductible [*I.R.C. § 274(e), (k)*; *Treas. Reg. § 1.274-2(f)*]:

- Business meals: food and beverages furnished under circumstances generally considered to be conducive to a business discussion.

- Food and beverages for employees: furnished on the business premises of the taxpayer primarily for his employees.

- Expenses treated as compensation: goods, services, and facilities which are furnished to employees and on which income tax is withheld.

- Reimbursed expenses: provided either that the expenses involve services performed for an employer who has not treated the expenses as wages subject to withholding or that the services are performed for a person other than the employer and the taxpayer receiving the reimbursed expense accounts to such person.

- Recreational, social, or similar activities for employees: other than employees who are officers, shareholders, or other owners or highly compensated employees; an individual owning less than a 10-percent interest in the trade or business is not considered a shareholder or other owner for this purpose. Membership dues for facilities providing these activities, however, are not deductible [*see I.R.C. § 274(a)(3)*].

- Certain business meetings: expenses directly related to business meetings of the taxpayer's employees, stockholders, agents, or directors.

- Meetings of tax-exempt organizations: expenses related and necessary to a business meeting or convention of a tax-exempt organization, such as a chamber of commerce, real estate board, or board of trade.

- Items available to the public: expenses for goods, services, and facilities made available by the taxpayer to the general public.

- Entertainment sold to customers: expenses for goods or services sold by the taxpayer in a bona fide transaction for adequate consideration.

[iii] Gifts

No deduction is allowed for business gifts made directly or indirectly to any individual if the expense of the gift (including expenditures for other gifts made to the same individual during the same taxable year) exceeds $25. For this

purpose, a gift does not include an item that is clearly of an advertising nature and costs no more than $4, or a sign, rack, or promotional material used on the business premises of the recipient [*I.R.C. § 274(b)*; *Treas. Reg. § 1.274-3*].

[iv] Awards to Employees

A deduction is allowed for employee achievement awards. The maximum allowable deduction is $400 annually per employee for awards other than qualified plan awards, with a cap of $1,600 annually per employee for all awards [*I.R.C. § 274(j)(1), (2)*].

An "employee achievement award" is an item of tangible personal property that (1) is given to an employee for length of service, after five years of service and not more often to a particular employee than once every succeeding five years [*see I.R.C. § 274(j)(4)(B)*], or to an employee other than a manager, administrator, clerical employee, or professional employee, for safety achievement (provided not more than 10 percent of eligible employees receive such an award in the taxable year in question) [*I.R.C. § 274(j)(4)(C)*], (2) is awarded as part of a meaningful presentation, and (3) is awarded under conditions and in circumstances not creating a significant likelihood of the payment of disguised compensation [*I.R.C. § 274(j)(3)(A)*]. A "qualified plan award" is an employee achievement award given pursuant to an established written plan or program of the employer that does not discriminate in favor of highly compensated employees [*see I.R.C. § 414(q)* (definition)], provided the average cost of an award (the total cost of awards given under the plan or program in the taxable year in question divided by the total number of recipients) does not exceed $400 [*I.R.C. § 274(j)(3)(B)*]. If the average cost of an award exceeds $400, the employer may not take any deduction for employee achievement awards.

[v] Travel Expenses

Traveling expenses include travel fares, meals, and lodging, and expenses incident to travel (such as expenses for sample rooms, telephone and telegraph, and public stenographers). Only those traveling expenses that are reasonable and necessary in the conduct of the taxpayer's business and directly attributable to the taxpayer's business are deductible [*Treas. Reg. § 1.162-2(a)*]. If a taxpayer travels to a destination and engages in both business and personal activities while there, traveling expenses to and from the destination are deductible only if the trip is "primarily related" to the taxpayer's trade or business. If the trip is primarily personal, the travel expenses to and from the destination are not deductible. However, expenses while at the destination which are properly allocable to the taxpayer's trade or business are deductible [*Treas. Reg. § 1.162-2(b)(1)*].

Whether a trip is related primarily to trade or business or is primarily personal in nature depends on the circumstances in each case. The relative amounts of time spent on business activities and on personal activities are important factors in making this determination [*Treas. Reg. § 1.162-2(b)(2)*]. When a spouse accompanies the taxpayer on a business trip, the expenses attributable to the spouse's travel are deductible only if it can be adequately shown that the spouse is an employee of the taxpayer, the spouse's travel is for a bona fide business purpose, and the expense would otherwise be deductible by the spouse. The same rules apply to the taxpayer's dependents and any other individuals accompanying the taxpayer [*I.R.C. § 274(m)(3)*; *Treas. Reg. § 1.162-2(c)*]. The deductible expense for travel on a cruise ship is limited to a multiple of the per diem allowance for federal employees (except when the taxpayer travels on the ship in order to attend a convention, seminar, or similar meeting held aboard the ship) [*I.R.C. § 274(m)(1)*; *see I.R.C. § 274(h)(2)*], and no deduction is allowed for the expenses of travel as a form of education [*I.R.C. § 274(m)(2)*].

Expenses incurred by a taxpayer in attending a convention or other meeting can be deductible depending on the particular circumstances. The fact that an employee uses vacation or leave time or that attendance is voluntary does not necessarily prohibit allowance of the deduction. Deductibility depends on whether there is a sufficient relation between the taxpayer's trade or business and attendance at the convention or other meeting so that attendance there benefits or advances the interests of that trade or business. If the convention is for political, social, or other purposes unrelated to the taxpayer's trade or business, the expenses are not deductible [*Treas. Reg. § 1.162-2(d)*]. No deduction whatsoever is

allowed for expenses incurred in attending more than two foreign conventions in any taxable year, and certain other limitations apply [*see I.R.C. § 274(h)*].

Commute fares are not considered as business expenses and are not deductible [*Treas. Reg. § 1.162-2(e)*].

[vi] Nondeductible Expenses

Illegal bribes and kickbacks paid to an official or employee of any government or of any agency or instrumentality of any government are not deductible [*I.R.C. § 162(b)*]. No deduction is allowable for a fine or penalty paid to a government for a violation of any law [*I.R.C. § 162(f)*]. Amounts paid either as a judgment for damages or in settlement of an alleged violation of the Clayton Act (antitrust laws) are not deductible [*I.R.C. § 162(g)*].

[e] Substantiation Required

[i] In General

No deduction is allowed for any entertainment, gift, or travel expense unless the taxpayer substantiates, by adequate records or by sufficient evidence corroborating the taxpayer's own statement, (1) the amount of the expenses; (2) the time and place involved, or the date and description of the gift; (3) the business purpose of the expense or other item; and (4) the business relationship to the taxpayer of the persons involved [*I.R.C. § 274(d)*]. The substantiation requirements are inapplicable to vehicles which, by reason of their nature, are not likely to be used more than a de minimis amount for personal purposes [*I.R.C. § 274(d), (i)*].

[ii] Substantiation by Adequate Records

In order to substantiate an expense by "adequate records," the taxpayer must maintain an account book, diary, statement of expense, or similar record and documentary evidence which in combination will establish each element required for an expenditure to be deductible. It is not necessary to record information in the account book if it duplicates information reflected on a receipt provided that the account book and receipt complement each other in an orderly manner [Temp. Treas. Reg. § 1.274-5T(c)(2)(i)]. A contemporaneous log is not required, but a record of the elements of an expenditure or of a business use of listed property made at or near the time of the expenditure or use, supported by sufficient documentary evidence, has a high degree of credibility not present with respect to a statement prepared later, when there generally is a lack of accurate recall. Thus, the corroborative evidence required to support a statement not made at or near the time of the expenditure or use must have a high degree of probative value to elevate it to the level of credibility reflected by a record made at or near the time of the expenditure or use supported by sufficient documentary evidence. The substantiation requirements of *I.R.C. § 274(d)* are designed to encourage taxpayers to maintain such records [Temp. Treas. Reg. § 1.274-5T(c)(1)].

[iii] Substantiation of Business Purpose

To constitute an adequate record of business purpose, a written statement of the purpose is generally required. However, what is required varies with the circumstances of each case. If the business purpose is evident from the circumstances, a written statement of purpose is not required. For example, a salesperson calling on customers on an established sales route ordinarily will not be required to furnish a written explanation of the business purpose of each expenditure. The same applies to a business meal if the business purpose is evident from the relationship of the participants at the meal and the surrounding circumstances [Temp. Treas. Reg. § 1.274-5T(c)(2)(ii)(b)].

[iv] Supporting Documents for Expenses of Seventy-Five Dollars or More

Documentary evidence, such as receipts or paid bills, is required for any expenditure for lodging while traveling away from home and any other expenditure of $75 or more (except that documentary evidence for transportation charges will

not be required if not readily available). Documentary evidence ordinarily will be considered adequate if it includes sufficient evidence to establish the amount, date, place, and essential character of the expenditure [Temp. Treas. Reg. § 1.274-5T(c)(2)(iii)].

[v] Substantiation by "Other Sufficient Evidence"

A taxpayer who fails to establish to the satisfaction of the Internal Revenue Service that he or she has substantially complied with the "adequate records" requirement with respect to an element of an expenditure or use must establish that element (1) by the taxpayer's own statement, whether written or oral, containing specific detailed information as to that element, and (2) by other corroborative evidence sufficient to establish that element. If the element to be established is the description of a gift or the cost, amount, time, place, or date of an expenditure or use, the corroborative evidence must be direct evidence, such as a written statement or oral testimony. If the element at issue is either the business relationship to the taxpayer of those entertained, or the business purpose of an expenditure, the corroborative evidence may be circumstantial evidence [Temp. Treas. Reg. § 1.274-5T(c)(3)].

[vi] Reporting of Expenses

An employee need not report on his or her personal income tax return business expenses for entertainment, gifts, and travel incurred solely for the benefit of the employer if the employer directly or indirectly pays those business expenses, if the amount paid by the employee is equal to the business expenses, and if the employee is required to, and does, make an adequate accounting to the employer. Making an "adequate accounting" to the employer means that the employee must account for all amounts paid directly or indirectly by the employer and submit to the employer an account book or similar record and any supporting documentary evidence precisely the same as that discussed above [Temp. Treas. Reg. § 1.274-5T(f)(2), (4)].

If the amount directly or indirectly paid by the employer for business expenses incurred by an employee is greater than the actual amount of those expenses, the employee must report the excess as income [Temp. Treas. Reg. § 1.274-5T(f)(2)(ii)]. If the deductible business expenses incurred by the employee exceed the amount paid directly or indirectly by the employer, and the employee makes an adequate accounting to his or her employer, then the employee must be able to substantiate any deduction for the excess with records and supporting evidence that will substantiate each element of expenditure in the manner required by Temporary Treasury Regulation § 1.274-5T(c) [Temp. Treas. Reg. § 1.274-5T(f)(2)(iii)]. If the employee is not required to account to the employer for these business expenses or, though required, has failed to do so, then the employee must complete and attach to his or her federal income tax return IRS Form 2106, "Statement of Employee Business Expenses." That form shows, among other items, the total expenses paid or incurred and a breakdown of the expenses into transportation, meals, lodging away from home, entertainment, gifts, and other business expenses and the portion of the total expenses paid directly or indirectly by the employer. The taxpayer must also maintain an account book or similar record and retain supporting documentary evidence precisely the same as that discussed above, sufficient to substantiate each element of each expenditure [Temp. Treas. Reg. § 1.274-5T(f)(3)].

[vii] Per Diem and Mileage Allowances

A per diem allowance of the greater of $44 per day or 125 percent of the maximum per diem rate authorized by the federal government in the locality involved, and a mileage allowance of not more than 20.5 cents per mile will be considered as satisfying the substantiation requirements of the Treasury Regulations if the employer reasonably limits payments of travel expenses to those that are ordinary and necessary in the conduct of the trade or business and the elements of time, place, and business purpose of travel are substantiated. If the arrangement is for reimbursement of actual expenses the employer must maintain adequate internal controls, such as requiring the employee's expense account to be verified by a responsible person. If the arrangement is for a flat per diem, the employer's practice must be based on reasonably accurate estimates of travel costs, including the recognition that costs vary in different localities [

Rev. Rul. 80-62, 1980-1 C.B. 63 ; *Rev. Rul. 80-203, 1980-2 C.B. 101* ; *Rev. Rul. 84-51, 1984-1 C.B. 90*].

[2] FORM

Provision for Reimbursement of Business Expenses Incurred by Employee; Requirement for Substantiating Records

Business Expenses

(a) Employee is authorized to incur reasonable business expenses for promoting the business of Employer, including expenditures for entertainment, gifts, and travel. Employer will reimburse Employee from time to time for all such business expenses provided that Employee presents to Employer's Comptroller the account book and documents when and as required by this Section.

(b) Employee shall maintain an account book in which Employee shall record, at or near the time each expenditure is made, the amount of the expenditure, the time, place, and designation of the type of the entertainment and travel or other expense, or the date and description of the gift, the business reason for the expenditure and the nature of the business benefit derived or expected to be derived as a result of the expenditure, and the names, occupations, addresses, and other information, sufficient to establish the business relationship to Employer, concerning each person who was entertained or given a gift. Gifts made to any one individual are not to exceed a total of $25 in any taxable year. [*If desired, add:* Employee's records of expenditures shall be maintained in substantially the form illustrated in the Employer's "expense report form," a copy of which is attached to this agreement.]

(c) Employee shall also obtain and retain documentary evidence (such as receipts or paid bills), which state sufficient information to establish the amount, date, place, and the essential character of the expenditure, for each expenditure of $75 or more (except for transportation charges if not readily available) and for lodging while traveling away from home.

(d) The forgoing account book and documentary evidence shall be delivered to Employer whenever requested by Employer and thereafter shall be retained by Employer.

[*OR*]

Reimbursement of Business Expenses

Employer will promptly reimburse Employee for all reasonable business expenses incurred by Employee in promoting the business of Employer, including expenditures for entertainment, gifts, and travel, provided that:

(1) Each such expenditure is of a nature qualifying it as a proper deduction on the federal and California income tax returns of Employer; and

(2) The Employee furnishes to Employer adequate records and other documentary evidence required by federal and California statutes and regulations issued by the appropriate taxing authorities for the substantiation of each such expenditure as an income tax deduction.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment

RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
G. Reimbursement of Expenses Incurred by Employee
1. Business Expenses of Employee

28-85 California Legal Forms--Transaction Guide § 85.411

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.411 Provision Specifying That Employee Use Employer's Credit Cards for Business Expenses

[1] Comment--Use of Form

This form requires that, insofar as possible, the employee use credit cards to charge all expenses reasonably incurred in promoting the business of the employer. It further provides that any expenses that cannot be charged on credit cards are to be paid by the employee, who will then be reimbursed later by the employer.

Even when a credit card is used, the employer must be able to substantiate its business expense deduction with exactly the same account book entries and documentary evidence that would be necessary if the employee had made the payment with cash or a personal check [*see* Temp. Treas. Reg. § 1.274-5T]. This form includes a requirement that the employee keep an account book and provide substantiating documentary evidence.

For general discussion of business expenses, see *§ 85.410[1]*.

[2] FORM

Provision Specifying That Employee Use Employer's Credit Cards for Business Expenses

Use of Credit Cards for Business Expenses

(a) All business expenses reasonably incurred by Employee in promoting the business of Employer, including expenditures for entertainment, gifts, and travel, are to be paid, insofar as possible, by the use of credit cards in the name of Employer which will be furnished to Employee.

(b) Any such reasonable business expenses that cannot be charged on a credit card may be paid by Employee, who will later be reimbursed by Employer.

(c) Employee shall keep an account book with regard to all expenses incurred on behalf of Employer, whether paid for by the use of a credit card or by Employee. Employee shall record in that account book, at or near the time that each expenditure is made, (1) the amount of the expenditure; (2) the time, place, and designation of the type of the entertainment and travel, or other expense, or the date and description of the gift; (3) the business reason for the expenditure and the nature of the business benefit derived or expected to be derived as a result of the expenditure; and (4) the name, occupation, address, and other information sufficient to establish a business relationship to Employer, concerning each person who was entertained or given a gift. Gifts made to any one individual shall not exceed a total of $25 in any taxable year.

(d) Employee shall also obtain documentary evidence (such as a receipt or paid bill), which states sufficient information to establish the amount, date, place, and the essential character of the expenditure, for each expenditure of $75 or more (except for transportation charges if not readily available) and for lodging while traveling away from home.

(e) The foregoing account book and documentary evidence shall be delivered to Employer whenever requested by Employer and shall thereafter be retained by Employer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
G. Reimbursement of Expenses Incurred by Employee
1. Business Expenses of Employee

28-85 California Legal Forms--Transaction Guide § 85.412

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.412 Provision for Payment to Employee of Specified Amount Monthly to Cover Business Expenses

[1] Comment

[a] Use of Form

This form provides that the employee will be provided with a specified amount of money each month as part of his or her compensation but specifically earmarked for business expenses. This method of expense reimbursement eliminates the need for the employee to document every expense or for the employer to verify that each expense is reasonably necessary.

An employer must indemnify its employees for expenses they necessarily incur in carrying out their employment duties [*Lab. Code § 2802(a)*]. Periodic lump-sum payments, as called for by this form, are a permissible method of reimbursement, so long as the amount paid is sufficient to provide full reimbursement for actual expenses necessarily incurred. Thus, if the employee can show that the lump sum is less than the actual expenses necessarily incurred, the employer must make up the difference [*Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 67 Cal. Rptr. 3d 468, 480-481, 169 P.3d 889]* . The employer's obligation to reimburse the employee's business expenses is not subject to contractual waiver by the employee [*Lab. Code § 2804*]. Therefore, any agreement between the employer and employee for reimbursement by lump-sum payments, or by any other method that approximates the employee's actual expenses (e.g., a per diem or mileage reimbursement), does not relieve the employer of the statutory obligation to pay full reimbursement, and such an agreement does not preclude the employee from suing to recover full reimbursement [*Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 67 Cal. Rptr. 3d 468, 479-481, 169 P.3d 889]* . Accordingly, this form provides that if the employee presents documentation that his or her reasonably necessary business expenses in a particular month exceed the lump-sum payment, the employer will reimburse the excess amount. Otherwise, no documentation of expenses is necessary, and the employee may retain the lump sum even if actual expenses in a particular month are less than the lump sum.

A lump-sum reimbursement of business expenses need not be segregated from the employee's other compensation and may take the form of an increase to the employee's base salary or commissions, so long as the employer provides a method or formula to identify what part of the combined compensation amount is intended to provide expense reimbursement [*Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 67 Cal. Rptr. 3d 468, 481-484, 169 P.3d 889]* .

For further discussion of the employer's duty to reimburse the employee's work-related expenses, including permissible methods of reimbursement of recurring expenses, see *§ 85.12[3]*.

[b] Reporting of Business Expenses When Employee Not Required to Make Adequate Accounting to Employer

This method, in which the employee makes no accounting to the employer with regard to business expenses, removes the burden of proving to the tax authorities that each expenditure was in fact a legitimate business expense from the employer and places it fully on the employee. The employee must submit, as part of his or her individual federal income tax return, Form 2106, "Statement of Employee Business Expenses" [*see § 85.410[1][e][vi]*].

In addition, the employee must maintain, for examination by the tax authorities, records and a supporting evidence sufficient to establish each element of each expenditure as a properly deductible business expense [*see* Temp. Treas. Reg. § 1.274-5T].

For a discussion of what records and supporting evidence are required, see *§ 85.410[1][e]*.

[2] FORM

Provision for Payment to Employee of Specified Amount Monthly to Cover Business Expenses

BUSINESS EXPENSES

(a) It is recognized by the parties to this agreement that Employee, in connection with the services to be performed by Employee for Employer, will be obliged to expend moneys for travel, entertainment of customers, and similar business expenses. In order to reimburse Employee for all business expenses, and as part of Employee's compensation, Employer shall pay Employee the sum of $_____ per month in addition to the compensation herein provided. This additional amount shall be paid on the last day of each month during the term of this agreement.

(b) Employee shall not be required to refund to Employer any expense reimbursement for any month in which the reimbursement exceeds Employee's actual business expenses. Employee shall not be required to maintain records of business expenses in order to receive the reimbursement payments described in Paragraph (a), above.

(c) If Employee's reasonably necessary business expenses in any calendar month exceed the reimbursement payment described in Paragraph (a), above, Employer shall reimburse Employee for the excess amount within 30 days after receipt from Employee of documentation of all of Employee's business expenses for the affected month.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
G. Reimbursement of Expenses Incurred by Employee
1. Business Expenses of Employee

28-85 California Legal Forms--Transaction Guide § 85.413

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.413 Provision That "Business Expenses" Are Limited to Those Specified in Employer's Rules

[1] Comment

[a] Use of Form

This form limits the meaning of the term "business expenses," as it is used elsewhere in the employment contract, to expenses specified in the employer's rules, regulations, or published policies. It may be used if it is deemed impractical to specify in detail in the employment contract precisely what expenditures are to be considered business expenses. This form enables the employer to modify its rules after execution of the employment contract if changing conditions make it advisable to do so without having to amend the contract.

For discussion of business expenses generally, see *§ 85.410[1]*.

[b] Employee's Duty to Comply With Rules Concerning Expenses

In general, an employee has a statutory duty to deliver accountings and receipts for business receipts [*see Lab. Code §§ 2861, 2862*; *see also § 85.410[1][b]*]. When these or other duties are spelled out in the employer's rules or policies, the employee has a statutory obligation to substantially comply with those directions unless obedience is impossible, unlawful, or would impose new and unreasonable burdens on the employee [*Lab. Code § 2856*]. Moreover, an employee is generally obligated to perform in conformance with the usage (*i.e.,* rules) of the employer unless otherwise directed by the employer or unless it is impracticable or manifestly injurious to the employer to do so [*see Lab. Code § 2857*].

[2] FORM

Provision That "Business Expenses" Are Limited to Those Specified in Employer's Rules

Definition of "Business Expenses" Governed by Employer's Rules

"Business expenses," as used in this agreement, shall mean only those expenditures specified in the [rules *or* regulations *or* policies] of Employer,whether currently in effect, or subsequently issued or modified. [Any subsequent modification of Employer's rules and regulations relating to business expenses shall not be effective until _____ days after issuance by Employer.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide §§ 85.414-85.419

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.414[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
G. Reimbursement of Expenses Incurred by Employee
2. Moving Expenses

28-85 California Legal Forms--Transaction Guide § 85.420

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.420 Provision for Payment by Employer of All Moving Expenses Deductible by Transferred Employee

[1] Comment

[a] Use of Form

This form provides that the employer will pay all deductible moving expenses incurred by a transferred employee. It is designed for use in an employment contract when the employer deems it necessary to provide in advance for the possibility that the employee might be transferred to another area and to provide an incentive for the employee to make the move. Therefore, this form is worded, to the extent practicable, in the language of *I.R.C. § 217* [*see* [c], *below*].

[b] Contents of Form

This form provides that the employer is to pay for moving expenses incurred by the transferred employee and the employee's spouse and minor children. Expenses for which the employee is to be reimbursed are a one way trip to the new residence when the actual move is made, and the costs of moving the employee's household goods and personal effects [*see I.R.C. § 217(b)(1)*]. The form provides that the employer is to pay moving expenses only if the employee is transferred to a new principal place of work that is at least 50 miles farther from the employee's residence than was the employee's previous principal place of work [*see I.R.C. § 217(c)*]. If the parties agree that the employer should pay moving expenses when the new workplace is less than 50 miles farther away than the old one, this form can be modified accordingly. In the latter case, however, the employee will have to report the moving expense reimbursement as income without a deducting the moving expenses [*see* [c], *below*].

This form provides that only "reasonable" moving expenses are to be paid, because of the requirement of reasonableness imposed by the Internal Revenue Code [*I.R.C. § 217(b)(1)*].

[c] Employee's Deduction of Moving Expenses

An employee may deduct the moving expenses allowable under the Internal Revenue Code in connection with the commencement of work as an employee at a new principal place of work [*I.R.C. § 217(a), (b)*]. The expenses are deductible even if they are reimbursed to the employee[*I.R.C. § 132(a)(6), (g)*], and are not included in the employee's income [*I.R.C. § 82*].

To be deductible, moving expenses must be "reasonable" [*I.R.C. § 217(b)(1)*]. The types of moving expenses that are deductible, provided that they are "reasonable" are those incurred for the following:

- Moving household goods and personal effects. Expenses incurred in moving household goods and personal effects from the former residence to the new residence are deductible [*I.R.C. § 217(b)(1)(A)*]. The costs of packing, crating, and in-transit storage, and insurance for goods and effects are deductible. Expenses for moving goods and effects from a place other than the former residence are allowable only to the extent that they do not exceed the amount that it would have cost to move them from the former residence. The cost of moving the employee's automobile to the new residence is deductible [*Rev. Rul. 65-309, 1965-2 C.B. 77*].

- Traveling to the new residence. Traveling expenses, costs of lodging, from the former residence to the new place of residence are deductible [*I.R.C. § 217(b)(1)(B)*].

Other travel expenses that were deductible under former law are no longer deductible. These include house hunting expenses [*see* former *I.R.C. § 217(b)(1)(C)*], expenses for meals and lodging for 30 days while occupying temporary quarters in the general location of the new principal place of work [*see* former *I.R.C. § 217(b)(1)(D)*], and reasonable incidental expenses incurred in the sale of the former residence and the purchase of the new residence [*see* former *I.R.C. § 217(b)(1)(E), (2)*].

Expenses involving any member of the taxpayer's household are allowable provided that the member has both the former residence and the new residence as his or her principal place of abode [*I.R.C. § 217(b)(2)*].

[d] Minimum Distance of Move

No moving expenses are deductible unless the taxpayer's new principal place of work is (1) at least 50 miles farther from his or her former residence than was his or her former principal place of work; or (2) if the employee had no former principal place of work, at least 50 miles from his or her former residence [*I.R.C. § 217(c)(1)*]. For purposes of computing this minimum 50-mile distance, the distance used must be the "shortest of the more commonly traveled routes" between the two points involved [*I.R.C. § 217(c)*].

[e] Minimum Period of Employment After Move Is Made

To deduct moving expenses, the taxpayer must meet one of the following additional requirements: (1) during the 12-month period immediately following arrival in the general location of the new principal place of work, the taxpayer must be a full-time employee for at least 39 weeks [*I.R.C. § 217(c)(2)(A)*], or (2) during the 24-month period immediately following arrival in the general location of the new principal place of work, the taxpayer must be a full-time employee or must perform services as a self-employed individual on a full-time basis, in that location, for at least 78 weeks, of which at least 39 weeks are during the 12 months immediately following arrival in that location [*I.R.C. § 217(c)(2)(B)*]. If the minimum employment requirement has not been satisfied before the due date of the employee's income tax return but sufficient time remains so that the requirement can still be fulfilled, the moving expenses can be deducted. However, if the employee ultimately fails to satisfy this requirement, then the amount of the moving expenses taken as a deduction must be included in the employee's gross income on the tax return for the following year [*I.R.C. § 217(d)(2)*].

The 39-week requirement does not apply if the employee is unable to satisfy it because of death, disability, discharge from employment other than for willful misconduct, or transfer by the employer for the benefit of the employer. In order for the discharge or transfer exceptions to apply, the full-time employment originally obtained by the employee must have been such that the employee could reasonably have expected to satisfy the 39-week requirement [*I.R.C. § 217(d)(1)*].

[2] FORM

Provision for Payment by Employer of All Moving Expenses Deductible by Transferred Employee

Moving Expenses

In the event that Employee during the term of this agreement is transferred by Employer to a new principal place of work at least 50 miles farther from the residence of Employee than is_____[his *or* her] then principal place of work, Employer will reimburse Employee for all reasonable expenses incurred for the following:

(a) Moving the household goods and personal effects of Employee, Employee's spouse, and Employee's minor children from Employee's then residence to the new place of residence selected by Employee.

(b) Traveling, including lodging, for a single one-way trip by Employee, Employee's spouse, and Employee's minor children from Employee's prior residence to the new place of residence selected by Employee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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2. Moving Expenses

28-85 California Legal Forms--Transaction Guide § 85.421

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.421 Provision for Payment of Moving Expenses Only if Authorized in Advance by Employer

[1] Comment

[a] Use of Form

This form provides that a transferred employee's moving expenses will be paid only if authorized in advance by the employer. It is intended for use when the employer does not wish to specify in the employment contract what moving expenses will be paid if the employee is transferred, but instead wants it understood that the employer will pay only those moving expenses that it authorizes in writing in advance in accordance with its then current policy.

For discussion of the tax treatment of moving expenses, see *§ 85.420[1]*. For discussion of the applicability of an employer's rules and policies, see *§ 85.274[1][c]*.

[b] Advantages of Form to Employer

From the employer's point of view, this type of provision has four advantages over one that specifies precisely what moving expenses are to be paid. First, the employer's policy regarding what moving expenses are to be paid by the employer can be readily changed from time to time. Second, employees transferred at the same time can each be paid the same relative amount of moving expenses; this would not be true if each had an employment contract with different provisions for moving expenses. Third, requiring advance written authorization for moving expenses enables the employer to keep a stricter control over the moving expenses that are to be paid. Finally, this provision avoids disputes between the employer and the employee as to what is "reasonable," since the employee can be informed in writing shortly before a particular move is to be made regarding exactly what the employer will pay in connection with that move.

[2] FORM

Provision for Payment of Moving Expenses Only if Authorized in Advance by Employer

Moving Expenses if Authorized in Advance

In the event that during the term of this agreement Employee is transferred by Employer to a new principal place of work, and that Employee decides to move as a result of the transfer, Employer shall be liable only for those moving or traveling expenses that are duly authorized in advance in a writing given to Employee by Employer in accordance with the regular policy of Employer at that time.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-85 California Legal Forms--Transaction Guide § 85.422

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.422 Provision for Payment of Specified Amount for Moving Expenses of New Employee Moving to Initial Place of Employment

[1] Comment--Use of Form

This form specifies the exact amount that an employer will pay to cover the moving expenses incurred by a new employee who is moving to the initial place of employment. In determining the amount that should be specified in the form, consideration should be given to the types of moving expenses discussed in *§ 85.420[1]*.

Instead of specifying the exact amount of moving expenses that the employer will advance, the employer may desire to specify the categories of moving expenses that it will pay. In that case, § 85.420 may be modified to apply to a new employee. When this form is used in an employment contract, the parties should also consider whether to include another provision governing later moves caused by transfers made by the employer [*see §§ 85.420, 85.421*].

This form also includes a provision requiring the employee to repay a portion of the moving expenses if he or she resigns prior to the end of the contract.

For discussion of the tax treatment of moving expenses, see *§ 85.420[1]*.

[2] FORM

Provision for Payment of Specified Amount for Moving Expenses of New Employee Moving to Initial Place of Employment

Moving Expenses

Employer shall pay to Employee the sum of $_____ to cover moving expenses incurred by Employee

in moving from [*place of employee's former residence*] to [*place where employee will initially work*]. Except for this sum, Employer shall not be liable to Employee for any moving expenses of any nature whatsoever incurred by Employee on account of that move.

In the event that Employee resigns prior to [prior to the term of this contract *or* prior to completing one year of service],_____[he *or* she] shall repay to Employer that portion of the moving expenses proportional to the percentage of [the contract remaining *or* the year remaining].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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2. Moving Expenses

28-85 California Legal Forms--Transaction Guide §§ 85.423-85.429

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.423[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
H. Property Rights of the Parties
1. Inventions, Patents, and Copyrightable Material

28-85 California Legal Forms--Transaction Guide § 85.430

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.430 Provision Assigning Employee's Inventions and Intellectual Property to Employer

[1] Comment

[a] Use of Form

This form is a provision specifying the circumstances under which an employee must assign to the employer the employee's rights to any inventions or intellectual property developed during the term of employment. The form is designed to conform to the requirements of *Lab. Code § 2870* setting forth the limitations for a valid provision of this type [*see* discussion under "Contracts to Assign Inventions and Patents," *below*].

The form includes the notice required by *Lab. Code § 2872* to the effect that the assignment provision does not apply to an invention that qualifies fully under the provisions of *Lab. Code § 2870* [*see* [e], *below*]. Such a written notice is required to be given to the employee at the time the agreement is made [*Lab. Code § 2872*].

This form may be easily adapted for use as a stand-alone agreement assigning the rights to inventions and intellectual property developed by the employee. Many employers, especially in high-technology industries, routinely require such stand-alone assignments of all their employees, including employees who do not have written employment contracts.

[b] Rights of Employee-Inventor in Absence of Contract

In the absence of any agreement, a person employed to make an invention must assign to the employer any patent obtained [*Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 658, 3 Cal. Rptr. 421]* . The reason is that such an employee has only produced what he or she was hired to invent. However, this rule is limited strictly to one employed to invent [*see* [c], *below*].

An employer who conceives the general idea of the invention and then has an employee use manual dexterity and even

inventive skill in working out the mechanical details of the invention is entitled to the patent, since the employee was the mere instrument through whom the employer realized the idea. To deprive the employer of the exclusive right in the perfected invention, the employee must contribute a new method or arrangement that in itself is a complete invention [*Famous Players-Lasky Corp. v. Ewing (1920) 49 Cal. App. 676, 679, 680, 194 P. 65]* .

[c] Rights of Employee Not Hired to Invent

Any employee, other than one hired to invent, is entitled to his or her own invention. The basis for this rule is the patent statute itself, which provides that "whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor" [*35 U.S.C. § 101*]. Public policy favors the exercise by an individual of his or her inventive powers and seeks to stimulate inventiveness by granting the inventor the enjoyment of the fruits of his or her endeavors. The law considers an invention to be the property of the one who conceived, developed, and perfected it. The inventor's rights in the invention will be fully protected unless they have been contracted away. Thus, for example, a company that employed a skilled worker to devise and make improvements in its manufacturing operations was not entitled to a conveyance of patents obtained for inventions made while the employee was thus employed without any express agreement to that effect [*Banner Metals, Inc. v. Lockwood (1960) 178 Cal. App. 2d 643, 658, 3 Cal. Rptr. 421]* . This rule as it relates to inventions discovered on the job is limited by the "shop right" of the employer [*see* [d], *below*].

[d] "Shop Right" of Employer in Absence of Agreement

Although the existence of the employer-employee relationship is not by itself sufficient to entitle the employer to partake of the employee's inventive genius, when an employee during the hours of employment, working with the employer's tools and equipment, conceives and perfects an invention, he or she must give the employer a nonexclusive, royalty-free right to make use of the invention. Such a right is called a "shop right." The shop right arises out of equitable principles and is a license implied from the facts when the facts warrant the implication. When the employee used the employer's time, facilities, and materials, the employer is in equity entitled to use that which embodies its own property and to duplicate it royalty-free as often as it may desire in its own business [*Treu v. Garrett Corp. (1968) 264 Cal. App. 2d 432, 436, 70 Cal. Rptr. 284* ; *Aero Bolt & Screw Co. v. Iaia (1960) 180 Cal. App. 2d 728, 736-737, 5 Cal. Rptr. 53]* .

[e] Contracts to Assign Inventions and Patents

Since the shop right entitles the employer to only a nonexclusive right, it is advisable from the employer's point of view to provide for outright assignment of the employee's invention. In California, an employment contract may contain a provision requiring the employee to assign to the employer the rights to inventions developed by employees under certain circumstances. Specifically, an assignment provision is enforceable only if the invention is made with the employer's assets, supplies, facilities, equipment, trade secret information, or time, relates, at the time that it is conceived or reduced to practice, to the employer's business, including actual or demonstrably anticipated research or development of the employer, or results from work performed for the employer by the employee. Thus, if an employee uses only his or her own time, resources, and ideas, and the invention is completely unrelated to the employer's business, any provision in an employment contract requiring assignment of the invention is void as applied to that invention [*see Lab. Code § 2870*].

Furthermore, an employer is prohibited from requiring, as a condition of employment, a contract provision that would be void under these circumstances [*Lab. Code § 2871*]. Finally, if an employment agreement contains a provision requiring the employee to assign or offer to assign any of his or her rights in any invention to the employer, the employer must also provide written notification to the employee that the agreement does not apply to inventions developed outside the scope defined above. The notification must be given at the time the employment agreement is made [*Lab. Code § 2872*].

[2] FORM

Provision Assigning Employee's Inventions and Intellectual Property to Employer

Inventions and Patents

(a) Employee agrees that any inventions made by Employee, solely or jointly with others, during the term of this contract, that are made with Employer's equipment, supplies, facilities, trade secrets, or time; or that relate, at the time of conception or of reduction to practice, to the business of Employer or Employer's actual or demonstrably anticipated research or development; or that result from any work performed by Employee for Employer, shall belong to Employer, and promises to assign the rights to all such inventions to Employer.

(b) For purposes of this provision, "inventions" includes anything that may be patentable or copyrightable, as well as any discovery, development, design, formula, improvement, invention, software program, process, technique, trade secret, and any other form of information that derives independent economic value from not being generally known to the public or to other persons who can obtain economic value from its disclosure, whether or not registrable or protectable under patent laws, copyright laws, or other laws. The "rights" to any such invention include patents, copyrights, trademarks, service marks, and any other proprietary rights associated with the invention.

(c) Employee also agrees that Employer shall have the right to keep any such inventions as trade secrets, if Employer chooses.

(d) Employee agrees to assign to Employer all rights in any other inventions if Employer is required to grant those rights to the United States Government or any agency thereof.

(e) This Section shall not apply to assign to Employer any of Employee's rights in any invention that Employee develops entirely on_____[his *or* her] own time without using Employer's equipment, supplies, facilities, or trade secret information, except for inventions that either (1) relate, at the time that the invention is conceived or reduced to practice, to Employer's business or to actual or demonstrably anticipated research or development of Employer; or (2) result from any work performed by Employee for Employer.

(f) In order to permit Employer to claim rights to which it may be entitled, Employee agrees to disclose to Employer in confidence all inventions that Employee makes during the course of_____[his *or* her] employment and all patent applications filed by Employee within a year after termination of_____[his *or* her] employment.

(g) Employee shall assist Employer in obtaining and enforcing patents and copyrights on all inventions, in the United States and in all foreign countries, and shall execute all documents and do all things necessary to obtain letters patent or copyright protection, to vest Employer with full and extensive titles thereto, and to protect the same against infringement by others. Employee's obligation to assist Employer in obtaining and enforcing such rights will continue after the termination of Employee's employment, and for such assistance rendered after the termination of employment Employer will compensate Employee at the rate of $_____ per [*specify, e.g.,* hour *or* day] for time actually spent by Employee at Employer's request.

(h) For the purposes of this agreement, an invention is deemed to have been made during the period of Employee's employment if the invention was conceived or first actually reduced to practice during that period, and Employee agrees that any patent application filed within a year after termination of_____[his *or* her] employment hereunder shall be presumed to relate to an invention made during the term of Employee's employment unless Employee can provide evidence to the contrary.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawOwnership InterestsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewPatent LawOwnershipEmployee Inventions & Shop RightsTrademark LawProtection of RightsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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H. Property Rights of the Parties
1. Inventions, Patents, and Copyrightable Material

28-85 California Legal Forms--Transaction Guide § 85.431

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.431 Provisions for Payment to Employee of Royalties Received

[1] Comment--Use of Form

This form sets forth two alternative provisions for payment to an employee of royalties received on inventions made by the employee under an employment contract. It is designed to be used in conjunction with a provision (such as *§ 85.430*) that gives the employer the exclusive property right in inventions conceived by the employee without providing for royalties. For discussion of the respective rights of the employer and the employee in inventions conceived by the employee, see *§ 85.430[1]*.

[2] FORM

Provisions for Payment to Employee of Royalties Received

Payment of Royalties

[*First alternative; use to specify a percentage royalty:*]

Employer agrees to share with Employee _____ percent of all royalties that Employer collects for licensing any patents assigned hereunder if those royalties are based on licensing of the patent itself without other patents or know-how. Employer shall have the rights, in its sole discretion, to grant licenses under the patent, such as cross-licenses or royalty-free licenses, and to refuse to grant licenses or sue infringers for infringement.

[*OR*]

[*Second alternative; use to specify varying percentage royalties:*]

(a) If Employer licenses others to use any inventions, designs, improvements, and discoveries conceived by Employee, Employer shall pay to Employee a portion of the money royalties received as follows: [*e.g.*, 40] percent of the first $[*specify figure, e.g.*, $2,000] or any part thereof received in any one calendar year; [*e.g.*, 30] percent of the next $[*specify figure, e.g.*, $2,000] or any part thereof received in any one calendar year; and [*e.g.*, 20] percent of all further sums collected in any one calendar year.

(b) All questions of whether, when, how, and to whom licenses shall be granted shall be determined in the sole discretion of Employer. If the invention was conceived by various employees of Employer or if the licenses granted involve other inventions in addition to that of Employee, the royalties received shall be apportioned according to the sole discretion of Employer. In either case, Employee shall receive the above percentages only on the proportion allocated to_____[his *or* her] invention or share of an invention.

Legal Topics:

For related research and practice materials, see the following legal topics:
Copyright LawOwnership InterestsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionEmployee InventionsPatent LawOwnershipEmployee Inventions & Shop Rights

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
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1. Inventions, Patents, and Copyrightable Material

28-85 California Legal Forms--Transaction Guide § 85.432

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.432 Provision Giving Employer Perpetual Royalty-Free License to Use Employee's Invention

[1] Comment--Use of Form

This form is a provision giving the employer a perpetual royalty-free license to use the employee's invention while the employee retains actual ownership of the invention. It is designed to give the employer a "shop right" in any invention conceived by the employee.

This form should not be used when the employee is hired as an inventor. In that case, the employer has a shop right or non-exclusive license by operation of law [*see § 85.430[1][d]*], and the use of *§ 85.430* is suggested if outright assignment of patent rights is desired. Conversely, this form should be used when the employee is *not* hired as an inventor. In that case, the employee is entitled to his or her own invention and the grant of a license by such an employee would be appropriate [for discussion, see *§ 85.430[1][c]*].

For a discussion of the employer's shop right and of the respective rights of the employer and the employee in inventions conceived by the employee, see *§ 85.430[1]*.

[2] FORM

Provision Giving Employer Perpetual Royalty-Free License to Use Employee's Invention

License of Invention by Employee to Employer

(a) All inventions, designs, improvements, and discoveries conceived by Employee during the term of this agreement, which pertain or relate to the business of Employer or to any experimental work carried on by Employer, shall be the property of Employee. However, from time to time, Employee will promptly fully inform and disclose to Employer all such inventions, designs, improvements, and discoveries.

(b) Employee hereby grants to Employer a perpetual royalty-free license to make, use, and sell products, processes, and services derived from all such inventions, designs, improvements, and discoveries.

(c) This license shall be exclusive for the term of this agreement and for any additional period that Employee is employed by Employer or any subsidiary or successor of Employer; thereafter, this license shall be nonexclusive.

(d) Employer and Employee shall each execute all documents and do all things necessary to preserve their respective rights.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionEmployee InventionsPatent LawOwnershipEmployee Inventions & Shop Rights

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DIVISION VI: PERFORMANCE OF SERVICES
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1. Inventions, Patents, and Copyrightable Material

28-85 California Legal Forms--Transaction Guide § 85.433

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.433 Provision Excluding Specified Inventions From Coverage of Employment Agreement

[1] Comment

[a] Use of Form

This form contains two alternative provisions under which either specified inventions or specified types of inventions made by the employee are excluded from coverage under the employment agreement. It is designed for use when, for example, a prospective employee is the owner of an invention which he or she is developing or for which a patent is pending or has been granted and desires to ensure that the invention will be excluded from any terms of the agreement that might otherwise cloud the employee's rights to the invention. This form can be used in conjunction with either § 85.430 or 85.432.

For a discussion of the respective rights of the employer and the employee in inventions conceived by the employee, see *§ 85.430[1]*.

[b] Drafting Considerations

When this form is used, careful attention should be given to the description of the excluded inventions. This description should be clear, unambiguous, and as specific as possible. If a patent is not pending or has not been granted for the invention involved, it is generally best to use an attached schedule, as suggested in this form. The attached schedule can then include a complete description and detailed plans, drawings, or photographs.

[2] FORM

Provision Excluding Specified Inventions From Coverage of Employment Agreement

Exclusion of Specified Inventions

[*First alternative; use to exclude specific inventions:*]

(a)_____[*describe invention, e.g.*, The invention by Employee of an improvement to aperture card mounting systems for commercial microfilming machines, for which an application for a United States patent was filed by Employee with the United States Patent Office on _____ [*date*], and bearing Serial No. _____, *or* The invention by Employee of an auxiliary transistor with variable power, for which Patent No. _____was granted to Employee on_____[*date*], *or* All inventions described in Schedule "A," which is attached to and made a part of this agreement] is [*or* are] specifically excluded from the terms of this contract.

(b) Any invention excluded hereunder is, and shall continue to be, the exclusive property of Employee, and Employer shall have no rights of any nature whatsoever therein.

[*Second alternative; use to exclude specified types of inventions described generally:*]

(a) All inventions, designs, improvements, and discoveries made by Employee prior to this agreement or during the term of this agreement relating to [*e.g.*, microfilm information retrieval systems *or* environmental and meteorological data systems] are specifically excluded from the terms of this contract.

(b) All excluded inventions, designs, improvements, and discoveries shall be conclusively presumed by the parties to this contract to be the exclusive property of Employee, and Employer shall have no rights of any nature whatsoever regarding them.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionEmployee InventionsPatent LawOwnershipEmployee Inventions & Shop Rights

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28-85 California Legal Forms--Transaction Guide §§ 85.434-85.439

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.434[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
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H. Property Rights of the Parties
2. Trade Secrets, Customer Lists, and Confidential Information

28-85 California Legal Forms--Transaction Guide § 85.440

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.440 Provision Maintaining Confidentiality of Trade Secrets

[1] Comment

[a] Use of Form

This form is a provision restricting the employee's use of trade secrets owned by the employer. Specifically, it describes the employer's trade secrets in general terms and includes a promise on the part of the employee not to disclose, misuse, or misappropriate them. This type of provision is commonly used in conjunction with another provision prohibiting the employee from engaging in unfair competition with the proprietor of the trade secret, whether during or after the term of the contemplated employment [*see § 85.471*].

The restrictive covenant includes promises on the part of the employee not to disclose, misappropriate, or misuse the employer's trade secrets other than in the course of his or her employment, whether during the term of the employment agreement or at any time thereafter. The use of a restriction against disclosure, misappropriation, or misuse is recommended because, even though an employer can obtain injunctive and other relief against a former employee who uses trade secrets acquired during the employment relation to the employer's prejudice [*see Bus. & Prof. Code §§ 17200, 17202-17209*; *Civ. Code §§ 3426.2, 3426.3*], a restrictive covenant such as this one provides a firm written basis for traditional contract remedies [*see* [d][iii], *below*] and informs the employee of his or her obligation not to divulge the employer's trade secrets. The legality of this covenant as it applies to the employee's post-employment activities is discussed under [d][iv], below.

This form includes a clause stating that all books, files, records, and the like that the employee will use during the course of the employment are the exclusive property of the employer. For an analogous provision and pertinent comment, see *§ 85.442*.

This form may be adapted for use as a stand-alone agreement to maintain the confidentiality of the employer's

proprietary information. Such a stand-alone confidentiality agreement may be used for employees who do not have written employment contracts.

[b] Definition of "Trade Secret"

For common law purposes, California has adopted the broad definition of "trade secret" set forth in the Restatement of Torts [*see* Restatement of Torts § 757, Comment (b)(1939)]. Under this definition, a trade secret may consist of any formula, pattern, device, or compilation of information that is used in the employer's business and that gives the employer an advantage over competitors who do not know it or use it [*Rigging Internat. Maintenance Co. v. Gwin (1982) 128 Cal. App. 3d 594, 606, 180 Cal. Rptr. 451* ; *Futurecraft Corp. v. Clary Corp. (1963) 205 Cal. App. 2d 279, 288-289, 23 Cal. Rptr. 198]* .

For the purposes of an action for misappropriation under the Uniform Trade Secrets Act [*Civ. Code § 3426 et seq.*], a "trade secret" is information, including any formula, pattern, compilation, program, device, method, technique, or process, that derives independent 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 is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [*Civ. Code § 3426.1(d)*; *see Penal Code § 499c(a)(9)* (criminal law definition of trade secret)]. For further discussion of the application of the Act, see [d][i], below.

Secrecy is a necessary element of a trade secret; to qualify as a trade secret, the information involved must be difficult for an outsider to acquire. Matters of public or general knowledge in a particular industry cannot be trade secrets. Information that is completely disclosed by a manufactured product cannot be a trade secret. A trade secret generally is known only in the particular business in which it is used. Without losing trade secret protection, an employer can communicate the trade secret to employees or to others pledged to secrecy. Others may know it independently, however, such as another who has discovered the same process but is also keeping it secret [*Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 288-290, 23 Cal. Rptr. 198* ; Restatement of Torts § 757, Comment (b)(1939)].

The mere agreement of the parties that something is a trade secret does not make it a protectable interest of the employer if it is not actually a trade secret [*see Ingrassia v. Bailey (1959) 172 Cal. App. 2d 117, 123-124, 341 P.2d 370]* . Moreover, the mere fact that skilled employees are persuaded to leave one employer to work for another does not necessarily provide proof that the use of their skills by the new employer constitutes use of any of their former employer's trade secrets [*see Bancroft-Whitney Co. v. Glen (1966) 64 Cal. 2d 327, 355-354, 49 Cal. Rptr. 825, 411 P.2d 921]* .

Under certain circumstances, customer lists may be considered trade secrets. For discussion and a provision designed to protect employers from unfair competition resulting from the use of customer lists, see *§ 85.472*.

[c] Factors Used in Determining Trade Secret Status

The factors to be considered in determining whether particular information is a trade secret of the employer are [*Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 288-290, 23 Cal. Rptr. 198* ; Restatement of Torts § 757, Comment (b)(1939)]:

- The extent to which the information is known outside of the employer's business.
- The extent to which it is known by employees and others involved in the employer's business.
- The measures taken by the employer to guard the secrecy of the information.

- The value of the information to the employer and the employer's competitors.
- The effort and money expended in developing the information.
- The relative ease or difficulty with which the information could be properly acquired by others.

[d] Protection of Trade Secrets

[i] In General

The foundation of trade secret protection law is Justice Holmes's statement that a party has the right to keep the work it has done, or paid for doing, to itself and that others may not steal that work [*see Board of Trade v. Christie Grain & Stock Co. (1905) 198 U.S. 236, 250, 25 S. Ct. 637, 49 L. Ed. 1031]* . A trade secret is given legal protection if it is acquired and used under a contractual or fiduciary relationship between the proprietor and the user [*see Irizarry y Puente v. President & Fellows of Harvard College (1st Cir. [Mass.] 1957) 248 F.2d 799, 802]* . Contractually obligated secrecy is a key method of protecting a trade secret because it provides a remedy without the automatic public disclosure that is required to patent or copyright an invention or process.

Trade secret law protects the trade secret proprietor against any unauthorized disclosure of confidential information by the user to third parties whom the proprietor does not wish to know that information. However, if an individual discovers a trade secret either independently or by "reverse engineering" applied to a product or invention that has been disseminated to the public, that person has not breached any contractual or fiduciary relationship and would not be liable under trade secret law [*see Civ. Code § 3426.1(a)*]. The confidentiality aspect of trade secret protection is significantly different from the protection afforded by copyright. For discussion of copyright law generally, see Ch. 103A, *Copyrights* , Parts A and C.

[ii] California Action for Misappropriation

Under the Uniform Trade Secrets Act [*Civ. Code § 3426 et seq.*], an actual or threatened misappropriation of a trade secret may be enjoined or otherwise limited [*see Civ. Code § 3426.2*] and damages can be recovered for the misappropriation [*see Civ. Code § 3426.3*]. The Act does not supersede any other statute relating to the misappropriation of a trade secret or any other statute regulating trade secrets [*Civ. Code § 3426.7(a)*], nor does it affect contractual, civil, or criminal remedies [*see Civ. Code § 3426.7(b)*]. For the definition of a "trade secret" for purposes of the Act, see [b], above.

"Misappropriation" includes improper acquisition and improper acquisition of a trade secret, by one who knows, or has reason to know, that the trade secret was acquired by improper means [*Civ. Code § 3426.1(b)(1)*]. The term also covers the improper disclosure or use of the trade secret. Thus, misappropriation is the disclosure or use of another person's trade secret without that person's consent by one who used improper means to acquire knowledge of the secret [*Civ. Code § 3426.1(b)(1)(A)*], or by one who knew (at the time of the disclosure) that his or her knowledge of the secret was derived by improper means or from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use [*Civ. Code § 3426.1(b)(1)(B)(i), (iii)*] or was acquired in breach of a duty to maintain its secrecy or limit its use [*Civ. Code § 3426.1(b)(1)(B)(ii)*]. "Misappropriation" also includes disclosure or use of a trade secret by a person who knew that it was a trade secret and that knowledge of it had been acquired by accident or mistake [*Civ. Code § 3426.1(b)(1)(C)*].

"Improper means" includes theft, bribery, misrepresentation, breach or inducement of a duty to maintain secrecy. The term also includes electronic or other means of espionage. However, reverse engineering or independent derivation alone are not improper means [*Civ. Code § 3426.1(a)*].

An action for misappropriation under the Act must be brought within three years after the misappropriation is discovered or should have been discovered [*see Civ. Code § 3426.6*]. As a prerequisite to discovery in an action for misappropriation under the Act, the complaining party must identify the trade secret with reasonable particularity [*Code Civ. Proc. § 2019(d)* (*Code Civ. Proc. § 2019.210*, operative July 1, 2005)]. However, the court is required to take reasonable measures to preserve its secrecy [*see Civ. Code § 3426.5*].

[iii] Contract Actions

The misappropriation or misuse of trade secrets that are protected by contract can also be remedied by means of traditional contract actions. The Uniform Trade Secrets Act specifically provides that it does not affect contractual remedies, whether or not they are based on misappropriation of a trade secret [*Civ. Code § 3426.7(b)(1)*]. Under the common law definition, a "trade secret" is any formula, device, or compilation of information used in one's business which gives that person an opportunity to obtain an advantage over competitors who do not know or use it [*Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 288-289, 23 Cal. Rptr. 198* ; Restatement of Torts § 757, Comment (b)(1939)]. Since this definition is broader than that set forth in the Uniform Trade Secrets Act and since the plaintiff in a common law contract action may not have to make the type of disclosure required under the Act, a common law contract action may be more desirable.

[iv] Action for Unfair Competition From Unauthorized Use of Trade Secret

Trade secrets are the property of the employer and cannot be used by the employee for his or her own benefit [*American Loan Corp. v. California Commercial Corp. (1963) 211 Cal. App. 2d 515, 522, 27 Cal. Rptr. 243]* . The use by a former employee to the former employer's prejudice of trade secrets acquired during the prior employment is unfair competition [*Peerless Oakland Laundry Co. v. Hickman (1962) 205 Cal. App. 2d 556, 559, 23 Cal. Rptr. 105]* .

"Unfair competition" is any unlawful, unfair, or fraudulent business act or practice [*Bus. & Prof. Code § 17200*]. The criminal law definition of trade secret includes information, including any formula, pattern, compilation, program, device, method, technique, or process, that derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic benefit from its disclosure or use and is subject to the efforts that are reasonable under the circumstances to maintain its secrecy [*Penal Code § 499c(a)(9)*; *see Civ. Code § 3426.1(d)* ("trade secret" defined under Uniform Trade Secrets Act (*Civ. Code § 3426 et seq.*)].

A person who commits unfair competition by misusing or misappropriating a trade secret may be enjoined from continuing to do so [*Bus. & Prof. Code §§ 17203, 17204*; *Civ. Code § 3420 et seq.*; *see Peerless Oakland Laundry Co. v. Hickman (1962) 205 Cal. App. 2d 556, 559, 23 Cal. Rptr. 105* (restraining order issued)]. That person can also be made liable for civil penalties [*Bus. & Prof. Code § 17206*]. The fact that the former employer is entitled to injunctive relief does not automatically give it the additional right to damages. However, the former employee will be ordered to account for the profits and it is generally held that damages will be awarded to the former employer both for the profits realized by the former employee and for any loss suffered by the former employer [*Western Electro-Plating Co. v. Henness (1961) 196 Cal. App. 2d 564, 570, 16 Cal. Rptr. 691]* .

For a provision under which the employee promises not to engage in acts of unfair competition after termination of his or her employment with respect to the employer's trade secrets, and discussion of the legality and effect of such a provision, see *§ 85.471*. For a provision prohibiting solicitation of the employer's customers after termination of employment and relevant discussion, see *§ 85.472*.

The former employee who misappropriates a former employer's trade secrets can also be subjected to any other remedies provided under California law [*Bus. & Prof. Code § 17205*]. The latter include damages for breach of any contractual provision against unauthorized use or disclosure of a trade secret [*see* [iii], *above*].

These remedies for unfair competition are available in addition to those available under the Uniform Trade Secrets Act since the Act does not affect other civil remedies that are not based upon misappropriation of a trade secret [*Civ. Code § 3426.7(b)(2)*], or criminal remedies, whether or not they are based on misappropriation [*Civ. Code § 3426.7(b)(3)*].

In the absence of an enforceable noncompetition agreement or any actual or threatened misappropriation of trade secrets, a California court will not apply the "doctrine of inevitable disclosure" to enjoin a former employee from working for a competing employer. As applied in some jurisdictions, the "doctrine of inevitable disclosure" allows a plaintiff to establish a claim of trade secret misappropriation by demonstrating that the defendant's new employment will inevitably lead him or her to rely on the plaintiff's trade secrets [*see, e.g., PepsiCo, Inc. v. Redmond (7th Cir. 1995) 54 F.3d 1262, 1269]* . In such a case, the result is not merely an injunction against the use of trade secrets, but an injunction restricting employment. However, the doctrine of inevitable disclosure has been rejected in California because it creates a de facto covenant not to compete and runs counter to the strong California public policy favoring employee mobility [*Whyte v. Schlage Lock Co. (2002) 101 Cal. App. 4th 1443, 1458-1464, 125 Cal. Rptr. 2d 277* ; *see Bus. & Prof. Code § 16600* (general prohibition against noncompetition agreements)].

[2] FORM

Provision Maintaining Confidentiality of Trade Secrets

Restrictions on Use of Trade Secrets and Proprietary Information

(a) During the term of employment under this agreement, Employee will have access to and become acquainted with various proprietary information of Employer, including discoveries, developments, designs, formulas, patterns, devices, secret inventions, processes, software programs, technical data, customer and supplier lists, and compilations of information, records, and specifications, and other matters constituting trade secrets as defined under *California Civil Code Section 3426.1*, all of which are owned by Employer and regularly used in the operation of Employer's business. Employee may also have access to the confidential information of third parties that has been provided to Employer subject to a Confidential Disclosure Agreement. The information described in this section constitutes "Proprietary Information."

(b) All proprietary information and all files, records, documents, drawings, specifications, equipment, computer files, computer records, computer programs, and similar items relating to the business of Employer, whether they are prepared by Employee or come into Employee's possession in any other way and whether or not they contain or constitute trade secrets owned by Employer, are and shall remain the exclusive property of Employer and shall not be removed from the premises of Employer, or reproduced or distributed in any manner, under any circumstances whatsoever without the prior written consent of Employer.

(c) Employee promises and agrees that_____[he *or* she] shall not misuse, misappropriate, or disclose any proprietary information or trade secrets described herein, directly or indirectly, or use them in any way, either during the term of this agreement or at any time thereafter, except as required in the course of_____[his *or* her] employment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionTrade SecretsTrade Secrets LawProtected InformationGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.441

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.441 Provision Designating Particular Information as Trade Secret

[1] Comment--Use of Form

This form is a provision designating certain and specifically described information as a trade secret. It includes a promise on the part of the employee not to disclose or misuse trade secrets. It is intended for inclusion in an employment agreement and may be used instead of the general provision restricting use of trade secrets set forth in *§ 85.440* if specificity in describing the trade secret will suffice.

For discussion of trade secrets generally, see *§ 85.440[1]*. Although an express contractual provision regarding trade secrets is not necessary to enable the employer to obtain injunctive relief for wrongful use by a former employee of a trade secret [*see § 85.440[1]*], the inclusion in the employment contract of a specific provision stating that a certain process, formula, pattern, device, or other compilation of information of the employer is a trade secret can assist in any subsequent litigation. It can be used to prove that the particular compilation of information was in fact a trade secret, because one of the factors to be considered in determining whether particular information is a trade secret is the extent of the measures taken by the employer to guard the secrecy of the information [Restatement of Torts, § 757, Comment (b)(1939); *see also Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 292, 23 Cal. Rptr. 198]* . However, the agreement of the parties that something is a trade secret does not make it a protectable interest of the employer if it is not actually a trade secret [*see Ingrassia v. Bailey (1959) 172 Cal. App. 2d 117, 123-124, 341 P.2d 370]* .

[2] FORM

Provision Designating Particular Information as Trade Secret

Specification of Trade Secrets

(a) It is contemplated that during the course of_____[his *or* her] employment, Employee will be

engaged in work involving Employer's [*e.g.*, process for precision microfilming of engineering drawings], known as [*e.g.*, Black Company's Process No. X-213], and will have access to and become acquainted with [*e.g.*, experiments, developments, formulas, patterns, devices, secret inventions, processes, compilations of information, records, and specifications] relating to that [*e.g.*, process].

(b) All of the data described in subsection (a), above, as well as the name and existence of [*e.g.*, the process] are trade secrets that are wholly owned and controlled by Employer.

(c) Employee shall not disclose any of Employer's trade secrets, directly or indirectly, or use them in any way, either during the term of this agreement or at any time thereafter, except as required in the course of_____[his *or* her] employment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionTrade SecretsTrade Secrets LawProtected InformationGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.442

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.442 Ownership of Customer Records

[1] Comment

[a] Use of Form

This form is a provision expressly stating that all records and books relating to customers of the employer and/or transactions encountered in the conduct of the employment are the exclusive property of the employer. Since this type of provision is likely to be part of the employer's attempt to forestall the employee from soliciting its customers after termination of the employer-employee relationship, this form should be used in conjunction with*§ 85.472*. For general discussion of solicitation of the employer's customers by an employee after termination of employment, see *§ 85.472[1][c]*.

The inclusion of this form can be helpful from the employer's point of view if the matter of customer solicitation after termination of the employment reaches the litigation stage. Because violation of an express contractual provision identifying tangible items as the property of the employer has a bearing on the ultimate court decision, it creates an extraordinary duty on the part of the employee not to misappropriate or misuse the employer's customer data [*see Southern California Disinfecting Co. v. Lomkin (1960) 183 Cal. App. 2d 431, 446, 7 Cal. Rptr. 43* (failure to return customer list as required by contract called "trade secret larceny" and violation of extraordinary duty imposed by contract)]. For discussion of the remedies an employer has against an employee for "trade secret larceny," see *§ 85.440[1][d]*.

[b] Duty of Employee

Everything that an employee acquires by virtue of his or her employment (such as customer record books) belongs to the employer [*Lab. Code § 2860*]. An employee must account for all transactions made during the course of the employment [*Lab. Code § 2861*] and deliver anything received (such as signed receipts, orders, contracts, credit

information, economic or demographic data, and the like) when the employer demands it [*Lab. Code § 2862*].

[c] Reimbursement for Employee-Purchased Record Supplies

Because an employee may purchase a notebook or similar item and enter customer information (or other information related to the transactions involved) in it, this provision specifically makes those items property of the employer even though they may have been purchased by the employee. In order to clearly establish the employer's exclusive ownership, and also to satisfy the statutory reimbursement requirement [*see Lab. Code § 2802*], the last sentence of the form provides that the employer will reimburse the employee for any such expenditures.

[2] FORM

Ownership of Customer Records

Ownership of Books, Records, and Papers

(a) All records of the accounts of customers, route books, and any records, books, and programs, whether maintained in physical or electronic media, relating in any manner to the customers of Employer [or the conduct of Employee's employment, including without limitation _____ (*specify, e.g.,* credit reports or memoranda, reports of transactions made to Employer, demographic or economic data discovered by Employee during the term of this contract, or sourcing lists of potential employees developed by Employee)], whether prepared by Employee or otherwise coming into Employee's possession, shall be the exclusive property of Employer regardless of who actually purchased the original book or record.

(b) All such books, records, and computer files, programs, and records shall be immediately returned to Employer by Employee on any termination of employment.

(c) If Employee purchases any record book, ledger, computer software program, or similar item to be used for record keeping, Employee shall immediately notify Employer, who shall then immediately reimburse Employee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionFormer Employer's CustomersTrade Secrets LawProtected InformationGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.443

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.443 Provision Maintaining Confidentiality of Client or Patient Information

[1] Comment--Use of Form

This form is for use if an employee of a professional service provider (such as an attorney, accountant, or physician) will have access to confidential information pertaining to clients or patients of the employer. The form embodies an agreement by the employee to maintain the confidentiality of the client or patient information.

This form may be inserted in a complete employment agreement. Alternatively, if the employee will not have a complete written employment agreement, this form may easily be adapted for use as a stand-alone agreement to be signed by the employee.

[2] FORM

Provision Maintaining Confidentiality of Client or Patient Information

Confidential _____ [Client ***or*** Patient] Information

(a) The parties acknowledge and agree that during the term of_____[his *or* her] employment, and in the course of discharging_____[his *or* her] duties, Employee shall have access to and possess personal, confidential information pertaining to the [professional clients *or* patients] of Employer. Employee acknowledges and agrees that the ability to maintain the confidentiality of [client *or* patient] information is an essential requirement of Employer's professional and business operations, and any unauthorized disclosure of confidential [client *or* patient] information would cause substantial damage to Employer's [clients *or* patients] as well as to Employer's professional and business standing.

(b) In consideration of being employed by Employer, Employee specifically agrees that_____[he *or*

she] shall not misuse, misappropriate, or disclose any such [client *or* patient] information directly or indirectly, to any other person or use the information in any way, either during the term of employment or at any time thereafter, except as is required in the course of_____[his *or* her] employment with Employer.

(c) Employee further agrees that all Employer's client files, records, documents, and similar items relating to Employer's [clients *or* patients], including copies, reproductions, and facsimiles of such items, whether prepared by Employee or others, are and shall remain exclusively the property of Employer and shall not be removed or transmitted from the premises of Employer unless expressly and specifically authorized by [*names or titles of principals of firm*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewHealthcare LawTreatmentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionFormer Employer's Customers

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DIVISION VI: PERFORMANCE OF SERVICES
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2. Trade Secrets, Customer Lists, and Confidential Information

28-85 California Legal Forms--Transaction Guide §§ 85.444-85.449

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.444[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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H. Property Rights of the Parties
3. Other Property

28-85 California Legal Forms--Transaction Guide § 85.450

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.450 Provision for Immediate Return of Employer's Property

[1] Comment

[a] Use of Form

This form is a provision requiring an employee to return to the employer all property belonging to the employer when requested by the employer or upon termination of the employment. The purpose of this form is to make clear to the employee that he or she is obligated to return all of the employer's property to the employer and to provide a contractual basis for recovery from the employee in case of noncompliance. It is suggested that this form be used when valuable property or property that embodies a trade secret is to be entrusted to the employee.

[b] Duty of Employee

Everything that an employee acquires by virtue of his or her employment (other than compensation) belongs to the employer, whether acquired lawfully or unlawfully, or during or after the term of employment [*Lab. Code § 2860*]. An employee must account for all transactions made during the course of the employment [*Lab. Code § 2861*] and deliver anything received when the employer demands it [*Lab. Code § 2862*]. If property entrusted to the employee is damaged as a result of the employee's negligence, he or she is liable to the employer [*Lab. Code § 2865*].

[2] FORM

Provision for Immediate Return of Employer's Property

Return of Employer's Property

On the termination of_____[his *or* her] employment or whenever requested by Employer, Employee

shall immediately deliver to Employer all property in_____[his *or* her] possession or under_____[his *or* her] control belonging to Employer [*optional:* including, but not limited to _____ (*specify*)] in good condition, ordinary wear and tear and damage by any cause beyond the reasonable control of Employee excepted].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-85 California Legal Forms--Transaction Guide § 85.451

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.451 Provision Giving Employer Right to Use Employee's Name as Part of Trade Name or Trademark

[1] Comment

[a] Use of Form

This form is a provision governing the use of the employee's name as part of a trade name or trademark. The first portion of the form grants the employer the right to use the employee's name in its trade name or trademark. The second portion limits the use of the employee's name in connection with another enterprise. This type of provision is commonly included in agreements between a professional corporation and one of the principals; however, it may be used by any employer whose trademark of trade name will include the name of the employee.

[b] Trade Name

Under federal law, a "trade name" is an individual or firm name used to identify a business or vocation [*15 U.S.C. § 1127*]. In California, a "trade name" is name used by a person to identify a business or vocation of that person [*Bus. & Prof. Code § 14202(d)*; *see Bus. & Prof. Code § 14202(e)* ("person" includes natural person and juristic person, which is firm, partnership, corporation, union, association, or other organization capable of suing and being sued)].

[c] Trademark

Under federal and California law, a "trademark" includes any word, name, symbol, or device, or any combination thereof, used by a person to identify and distinguish the goods of that person, including a unique product, from those manufactured or sold by others, and to indicate the source of the goods, even if that source is unknown [*15 U.S.C. § 1127*; *Bus. & Prof. Code § 14202(a)*]. Also, federal law treats a word, name, symbol, or device, or combination thereof as a "trademark" if a person has a bona fide intention to use it for the foregoing purposes in commerce and applies to register it as a trademark with the United States Patent and Trademark Office [*15 U.S.C. § 1127*].

For this purpose, a "person" includes a natural person and a juristic person, which includes a firm, partnership, corporation, union, association, or other organization capable of suing and being sued [*15 U.S.C. § 1127*; *Bus. & Prof. Code § 14202(e)*]. The federal definition of "person" also includes the United States, any agency or instrumentality thereof, or any individual, firm, or corporation acting for the United States and with the authorization and consent of the United States [*15 U.S.C. § 1127*].

A person who uses a trademark may register it with the Secretary of State [*Bus. & Prof. Code § 14207*] and with the United States Patent and Trademark Office [*15 U.S.C. § 1051*]. Registration of a trademark with the Secretary of State is effective for five years and may be renewed for successive five-year periods indefinitely [*Bus. & Prof. Code § 14217(a),(b)*]. Registration with the United States Patent and Trademark Office is effective for ten years and may be renewed for successive ten-year periods [*15 U.S.C. § 1059(a)*]. For detailed coverage of California trademark law, see Ch. 103B, *Trademarks* . For coverage of the federal law of trademarks, see LaLonde, Gilson on Trademarks (Matthew Bender).

[2] FORM

Provision Giving Employer Right to Use Employee's Name as Part of Trade Name or Trademark

Use of Employee's Name

(a) Employer shall have the right to use the name of Employee as part of the trade name or trademark of Employer if Employer deems it advisable to do so. Any trade name or trademark of which the name of Employee is a part adopted by Employer during the employment of Employee may be used thereafter by Employer for as long as Employer deems advisable.

(b) Employee shall not, either during the term of this agreement or at any time thereafter, use or permit the use of Employee's name in the trade name or trademark of any other enterprise engaged in a business similar in any respect to that conducted by Employer, unless that trade name or trademark clearly indicates that the other enterprise is a separate entity entirely distinct from and not to be confused with Employer, and unless the trade name or trademark does not contain any words or symbols stating or suggesting that the other enterprise or its employees have any prior or current affiliation with Employer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionGeneral OverviewTrademark LawProtection of RightsGeneral Overview

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28-85 California Legal Forms--Transaction Guide §§ 85.452-85.459

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[Reserved]

§§ 85.452[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
I. Obligations of Employer

28-85 California Legal Forms--Transaction Guide § 85.460

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.460 Provision That Employer Indemnify Losses of Employee in Discharging Duties

[1] Comment

[a] Use of Form

This form is a promise on the part of the employer to indemnify the employee for losses that occur as a direct consequence of the discharge of the employee's duties. An express provision to this effect is seldom used in employment contracts. It is necessarily embodied in every employment contract made in California because an employer has a statutory obligation to indemnify an employee for such losses [*Lab. Code § 2802*]. However, the employee's attorney may desire to include this provision so that the client will be aware of the employer's obligation.

[b] Employer's Obligation to Indemnify Employee for Losses in Discharging Duties

An employer must indemnify its employee for necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties or obedience to the directions of the employer. This obligation to indemnify applies even if the directions of the employer are unlawful, unless the employee at the time of obeying the directions believed them to be unlawful [*Lab. Code § 2802(a)*]. This statutory obligation cannot be waived by the parties [*Lab. Code § 2804*]; *see Gattuso v. Harte-Hanks Shoppers, Inc. (2007) 42 Cal. 4th 554, 67 Cal. Rptr. 3d 468, 479-481, 169 P.3d 889* (holding that agreement between employer and employee for reimbursement by method that approximates employee's actual expenses does not relieve employer of statutory obligation to pay full reimbursement and does not preclude employee from suing to recover full reimbursement); *see also Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 950-955, 81 Cal. Rptr. 3d 282, 292-296, 189 P.3d 285* (contract provision in which employee releases "any and all" claims against employer does not waive employee's right to indemnity under *Lab. Code § 2802(a)*)].

This obligation applies only to losses incurred in the scope of the employment. That is, the losses must be in direct consequence of the discharge of the duties of the employee, as opposed to losses suffered incidentally to the

employment. The test of whether a given activity that results in a loss to the employee is within the scope of employment is whether the activity is so unusual or startling that it would be unfair to include the loss as a cost of the employer's doing business [*Devereaux v. Latham & Watkins (1995) 32 Cal. App. 4th 1571, 1583-1584, 38 Cal. Rptr. 2d 849* (employee's expenses incurred while giving testimony adverse to employer's interests held not within scope of employment)]. Thus, for example, the indemnity statute has been held inapplicable to the loss of tools destroyed by fire after normal business hours, since the tools were not then being used in the discharge of the duties of the employee or in obedience to the instructions of the employer, and the employee was not required to leave the tools at the place of employment [*Earll v. McCoy (1953) 116 Cal. App. 2d 44, 46, 253 P.2d 86]* .

Expenses subject to indemnification include attorneys' fees incurred by the employee not only in defending against claims arising from the employee's discharge of duties, but also in proceedings against the employer to enforce the employee's right to indemnification [*Lab. Code § 2802(c)*; *O'Hara v. Teamsters Union Local No. 856 (9th Cir. 1998) 151 F.3d 1152, 1157, 1160-1161]* . For this purpose, a claim against an employee arises from the employee's discharge of duties if (1) the employee's actions giving rise to the claim are within the scope of employment; and (2) the claim is proven to be unfounded, that is, without merit [O'Hara v. Teamsters Union Local No. 856 *(9th Cir. 1998) 151 F.3d 1152, 1158-1160* (third party's claim against employee is unfounded as matter of law if third party dismisses claim with prejudice; that dismissal was part of settlement did not mean claim had merit, since settlement did not include any admission of liability by employee)].

If the employee brings an action against the employer to enforce the employee's right to indemnification, an award for the reimbursement of the employee's expenditures or losses must carry interest at the same rate as judgments in civil actions, accruing from the date on which the employee incurred the expenditures or losses [*Lab. Code § 2802(b)*].

For further discussion of the employer's duty to reimburse the employee's work-related expenses, including permissible methods of reimbursement of recurring expenses, see *§ 85.12[3]*.

[2] FORM

Provision That Employer Indemnify Losses of Employee in Discharging Duties

Indemnification of Losses of Employee

The Employer shall indemnify Employee for all necessary expenditures or losses incurred by Employee in direct consequence of the discharge of Employee's duties.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsIndemnityLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.461

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.461 Provision Permitting Employee to Examine Books Relating to Compensation

[1] Comment

[a] Use of Form

This form is a provision granting the employee the right, either personally or by an accountant or other representative, to examine those books and accounts of the employer that relate to a determination of the amount of compensation due the employee. This type of provision is for use primarily in agreements with salespersons or others whose compensation depends in whole or in part on the success of the employee's endeavors or that of the employer's business generally. For example, a salesperson who is paid on a commission basis or an executive whose salary is determined in part by the amount of net profits earned by the employer's business.

[b] Right of Employee to an Accounting

Use of this form is necessary when the compensation to be received by the employee is contingent (a contract basing compensation on net profits, for example). The reason for this is that in those cases, the exact amount of compensation that should be received by the employee can only be determined by reference to the books and accounts of the employer. There is no reason not to use this type of provision because an employer has a duty to account to the employee when the contract permits the employee to share in profits [*see Nelson v. Abraham (1947) 29 Cal. 2d 745, 751, 177 P.2d 931]* .

[2] FORM

Provision Permitting Employee to Examine Books Relating to Compensation

Examination of Books

The Employee shall have the right, either personally or by an accountant or other representative retained and paid by Employee, to examine the books and accounts of Employer as they relate to transactions affecting the amount of Employee's compensation. This right shall be exercised at times mutually convenient to Employee and Employer, but in any event, at least once during each half of the calendar year.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsCompensation

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DIVISION VI: PERFORMANCE OF SERVICES
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I. Obligations of Employer

28-85 California Legal Forms--Transaction Guide §§ 85.462-85.469

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[Reserved]

§§ 85.462[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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PART IV. FORMS
J. Obligations of Employee
1. Noncompetition With Employer

28-85 California Legal Forms--Transaction Guide § 85.470

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.470 Provision for Noncompetition by Employee During Term of Contract

[1] Comment

[a] Use of Form

This form is a provision forbidding the employee from competing directly or indirectly with the employer during the term of the agreement. Although competition by the employee with his or her employer during the term of the contract is a breach of contract even though the employment contract does not contain a provision to that effect [*see* [c], *below*], such a provision serves to more clearly establish or define that conduct as a breach of contract. Thus, for example, this form forbids both direct and indirect competition.

The inclusion of this form in the contract serves as a basis for a breach of contract action [*see* [c], *below*], if the need should arise. It also serves to inform the employee that any competitive activity during the term of the employment contract is a breach of contract. Since the employee might not otherwise be aware of this, use of this provision may prevent activity that otherwise would occur.

For a provision permitting the employee to engage in other specified employment, see *§ 85.272*. For discussion of provisions that have the effect of limiting competition after termination of employment see [c], *below*.

[b] Drafting of Exclusions From This Provision

This form includes an optional clause excluding from the basic prohibition against competition any activities the parties may agree to exclude. The basic prohibition is very broad and prohibits the employee from engaging in any type of activity during the term of the contract that might conceivably result in any direct or indirect competition with the employer. A broad provision is generally very useful from the standpoint of the employer, since it is impossible to foresee the precise activity on the part of a prospective employee that may result in harmful competition to the

employer. However, in particular circumstances it may operate too harshly by prohibiting activity that would be beneficial to the employee and/or would not be detrimental to the employer in any way.

[c] Competition Constituting Breach of Contract

An employee who has any business to transact on his or her own account similar to that entrusted to him or her by the employer must give preference to the employer's business [*Lab. Code § 2863*]. It is the duty of the employee to faithfully serve the employer during working hours and not to engage in a competing business even outside of working hours [*Charles T. Powner Co. v. Smith (1928) 91 Cal. App. 101, 102, 266 P. 833]* . When an employee engages in a business that makes him or her a competitor of the employer, no matter how much or how little time is devoted to it, there is an interest against this duty and therefore a violation of the employment contract, even though the agreement does not contain a noncompetition provision [*Stokes v. Dole Nut Co. (1995) 41 Cal. App. 4th 285, 295-296, 48 Cal. Rptr. 2d 673* ; *Puritas Laundry Co. v. Green (1911) 15 Cal. App. 654, 660, 115 P. 660]* . The Restatement of Agency rule is that an employee, unless otherwise agreed, cannot compete with the employer or act for persons whose interests are in conflict with those of the employer in matters with respect to which the employee is employed [Restatement (Second) of Agency, §§ 393, 394].

[2] FORM

Provision for Noncompetition by Employee During Term of Contract

Noncompetition During Term of Employment Contract

(a) During the term of this contract Employee shall not, directly or indirectly, either as an employee, employer, consultant, agent, principal, partner, stockholder, corporate officer, director, or in any other individual or representative capacity, engage or participate in any business that is in competition in any manner whatsoever with the business of Employer.

[*Optional additional clause; use to exclude specified activities from basic noncompetition provision:*]

(b) The foregoing obligation of Employee not to compete with Employer shall not prohibit Employee from _____ [*e.g.*, owning or purchasing any corporate securities that are regularly traded on a recognized stock exchange or over-the-counter market *or* from continuing to own and manage the real property located at 907 South Main Street, Bakersfield, California.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionNoncompetition & Nondisclosure Agreements

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J. Obligations of Employee
1. Noncompetition With Employer

28-85 California Legal Forms--Transaction Guide § 85.471

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.471 Provision Prohibiting Unfair Competition After Termination of Employment

[1] Comment

[a] Use of Form

This form prohibits an employee from engaging in any act of unfair competition with respect to an employer's trade secrets after termination of his or her employment. This type of provision may be used in any kind of employment contract pursuant to which an employee will gain access to the employer's trade secrets, including contracts for the employment of executives, managerial personnel, salespersons, technical personnel, or consultants. It is commonly used in conjunction with a provision that describes the employer's trade secrets in general terms and includes a promise on the part of the employee not to disclose or misuse them [*see § 85.440*].

[b] Purpose and Effect of Form

This form states the employee's acknowledgment and agreement that the sale or unauthorized use or disclosure of any of Employer's trade secrets constitutes "unfair competition." Because unfair competition is a tort and its elements are a matter of law, a contract provision characterizing a given activity as unfair competition (like a contract provision characterizing a particular matter as a trade secret) may not be ultimately determinative in an action for unfair competition. Nevertheless, this form has the salutary effect of telling the employee specifically what acts are prohibited and exactly what he or she is promising not to do. Moreover, inclusion of this form can be helpful from the employer's point of view if the matter reaches the litigation stage. This is because violation of an express contract provision identifying an employer's trade secrets as such has a bearing on the ultimate court decision since it creates an extraordinary duty on the part of the employee not to misappropriate or misuse them [*see Southern California Disinfecting Co. v. Lomkin (1960) 183 Cal. App. 2d 431, 446, 7 Cal. Rptr. 43* (failure to return customer list as required by contract called "trade secret larceny" and violation of extraordinary duty imposed by contract)]. For discussion of the employer's remedies against an employee for unfair competition, see *§ 85.440[1][d][iv]*.

For a provision prohibiting an employee from soliciting business from the employer's customers for a limited period after termination of employment and relevant discussion, see *§ 85.472*.

[c] Validity of Provisions Limiting Competition After Termination of Employment

[i] In General

The general rule is that any contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is void [*Bus. & Prof. Code § 16600*; *see D'Sa v. Playhut, Inc. (2000) 85 Cal. App. 4th 927, 929, 931-935, 102 Cal. Rptr. 2d 495* (discharging employee for refusing to sign employment agreement containing provision that violates *Bus. & Prof. Code § 16600* is violation of public policy)].

The general prohibition against noncompetition contracts is inapplicable when an agreement not to compete is made by a seller with a buyer in connection with a sale of the goodwill of a business, or in connection with the sale of an ownership interest in a business entity, when the sale of goodwill is involved [*Bus. & Prof. Code § 16601*], by one partner with other partners when the dissolution of a partnership is involved [*Bus. & Prof. Code § 16602*] or, under specified circumstances, in connection with the dissolution of a limited liability company [*Bus. & Prof. Code § 16602.5*]. In most employer-employee situations these exceptions have no application, but a shareholder-employee may have an employment contract that provides for a corporate buyout of the employee's shares on the termination of employment. In such a case, a noncompetition agreement in the buyout provision will not be valid unless a valuation of corporate goodwill is a component of the sale price [*Hill Medical Corp. v. Wycoff (2001) 86 Cal. App. 4th 895, 901-908, 103 Cal. Rptr. 2d 779]* .

Even when these exceptions do apply, the promise not to compete must be limited to a specified geographic area in which the business entity or partnership conducted business, and for only as long as the buyer carries on a like business therein [*see Bus. & Prof. Code §§ 16601, 16602*]. However, a covenant not to compete in connection with the sale of a business is not limited by state boundaries due to federal regulation of interstate commerce. Further, the statutory limitation on the scope of reasonable covenants not to compete to counties and cities does not limit the scope of the agreement to California [*Fleming v. Ray-Suzuki, Inc. (1990) 225 Cal. App. 3d 574, 582-583, 275 Cal. Rptr. 150]* .

[ii] Indirect Prohibitions

Certain indirect prohibitions are valid. For example, under the general rule of *Bus. & Prof. Code § 16600*, a provision in an employment contract forfeiting the employee's pension rights if he worked for a competitor restrained him from engaging in a lawful business and therefore was void [*Muggill v. Reuben H. Donnelley Corp. (1965) 62 Cal. 2d 239, 242-243, 42 Cal. Rptr. 107, 398 P.2d 147]* . However, provisions in the employment contract of a life insurance agent, which made his right to receive accrual commissions after severance of the employment relationship contingent on him not injuring the employer in its relationship with financial institution customers and not inducing those customers to discontinue cooperation with the employer in the sale of insurance, were not provisions in restraint of trade under *Bus. & Prof. Code § 16600*. This was because the ex-employee was not prevented from engaging in a trade, business, or profession [*Buskuhl v. Family Life Ins. Co. (1969) 271 Cal. App. 2d 514, 522, 76 Cal. Rptr. 602]* .

In addition, a provision in an employment contract between a life insurance company and a salesman entitling the salesman to certain "service fees" only "so long as this contract remains in force" has been held not to violate *Bus. & Prof. Code § 16600*. This provision did not purport to regulate the employee's conduct after the termination of his employment and did not restrain him from working for a competitor or in any way overtly limit his freedom to seek other employment. The loss of the service fees occurred upon the lawful termination of the contract, not as in the *Muggill* case cited above, upon the finding of other employment. Therefore, the provision in question did not operate as a restraint on trade and was valid [*Bach v. Curry (1968) 258 Cal. App. 2d 676, 681, 66 Cal. Rptr. 220]* .

[iii] Trade Secret and Narrow Restraint Exception

In addition to the statutory exceptions noted in [i], *above*, the California courts recognize a "trade secret exception" to the general rule, under which the courts will enforce a covenant not to compete to the extent necessary to protect an employer's trade secrets and confidential information [*Whyte v. Schlage Lock Co. (2002) 101 Cal. App. 4th 1443, 1462, 125 Cal. Rptr. 2d 277* ; *Muggill v. Reuben H. Donnelley Corp. (1965) 62 Cal. 2d 239, 242, 42 Cal. Rptr. 107, 398 P.2d 147* ; *Gordon v. Landau (1958) 49 Cal. 2d 690, 694, 321 P.2d 456]* . Thus, a covenant not to solicit the employer's customers may be enforceable if it is designed to protect the employer's confidential, proprietary, or trade-secret customer information, but not if the identity of the customers is not confidential and therefore not a trade secret [*see Thompson v. Impaxx, Inc (2003) 113 Cal. App. 4th 1425, 1429-1430, 7 Cal. Rptr. 3d 427* (complaint's allegation that customer lists were not confidential taken as true for purposes of judgment on the pleadings)]. The statutory privilege shielding statements made in judicial proceedings [*see Civ. Code § 47(b)*] does not apply in an action for breach of an employment contract containing an express agreement not to disclose trade secrets. Thus, if a former employee's testimony discloses an employer's trade secrets in a lawsuit between the employer and a third party, the judicial privilege will shield the former employee from tort liability for disclosing the trade secrets, but it does not protect the former employee from the employer's action based on breach of a covenant not to disclose the trade secret [*ITT Telecom Prods. Corp. v. Dooley (1989) 214 Cal. App. 3d 307, 318-320, 262 Cal. Rptr. 773]* .

A former employee has the right to enter into competition with his or her former employer, provided that competition is fairly and legally conducted [*Continental Car-Na-Var Corp. v. Moseley (1944) 24 Cal. 2d 104, 110, 148 P.2d 9* ; *Cal. Francisco Inv. Corp. v. Vrionis (1971) 14 Cal. App. 3d 318, 323, 92 Cal. Rptr. 201]* . However, a former employee's use of confidential information obtained from the former employer is viewed as unfair competition [*Rigging Int'l Maintenance Co. v. Gwin (1982) 128 Cal. App. 3d 594, 606, 180 Cal. Rptr. 451* ; *Greenly v. Cooper (1978) 77 Cal. App. 3d 382, 391, 392, 143 Cal. Rptr. 514]* .

The misuse of a former employer's trade secrets after termination of an employee's employment can be limited as a method of protecting a trade secret from unfair competition. For discussion of the remedies available to a former employer when a former employee commits an act of unfair competition after termination of employment, see *§ 85.440[1][d][iv]*.

The California Supreme Court has held that a noncompetition agreement is invalid under *Bus. & Prof. Code § 16600*, even if narrowly drawn, unless expressly authorized by statute [*Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 945-950, 955, 81 Cal. Rptr. 3d 282, 288-292, 296, 189 P.3d 285* ; *see Bus. & Prof. Code §§ 16601, 16602, 16602.5* (authorizing noncompetition agreement in connection with sale of business goodwill or corporate shares, or dissolution of partnership or limited liability company)]. However, the Court left open the question of the applicability of a "trade secret exception" to *Bus. & Prof. Code § 16600* [*Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 946 n.4, 81 Cal. Rptr. 3d 282, 289 n.4, 189 P.3d 285* ("[W]e do not here address the applicability of the so-called trade secret exception to [*Bus. & Prof. Code § 16600*], as Edwards does not dispute that portion of his agreement or contend that the provision of the noncompetition agreement prohibiting him from recruiting Andersen's employees violated [*Bus. & Prof. Code § 16600*].")].

[iv] Severance of Void Provisions

If a provision in the contract is in restraint of trade and therefore invalid, it is the policy of the courts to sever the provision restraining trade, if possible, and to enforce the remainder of the contract that is not so tainted [*Zajicek v. Koolvent Metal Awning Corp. of America (9th Cir. 1960) 283 F.2d 127, 133]* . However, terminating an employee for refusing to sign an employment agreement that contains an illegal noncompetition covenant is a violation of public policy, even if the agreement includes a severability provision that would preserve the enforceability of the remainder of the agreement [*D'Sa v. Playhut, Inc. (2000) 85 Cal. App. 4th 927, 929, 931-935, 102 Cal. Rptr. 2d 495* ; *see Bus. & Prof. Code § 16600* (except as provided by statute, any contract that restrains anyone from engaging in any lawful

profession, trade, or business is to that extent void)].

[d] Hazards of Using Prohibition Against Post-Employment Competition

Many national publications containing forms for employment contracts include provisions prohibiting the employee from competing with the employer after the employment period. Such provisions are included in those publications because they are valid, with varying limitations, in most jurisdictions [*see* Restatement (Second) of Agency, § 396; Restatement of Contracts, § 516; *see also* *Advanced Bionics Corp. v. Medtronic, Inc. (2003) 29 Cal. 4th 697, 706-708, 128 Cal. Rptr. 2d 172, 59 P.3d 231* (that noncompetition provision might be void in California ordinarily does not justify California court in issuing temporary restraining order against employer's action to enforce provision in another state's court); *Biosense Webster, Inc. v. Superior Court (2006) 135 Cal. App. 4th 827, 835-839, 37 Cal. Rptr. 3d 759* (rule of *Advanced Bionics* applies whether employer's out-of-state enforcement action is pending or prospective, in state court or in federal court)]. However, it is dangerous for the California attorney to use this type of provision without first carefully confirming that the precise language in question is valid under California law. Terminating an employee for refusing to sign an employment agreement that contains an illegal noncompetition covenant is a violation of public policy even if the agreement includes a severability provision that would preserve the enforceability of the remainder of the agreement [*D'Sa v. Playhut, Inc. (2000) 85 Cal. App. 4th 927, 929, 931-935, 102 Cal. Rptr. 2d 495* ; *see* discussion in [c][iv], *above*].

A related problem involves the use of standardized forms by nationwide employers with employees in California. In one case, although a noncompetition provision that both parties agreed was void in California was held severable in a federal court action, the attorneys for the former employee contended that the employer had included that provision in its contracts with California employees with the deliberate purpose of misleading them as to their legal rights and coercing them to refrain from competing later with the employer; therefore, they argued, the employer was guilty of "unclean hands" and should be barred from any equitable relief. However, because the same form of employment contract was used by the employer throughout its nationwide operation, the employer never sought to enforce the provision in California, and the employees involved were aware of the unenforceability of the provision in California and were not deterred by it, the court found that the employer was not guilty of "unclean hands" [*see* *Winston Research Corp. v. Minnesota Min. & Mfg. Co. (9th Cir. 1965) 350 F.2d 134, 142]* . Nevertheless, if the case had involved a California corporation operating only in California, the court potentially could have found the employer guilty of "unclean hands" and therefore not entitled to equitable relief.

A California Court of Appeal has held that California's public policy against covenants not to compete made a restrictive covenant against an employee residing in Maryland unenforceable, even though both the former employer and the former employee were not California residents. It was sufficient in that case that the former employee was recruited to work for a California corporation [*Application Group, Inc. v. Hunter Group, Inc. (1998) 61 Cal. App. 4th 881, 906-908, 72 Cal. Rptr. 2d 73]* .

[2] FORM

Provision Prohibiting Unfair Competition After Termination of Employment

Unfair Competition After Termination of Employment

Employee acknowledges and agrees that the sale or unauthorized use or disclosure of any of Employer's trade secrets [as described herein] obtained by Employee during Employee's employment with Employer, including information concerning _____ [*specify any particular matter to be covered, e.g.,* Employer's current products and any future or proposed products or services, the facts that those products or services are planned, under consideration, or in production, as well as any descriptions of the features of those products or services] constitute unfair competition. Employee promises and agrees not to engage in any unfair competition with Employer either during the term of this agreement or at any time thereafter.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionNoncompetition & Nondisclosure Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
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J. Obligations of Employee
1. Noncompetition With Employer

28-85 California Legal Forms--Transaction Guide § 85.472

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.472 Provision Prohibiting Solicitation of Customers or Fellow Employees After Termination of Employment

[1] Comment

[a] Use of Form

This form is a provision prohibiting an employee from soliciting business from the employer's customers or employees for a limited period after termination of employment. It is designed for use in employment contracts for sales or other personnel who have access to information concerning the employer's customers and who are likely to engage in competitive activities after the termination of employment. The use of this form creates an extraordinary duty on the part of the employee not to misappropriate or misuse the employer's customer data [*see Southern California Disinfecting Co. v. Lomkin (1960) 183 Cal. App. 2d 431, 446, 7 Cal. Rptr. 43* (failure to return customer list as required by contract called "trade secret larceny" and violation of extraordinary duty imposed by contract)].

For a provision having more general application in controlling the misuse or misappropriation of an employer's trade secret after termination of employment, see *§ 85.471*.

[b] Drafting Considerations

In light of the generally restrictive interpretation of *Bus. & Prof. Code § 16600* [*see § 85.471[1]* and *[c]*], *below*, careful consideration should be given to the use of this form. It should not be used in every employment contract because it is a partial restraint on the right of the employee to engage in a lawful profession, trade, or business and will be enforced by the courts only under limited circumstances [*see* [c][ii], *below*]. However, this form is patterned after a contract provision that has specifically been held valid and enforceable in two customer list cases, Gordon v. Wasserman (1957) [*153 Cal. App. 2d 328, 314 P.2d 759]* and Gordon v. Landau (1958) [*49 Cal. 2d 690, 321 P.2d 456* (one-year restraint held valid and enforceable)].

The form contains a blank for insertion of the length of the period that the employee is to refrain from soliciting the employer's customers. This period should not be any longer than is reasonably required to protect the employer's interests. A one-year restraint was upheld without discussion in the two cases cited above.

For an optional provision that may be added regarding ownership of records relating to customers, see *§ 85.442*.

[c] Restraining Solicitation of Former Employer's Customers

[i] Customer Lists Constitute Trade Secrets

When a customer list is accompanied by confidential information regarding the customers on the list, it is considered a trade secret [*see Reid v. Mass. Co. (1957) 155 Cal. App. 2d 293, 318 P.2d 54]* . The customer list of a telephone answering service [*Bus. & Prof. Code § 16606*] or an employment agency [*see Bus. & Prof. Code § 16607*] is a trade secret.

[ii] Protection of Customer List From Unfair Competition

Contract provisions that restrain any person from engaging in a lawful profession, trade, or business are void [*Bus. & Prof. Code § 16600*; *see Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 945-950, 955, 81 Cal. Rptr. 3d 282, 288-292, 296, 189 P.3d 285* (noncompetition agreement is invalid under *Bus. & Prof. Code § 16600*, even if narrowly drawn, unless it falls within one of statutory exceptions provided by *Bus. & Prof. Code §§ 16601, 16602, 16602.5*); *D'Sa v. Playhut, Inc. (2000) 85 Cal. App. 4th 927, 929, 931-935, 102 Cal. Rptr. 2d 495* (discharging employee for refusing to sign employment agreement containing provision that violates *Bus. & Prof. Code § 16600* is violation of public policy)]. However, the California courts recognize a "trade secret exception" to the general rule, under which the courts will enforce a covenant not to compete to the extent necessary to protect an employer's trade secrets and confidential information [*Whyte v. Schlage Lock Co. (2002) 101 Cal. App. 4th 1443, 1462, 125 Cal. Rptr. 2d 277* ; *Muggill v. Reuben H. Donnelley Corp. (1965) 62 Cal. 2d 239, 242, 42 Cal. Rptr. 107, 398 P.2d 147* ; *Gordon v. Landau (1958) 49 Cal. 2d 690, 694, 321 P.2d 456* ; *see Edwards v. Arthur Andersen LLP (2008) 44 Cal. 4th 937, 946 n.4, 81 Cal. Rptr. 3d 282, 289 n.4, 189 P.3d 285* ("[W]e do not here address the applicability of the so-called trade secret exception to [*Bus. & Prof. Code § 16600*], as Edwards does not dispute that portion of his agreement or contend that the provision of the noncompetition agreement prohibiting him from recruiting Andersen's employees violated [*Bus. & Prof. Code § 16600*].")]. Although a former employee may compete with a former employer, that competition must be fairly and legally conducted [*Continental Car-Na-Var Corp. v. Moseley (1944) 24 Cal. 2d 104, 110, 148 P.2d 9* ; *Cal. Francisco Inv. Corp. v. Vrionis (1971) 14 Cal. App. 3d 318, 323, 92 Cal. Rptr. 201]* . Thus, a former employee's use of confidential information obtained from the former employer is viewed as unfair competition [*Rigging Int'l Maintenance Co. v. Gwin (1982) 128 Cal. App. 3d 594, 606, 180 Cal. Rptr. 451* ; *Greenly v. Cooper (1978) 77 Cal. App. 3d 382, 391, 392, 143 Cal. Rptr. 514]* .

Agreements of the type set forth in this form have been held valid and enforceable in the face of arguments that they restrain the former employee from engaging in a trade or business when the restriction is carefully limited so that it does not prevent the former employee from engaging in the same type of business or any other business. The contract restriction is held to protect the customer list as a valuable trade secret on which the existence and survival of the business depends [*see Gordon v. Wasserman (1957) 153 Cal. App. 2d 328, 330, 314 P.2d 759* ; *Gordon v. Landau (1958) 49 Cal. 2d 690, 694, 321 P.2d 456]* ; for additional discussion of the "trade secret exception" to the general rule of *Bus. & Prof. Code § 16600*, see *§ 85.471[1][c][iii]*.

[iii] Informing Former Customers of Change of Employment

Although there are remedies for solicitation of a former employer's customers [*see* [ii], *above*], it is possible for the former employee to receive business from those customers without any solicitation on his or her part. Merely informing those customers of a change of employment, and nothing more, or discussing business with them on their invitation

does not constitute solicitation by the former employee and hence will not be enjoined [*Aetna Bldg. Maintenance Co. v. West (1952) 39 Cal. 2d 198, 204, 246 P.2d 11]* .

[2] FORM

Provision Prohibiting Solicitation of Customers or Fellow Employees After Termination of Employment

Soliciting Customers and Employees After Termination of Employment

(a) Employee acknowledges and agrees that the names and addresses of Employer's customers constitute trade secrets of Employer and that the sale of unauthorized use or disclosure of any of Employer's trade secrets obtained by Employee during Employee's employment with Employer constitute unfair competition. Employee further acknowledges that Employer's employees are a valuable asset in the operation of Employer's business. Employee promises and agrees not to engage in any unfair competition with Employer.

(b) For a period of _____ [*e.g.*, six months *or* one year] immediately following the termination of Employee's employment with Employer, Employee shall not directly or indirectly make known to any person, firm, or corporation the names or addresses of any of the customers of Employer or any other information pertaining to them, or call on, solicit, take away, or attempt to call on, solicit, or take away any of the customers of Employer on whom Employee called or with whom Employee became acquainted during Employee's employment with Employer, either for Employee or for any other person, firm, or corporation.

(c) For a period of _____ [*e.g.*, six months *or* one year] immediately following the termination of Employee's employment with Employer, Employee shall not directly or indirectly solicit, hire, recruit, or encourage any other employee of Employer to leave the Employer or work for any person or entity that is in competition with Employer.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDischargesLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionNoncompetition & Nondisclosure Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
J. Obligations of Employee
1. Noncompetition With Employer

28-85 California Legal Forms--Transaction Guide § 85.473

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.473 Additional Provision for Liquidated Damages for Breach of Noncompetition Clause

[1] Comment

[a] Use of Form

This form is a liquidated damages provision designed for use when the parties to an employment contract desire to fix the amount to be paid by the employee to the employer in the event that the employee breaches the covenant not to compete. For a provision of this type relating to liquidated damages for breach of an employee's obligation to work for the employer, see *§ 85.540*.

[b] Validity of Liquidated Damages Provision

A liquidated damages provision in an employment contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made [*Civ. Code § 1671(b)*]. Therefore, the attorney should bear in mind that the amount specified in a liquid damages provision should bear some reasonable relationship to the actual damages likely to be suffered by the employer if the employee breaches the contract. Use of an unreasonably high figure to deter or penalize the employee is likely to render the provision wholly unenforceable.

For a complete discussion of liquidated damages provisions in contracts generally, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[c] Disadvantages of Liquidated Damages Provision

Although a liquidated damages provision may seem attractive as a deterrent to the employee, it can have undesirable effects on the employer. Because the amount specified as damages must be reasonable in order to be enforceable [*Civ.*

Code § 1671(b)], the employer cannot arbitrarily use a high figure to protect itself. On the other hand, if the figure that is used is reasonable at the time the contract is made, but becomes unreasonably low by reason of subsequent events, it will still be enforceable against the employer. In such a case, the employer may find its recovery limited to considerably less than it would have been entitled to had it simply not included the liquidated damages clause.

[2] FORM

Additional Provision for Liquidated Damages for Breach of Noncompetition Clause

Liquidated Damages

In the event that Employee breaches the foregoing obligation not to compete, Employee shall pay to Employer the sum of $[*specify amount*] per month as liquidated damages for the period during which Employee continues to be in breach of the forgoing obligation not to compete. Employer and Employee agree that the amount stated herein as liquidated damages is reasonable under the circumstances existing at the time of the execution of this agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesLiquidated DamagesLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionNoncompetition & Nondisclosure Agreements

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28-85 California Legal Forms--Transaction Guide §§ 85.474-85.479

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.474[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
J. Obligations of Employee
2. Protection of Employer Against Losses Caused by Employee

28-85 California Legal Forms--Transaction Guide § 85.480

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.480 Provision Indemnifying Employer From Loss Caused by Employee's Negligence or Misconduct

[1] Comment

[a] Use of Form

This form provides that the employee will indemnify the employer for loss resulting from an employee's negligence or misconduct. In addition to making the employee responsible for indemnifying the employer, this provision serves to place the employee on notice of the fact that the employer may be liable to third parties for damages suffered by them as a result of the employee's negligence or misconduct. For a general explanation of indemnity clauses, see Ch. 79, *Suretyship, Guaranty, and Indemnity* .

Alternate provisions requiring a surety bond are *set forth in § 85.481*. For an alternative provision that requires the employee to post a security deposit to protect the employer against losses caused by an employee, see *§ 85.482*. For a provision requiring the employee to insure his or her own automobile if that vehicle is to be used in the employer's service, *see Section 7.02* of the *form in § 85.220*.

[b] Liability of Employee to Employer

Employees are required to use ordinary care and diligence during their term of employment [*Lab. Code § 2854*]. An employee who causes damage through culpable negligence is liable to the employer [*Lab. Code § 2865*]. An employee is bound to exercise a reasonable degree of skill in the absence of the employer's knowledge, at the time of employment, that the employee lacked skill [*Lab. Code § 2858*]; and in any case, the employee must exercise what skill he or she has to the extent required on the job [*Lab. Code § 2859*]. However, a contract provision making an employee liable for "all losses" that occur as a result of the employee's employment can be interpreted as making the employee a guarantor of the success of the business and would be illegal; therefore, it should not be used [*see Liberio v. Vidal (1966) 240 Cal. App. 2d 273, 276, 49 Cal. Rptr. 520* ; *see also Lab. Code §§ 2802, 2804*].

[c] Liability of Employer for Torts of Employee

While an employee may be liable to the employer for his or her negligence [*Lab. Code § 2865*], an employer is liable to third parties for the torts of its employee committed while acting within the scope of his or her employment under the doctrine of respondeat superior [*Civ. Code § 2338*]. The principal justification for the application of the doctrine of respondeat superior in any case is the fact that the employer may spread the risk through insurance and carry the cost of the insurance as part of its costs of doing business [*Johnston v. Long (1947) 30 Cal. 2d 54, 64, 181 P.2d 645]* . Consequently, the employer should assure that its business is adequately insured.

[2] FORM

Provision Indemnifying Employer From Loss Caused by Employee's Negligence or Misconduct

Indemnification by Employee

Employee shall indemnify and save Employer harmless from all liability from loss, damage, or injury to persons or property resulting from the negligence or misconduct of Employee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployer LiabilityContract LiabilityGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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J. Obligations of Employee
2. Protection of Employer Against Losses Caused by Employee

28-85 California Legal Forms--Transaction Guide § 85.481

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.481 Provision That Employee Be Covered by Surety Bond

[1] Comment--Use of Form

This form contains two alternate provisions requiring an employee to qualify for a surety bond. The first alternative requires the employee to qualify for the bond and provides that the employer will pay for the bond premiums. The second alternative provides that the employee will both furnish the bond and pay the bond premiums. The form continues with a provision that failure of the employee to qualify for the bond within a specified period will result in termination of the employment contract.

This form should be used when an employee will handle substantial sums of money that belong either to the employer or to customers of the employer for the protection of the employer from any loss caused by wrongful acts of the employee.

For discussion of the liability of an employee, see *§ 85.480[1][b]*.

[2] FORM

Provision That Employee Be Covered by Surety Bond

Qualification for Surety Bond

[*First alternative; use to require employee to qualify for bond and employer to pay premiums:*]

(a) Employee agrees that_____[he *or* she] will furnish all information and take any other steps necessary to enable Employer to obtain a fidelity bond conditioned on the rendering of a true account by Employee of

all moneys, goods, or other property that may come into the custody, charge, or possession of Employee during the term of_____[his *or* her] employment. The surety company issuing the bond and the amount of the bond shall be acceptable to and chosen by Employer in its sole discretion. All premiums on the bond shall be paid by Employer.

[*OR*]

[*Second alternative; use to provide that employee will both furnish bond and pay bond premiums.*]

(a) Within [*e.g.,* 30 days] from the date of this agreement, Employee shall furnish to Employer a fidelity bond conditioned on the rendering of a true account by Employee of all moneys, goods or other property that may come into the custody, charge, or possession of Employee during the term of_____[his *or* her] employment. The surety company issuing the bond and the terms and amount of the bond must be acceptable to Employer in the sole discretion of Employer. All premiums on the bond shall be paid by Employee.

[*Continue with the following:*]

(b) Failure by Employee to qualify for such a bond within [*e.g.,* 30 days] from the date of this agreement will result in immediate termination of this employment contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployer LiabilityThird Party InsurersLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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2. Protection of Employer Against Losses Caused by Employee

28-85 California Legal Forms--Transaction Guide § 85.482

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.482 Provision for Deposit as Security for Performance of Agreement by Employee

[1] Comment

[a] Use of Form

This form is a provision requiring that the employee deposit cash with the employer as security for the faithful performance of his or her duties. This type of provision is generally used only where the employee will be collecting relatively small sums directly from the customers of the employer, as in the case of a salesperson/driver for a bakery. If the sums to be collected by the employee are substantial, it would be unrealistic to require the employee to deposit an amount sufficient to adequately protect the employer. In that situation, the employer can be protected by use of a surety bond [*see § 85.481*].

[b] Applicability of Security Deposit Provision

An employment contract provision that requires security for losses suffered as a result of any breach or violation of the contract can be enforced. However, a provision making an employee liable for "all losses" that occur as a result of the employee's employment can be interpreted as making the employee a guarantor of the success of the business, and would be illegal. Therefore, that type of terminology should not be used [*see Liberio v. Vidal (1966) 240 Cal. App. 2d 273, 276, 49 Cal. Rptr. 520* ; *see also Lab. Code §§ 2802, 2804*].

[2] FORM

Provision for Deposit as Security for Performance of Agreement by Employee

Security Deposit

(a) Employee has deposited with Employer as security for [the performance *or* losses suffered as a result of any breach or violation] of this agreement the sum of $[*e.g.*, $100], the receipt of which is hereby acknowledged by Employer. [*Optional:* Employee shall deposit with Employer the additional sum of $_____ (*e.g.*, $10) each week (*or* each month) until the total deposit is $_____ (*e.g.*, $300)].

(b) This deposit shall be returned to Employee, with interest thereon at the rate of _____ percent per annum, within one month after the termination of_____[his *or* her] employment if Employee has faithfully performed all of_____[his *or* her] duties under this agreement.

(c) In case of any violation of Employee's duties, this deposit shall be used to the extent necessary to indemnify Employer or the customers of Employer for any loss caused by Employee's wrongful acts, and any remaining balance, with interest thereon at the rate stated herein, shall be returned to Employee.

(d) The provision for this deposit shall not limit any rights or remedies otherwise accruing to Employer in the event of a breach of this agreement by Employee.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployer LiabilityContract LiabilityGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide §§ 85.483-85.489

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[Reserved]

§§ 85.483[Reserved]

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3. Other Obligations of Employee

28-85 California Legal Forms--Transaction Guide § 85.490

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.490 Provision for Regular Physical Examinations of Employee

[1] Comment

[a] Use of Form

This form is a provision requiring the employee to submit to regular physical examinations. The intent of this type of provision is to enable both parties to detect problems sufficiently early so that they can be corrected and thus benefit the employer as well as the employee. This type of provision is primarily for use in agreements for the employment of top level executives and persons employed to operate equipment that entails high liability to the employer if death or disability were to occur during its operation (airplane pilots, for example). However, it can be included in any type of employment agreement.

[b] Payment of Examination Cost

This form provides that the employer will pay all examination costs. The employer rather than the employee is required by law to pay the cost of any pre-employment physical examination required as a condition of employment [*Lab. Code § 222.5*]. The same applies if a physical examination is required for the issuance of a driver's license and the license is required as a condition of employment [*Lab. Code § 231*].

[c] Restrictions on Employer's Right to Require Medical and Physical Examinations

[i] Constitutional Privacy Issues

As in the case of any other information-gathering procedure, an employer's requirement that an applicant or employee submit to a medical or physical examination as a condition of hiring or continued employment raises potential issues under the right to privacy contained in *California Constitution, Article I, Section 1*. In *Hill v. National Collegiate*

Athletic Assn., the California Supreme Court adopted a "balancing test" approach for analyzing most state constitutional privacy claims [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 37-38, 26 Cal. Rptr. 2d 834, 865 P.2d 633]* . This standard is less stringent than the "compelling interest" standard, which under *Hill* only applies in limited circumstances, such as those that implicate obvious government action impacting freedom of expression [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 34, 26 Cal. Rptr. 2d 834, 865 P.2d 633]* . The precise scope of each of these standards is not entirely settled, nor is the extent of an employee's privacy rights in a workplace setting. The result may depend on the public interest, the employer's special interests, and the employees' reasonable expectations of privacy in a particular employment setting [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 55-56* & n.20, *26 Cal. Rptr. 2d 834, 865 P.2d 633]* .

However, it is clear that a job applicant or employee claiming that an invasion of California constitutional privacy rights by reason of a medical examination must show (1) a legally protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and (3) conduct by the employer that amounts to a serious invasion of that interest. If these threshold elements are established, the court must then conduct a balancing test, weighing the employer's justification for the conduct in question against the intrusion on the applicant's privacy resulting from the conduct [*Leonel v. American Airlines, Inc. (9th Cir. 2005) 400 F.3d 702, 712, 714* (citing *Loder v. City of Glendale (1997) 14 Cal. 4th 846, 893, 59 Cal. Rptr. 2d 696, 927 P.2d 1200, 1230* ; *Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 39-40, 26 Cal. Rptr. 2d 834, 865 P.2d 633, 657)]* .

The Court in *Hill* applied the balancing test to determine that collegiate athletes' privacy interest in the confidentiality of medical treatment and information was not violated by a private athletic association's drug-testing program because the types of medical questions answered were routine in the athletic context, and the medical procedures had sufficient safeguards to protect the confidentiality of medical information furnished by the athletes [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 52-54, 26 Cal. Rptr. 2d 834, 865 P.2d 633]* . In *Pettus v. Cole*, the court of appeal applied the *Hill* analysis to a case involving an employer who invaded an employee's autonomy privacy by requiring that the employee enter a 30-day inpatient rehabilitation program as a condition of continued employment [*see Pettus v. Cole (1996) 57 Cal. Rptr. 2d 46]* . This required treatment was deemed an invasion of privacy because the employer offered no justification for that particular requirement, and it was clear from the record that there were far less intrusive alternatives [*Pettus v. Cole (1996) 57 Cal. Rptr. 2d 46]* .

Further, several pre-*Hill* court of appeal decisions have held, in a number of different contexts, that the right to privacy under the California Constitution protects the information contained in an individual's medical records in the absence of a compelling interest justifying the disclosure of that information [*see Cutter v. Brownbridge (1986) 183 Cal. App. 3d 836, 842-843, 228 Cal. Rptr. 545* ; *Board of Medical Quality Assurance v. Hazel Hawkins Memorial Hospital (1982) 135 Cal. App. 3d 561, 565, 185 Cal. Rptr. 405* ; *Jones v. Superior Court (1981) 119 Cal. App. 3d 534, 548-550, 174 Cal. Rptr. 148* ; *Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal. App. 3d 669, 679, 156 Cal. Rptr. 55]* . The *Hill* court offered no analysis on the continuing vitality of these cases.

Drug testing in the context of pre-employment medical examinations does not violate the California constitutional right to privacy, nor does it violate the *Fourth Amendment* [*Ross v. RagingWire Telecomms., Inc. (2008) 42 Cal. 4th 920, 927, 70 Cal. Rptr. 3d 382, 388, 174 P.3d 200* ; *Loder v. City of Glendale (1997) 14 Cal. 4th 846, 887-898, 59 Cal. Rptr. 2d 696, 927 P.2d 1200* ; *see Cal. Const. art. I, § 1*]. Equal employment opportunity laws impose some limitations on employer-required physical and mental examinations [*see* [iii], *below*].

Given the protected nature of the information revealed by a medical examination and the fact that the examination itself is, necessarily, physically intrusive, an employer arguably may be required to demonstrate a legitimate need for requiring such an examination [*see Norman-Bloodsaw v. Lawrence Berkeley Laboratory (9th Cir. 1998) 135 F.3d 1260, 1268-1271* (mere collection of sensitive medical and genetic information, such as syphilis, sickle-cell trait, or pregnancy, may be actionable violation of employee's constitutional right of privacy, even if employer makes no use of this information)]. In some instances, an employer may be able to demonstrate safety or security concerns that outweigh

the employee's right to be free from physical examinations. In such a case the scope and manner of the examination should be limited so as to minimize the invasion of the employee's privacy and to address only the employer's legitimate concerns. For example, a court of appeal has held random drug testing to be constitutionally permissible for an employee in a safety-sensitive construction and maintenance job. In that case, the employer's interest in reducing the substantial and real risk of injury to the employee's coworkers outweighed the employee's interest in privacy [*Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 161-167, 84 Cal. Rptr. 2d 775* (employee operated power tools and heavy equipment in close proximity to coworkers)]. In applying the *Hill* balancing test, the court noted that the employee's urine sample was taken at a medical clinic in a minimally intrusive manner, with no direct monitoring of the employee as he provided the sample, and that the employee's expectation of privacy regarding the substances he ingested had been diminished by the employer's six-month advance notice before testing began [*Smith v. Fresno Irrigation Dist. (1999) 72 Cal. App. 4th 147, 161-163, 84 Cal. Rptr. 2d 775]* .

Similarly, the drawing and testing of blood implicate a legally protected privacy interest. A job applicant who consents to preemployment blood testing has a reasonable expectation that the employer will not retrieve private medical information by performing blood tests outside the ordinary or accepted medical practice regarding general or preemployment medical examinations. An infringement of that reasonable expectation ordinarily would be a serious invasion of the applicant's privacy interest. Whether the testing violates the applicant's right to privacy usually depends on the reasonableness of the applicant's expectations, which requires a court to consider such matters as the customs, practices, and physical setting surrounding the blood tests, with particular emphasis on any notice provided or consent obtained [*Leonel v. American Airlines, Inc. (9th Cir. 2005) 400 F.3d 702, 712-713]* .

[ii] Contractual Waiver of Constitutional Privacy Rights

Even if a required medical or physical examination otherwise would be constitutionally prohibited, such examinations arguably may be permitted in cases in which the applicant or employee has voluntarily waived his or her privacy rights, such as in an employment contract.

The California Supreme Court has held that a *public* employer cannot require employees to waive their constitutional rights, including the right to privacy, as a condition of employment unless the public entity demonstrates a compelling interest justifying the waiver [*Long Beach City Employees Ass'n v. City of Long Beach (1986) 41 Cal. 3d 937, 951-952, 227 Cal. Rptr. 90, 719 P.2d 660* (privacy rights)]. Whether this rule applies to private employers has apparently never been addressed by any California appellate court. However, in the *Hill* case, the California Supreme Court drastically limited the continued application of the compelling interest standard [*Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 34-35, 26 Cal. Rptr. 2d 834, 865 P.2d 633* ; § 85.490[1][c][i]].

[iii] Equal Employment Opportunity Laws

Apart from the constitutional privacy issues discussed in *§ 85.490[1][c][i], above*, employer-required physical and medical examinations raise potential issues under equal employment opportunity laws, including the Rehabilitation Act of 1973 [*see 29 U.S.C. §§ 793, 794*], the Americans with Disabilities Act (ADA) [42 U.S.C. § 100 et seq.], and the Fair Employment and Housing Act (FEHA) [*Gov. Code § 12940*]. Both federal and state laws prohibit discrimination against employees and applicants based on physical or mental disability, as defined by those laws. Thus, any requirement that an employee "pass" a physical examination or respond to questions about his or her physical or medical condition must comply with the requirements of state and federal equal employment opportunity laws [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 862-866, 59 Cal. Rptr. 2d 696, 927 P.2d 1200* ; *see Norman-Bloodsaw v. Lawrence Berkeley Laboratory (9th Cir. 1998) 135 F.3d 1260, 1271-1273* (employer's requirement that only black and female applicants undergo certain preemployment medical testing not required for other applicants constitutes actionable discrimination under Title VII of Federal Civil Rights Act, *42 U.S.C. § 2000e et seq.*, even if test results are not used to deprive any applicant of job)]. For example, the FEHA provides generally that it is an unlawful employment practice for an employer to require any medical or psychological examination of an applicant, to make any medical or

psychological inquiry of an applicant, to make any inquiry whether an applicant has a mental disability or physical disability or medical condition, or to make any inquiry regarding the nature or severity of a physical disability, mental disability, or medical condition [*Gov. Code § 12940(e)(1)*; *see Gov. Code § 12940(f)* (employer may require *existing* employees to undergo job-related examinations that are consistent with business necessity)]. However, an employer may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation [*Gov. Code § 12940(e)(2)*; *see Gov. Code § 12940(n)*]. Moreover, an employer may require a medical or psychological examination or make a medical or psychological inquiry of a job applicant after an employment offer has been made but prior to the commencement of employment duties, provided that (1) the examination or inquiry is job-related and consistent with business necessity, and (2) all entering employees in the same job classification are subject to the same examination or inquiry [*Gov. Code § 12940(e)(3)*]. In any event, the FEHA specifically prohibits an employer from directly or indirectly subjecting an employee or job applicant to a test for the presence of any genetic characteristic [*Gov. Code § 12940(o)*]. For detailed coverage of the FEHA, see Ch. 1C, *Regulation of Employers* .

The ADA prohibits an employer with 15 or more employees from requiring a medical examination to determine the existence or extent of disabilities unless the examination is job-related and consistent with business necessity [*42 U.S.C. § 12112(d)*]. A physical examination is permitted only after an offer of employment has been made and only if all applicants in the same category are examined. The results of the examination may be used only to evaluate the applicant's ability to perform job-related functions [*see Norman-Bloodsaw v. Lawrence Berkeley Laboratory (9th Cir. 1998) 135 F.3d 1260, 1273* (ADA imposes no restriction on scope of preemployment medical exam, but only guarantees confidentiality and restricts use to which information may be put)]. The offer of employment may not be withdrawn on the basis of the examination if the applicant is capable of performing the job functions with reasonable accommodations [*42 U.S.C. § 12112(d)(3)*]. Medical information obtained in an examination must be kept in a separate, confidential file [*42 U.S.C. § 12112(d)*]. For detailed coverage of ADA, see Ch. 1C, *Regulation of Employers* .

Both FEHA and the ADA prohibit medical examinations and inquiries until after the employer has made an offer of employment [*see Gov. Code § 12940(e)(3)*; *42 U.S.C. § 12112(d)(3)*]. In effect, these provisions require an employer to complete its nonmedical investigation, including background checks, and make a conditional job offer before subjecting the job applicant to medical examinations and questioning. This mandated sequence serves in part to enable a job applicant to shield private medical information until he or she knows that, unless unable to meet medical requirements, he or she will be hired, and that if he or she is not hired, the true reason for the employer's decision will be transparent [*Leonel v. American Airlines, Inc. (9th Cir. 2005) 400 F.3d 702, 708-711]* .

An employer generally may take illegal drug use into consideration in making employment decisions [*Loder v. City of Glendale (1997) 14 Cal. 4th 846, 882-883, 59 Cal. Rptr. 2d 696, 927 P.2d 1200]* . The Compassionate Use Act of 1996 (Proposition 215) [*Health & Safety Code § 11362.5*] Compassionate Use Act does not require employers to accommodate medical marijuana use, and the Act does not establish a public policy against terminating employees who use marijuana for medical purposes. The Act does provide an exemption from criminal liability under two specific California statutes for a person who possesses or cultivates marijuana for medical purposes on the recommendation or approval of a physician [*Health & Safety Code § 11362.5(d)* (providing defense against prosecution under *Health & Safety Code §§ 11357, 11358* for person who possesses or cultivates marijuana for medical purposes on recommendation or approval of physician)]. However, marijuana possession remains illegal under federal law, even for medical use [*21 U.S.C. §§ 812, 844(a)*; *Gonzales v. Raich (2005) 545 U.S. 1, 26-29, 125 S. Ct. 2195, 162 L. Ed. 2d 1]* . Moreover, the Compassionate Use Act is limited in scope: it merely exempts medical users and their primary caregivers from criminal liability under two specified state statutes. Nothing in the Act's text or history indicates that the electorate intended the Act to articulate any policy concerning marijuana in the employment context, let alone a fundamental public policy requiring employers to accommodate marijuana use by employees [*Ross v. RagingWire Telecomms., Inc. (2008) 42 Cal. 4th 920, 931-933, 70 Cal. Rptr. 3d 382, 391-393, 174 P.3d 200]* .

[2] FORM

Provision for Regular Physical Examinations of Employee

Physical Examination

(a) Employee agrees to submit to a physical examination, prior to employment and annually thereafter [*or* at any time requested by Employer], by a physician selected by Employer.

(b) Employer shall pay all costs and fees related to all such physical examinations, and related tests, laboratory work, x-rays, and the like.

[*Optional:* (c) Failure to pass any such physical examination shall result in the termination of the services of Employee under this agreement _____ (immediately *or specify other time period*)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
J. Obligations of Employee
3. Other Obligations of Employee

28-85 California Legal Forms--Transaction Guide § 85.491

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.491 Provision for "Morality Clause"

[1] Comment

[a] Use of Form

This form is a provision intended to bind an employee to conduct that has due regard to public conventions and morals (*i.e.*, a so-called "morality clause"). Morality clauses can be included in employment contracts for persons who will meet the public on behalf of an employer.

[b] Validity of Morality Clause

Morality clauses in employment contracts are generally considered valid and binding [*Adams v. Southern Pacific Co. (1928) 204 Cal. 63, 67-68, 266 P. 541* ; *Twentieth Century-Fox Film Corp. v. Lardner (9th Cir. 1954) 216 F.2d 844, 850-851]* . Moreover, every employment contract includes an implied promise on the part of the employee to conduct himself or herself with such decency and propriety as not to injure the employer in its business [*Twentieth Century-Fox Film Corp. v. Lardner (9th Cir. 1954) 216 F.2d 844, 850-851* (citing Restatement of Agency § 380)]. Thus, "immoral" conduct by an employee in his or her relations with third persons will justify discharge of the employee even if the employment contract does not contain a morality clause, provided that the conduct in question affects the value of the performance that is due the employer [*Adams v. Southern Pacific Co. (1928) 204 Cal. 63, 67-68, 266 P. 541* ; Corbin on Contracts § 681].

[c] Effect of Constitutional Right to Privacy

The California constitution expressly guarantees Californians a right of privacy [*Cal. Const., art. I, § 1*]. This provision was enacted after the decisions discussed under [b], *above*. It does not prohibit all infringement of individual privacy, but does prohibit any intrusion that (1) infringes a legally protected privacy interest, (2) a reasonable expectation of

privacy, and (3) is a serious invasion of privacy, and that is not balanced by sufficient, countervailing interests [*see Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 39-40, 26 Cal. Rptr. 2d 834, 865 P.2d 633]* . The extent, if any, to which this provision limits the right of private employers to restrict the conduct of their employees remains uncertain. This form attempts to minimize any such impact by stating that the limitation is imposed to protect the employer's goodwill and thus its ability to maintain profitable operations.

[d] Effect of Equal Employment Law

Equal employment statutes limit the power of employers to discharge or discipline employees for certain matters that might be viewed as within the scope of a morality clause. For example, an employee generally may not be discharged because of his or her sexual orientation or perceived sexual orientation [*Gov. Code §§ 12926(m), 12940(a)*]. In addition, an employer of 25 or more employees must make reasonable accommodations for an employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program [*see Lab. Code § 1025*]. For detailed coverage of equal employment law, see Ch. 1C, *Regulation of Employers* .

[2] FORM

Provision for "Morality Clause"

Morality Clause

(a) Employee agrees to conduct [himself *or* herself] at all times with due regard to public conventions and morals. Employee agrees not to do or commit any act that will reasonably tend to degrade [him *or* her] or bring [Employee *or* Employer *or* Employer and Employee] into public hatred, contempt, or ridicule, or tend to shock or offend [society *or* the community in which Employee represents Employer], or to prejudice Employer or the [*type of industry, e.g.,* motion picture *or* banking] industry in general.

(b) Employee acknowledges and agrees that this provision is necessary to protect Employer's goodwill in the community in which Employee represents it and thus to protect the profitability of Employer's business.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.492

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.492 Provision for Searches of Employee's Person and Effects

[1] Comment

[a] Use of Form

This form is a provision under which the employee consents in advance to allow the employer to search his or her person and effects on the job. It limits the searches to those necessary to control theft or drug addiction.

[b] Right of Privacy

The California constitution expressly guarantees Californians a right of privacy [*Cal. Const., art. I, § 1*]. This provision does not prohibit all infringement of individual privacy, but does prohibit any intrusion that (1) infringes a legally protected privacy interest, (2) where there is a reasonable expectation of privacy, and (3) is a serious invasion of privacy, and that is not balanced by sufficient, countervailing interests [*see Hill v. National Collegiate Athletic Assn. (1994) 7 Cal. 4th 1, 39-40, 26 Cal. Rptr. 2d 834, 865 P.2d 633]* . It is not clear to what extent the provision set forth in this form may be considered a violation of the state constitutional right to privacy under this test, although the fact that the provision is limited to searches for evidence of illegal drugs or stolen property would seem likely to meet the requirement of a substantial countervailing interest.

For detailed discussion of the right of privacy, see Wilcox, California Employment Law, ch. 50 (Matthew Bender).

[2] FORM

Provision for Searches of Employee's Person and Effects

Searches

Employee agrees that_____[his *or* her] [*specify what is to be subject to search, e.g.*, person, clothing, packages, locker, desk, office, computer, computer files, e-mail, voicemail, and personal effects of any nature] may be searched at any time by Employer during the term of employment for the purpose of determining whether Employee is in possession of stolen property or illegal drugs. Employee waives any and all claims for any damages on account of such searches. A refusal by the Employee to submit to any such search shall result in immediate dismissal of Employee and termination of this contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.493

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.493 Provision Consenting to Drug and Alcohol Testing

[1] Comment--Use of Form

This form may be included in an employment agreement to obtain the employee's consent to be tested for drug and alcohol use in accordance with the employer's practices and procedures. For discussion of restrictions on an employer's right to require medical and physical examinations, including drug testing, see *§ 85.490[1][c]*.

This form may also be adapted to serve as a separate consent to drug and alcohol testing, to be used if there will be no written employment agreement.

[2] FORM

Provision Consenting to Drug and Alcohol Testing

Drug and Alcohol Testing

Employee consents to allow Employer to collect urine and blood specimens from Employee at any time requested by Employer, for testing for drugs, alcohol, and controlled substances in accordance with the then-existing policies and procedures of Employer. Employee also consents to the disclosure of the test results to appropriate management personnel of Employer. Employee waives any and all claims for any damages on account of such testing. Employee agrees that_____[his *or* her] refusal to provide the necessary urine and blood specimens shall be cause for immediate termination of Employee's employment.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawContract Conditions & ProvisionsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawPreemployment Practices

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28-85 California Legal Forms--Transaction Guide §§ 85.494-85.499

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[Reserved]

§§ 85.494[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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K. Termination of Employment
1. Termination for Cause

28-85 California Legal Forms--Transaction Guide § 85.500

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.500 Provision for Termination by Employer of Employment Contract for Breach or Neglect of Duty or Continued Incapacity to Perform

[1] Comment

[a] Use of Form

This form is a provision for the termination of an employment contract if the employer finds that the employee has willfully breached or habitually neglected his or her duties, or demonstrates continued incapacity to perform. This provision states all of the three grounds under which an employer may terminate an employment contract for a specified term [*Lab. Code § 2924*; *see* [c], *below*] and is therefore appropriate for inclusion in any such contract.

Any employment contract can be terminated for reasons other than the statutory grounds specified in this form [*see* [d], *below*]. If the contract is for a specified term employment, the parties may provide for termination prior to expiration for reasons other than those set forth in *Lab. Code § 2924* [*R. J. Cardinal Co. v. Ritchie (1963) 218 Cal. App. 2d 124, 143, 32 Cal. Rptr. 545]* . Unless termination prior to expiration is based on the grounds stated in the contract, however, the only statutory grounds for terminating prior to expiration are those set forth in *Lab. Code § 2924* [*Ehlers v. Langley & Michaels Co. (1925) 72 Cal. App. 214, 221, 237 P. 55]* .

For a provision specifying that the contract can be terminated by the employer for good cause only, and specifying that the good faith dissatisfaction of the employer constitutes "good cause," see *§ 85.502*. For a provision permitting an employee to terminate the contract for breach of the employer's obligations [*Lab. Code § 2925*], see *§ 85.501*.

[b] Drafting Considerations

When this form is included in the employment contract, the provision specifying the term of employment should clearly state that the term of employment is subject to prior termination. It is also important that the contract contain another

provision stating how the notice is to be given to the other party.

[c] Grounds for Termination of Contract for Specified Term

[i] Willful Breach of Duty

An employer can terminate a contract for a specified term if the employee commits a willful breach of duty [*Lab. Code § 2924*]. In addition to any duties imposed by the employment contract, an employee must use ordinary care and diligence in performing his or her job [*Lab. Code § 2854*], must comply substantially with all directions of the employer regarding the work (unless obedience is impossible, unlawful, or would impose new and unreasonable burdens upon the employee) [*Lab. Code § 2856*]. An employee must perform in conformance with the customs of the workplace, unless doing so would be impracticable or injurious to the employer's interests [*Lab. Code § 2857*]. An employee also has the duty to exercise a reasonable degree of skill (unless the employer had notice of his or her lack of skill before hiring the employee) [*Lab. Code § 2850*], the duty to use such skill as he or she possesses whenever the work requires it [*Lab. Code § 2859*], and the duty to give preference to the business of the employer whenever engaging in personal business similar to that given to the employee by the employer [*Lab. Code § 2863*].

A "willful" breach of duty is one that is intentional. The term does not imply any malice or wrong toward the other party [*May v. New York Motion Picture Corp. (1920) 45 Cal. App. 396, 404, 187 P. 785]* . To justify termination, however, the willful disobedience must be of a rule or order that is reasonable, since an employee is not bound to follow a rule or order that is impossible or unlawful, or would impose new and unreasonable burdens upon the employee [*see Mason v. Lyl Productions (1968) 69 Cal. 2d 79, 84, 69 Cal. Rptr. 769, 443 P.2d 193* ; *see also Lab. Code § 2856*].

"Willful breach of duty" is not involved when an employee uses his or her best efforts to serve the interests of the employer, even if those efforts are unsatisfactory [*Goudal v. C. B. DeMille Pictures Corp. (1931) 118 Cal. App. 407, 413, 5 P.2d 432]* . Reasonable defense of his or her performance, even if offensive to the employer, is not willful breach of duty [*Holtzendorff v. Housing Authority (1967) 250 Cal. App. 2d 596, 609-610, 614-615, 58 Cal. Rptr. 886]* . The term does include falsification of company records [*Swaffield v. Universal Ecsco Corp. (1969) 271 Cal. App. 2d 147, 167-168, 76 Cal. Rptr. 680]* . It also includes taking kickbacks [*Sears, Roebuck & Co. v. Blade (1956) 139 Cal. App. 2d 580, 590, 294 P.2d 140* (employer's suit)].

[ii] Habitual Neglect of Duty

An employer can terminate a contract for a specified term if the employee habitually neglects his or her duty [*Lab. Code § 2924*]. For a listing of an employee's duties, see [i], *above*.

The law requires an employee to exercise reasonable care and diligence and reasonable skill or such skill has he or she possesses in performing his or her duties [*Lab. Code §§ 2854, 2857-2859*]. "Reasonable care" is that degree of care that a reasonably prudent person would exercise if he or she were the employee [*Dahl-Beck Electric Co. v. Rogge (1969) 275 Cal. App. 2d 893, 906-907, 80 Cal. Rptr. 440]* . The failure to exercise such care, that is, the neglect of duty, must be "habitual" to justify premature termination, if it does not otherwise constitute willful breach of duty [*Lab. Code § 2924*].

[iii] Continued Incapacity to Perform

An employer generally can terminate a contract for a specified term if the employee demonstrates continued incapacity to perform [*Lab. Code § 2924*]. A disability that is only temporarily prevents an employee from performing his or her duties does not justify termination under this provision [*Rench v. Watsonville Meat Co. (1956) 138 Cal. App. 2d 482, 488, 292 P.2d 85]* . Moreover, the employer may have an obligation under the Americans with Disabilities Act (ADA) [*42 U.S.C. § 12001 et seq.*] and the California Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900 et seq.*] to make reasonable accommodations for an employee who has a disability covered under those laws [*see 42 U.S.C. §*

12102; *Gov. Code § 12926(i), (k)*]. If the employee can, with reasonable accommodation, perform the essential functions of his or her job, the employer must provide the accommodation unless doing so would cause an undue hardship to the employer's operation [*42 U.S.C. § 12112(a), (b)(5)*; *Gov. Code § 12940(a)(1), (m)*; *see Green v. State (Aug. 23, 2007) 42 Cal. 4th 254, 64 Cal. Rptr. 3d 390, 165 P.3d 118, 2007 Cal. LEXIS 8910* (employee has burden of establishing his or her ability, with reasonable accommodation, to perform essential functions)]. This form includes a provision reflecting that obligation [*see also § 85.264*]. For detailed coverage of employers' obligations to make reasonable accommodations for disabled employees under the ADA and FEHA, see California Forms of Pleading and Practice, Ch. 115 (Matthew Bender), and Wilcox, California Employment Law, Ch. 41 (Matthew Bender).

[d] Other Grounds for Termination of Employment Contracts

[i] Operation of Law

The Labor Code specifies four types of events that automatically terminate any employment contract. These are expiration of the term of employment specified in the contract, death of the employee, legal incapacity of the employee to act as an employee [*Lab. Code § 2920(a), (c), (d)*], and extinction of the subject of the contract [*Lab. Code § 2920(b)*]. For provisions stating specific types of conditions that constitute extinction of the subject of the contract, see *§§ 85.520-85.523*.

[ii] Employer's Death or Legal Incapacity

If the power of the employee is not coupled with an interest in its subject, any employment contract is terminated by notice to the employee of the employer's death or legal incapacity to contract [*Lab. Code § 2921*]. The ordinary employer-employee relationship is created for the benefit of the employer. The power of the employee is coupled with an interest in its subject only if the employer's power is created for the benefit of the employee or of a third person to protect some right or title, or to secure some performance. A power coupled with an interest is referred to in the Restatement of Agency as a "power given as security" [Restatement (Second) of Agency § 138]. A power coupled with an interest will occur only very rarely in an employment relationship.

[iii] Breach of Employer's Obligations to Employee

An employment contract for a specified term is subject to termination by the employee at any time the employer commits a willful or permanent breach of its obligations to the employee [*Lab. Code § 2925*]. For a provision specifying these grounds as a basis for termination of a contract for a specified term by the employee, see *§ 85.501*.

[iv] Dissolution of Partnership

On the expiration of 90 days after a partner's dissociation by death, the appointment of a guardian or conservator for the partner, or a judicial determination that the partner has otherwise become unable to perform the partner's duties under the partnership agreement, the partnership is dissolved unless, before that time, the majority in interest of the partners [*see Corp. Code § 16602(b)(2)* (calculating majority in interest)] agree to continue the partnership [*Corp. Code § 16801(2)(A)*; *see* 1996 Stats. ch. 1003 § 2; *see also* Ch. 15, *General Partnerships*].

The dissolution of a partnership has the effect of terminating a contract of employment between the partnership and an employee [*Louis v. Elfelt (1891) 89 Cal. 547, 551, 26 P. 1095]* .

[2] FORM

Provision for Termination by Employer of Employment Contract for Breach or Neglect of Duty or Continued Incapacity to Perform

Termination for Breach, Neglect, or Incapacity

If Employee willfully breaches or habitually neglects the duties that Employee is required to perform under the terms of this agreement, or demonstrates continued incapacity to perform those duties [after a period of _____ (*specify number*) _____ (days *or* months *or* years)], Employer may at its option terminate this agreement by giving written notice of termination to Employee without prejudice to any other remedy to which Employer may be entitled either at law, in equity, or under this agreement. However, Employer shall not terminate this agreement if Employee's disability is covered under the Americans With Disabilities Act or the California Fair Employment and Housing Act and reasonable accommodations can be made to permit Employee to continue working without imposing an undue hardship on the operation of Employer's business.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDischargesLabor & Employment LawWrongful TerminationBreach of ContractGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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K. Termination of Employment
1. Termination for Cause

28-85 California Legal Forms--Transaction Guide § 85.501

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.501 Provision for Termination on Statutory Grounds

[1] Comment

[a] Use of Form

This form is a provision that can be used to state all of the statutory grounds for termination of an employment contract as the grounds on which the contract can be terminated. It incorporates the grounds *set forth in § 85.500* (willful breach or habitual neglect of duty or continued incapacity to perform) as well as the other grounds discussed in the Comment to that form.

Since a contract that has no specified term (a "specified term" is a period greater than one month [*Lab. Code § 2922*]) can be terminated at the will of either party on notice to the other [*Lab. Code § 2922*], this provision is appropriate for inclusion in contracts at will. Any employment contract can be terminated for reasons other than the statutory grounds set forth in this form [*R. J. Cardinal Co. v. Ritchie (1963) 218 Cal. App. 2d 124, 143, 32 Cal. Rptr. 545]* .

[b] Drafting Considerations

One of the statutory grounds for termination of an employment contract is "extinction of its subject" [*Lab. Code § 2920(b)*]. This form substitutes the phrase "the occurrence of circumstances that make it impossible or impracticable for the business of the Employer to be continued" to avoid the ambiguity of the statutory phrase. For forms that provide for termination of an employment contract for specific types of extinction of the subject matter of the contract, see *§§ 85.520-85.523*.

The Labor Code also provides that an employment contract can be terminated by notice to the employee of the death of the employer or the loss by the employer of legal capacity to contract if the power of the employee is not coupled with an interest in its subject [*Lab. Code § 2921*]. This form does not limit termination for these reasons only to those

contracts in which the power of the employee is coupled with an interest, because in virtually every employment contract, the power of the employee is not coupled with an interest in its subject [*see § 85.500[1]*].

[2] FORM

Provision for Termination on Statutory Grounds

Grounds for Termination

This agreement shall terminate immediately on the occurrence of any one of the following events:

(1) The occurrence of circumstances that make it impossible or impracticable for the business of Employer to be continued.

(2) The death of Employee.

(3) The loss by Employee of legal capacity.

(4) The loss by Employer of legal capacity to contract.

(5) The willful breach of duty by Employee in the course of_____[his *or* her] employment, unless waived by Employer.

(6) The habitual neglect by Employee of_____[his *or* her] employment duties, unless waived by Employer.

(7) The continued incapacity on the part of Employee to perform_____[his *or* her] essential job duties, unless waived by Employer.

(8) The willful or permanent breach of the obligations of Employer to Employee under this agreement, unless waived by Employee.

(9) The death or dissolution of Employer [*or* of any partner in the business operated by Employer].

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDischarges

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28-85 California Legal Forms--Transaction Guide § 85.502

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.502 Provision for Termination of Employment Upon Good-Faith Dissatisfaction of Employer

[1] Comment

[a] Use of Form

This form provides for termination of an employment contract upon the good faith dissatisfaction of the employer with the employee's performance of his or duties. The grounds for termination specified in this form differ from the statutory grounds (willful breach or habitual neglect of duty or continued incapacity) stated in § 85.500 in that this form is broader.

[b] Use of Grounds Other Than Statutory Grounds for Termination

An employer may use contract provisions for termination of an employment contract for a specified term that differ from those specified by statute [*see Pecarovich v. Becker (1952) 113 Cal. App. 2d 309, 317-318, 248 P.2d 123* ; *R.J. Cardinal v. Ritchie (1963) 218 Cal. App. 2d 124, 143, 32 Cal. Rptr. 545]* . A contract for employment at will is terminable at the will of either party [*Lab. Code § 2922*] without any particular grounds being necessary as a prerequisite to the right to terminate [*but see* [c], *below*].

[c] Employment Terminable Upon Employer's Dissatisfaction With Performance

A provision that an employment contract is terminable when the employer decides that the employee's services are unsatisfactory is subject to the condition the employer's position must be a good faith dissatisfaction with the employee's performance. This rule applies regardless of whether a reasonable person would have been dissatisfied. The good faith determination of the employer that it is dissatisfied is conclusive on the employee [*Tiffany v. Pacific Sewer Pipe Co. (1919) 180 Cal. 700, 703, 182 P. 428* ; *Crillo v. Curtola (1949) 91 Cal. App. 2d 263, 271, 204 P.2d 941]* . A contract that requires one party to perform services to the satisfaction of the other party to the contract is not illusory

and is binding since the law imposes a duty of good faith on the employer [*see Mattei v. Hopper (1958) 51 Cal. 2d 119, 124, 330 P.2d 625* (requirement for leases satisfactory to purchaser)].

[d] Implied Covenant of Good Faith and Fair Dealing

A covenant of good faith and fair dealing is implied by law in employment contracts. The covenant obligates each party to a contract not to do anything that will prevent the other party from receiving the benefits of the contract [*Nelson v. Abraham (1947) 29 Cal. 2d 745, 751-754, 177 P.2d 931]* .

[2] FORM

Provision for Termination of Employment Upon Good-Faith Dissatisfaction of Employer

Satisfactory Performance of Duties

The employment of Employee shall continue only as long as the services rendered by Employee are satisfactory to Employer, regardless of any other provision contained in this agreement. Employer shall be the sole judge as to whether the services of Employee are satisfactory [; provided, however, that Employer's determination with respect to Employee's services are exercised reasonably and in good faith].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDischarges

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28-85 California Legal Forms--Transaction Guide § 85.503

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.503 Provision Stating When Garnishment of Employee's Wages Constitutes Grounds for Termination by Employer

[1] Comment

[a] Use of Form

This form is a provision specifying that any actual garnishment of the employee's wages in excess of a specified number constitutes grounds for termination of employment.

[b] Protection Against Discharge for Garnishment

An employer may not discharge any employee by reason of the fact that garnishment of his or her wages has been threatened. Moreover, no employer may discharge an employee because the employee's wages have been subjected to garnishment for the payment of one judgment. Any contravening provision of an employment contract is void as against public policy [*Lab. Code § 2929(b)*]. "Garnishment" refers to any judicial procedure through which the wages of an employee are required to be withheld for the payment of any debt [*Lab. Code § 2929(a)(1)*].

[2] FORM

Provision Stating When Garnishment of Employee's Wages Constitutes Grounds for Termination by Employer

Termination for Garnishment of Earnings

Employer may terminate this agreement if Employee's earnings have been subjected to garnishment for the payment of_____[*specify number in excess of one or state:* more than one] judgment[s], notwithstanding any

other provision in this agreement to the contrary.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawWage & Hour LawsAssignments, Deductions & Garnishments

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28-85 California Legal Forms--Transaction Guide §§ 85.504-85.509

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.504[Reserved]

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2. Termination At Will

28-85 California Legal Forms--Transaction Guide § 85.510

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.510 Provision for Termination of Contract At Will of Either Party

[1] Comment--Use of Form

This form may be used to expressly reaffirm the statutory presumption that an employment contract with no specified term may be terminated at the will of either party on notice to the other [*see Lab. Code § 2922*]. This form may be inserted into any employment contract that does not provide for a specific duration of employment.

The power to unilaterally terminate an at-will employment contract includes the power to modify the terms of the contract, for example, by demoting the employee or reducing the employee's wage. In effect, any such modification is a termination of the original contract and an offer of a new, unilateral employment contract under the modified terms [*DiGiacinto v. Ameriko-Omserv Corp. (1997) 59 Cal. App. 4th 629, 634-639, 69 Cal. Rptr. 2d 300]* . This form includes an express statement of the employer's right to modify the contract. For further discussion of at-will employment, as well as statutory and public policy limitations on the termination of at-will contracts, see *§§ 85.20[3][b]* and *85.24[2]*.

[2] FORM

Provision for Termination of Contract At Will of Either Party

Employment at Will

Either the Employer or the Employee may terminate this agreement at any time on notice to the other, with or without cause. The parties further agree that the Employer retains the right to modify, add, or eliminate any term or condition of this employment at any time on notice to Employee, with or without cause. The rights and duties set forth in this paragraph may not be modified in any way except by written agreement signed by _____ [*designated person with authority to waive at-will provision*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsLabor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDischarges

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28-85 California Legal Forms--Transaction Guide § 85.511

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.511 Acknowledgment of At Will Status

[1] Comment--Use of Form

In a typical situation, there is usually no need for rank-and-file employees to have complete individual written employment contracts. In such cases, a common procedure is for the employee to sign an acknowledgment of "at will" status. Although there is a statutory presumption that an employment contract with no specified term may be terminated at the will of either party [*see Lab. Code § 2922*], a written acknowledgment of at will status can serve to rebut any contention that the employer had impliedly agreed to exercise its right to terminate only for good cause [*see Dore v. Arnold Worldwide, Inc. (2006) 39 Cal. 4th 384, 391-392, 46 Cal. Rptr. 3d 668* (when employment contract expressly provides for "at will" employment terminable "at any time," any additional contractual provisions regarding probationary period and annual reviews do not expressly or impliedly create right to be terminated only for cause); *Kovatch v. California Casualty Management Co. (1998) 65 Cal. App. 4th 1256, 1275-1277, 77 Cal. Rptr. 2d 217* (positive performance reviews, commendations, salary increases, and vague assurances of future employment are insufficient to overcome statutory presumption of at-will employment, supported by express statements of at-will employment in employee handbook and in employee's signed job application); Pugh v. See's *Candies, Inc. (1981) 116 Cal. App. 3d 311, 324, 171 Cal. Rptr. 917]* .

The power to unilaterally terminate an at will employment contract includes the power to modify the terms of the contract, for example, by demoting the employee or reducing the employee's wage. In effect, any such modification is a termination of the original contract and an offer of a new, unilateral employment contract under the modified terms [*DiGiacinto v. Ameriko-Omserv Corp. (1997) 59 Cal. App. 4th 629, 634-639, 69 Cal. Rptr. 2d 300]* . This form includes an express statement of the employer's right to modify the contract. For further discussion of at will employment, as well as statutory and public policy limitations on the termination of at will contracts, see *§§ 85.20[3][b]* and *85.24[2]*.

This form also includes an acknowledgment of receipt of the employer's handbook containing full descriptions of the

terms and conditions of employment.

[2] FORM

Acknowledgment of At Will Status

Employment at Will

I understand and agree that my employment by_____[*name of employer*] is at will, which means that either the company or I can terminate my employment at any time, with or without cause, simply by notifying the other party that the employment is terminated. I have received a copy of the company's Handbook for Employees, which describes the general employment policies and practices of the company, all of which apply to my employment. I also understand and agree that the company retains the right to modify, add, or eliminate any of its general employment policies and practices at any time, with or without cause. I further understand and agree that any modification of my at will status can be made only by a written agreement signed on behalf of the company by an authorized officer.
Dated: _____.

_____ [*signature of employee*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsAt-Will EmploymentGeneral Overview

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28-85 California Legal Forms--Transaction Guide §§ 85.512-85.519

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.512[Reserved]

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3. Termination Upon Extinction of Subject Matter

28-85 California Legal Forms--Transaction Guide § 85.520

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.520 Provision for Termination on Discontinuance of Employer's Business

[1] Comment

[a] Use of Form

This form is a provision that enables the employer to terminate the contract in the event that it ceases its business operations. This form is particularly useful if the employer is a sole proprietorship. With this provision in the employment contract, the individual has greater freedom to cease business operations if health or any other personal problem makes it advisable to do so. This form is adaptable so that it can provide for termination if the operation of a particular office of the employer is discontinued, such as a branch office of which the employee is the manager.

[b] Termination Upon Extinction of Subject Matter

The extinction of the subject of the contract is a ground for automatic termination of an employment contract by operation of the Labor Code [*Lab. Code § 2920(b)*]. Since "extinction of the subject of the contract" is ambiguous, or at least, subject to interpretation, this form specifies one type of situation to which this provision ordinarily would apply.

[c] Statutory Requirements for Mass Layoffs

The federal Worker Adjustment and Retraining Notification Act (WARN) requires certain large employers to give employees 60 days' advance notice of any plant closing or mass layoff [*29 U.S.C. § 2102(a)*; *see 29 U.S.C. § 2101 et seq.*]. The WARN Act applies to any nongovernmental employer that has 100 or more full-time employees, or that has 100 or more full-and part-time employees who, in the aggregate, work more than 4000 hours per week, excluding overtime [*29 U.S.C. § 2101(a)(1)*].

Under California law, an employer generally may not order a mass layoff, relocation, or termination at a covered

establishment unless, 60 days before the order takes effect, the employer gives written notice of the order to the affected employees and the California Employment Development Department [*Lab. Code § 1401(a)*; *see Lab. Code § 1400(g)* (exception for employment that is seasonal or limited in time); *see also Lab. Code § 1402.5* (notice not required if it would preclude employer from obtaining capital or business needed to forestall layoffs)].

The notice must comply with the federal WARN Act requirements [*Lab. Code § 1401(b)*]. For this purpose, a "mass layoff" is a layoff during any 30-day period of 50 or more employees at a covered establishment [*Lab. Code § 1400(c), (d)*]. A "layoff" is "a separation from a position for lack of funds or lack of work" [*Lab. Code § 1400(c)*; *MacIsaac v. Waste Management Collection & Recycling, Inc. (2005) 134 Cal. App. 4th 1076, 1086-1087, 36 Cal. Rptr. 3d 650* (no layoff occurs when employees are transferred from one employer to another for whom they perform same work at same rates of pay and with whom they retain same seniority and benefits, because such employees are not separated from their positions; rather, their positions were shifted to new employer)]. A "relocation" means the removal of all or substantially all of the industrial or commercial operations in a covered establishment to a different location 100 miles or more away [*Lab. Code § 1400(e)*]. A "termination" means the cessation or substantial cessation of industrial or commercial operations in a covered establishment [*Lab. Code § 1400(f)*]. A "covered establishment" is any industrial or commercial facility or part thereof that employs, or has employed within the preceding 12 months, 75 or more persons [*Lab. Code § 1400(a)*].

For further discussion of statutory requirements for mass layoffs, see Ch. 1C, *Regulation of Employers* .

[2] FORM

Provision for Termination on Discontinuance of Employer's Business

Termination Upon Discontinuance of Business

If Employer ceases the operation of all its business [*or* of its office at _____ (*address*)], then this agreement shall terminate as of the effective date on which that operation is discontinued.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDischarges

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28-85 California Legal Forms--Transaction Guide § 85.521

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.521 Provision for Termination at Option of Employer Upon Revocation or Suspension of Liquor License

[1] Comment--Use of Form

This form is a provision permitting termination of an employment contract upon the revocation or suspension of any of the licenses granted to the employer by the State of California for the sale of alcoholic beverages. It is for use when the employer's business is the conduct of a bar, restaurant, night club, hotel, resort, or similar type of operation that requires such a license. This form is patterned after the contract provision considered by the court in *Nattini v. Dewey* [*Nattini v. Dewey (1950) 96 Cal. App. 2d 545, 546, 216 P.2d 46]* . For discussion of the automatic termination of an employment contract when its subject matter becomes extinct, see *§ 85.520[1][b]*.

[2] FORM

Provision for Termination at Option of Employer Upon Revocation or Suspension of Liquor License

Termination Upon Loss of Liquor Licenses

If any of the licenses granted to Employer by the State of California for the sale of alcoholic beverages at the place where Employee's services are to be performed are revoked or suspended, the Employer may at its option terminate this agreement as of the effective date of the revocation or suspension by giving written notice of termination to the Employee. Termination shall not prejudice any right or remedy which the Employer may have either at law, in equity, or under this agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesLabor & Employment LawEmployment

RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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28-85 California Legal Forms--Transaction Guide § 85.522

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.522 Provision Governing Termination Upon Merger, Transfer of Assets, or Dissolution of Corporate Employer

[1] Comment

[a] Use of Form

This form is a provision stating whether an employment agreement will be terminated by a merger if the employer is not the surviving corporation, by a transfer of all or substantially all of the employer's assets, or by dissolution of the employer, whether voluntary or involuntary. It is desirable for the parties to an employment agreement to consider whether any of the three situations referred to above should result in termination of the contract and then to expressly state their decision in the agreement. Use of this form can avoid costly litigation [*see, e.g., Prouty v. Gores Tech. Group (2004) 121 Cal. App. 4th 1225, 1232-1237, 18 Cal. Rptr. 3d 178* (corporate employees claimed benefits as third-party beneficiaries of purchase agreement between old and new parent companies)].

This form is intended for use when the employer is a corporation. However, it can be readily modified by the attorney to apply to any other type of legal entity.

For discussion of the automatic termination of an employment contract when its subject matter becomes extinct, see *§ 85.520[1][b]*.

[b] Merger of Corporations

When a merger occurs, the separate existence of the disappearing corporation ceases. Moreover, the surviving corporation succeeds, without other transfer, to all the rights and property of each of the disappearing corporations and is subject to all the debts and liabilities of each, in the same manner as if the surviving corporation had itself incurred them [*Corp. Code § 1107(a)*; *see Corp. Code § 1107.5* (surviving corporation assumes disappearing corporations'

liability under Bank and Corporation Tax Law, *Rev. & Tax. Code § 23001 et seq.*)].

[2] FORM

Provision Governing Termination Upon Merger, Transfer of Assets, or Dissolution of Corporate Employer

Effect of Employer's Merger, Transfer of Assets, or Dissolution

(a) This agreement shall [*or* shall not] be terminated by any merger where the Employer is not the surviving corporation, any transfer of all or substantially all of the assets of the Employer, or the voluntary or involuntary dissolution of Employer.

[*If agreement will not be terminated, add:*]

(b) In the event of any such merger or transfer of assets, the surviving corporation or the transferee of the Employer's assets shall be bound by and shall have the benefit of the provisions of this agreement, and Employer shall take allactions necessary to insure that any such corporation or transferee is bound by the provisions of this agreement].

Legal Topics:

For related research and practice materials, see the following legal topics:
Mergers & Acquisitions LawGeneral OverviewContracts LawPerformanceDischarges & TerminationsLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDischarges

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28-85 California Legal Forms--Transaction Guide § 85.523

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.523 Provision Governing Termination in Event of Bankruptcy or Similar Proceeding Involving Other Party

[1] Comment--Use of Form

This form is a provision governing the termination of an employment contract if one of the parties becomes bankrupt or insolvent. This form can be used to give such an option to terminate to one or both parties. For discussion of the automatic termination of an employment contract when its subject matter becomes extinct, see *§ 85.520[1][b]*.

[2] FORM

Provision Governing Termination in Event of Bankruptcy or Similar Proceeding Involving Other Party

Termination in Event of Bankruptcy or Similar Proceedings

(a) This agreement may be terminated immediately by _____ [*specify party or parties who may terminate, e.g.* Employer *or* Employee *or* either party to this agreement] at the terminating party's option and without prejudice to any other remedy to which that party may be entitled either at law, in equity, or under this agreement, if _____ [*specify party or parties whose acts may justify termination by other party, e.g.,* Employer *or* Employee *or* the other party]:

(1) Files a petition in bankruptcy court or is adjudicated a bankrupt;

(2) Institutes or permits to be instituted any procedure in bankruptcy court for reorganization or rearrangement of _____ [his *or* her *or* its] financial affairs;

(3) Has a receiver of _____ [his *or* her *or* its] assets or property appointed because of insolvency; or

(4) Makes a general assignment for the benefits of creditors.

(b) Termination shall be effected when the terminating party gives written notice of termination to the other party.

Legal Topics:

For related research and practice materials, see the following legal topics:
Bankruptcy LawGeneral OverviewContracts LawPerformanceDischarges & TerminationsLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDischarges

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
K. Termination of Employment
3. Termination Upon Extinction of Subject Matter

28-85 California Legal Forms--Transaction Guide §§ 85.524-85.529

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

[Reserved]

§§ 85.524[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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K. Termination of Employment
4. Effect of Termination

28-85 California Legal Forms--Transaction Guide § 85.530

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.530 Provision That Employee's Right to Compensation Ends as of Date of Termination

[1] Comment

[a] Use of Form

This form provides that if the employment agreement is terminated in accordance with its terms, the employee will receive compensation at the rate provided for in the agreement, prorated up to and including the date of termination. Use of this form is desirable because it clearly specifies the duties of the employer in this regard and thereby helps avoid misunderstanding on this point.

[b] Payment of Wages Due

On discharge, the wages earned and unpaid at the time of discharge generally are due and payable immediately [*Lab. Code § 201*; *see Smith v. Superior Court (2006) 39 Cal. 4th 77, 82-94, 45 Cal. Rptr. 3d 394, 137 P.3d 218* (employee is "discharged" for purposes of *Lab. Code § 201* not only when employee is involuntarily terminated from ongoing employment relationship, but also when employee is released after completing particular job assignment or time duration for which he or she was hired)]. An employer who willfully fails to comply with this requirement, or who imposes an abatement or reduction, is liable for wages at the same rate until they are paid or the employee commences an action to collect them, up to a maximum of 30 days [*Lab. Code § 203(a)*; *Mamika v. Barca (1998) 68 Cal. App. 4th 487, 491-494, 80 Cal. Rptr. 2d 175* (penalty is computed by multiplying employee's daily wage rate by number of days of nonpayment, including nonworkdays as well as workdays; thus, although penalty is limited to 30 days, it can exceed one month's wages)]. For further discussion, see *§ 85.12[2][a]*.

[2] FORM

Provision That Employee's Right to Compensation Ends as of Date of Termination

Compensation Prorated to Date of Termination

In the event that this agreement is terminated prior to the completion of the term of employment specified herein, Employee shall be entitled to the compensation earned prior to the date of termination as provided for in this agreement, computed pro rata up to and including that date. The compensation earned and unpaid at the time of discharge shall be paid without abatement or reduction immediately upon termination of this agreement. [Employee shall be entitled to no further compensation as of the date of termination.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDischarges

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4. Effect of Termination

28-85 California Legal Forms--Transaction Guide § 85.531

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.531 Provision Specifying Type of Compensation Forfeited Upon Termination

[1] Comment

[a] Use of Form

This form is a provision in which an employer can specify those types of compensation the employee will forfeit upon termination. An employer has a statutory duty to pay regular wages, such as weekly or monthly salary or payments on a commission basis paid weekly or monthly, and accrued vacation as of the date of termination [*Lab. Code §§ 200, 201*; *see § 85.530*]. However, there may be other forms of compensation that the employee could ordinarily expect, including annual or other bonuses, for example, that should be specifically cut off as of the date of termination through the use of this form.

The requirement that earned, unpaid wages be paid on termination or resignation [*Lab. Code §§ 201, 202*] is not violated by an employee incentive compensation plan under which employees can elect to receive, in lieu of a portion of their compensation, shares of company stock with restricted rights during a vesting period, with forfeiture of the restricted stock on an employee's resignation or termination for cause before the stock fully vests [*Schachter v. Citigroup, Inc. (2009) 47 Cal. 4th 610, 618-623, 101 Cal. Rptr. 3d 2, 9-13, 218 P.3d 262, 268-271* (because restricted stock had value--immediately exercisable voting and dividend rights, and contingent rights of full ownership--employee's bargained-for wages had been paid in full, and forfeiture of unvested shares did not constitute denial of compensation)].

[b] Drafting Considerations

It is suggested that the attorney drafting the agreement discuss this matter with the client. If there are special payments of the nature discussed and if the parties agree that a terminated employee should have no right to them, this form can be used to so provide in the employment contract.

[c] Vested Vacation Pay Cannot Be Forfeited

If an employment contract provides for paid vacations and an employee's employment is terminated before he or she takes the vacation time that has vested to that date, all vested vacation pay must be paid at the final rate of pay pursuant to the contract or the employer's policy concerning eligibility or time served. Moreover, an employment contract or an employer's policy may not provide for forfeiture of vested vacation time upon termination [*Lab. Code § 227.3*; *see* Owen v. Macy's, Inc. (2009) 175 Cal. App. 4th 462, 468, 96 Cal. Rptr. 3d 70 (Lab. Code § section 227.3 does not require that employer provide its employees with any paid vacation at all; rather, statute imposes certain requirements "whenever" employer provides vacation benefits)]. For this reason, vested vacation pay should not be included in this form, and may be specifically excluded from its coverage.

[d] Vesting of Retirement Benefits

Qualified pension and profit-sharing plans must provide that an employee's accrued benefit in the plan become fully vested on attainment of normal retirement age [*I.R.C. § 411(a)*] and that the employee's own contribution must at all times be vested and nonforfeitable [*I.R.C. § 411(a)(1)*]. They must also provide for nonforfeitable vesting of the employer's contributions [*see I.R.C. § 411(a)(2)*]. For further discussion, see Ch. 1D, *Overview of Employee Benefits* .

[2] FORM

Provision Specifying Type of Compensation Forfeited Upon Termination

Forfeiture of Specified Compensation Upon Termination

In the event that this agreement is terminated prior to the completion of the term of employment specified herein, Employee shall automatically and completely forfeit any rights that _____ [he *or* she] may have _____ [*specify period, e.g.,* for the fiscal year during which termination of this agreement occurs] _____ [*e.g.,* under the bonus plan established by Employer]. [This provision shall not apply to any vested right, including _____ (*specify, e.g.,* vested pension rights *or* vested profit-sharing rights *or* vested commission rights *or* vested vacation pay).]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsCompensationLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsDischarges

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28-85 California Legal Forms--Transaction Guide §§ 85.532-85.539

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[Reserved]

§§ 85.532[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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PART IV. FORMS
L. Effect of Breach of Contract

28-85 California Legal Forms--Transaction Guide § 85.540

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.540 Provision for Liquidated Damages for Breach of Employee's Obligation to Work for the Employer

[1] Comment

[a] Use of Form

This form provides that the employee will be liable for liquidated damages if he or she refuses to work or continue to work for the employer as agreed. This form should be used only when loss of the employee's talents will be a serious problem for the employer or to restrain departures during a training period when the cost of training exceeds the value of the employee to the employer. Ordinarily, a provision for liquidated damages which determines in advance the amount of damages to be paid for a breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing when the contract was made [*Civ. Code § 1671(b)*].

The provision is not appropriate for use in a contract for at will employment. Because an at will agreement may be terminated by either party at any time, the employee's refusal to work would simply effect a termination of the agreement [*see Lab. Code § 2922*]. For further discussion of at will employment, see *§§ 85.20[3][b]* and *85.24[2]*.

[b] Disadvantages of Liquidated Damages Provision

Although a liquidated damages provision may seem attractive as a deterrent to the employee, it can have undesirable effects on the employer. Because the amount specified as damages must be reasonable in order to be enforceable [*Civ. Code § 1671(b)*], the employer cannot arbitrarily use a high figure to protect itself. On the other hand, if the figure that is used is reasonable at the time the contract is made, but becomes unreasonably low by reason of subsequent events, it will still be enforceable against the employer. In such a case, the employer may find its recovery limited to considerably less than it would have been entitled to had it simply not included the liquidated damages clause.

For a provision establishing liquidated damages for breach of a noncompetition clause, see *§ 85.473*. For a discussion of

liquidated damages provisions in contracts generally, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[2] FORM

Provision for Liquidated Damages for Breach of Employee's Obligation to Work for the Employer

Liquidated Damages

In the event that Employee should refuse to work or to continue to work for Employer, Employer will incur certain damages and costs which are not accurately determinable, and therefore Employee shall pay to Employer as liquidated damages the sum of $_____ [*specify amount, such as sum equivalent to cost of training replacement employee or hiring another employee of similar talent*]. Employer and Employee both agree that the amount established hereunder as liquidated damages is reasonable under the circumstances existing at the time of the execution of this Agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsBreachLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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L. Effect of Breach of Contract

28-85 California Legal Forms--Transaction Guide §§ 85.541-85.549

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[Reserved]

§§ 85.541[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
M. Arbitration of Disputes

28-85 California Legal Forms--Transaction Guide § 85.550

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.550 Provision for Arbitration of Matters in Controversy at Request of Either Party

[1] Comment

[a] Use of Form

This form provides that any controversy involving the construction or application of the employment contract must be submitted to arbitration if either party requests it. The form further provides that the arbitration is to be governed by *Code Civ. Proc. §§ 1280-1294.2*.

If the arbitration provision in this form is presented to the employee as a discrete document, rather than as part of a fully integrated employment contract, the separate arbitration provision should be signed by the employer and employee. If an employment contract refers to a separate arbitration provision, but the arbitration provision is not signed by the parties, the arbitration provision may not be enforceable [*see Romo v. Y-3 Holdings, Inc. (2001) 87 Cal. App. 4th 1153, 1158-1160, 105 Cal. Rptr. 2d 208* (employee's signing of "acknowledgment" at end of employee handbook did establish assent to "mutual agreement to arbitrate," which was presented as separate section of handbook, with separate signature lines that were never signed by employee)].

[b] Drafting Considerations

The attorney drafting an employment agreement should first consider whether it should include a provision for arbitration or some alternative method of resolving disputes. Arbitration is a faster and more private method of resolving disputes than the judicial process. Whether arbitration is better or less expensive is debatable. However, the mere inclusion of an arbitration clause in a contract sometimes has the effect of pushing the parties into a settlement of the controversy without resort to either arbitration or the courts.

If it is determined that the employment contract should provide for arbitration, the second question to be resolved is whether the contract should provide that arbitration will be automatic or whether it will be used only if a party to the

contract requests it. This form provides for arbitration only if one party requests it. The form in *§ 85.551* makes arbitration mandatory.

The third question to be resolved is whether arbitration should apply to all controversies arising out of the contract or whether certain matters should be excluded from the operation of the arbitration provision. This form applies to all controversies over the construction or application of the employment contract; as such, it will encompass all claims rooted in the contractual relationship, including tort claims that arise from the employment relationship, whether based on conduct occurring before or after the termination of that relationship [*see Buckhorn v. St. Jude Heritage Med. Group (2004) 121 Cal. App. 4th 1401, 1406-1408, 18 Cal. Rptr. 3d 215]* . The *form in § 85.551* provides that certain matters can be excluded from arbitration.

If the employer is a division or subsidiary of a larger entity, and there is a possibility that the employee might eventually be transferred to another division or subsidiary, counsel should consider drafting the arbitration provision so that it expressly encompasses any claims involving the larger entity or its divisions and subsidiaries [*see Alliance Title Co. v. Boucher (2005) 127 Cal. App. 4th 262, 267-273, 25 Cal. Rptr. 3d 440* (after employee was transferred from one subsidiary to another subsidiary of parent corporation, equitable principles required employee's claims against transferee company to be submitted to arbitration, even though transferee company was not party to arbitration agreement between employee and transferor company)].

Arbitration may be conducted in accordance with the California Arbitration Act (CAA) [*Code Civ. Proc. §§ 1280-1294.2*] or the rules of the American Arbitration Association. This form provides for the former, while the form in *§ 85.551* provides for the latter. The California Supreme Court has ruled that the CAA is generally applicable to arbitration clauses in employment contracts, although the Legislature may selectively prohibit arbitration in certain areas [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 97-99, 99 Cal. Rptr. 2d 745, 6 P.3d 669]* .

The United States Supreme Court has held that the Federal Arbitration Act (FAA) [*9 U.S.C. § 1 et seq.*] applies to arbitration clauses in employment contracts, except contracts for the employment of transportation workers [*Circuit City Stores, Inc. v. Adams (2001) 532 U.S. 105, 121 S. Ct. 1302, 149 L. Ed. 2d 234, 251-252* (*overruling* Craft v. Campbell Soup Co. (9th Cir. 1998) 177 F.3d 1083); *see 9 U.S.C. § 1*]. The FAA does not completely displace state regulation of arbitration, but state law is preempted to the extent that it actually stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress [*Volt Information Sciences v. Board of Trustees (1989) 489 U.S. 468, 477, 109 S. Ct. 1248, 103 L. Ed. 2d 488]* . Thus, the parties may specify that the arbitration will be conducted in accordance with the CAA, and that Act will not be preempted unless enforcement of a particular provision of the CAA would undermine the goals and policies of the FAA [*see Volt Information Sciences v. Board of Trustees (1989) 489 U.S. 468, 477-478, 109 S. Ct. 1248, 103 L. Ed. 2d 488* ; *Garden Grove Community Church v. Pittsburgh-Des Moines Steel Co. (1983) 140 Cal. App. 3d 251, 262, 191 Cal. Rptr. 15]* . For example, the procedural provision of the CAA that authorizes a court to stay arbitration pending the outcome of related litigation [*Code Civ. Proc. § 1281.2(c)*] does not undermine or frustrate the FAA's substantive policy favoring arbitration. Accordingly, the FAA does not prevent a California court from applying that procedural provision in an arbitration that the parties have agreed to conduct under the CAA, even if the parties' agreement specifies that their designation of California law "shall not be deemed an election to preclude application of the [FAA], if it would be applicable" [*Cronus Investments, Inc. v. Concierge Services (2005) 35 Cal. 4th 376, 25 Cal. Rptr. 3d 540, 545-554, 107 P.3d 217]* .

Further, the FAA generally does not prevent a state from invalidating a given arbitration clause on such grounds as exist at law or in equity for the revocation of any contract [*9 U.S.C. § 2*; *see, e.g., Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 99-127, 99 Cal. Rptr. 2d 745, 6 P.3d 669* (refusing to enforce employment arbitration agreement that was unconscionable and violative of public policy)]. For example, the generally applicable rule that a party who breaches a contract cannot enforce it is available as a defense against an employer's attempt to enforce an arbitration agreement that the employer has materially breached [*see Brown v. Dillard's, Inc. (9th Cir. 2005)*

430 F.3d 1004, 1010 (employer breached agreement by refusing to participate in arbitration proceedings properly initiated by employee)].

For a detailed discussion of the considerations involved in the drafting of an arbitration provision for any type of contract, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[c] Validity of Arbitration Agreement

In drafting an arbitration provision for inclusion in an employment contract, counsel should verify that neither the language of the contract nor the surrounding circumstances contain anything that will render the arbitration provision invalid. The California Supreme Court has held that a mandatory arbitration agreement in an employment contract that encompasses unwaivable statutory rights (such as the employee's rights under the Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900 et seq.*]), or that encompasses unwaivable claims of wrongful termination in violation of public policy, must effectively permit the employee to vindicate those rights or claims in the arbitral forum. Therefore, such an arbitration agreement is invalid unless it meets the following standards [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 99-113, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *see Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1076-1081, 130 Cal. Rptr. 2d 892, 63 P.3d 979* (*Armendariz* standards apply to arbitration of claims of wrongful termination in violation of public policy, as well as to unwaivable statutory claims); *but see Giuliano v. Inland Empire Pers., Inc. (2007) 149 Cal. App. 4th 1276, 1288-1291, 58 Cal. Rptr. 3d 5* (*Armendariz* standards do not apply to arbitration of claim that is not based on FEHA or fundamental public policy tied to constitutional or statutory provision)]:

- The agreement must provide for neutral arbitrators.

- The agreement must provide for more than minimal discovery [*see Fitz v. NCR Corp. (2004) 118 Cal. App. 4th 702, 715-719, 13 Cal. Rptr. 3d 88* (minimum standards of fairness not met by agreement restricting discovery to depositions of two individuals and of experts expected to testify, plus exchange of hearing exhibits and witness lists, and barring additional discovery unless arbitrator finds fair hearing would be impossible without it)].

- The agreement must require a written award that will reveal the essential findings and conclusions on which the award is based, so as to permit judicial review.

- The agreement provides for all of the types of relief that would otherwise be available in court.

- The agreement must not require the employee to pay, as a condition of access to the arbitration forum, unreasonable costs or any arbitrators' fees or expenses, or any expense that the employee would not be required to bear if he or she brought the action in court [*see, e.g., Circuit City Stores, Inc. v. Mantor (9th Cir. 2003) 335 F.3d 1101, 1107-1108* (requirement that employee pay employer $75 filing fee to initiate arbitration, with waiver of fee available only at employer's discretion, is substantively unconscionable under California law); *McManus v. CIBC World Mkts. Corp. (2003) 109 Cal. App. 4th 76, 93, 134 Cal. Rptr. 2d 446* (employee required to pay $500 deposit plus $1,200 per arbitration hearing session)]. Therefore, a mandatory arbitration agreement that encompasses the arbitration of FEHA claims or claims of wrongful termination in violation of public policy is not subject to the California Arbitration Act's general cost-sharing provision [*see Code Civ. Proc. § 1284.2*], even if the agreement purports to incorporate the Act [*Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 719, 129 Cal. Rptr. 2d 659* ; *but see O'Hare v. Municipal Res. Consultants (2003) 107 Cal. App. 4th 267, 279-280, 132 Cal. Rptr. 2d 116* (agreement that incorporates American Arbitration Association cost-sharing rule is unconscionable)]. Rather, such an arbitration agreement impliedly obliges the employer to pay all types of costs that are unique to arbitration [*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1081-1085,*

130 Cal. Rptr. 2d 892, 63 P.3d 979 ; *Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 113, 99 Cal. Rptr. 2d 745, 6 P.3d 669]* .

The foregoing standards apply to any arbitration agreement that purports to encompass an employee's rights under any statute enacted "for a public reason," that is, for a public purpose. Thus, for example, these standards apply in determining the validity of an agreement to arbitrate claims arising under *Lab. Code § 230.8* (which prohibits discrimination against an employee for taking time off to participate in his or her child's school activities) or *Lab. Code § 970* (which prohibits employers from misrepresenting the terms and conditions of employment to induce a person to change residences to take the job) [*Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 716, 129 Cal. Rptr. 2d 659* ; *Mercuro v. Superior Court (2002) 96 Cal. App. 4th 167, 180, 116 Cal. Rptr. 2d 671]* .

The California Supreme Court has further held that, even as to claims other than unwaivable causes of action, an arbitration provision is unconscionable and unenforceable if it is (1) procedurally unconscionable, and (2) substantively unconscionable [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 113-121, 99 Cal. Rptr. 2d 745, 6 P.3d 669]* . The procedural aspect of unconscionability focuses on oppression or surprise due to unequal bargaining power, and it generally takes the form of a contract of adhesion, imposed as a condition of employment with no opportunity for the employee to negotiate [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 113-114, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1280-1281, 16 Cal. Rptr. 3d 296]* .

The substantive aspect of unconscionability focuses on the terms of the agreement and whether those terms are so one-sided as to lack basic fairness and mutuality [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1280-1281, 16 Cal. Rptr. 3d 296]* . For example, an arbitration provision lacks fairness and mutuality if it requires the employee, but not the employer, to arbitrate all claims arising out of the same transaction or occurrence. An arbitration agreement also is unconscionably one-sided if it restricts the full recovery of damages by the employee, while placing no such restriction on the employer [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 113-121, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *see Stirlen v. Supercuts, Inc. (1997) 51 Cal. App. 4th 1519, 1539-1540, 60 Cal. Rptr. 2d 138]* . Also unconscionably one-sided in an employment context is a provision authorizing an appeal to a second arbitrator from an award of $50,000 or more. Even if the provision makes such appeals available to both parties, the $50,000 threshold inordinately favors the employer (who will usually be the defendant) by giving it an opportunity to overturn a sizable arbitration award [*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1071-1074, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *but see Cummings v. Future Nissan (2005) 128 Cal. App. 4th 321, 329 n.9, 27 Cal. Rptr. 3d 10* (provision for second-level "appellate" arbitrator "is not invalid so long as there is no dollar-amount threshold for invoking it (which would make it almost exclusively an employer remedy)")]. Likewise, a provision for a vastly shortened limitations period for presenting the employee's claims is unconscionable [*Martinez v. Master Protection Corp. (2004) 1992-1 Trade Cas. (CCH) P69877, 118 Cal. App. 4th 107, 117-118, 12 Cal. Rptr. 3d 663* (arbitration agreement imposing six-month period for asserting any statutory or common-law claim was unconscionable)]. Another unconscionable provision in a contract of adhesion is one that gives the arbitrator exclusive authority to decide questions of enforceability, including questions of unconscionability [*Ontiveros v. DHL Express (USA), Inc. (2008) 164 Cal. App. 4th 494, 505, 79 Cal. Rptr. 3d 471* (when one party is "repeat player" in arbitration, arbitrator has self-interest in deciding that any given dispute is arbitrable)].

Procedural and substantive unconscionability must both be present for a court to exercise its discretion to refuse to enforce an arbitration provision because of unconscionability, but they need not be present in the same degree. In effect, a "sliding scale" applies: the more substantively oppressive the provision, the less evidence of procedural unconscionability is required to justify the conclusion that the provision is unenforceable. Conversely, a high degree of procedural unconscionability means that less evidence is necessary to support a holding of unenforceability [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 114, 99 Cal. Rptr. 2d 745, 6 P.3d 669]* . In one case, for example, a court of appeal held an arbitration provision unenforceable despite a low quantum of

procedural unconscionability because there was a high degree of substantive unconscionability. In that case, the court conceded that the nonnegotiable nature of the arbitration provision yielded a low quantum of procedural unconscionability because the arbitration provision was conspicuously printed in all capital letters (alerting the reader that it might be significant) and the employee's attorney had reviewed the provision before the employee signed it. At the same time, there was a high degree of substantive unconscionability based on a complete lack of mutuality (only the employee's claims were required to be arbitrated), the provision's requirement of a prearbitration resolution dispute-procedure controlled by the employer, and a severe limitation on the time for the employee to assert claims. Under the sliding-scale approach, the court of appeal concluded that the agreement was unconscionable and unenforceable [*Nyulassy v. Lockheed Martin Corp. (2004) 120 Cal. App. 4th 1267, 1286-1288, 16 Cal. Rptr. 3d 296]* .

If an arbitration agreement is "permeated" by unconscionability--that is, if it contains more than one unlawful provision, or if there is no discrete unlawful provision that can be severed from the agreement--then the entire arbitration agreement is void and cannot be partially enforced [*Armendariz v. Foundation Health Psychcare Servs., Inc. (2000) 24 Cal. 4th 83, 121-127, 99 Cal. Rptr. 2d 745, 6 P.3d 669* ; *see, e.g.,* *Franco v. Athens Disposal Co. (2009) 171 Cal. App. 4th 1277, 1304, 90 Cal. Rptr. 3d 539* (because arbitration agreement contained two unlawful provisions--class arbitration waiver, and provision precluding employee from seeking civil penalties on behalf of other employees under *Lab. Code § 2698 et seq.*--agreement as whole was tainted with illegality and was therefore unenforceable); *Sanchez v. Western Pizza Enters., Inc. (2009) 172 Cal. App. 4th 154, 181, 90 Cal. Rptr. 3d 818* (arbitration agreement containing more than one unlawful provision--class arbitration waiver and unconscionable arbitrator-selection clause--was permeated by unlawful purpose and was therefore unenforceable)]. For example, if an arbitration agreement (1) addresses the kinds of claims that normally would be brought by the employee but not those that would be brought by the employer, (2) limits the employee's recovery to the amount of wages paid during the employee's last six months of work, (3) precludes recovery by employee for statutory claims, (4) specifies a venue for arbitration that is convenient for the employer but not necessarily so for the employee, and (5) requires that the employee initially pay all costs of arbitration, the agreement is unconscionable and so one-sided as to be unenforceable [*Pinedo v. Premium Tobacco Stores, Inc. (2000) 85 Cal. App. 4th 774, 781, 102 Cal. Rptr. 2d 435* (such arbitration agreement "is at least equally unconscionable to the one presented in *Armendariz*")]. Similarly, an arbitration agreement is "permeated by an unlawful purpose," and therefore unenforceable in its entirety, if the terms of the agreement and the surrounding circumstances indicate a systematic effort to impose arbitration on an employee as an inferior forum that works to the employer's advantage [*Mercuro v. Superior Court (2002) 96 Cal. App. 4th 167, 184-186, 116 Cal. Rptr. 2d 671* (systematic effort to impose arbitration on employee as inferior forum was established by employer's threats and cajoling to get employee to sign agreement, lack of mutuality as to arbitrable claims, provision that unlawfully required employee to share burden of arbitrator's fee, and disadvantages to employee in using designated arbitrator); *O'Hare v. Municipal Res. Consultants (2003) 107 Cal. App. 4th 267, 282, 132 Cal. Rptr. 2d 116* (completely one-sided agreement compelling arbitration of all of employee's claims while allowing employer to file lawsuit on any claim it had against employee); *see Ferguson v. Countrywide Credit Indus., Inc. (9th Cir. 2002) 298 F.3d 778, 784-788* (following *Mercuro*, finding that lack of mutuality as to arbitrable claims, provision requiring employee to share arbitration costs after first day, and discovery limitations favoring employer so permeated agreement that severance was not possible)].

On the other hand, if there is only one unconscionable provision and it can be severed from the rest of the arbitration agreement, a court may delete the unconscionable provision and enforce the remainder of the agreement [*Little v. Auto Stiegler, Inc. (2003) 29 Cal. 4th 1064, 1074-1076, 130 Cal. Rptr. 2d 892, 63 P.3d 979* ; *Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal. App. 4th 708, 726-727, 129 Cal. Rptr. 2d 659]* . Thus, if an employment agreement requiring arbitration is not *permeated* by unconscionability, and the agreement contains a clause in which the parties expressly agree to allow the court or an arbitrator to sever or modify any unreasonable or unenforceable provisions, the arbitration provision as so modified may be enforceable [*Blake v. Ecker (2001) 93 Cal. App. 4th 728, 743-746, 113 Cal. Rptr. 2d 422]* . For samples of severability provisions, see *§ 85.200[2]*, *§ 9.07* [*see also § 85.120[14]*, P 6]. For further discussion of severability provisions, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

Federal courts have also ruled on the validity of arbitration agreements. Generally, an employer may require an

employee to sign an agreement to arbitrate employment-related claims, including Title VII discrimination claims, as a condition of employment [*EEOC v. Luce, Forward, Hamilton, & Scripps (9th Cir. 2003) 345 F.3d 742, 746-753* (en banc)]. However, the courts have found the following circumstances to be grounds for the invalidation of an arbitration agreement:

- The omission of an express waiver of statutory remedies, if the employee in signing the contract had been unaware that statutory claims would be subject to arbitration [*Renteria v. Prudential Ins. Co. of Am. (9th Cir. 1997) 113 F.3d 1104, 1105-1108* (Title VII claim)]. To be enforceable, an agreement to arbitrate federal statutory employment discrimination claims must include a clear and unmistakable waiver of a judicial forum for such claims [*see 14 Penn Plaza LLC v. Pyett (2009), 129 S. Ct. 1456, 173 L. Ed. 2d 398, 408-414* (collective bargaining agreement provision that clearly and unmistakably requires union members to arbitrate statutory antidiscrimination claims is enforceable)]. Thus, a provision for the arbitration of "matters under dispute," which could be understood to mean matters in dispute under the contract, is insufficient to waive the employee's right to a judicial forum for statutory employment discrimination claims [*see Wright v. Universal Maritime Serv. Corp. (1998) 525 U.S. 70, 119 S. Ct. 391, 396-397, 142 L. Ed. 2d 361* (collective bargaining agreement did not contain clear, unmistakable waiver, so court did not reach question of whether collective bargaining agreement can ever waive employees' right to litigate employment discrimination claims); *Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26, 35-43* (individual employee can make agreement that waives right to judicial forum for employment discrimination claim); *see also Kummetz v. Tech Mold, Inc. (9th Cir. 1998) 152 F.3d 1153, 1154-1156* (no waiver of judicial remedy when employee signed document acknowledging receipt of "information booklet" that included arbitration clause, but acknowledgement of receipt did not explicitly mention arbitration clause or waiver of right to sue)]. This form contains an optional provision expressly waiving the employee's right to a judicial forum for employment discrimination claims.

- A contractual provision calling for the splitting of arbitration costs between the employer and employee [*see Cole v. Burns Int'l Sec. Servs. (D.C. Cir. 1997) 105 F.3d 1465, 1483-1484* ; *but see Green Tree Fin. Corp.-Ala. v. Randolph (2000) 531 U.S. 79, 89-92, 121 S. Ct. 513, 148 L. Ed. 2d 373* (agreement to arbitrate consumer's claim under Truth in Lending Act is not rendered invalid merely because agreement is silent as to costs)].

If the employer has afforded the employee a meaningful opportunity to opt out of the arbitration agreement without losing his or her job, the arbitration agreement will not be deemed unconscionable [*Circuit City Stores, Inc. v. Ahmed (9th Cir. 2002) 283 F.3d 1198, 1199-1200* (agreement is not adhesive, and thus lacks procedural unconscionability, if employee is given opportunity to opt out of arbitration agreement); *but see Circuit City Stores, Inc. v. Mantor (9th Cir. 2003) 335 F.3d 1101, 1106-1107* (arbitration agreement is procedurally unconscionable if employee's opportunity to opt out is not meaningful, such as if employer pressures employee and threatens employee's job if he or she does not accept arbitration agreement)]. This form includes an optional provision allowing the employee to opt out by rescinding the arbitration provisions of the employment agreement.

California Labor Code Section 229 provides that an individual's civil action to collect unpaid wages may be maintained without regard to the existence of any private agreement to arbitrate, unless the arbitration agreement is part of a collective bargaining agreement [*Lab. Code § 229*]. If the employment involves interstate commerce, however, Section 229 is preempted by the Federal Arbitration Act, which requires enforcement of the arbitration provision [*9 U.S.C. § 2*; *Giuliano v. Inland Empire Pers., Inc. (2007) 149 Cal. App. 4th 1276, 1284-1288, 58 Cal. Rptr. 3d 5* (interstate nature of plaintiff's employee was undisputed, since defendant employer did business in two states, and plaintiff traveled to other states in course of employment)]. An arbitration agreement made between the employer and the employee will not bar the Equal Employment Opportunity Commission from pursuing judicial relief for the employee under the Americans With Disabilities Act [*EEOC v. Waffle House, Inc. (2002) 534 U.S. 279, 286-298, 122 S. Ct. 754, 151 L. Ed. 2d 755,*

763-770 (ADA grants EEOC exclusive authority over choice of forum and prayer for relief in its own enforcement action, and that authority is not affected by employee's signing of mandatory arbitration agreement); *see 42 U.S.C. §§ 12101 et seq., 12117(a)(ADA)*].

[2] FORM

Provision for Arbitration of Matters in Controversy at Request of Either Party

Arbitration at Request of One Party

(a) Any controversy between Employer and Employee involving the construction or application of any of the terms, provisions or conditions of this agreement shall be submitted to arbitration on the written request of either party served on the other. [*Optional:* This paragraph shall apply to any claim by Employee of employment discrimination under federal or state law, and on the written request of either party for arbitration of such a claim pursuant to this paragraph, Employer and Employee shall both be deemed to have waived the right to litigate the claim in any federal or state court.]

(b) Arbitration shall comply with and be governed by the provisions of the California Arbitration Act, *California Code of Civil Procedure Sections 1280 through 1294.2*, which is incorporated herein by reference.

(c) Employer and Employee shall each appoint one person to hear and determine the dispute and, if the two persons so selected are unable to agree, those two persons shall select a third impartial arbitrator whose decision shall be final and conclusive upon both parties.

(d) The result of arbitration hereunder shall be [binding *or* non-binding] upon the parties.

[*If desired, add provision making arbitration clause applicable to parent company and its divisions and subsidiaries:*]

(e) For purposes of the above arbitration provisions, the terms "Employer" and "party" shall include_____[*name of parent company*] and any of its divisions and subsidiaries for which Employee may be assigned to work from time to time.

[*If desired, add provision allowing employee to opt out of arbitration, e.g.:*]

(f) At any time within 30 days after executing this agreement, Employee may rescind the foregoing arbitration provisions. Rescission may be effected only by sending Employer written notice of Employee's election to rescind. On rescission by Employee, the foregoing arbitration provisions shall be of no force or effect, but the remaining provisions of this agreement shall continue in full force and effect.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsArbitration ProvisionsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 85 EMPLOYMENT AGREEMENTS
PART IV. FORMS
M. Arbitration of Disputes

28-85 California Legal Forms--Transaction Guide § 85.551

AUTHOR: by Edward Baskauskas, J.D. Lori A. M. Middlehurst, J.D., Practice Consultant

§ 85.551 Provision for Compulsory Arbitration of Matters in Dispute

[1] Comment--Use of Form

This form is a provision for compulsory arbitration of matters in dispute under an employment contract. It can be used if it has been decided that the employment agreement should include an arbitration clause providing that controversies involving the contract must be settled by arbitration in accordance with the rules of the American Arbitration Association.

If the arbitration provision in this form is presented to the employee as a discrete document, rather than as part of a fully integrated employment contract, the separate arbitration provision should be signed by the employer and employee. If an employment contract refers to a separate arbitration provision, but the arbitration provision is not signed by the parties, the arbitration provision may not be enforceable [*see Romo v. Y-3 Holdings, Inc. (2001) 87 Cal. App. 4th 1153, 1158-1160, 105 Cal. Rptr. 2d 208* (employee's signing of "acknowledgment" at end of employee handbook did establish assent to "mutual agreement to arbitrate," which was presented as separate section of handbook, with separate signature lines that were never signed by employee)].

This form has an optional provision that can be used to exclude certain matters from arbitration if that is the desire of the parties at the time of the execution of the agreement.

This form also contains an optional provision expressly waiving the employee's right to a judicial forum for statutory employment discrimination claims. To be enforceable, an agreement to arbitrate federal employment discrimination claims must include a clear and unmistakable waiver of a judicial forum [*see 14 Penn Plaza LLC v. Pyett (2009), 129 S. Ct. 1456, 173 L. Ed. 2d 398, 408-414* (collective bargaining agreement provision that clearly and unmistakably requires union members to arbitrate statutory antidiscrimination claims is enforceable)]. Thus, a provision for the arbitration of "matters under dispute," which could be understood to mean matters in dispute under the contract, is insufficient to waive the employee's right to a judicial forum for statutory employment discrimination claims [*see*

Wright v. Universal Maritime Serv. Corp. (1998) 525 U.S. 70, 119 S. Ct. 391, 396-397, 142 L. Ed. 2d 361 (collective bargaining agreement did not contain clear, unmistakable waiver, so court did not reach question of whether collective bargaining agreement can ever waive employees' right to litigate employment discrimination claims); *Gilmer v. Interstate/Johnson Lane Corp. (1991) 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26, 35-43* (individual employee can make agreement that waives right to judicial forum for employment discrimination claim); *see also Kummetz v. Tech Mold, Inc. (9th Cir. 1998) 152 F.3d 1153, 1154-1156* (no waiver of judicial remedy because employee signed document acknowledging receipt of "information booklet" that included arbitration clause, but acknowledgement of receipt did not explicitly mention arbitration clause or waiver of right to sue)]. For discussion of the validity of an agreement to arbitrate California statutory employment discrimination claims under the Fair Employment and Housing Act (FEHA) [*Gov. Code § 12900 et seq.*], see *§ 85.550[1][c]*.

For a provision stating that any disputed matter must be settled by arbitration only if either party requests it, and that the arbitration must be conducted in accordance with the California Arbitration Act [*Code Civ. Proc. §§ 1280-1294.2*], see *§ 85.550*. For a discussion of the general applicability of the California Arbitration Act and the Federal Arbitration Act [*9 U.S.C. § 1 et seq.*], see *§ 85.550[1][b]*. For a general discussion of the use of arbitration provisions, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[2] FORM

Provision for Compulsory Arbitration of Matters in Dispute

Compulsory Arbitration

Any controversy or claim arising out of or relating to this agreement, or the breach thereof [*optional:*, except _____ (*specify, e.g.*, controversies involving less than $1,500] shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment on the award rendered may be entered in any court having jurisdiction. [*Optional:* This paragraph shall apply to any claim by Employee of employment discrimination under federal or state law, and both Employer and Employee hereby waive the right to litigate such claims in any federal or state court].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsArbitration ClausesLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsArbitration ProvisionsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES

28-86 California Legal Forms--Transaction Guide 86.syn

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§ 86.200 Nondisclosure and Business Consulting Agreement for Computer Services--Long Form

[1] Comment

[a] Use of Form

[b] Using Additional or Alternative Provisions

[c] Compliance With Organizational Formalities

[d] Term of Engagement

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[f] Disclosure of Trade Secrets; Action for Unfair Competition

[g] Indemnification for Losses From Performing Duties

[h] Fees for Services Provided

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[j] Periodic Payment of Fees

[k] Termination of Agreement

[2] FORM

Nondisclosure and Business Consulting Agreement for Computer Services--Long Form

§ 86.201 Nondisclosure and Business Consulting Agreement--Short Form

[1] Comment--Use of Form

[2] FORM

Nondisclosure and Business Consulting Agreement--Short Form

§ 86.202 Nondisclosure and Consulting Agreement--Letter Form

[1] Comment

[a] Use of Form

[b] Essential Elements of Contract for Consulting Services

[2] FORM

Nondisclosure and Consulting Agreement--Letter Form

§ 86.203 Vendor to Vendor Contract for Professional Services

[1] Comment--Use of Form

[2] FORM

Vendor to Vendor Contract for Professional Services

§ 86.204 Consultant Nondisclosure Agreement

[1] Comment

[a] Use of Form

[b] Definition of "Trade Secret"

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§ 86.210 Basic Agreement for Accountancy Services--Letter Form

[1] Comment

[a] Use of Form

[b] Accountant's Services

[c] Compensation

[d] Termination of Agreement

[e] Other Provisions

[2] FORM

Basic Agreement for Accountancy Services--Letter Form

§ 86.211 Basic Agreement for Accountancy Services--Contract Form

[1] Comment--Use of Form

[2] FORM

Basic Agreement for Accountancy Services--Contract Form

§ 86.212 Engagement Letter for Audit Services

[1] Comment--Use of Form

[2] FORM

Engagement Letter for Audit Services

§ 86.213 Engagement Letter for Review Services

[1] Comment--Use of Form

[2] FORM

Engagement Letter for Review Services

§ 86.214 Agreement for Compilation of Balance Sheets and Income Statements

[1] Comment--Use of Form

[2] FORM

Agreement for Compilation of Balance Sheets and Income Statements

§ 86.215 Engagement Letter for Preparation of Income or Estate Tax Returns

[1] Comment--Use of Form

[2] FORM

Engagement Letter for Preparation of Income or Estate Tax Returns

§§ 86.216-86.219 [Reserved]

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[1] Comment

[a] Use of Form

[b] Statutory Requirements for Agreement

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§ 86.221 Prorater's Notice to Creditors

[1] Comment--Use of Form

[2] FORM

Prorater's Notice to Creditors

§§ 86.222-86.229 [Reserved]

§ 86.230 Life and Disability Insurance Analysis Agreement

[1] Comment

[a] Use of Form

[b] Required Contents

[c] Recordkeeping

[2] FORM

Life and Disability Insurance Analysis Agreement

§ 86.231 Letter Agreement for Continuous Insurance Analysis Service

[1] Comment--Use of Form

[2] FORM

Letter Agreement for Continuous Insurance Analysis Service

§§ 86.232-86.239 [Reserved]

§ 86.240 Letter Agreement for Appraisal Services--Personal Property

[1] Comment

[a] Use of Form

[b] Qualifications of Appraiser

[c] Appraisal Report

[2] FORM

Letter Agreement for Appraisal Services--Personal Property

§ 86.241 Letter Agreement for Appraisal Services--Real Property

[1] Comment

[a] Use of Form

[b] Licensing of Real Estate Appraisers

[2] FORM

Letter Agreement for Appraisal Services--Real Property

§ 86.242 Letter Agreement for Appraisal Services--Prepared by Attorney of Appraisal Client

[1] Comment--Use of Form

[2] FORM

Letter Agreement for Appraisal Services-Prepared by Attorney of Appraisal Client

§ 86.243 Agreement for Auctioneer Services--Contract Form

[1] Comment

[a] Use of Form

[b] Written Contract Required; Mandatory Terms

[c] Selection of Auctioneer

[d] Duties of Auctioneer

[e] Conditions of Sale

[f] Authority of Auctioneer

[g] Auctions With Reserve and Without Reserve

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[i] Receiving Bids on Behalf of Seller

[j] Completion of Sale

[k] Handling and Distributing Consignor's Funds

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[m] Auctioneers as Secondhand Dealers

[2] FORM

Agreement for Auctioneer Services--Contract Form

§§ 86.244-86.249 [Reserved]

§ 86.250 Letter Agreement for Services of Licensed Private Investigator

[1] Comment

[a] Use of Form

[b] Regulation of Private Investigators

[c] Persons Who Must Be Licensed as Private Investigators

[d] Persons Exempt From Licensing Requirements

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Letter Agreement for Services of Licensed Private Investigator

§ 86.251 Agreement Between Insurance Adjuster and Insurance Company

[1] Comment

[a] Use of Form

[b] "Insurance Adjuster" Defined

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[2] FORM

Agreement Between Insurance Adjuster and Insurance Company

§§ 86.252-86.259 [Reserved]

§ 86.260 Agreement Between Author and Publisher

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[b] Features of Form

[c] Ownership of Copyrighted Works

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[e] Duration of Copyright

[f] Termination of Transfers and Licenses

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[2] FORM

Agreement Between Author and Publisher

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§ 86.270 Immigration Consultant's Contract for Services

[1] Comment

[a] Use of Form

[b] Definitions

[c] Required Notice and Written Disclosures

[d] Contents of Contract

[e] Language and Translations

[f] Rescission of Contract

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Immigration Consultant's Contract for Services

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES

28-86 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers agreements between professionals (consultants, advisors, analysts, and accountants) and their clients for services. The Legal Background discusses issues relevant to professional agreements in general, including the relationship between the parties, the form of the contract, and restrictions on competitive activity. The Legal Background also discusses the governing law, licensure, and regulation of various professionals, including investment advisers, financial consultants, life and disability insurance analysts, and accountants. The forms include formal written professional agreements and contract provisions for business consultants, including, for example, computer and statistical consultants, financial advisors, insurance analysts, and accountants. Also included is a contract between an author and publisher, and agreements for services by an insurance analyst, appraiser, auctioneer, private investigator, and an immigration consultant.

For coverage of the law governing independent contractors generally, and general forms for agreements with independent contractors, see Ch. 84, *Independent Contractors* . Several other chapters cover specialized agreements with various types of independent contractors. Ch. 86A, *Agreements for Legal Services,* discusses professional agreements between attorneys and their clients. Ch. 87, *Entertainment Contracts* , contains agreements for entertainment-related services, including the services of entertainers, agents, and personal managers. Ch. 87A, *Athlete Agents* , contains forms relating to athlete agents. Ch. 89, *Home Improvement and Specialty Contracts* , discusses home improvement and swimming pool contracting and home solicitation contracts. Ch. 90A, *State Government Contracts* , and Ch. 90B, *Federal Government Contracts* , cover federal, state, and local government contract practices and procedures. Ch. 91, *Contracts With Sales Representatives* , covers agreements with manufacturers' or suppliers' agents, distributors, consignees, and commission merchants. Ch. 92, *Service Contracts* , deals with contracts for product servicing and for personal services.

For coverage of the law governing employment contracts, see Ch. 85, *Employment Agreements* . That chapter covers the elements and uses of written employment agreements other than collective bargaining agreements.

For an employment agreement between a professional corporation and a professional person such as an attorney or physician (typically used in connection with the incorporation of a professional practice), and related benefit provisions, see Ch. 12A, *Professional Corporations* . For detailed discussion of California and related federal employment laws, see California Employment Law(Matthew Bender).

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A. Primary Sources

28-86 California Legal Forms--Transaction Guide § 86.01

§ 86.01 California Sources

[1] Statutes

State Board of Accountancy. *Bus. & Prof. Code § 5000 et seq.*

State Board of Accountancy. *Bus. & Prof. Code §§ 5000, 5030.*

Continuing education. *Bus. & Prof. Code § 5026 et seq.*

Definitions and powers. *Bus. & Prof. Code § 5030 et seq.*

Agreement for services of public accountant. *Bus. & Prof. Code § 5034.*

Licensing of accountants. *Bus. & Prof. Code § 5050 et seq.*

Standards of professional conduct. *Bus. & Prof. Code § 5060 et seq.*

Fees and commissions. *Bus. & Prof. Code § 5061.*

Report following compilation, review, or audit of financial statements. *Bus. & Prof. Code § 5062.*

Application, registration, and permits to practice. *Bus. & Prof. Code § 5070 et seq.*

Education, examination, and experience requirements. *Bus. & Prof. Code § 5080 et seq.*

Audit documentation--contents; presumptions raised by improper documentation; retention and destruction of documentation. *Bus. & Prof. Code § 5097.*

Disciplinary proceedings. *Bus. & Prof. Code § 5100 et seq.*

Revocation and suspension of permit or certificate. *Bus. & Prof. Code § 5100*.

Board's authority to investigate complaints. *Bus. & Prof. Code § 5103*.

Criminal convictions. *Bus. & Prof. Code § 5120 et seq.*

Revenue and the accountancy fund. *Bus. & Prof. Code § 5130 et seq.*

Accountancy corporations. *Bus. & Prof. Code § 5150 et seq.*; *Corp. Code § 13400 et seq.* (professional corporations).

Volunteer accounting services. *Bus. & Prof. Code § 5170 et seq.*

Repossessors Act. *Bus. & Prof. Code § 7500 et seq.*

Private Investigator Act. *Bus. & Prof. Code § 7512 et seq.* Alarm Company Act. *Bus. & Prof. Code § 7590 et seq.*

Immigration consultant services and contracts. *Bus. & Prof. Code § 22440 et seq.*

Acting as immigration consultant. *Bus. & Prof. Code § 22441*.

Contract requirements and statutory form. *Bus. & Prof. Code § 22442*.

Composition of author subject to ownership. *Civ. Code § 655*.

Ownership and rights in products of the mind. *Civ. Code § 980 et seq.*

Invention, literature, and art protected. *Civ. Code § 980*.

Assignment or transfer; right of reproduction. *Civ. Code § 982*.

Consultant's agreement for term of more than one year required to be in writing. *Civ. Code § 1624*.

Disclosure of information by business entities performing bookkeeping services. *Civ. Code § 1799.1*.

Auctioneer and auction companies. *Civ. Code § 1812.600 et seq.*

Bond required. *Civ. Code § 1812.600*.

Performance of duties. *Civ. Code § 1812.605*.

Auctioneer's duty to truthfully represent goods to be auctioned. *Civ. Code § 1812.605(c)*.

Liability for acts of partners, employees, owners, and principals. *Civ. Code § 1812.606*.

Disclosure requirements. *Civ. Code § 1812.607*.

Auctioneer's duty to announce prior to offering item for sale, extent and amount of liens or encumbrances on any item except one being sold free and clear of all liens and encumbrances. *Civ. Code § 1812.607(k)*.

Violations and penalties. *Civ. Code § 1812.608*.

Authority of auctioneer from seller. *Civ. Code § 2362*.

Authority of auctioneer from bidder. *Civ. Code § 2363*.

Appointment of probate tax referees to determine market value of real estate for purposes of establishing deficiency judgment. *Code Civ. Proc. §§ 580a, 726*.

Sealed document not required. *Code Civ. Proc. § 1932*.

Sale by auction. *Com. Code § 2328*.

Bulk transfers by sale at auction. *Com. Code § 6108*.

Investment advisers and their representatives. *Corp. Code §§ 25009, 25202, 25230 et seq.*

Definition. *Corp. Code § 25009*.

Exemption from licensing. *Corp. Code § 25202*.

Licensing and notice filing requirements. *Corp. Code §§ 25230-25234*.

Prohibited actions. *Corp. Code § 25235*

Information on investment adviser available to public. *Corp. Code § 25247*.

Commodity transactions and commodity merchants. *Corp. Code § 29500 et seq.*

Life insurance analysts. *Ins. Code §§ 32.5, 1831 et seq.*

Financing consultants (proraters). *Fin. Code § 12000 et seq.*

Definitions. *Fin. Code § 12001 et seq.*

Exemptions. *Fin. Code §§ 12100, 12104*.

Licensing, application, bond requirements. *Fin. Code § 12200 et seq.*

Licensee regulations. *Fin. Code § 12300 et seq.*

Contract between prorater and debtor. *Fin. Code §§ 12319-12320*.

Suspension and revocation of licenses. *Fin. Code § 12400 et seq.*

[2] Regulations

Investment advisers. *10 Cal. Code Reg. § 260.231 et seq.*

Financing consultants (proraters). *10 Cal. Code Reg. § 1775 et seq.*

Accountancy Act regulations governing practice of public accountancy in California. *16 Cal. Code Reg. § 1 et seq.*

Definitions and general provisions. *16 Cal. Code Reg. §§ 1-5.3*.

Examinations. *16 Cal. Code Reg. §§ 6-14*.

Registration. *16 Cal. Code Reg. §§ 36-37*.

Appeals. *16 Cal. Code Reg. § 49*.

Rules of professional conduct. 16 Cal. Code Reg. § 50 et seq.

Fees. *16 Cal. Code Reg. § 70*.

Accountancy corporation rules. *16 Cal. Code Reg. §§ 75.4-75.11*.

Continuing education rules. *16 Cal. Code Reg. §§ 80-94*.

Denial, suspension, and revocation of certificates, permits, or licenses. *16 Cal. Code Reg. §§ 98-99.1*.

[3] California Attorney General Opinions

State Board of Accountancy's administrative rules and regulations provide adequate interpretation as to character of government experience required to qualify as certified public accountant. *70 Ops. Cal. Att'y Gen. 292 (1987)* .

Regulation of experience requirements of CPA applicants. *60 Ops. Cal. Att'y Gen. 1 (1977)* .

Licensing of sheriff as private investigator. *48 Ops. Cal. Atty. Gen. 80 (1966)* .

Public accountant not able to obtain new permit after permit to practice canceled by failure to renew for five years. *42 Ops. Cal. Att'y Gen. 43, 44 (1963)* .

Time for retention of cash deposited in lieu of bond by private investigator or adjustor licensee after revocation of license. *40 Ops. Cal. Atty. Gen. 171 (1962)* .

Advertising by private investigator of specialty of obtaining evidence for divorce cases is violation of Penal Code. 39 Ops. Cal. Att'y. Gen. 279 (1962).

Effect of revocation of private investigator's license on use of fictitious name; bureau's right to authorize use by another. 38 Ops. Cal. Att'y. Gen. 110 (1961).

Lack of good moral character not covered by *Bus. & Prof. Code § 5100* not ground for discipline of certified public accountant. *36 Ops. Cal. Att'y Gen. 169, 174 (1960)* .

All State Board of Accountancy licensees are subject to Board's rules of professional conduct. 35 Ops. Cal. Att'y Gen. 120 (1960) Sales tax inapplicable to auction sales when goods delivered out of state. 10 Ops. Cal. Att'y. Gen. 176

(1947).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview

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§ 86.02 Federal Sources

[1] Statutes

Investment Advisors Act of 1940. *15 U.S.C. § 80b-3.*

Federal Commodity Exchange Act, regulating commodity advisors. *7 U.S.C. § 1 et seq.*

[2] Regulations

Application form for surrender of certificate as investment advisor. 17 C.F.R. 49.501a.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§§ 86.03[Reserved]

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28-86 California Legal Forms--Transaction Guide § 86.05

§ 86.05 Law Reviews and Periodicals

Lowenfels & Bromberg, *Liabilities of Lawyers and Accountants Under Rule 10b-5 , 53 Bus. Law. 1157 (1998).*

Comment, *Bily v. Arthur Young & Co: An Inequitable Approach to Defining Accountant Liability to Third Parties, 28 U.S.F. L. Rev. 239 (1993).*

Comment, *Professional-Client Sex: Is Criminal Liability an Appropriate Means of Enforcing Professional Responsibility, 40 UCLA L. Rev. 1275 (1993).*

Note, *Accountants' Liability after Bily v. Arthur Young & Co.: A More Equitable Proposal for Third Party Recovery, 45 Hastings L.J. 147 (1993).*

Note, *Bily v. Arthur Young & Co.: Is Limiting Auditor Liability to Third Parties Favoritism or Fair Play? 26 Loy. L.A. L. Rev. 1335 (1993).*

Machlowitz, *Hiring, Firing, and Managing Environmental Consultants (With Checklist)*, 37(3) Prac. Law. 35 (1991).

Rykoff & Mainstain, *BILY: The Accountant's Duty of Care Expanded?* 25 Beverly Hills L.J. 22 (Winter 1991).

Spertus, *Holding Environmental Consultants Liable for Their Negligence: A Proposal for Change, 64 So. Cal. L. Rev. 1143 (May 1991).*

Paschall, *Accountants' Liability*, 26 Trial 42 (May 1990).

Goldstein & Dixon, *New Teeth for the Public Watchdog: The Expanding Role of the Independent Accountant in Detecting, Preventing, and Reporting Financial Fraud, 44 Bus. Law. 439 (Feb. 1989).*

Comment, *Accountants' Liability for Unaudited Historical and Prospective Financial Statements, 25 San Diego L. Rev. 757 (Sept.-Oct. 1988)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsProfessional ConductGeneral OverviewSecurities LawInvestment AdvisersGeneral OverviewTortsMalpractice & Professional LiabilityGeneral OverviewTortsMalpractice & Professional LiabilityAttorneysTortsMalpractice & Professional LiabilityProfessional Services

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§ 86.06 Annotations

Annot., Liability of Independent Accountant to Investors or Shareholders, 35 A.L.R.4th 225 (1985) .

Annot., Privileged Communications Between Accountant and Client, 33 A.L.R.4th 539 (1984) .

Annot., Validity and Construction of Contractual Restriction on Right of Accountant to Practice Incident to Sale of Practice or Withdrawal From Accountancy Partnership, 13 A.L.R.4th 661 (1982) .

Annot., Validity, Construction, and Application of Statute or Regulation Restricting Use of Terms Such as "Accountant," "Public Accountant," or "Certified Public Accountant," 4 A.L.R.4th 1201 (1981) .

Annot., Tax Preparer's Liability to Taxpayer in Connection With Preparation of Tax Return, 81 A.L.R.3d 1119 (1977) .

Annot., Liability of Public Accountant to Third Parties, 46 A.L.R.3d 979 (1972) .

Annot., Liability of Defaulting Purchaser to Owner's Broker or Auctioneer, 30 A.L.R.3d 1395 (1970) .

Annot., Investigations and Surveillance, Shadowing and Trailing, as Violation of Right of Privacy, 13 A.L.R.3d 1025 (1967) .

Annot., Husband's Liability for Expenses Incurred by Wife in Investigating His Marital Transgressions, 99 A.L.R.2d 264 (1965) .

Annot., Personal Liability of Auctioneer to Owner or Mortgagee for Conversion, 96 A.L.R.2d 208 (1964) .

Annot., Liability of Auctioneer or Clerk to Buyer as to Title, Condition, or Quality of Property Sold, 80 A.L.R.2d 1237 (1961) .

Annot., Revocation of License of Private Detective or Investigator, 63 A.L.R.2d 775 (1959) .

Annot., Regulation and Licensing of Jewelry Auctions, 53 A.L.R.2d 1433 (1957) .

Annot., Implied or Apparent Authority of Agent Selling Personal Property to Make Warranties, 40 A.L.R.2d 285 (1955) .

Annot., Withdrawal of Property From Auction Sale, 37 A.L.R.2d 1049 (1954) .

Annot., Title to Goods, as Between Purchaser From, and One Who Entrusted Them to, Auctioneer, 36 A.L.R.2d 1362 (1954) .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 86.07 Text References

[1] Matthew Bender Sources

California Forms of Pleading and Practice(Matthew Bender).

Ch. 77, *Auctions and Auctioneers.*

Ch. 140, *Contracts* .

Ch. 462, *Public Accountants* .

Ch. 530, *Statute of Frauds* .

California Insurance Law and Practice, Ch. 60, *Licensing* (Matthew Bender).

California Legal Forms(Matthew Bender).

Ch. 12A, *Professional Corporations* .

Ch. 16C, *Limited Liability Partnerships.*

Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

Ch. 84, *Independent Contractors* .

Ch. 85, *Employment Agreements.*

Ch. 86A, *Agreements for Legal Services* .

Ch. 87, *Entertainment Contracts*.

Ch. 87A, *Athlete Agents.*

Ch. 89, *Home Improvement and Specialty Contracts.*

Ch. 90A, *State Government Contracts* .

Ch. 90B, *Federal Government Contracts.*

Ch. 91, *Contracts With Sales Representatives* .

Ch. 92, *Service Contracts* .

Rabkin & Johnson, Current Legal Forms with Tax Analysis(Matthew Bender).

Ch. 12, *Employment and Compensation.*

Ch. 17, *Corporate Organizations*.

Fern, WARREN'S Forms of Agreements, Ch. 4A, *Professional Services* (Matthew Bender).

California Points and Authorities(Matthew Bender).

Ch. 50, *Contracts*.

Ch. 216, *Statute of Frauds*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview

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§§ 86.08[Reserved]

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§ 86.10 Employee and Independent Contractor Distinguished

An independent contractor generally is one who, in rendering services, exercises an independent occupation and deals with the "employer" only with respect to the results of the work, not the means by which it is to be accomplished. The chief common law factor in determining that one is an independent contractor is that the employer of an independent contractor has no right of control over the mode of performing the work involved [*Green v. Soule (1904) 145 Cal. 96, 99, 78 P. 337]* , while the key element of the employer-employee relationship is that the employer has the right to control and direct the activities of the employee [*see Industrial Indem. Exchange v. Industrial Acci. Com. (1945) 26 Cal. 2d 130, 135, 156 P.2d 926]* . In addition to the "control" factor, there are numerous other factors to be considered in determining whether a person is an employee or an independent contractor. These factors and related issues are discussed in detail in Ch. 84, *Independent Contractors* .

Whether a professional is classified as an employee or as an independent contractor has important consequences for both parties to the agreement. For example, an employer is required to withhold income tax and make unemployment insurance and Social Security contributions for employees, but not for independent contractors [*see I.R.C. §§ 3102, 3111, 3401(a), 306(c)*; *Unemp. Ins. Code §§ 135, 675, 976, 2602, 2652, 13005*]. Further, under the doctrine of respondeat superior, an employer may be vicariously liable for torts committed by an employee against third parties, but a person who hires an independent contractor generally is not vicariously liable for the torts of the contractor [*Van Arsdale v. Hollinger (1968) 68 Cal. 2d 245, 250-252, 66 Cal. Rptr. 20, 437 P.2d 508 , overruled on other grounds, Privette v. Superior Court (1993) 5 Cal. 4th 689, 21 Cal. Rptr. 2d 72, 854 P.2d 721]* . Thus, the hirer of an independent contractor ordinarily is not liable to an employee of the contractor for injuries caused by the negligence of the contractor [*Camargo v. Tjaarda Dairy (2001) 25 Cal. 4th 1235, 1244-1245, 108 Cal. Rptr. 2d 617* (no liability under negligent hiring theory); *Toland v. Sunland Housing Group, Inc. (1998) 18 Cal. 4th 253, 267, 955 P.2d 504* (no liability under "peculiar risk doctrine" even when hirer fails to require that special precautions be taken to avert peculiar risks of work); *Privette v. Superior Court (1993) 5 Cal. 4th 689, 696, 21 Cal. Rptr. 2d 72, 854 P.2d 721* (no liability under "peculiar risk doctrine")].

The forms in this chapter assume an independent contractor relationship between the contracting parties. For employment contracts, see Ch. 85, *Employment Agreements* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawEmployment RelationshipsAt-Will EmploymentEmployeesLabor & Employment LawEmployment RelationshipsIndependent Contractors

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§ 86.11 Form of Contract

A contract engaging a consultant or adviser may be oral unless specifically required by statute to be in writing [*Civ. Code § 1622*]. However, if the agreement by its terms is not to be performed within a year from its making, it is invalid unless it is in writing and subscribed by the party to be charged [*Civ. Code § 1624(a)*]. For discussion of the statute of frauds and when a written contract is required, see *Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.14[1]*; see also *California Forms of Pleading and Practice, Ch. 530, Statute of Frauds, § 530.12* (Matthew Bender), and California Points and Authorities, Ch. 216, *Statute of Frauds* (Matthew Bender).

Other than the basic requirements for the formation of any contract [*see* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*], and the requirement of a writing, when applicable, under the statute of frauds, no special formalities are required in connection with the execution of an agreement with a consultant. In fact, in many cases, contracting parties do not use a written agreement. However, as a practical matter, setting out the parties' respective duties and obligations in writing may help prevent misunderstandings and unfulfilled expectations. A written document is also valuable in any litigation or arbitration proceeding arising from the engagement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral Overview

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§ 86.12 Noncompetition Agreements

Contract provisions that restrain a person from engaging in a lawful profession, trade, or business of any kind are, to that extent void [*Bus. & Prof. Code § 16600*; *see, e.g., Kolani v. Gluska (1998) 64 Cal. App. 4th 402, 407-408, 75 Cal. Rptr. 2d 257* (covenant not to compete in sales representative agreement held void and unenforceable)]. California has a strong interest in protecting its workers from noncompetition agreements under *Bus. & Prof. Code § 16600* [*see Advanced Bionics Corp. v. Medtronic, Inc. (2003) 29 Cal. 4th 697, 706-708, 128 Cal. Rptr. 2d 172, 59 P.3d 231* (despite state's strong interest, enjoining proceedings in another state requires exceptional circumstance that outweighs threat to judicial restraint and comity principles)].

However, certain restraints may be deemed reasonable and permissible. Whether an interference with the right to pursue a trade or occupation by otherwise lawful means lacks sufficient justification and is therefore illegal is determined in light of all the circumstances, by balancing the respective importance to society and the parties of protecting the activities interfered against permitting the inference [Willis v. Santa Ana etc. Hosp. Assn. (1962) 58 Cal. 2d 806, 810, 26 Cal. Rptr. 640 , *overruled on other grounds, Cianci v. Superior Court (1985) 40 Cal. 3d 903, 221 Cal. Rptr. 575, 710 P.2d 375* ; *Webb v. West Side Dist. Hosp. (1983) 144 Cal. App. 3d 946, 952, 193 Cal. Rptr. 80* , *overruled on other grounds, Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 10 Cal. Rptr. 2d 183, 832 P.2d 899]* . Thus, for example, exclusive dealing contracts between hospitals and groups of physicians, if reasonable, have been upheld [*see Centeno v. Roseville Community Hosp. (1979) 107 Cal. App. 3d 62, 69-70, 167 Cal. Rptr. 183]* . Further, in another case, a provision in a contract between a hospital and a doctor for the recruitment and training of qualified emergency room doctors, under which the hospital agreed to pay the doctor a specified fee if it hired any doctor previously recruited by him did not restrain the employment of any professional person. The purpose of the contract was not to create a monopoly, but instead to allow the hospital to employ doctors originally recruited by the other party while protecting that party against unfair exploitation of his services [*Webb v. West Side Dist. Hosp. (1983) 144 Cal. App. 3d 946, 952-954, 193 Cal. Rptr. 80]* .

For a sample noncompetition clause, see *§ 86.200[2]*. Nondisclosure and consulting agreements are *set forth in § 86.201[2]* and *§ 86.202[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsGeneral OverviewLabor & Employment LawEmployment RelationshipsEmployment ContractsConditions & TermsTrade Secrets & Unfair CompetitionNoncompetition & Nondisclosure Agreements

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§ 86.13 Investment Advisers

[1] Governing Law; Definition

Corp. Code §§ 25009, *25202*, and *25230 et seq.*, together with implementing regulations [*see 10 Cal. Code Reg. §§ 260.231 et seq.*, (licensing and regulation; experts' liability); *see also 10 Cal. Code Reg. §§ 260.240 et seq.*, *260.300 et seq.* (general and miscellaneous provisions)], govern investment advisers. This law is administered by the Commissioner of Corporations.

"Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as a part of a regular business, publishes, analyzes, or reports concerning securities. Certain financial institutions, attorneys and other professional people whose service is incidental to the practice of their profession, broker-dealers who receive no special compensation for their advice, and certain publishers are exempt from this definition [*Corp. Code § 25009*].

The adviser may not use the term "investment counsel" unless the adviser's principal business consists of acting as an investment adviser [*Corp. Code § 25235(e)*].

[2] License Required Unless Exempt

It is unlawful for any investment adviser to conduct business in California without a valid investment adviser's certificate issued by the Commissioner of Corporations, unless the investment adviser is exempt from licensing requirements [*see Corp. Code § 25202*] or is subject to *Corp. Code § 25230.1* [*Corp. Code § 25230(a)*; *see Corp. Code § 25230(b)* (rules relating to qualification and employment of investment adviser representatives), *Corp. Code § 25230(c)* (Commissioner's right to review investment advisor's disciplinary history)]. *Corp. Code § 25230.1* exempts from licensing requirements persons registered under Section 203 of the federal Investment Advisors Act of 1940 [*see 15 U.S.C. § 80b-3*] and persons exempt from the definition of investment adviser under that Act [*Corp. Code § 25230.1*]. However, those persons may not conduct business in California unless they have fewer than six clients as specified in *Corp. Code § 25202* or unless they comply with specified filing requirements [*Corp. Code § 25230.1(a)*; *see Corp. Code § 25230.1(b)* (filing requirements)].

A person registered, licensed, or qualified (or exempt from registering, licensing, or qualifying) as an investment adviser by another state, who has not had any certificate denied or revoked under the California law regulating investment advisers or any predecessor statutes, is exempt from licensing requirements [*see Corp. Code § 25230*] if the investment adviser does not have a place of business in California and has had fewer than six clients who are California residents during the preceding 12 months [*Corp. Code § 25202(a)*].

[3] Application for Certificate

An applicant must file a prescribed application with the Commissioner [*Corp. Code § 25231*; *see 10 Cal. Code Reg. § 260.231* (form)]. The applicant must also pass a securities examination administered by one of the major stock exchange groups or pass the examination required to become a Chartered Financial Analyst, Chartered Investment Counselor, Certified Financial Planner, or Personal Financial Specialist. The examination must have been taken within two years prior to applying for the license [*10 Cal. Code Reg. § 260.236*]. The license is subject to suspension or revocation for certain specified violations [*Corp. Code §§ 25232*, *25232.1-25232.3*; *see* [7][b], [c], *below*].

[4] Compensation

A contract between a licensed investment adviser and a client may not provide for the investment adviser to receive compensation based on a share of capital gains or appreciation earned by the client [*Corp. Code § 25234(a)(1)*]. However, the contract may provide for the adviser to be compensated on the basis of a percentage of the total value of the portfolio averaged over a specified period of time or taken as of a definite date [*Corp. Code § 25234(b)*].

[5] Regulations to Protect Clients' Funds

[a] Commissioner's Authority

The Commissioner is authorized to make appropriate rules to govern licensed investment advisers who have custody of their clients' funds or who have a power of attorney from their clients to execute transactions [*Corp. Code § 25237*]. An investment adviser may not do business in California unless he or she meets the standards of the Commissioner [*Corp. Code § 25236*]. Moreover, activities of investment advisers and persons associated with advisers must conform to the rules prescribed by the Commissioner to promote fair, equitable, and ethical principles [*see Corp. Code § 25238*].

[b] Trading for Advisor's Account

An investment advisor may not trade for the adviser's own account without full disclosure and the client's written consent [*Corp. Code § 25235(c)*].

[c] Client Trust Accounts; Limits on Aggregate Indebtedness

The client's funds must be segregated in trustee bank accounts containing only clients' funds, with separate records for each account. The advisor must notify the client of the manner in which these funds are maintained, and must send an itemized statement to the client at least every three months. At least once each year, an independent accountant must examine the records [*10 Cal. Code Reg. § 260.237*].

Regulations limit the aggregate indebtedness permitted an investment adviser and require specific levels of tangible net capital, depending on the adviser's degree of control over the client's funds [*see 10 Cal. Code Reg. § 260.237.2* (minimum financial requirements); *10 Cal. Code Reg. § 260.237.1* (alternate minimum financial requirements, operative until 1/1/05; *see also 10 Cal. Code Reg. § 260.216.12* (minimum capital requirements for broker-dealers))].

[6] Agent for Service of Process; Filing Records and Reports

Every non-California applicant for an investment adviser's certificate and every investment adviser subject to *Corp. Code § 25230.1* [*see* [2], *above*] must appoint the Commissioner as the applicant's agent for service of process [*Corp. Code § 25240*; *10 Cal. Code Reg. § 260.240*]. Every licensed investment adviser must make and keep all records and file all reports required by the Commissioner's rules, subject to the limitations of Section 222 of the Investment Advisors Act of 1940 [*Corp. Code § 25241(a)*; *see 10 Cal. Code Reg. § 260.241 et seq.*; *see also 15 U.S.C. § 80b-18a*].

[7] Termination of Licensure

[a] Surrender

An investment adviser may apply to the Commissioner to surrender his or her adviser's certificate. The surrender will become effective within 30 days after the Commissioner receives the application, unless a revocation or suspension proceeding is pending when the application for surrender is filed, or a proceeding is instituted within 30 days thereafter. If a proceeding is pending or instituted, withdrawal becomes effective at a time and on any conditions determined by the Commissioner [*Corp. Code § 25242(a)*; *see 10 Cal. Code Reg. § 260.242* (application form be filed on Securities and Exchange Form BDW (Uniform Request for Broker-Dealer Withdrawal)); *see also 17 C.F.R. 249.501a*].

[b] Suspension

The Commissioner may suspend a certificate if an investment adviser fails to do any of the following [*Corp. Code § 25242(c)*]:

- Pay specified fees required by statute within 10 days after notice by the Commissioner that the fee is due and unpaid [*see Corp. Code §§ 25217, 25218, 25236* (fees)].

- File any report required by statute within 10 days after notice by the commissioner that the report is due [*see* Corp. Code § Section 25241 (required reports)].

- Maintain any bond required statute [*see Corp. Code §§ 25216(e), 25237*].

- File an application, as required by statute, within the later of the time specified by statute or within 10 days after notice by the Commissioner that the application is required [*see Corp. Code § 25211(a), (c)*].

- Maintain any capital required by statute [*see Corp. Code §§ 25216(c), 25237*].

- Maintain records as required by statue [*see Corp. Code § 25241*].

[c] Revocation of Certificate

The Commissioner may revoke an investment adviser's certificate if the Commissioner finds that the investment adviser [*Corp. Code § 25242(b)*]:

- Is no longer in existence.

- Has ceased to do business as an investment adviser.

- Is subject to an adjudication of mental incompetence or to the control of a committee or conservator or guardian.

- Cannot be located after reasonable search.

The Commissioner may also revoke a certificate for the reasons enumerated in [b], *above* [*see Corp. Code § 25242(c)*].

Any person whose certificate is revoked must immediately surrender the certificate to the Commissioner [*Corp. Code § 25244*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewSecurities LawInvestment AdvisersGeneral OverviewSecurities LawInvestment AdvisersDefinitions

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§ 86.14 Financial Consultants (Proraters)

[1] Governing Law; Definition

Financial consultants acting as proraters are governed by the Check Sellers, Bill Payers, and Proraters Law [*Fin. Code § 12000 et seq.*] and the implementing regulations [*see 10 Cal. Code Reg. § 1775 et seq.*].

A "prorater" is a person who receives money from a debtor for the purpose of distributing it among the debtor's creditors in full or partial payment, of the debtor's obligations [*Fin. Code § 12002.1*; *see Nationwide Asset Servs., Inc. v. DuFauchard (2008) 164 Cal. App. 4th 1121, 1125-1126, 79 Cal. Rptr. 3d 844* (constructive receipt of debtor's funds is sufficient to bring person within statutory definition)]. The Commissioner of Corporations issues both general and special proraters licenses [*see Fin. Code § 12200.5*; *see also* [2], *below*]. The term "prorater" as used in this chapter refers to a general prorater, unless otherwise noted.

Licensed proraters are not "credit services organizations" [*Civ. Code § 1789.12(a)*] and therefore are not subject to the Credit Services Act [*see Civ. Code § 1789.10 et seq.*], which restricts the advertising and business practices of those organizations. (A credit services organization offers to provide or actually provides service designed to improve a person's credit rating or to obtain an extension of credit [*Civ. Code § 1789.12(a)*].)

Various persons and their authorized agents are exempt from the Check Sellers, Bill Payers, and Proraters Law. Exemptions include specified financial institutions, specified consumer finance lenders, attorneys in the course of their practice, creditors' associations, employment agencies providing services under Civ. Code § 1812.500 et seq., real estate licensees, transactions in which money or other property is paid to a "joint control agency," assignments for the benefit of creditors, or liquidation of a business or property, under supervision of a creditor's committee, public or certified public accountants in the course of their practice, persons receiving money for transmission to foreign countries when selling certain checks or drafts, and any group of foreign nation banks licensed to do business in California, when selling any foreign currency travelers' checks issued by the group [*see Fin. Code § 12100*]. In addition, nonprofit community service organizations that meet specified requirements are exempt for the requirements imposed on proraters [*see Fin. Code § 12104*].

[2] Licensure

A prorater must be licensed by the Commissioner [*Fin. Code § 12200*]. The only "person" eligible for a general proraters license is a corporation organized under California law for that purpose [*Fin. Code § 12200.1*]. However, a special proraters license may be issued to a qualified individual to engage in business as a business agent [*Fin. Code § 12200.2*]. A "business agent" is a person who engages in business as a prorater "as an incident to the business of advising, counseling, or directing persons in their investments, and in the organization and management of their affairs under an exclusive contract, the primary purpose of which is not the liquidation of existing indebtedness" [*Fin. Code § 12002.2*].

[3] Application for Licence

An application for a licence must be in writing, under oath, and in a form prescribed by the Commissioner [*see Fin. Code § 12201*; *see also Fin. Code §§ 12202-12204* (information required in application)]. If, after investigating the background and experience of the applicant and the applicant's business plan, the Commissioner determines that the applicant has satisfied the requisite statutory requirements, the Commissioner will issue a license [*see Fin Code § 12216*; *see also Fin. Code § 12214* (application fees and license fees)].

[4] Financial Requirements

Licensees must meet financial requirements and must maintain a surety bond or deposit with the Commissioner in a specified amount [*Fin. Code § 12205*; *see Fin. Code §§ 12206-12213* (bond requirements)]. In addition to the surety bond, the Commissioner may require the licensee to obtain an adequate fidelity bond or deposit to cover each officer, employee, or agent, and every other person having access to or authority to draw against funds collected by or for the licensee. The bond or deposit is intended to protect the public from loss through embezzlement, mysterious disappearance, theft, holdup, or burglary [*Fin. Code § 12223*].

[5] Regulation of Proraters' Conduct

Fin. Code § 12300 et seq. contain an extensive list of rules concerning the conduct of proraters. The law regulates requirements for trust accounts [*see Fin. Code § 12300.3* (creation of trust funds, handling, limitations and prohibitions)]; books, accounts, and records [*see Fin. Code § 12303*]; annual reports and financial statements [*see Fin. Code § 12304*]; place of business and branch offices [*see Fin. Code § 12302*]; maximum disbursement charges and origination fees [*see Fin. Code §§ 12314*, 13320]; advertising [*see Fin. Code § 12311*]; and prohibited conduct [*see Fin. Code §§ 12314.1, 12317-12318, 12323-12329*]. For further discussion, see *§ 86.220[1]*.

[6] Suspension or Revocation of License

The Commissioner may suspend or revoke a license, following a noticed hearing in accordance with the Administrative Procedure Act, based on [*Fin. Code § 12400*; *see Fin. Code § 12402* (hearing)]:

- Any violation of the Check Sellers, Bill Payers, and Proraters Law or its implementing regulations.

- Failure to report within 10 days the establishment of a mobile unit, branch office, or agency location, or failure on demand of the Commissioner.

- Failure on demand of the commissioner to terminate and cancel any agency [*see Fin. Code § 12301.4* (termination of agency)].

- Existence of any fact or condition that would have warranted the Commissioner's refusal to issue the license, if that fact or condition had existed at the time of the licensee's original application.

The Commissioner, on three days notice and a hearing, may suspend any license for a period not exceeding 30 days, pending investigation [*Fin. Code § 12401*]. The Commission may summarily suspend or revoke a license for failure to pay the required fee [*Fin. Code § 12401.1*; *see Fin. Code § 12214 (fee)*].

[7] Enjoining Certain Acts or Practices

Willful violation of the Check Sellers, Bill Payers, and Proraters Law is a misdemeanor, punishable by fine or imprisonment, or both [*Fin. Code § 12102*]. The Commissioner may investigate and bring an action to enjoin illegal acts or practices or to enforce compliance with the law [*see Fin. Code §§ 12105(a), 12106(a)*]. On a proper showing, a permanent or preliminary injunction, a regaining order, or a writ of mandate will be granted and a receiver or conservator may be appointed for the defendant's assets [*see Fin. Code § 12105(a)*]. The Commissioner, after notice and opportunity for a hearing, may levy administrative penalties against any person or licensee who violates the law or regulations [*see Fin. Code §§ 12105(c), 12107*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-86 California Legal Forms--Transaction Guide § 86.15

§ 86.15 Life and Disability Insurance Analysts

[1] Governing Law; Definition

Life and disability insurance analysts are governed by *Ins. Code § 1831 et seq.* A life and disability insurance analyst is a "person who, for a fee or compensation of any kind, paid by or derived from any person or source other than an insurer, advises, purports to advise, or offers to advise any person insured under, named as beneficiary of, or having any interest, in a life and disability insurance contract, in any manner concerning that contract or his or her rights in respect thereto" [*Ins. Code § 32.5*].

[2] Licensure

To qualify for a life and disability insurance analyst's license, a person may not be an officer or employee of an insurance company [*Ins. Code § 1832*] or a minor or nonresident of California [*Ins. Code § 1833*]. An eligible person must submit a written application to the Insurance Commissioner [*Ins. Code § 1834*]. The applicant must show his or her integrity, good reputation, knowledge of life or disability insurance, and generally that he or she is a fit or proper person to receive a license [*see Ins. Code § 1836*]. Further, the applicant must pass a written examination showing his or her qualifications to act as a life and disability insurance analyst [*Ins. Code § 1839*; *see Ins. Code § 1840* (scope of examination)]. The applicant must file with the Insurance Commissioner, in writing, the applicant's true name and all fictitious names under which the applicant conducts or intends to conduct the business [*Ins. Code § 1841*] and must pay the required fees [*Ins. Code § 1842*].

No one is eligible to be licensed as a life and disability insurance analyst unless, for five years preceding the date of the examination, he or she has been licensed as both a life-only and accident and health licensee under *Ins. Code § 1626(a)(1), (2)* [*Ins. Code § 1849*]. A "life licensee" is a person authorized to act as a life agent. Licenses to act as a life agent include the following types [*Ins. Code § 1626(a)(1), (2)*]:

- Life only, which entitles the licensee to transact insurance coverage on human lives, including benefits of endowment and annuities, and may include benefits in the event of death or dismemberment by accident and benefits for disability income.

- Accident and health, which entitles the licensee to transact insurance coverage for sickness, bodily injury, or accident death, and may include benefits for disability income.

An accident and health agent licensee is also authorized to transact 24-hour care coverage [*see Ins. Code § 1749.02* (definition)], in accordance with the requirements of *Ins. Code § 1749(d)* (prelicensing education) or 1749.33(d) (continuing education) [*Ins. Code § 1626(b)*].

An organization may hold a license to act as a life and disability insurance analyst, provided its organizational agreement (articles of incorporation or association or agreement of copartnership) do not forbid it to act in that capacity [*Ins. Code § 1842.1(a)*]. Only general partners or employees of partnerships, members, officers, or employees of associations, and corporate officers and employees are eligible to be named under an organizational license [*Ins. Code § 1842.1(b)*]. These individuals must also satisfy all the individual requirements applicable to life and disability insurance analysts [*Ins. Code § 1842.1(c)*].

[3] Exemptions from Licensure

Specified persons are exempt from the licensing requirement, including active members of the California state bar, qualified actuaries, bank or trust company officials, investment advisers, and certain employees who, on behalf of their employer or its employees, transact life or disability insurance with, but not on behalf of an insurer, or advise the employer or it employees concerning life or disability insurance [*see Ins. Code § 1831*].

[4] Acting Without License; Other Prohibited Acts

Any person who unlawfully acts or offers to act as a life and disability insurance analyst without a valid license is guilty of a misdemeanor [*Ins. Code § 1844*]. Further, any such activity may be enjoined as a public nuisance [*Ins. Code § 1845*].

A life and disability insurance analyst may not permit to be issued any statement that is known or should have been known to misrepresent the terms of a policy, the benefits and privileges promised, or any future dividend [*see Ins. Code § 780*]. In addition, an analyst may not make any statement that is known or should have been known to be a misrepresentation in order to induce a person to take out, refuse, change, or forfeit life or disability insurance [*see Ins. Code § 781*]. Any violation of these provisions is subject to a fine or imprisonment or both [*see Ins. Code § 782*; *see also Ins. Code § 1737 et seq.* (disciplinary actions)].

Insurance companies may not pay a commission to life and disability insurance analysts [*Ins. Code § 1832*]. Further, a life and disability insurance analyst may not charge a fee for any service that is customarily associated with soliciting insurance sales or servicing insurance contracts written by the analyst or contracts for which the analyst is receiving compensation from the insurer [*Ins. Code § 1848*]. Moreover, an analyst may not receive any fee unless that fee is based on a written agreement signed by the party to be charged [*Ins. Code § 1848*; *see § 86.230*].

Requirements for written agreements are *covered in § 86.230[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewInsurance LawClaims & ContractsGeneral OverviewInsurance LawDisability InsuranceGeneral OverviewInsurance LawLife InsuranceGeneral Overview

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§ 86.16 Accountants--Types and Services

[1] In General

In discussing agreements for professional accounting services by accountants, it is important to differentiate between licensed and unlicensed accountants, and the services that each may provide. Some accounting services may be legally provided in California only by persons licensed by the State Board of Accountancy [*see* [5], *below*], while other accounting services may be provided by anyone, whether or not they are licensed [*see* [6], *below*].

[2] "Certified Public Accountants" and "Public Accountants"

"Certified public accountants" are persons and firms who have received from the Board a certified public accountant certificate and who hold valid permits to practice as such [*Bus. & Prof. Code § 5033*; *see Bus. & Prof. Code §§ 5072* (partnerships), 5150 (accountancy corporations)]. Such a person may be styled and known as a "certified public accountant" and may also use the abbreviation "C.P.A." No other person or firm is allowed to use that title, designation, or abbreviation, or any other title, designation, sign, card, or device tending to indicate that the person using it is a certified public accountant [*Bus. & Prof. Code § 5055*]. In order to be licensed as a certified public accountant, a person must comply with education, examination, and experience requirements [*see Bus. & Prof. Code §§ 5081, 5082, 5090*; *see also Bus. & Prof. Code §§ 5092, 5093, 5095* (experience requirements); *Bus. & Prof. Code § 5094* (educational requirements); *Bus. & Prof. Code § 5081.1* (additional requirements for registered public accountant)].

"Public accountants" are persons and firms who are registered with the State Board of Accountancy and who hold a valid permit for the practice of public accountancy [*Bus. & Prof. Code § 5034*; *see Bus. & Prof. Code §§ 5072* (partnerships), 5150 (accountancy corporations)]. For a listing of the services constituting "public accountancy," see [3], *below*. Such a person may be styled and known as a "public accountant" and may also use the abbreviation "P.A." No other person or firm is allowed to use that title, designation, or abbreviation, or any other title, designation, sign, card, or device tending to indicate that the person using it is a public accountant [*Bus. & Prof. Code § 5056*].

Certified public accountants and public accountants are both legally authorized to practice all aspects of public accountancy, and there is no practical distinction between the two classifications. The difference in terminology exists because those licensed as public accountants were originally "grandfathered" in under that classification when the

Accountancy Act was revised in 1945. The Board does not license new public accountants.

[3] Unlicensed Individuals May Use Term "Accountant"

Unlicensed individuals are permitted by law to practice specified accounting services [*see Bus. & Prof. Code §§ 5051(f)-(i), 5052*; *see also* [6], *below*]. Such persons are not allowed to use the title or designation "chartered accountant," "certified accountant," "enrolled accountant," "registered accountant," "licensed accountant," or any other title or designation likely to be confused with "certified public accountant" or "public accountant," or any of the abbreviations "C.A.," "E.A.," "R.A.," or "L.A.," or similar abbreviations likely to be confused with "C.P.A." or "P.A." [*Bus. & Prof. Code § 5058* (limited exceptions for certain foreign titles and enrolled agents licensed to practice before IRS; *see* [4], *below*)]. Regulations of the State Board of Accountancy state that use of the term "accountant," when used either singly or collectively in conjunction with other titles, is likely to be confused with the titles "certified public accountant" and "public accountant" within the meaning the statute [*16 Cal. Code Reg. § 2*]. However, the California Supreme Court has held that unlicensed persons are constitutionally permitted to call themselves "accountants" as long as the use of that term does not stand to potentially mislead the public regarding the user's licensee or nonlicensee status [*Moore v. California State Bd. of Accountancy (1992) 2 Cal. 4th 999, 1023, 9 Cal. Rptr. 2d 358, 831 P.2d 798]* . This usually means that the word "accountant" or similar generic term is used in conjunction with a modifier or modifiers that serve to dispel any possibility of confusion, such as an express disclaimer stating that the "accounting" services being offered do not require a state license [*Moore v. California State Bd. of Accountancy (1992) 2 Cal. 4th 999, 1024, 9 Cal. Rptr. 2d 358, 831 P.2d 798]* .

For a discussion of accounting and related services that may lawfully be rendered by unlicensed individuals, see [6], *below*.

[4] Enrolled Agents

An enrolled agent is a person who is authorized by the Internal Revenue Service to represent taxpayers before the IRS [*see* 31 C.F.R. § 10 et seq. (Treasury Dept. Circular 230)]. Persons enrolled to practice before the Internal Service and recognized as enrolled agents may use the abbreviation "E.A." in California, regardless of whether or not they are licensed in California as certified public accountants or public accountants [*Bus. & Prof. Code § 5058*]. Other persons and firms are prohibited from using those initials, whether or not they are certified public accounts [*Bus. & Prof. Code § 5058*].

[5] Practice of Public Accountancy

Persons or firms generally must be licensed by the Board (in other words, be a CPA or public accountant) in order to practice "public accountancy" [*Bus. & Prof. Code § 5050(a)*]. There are limited exceptions for persons licensed in another state or country [Bus. & Prof. Code § 5050(a)]:

- Practice that is temporary and incident to practice in another state, provided the person or firm does not solicit clients in California, does not assert or imply licensure in California, and does not develop, implement, of market to California consumers any abusive tax avoidance transaction [Bus. & Prof. Code § 5050(b), repealed eff. January 1, 2011].

- Temporary practice in California incident to an engagement in the country in which the person who holds a valid, current license or other authority to practice public accountancy, provided the temporary practice is regulated by the foreign country and performed under the accounting or auditing standards of that country, and that the person does not hold himself or herself out as a holder of a California license or practice privilege [Bus. & Prof. Code § 5050(c)].

- Practice that is limited to preparing tax returns for natural persons who are California residents or estate tax returns for the estates of natural persons who were clients at the time of death, provided the person or firm holds a valid, current license or permit to practice public accountancy from another state [Bus & Prof. Code § 5054(a)].

- Practice of public accountancy through the holder of a California practice privilege by a certified public accounting firm authorized to practice in another state that does not have an office in California, provided the practice is limited to authorized practice by the holder of the practice privilege [*see* Bus & Prof. Code § 5096.12, repealed January 1, 2011].

Practicing public accountancy in California without being properly licensed is a misdemeanor [*Bus. & Prof. Code § 5120*].

Except as discussed below, a person is considered to be engaged in the practice of public accountancy, and therefore must be licensed as a CPA or public accountant, if that person does any of the following [*Bus. & Prof. Code § 5051*]:

- Holds himself or herself out to the public as acting in that capacity.

- Maintains an office for that practice.

- Performs, or offers to perform, any services for a client for compensation that involve audit, examination, verification, investigation, certification, presentation, or review of financial transactions and accounting records.

- Prepares or certifies for clients reports on audits or examinations of books and records of account, balance sheets, and other financial, accounting, and related schedules, exhibits, statements, or reports that are to be used for publication or for the purpose of obtaining credit or for filing with a court or with any governmental agency, or for any other purpose.

- In general, or as an incident to that work, renders professional services to clients for compensation in any matters relating to accounting procedure and to the recording, presentation, or certification of financial information or data.

- Keeps books, makes trial balances, prepares statements, makes audits, or prepares reports, all as a part of bookkeeping operations for clients.

- Prepares, or signs as the tax preparer, tax returns for clients.

- Prepares personal financial or investment plans or provides clients products or services of others in implementation of personal financial or investment plans.

- Provides management consulting services to clients.

Note that an unlicensed person may provide the last four categories of services listed above as long as that person does not hold himself or herself out, solicit, or advertise for clients using the certified public accountant or public accountant title or abbreviation [*see* [6], *below*]. A person is not holding himself or herself out, or soliciting or advertising for clients solely by reason of displaying a C.P.A. or P.A. certificate in his or her office or identifying himself or herself as a C.P.A. or P.A. on other than signs, advertisements, letterhead, business cards, publications directed to clients or potential clients, or on financial or tax documents of a client [*Bus. & Prof. Code § 5051*].

After 2005, an individual whose principal place of business is not in California and who has a valid and current license, certificate, or permit to practice public accountancy from another state may practice public accountancy in California under a practice privilege, without obtaining a California certificate or license, if the individual satisfies one of the following requirements [*Bus. & Prof. Code § 5096(a)*; *see Bus. & Prof. Code § 5096(c),(e)* (procedure to obtain practice privilege; obligations of practicing under privilege)]:

- The individual has continually practiced public accountancy as a certified public accountant under a valid license issued by any state for at least four of the last 10 years.

- The individual has a license, certificate, or permit from a state determined by the Board to have education, examination, and experience qualifications for licensure substantially equivalent to California's qualifications [*see Bus & Prof. Code § 5093* (qualifications)].

- The individual possesses education, examination, and experience qualifications for licensure determined by the Board to be substantially equivalent to California's qualifications.

[6] Services for Which License Not Required

As noted in [5], *above*, persons not licensed as public accountants or certified public accountants may provide the following services as long as they do not hold themselves out to be licensed [*Bus. & Prof. Code § 5051*]:

- Keeping books, making trial balances, preparing statements, making audits, or preparing reports, all as a part of bookkeeping operations for clients.

- Preparing or signing as the tax preparer, tax returns for clients.

- Preparing personal financial or investment plans or providing clients products or services of others in implementation of personal financial or investment plans.

- Providing management consulting services to clients.

In addition, the statutes regulating the practice of public accountancy are specifically made inapplicable to any person who, as an employee, independent contractor, or otherwise, contracts with one or more persons, organizations, or entities, for the purpose of keeping books, making trial balances, statements, making audits or preparing reports, all as a part of bookkeeping operations, provided that such trial balances, statements, or reports are not issued over the name of that person as having been prepared or examined by a certified public accountant or public accountant [*Bus. & Prof. Code § 5052*].

[7] Exemption for Employees, Assistants, and Attorneys

Unlicenced employees and assistants of certified public accountants or public accountants may perform services constituting public accountancy, provided that they are under the control and supervision of a properly licensed person and they do not issue statements over their own names [*Bus. & Prof. Code § 5053*].

An attorney at law, acting in connection with his or her practice, is exempt from the accountancy law [*Bus. & Prof. Code § 5053*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral Overview

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§ 86.17 Accountants--Regulation

[1] Regulatory Authority

The practice of public accountancy is regulated by *Bus. & Prof. Code § 5000 et seq.* and by *16 Cal. Code Reg. § 1 et seq.* The regulatory authority is Department of Consumer Affairs, State Board of Accountancy ("Board") [*Bus. & Prof. Code § 5000*, repealed January 1, 2006)]. The Board may receive and investigate complaints and conduct investigations or hearings with or without filing a complaint, and obtain evidence relating to and involving the conduct of licensees or any violation or alleged violation of *Bus. & Prof. Code § 5000 et seq.* [*Bus. & Prof. Code § 5103*]. The Board may issue subpoenas in connection with an investigation or action authorized by *Bus. & Prof. Code § 5000 et seq.* [*Bus. & Prof. Code § 5108*].

[2] Rules of Professional Conduct

The Board, by regulation, may prescribe, amend or repeal rules of professional conduct appropriate to establish and maintain a high standard of integrity and dignity in the profession [*Bus. & Prof. Code § 5018*]. The rules of professional conduct applicable to public accountants are found in *16 Cal. Code Reg. § 50 et seq.* All Board licensees, whether privately employed or engaged in public accountancy, are subject to Board's rules of professional conduct *[35 Ops. Cal. Att'y Gen. 120, 122 (1960)]* .

[3] Discipline by State Board of Accountancy

After notice and hearing, the Board may revoke, suspend, or refuse to renew any permit or certificate, or censure the permit or certificate holder, for unprofessional conduct, including, but is not limited to, the following [*Bus. & Prof. Code § 5100*]:

- A conviction of any crime substantially related to the qualifications, functions, and duties of a certified public accountant or a public accountant. For this purpose, a plea of nolo contendere is considered a conviction, and even if a person is permitted to withdraw a plea of guilty and enter a plea of not guilty or if a verdict against that person is set aside or the action is subsequently dismissed, that person is still considered to have been convicted [*Bus. & Prof. Code § 5106*].

- A violation of *Bus. & Prof. Code §§ 478, 498, 499*, dealing with false statements or omissions in the application for a license, in obtaining a certificate as a certified public accountant, in obtaining registration under *Bus. & Prof. Code § 5000 et seq.*, or in obtaining a permit to practice public accountancy.

- Dishonesty, fraud, gross negligence or repeated negligent acts committed in the same or different engagements, for the same or different clients, or any combination of engagements or clients, each resulting in a violation of applicable professional standards indicating a lack of competency in the practice of public accountancy or in the performance of the bookkeeping operations described in *Bus. & Prof. Code § 5052*.

- Cancellation, revocation, or suspension of a certificate, other authority to practice or refusal to renew the certificate or other authority to practice as a certified public accountant or a public accountant, or any other discipline by any other state or foreign country.

- Violation of *Bus. & Prof. Code § 5097*, relating to auditing documentation [*see § 86.18[12]*].

- Violation of *Bus. & Prof. Code § 5120*, relating to unauthorized practice of public accountancy [*see* [6], *above*].

- Willful violation of *Bus. & Prof. Code § 5000 et seq.* or any rule or regulation promulgated by the Board.

- Suspension or revocation of the right to practice before any governmental body or agency [*see Clare v. State Bd. of Accountancy (1992) 10 Cal. App. 4th 294, 302, 12 Cal. Rptr. 2d 481* (requiring substantial relationship between suspension or revocation and accountant's qualifications, functions, or duties)].

- Fiscal dishonesty or breach of fiduciary responsibility of any kind.

- Knowing preparation, publication, or dissemination of false, fraudulent, or materially misleading financial statements, reports, or information.

- Embezzlement, theft, misappropriation of funds or property, or obtaining money, property, or other valuable consideration by fraudulent means or false pretenses.

- The imposition of any discipline, penalty, or sanction on a registered public accounting firm or associated person of the firm, or both, or on any other holder of a permit, certificate, license, or other authority to practice in California, by the Public Company Accounting Oversight Board or the United States Securities and Exchange Commission, or their designees under the Sarbanes-Oxley Act of 2002 or other federal legislation.

- Unlawfully engaging in the practice of public accountancy in another state.

The Board may also issue subpoenas and conduct investigations and hearings in connection with any violation of *Bus. & Prof. Code § 5000 et seq.*, governing accountants [*see Bus. & Prof. Code §§ 5103, 5108, 5109*].

Revocation of an accountancy license is not penal. The only purpose of such an action is to protect the public from incompetence and lack of integrity [*Murrill v. Board (1950) 97 Cal. App. 2d 709, 712, 218 P.2d 569]* .

Cause for discipline by the Board does not void or render nonexistent agreements made in contravention of the rules. For example, when an accounting firm was engaged in the practice of accountancy, and had as a partner a woman who was not a licensee in good standing in California (thus contravening the provisions of *Bus. & Prof. Code § 5072*), the Board could discipline her and her partners in the firm or revoke the firm's registration and permit to practice. However, the fact that the firm was in violation of the rules of professional conduct did not void or render nonexistent any agreement the firm had with her or with its insurance carrier [*Montgomery v. Cal. Accountants Mutual Ins. Co. (1998) 61 Cal. App. 4th 854, 859-860, 72 Cal. Rptr. 2d 39]* .

[4] Enjoining Acts or Practices Violating Accounting Statutes

Whenever in the judgment of the Board or, with its approval, the administrative committee, any person has engaged, or is about to engage, in any acts or practices that constitute, or will constitute, an offense against *Bus. & Prof. Code § 5000 et seq.* (provisions regulating practice of public accountancy), the Board may apply to the appropriate court for an order enjoining those acts or practices. On a showing by the Board that a person has engaged, or is about to engage, in any act or practice that constitutes an offense under *Bus. & Prof. Code § 5000 et seq.*, the court must grant an injunction, restraining order, or other order that may be appropriate [*Bus. & Prof. Code § 5122*].

[5] Advertising

A certified public accountant or a public accountant may not advertise in any manner that is false, fraudulent, or misleading in violation of *Bus. & Prof. Code § 17500* [*16 Cal. Code Reg. § 63*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART II. LEGAL BACKGROUND

28-86 California Legal Forms--Transaction Guide § 86.18

§ 86.18 Accountants--Accounting Firms

[1] Sole Proprietorship

An individual may engage in the practice of accountancy as a sole proprietorship if he or she holds the required certificate and has been issued a valid permit to practice [*see Bus. & Prof. Code § 5070*].

[2] General Partnership

A partnership, other than a limited partnership, may be registered with the Board as certified public accountants, provided that it meets all of the following requirements [*Bus. & Prof. Code § 5072*]:

- At least one general partner is a California certified public accountant, public accountant, or accountancy corporation [*see* [3], *below*], in good standing or has applied for a C.P.A. certificate.

- Each partner personally engaged in the practice of accounting in California is a California licensee in good standing or has applied for a C.P.A. certificate.

- Each partner not personally engaged in practice in California is a certified public accountant in good standing of some state.

- Each resident manager in charge of a firm office in California is a California licensee in good standing or has applied for a C.P.A. certificate.

[3] Accountancy Corporation

[a] Definition

An accountancy corporation is a corporation that is registered with the Board and has a current valid certificate of registration from the Board [*Bus. & Prof. Code § 5150*; *see Bus. & Prof. Code § 5152.1* (permit to practice must be renewed biannually)]. Subject to all applicable statutes, rules, and regulations, an accountancy corporation is entitled to

practice accountancy [*Bus. & Prof. Code § 5150*; *16 Cal. Code Reg. § 75.5*].

[b] Requirements

An accountancy corporation must be a domestic corporation, or a foreign corporation that is qualified to transact intrastate business under the General Corporation Law [*Bus. & Prof. Code § 5151*; *see Corp. Code § 13404.5* (qualification of foreign professional corporations); *see also* Ch. 12A, *Professional Corporations*]. Each officer, director, shareholder, or employee of the corporation who will render professional services must be licensed either in California or in the jurisdictions in which that person practices [*Bus. & Prof. Code § 5151*; *16 Cal. Code Reg. § 75.5(b)*; *see Corp. Code § 13401(d)* ("licensed person" defined); *see also Bus. & Prof. Code §§ 5053* (work of unlicenced employees), 5079 (nonlicensee owners)]. Further, each director, shareholder, and officer must be an accountant or a person licensed to render accounting services in the jurisdictions in which the person practices, with two exceptions [*Bus. & Prof. Code § 5154*]. First, if the corporation has only one shareholder, this shareholder must be sole director, president, and treasurer, and the other corporate officers need not be licensed persons [*Corp. Code § 13403*]. Second, a corporation may have owners who are not licensed as certified public accountants or public accountants if the following conditions are met [*see Bus. & Prof. Code §§ 5154, 5079(a)(1)-(6)*]:

- Nonlicensee owners must be natural persons or entities, such as partnerships or professional corporations. Each ultimate beneficial owner of an equity interest in that entity must be a natural person materially participating in the business conducted by the firm or an entity controlled by the firm.

- Nonlicensee owners must materially participate in the business of the firm, or an entity controlled by the firm, and their ownership interest must revert to the firm on the cessation of any material participation.

- Licensees must in the aggregate, directly or beneficially, comprise a majority of owners, except that firms with two owners may have one owner who is a nonlicensee.

- Licensees must in the aggregate, directly or beneficially, hold more than half of the equity capital and possess majority voting rights.

- Nonlicensee owners must not hold themselves out as certified public accountants or public accountants, and each licensed firm must disclose actual or potential involvement of nonlicensee owners in the services provided.

- There must be a certified public accountant or public accountant who has ultimate responsibility for each financial statement attestation and compilation service engagement.

However, except as permitted by the State Board of Accountancy in the exercise of its discretion, a person may not become a nonlicensee owner or remain a nonlicensee owner if the person has done either of the following [*Bus. & Prof. Code § 5079(a)(7)*; *see Bus. & Prof. Code § 5079(b)* (obligation to report, in writing, occurrence of any of following events)]:

- Been convicted of any crime, an element of which is dishonesty or fraud, under the laws of any state, of the United States, or of any other jurisdiction.

- Had a professional license or the right to practice revoked or suspended for reasons other than nonpayment of dues or fees, or has voluntarily surrendered a license or right to practice with disciplinary charges or a disciplinary investigation pending, and has not been reinstated by a licensing or regulatory agency of any state or of the United States, including, but not limited to, the Securities and Exchange

Commission or Public Company Accounting Oversight Board, or of any other jurisdiction.

Each office of an accountancy corporation engaged in the practice of public accountancy in California must be managed by a certified public accountant or public accountant [*Bus. & Prof. Code § 5158*]. Further, all work in an office of a certified public accountant or public accountant in California which is not under the personal management of such an accountant must be supervised by a certified public accountant or public accountant [*Bus. & Prof. Code § 5078*].

[c] Prohibition Against Unprofessional Conduct

An accountancy corporation may not do or fail to do any act, if the act or its omission would constitute unprofessional conduct under any statute, rule, or regulation. In the conduct of its practice, the corporation must observe and be bound by those statutes, rules, and regulations to the same extent as a person [*Bus. & Prof. Code § 5156*].

[4] Limited Liability Partnerships

Public accountants may also form limited liability partnerships. For discussion of this form of entity, see Ch. 16C, *Limited Liability Partnerships* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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DIVISION VI: PERFORMANCE OF SERVICES
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PART II. LEGAL BACKGROUND

28-86 California Legal Forms--Transaction Guide § 86.19

§ 86.19 Accountants--Rights and Duties

[1] Right to Practice Accountancy

An accountant does not acquire a vested right to practice accountancy by reason of his or her registration certificate. The general right to engage in a trade, profession, or business is subject to the power inherent in the state to make necessary rules and regulations respecting the use and enjoyment of property necessary for the preservation of the public health, morals, comfort, order, and safety. These regulations may not deprive owners of property without due process of law. Thus, no person can acquire a vested right to continue, even when licensed, in a business, trade, or occupation that is subject to legislative control under a state's police powers [*Murrill v. Board (1950) 97 Cal. App. 2d 709, 711-712, 218 P.2d 569]* .

[2] Duties to Clients; Malpractice

Accountants have been recognized as a skilled professional class subject generally to the same rules of liability for negligence in the practice of their profession as are members of other skilled professions [*see, e.g., Mattco Forge, Inc. v. Arthur Young & Co. (1997) 52 Cal. App. 4th 820, 831-833, 60 Cal. Rptr. 2d 780* (action for accounting malpractice based on allegedly negligent trial assistance)]. As members of a skilled profession, they are experts [*Lindner v. Barlow, Davis & Wood (1962) 210 Cal. App. 2d 660, 665, 27 Cal. Rptr. 101]* . The services of experts are sought because of their special skill. They have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for negligence. Those who hire experts, however, are not justified in expecting infallibility; they can expect only reasonable care and competence [*Gagne v. Bertran (1954) 43 Cal. 2d 481, 489, 275 P.2d 15* (action by purchaser of land against defendant hired to make fill test); *Lindner v. Barlow, Davis & Wood (1962) 210 Cal. App. 2d 660, 665, 27 Cal. Rptr. 101* (malpractice action against accountants)].

The elements of a cause of action in tort for accounting malpractice based on negligence are [*Mattco Forge, Inc. v. Arthur Young & Co. (1997) 52 Cal. App. 4th 820, 833, 60 Cal. Rptr. 2d 780* (applying trial-within-trial standard to accounting malpractice action based on allegedly negligent litigation support)]:

- The duty of the accountant to use such skill, prudence, and diligence as other members of the

profession commonly possess and exercise;

- Breach of the duty;
- Proximate causal connection between the negligent conduct and the resulting injury; and
- Actual loss or damage resulting from the accountant's negligence.

An action against an accountant for failure to perform his or her obligation to the person employing him or her may be based on breach of a contract. If an accountant contracts to do a specific thing, his or her obligation is not limited to the exercise of ordinary care but is a positive, specific duty [*L. B. Laboratories, Inc. v. Mitchell (1952) 39 Cal. 2d 56, 63, 244 P.2d 385]* . However, when the accountant is retained to conduct an independent audit report, the accountant's responsibility to the intended beneficiaries of that report may influence the accountant's relationship to his or her client. Indeed, the importance of the independent audit report and the credence with which it is viewed by third parties [*see* [4], *below*] are reflected in the standard to which the profession is held. The public reliance on the objectivity and integrity of certified public accountants to maintain the orderly function of commerce imposes a public interest responsibility on them [*National Med. Transp. Network v. Deloitte & Touche (1998) 62 Cal. App. 4th 412, 428, 72 Cal. Rptr. 2d 720]* . By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a public responsibility transcending any employment relationship with the client. Thus, an accounting firm may resign as independent auditor of a company without issuing an opinion [*Nat'l Medical Transportation Network v. Deloitte & Touche (1998) 62 Cal. App. 4th 412, 428-432, 72 Cal. Rptr. 2d 720* (firm presented evidence that resignation was justified by lack of cooperation from client's management, firm's loss of faith in client's integrity, and threats from client's chief executive officer compromising firm's independence as support for good cause)].

[3] Liability to Persons Not in Privity

In general, an accountant has no liability to third parties not in privity. The California Supreme Court has rejected the prior rule that accountants owe a duty of care to all persons who reasonably and foreseeably rely on the accountant's professional opinions [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 405-406 n.15, 416, 11 Cal. Rptr. 2d 51, 834 P.2d 745* (overruling *Int'l Mortgage Co. v. John P. Butler Accountancy Corp. (1986) 177 Cal. App. 3d 806, 223 Cal. Rptr. 218*)]. There is now a strict privity rule, under which an auditor's liability for general negligence in the conduct of an audit of its client's financial statements is confined to the client--that is, the person who contracts for or engages the audit services. Other persons may not recover on a pure negligence theory [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 406, 11 Cal. Rptr. 2d 51, 834 P.2d 745]* . This rule has been held to be retroactive in application [*Industrial Indemnity Co. v. Touche Ross & Co. (1993) 13 Cal. App. 4th 1086, 1092, 17 Cal. Rptr. 2d 29]* .

Although parties who are not in a contractual relationship with an accountant may not sue for general negligence, intended beneficiaries of audit reports who are known to the auditor and for whose benefit the auditor renders the report may recover on a theory of negligent misrepresentation [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 406-407, 11 Cal. Rptr. 2d 51, 834 P.2d 745* ; *see Civ. Code § 1710(2)*]. This is because nonclients of the auditor are connected with the audit through receipt of and express reliance on the audit report. Therefore, the report, not the audit itself, is the foundation of the third person's claim [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 412-413, 11 Cal. Rptr. 2d 51, 834 P.2d 745]* .

In addition to negligent misrepresentation, an auditor may be liable to third parties for intentional fraud in the preparation of an audit report. In such a suit, it must be shown that the auditor had no belief in the truth of the statements made and that the auditor made them recklessly, even though the auditor may not have had actual knowledge of the false or baseless character of its opinion [*Bily v. Arthur Young & Co. (1992) 3 Cal. 4th 370, 414-415, 11 Cal. Rptr. 2d 51, 834 P.2d 745]* .

For detailed discussion of malpractice issues and litigation forms, see California Forms of Pleading and Practice, Ch. 462, *Public Accountants* (Matthew Bender).

[4] Confidential Relationship Between Client and Accountant

A confidential relationship exists between a certified public accountant or public accountant and the accountant's client or former client. This relationship prevents the accountant from disclosing any information obtained from the client, unless the client consents or disclosure is required by a subpoena or summons enforceable by court order [*16 Cal. Code Reg. § 54(a)*]. However, this confidentiality requirement does not bar a licensee from responding [*16 Cal. Code Reg. § 54(b)*]:

- To an official inquiry from a federal or state government regulatory agency.
- To another licensee in connection with a proposed sale or merger of the licensee's professional practice.
- To another licensee to the extent necessary for purposes of professional consultation and to professional standards review, ethics or quality control peer review organizations.
- When specifically required by law.

[5] Use of Accountant's Name

A licensed accountant may not permit another person, other than a partner or an employee, to use the accountant's name in connection with an accountancy practice [*16 Cal. Code Reg. § 55*].

[6] Fees and Commissions

A certified public accountant or public accountant generally may not pay a fee [*see Bus. & Prof. Code § 5061(f)* ("fee" defined)] or commission to obtain a client or accept a fee or commission for referring a client to the products and services of a third party [*Bus. & Prof. Code § 5061(a)*]. However, a public accountant who is *not* performing any of the services specified in *Bus. & Prof. Code § 5061(c)* (listed *below*), and who complies with specified disclosure requirements, may accept a fee or commission for providing a client with products or services provided by a third party in conjunction with services provided by the accountant [*Bus. & Prof. Code § 5061(b)*; *see Bus. & Prof. Code § 5061(d)* (disclosure of fact of commission required)].

A public accountant is prohibited from performing services for a client, or an officer or director of a client, or a client-sponsored retirement plan, for a commission, or receiving a commission from a third party for providing products or services of that third party to a client, or an officer or director of a client, or a client-sponsored retirement plan, during the period in which the accountant also performs for the client, or officer or director of the client, or client-sponsored retirement plan, any of the following services, and during the period covered by any historical financial statements involved in these services [*Bus. & Prof. Code § 5061(c)*]:

- An audit or review of a financial statement.
- A compilation of a financial statement when the accountant reasonably expects that a third party will use the financial statement and the compilation report does not disclose a lack of independence.
- An examination of prospective financial information.

A public accountant who is not prohibited from performing services for a commission, or from receiving a commission, and who is paid or expects to be paid a commission, must disclose that fact to any client or entity to whom the accountant recommends or refers a product or service to which the commission relates [*Bus. & Prof. Code § 5061(d)*]. The Board is required by statute to adopt regulations implementing this requirement, including, at a minimum, that the disclosure satisfy the following conditions [*Bus. & Prof. Code § 5061(d)*]:

- Be in writing and be clear and conspicuous.
- Be signed by the recipient of the product or service.
- State the amount of the commission or the basis on which it will be computed.
- Identify the source of the payment and the relationship between the source of the payment and the person receiving the payment.
- Be presented to the client at or before the time the recommendation of the product or service is made.

[7] Contingent Fees

A licensed accountant is prohibited from performing, for a contingent fee, any professional services for, or receiving a contingency fee from, a client for whom the licensee or the licensee's firm performs [*16 Cal. Code Reg. § 62(a)(1)*]:

- An audit or review of a financial statement.
- A compilation of a financial statement when the licensee expects or reasonably should expect that a third party will use the financial statement and the licensee's compilation report does not disclose a lack of independence.
- An examination of prospective financial information.
- Any other attest engagement when the licensee accountant expects or reasonably should expect that a third party will use the related attestation report.
- Any other services requiring independence.

In addition, a licensed accountant may not charge a contingent fee to do any of the following [*16 Cal. Code Reg. § 62(a)(2)-(4)*]:

- Prepare an original tax return for any client.
- Prepare an amended tax return, claim for tax refund, or perform other similar tax services for any client.
- Perform an engagement as a testifying expert.

For these purposes, a "contingency fee" is a fee established for the performance of any service under an arrangement in which no fee will be charged unless a specific finding or result is attained, or in which the amount of the fee is otherwise dependent on the finding or result of the service [*16 Cal. Code Reg. § 62(b)*]. However, fees are not regarded as being contingent if fixed by courts or governmental entities acting in a judicial or regulatory capacity, or in tax matters if determined based on the results of judicial proceedings or the findings of governmental agencies in a judicial

or regulatory capacity, or there is a reasonable expectation of substantive review by a taxing authority [*16 Cal. Code Reg. § 62(b)*].

[8] Conflict of Interest

A licensee who is engaged in the practice of public accounting may not concurrently engage in any business or occupation that impairs his or her objectivity or creates a conflict of interest in rendering professional services [*16 Cal. Code Reg. § 57*]. In addition, a licensee (or a firm of which the licensee is a partner or shareholder) may not express an opinion on financial statements of an enterprise unless the licensee and his or her firm are independent from the enterprise being examined [*16 Cal. Code Reg. § 65*]. Independence must be determined by assessing the accountant's financial, promotional, managerial, and other relationships with the enterprise to determine whether, in the circumstances, his or her opinion would be considered independent, objective, and unbiased by one who had knowledge of all the facts [*16 Cal. Code Reg. § 65*].

A licensee may not accept employment with a publicly traded corporation or its affiliate within 12 months of the issuance of a financial statement report if both of the following are true [*Bus. & Prof. Code § 5062.2*]:

- The licensee has participated in an audit engagement for the corporation and held responsibility, with respect to the audit engagement, requiring the licensee to exercise significant judgment in the audit process. Responsibilities meeting these requirements include, but are not limited to, positions, however titled, in which the licensee was the person in charge of the fieldwork, up through positions in which the licensee was a partner on the engagement.

- The employment would permit the licensee to exercise significant authority over accounting or financial reporting, including authority over the controls related to those functions.

[9] Unauthorized Practice of Law

No person may practice law in California unless he or she is an active member of the State Bar [*Bus. & Prof. Code § 6125*]. Anyone advertising himself or herself as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, or otherwise authorized pursuant to statute or court rule to practice law in California at the time of doing so, is guilty of a misdemeanor [*Bus. & Prof. Code § 6126(a)*]. In addition, an accountant who has engaged in the illegal practice of law has no cause of action for fees for services rendered in violation of *Bus. & Prof. Code § 6126* [*see Agran v. Shapiro (1954) 127 Cal. App. 2d Supp. 807, 826 , 273 P.2d 619]* .

[10] Ownership of Papers

All statements, records, schedules, working papers, and memoranda made by a licensee or a partner, shareholder, officer, director, or employee of a licensed public accountant, incident to, or in the course of, rendering services to a client in the practice of public accountancy are and remain the property of the licensee, in the absence of an express agreement between the licensee and the client to the contrary, with the exception of [*Bus. & Prof. Code § 5037(a)*]:

- Reports submitted by that licensee to the client.

- Records that are part of the client's records.

None of these statements, records, schedules, working papers, or memoranda may be sold, transferred, or bequeathed, without the consent of the client or the client's personal representative or assignee, to anyone other than one or more surviving partners or stockholders or new partners or stockholders of the licensee, or any combined or merged firm successor in interest to the licensee [*Bus. & Prof. Code § 5037(a)*].

A licensed public accountant is required to furnish the following to his or her client or former client, on request and reasonable notice [*Bus. & Prof. Code § 5037(b)*]:

- A copy of the licensee's working papers, to the extent that those working papers include records that would ordinarily constitute part of the client's records and are not otherwise available to the client.

- Any accounting or other records belonging to, or obtained from or on behalf of, the client which the licensee removed from the client's premises or received for the client's account.

The licensee may make and retain copies of documents of the client when they form the basis for work done by the licensee [*Bus. & Prof. Code § 5037(b)(2)*].

[11] Audit Documentation

Audit documentation is an accountant's records of the procedures applied, tests performed, information obtained and pertinent conclusions reached in an audit engagement. Audit document must include, but is not limited to [*Bus. & Prof. Code § 5097(a)*]:

- Programs.

- Analyses.

- Memoranda.

- Letters of confirmation and representation.

- Copies or abstracts of company documents.

- Schedules or commentaries prepared or obtained by the accountant.

Audit documentation must be sufficient to enable a reviewer with relevant knowledge and experience, but no previous connection to the audit engagement, to understand the nature, timing, extent, and results of the auditing or other procedures performed, evidence obtained, and conclusions reached, and to determine the identity of the persons who performed and reviewed the work [*Bus. & Prof. Code § 5097(b)*]. Failure of the documentation to document procedures applied, tests performed, evidence obtained, and relevant conclusions reached raises a rebuttable presumption that the procedures were not applied, tests were not performed, information was not obtained, and relevant conclusions were not reached. This rebuttable presumption affects the burden of proof relative to the portions of the audit not documented. The burden may be met by a preponderance of the evidence [*Bus. & Prof. Code § 5097(c)*].

Audit documentation must be maintained for the longer of a minimum period of seven years--which will be extended during any investigation, disciplinary action or legal action involving the accountant or the accountant's firm--or a period sufficient to satisfy professional standards and to comply with applicable laws and regulations [*Bus. & Prof. Code § 5097(d), (e)*]. Accountants must maintain a written documentation retention and destruction policy setting out the accountant's practices and procedures complying with the documentation requirements [*Bus. & Prof. Code § 5097(f)*].

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[Reserved]

§§ 86.20[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

28-86 California Legal Forms--Transaction Guide § 86.100

§ 86.100 Facts

1. Name, address, and telephone number of professional to be engaged.

2. Name of person or entity ("client") for whom work will be performed, and address and telephone number of client's principal place of business.

3. Person authorized to enter into contracts on behalf of client:

a. Name.

b. Title.

c. Office address.

d. Source of authority, either:
(1) Resolution of board of directors or partners.

(2) Other.

4. Nature or description of client's business activities.

5. Nature or description of any trade secrets proprietary to client, to be protected under agreement for professional services, such as:

a. Customer lists or contracts.

b. Financial data.

c. Cost and sales data.

d. Formulae or processes.

e. Devices or models.

f. Drawings.

g. Plans or information that particular matters are being planned or discussed.

6. Duration of agreement, either:

a. Specified term, including:

(1) Length of initial term.

(2) Dates on which initial term is to begin and end.

(3) Length of renewal term or terms, if desired.

b. By project.

7. Any required licenses or permits required to perform professional services.

8. Description of duties professional will perform:

NOTE:

It is important that the description of duties be as detailed as reasonably possible. Misunderstanding between the parties as to what specific tasks are included within the overall project is probably the greatest single source of trouble in connection with the preparation of agreements for professional services. The description should include both a description of the overall project or service and a breakdown of what is included in each major component of the overall task.

As important as what services will be included in the agreement is the question of what related services will ***not*** be included. Both prospective parties to such an agreement should explore in detail what services are and are not included in the agreement.

a. As part of basic package of services specified in agreement.

b. At extra cost in addition to basic services.

9. Limitations on professional's authority, such as:

a. Matters that will require prior approval of client, if applicable.

b. Matters requiring exercise of professional's discretion.

10. Amount and nature of compensation:

a. Per hour.

b. Per job.

c. For each particular component of total project, if appropriate.

d. Frequency of payment.

11. Amount of contingency fee, if allowed, and frequency of payment.

NOTE:
Use of contingent fees by a licensed accountant ordinarily is impermissible [***see*** *16 Cal. Code Reg. § 62*; § 86.19[7]].

12. Amount of royalty and frequency of payment.

13. Ownership or disposition of professional's inventions, writings, or creations.

a. Assignment to client with or without royalties payable to professional; or

b. Title retained by professional.

14. Grounds or methods for terminating agreement:

a. Completion of task.

b. Termination by either or both parties on notice.

c. Death of professional or client.

d. Willful breach.

e. Habitual neglect of duties.

f. Dishonesty, fraud, misrepresentation, or other acts of moral turpitude.

15. Effect of merger, transfer of assets, or dissolution of client on agreement for professional services.

Legal Topics:

For related research and practice materials, see the following legal topics:
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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

28-86 California Legal Forms--Transaction Guide § 86.101

§ 86.101 Documents

1. Any previous contracts between parties.

2. Correspondence between parties concerning the agreement for services.

Legal Topics:

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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

28-86 California Legal Forms--Transaction Guide §§ 86.102-86.109

[Reserved]

§§ 86.102[Reserved]

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CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART III. TRANSACTION GUIDE
B. Preliminary Determinations
1. General Determinations for Professional Services Agreements

28-86 California Legal Forms--Transaction Guide § 86.110

§ 86.110 Relationship Between the Parties

NOTE:

An attorney who is employed to draft an agreement for professional services should first consider what the relationship between the parties is or should be, and whether the professional will be classified as an independent contractor or employee. The forms in this chapter assume an independent contractor-relationship between the contracting parties. For forms suitable to use if an employment relationship exists, see Ch. 85, ***Employment Agreements*** .

1. Determine whether potential engagement is more like independent contractor relationship than employer-employee relationship [*see* Ch. 84, *Independent Contractors*].

NOTE:

Even if both of the parties regard the professional as an independent contractor, circumstances can easily arise in which a professional may be classified as an employee for purposes of California wage and hours of work laws, workers' compensation and unemployment purposes, and federal income tax withholding. For a detailed discussion of the factors that are used to determine whether a person is an employee or an independent contractor, see Ch. 84, ***Independent Contractors*** .

2. If contemplated relationship is not that of independent contractor-client, determine whether it is that of employer and employee [*see* Ch. 85, *Employment Agreements*].

3. Consider whether partnership or joint venture would be more suitable relationship [*see* Ch. 15, Part A, *Formation of General Partnerships*].

4. Determine whether contemplated relationship is that of professional employed by his or her professional corporation [for employment contract, *see* Ch. 12A, *Professional Corporations*].

5. If professional is to act in representative capacity:

a. Consider whether granting that person power of attorney is necessary or appropriate to accomplish objectives [*see* Ch. 98, *Powers of Attorney*].

b. Consider whether individual should be given authority to act as client's agent.

6. Assess strength of client's negotiating position with respect to terms of contemplated services:

a. Importance of service to client.

b. Immediacy of client's need.

c. Whether services of comparable quality are available from other professionals at a similar price.

Legal Topics:

For related research and practice materials, see the following legal topics:
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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
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1. General Determinations for Professional Services Agreements

28-86 California Legal Forms--Transaction Guide § 86.111

§ 86.111 Need for Written Contract

1. Determine whether statute of frauds [*Civ. Code § 1624*] requires agreement for professional services to be in writing.

a. Determine whether contemplated contract will provide that it will not be performed within one year from the time of its making.

NOTE:
A contract that will expressly not be performed within a year of making is invalid unless it or a memorandum of the contract is in writing and signed by the party to be charged [*Civ. Code § 1624(a)(1)*].

b. Consider whether contemplated contract will be such that it cannot possibly be performed within one year.

NOTE:
A contract is within the statute of frauds if, under its terms, the professional cannot possibly perform it completely within one year from the making of the contract [***Civ. Code § 1624(a)(1); see*** *White Lighting Co. v. Wolfson (1968) 68 Cal. 2d 336, 343, 66 Cal. Rptr. 697, 438 P.2d 345]* . For discussion and references to other detailed discussions of statute of frauds issues, see *§ 86.11*.

c. Determine whether contract will specify term of one year or less, with option for extension.

NOTE:
Such a contract is not invalid under the statute of frauds, even if oral [*Civ. Code § 1624(a)(1); Columbia Pictures Corp. v. DeToth (1945) 26 Cal. 2d 753, 759, 161 P.2d 217]* .

2. Determine whether or not any other statute requires that contract be in writing [*see, e.g., Bus. & Prof. Code § 22442(a)* (immigration consultants), discussed in *§ 86.270[1]*; *Civ. Code § 1812.608(d)* (auctioneers), discussed in *§ 86.243[1][b]*.

3. Even if contract need not be written, consider whether it would be advantageous to client, or to professional, to specify any of following in writing:

NOTE:
Some or all of the following should be in writing in order to make specific and memorialize the bargain of the parties and avoid the need for litigation that might arise in the absence of specificity. If only a few of the following items need to be memorialized in writing, counsel should consider using a simple, stand-alone document acknowledging or agreeing to each of the particular items. This can be done in a letter that requires the client's or the professional's written assent. For example, a letter might be used for a nondisclosure agreement to protect the client's confidential business information.

a. Term of agreement.

b. Professional's duties, and any limitations on those duties.

c. Compensation to be paid.

d. Property rights of the parties to:

(1) Patents or copyrights on works created by professional under agreement.

(2) Trademarks.

(3) Trade secrets, including:
(a) Customer lists.

(b) Processes or formulas.

(c) Business methods.

(d) Business plans.

(e) Unregistered patentable inventions.

(f) Unregistered copyrightable creations.

e. Protection of client from competitive activities of professional during term of agreement.

f. Protection of client from unfair competition by professional during or after term of engagement [*see § 86.12*].

g. Protection of professional not to be restrained from engaging in a lawful profession, trade, or business [*see § 86.12*].

h. Other obligations of parties.

i. Grounds and procedures for terminating contract.

4. Determine whether need for writing is outweighed by any of following disadvantages:

a. Time and expense of preparing written agreement.

b. Possibility that specificity of formal contract may unduly limit client, by taking away flexibility in dealing with professional.

5. Consider whether some document other than formal professional services agreement might serve client's purpose; for example:

a. Offer letter requiring professional's written assent.

b. Written agreement of nondisclosure of trade secrets.

c. Written assignment of intellectual property rights concerning projects worked on by professional in course of engagement.

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-86 California Legal Forms--Transaction Guide § 86.112

§ 86.112 Corporate, Partnership, or Association Formalities Necessary to Enter into Agreement for Professional Services

1. If corporation, partnership, or association ("organization") is to be party engaging professional, determine whether its basic organizational documents (i.e., articles or partnership agreement or bylaws) contain provisions governing or bearing on:

a. Authority to enter into contracts.

b. Authority to set compensation.

2. Determine whether bylaws or other basic organizational documents contain any other provision governing or bearing on:

NOTE:
Basic organizational document provisions bearing on these subjects may have an influence on the terms of a contract for professional services.

a. Management of business; or

b. Conduct of organization's affairs.

c. Authority of professional to bind client.

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-86 California Legal Forms--Transaction Guide §§ 86.113-86.119

[Reserved]

§§ 86.113[Reserved]

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28-86 California Legal Forms--Transaction Guide § 86.120

§ 86.120 Agreement With Business Consultant

NOTE:

Business consultants provide a myriad of services--in management, statistics, computers, information systems, marketing, personnel, research and development, and many others. Accordingly, in addition to making the determinations *outlined in §§ 86.110-86.112*, counsel should to make additional determinations based on the type of professional engagement contemplated. For a sample agreement to engage a business or computer consultant, see *§ 86.200*.

1. Determine the type and extent of professional services needed [*see § 86.140[3]*].

2. Determine client's and/or professional's desires regarding property rights and noncompetition restrictions [*see § 86.140[7]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-86 California Legal Forms--Transaction Guide § 86.121

§ 86.121 Agreement With Accountant

NOTE:
In addition to making the determinations *outlined in §§ 86.110-86.112*, counsel should make the additional determinations listed in this section. For sample agreements, see *§§ 86.210-86.215*.

1. Determine nature of accounting services sought by client [*see §§ 86.210-86.215*].

2. Determine extent of professional services needed [*see § 86.140[3]*]:

a. Accounting and auditing, including:
(1) Auditing and certifying financial reports for management, stockholders, or creditors.

(2) Securities and Exchange Commission registrations and regulatory agency reporting.

(3) Expert testimony.

(4) Discussions with creditors.

(5) Bankruptcies.

b. Taxation, including:

(1) Preparation of income tax, estate tax and employer tax returns.

(2) Handling Internal Revenue Service audits.

(3) Obtaining advance rulings from the IRS.

(4) Income tax planning.

(5) Estate planning.

(6) Allocation of taxes and their effect on profit and loss statements.

c. Management advisory services.

(1) Systems and work flow.

(2) Budgeting.

3. Determine whether accounting services needed by client must be rendered by a certified public accountant or public accountant, or whether those services may be rendered by an unlicensed person [*see § 86.16[5], [6]*].

4. Determine whether accounting professional proposed to be engaged is properly licensed to provide all of those services.

NOTE:

Not all persons holding themselves out as "accountants" are licensed certified public accountants or public accountants [***see** § 86.16[5]*]. Although unlicensed persons are legally permitted to perform some specific accounting services (such as bookkeeping and preparation of tax returns), other services constituting the "practice of public accountancy" may only be performed by CPAs or public accountants [***see** Bus. & Prof. Code §§ 5051, 5052*]. For detailed discussion, see *§ 86.16[5], [6]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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28-86 California Legal Forms--Transaction Guide § 86.122

§ 86.122 Agreement With Insurance Adjuster

NOTE:
In addition to making the determinations *outlined in §§ 86.110-86.112*, counsel should make the additional determinations listed in this section. For a sample agreement, see *§ 86.251*.

1. Determine what type of insurance coverage and loss is involved; e.g., automobile accident, fire, death of insured, or loss by theft.

2. Determine extent of authority to be given analyst to [*see § 86.251[2],* PP 1, 2]:

a. Clarify insurance coverage.

b. Investigate accident or loss.

c. Determine liability question.

NOTE:
Agreements between insurance companies and insurance adjusters ordinarily restrict the adjuster's authority to admit liability on the insurer's behalf [***see*** *§ 86.251[2],* P 1].

d. Accept or reject proof of loss.

e. Engage in settlement negotiations.

f. Obtain releases from parties.

g. Aid in preparation of defense of claim in event that claim is not settled.

3. Consider whether any powers are to be reserved expressly to insurance company.

4. Consider whether insurance analyst should be required to post bond or other security.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewInsurance LawIndustry RegulationInsurance Company OperationsRepresentativesAdjusters & InvestigatorsGeneral Overview

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28-86 California Legal Forms--Transaction Guide § 86.123

§ 86.123 Agreement With Appraiser

NOTE:
In addition to making the determinations *outlined in §§ 86.110-86.112*, counsel should make the additional determinations listed in this section. For sample agreements, see *§§ 86.240-86.242*.

1. Determine basic facts relating to appraisal:

a. Whether real property, personal property, and/or business is to be appraised.

b. Underlying purpose of appraisal (e.g., condemnation, valuation for insurance purposes, financing, sale of business or property, estate valuation, or other purpose.

2. Determine whether appraiser has proper qualifications for particular type of appraisal.

a. Is appraiser member of professional society of appraisers?

b. Does appraiser have sufficient education, training, experience, and skill with particular kind of appraisal involved?

c. Is appraiser likely to be credible to insurer, court, lender, purchaser, or other party who will be examining appraisal?

3. Determine manner in which appraisal is to be rendered.

a. Will appraiser be required to prepare written report, documented by supporting charts,

maps, and other data?

b. Will appraiser merely be asked to give appraiser's conclusions as to value of subject property?

4. Determine amount and method of compensation to be paid to appraiser.

a. Initial retainer fee?

b. Progress payments to be paid as work progresses?

c. Balance due, or single lump sum payment, on completion of appraisal report?

d. Additional compensation for court appearances and testimony?

e. Additional compensation for travel or other specified expenses?

5. Determine how much time will be required for completion of appraisal, and include provision specifying when final appraisal will be due.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewReal Property LawBrokersGeneral Overview

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28-86 California Legal Forms--Transaction Guide § 86.124

§ 86.124 Agreement With Auctioneer

NOTE:
In addition to making the determinations *outlined in §§ 86.110-86.112*, counsel should make the additional determinations listed in this section. For a sample agreement, see *§ 86.243*.

1. Determine what property will sold.

2. If property consists of more than one item:

a. Should it be sold in bulk (single lot) or in multiple lots?

b. For multi-lot sales:
(1) Threshold minimum value (based on presale value estimates) for any single lot.

(2) Auctioneer's discretion to combine individual items of property into lots to meet minimum value requirement specified in P (1), *above* [*see § 86.243* P 4].

3. Determine auctioneer's duties with regard to presale activities [*see § 86.243[2]*, P 2]:

a. Advertising sale in advance.

b. Preparing catalogs or brochures.

c. Arranging property for public inspection.

d. Whether auctioneer will be entitled to additional compensation in excess of basic compensation rate [*see* P 9, *below*] for doing any of the activities specified in PP a-c, *above*.

4. Determine whether auction is to be sealed bid or open bid [*see, e.g., § 86.243[2],* P 4 (public auction)].

5. Determine whether lots will be offered with or without reserve, and amount of reserve allocated to each lot, if any [*see § 86.243[2],* P 4].

6. Determine terms for payment of sale price by buyer [*see § 86.243[2],* P 4]:

a. Purchase price payable in full on conclusion of sale.

b. Deposit of percentage of purchase price on conclusion of sale, with balance due on or before subsequent specified date.

c. Which of following forms of payment will be acceptable:

(1) Cash.

(2) Certified check, money order, letter of credit, or other guaranteed form of payment.

(3) Personal check.

(4) Credit card.

7. Determine whether prospective bidders will be required to meet bidder qualification standards before being allowed to bid in auction:

a. Advance deposit of percentage of estimated value of item.

b. Valid credit card number on file with auctioneer before sale.

8. Determine whether bidding on behalf of seller will be permitted.

NOTE:
If this type of bidding is allowed, it must be an express term of the auction and all potential bidders must be made aware of the provision to avoid having the sale voided by a successful bidder [***see*** *Com. Code § 2328(4)*; § 86.243[1][i]].

9. Determine auctioneer's compensation [*see § 86.243[2],* P 5].

a. Flat or hourly rate.

b. Commission on items sold.

(1) How commission will be assessed:
(a) Added to amount of winning bid and charged to buyer ("buyer's premium").

(b) Deducted from winning bid and charged to seller.

(c) Combination of PP (a) and (b), *above*.

NOTE:
For example, the auctioneer might charge the buyer a 15 percent buyer's premium and also charge the seller a 10 percent commission on the sale, for a total of 25 percent commission for the auctioneer.

(2) Percentage rate(s) of commission charged to buyer and/or seller.

c. Whether auctioneer will charge any fee for unsold lots and, if so, how that fee will be determined.

(1) Determined as a specified percentage of seller's reserve price.

(2) Determined as a specified percentage of presale value estimate.

(3) Flat fee (e.g., $15 per unsold lot).

d. Reimbursement of auctioneer for specified expenses [*see* P 3, *above*].

e. Determine how auctioneer's fees will be paid.

(1) Deducted by auctioneer from net proceeds of sale prior to reimbursing seller following conclusion of auction.

(2) Paid directly by seller prior to or on conclusion of auction.

12. Determine terms for payment of auction proceeds by auctioneer to seller:

a. Manner of payment; usually check or certified check.

b. When payment will be made:

(1) Immediately on conclusion of sale.

(2) On verification that buyers' payments have cleared auctioneer's financial institution.

(3) Within specified period after auction, to allow for resolution of any issues with respect to auction items.

13. Determine whether to include agreement by seller to hold auctioneer harmless and to indemnify auctioneer from any subsequent liability if item is subsequently determined not to be authentic.

14. Determine whether or not auctioneer will make arrangements for shipment of property to out-of-area winning bidders prior to auction.

15. Determine what will be done with any unsold lots following conclusion of auction?

a. Returned to seller.

b. Sold or otherwise disposed of by auctioneer.

NOTE:
In some circumstances, such as the sale of tangible personal property in a decedent's estate, the seller may not want to have unsold items returned. In these circumstances, the auctioneer is sometimes given authority to sell unsold items at set sale, donate them to charity, or simply get rid of them.

c. Who will bear cost of return?

16. Determine whether auctioneer will be required to maintain insurance on property during period of time it is in auctioneer's custody.

17. Consider including standard warranty of owner that owner has merchantable title to property offered for sale and grants auctioneer right to auctioneer to convey merchantable title to successful bidder [*see § 86.243[2],* P 7].

18. Determine whether auction is subject to UCC bulk sale requirements [*see Com. Code §§ 6101-6111*].

NOTE:
An auction is a bulk sale if it is a sale or series of sales not in the ordinary course of the seller's business of more than half of the seller's inventory and equipment, as measured by a value on the date of the bulk-sale agreement [*Com. Code § 6102(a)(3)(i)*]. For additional coverage, see *§ 86.243* (form). The bulk sales laws are discussed in Ch. 17, ***Buying and Selling a Business or Professional Practice*** .

19. Determine whether auctioneer is subject to statutory requirements for secondhand dealers [*see Bus. & Prof. Code § 21500 et seq.*].

NOTE:
An auctioneer whose principal business is primarily that of accepting for auction or auctioning secondhand tangible personal property is also a secondhand dealer [***see*** *Bus. & Prof. Code § 21626(a)*] with certain responsibilities under the law. However, "secondhand dealer" does ot include coin dealers [***see*** *Bus. & Prof. Code § 21626(a), (b)*]. For detailed discussion and forms for use in bringing secondhand dealers, including auctioneers when applicable, into compliance with the applicable laws, see Ch. 102B, ***Pawnbrokers, Finance Lenders, and Secondhand Goods Dealers*** **.**

20. Verify that auctioneer has bond on file with Secretary of State [*Civ. Code § 1812.600(c)(1)*; *see § 18.243[1][c]*], and include in agreement a statement that auctioneer has such a bond on file [*Civ. Code § 1812.608(d)*; *see § 18.243[2],* P 16].

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28-86 California Legal Forms--Transaction Guide § 86.125

§ 86.125 Agreement With Private Investigator

NOTE:

In addition to making the determinations *outlined in §§ 86.110-86.112*, counsel should make the additional determinations listed in this section. For a sample agreement, see *§ 86.250*.

1. Determine nature of transaction for which services of investigator are needed, e.g., to investigate validity of plaintiff's claim of injuries in personal injury action.

2. Determine what services investigator will be required to render, including [*see § 86.250[2]*]:

a. Interviewing known witnesses.

b. Hunting or advertising for other witnesses.

c. Obtaining statements from parties and witnesses.

d. Investigating activities, habits, or other personal characteristics of parties or witnesses.

e. Tailing, shadowing, or keeping one or more persons under surveillance.

f. Obtaining photographs, movies, tape recordings, or other physical evidence relating to past or present activities of one or more persons.

g. Locating missing or stolen property.

3. Determine whether investigator will prepare report in connection with investigation and, if so, determine level of detail.

Legal Topics:

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28-86 California Legal Forms--Transaction Guide § 86.126

§ 86.126 Agreements Between Author and Publisher

NOTE:

In addition to making the determinations *outlined in §§ 86.110-86.112*, counsel should make the additional determinations listed in this section. For a sample agreement, see *§ 86.260*.

1. Determine whether agreement will encompass writing of work or whether it is merely agreement to publish and distribute work.

2. For work not yet been written, consider provisions relating to [*see § 86.260[2]*, P 4]:

a. Work's subject matter.

b. Title.

c. Approximate number of pages.

d. Due date of manuscript.

3. Determine matters relating to copyright [*see § 86.260[2]*, P 2, 3].

a. Ownership of copyright.

b. Application for copyright.

c. Renewal of copyright.

4. Consider including standard warranty by author that work will not contain defamatory or unlawful matter and will not infringe copyright or violate any proprietary right [*see § 86.260[2]*, P 6].

5. Consider additional warranty of author that work is original and unpublished composition of author.

6. Consider provisions relating to acceptance or rejection of manuscript, corrections, proofreading, and revision [*see § 86.260[2]*, P 7].

a. Who will bear expenses relating to these items?

b. Will author be entitled to any additional compensation for these items?

7. Determine nature and amount of compensation to be paid to author [*see § 86.260[2]*, P 8].

a. Royalty payments.
(1) Percentage.

(2) Method of calculation, for example:
(a) Gross sales revenues; or

(b) Net sales revenues after deduction of some or all of following charges:
(i) Returns.

(ii) Sales commissions, if applicable.

(iii) Publisher's editorial expenses.

(iv) Printing, disk duplication, and/or other manufacturing costs.

(v) Packaging and shipping expenses.

(3) Duration.

(4) Whether royalty will be paid on subsequent editions based on author's contributions to initial edition of work.

(5) When payable (for example, quarterly, semiannually, etc.)

b. Flat rate payment.

(1) Lump-sum or incremental payments.

(2) Amount(s).

(3) When payable.

(a) On submission and acceptance of all or specified increments of manuscript.

(b) On publication of work.

(c) Other payment schedule.

8. Consider whether provision should be made for payment of compensation for:

a. Reprints.

b. Inexpensive or paperback editions of work.

c. Subsidiary rights such as radio, television, or motion picture.

d. Reproduction via Internet, CD-ROM, or other electronic media.

9. Determine rights of parties with respect to termination.

a. Will publisher have right to terminate agreement if manuscript is unsatisfactory, or if requested editorial revisions are not made within a reasonable time?

b. Will publisher have right to terminate agreement if work does not sell or is not profitable after a specified trial period?

c. Will author have right to terminate agreement if work goes out of print, or if publisher becomes bankrupt?

d. Who will own copyright to work on termination of agreement?

e. Who will own stock on hand, plates, electronic master files, and other publishing equipment.

Legal Topics:

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28-86 California Legal Forms--Transaction Guide § 86.127

§ 86.127 Agreement With Immigration Consultant

NOTE:
In addition to making the determinations *outlined in §§ 86.110-86.112*, counsel should make the additional determinations listed in this section. For a sample agreement, see *§ 86.270*.

1. Determine whether client must use standard immigration consultant's contract [*see 16 Cal. Code Reg. § 3840(b)*].

a. Determine whether client is engaging in business of or acting as immigration consultant.

NOTE:
A person engaging in the business of or acting as an immigration consultant who enters into a contract or agreement with a client to provide services must provide the client with a written contract, as specified by statute, before providing any services [***Bus. & Prof. Code § 22442(a); see 16 Cal. Code Reg. § 3840(a); see also § 86.270[2]*]. For discussion of what constitutes engaging in the business of or acting as an immigration consultant, see *§ 86.270[1][b]*.**

b. If client is engaging in business of or acting as immigration consultant, determine whether either of following exceptions applies:

(1) Is client authorized to practice law or authorized by federal law to represent clients before the Board of Immigration Appeals or the Citizenship and Immigration Services (CIS) [*Bus. & Prof. Code § 22440*]?

(2) Is client employee of nonprofit tax-exempt corporation that helps clients complete application forms in immigration matters [*Bus. & Prof. Code § 22442(h)*]?

NOTE:
The requirement of a written contract, and the content, language, and rescission requirements of *Bus. & Prof. Code § 22442* do not apply to employees of nonprofit tax-exempt corporations who help clients complete application forms in an immigration matter. This exception applies whether or not the corporation charges a fee, as long as any fee is consistent with the fee authorized by the Board of Immigration Appeals for qualified designated entities [*Bus. & Prof. Code § 22442(h)*; ***see*** *8 C.F.R. § 292.2*].

2. Determine services to be provided [*see Bus. & Prof. Code § 22442(b)*].

NOTE:
The written contract must list the documents to be prepared by the immigration consultant, and must explain the purpose and process of each document [*Bus. & Prof. Code § 22442(b)(4)*]. The written contract must also state the purpose for which the immigration consultant has been hired and the actions to be taken by him or her regarding each document. Required information includes the agency and office where each document will be filed and the approximate processing times according to the current published agency guidelines [*Bus. & Prof. Code § 22442(b)(5)*].

The written contract must include a provision informing the client that he or she may report complaints relating to immigration consultants to the California Office of Immigrant Assistance of the Department of Justice. The written contract must also include a provision stating that complaints concerning the unauthorized practice of law may be reported to the California State Bar. These last two provisions must include the toll free telephone numbers and Internet Web sites of those entities [Bus. & Prof. Code § 22442(b)(6)].

3. Determine cost of those services [*see Bus. & Prof. Code § 22442(b)*].

4. Avoid any guarantee or promise not based in fact, or any statement that consultant can or will get special favors from or has special influence with CIS [*Bus. & Prof. Code § 22442(c)*].

NOTE:
An immigration consultant also may not make these statements orally to a client [*Bus. & Prof. Code § 22442(g)*].

5. Include on face of contract in 10-point bold type statement that immigration consultant is not an attorney and may not perform legal services [*Bus. & Prof. Code § 22442(b)*].

6. State contract provisions in both English and client's native language [Bus. & Prof. Code § 24442(d); *16 Cal. Code Reg. § 3840(a)*], with translation placed on reverse side of document containing English version of contract [*16 Cal. Code Reg. § 3840(a)*].

NOTE:
A written contract is void if it is does not comply with this requirement [*Bus. & Prof. Code § 22442(e)*].

7. Include statement that client may report complaints relating to immigration consultants to Office of Immigrant Assistance of Department of Justice [Bus. & Prof. Code § 22442(b)(6)].

NOTE:

This provisions must include the office's toll free telephone number and its Internet Web site [Bus. & Prof. Code § 22442(b)(6)].

8. Include statement that complaints about unauthorized practice of law may be reported to California State Bar [Bus. & Prof. Code § 22442(b)(6)].

NOTE:

This provisions must include California State Bar's toll free telephone number and its Internet Web site [Bus. & Prof. Code § 22442(b)(6)].

9. Conspicuously state in written contract in both English and client's native language right of client to rescind contract within 72 hours of signing [*Bus. & Prof. Code § 22442(f)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewImmigration LawGeneral Overview

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28-86 California Legal Forms--Transaction Guide §§ 86.128-86.139

[Reserved]

§§ 86.128[Reserved]

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C. Drafting Guide

28-86 California Legal Forms--Transaction Guide § 86.140

§ 86.140 Drafting Guide for Professional Services Agreements

NOTE: In approaching the task of drafting an agreement for professional services, counsel should first ascertain the client's desires with respect to the basic subjects the agreement should cover. Sections 86.100 and 86.101 list the basic subjects common to most contract situations. For discussion of specific issues to consider in the drafting of particular agreements, see *§§ 86.120-86.127*, as well as the relevant forms.

[1] Introductory Matters

1. Specify date and place of agreement.

NOTE:
The date and place is commonly set forth either at the beginning of the agreement or immediately above the signature block as "Executed on _____ [***date***], at _____ [***place***]."

2. Include designation of parties and their addresses.

NOTE:
This information is commonly set forth in an introductory paragraph at the beginning of a contract [***see*** *§ 86.200[2]*].

a. Name of each party.

b. Address of each party.

c. Designation of parties as "client" or "corporation" and "consultant."

d. Description of client as corporation, partnership, or sole proprietor.

3. Consider including recitals of such matters as:

a. Client's trade or business.

b. Client's reasons for engaging professional.

c. Professional's special skill, background, or expertise.

4. State that client engages professional and professional accepts engagement [*see § 86.200[2], § 2.01*].

NOTE:
This type of statement is generally included in the provision specifying the term of the contract, but may be separately stated.

[2] Term of Contract

1. If contract is to be for a specified period:

a. State that client engages professional and that professional accepts engagement for specified period [*see § 86.200[2], § 2.01*].

b. Specify dates on which period of engagement begins and ends, if applicable [*see § 86.200[2], § 2.01*].

c. If contract is to be renewable for additional periods, specify method, length of renewal period, and conditions to which renewal is subject, *e.g.* [*see § 86.200[2], § 2.02*]:
(1) Automatically.

(2) For succeeding terms of stated length.

(3) Subject to specified condition (e.g., unless either party gives notice to the other within specified time before expiration of any term of intention not to renew).

d. Consider providing that contract is subject to earlier termination under other provisions [*see § 86.200[2],* Article 15].

2. If contract is to perform particular task or tasks, state that client agrees to engage professional and that professional accepts engagement, but do not specify any period [*see, e.g., § 86.214[2]* (accountant's preparation of tax returns)].

[3] Professional Services

1. Set forth title of professional [*see § 86.200[2],* § 1.01].

2. Describe professional's duties under contract:

a. In general terms; or

NOTE:
Describing professional services in general terms gives the client the flexibility to change the job duties without necessitating a change in the contract.

b. With greater particularity.

NOTE:
A detailed description of the services to be provided is especially important when the contract is on a flat fee basis, in order to reduce the possibility of confusion over what is or is not included in the flat fee.

3. Specify services not to be provided by professional, if appropriate.

NOTE:
A description of what is ***not*** included in the professional's services can be as important in some cases as what ***is*** included. For example, most engagement letters for income tax preparation state that handling an audit based on the tax return is not included in the preparation fee [***see*** *§ 86.214[2]*]. As in the case of the description of included services in P 2, ***above***, specificity is particularly important when the professional will charge a flat fee.

4. Specify that professional's performance may be conditioned on receipt of certain information, approvals, and reports from the client on a scheduled basis [*see* 86.214[2] (accountant's preparation of tax returns)].

5. Set forth limitations on professional's exercise of duties:

a. Specify any matters requiring consent of board of directors, if applicable [*see § 86.200[2]*, § 1.03].

b. Specify that professional's exercise of duties is subject to direction of officer and or board of directors, if applicable.

6. Consider stating name or title of person to whom professional reports.

7. State place where duties are to be performed, if applicable.

8. Consider including provision that professional is authorized to use the listed equipment, supplies, and/or facilities to the extent owned by another, e.g., a university [*see § 86.202[2]*, P 2].

9. Consider including provision requiring professional not to engage in any competing or conflicting business pursuits or any business, commercial, or professional nature services of the type provided to client without client's prior consent [*see § 86.200[2]*, *§ 7.01*].

10. Consider use of provision requiring professional's performance to be rendered to client's satisfaction.

11. Consider including agreement that professional has neither right nor authority to contract on behalf of client without client's written consent.

[4] Licensure

1. If professional must be licensed or certified to perform his or her job, consider including provision requiring current licensing or certification as a condition of continued engagement.

2. Consider specifying that professional will pay licensing fees and costs of any mandatory continuing education associated in maintaining license.

[5] Compensation

1. Specify professional's compensation:

NOTE:
A periodic retainer fee may be agreed on, usually in connection with one of the following methods of compensation.

a. Per hour [*see § 86.200[2], § 3.01*].

NOTE:
When charges are per hour, an additional charge is normally made for the out-of-pocket expenses, including telephone and mailing or courier costs, and special reports and services received from third parties [***see*** § 86.300[2], *§ 3.02*].

b. Flat fee per job [*see § 86.214[2]* (accountant's preparation of tax returns)].

NOTE:
A maximum or minimum fee, or both, may included in the agreement to protect the client from excessive charges and to assure the professional that the project will be worth the effort to undertake.

c. On commission.

d. Contingency fee.

NOTE:
Use of contingent fees by a licensed accountant is not ordinarily permissible [***see*** *16 Cal. Code Reg. § 62*; § 86.16[8]].

e. As a percentage of cost or dollar volume involved.

NOTE:
Financial counselors in connection with the amount of debts to be prorated often use this method. A stated maximum or minimum fee or both may be used in connection with this method of compensation.

2. Specify payment schedule.

[6] Reimbursement of Expenses Incurred by Professional

1. Consider including provision for reimbursement of business expenses:

NOTE:
If the agreement is for professional services outside the United States, the business expense clause should state whether reimbursement is to be made in United States dollars or local foreign currency.

a. Specify what expenses are reimbursable.
(1) Consider defining "business expenses" as those specified in agreement or as those that are deductible business expenses under the Internal Revenue Code [*see § 86.200[2], § 3.03*]; or

(2) Specifically define what constitutes reimbursable expenses [*see § 86.202[2], § 3.02*].

b. Require professional to maintain substantiating records and submit them to client [*see § 86.200[2], § 3.03*].

2. Consider provision for payment to professional of specified amount periodically to cover business expenses (as alternative to provisions for reimbursement of business expenses).

[7] Property Rights of Parties

1. If professional is hired to perform research and development work, include provision [*see § 86.200[2],* Article 4]:

a. Assigning inventions of professional to client; and/or

b. Excluding specified inventions from coverage of agreement for services.

2. If desired, include provision for payment of royalties to professional on inventions assigned to client:

NOTE:
This type of provision may be used in conjunction with a provision that gives the client the exclusive property right in inventions conceived by the consultant without providing for royalties. For an example of this type of provision in the employment context, see *Ch. 85, **Employment Agreements**, § 85.431* **.**

a. Percentage royalty; or

b. Varying percentage royalty.

3. If professional retains ownership of inventions, consider provision giving client perpetual royalty-free license to use those inventions.

NOTE:
For an example of this type of provision in the employment context, see *Ch. 85, **Employment Agreements**, § 85.432*.

4. If professional will have access to client's trade secrets, include provisions restricting professional's use of those secrets:

a. State that during course of engagement, professional will have access to and become acquainted with client's trade secrets, and include general description [*see § 86.200[2], § 5.01*].

b. Specify that all files, records, documents, and other items pertinent to the particular contract situation are and remain client's property and limit professional's ability to remove them from client's premises [*see § 86.200[2]*, § 5.04].

c. Set forth professional's promise and agreement not to misuse, misappropriate, or disclose client's trade secrets [*see § 86.200[2], § 5.02*].

d. Include professional's agreement not to engage in unfair competition with respect to client's trade secrets [*see § 86.200[2]*, § 5.03]:
(1) Professional's acknowledgment and agreement that sale or unauthorized use or disclosure of client's trade secrets constitute unfair competition.

(2) Professional's promise and agreement not to engage in any unfair competition with client either:
(a) During term of agreement; or

(b) At any time thereafter.

5. Prohibit competitive activities on part of professional against client during term of engagement [*see § 86.200[2], § 7.01*].

6. Include provision prohibiting professional from engaging in unfair competition after termination of engagement [*see § 86.200[2], § 7.01*].

[8] Termination of Agreement

1. Consider use of provision for termination on occurrence of stated event, such as [*see § 86.200[2], § 15.02*]:

a. Breach of duty.

b. Neglect of duty.

c. Continued incapacity to perform.

2. Consider use of provision for termination on default, such as [*see § 86.200[2]*, § 15.03]:

a. Corporation's failure to pay professional any compensation due within 30 days after written demand for payment.

b. Consultant's failure to complete services specified in agreement.

c. Consultant's material breach of any representation or agreement contained in contract.

d. Corporation's material breach of any representation or agreement contained agreement.

3. Include provision for termination on notice from terminating party to other party [*see § 86.200[2], § 15.01*].

[9] Effect of Breach of Contract

1. Consider use of provision stating that [*see § 86.200[2],* § 11.04]:

a. Services to be performed are of special character that gives them peculiar value.

b. Loss of services cannot be reasonably or adequately compensated in damages in action at law.

c. Professional expressly agrees that client is entitled to injunctive and other equitable relief to prevent or remedy breach of contract by professional.

2. Specify consequences of client's breach.

[10] Arbitration or Other Resolution of Disputes

1. Consider use of provision under which either party may request arbitration of matters in controversy [*see § 86.200[2], § 17.02*].

2. Alternatively, consider use of provision for compulsory arbitration of matters in controversy.

3. Consider providing for other forms of alternative dispute resolution, such as mediation.

NOTE:
For detailed coverage of arbitration, mediation, and other types of alternative dispute resolution, including forms of contractual provisions for each type, see California Forms of Pleading and Practice, Chs. 30- 38 (Matthew Bender).

[11] General Provisions

NOTE:
For more detailed discussion of standard contractual provisions of the type noted in this subsection, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions*** .

1. Specify manner of giving notice to other party [*see § 86.200[2], § 17.01*].

2. Provide for attorneys' fees and costs [*see § 86.200[2],* § 17.03].

3. State that contract contains entire agreement of parties [*see § 86.200[2],* § 17.04]

4. Provide for modification of contract only by subsequent written agreement [*see § 86.200[2], § 17.05*].

5. Specify effect of any waiver [*see § 86.200[2], § 17.06*].

6. Provide for event that part of contract is declared invalid, either [*see § 86.200[2], § 17.07*]:

a. Remaining provisions of contract to continue in full force and effect [*see Civ. Code § 1670.5(a)* (if contract contains unconscionable provision, court may sever or limit application of that provision, and enforce remainder of contract)].

b. Invalid provision to be deemed amended as court or arbitrator finds reasonable.

NOTE:
Generally, the courts lack the power to reform unenforceable contract provisions (as opposed to merely severing or limiting them). However, in the context of an employment agreement, one court of appeal held that if an agreement contains a clause in which the parties expressly agree to allow the court or an arbitrator to sever or modify any unreasonable or unenforceable provisions, the arbitration provision as so modified may be enforceable [*Blake v. Ecker (2001) 93 Cal. App. 4th 728, 743-746, 113 Cal. Rptr. 2d 422]* .

7. State that California law governs agreement [*see § 86.200[2],* § 17.08].

8. Include date and signature blocks.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART III. TRANSACTION GUIDE
C. Drafting Guide

28-86 California Legal Forms--Transaction Guide §§ 86.141-86.199

[Reserved]

§§ 86.141[Reserved]

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART IV. FORMS
A. Business Consultants

28-86 California Legal Forms--Transaction Guide § 86.200

§ 86.200 Nondisclosure and Business Consulting Agreement for Computer Services--Long Form

[1] Comment

[a] Use of Form

This form is a contract between a business consultant and a client for whom the consultant will perform specified services. The example used in this form is for the services of a software consultant, who will provide computer consulting services, including analysis, systems design, programming, testing, documentation, and any other related services necessary to fulfill the client's computer consulting requirements. The form is drafted for use between a client corporation and an individual consultant, for full-time temporary work. However, it can adapted for use by any type of business organization to engage the services of almost any type of business consultant. Separate provisions for part-time work or for automatic renewal of succeeding terms are illustrated in alternate sections of the form.

Frequently, a vendor will fill a consulting position for a corporate client. In that case, the vendor will have an agreement with the consultant (a "vendor-to-vendor" agreement). For a sample "vendor-to-vendor" contract, see *§ 86.203[2]*.

Nondisclosure agreements for the protection of the client's confidential and proprietary information may be incorporated into the agreement for services, as they are in this form. However, nondisclosure issues are frequently covered in separate agreements. For a sample separate nondisclosure contract, see *§ 86.204[2]*.

[b] Using Additional or Alternative Provisions

This form represents only one of the virtually infinite number of ways such a professional services contract might be drafted. Counsel preparing an agreement for the services of a business consultant should carefully consider the needs of the firm or the desires of the prospective consultant. Some of these can be ascertained by asking the client the questions indicated in the Client Interview [*see § 86.100*]. With the answers to these questions, the attorney should consult the Drafting Guide *set forth in § 86.140* and tailor the agreement so that it will best fit the circumstances of the particular situation.

The Drafting Guide describes the particular provisions included in this chapter and indicates their location. If individual provisions used in this form do not fit the particular factual problem confronting the attorney, the other forms referred to in the Drafting Guide may be more suitable.

[c] Compliance With Organizational Formalities

Before an consultant services contract is executed with a business entity client, the attorney should make certain that all provisions of the client's articles of incorporation or partnership agreement, shareholders' agreement (if any), bylaws, and applicable statutes have been complied with. Counsel should also be sure that the board of directors or its equivalent has authorized the engagement and granted its representative authority to enter into the agreement. For a general discussion of this matter, see Ch. 5, *Directors' Meetings, Actions, and Resolutions* . The usual procedure for a corporation is for the board of directors or its equivalent to pass a resolution authorizing the president to execute contracts on behalf of the firm [*see* Ch. 5, *Directors' Meetings, Actions, and Resolutions*].

[d] Term of Engagement

A business consultant contract may be full or part-time, usually for a limited time period, frequently six months or one year. Occasionally, the initial period of such a contract will be one year, which is automatically extended for successive year terms, but may be terminated by either party under specified conditions [*see* [2*], § 2.02, below* .]

[e] Competitive Activities

This form contains a provision prohibiting the consultant from engaging in any type of direct or indirect competition with the client during the term of the contract, or from soliciting client's employees to engage in competitive activities [*see* [2*], § 7.01, below*].

If the consultant is to be prohibited from hiring the client's employees for some future period, then the prohibition must be drafted narrowly, since a very broad prohibition could be unenforceable [*see, e.g., VL Systems, Inc. v. Unisen, Inc. (2007) 152 Cal. App. 4th 708, 718, 61 Cal. Rptr. 3d 818* (no-hire provision in company's standard contract for buying various consultants' services, which bound consultant to pay damages if consultant hired any of company's employees within one year, was not enforceable because it was very a broad provision covering not only solicitation by consultant but also all hiring, it applied to all of company's employees regardless of whether they worked with consultant or were even employed at time consultant rendered services, it was not necessary to protect company's legitimate interests, and it was outweighed by public policy favoring freedom of mobility for employees)].

[f] Disclosure of Trade Secrets; Action for Unfair Competition

This form also contains a provision designed to protect the client's trade secrets and prevent the consultant from disclosing them during or after termination of the agreement [*see* [2], Article 5, *below*]. It does this by characterizing any unauthorized disclosure as unfair competition and requiring the consultant not to engage in any acts of unfair competition.

"Unfair competition" is any unlawful, unfair, or fraudulent business act or practice [*Bus. & Prof. Code § 17200*]. The criminal law definition of trade secret includes information, including any formula, pattern, compilation, program, device, method, technique, or process, that derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic benefit from its disclosure or use and is subject to the efforts that are reasonable under the circumstances to maintain its secrecy [*Penal Code § 499c(a)(9)*; *see Civ. Code § 3426.1(d)* ("trade secret" defined under Uniform Trade Secrets Act (*Civ. Code § 3426 et seq.*)].

A person who commits unfair competition by misusing or misappropriating a trade secret may be enjoined from continuing to do so [*Bus. & Prof. Code §§ 17203, 17204*; *Civ. Code § 3420 et seq.*; *see Peerless Oakland Laundry Co.*

v. Hickman (1962) 205 Cal. App. 2d 556, 559, 23 Cal. Rptr. 105 (restraining order issued to prevent former employee's use, to former employer's prejudice, of trade secrets acquired during prior employment)]. Such a person can also be made liable for civil penalties [*Bus. & Prof. Code § 17206*].

For further discussion of the law relating to trade secrets, see *§ 86.204[1]*.

[g] Indemnification for Losses From Performing Duties

This form includes an indemnification provision requiring the consultant to pay all federal and state taxes required by the consultant's status as a self-employed individual [*see* [2*], §§ 10.01*, 11.03, *below*]. Although this type of provision merely states an obligation imposed by statute [*see I.R.C. § 1402*], the attorney representing the client may desire to have this provision included so that the consultant is will be aware at all times of this obligation.

[h] Fees for Services Provided

A compensation provision is an essential element of the contract for services. Compensation for computer services consultants is generally based on an hourly amount [*see* [2], Article 3, *below*]. Some contracts specify a maximum amount that may be earned [*see* [2*], § 3.02, below* .]

[i] Reimbursement for Expenses

The contract provides for reimbursement for actual reasonable expenses authorized by the client, including travel, meals, and lodging. In addition, the agreement authorizes reimbursement of the cost of ancillary services, such as services by designers, modelmakers, or clerical help, when needed by the consultant and authorized in advance, in writing, by the client [*see* [2], §§ 3.02, 3.03]. The reimbursement provision should be tailored to reflect the types of reimbursable costs that the professional is likely to incur in performing the specific types of services contemplated by the parties.

[j] Periodic Payment of Fees

This contract provides for payment for all services and expenses (on presentation of receipts) within 10 days of presentation of monthly invoices [*see* [2*], § 3.04, below*].

[k] Termination of Agreement

Every agreement for services is terminated by expiration of the term specified in the contract. In addition, the agreement may be terminated on the occurrence of specific events, or by giving notice. Alternative termination provisions are contained in [2], Article 15, *below*.

[2] FORM

Nondisclosure and Business Consulting Agreement for Computer Services--Long Form

COMPUTER CONSULTANT SERVICE AGREEMENT

_____[*name of client*] ("Corporation"), a California corporation, located at _____[*address of principal place of business*], and _____[*name of consultant*] ("Consultant"), _____[*address*], in consideration of the mutual promises made in this Agreement, agree as follows:

ARTICLE 1. DUTIES AND RESPONSIBILITIES

Section 1.01. Consultant, a [*specify profession, e.g.*, Software Engineer], will provide [*specify services, e.g.*, computer consulting services for Corporation, including analysis, systems design, programming, testing, documentation, and any other related services necessary to fulfill Corporation's computer consulting requirements].

Section 1.02. Corporation will provide Consultant with the compensation and business expense reimbursement specified elsewhere in this Agreement.

[*If certain of Consultant's activities will require consent of board of directors, add:*]

Section 1.03. Consultant will not, without specific approval of Corporation's Board of Directors, do or contract to do any of the following: [*specify*].

ARTICLE 2. TERM OF AGREEMENT

[*If work will be full-time, use:*]

Section 2.01. Corporation will retain Consultant to work full-time for as a consultant for Corporation in the field of [*e.g.*, software engineering], beginning _____[*date*] and ending _____[*date*]. Consultant accepts this engagement.

[*OR, if work will be part-time, use:*]

Section 2.01. Corporation will retain Consultant to work part-time for as a consultant for Corporation in the field of [*e.g.*, software engineering], beginning _____[*date*] and ending _____[*date*]. Consultant accepts this engagement. Consultant will devote the time called for in this Agreement only at the time or times and only at the place or places as may be mutually arranged between the Consultant and Corporation. Consultant will use Consultant's best efforts to accomplish the technical and commercial goals identified by Corporation during the term of this Agreement. Corporation acknowledges that Consultant may have other confidentiality commitments. Corporation will not require Consultant to perform tasks which might reasonably result in Consultant's breach of any confidentiality commitment. Consultant further acknowledges that Consultant has no existing obligations to any third party, as employee, consultant, or otherwise, that would conflict with, or restrict Consultant's ability to fulfill any of Consultant's commitments or obligations under this Agreement.

[*Continue with the following:*]

[*If engagement may be automatically renewed, add:*]

Section 2.02. This Agreement will be renewed automatically for succeeding terms of [*specify period, e.g.*, one year each], unless either party gives notice to the other at least [*specify notice period, e.g.*, 60] days before the expiration of any term of _____[his *or* her *or* its] intention not to renew [*optional:* pursuant to Corporation's bylaws].

[*Continue with the following:*]

ARTICLE 3. COMPENSATION AND EXPENSES

Section 3.01. For time actually spent rendering service, Corporation will pay Consultant at the rate of $_____ per hour. [*Optional:* The maximum amount payable under this Agreement is $_____.]

Section 3.02. In addition to the compensation specified in Section 3.01, Consultant will be paid for actual reasonable expenses authorized by Corporation, including travel, meals and lodging; and when needed by Consultant and authorized in advance and in writing by Corporation, the cost of ancillary services to others, such as designers, draftsmen, modelmakers, or clerical help. [*Optional:* Reimbursement of _____ (individual *or* aggregate) expenses in excess of $_____ (*specify amount*) will be made only if those expenses are approved by Corporation before being incurred, unless Corporation in its sole discretion elects to reimburse Consultant after the fact.]

Section 3.03. Each expenditure referred to in Section 3.02 will be reimbursable only if Consultant furnishes to Corporation adequate records and other documentary evidence required by federal and state statutes and regulations issued by the appropriate taxing authorities for the substantiation of each such expenditure as an income tax deduction.

Section 3.04. Payment of all services and expenses will be made within [*e.g.*, 10] days of presentation of monthly invoices.

ARTICLE 4. PROPERTY RIGHTS

Section 4.01. Consultant agrees to make prompt and full disclosure to Corporation in writing the details of all inventions, discoveries, or improvements (whether patentable or not) made or conceived by Consultant, alone or with others, that arise out of, or relate to the subject matter of this Agreement.

Section 4.02. Consultant further agrees to keep necessary records, including notes, sketches, drawings, models and data supporting all inventions and discoveries made by the Consultant, alone or with others, during the course of performing the services required under this Agreement.

Section 4.03. Consultant further agrees to all records described in Section 4.02 to Corporation on expiration or termination of this Agreement.

Section 4.04. Consultant further agrees to assign to Corporation all inventions and discoveries made by the Consultant, alone or with others, that arise out of and pertain to the services rendered under this Agreement, together with patents as may be obtained on these inventions and discoveries.

Section 4.05. On request of Corporation, Consultant, alone or with others, will execute all proper papers and cooperate in the fullest degree with Corporation in securing, maintaining, and enforcing any patents that arise from the services rendered under this Agreement.

Section 4.06. Consultant, alone or with others, will be compensated for Consultant's reasonable time spent in fulfilling all obligations set forth in this Article 4, that arise subsequent to filing and assignment of patent applications. The compensation referred to in this paragraph will be based on Consultant's standard hourly rate stated in Section 3.01. Compensation will be due and payable by Corporation on receipt of the assignment of Consultant's entire right, title and interest in and to an invention or improvement, as provided in Section 4.04, and receipt of an itemized statement from Consultant of consultant's time and expenses reasonably incurred in fulfilling the obligations set forth in this Article 4 with respect to that invention or improvement.

Section 4.07. Consultant warrants that Consultant does not have any commitments to others under which Consultant is

obligated to assign to them inventions or improvements, or rights on those inventions or improvements, in conflict with Consultant's obligations to Corporation under this Agreement.

Section 4.08. Consultant agrees that the payments to Consultant specified in Sections 3.01 and 4.06 will constitute full and complete compensation for all obligations assumed by Consultant under this Agreement, and for all inventions, improvements, and patent rights assigned under this Agreement.

Section 4.09. Consultant agrees that on the expiration or termination of this Agreement, all drawings, designs, computer programs and software, specifications, notebooks, tracing photographs, negatives, reports, findings, recommendations, data and memoranda of every description arising out of and relating to the services rendered under this Agreement, together with any copyright in these materials, are the confidential and proprietary property of Corporation or its assigns, and that Corporation will have the exclusive right to copyright and/or publish such material. Consultant agrees that Consultant will not claim any additional compensation arising out of the use of these materials in any manner by Corporation or its assigns.

ARTICLE 5. TRADE SECRETS

Section 5.01. Corporation is aware that Consultant may be now or may in the future perform consulting services or become an employee of others. The parties also acknowledge and agree that during the term of this Agreement and in the course of the discharge of Consultant's duties under the Agreement, Consultant will have access to and become acquainted with financial, personnel, sales, scientific, technical and other information regarding formulas, patterns, compilations, programs, devices, methods, techniques, operations, plans and processes that are owned by Corporation, actually or potentially used in the operation of Corporation's business, or obtained from third parties under an agreement of confidentiality, and that such information constitutes Corporation's "trade secrets."

Section 5.02. Consultant specifically agrees that Consultant will not misuse, misappropriate, or disclose in writing, orally, or by electronic means, any trade secrets, directly or indirectly, to any other person or use them in any way, either during the term of this Agreement or at any other time thereafter, except as is required in the course of Consultant's engagement.

Section 5.03. Consultant acknowledges and agrees that the sale or unauthorized use or disclosure in writing, orally, or by electronic means, of any of Corporation's trade secrets obtained by Consultant during the course of Consultant's engagement under this Agreement, including information concerning Corporation's actual or potential work, services, or products, the facts that any such work, services, or products are planned, under consideration, or in production, as well as any descriptions thereof, constitute unfair competition. Consultant promises and agrees not to engage in any unfair competition with Corporation, either during the term of this Agreement or at any other time thereafter.

Section 5.04. Consultant agrees that all files, records, documents, drawings, specifications, equipment, software, and similar items, whether maintained in hard copy or in electronic form, relating to Corporation's business, whether prepared by Consultant or others, are and will remain exclusively the property of Corporation and that they will be removed from Corporation's premises or, if kept in electronic form, from Corporation's computer systems [*specify procedure, e.g.,* only with the express prior written consent of Corporation's Board of Directors].

ARTICLE 6. CONFIDENTIAL BUSINESS INFORMATION

Section 6.01. Consultant agrees that all of the business information related specifically to Corporation developed by or communicated by or to Consultant in the performance of the services described in this Agreement is of a highly confidential nature, and that, unless the Consultant has the prior written approval of Corporation, no use or oral or written disclosure of that information by the Consultant will be made either during or after the term of this Agreement, except that Consultant may disclose that information to persons including the employees of Corporation or its

subsidiaries or affiliated companies who may be designated to work with the Consultant.

Section 6.02. The restriction of Section 6.01 does not apply to information which the Consultant can demonstrate was at the time of the execution of this Agreement:

(a) In the public domain; or

(b) Part of Consultant's prior knowledge; or

(c) Learned from a third party without the breach of a confidential relationship with Corporation.

Section 6.03. Consultant acknowledges that Corporation regards its mere interest in the subject matter discussed with Consultant to be a matter of strict confidentiality. Consultant therefore agrees that Consultant will not disclose to any third party, at any time, any of the subject matter of this Agreement.

ARTICLE 7. COMPETITIVE ACTIVITIES

Section 7.01. Consultant agrees that during this Agreement and for a period of [*number of months or years*] thereafter, Consultant will not directly or indirectly, in any capacity, compete or attempt to compete with Corporation.

ARTICLE 8. CONTINUATION OF RIGHTS AND OBLIGATIONS

Section 8.01. Notwithstanding the expiration or termination of this Agreement for any reason whatsoever, the respective rights and obligations set forth in Articles 3, 4, 5, 6 and 7 in this Agreement will continue in full force and effect for a period of [*time frame, e.g.,* five years].

ARTICLE 9. AGENCY

Section 9.01. It is understood and agreed that the Consultant is an independent contractor in respect to Consultant's relationship to Corporation, and that Consultant is not and should not be considered an agent or employee of the Company for any purpose. Consultant agrees not to represent [himself *or* herself] as an agent or employee of the Company at any time.

Section 9.02. Nothing in this Agreement will be construed or implied to create a relationship of partners, agency, joint venturers, or of employer and employee between Consultant and Company.

ARTICLE 10. INDEPENDENT CONTRACTOR STATUS

Section 10.01. Consultant will have full control and discretion as to the ways and means of performing any and all services to be provided under this Agreement. It is understood that in the performance of this Agreement Consultant is not in any way acting as an employee of Corporation, and Consultant will be responsible for all taxes, social security payments, and other similar payments or contributions due as a result of any payments made pursuant to the terms of this Agreement.

Section 10.02. As an independent contractor, Consultant agrees that Corporation has no obligation under the state or federal laws regarding employee liability, and that Corporation's total commitment and liability under this arrangement is the performance and the fees limited as described in Articles 2 and 4.

ARTICLE 11. INDEMNIFICATION; INJUNCTIVE RELIEF

Section 11.01. Consultant will indemnify and hold Corporation harmless from all liability for loss, damage, or injury to

persons or property resulting from the negligence or misconduct of Consultant, including any loss arising from breach of contract or improper performance by the Consultant and for damages and/or injuries which may be incurred by Corporation by virtue of defective design, material or workmanship in any goods or services furnished by Consultant under this Agreement.

Section 11.02. Consultant will not relieve Corporation from liability caused by the willful misconduct or sole negligence of Corporation, its offices, agents, or servants.

Section 11.03. Consultant agrees to indemnify Corporation against all federal, state, and local tax liability (including penalties and interest) which may result from any federal, state, or local tax audit (including, but not limited to, income, social security, disability, and unemployment taxes) that deems Consultant to be an employee rather than an independent contractor of Corporation.

Section 11.04. Consultant represents and agrees that the services to be performed under the terms of this contract are of a special, unique, unusual, extraordinary, and intellectual character that gives them a peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law. Consultant therefore expressly agrees that Corporation, in addition to any other rights or remedies that Corporation may possess, will be entitled to injunctive and other equitable relief to prevent or remedy a breach of this contract by Consultant.

ARTICLE 12. INSURANCE

Section 12.01. Consultant will maintain at all times during the performance of labor or service for Corporation under this Agreement, comprehensive public liability insurance, including automobile and contractual liability coverages with limits of [*specify, e.g.,* $500,000/$1,000,000 bodily injury and unit of $1,000,000 per occurrence].

Section 12.02. Consultant will furnish an insurance certificate and/or state issued certificate evidencing the above coverages. Insurance certificates must be endorsed to provide that Corporation will be notified in writing 10 days before any substantial modification or termination of the subject policy.

ARTICLE 13. AUTHORITY FOR PRODUCT DESIGN

Section 13.01. Corporation has the authority for product design, and thus can accept or reject partial or complete designs or design concepts proposed by Consultant.

ARTICLE 14. ETHICAL CONDUCT; RECORDKEEPING

Article 14.01. Corporation's policy requires ethical conduct in all business activities and practices, including proper recording and reporting of all transactions and compliance with applicable laws. The adequacy and accuracy of Consultant's billings, supporting documentation, and other information rendered to Corporation become the basis for Corporation's further recording and reporting, both internally and externally. Consultant is not expected or authorized to take any action on Corporation's behalf that would result in inadequate or inaccurate recording or reporting of assets, liabilities, or any other transaction or that would violate any applicable laws, rules, or regulations.

ARTICLE 15. TERMINATION

[*Choose among the following:*]

Section 15.01. Unless otherwise terminated as provided in this Agreement, this Agreement will continue in effect [*specify length corresponding with that set forth in Article 2, e.g.,* for a period of _____ (number of months *or* years) *or* until the services provided for in this Agreement have been fully and completely performed] and

will then terminate unless renewed in writing by both parties.

[*AND/OR*]

[Section 15.01.] Notwithstanding any other provision of this Agreement, either party may terminate this Agreement at any time by giving [*specify reasonable notice based on type of services to be rendered by consultant, e.g.,* 30 days] written notice to the other party. Unless otherwise terminated as provided in this Agreement, this Agreement will continue in force [*specify length corresponding with that set forth in Article 2, e.g.,* for a period of _____ (number of months *or* years) or until the services provided for in this Agreement have been fully and completely performed].

[*Continue with the following:*]

Section 15.02. This Agreement will terminate automatically on the occurrence of any of the following events:

(a) Bankruptcy or insolvency of either party.

(b) Sale of the business of either party.

(c) Death of either party.

(d) [*specify other event on which agreement will terminate, e.g.,* Assignment of this Agreement by either party without the consent of the other party].

Section 15.03. If either party defaults in the performance of this Agreement or materially breaches any of its provisions, the non-breaching party may terminate this Agreement by giving written notification to the breaching party. Termination will take effect immediately on receipt of notice by the breaching party or five days after mailing of notice, whichever occurs first. For the purposes of this paragraph, material breach of this Agreement includes, but is not limited to, the following:

(a) Corporation's failure to pay Consultant any compensation due within 30 days after written demand for payment.

(b) Consultant's failure to complete the services specified in Article 1.

(c) Consultant's material breach of any representation or agreement contained in Section 4.07.

(d) Corporation's material breach of any representation or agreement contained in this Agreement.

(e) [*specify any other situation constituting material breach*].

ARTICLE 16. EFFECT OF MERGER, TRANSFER OF ASSETS, OR DISSOLUTION OF CORPORATION

Section 16.01. This Agreement [will *or* will not] be terminated by any voluntary or involuntary dissolution of Corporation resulting from either a merger or consolidation in which Corporation is not the consolidated or surviving corporation, or a transfer of all or substantially all of the assets of Corporation.

[*If agreement will not be terminated under preceding circumstances, add:*]

Section 16.02. In the event of any such merger or consolidation or transfer of assets, Corporation's rights, benefits, and obligations hereunder [will *or* may] be assigned to the surviving or resulting corporation or the transferee of Corporation's assets.

[*Continue with the following:*]

ARTICLE 17. GENERAL PROVISIONS

Section 17.01. Any notices to be given under the Agreement by either party to the other will be in writing and may be transmitted by personal delivery or by mail, registered or certified, postage prepaid with return receipt requested. Mailed notices will be addressed to the parties at the addresses appearing in the introductory paragraph of this Agreement, but each party may change that address by written notice in accordance with this section. Notices delivered personally will be deemed communicated as of the date of actual receipt; mailed notices will be deemed communicated as of _____[*specify, e.g.*, the date of mailing].

Section 17.02. (a) Any controversy between Corporation and Consultant involving the construction or application of any of the terms, provisions, or conditions of this Agreement will on the written request of either party served on the other be submitted to arbitration. Arbitration will comply with and be governed by the provisions of the California Arbitration Act.

(b) Corporation and Consultant will each appoint one person to hear and determine the dispute. If the two persons so appointed are unable to agree, then those persons will select a third impartial arbitrator whose decision will be final and conclusive upon both parties.

Section 17.03. If any [legal action *or* specify more limited provision, *e.g.*, legal action based in contract law] is necessary to enforce or interpret the terms of this Agreement, the prevailing party will be entitled to reasonable attorneys' fees, costs, and necessary disbursements in addition to any other relief to which that party may be entitled. This provision will be construed as applicable to the entire contract.

Section 17.04. This instrument contains the entire Agreement of the parties with respect to the subject matter hereof and there are no other promised representations or warranties affecting it. This Agreement supersedes any and all other agreements, either oral or in writing, between Consultant and Corporation with respect to the engagement of Consultant by Corporation and contains all of the covenants and agreements between the parties with respect to that engagement in any manner whatsoever. Each party to this Agreement acknowledges that no representation, inducements, promises, or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party that are not embodied in the Agreement, and that no other agreement, statement, or promise not contained in this Agreement will be valid or binding on either party.

Section 17.05. Any modification of this Agreement will be effective only if it is in writing and signed by the party to be charged.

Section 17.06. The failure of either party to insist on strict compliance with any of the terms, covenants, or conditions of this Agreement by the other party will not be deemed a waiver of that term, covenant, or condition, nor will any waiver or relinquishment of any right or power at any one time or times be deemed a waiver or relinquishment of that right or power for all or any other times.

[*Either (see § 86.140[11], P 6):*]

Section 17.07. If any provision in this Agreement is held by a court [*if appropriate, add:* or arbitrator] of competent

jurisdiction to be invalid, void, or unenforceable, the remaining provisions of this Agreement will nevertheless continue in full force without being impaired or invalidated in any way.

[*OR*]

Section 17.07. If any provision in this Agreement is held by a court [*if appropriate, add:* or arbitrator] of competent jurisdiction to be unreasonable, invalid, void, or unenforceable, then this Agreement will be deemed amended to provide for the modification of the unreasonable, invalid, void, or unenforceable provision to the extent that the court [*if appropriate, add:* or arbitrator] finds reasonable, and the remaining provisions of this Agreement will continue in full force without being impaired or invalidated in any way.

[*Continue with the following:*]

Section 17.08. This Agreement will be governed by and construed in accordance with the laws of the State of California.

Section 17.09. If Consultant dies before the expiration of the term of Consultant's engagement under this Agreement, any sums that may be due to Consultant from Corporation under this Agreement as of the date of death will be paid to Consultant's executors, administrators, heirs, personal representatives, successors, and assigns.

Executed on _____[*date*] at _____[*city*], California.

CORPORATION
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]
CONSULTANT
_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsGeneral OverviewContracts LawTypes of ContractsGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART IV. FORMS
A. Business Consultants

28-86 California Legal Forms--Transaction Guide § 86.201

§ 86.201 Nondisclosure and Business Consulting Agreement--Short Form

[1] Comment--Use of Form

This form is for use by a corporate client to engage the services of a business professional. In contrast to the *form in § 86.200[2]*, this form is designed to be used for "smaller" consulting jobs--for example, jobs for which the total fees for services will be $ 5,000, or less. In practice, parties to smaller contacts often neglect to put their agreements in writing. Nevertheless, a written contract is recommended to help alleviate misunderstanding. This form is a basic written agreement.

This agreement states that the consultant will provide his or her services to the corporation on an as-needed basis. For provisions for full-time work for a specified period or for automatic renewal of succeeding terms, see the *form in § 86.200[2]*. This agreement also states that corporation will provide consultant with a laptop computer for his or her use during the duration of this agreement [*see* [2], Section 5, *below*].

For discussion of the clauses in this contract and other clauses, that may be relevant, see *§ 86.200*.

[2] FORM

Nondisclosure and Business Consulting Agreement--Short Form

NONDISCLOSURE AND BUSINESS CONSULTING AGREEMENT

THIS AGREEMENT is made on _____[*date*] between [*client*] ("Corporation"), a California corporation having it offices at _____[*address*], and [*consultant*] ("Consultant"), _____[*address*].

Recitals

1. Corporation seeks someone who has years of experience in the field of [*e.g.*, Research Statistics].

2. Consultant maintains that [he *or* she] has the requisite years of experience in the field in the field of [*e.g.*, Research Statistics].

3. Consultant is willing to make available to Corporation Consultant's knowledge and experience in that field and represents that Consultant is completely free to make that knowledge and experience available to Corporation.

4. Corporation desires to receive this knowledge and experience from Consultant on a fee basis by engaging Consultant in a working capacity in the field of [*e.g.*, Research Statistics].

THEREFORE, in consideration of the promises and of the mutual covenants and agreements contained in this Agreement, Corporation and Consultant, intending to be legally bound under this Agreement, agree as follows:

Consultant's Right to Perform Services

Section 1. Consultant represents that Consultant has the right to perform the work services for Corporation as provided in this Agreement. Corporation enters into this Agreement relying on this representation by Consultant.

Consultant's Availability and Services

Section 2. Consultant agrees that during the term of this Agreement (as defined in Section 6) Consultant will be available at Corporation's request to render working services to Corporation as Corporation may request on matters relating to, but not limited to: [*e.g.*, data analysis, interpretation, and experimental design with respect to research and development programs in Specialty Chemical, Alkali and Derivatives, Discovery and Powder Coating areas]. Consultant's services will be rendered as required during the term of this Agreement.

Use of Consultant to Provide Services; Compensation

Section 3. Corporation agrees to utilize Consultant as needed during the term of this Agreement for working services to be rendered under this Agreement and agrees to pay Consultant a fee at the rate of $[*specify hourly rate, flat rate, or other fee*] for services rendered. This fee will cover only working services actually rendered and will be paid within [*number of days, e.g.*, 10 days after receipt of invoice].

Independent Contractor Relationship

Section 4. Consultant, as an independent contractor, will not be eligible for any employee benefits, nor will any such benefits be made available to Consultant as a result of this Agreement.

Use of Computer

Section 5. Corporation agrees to authorize the consultant to use Lap Top Computer Serial No. _____, for the sole purpose of completing work for Corporation. Corporation reserves the right to request return of this computer at any time.

Confidential Information

Section 6. Consultant agrees to maintain in strict confidence all information and data including, but not limited to, confidential and or proprietary information that Consultant acquires from Corporation in the performance of Consultant's services under this Agreement and agrees not to disclose this information or data to others without Corporation's prior written authorization unless, and only to the extent that, the information will have been published. The obligations of confidentiality contained in this Agreement will terminate _____[*e.g.*, five years after the date of the initial disclosure by Corporation to Consultant of the information].

Term of Agreement

Section 7. The term of this Agreement, beginning on _____[*date*], will be 180 calendar days unless extended by written notification from Corporation. This written notification will be forwarded (in accordance with Section 9) at least 10 days before the termination date and will state the exact length of the extension.

Hours of Service

Section 8. The Consultant will render working services under this Agreement during normal and customary business hours, unless otherwise directed by Corporation.

Insurance

Section 9 Consultant agrees to provide adequate insurance, while engaged in performing this Agreement, against bodily injury and/or property damage in adequate types and amounts and to hold Corporation harmless against all loss claims based on bodily injury to or by Consultant, personnel and/or property damage caused by Consultant.

Risk of Loss

Section 10. Consultant will assume the risk of loss from automotive liability caused by Consultant's personnel in the course of performing Consultant's services. Consultant will indemnify, defend, and hold Corporation harmless for personal injury and property damage to third parties (including employees of Corporation) occurring during Consultant's performance of the work and caused by the negligence of Consultant.

Payment of Taxes

Section 11. Consultant acknowledges that for purposes of this consulting arrangement, Consultant is solely responsible for paying all income related taxes, including Social Security, in a timely manner pursuant to federal, state, and local tax laws. Consultant agrees to indemnify, defend, and hold Corporation harmless from and against any claims by any taxing authority resulting from Consultant's failure to pay any tax imposed on income derived from Consultant's performance of services under this Agreement.

Termination of Agreement

Section 12. Either party may terminate this agreement prior to the 180 calendar days, (as stated in Section 7) by providing written notice at least ten working days prior to the termination date, given in accordance with Section 13.

Notice

Section 13. Any written notice to be given under this Agreement will be deemed sufficiently served when deposited in the United States mails in a sealed envelope with sufficient postage affixed, registered or certified, with return receipt requested and addressed to:

CORPORATION:
_____ [*Corporation's designated contact*]
at: _____ [*address*]
CONSULTANT:
_____ [*Consultant*]
at: _____ [*address*]

Any party may change the address to which notice to it may be given by written notice to the other as provided in this Agreement.

Entire Agreement; Amendment

Section 14. This Agreement constitutes the entire understanding between the parties with respect to the subject of the Agreement, and may not be altered or amended in any manner except by a writing signed by the parties.

Governing Law

Section 15. This Agreement and is provisions will be construed in accordance with the laws of the State of California.

Executed on _____[*date*] at _____[*city*], California.

CORPORATION
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]
CONSULTANT
_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsGeneral OverviewContracts LawTypes of ContractsGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
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A. Business Consultants

28-86 California Legal Forms--Transaction Guide § 86.202

§ 86.202 Nondisclosure and Consulting Agreement--Letter Form

[1] Comment

[a] Use of Form

This form is a basic nondisclosure and consulting agreement in letter form. In contrast to the *form in § 86.200[2],* this form is designed to be used for "smaller" consulting jobs--for example, jobs for which the total fees for services will be $ 5,000 or less. For a similar form in a contract style, see *§ 86.201*. In practice, parties to smaller contacts often neglect to put their agreements in writing. In such situations, a letter agreement, with its less formal appearance, may be more agreeable to the parties, while preserving the basic advantages of using a written agreement.

This agreement is drafted for the situation in which the consultant will be working for a corporation and the corporation rather than the consultant will prepare the letter agreement. The form can be adapted to the situation in which the consultant rather than the client prepares the agreement.

[b] Essential Elements of Contract for Consulting Services

The essential elements of an agreement for consulting services include:

- A description of the consulting services to be provided;
- The term during which the parties agree the consultant will perform the services; and
- The compensation to be paid to the consultant, or the method by which the amount of compensation is to be computed.

Other elements ordinarily addressed in an agreement for business consulting services include nondisclosure issues, including confidentiality and return of documents, and intellectual property rights. Also included in this form is the stipulation that during the term of the agreement, the consultant will not purchase or sell shares of or options for the

company' stock for his or her own account or the account of any other person or entity.

For additional discussion and a more detailed consulting services agreement, including additional provisions relating to trade secrets and property rights, see *§ 86.200[2]*.

[2] FORM

Nondisclosure and Consulting Agreement--Letter Form

[*Client's Letterhead*]
_____[*date*]
_____[*name of consultant*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of consultant*] :

This letter contains our agreement regarding the terms and conditions under which you have agreed to provide consulting services to this company. If the terms as set forth in this letter are agreeable to you, please sign and date this agreement at the end in the space provided.

1. Beginning on _____[*date*], you agree to provide consulting services to the Company in the field of [*e.g.*, statistical analysis]. These services are expected to specifically include the following activities: _____[*describe with as much specificity as reasonably possible*]. [*Optional:* Unless otherwise agreed, your services will *not* include any of the following: _____ (*specify*)].

2. You agree to provide, at your own expense, the following equipment, supplies, and facilities, as necessary: [*specify*]. You warrant that you are authorized to use the listed equipment, supplies, and facilities to the extent owned by another (for example, a college or university), and that such use will not prevent the you from carrying out the obligations of this agreement, particularly with regard to intellectual properly, as addressed in Paragraph 9.

3. You agree that the services provided under this agreement will be carried out to the best of your ability and in accordance with the standard of care customarily observed with regard to such services in your profession.

4. Your services will be performed at times and locations as are mutually agreed.

5. We will compensate you for the services described above at the rate of $_____ per hour (including reasonable travel time at our request), billable [*e.g.*, monthly]. You agree to provide a detailed itemization of hours billed upon request.

6. We will reimburse you for reasonable travel and out-of-pocket expenses you incur while performing services for us under this agreement. These expenses include, but are not limited to, economy class airfare, accommodations, meals, mileage reimbursement at our standard rate for use of personal car, rental cars, courier expenses, telephone, and fax. Copies of all receipts for expenses greater than [*specify, e.g.*, $25] will need to be submitted with billings. [*Optional:* Reimbursement of _____ (individual *or* aggregate) expenses in excess of $_____ (*specify amount*) will be made only if we approve those expenses in advance, unless we elect, in our sole discretion, to reimburse you after the fact.]

7. (a) We anticipate disclosing confidential information to you in connection with your services under this agreement. Confidential information includes trade secrets, proprietary information, of materials (whether or not patentable)

including, but not limited to, [*specify as appropriate to client's business, e.g.,* drug samples, compounds, protocols, investigator brochures, case report forms, methodology, equipment, data, reports, know-how, computer software, sources of supply, manufacturing processes, patent strategies, facilities, financial information, advertising campaigns and strategies, marketing and sales data, employees, consultants, and business plans], which are owned or controlled by us.

(b) You agree to use confidential information only for the purpose of providing consulting services and will not disclose or use confidential information for any other purpose. You may disclose confidential information to others who are legally bound to you to protect the confidentiality of confidential information, provided that we are informed of any such disclosure before it is made.

(c) Your obligation not to disclose confidential information will not be applicable to confidential information that either:

(1) Is or later becomes available to the public through no breach of this agreement on your part;

(2) You obtained from a third party having the legal right to disclose that information to you;

(3) Was already in your possession on the effective date of this agreement and was not confidential or subject to other restrictions on disclosure as of that date; or

(4) Is required to be disclosed by law, government regulation, or court order, as long as we are given advance notice of any such disclosure and an opportunity to seek a protective order or confidential treatment.

8. At our request, you will return to us any and all confidential items you receive under this agreement (and all copies and reproductions)[, except that you may retain a copy solely for archival purposes].

9. You hereby assign to us all right, title, and interest in and to all intellectual property (including trade secrets, inventions, works of authorship or ideas, or clinical trial results) made, conceived, reduced to practice, or otherwise developed by you, alone or jointly with others, in connection with services under this agreement, or during any retention discussion with us occurring [*specify, e.g.,* not more than six months] before the effective date of this agreement. You hereby grant us an irrevocable power of attorney to execute on your behalf patent applications or any documents required to perfect our interest in any such intellectual property.

10. You warrant that to the best of your knowledge and belief, we are free to use, without any restriction, whatever advice and assistance you provide to us under this agreement. You further warrant that you will make no unauthorized disclosure to us of any information that is proprietary to a third party.

11. You warrant that you have not entered into, and will not enter into, any agreement in conflict with this agreement.

12. You are free to disclose to third parties data or information relating to us or your services to us, as long as the data or information does not contain or reveal confidential information, we have been given reasonable opportunity to review the planned disclosure, and have agreed to the disclosure.

13. (a) The initial term of this agreement will expire on _____[*date*]. This agreement will be renewable in writing for successive periods on the mutual consent of both parties.

(b) This agreement may be terminated by either party on [*specify, e.g.,* 30 days written notice].

(c) The duties, rights, and obligations specified in Paragraphs 7, 8, 9 and 12 will survive termination or expiration of this agreement.

(d) If we continue or re-establish a business consulting relationship after expiration of this agreement, but without a subsequent written agreement, we agree that the terms and conditions of this agreement will be construed by our course of conduct to have been renewed or reinstated for an additional period equal to the length of the initial term.

14. Your relationship with us will be that of an independent contractor and not an employee. You agree that you will not be eligible for any employee benefits that we provide to our employees. You further understand and agree that we will not deduct taxes, social security, unemployment insurance, or any other similar contributions that are typically made for employees, from the compensation paid to you under this agreement, and that you are solely responsible for such taxes and similar contributions.

15. During the term of this agreement, you agree not to purchase or sell, whether for your own account or the account of any other person or entity, shares of or options for our stock, or recommend that others do so.

16. This agreement will be governed by the laws of the state of California.

17. Your obligations under this agreement are neither delegable nor assignable. We may assign this agreement at our discretion.

18. Any notice under this agreement will be sent to the addresses listed in this agreement, by certified or registered mail, and will be deemed given five days after the date of postmark.

19. This agreement supersedes all prior agreements, written or oral, between us relating to the subject matter of this agreement. This agreement may be modified, changed, or discharged, in whole or in part, only by an agreement in writing signed by both of us, except that a writing is not required for mutually agreed changes in the nature, frequency, or type of consulting services you will provide.

20. We will have the right to enforce any provision of this agreement by injunction, specific performance or other equitable relief without prejudice to other rights and remedies that we may have for a breach of this agreement.

21. If any part of this agreement is found unenforceable or void in a final judicial determination, you and we will reform this agreement so as to most closely approximate the original intent.

If this agreement meets with your approval, please sign and return the original and one copy of this agreement; you may retain the additional copy for your own records.

Sincerely,
_____ [*name of client*]
By _____ [*signature*]
[*typed name and title*]

AGREEMENT AND ACCEPTANCE

I have read the foregoing letter agreement, and by my signature below hereby approve and agree to be bound by those terms and conditions.

Date: _____

_____ [*signature of consultant*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral OverviewContracts LawTypes of ContractsGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
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A. Business Consultants

28-86 California Legal Forms--Transaction Guide § 86.203

§ 86.203 Vendor to Vendor Contract for Professional Services

[1] Comment--Use of Form

This form is a "vendor-to-vendor" agreement, in which one firm retains a business consultant to provide consulting services to a another person or entity. The agreement establishes a contractor-subcontractor relationship. The agreement is drafted between two corporate entities, the vendor and the consultant. However, it may be adapted for use by any combination of entities or individuals.

This agreement prohibits the subcontractor from accepting a position with the vendor's client, unless the subcontractor pays a placement fee.

As a practical matter, a consultant working as a subcontractor on a vendor-to-vendor contract is often required to sign two nondisclosure and property rights agreements--one provided by the vendor, between the consultant and the company for whom the vendor retained the consultant's services [*see* [2], *below*], and the other, provided by the company for whom the services will be provided. For further discussion of nondisclosure agreements and property rights, see *§ 86.200*. For a separate nondisclosure agreement, see *§ 86.204*.

For additional discussion of consultant contract provisions, see *§ 86.200[1]*. The *form in § 86.200[2]* also contains other general provisions that can be added to this form if desired [*see, e.g., § 86.200[2],* Article 17 (standard contract provisions)]. Copyright issues are discussed generally in § 86.260. For detailed discussion of those issues, see Ch. 103A, *Copyrights* .

[2] FORM

Vendor to Vendor Contract for Professional Services

VENDOR-TO-VENDOR CONTRACT AND NONDISCLOSURE AGREEMENT

This Agreement, dated _____, is between _____[*name of vendor*] ("Company")

_____[, a _____ (California corporation *or* limited liability company *or* partnership)], located at _____[*address of principal place of business*], and _____[*name of consultant*] ("Subcontractor") _____[, a _____ (*identify state*) corporation or partnership)], located at _____[*address of principal place of business*], with Federal Tax Identification Number _____.

1. This Agreement establishes a Vendor-to-Vendor, Contractor-Subcontractor relationship. Company presently has available a temporary position to provide consulting services to its client, _____[*name of client*] ("Client"), in the field of [*specify, e.g.,* Internet marketing]. Company agrees[, subject to Client's approval,] to have Subcontractor provide those services to Client under the terms of this agreement.

2. Subcontractor accepts and agrees to provide services to Client in accordance with this Vendor-to-Vendor contract (subject to Paragraph 1 and 5), beginning on _____[*date*] and ending on _____[*date*]. Subcontractor agrees to devote time and efforts to the business and affairs of Company and Client, with such duties as may be assigned to Subcontractor by Company from time to time. The duration of this initial contract may be extended by mutual agreement of Subcontractor and Company.

3. As compensation for Subcontractor's services, Company will pay Subcontractor for all Client-approved hours spent by Subcontractor in rendering to Client the services described in Paragraphs 1 and 2, above, at a rate of $_____ per hour. Subcontractor will invoice the Company [*term, e.g.,* weekly *or* bi-weekly *or* monthly] and provide Client-approved time sheets supporting each invoice. Company and Subcontractor agree that this rate of compensation is confidential. Subcontractor will not discuss Subcontractor's compensation with Client, other Company consultants, or anyone at Client's site.

4. Subcontractor agrees that in performing its duties and obligations under this agreement, and rendering services to Client, Subcontractor will be acting as an independent contractor of Company, and not as an employee of Company or Client. Accordingly, Subcontractor is responsible for filing all necessary and required tax filings, reports, payments, and similar obligations. Company is not responsible for any workers' compensation, Medicare, Medicaid, or other similar deductions or contributions, which shall be the sole responsibility of Subcontractor. Furthermore, Subcontractor is not entitled to any coverage for medical, dental, long term disability, life insurance benefits, or other benefits that Company may offer to its own employees. In addition, Subcontractor also waives any and all rights to employee-related benefits including, but not limited to, vacation, sick time, absences, holidays, educational assistance, and special employee savings plans and bonuses of any type, with the exception of, when applicable, of candidate referral bonuses.

5. Notwithstanding other provisions of this Agreement, Subcontractor may terminate this Agreement by giving the Company [*specify, e.g.,* 10 working days] written notice. Company may terminate this Agreement for any reason on notice to Subcontractor.

6. Subcontractor agrees that during this contract and a period of _____ months thereafter, Subcontractor will not directly or indirectly, in any capacity, compete or attempt to compete with Company by providing [*specify services, e.g.,* Internet marketing services] to Client, either directly, or indirectly through another consulting company, or by inducing any other individual or entity to do so. Should Subcontractor circumvent this provision in the time frame stated above, and accept a permanent position with Client, Subcontractor agrees to pay to Company a one-time permanent placement fee of [*specify, e.g.,* $10,000 or five percent of Subcontractor's annualized compensation from Client]. This fee will be payable to Company in full within [*specify, e.g.,* 30 days] after Subcontractor accepts a permanent position with Client and shall be due and payable without regard to how long Subcontractor remains in a permanent position with Client.

7. Subcontractor understands and agrees and that all information or data it may receive from Company or Client in connection the process of providing services to Client will be deemed confidential and may not be disclosed to anyone

other than Company or Client without the prior written consent of Company or Client. Any violation of this paragraph shall be deemed to be material and shall be cause for immediate termination of this agreement. Subcontractor also agrees that as a condition of this Agreement, Subcontractor will execute the agreement relating to nondisclosure and intellectual property rights attached to this agreement as Attachment A.

8. This Agreement supersedes any and all prior understandings and undertakings between the parties with regard to the subject matter of this Agreement.

Executed on _____[*date*] at _____[*city*], California.

COMPANY
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]

Executed on _____[*date*] at _____[*city*], California.

SUBCONTRACTOR
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]

SUBCONTRACTOR ATTACHMENT A

AGREEMENT BETWEEN SUBCONTRACTOR AND CLIENT _____ [*name*] REGARDING NONDISCLOSURE AND INTELLECTUAL PROPERTY

In consideration of payment for the performance of work or assignments on behalf of _____[*name of company*] ("Company") for _____[*name of vendor's client*] ("Client") or any of Client's affiliates, and other good and valuable consideration, including Subcontractor's use, on behalf of Client, of Client's materials, private or proprietary information, or facilities, Subcontractor agrees as follows:

1. Subcontractor assigns and agrees to assign to Client all Subcontractor's right, title, and interest in and to all inventions, discoveries, improvements, ideas, computer or other apparatus programs and related documentation, and other works of authorship ("Intellectual Property") whether or not patentable, copyrightable, or subject to other forms of protection, that are made, created, developed, written, or conceived by Subcontractor, during or outside of regular working hours, either solely or jointly with another, in whole or in part, either:

(a) In the course of Subcontractor's work or assignment, or

(b) That are suggested by or result from a task assigned to Subcontractor or work performed for on behalf of Client relating to Subcontractor's assignment, or

(c) With the use of Client's time, material, private or proprietary information, or facilities.

2. Subcontractor, without charge to Client, but at _____ Client's expense, will execute a specific assignment of title to Client and do anything else reasonably necessary to enable Client to secure a patent, copyright or

other form of protection for the intellectual property described in Paragraph 1 anywhere in the world.

3. Subcontractor further agrees that it will keep in confidence and will not, except as required in the conduct of Client's business as authorized in writing on behalf of Client, publish, disclose, or use, during and after the period of my work or assignment, any private or proprietary information that Subcontractor may in any way acquire, learn, develop, or create by reason of my work or assignment performed for or on behalf of Client.

4. Subcontractor agrees that this Agreement does not constitute a contract of employment with Client, nor does it confer any rights by license or otherwise in any Intellectual Property to which Subcontractor may have access.

5. Subcontractor agrees that it will not disclose any information that Subcontractor considers to be proprietary or confidential to any of Subcontractor's contractors or customers, except with Client's express written consent. All specifications, drawings, sketches, models, samples, tools, computer or other apparatus programs, technical or business information or data, written, oral or otherwise, furnished by Client under this Agreement or in contemplation of this Agreement, will be treated by Subcontractor as confidential or proprietary.

6. In the event that Subcontractor has previously executed an agreement with Client relating to the work that Subcontractor is about to undertake, it is understood and agreed that any and provisions of this Agreement will supersede any conflicting terms and conditions of any previously executed agreement.

Executed on _____[*date*] at _____[*city*], California.

SUBCONTRACTOR
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]

Executed on _____[*date*] at _____[*city*], California.

CLIENT
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral OverviewContracts LawTypes of ContractsGeneral OverviewTrade Secrets LawProtection of SecrecyGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART IV. FORMS
A. Business Consultants

28-86 California Legal Forms--Transaction Guide § 86.204

§ 86.204 Consultant Nondisclosure Agreement

[1] Comment

[a] Use of Form

This form is a separate agreement for nondisclosure of trade secrets and other confidential issues. Nondisclosure issues may be covered in the contract for services [*see, e.g., § 86.200[2]*] or in a separate agreement. The form describes the trade secrets of the party retaining the consultant in general terms, and includes a promise on the part of the consultant not to disclose, misuse, or misappropriate them during the term of the agreement or at any time thereafter. This type of agreement may be used in conjunction with a provision prohibiting the consultant from engaging in unfair competition with the proprietor of the trade secret, whether during or after the term of the contemplated engagement [*see § 86.200[2]*, § 5.03; *see also* [g], *below*].

The use of an agreement against disclosure, misappropriation, or misuse is recommended because even though injunctive and other relief may be available against a person who uses trade secrets to the owner's prejudice [*see Bus. & Prof. Code §§ 17200, 17202-17209*; *see also Civ. Code §§ 3426.2, 3426.3*], an agreement such as this one provides a firm written basis for traditional contract remedies [*see* [f], *below*], clearly informs the consultant of his or her obligation not to divulge the client's trade secrets, and emphasizes the client's position on disclosure.

Many companies, especially in high-technology industries, routinely require such a stand-alone agreement of all their consultants.

This form includes a clause stating that all books, files, records, and the like that the consultant will use during the course of the engagement are the exclusive property of the entity for whom consulting services are provided.

[b] Definition of "Trade Secret"

For common law purposes, California has adopted the broad definition of "trade secret" set forth in the Restatement of Torts [*see* Restatement of Torts § 757, Comment (b) (1939)]. Under this definition, a trade secret may consist of any

formula, pattern, device, or compilation of information that is used in the client's business and that gives the client an advantage over competitors who do not know it or use it [*see Rigging Int'l Maintenance Co. v. Gwin (1982) 128 Cal. App. 3d 594, 606, 180 Cal. Rptr. 451* ; *see also Futurecraft Corp. v. Clary Corp. (1963) 205 Cal. App. 2d 279, 288-289, 23 Cal. Rptr. 198]* .

For the purposes of an action for misappropriation under the Uniform Trade Secrets Act [*Civ. Code § 3426 et seq.*], a "trade secret" is information, including any formula, pattern, compilation, program, device, method, technique, or process, that derives independent 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 is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [*Civ. Code § 3426.1(d)*; *see Penal Code § 499c(a)(9)* (criminal law definition of trade secret)]. For further discussion of the application of the Act, see [e], *below*.

Secrecy is a necessary element of a trade secret; to qualify as a trade secret, the information involved must be difficult for an outsider to acquire. Matters of public or general knowledge in a particular industry cannot be trade secrets. Information that is completely disclosed by a manufactured product cannot be a trade secret. A trade secret generally is known only in the particular business in which it is used. Without losing trade secret protection, the trade secret can be communicated to employees or to others pledged to secrecy. Others may know it independently, however, such as another who has discovered the same process but is also keeping it secret [*Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 288-290, 23 Cal. Rptr. 198* ; *see also* Restatement of Torts § 757, Comment (b) (1939)].

The mere agreement of the parties that something is a trade secret does not make it a protectable interest if it is not actually a trade secret [*see Ingrassia v. Bailey (1959) 172 Cal. App. 2d 117, 123-124, 341 P.2d 370]* .

[c] Factors Used in Determining Trade Secret Status

The factors to be considered in determining whether particular information is a trade secret are [*Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 288-290, 23 Cal. Rptr. 198* ; *see also* Restatement of Torts § 757, Comment (b) (1939)]:

- The extent to which the information is known outside of the business.
- The extent to which the information is known by employees and others involved in the business.
- The measures taken to guard the secrecy of the information.
- The value of the information to the owner and the owner's competitors.
- The effort and money expended in developing the information.
- The relative ease or difficulty with which the information could be properly acquired by others.

[d] Protection of Trade Secrets

The foundation of trade secret protection law is the statement that a party has the right to keep the work it has done, or paid for doing, to itself and that others may not steal that work [*see Chicago Board of Trade v. Christie Grain & Stock Co. (1905) 198 U.S. 236, 250, 25 S. Ct. 637, 49 L. Ed. 1031]* . A trade secret is given legal protection if it is acquired and used under a contractual or fiduciary relationship between the proprietor and the user [*see* J. Irizarry y Puente v. President & F. of Harvard Col. (1st Cir. [Mass.] 1957), *248 F.2d 799, 802]* . Contractually obligated secrecy is a key method of protecting a trade secret because it provides a remedy without the automatic public disclosure that is required to patent or copyright an invention or process.

Trade secret law protects the trade secret proprietor against any unauthorized disclosure of confidential information by the user to third parties whom the proprietor does not wish to know that information. However, if an individual discovers a trade secret either independently or by "reverse engineering" applied to a product or invention that has been disseminated to the public, that person has not breached any contractual or fiduciary relationship and would not be liable under trade secret law [*see Civ. Code § 3426.1(a)*].

The confidentiality aspect of trade secret protection is significantly different from the protection afforded by copyright. For discussion of copyright law generally, see Ch. 103A, *Copyrights* . For more detailed discussion of actions involving the disclosure or misuse of trade secrets, see *California Forms of Pleading and Practice, Ch. 565, Unfair Competition, § 565.100 et seq.* (Matthew Bender).

[e] California Action for Misappropriation

Under the Uniform Trade Secrets Act, which has been adopted in California [*Civ. Code § 3426 et seq.*], an actual or threatened misappropriation of a trade secret may be enjoined or otherwise limited [*see Civ. Code § 3426.2*], and damages can be recovered for the misappropriation [*see Civ. Code § 3426.3*]. The Act does not supersede any other statute relating to the misappropriation of a trade secret or any other statute regulating trade secrets [*Civ. Code § 3426.7(a)*], nor does it affect contractual, civil, or criminal remedies [*see Civ. Code § 3426.7(b)*]. For the definition of a "trade secret" for purposes of the Act, see [b], *above*.

"Misappropriation," for purposes of the Act, includes improper acquisition of a trade secret, by one who knows, or has reason to know, that the trade secret was acquired by improper means [*Civ. Code § 3426.1(b)(1)*]. The term also covers the improper disclosure or use of the trade secret. Thus, misappropriation is the disclosure or use of another person's trade secret without that person's consent by one who used improper means to acquire knowledge of the secret [*Civ. Code § 3426.1(b)(2)(A)*], or by one who knew (at the time of the disclosure) that his or her knowledge of the secret was derived by improper means or from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use [*Civ. Code § 3426.1(b)(2)(B)(i), (iii)*] or was acquired in breach of a duty to maintain its secrecy or limit its use [*Civ. Code § 3426.1(b)(2)(B)(ii)*]. "Misappropriation" also includes disclosure or use of a trade secret by a person who knew that it was a trade secret and that its knowledge had been acquired by accident or mistake [*Civ. Code § 3426.1(b)(2)(C)*].

"Improper means" includes theft, bribery, misrepresentation, breach or inducement of a duty to maintain secrecy. The term also includes electronic or other means of espionage. However, reverse engineering or independent derivation alone are not improper means [*Civ. Code § 3426.1(a)*].

An action for misappropriation under the Act must be brought within three years after the misappropriation is discovered or should have been discovered [*see Civ. Code § 3426.6*]. As a prerequisite to discovery in an action for misappropriation under the Act, the complaining party must identify the trade secret with reasonable particularity [Code Civ. Proc. § 2019.201]. However, the court is required to take reasonable measures to preserve its secrecy [*see Civ. Code § 3426.5*].

[f] Contract Actions

The misappropriation or misuse of trade secrets that are protected by contract can also be remedied by means of traditional contract actions. The Uniform Trade Secrets Act specifically provides that it does not affect contractual remedies, whether or not they are based on misappropriation of a trade secret [*Civ. Code § 3426.7(b)(1)*]. Under the common law definition, a "trade secret" is any formula, device, or compilation of information used in one's business which gives that person an opportunity to obtain an advantage over competitors who do not know or use it [*Futurecraft Corp. v. Clary Corp. (1962) 205 Cal. App. 2d 279, 288-289, 23 Cal. Rptr. 198* ; *see also* Restatement of

Torts § 757, Comment (b) (1939)]. Since this definition is broader than that set forth in the Uniform Trade Secrets Act and since the plaintiff in a common law contract action may not have to make the type of disclosure required under the Act, a common law contract action may be more desirable.

[g] Action for Unfair Competition

"Unfair competition" is any unlawful, unfair, or fraudulent business act or practice [*Bus. & Prof. Code § 17200*]. The criminal law definition of trade secret includes information, including any formula, pattern, compilation, program, device, method, technique, or process, that derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic benefit from its disclosure or use, and is subject to the efforts that are reasonable under the circumstances to maintain its secrecy [*Penal Code § 499c(a)(9)*; *see Civ. Code § 3426.1(d)* ("trade secret" defined under Uniform Trade Secrets Act; *Civ. Code § 3426 et seq.*)].

A person who commits unfair competition by misusing or misappropriating a trade secret may be enjoined from continuing to do so [*Bus. & Prof. Code §§ 17203, 17204*; *Civ. Code § 3426 et seq.*; *see Peerless Oakland Laundry Co. v. Hickman (1962) 205 Cal. App. 2d 556, 559, 23 Cal. Rptr. 105* (restraining order issued to prevent former employee's use, to former employer's prejudice, of trade secrets acquired during prior employment)]. That person can also be held liable for civil penalties [*Bus. & Prof. Code § 17206*].

A consultant who misappropriates a former client's trade secrets can also be subjected to any other remedies provided under California law [*see Bus. & Prof. Code § 17205*]. These remedies include damages for breach of any contractual provision against unauthorized use or disclosure of a trade secret [*see* [f], *above*]. These remedies for unfair competition are available in addition to those available under the Uniform Trade Secrets Act, since the Act does not affect other civil remedies that are not based upon misappropriation of a trade secret [*Civ. Code § 3426.7(b)(2)*], or criminal remedies, whether or not they are based on misappropriation [*Civ. Code § 3426.7(b)(3)*].

[2] FORM

Consultant Nondisclosure Agreement

CONSULTANT NONDISCLOSURE AGREEMENT

In consideration of my services as a consultant with [*company*] ("Company") and of the compensation I will receive in the course of performing those services, I agree as follows:

1. Except as Company may otherwise consent in writing, I will not directly or indirectly use (other than for Company), publish, or otherwise disclose at any time (except as my Company duties may require), either during or subsequent to the performance of my consulting services, any of Company's confidential information (whether or not conceived, originated, discovered, or developed in whole or in part by me) as defined below.

2. "Confidential information" as used in this Agreement means information or material that is not generally available to or used by others, or the utility or value of which is not generally known or recognized as standard practice whether or not the underlying details are in the public domain, including without limitation:

(a) Information or material that relates to Company's inventions, technological developments, "know-how", purchasing, accounting, merchandising or licensing

(b) Trade secrets.

(c) Software in various stages of development (source code, object code, documentation, diagrams, flow charts), designs, drawings, specifications, models; data and customer information; and

(d) Any information of the type described above that Company obtained from another party and that Company treats as proprietary or designates as confidential, whether or not owned or developed by Company.

3. The obligations of confidentiality imposed by this Agreement will not apply to confidential information that:

(a) Is or has been generally available to the public by any means, through no fault of my own, and without breach of this Agreement.

(b) Is or has been lawfully disclosed to me by a third party without an obligation of confidentiality being imposed on me.

(c) Has been disclosed without restriction by Company or by a third party owner of confidential information.

4. I agree to deliver to Company promptly on request, or on the date of termination of my consulting services, all documents, software, including any copies, and other materials in my possession pertaining to the business of Company and originating with Company that came into my possession.

5. For a period of [*time period, e.g.,* two years] following termination of my consulting services with Company within a worldwide geographical area (it being understood and agreed that Company's industry is worldwide and that Company faces competition throughout the world and has customers throughout the world), I agree not to engage in or contribute my knowledge to any work that is then competitive with or similar to the product, process, apparatus or service on which I work or worked or with respect to which I have or had access to confidential information while at the Company at any time before that termination. However, I will be permitted to engage in such proposed work or activity, and Company will furnish me a written consent to that effect, if I furnish to Company clear and convincing written evidence including assurance from me and my employer, that the fulfillment of my duties in such proposed work or activity will not cause me to disclose, base judgment upon, or use any confidential information. The geographical area set forth in this paragraph is divisible so that if this clause is invalid or unenforceable in an included geographical area, that area is severable and this clause remains in effect for the remaining geographical areas in which the clause is valid.

Executed on _____[*date*] at _____[*city*], California.

COMPANY
_____ [*name of corporation*]
By _____ [*signature*]
[*typed name and title*]

Executed on _____[*date*] at _____[*city*], California.

CONSULTANT
_____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral OverviewContracts LawTypes of ContractsGeneral OverviewTrade Secrets LawProtection of SecrecyGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-86 California Legal Forms--Transaction Guide §§ 86.205-86.209

[Reserved]

§§ 86.205[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART IV. FORMS
B. Accountants

28-86 California Legal Forms--Transaction Guide § 86.210

§ 86.210 Basic Agreement for Accountancy Services--Letter Form

[1] Comment

[a] Use of Form

This form is a basic letter agreement between a client and a certified public accountant or a public accountant to provide public accountancy services to the client. Although a formal contract may be used [*see § 86.211[2]*], the usual practice for routine accounting services is to memorialize the engagement in letter form. Typically such letters are kept simple and informal.

For the sake of completeness, this sample agreement contains a number of standard contract provisions [*see* [d], *below*] that are appropriate in any contract but are not always included in letter contracts for accounting services. For ease of reference, the accountant letter agreements in this chapter use a numbered paragraph format. If a less formal appearance is desired, the paragraph numbers can be deleted and the provisions of the form set out in ordinary paragraphs.

For a general discussion of the practice of accountancy, see *§§ 86.16, 86.19*. For forms specifically related to audit, review, and compilation services, see *§ 86.212-86.214*. For an agreement for the preparation of income or estate tax returns, see *§ 86.215*.

[b] Accountant's Services

Paragraph 1 of this form specifies the services that the accountant will perform under the agreement. If the agreement contemplates a general arrangement under which the accountant will perform general accounting services as necessary or on request, the first alternative should be used.

If the arrangement is for a specific and limited task, the second alternative should be used. When the second alternative is used, the description of the services to be provided should be as specific and detailed as possible. This is especially important if the services are to be provided on a flat fee basis, since the more detailed the description of services, the lesser the likelihood of misunderstandings or disagreements over exactly what services were included in the flat fee. In

addition, the accountant should specify any services that are not included in the basic package contemplated by the agreement. The second alternative contains an optional provision that may be used to limit the services to be rendered. The description of excluded services, like the description of included services, should be as specific and detailed as reasonably possible. The second alternative also contains language stating that any additional services will be billed at extra cost.

For more detailed descriptions of specific types of accounting services, see the *forms in §§ 86.212-86.215*. For a discussion of what services are included in the term "public accountancy services," what services must be rendered by a certified public accountant or public accountant, and what services may be rendered by other persons, see *§ 86.16[5], [6]*. For a discussion of the distinction between a certified public accountant or public account and unlicensed individuals, see *§ 86.16[2], [3]*.

[c] Compensation

Paragraph 2 of the form contains two alternative methods of compensation. The first provides simply that all services will be charged on an hourly basis at the accountant's standard hourly rate. This is the most common method of compensation in agreements for accounting services, since it is usually difficult to determine at the time the agreement is entered into exactly how much time the accountant will have to spend to perform the necessary services.

The second alternative provision in Paragraph 2 provides for a flat fee for specific services [*see* [b], *above*]. Such a provision may be appropriate when the nature and scope of the accounting services can be accurately determined in advance. This alternative provides that if additional services are rendered, those services will be billed at the accountant's standard hourly rate.

In addition, this form also provides that the client will charge costs and expenses back to the client. These costs include photocopying, postage, filing fees, and similar expenses.

This agreement also provides for the payment of a retainer upon execution of the agreement, prior to the commencement of services [*see* Paragraph 3 of form]. Retainer provisions are common in accountant agreements. The retainer will be credited against amounts charged to the client for fees and expenses, and any unused balance refunded to the client on termination of the agreement.

[d] Termination of Agreement

Paragraph 4 of this agreement provides for termination by either party at any time on written notice to the other party. On termination, any amounts accrued but unpaid as of the date of the termination will be billed to the client. If compensation was to be in the form of a flat fee and the agreement is terminated before completion of the accountant's services, the form provides that the accountant is to be compensated for time actually spent, in lieu of the flat fee [*see* Paragraph 4 of Form].

In addition, Paragraph 3 provides that any portion of the accountant's retainer that has not been applied against amounts due for the accountant's fees and expenses will be refunded to the client on termination of the agreement.

For alternative provisions governing termination of the contract, see the *form in § 86.211[2]*.

[e] Other Provisions

This contract contains other standard "boilerplate" provisions. These provisions are not always included in informal letter agreements, but are included here for the sake of completeness:

- A provision for arbitration of any disputes arising under the agreement [*see* Paragraph 5 of form; for discussion and alternative provisions, *see Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.250*]. In practice, arbitration provisions are included in many accountant agreements.

- A provision allowing the prevailing party in any litigation or arbitration to recover attorneys' fees [*Civ. Code § 1717*; *see* Paragraph 6 of form; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.252*].

- A severability clause [*see* Paragraph 7 of form; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.271*].

- A choice of law clause specifying that the agreement will be governed by California law [*see* Paragraph 8 of form; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.273*].

- An "entire agreement" clause [*see* Paragraph 9 of form; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.270*].

- A provision governing the manner of notice under the contract [*see* Paragraph 10 of form; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.294*].

[2] FORM

Basic Agreement for Accountancy Services--Letter Form

[*Accountant's letterhead*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

This letter contains our agreement regarding the terms and conditions under which we will provide public accountancy services to you. If the terms as set forth in this letter are agreeable to you, please sign and date this agreement at the end in the space provided.

[*For a general statement of services to be rendered, include the following:*]

1. We agree to perform such general tax and accounting services for you as you may request or authorize us to perform with respect to your business and/or personal affairs, under the terms and conditions set forth in this letter agreement [*if desired, add listing of specific types of services:*, including such matters as _____ (*e.g.*, general bookkeeping services, preparation of monthly financial statements, tax reports, and returns)].

[*Or, to limit services to one or more specifically described services, use the following:*]

1. We agree to perform the following specific accounting services for you under the terms and conditions stated in this letter agreement: _____[*describe services with specificity*]. In addition, we may perform additional

accounting services for you if you so request and we agree to do so. Any services that are not specifically described above will not be included in the basic compensation and will be billed separately as stated below. [*Optional:* Unless otherwise agreed, we will not _____ (*specify any services specifically excluded from the basic services accountant will provide*)].

[*Continue with the following:*]

[*If compensation is to be based exclusively on an hourly rate:*]

2. Our fees for the services specified above, and for any additional services, will be charged at our standard hourly rate of $_____ per hour.

[*Or, if compensation is to be on a flat rate basis:*]

2. Our fee for the services specified above will be $[*state flat rate, e.g.,* $2,000]. Additional services not specified above will be charged at our standard hourly rate of $_____ per hour.

[*Continue with the following:*]

In addition, you also agree to reimburse us for any incidental costs and expenses relating to the services we provide. These costs and expenses may include, but are not limited to, such things as [secretarial and similar charges,] telephone calls, photocopying and related expenses, shipping and mailing charges, document filing fees, other government fees, notary fees, and similar expenses. Statements of the amount due will be sent to you on a periodic [*or specify a more precise term, e.g.,* monthly *or* quarterly] basis and will be due and payable within _____ days thereafter.

[*Optional retainer provision:*]

3. You agree to pay us a retainer of $_____ upon signing this letter. This retainer will be credited against our fees, costs, and expenses as specified above. If this agreement is terminated, any portion of the retainer in excess of amounts credited against our fees, costs, and expenses, as of the time of termination, will be refunded to you promptly after termination of the agreement.

[*Continue with the following:*]

4. Either of us may terminate this agreement at any time, effective upon written notice to the other party. In the event that this agreement is terminated [*for a flat fee agreement or similar arrangement, add:* before we complete the services specified above, then in lieu of the fee specified above for our services], you agree to compensate us at our regular hourly rate for any time expended but not billed as of the termination date, as well as any costs or expenses as specified above incurred but not billed as of that date.

5. If any disagreement or controversy arises between us with respect to the terms of our agreement, it will be submitted to arbitration in accordance with *California Code of Civil Procedure Sections 1280 through 1294.2*.

6. If any party to this agreement resorts to litigation or arbitration to enforce or interpret any provision of this contract,

the prevailing party will be entitled to recover reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision applies to the entire agreement.

7. If any part of this agreement should be found to be invalid, the invalidity will not affect the remainder of this agreement, which will continue in effect as if this agreement had been executed without the invalid part.

8. This agreement will be governed by California law.

9. This letter agreement states our entire agreement with you with respect to the subject matter of the agreement, and supersedes any and all other agreements, whether oral or in writing, between us with respect to the subject of this agreement. No agreement, statement, or promise not contained in this letter agreement will be valid or binding between us with respect to the subject of this agreement.

10. Any notice required to be given under this contract may be given by personal delivery or by registered or certified mail, postage prepaid, return receipt requested, to the address of the party to whom notice is being given, as stated in this letter. Notice will be deemed communicated as of actual receipt by the other party.

We believe that this letter accurately summarizes the terms of the engagement. If you agree that this letter correctly sets forth our agreement, please sign and date, as indicated below and return this letter to us. A copy is enclosed for your files.

We appreciate the opportunity to be of service to you. If you have any questions or would like to discuss anything in this letter, please be sure to call us.

Sincerely,
_____ [*name of accountant*]
By _____ [*signature*]
[*typed name and title*]

AGREEMENT AND ACCEPTANCE

I have read the above letter agreement, and by signing below hereby approve and agree to be bound by those terms and conditions.

Date: _____

_____ [*signature of client*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral OverviewContracts LawTypes of ContractsGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART IV. FORMS
B. Accountants

28-86 California Legal Forms--Transaction Guide § 86.211

§ 86.211 Basic Agreement for Accountancy Services--Contract Form

[1] Comment--Use of Form

This form is a contract between an accountant and client specifying the nature of the services to be performed by the accountant and the compensation for those services. It is similar in general scope to the letter agreement in § 86.210, but contains more formal and detailed provisions of the type that are typically included in a formal contract.

In practice, agreements for accounting services normally are memorialized in a less formal engagement letter. Formal written agreements with accountants are not commonly used. Nevertheless, circumstances may arise in which one or both parties believes that a formal contract is the most appropriate way to protect their respective interests.

This form can be used either when the accountant is engaged to perform a specific task, or when the accountant is engaged to perform all accounting services required or requested by the client on an ongoing open-ended basis or for a specified period of time [*see* Paragraph 2 of Form].

Compensation can be on either an hourly basis, a flat fee basis, or a periodic basis [*see* Paragraph 3 of Form]. Hourly fees are the most common form of compensation in accountant agreements. If a flat fee or periodic arrangement is used, it is especially important that the services be described with particularity, and that any excluded services also be specifically noted, in order to reduce the chances of subsequent disagreements over the scope of services included in the basic fee [*see § 86.210[1][b]* for additional discussion]. For descriptions of specific types of accounting services, see *§§ 86.212-86.215*. This agreement also provides for an advance retainer to be credited against the accountant's fees [*see* Paragraph 5 of Form].

An arbitration provision is also included [*see* Paragraph 7 of Form; *see also Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.271*].

For discussion of some of the other standard provisions in this agreement, see *§ 86.210[1][e]*. For a general discussion of the practice of accountancy, see *§§ 86.16, 86.19*. For forms specifically related to audit, review, and compilation

services, see *§ 86.212-86.214*. For an agreement for the preparation of income or estate tax returns, see *§ 86.215*.

[2] FORM

Basic Agreement for Accountancy Services--Contract Form

AGREEMENT FOR ACCOUNTANCY SERVICES

This AGREEMENT is made this _____ day of [*month and year*], between _____[*name of accountant*] ("Accountant"), [a _____ (*status, e.g.,* California professional corporation *or* California limited liability partnership)] duly licensed by the State of California as a [certified public accountant *or* public accountant] and having a principal place of business at _____[*address*], and _____[*name of client*] ("Client"), [a _____ (*status, e.g.,* sole proprietorship *or* California corporation *or* California limited liability company *or* California limited partnership)], _____[*address.*]

Term of Agreement

1. This Agreement will become effective _____[*e.g.,* as of the date stated above *or* on _____ (*date*)], and will continue in effect until _____[*e.g.,* the services provided for under this Agreement have been performed *or* terminated as provided in this Agreement *or specify a date of termination*].

Accountant's Services

[*For a general statement of services to be rendered, include the following:*]

2. During the term of this agreement, Accountant agrees to perform such general tax and accounting services for Client as Client may request or authorize Accountant to perform, under the terms and conditions set forth in this Agreement [*if desired, add listing of specific types of services:*, including such matters as _____ (*e.g.,* general bookkeeping services, preparation of monthly financial statements, tax reports, and returns)]. [*Optional:* Unless otherwise expressly agreed in writing, Accountant will not _____ (*specify any services specifically excluded from the basic services accountant will provide*)].

[*Or, to limit services to one or more specifically described services, use the following:*]

2. Accountant agrees to perform the following specific accounting services for Client under the terms and conditions stated in this agreement: _____[*describe services with specificity*]. In addition, Accountant, in Accountant's discretion, may perform additional accounting services for Client if Client so requests and Accountant agrees to do so. Any services that are not specifically described in this section are not be included in the basic compensation rate specified in Paragraph 3 and will be billed separately to Client as stated below. [*Optional:* Unless otherwise agreed in writing, Accountant will not _____ (*specify any services specifically excluded from the basic services accountant will provide*)].

[*Continue with the following:*]

Accountant's Fees

[*If compensation is to be based exclusively on an hourly rate:*]

3. Accountant's fees for the services specified in Paragraph 2, above, and for any additional services, will be charged on an hourly basis at Accountant's standard hourly rate of $_____ per hour. Amounts due for Accountant's fees, costs, and expenses will be billed to Client on a [monthly *or* quarterly *or specify other billing cycle*] basis and will be due and payable within _____ days thereafter. [Amounts more than _____ days past due will accrue interest at the rate of _____ percent per _____ (*e.g.*, month)].

[*Or, if compensation is to be on a periodic basis:*]

3. Accountant's fee for the services specified in Paragraph 2, above, will be $_____ per [*time period, e.g.*, month]. Any additional services performed by Accountant for Client and not specified in Paragraph 2, above, will be charged on an hourly rate basis at Accountant's standard hourly rate of $_____ per hour. Amounts due for Accountant's fees, costs, and expenses will be billed to Client on a [monthly *or* quarterly *or specify other billing cycle*] basis and will be due and payable within _____ days thereafter. [Amounts more than _____ days past due will accrue interest at the rate of _____ percent per _____ (*e.g.*, month)].

[*Or, if compensation is to be on a flat rate basis:*]

3. Accountant's total fee for the services specified in Paragraph 2, above, will be $_____, payable _____[on Accountant's completion of the services specified in Paragraph 2 *or specify periodic payment schedule, e.g.*, in _____ equal monthly installments of $_____, beginning on _____ (*date*)]. Any additional services not specified in Paragraph 2, above, will be charged to Client on an hourly rate basis at Accountant's standard hourly rate of $_____ per hour. Amounts due for any additional fees and for Accountant's costs and expenses will be billed to Client on a [monthly *or* quarterly *or specify other billing cycle*] basis and will be due and payable within _____ days thereafter. [Amounts more than _____ days past due will accrue interest at the rate of _____ percent per _____ (*e.g.*, month)].

[*Continue with the following:*]

Costs and Expenses

4. In addition to the fees specified above, Client will reimburse Accountant for any incidental costs and expenses Accountant incurs in performing services for Client under this agreement, including, but not limited to, [secretarial and similar charges,] telephone calls, photocopying and related expenses, shipping and mailing charges, document filing fees, other government fees, notary fees, and similar expenses. [*Optional:* Client further agrees to reimburse Accountant for reasonable travel and out-of-pocket expenses incurred while performing services for Client under this Agreement, including, but not limited to, economy class airfare, accommodations, meals, mileage reimbursement at Accountant's standard rate for use of a personal car, rental cars, courier expenses, telephone, and fax]. Costs and expenses will be billed to Client as specified in Paragraph 3, above. Copies of all receipts for expenses greater than [*specify, e.g.*, $25]

will be provided on request. [*Optional:* Reimbursement of _____ (individual *or* aggregate) expenses in excess of $_____ (*specify amount*) will be made only if Client approves those expenses in advance or elects, in Client's sole discretion, to reimburse Accountant after the fact.]

Retainer

[*Optional retainer provision:*]

5. Client agrees to pay Accountant a retainer of $_____ upon signing this Agreement. This retainer will be credited against Accountant's fees, costs, and expenses as specified above. If this agreement is terminated, any portion of the retainer in excess of amounts credited against Accountant's fees, costs, and expenses, as of the time of termination, will be refunded to Client promptly following termination of the agreement.

[*Select one of the following alternatives:*]

Termination on Notice

6. Either party may terminate this agreement at any time by giving [*specify time requirement, if any, e.g.*, 30 days] written notice to the other party. In the event that this agreement is terminated [*for a flat fee agreement or similar arrangement, add:* before Accountant completes the services specified above, then in lieu of the fee specified above for Accountant's services], Client agrees to compensate Accountant at Accountant's regular hourly rate for any time expended but not billed as of the termination date, as well as any costs or expenses as specified above incurred but not billed as of that date.

[*OR*]

Termination

6. (a) This agreement will terminate on expiration of the term specified in Paragraph 1, above, unless that term is extended in writing by mutual agreement of the parties. In addition, the agreement may be terminated prior to the expiration of that term in accordance with (b) and (c), below.

(b) Accountant, at its option, may elect to terminate this Agreement immediately upon written notice to Client on the occurrence of any of the following events:

(1) Accountant [retires, becomes incapacitated, or for any other reason] ceases or withdraws from the practice of public accountancy.

(2) Client fails to cooperate in providing Accountant with access to all necessary records, data, and other materials that Accountant reasonably requests to enable Accountant to perform services for Client under the terms of this Agreement.

(3) Client declares bankruptcy, becomes insolvent, or reasonably appears to Accountant to be or be likely to become unable to meet its financial obligations to Accountant under the terms of this Agreement.

(4) Client engages in any illegal or fraudulent activity, misrepresentations, or similar activity involving or arising out of the work performed by Accountant under this agreement, or otherwise misuses balance sheets or other financial information prepared or reviewed by Accountant under this Agreement.

(5) Any amounts owed by Client to Accountant under the terms of this Agreement remain past due for more than

_____ [*specify period, e.g.,* 60 days].

(c) Client, at its option, may elect to terminate this Agreement immediately upon written notice to Client on the occurrence of any of the following events:

(1) Client [dies,] goes out of business, or changes Client's business activities in such a manner that Accountant's services are no longer reasonably necessary.

(2) Accountant or Client moves their principal place of business more than

_____ miles outside

_____ [*e.g.,* Orange County *or specify other geographical limitation*].

(3) Accountant fails to render services under this Agreement in a timely manner.

(4) Accountant's services under this Agreement at any time fail to reasonably meet the generally accepted standards for the practice of public accountancy.

(d) In the event this agreement is terminated under (b) or (c), above, [*for a flat fee agreement or similar arrangement, add:* then in lieu of the fee specified above for Accountant's services], Client agrees to compensate Accountant for at Accountant's regular hourly rate for any time expended but not billed as of the termination date, as well as any costs or expenses as specified above incurred but not billed as of that date.

Arbitration

7. Any controversy between the parties to this Agreement involving the construction or application of any of its terms, covenants, or conditions will be submitted to arbitration, on the written request of one party served on the other. The arbitration will comply with and be governed by the provisions of the California Arbitration Act, *California Code of Civil Procedure Sections 1280 through 1294.2*.

Attorneys' Fees

8. If any party to this Agreement resorts to litigation or arbitration to enforce or interpret any provision of this Agreement, the prevailing party will be entitled to recover reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision applies to the entire contract.

Client's Cooperation

9. Client agrees to cooperate fully and completely with Accountant and to provide Accountant with all the necessary

data, information, records, and other materials requested by Accountant that are reasonably necessary to enable Accountant to render accounting services to Client under the terms of this Agreement.

Independent Contractor

10. In performing accounting services under this Agreement, Accountant at all times will be an independent contractor and not an employee of Client.

Entire Agreement

11. This Agreement contains the entire agreement between the parties relating to the rights granted and the obligations assumed. Any oral representations or modifications concerning this Agreement will be of no force or effect excepting a subsequent modification in writing, signed by the party to be charged.

Partial Invalidity

12. If any part of this contract is declared invalid for any reason, the remainder of the agreement shall be unaffected. The other parts of the agreement shall remain in effect as if the agreement had been executed without the invalid part. The parties declare that they intend and desire that the remaining parts of the agreement continue to be effective without any part or parts that have been declared invalid.

Governing Law

13. The validity of this Agreement and its terms or provisions, as well as the rights and duties of the parties, will be interpreted and construed pursuant to and in accordance with the laws of the State of California.

Amendments and Waivers

14. Any term or provision of this Agreement may be amended and the observance of any term of this Agreement may be waived (either generally or in a particular instance and either retroactively or prospectively) only by a writing signed by the party to be bound thereby. The waiver by a party of any breach of this Agreement will not be deemed to constitute a waiver of any other default or succeeding breach or default.

Notices

15. Any notices to be given under this Agreement by either party to the other may be effected either by personal delivery in writing or by mail, registered or certified, postage prepaid with return receipt requested. Mailed notices must be addressed to the addresses of the parties as they appear in the introductory paragraph of this agreement, but each party may change address by written notice in accordance with this paragraph. Notices delivered personally will be deemed communicated as of actual receipt; mailed notices will be deemed communicated as of [*e.g.,* one] day[s] after mailing.

[*Optional provision when client is a business entity:*]

Authority

16. Client's representatives who are signing this agreement on behalf of Client warrant that they are fully authorized by Client to engage Accountant to perform accounting services for Client, and that all necessary approvals required under Client's governing instruments in order to engage Accountant to provide these services have been obtained, and all necessary procedures followed.

[*Continue with the following:*]

Executed on _____[*date*] at _____[*city*], California.

ACCOUNTANT
_____ [*name of accountant*]
By _____ [*signature*]
[*typed name and title*]
CLIENT
[*typed name of client*]
_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral OverviewContracts LawTypes of ContractsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART IV. FORMS
B. Accountants

28-86 California Legal Forms--Transaction Guide § 86.212

§ 86.212 Engagement Letter for Audit Services

[1] Comment--Use of Form

This form is an engagement letter to be used by an accountant or accounting firm that will provide audit services to a person or group of persons, such as the board of directors or partnership audit committee. Although a formal contract may be used [*see § 86.211[2]*], most accountants prefer the informality of a letter agreement. For additional discussion of the format of the letter agreements in this chapter, see *§ 86.210[1][a]*.

This form carefully delineates the auditor's responsibility. The auditor will audit balance sheets, related statements of income and retained earnings, and financial statements to express an opinion [*see* Paragraph 1 of Form]. This form outlines the standard procedures used in conducting an audit, such as selective testing of accounting records and supporting documents, and explains that the auditors will not examine all transactions in detail [*see* Paragraphs 2, 4, 5, 6, of Form]. The client will provide the basic information used in the audit, and the client is responsible for its completeness and accuracy [*see* Paragraph 3 of Form].

This form emphasizes that management is responsible for the financial statements [*see* Paragraph 6 of Form]. If the auditor's opinion will be anything other than unqualified, the auditor will discuss its analysis with the client in advance [*see* Paragraph 1 of Form].

The form contains an optional paragraph stating that the auditors will request written representations from the client's attorneys, and advising the client that counsel may bill the client for counsel's response [*see* Paragraph 11 of Form]. This paragraph may avoid subsequent controversy if the client will be billed for responding to a legal representation letter.

The form sets forth the accountant's fees and provides for binding arbitration in the event of a fee dispute [*see* Paragraph 13 of Form]. For additional discussion of arbitration provisions, see *Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.250*].

For additional discussion of some of the other provisions in this chapter, see *§ 86.210[1]*. For a general discussion of the practice of accountancy, see *§§ 86.16, 86.19*. For forms specifically related to review and compilation services, see *§ 86.213*, *86.214*. For an agreement for the preparation of income or estate tax returns, see *§ 86.215*.

[2] FORM

Engagement Letter for Audit Services

[*Accountant's letterhead*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear [*client*]:

This letter is to confirm the terms of our agreement regarding our audit of the financial statements of _____[*name of client*] ("Client") for the taxable year ending _____. If the terms of the agreement as set forth in this letter are agreeable to you, please sign and date this agreement at the end in the space provided. [*If agreement is for the first audit with the client, add:* To perform our initial audit, we will need to review your previous auditor's work papers. You must authorize the previous auditors to release their work papers to us for the tax year(s) _____.]

1. We will audit the balance sheet of _____[*name of client*], as well as related statements of income, retained earnings, and cash flow for the relevant year and express our opinion of them. We will also express an opinion as to the financial statements, which are the responsibility of _____[*name of client*]'s management. If our opinion as to the financial statements will be anything other than unqualified, we will discuss the [basis *or* bases] for this conclusion in advance.

2. We will use our professional judgment when conducting the audit, in accordance with generally accepted accounting principles. Whenever we are aware that applicable tax law may be unclear, or that there are conflicting interpretations of the law by authorities (for example, tax agencies and courts), with regard to a matter subject to audit, we will explain the possible alternatives. We will adopt whatever position you request during the audit, provided that it is consistent with the Internal Revenue Codes, regulations, case law, revenue rulings, and letter ruling interpretations. We assume no liability for any assessment of additional interest or penalties.

3. You agree to furnish all of the basic information necessary for the completion of the audit. You are responsible for the accuracy and completeness of this information. You represent that the written and oral information you provide is accurate and complete to the best of your knowledge. [*Optional:* Your employees will prepare all confirmations requested, including but not limited to accounts receivable and accounts payable, and provide copies of invoices on request.]

4. We will perform the audit to be reasonably assured that the financial statements are free of material misstatement. We will (1) examine the documentary evidence supporting the amounts, transactions, and disclosures in the financial statements on a test basis; (2) examine and assess the accounting principles used in the financial statements; (3) assess the estimates made by management in the financial statements; and (4) provide an overall analysis of the financial statements. We may also evaluate inventories in person, and we may directly confirm receivables, assets, or liabilities by contacting [*specify, e.g.,* selected creditors, selected customers, financial institutions, and legal counsel].

5. An audit is based on selective testing of accounting records and supporting documentation. We will use our own

judgment about the nature and scope of the testing. We will not independently verify the stated information, although we may ask for clarification on certain items. Because do not examine all transactions, the audit is inherently subject to the risk that material misstatements and irregularities will not be discovered. We do not guarantee that our audit will discover a material misstatement in the financial statement.

6. Further, we will advise about the appropriate accounting principles used in the preparation of the financial statements. Nevertheless, as stated above, the ultimate responsibility for the accuracy of the financial statements rests with your management.

7. We anticipate beginning the audit on or about _____[*date*], and completing the audit and issuing our report no later than _____[*date*]. [*Optional:* we will observe inventory counting on _____ (*date*).]

8. Fees for conducting this audit will be billed at our regular hourly rates, which range from $_____ per hour to $_____ per hour, depending on the experience of the person(s) assigned to the audit. You will also be charged for out-of-pocket expenses, such as overnight delivery, telephone charges, photocopying charges, and postage; these expenses will be itemized and billed to you. In addition, there will be a computer fee of $_____. [*Optional:* If this audit engagement continues beyond _____ (*date*), there may be a slight increase in our hourly rates; you will receive _____ days notice of any increase in our hourly rates.]

9. We require a retainer before starting work. This retainer is applied to the final billing. Any retainer in excess of the final billing will be refunded. A retainer of $_____ will be necessary to begin work on this audit engagement. A final bill will be sent to you on completion of the audit. This retainer will not accrue interest while held by this firm.

[*Select one of the following alternatives:*]

10. Payment is due within 30 days of the completion of our audit.

[*OR*]

10. We will send statements for our services on a [*specify, e.g.*, monthly *or* bimonthly] basis. Payment is due within 30 days of the invoice date.

[*Continue with the following:*]

Bills become past due after _____. In the event that a bill becomes past due, we will [cease work on the audit until your account is made current *or* withdraw from the engagement].

11. We will retain the work papers related to this audit engagement for _____ years. Thereafter, it is your responsibility to retain these records in case of future examination by government or taxing authorities.

[*Optional:*]

12. We will seek written representations from your attorneys as part of this audit engagement. Your attorneys may bill you for the time to respond to our inquiry.

[*Continue with the following:*]

13. In the event of any dispute over fees, Client and Accountant mutually agree to make good faith efforts to resolve the dispute through mediation. If the dispute cannot be resolved through mediation, Client and Accountant mutually agree to submit the matter to arbitration pursuant to the rules of the American Arbitration Association ("AAA"). This arbitration will be binding and final.

IN AGREEING TO THIS ARBITRATION PROVISION, ACCOUNTANT AND CLIENT SPECIFICALLY UNDERSTAND AND AGREE THAT ACCOUNTANT AND CLIENT ARE FOREGOING:

- **THE RIGHT TO TRIAL IN A COURT OR BY A JURY FOR ANY DISPUTE ARISING FROM OR RELATING TO THIS AGREEMENT OR TO ANY ASPECT OF THE PROFESSIONAL RELATIONSHIP OR SERVICES RENDERED BY ACCOUNTANT TO CLIENT.**

- **ALL JUDICIAL RIGHTS, INCLUDING THE RIGHT TO APPEAL FROM THE DECISION OF THE ARBITRATOR(S).**

ACCOUNTANT _____ CLIENT _____

14. If any party to this agreement resorts to litigation or arbitration to enforce or interpret any provision of this contract, the prevailing party will be entitled to recover reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision applies to the entire agreement.

15. If any part of this agreement should be found to be invalid, the invalidity will not affect the remainder of this agreement, which will continue in effect as if this agreement had been executed without the invalid part.

16. This agreement will be governed by California law.

17. This letter agreement states our entire agreement with you with respect to the subject matter of the agreement, and supersedes any and all other agreements, whether oral or in writing, between us with respect to the subject of this agreement. No agreement, statement, or promise not contained in this letter agreement will be valid or binding between us with respect to the subject of this agreement.

We believe that this letter accurately summarizes the terms of the engagement. If you agree that this letter correctly sets forth our agreement, please sign and date, as indicated below and return this letter to us. A copy is enclosed for your files.

We appreciate the opportunity to be of service to you. If you have any questions or would like to discuss anything in this letter, please be sure to call us.

Sincerely,
_____ [*name of accountant*]
By _____ [*signature*]
[*typed name and title*]

AGREEMENT AND ACCEPTANCE

I have read the above letter agreement, and by signing below hereby approve and agree to be bound by those terms and condtions.

Date: _____

_____ [*signature of client*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral OverviewContracts LawTypes of ContractsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
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B. Accountants

28-86 California Legal Forms--Transaction Guide § 86.213

§ 86.213 Engagement Letter for Review Services

[1] Comment--Use of Form

This form is an engagement letter to be used by an accountant or accounting firm that will review the financial statements, balance sheets, and related documentation. Although a formal contract may be used [*see § 86.211[2]*], most accountants prefer the informality of a letter agreement. For additional discussion of the format of the letter agreements in this chapter, see *§ 86.210[1][a]*.

This form clarifies that a review is not an audit, which is a broader procedure designed to secure an overall opinion regarding a company's financial statements [*see* Paragraph 3 of Form; *see also § 86.212*]. This letter delineates the accountant's responsibility to conduct the review, which will consist primarily of analytical review of financial data and interviewing personnel [*see* Paragraphs 1, 2 of Form]. The client will provide the financial statements and other documentation, and management is responsible for ensuring that they have been prepared in accordance with generally acceptable accounting principles [*see* Paragraph 3 of Form].

The form sets forth the accountant's fees and provides for binding arbitration in the event of a fee dispute [*see* Paragraph 9 of Form]. For additional discussion of arbitration provisions, see *Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.250*].

For a general discussion of the practice of accountancy, see *§§ 86.16, 86.19*. For forms specifically related to audit and compilation services, see *§ 86.212, 86.214*. For an agreement for the preparation of income or estate tax returns, see *§ 86.215*.

[2] FORM

Engagement Letter for Review Services

[*Accountant's letterhead*]

_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear [*client*]:

This letter is to confirm our understanding regarding our review of the financial statements of _____[*name of client*] ("Client") for the taxable year ending [*specify*]. If the terms of the agreement as set forth in this letter are agreeable to you, please sign and date this agreement at the end in the space provided.

1. We will review the balance sheet of _____[*name of client*], as well as related statements of income, retained earnings, and cash flow for the relevant year as of _____[*date*].

2. We will use our professional judgment when conducting our review, in accordance with generally accepted accounting principles. We will apply analytical procedures to financial information and interview personnel. A review does not involve analysis of the client's internal control structure, testing accounting records, and other audit procedures. We will not perform an audit, and will not express an overall opinion regarding the financial statements.

3. You agree to furnish all of the basic information necessary for the completion of the audit. You are responsible for the accuracy and completeness of this information. You represent that the written and oral information you provide is accurate and complete to the best of your knowledge. Your employees will provide specific information and documentation on request. These responses must be given in a timely manner so that we make complete our analysis and issue our report as stated below.

4. We anticipate beginning the review on or about _____[*date*], and completing the review and issuing our report no later than _____[*date*]. We currently expect our report to read along the following lines:

"We have reviewed the attached balance sheet of _____ [*name of client*], and related statements of income, retained earnings, and the like as of _____ [*date*] in accordance with generally accepted accounting principles. Based on this review, we have found no need for any material modifications to the attached financial statements in order to conform them to generally accepted accounting principles."

5. Fees for conducting this review will be billed at our regular hourly rates, which range from $_____ per hour to $_____ per hour, depending on the experience of the person(s) assigned to the audit. You will also be charged for out-of-pocket expenses, such as overnight delivery, telephone charges, photocopying charges, and postage; these expenses will be itemized and billed to you. In addition, there will be a computer fee of $_____. [*Optional:* If this engagement continues beyond _____ (*date*), there may be a slight increase in our hourly rates; you will receive _____ days' notice of any increase in our hourly rates.]

6. We require a retainer before starting work. This retainer is applied to the final billing. Any retainer in excess of the final billing will be refunded. A retainer of $_____ will be necessary to begin work on this engagement. A final bill will be sent to you on completion of the review. This retainer will not accrue interest while held by this firm.

[*Select one of the following alternatives:*]

7. Payment is due within 30 days of the completion of our review and issuance of our report.

[*OR*]

7. We will send statements for our services on a [*specify, e.g.*, monthly *or* bimonthly] basis. Payment is due within 30 days of the invoice date.

[*Continue with the following:*]

Bills become past due after _____. In the event that a bill becomes past due, we will [cease work on the review until your account is made current *or* withdraw from the engagement].

8. We will retain the work papers related to this engagement for _____ years. Thereafter, it is your responsibility to retain these records in case of future examination by government or taxing authorities.

9. In the event of any dispute over fees, Client and Accountant mutually agree to make good faith efforts to resolve the dispute through mediation. If the dispute cannot be resolved through mediation, Client and Accountant mutually agree to submit the matter to arbitration pursuant to the rules of the American Arbitration Association ("AAA"). This arbitration will be binding and final.

IN AGREEING TO THIS ARBITRATION PROVISION, ACCOUNTANT AND CLIENT SPECIFICALLY UNDERSTAND AND AGREE THAT ACCOUNTANT AND CLIENT ARE FOREGOING:

- **THE RIGHT TO TRIAL IN A COURT OR BY A JURY FOR ANY DISPUTE ARISING FROM OR RELATING TO THIS AGREEMENT OR TO ANY ASPECT OF THE PROFESSIONAL RELATIONSHIP OR SERVICES RENDERED BY ACCOUNTANT TO CLIENT.**

- **ALL JUDICIAL RIGHTS, INCLUDING THE RIGHT TO APPEAL FROM THE DECISION OF THE ARBITRATOR(S).**

ACCOUNTANT _____ CLIENT _____

10. If any party to this agreement resorts to litigation or arbitration to enforce or interpret any provision of this contract, the prevailing party will be entitled to recover reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision applies to the entire agreement.

11. If any part of this agreement should be found to be invalid, the invalidity will not affect the remainder of this agreement, which will continue in effect as if this agreement had been executed without the invalid part.

12. This agreement will be governed by California law.

13. This letter agreement states our entire agreement with you with respect to the subject matter of the agreement, and supersedes any and all other agreements, whether oral or in writing, between us with respect to the subject of this agreement. No agreement, statement, or promise not contained in this letter agreement will be valid or binding between us with respect to the subject of this agreement.

We believe that this letter accurately summarizes the terms of the engagement. If you agree that this letter correctly sets

forth our agreement, please sign and date, as indicated below and return this letter to us. A copy is enclosed for your files.

We appreciate the opportunity to be of service to you. If you have any questions or would like to discuss anything in this letter, please be sure to call us.

Sincerely,
_____ [*name of accountant*]
By _____ [*signature*]
[*typed name and title*]

AGREEMENT AND ACCEPTANCE

I have read the above letter agreement, and by signing below hereby approve and agree to be bound by those terms and condtions.

Date: _____

_____ [*signature of client*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral OverviewContracts LawTypes of ContractsGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART IV. FORMS
B. Accountants

28-86 California Legal Forms--Transaction Guide § 86.214

§ 86.214 Agreement for Compilation of Balance Sheets and Income Statements

[1] Comment--Use of Form

This form is an engagement letter to be used by an accountant or accounting firm that will compile annual and interim balance sheets and other statements of income. Although a formal contract may be used [*see § 86.211[2]*], most accountants prefer the informality of a letter agreement. For additional discussion of the format of the letter agreements in this chapter, see *§ 86.210[1][a]*.

A compilation involves presenting management's representations in the form of financial statements. This form clarifies that a compilation engagement does not involve the audit or review of the client's financial statements [*see §§ 86.212, 86.213*]. This letter delineates the accountant's responsibility to compile annual and interim balance sheets and other statements of income [*see* Paragraph 1 of Form]. Because compilation does not involve audit or review, the accountants expressly disclaim any opinion as to the financial statements [*see* Paragraph 2 of Form]. Because no audit is involved, this type of engagement cannot be relied on to disclose errors, irregularities, or illegalities. The client will provide the information necessary to compile the financial statements. However, the client remains responsible for the content of these statements [*see* Paragraph 1 of Form].

The form sets forth the accountant's fees and provides for binding arbitration in the event of a fee dispute [*see* Paragraph 8 of Form]. For additional discussion of arbitration provisions, see *Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.250*].

For a general discussion of the practice of accountancy, see *§§ 86.16, 86.19*. For forms specifically related to audit and review services, see *§ 86.212, 86.213*. For an agreement for the preparation of income or estate tax returns, see *§ 86.215*.

[2] FORM

Agreement for Compilation of Balance Sheets and Income Statements

[*Accountant's letterhead*]

_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear [*client*]:

This letter is to confirm our understanding regarding the scope and objectives of our compilations services for _____[*name of client*] ("Client") for the taxable year ending [*specify*]. If the terms of our agreement as set forth in this letter are agreeable to you, please sign and date this agreement at the end in the space provided.

1. We will compile, from the information you provide us, annual and interim balance sheets, as well as related statements of income, retained earnings, and cash flow for the relevant year as of _____[*date*]. You agree to furnish all of the basic information necessary for the completion of our compilation services. You are responsible for the accuracy and completeness of this information. If we are unable to complete the compilation for any reason, we will not issue a report on the financial statements.

2. We will not perform an audit or review of the financial statements. We will not express an opinion regarding the financial statements as a whole and expressly disclaim any opinion as to those financial statements. Because no audit is involved, this type of engagement cannot be relied on to disclose errors, irregularities, or illegalities.

3. We anticipate beginning compilation on or about _____[*date*], and completing the process and issuing our report no later than _____[*date*]. We currently expect our report to read along the following lines:

"We have compiled the attached balance sheet of _____ [*name of client*], and related statements of income, retained earnings, and the like as of _____ [*date*] in accordance with generally accepted accounting principles. A compilation involves presenting management's representations in the form of financial statements."

4. Fees for conducting this compilation will be billed at our regular hourly rates, which range from $_____ per hour to $_____ per hour, depending on the experience of the person(s) assigned to the engagement. You will also be charged for out-of-pocket expenses, such as overnight delivery, telephone charges, photocopying charges, and postage; these expenses will be itemized and billed to you. In addition, there will be a computer fee of $_____. [*Optional:* If this engagement continues beyond _____ (*date*), there may be a slight increase in our hourly rates; you will receive _____ days' notice of any increase in our hourly rates.]

5. We require a retainer before starting work. This retainer is applied to the final billing. Any retainer in excess of the final billing will be refunded. A retainer of $_____ will be necessary to begin work on this engagement. A final bill will be sent to you on completion of the review. This retainer will not accrue interest while held by this firm.

[*Select one of the following alternatives:*]

6. Payment is due within 30 days of the completion of our review and issuance of our report.

[*OR*]

6. We will send statements for our services on a [*specify, e.g.,* monthly *or* bimonthly] basis. Payment is due within 30 days of the invoice date.

[*Continue with the following:*]

Bills become past due after _____. In the event that a bill becomes past due, we will [cease work on the review until your account is made current *or* withdraw from the engagement].

7. We will retain the work papers related to this engagement for _____ years. Thereafter, it is your responsibility to retain these records in case of future examination by government or taxing authorities.

8. In the event of any dispute over fees, Client and Accountant mutually agree to make good faith efforts to resolve the dispute through mediation. If the dispute cannot be resolved through mediation, Client and Accountant mutually agree to submit the matter to arbitration pursuant to the rules of the American Arbitration Association ("AAA"). This arbitration will be binding and final.

IN AGREEING TO THIS ARBITRATION PROVISION, ACCOUNTANT AND CLIENT SPECIFICALLY UNDERSTAND AND AGREE THAT ACCOUNTANT AND CLIENT ARE FOREGOING:

- **THE RIGHT TO TRIAL IN A COURT OR BY A JURY FOR ANY DISPUTE ARISING FROM OR RELATING TO THIS AGREEMENT OR TO ANY ASPECT OF THE PROFESSIONAL RELATIONSHIP OR SERVICES RENDERED BY ACCOUNTANT TO CLIENT.**

- **ALL JUDICIAL RIGHTS, INCLUDING THE RIGHT TO APPEAL FROM THE DECISION OF THE ARBITRATOR(S).**

ACCOUNTANT _____ CLIENT _____

9. If any party to this agreement resorts to litigation or arbitration to enforce or interpret any provision of this contract, the prevailing party will be entitled to recover reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision applies to the entire agreement.

10. If any part of this agreement should be found to be invalid, the invalidity will not affect the remainder of this agreement, which will continue in effect as if this agreement had been executed without the invalid part.

11. This agreement will be governed by California law.

12. This letter agreement states our entire agreement with you with respect to the subject matter of the agreement, and supersedes any and all other agreements, whether oral or in writing, between us with respect to the subject of this agreement. No agreement, statement, or promise not contained in this letter agreement will be valid or binding between us with respect to the subject of this agreement.

We believe that this letter accurately summarizes the terms of the engagement. If you agree that this letter correctly sets forth our agreement, please sign and date, as indicated below and return this letter to us. A copy is enclosed for your files.

We appreciate the opportunity to be of service to you. If you have any questions or would like to discuss anything in this letter, please be sure to call us.

Sincerely,
_____ [*name of accountant*]
By _____ [*signature*]
[*typed name and title*]

AGREEMENT AND ACCEPTANCE

I have read the above letter agreement, and by signing below hereby approve and agree to be bound by those terms and conditions.

Date: _____

_____ [*signature of client*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral OverviewContracts LawTypes of ContractsGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
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B. Accountants

28-86 California Legal Forms--Transaction Guide § 86.215

§ 86.215 Engagement Letter for Preparation of Income or Estate Tax Returns

[1] Comment--Use of Form

This form is an engagement letter to be used by an accountant for the preparation of income or estate tax returns. Although a formal contract may be used [*see § 86.211[2]*, most accountants prefer an informal letter agreement, particularly for the preparation of income tax returns. For the sake of completeness and illustration, this form includes a number of standard contract provisions. Some accountants use even simpler engagement letters that omit most of those provisions. For additional discussion of the format of the letter agreements in this chapter, see *§ 86.210[1][a]*].

This form sets forth the accountant's obligations and highlights the client's responsibilities to ensure the timely and accurate preparation of returns.

For a general discussion of the practice of accountancy, see *§§ 86.16, 86.19*. For forms specifically related to audit, review, and compilation services, see *§ 86.212-86.214*.

[2] FORM

Engagement Letter for Preparation of Income or Estate Tax Returns

[*Accountant's letterhead*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear [*client*]:

This letter is to confirm our understanding regarding our preparation of _____[your federal and state

income tax returns *or* the estate tax return for the estate of _____ (*name)*]. If the terms of the agreement as set forth in this letter are agreeable to you, please sign and date this agreement at the end in the space provided.

[*For preparation of income tax returns, use:*]

1. We will prepare your [*year*] federal [individual *and/or* partnership *and/or* corporate] income tax return[s] and [individual *and/or* partnership *and/or* corporate] state income tax return[s] for the state[s] of [*specify state or states, e.g.*, California *or* California and Delaware].

[*Or, for preparation of estate tax returns, use:*]

1. We will prepare the federal estate tax return, the decedent's final income tax return, and the fiduciary income tax returns and compiled summary of accounts and recapitulation of cash with supporting exhibits of cash receipts, cash disbursements, distributions, gain or loss on sales, and property on hand, for submission to the probated court. In preparing the estate tax returns, we will not independently determine values, except when values can be determined by reference to market quotations contained in the Wall Street Journal or similar source [*optional:* or by reference to the Kelly Blue Book]. All other valuations will be performed by outside parties.

[*Continue with the following:*]

2. You agree to furnish all of the information that is necessary for the preparation of these returns, and you represent that the written and oral information you supply me is accurate and complete to the best of your knowledge. By your signature below you agree that you have the necessary records, receipts, or other evidence to substantiate the items of income and deductions shown on your returns. We will not independently verify your information, although we may ask for clarification on certain items.

3. Tax returns are subject to audits and to adjustments by the taxing authorities, which may result in additional assessments of tax, interest, and penalties. You should retain the tax records related to your tax returns for at least three years after the date you file, since additional assessments will generally be made during that period. Generally, an assessment by the taxing authorities is presumed correct and must be rebutted by the taxpayer. You understand that we do not assume responsibility for such assessments and, if you would like us to assist you in connection with the audit of your return, there will be an additional fee for our services.

4. We will use our professional judgment in preparing your returns. Whenever we are aware that applicable tax law may be unclear or that there are conflicting interpretations of the law by authorities (for example, tax agencies and courts) we will explain the possible positions that may be taken on your return. We will adopt whatever position you request on your return so long as it is consistent with the Internal Revenue Codes, regulations, case law, revenue rulings, and letter ruling interpretations. If the Internal Revenue Service contests this position, it may assess additional tax, plus interest and penalties. We assume no liability for any such additional penalties or assessments.

5. You may choose to have us file your tax return electronically with the Internal Revenue Service. According to the Internal Revenue Service, taxpayers receive their refunds three to four weeks before those who file paper returns. You must review and sign the Internal Revenue Form before the electronic return can be submitted. Our fee for filing your return electronically is $_____. This fee is in addition our other fees, costs, and expenses.

6. Fees for the preparation of your tax returns will be $_____ per hour. In addition, there will be a

computer fee of $_____. [*If accountant will use an outside computer service, add*: We will use a computer processing service located outside our office.] Payment is due on the completion of your returns. Fees may also include out-of-pocket expenses, such as overnight delivery. These fees will be itemized and billed to you.

7. We require a retainer before starting work. This retainer is applied to the final billing. Any retainer in excess of the final billing will be refunded. A retainer of $_____ will be necessary to begin work on this engagement. A final bill will be sent to you on completion of your tax returns.

8. We must receive your information by _____[*date*] in order to have your returns completed by _____[*due date of tax returns*]. If your information is not complete at that time, we may not be able to complete your returns before the filing date. Ultimately, you may be subject to filing penalties because of this delay.

9. If any party to this agreement resorts to litigation or arbitration to enforce or interpret any provision of this contract, the prevailing party will be entitled to recover reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision applies to the entire agreement.

10. In the event of any dispute over fees, Client and Accountant mutually agree to make good faith efforts to resolve the dispute through mediation. If the dispute cannot be resolved through mediation, Client and Accountant mutually agree to submit the matter to arbitration pursuant to the rules of the American Arbitration Association ("AAA"). This arbitration will be binding and final.

IN AGREEING TO THIS ARBITRATION PROVISION, ACCOUNTANT AND CLIENT SPECIFICALLY UNDERSTAND AND AGREE THAT ACCOUNTANT AND CLIENT ARE FOREGOING:

- **THE RIGHT TO TRIAL IN A COURT OR BY A JURY FOR ANY DISPUTE ARISING FROM OR RELATING TO THIS AGREEMENT OR TO ANY ASPECT OF THE PROFESSIONAL RELATIONSHIP OR SERVICES RENDERED BY ACCOUNTANT TO CLIENT.**

- **ALL JUDICIAL RIGHTS, INCLUDING THE RIGHT TO APPEAL FROM THE DECISION OF THE ARBITRATOR(S).**

ACCOUNTANT _____ CLIENT _____

11. If any part of this agreement should be found to be invalid, the invalidity will not affect the remainder of this agreement, which will continue in effect as if this agreement had been executed without the invalid part.

12. This agreement will be governed by California law.

13. This letter agreement states our entire agreement with you with respect to the subject matter of the agreement, and supersedes any and all other agreements, whether oral or in writing, between us with respect to the subject of this agreement. No agreement, statement, or promise not contained in this letter agreement will be valid or binding between us with respect to the subject of this agreement.

We believe that this letter accurately summarizes the terms of the engagement. If you agree that this letter correctly sets forth our agreement, please sign and date, as indicated below and return this letter to us. A copy is enclosed for your files.

We appreciate the opportunity to be of service to you. If you have any questions or would like to discuss anything in

this letter, please be sure to call us.

Sincerely,
_____ [*name of accountant*]
By _____ [*signature*]
[*typed name and title*]

AGREEMENT AND ACCEPTANCE

I have read the above letter agreement, and by signing below hereby approve and agree to be bound by those terms and conditions.

Date: _____

_____ [*signature of client*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewTax LawFederal Estate & Gift TaxesGeneral Overview

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28-86 California Legal Forms--Transaction Guide §§ 86.216-86.219

[Reserved]

§§ 86.216[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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PART IV. FORMS
C. Financial Consultants

28-86 California Legal Forms--Transaction Guide § 86.220

§ 86.220 Financial Consultant Agreement

[1] Comment

[a] Use of Form

This form is an agreement between a financial consultant ("prorater") and a client under which the prorater agrees to act as an intermediary between the client and the client's creditors in arranging a plan for the orderly payment of the client's debts. A "prorater" is one who is in the business of receiving cash from a debtor-client for the purpose of distributing it among the client's creditors in payment of the client's obligations [*Fin. Code § 12002.1*; *see Nationwide Asset Servs., Inc. v. DuFauchard (2008) 164 Cal. App. 4th 1121, 1125-1126, 79 Cal. Rptr. 3d 844* (constructive receipt of debtor's funds is sufficient to bring person within statutory definition)]. Proraters must be licensed by the Commissioner of Corporations [*see Fin. Code § 12200 et seq.*] and are subject to regulation by the Commissioner [*see Fin. Code § 12300 et seq.*]. For further discussion, see *§ 86.14*.

Typically, this type of agreement provides that the client will deliver a specified amount of money (usually the client's paycheck) to the prorater. The prorater will then devise a financial plan designed to help the client out of debt and a budget designed to help the client live on the net income after distributions to the creditors and payment of the prorater's fee.

A prorater may also provide money management advice to the client on a continuing basis. This form does not provide for this type of advice, but may be adapted accordingly.

The agreement must be executed by the prorater and the debtor, and an executed copy must be given immediately to the debtor. The agreement does not become effective until the debtor-client makes a payment to the prorater for distribution to the client's creditors [*Fin. Code § 12320*].

[b] Statutory Requirements for Agreement

A contract between a prorater and a debtor must contain the following information [*Fin. Code § 12319*]:

- A list of every debt to be prorated with the creditor's name and the total of all debts [*see also Fin. Code § 12315.1*].

- A provision for specific payments reasonably within the ability of the debtor to pay.

- The rate and amount of the prorater's charge in precise terms.

- The approximate number and amount of installments required to pay the debts in full.

- The name and address of both parties.

- Any other provisions or disclosures required by the Commissioner of Corporations for the protection of the debtor and the proper conduct of business by the prorater. The Commissioner requires that all contracts between a prorater and a debtor customer contain a notice referring the debtor to the Department of Corporations for further information [*see 10 Cal. Code Reg. § 1799*]. This notice apparently is intended as a form of consumer protection.

[c] Disbursements

At least once each month, a prorater must make disbursements to the client's creditors. These disbursements may not aggregate less than 70 percent of all funds received from the client [*Fin. Code § 12314*].

[d] Maximum Disbursement Charges

The total charges that a prorater can receive for its services may not exceed the following percentages except for payments made on recurring obligations [*Fin. Code § 12314*]:

- 12 percent of the first $3,000 disbursed.

- 11 percent of the next $2,000.

- 10 percent of the remaining disbursements, except for payments made on recurring obligations.

"Recurring obligations" are rent, utility, telephone, spousal support, monthly insurance premium, and obligations secured by a first mortgage or first deed of trust on real property [*Fin. Code § 12314*].

The maximum fee applicable to disbursements consisting of rent or mortgage payments is $4 per disbursement [*Fin. Code § 12314(b)*]. A maximum of $1 may be charged on any other recurring disbursement [*Fin. Code § 12314(c)*].

[e] Origination Fee

An origination fee of not more than $50 may be charged if the prorater has given proper notice to the creditors [*see Fin. Code § 12315.1*; *see also* [f], *below*] and if the prorater has delivered an executed copy of this agreement to the debtor [*see Fin. Code § 12320*; *see also* [a], *above*], even if the prorater has not obtained the consent of the creditors [*see Fin. Code § 12314(a)*; *see also Fin. Code § 12315*]. However, if the debtor does not cancel or default on the performance of his or her agreement with the prorater within 12 months after execution of the agreement, the origination fee must be refunded [*Fin. Code § 12314*].

[f] Notice to and Consent of Creditors

A prorater must give all creditors written notice of the client's desire to engage its service. This notice must be given within five days of the date on which the agreement becomes effective and must include notice of the proposed monthly disbursement [*Fin. Code § 12315.1*]. A sample notice is *set forth in § 86.221[2]*.

A prorater may not accept a fee (other than an origination fee [*see Fin. Code § 12314(a)*]) unless the prorater has obtained the consent of at least 51 percent of the number of creditors listed in the agreement and of creditors representing at least 51 percent of the total amount of debt or unless that number of creditors have accepted a distribution of payment [*Fin. Code § 12315*].

[g] Prohibited Transactions

A prorater may not purchase any of its client's obligations from the client's creditors [*Fin. Code § 12317*]. Proraters may not accept blank instruments executed by their clients, negotiable instruments in payment for their charges, any note, wage assignment, or other security for their charges, any confession of judgment or power of attorney to confess judgment against their clients, or any power of attorney to appear for their clients in judicial proceedings [*Fin. Code § 12318(a)-(d)*]. Proraters are also prohibited from obtaining a release of any obligation to be performed by them [*Fin. Code § 12318(e)*].

If a prorater charges or receives fees in excess of the amounts permitted by law, except as a result of an accidental and good faith error, the agreement will be void and the prorater will be required to return to the client all amounts received [*Fin. Code § 12316*]. No cancellation fee or termination penalty may be charged by a prorater [*Fin. Code § 12314.1*].

[2] FORM

Financial Consultant Agreement

FINANCIAL CONSULTANT AGREEMENT

Consultant's Services

1. _____[*Name of client*], _____[*address*] ("Client"), hereby engages the services of _____[*name of financial consultant*], _____[*address*] ("Counselors"), to attempt to arrange a plan of payment of all obligations submitted and to act as Trustee with respect to the payment of those obligations. Client has prepared a complete list of those obligations, attached as Exhibit A, which is incorporated by reference in this Agreement.

Agreement to Limit Further Indebtedness

2. Client agrees not to incur any further indebtedness without the written consent of Counselors while this plan is in effect, except for necessaries of life in the event of an emergency. Client authorizes Counselors to notify any and all credit reporting or credit extending agencies of this Agreement.

Payment Schedule

3. Client agrees to make approximately _____ payments of $_____ per month, on or before [*specify, e.g.,* the fifth of every month]. These payments begin on _____[*date*]. These payments will be applied to the obligations listed in Exhibit A and will continue until all accounts listed in Exhibit A are paid in full.

Limited Power of Attorney

4. Client grants to Counselors a power of attorney with full authority to endorse and cash any and all checks made payable to Client and to be credited to Client's account. Client may revoke this power of attorney only on 30 days written notice to Counselors.

Basis for Payment Plan

5. Counselors agree to attempt to arrange a plan of payment of the obligations listed based on a reasonable and agreeable amount of money available from Client after analyzing Client's net income and living expenses as of the date of this agreement.

Distribution Agreement

6. Counselors agree to distribute the money that Client pays into their office to the creditors listed in Exhibit A, or creditors who may subsequently added, in the proportions that the Counselors deem proper, subject to Counselors' fees.

Fees and Charges

7. In consideration for the services to be provided by Counselors, Client agrees to pay Counselors a fee of [*e.g.*, 12 percent of the first $3,000, 11 percent of the next $2,000, and 10 percent in excess of $5,000] of any moneys paid on the submitted obligations. Client further agrees to pay a fee of $_____ per disbursement of [current rent *or* first mortgage *or* first trust deed] payments and a fee of $_____ per disbursement to pay [other recurring obligations *or specify*, *e.g.*, current utility bills, current telephone bills, current spousal support payments, and current monthly insurance payments)].

Expenses Incurred

8. Client agrees to repay any expense incurred by Counselors at Client's request that does not arise out of the ordinary negotiations with creditors in originally arranging this payment plan.

Accounting

9. Counselors agree to render to Client, at least once every six months, an accounting itemizing the total amount received, the total amount paid to each creditor, the total amount that any creditor has agreed to accept as payment in full on any debt owed, the amount of charges deducted, and any amount held in reserve. Counselors further agree to render that accounting within seven days after written demand.

Liability and Enforcement

10. Client agrees that Counselors will not be responsible or liable for any action on the part of Client's creditors. If Client breaches this agreement for any reason, Counselors may at their option be free to notify all creditors of

Counselors' nonliability and will be relieved of any further obligation.

Attorneys' Fees

11. If any [legal action *or specify more limited provision, e.g.,* legal action based in contract law] is necessary to enforce or interpret the terms of this agreement, the prevailing party will be entitled to reasonable attorneys' fees, costs, and necessary disbursements in addition to any other relief to which that party may be entitled.

FOR INFORMATION CONTACT
THE DEPARTMENT OF CORPORATIONS,
STATE OF CALIFORNIA

Executed on _____[*date*] at _____[*city*], California.

_____ [*signature of client*]
[*typed name*]
APPROVED BY:
_____ [*signature of client's spouse*]
[*typed name*]
ACCEPTED BY:
[name of financial consultant]
_____ [*signature of financial consultant's representative*]
[*typed name and title*]

EXHIBIT A

LIST OF OBLIGATIONS TO BE PRORATED BY COUNSELORS

The following is a complete listing of the current obligations of _____[*name of client*] on [*date of agreement*]:

Nonrecurring Obligations

	Creditor's Name	Creditor's Address
Total Due		
_____	_____	$_____
_____	_____	$_____
_____	_____	$_____

Recurring Obligations

	Creditor's Name	Creditor's Address
Total Due		
_____	_____	$_____
_____	_____	$_____

_____ _____ $_____

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawGeneral OverviewContracts LawTypes of ContractsGeneral Overview

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C. Financial Consultants

28-86 California Legal Forms--Transaction Guide § 86.221

§ 86.221 Prorater's Notice to Creditors

[1] Comment--Use of Form

This form is a notice that a prorater must give to creditors of the prorater's client. A prorater must give all creditors written notice of the client's desire to engage its service within five days of the date on which the agreement becomes effective, and must include notice of the proposed monthly disbursement to the creditor [*Fin. Code § 12315.1*]. Furthermore, before accepting any fee other than an origination fee [*see Fin. Code § 12314(a)*] from the debtor, the prorater must obtain the consent of at least 51 percent of the number of creditors listed in the agreement and of creditors representing at least 51 percent of the total amount of debt [*Fin. Code § 12315*].

[2] FORM

Prorater's Notice to Creditors

[*Prorater's letterhead*]

NOTICE TO CREDITORS

To: _____[*Name of creditor*]

You are hereby notified that on _____[*date within five days of notice*], _____[*name of prorater*] ("Prorater"), whose principal place of business is located at _____[*address*], and _____[*name of debtor*] ("Debtor"), who resides at_____[*address*], signed an agreement under which Debtor engaged the services of Prorater to receive money (or evidence of money) for the purpose of distribution among Debtor's creditors in [payment *or* partial payment] of Debtor's past due obligations. The proposed [monthly *or* bi-monthly] payment to be made to _____[*name of creditor*] is $_____.

Date _____

Sincerely,
_____ [*name of prorater*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor Relations

California Legal Forms--Transaction Guide

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28-86 California Legal Forms--Transaction Guide §§ 86.222-86.229

[Reserved]

§§ 86.222[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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PART IV. FORMS
D. Insurance Analysts

28-86 California Legal Forms--Transaction Guide § 86.230

§ 86.230 Life and Disability Insurance Analysis Agreement

[1] Comment

[a] Use of Form

This form is an agreement between a life and disability insurance analyst [*see § 86.15*] and a client providing that the insurance analyst will review the client's insurance needs and make recommendations as to the insurance policies and insurers most suitable to the client's situation, and as to any possible reductions in insurance premiums that might be available. A "life and disability insurance analyst" is a person who advises any insured under life and disability insurance policy, or anyone having any interest in such a policy, for compensation that is paid by or derived from any person or source other than an insurer [*Ins. Code § 32.5*]. Life and disability insurance analysts are required to be licensed by the Department of Insurance, and unauthorized persons who act as life and disability insurance analysts are guilty of a misdemeanor [*Ins. Code § 1844*; *see Ins Code §§ 1831-1849* (licensing statutes); *but see Ins. Code § 1831* (attorneys, licensed actuaries, bank and trust company employees, and employees procuring insurance on behalf of their employers are not required to be licensed)].

This agreement provides that the analyst will be compensated on a per diem basis [*see* Paragraph 2 of form]. The rate of compensation depends on the knowledge and experience of the person making the analysis. To protect the client, and to ensure the analyst that the insurance matters involved are of a substantial nature, the form establishes a minimum and maximum fee.

For an informal letter agreement for continuous insurance analysis services for other types of insurance, see *§ 86.231*.

[b] Required Contents

A fee agreement with a life and disability insurance analyst must include the following information [*Ins. Code § 1848*]:

- A statement that information and services concerning insurance policies may be obtained directly from the insurer without cost.

- A statement outlining the services to be performed for which a fee is to be charged.
- The fee to be charged.

If the analyst is also licensed as an insurance agent under *Ins. Code § 1621 et seq.*, the agreement must include a statement indicating that the analyst is so licensed and, as such, receives commissions for the sale of products [*Ins. Code § 1848*; *see Ins. Code § 1621* ("insurance agent" is a person who transacts insurance, including 24-hour care coverage (see *Ins. Code § 1749.02*), other than life, disability, or health insurance, on behalf of an admitted insurance company)]. Life and disability insurance analysts are not required to be licensed as insurance agents unless they act in that capacity [*see Ins. Code § 1634(d)*].

[c] Recordkeeping

The analyst must retain a copy of the agreement for a minimum of three years after the services have been fully performed [*Ins. Code § 1848*].

[2] FORM

Life and Disability Insurance Analysis Agreement

LIFE AND DISABILITY INSURANCE ANALYSIS AGREEMENT

This AGREEMENT is between _____[*name of client*], _____[*address*] ("Client"), and _____[*name of insurance analysts*], _____[*address*] ("Analysts").

1. Analysts agree to perform a thorough fact-finding analysis of Client's entire insurance situation with regard to Client's life and disability insurance requirements. Analysts will audit all insurance policies covering Client's direct interest. Analysts will furnish information and make recommendations, with particular attention to the terms and conditions of insurance contracts and the reduction of insurance premiums to a minimum consistent with Client's best interests. Analysts will serve as insurance analysts and advisers to Client for a period of [*estimated number of months required to complete analysis*] months from the inception date of this Agreement.

2. Client agrees to pay Analysts the following compensation for rendering services rendered under this Agreement:

(a) $_____ per diem for the services of a Senior Analyst, subject to a minimum fee of $_____ and a maximum fee of $_____.

(b) $_____ per diem for the services of a Junior Analyst, subject to a minimum fee of $_____ and a maximum fee of $_____.

(c) Total fees under this Agreement, exclusive of reimbursements for out-of-pocket expenses, will not exceed $_____.

3. In addition to the fees specified in Paragraph 2, above, Client agrees to reimburse Analysts for Analysts' costs and expenses in connection with Analysts' performance of the analysis specified in Paragraph 1, above. These costs and expenses may include, but are not limited to, such things as [secretarial and similar charges,] telephone calls, reasonable and necessary travel expenses, photocopying and related expenses, shipping and mailing charges, document filing fees, notary fees, and similar expenses.

4. The inception date of this agreement is _____[*date*].

[*Either:*]

5. Analysts warrant that they do not sell insurance or accept commissions on insurance from any source whatsoever.

[*Or, if analyst is also licensed as an insurance agent:*]

5. Analysts are also licensed as insurance agents. As such, they receive commissions for the sale of insurance products.

[*Continue with the following:*]

6. Client acknowledges that Client is aware that information and services concerning insurance policies that Analyst will provide may be obtained directly from the insurer without cost.

Executed on _____[*date*] at _____[*city*], California.

ANALYST
_____ [*name of analyst*]
By _____ [*signature*]
[*typed name and title*]
CLIENT
_____ [*signature of client*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewInsurance LawClaims & ContractsGeneral OverviewInsurance LawDisability InsuranceGeneral OverviewInsurance LawLife InsuranceGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
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D. Insurance Analysts

28-86 California Legal Forms--Transaction Guide § 86.231

§ 86.231 Letter Agreement for Continuous Insurance Analysis Service

[1] Comment--Use of Form

This form is a letter agreement in which an insurance analyst confirms an oral agreement to provide continuous insurance analysis service. This type of arrangement is usually used by businesses to assure that their varying insurance needs are met on an ongoing basis. The letter agreement is informal, because the services to be provided have been determined in previous discussions. The form serves as a confirmation of the fee to be charged and the period of time that the agreement will remain in force. The client signifies acceptance of the agreement by signing a copy of the letter and returning it to the analyst.

This type of agreement is often used when the scope of the client's insurance needs require continuous review and consultation with an independent analyst. This form provides for a fixed fee per month on a retainer basis. The services provided under the agreement specifically excludes analysis of life and disability insurance.

For further discussion, see *§§ 86.15, 86.230[1]*.

[2] FORM

Letter Agreement for Continuous Insurance Analysis Service

[*Analyst's letterhead*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

This letter confirms our conversation _____[yesterday *or* of _____ (*date*)] with respect to our continuous insurance analysis service.

The fee for this service will be $_____ per month, payable [*specify, e.g.,* on or before the fifth of each month]. We will provide consultation on all insurance matters [except life and disability insurance]. This service will include all of the following:

- Review of all new policies, endorsements, and changes.
- Verification of premiums and audit statements.
- Advice on changes in the insurance coverages and markets.

This arrangement will begin _____[immediately *or* on _____ (*date*)] and will remain in effect until _____[*date or* one of us gives the other written notice of termination].

If this arrangement is agreeable, please signify your acceptance on the space provided below.

Sincerely,
_____ [*typed name of insurance analyst*]
By _____ [*signature*]

ACCEPTED AND APPROVED on _____ [*date*].

_____ [*name of client*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewInsurance LawClaims & ContractsGeneral OverviewInsurance LawLife InsuranceGeneral Overview

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D. Insurance Analysts

28-86 California Legal Forms--Transaction Guide §§ 86.232-86.239

[Reserved]

§§ 86.232[Reserved]

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E. Appraisal and Auction Services

28-86 California Legal Forms--Transaction Guide § 86.240

§ 86.240 Letter Agreement for Appraisal Services--Personal Property

[1] Comment

[a] Use of Form

This form is an agreement between an appraiser and a client for appraisal of the client's personal property. By the use of a letter proposal, the appraiser can communicate to the prospective client the nature of the services that will be rendered and the anticipated cost of those services. The letter format of this agreement has the advantage of informality and brevity and can be readily adapted to fit the needs of a particular client.

Appraisals of personal property typically are required in connection with matters such as insurance claims, decedents' estates, sales of businesses, private sales of personal property, litigation involving personal property, and tax-related matters in which the value of property is important.

For a letter agreement for an appraisal of real property, see *§ 86.241*.

[b] Qualifications of Appraiser

Because an appraisal is essentially nothing more than an expression of the appraiser's professional opinion of the value of the appraised property, it is important to select an appraiser with the necessary qualifications to determine the value of the type of property at issue. This is especially important if it is anticipated that the appraiser's opinion will have to "stand up" in court. The appraiser's expertise in valuing the specific type of property being appraised may be critical in this situation, and a recitation of the appraiser's professional qualifications and experience is likely to be essential, especially if the opposing party has engaged another appraiser to present an opposing point of view. In addition to the appraiser's qualifications as an expert, an evaluation of the appraiser's ability to testify as an expert witness may be crucial in such a situation. Similarly, insurance companies may be reluctant to accept an appraisal for insurance purposes if the appraiser's qualifications and experience cannot be firmly established.

Appraisers for most types of property other than real estate [*see § 86.241*] are not subject to any governmental licensing

requirements. For appraisers of property other than real estate, professional societies exist that can supply information on the qualifications of individual members.

After a prospective client has made an initial contact with an appraiser or appraisal firm, it is ordinarily necessary for an appraiser to inspect the property or business that will be the subject of the appraisal to determine the complexity of the problem involved.

[c] Appraisal Report

An appraiser ordinarily presents his or her conclusions in an appraisal report. The length of the report and its complexity vary with the nature of the property being appraised. If it is necessary that the report include any specific matter, that requirement should be stated in the appraisal agreement.

The appraisal report should contain the facts relied on by the appraiser in reaching his or her conclusions, as well as any relevant supporting documents, photographs, maps, charts, or other data.

[2] FORM

Letter Agreement for Appraisal Services--Personal Property

[*Appraiser's letterhead*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

As you requested, we are submitting our proposal for an appraisal of [*specify, e.g,* your antique silver service], currently located at _____.

We understand the purpose of this appraisal to be _____[*e.g.,* to determine the _____ (fair market value *or* replacement value)], and we understand that you intend to use our appraisal in connection with _____[*specify, e.g,* insuring the property *or* your estate planning objectives]. In the preparation of this appraisal we will base our estimate of value on _____[*specify, e.g,* our expertise in this area and recent sales *and* auctions of comparable property].

Our fee for our appraisal services will be [*specify; e.g., for a flat rate fee* $_____ *or, for an hourly rate fee,* charged at our standard hourly rate of $_____ per hour *or, for fee based on value of item appraised,* _____ (*e.g.,* 1) percent of the first $_____ (*e.g.,* $10,000) of appraised value and _____ (*e.g.,* 1/2) percent of any appraised value in excess of the first $_____ (*e.g.,* $10,000)]. [*Optional:* A retainer fee of $_____ is due and payable on receipt of your authorization to proceed with the appraisal, and the balance of the fee will be due on delivery of the completed appraisal report to you].

Our fee includes preparation of a written appraisal report that we will submit to you. The fee specified above does not include a charge for court appearances to give testimony, if such testimony should be required. The fee for such testimony will be $_____ per day or $_____ per half day, plus travel and incidental expenses. For the purpose of computing the fee for court appearances, time amounting to one-half day or less will be treated as one-half day, and time in excess of one-half day will be treated as a full day. We require at least [*specify, e.g,* three days advance] notice of the cancellation of a scheduled court appearance. In lieu of this notice, we

will charge an appearance fee of one-half day.

We may incur incidental costs and expenses in connection with the appraisal, including, but not limited to, such things as [secretarial and similar charges,] telephone calls, [reasonable and necessary travel expenses,] photocopying and related expenses, shipping and mailing charges, charges for obtaining documentation relevant to the appraisal, notary fees, and similar expenses. These costs will be billed to you in addition to our regular appraisal fee specified above.

We will keep this proposal open for a period of [*specify, e.g,* 30 days] for your acceptance. We anticipate that the preparation of the appraisal report will take approximately [*e.g.*, 5 days] after the receipt of your authorization. Due to the need to schedule appraisal assignments in advance, this estimate is subject to revision on changes in our work load. By replying promptly, you will be assured that your project will receive our earliest attention.

[*Optional:* We will pick up the property for appraisal on _____ (*date) or* Please mail the property to us at the address below, carefully packed and fully insured for your protection.] Once the property is in our possession, it is insured under our policy for replacement value against theft, loss, or damage.

We thank you for your interest in our services and for giving us this opportunity to be of service to you. If this proposal meets with your approval, please so indicate by signing in the space provided below and return a signed copy of this letter to us [*optional:* with the required retainer fee].

Sincerely,
_____ [*name of appraisal firm*]
By _____ [*authorized signature*]
[*typed name and title*]

AGREEMENT AND ACCEPTANCE

I have read the above letter agreement, and by signing below hereby approve and agree to be bound by those terms and conditions.

Date: _____

_____ [*signature of client*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview

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28-86 California Legal Forms--Transaction Guide § 86.241

§ 86.241 Letter Agreement for Appraisal Services--Real Property

[1] Comment

[a] Use of Form

This form is an agreement between an appraiser and a client for appraisal of the client's real property. Real property appraisals typically are required in connection with the proposed purchase, sale, or refinancing of real property, or in matters involving a decedent's estate.

For discussion of matters pertaining to appraisers in general, see *§ 86.240*.

[b] Licensing of Real Estate Appraisers

Unlike most other types of appraisers, real estate appraisers are required to be licensed by the State of California before performing real estate appraisals [*Bus & Prof. Code §§ 11320* (federally regulated real estate appraisal activity), 11321 (California activity)]. Real estate appraisers are licensed and regulated under the Real Estate Appraisers Licensing and Certification Law [*Bus & Prof. Code § 11300 et seq.*] by the California Office of Real Estate Appraisers (OREA) [Bus & Prof. Code § 1130]. An appraiser must be licensed under that law in order to use that title or sign a real estate appraisal [*Bus & Prof. Code § 11321(a), (b)*].

Licensed real estate appraisers are prohibited from engaging in any appraisal activity in connection with the purchase, sale, transfer, financing, or development of real property if the appraiser's compensation is dependent on or affected by the value conclusion he or she generated [*Bus & Prof. Code § 11323*].

[2] FORM

Letter Agreement for Appraisal Services--Real Property

[*Appraiser's letterhead*]

_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

As you requested, we are submitting our proposal for an appraisal of your real property located at _____.

We understand the purpose of this appraisal to be [*e.g.*, to determine the fair market value of the land and improvements], and we understand that you intend to use our appraisal in connection with [*specify, e.g,* obtaining a second mortgage on the property]. In the preparation of this appraisal we will base our estimate of value on [*specify, e.g,* recent sales of comparable properties in the immediate vicinity]. In addition, we will take into account [*e.g.*, the capitalized value of the property, based on the past and prospective net income computed as an appropriate return on investment, and also the current depreciated reproduction cost of the improvements of the real property added to the market value of the land alone].

Our fee for our appraisal services will be _____[*specify, e.g., for a flat rate fee* $_____ *or, for an hourly rate fee,* charged at our standard hourly rate $_____ per hour]. [*Optional:* A retainer fee of $_____ is due and payable on receipt of your authorization to proceed with the appraisal, and the balance of the fee will be due on delivery of the completed appraisal report to you].

Our fee includes preparation of a written appraisal report that we will submit to you. The fee specified above does not include a charge for court appearances to give testimony, if such testimony should be required. The fee for such testimony will be $_____ per day or $_____ per half day. For the purpose of computing the fee for court appearances, time amounting to one-half day or less will be treated as one-half day, and time in excess of one-half day will be treated as a full day. We require at least [*specify, e.g,* three days advance] notice of the cancellation of a scheduled court appearance. In lieu of this notice, we will charge an appearance fee of one-half day.

We may incur incidental costs and expenses in connection with the appraisal, including, but not limited to, such things as [secretarial and similar charges,] telephone calls, [reasonable and necessary travel expenses,] photocopying and related expenses, shipping and mailing charges, charges for obtaining documentation relevant to the appraisal, notary fees, and similar expenses. These costs will be billed to you in addition to our regular appraisal fee specified above.

We will keep this proposal open for a period of [*specify, e.g,* 30 days] for your acceptance. We anticipate that the preparation of the appraisal report will take approximately [*e.g.*, 5 days] after the receipt of your authorization. Due to the need to schedule appraisal assignments in advance, this estimate is subject to revision on changes in our work load. By replying promptly, you will be assured that your project will receive our earliest attention.

We thank you for your interest in our services and for giving us this opportunity to be of service to you. If this proposal meets with your approval, please so indicate by signing in the space provided below and return a signed copy of this letter to us [*optional:* with the required retainer fee].

Sincerely,
_____ [*name of appraisal firm*]
By _____ [*authorized signature*]
[*typed name and title*]

AGREEMENT AND ACCEPTANCE

I have read the above letter agreement, and by signing below hereby approve and agree to be bound by those terms and conditions.

Date: _____

_____ [*signature of client*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewReal Property LawProperty Valuation

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28-86 California Legal Forms--Transaction Guide § 86.242

§ 86.242 Letter Agreement for Appraisal Services--Prepared by Attorney of Appraisal Client

[1] Comment--Use of Form

This form is a letter agreement prepared by an attorney engaging an appraiser to appraise property owned by a client. The attorney assumes the tasks of selecting the appraiser and establishing the duties to be performed and the compensation to be paid. This situation may arise when the appraisal is needed in the context of legal matters being handled by the attorney, such as estate or tax planning or the sale or acquisition of a business.

For a general discussion of appraisal services, see *§ 86.240[1]*.

[2] FORM

Letter Agreement for Appraisal Services-Prepared by Attorney of Appraisal Client

[*Attorney's letterhead*]
_____[*date*]
_____[*name of appraiser*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of appraiser*] :

As you know, I have been retained by _____[*name of client*] to represent [him *or* her *or* it] in connection with _____[*specify, e.g.,* the liquidation of _____ (his *or* her *or* its) business located at _____] and have been authorized to engage the services of an appraiser on behalf of my client to prepare an appraisal in connection with that [*e.g.,* liquidation]. This letter will confirm our agreement concerning the preparation of an appraisal of _____[*e.g.,* the liquidation value of the tangible assets owned by _____ and located at _____], consisting of [*e.g.,* office equipment, tools,

furniture, inventory, and supplies].

You are to prepare an appraisal report that contains a summary of your conclusions, supported by any charts, diagrams, maps, photographs, documents, and data used in arriving at your result. In addition to an overall value figure, your report is to contain a separate listing and valuation for the following items: [*e.g.*, machinery and equipment, inventory, and office equipment and supplies].

You will receive a fee for your services, calculated at your regular rate for appraisal services, subject to a maximum of $_____, plus any out-of-pocket expenses incurred in regard to this appraisal. This fee is to be billed directly to _____[*name of client*] and is to be paid by [him *or* her *or* it]. You will receive a retainer fee of $_____ on the commencement of the appraisal and the balance on delivery of a final appraisal report to me that meets with my approval.

Should we need you to appear and testify in court as an expert witness, you will receive $_____ per day for these services.

It is expressly understood that _____[*name of client*] is to be solely responsible for the payment of your fee and that you are to collect directly from [him *or* her *or* it]. You further understand that your compensation under this agreement is in no way contingent on the amount at which you value the assets appraised under this agreement and that asset value is not a consideration in setting your fee.

You agree that neither you nor any of your employees will divulge the contents of the appraisal report to any person or firm without first obtaining my written consent. Further, neither you nor any of your employees will divulge any confidential information obtained about the business of _____[*name of client*], or about any of the assets owned by [him *or* her *or* it], to anyone without the prior written consent of _____[*name of client*].

If these terms are acceptable to you, please indicate your acceptance by signing the copy enclosed, and return it to me no later than _____[*date*].

Sincerely,
_____ [*signature of attorney*]
[*typed name*]

AGREEMENT AND ACCEPTANCE

I have read the above letter agreement, and by signing below hereby approve and agree to be bound by those terms and conditions.

Date: _____

_____ [*name of appraisal firm*]
By _____ [*authorized signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewReal Property LawProperty Valuation

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DIVISION VI: PERFORMANCE OF SERVICES
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E. Appraisal and Auction Services

28-86 California Legal Forms--Transaction Guide § 86.243

§ 86.243 Agreement for Auctioneer Services--Contract Form

[1] Comment

[a] Use of Form

This form is a contract between a professional auctioneer and a property owner for the sale of personal property at auction. This is a relatively simple contract that contains the basic terms and conditions of the auctioneer's engagement and meets the minimum statutory requirements [*see* [b], *below*].

Major auction houses usually have their own standardized agreements for use when property is consigned for auction. In general, the terms of these standardized agreements, while similar in basic scope to this agreement, are considerably more detailed and complex than this form, and are highly favorable towards the auction house. The terms of these agreements may or may not be negotiable, depending on the nature of the terms in question, the value of the property involved, and the general policy of the auction house. For particularly valuable or unique items, it may be desirable or possible to use a custom-drafted agreement. Circumstances may also arise in which a party may engage an auctioneer to run a particular sale that is not part of a regularly scheduled auction, as in the case of an auction sale involving the liquidation of the assets of a business on its premises.

Civ. Code §§ 1812.600-1812.609 impose various obligations on auctioneers and auction houses relating to advertising and representations of property being auctioned, conduct of the auction, the auctioneer's liability for misrepresentation, and so on. Waiver of these provisions is contrary to public policy and void, and many of these provisions carry fines and other penalties as well [*Civ. Code § 1812.609*]. Other relevant statutes include *Com. Code § 2328* and *Civ. Code §§ 2262* and *2263*, discussed elsewhere in this comment.

For further discussion of auctions and auctioneers, see California Forms of Pleading and Practice(Matthew Bender), Ch. 77, *Auctions and Auctioneers* .

[b] Written Contract Required; Mandatory Terms

No one may sell goods at auction in California before the auctioneer or auction company involved has entered into a written contract with the owner or consignor of the goods. This contract must set forth the terms and conditions upon which the auctioneer or auction company accepts the goods for sale, and must include all of the following [*Civ. Code § 1812.608(d)*]:

- The auctioneer's or auction company's name, trade or business name, business address, and business telephone number.

- An inventory of the item or items to be sold at auction [*see* Paragraph 1 and Schedule A of form].

- A description of the services to be provided [*see* Paragraphs 2, 4 of form] and the agreed consideration for the services [*see* Paragraph 5 of form]. The description must explicitly state which party is responsible for advertising and other expenses [*see* Paragraph 5(b) of form].

- The approximate date or dates when the item or items will be sold at auction [*see* Paragraph 3 of form].

- A statement as to which party will be responsible for insuring the item or items against loss by theft, fire, or other means [*see* Paragraph 6 of form].

- A disclosure that the auctioneer or auction company has a bond on file with the Secretary of State [*see* Paragraph 16 of form].

Failure to comply with the preceding requirement is an infraction punishable by a fine [*Civ. Code § 1812.608(d)*], as is the failure of an auctioneer or auction house to abide by the terms of the written contract [*Civ. Code § 1812.608(g)*].

All amendments or addenda to any written contract with an owner or consignor or an auctioneer must also be reduced to writing. Failure to do so is also an infraction punishable by a fine [*Civ. Code § 1812.608(f)*].

Any provision waiving any of the provisions of Bus. & Prof. Code § 1812.600 et seq., which are discussed throughout this form comment, is void and unenforceable [*Civ. Code § 1812.609*].

[c] Selection of Auctioneer

At one time, auctioneers were required to be licensed in California [*see* former *Bus. & Prof. Code § 5700 et seq.* (repealed 1993)]. Those provisions were repealed in 1993, and an auctioneer's license is no longer required. Auctioneers are required, however, to post a surety bond with the Secretary of State for the protection of anyone damaged by any fraud, dishonesty, misstatement, misrepresentation, deceit, unlawful acts or omissions, or failure to provide services [*Civ. Code § 1812.600(a), (b)*]. An auctioneer or auction company cannot legally conduct any business without having such a bond in force [*Civ. Code § 1812.600(c)(1)*], and must disclose the bond number, as well as his or her name, trade or business name, and telephone number, in all advertising that specifies an auction date [*Civ. Code § 1812.607(a)*]. Anyone selling property at auction must also have a valid and unrevoked seller's permit from the State Board of Equalization [*Civ. Code § 1812.608(k)*].

In order for an auction sale to be an effective marketing device, it is necessary that a sufficient number of interested bidders be attracted. An auctioneer should be selected who holds regular sales of the type of merchandise involved, or who will be able to advertise the sale sufficiently to bring the sale to the attention of the greatest number of potential buyers.

Prior to entering into a contract with an auctioneer, the prospective consignor should inquire regarding the usual terms

and conditions under which the auctioneer conducts sales. Special consideration should be given to the following areas:

- The auctioneer's usual commission rates for both sellers and buyers.

- Whether or not the auctioneer assesses any charges for unsold lots, including storage and shipment charges.

- Whether or not the auctioneer charges back catalog expenses or other advertising expenses to the customer.

The last two categories of charges above can generate hidden expenses that will reduce the profitability of the auction, and generate a loss for the consignor if the item is not sold. Auctioneers' policies vary in this regard; these terms may be negotiable in some cases, but in others may be a matter of the auctioneer's strict policy and not a subject for negotiation.

[d] Duties of Auctioneer

In conducting the business of auctioneering, each auctioneer and auction company, and the company's owners, partners, officers, agents, and employees, are required by law to do all of the following [*Civ. Code § 1812.605*]:

- Follow all lawful requests of the owner or consignor of the goods being sold at auction with regard to the sale of those goods.

- Perform his or her duties so that the highest or most favorable offer made by a member of his or her audience is accepted, except to the extent that any item or sale is offered with reserve or subject to confirmation.

- Truthfully represent the goods to be auctioned [*see Civ. Code § 1812.608(i)* (penalties and refund requirements for knowingly misrepresenting nature of any item or items to be sold at auction, including age, authenticity, value, condition, or origin)].

- Otherwise perform his or her duties in accordance with California law.

[e] Conditions of Sale

Auctioneers are required to post or distribute to the audience the audience the terms, conditions, restrictions, and procedures whereby goods will be sold at the auction, and announce any changes to those terms, conditions, restrictions, and procedures prior to the beginning of the auction sale. Failure to do so is an infraction subject to a fine [*Civ. Code § 1812.607(c)*]. Misrepresenting the terms, conditions, restrictions, or procedures under which goods will be sold at auction is also an infraction [*Civ. Code § 1812.608(j)*].

The existence and amount of any liens or other encumbrances on any items offered for sale must be disclosed immediately prior to the sale [*Civ. Code § 1812.607(k)*].

[f] Authority of Auctioneer

In the absence of special authorization or usage to the contrary, an auctioneer has authority from the seller to do all of the following [*Civ. Code § 2362*]:

- Sell by public auction to the highest bidder.

- Sell for cash only, except such articles as are usually sold on credit at auction.

- Warrant the title of the seller and the quality and quantity of the personal property sold [*see Civ. Code § 2323*].

- Prescribe reasonable rules and terms of sale.

- Deliver the thing sold, on payment of the price.

- Collect the price.

- Do whatever else is necessary, or proper and usual, in the ordinary course of business, for effecting these purposes.

Further, the auctioneer has the authority from both the seller and an auction bidder to act as agent and bind them by a memorandum of the sale contract that is sufficient to satisfy the requirements of the Statute of Frauds [*Civ. Code § 2363*].

This form provides that the auctioneer has sole and complete authority over the conduct of the sale and that the auctioneer's decisions are final [*see* Paragraph 4 of form]. Auction agreements virtually always contain a similar provision, or a more complex variant detailing the auctioneer's specific authority.

This form also assumes that the auctioneer has a standard statement of the terms and condition of sale [*see* [e], *above*], and incorporates those provisions by reference, rather than restating them in full [*see* Paragraph 4 of form]. Virtually all established auctioneers have such a standard set of terms and conditions, and require that buyers agree to adhere to those conditions before being permitted to bid in the sale [*see* Paragraph 4 of form].

[g] Auctions With Reserve and Without Reserve

An auction sale may be either with reserve or without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time before the auctioneer announces completion of the sale [*see Com. Code § 2328(3)*]. If the auction is without reserve, however, an article or lot cannot be withdrawn after the auctioneer calls for bids on that article or lot unless no bid is made within a reasonable time [*Com. Code § 2328(3)*]. Unless an auction sale is expressly agreed to be without reserve, it will be with reserve and the goods offered for sale may be withdrawn at any time before the completion of the sale [*Com. Code § 2328(3)*].

[h] Retraction of Bid by Bidder

Whether an auction is with or without reserve, a bidder may retract the bid at any time before the auctioneer's announcement of the completion of the sale. The retraction, however, does not revive any previous bids [*Com. Code § 2328(3)*].

[i] Receiving Bids on Behalf of Seller

If the auctioneer at any auction other than a forced sale knowingly receives a bid on the seller's behalf, or the seller makes or procures such a bid, and notice has not been given that liberty for bidding by the seller is reserved, the buyer may at his or her option void the sale, or take the goods at the price of the last good faith bid before the completion of the sale [*Com. Code § 2328(4)*]. Further, an auctioneer is prohibited from allowing the owner or consignor, or any of their agents, to bid on the item, without disclosing to the audience that the other, consignor, or agent has reserved the right to bid [Bus. & Prof. Code § 1812.608(h)(2)]. Because of these rules, auction houses commonly state in their

conditions of sale that such bids are expressly permitted.

With the preceding exception, an auctioneer may not cause or allow any person to bid at a sale for the sole purpose of increasing the bid on any item or items being sold by the auctioneer ("shill bidding") [Bus. & Prof. Code § 1812.608(h)]. Stating any increased bid greater than that offered by the last highest bidder when, in fact, no person has made such a bid, is similarly prohibited [Bus. & Prof. Code § 1812.608(h)(1)]. Violation is an infraction subject to a fine [Bus. & Prof. Code § 1812.608(h)].

[j] Completion of Sale

In a sale by auction in which goods are offered in lots, each lot is the subject of a separate sale [*Com. Code § 2328(1)*]. The sale is complete when the auctioneer so announces by the fall of the hammer or in some other customary manner [*Com. Code § 2328(2)*]. If a bid is made while the hammer is falling in acceptance of a prior bid, the auctioneer may in his or her discretion reopen the bidding, or declare the goods sold under the bid on which the hammer was falling [*Com. Code § 2328(2)*].

[k] Handling and Distributing Consignor's Funds

Auctioneers and auction houses are required to maintain the funds of all owners, consignors, buyers, and other clients and customers separate from personal personal funds and accounts [Bus. & Prof. Code § 1812.607(j)].

Within 30 working days after the sale transaction, the auctioneer or auction house is required to provide an account to the owner or consignor of all goods that are the subject of the auction [Bus. & Prof. Code § 1812.607(h)]. The proceeds due to the seller or consignor must also be paid out within 30 days, unless a delay is compelled by legal proceedings or the inability of the auctioneer or auction company, through no fault of his or her own, to transfer title to the goods or to comply with any other legal requirements [Bus. & Prof. Code § 1812.607(i); *see* Paragraph 5(e) of form]. Violation of either of these provisions is a misdemeanor [Bus. & Prof. Code § 1812.607(h), (i)].

[l] Bulk Sale By Auction

A sale by auction (or a sale conducted by a liquidator on the seller's behalf) is a "bulk sale" if it is a sale or series of sales not in the ordinary course of the seller's business of more than half of the seller's inventory and equipment, as measured by the fair market value on the date of the bulk-sale agreement [*Com. Code § 6102(a)(3)(i), (15)*]. In a bulk sale, the auctioneer or liquidator must meet the requirements of the Bulk Sales Division of the Uniform Commercial as adopted in California [*Com. Code § 6108(a)(1)*; *see Com. Code §§ 6101 et seq.*].

Under the Bulk Sales Division, the auctioneer or liquidator must obtain from the seller a list of all business names and addresses used by the seller within three years before the list is sent or delivered to the auctioneer [*Com. Code §§ 6104(a), 6108(a)(1)*]. In addition, the auctioneer or liquidator must comply with detailed notice requirements designed to protect the seller's creditors [*Com. Code §§ 6104(b), 6108(a)(1)*; *see Com. Code §§ 6105, 6108(a)(3)* (notice requirements)].

The auctioneer or liquidator is also subject to the liabilities ordinarily imposed on buyers under the Bulk Sales Division [*Com. Code § 6108(a)*; *see Com. Code § 6107*]. However, in a single bulk sale, the cumulative liability of the auctioneer or liquidator to comply with statutory requirements [*see Com. Code § 6108*] may not exceed the amount of the net proceeds of the sale allocable to inventory and equipment sold, less the amount of the portion of any part of the net proceeds paid to or applied for the benefit of a creditor that is allocable to the inventory and equipment [*Com. Code § 6108(a)(4)*]. A payment made by the auctioneer or liquidator to a person to whom the auctioneer or liquidator is liable, or believes himself or herself to be liable, reduces pro tanto the auctioneer's or liquidator's cumulative liability [*Com. Code § 6108(b)*].

Because the person who buys at a bulk sale conducted by an auctioneer or a liquidator is not the "buyer" for purposes of the Bulk Sales Division [*see Com. Code § 6108(a)(1)*], that person need not comply with bulk sales requirements imposed on buyers, and is not liable for the failure of an auctioneer or liquidator to comply with those requirements [*Com. Code § 6108(c)*].

If the contemplated transaction is a "sale conducted by a liquidator on the seller's behalf" rather than an auction [*see Com. Code § 6102(a)(3)(i)*], the following form should be modified accordingly.

For detailed coverage of requirements under the Bulk Sales Division, see Ch. 17, *Buying and Selling a Business or Professional Practice* .

[m] Auctioneers as Secondhand Dealers

An auctioneer whose principal business is primarily that of accepting for auction or auctioning secondhand tangible personal property is also a secondhand dealer [*see Bus. & Prof. Code § 21626(a)*], with specified responsibilities under the law. However, "secondhand dealer" does not include coin dealers [*see Bus. & Prof. Code § 21626(a), (b)*]. For detailed discussion and forms relating to secondhand dealers with respect to bringing the auctioneer, when necessary, into line with the applicable laws, see Ch. 102B, *Pawnbrokers, Personal Property Brokers, and Secondhand Goods Dealers* .

[2] FORM

Agreement for Auctioneer Services--Contract Form

AUCTIONEER SERVICES AGREEMENT

This AGREEMENT is made on _____[*date*], by and between _____[*name*] ("Owner") and _____[*name*] ("Auctioneer").

Auctioneer's Services

1. Owner hereby engages the services of Auctioneer, as Owner's sole and exclusive agent, to publicize and sell by auction personal property belonging to Owner [consisting of _____ (*describe*) *or, if items are too numerous or detailed to itemize in the body of the agreement:*, as itemized on Schedule A attached to this Agreement].

Obligation of Auctioneer

2. Auctioneer agrees to advertise and sell at public auction the property specified above agrees to use Auctioneer's best efforts to advertise and sell the property at the highest price obtainable. [*Add if auction is bulk sale:* Auctioneer also agrees to comply with all requirements of the Uniform Commercial Code-Bulk Sales relating to bulk sales by auction.] Advertising for the sale shall include [*specify, e.g.,* preparation of an auction catalog, brochures and signs advertising the auction, and media advertisements that, in Auctioneer's best professional judgment, are most likely to attract potential bidders to the sale].

Time and Place of Auction

3. The auction will take place on or about _____[*date*] at _____[*specify, e.g.,* the

offices of the Auctioneer located at _____].

Terms of Auction

4. The items of personal property set forth above will be sold at public auction to the highest bidder, and _____[*specify payment terms, e.g.,* the successful bidder will be required to give a deposit of _____ percent of the sale price on the conclusion of the bidding, and to pay the balance of the purchase price within _____ days after the date of the auction *or* the terms of the auction are all cash, payable by the successful bidder on the conclusion of the bidding]. All items will remain in the possession of the Auctioneer until full payment has been received from the purchaser.

[*Select one of the following alternatives:*]

The auction will be conducted without reserve and all items placed for sale will be sold to the highest bidder unless no bids are received within a reasonable time.

[*OR*]

The auction will be an auction without reserve and any goods offered for sale may be withdrawn at any time before the completion of the sale. There will be no reserve price on any item offered for sale.

[*OR*]

The goods offered for sale will not be sold at less than the reserve price[s] _____[of $_____ *or, for multiple lots of property:* specified by the Owner in the attached Schedule A].

[*Continue with the following:*]

The auction will be conducted in accordance with *California Commercial Code 2328* and *California Civil Code Sections 2362* and *2363* [and Auctioneer's standard terms and conditions of bidding and sale, a copy of which is attached to this Agreement as Schedule B and incorporated into this Agreement by reference.] Auctioneer will have sole and complete Authority over the conduct of the auction and any decision of Auctioneer with respect to the conduct of the Auction and the acceptance of rejection of any bid shall be final. Auctioneer, at Auctioneer's discretion, may establish a threshold estimated minimum value requirement (based on pre-sale estimates) for any single lot and may combine individual items of Owner's property to meet that minimum lot value requirement.

Compensation

5. (a) As compensation for Auctioneer's services in conducting the auction, Auctioneer will receive a commission of _____ percent of the gross receipts from the sale of the personal property sold at auction under this agreement.

[*EITHER:*]

(b) In addition to Auctioneer's compensation as specified in (a), above, Owner will pay the following expenses: [*specify in detail (see Civ. Code § 1812.608(d)(3)); e.g.*, a catalog descrption fee of $50 *or* costs and expenses for advertising the property for a period of two weeks before the auction in a general circulation newspaper of general circulation]. Except as otherwise specified in this agreement, any other expenses relating to the auction shall be borne by [Auctioneer *or* Owner].

[*OR*]

(b) Except as otherwise specified in this Agreement, Auctioneer shall bear all costs of advertising and other expenses connected with the Auction.

[*Continue with the following:*]

[*Optional:*]

(c) Auctioneer will charge a storage and processing fee of [*specify, e.g.,* $15 *or* two percent of the owner's reserve price of the lot, if any] on each lot that remains unsold at the conclusion of the auction.

[*Continue with the following:*]

(d) Auctioneer will deduct Auctioneer's compensation from the receipts from the auction sales before remitting those receipts to the Owner, and will remit the balance to Owner, together with an accounting of Owner's property in the sale, within 30 days following conclusion of the sale, except in the event of delay due to legal proceedings or the inability of Auctioneer, through no fault of Auctioneer's own, to transfer title to the goods or comply with any other legal requirements.

Insurance

[*Either:*]

6. Auctioneer is responsible for maintaining adequate insurance on the property against loss from fire, theft, or other means, from the time Auctioneer actally receives the property from Owner until the time when the property is either delivered to the highest bidder following conclusion of the auction, or returned unsold to Owner.

[*OR*]

6. Auctioneer will not maintain fire, theft, or any other insurance on the property at any time. If Owner desires any such insurance, Owner must obtain it at Owner's own expense.

[*Continue with the following:*]

Warranties of Owner

7. Owner warrants that Owner is the legal owner of the items of personal property offered for sale under this Agreement, has full and merchantable title to the property, and that the property is free and clear of liens, encumbrances, and other claims to title or possession, including any pending claims or litigation, except as may be specified in this Agreement. Owner hereby grants to Auctioneer the right to convey a merchantable title to that property to the successful buyer or buyers at the auction. Owner further represents that to the best of Owner's knowledge and belief, the property is genuine and that any descriptions of the property that Owner has provided Auctioneer are correct and accurate.

Arbitration

8. Any controversy between the parties to this Agreement involving the construction or application of any of its terms, covenants, or conditions will be submitted to arbitration, on the written request of one party served on the other. The arbitration will comply with and be governed by the provisions of the California Arbitration Act, *California Code of Civil Procedure Sections 1280 through 1294.2*.

Attorneys' Fees

9. If any party to this Agreement resorts to litigation or arbitration to enforce or interpret any provision of this Agreement, the prevailing party will be entitled to recover reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision applies to the entire contract.

Entire Agreement

10. This Agreement contains the entire agreement between the parties relating to the rights granted and the obligations assumed. Any oral representations or modifications concerning this Agreement will be of no force or effect excepting a subsequent modification in writing, signed by the party to be charged.

Partial Invalidity

11. If any part of this contract is declared invalid for any reason, the remainder of the agreement shall be unaffected. The other parts of the agreement shall remain in effect as if the agreement had been executed without the invalid part. The parties declare that they intend and desire that the remaining parts of the agreement continue to be effective without any part or parts that have been declared invalid.

Governing Law

12. The validity of this Agreement and its terms or provisions, as well as the rights and duties of the parties, will be interpreted and construed pursuant to and in accordance with the laws of the State of California.

Amendments and Waivers

13. Any term or provision of this Agreement may be amended and the observance of any term of this Agreement may be waived (either generally or in a particular instance and either retroactively or prospectively) only by a writing signed

by the party to be bound thereby. The waiver by a party of any breach of this Agreement will not be deemed to constitute a waiver of any other default or succeeding breach or default.

Assignment

14. This Agreement may not be assigned by either party without the prior written consent of the other party. Subject to this limitation, this Agreement will inure to the benefit of and be binding on the successors and assigns of the respective parties.

Notices

15. Any notices to be given under this Agreement by either party to the other may be effected either by personal delivery in writing or by mail, registered or certified, postage prepaid with return receipt requested. Mailed notices must be addressed to the addresses of the parties as they appear in the introductory paragraph of this agreement, but each party may change address by written notice in accordance with this paragraph. Notices delivered personally will be deemed communicated as of actual receipt; mailed notices will be deemed communicated as of [*e.g.*, one] day[s] after mailing.

Auctioneer's Bond

16. Auctioneer maintains a bond on file with the California Secretary of State as required by *California Civil Code Section 1812.600*. Auctioneers Bond # _____.

Executed at _____, California, on the day and year written above.

AUCTIONEER
_____ [*name of auction company or auctioneer*]
_____ [*trade name, if different from above*]
_____ [*business address*]
_____ [*business telephone number*]
By _____ [*signature of auctioneer or representative*]
[*typed name*]
PROPERTY OWNER
_____ [*signature of owner*]
[*typed name*]

Schedule A
Itemization of Property to Be Sold At Auction

Item or Lot Number	Description	Owner's Reserve
_____	_____	_____
_____	_____	_____

_____ _____ _____
_____ _____ _____

Schedule B
Auctioneer's Standard Terms and Conditions of Sale

[*Attach copy of auctioneer's standard terms and conditions of sale here.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Sales (Article 2)Contract TermsSale by AuctionContracts LawTypes of ContractsGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART IV. FORMS
E. Appraisal and Auction Services

28-86 California Legal Forms--Transaction Guide §§ 86.244-86.249

[Reserved]

§§ 86.244[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART IV. FORMS
F. Investigative Services

28-86 California Legal Forms--Transaction Guide § 86.250

§ 86.250 Letter Agreement for Services of Licensed Private Investigator

[1] Comment

[a] Use of Form

This form is a letter agreement from a defense attorney to a licensed private investigator engaging the services of the private investigator on behalf of the attorney's client in connection with a personal injury case. The investigator is retained to obtain information about an accident and about the activities of the plaintiff to verify the validity of the personal injury claim.

The situation illustrated in this form is one of the most common in which the need for the services of a private investigator arises. Other common situations include investigations in connection with divorce or dissolution of marriage actions, investigations of thefts or other business losses, and the investigation of employee activities on the job to determine efficiency. The description of services in the form can be modified to suit other types of situations.

For a list of the determinations in drafting a private investigator's service contract, see *§ 86.125*.

[b] Regulation of Private Investigators

Private investigators are regulated by and licensed under the Private Investigator Act [*Bus. & Prof. Code §§ 7512 et seq.*].

The Private Investigator Act does not contain any specific requirements for contracts with private investigators. However, the Act does contain a number of important limitations and prohibitions on what private investigators may and may not do [*see, e.g., Bus & Prof. Code §§ 7539(a)* (confidentiality of client information), (d) (use of badge prohibited), (e) (use of uniform or insignia prohibited), (g) (limitations on right to enter private property), (j) (limitations on use of fictitious name), 7561.3(a) (misrepresentation as government employee), 7561.4(b) (manufacturing evidence defined as fraudulent activity)]. Contract provisions at odds with these limitations presumably would be void and unenforceable [*see Civ. Code § 1667*].

A private investigator may provide services to protect a person (but not property) when those services are incidental to an investigation that he or she has previously been hired to perform [*see Bus. & Prof. Code § 7521.5* (requirements)]. Private investigators, unless they are attorneys, are not authorized to engage in acts constituting the practice of law [*Bus. & Prof. Code § 7514*].

[c] Persons Who Must Be Licensed as Private Investigators

All persons doing business as private investigators must be licensed in California [*Bus. & Prof. Code §§ 7520, 7523*; *but see Bus. & Prof. Code § 7520.5* (limited 60-day exception for out-of-state investigators conducting investigations originating outside California)].

A "private investigator" for purposes of the Private Investigator Act is a person (individual, firm, company, association, organization, partnership, or corporation [*Bus. & Prof. Code §§ 7512.3*]), other than an insurance adjuster, who is paid to investigate and obtain information regarding any of the following [*see Bus. & Prof. Code § 7521(a)*]:

- Crimes or other wrongs.
- The identity, habits, conduct, business or occupation, honesty or trustworthiness, reputation or character, movement or whereabouts, affiliations, or transactions of any person.
- The cause or responsibility for fires, libels, losses, accidents, or damage or injury to persons or property.
- Securing evidence to be used before any court, board, officer, or investigating committee.
- Employees' integrity, honesty, breach of rules, or other standards of job performance.

[d] Persons Exempt From Licensing Requirements

Numerous classes of persons who might otherwise fall within the preceding definition are specifically excluded from regulation by the Private Investigator Act, and are not required to be licensed under the Act in order to carry out their activities [*see Bus. & Prof. Code § 7522* (exempt categories)]. Some of the more significant exceptions in the context of this chapter include the following:

- Persons engaged exclusively in the business of obtaining and furnishing information as to the financial rating of persons [*Bus. & Prof. Code § 7522(c)*].
- Persons engaged solely in the business of securing information about persons or property from public records [*Bus. & Prof. Code § 7522(h)*].
- Insurance companies, agents, and brokers licensed in California when performing duties in connection with insurance transacted by them [*Bus. & Prof. Code § 7522(f)*].
- Attorneys and insurance adjusters in performing their duties in those respective capacities [*Bus. & Prof. Code § 7522(e), (j)*].
- Employees performing services exclusively in connection with their employer's affairs, providing the employer does not provide contract security services for other entities or persons and the employees do not carry or use deadly weapons in performing their duties [*see Bus. & Prof. Code § 7522(a)*].

- Banks and savings and loan associations [*Bus. & Prof. Code § 7522(g), (k)*].

- Secured creditors engaged in the repossession of a creditor's collateral and lessors engaged in the repossession of leased property [*Bus. & Prof. Code § 7522(l)*].

- Registered process servers when serving process [*Bus. & Prof. Code § 7522(m)*; *see Bus. & Prof. Code § 22350*].

- Persons or businesses conducting objective observations of consumer purchases of products or services in the public environments of a business establishment by the use of a preestablished questionnaire [*see Bus. & Prof. Code § 7522(n)*].

- Charitable philanthropic societies or associations incorporated under California law and organized and maintained for the public good and not for private profit [*Bus. & Prof. Code § 7522(d)*].

[2] FORM

Letter Agreement for Services of Licensed Private Investigator

[*Attorney's letterhead*]
_____[*date*]
_____[*name of investigator*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of investigator*] :
RE: Investigation of _____ [*name of plaintiff*]

This letter will confirm our understanding and your authority to proceed with the investigation of the validity of the personal injury claim filed by _____[*name of plaintiff*] ("Subject") against my client, _____[*name*].

1. You will investigate the circumstances surrounding the accident that occurred on _____[*date*], and will obtain copies of any police reports, photographs of the accident scene, and statements of witnesses. You will obtain the names of all witnesses presently known and obtain statements from them and advertise for a reasonable time in a local paper for other persons who may have witnessed the accident. You will take photographs of the accident scene in its present condition, under circumstances resembling as closely as possible the conditions that existed at the time of the accident.

2. You will investigate the Subject's background and obtain any available information on _____[his *or* her] past medical history, including prior disabilities, accidents, or other physical conditions or impairments.

3. You will investigate the Subject's present activities and prepare a report on all activities since the above-mentioned accident, with special emphasis on activities that involve physical exertion or the movement of [*specify, e.g.,* the arms and legs *or* the right shoulder].

4. You will keep the Subject under surveillance [*specify, e.g.,* 24] hours per day for a period of [*specify, e.g.,* a week] and take appropriate still photographs and movies of the Subject that show the Subject engaged in various types of physical activity.

5. On or before _____[*date*], you will submit a report containing the requested information as soon as that information is obtained and you will forward all documents, charts, statements, photographs, movies, and other matter as soon as available. You will give [daily *or* weekly] progress report of your activities and findings by telephone and promptly report any unusual or important findings.

6. Your fee for the services described in this letter will be $_____ per [hour *or* day]. As we have agreed, your total fee will not exceed $_____ without the prior written consent of _____[*name of client*].

7. In addition to your fee, you will be reimbursed for reasonable and necessary expenses incurred in the course of your investigation, including but not necessarily limited to, [secretarial and similar charges,] telephone calls, fax, computer charges, reasonable meal expenses while on surveillance, reasonable and necessary travel expenses, photocopying, film and film developing, shipping and mailing charges, charges and fees for obtaining documents and records, and similar expenses. You agree to provide itemized documentation and receipts for any costs and expenses for which you seek reimbursement. You further agree not to incur any individual costs and expenses in excess of $[*specify, e.g.,* $500] or total costs and expenses in excess of $[*specify, e.g.,* $2,500] without the prior written consent of _____[*name of client*].

8. Fees, costs, and expenses will be paid on _____[completion of your services *or* a _____ (weekly *or* monthly) basis]. All bills for your services should be sent directly to my client _____[*name*], at _____[*address*], with a copy to this office.

If the above instructions accurately reflect your understanding of our agreement, please indicate your assent to these terms by signing and returning a copy of this letter to me no later than _____[*date*]. You may then proceed immediately with your investigation.

Sincerely,
_____ [*signature of attorney*]
[*typed name*]
For _____[typed name of law firm]

AGREEMENT AND ACCEPTANCE

I have read the above letter agreement, and by signing below hereby approve and agree to be bound by those terms and condtions.

Date: _____

_____ [*name of private investigator firm*]
By _____ [*authorized signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART IV. FORMS
F. Investigative Services

28-86 California Legal Forms--Transaction Guide § 86.251

§ 86.251 Agreement Between Insurance Adjuster and Insurance Company

[1] Comment

[a] Use of Form

This form is an agreement between an insurance adjuster and an insurance company concerning the investigation and settlement of a specific claim made against the insurance company. This form uses the common examples of an auto accident or fire insurance claim. The form may be adapted to a variety of claims arising from accidents, fires, deaths, or other types of insured losses.

[b] "Insurance Adjuster" Defined

An insurance adjuster is a person (other than a private investigator [*see Bus. & Prof. Code § 7521*; *see also § 86.250[1]*) who, for consideration, does any of the following [*Ins. Code § 14021*; *see Ins. Code § 14022* (exceptions)]:

- Engages in business or accepts employment to make any investigation for the purpose of obtaining information in the course of adjusting or otherwise participating in the disposal of any claim under an insurance policy on behalf of an insurer.

- Engages in soliciting insurance adjustment business.

- Aids any insurer in any manner with reference to any of the following:

    - Crime or wrongs done or threatened against the United States or any state or territory of the United States.

    - The identity, habits, conduct, business, occupation, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person.

- The location, disposition, or recovery of lost or stolen property.

- The cause or responsibility for fires, libels, losses, accidents, or damage or injury to persons or to property.

- Securing evidence to be used before any court, board, officer, or investigating committee.

This definition is not intended to limit the ability of a duly licensed independent insurance adjuster to perform the duties of an independent insurance adjuster for any other entity [*Ins. Code § 14021*].

[c] License Requirement and Ethical Standards

Insurance adjusters falling within the above definition must be licensed by the Insurance Commissioner [*Ins. Code § 14020*] and may not do any of the following [*Ins. Code § 14039*]:

- Fail to disclose his or her full financial interest in a contract or agreement executed by him or her for the adjustment of a claim prior to the execution of the agreement.

- Use any misrepresentation to solicit a contract or agreement to adjust a claim.

- Solicit or accept remuneration from, or have a financial interest exceeding 3 percent in, any salvage, repair, or other firm, which obtains business in connection with any claim which he or she has a contract or agreement to adjust.

[2] FORM

Agreement Between Insurance Adjuster and Insurance Company

INSURANCE ADJUSTING AGREEMENT

This AGREEMENT is made this _____ day of [*month and year*], by and between _____[*name of insurance company*], a California corporation, ("Company"), and _____[*name of adjuster*] ("Adjuster").

Recitals

Company, an insurer licensed to do business in the State of California, issued a policy of [*e.g.*, automobile liability *or* fire *or other type*] insurance on a [*specify make, year, license, and identification number of insured automobile, or type and location of structure insured*] to _____[*name*], _____[*address*] as named insured. As a result of [*e.g.*, an accident *or* a fire] on _____[*date*], one or more claims have been or may be filed against Company under this policy.

Company desires to retain Adjuster to investigate the circumstances surrounding this [*e.g.*, accident *or* fire], to determine the extent of its possible liability under the aforementioned policy, and to determine the merit of and help settle any claims that may be filed against Company as a result of this incident.

THEREFORE, Company retains the services of Adjuster and Adjuster agrees to render services for Company on the terms and conditions of this Agreement.

Authorization

1. Company authorizes Adjuster to act on behalf and in the name of Company to investigate any and all claims arising out of the [accident *or* fire] that occurred on or about _____[*date*], and involved [*e.g.*, an automobile *or* a house and garage] owned by _____[*name of insured*], the name insured under policy number _____. Adjuster is further authorized on Company's behalf to determine whether and to what extent any claimed loss is covered by this policy and to negotiate with and enter into agreements with any and all persons with regard to the amount of loss or damage and to make payments and obtain releases in full settlement of any such claims of loss or damage. However, Adjuster does not have the authority to admit liability on Company's behalf for any claimed loss or damage or to waive any provision or condition of the policy.

Services

2. In conjunction with the investigation and negotiation of any claim covered by this Agreement, Adjuster will seek out witnesses and obtain statements from the parties, witnesses, and any officials who might have knowledge of facts concerning the incident. Adjuster will obtain any photographs, statements, reports, or other physical evidence that may be available and that will aid in the determination of liability for or amount of damage or loss sustained as a result of the incident. Adjuster will assist Company in the defense of any claim that cannot, after reasonable effort, be settled. Adjuster will procure evidence to be used in the presentation of a case before a court, arbitrator, or other tribunal.

Fee

3. For services rendered under this Agreement, Adjuster will receive _____[*specify, e.g.*, $_____ per hour, plus costs and expenses]. Adjuster will send a [*e.g.*, weekly] bill to Company itemizing the charges made. Adjuster's total fee, including costs and expenses, will not exceed $_____ without the prior written approval of Company. Adjuster will be paid within [*e.g.*, 15] days after Company receives Adjuster's bill.

Termination

4. This Agreement may be terminated at any time by either party, with or without cause, by giving written notice to the other party. Termination will be effective _____[*e.g.*, immediately upon receipt of that notice if personally delivered, or within _____ days after mailing that notice].

Notices

5. Any notices required under this Agreement may be sent by regular mail to Company at its main offices located at _____[*address*] or to Adjuster at _____[*address*], unless a different address has been subsequently selected and written notice has been properly given to the other party. Notices under this Agreement may be sent by certified mail or telegram, or hand-delivered.

Independent Contractor

6. In performing services under this Agreement, Adjuster at all times will be an independent contractor and not an employee of Company.

Assignment

7. This Agreement may not be assigned by either party without the prior written consent of the other party.

Governing Law

8. The validity and interpretation of any of the terms or provisions of this Agreement, or of the rights or duties of any of the parties under this Agreement, will be governed by the laws of the State of California.

Executed at _____, California, on the day and year first above written.

COMPANY
_____ [*name of insurance company*]
By _____ [*signature*]
[*typed name and title*]
ADJUSTER
_____ [*signature of adjuster*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewInsurance LawClaims & ContractsGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART IV. FORMS
F. Investigative Services

28-86 California Legal Forms--Transaction Guide §§ 86.252-86.259

[Reserved]

§§ 86.252[Reserved]

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART IV. FORMS
G. Author Contracts

28-86 California Legal Forms--Transaction Guide § 86.260

§ 86.260 Agreement Between Author and Publisher

[1] Comment

[a] Use of Form

This form is an agreement between an author and publisher in which the author agrees to write and the publisher agrees to publish a book on a given topic. It specifies that the author will be compensated on a royalty basis.

For a list of issues to consider before drafting a contract between an author and a publisher, see *§ 86.126*. Copyright law is briefly discussed in [b], *below*. For more detailed discussion of the law and procedures relating to copyright and copyright registration, see Ch. 103A, *Copyrights* .

[b] Features of Form

This form is designed for an arrangement in which an author will produce a complete original work on a predetermined topic [*see* Paragraph 1 of Form], to be published exclusively by the publisher [*see* Paragraph 2 of Form]. The author is required to deliver manuscript of an approximate length to the publisher on or before a specified date [*see* Paragraph 4 of Form]. The publisher has the right to require revision of the manuscript [*see* Paragraph 5(a) of Form] and controls all the details of production and marketing, including the price, form of edition, and so on [*see* Paragraphs 5(b), 7 of Form].

The author will receive a royalty consisting of a specified percentage of the revenue from all copies sold, with specified adjustments and exclusions [*see* Paragraph 8 of Form]. The author will also receive an advance against royalties upon execution of the contract [*see* Paragraph 8(g) of Form].

The publisher is given the right to elect not to publish the book if that course of action seems best in light of changed economic or market conditions [*see* Paragraph 10 of Form]. If such a provision is not included, nonpublication for economic or market reasons may be a breach of contract by the publisher [*see Chodos v. West Publishing Co. (9th Cir. 2002) 292 F.3d 992, 998*]. It has been held that a contract provision giving a publisher broad discretion not to publish a work does not make the contract illusory, because the publisher's rights are limited by its implied covenant of good faith

and fair dealing [*see* Chodos v. West Publishing Co. (9th Cir. 2002) 292 F.3d 992, 997]. This agreement provides that in the event the work is not published, ownership rights revert to the author [*see* Paragraph 10 of Form].

The author also agrees to refrain from writing or publishing competitive works [*see* Paragraph 11 of Form] and to cooperate in the preparation of subsequent editions [*see* Paragraph 12 of Form].

[c] Ownership of Copyrighted Works

A "copyright owner" is the owner of any of the exclusive rights comprised in a copyright [*17 U.S.C. § 101*]. The ownership of a copyright or any exclusive rights under it is distinct from ownership of any material object in which the work is embodied [*17 U.S.C. § 202*].

A copyright initially vests in the author or authors of the work [*17 U.S.C. § 201(a)*]. If two or more authors prepare a work with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole, it is referred to as a joint work [*17 U.S.C. § 101*], and the authors are co-owners of the copyright [*17 U.S.C. § 201(a)*].

[d] Transfer of Copyright

Ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law [*17 U.S.C. § 201(d)(1)*]. Any of the exclusive rights comprised in a copyright [*see 17 U.S.C. § 106*] may be transferred and owned separately [*17 U.S.C. § 201(d)(2)*].

Any transfer (other than by operation of law) must be made by an instrument of conveyance or a note or other memorandum signed by the owner or his or her duly authorized agent [*see 17 U.S.C. § 204(a)*]. A certificate of acknowledgment is not required but is, in certain cases, prima facie evidence of the execution of the transfer [*see 17 U.S.C. § 204(b)*]. Any transfer of copyright ownership or other document pertaining to a copyright may be recorded in the Copyright Office, which then serves as constructive notice of the facts stated in the document [*see 17 U.S.C. § 205(c)*].

The Copyright Law also establishes a priority between conflicting transfers [*see 17 U.S.C. § 205(d)*]. For transfers executed within the United States, the one executed first prevails if duly recorded [*see 17 U.S.C. § 205(c)*] within one month after its execution, or within two months after its execution outside the United States. Otherwise, the transfer last executed prevails, provided it was recorded first, taken in good faith for a valuable consideration or on the basis of a binding promise to pay royalties, and without notice of the earlier transfer [*17 U.S.C. § 205(d)*].

A nonexclusive license, whether recorded or not, will prevail over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or the owner's duly authorized agent. However, for the above rule to apply, the license must either have been taken before execution of the transfer, or in good faith before recordation of the transfer and without notice of it [*17 U.S.C. § 205(e)*].

[e] Duration of Copyright

For works created on or after January 1, 1978, copyright protection automatically begins at the time of its creation [*17 U.S.C. §§ 101, 302(a)*]. The copyright normally endures for the life of the author plus 70 years [*see 17 U.S.C. § 302*; *see also 17 U.S.C. § 304(a), (b)* (duration of subsisting copyrights)].

[f] Termination of Transfers and Licenses

The nontestamentary transfer or license of a copyright of a work not made for hire, or of any right under a copyright is subject to termination within a period of five years beginning at the end of 35 years from the date the grant was executed [*see 17 U.S.C. § 203(a)*]. If the grant covers the right of publication, the period begins at the end of the shorter

of the following periods [*17 U.S.C. § 203(a)(3)*]:

- 35 years from the publication date of the work under the grant; or
- 40 years from the date of execution of the grant.

On the date of termination, all rights covered by the terminated grant revert to the author or other persons entitled to exercise termination rights, subject to specified limitations [*see 17 U.S.C. § 203(b)*; *see 17 U.S.C. §§ 203(a)(1), (2)*]. Future rights that will revert on termination of the grant become vested on the date the notice of termination is served [*see 17 U.S.C. § 203(b)(2)*; *see also 17 U.S.C. § 203(a)(4)*].

If the rights under an existing copyright were transferred prior to the effective date of the Copyright Act, the Act permits the author or other specified persons to terminate those rights for the extended term, except in the case of a copyright in a work made for hire [*see 17 U.S.C. § 304(c)*]. For additional discussion of this right, see Ch. 103A, *Copyrights* .

[g] Preemption of State Law

All legal or equitable rights that are equivalent to any of the exclusive rights granted under a copyright [*see 17 U.S.C. § 106*] in works of authorship that are fixed in a tangible medium of expression, and come within the subject matter of copyright [*see 17 U.S.C. §§ 102, 103*], regardless of when created and whether published or not, are governed exclusively by the federal Copyright Law. No one is entitled to any copyright under the common law or the statutes of any state [*see 17 U.S.C. § 301(a)*]. Thus, state statutes such as *Civ. Code §§ 980-982*, to the extent that they grant any rights similar to a copyright, have been preempted by the federal Copyright Law. For discussion of matters not preempted by the federal Copyright Law, see Ch. 103A, *Copyrights* .

[2] FORM

Agreement Between Author and Publisher

AGREEMENT BETWEEN AUTHOR AND PUBLISHER

This agreement is made on _____[*date*], between _____[*name of publisher*], [specify status, a California corporation] ("Publisher") and _____[*name of author*], _____[*address*] ("Author").

Creation of Work

1. Author will prepare and supply a work ("Work") tentatively titled "_____". This title is a working title and may be changed by mutual agreement. The work will consist of [*specify subject matter of work, e.g.,* a romantic novel set in the Alaska gold rush *or* a scholarly historical analysis of the evolution of land tenure in medieval England *or* a children's story about a family of whales, designed to appeal to children aged five to seven years *and, if more detailed description of contents of work is desired, add detailed description here.*]

Rights and Licenses

2. Author grants and assigns to Publisher during the whole world term of its copyright and all renewals and any extensions the following rights in the Work:

(a) The sole and exclusive right to print, publish, and sell the Work in book and in all digital electronic forms in the

English language throughout the world and the right to license others to do so.

(b) The sole and exclusive right to grant licenses for translations into foreign languages, and for publication of those translations, and for exercise by foreign publishers of any of the other rights enumerated in this Agreement in any foreign country.

(c) The sole and exclusive right to publish book club and microform editions, to publish in other languages, to grant permissions to publish material from the Work in other works including sound and video recordings, information storage, processing, transmission and retrieval systems, multimedia renditions, to display and transmit electronically and through on-line information services, including the Internet, and to publish all derivative work in all media.

Copyright

3. Publisher will register the copyright of the Work at its own expense as an administrative convenience, in the name of _____[*publisher's imprint*], and will preserve and record the copyright in compliance with Title 17 of the United States Code and with any foreign statutes, treaties, and conventions as it, in its sole discretion, considers necessary and appropriate. Publisher will include in each copy of the Work published by it or under its authority a copyright notice in conformity to U.S. law and the Universal Copyright Convention. In the event the Work contains parts written by persons other than Author, those persons will assign their copyrights to Author, who will in turn license Publisher as stated in this Agreement.

The Manuscript

4. (a) Author agrees to deliver on or before _____[*date*], a manuscript on disk, in a word processing format compatible with Publisher's software, and a hard copy of approximately _____ pages, on 81/2 " x 11" paper, of approximately 200 words per page [, with approximately _____ camera-ready line art illustrations, _____ black and white and _____ color photographs that will result in a published book of approximately _____ published pages in a [*e.g.*, 6 x 9] trim size.

(b) Author will retain a copy of the Work including both text and illustrations.

(c) Author agrees to provide complete and final photographs, drawings, charts, maps or other illustrative material ("Illustrations") and a preface and/or foreword, table of contents, or other aids if necessary for the Work. Author agrees to provide an index. If Author fails to supply any of the foregoing, or if any of the foregoing as submitted is unsatisfactory to Publisher, Publisher is entitled to provide them and charge their cost against Author's royalties.

(d) If the manuscript is not delivered in content and form satisfactory to Publisher within the specified time, for any reason including without limitation by reason of Author's death or otherwise, unless the time is extended in writing by Publisher, Publisher is entitled to terminate this Agreement. Beyond the extension(s) agreed upon by Publisher in writing, Publisher has the right to negotiate a reduced royalty if the manuscript is further delayed.

(e) With regard to any and all material obtained from other copyrighted works, or the incorporation of illustrations, Author will obtain, at Author's own expense, and file with Publisher at the time of manuscript delivery, written consents of the owner of those copyrighted materials for use of those materials, or written permissions or releases from models used in those illustrations, granting Publisher the right to publish those materials or images in the Publisher's English-language and any foreign language editions of the Work. If Author fails to obtain the required permissions, Publisher will deduct all fees, royalties and other charges for obtaining permissions and for use of those copyrighted materials from Author's royalties.

(f) It is understood and agreed that Publisher is not the insurer of the manuscript for the Work or any other materials placed in its possession by the Author, and Publisher will not be liable for any loss.

(g) If the Agreement is terminated for any reason set forth in Paragraph 4(d), any advance and grant monies paid to Author must be returned to Publisher. Until those monies have been returned, Author may not cause publication of the Work elsewhere without the written permission of Publisher.

Revision and Acceptance of Manuscript

5. (a) It is understood and agreed that it is Publisher's policy and practice to selectively obtain reviews of an Author's manuscript in order to assess the suitability of the manuscript for the purpose intended and tailoring the manuscript to the specific market aimed at. Author agrees to make all revisions reasonably required by the Publisher in the interest of the widest acceptance of the Work in the market.

(b) When Publisher, in its sole discretion, has determined that the manuscript is satisfactory in form and content for its publishing program, and Author has furnished any marketing information that Publisher may deem helpful to the sale of the Work, the manuscript will be published at Publisher's expense in the style and manner, under Publisher's imprint, and at the price that Publisher deems suitable.

Indemnities and Warranties

6. Author warrants that Author and any contributors are the originators of the work; that Author is the sole proprietor of the Work and has the full power and authority to copyright the Work and make this Agreement; and that the Work will not infringe on any copyright, right of publicity or privacy or any other proprietary right of any third party or contain any libelous matter. Author will indemnify and hold Publisher harmless against all claims, suits, costs, damages, losses, and expenses (including reasonable attorneys' fees) that Publisher may incur by reason of any infringement of the Work on any copyright or proprietary right, and/or by inclusion of material found to be libelous or injurious to the user. Publisher will also have the exclusive right to sue or defend against those actions, through counsel of its own choosing. Until any claim or suit has been settled or withdrawn, Publisher may withhold reasonable sums due Author under this Agreement. Further, the warranties and indemnities contained in this Agreement survive its termination and extend to licensees, distributors and assigns of Publisher.

Processing the Manuscript

7.(a) Publisher has the right, in its sole discretion, to edit and design the format of the Work, including size, typography, paper, method of printing, type of binding, and jacketing; to determine and set the price, including any special prices; and to use all customary means of advertising and marketing the Work.

(b) Author will read the copyedited proofs, responsibly incorporate the copyedited changes, and submit final manuscript within _____ days of receipt, and be responsible for the accuracy of the proof and corrections.

Author's Compensation

8. Publisher will royalties to Author on the net amount actually received on the sale of regular editions of the Work in book form in the English language, as specified below:

(a) [*specify, e.g.,* 12 percent] on all copies sold. The parties agree that the same rates will be paid as royalty for electronic editions if, in the sole judgment of Publisher, such editions are deemed mutually beneficial.

(b) No royalty will be paid on returned copies; complimentary copies to Author; copies given to others, including review copies, for the purpose of aiding the sale of the Work; traveler's samples; or damaged copies. Publisher may authorize limited use of quotations from the Work by others without remuneration to Author if, in Publisher's sole discretion, that use benefits the sale of the Work.

(c) On all copies of overstock, which the Publisher deems it expedient to sell at remainder prices, a royalty of [*specify, e.g.,* 10 percent] of the amount received by Publisher will be paid to Author, except when those copies are sold at or below cost, in which case no royalty will be payable.

(d) Author will receive [*specify, e.g.,* 50 percent] of the amount received by Publisher after Publisher's manufacturing costs have been deducted on royalty inclusive special sales of the Work in book form in the English language, such as to a book club. However, on special sales for which royalties are paid by the purchaser, Author will receive [*specify, e.g.,* 50 percent] of the royalties paid to Publisher.

(e) Author will receive [*specify, e.g.,* 50 percent] of the amount received by Publisher from the sale to third parties, such as to publishers of foreign translations.

(f) Publisher will furnish a total of [*e.g.,* six] copies of the Work to Author without charge. Additional copies for Author's use will be supplied at a discount of [*specify, e.g.,* 30 percent] from the standard list price. Author may also purchase for personal use, and not for resale, single copies of any book published by Publisher at a [*specify, e.g.,* 30 percent] discount from the standard list price.

(g) Publisher will prepare a statement of royalties [*specify term, e.g.,* annually *or* quarterly] within [*specify, e.g.,* 90] days following the end of the [*specify period, e.g.,* fiscal year *or* calendar quarter]. Remittance of the amount due to Author will accompany the statement. No royalty payment will be issued if the amount due Author is less than [*specify, e.g.,* $50]. Payment will be delayed until the next usual reporting period when that amount has accumulated.

(h) Publisher will pay Author a $_____ advance against royalties upon execution of this Agreement. The amount of this advance will be repaid from the royalties earned by Author under this Paragraph, and no royalties will be paid out to Author until this advance has been repaid to Publisher in full. Until such time as this advance has been repaid from royalties earned by Author on the Work, Publisher will prepare and submit royalty statements to Author as provided in (g), above, indicating royalties earned by Author, crediting those amount against this advance, and showing any remaining balance of this advance as of the end of the royalty period.

Publication Date

9. The parties contemplate that the finished Work will be first published and available for public purchase _____[*specify, e.g.,* on or about _____ (*specify approximate date*) *or* in time for sale during the _____ (*year*) Christmas shopping season]. Author and Publisher agree to use reasonable good-faith efforts to assure that the Work is ready for publication at that time. However, Publisher shall not incur any liability for delay in publication due to circumstances beyond Publisher's control, including but not limited to war, insurrection, terrorist acts, riot, storms, earthquakes, floods, or other natural disaster, labor disputes, strikes, or problems with suppliers.

Nonpublication

10. Author and Publisher have entered into this Agreement in view of the economic and market conditions existing at the time of execution of this Agreement. If Publisher, in the reasonable exercise of its professional judgment, determines that as a result of changes in the general economic conditions or the market for the Work, the publication of the Work would no longer be economically advantageous or would expose Publisher to a significantly increased risk of financial loss, Publisher may elect not to publish the Work. In the event Publisher should make such an election, Publisher will return to Author any manuscript and other materials submitted by Publisher and thereafter shall retain no right or interest in the work, which shall revert to Author. In the event of nonpublication under this paragraph, Author [shall *or* shall not] be required to return any sums advanced by Publisher under Paragraph 6(h) of this Agreement.

Competitive Books by the Author

11. Author agrees that during the term of this Agreement, Author will not publish or furnish to any other publisher for sale, trade or otherwise, any other edition of the Work revised, corrected, enlarged, abridged, or otherwise, or any book of a character that would compete with or injure the sale of the Work. [Author may use portions of the material from the Work in Author's classroom or business during the manuscript development of the Work or for inclusion in scholarly papers for scientific journals if the Work and Publisher are cited.]

Future Editions

12. Author agrees to revise the first and subsequent editions of the Work, when requested to do so by Publisher, under the same terms and conditions as set out in the Agreement, as though it were being published for the first time, including the computation of royalties, but excepting first edition advances or grants. A new schedule for manuscript delivery will be determined by Publisher. If Author fails to revise the Work in accordance with the standards reasonably required by Publisher, for any reason, Publisher may engage some competent person or persons to prepare the revised editions, and will have the right to cause that fact to be evident in the new edition, and charge the cost of the services of that person or those persons against the royalties accruing to Author or Author's estate. Publisher will have the sole right to determine the amount of the fee or royalty percentage to revise the royalty rates in this Agreement as it deems equitable. Publisher will be entitled to continue to use Author's name in all editions of the Work and in all advertisements of the work, whether or not those editions are prepared by Author. Publisher also will be entitled to adjust the names of Author and revising party or parties in its sole discretion.

Termination and Reversion of Rights

13. (a) When, in Publisher's judgment, the demand for the Work is no longer sufficient to warrant its revision or its continued manufacture or maintenance in inventory, Publisher may discontinue its manufacture, sale, and distribution or elect to offer the Work on a single copy, on-demand basis, those copies to be produced by a third party at the request of a customer. The royalty to the Author on such a single-copy reproduction sales will be [*specify, e.g.,* 10 percent] of the Net Receipts over the remaining life of the Work. When Publisher decides to discontinue the sale and distribution of the Work, it will notify Author in writing, addressed to Author's last known address and deposited in the United States mails. This Agreement terminate will at that time all rights granted to Publisher in this Agreement will revert to Author (except as to artwork and illustrations prepared or obtained at Publisher's expense, which will remain the property of Publisher).

(b) Author will have the option to buy from Publisher any or all copies of the Work on hand at the cost of manufacture and shipment. Publisher may offer its plates, film, or artwork, if available, to Author at Publisher's cost plus freight. At

that point, Publisher will be privileged to dispose of the copies destroyed or disposed of at or below cost. Termination will not affect existing third party licenses or proceeds to Author or Publisher from those licenses.

Interpretation

14. This Agreement will be interpreted according to California law, without regard to principles of conflicts of law.

Severability

15. If any provision of this Agreement is held unenforceable, in whole or in part, the remainder of the provision and the entire Agreement is severable and remains in effect.

Modification of Agreement

16. Any revisions or modifications of this Agreement must be made in writing and signed by both parties.

Heirs and Assigns

17. This Agreement will be binding up the parties, their heirs, successors, administrators, assigns, and personal representatives. References to Author and Publisher include their heirs, successors, administrators, assigns, and personal representatives.

[*Optional:*]

Multiple Authorship

18. If two or more authors are a party to this Agreement, the word Author, as used in this Agreement, will be deemed to include, jointly and severally, all collaborators, authors, or owners who are signatories to this Agreement. Unless otherwise provided in this Agreement or in written instructions to the Publisher signed by or on behalf of all the collaborators, authors or owners, all sums payable to the Author will be divided equally between or among them and the Publisher will render separate accounts and make separate payments to each of them. The Author may direct the Publisher in writing to advance sums from Author's royalty account to pay contributors who are not signatories to this Agreement.

[*Continue with the following:*]

Entire Agreement

19. This Agreement contains the entire understanding of the parties and supersedes all prior oral or written understandings, presentations, or agreements.

Executed at _____, California, on the day and year written above.

AUTHOR
_____ [*signature of author*]
[*typed name*]
_____ [*social security number*]
PUBLISHER
_____ [*name of publisher*]
By [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
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28-86 California Legal Forms--Transaction Guide §§ 86.261-86.269

[Reserved]

§§ 86.261[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86 AGREEMENTS FOR PROFESSIONAL SERVICES
PART IV. FORMS
H. Immigration Consultants

28-86 California Legal Forms--Transaction Guide § 86.270

§ 86.270 Immigration Consultant's Contract for Services

[1] Comment

[a] Use of Form

This form is the standard immigration consultant's contract for services prescribed by the Department of Consumer Affairs in *16 Cal. Code Reg. § 3840* and required by *Bus. & Prof. Code § 22442*.

Every person engaging in the business of or acting as an immigration consultant [*see* [b], *below*] who enters into a contract or agreement with a client to provide services must provide the client with a written contract like this form before providing any services [*Bus. & Prof. Code § 22442(a)*; *16 Cal. Code Reg. § 3840(a)*].

Bus. & Prof. Code § 22440 et seq. do not apply to person authorized to practice law or authorized by federal law to represent clients before the Board of Immigration Appeals or the Citizenship and Immigration Services (CIS) [*Bus. & Prof. Code § 22440*].

[b] Definitions

A person engages in the business of or acts as an immigration consultant when he or she gives nonlegal assistance or advice [*see Bus. & Prof. Code § 22441(d)* (legal advice by immigration consultant is violation); *see also* [g], *below*] on an immigration matter. This advice or assistance includes, but is not limited to, the following [*Bus. & Prof. Code § 24441(a)*]:

- Completing a form provided by a state or federal agency, but not giving advice on how to answer form questions.
- Translating a client's answers to form questions.
- Securing for a client supporting documents necessary to complete the forms.

- Submitting completed forms on a client's behalf and at the client's request to the CIS.

- Making referrals for legal representation in an immigration matter.

An "immigration matter" is any proceeding, filing, or action affecting the immigration or citizenship status of any person that arises under immigration and naturalization law, executive order or presidential proclamation, or an action of the CIS, State Department, or Labor Department [*Bus. & Prof. Code § 22441(b)*].

[c] Required Notice and Written Disclosures

An immigration consultant must display in his or her office a 12-by-20 inch notice in English and the native language of the consultant's clientele stating the consultant's name and address, evidence of compliance with applicable bonding requirements [*see* [h], *below*], that the consultant is not an attorney, the services the immigration consultant provides, the current and total fee for each service, and the name of each consultant employed at each location [*Bus. & Prof. Code § 22442.2(a)*]. Before performing any services, the consultant must give the client written disclosure, in the client's native language, of his or her name, address, telephone number, agent for service of process, the legal name of the employee who consulted with the client, if different from the immigration consultant, and evidence of compliance with applicable bonding requirements [*Bus. & Prof. Code § 22442.2(b)*].

[d] Contents of Contract

The written contract must include the following [*Bus. & Prof. Code § 22442(b)*]:

- The services to be performed.

- Costs of the services to be performed.

- A printed statement on the face of the contract, in 10-point bold type, that the immigration consultant is not an attorney and may not perform the legal services that an attorney performs.

- The documents to be prepared by the immigration consultant, and an explanation of the purpose and process of each document.

- A statement of the purpose for which the immigration consultant has been hired and the actions to be taken by the immigration consultant regarding each document, including the agency and office where each document will be filed and the approximate processing times according to current published agency guidelines.

- A statement that client may report complaints relating to immigration consultants to the Office of Immigrant Assistance of the Department of Justice, including the office's telephone number and Internet web site.

- A statement that complaints about the unauthorized practice of law may be reported to the California State Bar, including the Bar's telephone number and Internet web site.

The contract may not include any guarantee or promise not based in fact, or any statement that the consultant can or will get special favors from or has special influence with the CIS [*Bus. & Prof. Code § 22442(c)*]. Moreover, an immigration consultant may not make such statements orally to a client [*Bus. & Prof. Code § 22442(g)*].

The face of the contract must contain a statement, in 10-point bold type, that the immigration consultant is not an attorney and may not perform legal services [*Bus. & Prof. Code § 22442(b)*; *see* [g], *below*]. This statement is in item (2) of the form under the heading "NOTICE" [*see* [2], *below*].

[e] Language and Translations

The contract must be in both English and the client's native language [Bus. & Prof. Code § 24442(d); *16 Cal. Code Reg. § 3840(a)*]. A written contract is void if it is does not comply with this requirement [*Bus. & Prof. Code § 22442(e)*]. The immigration consultant is responsible for translating the contract into the client's native language. This translation must appear on the reverse side of the document containing the English version of the contract [*16 Cal. Code Reg. § 3840(a)*].

An immigration consultant may not, with the intent to mislead, literally translate words and titles that imply that the consultant is an attorney, including, but not limited to, "notary public," "notary," "licensed," "attorney," or "lawyer" [*Bus. & Prof. Code § 22442.3(a)*].

[f] Rescission of Contract

A client has the right to rescind the contract within 72 hours of signing. This right must be conspicuously set forth in the written contract in both English and the client's language [*Bus. & Prof. Code § 22442(f)*]. This right is stated in Part III of the contract under the heading "CANCELLATION" [*see* [2], *below*].

[g] Prohibited Acts and Practices

The following acts by an immigration consultant constitute violations of the governing statutes:

- Giving legal advice [*Bus. & Prof. Code § 22441(d)*].

- Violating the notice, written disclosure, content, language, translation or rescission requirements of *Bus. & Prof. Code §§ 22442, 22442.2, 22442.3* [*see Bus. & Prof. Code § 22442(f)*; *see also* [c]-[f], *above*].

- Violating the bonding requirements of *Bus. & Prof. Code § 22443.1* [*see* [h], *below*].

- Failing to provide the required written contract [*see Bus. & Prof. Code § 22442(a), (d)*].

- Failing to provide copies of required forms and documents to clients, or to maintain records for three years from the date of last service to a client [*Bus. & Prof. Code § 22443(a), (b)*].

- Acting as an immigration consultant other than as provided in *Bus. & Prof. Code § 22440 et seq.*, unless authorized to practice law or authorized by federal law to represent clients before the Board of Immigration Appeals or the CIS [*Bus. & Prof. Code § 22440*].

- The consultant is prohibited from retaining the original documents of a client in his or her possession [*Bus. & Prof. Code § 22443(c)*].

- Making false or misleading statements to a client [*Bus. & Prof. Code § 22444(a)*].

- Making any guarantee or promise to a client, unless the guarantee or promise is in writing and has some basis in fact [*Bus. & Prof. Code § 22444(b)*].

- Making any statement that the immigration consultant can or will obtain any special favors from or has any special influence with the CIS or any other governmental agency, employee, or official, that may have a bearing on the client's immigration matter [*Bus. & Prof. Code § 22444(c)*].

- Charging the client a fee for referral of the client to another for services that the immigration consultant cannot or will not provide to the client. This prohibition must be set forth on a conspicuously displayed sign in the consultant's office [*Bus. & Prof. Code § 22444(d)*].

[h] Bonding and Disclosure Requirements

An immigration consultant must file a bond of $50,000, or a deposit in that amount, with the Secretary of State as a prerequisite to doing business [*Bus. & Prof. Code § 22443.1(a)*]. Employees of nonprofit, tax-exempt corporations are exempt from these requirements [*Bus. & Prof. Code § 22443.1(j)*; *see* [j], *below*].

An immigration consultant who is required to file a surety bond with the Secretary of State must also file a disclosure form [*Bus. & Prof. Code § 22443.1(c)*]. The disclosure form must contain all of the following information [*Bus. & Prof. Code § 22443.1(c)*]:

- The consultant's name, date of birth, residence address, business address, residence telephone number, and business telephone number.

- The name and address of the consultant's agent for service of process, if one is required to be or has been appointed.

- Whether the consultant has ever been convicted of a violation of *Bus. & Prof. Code § 22440 et seq.* (governing immigration consultants) or *Bus. & Prof. Code § 6126* (unlawful practice of law).

- Whether the consultant has ever been arrested or convicted of a crime.

- The name, business address, business telephone number, and agent for service of process of any corporation or partnership employing the consultant.

Along with the disclosure form, the consultant must also submit:

- A copy of current photo identification [Bus. & Prof. Code § 22443.1(g)(1)].

- A photo of the consultant that meets the requirements for U.S. passport photos [*see* Bus. & Prof. Code § 22443.1(g)(2)].

- The consultant's fingerprints and related information required by the Department of Justice to obtain information about any state or federal arrests or convictions [Bus. & Prof. Code § 22442.4(a)].

The consultant must also pass a background check by the Secretary of State [Bus. & Prof. Code § 22441.1(a); *see* Bus. & Prof. Code § 22441.1(b) (disqualifications)].

An immigration consultant must notify the Secretary of State in writing within 30 days of renewal of the surety bond or any change of name, address, telephone number, or agent for service of process [*Bus. & Prof. Code § 22443.1(d)*].

A person awarded damages against the consultant can recover those damages from the bond or deposit, which then must

be reinstated before the consultant conduct further business [*Bus. & Prof. Code § 22447(a)*; In an action brought by the Attorney General, a district attorney, or a city attorney [*see Bus. & Prof. Code § 22445(a)(1)*; *see also* [i], *below*], the court may order relief for the injured parties to be paid from the bond [*Bus. & Prof. Code § 22447(a)*].

[i] Criminal Penalties and Civil Remedies

Any violation of the statutes regulating immigration consultants [*Bus. & Prof. Code § 22440 et seq.*] is subject to a civil penalty to be assessed and collected in a civil action brought by any person injured by the violation, or in a civil action brought by the Attorney General, a district attorney, or a city attorney [*Bus. & Prof. Code § 22445(a)(1)*]. An action brought on behalf of the state does not preclude the injured party from also bringing an action [*Bus. & Prof. Code § 22445(a)(1)*]. The Attorney General, a district attorney, or a city attorney that brings a civil action for a violation of *Bus. & Prof. Code § 22440 et seq.* must also seek injunctive relief, restitution, or other equitable relief [*Bus. & Prof. Code § 22445(a)(3)*; *Bus. & Prof. Code § 22446.5(c)*]. In addition, a violation is a misdemeanor [*Bus. & Prof. Code § 22445(b)*]. A second or subsequent violation of *Bus. & Prof. Code §§ 22442.2* or *22442.3* constitutes a misdemeanor [*Bus. & Prof. Code § 22445(c)*; *see Bus. & Prof. Code § 22445(a), (b)* (penalties)]. A second or subsequent violation of any other provision of the statutes regulating immigration consultants [*Bus. & Prof. Code § 22440 et seq.*] is a felony [*Bus. & Prof. Code § 22445(c)*].

Civil actions are also available for violations, and payment of restitution to client takes precedence over payment of a fine [*Bus. & Prof. Code § 22445(b)*]. Any person aggrieved by an immigration consultant's violation of *Bus. & Prof. Code § 22440 et seq.* may bring a civil action for an injunction, damages, or both. A prevailing plaintiff is entitled to actual damages plus an amount equal to the greater of triple actual damages or $1,000 per violation, in addition to reasonable attorneys' fees and costs [*Bus. & Prof. Code § 22446.5(a)*]. Anyone claiming a violation by a consultant may bring a civil action for an injunction on behalf of the general public and, if successful, is entitled to reasonable attorneys' fees and costs [*Bus. & Prof. Code § 22446.5(b)*]. In addition, the Attorney General, district attorney, or city attorney may bring a civil action for injunctive relief, restitution, or other equitable relief against immigration consultants for a violation of *Bus. & Prof. Code § 22440 et seq.* [*Bus. & Prof. Code § 22446.5(c)*].

[j] Exception for Nonprofit Tax-Exempt Corporations

The requirement of a written contract [*see* [c], *above*], content [*see* [d], *above*], language translation [*see* [e], *above*], and rescission [*see* [f], *above*] requirements of *Bus. & Prof. Code § 22442* do not apply to employees of nonprofit tax-exempt corporations who help clients complete application forms in an immigration matter [*Bus. & Prof. Code § 22442(h)*]. This exception applies whether or not the corporation charges a fee, as long as that fee, which may include reasonable costs, is consistent with the fee authorized by the Board of Immigration Appeals for qualified designated entities [*Bus. & Prof. Code § 22442(h)*; *see 8 C.F.R. § 292.2*].

[k] Statement of Account

An immigration consultant must provide a signed receipt to the client for each payment made by the client. The receipt must be typed or computer generated on the immigration consultant's letterhead [*Bus. & Prof. Code § 22442.1(a)*]. A statement of accounting for services rendered and payments made must be provided to the client every two months, must be typed or computer generated on the consultant's letterhead, and must display the individual charges and total charges for services, and the client's offsetting payments. The immigration consultant must provide the client with a written translation of the statement in the client's native language [*Bus. & Prof. Code § 22442.1(b)*].

[2] FORM

Immigration Consultant's Contract for Services

IMMIGRATION CONSULTANT

CONTRACT FOR SERVICES

This is a contract between _____, called "Immigration Consultant," and _____, called "client."

NOTICE

1. It is important that the client read this entire contract before signing it.

[*Print following paragraph in at least 10-point bold type (16 Cal. Code Reg. § 3840)*]

2. This Immigration Consultant is not an attorney and cannot give legal advice or provide legal services in representing you in this immigration matter.

3. It is a violation of California Law for the Immigration Consultant to keep any of your original documents because you have failed to pay fees or expenses to the Immigration Consultant.

I. SERVICES

The Immigration consultant will provide the following services: (List all services for which the client is being charged.) [*In description of services below, include (1) listing of documents to be prepared by immigration consultant, and explanation of the purpose and process of each document; and (2) statement of purpose for which immigration consultant has been hired and actions to be taken by consultant regarding each document, including agency and office where each document will be filed and approximate processing times according to current published agency guidelines (see [1][d], above).*]

A. _____
B. _____
C. _____
D. _____

You are paying only for those services listed above and the Immigration Consultant makes no promises to provide any other services. The Immigration Consultant does not have special influence and cannot obtain special favors from the United States Citizenship and Immigration Services. It is a violation of California law for the Immigration Consultant to claim special influence or to make false or misleading statements to the client.

II. FEES AND EXPENSES

The client agrees to pay the Immigration Consultant the following fees and expenses:

[*EITHER:*]

A flat fee in the total amount of $_____ for all services and expenses to be paid _____ [*state terms of payment*]_____.

[*OR*]

An hourly rate of $_____ per hour, not to exceed a total of $_____ for all services and expenses. When an hourly fee is charged, the Immigration Consultant agrees to provide a statement itemizing all services rendered and expenses incurred. This statement will be provided to the client at any time a payment is due, and at least every six months, whether or not a payment is due.

[*OR*]

A contingency fee in the amount of $_____ for all services and expenses. No part of this fee shall be paid until the Immigration Consultant achieves the following result for the client: _____ [*state the specific immigration status or other benefit to be achieved for the client*].

[*Continue with the following:*]

III. CANCELLATION

This contract may be canceled by the client, in writing, at any time.

A. If the contract is canceled within 72 hours of its signing, the client is not required to pay any fees or expenses to the Immigration Consultant and is entitled to a refund of any fees or expenses previously paid.

B. If the contract is canceled more than 72 hours after being signed, the client shall pay the full contract fee and expenses if the contract was substantially completed or fully performed, or the reasonable value of the services provided and expenses incurred, whichever is less.

IV. REPORTING COMPLAINTS

You may report complaints about this immigration consultant to the California Office of Immigrant Assistance of the Department of Justice. The Office's web site is: http://ag.ca.gov/immigrant/, and its telephone number is 1-800-952-5225.

You may report complaints about this immigration consultant to the California State Bar. The State Bar's web site is: http://www.calbar.ca.gov/, and its telephone number for complaints against attorneys is: 1-800-843-9053.

V. DAMAGES, ATTORNEYS' FEES, AND COSTS

In the event of a suit for damages arising from this contract or a suit to enforce any of its provisions, the court may award reasonable attorneys' fees and costs of suit to the prevailing party.

Executed on _____[*date*].

IMMIGRATION CONSULTANT
_____ [*signature of immigration consultant*]

[*typed name*]
_____ [*street address*]
_____ [*city, state*]
_____ [*telephone number*]
CLIENT
_____ [*signature of client*]
[*typed name*]
_____ [*street address*]
_____ [*city, state*]
_____ [*telephone number*]

(BEFORE THIS CONTRACT IS VALID AND BINDING A COPY FULLY EXECUTED BY ALL PARTIES MUST BE GIVEN TO THE CLIENT.)

ALLEGED VIOLATIONS OF THE LAW GOVERNING THIS CONTRACT MAY BE REPORTED TO THE LOCAL DISTRICT ATTORNEY

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewImmigration LawGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86A AGREEMENTS FOR LEGAL SERVICES

28-86A California Legal Forms--Transaction Guide 86A.syn

§ 86A.syn Synopsis to Chapter 86A: AGREEMENTS FOR LEGAL SERVICES

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[2] California Rules of Professional Conduct

[3] State Bar Rules

§§ 86A.02-86A.04 [Reserved]

§ 86A.05 Law Reviews and Periodicals

§ 86A.06 Annotations

§ 86A.07 Text References

§§ 86A.08-86A.09 [Reserved]

§ 86A.10 Regulation of Legal Profession

§ 86A.11 Formation of Attorney-Client Relationship

[1] Agreement Forms Basis of Relationship

[2] When Written Agreement Is Required

[a] Contents of Agreement; Execution Requirements

[b] Billing Requirements

[c] Exceptions to Writing and Content Requirements

[d] Effect of Noncompliance

[3] Retainer Fee Agreements

[4] Contingency Fee Contracts

[a] "Contingency Fee Contract" Defined

[b] Required Contents; Execution Requirements

[c] Exceptions to Writing and Content Requirements

[d] Limitations on Enforceability of Contingency Fee Contracts

[e] Effect of Noncompliance

[5] Other Types of Retention Agreements

[6] Translation of Contract

[7] Fee Agreement Is Confidential

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[1] Attorney-Client Relationship Likened to That of Principal and Agent

[2] Attorney as Fiduciary

[3] Prohibition Against Representing Conflicting Interests

[a] Disclosure of Existence of Adverse Interest

[b] Obtaining Informed Consent to Representation

[4] Attorney's Duty to Communicate With Client

§ 86A.13 Scope of Attorney's Authority

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[2] Impairment of Client's Rights or Cause of Action

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§ 86A.16 Fees

[1] Unconscionable Fees Prohibited

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[1] Use of Trust Accounts

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[b] Rules of Professional Conduct

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[4] Attorney-Client Relationship Otherwise Terminates When Services Completed

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[b] Advantages of Mediation

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[3] Arbitration

[a] State Bar Arbitration Program

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§§ 86A.20-86A.99 [Reserved]

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§ 86A.200 Contingent Fee Agreement for Damage Claim--Letter Form

[1] Comment

[a] Use of Form

[b] Statutory Requirements

[c] Lien Against Recovery

[d] Translation Requirements

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[2] FORM

Contingent Fee Agreement for Damage Claim--Letter Form

§ 86A.201 Contingent Fee Agreement for Damage Claim--Contract Form

[1] Comment

[a] Use of Form

[b] Arbitration Provision

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[2] FORM

Contingent Fee Agreement for Damage Claim--Contract Form

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[a] Use of Form

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[2] FORM

Contingent Fee Agreement for Malpractice Action Against Health Care Provider--Contract Form

§ 86A.203 Authorization for Release of Medical Records

[1] Comment

[a] Use of Form

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[2] FORM

Authorization for Release of Medical Records

§ 86A.204 Vehicle Accident Report Authorization

[1] Comment--Use of Form

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Vehicle Accident Report Authorization

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Estate Planning Letter Explaining Dual Representation of Spouses

§ 86A.212 Contingent Fee Agreement Regarding Will Contest--Letter Form

[1] Comment

[a] Use of Form

[b] Required Contents

[c] Estate's Liability for Extraordinary Attorneys' Fees

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[2] FORM

Contingent Fee Agreement Regarding Will Contest--Letter Form

§ 86A.213 Contingent Fee Agreement Regarding Claim That Some or All of Deceased Spouse's Estate is Community Property--Letter Form

[1] Comment

[a] Use of Form

[b] Testamentary Disposition of Community Property

[c] Execution Requirements

[2] FORM

Contingent Fee Agreement Regarding Claim That Some or All of Deceased Spouse's Estate is Community Property--Letter Form

§ 86A.214 Contingent Fee Agreement Regarding Client's Claim as Heir of Intestate Decedent--Letter Form

[1] Comment

[a] Use of Form

[b] Execution Requirements

[2] FORM

Contingent Fee Agreement Regarding Client's Claim as Heir of Intestate Decedent--Letter Form

§§ 86A.215-86A.219 [Reserved]

§ 86A.220 Contingent Fee Agreement Regarding Condemnation Proceeding--Contract Form

[1] Comment--Use of Form

[2] FORM

Contingent Fee Agreement Regarding Condemnation Proceeding--Contract Form

§ 86A.221 Contingent Fee Agreement for Collections--Letter Form

[1] Comment

[a] Use of Form

[b] Other Fee Agreements for Collection Cases

[c] Regulation of Attorney Acting as Debt Collector

[2] FORM

Contingent Fee Agreement for Collections--Letter Form

§ 86A.222 Contingent Fee Agreement for Employment Discrimination Claim--Letter Form

[1] Comment--Use of Form

[2] FORM

Contingent Fee Agreement for Employment Discrimination Claim--Letter Form

§§ 86A.223-86A.229 [Reserved]

§ 86A.230 Retainer Agreement for Regular Legal Services for a Business--Letter Form

[1] Comment

[a] Use of Form

[b] Retainer Agreements

[2] FORM

Retainer Agreement for Regular Legal Services for a Business--Letter Form

§ 86A.231 Agreement for Formation of Corporation--Letter Form

[1] Comment--Use of Form

[2] FORM

Agreement for Formation of Corporation--Letter Form

§ 86A.232 Retainer Agreement for Representation of Client in Action for Marital Dissolution--Letter Form

[1] Comment

[a] Use of Form

[b] Contracts for Representing Parties to Marital Dissolutions

[2] FORM

Retainer Agreement for Representation of Client in Action for Marital Dissolution--Letter Form

§ 86A.233 Retainer Agreement for Representation of Client in Federal Tax Matters--Letter Form

[1] Comment--Use of Form

[2] FORM

Retainer Agreement for Representation of Client in Federal Tax Matters--Letter Form

§ 86A.234 Hourly Fee Agreement for Representation--Contract Form

[1] Comment

[a] Use of Form

[b] Advantages of Hourly Billing

[c] Writing and Content Requirements

[2] FORM

Hourly Fee Agreement for Representation--Contract Form

§§ 86A.235-86A.239 [Reserved]

§ 86A.240 Provision for Interest on Overdue Attorneys' Fees

[1] Comment--Use of Form

[2] FORM

Provision for Interest on Overdue Attorneys' Fees

§ 86A.241 Provision Stating That Hourly Fee Is Reasonable

[1] Comment--Use of Form

[2] FORM

Provision Stating That Hourly Fee is Reasonable

§ 86A.242 Provision Requiring New Agreement for Appellate Services

[1] Comment--Use of Form

[2] FORM

Provision Requiring New Agreement for Appellate Services

§ 86A.243 Provision Permitting Withdrawal of Counsel

[1] Comment--Use of Form

[2] FORM

Provision Permitting Withdrawal of Counsel

§ 86A.244 Provision Requiring Client to Keep Counsel Informed as to Contact Information

[1] Comment--Use of Form

[2] FORM

Provision Requiring Client to Keep Counsel Informed as to Contact Information

§ 86A.245 Mediation Provision

[1] Comment--Use of Form

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Mediation Provision

§ 86A.246 Cover Letter for Legal Services Agreement

[1] Comment--Use of Form

[2] FORM

Cover Letter for Legal Services Agreement

§ 86A.247 Contract Addendum Explaining Joint Representation

[1] Comment

[a] Use of Form

[b] Disclosures Regarding Communications and Confidential Information

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[d] Withdrawal of Counsel

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[2] FORM

Contract Addendum Explaining Joint Representation

§ 86A.248 Letter Demanding Fees and/or Costs and Advising Client Regarding Availability of Arbitration and/or Mediation

[1] Comment

[a] Use of Form

[b] Arbitration of Fee and/or Cost Disputes

[c] Practical Considerations

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Letter Demanding Fees and/or Costs and Advising Client Regarding Availability of Arbitration and/or Mediation

§ 86A.249 Letter Declining Employment

[1] Comment--Use of Form

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Letter Declining Employment

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DIVISION VI: PERFORMANCE OF SERVICES
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28-86A California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers agreements for professional services between attorneys and clients. It focuses on the creation and termination of the attorney-client relationship. The chapter discusses the duration of that relationship in the context of limits on the attorney's authority to act for his or her client. The chapter briefly covers the control and regulation of the legal profession by the state bar, legislature, and judiciary, and discusses the ethical considerations attending the attorney-client relationship.

The Transaction Guide contains checklists of substantive considerations and procedures to follow in accepting employment and drafting agreements for legal services. The forms include complete representative agreements for a variety of legal services, including retention and contingency fee agreements. They include both informal letters confirming retention and formal contracts.

This chapter does not cover admission to practice, advertising and solicitation, how to perform legal services, the attorney-client privilege, attorney-client relationships arising from court appointments, the practice of criminal law, the attorney's relationship to third parties, conduct in court, nondiscrimination requirements, or the operation and management of a law office.

For a discussion of the procedures involved in forming a law corporation, see Ch. 12A, *Professional Corporations* . For an analysis of the steps involved in forming a law partnership, see Ch. 15, *General Partnerships* . To form a limited liability law partnership, see Ch. 16C, *Limited liability Partnerships*. Agreements for professional services other than legal services are covered in Ch. 86, *Agreements for Professional Services* . For further discussion of conflicts of interest, see Ch. 1A, *Role of Counsel in Starting a New Business* .

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PART I. RESEARCH GUIDE
A. Primary Sources

28-86A California Legal Forms--Transaction Guide § 86A.01

§ 86A.01 California Sources

[1] Statutes

State Bar Act. *Bus. & Prof. Code § 6000*.

Members of State Bar. *Bus. & Prof. Code §§ 6002-6005*.

Duties of attorney. *Bus. & Prof. Code § 6068*.

Disclosure of financial records to State Bar. *Bus. & Prof. Code § 6069*.

Disciplinary Authority of Board of Governors. *Bus. & Prof. Code § 6075 et seq.*

Requirements applicable to attorneys and their employees assisting in collection of consumer debts. *Bus. & Prof. Code § 6077.5*.

Disciplinary authority of the courts. *Bus. & Prof. Code § 6100 et seq.*

Attorney's duty to promptly communicate written settlement offer to client. *Bus. & Prof. Code § 6103.5*.

Violation of Probate Code provisions relating to compensation and donative transfers. *Bus. & Prof. Code § 6103.6*.

Acts of moral turpitude, dishonesty, or corruption. *Bus. & Prof. Code § 6106*.

Violation of Civil Code provisions relating to performing residential mortgage loan modification or loan forbearance services. *Bus. & Prof. Code § 6106.3*

Proposal of professional conduct rule governing sexual relations between attorneys and clients. *Bus. & Prof. Code §*

6106.8.

Imposition of discipline for sexual relationship with client. *Bus. & Prof. Code § 6106.9*.

Unlawful practice of law. *Bus. & Prof. Code § 6125 et seq.*

Bar fees. *Bus. & Prof. Code § 6140 et seq.*

Fee agreements. *Bus. & Prof. Code § 6146 et seq.*

Limitations; periodic payments; definitions. *Bus. & Prof. Code § 6146*.

Contingency fee contract--contents; effect of noncompliance; application to contracts for recovery of workers' compensation benefits. *Bus. & Prof. Code § 6147*.

Contingency fee contracts; recovery of claims between merchants. *Bus. & Prof. Code § 6147.5*.

Written fee contract--contents; effect of noncompliance. *Bus. & Prof. Code § 6148*.

Written fee contract--confidential communication. *Bus. & Prof. Code § 6149*.

Insurer notice to claimant of settlement payment delivered to claimant's attorney. *Bus. & Prof. Code § 6149.5*.

Unlawful solicitation. *Bus. & Prof. Code § 6150 et seq.*

Requirements for lawyer referral services. *Bus. & Prof. Code § 6155*.

Legal advertising. *Bus. & Prof. Code § 6157 et seq.*

Law corporations. *Bus. & Prof. Code § 6160 et seq.*

Cessation of law practice. *Bus. & Prof. Code § 6180 et seq.*

Arbitration of attorneys' fees. *Bus. & Prof. Code § 6200 et seq.*

Spanish language requirements for contracts. *Civ. Code § 1632*.

Statute of limitations: actions against attorney for wrongful act or omission, other than fraud. *Code Civ. Proc. § 340.6*.

[2] California Rules of Professional Conduct

Rules of professional conduct. Cal. Rules *Prof. Cond., Rule 1-100*.

Failing to act competently. Cal. Rules *Prof. Cond., Rule 3-110*.

Avoiding adverse interests. Cal. Rules *Prof. Cond., Rule 3-300*.

Avoiding representation of adverse interests. Cal. Rules *Prof. Cond., Rule 3-310*.

Communication. Cal. Rules *Prof. Cond., Rule 3-500*.

Organization as client. Cal. Rules *Prof. Cond., Rule 3-600*.

Fees for legal services. Cal. Rules *Prof. Cond., Rule 4-200*.

[3] State Bar Rules

Certificate of registration for registered LLP providing legal services. State Bar LLP Rules and Regulations, Rule 1 et seq.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLegal EthicsClient RelationsGeneral Overview

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[Reserved]

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§ 86A.05 Law Reviews and Periodicals

Note, *2002 Ethics Roundup: Issues of Loyalty and Confidentiality Continue to Dominate Developments in Legal Ethics, 26 L. A. Law. 31 (2003).*

Comment, *Seeking Optimal Dispute Resolution Clauses in High Stakes Employment Contracts, 23 Berkeley J. Emp. & Lab. L. 107 (2002).*

Comment, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment, 90 Cal. L. Rev. 1203 (2002).*

Comment, *Legal Ethics: The Evolution of the Rules of Professional Conduct*, 25 L. A. Law. 61 (2002).

Comment, *Accepting Percentage of Prospective Profits as Attorneys Fees for Preparing and Prosecuting Patent Application, 24 L. A. Law. 47 (2002).*

Comment, *Stock-based Compensation for Legal Services: Resurrecting the Ethical Dilemma, 42 Santa Clara L. Rev. 1227 (2002).*

Steele, *Attorney Internet Ethics, 22 Cal. Law. 51 (2002).*

Note, *Fee-Splitting Headaches: The Courts Require Absolute Compliance with Rule 2-200 to Enforce Fee-sharing Agreements, 24 L. A. Law. 26 (2001).*

Note, *Attorney Conduct: New Statutes Govern Attorney Conduct, 27 San Francisco Att'y 11 (2001).*

Poll, *Making the Decision to Raise Fees and Billing Rates, 24 L. A. Law. 14 (2001).*

Comment, *Bonus Points: Bonus Provisions Agreed to by Attorneys and Their Clients Will Likely Be Enforceable If the Agreement Clearly Delineates an "Extraordinarily Favorable Result," 23 L. A. Law. 41 (2000).*

Note, *Part One: The Lawyers: Sex and the Divorce Lawyer, 11 J. Contemp. Legal Issues 24 (2000).*

Note, *Review of Selected 1998 California Legislation: Business Associations and Professions: Exception for Binding Arbitration Created for Out-of-State Counsel, 30 McGeorge L. Rev. 405 (1999).*

Note, *Attorneys Who Enter Into Business Transactions With Their Clients: A Presumption of Undue Influence, Malpractice, and Impropriety, 1 J. Legal Advoc. & Prac. 7 (1999).*

Article, *When Attorneys May Be Liable to Other Attorneys--Possible Theories of Liability, 23 J. Legal Prof. 373 (1998).*

Lewis & Peck, *Earning and Keeping Your Fees: Fee Agreements are the Second Most Important Document of Any Legal Practice*, Cal. State Bar J. (August 1998).

Article, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution, 85 Cal. L. Rev. 577 (1997).*

Minan & Lawrence, *The Personal Liability of an Attorney for Expert Witness Fees in California: Understanding Contract Principles and Agency Theory, 34 San Diego L. Rev. 541 (1997).*

Gregg, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity*, 43 UCLA Rev. 1321 (1996).

Note, *The Illusive Consistency: a Case for Adopting the Aba Standards for Imposing Lawyer Sanctions in In re Martin, 40 S.D. L. Rev. 300 (1995).*

Pansky, *Client Trust Account Procedures, 15 L. A. Law. 32 (Dec. 1992).*

Zitrin, *Drafting Airtight Fee Agreements, 12 Cal. Law. 67 (Oct. 1992).*

Note, *Lawyer Discipline, 43 Stan. L. Rev. 907 (1991).*

Note, *Liability of Attorneys, Accountants, Appraisers, and Other Independent Contractors Under the Financial Institutions Return, Recovery, and Enforcement Act of 1989, 42 Hastings L.J. 249 (Nov. 1990).*

Rensberger, *Legal Specialists: What Standard of Care*, 26 Trial 24 (May 1990).

Cramton, *The Lawyer's Professional Independence*, 25 Trial 84 (Aug. 1989).

Comment, *Attorney Discipline and the California Supreme Court: Transfer of Direct Review to the Courts of Appeal, 71 Cal. L. Rev. 252 (1984).*

Braun, *Gibson, Dunn, & Crutcher v. Superior Court Revisited: A Critical Analysis and Proposal Respecting an Attorney Malpractice Defendant's Right to Cross Complain for Comparative Indemnity Against the Former Client's Present Attorney, 22 Santa Clara L. Rev. 1 (1982).*

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 86A.06 Annotations

Annot., Disciplinary Action Against Attorney Taking Loan From Client, 9 A.L.R.5th 193 (1996) .

Annot., Validity and Construction of Procedures to Temporarily Suspend Attorney From Practice, or Place Attorney on Inactive Status, Pending Investigation of, and Action Upon, Disciplinary Charges, 80 A.L.R.4th 136 (1990) .

Annot., Disqualification of Law Firm from *Representing Party in Federal Civil Suit Involving Former Client of That Firm, 56 A.L.R. Fed. 189 (1982)* .

Annot., Excessive Fee: Attorney's Charging Excessive Fee as Ground for Disciplinary Action, 11 A.L.R.4th 342 (1981) .

Annot., Validity, Construction, and Effect of Contract Providing for Contingent Fee to Defendant's Attorney, 9 A.L.R.4th 191 (1981) .

Annot., Withdrawal as Counsel: Legal Malpractice in Connection With Attorney's Withdrawal as Counsel, 6 A.L.R.4th 342 (1981) .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 86A.07 Text References

California Forms of Pleading and Practice (Matthew Bender).

Ch. 70, *Attorney Admission* .

Ch. 71, *Attorney Discipline* .

Ch. 72, *Attorney Practice and Ethics* .

Ch. 76, *Attorney Professional Liability* .

California Legal Forms (Matthew Bender).

Ch. 12A, *Professional Corporations* .

Ch. 15, *General Partnerships* .

Ch. 16C, *Limited Liability Partnerships* .

Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

California Points and Authorities (Matthew Bender).

Ch. 24, *Attorneys at Law: Substitution, Withdrawal, Disqualification, and Authority to Appear* .

Ch. 24A, *Attorneys at Law: Malpractice*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLegal EthicsClient RelationsGeneral OverviewTortsMalpractice & Professional LiabilityAttorneysTortsVicarious LiabilityPartnersGeneral Overview

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§ 86A.10 Regulation of Legal Profession

The State Bar Act [*Bus. & Prof. Code § 6000 et seq.*] governs the practice of law. The Act creates the State Bar of California [*see Bus. & Prof. Code § 6001*], which consists of all persons admitted and licensed to practice law in California, except for judges of courts of record while they are in office [*Bus. & Prof. Code § 6002*]. The Bar is controlled and managed by members of the legal profession and is an administrative arm of the California Supreme Court for purposes of assisting in matters of admission and discipline of attorneys [*see Chronicle Pub. Co. v. Superior Court (1960) 54 Cal. 2d 548, 566, 7 Cal. Rptr. 109, 354 P.2d 637]* .

The State Bar Act also establishes the Board of Governors of the State Bar [*see Bus. & Prof. Code § 6010*]. The Board of Governors is elected by active bar members [*see Bus. & Prof. Code § 6018*] and is primarily responsible for promulgating rules and regulations necessary or expedient for carrying out the purposes of the Act [*see Bus. & Prof. Code §§ 6010, 6025*]. The Board is authorized to implement and enforce those regulations to the extent they concern the Rules of Professional Conduct and attendant disciplinary matters [*see Bus. & Prof. Code §§ 6076, 6077*]. However, in all other respects the Board functions in a strictly advisory capacity [*see Bus. & Prof. Code §§ 6064, 6078*]. The Board's decisions regarding certification for admission, reproval, reinstatement, suspension, or disbarment are subject to review by the California Supreme Court, or by a California Court of Appeal in accordance with the procedure prescribed by the California Supreme Court [*see Bus. & Prof. Code §§ 6066, 6082, 6083*].

The right to practice law involves the exercise of a personal privilege similar in nature to a public trust. The granting of this privilege is determined by the judiciary rather than the legislature. However, the courts follow rules and regulations prescribed by the legislature in making that determination [*see Bus. & Prof. Code §§ 6060-6069*]. These legislative rules and regulations are minimum standards, and the courts may demand more than the legislature for admission to practice [*see In re Lavine (1935) 2 Cal. 2d 324, 328, 41 P.2d 161]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsProfessional ConductGeneral OverviewTortsMalpractice & Professional LiabilityAttorneys

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§ 86A.11 Formation of Attorney-Client Relationship

[1] Agreement Forms Basis of Relationship

Attorney-client relationships arise from express or implied contracts between attorneys and persons who retain them to perform legal services [*see Neblett v. Getty (1937) 20 Cal. App. 2d 65, 68-69, 66 P.2d 473]* . An attorney-client relationship may exist even though the parties do not reduce their agreement to a formal writing. The existence of an attorney-client relationship is a question of fact to be determined by an analysis of the parties' conduct [*see Quaglino v. Quaglino (1979) 88 Cal. App. 3d 542, 547-548, 152 Cal. Rptr. 47]* .

Although a contract implied by the parties' conduct can establish an attorney-client relationship, it is always preferable from both a business and professional standpoint to document all agreements for legal services in writing. In addition, a written agreement is required by law in many cases [*see Bus. & Prof. Code §§ 6147, 6148*; *see also* [2], [4], *below*].

Before accepting employment, the attorney should arrive at an understanding with the client regarding the precise scope of that employment and should clearly explain the basis of all legal fees. As soon as possible after accepting employment, the attorney should confirm these matters in writing. The writing may be a formal contract or an informal letter. Legal services ordinarily are provided on flat fee or hourly rate bases [*see* [2], *below*], under retainer arrangements [*see* [3], *below*], and under contingency fee contracts [*see* [4], *below*].

[2] When Written Agreement Is Required

[a] Contents of Agreement; Execution Requirements

Contingency fee contracts are subject to special writing and content requirements [*Bus. & Prof. Code § 6147*; *see* [4], *below*]. All other agreements for attorneys' fees must be in writing if it is reasonably foreseeable that the total expense to the client, including attorneys' fees, will exceed $1,000 [*Bus. & Prof. Code § 6148(a)*; *see Bus. & Prof. Code § 6148(e), (f)* (rule applicable to fee agreements executed after January 1, 2000)]. Written contracts must contain all of the following [*Bus. & Prof. Code § 6148(a)*]:

- The basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and

other standard rates, fees, and charges applicable to the case.

- The general nature of the legal services to be provided to the client.

- The respective responsibilities of the attorney and the client as to the performance of the contract.

When the parties enter into the contract, the attorney must provide a duplicate copy of the contract signed by both the attorney and the client, or the client's guardian or representative, to the client or to the client's guardian or representative [*Bus. & Prof. Code § 6148(a)*].

PRACTICE TIP:

Because an attorney-client relationship may be created informally or by an implied contract, prudence requires that counsel be aware of potential liability arising from casual conversations. Even when a written agreement is not required by statute, counsel should consider memorializing the representation in writing. If an attorney believes that he or she may have given a potential client the impression that counsel might take the case, counsel should draft a letter clarifying that he or she has *not* agreed to represent the potential client.

[b] Billing Requirements

All bills sent by an attorney to a client must clearly state the basis of the billing. Bills for the attorneys' fees portion of the bill must include the amount, rate, basis for calculation, or other method of determination of the attorneys' fees and costs. Bills for costs and expenses portion of the bill must clearly identify the costs and expenses incurred and the amount of the costs and expenses [*Bus. & Prof. Code § 6148(b)*].

On request by the client, the attorney must provide a bill to the client no later than 10 days following the request unless the attorney has provided a bill to the client within the preceding 31 days. In the latter situation, the attorney may provide a bill to the client within 31 days after the most recent bill was provided. The client may make billing requests at intervals of no less than 30 days following the initial request. An attorney responding to a client's request for billing information, the attorney may use billing data that is currently effective on the date of the request. Fees or costs that cannot be accurately determined must be described and estimated to the client [*Bus. & Prof. Code § 6148(b)*].

[c] Exceptions to Writing and Content Requirements

The writing and content requirements discussed in [a] and [b], *above*, do not apply in the following situations [*Bus. & Prof. Code § 6148(d)*]:

- Services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client, or when a writing is otherwise impractical.

- A fee arrangement implied by the fact that the attorney's services are of the same general kind as previously rendered to and paid for by the client.

- If the client knowingly states in writing, after full disclosure of the provisions of *Bus. & Prof. Code § 6148*, that a writing concerning fees is not required.

- If the client is a corporation.

These writing and content requirements also are inapplicable to contingency fee contracts for the recovery of claims between merchants [*see Com. Code § 2104*] arising from the sale or lease of goods or services rendered, or money

loaned for use, in the conduct of a business or profession if the merchant contracting for legal services employs 10 or more individuals [*Bus. & Prof. Code § 6147.5(a)*].

PRACTICE TIP:

Even when not required, counsel is advised to send an engagement letter limiting the scope of the representation to the obligations intended to be assumed. The letter should state that counsel makes no guarantees or representations regarding the outcome of the case. Further, it is advisable to state clearly the obligations of the parties under the agreement, including a clause requiring the client's cooperation.

[d] Effect of Noncompliance

The failure to comply with any of the above writing or execution requirements set forth in [a] and [b], *above*, renders the fee agreement voidable at the option of the client. However, if the agreement is voided, the attorney is still entitled to collect a reasonable fee for his or her services [*Bus. & Prof. Code § 6148(c)*].

[3] Retainer Fee Agreements

A "retainer fee arrangement" exists when a client pays an attorney a specific sum of money to secure that attorney's availability over a given period of time. The attorney earns the retainer as soon as it is paid, since he or she is entitled to the money regardless of whether or not any legal services are actually performed for the client [*Baranowski v. State Bar (1979) 24 Cal. 3d 153, 164 n.4, 154 Cal. Rptr. 752, 593 P.2d 613]* . Retainer fee arrangements are commonly used by attorneys with tax and/or business planning practices whose clients often call with brief questions that are easily handled over the telephone and for which the attorneys prefer not to bill directly.

Retainer fee agreements are distinct from advance fee payments. An "advance fee payment" is usually made to cover costs, expenses, or services in connection with a particular case or undertaking (such as the incorporation of a business). The money advanced under this type of arrangement is not earned until the legal service involved is actually performed. As a matter of practice, an attorney must deposit an advance fee payment in an interest bearing trust account [*see Cal. Rules Prof. Conduct, Rule 4-100(A)*; *see also Baranowski v. State Bar (1979) 24 Cal. 3d 153, 159, 154 Cal. Rptr. 752, 593 P.2d 613]* .

[4] Contingency Fee Contracts

[a] "Contingency Fee Contract" Defined

A "contingency fee contract" is an agreement for legal services under which the attorney is paid only if he or she attains a specified result for the client (such as securing a money judgment in the trial of a personal injury action). A contingent fee is generally paid out of the client's recovery in the action for which the attorney was retained. Contingency fee contracts are most frequently used by plaintiffs' attorneys who are able to analyze prospective clients' cases and evaluate the amount of work that will be involved, as well as the likelihood and extent of eventual recovery.

[b] Required Contents; Execution Requirements

All contingency fee contracts, other than those for the recovery of workers compensation benefits and the recovery of claims between merchants [*see Bus. & Prof. Code § 6147.5(a)*], must be in writing and contain the following [*Bus. & Prof. Code § 6147(a), (c)*; *see Bus. & Prof. Code § 6147(d)* (effective January 1, 2000)]:

- The contingency fee rate on which the parties agreed.

- An explanation of the manner in which costs and disbursements incurred in prosecuting or settling the claim will affect the contingency fee and the client's recovery.

- A statement to what extent, if any, the client may be required to compensate the attorney for related matters arising out of their relationship but not covered by the contingency fee contract. This statement may include any amounts collected for the plaintiff by the attorney.

- A statement that the fee is negotiable and not set by law, unless the action is for malpractice against a health care provider [*see Bus. & Prof. Code § 6146* (limitations on fees)].

- A statement that the rates set forth in *Bus. & Prof. Code § 6146* are the maximum limits for the contingency fee contract and that the parties may negotiate a lower rate if the action is for malpractice against a health care provider [*see § 86A.202[2]*].

An attorney who contracts to represent a client on a contingency fee basis must provide, at the time the contract is entered into, a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative [*Bus. & Prof. Code § 6147(a)*].

[c] Exceptions to Writing and Content Requirements

The writing and content requirements discussed in this section do not apply to contingency fee contracts for the recovery of workers' compensation benefits [*Bus. & Prof. Code § 6147(c)*].

Further, these writing and content requirements do not apply to contingency fee contracts for the recovery of claims between merchants [*see Com. Code § 2104*] arising from the sale or lease of goods or services rendered, or money loaned for use, in the conduct of a business or profession if the merchant contracting for legal services employs 10 or more individuals [*Bus. & Prof. Code § 6147.5(a)*]. When no written contract for legal services exists in this context, statutory ceilings limit the amount of contingency fees that may be contracted for and collected [*Bus. & Prof. Code § 6147.5(b)*].

[d] Limitations on Enforceability of Contingency Fee Contracts

Courts will not enforce an unreasonable contingency fee contract. The reasonableness of a contingent fee is determined in light of circumstances as they appeared to the parties at the time the contract was executed [*Setzer v. Robinson (1962) 57 Cal. 2d 213, 218, 18 Cal. Rptr. 524, 368 P.2d 124]* . A 35-percent contingent fee ordinarily is considered reasonable, but a 70-percent contingent fee is excessive and a contract providing for a fee of that size will not be enforced [*see Jackson v. Campbell (1932) 215 Cal. 103, 106, 8 P.2d 845]* .

Certain statutory and public policy restrictions apply to contingency fee contracts and may affect their enforceability. For example, a contingency fee contract between an attorney and the petitioner in a marital dissolution proceeding is generally void as against the public policy favoring the preservation of marriages [*see Coons v. Kary (1968) 263 Cal. App. 2d 650, 652-653, 69 Cal. Rptr. 712]* . However, a contingency fee contract between an attorney and a respondent may be enforceable if it was executed after the dissolution action was instituted and an analysis of the circumstances (such as the existence of any possibility of a reconciliation) indicates that upholding the contract would not frustrate applicable public policy [*see Krieger v. Bulpitt (1953) 40 Cal. 2d 97, 100-101, 251 P.2d 673]* .

A provision in a contingency fee agreement barring the client from settling the case without the attorney's consent probably is void as against public policy. A lawsuit belongs to the client, not the attorney, and the client therefore has the right to discharge it at will. In an early case, the court held that provisions in a contingency fee agreement that prohibited the client or the attorney from settling the case without the consent and knowledge of the other, and that imposed a penalty for dismissing the suit without the attorney's consent, were void as against public policy [*Hall v. Orloff (1920) 49 Cal. App. 745, 749* (attorney's measure of recovery after client abandons case is reasonable value of

services rendered)]. However, another court upheld a provision that did not prevent the client from settling the case at any time, but instead provided for payment of an agreed amount to the attorney on the client's settlement [*Klein v. Lange (1928) 91 Cal. App. 400, 405, 267 P. 130* (parties attempted to deprive attorney of contractual fees)]. The reasonableness of the contractual fees was not at issue in the latter case, and a contrary holding could result if a contractual fee provision operated to require an unreasonable or unconscionable fee under the circumstances of a settlement [*see Cal. Rules Prof. Conduct, Rule 4-200(A)* (prohibition against charging unconscionable fees); *see also § 86A.16[1]*]. Subsequently, the California Supreme Court declined to decide whether a contract provision requiring the attorney's approval of settlement was void because of the fact that no settlement had been attempted in the case. However, the court stated that an invalid approval provision would not necessarily invalidate the compensation features of the contract if they were otherwise lawful, and that the approval provision could be challenged only when the attorney sued on it [*Calvert v. Stoner (1948) 33 Cal. 2d 97, 104-105, 199 P.2d 297]* . Because of the questionable validity of attorney approval provisions, the contingency fee agreements in this chapter do not require counsel's approval for settlement.

When representing the plaintiff in a malpractice action against a health care provider, an attorney is limited to the recovery of specified amounts as contingent fees [*see Bus. & Prof. Code § 6146*; *see also §§ 86A.16[4], 86A.130*]. The recovery of contingency fees may also be limited in claims between merchants [*see Bus. & Prof. Code § 6147.5*; *see also §§ 86A.16[5], 86A.130*].

[e] Effect of Noncompliance

The failure to comply with any of the writing requirements set forth in [a] and [b], *above*, renders the contingent fee agreement voidable at the option of the client. However, if the agreement is voided, the attorney is still entitled to collect a reasonable fee for his or her services [*Bus. & Prof. Code § 6148(b)*].

[5] Other Types of Retention Agreements

Attorneys may combine selected features of retainers, advance fee payments, and contingency fee contracts to form hybrid retention agreements. For example, attorneys commonly agree to agree to represent a client for an advance fee payment to cover costs with any additional compensation contingent on the attorney's achieving a specified result for the client. When creating a hybrid type of contract for legal services it is important to keep accurate records of all sums received from the client and to separately identify amounts that constitute fees already earned by the attorney and amounts that constitute the client's property. After identifying these funds, the attorney must deposit them in appropriate separate accounts [*see Cal. Rules Prof. Conduct, Rule 4-100(A)*].

Some attorneys charge hourly fees or flat rates (such as a specified amount for drafting a will) for all services they perform. These types of agreements afford simplicity from administrative and bookkeeping standpoints. However, if an attorney does not vary the rates charged, he or she might be criticized for failing to weigh the considerations for setting reasonable fees set forth in the Rules of Professional Conduct [*see Cal. Rules Prof. Conduct, Rule 4-200(B)*; *see also § 86A.16[1]*].

[6] Translation of Contract

Any attorney who negotiates a contract for legal services primarily in a language other than English may have to provide the client with a translation of the contract in that other language. For contracts entered into prior to July 1, 2004, this requirement applied only to contracts negotiated primarily in Spanish. On and after July 1, 2004, it is applicable to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [*see Civ. Code § 1632*]. Contracts containing a statement of fees or charges for legal services are specifically subject to these requirements [*Civ. Code § 1632 (b)(6)*]. The translation, when required, must be delivered prior to execution of the agreement [*Civ. Code § 1632 (b)*]. The translation must include a translation of every term and condition in the

agreement [*Civ. Code § 1632 (b)*].

The translation requirement does not apply if the person purchasing the attorney's services has participated in the negotiations through his or her own interpreter [*Civ. Code § 1632(h)* ("interpreter"defined)]. Failure to comply with these requirements gives the aggrieved party the right to rescind the contract [*Civ. Code § 1632(k)*].

The terms of the contract or agreement that is executed in the English language will determine the rights and obligations of the parties. However, the Spanish-language translation of the contract is admissible in evidence, but only to show that no contract was entered into because of a substantial difference in the material terms and conditions of the contract and the translation [*Civ. Code § 1632(j)*].

For a more detailed discussion of these translation requirements, and related requirements, see *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.64*.

[7] Fee Agreement Is Confidential

A written fee agreement between counsel and client is deemed to be a confidential communication within the meaning of *Evid. Code § 952* and an attorney's duty to keep client matters confidential [*Bus. & Prof. Code § 6149*; *see Bus. & Prof. Code § 6068(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAccepting Representation

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§ 86A.12 Nature of Attorney-Client Relationship

[1] Attorney-Client Relationship Likened to That of Principal and Agent

The attorney-client relationship is most often characterized as an agent-principal arrangement [*see Yanchor v. Kagan (1971) 22 Cal. App. 3d 544, 549, 99 Cal. Rptr. 367]* . Any person who has the capacity to enter into contracts with others may appoint an agent [*Civ. Code § 2296*] and, accordingly, may employ an attorney [*see* Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for information regarding capacity to contract]. However, in limited situations, usually involving insurance defense counsel, attorneys are independent contractors responsible for their own conduct and are not subject to their employers' control or direction over the detail and manner of their performance [*see Merritt v. Reserve Ins. Co. (1973) 34 Cal. App. 3d 858, 880, 110 Cal. Rptr. 511* (trial counsel); *but see Casselman v. Hartford A. and I. Co. (1940) 36 Cal. App. 2d 700, 711-714, 98 P.2d 539* (counsel conducting investigation for insurance company)].

[2] Attorney as Fiduciary

An attorney owes a fiduciary obligation to the client, who under the law of agency is generally bound by the attorney's actions on his or her behalf [*Houston General Ins. Co. v. Superior Court (1980) 108 Cal. App. 3d 958, 964, 166 Cal. Rptr. 904* ; *see Civ. Code § 2305*]. Because the nature of the attorney-client relationship is inherently confidential, the Rules of Professional Conduct limit an attorney's ability to accept certain employment [*see* [3], *below*].

No fiduciary duties are owed to a prospective client before entering into an attorney-client relationship, although counsel owes the prospective client the duty of confidentiality concerning any communication necessary to locating and selecting the attorney. Thus, attorneys may negotiate compensation and thestructure of the attorney-client relationship with clients in an arm's-length transaction, except when statutes and rules specifically provide to the contrary [*see Ramirez v. Sturdevant (1994) 21 Cal. App. 4th 904, 913* (in general, negotiation of fee agreement is arm's-length transaction)]. Once the attorney-client relationship begins, however, counsel owes the client fiduciary duties of the highest character [*see Neel v. Magana, Olney, Levy, Cathcart & Gelfand (1971) 6 Cal. 3d 176, 189-190, 98 Cal. Rptr. 837* ; *Clancy v. State Bar (1969) 71 Cal. 2d 140, 146-148, 77 Cal. Rptr. 657, 454 P.2d 329]* . The critical nature of a fiduciary or confidential relationship is that the parties do not deal on equal terms: the person in whom the trust and confidence is reposed and who accepts that trust and confidence is in a superior position to exert unique influence over

the dependent party [*see Barbara A. v. John G. (1983) 145 Cal. App. 3d 369, 383, 193 Cal. Rptr. 422]* .

[3] Prohibition Against Representing Conflicting Interests

[a] Disclosure of Existence of Adverse Interest

An attorney is not permitted to accept or continue representation of a client without first providing written disclosure to the client when any of the following situations exist [*Cal. Rules Prof. Conduct, Rule 3-310(B)*]:

- Counsel has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter;

- Counsel knows or reasonably should know that counsel previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter and that previous relationship would substantially affect the member's representation;

- Counsel has or had a legal, business, financial, professional, or personal relationship with another person or entity that counsel knows or reasonably should know would be affected substantially by resolution of the matter; or

- Counsel has or had a legal, business, financial, or professional interest in the subject matter of the representation.

The written disclosure must inform the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client as a result of the attorney's representation [*Cal. Rules Prof. Conduct, Rule 3-310(A)(1)*]. The foregoing requirements are intended to apply only to the attorney's own relationships or interests, unless the attorney knows that a partner or associate in his or her firm has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation [*Cal. Rules Prof. Conduct, Rule 3-310*, Discussion].

[b] Obtaining Informed Consent to Representation

In addition to disclosing the existence and nature of any adverse interest [*see* [a], *above*], the attorney must also obtain the informed consent of the client or former client to the representation. "Informed consent," for this purpose, means the client's or former client's written agreement to the representation following written disclosure [*Cal. Rules Prof. Conduct, Rule 3-310(A)(2)*].

Absent the informed written consent of each client, an attorney may not do any of the following [*Cal. Rules Prof. Conduct, Rule 3-310(C)*]:

- Accept representation of more than one client in a matter in which the interests of the clients potentially conflict;

- Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

- Represent a client in a matter, and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter. This restriction applies to representation s of clients in both litigation and transactional matters [*Cal. Rules Prof. Conduct, Rule 3-310*, Discussion].

The first two limitations above apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction, or in some other common enterprise or legal relationship. Examples of the latter include the formation of a partnership for several partners or a corporation for several shareholders, the preparation of an antenuptial agreement, or joint or reciprocal wills for a husband and wife [*see § 86A.211* (estate planning letter explaining dual representation of spouses)], or the resolution of an "uncontested" marital dissolution [*Cal. Rules Prof. Conduct, Rule 3-310,* Discussion].

An attorney who represents two or more clients may not enter into an aggregate settlement of the claims of or against the clients, without the informed written consent of each client [*Cal. Rules Prof. Conduct, Rule 3-310(D)*].

Absent the client's informed written consent, an attorney or law firm may not represent an interest adverse to a client or former client if that interest relates to a matter regarding which the attorney or firm obtained confidential information in the course of his or her employment [*Cal. Rules Prof. Conduct, Rule 3-310(E)*].

Otherwise, neither the disclosure of the new engagement to a former client or the consent of the former client to the new engagement is required [*Cal. Rules Prof. Conduct, Rule 3-310,* Discussion].

Finally, an attorney cannot represent parties with conflicting interests if litigation is commenced or contemplated, regardless of whether the parties consent [*see American Box & Drum Co. v. Harron (1941) 44 Cal. App. 2d 370, 373, 112 P.2d 332]* .

PRACTICE TIP:

Potential clients may be unaware of the extent to which their interests conflict and may seek representation by a single attorney to save legal fees. For example, parties to a marital dissolution often agree between themselves regarding property division, support, and related matters and wish to retain an attorney only to reduce their agreement to writing and obtain a court order. The parties may be unaware of the tax or other consequences of their agreement and an attorney who advises them on these matters risks violating the Rules of Professional Conduct [*see Cal. Rules Prof. Conduct, Rule 3-310(B)*].

[4] Attorney's Duty to Communicate With Client

Once the attorney-client relationship is formed, attorneys are obligated to communicate with their clients in the following respects:

- Communicate all facts and circumstances necessary to enable the client to make free and intelligent decisions regarding the subject matter of the representation [*Lysick v. Walcom (1968) 258 Cal. App. 2d 136, 147, 65 Cal. Rptr. 406]* .

- Communicate all information the attorney has or may acquire in relation to the subject matter of the transaction [*see Beery v. State Bar (1987) 43 Cal. 3d 802, 812-813]* .

- Advise the client of significant developments in the client's case and respond to client status inquiries [*see Cal. Rules Prof. Conduct, Rule 3-500*].

- Convey to the client the terms and conditions of any settlement offer [*Cal. Rules Prof. Conduct, Rule 3-500*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConfidentiality of InformationLegal EthicsClient RelationsEffective Representation

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28-86A California Legal Forms--Transaction Guide § 86A.13

§ 86A.13 Scope of Attorney's Authority

[1] Authority to Bind Client Governed by Agency Principles

An attorney has the authority to bind his or her client in all matters (for example, filing pleadings and compromising cases) regarding the regular conduct of a case [*see Code Civ. Proc. § 283(1)*]. Unless the client files a revocation of authority, an attorney may receive money claimed by the client either during the pendency of an action or after judgment is entered and then may discharge the client's claim or acknowledge satisfaction of a judgment [*Code Civ. Proc. § 283(2)*].

The authority of an attorney to bind a client by agreement or stipulation is governed by the principles of agency, and the client is bound by the acts of the attorney-agent within the scope of his or her actual, express or implied, or ostensible authority. The client is also bound by unauthorized acts that he or she ratifies [*Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 403-404* , & n.2, *212 Cal. Rptr. 151, 696 P.2d 645]* .

A rebuttable presumption arises that an attorney who appears for a litigant has authority to perform all acts incidental to the conduct of the case [*Clark Equip. Co. v. Wheat (1979) 92 Cal. App. 3d 503, 523, 154 Cal. Rptr. 874]* . Accordingly, it is possible for an attorney's fraudulent or malicious acts in conducting litigation to be imputed to the client [*see Clark Equipment Co. v. Wheat (1979) 92 Cal. App. 3d 503, 523, 154 Cal. Rptr. 874* ; *see also Tool Research & Engineering v. Henigson (1975) 46 Cal. App. 3d 675, 120 Cal. Rptr. 291 , overruled on other grounds, Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal. 3d 863, 877-878, 254 Cal. Rptr. 336, 765 P.2d 498]* .

Merely by virtue of his or her employment, an attorney is authorized to bind the client in procedural matters. Thus, stipulations that are necessary or incidental to tactical matters--the management of the case--that affect only the procedure or remedy, as distinguished from the cause of action itself and the essential rights of the client, are binding on the client [*Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 403-404, 212 Cal. Rptr. 151, 696 P.2d 645]* . An attorney must be able to make tactical decisions, such as whether to call a particular witness, and the court and opposing counsel must be able to rely on these decisions, even when the client voices opposition in open court [*see Nahhas v. Pacific Greyhound Lines, Inc. (1961) 192 Cal. App. 2d 145, 146, 13 Cal. Rptr. 299]* .

[2] Impairment of Client's Rights or Cause of Action

An attorney is not authorized to impair a client's substantial rights or the cause of action itself. These are matters that differ from routine and tactical or procedural decisions in the degree to which they affect the client's interest, and involve matters of judgment that extend beyond the technical so that any client would be expected to share in them. For example, the attorney must be specifically authorized to settle and compromise a claim because the employment relationship gives no implied or ostensible authority to do so. Similarly, an attorney may not stipulate to a matter that would eliminate an essential defense, agree to the entry of a default judgment, stipulate that only nominal damages may be awarded, or agree to an increase in the amount of a judgment against the client, or waive findings so that no appeal can be made [*Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 404-405, 212 Cal. Rptr. 151, 696 P.2d 645* ; *see, e.g., Linsk v. Linsk (1969) 70 Cal. 2d 272, 277, 74 Cal. Rptr. 544, 449 P.2d 760* (attorney exceeds his or her authority by waiving client's substantial right, such as right to testify, contrary to client's instructions)].

[3] Contracting on Behalf of Client

Absent express authority, an attorney does not have implied plenary authority to contract on behalf of the client. That authority is not enlarged because the contract is entered into in conjunction with pending litigation. Thus, for example, an attorney does not have apparent authority to bind the client to an agreement for arbitration merely by virtue of the attorney-client relationship. When a client engages an attorney to litigate in a judicial forum, the client has a right to be consulted, and his or her consent must be obtained before the dispute can be transferred to another and quite different forum [*Blanton v. Womancare, Inc. (1985) 38 Cal. 3d 396, 407-408, 212 Cal. Rptr. 151, 696 P.2d 645* ; *see, e.g., Nellis v. Massey (1952) 108 Cal. App. 2d 724, 728, 239 P. 2d 509* (attorney, retained as advisor or negotiator, lacks power to enter into contracts on client's behalf, absent specific written authority)].

[4] Settlement Authority

An attorney must promptly communicate to his or her client any written settlement offer. This communication is discoverable by either party in any action in which the existence or communication of the settlement offer is an issue before the trier of fact [*Bus. & Prof. Code § 6103.5*].

An attorney who settles a client's case without specific authority from the client may be disciplined, even if the settlement was fair and the client suffered no damage. These considerations do not excuse the attorney's wrongful conduct [*Trousil v. State Bar (1985) 38 Cal. 3d 337, 342, 211 Cal. Rptr. 525, 695 P.2d 1066]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral Overview

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28-86A California Legal Forms--Transaction Guide § 86A.14

§ 86A.14 Business Transactions With Clients

An attorney may not enter into a business transaction with a client, or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied [*Cal. Rules Prof. Conduct, Rule 3-300*]:

- The transaction or acquisition and its terms are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that should reasonably have been understood by the client;

- The client is advised in writing that he or she may seek the advice of an independent lawyer of the client's choice and is given a reasonable opportunity to seek that advice; and

- The client thereafter consents in writing to the terms of the transaction or the terms of the acquisition.

Rule 3-300 is intended to apply when an attorney wishes to obtain an interest in client's property in order to secure the amount of the member's past due or future fees. This rule is not intended to apply to the agreement by which an attorney is retained by the client, unless the agreement confers on the attorney an ownership, possessory, security, or other pecuniary interest adverse to the client, which is subject in part, to Rule 4-200 [*Cal. Rules Prof. Conduct, Rule 3-300* (discussion); *Cal. Rules Prof. Conduct, Rule 4-200*]. Further, Rule 3-300 is not intended to apply when counsel and client each make an investment on terms offered to the general public or a significant portion of the public. For example, Rule 3-300 is not intended to apply when an attorney invests in a limited partnership syndicated by a third party and the counsel's client makes the same investment. Although both attorney and client are investing in the same business, counsel has not entered into the transaction "with" the client for the purposes of the rule [*Cal. Rules Prof. Conduct, Rule 3-300* (discussion)].

All dealings between an attorney and his or her client are subject to strict judicial scrutiny when they benefit the attorney. When this type of transaction is challenged, the attorney has the burden of proving that it was fair and that the client fully knew and understood its terms [*see Clancy v. State Bar (1969) 71 Cal. 2d 140, 146-147, 77 Cal. Rptr. 657,*

454 P.2d 329] .

PRACTICE TIP:

By its terms, Rule 3-300 does not apply to a new prospective client with whom the attorney has not formed a relationship [*see Cal. Rules Prof. Conduct, Rule 3-300*]. If a dissatisfied client attempts to void a transaction with his or her attorney, the attorney's burden of proving the client's subjective understanding is very difficult.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsConflicts of Interest

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§ 86A.15 Sexual Relations With Clients

In a relationship with a client, an attorney is subject to discipline for doing any of the following [*Bus. & Prof. Code § 6106.9(a)*; *see Cal. Rules Prof. Conduct, Rule 3-120(B)*]:

- Require or demand sexual relations with a client incident to or as a condition of any professional representation;

- Using coercion, intimidation, or undue influence in entering into sexual relations with a client; or

- Continuing to represent a client with whom the attorney has sexual relations if the sexual relations cause the attorney to perform legal services incompetently [*see Cal. Rules Prof. Conduct, Rule 3-110*].

These prohibitions do not apply to sexual relations between attorneys and their spouses, or to ongoing consensual relationships that predate the initiation of the attorney-client relationship [*Bus. & Prof. Code § 6106.9(b)*; *Cal. Rules Prof. Conduct, Rule 3-120(C)*]. Although this exception excludes representation of certain clients from the scope of Rule 3-120, this exclusion is not intended to preclude the applicability of other Rules of Professional Conduct, including Rule 3-110 [*see Cal. Rules Prof. Conduct, Rule 3-120* (discussion); *see also Cal. Rules Prof. Conduct, Rule 3-110*]. Further, if a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm are not subject to discipline under this rule solely because of the occurrence of those sexual relations.

"Sexual relations" means sexual intercourse or the touching of an intimate part of another person for the purpose of sexual arousal, gratification, or abuse [*Bus. & Prof. Code § 6106.9(d)*; *Cal. Rules Prof. Conduct, Rule 3-120(A)*].

Rule 3-120 is intended to prohibit sexual exploitation by a lawyer in the course of a professional representation. In all client matters, attorneys are advised to keep clients' interests paramount in the course of the representation. Often, based on the nature of the underlying representation, a client exhibits great emotional vulnerability and dependence on the advice and guidance of counsel. Because attorneys owe the utmost duty of good faith and fidelity to clients [*see, e.g., Greenbaum v. State Bar (1976) 15 Cal. 3d 893, 903, 126 Cal. Rptr. 785, 544 P.2d 921]* , and the relationship between

an attorney and client is a fiduciary relationship of the very highest character, all dealings between an attorney and client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for unfairness [*see, e.g., Giovanazzi v. State Bar (1980) 28 Cal. 3d 465, 472, 169 Cal. Rptr. 581, 619 P.2d 1005* ; *Benson v. State Bar (1975) 13 Cal. 3d 581, 586, 119 Cal. Rptr 297, 531 P.2d 1081]* . When attorneys exercise undue influence over clients or take unfair advantage of clients, discipline is appropriate [*see, e.g., Magee v. State Bar (1962) 58 Cal. 2d 423, 24 Cal. Rptr. 839, 374 P.2d 807]* .

For purposes Rule 3-120, if the client is an organization, any individual overseeing the representation is deemed to be the client [*Cal. Rules Prof. Conduct, Rule 3-120* (discussion); *see Cal. Rules Prof. Conduct, Rule 3-600*]. Any complaint made to the State Bar alleging a violation of the bar against sexual relations with a client must be verified under oath by the person making the complaint [*Bus. & Prof. Code § 6106.9(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsProfessional ConductGeneral OverviewLegal EthicsSanctionsDisciplinary ProceedingsGeneral Overview

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§ 86A.16 Fees

[1] Unconscionable Fees Prohibited

Attorneys are prohibited from charging or collecting illegal or unconscionable fees for their services [*Cal. Rules Prof. Conduct, Rule 4-200(A)*]. The unconscionability of a fee agreement is determined on the basis of all the facts and circumstances existing when the agreement is entered into, except when the parties contemplate that the fee will be affected by later events. When appropriate, the following factors are among those to be considered in determining the conscionability of a fee [*Cal. Rules Prof. Conduct, Rule 4-200(B)*; *see Cline v. Zappettini (1955) 131 Cal. App. 2d 723, 728, 281 P.2d 35]* :

- The amount of the fee in proportion to the value of the services performed.
- The relative sophistication of the attorney and the client.
- The novelty and difficulty of the questions involved, and the skill required to properly perform the legal service.
- The likelihood, if apparent to the client, that the attorney will be precluded from other employment by representing the client.
- The amount involved and the results obtained.
- The time limitations imposed by the client or by the circumstances.
- The nature and length of the professional relationship with the client.
- The experience, reputation, and ability of the attorney or attorneys performing the services.
- Whether the fee is fixed or contingent.

- The time and labor required to perform the service.
- The informed consent of the client to the fee agreement.

An attorney cannot unilaterally determine his or her own fee and withhold funds held in trust for a client in order to satisfy it [*Most v. State Bar (1967) 67 Cal. 2d 589, 597, 63 Cal. Rptr. 265, 432 P.2d 953]* . Counsel should ensure that the client is aware, at the outset of their relationship, of exactly what the legal fees will be, or on what factors they will be based. The parties may modify the fee arrangement in a written contract. However, absent modification, the arrangement remains binding even if the attorney made a bad bargain and the legal services are reasonably worth more than the agreed price [*see Reynolds v. Sorosis Fruit Co. (1901) 133 Cal. 625, 629, 66 P. 21]* .

If the parties enter into a contract for compensation at the time the attorney-client relationship is established, the contract is enforceable without a showing by the attorney that the contract is fair and openly made [*Berk v. Twentynine Palms Ranchos, Inc. (1962) 201 Cal. App. 2d 625, 637, 20 Cal. Rptr. 144]* . However, fee contracts made after the creation of the attorney-client relationship are presumed to be entered into under undue influence [*Carlson, Collins, Gordon & Bold v. Banducci (1967) 257 Cal. App. 2d 212, 226-227, 64 Cal. Rptr. 915]* . A court scrutinizing the agreement will require the attorney to offer clear and satisfactory evidence that the client was fully informed of all pertinent facts so that the client was able to act understandingly with the attorney [*Cline v. Zappettini (1955) 131 Cal. App. 2d 723, 727, 281 P.2d 35]* .

PRACTICE TIP:

If the parties fail to include a fee provision in the retention contract, a court may award the attorney reasonable fees based on an implied contract theory [*see Cowen v. Calabrese (1964) 230 Cal. App. 2d 870, 872, 41 Cal. Rptr. 441]* . Special rules limit the maximum permissible contingent fee in a medical malpractice action [*Bus. & Prof. Code § 6146*]. For discussion of these rules, see *§ 86A.16[4]*.

[2] Contracting With Minors

Contracts to perform legal services for or on behalf of minors are subject to the general rules governing minors' contracts. For discussion of minors' contracts generally, see Ch. 100B, *Contracts and Employment of Minors* . In addition, *Fam. Code § 6602* provides that a contract for attorneys' fees for services in litigation, made by or on behalf of a minor, is void unless the contract is approved, on petition by an interested person, by the court in which the litigation is pending or by the court having jurisdiction of the guardianship estate of the minor. If the contract is not approved and a judgment is recovered by or on behalf of the minor, the attorneys' fees chargeable against the minor will be fixed by the court rendering the judgment [*Fam. Code § 6602*]. For further discussion and forms, see California Forms of Pleading and Practice, Ch. 291, *Guardians Ad Litem* (Matthew Bender).

[3] Written Consent of Client Required for Fee Sharing Agreements

The Rules of Professional Conduct require written client consent to fee sharing between attorneys [*see Cal. Rules Prof. Conduct, Rule 2-200*; *see also Chambers v. Kay (2002) 29 Cal. 4th 142, 162 n.163, 126 Cal. Rptr. 2d 536, 56 P. 3d 645* (*Cal. Rules Prof. Conduct, Rule 2-200* barred plaintiff attorney from sharing in fees due to noncompliance with written client consent requirement); *Margolin v. Shemaria (2000) 85 Cal. App. 4th 891, 903, 102 Cal. Rptr. 2d 502* (attorney who made case referral to another attorney had no viable contract for fee-sharing when contract did not comply with Rule 2-200)]. Specifically, an attorney may not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder of that attorney unless (1) the client has consented in writing to the arrangement after a full disclosure has been made in writing that a division of fees will be made and the terms of that division; and (2) the total fee charged by all lawyers is not increased solely by reason of the fee sharing and is not unconscionable as that term [*Cal. Rules Prof. Conduct, Rule 2-200(A)*; *see Cal. Rules Prof. Conduct, Rule 4-200*; *see also* [1], *above*].

However, in the absence of written client consent to an agreement between law firms to divide fees, a law firm that is barred from dividing fees under Rule 2-200 may nevertheless recover from the other law firm in quantum meruit for the reasonable value of services it rendered on the client's behalf [*Huskinson & Brown, LLP v. Wolf (2004) 32 Cal. 4th 453, 464, 9 Cal. Rptr. 3d 693, 84 P.3d 379* (court emphasized holding did not increase attorney fees paid or owed by client)].

With the exception of proper fee sharing arrangements and purchases of law practices [*see Cal. Rules Prof. Conduct, Rule 2-300*], an attorney may not compensate, give, or promise anything of value to any lawyer for the purpose of recommending or securing employment of the attorney or the attorney's law firm by a client, or as a reward for having made a recommendation resulting in the employment of the attorney or the attorney's law firm. An attorney who offers or gives a gift or gratuity to any lawyer who has made a recommendation resulting in the employment of that attorney or his or her firm does not constitute a per se violation of this rule, provided that the gift or gratuity was not offered in consideration of any promise, agreement, or understanding that such a gift or gratuity would be forthcoming, or that referrals would be made or encouraged in the future [*Cal. Rules Prof. Conduct, Rule 2-200(B)*].

[4] Monetary Limitations Applicable to Malpractice Suits Against Health Care Providers

Contingency fees for representing plaintiffs in malpractice actions against health care providers are limited to the following maximum amounts [*Bus. & Prof. Code § 6146(a)*]:

- 40 percent of the first $50,000 recovered;
- 331/3 percent of the next $50,000 recovered;
- 25 percent of the next $500,000 recovered; and
- 15 percent of any amount by which the recovery exceeds $600,000.

These limitations apply regardless of whether the amounts are recovered by settlement, arbitration, or judgment, or whether the person for whom the recovery is made is a responsible adult, an infant, or a person of unsound mind [*Bus. & Prof. Code § 6146(a)*]. "Recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. However, costs of medical care incurred by the plaintiff and the attorney's office-overhead costs or charges are not deductible disbursements or costs for this purpose [*Bus. & Prof. Code § 6146(c)(1)*].

If the plaintiff receives periodic payments, for example, under a structured settlement/annuity arrangement [*see Code Civ. Proc. § 667.7*], the court will place a total value on the payments based on the plaintiff's life expectancy and will include that amount in computing the attorneys' fees [*see Bus. & Prof. Code § 6146(b)*]. For a contingent fee contract to be used in medical malpractice actions, see *§ 86A.202*.

The term "health care providers" includes doctors, dentists, lab technicians, chiropractors, osteopaths, speech pathologists, audiologists, nurses, veterinarians, and licensed clinics, health dispensaries, or health facilities [*see Bus. & Prof. Code § 6146(c)(2)*; *see also Bus. & Prof. Code § 500 et seq.*]. The term also encompasses the legal representatives of a health care provider [*Bus. & Prof. Code § 6146(c)(2)*]. The term "professional negligence" refers to a negligent act or omission to act by a health care provider in the rendering of professional services that is the proximate cause of personal injury or wrongful death, provided that the services are (1) within the scope of services for which the provider is licensed and (2) outside any restriction imposed by the licensing agency or licensed hospital [*Bus. & Prof. Code § 6146(c)(3)*].

[5] Monetary Limitations Applicable to Recovery of Claims Between Merchants

Bus. & Prof Code §§ 6147 and *6148*, discussed in *§ 86A.11[2]* and *[4]*, do not apply to contingency fee contracts for the recovery of claims between merchants [*see Com. Code § 2104*], arising from the sale or lease of goods or services rendered, or money loaned for use, in the conduct of a business or profession if the merchant contracting for legal services employs 10 or more individuals [*Bus. & Prof. Code § 6147.5(a)*]. If no written contract for legal services exists, an attorney may not contract for or collect a contingency fee in excess of the following limits [*Bus. & Prof. Code § 6147.5(b)*]:

- 20 percent of the first $300 collected.
- 18 percent of the next $1,700 collected.
- 13 percent of sums collected in excess of $2,000.

An attorney is permitted to charge and collect the following minimum fees [*Bus. & Prof. Code § 6147.5(b)*]:

- $25 in collections of $75 to $125.
- 331/3 percent of collections less than $75.

[6] Attorneys' Liens

An attorney may establish a lien to secure his or her fees on the judgment or property obtained as a result of the attorney's services. If a contingent fee contract does not contain express language creating an attorney's lien, whether or not a lien exists is a question of fact involving a determination of the parties' intentions [*Gelfand, Greer, Popko & Miller v. Shivener (1973) 30 Cal. App. 3d 364, 370, 105 Cal. Rptr. 445]* . The parties need not use the word "lien" in their contract to create a lien. An implied equitable lien exists if the parties agree that the attorney is to look to the judgment as security for fees [*see Wagner v. Sariotti (1943) 56 Cal. App. 2d 693, 697, 133 P.2d 430]* .

An attorney may enforce a contractual lien in an independent action against the client, but a discharged attorney may not intervene in the main action to enforce the lien [*Bandy v. Mt. Diablo Unified Sch. Dist. (1976) 56 Cal. App. 3d 230, 234, 126 Cal. Rptr. 890]* . However, no independent action is necessary to divide attorney fees between former and current counsel. In *Curtis v. Estate of Fagan*, a minor's current attorney filed a petition for compromise, seeking attorneys' fees and costs, and former counsel filed a lien claiming fees under a theory of quantum meruit. Current counsel argued that the court had no jurisdiction to divide fees. The trial court divided fees between the two attorneys. The appellate court affirmed, concluding that attorney fees could be divided in the main action, eliminating the need for a separate action [*Curtis v. Estate of Fagan (2000) 82 Cal. App. 4th 270, 279, 98 Cal. Rptr. 2d 84]* .

A party to a family law action may encumber his or her interest in community real property to pay reasonable attorneys' fees. This encumbrance is known as a "family law attorney's real property lien" [*Fam. Code § 2033(a)*]. The lien may be limited for good cause, or may be denied if the encumbrance would likely result in an unequal division of property [*Fam. Code § 2034(a)*]. For a detailed discussion of the family law attorney's real property lien, see Ch. 125, *Provisions for Payment of Income Taxes, Attorneys' Fees, and Costs* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsAttorney FeesGeneral OverviewLegal EthicsClient RelationsAttorney FeesExcessive Fees

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§ 86A.17 Handling Client's Funds

[1] Use of Trust Accounts

An attorney must deposit all funds that he or she receives for a client's benefit, including advances for costs and expenses, in a bank account designated as "Trust Account," "Client's Fund Account," or other similar title. These trust accounts must be maintained in California unless there is a substantial relationship between the client and another jurisdiction and the client consents in writing to the establishment of a trust account in that jurisdiction [Cal. Rules *Prof. Cond., Rule 4-100(A)*].

An attorney is prohibited from commingling his or her own funds with those of the client except to the extent reasonably necessary to pay bank charges, or to the extent that both the client and attorney have an interest in those funds. In the latter case, the attorney must withdraw his or her portion of the funds from the trust account as soon as the respective interests become fixed. However, if the client disputes the attorney's interest in the funds, they may not be withdrawn from the trust account until the dispute is resolved [Cal. Rules *Prof. Cond., Rule 4-100(A)*].

An attorney must promptly notify a client when he or she receives property on the client's behalf [Cal. Rules *Prof. Cond., Rule 4-100(B)(1)*]. If the attorney receives securities or other property, the attorney must label that property and place it in a safe deposit box as soon as practicable [Cal. Rules *Prof. Cond., Rule 4-100(B)(2)*]. An attorney must maintain complete records of all funds, securities, and other properties of a client coming into the possession of the attorney or law firm and render appropriate accounts to the client [Cal. Rules *Prof. Cond., Rule 4-100(B)(3)*; *see* [3], *below*]. Counsel must promptly pay or deliver, as requested by the client, any funds, securities, or other properties in the attorney's possession that the client is entitled to receive [Cal. Rules *Prof. Cond., Rule 4-100(B)(4)*].

[2] Use of Demand Trust Accounts

An attorney or law firm that receives or disburses trust funds must establish and maintain an Interest on Lawyers' Trust Accounts (IOLTA). The attorney or law firm must deposit or invest in this account all client deposits or funds that are nominal in amount or invested for a short time period [see *Bus. & Prof. Code § 6211(a)*]. Interest and dividends earned on these accounts are paid to the State Bar of California to fund legal services programs for the indigent [*see Bus. & Prof. Code § 6211(a)*; *see generally Bus. & Prof. Code § 6210 et seq.*].

Financial institutions that are depositories for attorney trust accounts under *Bus. & Prof. Code § 6211* must report to the State Bar if any properly payable instrument is presented against an attorney trust account containing insufficient funds, whether or not the instrument is honored [*Bus. & Prof. Code § 6091.1*; *see Bus. & Prof. Code § 6091.2(a)* ("financial institution" defined)]. If the payment instrument is honored, the report must include specific information regarding the parties to the transaction, the date and amount of payment presented, and the amount of the overdraft [*Bus. & Prof. Code § 6091.1(b)(2)*]. If the instrument is dishonored, the report must be identical to the overdraft notice customarily forwarded to the customer [*Bus. & Prof. Code § 6091.1(b)(1)*].

[3] Recordkeeping Requirements

An attorney must maintain complete records of all funds, securities, and other properties of a client coming into the possession of the attorney or law firm and render appropriate accounts to the client. The attorney must preserve these records for a period of no less than five years after final appropriate distribution of the funds or properties, and comply with any order for an audit issued pursuant to the Rules of Procedure of the State Bar [Cal. Rules *Prof. Cond., Rule 4-100(B)(3)*].

Specifically, an attorney must maintain all of the following from the date of receipt of client funds through the period ending five years from the date of appropriate disbursement of the funds [Cal. Rules *Prof. Cond., Rule 4-100(C)(1)*]:

- A written ledger for each client on whose behalf funds are held stating:
    - The client's name;
    - The date, amount, and source of all funds received on behalf of the client;
    - The date, amount, payee and purpose of each disbursement made on behalf of the client; and
    - The current balance for the client.
- A written journal for each bank account setting forth:
    - The name of the account;
    - The date, amount, and client affected by each debit and credit; and
    - The current balance in the account.
- All bank statements and canceled checks for each bank account.
- Each monthly reconciliation (balancing) of the three preceding materials.

An attorney must maintain, from the date of receipt of all securities and other properties held for the benefit of client through the period ending five years from the date of appropriate disbursement of the securities or properties, a written journal specifying the following [Cal. Rules *Prof. Cond., Rule 4-100(C)(2)*]:

- Each item of security and property held.
- The name of the person on whose behalf the security or property is held.

- The date of receipt of the security or property.
- The date of distribution of the security or property.
- The name of the person to whom the security or property was distributed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsClient Funds

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DIVISION VI: PERFORMANCE OF SERVICES
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28-86A California Legal Forms--Transaction Guide § 86A.18

§ 86A.18 Termination of Attorney-Client Relationship

[1] Mandatory Withdrawal of Counsel

The Rules of Professional Conduct specify the factual circumstances under which an attorney must withdraw from representing a client [*see Cal. Rules Prof. Conduct, Rule 3-700(B)*]. Whether withdrawal is mandatory or permissive [*see* [2], *below*], an attorney may not withdraw from employment before taking reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, returning property and unearned fees, and complying with applicable laws and rules [*Cal. Rules Prof. Conduct, Rule 3-700(A)(2), (D)*; *see* Read v. State Bar (1991) 53 Cal. 3d 394, 279 Cal. Rptr. 818, 807 P.2d 1047 , *as modified,* 53 Cal. 3d 1009A (withdrawal without client consent or court approval without taking reasonable steps to avoid foreseeable prejudice to client violates disciplinary rules); *see also* [5], *below*].

An attorney representing a client before a tribunal must withdraw from employment with the permission of the tribunal, if required by its rules, and an attorney representing a client in other matters must withdraw from employment, if [*Cal. Rules Prof. Conduct, Rule 3-700(B)*]:

- Counsel knows or should know that the client is bringing an action, conducting a defense, asserting a litigation position, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;

- Counsel knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or

- Counsel's mental or physical condition renders it unreasonably difficult to carry out the employment effectively.

[2] Permissive Withdrawal of Counsel

[a] In General

When an attorney is acting for a client in a lawsuit or special proceeding, he or she may withdraw and another attorney may substitute in either with the consent of both attorney and client, or on a court order made pursuant to the application of either attorney or client [*see Code Civ. Proc. § 284*]. An attorney of record for a party to a domestic relations case may withdraw by serving appropriate notice on the client and adverse party [*see Code Civ. Proc. § 285.1*].

[b] Rules of Professional Conduct

The Rules of Professional Conduct outlining the factual circumstances under which an attorney may withdraw from representing a client [*see Cal. Rules Prof. Conduct, Rule 3-700(c)*]. Whether permissive or mandatory [*see* [1], *above*], an attorney may not withdraw from employment before taking reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, returning property and unearned fees, and complying with applicable laws and rules [*Cal. Rules Prof. Conduct, Rule 3-700(A)(2)*; *see Cal. Rules Prof. Conduct, Rule 3-700(D)*; *see also* [5], *below*].

If counsel is not mandated to withdraw [*see* [1], *above*], an attorney may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless the request or withdrawal is based on one of the following circumstances [*Cal. Rules Prof. Conduct, Rule 3-700(A)(3)*]:

- The client does one of the following:
    - Insists on presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.
    - Seeks to pursue an illegal course of conduct.
    - Insists that counsel pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act.
    - By other conduct renders it unreasonably difficult for counsel to carry out the employment effectively.
    - Insists, in a matter not pending before a tribunal, that counsel engage in conduct that is contrary to the judgment and advice of the counsel but not prohibited under the Rules of Professional Conduct or the State Bar Act.
    - Breaches an agreement or obligation to the counsel as to expenses or fees.
- The continued employment is likely to result in a violation of the Rules of Professional Conduct or of the State Bar Act.
- The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.
- Counsel's mental or physical condition renders it difficult for counsel to carry out the employment effectively.
- The client knowingly and freely assents to termination of the employment.
- Counsel believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find

the existence of other good cause for withdrawal.

[c] Entitlement to Fees

Unlike a discharged attorney [*see* [3], *below*], an attorney who voluntarily withdraws from a contingency fee arrangement is not entitled to recover for the reasonable value of his or her services, unless the withdrawal is a justified withdrawal [*Estate of Falco (1987) 188 Cal. App. 3d 1004, 1012-1014, 233 Cal. Rptr. 807* ; *Hensel v. Cohen (1984) 155 Cal. App. 3d 563, 567-569, 202 Cal. Rptr. 85]* . A withdrawal to comply with the ethics of professional conduct constitutes a justified withdrawal. However, the attorney has the burden of proving the following [*Estate of Falco (1987) 188 Cal. App. 3d 1004, 1016, 233 Cal. Rptr. 807]* :

- The withdrawal was mandatory, not merely permissive, under statute or state bar rules;
- The overwhelming and primary motivation for the withdrawal was the obligation to comply with ethical requirements;
- Counsel began the action in good faith;
- The client recovered on the claim after counsel withdrew; and
- Counsel's work contributed in some measurable degree to the client's ultimate recovery.

Although a client's exercise of the right to reject a settlement offer is not cause for a justified withdrawal, a client may be required to make restitution to the attorney under a theory of unjust enrichment if the client later accepts a settlement substantially similar to that negotiated by the attorney before his or her withdrawal [*Estate of Falco (1987) 188 Cal. App. 3d 1004, 1019, 233 Cal. Rptr. 807]* .

[3] Discharge of Counsel

A client may terminate the attorney-client relationship by discharging the attorney at will either with or without cause [*see Fracasse v. Brent (1972) 6 Cal. 3d 784, 790, 100 Cal. Rptr. 385, 494 P.2d 9]* . An attorney who breaches the Rules of Professional Conduct and who, because of that breach, is rightfully discharged by his or her client, is entitled to compensation for services provided before the breach [*Jeffry v. Pounds (1977) 67 Cal. App. 3d 6, 12, 136 Cal. Rptr. 373* ; *see also Pringle v. La Chapelle (1999) 73 Cal. App. 4th 1000, 1005-1007, 87 Cal. Rptr. 2d 90* (although attorney failed to follow *Cal. Rules Prof. Conduct, Rule 3-600(E)* regarding waiver of conflict, violation of rule does not automatically preclude attorney from obtaining fees)]. An attorney who is discharged without cause is similarly entitled to reasonable fees for services rendered until the time of discharge [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 792, 100 Cal. Rptr. 385, 494 P.2d 9* ; *Oliver v. Campbell (1954) 43 Cal. 2d 298, 304, 273 P.2d 15* (in contracts employing attorney for fixed fee, attorney may recover reasonable value of services performed to time of discharge when client wrongfully discharges attorney before completing contract)].

A discharged attorney's cause of action to recover compensation for services under a contingent fee contract does not accrue until the stated contingency (such as recovery of damages) occurs [*Fracasse v. Brent (1972) 6 Cal. 3d 784, 792, 100 Cal. Rptr. 385, 494 P.2d 9]* .

PRACTICE TIP:

The amount of fees to which a discharged attorney is entitled does not depend on whether the client acted wrongfully or with cause in terminating the relationship [*see Fracasse v. Brent (1972) 6 Cal. 3d 784, 792, 100 Cal. Rptr. 385, 494 P.2d 9]* .

[4] Attorney-Client Relationship Otherwise Terminates When Services Completed

In most instances, the type of legal services involved and the scope of the employment determine when an attorney-client relationship terminates [*see Kalmus v. Kalmus (1951) 103 Cal. App. 2d 405, 425, 230 P.2d 57 , cert. denied, 342 U.S. 903 (1952)]* . For example, if an attorney is retained to litigate an action, the relationship ordinarily terminates when a judgment is entered. However, the terms of employment may provide otherwise, such as by requiring the attorney to take any action necessary to enforce the judgment [*see Mizrahi v. Miscione (1967) 252 Cal. App. 2d 673, 676-677, 60 Cal. Rptr. 680]* .

It may be difficult to identify the exact point at which an undertaking is accomplished. For example, a client may not believe that the attorney has fully performed unless the judgment is collected, while the attorney may believe that obtaining the judgment satisfies his or her obligation to the client and that he or she should be separately compensated for any collection efforts that are necessary. Accordingly, the retention agreement should clearly specify what services the attorney will perform.

Occurrences other than the resolution of a case or accomplishment of an undertaking can terminate the attorney-client relationship. In general, when a client dies, the attorney's authority to act on his or her behalf ends. An exception to this rule exists when the parties entered into a special contract of employment, such as a specific contract to conduct a suit to final judgment or an agreement on a fee for an entire case [*Estate of Lanza (1964) 229 Cal. App. 2d 720, 724, 40 Cal. Rptr. 528]* . When the attorney dies, the client may be required to either appoint another attorney or represent himself or herself [*see Code Civ. Proc. § 286*].

[5] Return of Property and Unearned Fees

An attorney whose employment has terminated must promptly release to the client, at the request of the client, all the client papers and property, subject to any protective order or non-disclosure agreement. "Client papers and property" includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not [*Cal. Rules Prof. Conduct, Rule 3-700(D)*]. In addition, counsel must promptly refund any part of a fee paid in advance that has not been earned. However, this refund provision does not apply to a true retainer fee that is paid solely for the purpose of ensuring the availability of the member for the matter [*Cal. Rules Prof. Conduct, Rule 3-700(D)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsLegal EthicsClient RelationsGeneral Overview

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§ 86A.19 Dispute Resolution Mechanisms

[1] Contractual Provision Permitted

Attorneys who prefer to resolve any dispute with a client in a forum other than the courts may wish to include a mediation or arbitration clause in the fee agreement or engagement letter. No statute, rule, or other provision of California law bars a lawyer and client from agreeing to mediate future disputes. However, ethical considerations may affect the enforceability of a mediation or arbitration agreement.

[2] Mediation

[a] Mediation Is Voluntary

The Board of Governors of the State Bar is authorized to establish, maintain, and administer a system and procedure for the mediation of fee and/or cost disputes [*Bus. & Prof. Code § 6200*]. Mediation, unlike arbitration, is voluntary for both clients and attorneys [*Bus. & Prof. Code § 6200(c)*; *see* [3], *below*]. The mediation process is based on direct negotiations between the attorney and his or her client, and is an extension of the negotiated settlement process. All discussions and offers of settlement are confidential and may not be disclosed in subsequent arbitration or other proceedings [*Bus. & Prof. Code § 6200(h)*].

PRACTICE TIP:
Attorneys should check with their local bar associations to see if they have sponsored mediation systems.

[b] Advantages of Mediation

Mediation offers attorneys and clients an opportunity to resolve disputes in a confidential setting [*see Bus. & Prof. Code § 6200(h)*]. Typically, mediation is the most flexible method to resolve conflicts between the parties, allowing for creative and specifically tailored methods. Further, mediation is ordinarily less expensive and faster than arbitration [*see* [3], *below*] or litigation.

[c] Disadvantages of Mediation

Because mediation is ordinarily a voluntary and non-binding process, a fee agreement or engagement letter may suggest that client and attorney agree to consensual mediation as a first means of dispute resolution. However, the parties should be cognizant of the fact that counsel will probably not be able to compel client mediation involuntarily if it would affect the client's rights to arbitrate a fee dispute [*see Bus. & Prof. Code § 6200 et seq.*; *see* [3], *below*].

[d] Mediation Provisions

A lawyer or law firm may include a provision in a fee agreement or engagement letter by which client and lawyer agree to mediate their disputes before pursuing other dispute resolution procedures. For example, a fee agreement may provide that the client and lawyer agree to mediate future disputes about claims against the lawyer (such as attorney malpractice) or fees and costs. The agreement may also specify that the mediation will be conducted by a neutral mediator provided by a designated mediation service, specify a particular location, and specify the applicable mediation procedure. Further, the agreement may provide that the designated mediation service will select the mediator only if the parties fail to do so. Finally, the mediation provision may allocate the costs of mediation, such as by providing that each party will bear his or her own expenses.

[3] Arbitration

[a] State Bar Arbitration Program

The Board of Governors of the State Bar administers a fee and/or cost arbitration program [*see Bus. & Prof. Code § 6200(a)*]. Under the program, the arbitrator may do take and hear evidence pertaining to the proceeding, administer oaths and affirmations, and compel, by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding [*Bus. & Prof. Code § 6200(g)*].

The arbitration program does not apply to any of the following [*Bus. & Prof. Code § 6200(b)*; *see Bus. & Prof. Code § 6203(a)*]:

- Attorneys who are admitted to practice but do not maintain an office in California.
- Disputes in which the client charges the attorney with malpractice or professional misconduct.
- Disputes in which the attorneys' fees are determined by statute or court order.

Unless a client has agreed in writing to arbitration of all disputes concerning fees, costs, or both, arbitration is voluntary for a client. Arbitration is mandatory for an attorney, however, if arbitration is commenced by a client [*Bus. & Prof. Code § 6200(c)*]. With respect to fee and/or cost disputes involving allegations of malpractice or professional misconduct, evidence relating to those claims is admissible only to the extent that those claims bear on the fees and/or costs to which the attorney may be entitled. The arbitrators may not award affirmative relief, either in the form of damages, offset, or otherwise for injuries underlying those claims. However, they may award a refund of unearned prepaid fees [*Bus. & Prof. Code § 6203(a)*].

[b] Advantages of Arbitration

The arbitration process has significant advantages for both attorney and client. In general, arbitration permits confidentiality, some flexibility and, in most cases, cost-effectiveness and speed, while avoiding the expense and stress of litigation. Advantages for attorneys include the following:

- Arbitration of professional liability issues can increase the likelihood of a more reasonable damage

award against the attorney if liability is conceded or found by limiting the risk of a runaway jury award.

- In fee arbitrations, state or local bar fee arbitrators are precluded from considering any counterclaims or offsets for malpractice or other performance issues in any fee dispute. Thus, an attorney can resolve a fee dispute with a client in the fee arbitration forum while the client must independently initiate a legal malpractice or related claim in another forum.

[c] Strong Policy Favoring Enforcement of Arbitration Clauses

California has a strong policy favoring arbitration even when the decision causes substantial injustice and is contrary to public policy [*see, e.g., Moncharsh v. Heily & Blase (1992) 3 Cal. 4th 1, 10 Cal. Rptr. 2d 183, 832 P.2d 899* ; *Beynon v. Garden Grove Medical Group (1980) 100 Cal. App. 3d 698, 704, 161 Cal. Rptr. 146* (arbitration agreement must have been openly and fairly entered into to be enforceable)]. However, case law has consistently held that this strong policy favoring arbitration does not extend to issues beyond the scope of the arbitration agreement. The California Supreme Court has held that although a strong policy favors enforcing agreements to arbitrate, there is no policy compelling persons to accept arbitration of controversies that they have not agreed to arbitrate [*Freeman v. State Farm Mut. Auto. Ins. Co. (1975) 14 Cal. 3d 473, 481, 121 Cal. Rptr. 477, 535 P.2d 341]* .

When the scope of arbitration is in doubt and the case involves an issue in which there is a constitutional right to a jury trial, doubt should be resolved in favor of a trial by jury and against arbitration [*Fireman's Fund Ins. Companies v. Younesi (1996) 48 Cal. App. 4th 451, 458-459* ; *see Mayhew v. Benninghoff (1997) 53 Cal. App. 4th 1365, 1371-1372, 62 Cal. Rptr. 2d 27]* . The right to pursue claims in a judicial forum is a substantial right and one not lightly to be deemed waived. Because the parties to an arbitration clause surrender this substantial right, the general policy favoring arbitration cannot replace an agreement to arbitrate [*Mayhew v. Benninghoff (1997) 53 Cal. App. 4th 1365, 1371-1372, 62 Cal. Rptr. 2d 27* (lawyers cannot be permitted to create presumption of arbitrability through all-purpose arbitration clauses in engagement agreements)].

[d] Arbitration Provisions

Bus. & Prof. Code § 6200(c) provides that arbitration is voluntary for a client unless the client has agreed in writing to arbitration of all disputes concerning fees, costs, or both. Before its amendment, effective January 1, 1997, the fee arbitration statute expressly stated that fee arbitrations were voluntary for the client. The amendment thus permits an attorney and client to agree in a fee agreement or engagement letter to mandatory fee arbitration.

Bus. & Prof. Code § 6204(a) provides that counsel and client may agree in writing to be bound by the award of the arbitrators at any time after a dispute over fees, costs, or both has arisen. Therefore, a fee agreement or engagement letter should not contain an agreement to binding arbitration.

PRACTICE TIP:

The language of an arbitration clause must *clearly* state what disputes are subject to arbitration. For example, in a family law matter, a court refused to compel arbitration of a client's legal malpractice claims, holding that the fee agreement was not clear enough to apprise the client that a legal malpractice claim was covered. The fee agreement required arbitration of disputes "regarding fees, costs or any other aspect of our attorney-client relationship." The court held that the agreement did not clearly put the client on notice that legal malpractice claims would be arbitrated [*see Lawrence v. Walzer & Gabrielson (1989) 207 Cal. App. 3d 1501, 1506-1508, 256 Cal. Rptr. 6]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionGeneral OverviewLegal EthicsClient RelationsGeneral Overview

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[Reserved]

§§ 86A.20[Reserved]

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A. Client Interview--Facts and Documents

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NOTE:

The purpose of this subpart is to assist counsel in gathering all information necessary to determine whether to accept the representation and the parameters of that representation, and to draft an agreement.

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28-86A California Legal Forms--Transaction Guide § 86A.100

§ 86A.100 Facts

1. Name, address, and telephone and fax numbers of client.

2. If client is business:

a. Form of business organization:

NOTE:
When business entities are involved, it is critical to identify who the actual client is, in order to help avoid conflicts of interest.

(1) Corporation or S corporation.

(2) General or limited partnership.

(3) Limited liability company.

(4) Limited liability partnership.

(5) Sole proprietorship.

b. Name, address, and telephone and fax numbers of business and principals.

3. If client is individual:

a. Age of client.

b. Marital status.

c. Number, age, names, and addresses of children.

4. Purpose of consultation, including all information about the work to be done.

NOTE:

Counsel should make an initial assessment as to any potential conflicts of interest at the early stages of the client interview before he or she elicits much substantive information from the prospective client [*see* *Cal. Rules Prof. Conduct, Rule 3-100 et seq.* (professional relationship with clients)].

5. Timing of consultation:

a. Status of transaction.

b. Whether contracting parties are already in agreement over proposed transaction.

6. Information as to client's experience with type of proposed transaction.

7. Information relating to other parties to proposed transaction or litigation.

a. Name, address, and telephone and fax numbers of parties.

b. If prospective client is party to pending civil action:

(1) Court and action number.

(2) If client is defendant, date on which he or she was served and how service was effected (e.g., mail or personal delivery).

c. If attorney will act as negotiator and/or advisor, whether other party to transaction is represented by counsel.

NOTE:

Parties to an apparently simple business transaction (e.g., the sale of a small business or the lease of a building) will sometimes consult an attorney to draft their agreement and obtain necessary licenses and permits. Typically, the parties will have negotiated the terms of the transaction before consulting an attorney. Attorneys should be cautious when in accepting this type of employment because, if the parties subsequently have a dispute regarding the terms of the transaction, the attorney may be charged by one or both with representing an adverse interest [*see* *§ 86A.12[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConfidentiality of InformationLegal EthicsClient RelationsConflicts of Interest

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28-86A California Legal Forms--Transaction Guide § 86A.101

§ 86A.101 Documents

1. If conservator, guardian, or other personal representative wants to retain attorney to perform legal services for conservatee or other charge, obtain documentary verification of person's capacity (e.g., letters of appointment).

2. If client is defendant in civil suit, obtain:

a. Copy of summons and proof of service.

b. Copy of original complaint and all amended complaints.

c. If substituting in or associating with present attorney of record:
(1) Substitution or association papers [*see Code Civ. Proc. § 284*].

(2) Entire court file and copy of prior attorney's or co-counsel's file.

d. Copies of all client's insurance policies and endorsements.

NOTE:

Regardless of whether or not an attorney believes an insurance policy would afford coverage for a specific action, he or she should always review the client's policies. Even if the client ultimately is not entitled to indemnity for an adverse judgment, he or she might still be entitled to a defense from the carrier [*see* *Gray v. Zurich (1966) 65 Cal. 2d 263, 276-277, 54 Cal. Rptr. 104, 419 P.2d 168]* .

3. If client wants to pursue claim for personal injury, all medical records [*see § 86A.203*].

4. If client wants to pursue claim for property damage arising from automobile accident, accident and witness reports [*see § 86A.204*].

5. If client seeks representation with respect to real property matter:

a. Documentary proof of ownership (e.g., deed or other conveyance).

b. Title insurance report.

c. Any other documents necessary for particular matter (e.g., abstract of title).

6. If client seeks representation on matter affecting existing partnership:

a. Copy of partnership agreement, including all amendments.

b. Copies of any available and relevant financial documentation.

NOTE:

For analysis and forms regarding actions affecting partnerships, see California Forms of Pleading and Practice, Chs. 400-406 (Matthew Bender). For analysis and forms relating to general partnership formation and dissolution, see Ch. 15, *General Partnerships* . For analysis and forms relating to limited partnership formation and dissolution, see Ch. 15A, ***Limited Partnerships*** . For analysis and forms relating to limited liability partnership formation and dissolution, see Ch. 16C, ***Limited Liability Partnerships*** .

7. If client seeks representation on matter affecting existing corporation:

a. Copies of organizational documents.

b. Balance sheet.

c. Any other documents, such as permit for stock offering, appropriate to particular type of action.

NOTE:

For analysis and forms regarding actions affecting corporations, see California Forms of Pleading and Practice, Ch. 160, *Corporations: Capacity* , through Ch. 170, *Corporations: Dissolution and Winding Up* (Matthew Bender). For an analysis of the law and forms relating to corporate formation and dissolution, see Ch. 2, ***Formation of Corporations*** , and Ch. 12, ***Winding Up and Dissolution*** .

8. If client seeks advice regarding personal bankruptcy, list of client's assets and obligations [*see* Ch. 77, *Discharge of Obligations*].

9. If client wants to change form of existing business:

a. Copies of organizational documents.

b. Balance sheets from previous years.

NOTE:

The choice of business organization is often determined by tax considerations. Accordingly, an attorney should review an existing business' balance sheets for several years to determine whether a change in form would be beneficial [***see*** Ch. 1B, ***Selecting Form of Business Entity*** , and Ch. 1E, ***Taxation of Businesses***].

c. Any other documents, such as buy-sell agreement, that could be affected by change.

10. If client seeks advice regarding probate, will contest, or other estate matter:

a. Copy of will.

b. Copies of any applicable trust instruments.

b. Copy of any probate documents.

c. Copies of any appraisals.

11. If client seeks advice regarding marital dissolution, see Ch. 110, *Marital Settlement Agreements* , for a checklist of documents and information.

12. Copies of any other outstanding contracts that might affect transaction or litigation at issue.

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawConservators & GuardiansGeneral OverviewLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAccepting Representation

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[Reserved]

§§ 86A.102[Reserved]

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B. Preliminary Determinations

28-86A California Legal Forms--Transaction Guide § 86A.110

§ 86A.110 Accepting Employment

1. If potential client seeks representation in matter involving litigation, determine whether:

a. Potential client has viable cause of action;

b. Suit would be premature; or

c. No evidence supports complaint.

2. If potential client seeks representation in business or other non-litigation matter, determine whether it is possible to perform desired services [*see* P 8, *below*].

3. Determine whether potential client has capacity to enter into contracts [*see* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*].

NOTE:

If prospective clients are seeking to form a partnership and seek representation for the partnership, counsel must review whether there are sufficient indicia of an ostensible or oral partnership to permit counsel to represent the partnership in formation as an entity [*see, e.g.,* *Buehler v. Sbardellati (1995) 34 Cal. App. 4th 1527]* . If there is insufficient agreement among the partners as to the form of organization and their respective obligations and liabilities to each other, counsel may need to represent the individuals.

4. Ascertain whether potential client has interest adverse to [*see § 86A.12[3]*]:

a. Interest of present or former client regarding matter on which attorney obtained confidential information by reason of his or her employment [*see Cal. Rules Prof. Conduct, Rule 3-310(D)*].

b. Interest of attorney [*see Cal. Rules Prof. Conduct, Rule 3-300*].

5. Determine whether potential client or clients have conflicting interests [*see Cal. Rules Prof. Conduct, Rule 3-310(B)*].

NOTE:

An attorney must be scrupulous in identifying potentially conflicting interests. For example, a firm violates *Cal. Rules Prof. Conduct, Rule 5-102* if it undertakes the representation of a third person in suing a current client on a completely unrelated matter [*see* *Jeffry v. Pounds (1977) 67 Cal. App. 3d 6, 10, 136 Cal. Rptr. 373]* .

Counsel can check the office index to determine whether firm is representing an adverse party in the same or another action. This assessment should be completed early in the interview or negotiating process. Counsel should be careful about acquiring confidential information from a prospective client that might affect another case, even when the parties will agree to waive any conflict of interest [*see* *§ 86A.12[3]*].

6. If potential client consults attorney on a tort matter:

a. Evaluate his or her demeanor and determine:
(1) Whether or not client control problems are likely to arise.

NOTE:

If an attorney has problems controlling his or her client, the attorney's ability to plan and carry out an effective litigation strategy can be seriously impaired.

(2) What kind of witness person would make on his or her own behalf (e.g., whether the person would be credible in testimony or would engender jury sympathy).

NOTE:

Until parties have been deposed it is difficult to evaluate their witness potential. However, if an attorney feels that the potential client clearly could not be brought in front of a jury, he or she should carefully weigh countervailing factors in deciding whether to accept employment.

b. Determine whether cause of action is barred by applicable statute of limitations.

7. If potential client was served with summons, determine:

a. Whether service was effective.

b. When response is required and, if time has expired, whether default has been taken.

c. Whether he or she is entitled to defense and/or indemnity under any of client's insurance policies.

8. Determine whether attorney is capable of handling potential client's case, or whether:

a. Case should be referred to expert counsel;

NOTE:

An attorney engaged in general practice must refer a client to an expert or associate an expert if, under the circumstances, a reasonably careful and skillful attorney

would do so. An attorney who fails to refer a case to an expert when necessary will be held to the higher standard of care applicable to attorneys who hold themselves out as experts [***Horne v. Peckham (1979) 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 , disapproved on other grounds****, ITT Small Business Finance Corp. v. Niles (1994) 9 Cal. 4th 245, 256-257, 36 Cal. Rptr. 2d 552, 885 P.2d 965] .*

b. Other counsel should be associated.

9. Assess need for additional non-legal professional advisors:

a. Accountant.

b. Financial advisor.

c. Broker.

d. Experts.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationGeneral OverviewLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAccepting Representation

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86A AGREEMENTS FOR LEGAL SERVICES
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

28-86A California Legal Forms--Transaction Guide § 86A.111

§ 86A.111 Retention Agreement

1. Determine client's goals and ascertain exactly what client wants done.

NOTE:

Failure to reach a common understanding regarding what legal services the attorney will provide and how much the client will pay for those services can lead to future discord between the attorney and client and a disruption of their relationship.

2. Determine scope of representation.

3. Determine type of retention agreement to use [*see § 86A.11*; *see also Bus. & Prof. Code §§ 6146-6149* (fee agreements)].

a. Contingent fee agreement [*see §§ 86A.200-86A.202, 86A.212-86A.214, 86A.220-86A.222*].

NOTE:

An attorney should be cautious in entering into a contingent fee contract to represent a person with whom he or she already has a professional relationship. There is a rebuttable presumption that a contingency fee contract entered into during the existence of the attorney-client relationship was executed without adequate consideration and that the attorney exerted undue influence on the client [*see* *Thomson v. Casaudoumecq (1962) 205 Cal. App. 2d 549, 553, 23 Cal. Rptr. 189* ; *see also* *Rader v. Thrasher (1962) 57 Cal. 2d 244, 249-250, 18 Cal. Rptr. 736, 368 P.2d 360]* . Accordingly, an attorney must carefully document all circumstances and negotiations leading up to the execution of a contingent fee contract with a current client.

b. Retainer fee arrangement [*see §§ 86A.230-86A.233*].

c. Flat fee arrangement for specific service [*see §§ 86A.230-86A.233*].

d. Hourly rate fee arrangement [*see §§ 86A.234*].

4. Determine whether fees are regulated by law [*see Bus. & Prof. Code § 6146* (medical malpractice actions); *see also 28 U.S.C. § 2678* (tort actions against branches of federal government)] or determined by court [*see* Prob. Code §§ 1081, 1120, *2640-2644*].

5. If fees are not regulated by law or awarded by court, evaluate following factors in order to determine appropriate fees to charge [*see Cal. Rules Prof. Conduct, Rule 4-200(B)*]:

a. Amount of fee in proportion to value of services performed.

b. Relative sophistication of attorney and client.

c. Novelty and difficulty of questions involved and skill required to properly perform legal service.

d. Likelihood, if not apparent to client, that attorney will be precluded from other employment by representing client.

NOTE:
If the attorney will be precluded from accepting other employment due to the representation of the client, he or she should disclose this to the client.

e. Amount involved and results obtained.

f. Time limitations imposed by client or by circumstances.

g. Nature and length of professional relationship with client.

h. Experience, reputation, and ability of attorney or attorneys performing services.

i. Whether fee is fixed or contingent.

j. Time and labor required to perform service.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAccepting Representation

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[Reserved]

§§ 86A.112[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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28-86A California Legal Forms--Transaction Guide § 86A.120

§ 86A.120 Accepting Employment

1. If attorney has identified conflicting interest [*see Cal. Rules Prof. Conduct, Rule 3-310*; *see also §§ 86A.12[3]*, *86A.247* (disclosure for joint representation)]:

a. Disclose and explain conflict to potential client.

b. Obtain client's written consent to representation under disclosed terms.

2. If potential client has interest adverse to interest of current or former client and regarding matter on which attorney obtained confidential information [*see Cal. Rules Prof. Conduct, Rule 3-310(D)*]:

a. Disclose and explain matter to client or former client, and

b. Obtain client's or former client's written consent to proposed employment by client with adverse interest.

3. If substituting into pending action, file substitution papers with clerk of court [*see Code Civ. Proc. § 284*].

NOTE:
Generally the attorney who is substituting out will prepare substitution papers to be executed by the attorney and the client.

4 If client is defendant, place all client's insurance carriers on notice of suit.

5. Draft retention agreement [*see § 86A.130*] and:

a. Go over all terms of agreement with client.

b. Explain basis for fees and billing method.

c. Deliver unexecuted translation of agreement to client if attorney negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [*see Civ. Code § 1632*].

NOTE:

An attorney who negotiates a contract for legal services primarily in a language other than English may have to provide the client with a translation of the contract in that other language prior to execution of the contract. For contracts entered into prior to July 1, 2004, this requirement applied only to contracts negotiated primarily in Spanish. On and after July 1, 2004, it is applicable to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [*see Civ. Code § 1632*]. This requirement does not apply if the person purchasing the attorney's services has participated in the negotiations through his or her own interpreter [*Civ. Code § 1632*((h) ("interpreter"defined)]. Failure to comply with these requirements gives the aggrieved party the right to rescind the contract [*Civ. Code § 1632(k)*]. For a detailed discussion of these translation requirements, and related requirements, see *Ch. 45, **Consumer Installment Loans and Credit Sales**, § 45.64*.

d. Have client execute agreement.

e. Provide client with copy of agreement [*see Bus. & Prof. Code § 6147*].

6. Establish office file on new client and, if appropriate, place case on office calendar or docketing system.

7. If attorney has accepted advance fee payment, deposit in interest bearing trust account for client [*see* Cal. Rules *Prof. Cond., Rule 4-100(A)*; *see also § 86A.17*].

8. If contract is for services in litigation and is made by or on behalf of a minor, obtain approval of court in which litigation is pending or that has jurisdiction over minor's estate [Fam. Code § 660].

NOTE:

A contract for attorneys' fees for services in litigation, made by or on behalf of a minor, is void unless the contract is approved, on petition by an interested person, by the court in which the litigation is pending or by the court having jurisdiction of the guardianship estate of the minor. If the contract is not approved and a judgment is recovered by or on behalf of the minor, the attorneys' fees chargeable against the minor will be fixed by the court rendering the judgment [*Fam. Code § 6602*]. For discussion and forms, see California Forms of Pleading and Practice, Ch. 291, *Guardians Ad Litem* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAccepting RepresentationLegal EthicsClient RelationsConfidentiality of InformationLegal EthicsClient RelationsConflicts of Interest

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28-86A California Legal Forms--Transaction Guide § 86A.121

§ 86A.121 Declining Employment

1. If declining employment, immediately:

    a. Notify rejected party orally.

    b. Place note in file documenting date, time, and manner of oral notice.

2. Promptly return all documents provided for review.

3. Draft letter to rejected party [*see § 86A.249*]:

    a. Specifying matter in which attorney is declining to represent party.

    b. Confirming conversation of specified date in which attorney orally advised party that he or she was declining employment.

    c. If appropriate, advising party that statute of limitations on his or her action will expire on a specified date and that any action that party may have must be filed by that date.

    d. Advising party to consult other counsel on matter if he or she desires.

    e. Confirming return of documents.

4. Send letter by registered or certified mail, return receipt requested.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAccepting Representation

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28-86A California Legal Forms--Transaction Guide §§ 86A.122-86A.129

[Reserved]

§§ 86A.122[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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28-86A California Legal Forms--Transaction Guide § 86A.130

§ 86A.130 Legal Services Contract

NOTE:

A properly drafted legal services agreement sets the parameters of the attorney-client relationship, structuring the terms and conditions of the attorney-client relationship. A typical agreement provides for dispute resolution and allocates the risk of loss or the burden of costs. Fee agreements should be reviewed annually to conform to any changes in law or practice.

1. Specify parties to agreement:

NOTE:

Particularly when multiple clients are involved, or when some form of entity is a prospective party, it is critical for counsel to determine the identity of the client. For example if partners in a in a general partnership consult counsel, will counsel represent the partners individually, the partnership, or both. Similarly, if a corporation is involved, counsel must determine whether he or she will represent the corporation, its shareholders or members, or both. A properly drafted legal services agreement should memorialize this determination. In addition to specifying whom the attorney is representing in such situations, it may be advisable to expressly note that the attorney is *not* representing specific parties.

a. Names of parties.

b. If civil action, identify client's status:
(1) Client is plaintiff in civil action.

(2) Client is petitioner or respondent in marital dissolution proceeding.

(3) Capacity in which counsel is representing client.

NOTE:
If the client is an officer, director, or CEO of a corporation, counsel must determine, and the agreement should state, whether counsel is representing the individual in a representative or individual capacity. If the client is a trustee or executor of an estate, counsel must similarly determine the nature of the representation. This determination may affect the nature of the duties under the agreement, including whether counsel may disclose confidential information to a successor in interest [*see* *Moeller v. Superior Court (1997) 16 Cal. 4th 1124, 69 Cal. Rptr. 2d 317, 947 P.2d 279]* .

c. Capacity of client to enter contract.

d. If business, partnership, or corporate undertaking:

(1) Form of organization and location of principal place of business.

(2) Any doing business as names.

(3) State of organization.

e. If law firm is large and client has not met with all attorneys who will work directly with client, identify:

(1) Attorney primarily responsible for handling client's case or undertaking.

(2) Other attorneys likely to work on case.

NOTE:
If one attorney in a firm has a reputation for expertise in the area of law in which the client seeks representation, the agreement should specify to what extent that attorney will be involved in the client's case. The client may become dissatisfied if the specific attorney he or she expected to provide services does not do so.

2. Identify scope of services under agreement:

a. Specify type of case (e.g., medical malpractice) in which attorney will represent client, or nature of services attorney will provide (e.g., incorporation of business) [*see §§ 86A.202[2], 86.231[2]*].

(1) If matter consists of personal injury claim, specify date and location of occurrence giving rise to claim [*see § 86A.200[2]*].

(2) If appropriate, specify governing statute.

(3) If attorney is employed to negotiate or advise regarding business matter, include provision specifically authorizing him or her to enter into contracts on client's behalf if desired.

NOTE:

Absent specific written authority, attorneys lack authority to enter into binding contracts for their clients [***Nellis v. Massey (1952) 108 Cal. App. 2d 724, 728, 239 P.2d 509]*** **.**

b. If matter involves pending civil action, specify [*see, e.g., § 86A.234[2],* P 2]:

(1) County and court where filed.

(2) Action number.

(3) Caption.

c. Extent of services covered by agreement, including, as appropriate:

NOTE:

A legal services contract may be drafted to cover representation in stages, and may include a provision that the parties will first reach a new fee agreement before extending the representation beyond the stated stage.

(1) Informal resolution or settlement negotiations.

(2) Formal settlement negotiations.

NOTE:

A contingent fee contract should not require the attorney's consent to any settlement of a case as such a provision is probably void as against public policy [*see* *Hall v. Orloff (1920) 49 Cal. App. 745, 749]* . For further discussion, see *§ 86A.11[4][d]*].

(3) Formal alternative dispute resolution:

(a) Mediation.

(b) Arbitration.

(4) Filing lawsuit.

(5) Seeking extraordinary relief, such as temporary restraining order or permanent injunction.

(6) Enforcing judgment or obtaining final order in marital dissolution case.

NOTE:

Actions necessary to collect a judgment, as well as obtaining a final order in a marital dissolution case are typically beyond the ordinary limits of representation.

(7) Appellate services.

NOTE:

Appellate services, both during a case and after final judgment, typically are beyond the ordinary limits of representation, due to the extraordinary nature of an

appeal and the substantial additional expense it entails. Appeals and related services typically are covered under separate fee agreements.

d. If desired, limit purpose for which attorney is retained (e.g., to secure continuance in specified civil action).

NOTE:

If the client wants the attorney to perform only a very limited service, this limitation should be clearly stated in the retention agreement so that the extent of the attorney's duty will be similarly limited if he or she and the client engage in any subsequent disputes regarding the attorney's performance.

e. Any limits on attorney's authority to act, such as:

NOTE:

An attorney has the authority to bind his or her client in all matters regarding the regular conduct of the case [*Code Civ. Proc. § 283(1)*]. Unless the client files a revocation of authority, an attorney may receive money claimed by the client either during the pendency of an action or after judgment is entered and may discharge the client's claim or acknowledge satisfaction of a judgment [*Code Civ. Proc. § 283(2)*].

(1) Prohibiting attorney from entering into stipulations without client's prior consent.

(2) Prohibiting attorney from joining particular defendant(s) without client's prior consent.

(3) Prohibiting attorney from settling action without client's prior consent [*see, e.g., §§ 86A.200[2], 86A.201[2],* P 8].

NOTE:

An attorney is presumed to have authority to compromise his or her client's case [*see* *Linsk v. Linsk (1969) 70 Cal. 2d 272, 277, 74 Cal. Rptr. 544, 449 P.2d 760]* . An attorney must convey the amounts, terms, and conditions of all written settlement offers to the client regardless of whether or not the attorney recommends accepting the offers [***see*** *Rule 5-105, Cal. Rules Prof. Conduct*].

3. Require client to cooperate with attorney by [*see, e.g., §§ 86A.200[2], 86A.201[2],* P 2]:

a. Keeping current contact information on file withe counsel, including notifying attorney of any change of address.

b. Notifying attorney of any extended absence.

c. Appearing on reasonable notice for all matters at which client's presence is required.

d. Reasonably considering attorney's recommendations regarding settlement.

4. If attorney believes associate counsel may be necessary, include provision allowing association on reasonable notice to client [*see §§ 86A.200[2], 86A.202[2],* P 8].

5. If attorney has had opportunity to review facts or documents, specify that:

a. On basis of review, attorney believes client has cause of action in specific matter [*see, e.g., § 86A.213*].

b. Attorney makes no representation as to merits or outcome of case [*see, e.g., § 86A.201[2],* P 6].

6. State amount of fees and responsibility for payment of fees and costs.

a. Specify whether client will pay advance on fee [*see, e.g., §§ 86A.11[3], 86A.210[2]*].

b. If attorney will advance costs for case or undertaking [*see § 86A.202[2],* P 2]:

(1) State that attorney will make cost advances.

(2) Describe types of costs anticipated (e.g., private investigators, preparation of evidence, court costs).

NOTE:
Provisions for paralegal services are usually addressed with counsel's hourly fees [*see §§ 86A.233[2],* P 4, 86A.234[2], P 4].

(3) Consider providing reasonable estimate of these costs, absent extraordinary developments in case.

(4) Require client to reimburse attorney for all cost advances.

NOTE:
The client must always remain responsible for costs of the action or undertaking [*see Rule 4-210, Cal. Rules Prof. Conduct*]. However, a plaintiff's attorney who unsuccessfully pursues an action for damages under a contingent fee agreement will sometimes decide not to press his or her claim for reimbursement from the client.

c. If fee is contingent [*Bus. & Prof. Code § 6147*; *see § 86A.11[4]*; *see also §§ 86A.200-86A.202, 86A.212-86A.214, 86A.220-86A.222*]:

NOTE:
The number of stages referred to in a contingency fee agreement should relate to the apparent complexity of the case and the amount of time the attorney expects will be necessary either to place the case in a settlement posture or to bring it to trial.

In general, a contract to represent an individual in a marital dissolution proceeding should not be made on a contingent fee basis as such an agreement is ordinarily void as against the public policy favoring the preservation of marriages [*see Coons v. Kary (1968) 263 Cal. App. 2d 650, 652-653, 69 Cal. Rptr. 712]* . However, a contingency fee contract between counsel and a respondent may be enforceable if it was executed after the dissolution action was instituted and an analysis of the circumstances (such as the existence of any possibility of a reconciliation) indicates that upholding the contract would not frustrate applicable public policy [***see*** *Krieger v. Bulpitt (1953) 40 Cal. 2d 97, 100-101, 251 P.2d 673]* . For further discussion, see 86A.11[4][d]].

Note that *Bus. & Prof. Code § 6147* does not apply in actions for recovery of claims between merchants [*Bus. & Prof. Code § 6147.5(a)*; *see §§ 86A.11[2], [4], 86A.16[5]*]. For these purposes, a

"merchant" is a person who deals in goods of the kind or otherwise by his occupation holds himself or herself out as having knowledge or skill peculiar to the practices or goods involved in the transaction, or to whom such knowledge or skill may be attributed by the person's employment of an agent or broker or other intermediary who by that person's occupation holds himself or herself out as having such knowledge or skill. "Between merchants" means any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants [*Com. Code § 2104*]. Although the requirements below are inapplicable to such contracts, statutory limitations are imposed on the amount of recovery in this situation when no written agreement for legal services exists [***see** Bus. & Prof. Code § 6147.5(b)*].

(1) State agreed contingency fee rate(s) (that is, percentage of recovery to which attorney will be entitled depending on stage of proceeding when matter is resolved).

(2) Explain manner in which costs and disbursements incurred in prosecuting or settling claim will affect contingency fee and client's recovery [*see, e.g., § 86A.201[2]*].

(3) State to what extent, if any, client may be required to compensate attorney for related matters arising out of relationship but not covered by contract.

(4) State that fee is negotiable and not set by law unless action is for malpractice against health care provider [*see* P (5), *below*].

(5) If action is for malpractice against health care provider [*see §§ 86A.16[4], 86A.202*]:

(a) State that rates set forth in *Bus. & Prof. Code § 6146* are maximum limits for contingency fee contracts and that parties may negotiate lower rate.

(b) State that attorney will receive as maximum fee [*see Bus. & Prof. Code § 6146(a)*]:
(i) 40 percent of first $50,000 recovered.

(ii) 331/3 percent of next $50,000 recovered.

(iii) 25 percent of next $500,000 recovered.

(iv) 15 percent of any amount by which recovery exceeds $600,000.

d. If fee is retainer [*see § 86A.11[3]; see also § 86A.230-86A.234*]:

(1) Specify amount of retainer, and

(2) That retainer has been paid, or date on which it will be paid.

(3) Specify amount of time for which retainer will secure attorney's availability.

(4) Specify what services attorney will perform for retainer fee.

(5) Specify extraordinary services for which attorney will be available at his or her regular rates.

(6) If applicable, specify rate at which paralegal services (or any other special services outside retainer

agreement) will be charged.

(7) If desired, provide that interest will be charged on overdue accounts for extraordinary services [*see § 86A.240[2]*].

e. If fee is flat rate for particular service [*see § 86A.231[2]*]:

(1) Specify extent of service that attorney will perform for stated fee.

(2) Specify related services that may need to be performed but that are not included within the flat fee agreement, whether attorney will be available to perform those related services, and that client will be charged at regular rate for extraordinary services.

(3) If applicable, specify rate at which paralegal services (or any other special services outside retainer agreement) will be charged.

(4) If desired, specify that client will be charged interest on overdue accounts for extraordinary services [*see § 86A.240[2]*].

f. If reasonably foreseeable that total expense to client, including attorneys' fees, will exceed $1,000, state [*Bus. & Prof. Code § 6148(a)*; *see § 86A.234[2]*]:

NOTE:

Use of a written contract is mandatory when it is reasonably foreseeable that total expense will exceed $1,000 [*Bus. & Prof. Code § 6148(a)*]. The following requirements apply to all attorneys' fee agreements that meet the $1,000 limit, except for contingent fee agreements and certain special situations for which statutory exceptions are provided [*see* *Bus. & Prof. Code § 6148(d)*]. For further discussion, see *§ 86A.11[2]*.

Note that *Bus. & Prof. Code § 6148* does not apply in actions for recovery of claims between merchants [*Bus. & Prof. Code § 6147.5(a)*; see the NOTE to P c, *above*].

(1) Basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case.

(2) General nature of legal services to be provided to client.

(3) Respective responsibilities of attorney and client as to performance of contract.

g. Specify that court will determine attorneys' fees if action is:

(1) Ordinary probate proceeding [*see Prob. Code § 10810*].

(2) Guardianship proceeding [*see Prob. Code § 2640(a)(3)*].

(3) Conservatorship proceeding [*see Prob. Code § 2640(a)(3)*].

(4) Action under Federal Tort Claims Act [*see 28 U.S.C. § 2678*].

7. If desired, specify that attorney will have lien for fees and costs on client's recovery.

NOTE:

An attorney will have an implied lien for fees in most contingency fee situations [***see*** *§ 86A.16[6]*]. However, it is better practice to include a specific lien provision in the retention contract [***see*** *§ 86A.16[6], 86A.200[1][c], [2]*].

8. If desired, specify that disputes under agreement will be resolved pursuant to mediation or arbitration [*see §§ 86A.19, 86A.201[2],* P 12].

9. Provide space for both parties to sign.

10. Provide space for client to acknowledge receipt of copy of contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLegal EthicsClient RelationsGeneral OverviewLegal EthicsLegal Services MarketingGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-86A California Legal Forms--Transaction Guide §§ 86A.131-86A.139

[Reserved]

§§ 86A.131[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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28-86A California Legal Forms--Transaction Guide § 86A.140

§ 86A.140 Termination of Attorney-Client Relationship

1. If withdrawing from employment [*see Cal. Rules Prof. Conduct, Rule 3-700(A)*]:

NOTE:
Cal. Rules of Prof. Conduct, Rule 3-700(B), (C),* lists situations in which withdrawal by counsel is mandatory and permissive. For further discussion, see *§ 86A.18[1], [2].

a. Give notice to client.

b. Allow client time to employ other counsel.

c. Deliver to client all papers and property to which he or she is entitled **[** *Cal. Rules Prof. Conduct, Rule 3-700(D)*; *see § 86A.18[5]*].

d. Refund any fee paid in advance that has not been earned [*see § 86A.11[1]*].

e. Comply with any other applicable laws or rules [*Cal. Rules Prof. Conduct, Rule 3-700(A)(2)*; *see Cal. Rules Prof. Conduct, Rule 3-700(D)*].

2. If substituting out of pending action [*see Code Civ. Proc. § 284*]:

a. Prepare substitution papers.

b. Have parties execute papers.

c. File papers with court.

3. If undertaking has been accomplished or proved impossible:

a. Advise client of accomplishment or impossibility.

b. Collect fee.

NOTE:
If the contracted-for legal services are impossible to perform, the attorney is entitled to the reasonable value of services actually rendered [*see* *Green v. Sherritt (1936) 17 Cal. App. 2d 732, 735-736]* .

c. Write letter to client confirming that:

(1) Undertaking is accomplished and matter is closed; or

(2) Undertaking was impossible but that client may consult other counsel.

d. Mail letter to client, return receipt requested.

e. Close office file on matter.

4. If representing party to civil action, file closing papers (e.g., compromise of disputed claim, judgment, etc.) and:

a. Provide client with copies.

b. If retention agreement extends duty beyond negotiating settlement or obtaining judgment for plaintiff, collect judgment or file judgment lien on defendant's property.

NOTE:
For an analysis of the law and forms relating to recording and enforcing judgments, see California Forms of Pleading and Practice, Ch. 318, *Judgments* (Matthew Bender).

c. Collect fee if from settlement or judgment proceeds.

d. Close office file.

e. Write letter advising client that matter is closed.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceDischarges & TerminationsLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAccepting Representation

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DIVISION VI: PERFORMANCE OF SERVICES
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28-86A California Legal Forms--Transaction Guide § 86A.141

§ 86A.141 Fee Collection

1. If client will not pay agreed-on fees or costs, or both, consider [*see § 86A.16*]:

a. Compromising amount of fees and/or costs.

b. Taking promissory note.

c. Arranging for installment payments.

d. Filing suit for fees and/or costs.

2. If decision is made to file suit, or to begin any other proceeding under contract providing for alternative to arbitration for fees and/or costs (except mediation), for fees and/or costs, first [*see Bus. & Prof. Code § 6201(a)*; *see also § 86A.248[2]*]:

a. Notify client that suit will be filed and that he or she has 30 days in which to demand arbitration of disputed fees and/or costs [*see § 86A.248[2]*].

NOTE:
For coverage of arbitration and suits for attorneys' fees, see California Forms of Pleading and Practice, Ch. 72, *Attorney Practice and Ethics* (Matthew Bender).

b. Calendar matter for 30 days from date notice was mailed.

Legal Topics:

For related research and practice materials, see the following legal topics:

Legal EthicsClient RelationsAttorney FeesGeneral OverviewLegal EthicsClient RelationsBilling & Collection

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28-86A California Legal Forms--Transaction Guide §§ 86A.142-86A.199

[Reserved]

§§ 86A.142[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86A AGREEMENTS FOR LEGAL SERVICES
PART IV. FORMS
A. Damage Claims

28-86A California Legal Forms--Transaction Guide § 86A.200

§ 86A.200 Contingent Fee Agreement for Damage Claim--Letter Form

[1] Comment

[a] Use of Form

This form is a letter-style contingent fee agreement under which an attorney agrees to represent a client in a specific claim for damages. The form is designed for use in the context of an accident, and contains blanks near the top for the date and location of the accident. Plaintiffs' attorneys who practice primarily in the areas of personal injury and property damage most frequently use this type of contingent fee agreement. However, this form can be adapted for any kind of tort claim except malpractice actions against health care providers. For an appropriate form to use in medical malpractice actions, see *§ 86A.202*.

Under a contingency fee agreement, the attorney's fee is generally a specified percentage of any net recovery [*see* [2], *below*; *see also § 86A.201[2]*, P 3]. That percentage varies depending on the stage at which the recovery is made (e.g., before filing an action or after commencement of trial). This form specifies different percentages for three different litigation stages. Some contingency fee agreements specify only two stages and some specify as many as five. The number of stages referred to in the agreement should depend on the apparent complexity of the case and the amount of time the attorney expects will be necessary either to place the case in a settlement posture or to bring it to trial. If the attorney prefers more or fewer than three, this form can be modified accordingly.

This form is designed so that the attorney can have it photocopied or printed in advance on his or her letterhead. On the client's first office visit the parties can complete the blanks and execute the agreement. Counsel must provide the client with a signed copy of the agreement at the time of execution [*see Bus. & Prof. Code § 6147(a)*]. If the client does not execute the agreement in the attorney's office, counsel should request the client to countersign the letter and return it to the attorney as soon as possible.

Many attorneys prefer that retention agreements be in letter form, so that the attorney-client relationship will commence in an informal and friendly manner. However, if the attorney prefers a more formal contract style, § 86A.201 may be used.

[b] Statutory Requirements

All contingency fee contracts, other than those for the recovery of workers compensation benefits and the recovery of claims between merchants [*see Bus. & Prof. Code § 6147.5(a)*], must be in writing and contain the following [*Bus. & Prof. Code § 6147(a), (c)*; *see Bus. & Prof. Code § 6147(d)*]:

- The contingency fee rate on which the parties agreed.

- An explanation of the manner in which costs and disbursements incurred in prosecuting or settling the claim will affect the contingency fee and the client's recovery.

- A statement to what extent, if any, the client may be required to compensate the attorney for related matters arising out of their relationship but not covered by the contingency fee contract. This statement may include any amounts collected for the plaintiff by the attorney.

- A statement that the fee is negotiable and not set by law, unless the action is for malpractice against a health care provider [*see Bus. & Prof. Code § 6146* (limitations on fees)].

- A statement that the rates set forth in *Bus. & Prof. Code § 6146* are the maximum limits for the contingency fee contract and that the parties may negotiate a lower rate unless the action is for malpractice against a health care provider [*see* [2], below; *see also § 86A.201[2]*, P 13].

[c] Lien Against Recovery

An attorney may establish a lien to secure his or her fees on the judgment or property obtained as a result of the attorney's services. If a contingent fee contract does not contain express language creating an attorney's lien, whether or not a lien exists is a question of fact involving a determination of the parties' intentions [*Gelfand, Greer, Popko & Miller v. Shivener (1973) 30 Cal. App. 3d 364, 370, 105 Cal. Rptr. 445]* . The parties need not use the word "lien" in their contract in order to create a lien. An implied equitable lien exists if the parties agree that the attorney is to look to the judgment as security for fees [*see Wagner v. Sariotti (1943) 56 Cal. App. 2d 693, 697, 133 P.2d 430]* .

An attorney may enforce a contractual lien in an independent action against the client. However, if the attorney has been discharged, he or she may not intervene in the main action to enforce the lien [*Bandy v. Mt. Diablo Unified Sch. Dist. (1976) 56 Cal. App. 3d 230, 234, 126 Cal. Rptr. 890]* .

[d] Translation Requirements

Any attorney who negotiates a contract for legal services primarily in a language other than English may have to provide the client with a translation of the contract in that other language. For contracts entered into prior to July 1, 2004, this requirement is applicable only to contracts negotiated primarily in Spanish. On and after July 1, 2004, it is applicable to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [*see Civ. Code § 1632*]. For further discussion, see *§ 86A.111[6]*. For a detailed discussion of these translation requirements, and related requirements, see *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.64*.

[e] Execution Requirements

All contingency fee contracts, other than those for the recovery of workers compensation benefits and the recovery of claims between merchants [*see Bus. & Prof. Code § 6147.5(a)*], must be in writing and signed by both parties [*Bus. & Prof. Code § 6147(a), (c)*]. An attorney who contracts to represent a client on a contingency fee basis must provide, at the time the contract is entered into, a duplicate copy of the contract, signed by both the attorney and the client, or the

client's guardian or representative, to the plaintiff, or to the client's guardian or representative [*Bus. & Prof. Code § 6147(a)*].

If the contract does not satisfy the writing [*see* [b], *above*] or these execution requirements, the agreement is voidable at the option of the client. However, if the agreement is voided, the attorney is still entitled to collect a reasonable fee for his or her services [*Bus. & Prof. Code § 6148(c)*; *see § 86A.11[4][e]*].

[2] FORM

Contingent Fee Agreement for Damage Claim--Letter Form

[*Letterhead of attorney or law firm*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Re: _____ [*date*] Date of Accident
[*site*] Site of Accident
Dear _____ [*name of client*] :

This letter will confirm the terms on which this office has been retained by you to represent you in the prosecution of any and all claims that you have for personal injury and property damage arising out of the above-captioned accident.

The attorney's fee will be a percentage of the net amount obtained for you. If nothing is recovered, this office will receive nothing for its services. This office will advance all legal, investigative, and trial costs necessary for the prosecution of your claims. You will reimburse this office for those costs regardless of whether or not any amount is recovered on your behalf.

From the amount recovered for you, this office will first be repaid for all costs advanced on your behalf. The attorney's fee will be a percentage of the remaining balance depending on the stage at which the recovery is received. The following fees have been negotiated by you and this office and are not set by law:

_____ [*e.g.*, 331/3] percent if recovery is received before _____ [the filing of an action *or* the pretrial conference *or* the commencement of trial].

_____ [*e.g.*, 331/3 *or* 40] percent if recovery is received after _____ [the filing of an action *or* the pretrial conference *or* the commencement of trial].

_____ [*e.g.*, 45 *or* 50] percent if recovery is received after either the commencement of a second trial or the filing of an appeal by either party.

You will not be obligated to compensate this office for any matter related to but not specifically covered in this agreement, such as the collection of any recovery obtained on your behalf.

This office will not settle your claims without your complete approval. This office may associate any other attorney at its discretion and expense [*optional:* and may withdraw at any time after giving you reasonable notice]. You agree to give an equitable lien on your claims and recovery to this office for its services and costs advanced. You will keep this office advised of your whereabouts at all times, appear on reasonable notice at any depositions and court appearances, and comply with all reasonable requests made by this office in connection with the preparation and presentation of your

claims.

Please review this letter and, if it meets with your approval, sign and date the enclosed copy of this letter and return it to us in the envelope provided. The additional copy is for your records. We look forward to a long and pleasant professional relationship with you. If you ever have any questions regarding your estate planning matters, or anything addressed in this letter, please do not hesitate to contact me.

Sincerely,
_____ [*signature of attorney*]
[*typed name*]
For _____ [*typed name of law firm*]

[*Select one of the following alternatives; either:*]

I understand and agree to the terms set forth in this letter.

_____ [*signature of client*]
[*typed name*]

Date: _____

[*OR*]

I hereby acknowledge that I have read this document in its entirety, that I know and understand its contents, that I have had an opportunity to consult with others (including other attorneys) concerning its contents, and that I am bound by its terms. This Agreement may be signed in counterparts.

_____ [*signature of client*]
[*typed name*]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesContingency FeesLegal EthicsClient RelationsBilling & Collection

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86A AGREEMENTS FOR LEGAL SERVICES
PART IV. FORMS
A. Damage Claims

28-86A California Legal Forms--Transaction Guide § 86A.201

§ 86A.201 Contingent Fee Agreement for Damage Claim--Contract Form

[1] Comment

[a] Use of Form

This form is an attorney-client contingent fee agreement in contract form. This form is similar to the letter agreement in § 86A.200, but more formal and detailed. Many attorneys prefer that retention agreements be in letter form, so that the attorney-client relationship will commence in an informal and friendly manner. If counsel prefers a more informal letter style agreement, § 86A.200 may be used.

This form defines the scope of representation. It provides that counsel will represent the client until a settlement or judgment is reached through arbitration or trial, and includes defense against counterclaims. Counsel agrees to represent client through any appeal, but under the provisions of a separate contract [*see* [2], P 1, *below*].

The form provides that counsel will be paid the greater of the negotiated contingent fee (from the amount recovered through prosecution of the client's claims, whether by settlement or judgment) or the amount of any attorneys' fees awarded as a result of counsel's prosecution of the claims [*see* [2], P 3, *below*; *see also § 86A.11[5]*]. The client is responsible for all costs of litigation [*see* [2], PP 6, 7, *below*]. The form grants counsel a lien to secure payment [*see* [2], P 12, *below*; *see also § 86A.16[6]*].

The form provides that either party may withdraw from the representation [*see* [2], P 13, *below*].

This form is not appropriate for use in malpractice actions against health care providers. For an appropriate form to use in medical malpractice actions, consult § 86A.202.

[b] Arbitration Provision

An arbitration agreement must clearly and explicitly put the client on notice that legal malpractice claims are subject to arbitration. Any ambiguity in an arbitration clause will be construed against the drafter of the agreement, especially

when drafted by an attorney [*see Mayhew v. Benninghoff (1997) 53 Cal. App. 4th 1365, 1371-1372, 62 Cal. Rptr. 2d 27* (counsel is responsible for drafting clear and explicit agreement stating that arbitration clause applied to both legal services and unrelated business dealings; counsel should have advised client in writing of right to consult independent lawyer on arbitration clause)].

This form provides that any and all claims or disputes arising from or relating to the agreement, or to the professional services rendered by counsel, will be resolved by arbitration [*see* [2], P 14, *below*]. The form provides that the arbitrability of any dispute will be determined by either California or federal law, and that the agreement will be construed, to the maximum extent allowable under California or federal law, in favor of arbitration. The prevailing party in any arbitration will be entitled to recover all costs incurred, including reasonable attorneys' fees and expenses. However, the form bars the arbitrator from awarding punitive, exemplary, or enhanced damages, and the parties waive any right to seek or recover any such damages in arbitration.

PRACTICE TIP:

Although not required in the context of legal malpractice (as opposed to medical malpractice), the arbitration clause should be printed in at least 10-point type [*see, e.g., Code Civ. Proc. § 1295(a)*].

PRACTICE TIP:

Caution should be exercised when negotiating an arbitration clause with an existing client as Rule 3-300 applies to the negotiations [*see Cal. Rules Prof. Conduct, Rule 3-300*]. Failure to comply with Rule 3-300 could invalidate the arbitration clause in a new agreement with an existing client. Further, because arbitration language must be clear and explicit, counsel should note that a properly negotiated arbitration clause in a second agreement will not necessarily affect the arbitrability of matters arising from the earlier representation [*see Mayhew v. Benninghoff (1997) 53 Cal. App. 4th 1365, 1371-1372, 62 Cal. Rptr. 2d 27* (attorney who failed to comply with Rule 3-300 required disclosures and consent relating to attorney-client business transactions could not rely on arbitration clause)].

PRACTICE TIP:

Contractual arbitration clauses that are perceived as unfair or one-sided may be held unconscionable and invalid under general contract principles. For general discussion of unconscionability and its application to arbitration clauses, see *California Forms of Pleading and Practice, Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration , § 32.21[3]* , and *Ch. 140, Contracts , § 140.25* (Matthew Bender).

[c] Modification of Agreement

This form provides that the parties may modify the agreement. Any modification must be in writing and signed by both attorney(s) and client [*see* [2], P 17, *below*]. Counsel should bear in mind that Rule 3-300 applies to the modification of an existing fee agreement with an existing client [*see* State Bar of California Formal Ethics Opinion 1989-116; *Cal. Rules Prof. Conduct, Rule 3-300* (avoidance of adverse interest with client); *see also § 86A.14*]. Existing clients should be given sufficient notice of any proposed change to fee agreements and engagement letters [*see Severson, Werson, Berke & Melchior v. Bolinger (1991) 235 Cal. App. 3d 1569, 1 Cal. Rptr. 2d 531]* .

[d] Execution Requirements

All contingency fee contracts, other than those for the recovery of workers compensation benefits and the recovery of claims between merchants [*see Bus. & Prof. Code § 6147.5(a)*], must be in writing and signed by both parties [*Bus. & Prof. Code § 6147(a), (c)*]. An attorney who contracts to represent a client on a contingency fee basis must, at the time the contract is entered into, provide a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative [*Bus. & Prof. Code § 6147(a)*]. For further discussion, see *§ 86A.200[1][e]*.

If an attorney negotiates primarily in Spanish, the attorney must deliver an unexecuted Spanish language translation of any contract or agreement that contains a statement of fees or charges for legal services *before* the parties execute the retention agreement [*Civ. Code § 1632(a)(5)*]. For further discussion, see *§ 86A.200[1][d]*.

[2] FORM

Contingent Fee Agreement for Damage Claim--Contract Form

ATTORNEY/CLIENT CONTINGENT FEE AGREEMENT

This is an agreement between _____[*name of client*] ("Client") and [*specify name of attorney or firm and structure, e.g.,* Legal Advisers, a Professional Law Corporation] ("Attorneys").

Subject of Representation and Scope of Services

1. Client retains Attorneys to represent Client in pursuing claims ("Client's Claims") against [*identify opponent*], and any other appropriate parties, including without limitation _____, arising from the actions of _____ as officers, directors and/or shareholders of _____.

Attorneys are currently in the process of evaluating Client's claims against [*opponent*]. If Attorneys conclude after performing this evaluation, or at any point in time, that Client's Claims do not justify the risk for Attorneys in proceeding on a contingent fee basis, Attorneys will withdraw from Client's representation as allowed under Paragraph 13 of this agreement.

Attorneys will provide those legal services reasonably required to represent Client. Attorneys will take reasonable steps to keep Client informed of the progress of the matter, and respond to Client's inquiries. In doing so, Attorneys will provide Client with monthly reports summarizing the services performed and hours spent on the matter during the prior month.

If an action is commenced, Attorneys will represent Client until a settlement or judgment is reached through arbitration or trial. Attorneys will oppose any motion for a new trial or any other post-trial motions filed by an opposing party, or will make any appropriate post-trial or post-arbitration motions on Client's behalf. After judgment, Attorneys will represent Client on any appeal, or in any proceedings designed to execute on the judgment, with such additional compensation as Attorneys and Client may agree in a separate agreement.

In the event of any counterclaims or cross-claims filed against Client by [*opponent*], Attorneys will defend Client as part of this Agreement.

Client's Duties

2. Client agrees to be truthful with Attorneys, to assist and cooperate with Attorneys in the prosecution of Client's Claims, to abide by this Agreement, to pay Attorneys' bills on time, and to keep Attorneys advised of any changes in Client's address or telephone number.

Fees

3. Attorneys will only be compensated for legal services if a recovery is obtained for Client. If no recovery is obtained, Client will only be obligated to pay for costs, disbursements, and expenses, as described in Paragraphs 6 and 7. In the event a recover is obtained, attorneys will be paid the greater of:

(1) A contingent fee from the proceeds of any amount recovered through prosecution of Client's Claims, either by settlement or judgment; or

(2) The amount of any attorneys' fees awarded as a result of Attorneys' prosecution of Client's Claims.

Contingent Fee Percentages

4. The amount of the contingent fee will be calculated as a percentage of the Net Recovery to Client as follows:

(1) Thirty-three and one-third percent of any Net Recovery before the commencement of trial; and

(2) Forty percent of any Net Recovery after commencement of trial.

As used in this Agreement, the "commencement of trial" means the appearance of Attorneys in court or arbitration on the first date when any lawsuit or arbitration involving Client's Claims is scheduled for trial or arbitration hearing, even if the trial or arbitration hearing is continued to a later date for reasons beyond Attorneys' control.

Net Recovery Determination

5. The term "Net Recovery" includes all monies or other things of value awarded to Client as a result of Client's Claims, less the total amount of costs, disbursements and expenses paid by Client in connection with Attorneys' prosecution of Client's Claims. If Client is awarded costs or attorneys' fees in connection with any judgment on Client's Claims, all such amounts will be included in the calculation of Net Recovery for purposes of this Agreement.

If the Net Recovery consists of payments to be made over a period of time, or of property not entirely cash or cash equivalent, the contingency fee will be based on the present cash value of the recovery as determined by generally recognized accounting and appraisal standards. The contingency fee will be paid out of the first funds or property paid by any party in connection with resolution of Client's Claims.

Litigation Costs and Expenses

6. All costs incurred or disbursements made by Attorneys in connection with their representation of Client are to be paid by Client within _____[*specify, e.g.*, 30 days after receipt of Attorneys' statement or invoice]. These costs or disbursements include but are not limited to, [*broadly specify costs, e.g.*, investigation expenses; long distance telephone or facsimile charges; reproduction costs; travel expenses (by coach or tourist class); charges for deposition or trial transcripts; charges for delivery of documents by mail or messenger services; court filing, witness fees, and jury fees; computerized legal or factual research charges; fees and costs for preparation of trial exhibits; videotape supplies and services; and all similar costs or expenses incurred by Attorneys, except for legal services].

Each calendar quarter beginning with the filing of a complaint in this matter, Attorneys will provide Client with their best estimate of the costs likely to be incurred during the following quarter. Attorneys will also obtain Client's prior approval before incurring any costs (other than deposition costs) that are reasonably likely to exceed [*e.g.*, $3,000 during a 30-day period].

Employment of Consultants, Experts and Investigators

7. Attorneys may employ consultants, experts and investigators to assist Attorneys in preparation for trial and/or to testify as witnesses at trial. All fees and expenses charged by these persons will be paid by Client, in the same manner as other litigation costs and expenses. Attorneys will consult with Client and obtain Client's approval before employing each and any consultant, expert, or investigator. All consultants, experts, or investigators will be employed directly by Attorneys and will report exclusively to Attorneys.

Favorable Outcome Not Guaranteed

8. Attorneys make no representations or warranties concerning the successful prosecution of Client's Claims. Client understands that there are risks and other uncertainties in all litigation and knowingly accepts those risks and uncertainties with respect to this matter. All statements of Attorneys with respect to these risks and uncertainties are statements of opinion only.

Power of Attorney

9. Client gives Attorneys full power of attorney to execute all documents connected with the prosecution of Client's Claims, including pleadings, settlement agreements, stipulations, releases, verifications, dismissals, and all other documents that Client could properly execute.

Settlement

10. Any decision to settle some or all of Client's claims must be approved by both Client and Attorneys. Neither Client nor Attorneys may unreasonably withhold approval. Client expressly agrees that Client will not waive any entitlement to an award of attorneys' fees and expenses without Attorneys' prior consent, for example, by accepting a settlement that precludes Attorneys from obtaining reimbursement of Attorneys' fees and expenses.

Publicity

11. Attorneys and Client will agree in advance on the content and nature of any press releases or other publicity concerning a settlement or any other aspect of the litigation involving Client's claims.

Attorneys' Lien

12. To secure payment to Attorneys of all sums due under this Agreement for services rendered or costs advanced, Client grants Attorneys a lien on Client's right to recover any amounts from prosecution of Client's Claims.

Termination of Attorney-Client Relationship

13. Attorneys may withdraw from representation of Client at any time on reasonable notice to Client. In the event of voluntary withdrawal, Attorneys will be entitled to reimbursement for all costs, disbursements, and expenses incurred

by Attorneys in connection with their representation of Client, but not to any contingent fee.

Client may discharge Attorneys at any time on reasonable notice. If Attorneys are discharged, or if Attorneys are otherwise unable to continue representing Client due to circumstances beyond Attorneys' control, Attorneys will be entitled to be paid the greater of: (1) a reasonable contingent fee from any net recovery; or (2) compensation for all hours worked by Attorneys at Attorneys' usual hourly rates. The amount of this reasonable fee will be based on the value of Attorneys' contribution to the net recovery ultimately obtained.

[*Present in at least 10-point type (see Code Civ. Proc. § 1295(a)):*]

Arbitration

14. By initialing this arbitration provision below, the parties agree that any and all claims or disputes, of any type, nature, or description whatsoever, arising from or relating to this Agreement or the professional services rendered by Attorneys, will be resolved by arbitration, pursuant to the rules of the American Arbitration Association ("AAA"), except as those rules may conflict with any part or provision of this Paragraph 14, in which case the terms of this Paragraph 14 control. The parties agree that the place of arbitration will be the AAA office in or closest to [*specify, e.g.,* San Francisco, California], unless otherwise agreed by the parties. Notwithstanding the provisions of Paragraph 13, *below*, the arbitrability of any dispute will be determined by [California *or* federal] law and this Agreement will be construed, to the maximum extent allowable under [California *or* federal] law, in favor of arbitration.

[*Select one of the following alternatives:*]

[*To memorialize both parties' understanding, use:*]

IN AGREEING TO THIS ARBITRATION PROVISION, ATTORNEY AND CLIENT SPECIFICALLY UNDERSTAND AND AGREE THAT BY ENTERING THIS AGREEMENT ATTORNEY AND CLIENT ARE FOREGOING:

- **THE RIGHT TO TRIAL IN A COURT OR BY A JURY FOR ANY DISPUTE ARISING FROM OR RELATING TO THIS AGREEMENT OR TO ANY ASPECT OF THE PROFESSIONAL RELATIONSHIP OR SERVICES RENDERED BY ATTORNEYS TO CLIENT.**

- **ALL JUDICIAL RIGHTS, INCLUDING THE RIGHT TO APPEAL FROM THE DECISION OF THE ARBITRATOR(S).**

[*Or, to memorialize the client's understanding, use:*]

IN AGREEING TO THIS ARBITRATION PROVISION, CLIENT SPECIFICALLY UNDERSTANDS AND AGREES THAT BY ENTERING THIS AGREEMENT CLIENT IS FOREGOING THE RIGHT TO TRIAL IN A COURT OR BY A JURY FOR ANY DISPUTE ARISING FROM OR RELATING TO THIS AGREEMENT OR TO ANY ASPECT OF THE PROFESSIONAL RELATIONSHIP OR SERVICES RENDERED BY ATTORNEYS TO CLIENT, INCLUDING WITHOUT LIMITATION, THE FOLLOWING:

- **ANY DISPUTE OVER WHAT CONSTITUTES A REASONABLE CONTINGENT FEE IN THE EVENT ATTORNEYS ARE DISCHARGED, DISQUALIFIED, OR FOR ANY OTHER REASON DO NOT CONTINUE REPRESENTING CLIENT THROUGH JUDGMENT IN THE ACTION;**

- **ANY DISPUTE REGARDING THE PROFESSIONAL SERVICES RENDERED BY ATTORNEYS, INCLUDING ANY CLAIM OF PROFESSIONAL ERRORS, OMISSIONS, NEGLIGENCE, OR MALPRACTICE;**

- **ANY AND EVERY OTHER CLAIM OR DISPUTE WHATSOEVER, WHETHER BASED IN CONTRACT, IN TORT, OR ON THE ALLEGED BREACH OF ANY DUTY IMPOSED BY ANY STATUTE, RULE, OR REGULATION.**

[*Continue with the following:*]

The parties further agree that the prevailing party in any arbitration will recover all costs incurred, including reasonable attorneys' fees and expenses. These costs will include the reasonable value of all time spent by Attorneys or Client in connection with the arbitration. However, the arbitrator will have no authority to award punitive, exemplary or enhanced damages, and the parties hereby waive any right to seek or recover any such damages. By initialing the space provided below, the parties represent and agree that they have read and understood the terms of this Paragraph 14, that they have had a full and adequate opportunity to seek counsel regarding the terms of this Paragraph 14, and that they knowingly, expressly and voluntarily agree to resolve any dispute between them by arbitration as provided in this Paragraph 14. If either Attorneys or Client should refuse to submit to arbitration, either Attorneys or Client may be compelled to arbitrate under [California *or* federal] law. Attorneys and Client acknowledge the above, and that this mutual agreement for binding arbitration is voluntary.

_____ _____

Attorneys Client

Applicable Law

15. Except as specifically provided in Paragraph 14, above, the laws of the State of California govern the construction and interpretation of this Agreement and any dispute between the parties, including without limitation, disputes arising out of or relating to this Agreement, the professional relationship between the parties, and the professional services rendered by Attorneys to Client.

Client understands and acknowledges that the terms of a contingent fee arrangement for the types of claims covered by this Agreement are not set by law in California, but are instead left to negotiation and agreement between attorneys and their clients.

Entire Agreement

16. This document sets forth and constitutes the entire agreement between Attorneys and Client and supersedes any previous discussions, negotiations, or agreements on the same subject.

Severability

17. If any provision of this Agreement is held unenforceable, in whole or in part, the remainder of the provision and the entire Agreement is severable and remains in effect.

Modification of Agreement

18. Any revisions or modifications of this Agreement must be made in writing and signed by both Attorneys and Client.

Client's Receipt of Agreement and Knowledge of Terms

19. Client acknowledges that Client has read and fully understood all of the terms and conditions of this Agreement before signing it; that the undersigned is authorized to enter into this Agreement on behalf of Client; [*optional:* that Client has consulted with counsel other than Attorneys for advice with respect to this Agreement;] and that Client has received an executed copy of this Agreement.

Date: _____

_____ [*signature*]
[*typed name*]
For _____ [*typed name of law firm*]

ARBITRATION NOTICE TO CLIENT: IF THE ARBITRATION CLAUSE [P 14] IN THIS AGREEMENT HAS BEEN INITIALED, CLIENT IS AGREEING TO HAVE ISSUES INCLUDING MALPRACTICE DECIDED BY BINDING ARBITRATION AND CLIENT IS GIVING UP CLIENT'S RIGHT TO A COURT OR JURY TRIAL FOR SUCH DISPUTES.

APPROVED AND AGREED

Date: _____

_____ [*signature of client*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesContingency FeesLegal EthicsClient RelationsBilling & Collection

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86A AGREEMENTS FOR LEGAL SERVICES
PART IV. FORMS
A. Damage Claims

28-86A California Legal Forms--Transaction Guide § 86A.202

§ 86A.202 Contingent Fee Agreement for Malpractice Action Against Health Care Provider--Contract Form

[1] Comment

[a] Use of Form

This form is a contingent fee contract to be used by an attorney representing the plaintiff in a medical malpractice action. Contingent fees in the context of medical malpractice actions are subject to statutory limitations [*Bus. & Prof. Code § 6146*]. This form complies with these limits [*see* [b], *below*]. A contingency fee contract must be signed by both the attorney and the plaintiff (or the plaintiff's guardian or representative) [*Bus. & Prof. Code § 6147(a)*].

For an analysis of the law relating to contingent fee contracts for actions other than medical malpractice suits, see *§ 86A.11[4]*.

[b] Fee Limits in Medical Malpractice Actions

Contingency fees for representing plaintiffs in malpractice actions against health care providers are limited to the following maximum amounts [*Bus. & Prof. Code § 6146(a)*; *see § 86A.16[4]*]:

- 40 percent of the first $50,000 recovered;
- 331/3 percent of the next $50,000 recovered;
- 25 percent of the next $500,000 recovered; and
- 15 percent of any amount by which the recovery exceeds $600,000.

If the plaintiff receives periodic payments, for example, under a structured settlement/annuity arrangement [*see Code Civ. Proc. § 667.7*], the court will place a total value on the payments based on the plaintiff's life expectancy and will include that amount in computing the attorneys' fees [*see Bus. & Prof. Code § 6146(b)*].

The statutory limitations on contingent fees in medical malpractice actions apply regardless of whether the recovery is by settlement, arbitration, or judgment. Further, the limitation apply to agreements with clients that are infants or persons of unsound mind, as well as to those who are responsible adults [*Bus. & Prof. Code § 6146(a)*].

The term "recovered" means the net sum recovered after deducting any disbursements or costs incurred in connection with prosecution or settlement of the claim. However, costs of medical care incurred by the plaintiff and the attorney's office overhead costs or charges are not deductible disbursements or costs for this purpose [*Bus. & Prof. Code § 6146(c)(1)*]. The term "health care providers" includes doctors, dentists, lab technicians, chiropractors, osteopaths, speech pathologists, audiologists, nurses, veterinarians, and licensed clinics, health dispensaries, or health facilities, as well as their legal representatives [*see Bus. & Prof. Code § 6146(c)(2)*; *see also Bus. & Prof. Code § 500 et seq.*]. The term "professional negligence" refers to a negligent act or omission to act by a health care provider in the rendering of professional services that is the proximate cause of personal injury or wrongful death, provided that the services are (1) within the scope of services for which the provider is licensed and (2) outside any restriction imposed by the licensing agency or licensed hospital [*Bus. & Prof. Code § 6146(c)(3)*].

[c] Withdrawal Provision

This form provides that counsel may withdraw within a reasonable time after giving the Client notice of the withdrawal. The Rules of Professional Conduct limit an attorney's right to voluntarily withdraw from a case [*see Cal. Rules Prof. Conduct, Rule 3-700(C)*]. For further discussion, see *§ 86A.18[2]*.

[d] Execution Requirements

All contingency fee contracts, other than those for the recovery of workers compensation benefits and the recovery of claims between merchants [*see Bus. & Prof. Code § 6147.5(a)*], must be in writing and signed by both parties [*Bus. & Prof. Code § 6147(a), (c)*]. An attorney who contracts to represent a client on a contingency fee basis must provide, at the time the contract is entered into, a duplicate copy of the contract, signed by both the attorney and the client, or the client's guardian or representative, to the plaintiff, or to the client's guardian or representative [*Bus. & Prof. Code § 6147(a)*]. For further discussion, see *§ 86A.200[1][e]*.

If an attorney negotiates primarily in Spanish, the attorney must deliver an unexecuted Spanish language translation of any contract or agreement that contains a statement of fees or charges for legal services *before* the parties execute the retention agreement [*Civ. Code § 1632(a)(5)*]. For further discussion, see *§ 86A.200[1][d]*.

[2] FORM

Contingent Fee Agreement for Malpractice Action Against Health Care Provider--Contract Form

CONTINGENT FEE AGREEMENT

_____[*name of client*], "Client," and _____[*name of attorney, partnership, or law corporation*], "Attorney," agree as follows:

Purpose of Representation

1. Client employs Attorney to represent Client in the prosecution of any and all claims for personal injury that the client may have arising out of _____[*describe occurrence, e.g.,* treatment that Client received from January 1, 1983, through January 15, 1983, at XYZ Hospital located at _____ (*city and state*)].

Advancement of Litigation Expenses

2. Attorney will advance all expenses that _____[he *or* she] believes are reasonably necessary for the prosecution of Client's claims (including but not limited to court costs, expenses of investigation, expenses of medical examination, and the costs of obtaining and presenting evidence).

Reimbursement of Amounts Advanced

3. Client will reimburse the Attorney for all costs advanced on Client's behalf regardless of whether or not any recovery is obtained on Client's claims.

Attorney's Fee

4. Attorney will be compensated for services rendered only if Attorney obtains a recovery for Client. From any recovery received, Attorney will first be repaid for all litigation expenses advanced on behalf of Client under Paragraph 3 of this Agreement. The fee to be paid Attorney will be a percentage of the remaining balance of the recovery, depending on the stage at which the recovery is received:

40 percent of the first $50,000 recovered.

331/3 percent of the next $50,000 recovered.

25 percent of the next one $500,000 recovered.

15 percent of any amount by which the recovery exceeds $600,000.

Negotiation of Rates

5. The contingency fee rates set forth in Paragraph 4 are the maximum limits allowed under *Business and Professions Code Section 6146*. The parties understand and acknowledge that they may negotiate lower rates.

No Additional Compensation

6. Client shall not be obligated to compensate Attorney for any matter related to, but not specifically covered in, this Agreement including, but not limited to, the collection of any recovery.

Approval Necessary for Settlement

7. Attorney will not make any settlement of any nature for any of Client's claims without Client's complete approval.

Association of Other Attorneys

8. Attorney, at Attorney's sole discretion and expense, may associate any other attorney in representing Client's claims.

Withdrawal of Attorney

9. Attorney may withdraw from the representation of Client with regard to the claims covered by this Agreement within a reasonable time after giving Client notice of the withdrawal.

Attorney's Lien

10. Attorney will have a lien for services rendered and costs advanced on any sums recovered, whether by settlement or judgment, on account of Client's claims.

Cooperation of Client

11. Client will keep Attorney advised of Client's address at all times, appear on reasonable notice at any and all depositions and court appearances, and comply with all reasonable requests of Attorney in connection with the preparation and presentation of Client's claims.

Attorney's Authority

12. Client gives Attorney the power and authority to execute any and all pleadings, claims, settlements, drafts, checks, compromises, releases, dismissals, deposits, orders, and other papers that Client could properly execute, and to receive on Client's behalf any moneys or other things of value to which Client may be entitled because of any judgment recovered or any settlement agreed on in connection with the claims covered by this Agreement.

Applicable Law

13. The laws of the State of California govern the construction and interpretation of this Agreement and any dispute between the parties, including, without limitation, disputes arising out of or relating to this Agreement, the professional relationship between the parties, and the professional services rendered by Attorney to Client.

Entire Agreement

14. This document sets forth and constitutes the entire agreement between Attorney and Client and supersedes any previous discussions, negotiations, or agreements on the same subject.

Severability

15. If any provision of this Agreement is held unenforceable, in whole or in part, the remainder of the provision and the entire Agreement is severable and remains in effect.

Modification of Agreement

16. Any revisions or modifications of this Agreement must be made in writing and signed by both Attorney and Client.

Client's Receipt of Agreement and Knowledge of Terms

17. Client acknowledges that Client has read and fully understood all of the terms and conditions of this Agreement before signing it; that the undersigned is authorized to enter into this Agreement on behalf of Client; and that Client has received an executed copy of this Agreement.

Date: _____

_____ [*signature*]
[*typed name*]
For _____ [*typed name of law firm*]

APPROVED AND AGREED

Date: _____

_____ [*signature of client*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Healthcare LawActions Against FacilitiesGeneral OverviewLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesContingency FeesLegal EthicsClient RelationsBilling & CollectionTortsMalpractice & Professional LiabilityHealthcare Providers

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86A AGREEMENTS FOR LEGAL SERVICES
PART IV. FORMS
A. Damage Claims

28-86A California Legal Forms--Transaction Guide § 86A.203

§ 86A.203 Authorization for Release of Medical Records

[1] Comment

[a] Use of Form

This form is a medical authorization. It will enable an attorney to obtain all of his or her client's medical and dental records. An attorney who accepts a personal injury case should have his or her client execute several of these forms at the same time that the client executes the retention agreement [*see § 86A.202*]. Use of this form will facilitate the gathering of medical and/or dental information as the attorney develops the case. The attorney should complete the name and date on each form as needed for particular addressees.

[b] Confidentiality of Medical Records

Medical and dental information is confidential and will be released to an attorney only with his or her client's express written consent [*see Civ. Code § 56.11*]. An attorney who receives information under a medical authorization from his or her client may not further disclose that information unless authorized to do so [*Civ. Code § 56.13*].

[c] Statutory Requirements

An authorization for the release of medical information by a provider of health care, health care service plan, pharmaceutical company, or contractor will be valid if drafted in a typeface no smaller than 14-point type or handwritten, and the authorization is clearly separate from any other language that appears on the page [*Civ. Code § 56.11(a), (b)*]. The authorization must state all of the following [*Civ. Code § 56.11(d)-(i)*]:

- The specific uses and limitations on the types of medical information to be disclosed.

- The name or functions of the health care provider, health care service plan, pharmaceutical company, or contractor authorized to disclose the information.

- The name or functions of the person or entity entitled to receive the information.
- The specific uses and limitations on the use of the information by the authorized recipient.
- A specific date after which the health care provider, health care service plan, pharmaceutical company, or contractor is no longer authorized to release the information.
- That the signatory has the right to receive a copy of the authorization.

The authorization must be executed by a signature that serves no other purpose than to execute the authorization [*Civ. Code § 56.11(b)*]. It must be signed and dated by the patient to whom the information relates, by an appropriate legal representative of the patient, or by the beneficiary or personal representative of a deceased patient [*see Civ. Code § 56.11(c)*].

[2] FORM

Authorization for Release of Medical Records

AUTHORIZATION FOR RELEASE OF MEDICAL RECORDS

To: _____[*addressee*]
_____[*date*]
[*addressee's function, e.g.,* surgeon]
_____[*office address*]
_____[*city, state, zip*]

You are authorized to provide my attorney[s], _____[*name(s) and address*] with all information relative to my physical condition and any diagnosis and result of treatment that you rendered to me. You are also authorized to allow my attorney[s] to examine and copy all medical, dental, laboratory, and hospital records concerning me.

This authorization is executed to enable my attorney to prosecute a claim for damages on my behalf. I understand that I am entitled to receive a copy of this authorization.

[*Add, if placing a time limit on authorization:*]

This authorization will remain in effect until _____[*date*]. After that date you are no longer authorized to release any medical, dental, laboratory, or hospital records concerning me.

_____ [*client's signature*]
[*typed name*]
_____ [*client's address*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewTortsProcedureDiscovery

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86A AGREEMENTS FOR LEGAL SERVICES
PART IV. FORMS
A. Damage Claims

28-86A California Legal Forms--Transaction Guide § 86A.204

§ 86A.204 Vehicle Accident Report Authorization

[1] Comment--Use of Form

This form is an authorization for the release of a vehicle accident report. An attorney can obtain information from an official vehicle accident report only if a person involved in the accident authorizes him or her to do so [*Veh. Code § 16005(b)(2)*]. If an attorney accepts a case involving a motor vehicle accident, he or she should have the client execute this form concurrently with the execution of the retention agreement [*see §§ 86A.200, 86A.201*].

[2] FORM

Vehicle Accident Report Authorization

VEHICLE ACCIDENT REPORT AUTHORIZATION

_____[*date*]
To: _____[*addressee*]
_____[*office address*]
_____[*city, state, zip*]

You are authorized to furnish my attorney[s], _____[*name(s) and address*] with all information contained in any vehicle accident report on file with you relating to the accident that occurred on _____[*date*] at [*specify location*] in which I was injured. You are expressly authorized to allow my attorney[s] to receive a copy of that vehicle accident report.

_____ [*client's signature*]
[*typed name*]
_____ [*client's address*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewTortsProcedureDiscoveryTortsTransportation TortsMotor VehiclesGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-86A California Legal Forms--Transaction Guide §§ 86A.205-86A.209

[Reserved]

§§ 86A.205[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86A AGREEMENTS FOR LEGAL SERVICES
PART IV. FORMS
B. Estate Planning and Decedent's Estates

28-86A California Legal Forms--Transaction Guide § 86A.210

§ 86A.210 Estate Planning Informational Letter

[1] Comment--Use of Form

This form is an informational letter to be sent to prospective clients after the initial interview and conflicts check. The form is drafted from the perspective of a partnership or corporation, but can be easily adapted for use by a sole practitioner.

The letter explains the calculation of fees, as well as billing and payment requirements. The letter also explains that ancillary fees advanced by counsel will be billed separately. The letter further notes that either party may terminate the legal representation.

The letter also includes an optional paragraph for use when the attorney has accepted a retainer, clarifying that the retainer does not represent the total amount of fees for the representation.

The form contains a signature blank for the client to sign and date and return to counsel. Two copies of the letter should be sent to the client, one for the client's records.

[2] FORM

Estate Planning Informational Letter

[*Letterhead of attorney, partnership, limited liability partnership, or law corporation*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

We are delighted to assist you with your estate planning. A successful professional relationship should begin with a mutual understanding of expectations regarding the legal services to be performed by us and the basis of our charges. Accordingly, our procedure for new estate planning clients is to review these matters briefly in writing.

Professional Undertaking. First and foremost, we will do our utmost to meet your estate planning goals in the most prompt and efficient manner possible. If at any time you have questions or concerns about any aspects of the planning process or your estate planning documents, please contact me at once. For your information, we maintain errors and omissions insurance coverage applicable to the legal services we will be providing to you.

Fees. Our legal fees for estate planning services are primarily based on the time required for your matters. However, in certain cases, our fees may be increased or decreased to reflect special difficulties involved in your estate plan, the degree of expertise required, extraordinary time demands, savings or other benefits to you that are disproportionate to the time expended or other unusual circumstances. We will review carefully all statements before they are issued to ensure that the amount charged is fair and appropriate.

Our attorney time for estate planning is currently billed [*specify, e.g.,* at rates ranging from $185 to $300 per hour, depending on the experience and specialty of the attorney involved]. We occasionally use legal assistants in the estate planning process to prepare initial drafts of simple documents. Paralegal time is currently billed at $_____ per hour and law clerk time is currently billed at $_____ per hour.

[*Optional:*]

We have found it necessary periodically to increase billing rates for attorneys and legal assistants. If such an increase occurs, you will be promptly informed by at least 30 days' written notice. All increased billing rates are prospective. If you refuse to pay the increased rates, counsel may withdraw as counsel in this matter.

[*Continue with the following:*]

Costs Advanced For Your Account. Some estate planning matters require substantial amounts of costly ancillary services, such as long distance telephone calls, photocopying, computerized legal research, travel, lodging, meals, filing fees, deposition transcripts, postage, and staff overtime. To allocate these expenses fairly and keep legal fees as low as possible for those matters that do not involve such expenditures, these items are separately itemized on our statements as "costs advanced."

[*Optional:* When we anticipate unusually large expenses or in other cases when we deem it appropriate, we will forward to you bills from third parties and request that you promptly pay these costs directly.]

[*Optional:* It may become necessary for us, with your consent, to retain expert witnesses or other consultants to aid us in representing you. You will be responsible for the costs of any experts and consultants so retained.]

Billings. Our billing statements ordinarily are prepared monthly. Our responsibility is to ensure that you receive a complete, accurate, and fair statement. We strongly encourage you to raise promptly any questions or comments you may have regarding any statement with us.

In return, we expect payment of our statements within [*specify, e.g.,* 30 days after receipt]. By this letter, you authorize us to add a late payment charge at the rate of [*specify, e.g.,* one and one half percent per month] to each statement that is

not paid within [*e.g.*, 30 days after receipt]. Payments received are first credited to any disbursements advanced by us, and the balance to fees. Any advance payment or retainer made to the firm will be credited to your account against fees and disbursements.

Failure to pay your bill promptly and regularly on receipt may result in suspension or termination of our legal services for you, in the absence of some other agreement regarding timely payment. [*Optional:* If we are involved in litigation on your behalf, you must understand that we may withdraw as counsel of record if our fees are overdue. Moreover, we will have a lien for payment of our unpaid fees and costs on any judgment, settlement, or other recovery you receive as a result of this litigation.] If legal action is instituted for collection of legal fees, the prevailing party will be entitled to recover its legal fees and costs incurred in connection with that action.

Termination. You have the right to terminate our professional relationship at any time. We have the same right, subject to an obligation to give you reasonable time to arrange alternative representation if you choose.

[*Optional, for use when retainer has been accepted:*]

Retainer. Before commencing this representation, we requested and you agreed to pay us a retainer of $_____. This sum is an advance against fees for our services and disbursements; it is not an estimate of our total fees. It is often difficult to forecast accurately the amount of legal attention a particular estate planning matter will require. At any time we may request you to replenish a retainer that has been consumed, or to increase the amount of your retainer. We will hold any retainers or advance payments received in a trust account until the various fees and costs are actually earned or incurred. The amount of any unused retainer will be returned to you without interest when your estate planning is completed.

[*Continue with the following:*]

Please review this letter and, if it meets with your approval, sign and date the enclosed copy of this letter and return it to us in the envelope provided. We look forward to a long and pleasant professional relationship with you. If you ever have any questions regarding your estate planning matters, or anything addressed in this letter, please do not hesitate to contact me.

Sincerely,
_____ [*signature of attorney*]
[*typed name*]
For _____ [*typed name of law firm*]

APPROVED AND AGREED

_____ [*signature of client*]
[*typed name*]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Estate, Gift & Trust LawEstates Created by Trusts & WillsGeneral OverviewLegal EthicsClient RelationsGeneral Overview

California Legal Forms--Transaction Guide

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B. Estate Planning and Decedent's Estates

28-86A California Legal Forms--Transaction Guide § 86A.211

§ 86A.211 Estate Planning Letter Explaining Dual Representation of Spouses

[1] Comment--Use of Form

This form is a letter to be sent to prospective married clients who are jointly seeking estate planning services. The letter can be adapted for use in other contexts, including situations involving estate planning for unmarried couples.

The letter explains that although spouses customarily employ the same counsel for estate planning services, the Rules of Professional Conduct require that counsel explain the ramifications of dual representation and secure the clients' consent to this representation [*see Cal. Rules Prof. Conduct, Rule 3-310*, discussed in *§ 86A.12[3][a], [b]*]. The letter states that both spouses are clients and that spouses can have divergent and conflicting interests and objectives regarding their estate planning. The letter explains that if each spouse retained separate counsel, each would have an advocate for their own position, each would receive totally independent advice, and information given to separate counsel would be confidential and barred from disclosure without consent.

The letter then explains that if single counsel is retained jointly, counsel's obligation is to assist in developing a coordinated overall plan and to encourage the resolution of differing interests in an equitable manner and in the best interests of the marriage. Counsel will not be able to serve as an advocate for one spouse against the other.

The letter further advises the clients that if a conflict arises between the spouses, such that it is impossible for counsel to properly represent both spouses, counsel would be forced to withdraw as joint attorney. Counsel would then advise one or both of the spouses to obtain independent counsel.

Finally, the form contains an acknowledgement for each spouse to sign.

Because of the frequency with which estate planners represent couples in preparation of their estate plans, numerous variations of this type of disclosure document exist. For an illustration of another type of disclosure form for use in this situation, see *Ch. 60, Estate Planning, § 60.201*. For a more general type of conflict of interest disclosure that is adaptable to a wide variety of dual representation situations, see *§ 86A.247*.

For discussion of the general rules governing representation of clients with potentially adverse interests, see *§ 86A.12*. For detailed discussion of conflict of interest issues that can arise in the estate planning context, see *California Wills & Trusts, Ch. 4, Ethical Considerations and Professional Responsibility, § 4.04* (Matthew Bender).

[2] FORM

Estate Planning Letter Explaining Dual Representation of Spouses

[*Letterhead of attorney, partnership, limited liability partnership, or law corporation*]
_____[*date*]
_____[*name of clients*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ and _____ [*name of clients*] :

You have asked us to perform legal services for you relating to your estate planning needs. It is customary for a husband and wife to employ the same law firm to assist them in planning their estates. However, it is important for both of you to understand that since we would be representing both of you, each of you would be our client. Under these circumstances, it is our ethical obligation under the Rules of Professional Conduct of the State Bar of California to fully advise you of the considerations involved in such a "dual representation" and to obtain your consent to this representation.

Spouses can have differing, and sometimes conflicting, interests and objectives regarding their estate planning. For example, they may have different views on how property should pass after the death of one or both of them. In addition, we may recommend in some cases that property holdings be restructured to take advantage of available tax benefits, which may involve gifts from one spouse to the other, or a recharacterization of your separate or community property. A marital property agreement may even be desirable. These types of actions will have an effect on control over and rights in present and future property by each of you, possibly including how your property would be divided in the event of a divorce. These are just a few examples. Each couple's situation is unique.

If each of you retained separate counsel, you would each have an advocate for your position and receive totally independent advice. Information given to your separate lawyer would be confidential and could not be disclosed to your spouse without your consent.

This is not the case when one firm advises both of you. If you ask us to continue to serve you jointly, our effort will be to assist in developing a coordinated overall plan and to encourage the resolution of differing interests in an equitable manner and in the best interests of your marriage. If the two of you have a difference of opinion concerning your proposed estate plan, we can point out the pros and cons of those divergent opinions. However, we cannot be an advocate for one of you against the other. Matters that one of you might discuss with us in the estate planning process cannot be kept from the other, although it certainly is privileged from disclosure to third parties.

Although I doubt that it will happen, if conflicts do arise between the two of you such that it is impossible in our judgment to perform our obligations to each of you in accordance with this letter, it would become necessary for us to withdraw as your joint attorney. We would then advise one or both of you to obtain independent counsel.

After considering these factors, each of you must decide whether you wish us to continue to represent you jointly in connection with your estate planning and related matters. If you do, please sign and return the enclosed copy of this letter in the envelope provided. By signing and returning the letter, you are acknowledging that you have read and

understand this letter and wish us to proceed with your representation.

Please keep in mind that you are each completely free at any time to have the advice of separate counsel. Please contact me if you have any questions whatsoever about this matter.

Sincerely,
_____ [*signature*]
[*typed name*]
For _____ [*typed name of law firm*]

CLIENTS' CONSENT TO REPRESENTATION

We have each reviewed the foregoing letter and understand its contents. We understand the discussion of conflicts set forth above and realize that there are areas where our interests and objectives may differ, and areas of potential or actual conflict of interest between us in connection with our estate planning and related matters. We understand that either of us may retain separate, independent counsel in connection with these matters at any time. After careful consideration, each of us requests that _____[*name of attorney or firm*] represent us jointly in connection with our estate planning and related matters and each of us consents to that dual representation. Each of us also understands and agrees that communications and information _____[*name of attorney or firm*] receives from either of us relating to these matters may be shared with the other.

APPROVED AND AGREED

_____ [*signature of first spouse*]
[*typed name*]

Date: _____

APPROVED AND AGREED

_____ [*signature of second spouse*]
[*typed name*]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsGeneral OverviewLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAccepting Representation

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B. Estate Planning and Decedent's Estates

28-86A California Legal Forms--Transaction Guide § 86A.212

§ 86A.212 Contingent Fee Agreement Regarding Will Contest--Letter Form

[1] Comment

[a] Use of Form

This form is a letter-style contingent fee agreement confirming an attorney's retention by a client who desires to contest a will or to defend against a will contest. For discussion of the law governing contingency fee contracts, see *§ 86A.11[4]*.

Most attorneys prefer the informality of letter-style as opposed to contract-style retention agreements. However, if the attorney and/or client desire a more formal employment contract, this form can be adapted to a contract-style agreement [*see § 86A.201*].

For forms that may be used in the will contest itself, see California Forms of Pleading and Practice, Ch. 444, *Probate: Will Contests* , (Matthew Bender).

[b] Required Contents

All contingency fee contracts, other than those for the recovery of workers compensation benefits and the recovery of claims between merchants [*see Bus. & Prof. Code § 6147.5(a)*], must be in writing and contain the following [*Bus. & Prof. Code § 6147(a), (c)*; *see Bus. & Prof. Code § 6147(d)* (effective January 1, 2000)]:

- The contingency fee rate on which the parties agreed.

- An explanation of the manner in which costs and disbursements incurred in prosecuting or settling the claim will affect the contingency fee and the client's recovery.

- A statement to what extent, if any, the client may be required to compensate the attorney for related matters arising out of their relationship but not covered by the contingency fee contract. This statement

may include any amounts collected for the plaintiff by the attorney.

- A statement that the fee is negotiable and not set by law [*see Bus. & Prof. Code § 6146* (limitations on fees)].

- A statement that the rates set forth in *Bus. & Prof. Code § 6146* are the maximum limits for the contingency fee contract [*see* [2], *below*].

[c] Estate's Liability for Extraordinary Attorneys' Fees

A decedent's estate is liable for fees to the executor's or administrator's attorney who conducts ordinary probate proceedings. In addition, the court may award just and reasonable attorneys' fees from the estate for any extraordinary services, including extraordinary services by any paralegal performing those services under the direction and supervision of an attorney [*Prob. Code § 10811*]. However, because payment for extraordinary services is in the discretion of the court, and not an entitlement [*see Estate of McKenzie (1962) 199 Cal. App. 2d 393, 399, 18 Cal. Rptr. 680]* , an attorney who accepts employment on behalf of a party to a will contest or any other extraordinary probate proceeding should make an arrangement regarding fees.

The attorney for a personal representative may agree to perform extraordinary service on a contingent fee basis, but only if the agreement meets statutory conditions. The agreement must be in writing, and must comply with requirements for contingent fee contracts in general [*Prob. Code § 10811(c)(1)*; *see Bus. & Prof. Code § 6147*; *see also § 86A.11[4]*]. In addition, the agreement must be approved by the court following a properly noticed hearing [*Prob. Code § 10811(c)(2)*; *see Prob. Code § 10812* (notice requirements)]. The court must determine that the compensation provided in the agreement is just and reasonable, and that the agreement is to the advantage of the estate and in the best interests of the persons who are interested in the estate [*Prob. Code § 10811(c)(3)*].

[d] Specificity in Agreements Regarding Probate Matters

It is important to clearly specify the basis on which a contingency fee in a will contest or any other extraordinary probate proceeding will be determined. Frequently, several people will have an interest in the outcome of a will contest. However, unless an attorney is retained by all parties sharing a common interest, that attorney's contingency fee will depend on the extent of recovery realized by the individual client who employed him or her [*see Estate of Ott (1979) 99 Cal. App. 3d 605, 611, 160 Cal. Rptr. 402]* . Accordingly, if a group of persons sharing a common interest in a will contest wish to retain an attorney on a contingency fee basis, the agreement should recite the names of all members of the group and clearly define the percentage of each one's recovery that will constitute the attorney fee. In these cases the attorney must be certain to avoid representing potentially conflicting interests [*see § 86A.12[3]*].

[e] Execution Requirements

Both parties must sign the contingency fee contract, and counsel must provide the client with a copy of the contract at the time of execution [*Bus. & Prof. Code § 6147(a)*]. If the contract does not contain all of the required information, is not properly signed, or if the client is not provided with a copy, it is voidable at the client's option. However, counsel will be entitled to collect a reasonable fee for his or her services [*Bus. & Prof. Code § 6147(b)*]. For further discussion, see *§ 86A.200[1][e]*.

Any attorney who negotiates a contract for legal services primarily in a language other than English may have to provide the client with a translation of the contract in that other language. For contracts entered into prior to July 1, 2004, this requirement is applicable only to contracts negotiated primarily in Spanish. On and after July 1, 2004, it is applicable to contracts negotiated primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean [*see Civ. Code § 1632*]. For further discussion, see *§ 86A.111[6]*. For a detailed discussion of these translation requirements, and related

requirements, see *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.64*.

[2] FORM

Contingent Fee Agreement Regarding Will Contest--Letter Form

[*Letterhead of attorney or law firm*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

This letter will confirm the terms on which you have retained this office to represent you _____[in contesting the will of _____ (*name*) ("decedent"), dated _____ *or* defending your interests in the will of _____ (*name*) ("decedent") dated _____, against the will contest filed by _____ (*name(s) of contestant(s))*].

The attorneys' fee will be a percentage of the fair market value of whatever you receive from the estate of the decedent as of the time you receive it. If you receive nothing, you will not be obligated to compensate this office for its services. This office will advance all legal, investigative, and trial costs necessary for [contesting *or* defending] the will of the decedent on your behalf. You will reimburse this office for these costs regardless of whether any amount is recovered on your behalf.

From the amount recovered for you, this office will first be repaid for all costs advanced on your behalf. The attorneys' fee will be a percentage of the fair market value of the remaining balance, depending on the stage at which the matter is resolved. The following fees have been negotiated by you and this office and are not set by law:

_____ [*e.g.*, 10 *or* 20 *or* 30] percent if the matter is resolved before the commencement of trial.

_____ [*e.g.*, 20 *or* 30 *or* 40] percent if the matter is resolved after the commencement of trial but before an appeal or a new trial.

_____ [*e.g.*, 30 *or* 40 *or* 50] percent if the matter is resolved after either the filing of an appeal by any party or the commencement of a second trial.

You will not be obligated to compensate this office for any matter related to, but not specifically covered in, this agreement.

No settlement of your interest in the decedent's estate will be made without your complete approval. This office may associate any other attorney at its discretion and expense. [*Optional:* This office may withdraw at any time after giving you reasonable notice.]

You have given this office an equitable lien for its services and costs advanced on your claims and recovery. You will keep this office advised of your whereabouts at all times, appear on reasonable notice at any depositions and court appearances, and comply with all reasonable requests in connection with the preparation and presentation of this matter.

If you agree to the terms of this letter, please date and sign the enclosed copy and return it to this office in the enclosed self-addressed envelope. Enclosed is an additional copy, which you should retain for your records.

Sincerely,
_____ [*signature*]
[*typed name*]
For _____ [*typed name of law firm*]

APPROVED AND AGREED

_____ [*signature of client*]
[*typed name*]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsGeneral OverviewLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesContingency Fees

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PART IV. FORMS
B. Estate Planning and Decedent's Estates

28-86A California Legal Forms--Transaction Guide § 86A.213

§ 86A.213 Contingent Fee Agreement Regarding Claim That Some or All of Deceased Spouse's Estate is Community Property--Letter Form

[1] Comment

[a] Use of Form

This form is a letter-style contingent fee agreement under which an attorney agrees to pursue a claim that certain assets in a client's deceased spouse's estate are community property. Most attorneys prefer the informality of letter-style, as opposed to contract-style, retainer agreements. However, if the attorney or client desires a more formal employment contract, this form can be adapted to the contract style of § 86A.201.

For an analysis of the law governing contingency fee contracts, see *§§ 86A.11[4]* and *86A.200[1][b]*.

[b] Testamentary Disposition of Community Property

When one spouse dies, half of his or her community property belongs to the surviving spouse and the other half is subject to the decedent's testamentary disposition [*Prob. Code § 100(a)*; *see Prob. Code § 6401*], unless the spouses have agreed in writing to otherwise divide their community property [*see Prob. Code § 100(b)*]. A surviving spouse may want to institute an action to have his or her rights judicially determined if the decedent's will disposes of property in the decedent's name to persons other than the surviving spouse and the executor of the estate refuses to acknowledge that the surviving spouse has a community property interest in that property.

In some instances, part of a decedent's estate will be community or quasi-community property either devised to the surviving spouse or passing to that spouse through intestacy. In these situations, the surviving spouse may petition the court in which probate administration normally would occur to declare the character of the property and to declare that administration will not be necessary [*see Prob. Code § 13650*]. For further discussion, see *Ch. 61, Will Drafting and Complete Will Forms, § 61.14*; California Probate Practice, Ch. 4, *Transfers of Property Without Administration* (Matthew Bender); and California Forms of Pleading and Practice, Ch. 441, *Probate: Disposition Without Administration* (Matthew Bender).

The attorneys' fees for services rendered in connection with filing the petition and obtaining the court order should be determined by private agreement between the parties and are not subject to court approval [Prob. Code § 13660; *see Bus. & Prof. Code § 6147* (contingency fee requirements); *see also § 86A.11[4]*].

[c] Execution Requirements

Both parties must sign the contingency fee contract, and counsel must provide the client with a copy of the contract at the time of execution [*Bus. & Prof. Code § 6147(a)*]. If the contract does not contain all of the required information, is not properly signed, or if the client is not provided with a copy, it is voidable at the client's option. However, counsel will be entitled to collect a reasonable fee for his or her services [*Bus. & Prof. Code § 6147(b)*]. For further discussion, see *§ 86A.200[1][e]*.

If an attorney negotiates primarily in Spanish, the attorney must deliver an unexecuted Spanish language translation of any contract or agreement that contains a statement of fees or charges for legal services *before* the parties execute the retention agreement [*Civ. Code § 1632(a)(5)*]. For further discussion, see *§ 86A.200[1][d]*.

[2] FORM

Contingent Fee Agreement Regarding Claim That Some or All of Deceased Spouse's Estate is Community Property--Letter Form

[*Letterhead of attorney or law firm*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

[We *or* I] have reviewed the copy of your late [husband's *or* wife's] will that you left with this office on _____[*date*]. That will devises to persons other than yourself all of the property standing in your late [husband's *or* wife's] name at the time of _____[his *or* her] death. Based on the facts that you gave[us *or* me], it is [our *or* my] opinion that [some *or* all] of that property is community property. You are legally entitled to receive one-half of any such community property.

This letter will confirm the terms on which you have retained this office to represent you for the purpose of obtaining your community property interest in your deceased spouse's estate.

[Our *or* My] fee will be a percentage of the fair market value of whatever property you receive that was standing in the name of your deceased spouse at the time of [his *or* her] death. If you receive nothing, you will not be obligated to compensate this office for its services. This office will advance all legal, investigative, and trial costs necessary for the prosecution of your claim. You will reimburse this office for those costs regardless of whether any amount is recovered on your behalf.

From the amount recovered for you, this office will first be repaid for all costs advanced on your behalf. The attorneys' fee will be a percentage of the fair market value of the remaining balance depending on the stage at which the matter is resolved. The following fees have been negotiated by you and this office and are not set by law:

_____ [*e.g.,* 10 *or* 20 *or* 30] percent if the matter is resolved before the commencement of trial.

_____ [*e.g.*, 20 *or* 30 *or* 40] percent if the matter is resolved after the commencement of trial but before an appeal or a new trial.

_____ [*e.g.*, 30 *or* 40 *or* 50] percent if the matter is resolved after either the filing of an appeal by any party or the commencement of a second trial.

You will not be obligated to compensate this office for any matter related to, but not specifically covered in, this agreement.

No settlement of your interest in the decedent's estate will be made without your complete approval. This office may associate any other attorney at its discretion and expense [*optional:* and may withdraw at any time after giving you reasonable notice].

You have given this office an equitable lien for its services and costs advanced on your claims and recovery. You will keep this office advised of your whereabouts at all times, appear on reasonable notice at any depositions and court appearances, and comply with all reasonable requests in connection with the preparation and presentation of this matter.

If you agree to the terms of this letter, please date and sign the enclosed copy and return it to this office in the enclosed self-addressed envelope. Enclosed is an additional copy, which you should retain for your records.

Sincerely,
_____ [*signature*]
[*typed name*]
For _____ [*typed name of law firm*]

APPROVED AND AGREED

_____ [*signature of client*]
[*typed name*]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawEstates Created by Trusts & WillsGeneral OverviewLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesContingency FeesReal Property LawEstatesGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 86A AGREEMENTS FOR LEGAL SERVICES
PART IV. FORMS
B. Estate Planning and Decedent's Estates

28-86A California Legal Forms--Transaction Guide § 86A.214

§ 86A.214 Contingent Fee Agreement Regarding Client's Claim as Heir of Intestate Decedent--Letter Form

[1] Comment

[a] Use of Form

This form is a letter-style contingent fee agreement for the representation of the heir of an intestate decedent. Most attorneys prefer the informality of letter-style, as opposed to contract-style, retention agreements. If the attorney and/or client desire their agreement to be more formal, they can adapt this form to the contract style [*see § 86A.201*].

For an analysis of the law governing contingency fee contracts, see *§§ 86A.11[4]* and *86A.200[1][b]*.

For forms regarding the pursuit of the claim itself, see California Forms of Pleading and Practice, Ch. 440, *Probate: Is Probate Necessary ?* (Matthew Bender).

[b] Execution Requirements

Both parties must sign the contingency fee contract, and counsel must provide the client with a copy of the contract at the time of execution [*Bus. & Prof. Code § 6147(a)*]. If the contract does not contain all of the required information, is not properly signed, or if the client is not provided with a copy, it is voidable at the client's option. However, counsel will be entitled to collect a reasonable fee for his or her services [*Bus. & Prof. Code § 6147(b)*]. For further discussion, see *§ 86A.200[1][e]*.

If an attorney negotiates primarily in Spanish, the attorney must deliver an unexecuted Spanish language translation of any contract or agreement that contains a statement of fees or charges for legal services *before* the parties execute the retention agreement [*Civ. Code § 1632(a)(5)*]. For further discussion, see *§ 86A.200[1][d]*.

[2] FORM

Contingent Fee Agreement Regarding Client's Claim as Heir of Intestate Decedent--Letter Form

[*Letterhead of attorney or law firm*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

Based on the facts that you presented during our meeting of _____[*date*], [I *or* we] believe that you have a valid claim to a portion of the estate of _____[*name of decedent*], who died without a will, because you are a [*relationship, e.g.*, sister *or* daughter *or* brother *or* son] of _____[*name of deceased*].

This letter will confirm the terms on which you have retained this office to represent you for the purpose of obtaining your interest in the decedent's estate.

The attorneys' fee will be a percentage of the fair market value of whatever you receive from the estate of the decedent as of the time you receive it. If you receive nothing, you will not be obligated to compensate this office for its services. This office will advance all legal, investigative, and trial costs necessary for the prosecution of your claim. You will reimburse this office for these costs regardless of whether any amount is recovered on your behalf.

From the amount recovered for you, this office will first be repaid for all costs advanced on your behalf. The attorneys' fee will be a percentage of the fair market value of the remaining balance, depending on the stage at which the matter is resolved. The following fees have been negotiated by you and this office and are not set by law:

_____ [*e.g.*, 10 *or* 20 *or* 30] percent if the matter is resolved before the commencement of trial.

_____ [*e.g.*, 20 *or* 30 *or* 40] percent if the matter is resolved after the commencement of trial but before an appeal or a new trial.

_____ [*e.g.*, 30 *or* 40 *or* 50] percent if the matter is resolved after either the filing of an appeal by any party or the commencement of a second trial.

You are not obligated to compensate this office for any matter related to, but not specifically covered in, this agreement.

No settlement of your interest in the decedent's estate will be made without your approval. This office may associate any other attorney at its discretion and expense. [*Optional:* This office may withdraw at any time after giving you reasonable notice.]

You have given this office an equitable lien for its services and costs advanced on your claims and recovery. You will keep this office advised of your whereabouts at all times, appear on reasonable notice at any depositions and court appearances, and comply with all reasonable requests in connection with the preparation and presentation of this matter.

If you agree to the terms of this letter, please date and sign the enclosed copy and return it to this office in the enclosed self-addressed envelope. Enclosed is an additional copy, which you should retain for your records.

Sincerely,
_____ [*signature*]
[*typed name*]
For _____ [*typed name of law firm*]

APPROVED AND AGREED

_____ [*signature of client*]
[*typed name*]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Estate, Gift & Trust LawWillsBeneficiariesGeneral OverviewLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesContingency Fees

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28-86A California Legal Forms--Transaction Guide §§ 86A.215-86A.219

[Reserved]

§§ 86A.215[Reserved]

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PART IV. FORMS
C. Other Contingent Fee Agreements

28-86A California Legal Forms--Transaction Guide § 86A.220

§ 86A.220 Contingent Fee Agreement Regarding Condemnation Proceeding--Contract Form

[1] Comment--Use of Form

This form is a contingent fee contract for representing a property owner in a condemnation proceeding. The agreement is drafted in contract format. Many attorneys prefer the informality of letter-style retention agreements. If the attorney wants the professional relationship to begin on a less formal note, this form can be adapted to the letter-style contingency fee agreement in § 86A.201.

As a matter of practice, the contingency fee in condemnation proceedings generally is based on the difference between the condemnor's original offer and the amount ultimately received, as opposed to being based on the amount the owner recovers. Accordingly, the percentages employed are higher than in most other contingent fee cases.

For an analysis of the law governing contingency fee contracts, including the information that must be included in the agreement, see *§ 86A.11[4]* and *§ 86A.200[1][b]*. For discussion of execution and Spanish-language requirements, see *§ 86A.200[1][d]*, *[e]*. For forms to be used in this type of action, see California Forms of Pleading and Practice, Ch. 247, *Eminent Domain* (Matthew Bender).

[2] FORM

Contingent Fee Agreement Regarding Condemnation Proceeding--Contract Form

CONTINGENT FEE CONTRACT

_____[*name of client*], "Client," and _____[*name of attorney or law firm*], "Attorney," agree as follows:

Purpose of Representation

1. Client employs Attorney to represent Client in the condemnation proceeding instituted by _____[*name of condemnor*] as condemnor involving Client's real property located at [*location*].

Advancement of Litigation Expenses

2. Attorney will advance all expenses (including court costs, appraisal expenses, and the costs of obtaining and presenting evidence) that appear to Attorney to be reasonably necessary for the proper handling of the condemnation proceeding.

Reimbursement of Amounts Advanced

3. Client will reimburse Attorney for all costs advanced on Client's behalf. Client's obligation to reimburse Attorney for all costs advanced will not be affected by the amount received by Client in the condemnation proceeding.

Attorney's Fee

4. From the total amount received by Client from the condemnor, Attorney will first be repaid for all costs advanced on behalf of Client under Paragraph 3 of this Agreement. The attorneys' fee will be [*e.g.*, 50] percent of the difference between the remaining balance and the amount of the condemnor's present offer of $_____.

Negotiation of Fees

5. The attorney's fees set forth in Paragraph 4 are not regulated by law but are negotiable between Attorney and Client. Unless the parties negotiate and execute a separate agreement, Client will not be liable to compensate Attorney for any matter related to, but not specifically covered in, this Agreement.

Client's Approval Necessary for Settlement

6. No settlement of any nature will be made as to any of Client's claims without Client's complete prior approval.

Association of Other Attorneys

7. Attorney, at Attorney's sole discretion and expense, may associate any other attorney in representing Client's claims.

Withdrawal of Attorney

8. Attorney may withdraw from the representation of Client with regard to the claims covered by this Agreement within a reasonable time after giving Client notice of the withdrawal.

Attorney's Lien

9. Attorney will have a lien for services rendered and costs advanced on the sums recovered by Client, whether by

settlement or judgment, on account of the condemnation proceeding.

Cooperation of Client

10. Client will keep Attorney advised of Client's address at all times, will appear on reasonable notice at any and all depositions and court appearances, and will comply with all reasonable requests of Attorney in connection with the preparation and presentation of the condemnation proceeding.

Attorney's Authority

11. Client gives Attorney the power and authority to execute any and all pleadings, claims, settlements, drafts, checks, compromises, releases, dismissals, deposits, orders, and other papers that Client could properly execute, and to receive on Client's behalf any moneys or other things of value to which Client may be entitled because of any judgment recovered, or any settlement agreed on, in connection with the claims covered by this Agreement.

Applicable Law

12. The laws of the State of California govern the construction and interpretation of this Agreement and any dispute between the parties, including without limitation, disputes arising out of or relating to this Agreement, the professional relationship between the parties, and the professional services rendered under this Agreement.

Entire Agreement

13. This document sets forth and constitutes the entire agreement between the undersigned parties and supersedes any previous discussions, negotiations, or agreements on the same subject.

Severability

14. If any provision of this Agreement is held unenforceable, in whole or in part, the remainder of the provision and the entire Agreement is severable and remains in effect.

Modification of Agreement

15. Any revisions or modifications of this Agreement must be made in writing and signed by both Attorney and Client.

Client's Receipt of Agreement and Knowledge of Terms

16. Client acknowledges that Client has read and fully understood all of the terms and conditions of this Agreement before signing it; that the undersigned is authorized to enter into this Agreement on behalf of Client; and that Client has received an executed copy of this Agreement.

Date: _____

_____ [*signature*]
[*typed name*]
For _____ [*typed name of law firm*]

APPROVED AND AGREED

Date: _____

_____ [*signature of client*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesContingency FeesReal Property LawEminent Domain ProceedingsGeneral Overview

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C. Other Contingent Fee Agreements

28-86A California Legal Forms--Transaction Guide § 86A.221

§ 86A.221 Contingent Fee Agreement for Collections--Letter Form

[1] Comment

[a] Use of Form

This form is a contingent fee agreement confirming retention in a collection matter. It is designed to be used by an attorney whose client is a business, either wholesale or retail, with delinquent accounts. Most attorneys prefer the informality of letter-style, as opposed to contract-style, retention agreements. However, if the attorney and/or client desire a more formal employment contract, this form can be adapted to the contract style of § 86A.201.

Unlike the other types of contingent fee arrangements, this form provides that the attorney's percentage fee will decline as the amount recovered increases. The rationale behind this declining fee scale is that the collection of a small claim involves the same amount of work as a large one. This form defines "claim" as a debt arising from a transaction or series of transactions, the entire amount of which was due at the time the client referred the matter to counsel for collection to avoid any future misunderstanding with the client. If this definition is not suitable, the attorney should modify it to fit the circumstances.

For an analysis of the law governing contingency fee contracts, including the information that must be included in the agreement, see *§§ 86A.11[4], 86A.200[1][b]*. For discussion of execution and Spanish-langauge requirements, see *§ 86A.200[1][d], [e]*.

[b] Other Fee Agreements for Collection Cases

Collections that involve only one or very few claims are sometimes undertaken on contingent fee arrangements in which the percentage fees increase as the collection suits progress. This form may be adapted by including a fee scale similar to that in § 86A.200[1][b], [2] if this arrangement is preferable in light of the circumstances.

Other collection attorneys employ fixed fee schedules (for example, $25 for each letter requesting payment that the attorney sends to the debtor). If the attorney fails to collect the amount owed, the client turns the matter over to a

collection agency or suit is filed and the parties execute a contingency fee contract [*see § 86A.11[5]*].

[c] Regulation of Attorney Acting as Debt Collector

The conduct of attorneys and their employees who engage or assist in debt collecting is regulated [*see Bus. & Prof. Code § 6077.5*]. In general, they must comply with statutes regulating the practice of debt collecting [*see Civ. Code §§ 1788.10-1788.16*]. For discussion of the regulation of debt collecting, see Ch. 92, *Service Contracts* .

[2] FORM

Contingent Fee Agreement for Collections--Letter Form

[*Letterhead of attorney or law firm*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

This letter will confirm our conversation of _____[*date*], in which you retained this office to collect the following claims on behalf of your firm: [*specify claims e.g.*, $4,000 due from XYZ Corporation].

For purposes of this agreement, a "claim" is a debt arising from a transaction or series of transactions, the entire amount of which is due at the time you first refer the matter to this office for collection.

The attorneys' fee will be a percentage of the net amount obtained for you with regard to each claim. This office will advance all costs necessary for the collection of these claims. You will reimburse this office for those costs.

From the amount recovered on each claim, this office will first be repaid for all costs advanced on your behalf with regard to that claim and for which you have not yet made reimbursement. The attorneys' fee will be a percentage of the remaining balance recovered on each claim:

_____ [*e.g.*, 40 *or* 45] percent of the first $_____ [*e.g.*, 500 *or* 1,000].

_____ [*e.g.*, 35 *or* 40] percent of the next $_____ [*e.g.*, 500 *or* 1,000].

_____ [*e.g.*, 30 *or* 35] percent of the excess over $_____ [*e.g.*, 1,000 *or* 2,000].

No settlement of any claim will be made without your approval. This office may associate any other attorney at its discretion and expense [*optional:* and may withdraw at any time after giving you reasonable notice]. You have given this office an equitable lien for its services and costs advanced on your claims and recovery. You will appear on reasonable notice at any depositions and court appearances, and comply with all reasonable requests in connection with the preparation and presentation of this matter.

We appreciate the opportunity of being of service to you. If the terms of this letter differ in any respect from your understanding of our conversation of _____[*date*], please advise me. Otherwise, please date and sign the enclosed copy and return it to this office in the enclosed self-addressed envelope. Enclosed is an additional copy that you should retain for your records.

Sincerely,
_____ [*signature of attorney*]
[*typed name*]
For _____ [*typed name of law firm*]

APPROVED AND AGREED

_____ [*signature of client*]
[*typed name*]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor RelationsLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesContingency Fees

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28-86A California Legal Forms--Transaction Guide § 86A.222

§ 86A.222 Contingent Fee Agreement for Employment Discrimination Claim--Letter Form

[1] Comment--Use of Form

This form is a letter-style contingent fee agreement that confirms an attorney's retention to represent a client in an employment discrimination class action under the Civil Rights Act of 1964 [*see 42 U.S.C. §§ 2000e-2000e-17*]. Most attorneys prefer the informality of letter style, as opposed to contract style retention agreements. However, if the attorney and/or client desire a more formal employment contract, this form can be adapted to the style of § 86A.201.

This form is drafted to include potential class representation. In employment discrimination actions under the Civil Rights Act of 1964, attorneys' fees are awarded to the prevailing party. This form provides that the client agrees to pursue an appeal if the court fails to award adequate attorneys' fees.

For an analysis of the law governing contingency fee contracts, see *§§ 86A.11[4], 86A.200[1][b]*. For discussion of execution and Spanish-language requirements, see *§ 86A.200[1][d], [e]*.

[2] FORM

Contingent Fee Agreement for Employment Discrimination Claim--Letter Form

CONTINGENT FEE AGREEMENT
[*Letterhead of attorney or law firm*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

This letter will confirm our understanding with you (and a class consisting of others similarly situated) that the matters discussed in our conversation of _____[*date*] will probably lead to a lawsuit for racial discrimination and other wrongs done.

This office will represent you and the class on the following terms:

- Two types of expenses will likely be incurred: out-of-pocket costs and hourly costs. Our office will advance these costs on your behalf. If the case is won or settled, the expenses may be fully recovered. If they are not fully recovered, then your award or settlement will first be used to pay any unrecovered out-of-pocket costs, after which _____ [*e.g.*, 331/3] percent of the remainder of your award will be held to cover unrecovered hourly expenses.

- If the court fails to award adequate attorneys' fees, you agree to appeal that matter on the recommendation of this office.

- No settlement of your claim will be made without your prior approval. You agree to consider seriously any settlement recommendations that we make, and you will not unreasonably withhold your consent to a recommended settlement proposal

- You will not be obligated to compensate this office for any matters related to, but not specifically covered in, this agreement.

The terms of our agreement for compensation are not set by law but have been negotiated between this office and yourself.

Please review this letter and, if it meets with your approval, sign and date the enclosed copy of this letter and return it to us in the envelope provided. Enclosed is an additional copy, which you should retain for your records. We look forward to a long and pleasant professional relationship with you. If you have any questions regarding anything addressed in this letter, please do not hesitate to contact me.

Sincerely,
_____ [*signature of attorney*]
[*typed name*]
For _____ [*typed name of law firm*]

APPROVED AND AGREED

_____ [*signature of client*]
[*typed name*]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment LawDiscriminationGeneral OverviewLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesContingency Fees

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28-86A California Legal Forms--Transaction Guide §§ 86A.223-86A.229

[Reserved]

§§ 86A.223[Reserved]

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D. Other Retention Agreements

28-86A California Legal Forms--Transaction Guide § 86A.230

§ 86A.230 Retainer Agreement for Regular Legal Services for a Business--Letter Form

[1] Comment

[a] Use of Form

This form is a standard retainer agreement in which an attorney agrees to provide ordinary legal services for a business at a stipulated monthly rate. Most attorneys prefer the informality of letter-style, as opposed to contract-style, retainer agreements. However, if the attorney or client desires a more formal employment contract, this form can be adapted to the contract style of § 86A.201.

This form provides that the monthly rate does not cover the preparation of legal documents, obtaining patents and copyrights, the prosecution or defense of any legal or equitable action or other claims, or representing the client before any governmental agencies. The form further provides that counsel will be available to handle these additional matters, and that client will be charged at at the attorney's regular rates.

For an analysis of the principles governing the reasonableness of fees, see *§ 86A.16[1]*. For discussion of execution and Spanish-language requirements, see *§ 86A.200[1][d], [e]*.

[b] Retainer Agreements

A retainer fee arrangement exists when a client pays an attorney a specified sum of money to secure that attorney's availability over a given period of time. The attorney earns the retainer as soon as it is paid because the attorney is entitled to the money regardless of whether or not any legal services are actually peformed [*Baranowski v. State Bar (1979) 24 Cal. 3d 153, 164, 154 Cal. Rptr. 752, 593 P.2d 613]* . Retainer fee arrangements are particularly appropriate for attorneys with small business clients who ordinarily have questions that can be handled quickly and for which the attorneys prefer not to bill directly. The retainer arrangement benefits the small business client by affording that client readily available legal advice regarding ordinary matters. For an analysis of the factors that distinguish a retainer fee arrangement from an advance fee payment, see *§ 86A.11[3]*.

[2] FORM

Retainer Agreement for Regular Legal Services for a Business--Letter Form

[*Letterhead of attorney or law firm*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

This letter will confirm the terms on which you have retained this office to act as counsel for your business _____[*name of business*], [located at *or* the principal office of which is located at] _____[*address*].

Our office will be available to you and will advise you and your employees in the regular conduct of your business, by telephone and in conferences, and will write any incidental correspondence. You will pay to our office the sum of $_____ per month regardless of whether you actually consult us during that time period.

This monthly compensation does not cover any of the following activities:

The preparation of any legal documents;

Obtaining patents and copyrights;

The prosecution or defense of any legal or equitable action or other claims; or

Representing you before any governmental agencies.

However, this office will always be available to handle the above matters if you desire, and you would then be charged at our regular rates.

We are pleased to have this opportunity to be of service to you. [*Optional:* This retainer agreement may be canceled by either party on _____ days written notice to the other.]

Please review this letter and, if it meets with your approval, sign and date the enclosed copy of this letter and return it to us in the envelope provided. Enclosed is an additional copy, which you should retain for your records. We look forward to a long and pleasant professional relationship with you. If you have any questions regarding anything addressed in this letter, please do not hesitate to contact me.

Sincerely,
_____ [*signature of attorney*]
[*typed name*]
For _____ [*typed name of law firm*]

APPROVED AND AGREED

_____ [*signature of client*]
[*typed name*]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesGeneral OverviewLegal EthicsClient RelationsAttorney FeesFee Agreements

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D. Other Retention Agreements

28-86A California Legal Forms--Transaction Guide § 86A.231

§ 86A.231 Agreement for Formation of Corporation--Letter Form

[1] Comment--Use of Form

This form is an agreement in letter form in which an attorney agrees to incorporate a new business or an existing business for a flat fee. Many attorneys prefer a letter style retainer agreement because they believe it allows the professional relationship to begin on a friendly note. However, if the attorney or the client prefers a more formal retention agreement, this form can be adapted to the contract style of § 86A.201.

For an analysis of the steps involved in forming a corporation and appropriate forms, see Ch. 1A, *Role of Counsel in Starting a New Business* , Ch. 2, *Formation of Corporations* , Ch. 2A, *Incorporating A Going Business* , Ch. 3, *Articles of Incorporation* , and Ch. 4, *Bylaws* .

For discussion of execution and Spanish-language requirements, see *§ 86A.200[1][d]* and *[e]*.

[2] FORM

Agreement for Formation of Corporation--Letter Form

AGREEMENT FOR FORMATION OF CORPORATION
[*Letterhead of attorney or law firm*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

This letter will confirm the terms on which you have retained this office to [incorporate your business *or* to establish a

corporation] as _____[*name of business or proposed corporate name*].

In connection with forming the corporation, this office will perform the following tasks:

- Reserve the corporate name.
- Prepare articles of incorporation, bylaws, and minutes of the first meeting of the directors.
- Attend the initial organizational meeting of the directors.
- Obtain a permit for one stock issue.

Our compensation for these services will be $_____, of which you _____[have paid us $_____ *or* will pay us $_____ at the end of this month]. The balance will be paid when our work is completed. This fee does not include the out-of-pocket expenses, such as filing fees and the costs of stock certificates and corporate seal, which we estimate will total approximately $_____. We will advance those expenses and bill you for them.

Please review this letter and, if it meets with your approval, sign and date the enclosed copy of this letter and return it to us in the envelope provided. Enclosed is an additional copy, which you should retain for your records. We look forward to a long and pleasant professional relationship with you. If you have any questions regarding anything addressed in this letter, please do not hesitate to contact me.

Sincerely,
_____ [*signature of attorney*]
[*typed name*]
For _____ [*typed name of law firm*]

APPROVED AND AGREED

_____ [*signature of client*]
[*typed name*]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsFormationGeneral OverviewContracts LawTypes of ContractsGeneral OverviewLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesFee Agreements

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
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D. Other Retention Agreements

28-86A California Legal Forms--Transaction Guide § 86A.232

§ 86A.232 Retainer Agreement for Representation of Client in Action for Marital Dissolution--Letter Form

[1] Comment

[a] Use of Form

This form is a retainer agreement in letter-style in which an attorney agrees to represent a party to a marital dissolution action. It is designed so that it can be used for the representation of either the petitioner or the respondent.

Many attorneys prefer a letter-style retention agreement because they believe it allows the professional relationship to begin on a friendly note. However, if the attorney and/or the client prefer a more formal retention agreement, this form can be adapted to the contract style of § 86A.201. However, if this form is adapted to the contract-style of § 86A.201, care should be taken that the fee arrangement is not set out on a contingency basis [*see* [b], *below*].

For forms used in marital dissolution proceedings, See California Forms of Pleading and Practice, Ch. 220, *Dissolution of Marriage: Master Procedural Guide* (Matthew Bender).

For discussion of execution and Spanish-language requirements, see *§ 86A.200[1][d]* and *[e]*.

[b] Contracts for Representing Parties to Marital Dissolutions

Parties to a marital dissolution action often agree between themselves regarding property division, support, and child custody matters and consult an attorney solely to reduce their agreement to writing and obtain an appropriate court order. Since the parties may be unaware of the extent to which their interests in the matter conflict, the attorney must be extremely careful in accepting employment in these situations [*see § 86A.12[2]*; *see also § 86A.247* (contract addendum explaining multiple representation)].

A contingency fee contract between an attorney and the petitioner in a marital dissolution proceeeding generally is void as against the public policy favoring preservation of marriages [*see Coons v. Kary (1968) 263 Cal. App. 2d 650, 652-653, 69 Cal. Rptr. 712]* . However, a contingency fee contract between an attorney and a respondent may be

enforceable if it was executed after the dissolution action was instituted and an analysis of the circumstances (e.g., whether there is any possibility of a reconciliation) indicates that upholding the contract would not frustrate public policy [*see Krieger v. Bulpitt (1953) 40 Cal. 2d 97, 100-101, 251 P.2d 673]* .

For an analysis of the law governing contingency fee and other types of contracts, see *§ 86A.11* and *§ 86A.200[1][b]*.

Some attorneys representing parties to a marital dissolution charge an additional flat fee for obtaining the final decree. The retainer agreement should clearly state whether or not the attorney will charge an additional fee for this service and, if so, what that fee will be.

[2] FORM

Retainer Agreement for Representation of Client in Action for Marital Dissolution--Letter Form

[*Letterhead of attorney or law firm*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

This letter will confirm the terms on which you have retained this office to represent you [in the action for dissolution of your marriage that we will file on your behalf *or* in the defense of the action for dissolution of your marriage that has been filed against you].

Our fee for representing you in this marital dissolution will be a total of $_____, of which _____[you have paid us $_____ *or* of which you will pay us $_____ when you return the copy of this letter to us]. You will pay the remaining balance on the completion of our work. [*Add if representing petitioner:* Any amount that this office receives from your spouse as a result of a court order for our attorney's fee will, of course, be credited to your account.]

The fee quoted above does not include any services that may be required in connection with any orders to show cause. You will be billed for those services at our regular rates. The fee quoted above does not include out-of-pocket costs, such as filing and service fees, which we estimate will be approximately $_____. We will advance those costs and bill you for them. [*Add if desired:* There will be _____[an additional fee of $_____ *or* no additional attorney's fee] if this office obtains a final judgment dissolving the marriage on your behalf.]

This office will not settle any aspect of your marital dissolution without your approval. You have given this office an equitable lien for its services and costs advanced on any property you receive in the disposition of this case. You will keep this office advised of your whereabouts at all times, appear on reasonable notice at any depositions and court appearances, and comply with all reasonable requests in connection with the preparation and presentation of the case.

Please review this letter and, if it meets with your approval, sign and date the enclosed copy of this letter and return it to us in the envelope provided. Enclosed is an additional copy, which you should retain for your records. If you have any questions regarding anything addressed in this letter, please do not hesitate to contact me.

Sincerely,
_____ [*signature of attorney*]

[*typed name*]
For _____ [*typed name of law firm*]

APPROVED AND AGREED

_____ [*signature of client*]
[*typed name*]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Family LawMarital Termination & Spousal SupportDissolution & DivorceGeneral OverviewLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesGeneral OverviewLegal EthicsClient RelationsAttorney FeesFee Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
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28-86A California Legal Forms--Transaction Guide § 86A.233

§ 86A.233 Retainer Agreement for Representation of Client in Federal Tax Matters--Letter Form

[1] Comment--Use of Form

This form is a retainer agreement for the representation of a client concerning collection problems with the Internal Revenue Service. Many attorneys prefer a letter style retainer agreement because they believe it allows the professional relationship to begin on a friendly note. However, if the attorney or the client prefers a more formal retention agreement, this form can be adapted to the contract style of § 86A.201.

The form limits the scope of the attorney's duties under the agreement: counsel will take all reasonably necessary steps necessary to represent the client for the delineated tax years. However, services do not include litigation of any kind [*see* [2], P 2, *below*].

[2] FORM

Retainer Agreement for Representation of Client in Federal Tax Matters--Letter Form

[*Letterhead of attorney or law firm*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

This ATTORNEY-CLIENT FEE CONTRACT ("Contract") is entered in to between _____[*name of client(s)*] ("Client(s)") and _____[*name of attorney*] ("Attorney").

This agreement is required by *Business and Professions Code Section 6148* and is intended to fulfill the requirements of

that statute.

1. **Conditions.** This contract will not take effect, and Attorney will have no obligation to provide legal services, until Client[s] return a signed copy of this Contract and pay the deposit called for under Paragraph 3.

2. **Scope and Duties.** Client[s] hire Attorney to provide legal services in connection with their collection problems with the Internal Revenue Service for the tax years [*specify time period as limiting scope of representation, e.g.*, 2000 and 2001]. Attorney will provide those legal services reasonably required to represent Client[s] and will take reasonable steps to keep Client[s] informed of progress and to respond to [Client's *or* Clients'] inquiries. Attorney's services will not include litigation of any kind, whether in court, in administrative hearings, or before government agencies or arbitration tribunals. Client[s] will be truthful with Attorney, cooperate with Attorney, keep Attorney informed of developments, abide by this contract, pay Attorney's bill on time and keep Attorney advised of [Client's *or* Clients'] address, telephone number and whereabouts.

3. **Deposit.** Client[s] paid $_____ on _____[*date*]. Clients will pay an additional $_____ by _____[*date*]. Any part of this sum that has not been earned at that point will be deposited in a trust account, to be used to pay costs and expenses and fees for legal services. Client[s] authorize Attorney to withdraw sums from the trust account to pay costs and fees incurred on behalf of Client[s]. Any unused deposit at the conclusion of Attorney's services will be refunded.

4. **Legal Fees.** Client[s] agree to pay legal services at the following rates:

Attorney: _____ [*specify hourly rate, e.g.*, $250.00/hr.]

Paralegal: _____ [*specify hourly rate, e.g.*, $50.00/hr.]

Secretary: _____ [*specify hourly rate, e.g.*, $25.00/hr.]

5. **Costs and Expenses.** In addition to paying legal fees, Client[s] will reimburse Attorney for all costs and expenses incurred by the Attorney, including, but not limited to fees fixed by law or assessed by public agencies, long distance telephone calls, messenger and delivery fees, postage, copying at $_____ per page, parking fees, mileage at _____ cents per mile, investigation expenses, consultant's fees, and other similar items. Client[s] authorize Attorney to incur all reasonable costs and to hire any investigators or consultants reasonably necessary in Attorney's judgment, unless one or both of the clauses below are initialed by Client[s] and Attorney.

_____ Attorney will obtain [Client's *or* Clients'] consent before incurring any cost in excess of $_____.

_____ Attorney will obtain [Client's *or* Clients'] consent before retaining outside investigators or consultants.

6. **Statements.** Attorney will send Client[s] periodic statements within [*specify, e.g.*, 35 days] of each statement's date. Client[s] may request a statement at intervals of no less than [*specify, e.g.*, 30 days]. On [Client's *or* Clients'] request, Attorney will provide a statement within [*specify, e.g.*, 10 days].

7. **Discharge and Withdrawal.** Client[s] may discharge Attorney at any time. Attorney may withdraw with [Client's *or* Clients'] consent or for good cause. Good cause includes [Client's *or* Clients'] breach of this Contract, [Client's *or* Clients'] refusal to cooperate with Attorney or to follow Attorney's advice on a material matter, or any other fact or circumstance that would render Attorney's continuing representation unlawful or unethical.

8. **Conclusion of Service.** When Attorney's services conclude, all unpaid charges will become immediately due and payable. After Attorney's services conclude, Attorney, at [Client's *or* Clients'] request, will deliver [Client's *or* Clients'] original documents, if any, to Client[s], along with Client funds or property in Attorney's possession.

9. **Disclaimer of Guarantee.** Nothing in this Agreement and nothing in Attorney's statements to Client[s] will be construed as a promise or guarantee about the outcome of [Client's *or* Clients'] matter or that a specific result will be achieved. Attorney makes no promises or guarantees. Attorney's comments about the outcome of [Client's *or* Clients'] matter are expressions of opinion only.

10. **Effective Date.** This Contract will take effect when Client[s] [has *or* have] performed the conditions stated in Paragraph 1, but its effective date will be retroactive to the date Attorney first provided services. The date at the beginning of this Contract is for reference only. Even if this Contract does not take effect, Clients will be obliged to pay Attorney the reasonable value of any services Attorney may have performed for Clients.

Sincerely,
_____ [*signature of attorney*]
[*typed name*]
For _____ [*typed name of law firm*]

APPROVED AND AGREED

_____ [*signature of client*]
[*typed name*]

Date: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesGeneral OverviewLegal EthicsClient RelationsAttorney FeesFee AgreementsTax LawFederal Income Tax ComputationGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-86A California Legal Forms--Transaction Guide § 86A.234

§ 86A.234 Hourly Fee Agreement for Representation--Contract Form

[1] Comment

[a] Use of Form

This form is a compensation agreement under which an attorney agrees to perform stated services for a client for a designated hourly fee that is not contingent on the attainment of a specified result. The hourly rate may easily be converted to a statutory fee or flat fee. This form is drafted for use in a contract style agreement but may be adapted for use in a letter style agreement.

For clarity, this form provides for separate hourly rates for attorneys and legal assistants. Further, the form explains that time is charged in increments of an hour, and assigns a percentage for tasks such as telephone calls and letters. Finally, the form permits counsel to charge less than the designated hourly rate for certain tasks, such as travel time [*see* [2], PP 4, 5, *below*].

[b] Advantages of Hourly Billing

When the amount of time that will be needed to complete the task is difficult to determine in advance, an hourly rate agreement may be the fairest arrangement for both attorney and client. It ensures that the attorney will be compensated for all work actually performed, even if the task takes more time than originally anticipated. Conversely, it assures the client that he or she will pay only for the time it actually takes the attorney to complete the task. Thus, if the attorney is able to complete the task in less time than anticipated, the attorney's fee may be less than if a lump sum was charged for the same service. Finally, if the client has a change of mind about the service or terminates the attorney's services before the task is complete, it is much easier to determine the fee due to the attorney under an hourly rate arrangement than under a flat fee or contingent fee agreement.

[c] Writing and Content Requirements

With stated exceptions [*see Bus. & Prof. Code § 6148(d)*; *see also § 86A.11[2][c]*], attorneys' fees agreements other

than contingent fee contracts [*see Bus. & Prof. Code § 6147*; *see also § 86A.11[4]*] must be in writing if it is reasonably foreseeable that total expense to the client, including attorneys' fees, will exceed $1,000. These contracts must contain the following [*Bus. & Prof. Code § 6148(a)*; *see Bus. & Prof. Code § 6148(e), (f)* (rule applicable to fee agreements executed after January 1, 2000)]. Written contracts must contain all of the following [*Bus. & Prof. Code § 6148(a)*]:

- The basis of compensation including, but not limited to, hourly rates, statutory fees or flat fees, and other standard rates, fees, and charges applicable to the case.
- The general nature of the legal services to be provided to the client.
- The respective responsibilities of the attorney and the client as to the performance of the contract.

These statutory requirements are somewhat vague. For example, the statutory reference to fees and charges applicable to the "case" could be construed to limit application of the statute to situations involving an actual case or controversy, as opposed, for example, to nonlitigation work such as estate planning, business transactions, and real estate transactions. The statute also offers no guidance on what ought to be included in "standard rates, fees, and charges," how much detail the statement of the "general nature of the legal services" should contain, and what matters should be included under the description of the "respective responsibilities of the attorney and the client."

The lack of detail in the statute poses a definite drafting problem for attorneys. Given the uncertainties noted above, it is recommended that attorneys make the descriptions of fees, legal services, and responsibilities of the parties as detailed as reasonably possible, and that a written contract complying with the statutory requirements be used in nonlitigation transactions as well as those relating to representation in a "case." No harm will be done by the use of a more detailed written agreement, and the more detail that is included, the less likely that the contract will be voided for failure to comply with the statutory requirements.

When the parties enter into the contract, the attorney must provide a duplicate copy of the contract signed by both the attorney and the client, or the client's guardian or representative, to the client or to the client's guardian or representative [*Bus. & Prof. Code § 6148(a)*].

The failure to comply with any of these requirements renders the fee agreement voidable at the option of the client. However, if the agreement is voided, the attorney is still entitled to collect a reasonable fee for his or her services [*Bus. & Prof. Code § 6148(c)*; *see § 86A.11[2][d]*].

[2] FORM

Hourly Fee Agreement for Representation--Contract Form

HOURLY FEE AGREEMENT

This agreement is between _____[*name of client*] ("Client") and [*specify name of attorney or firm and structure, e.g.,* Legal Advisers, a Professional Law Corporation] ("Attorneys").

Identification of Parties

1. This contract is made on _____[*date*], between _____[*full, exact name of attorney or law firm*], _____[*status and/or capacity, e.g.,* a California professional corporation *or* as a partner of _____ (*name of firm*)], _____[*address*], referred to as "[Attorney *or* Attorneys]," and [*name and status of client, e.g.,* Coal Hill Associates, a California general partnership], _____[

address], referred to as "Client."

Employment of Attorney[s]

2. Client retains and employs [Attorney *or* Attorneys] to act as legal counsel for Client in the matter of _____[*specify case title if a legal action is pending, e.g.,* Dupree v. August West & Co., Case No. _____, _____ (*court); or describe subject or transaction; e.g.,* the sale of the apartment building located at _____].

Obligations of Attorney[s]

[*For representation involving litigation:*]

3. [Attorney *or* Attorneys] will [*specify services that attorney(s) will provide, e.g.,* defend Client in the action specified in Paragraph 2, including, as necessary and with the prior consent of Client: the preparation of pleadings, motions, and related matters; conduct of discovery; filing of cross-complaints and any complaints against third parties relating to the action described in Paragraph 2; conduct of settlement negotiations; and conduct of trial].

[*Or, for representation not involving litigation:*]

3. [Attorney *or* Attorneys] will [*specify all actions and activities that attorney will have to take, e.g,* draft or review all necessary documents and advise Client regarding the legal effect of all proposed terms and conditions; counsel Client regarding the legal consequences of the sale; negotiate with the prospective purchasers, if requested to do so by Client, regarding the resolution of any legal issues connected with the sale; and assist Client in obtaining all necessary permits and taking any other steps that may be necessary to complete the transaction].

Basic Hourly Fees

4. Client agrees to pay [Attorney *or* Attorneys] for the services described in Paragraph 3, above, as follows: _____ [*specify hourly rate for counsel and legal assistants, e.g.,*

- Senior partner: _____ (*specify hourly rate, e.g.,* $250.00/hr.)
- Partner: _____ (*specify hourly rate, e.g.,* $200.00/hr.)
- Associate: _____ (*specify hourly rate, e.g.,* $150.00/hr.)
- Paralegal: _____ (*specify hourly rate, e.g.,* $ 40.00/hr.)
- Law clerk: _____ (*specify hourly rate, e.g.,* $ 30.00/hr.)
- Secretary: _____ (*specify hourly rate, e.g.,* $25.00/hr.)

Time is charged in minimum units of [*specify, e.g.,* one-tenth of an hour]. Telephone calls to or on behalf of Client are charged at [*specify, e.g.,* 2 hours per call]. Letters sent on behalf of Client are charged at [*specify, e.g.,* 5 hours per

letter].

_____[*Describe fees for any special services that vary from basic rate; e.g.,* Trial time is not included in this basic rate. If it becomes necessary for _____ (Attorney *or* Attorneys) to represent Client at trial of the action described in Paragraph 2, or any related action, Client agrees to pay _____ [Attorney *or* Attorneys] $_____ per day for each day or partial day of trial.] [*Optional:* The total payment to _____ (Attorney *or* Attorneys) for these services will be not less than $_____ or more than $_____.]

Other Charges

5. In addition to the basic fee stated in Paragraph 4, above, Client agrees to pay all reasonable and necessary expenses incurred by [Attorney *or* Attorneys] on behalf of Client in connection with the services described in Paragraph 3, as follows:

- Automobile travel, at the rate of _____ [*e.g.,* 20 cents] per mile.

- Other travel expenses at actual cost, including but not limited to air fare (business or first class), taxicab fare, meals, and lodging, incurred while representing Client.

- Expenses for the printing or reproduction of documents required in connection with the services described in Paragraph 3, at the rate of $_____ per page for in-house services, and $_____ per page for printing or reproduction outside the office.

- Facsimile charges at the rate of $_____ per page.

- Any filing fees, permit fees, or other fees paid or advanced by _____ [Attorney *or* Firm] on behalf of Client in accordance with Paragraph 6, *below*.

- _____ [*Specify any other costs or expenses to be paid by client*.]

Costs

6. Client agrees to pay all fees, costs, and expenses arising out of the matter referred to in Paragraph 3, above. [Attorney *or* Attorneys] will not be obligated to pay or advance any fees, costs, or expenses, and may at _____[his *or* her *or* their] sole option (1) require Client to advance payment for any such costs; or (2) arrange to have those costs directly billed to Client. Notwithstanding this Paragraph 6, [Attorney *or* Attorneys] may, at _____[his *or* her *or* their] sole option, advance such costs as _____[he *or* she *or* they] deem[s] appropriate and obtain reimbursement from Client under Paragraph 5. The fact that [Attorney *or* Attorneys] elect[s] to advance any particular item of cost of behalf of Client does not create an obligation to advance the same or similar items of cost at any future time.

Billing

7. [Attorney *or* Attorneys] will submit monthly billing statements to Client itemizing amounts charged under the basic hourly rate stated in Paragraph 4, above, and any costs and expenses for which [Attorney is *or* Attorneys are] entitled to reimbursement under Paragraph 5, above. Client agrees to pay the amount due within 30 days following receipt of the

billing statement.

Other Obligations of Client

8. Client agrees to cooperate with [Attorney *or* Attorneys] to the extent necessary for [Attorney *or* Attorneys] to discharge _____[his *or* her *or* their] duties under this Agreement. Cooperation includes, but is not limited to attendance at all proceedings, meetings, conferences, and other events at which Client's presence is required; and providing [Attorney *or* Attorneys] with any necessary documents and other information promptly on request.

Governing Law

9. The validity of this Agreement and of any of its terms or provisions, as well as the rights and duties of the parties under this Agreement, will be construed pursuant to and in accordance with California law.

Entire Agreement

10. This document sets forth and constitutes the entire agreement between Client and [Attorney *or* Attorneys] and supersedes any previous discussions, negotiations, or oral or written agreements on the same subject. This Agreement contains all of the covenants and agreements between the parties with respect to the subject matter of this Agreement, and each party to this Agreement acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except those covenants and agreements embodied in this Agreement. No agreement, statement, or promise not contained in this Agreement is valid or binding.

Severability

11. If any provision of this Agreement is held unenforceable, in whole or in part, the remainder of the provision and the entire Agreement is severable and remains in effect.

Modification of Agreement

[*Either:*]

12. Any revisions or modifications of this Agreement must be made in writing and signed by both Client and [Attorney *or* Attorneys].

[*OR, to permit oral modification:*]

12. Any revisions or modifications of this Agreement must be made in writing and signed by both Client and [Attorney *or* Attorneys] or by oral agreement to the extent that the parties act in accordance with the modification.

[*Continue with the following:*]

Client's Receipt of Agreement and Knowledge of Terms

13. Client acknowledges that Client has read and fully understood all of the terms and conditions of this Agreement before signing it; that the undersigned is authorized to enter into this Agreement on behalf of Client; [*optional:* that Client has consulted with counsel other than [Attorney *or* Attorneys] for advice with respect to this Agreement;] that Client has received an executed copy of this Agreement.

Date: _____

_____ [*signature*]
[*typed name*]
For _____ [*typed name of law firm*]

APPROVED AND AGREED

Date: _____

_____ [*signature of client*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesGeneral OverviewLegal EthicsClient RelationsAttorney FeesFee Agreements

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28-86A California Legal Forms--Transaction Guide §§ 86A.235-86A.239

[Reserved]

§§ 86A.235[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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E. Miscellaneous Provisions and Related Forms

28-86A California Legal Forms--Transaction Guide § 86A.240

§ 86A.240 Provision for Interest on Overdue Attorneys' Fees

[1] Comment--Use of Form

This form is a provision for the accrual of interest on overdue attorneys' fees. It may be included in any retention agreement if the attorney wants to charge his or her client interest on overdue accounts. It is drafted in letter format but can be easily converted to contract format.

Including this type of interest provision may facilitate prompt collections of attorneys' fees. However, this form lends a commercial tone to the creation of the attorney-client relationship. Attorneys who are concerned about their professional relationships commencing on a friendly level and who take a more service-oriented approach toward their practices will probably prefer not to use this form.

[2] FORM

Provision for Interest on Overdue Attorneys' Fees

Provision for Interest on Overdue Attorneys' Fees

[I *or* We] will bill you on a monthly basis for [services rendered under the Agreement *or* any extraordinary services] for which you are charged at our regular rates. If you do not remit payment for those services within [*specify, e.g.*, 60 days] from the date of the statement, interest will be charged on the principal balance (fees, costs, and disbursements) shown on the statement. Interest will be calculated by multiplying the unpaid balance by the periodic rate of _____ per month (_____ ANNUAL PERCENTAGE RATE). The unpaid balance will bear interest until paid.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-86A California Legal Forms--Transaction Guide § 86A.241

§ 86A.241 Provision Stating That Hourly Fee Is Reasonable

[1] Comment--Use of Form

This form is a provision by which the client acknowledges that the attorney's hourly rate is fair and reasonable, even though other attorneys might charge more or less for the same services. It states that the attorney makes no representation or guarantee as to the outcome of the matter, but agrees to competently represent the client. This form is drafted in contract format but can be easily converted to letter format.

[2] FORM

Provision Stating That Hourly Fee is Reasonable

Hourly Fees Are Reasonable

_____. Client[s] agree[s] that Attorney's hourly rate is fair and reasonable, and understand[s] that other attorneys may charge more or less for the same services. Attorney makes no representation or guarantee as to the outcome of the matter, but agree[s] to represent Client[s] competently in this matter.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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E. Miscellaneous Provisions and Related Forms

28-86A California Legal Forms--Transaction Guide § 86A.242

§ 86A.242 Provision Requiring New Agreement for Appellate Services

[1] Comment--Use of Form

This form is a provision limiting the scope of the attorney's representation. It provides that counsel may not be required to appeal any decision rendered in the case without a new and separate agreement for services. This form is drafted in contract format but can be easily converted to letter format.

Similar language may be used to provide that collection of a judgment once that judgment has been obtained is not included in the basic agreement.

[2] FORM

Provision Requiring New Agreement for Appellate Services

Appellate Services Require New Agreement

_____. Client[s] agree that Attorney may not be required to appeal any decision in this case unless a new and separate agreement is reached.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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28-86A California Legal Forms--Transaction Guide § 86A.243

§ 86A.243 Provision Permitting Withdrawal of Counsel

[1] Comment--Use of Form

This form is a provision permitting counsel to withdraw from the representation. The form provides that counsel may withdraw for any reason other than nonpayment of fees or retainers in accordance with the agreement after providing reasonable notice to the client. This form is drafted in contract format but can be easily converted to letter format.

For discussion of of the requirements and restrictions applicable to mandatory withdrawal, see *§ 86A.18[1]*. Permissive withdrawal of counsel is discussed § 86A.18[2].

[2] FORM

Provision Permitting Withdrawal of Counsel

Withdrawal of Counsel

_____. If Attorney wishes to withdraw from representation of Client[s] for any reason other than the failure of Client[s] to make timely payment of [fees *or* retainer] in accordance with this agreement, Attorneymust give reasonable notice to Client[s] in writing before withdrawing from the case.

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAccepting Representation

California Legal Forms--Transaction Guide

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28-86A California Legal Forms--Transaction Guide § 86A.244

§ 86A.244 Provision Requiring Client to Keep Counsel Informed as to Contact Information

[1] Comment--Use of Form

This form is a provision requiring the client to keep counsel informed of the client's current residence and business addresses and telephone numbers. The form also requires the client to notify counsel if the client will be unavailable for an extended period of time. For example, if the client plans to be out of town, is hospitalized, or is otherwise unavailable at the current contact numbers for an extended period, the client must notify counsel. This form is drafted in contract format but can be easily converted to letter format.

[2] FORM

Provision Requiring Client to Keep Counsel Informed as to Contact Information

Client's Duty to Inform Counsel of Current Contact Information

_____. Client[s] agree to keep Attorney apprised of [Client's *or* Clients'] current residence and business _____[address *or* addresses] and telephone number[s]. Further, Client[s] agree[s] to promptly notify Attorney if _____ Client[s] will not be reachable at [Client's *or* Clients'] residence or businessaddress or telephone numbers within [*specify, e.g.,* any period of 10 or more consecutive days].

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral Overview

California Legal Forms--Transaction Guide

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28-86A California Legal Forms--Transaction Guide § 86A.245

§ 86A.245 Mediation Provision

[1] Comment--Use of Form

This form provides that the parties will make good faith efforts to resolve disputes by mediation before pursuing other forms of dispute resolution. This form is drafted for use in a contract style agreement but may be adapted for use in a letter style agreement.

Mediation offers attorneys and clients an opportunity to resolve disputes in a confidential setting [*see Bus. & Prof. Code § 6200(h)*]. The mediation process is based on direct negotiations between the attorney and his or her client, and is an extension of the negotiated settlement process. All discussions and offers of settlement are confidential and may not be disclosed in subsequent arbitration or other proceedings [*Bus. & Prof. Code § 6200(h)*].

Mediation is voluntary for both clients and attorneys [*Bus. & Prof. Code § 6200(c)*]. The parties should be cognizant of the fact that counsel probably will not be able to compel client mediation involuntarily if it would affect the client's rights to arbitrate a fee dispute [*see Bus. & Prof. Code § 6200 et seq.*].

For further discusssion of mediation and arbitration, see *§ 86A.19*.

[2] FORM

Mediation Provision

Mediation

_____. If a dispute arises out of any aspect of this Agreement between Client[s] and Attorney, or the breach of this Agreement, and if the dispute cannot be settled through negotiation, Attorney and Client[s] agree to discuss in good faith the use of mediation before resorting to arbitration, litigation, or other dispute resolution mechanism.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionMediationsLegal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsBilling & Collection

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28-86A California Legal Forms--Transaction Guide § 86A.246

§ 86A.246 Cover Letter for Legal Services Agreement

[1] Comment--Use of Form

This form is a cover letter drafted to acompany two copies of a legal services agreement. The letter requests that the client sign the agreement, return a copy to counsel, and retain a signed copy for the client's records.

The form includes an optional provision for use when counsel is sending additional materials to the client with the agreement. For example, counsel might wish to send an addendum to the agreement outlining the ethical obligations when representing multiple clients [*see § 86A.247*].

Counsel should include self-addressed, stamped envelope(s) for the client to use in returning a copy of the agreement, as well as any other materials needed to be acknowledged and returned to counsel.

[2] FORM

Cover Letter for Legal Services Agreement

[*Letterhead of attorney or law firm*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

Enclosed are two copies of the Legal Services Agreement, about which I spoke to you on _____[*date*]. One copy is for your records.

Please review this agreement carefully, as it sets out our fee agreement and mutual obligations. If the Agreement meets with your approval, signify your consent to its terms by signing at the designated space at the bottom of of the Agreement. to signify your consent to its terms.

[*Optional, add if additional enclosures are included:*]

_____[*Identify any other enclosures and signature requirements, e.g.,* The enclosed Addendum to the Agreement discusses representation of joint clients and confidentiality issues. Please review this addendum as well, and initial the consent clause in the appropriate space. Please return one copy to me in the enclosed, self-addressed envelope.]

[*Continue with the following:*]

Please do not hesitate to call me if you have questions.

Sincerely,
_____ [*signature of attorney*]
[*typed name*]
For _____ [*typed name of law firm*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsAttorney FeesGeneral OverviewLegal EthicsClient RelationsAttorney FeesFee Agreements

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28-86A California Legal Forms--Transaction Guide § 86A.247

§ 86A.247 Contract Addendum Explaining Joint Representation

[1] Comment

[a] Use of Form

This form is an addendum to a legal services agreement that may be used when counsel will be representing multiple clients. The form is intended primarily for use when the prospective clients are spouses, but may also be used in other situations involving joint representation.

This form is detailed and specific and is drafted in formal contract language. It can be converted to letter format if desired. For a letter form agreement dealing with the provision of estate planning services, see *§ 86A.211*. Attorneys who prefer a simpler, less formal disclosure letter, may wish to use the alternative conflict of interest disclosure *form in Ch. 60, Estate Planning, § 60.201*, in situations involving estate planning services. For a detailed conflict of interest disclosure letter for use in situations involving the formation of a business, see *Ch. 1A, Role of Counsel In Starting a New Business, § 1A.203*.

For discussion of an attorney's basic duties with respect to conflicts of interest and other issues that typically arise in the context of joint representation, see *§ 86A.12[3]*.

[b] Disclosures Regarding Communications and Confidential Information

The form explains that communications and information may be fully disclosed to the other client unless the client informs counsel that a a particular communication or item of information must be considered confidential from the other client. It also explains that this disclosure is an exception to the general rule that attorneys not disclose confidential communications or secrets of a client. By signing the addendum, each client expressly consents to this limited disclosure, except for communications or items of information that the client has indicated must remain confidential from the other client [*see* [2], P 2, *below*].

[c] Conflict of Interest Disclosures

The form informs the clients that the Rules of Professional Conduct of the State Bar of California require counsel to inform clients in writing of the relevant circumstances and of the actual and foreseeable adverse consequences to a client before an attorney may represent two or more clients interested in the same subject matter [*see* Cal. Rules Prof. Cond., Rule 3-310, discussed in *§ 86A.12[3]*]. When the clients' interests potentially conflict, counsel may not represent them without their informed written consent [*see* [2], P 3, *below*].

[d] Withdrawal of Counsel

The form explains that counsel may withdraw if one client object to the withholding of information as requested by the other client, or if there is an actual conflict between the interests of the Client, provided the withdrawal is permitted under the State Bar's Rules of Professional Conduct. By signing the addendum, each client expressly consents to the multiple representation despite the possibility of conflict [*see* [2], P 4, *below*].

[e] Representation of Adverse Interests

The form informs the clients that the Rules of Professional Conduct require that counsel inform a client in writing of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client, before beginning or continuing to represent the client, when the attorney has or had a relationship with another party interested in the subject matter of the attorney's proposed representation of the client. The form explains that counsel is unaware of any relationship with any other party interested in the subject matter of the services for the client under the agreement, or of any separate matter in which client has an interest adverse to that of any client of attorney other than that stated in the agreement. By signing the addendum, each client expressly consents to the multiple representation despite the possibility of conflict [*see* [2], P 5, *below*].

[2] FORM

Contract Addendum Explaining Joint Representation

ADDENDUM TO LEGAL SERVICES AGREEMENT:
Confidentiality, Conflicts of Interest, and Representation of Adverse Interests in Situations Involving Joint Representation of Multiple Clients

Additional Provisions

1. In addition to the terms and conditions stated in the agreement for legal services between Attorney and Clients being executed concurrently with this document, Clients understand and agree to the following additional terms and conditions arising from the fact that Attorney will be jointly representing both Clients with respect to the matters set forth in the agreement for legal services.

Communications and Confidentiality

2. Any communications and information may be fully disclosed by Attorney to either Client unless one Client informs Attorney of his or her desire that a particular communication or item of information be considered confidential and be withheld from the other Client. Clients have been informed and understand that California law requires that an attorney not disclose confidential communications or secrets of a client. Each Client hereby expressly consents to disclosure to the other Client except for communications or items of information about which he or she informs Attorney that confidentiality from the other Client must be maintained. If a Client informs Attorney that confidentiality must be maintained from the other Client with respect to a particular communication or item of information, Attorney will

advise the other Client that such a request has been made, without divulging its subject matter, and will inquire whether the other Client objects to Attorney withholding the communication or item of information from the other Client. Nothing in this provision is intended to authorize, under any circumstances, Attorney's disclosure of confidential communications or secrets of either Client to any individual or entity other than the other Client.

Conflicts of Interest

3. Clients have been informed and understand that the Rules of Professional Conduct of the State Bar of California require that before an attorney may represent two or more clients interested in the same subject matter, the attorney must inform each client in writing of the relevant circumstances and of the actual and foreseeable adverse consequences to the client. Clients are further informed that the Rules require that when the interests of the clients potentially conflict, the attorney may not represent them without their informed written consent. Attorney has explained to Clients the possibility of conflict that is raised by multiple representation with respect to the legal services that Attorney will be providing to Clients. Each Client hereby consents to the multiple representation despite the possibility of conflict.

Attorney Withdrawal

4. Attorney may withdraw from representing both Clients if one Client objects to Attorney withholding from him or her a communication or item of information as requested by the other Client, or if there is an actual conflict between the interests of the Clients, provided the withdrawal is permitted under the Rules of Professional Conduct of the State Bar of California.

Representation of Adverse Interests

5. Clients have been informed and understand that the Rules of Professional Conduct of the State Bar of California require that before an attorney may begin or continue to represent a client when the attorney has or had a professional relationship with another party interested in the subject matter of the attorney's proposed representation of the client, the attorney must inform the client in writing of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client. Client is further informed that the Rules require that, before an attorney may represent a party who, in a separate matter, has an interest adverse to that of the attorney's client in the separate matter, the attorney obtain the informed written consent of both parties. Attorney is not aware of any relationship with any other party interested in the subject matter of Attorney's services for client under this Agreement or of any separate matter in which Client has an interest adverse to that of any client of Attorney other than what is set forth in this Agreement.

Clients' Understanding and Agreement

6. Clients acknowledge that Attorney has discussed with each of them the issues that may arise when an attorney jointly represents more than one client, that each of them has carefully read this document, and that Attorney has answered all questions that Clients have asked regarding any aspects of this joint representation about which they may have been unsure. Clients represent that each of them understands the matters contained in this document and explained by Attorney regarding joint representatation, and that with full awareness of these matters, each Client is willing and agrees to be jointly represented by Attorney. Clients further acknowledge that Attorney has suggested to them that each of them may wish to consult independent counsel regarding the advisability of joint representation, and that they have either consulted such counsel or do not wish to do so.

Signature and Execution

Each Client, by signing below, acknowedges that Attorney has been employed as counsel to represent [*identify clients, e.g.,* husband and wife] jointly [*specify nature of representation*].

Date: _____

_____ [*signature of first client*]

Date: _____

_____ [*signature of second client*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral OverviewLegal EthicsClient RelationsConflicts of InterestLegal EthicsClient RelationsEffective Representation

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28-86A California Legal Forms--Transaction Guide § 86A.248

§ 86A.248 Letter Demanding Fees and/or Costs and Advising Client Regarding Availability of Arbitration and/or Mediation

[1] Comment

[a] Use of Form

This form is a demand letter for attorneys' fees, costs, or both. It advises the client of the availability of arbitration and/or voluntary mediation to settle a fee and/or cost dispute. It is designed to be used when the attorney and client disagree regarding the amount due to the attorney for his or her services. The letter in this form should be sent only after the attorney has made a reasonable attempt at resolving the fee dispute. It should be sent through certified or registered mail with a return receipt requested so that the date of receipt can be verified if the need arises.

This form should not be used when the client does not dispute that attorneys' fees and/or costs are due but lacks sufficient money to pay those amounts. In cases of this type, the attorney should evaluate the client's financial situation and consider discounting the amount owed, abandoning the claim, or taking a promissory note from the client.

For further discussion of mediation and arbitration, see *§ 86A.19*. For an analysis of the factors involved in determining whether attorneys' fees are reasonable and the principles followed in collection suits by attorneys against their clients, see the *discussion under § 86A.16*. For forms to be used in suits to collect legal fees and/or costs, see *California Forms of Pleading and Practice, Ch. 72, Attorney Practice and Ethics, § 72.430 et seq.* (Matthew Bender)**,** and California Points and Authorities, Ch. 25, *Attorney's Fees* (Matthew Bender).

[b] Arbitration of Fee and/or Cost Disputes

Before, or at the same time as, the attorney serves a client with a summons in an action for collection of fees and/or costs, or in any other proceeding against the client under a contract between the attorney and the client that provides for an alternative to arbitration for fees and/or costs, an attorney must give the client written notice of his or her right to arbitrate their dispute under *Bus. & Prof. Code §§ 6200-6206*. An attorney's failure to properly notify the client of the available arbitration program constitutes grounds for dismissal of any collection suit or other proceeding that the

attorney may begin against the client [*Bus. & Prof. Code § 6201(a)*]. However, this notice is not required before initiating mediation of the dispute [*Bus. & Prof. Code § 6201(a)*; *see § 86A.19[2]*].

A client who does not request arbitration within 30 days after receiving the notice waives the right to arbitrate [*Bus. & Prof. Code § 6201(a)*]. Further, a client's right to request or maintain arbitration is waived if the client commences an action or files any pleading seeking (1) judicial resolution of a fee dispute; or (2) affirmative relief against the attorney for damages or otherwise based on alleged malpractice or professional misconduct [*Bus. & Prof. Code § 6201(d)*]. However, even if a client waives the right to arbitration, the parties may stipulate to set aside the waiver and to proceed with arbitration [*Bus. & Prof. Code § 6201(e)*].

The State Bar is required to establish by rule an appropriate procedure to disqualify an arbitrator or mediator at the request of either party [*Bus. & Prof. Code § 6204.5(a)*; *see* Rules of Procedure for Fee Arbitrations and the Enforcement of Awards by the State Bar of California, Rule 23]. The State Bar, or a local bar association delegated to conduct the arbitration, must deliver a notice to the parties advising them of their rights to judicial relief after the arbitration proceeding [*Bus. & Prof. Code § 6204.5(b)*].

[c] Practical Considerations

An attorney who contemplates suing his or her client for fees and/or costs should consider the ethical and practical problems associated with that course of action [*see § 86A.12[2]*]. Further, if the attorney is handling other matters for the client, the attorney must weigh the extent of the fee and/or cost dispute, and balance it against the total value of the client's business. The attorney must also consider the likelihood that the client will cross-complain for legal malpractice. If the attorney decides to proceed with a collection suit, he or she should obtain separate counsel to prosecute that suit, and should also ensure that the client is advised to obtain independent counsel.

[2] FORM

Letter Demanding Fees and/or Costs and Advising Client Regarding Availability of Arbitration and/or Mediation

[*Letterhead of attorney or law firm*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*name of client*] :

This letter confirms that we have been unable to resolve our dispute regarding this office's claim against you for legal [fees *or* costs *or* fees and costs] arising from professional services rendered on your behalf in [*specify services, e.g.,* incorporating XYZ Company *or* the matter of Doe v. Doe, San Francisco County Superior Court Action No. 1111].

[*Use to invite participation in mediation when operative:*]

One process for resolving our dispute is to participate in mediation. This is a voluntary consensual process based on direct negotiations between us, and is an extension of the negotiated settlement process. All discussions and offers of settlement are confidential and may not be disclosed in any subsequent arbitration or other proceeding.

[*Use to inform client of right of arbitration:*]

Please be advised that you have the right to submit our dispute to arbitration under the provisions of *Business and Professions Code Sections 6200-6206*. You have 30 days from the date on which you receive this letter in which torequest arbitration. If you do not do so, you will be deemed to have waived the right to arbitrate our dispute under the program established by the Board of Governors of the State Bar of California. You will also waive this right if you commence a court action against me for resolution of this dispute, seek affirmative relief against me for damages or otherwise based on alleged malpractice or professional misconduct.

[*If local bar association has arbitration program:*]

You can obtain a form to request fee and/or cost arbitration from the local bar association at _____[*address*].

[*Or, if local bar association has no arbitration program:*]

You can obtain a form to request fee and/or cost arbitration from the State Bar of California at _____[*address*].

[*Continue with the following:*]

Sincerely,
_____ [*signature of attorney*]
[*typed name*]
For _____ [*typed name of law firm*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewCivil ProcedureAlternative Dispute ResolutionMediationsLegal EthicsClient RelationsAttorney FeesGeneral OverviewLegal EthicsClient RelationsAttorney FeesFee AgreementsLegal EthicsClient RelationsBilling & Collection

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28-86A California Legal Forms--Transaction Guide § 86A.249

§ 86A.249 Letter Declining Employment

[1] Comment--Use of Form

This form is a letter declining employment. It is designed to be used by an attorney who has been consulted by a prospective client but who has decided to decline employment. Immediately after deciding not to accept employment, an attorney should orally advise the rejected party of that decision. The attorney should then confirm the declination with the letter in this form.

If the rejected party provided the attorney with any documents relative to the proposed employment, counsel should return these documents when sending this letter. An attorney should send all declination letters by either registered or certified mail with a return receipt requested. If ever the need ever arises, counsel will be able to document that an attorney-client relationship never existed with the rejected party.

[2] FORM

Letter Declining Employment

[*Letterhead of attorney or law firm*]
_____[*date*]
_____[*name of client*]
_____[*street address*]
_____[*city, state, zip*]

Dear _____ [*addressee*] :

This will confirm our telephone conversation on _____[*date*], in which I advised you that _____[I *or* this office] decline to represent you in _____[*specify matter on which attorney was consulted, e.g.,* negotiating and drafting a commercial lease for your premises at 111 A Street *or* your

claim for damages arising from the automobile accident in which you were involved on January 1, 1997].

[*EITHER*]

You should feel free to consult other attorneys on this matter.

[*OR*]

You have until _____[*date*], in which to file a law suit on this matter. After that date, the statute of limitations applicable to your case will have expired and you will be barred from filing suit. Accordingly, if you decide to pursue this matter, you should consult another attorney as soon as possible.

[*Continue with the following:*]

[*Add if counsel received documentation from client:*]

Enclosed is the [*specify any document being returned, e.g.,* title report] that you left at this office on _____[*date*].

[*Continue with the following:*]

Thank you for consulting _____[me *or* this office]. I regret that [I *or* we] cannot be of service to you.

Sincerely,
_____ [*signature of attorney*]
[*typed name*]
For [*typed name of law firm*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Legal EthicsClient RelationsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 88 LICENSING OF CONTRACTORS

29-88 California Legal Forms--Transaction Guide 88.syn

§ 88.syn Synopsis to Chapter 88: LICENSING OF CONTRACTORS

§ 88.01 California Sources

[1] California Statutes

[2] California Regulations

§§ 88.02-88.04 [Reserved]

§ 88.05 Law Reviews

§ 88.06 Annotations

§ 88.07 Text References

[1] Matthew Bender Sources

§§ 88.08-88.09 [Reserved]

§ 88.10 Overview of Licensing Requirement

[1] Purpose and Administration

[2] Licenses and Ongoing Regulation

[3] Exempt Persons and Projects

§ 88.11 Definition of "Contractor"

§ 88.12 Classifications of Contractors

[1] Classification Process

[2] Categories for All Contractors

[3] Restrictions on General Building Contractors' Contracts and Work

[4] Subclassification of Specialty Contractors

[5] Additional Classifications

§ 88.13 License Application Process

[1] Written Application and Examination

[2] Qualifying Individual

[3] Financial Qualifications

[a] Minimum Operating Capital and Contractor's Bond

[b] Workers' Compensation Insurance

[4] Group Qualifications

[5] License for Joint Venture

[6] Probationary License

[7] Voiding of Application

§ 88.14 Workers' Compensation Insurance Requirement

§ 88.15 Local Permits, Inspections, and Licenses

§ 88.16 Renewal of Licenses

§ 88.17 Suspension or Revocation of License

§ 88.17A Prohibitions Related to Individual With Revoked License Who Performs Acts for Which License Is Required

[1] Acts Performed by Individual Whose License Has Been Revoked

[2] Acts by Licensee Employing Individual Whose License Has Been Revoked

§ 88.18 Failure to Obtain License

§ 88.19 Starting Contracting Business

§ 88.20 Home Improvement

[1] Contractors

[2] Salespersons

§§ 88.21-88.99 [Reserved]

§ 88.100 Facts

Scope

§ 88.101 Documents

Scope

§§ 88.102-88.109 [Reserved]

§ 88.110 Obtaining License

Scope

§§ 88.111-88.119 [Reserved]

§ 88.120 Preparing and Submitting Application for Original License

Scope

§ 88.121 Applying for Joint License

Scope

§ 88.122 Satisfying Examination Requirement

Scope

§ 88.123 Posting Adequate Security

Scope

§ 88.124 Satisfying Remaining Requirements

Scope

§§ 88.125-88.129 [Reserved]

§ 88.130 Renewing License

Scope

§ 88.131 Obtaining Changes in Licensee's Classification

Scope

§ 88.132 Handling Disassociation of Qualifying Individual

Scope

§ 88.133 Handling Death of Sole Proprietor, Death or Disassociation of Partner, or Dissolution of Corporation

Scope

§ 88.134 Handling Inactive Licenses

Scope

§ 88.135 Complying With Advertising Restrictions

Scope

§ 88.136 Complying With Miscellaneous Requirements

Scope

§§ 88.137-88.199 [Reserved]

§ 88.200 Application for Original Contractor's License

[1] Comment

[a] Use of Form

[b] Information to Be Furnished

[c] Insufficient Applications

[d] Waiver of Certain Disclosure Requirements

[e] Execution and Verification

[f] Denial of Application

[2] FORM

Application for Original Contractor's License

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 88 LICENSING OF CONTRACTORS

29-88 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the licensing of contractors pursuant to the Contractors' State License Law [*Bus. & Prof. Code § 7000 et seq.*] and its implementing regulations [*16 Cal. Code Reg. § 810 et seq.*]. These licensing requirements basically apply to any person who engages in construction work for more than $500 in compensation [*see Bus. & Prof. Code § 7048*], unless the person or proposed project is specifically exempted. The Legal Background presents an overview of the licensing requirements, and the Transaction Guide lists the exemptions and sets forth a step-by-step guide for complying with the requirements.

The Transaction Guide also deals with certain post-licensing provisions of the Contractors' State License Law, such as the requirements for renewing licenses, preparing acceptable advertisements, and replacing key personnel. It also contains a brief discussion of the procedures for reinstating licenses that were revoked or suspended in a disciplinary proceeding. For a thorough discussion of licensing-related litigation, see California Forms of Pleading and Practice, Ch. 104, *Building Contracts* (Matthew Bender).

For related discussions, see Ch. 89, *Home Improvement and Specialty Contracts* , Ch. 90A, *State Government Contracts* , Ch. 90B, *Federal Government Contracts* , and Ch. 30D, *Construction Contracts and Subcontracts* .

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CHAPTER 88 LICENSING OF CONTRACTORS
PART I. RESEARCH GUIDE
A. Primary Sources

29-88 California Legal Forms--Transaction Guide § 88.01

§ 88.01 California Sources

[1] California Statutes

Grounds for Denial of Licensure. *Bus. & Prof. Code § 480*.

Contractors' State License Law. *Bus. & Prof. Code § 7000 et seq.*
Investigation and enforcement of consumer complaints. *Bus. & Prof. Code §§ 7019, 7020*.
Basic definition of contractor. *Bus. & Prof. Code § 7026*.
License Requirement. *Bus. & Prof. Code §§ 7028, 7065-7077*.
Exemptions. *Bus. & Prof. Code §§ 7040-7054.5*.
Work requiring contractor's license that may be performed by gas, heat, or electrical public utilities. *Bus. & Prof. Code § 7042.1(a)*.
Classifications. *Bus. & Prof. Code §§ 7055-7059.1*.
Asbestos certification examination required for contractors doing asbestos-related work. *Bus. & Prof. Code § 7058.5*.
Hazardous substance removal certification examination. *Bus. & Prof. Code § 7058.7*.
Suspension or revocation of license for failure to maintain sufficient bond. *Bus. & Prof. Code § 7071.15*.
Arbitration of complaints. *Bus. & Prof. Code §§ 7085-7085.9*.
Disciplinary Proceedings. *Bus. & Prof. Code §§ 7090-7124.6*.
Grounds for denial of application for license. *Bus. & Prof. Code § 7090*.
Suspension for failure to pay civil penalty or to comply with correction order or order to pay specified sum to injured party in lieu of correction. *Bus. & Prof. Code § 7090.1*.
Licensee's failure to respond to request for cooperation in investigation of licensee as cause for discipline. *Bus. & Prof. Code § 7111.1*.
Workers' compensation insurance requirements. *Bus. & Prof. Code §§ 7125-7125.2*.
Renewal of Licenses. *Bus. & Prof. Code §§ 7140-7145.5*.
Home Improvement Business. *Bus. & Prof. Code §§ 7150-7168*.
Asbestos consultants and site surveillance technicians. *Bus. & Prof. Code §§ 7180-7189.7*.

Deposits in Lieu of Contractors' Bonds. *Code Civ. Proc. §§ 995.710-995.770.*

[2] California Regulations

Contractors' State License Board. *16 Cal. Code Reg. §§ 810-890.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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[Reserved]

§§ 88.02[Reserved]

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B. Secondary Sources

29-88 California Legal Forms--Transaction Guide § 88.05

§ 88.05 Law Reviews

Imel, *Substantial Compliance with the Contractors' State License Law: An Equitable Doctrine Producing Inequitable Results, 34 Loy. L.A. L. Rev. 1539 (2001).*

Allenby, *Home Depot U.S.A., Inc. v. Contractors' State License Board: A Lesson in Grammar for California Contractors, 19 T. Jefferson L. Rev. 295 (1997).*

Legal Topics:

For related research and practice materials, see the following legal topics:
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29-88 California Legal Forms--Transaction Guide § 88.06

§ 88.06 Annotations

Annot., *Modern status of rules regarding tort liability of building or construction contractor for injury or damage to third persons occurring after completion and acceptance of work*, 75 A.L.R.5th 513 (2000) .

Annot., *Application of state and local construction and building regulations to contractors engaged in construction projects for the federal government, 131 A.L.R. Fed. 583 (1996)* .

Annot., *Failure of building and construction artisan or contractor to procure business or occupational license as affecting enforceability of contract or right of recovery for work done--modern cases*, 44 A.L.R.4th 271 (1986) .

Annot., *Validity of municipality's ban on construction until public facilities comply with specific standards*, 92 A.L.R.3d 1073 (1979) .

Annot., *Construction work by foreign corporation as doing business for purposes of statute requiring foreign corporations to qualify as condition of access to local courts*, 90 A.L.R.3d 937 (1979) .

Annot., *Recovery back of money paid to unlicensed person required by law to have occupational or business license permit to make contract*, 74 A.L.R.3d 637 (1976) .

Annot., *Failure of artisan or construction contractor to comply with statute or regulation requiring a work permit or submission of plans as affecting his right to recover compensation from contractee*, 26 A.L.R.3d 1395 (1969) .

Annot., *Construction of attorney's fees provision in contractor's bond*, 8 A.L.R.3d 1438 (1966) .

Legal Topics:

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29-88 California Legal Forms--Transaction Guide § 88.07

§ 88.07 Text References

[1] Matthew Bender Sources

California Legal Forms (Matthew Bender).
Ch. 30A, *Construction Financing*.
Ch. 30C, *Agreements with Architects, Engineers, and Other Design Professionals*.
Ch. 30D, *Construction Contracts and Subcontracts*.
Ch. 31, *Mechanics' Liens*.
Ch. 89, *Home Improvement and Specialty Contracts*.

California Real Estate Law and Practice (Matthew Bender).
Ch. 430, *Licensing of Contractors*.

California Forms of Pleading and Practice (Matthew Bender).
Ch. 104, *Building Contracts*.

California Points and Authorities (Matthew Bender).
Ch. 152, *Mechanics' Liens*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§§ 88.08[Reserved]

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§ 88.10 Overview of Licensing Requirement

[1] Purpose and Administration

The Contractors' State License Law [*Bus. & Prof. Code § 7000 et seq.*] is designed to protect the public against the consequences of incompetent workmanship, imposition, and deception [Asdourian v. Araj (1985) 38 Cal. 3d 276, 282, 211 Cal. Rptr. 703, 696 P.2d 95] . It is intended to insure the safety and protection of the public by preventing the inexperienced from acting as contractors [Gatti v. Highland Park Builders, Inc. (1946) 27 Cal. 2d 687, 690, 166 P.2d 265 ; *see Bus. & Prof. Code § 7068(a)* (Contractors' State License Board may require applicant to show such knowledge and experience as Board deems necessary for safety and protection of public)]. The law is administered by the Contractors' State License Board [*Bus. & Prof. Code § 7010*; *see Bus. & Prof. Code §§ 7000.5-7021*]. The Board's highest priority is protecting the public. Whenever that priority is inconsistent with other interests sought to be promoted, protecting the public is paramount [*Bus. & Prof. Code § 7000.6*]. Many of the administrative duties of the Board are carried out by the Registrar of Contractors (referred to in this chapter as the "Registrar"), who is the executive officer and secretary of the Board [*Bus. & Prof. Code § 7011* (to remain in effect until January 1, 2011, and repealed as of that date, unless later enacted statute that is enacted before January 1, 2011, deletes or extends that date)].

[2] Licenses and Ongoing Regulation

All potential contractors, including individuals, partnerships, and corporations, must be licensed unless a specific exemption is available. It is a misdemeanor for any nonexempt person or entity to engage in the business or act in the capacity of a contractor in California without having a contractor's license [*Bus. & Prof. Code §§ 7028(a), 7065*; *see Bus. & Prof. Code § 7025*].

The Contractors' State License Law also governs licensed contractors. Any licensee violating the ongoing standards of conduct prescribed by the law will be subject to disciplinary action [*see Bus. & Prof. Code §§ 7090-7124.6* (disciplinary proceedings)].

[3] Exempt Persons and Projects

Numerous persons, projects, and businesses are exempt from the requirements of the Contractors' State License Law [

see Bus. & Prof. Code §§ 7040-7054.5]. One of the most important exemptions applies to improvements made by the owner of the affected property, if the work is not done for purposes of sale and certain other requirements are met [*see Bus. & Prof. Code § 7044(a)(1)*]. Another significant exemption applies to improvements made by a homeowner on his or her own principal residence [*see Bus. & Prof. Code § 7044(a)(3)*]. For a complete list of these exemptions, see *§ 88.110*.

Legal Topics:

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§ 88.11 Definition of "Contractor"

For purposes of the Contractors' State License Law, the terms "contractor" and "builder" are synonymous. "Contractor" means any person (defined as an individual or certain entities) [*see Bus. & Prof. Code § 7025*] who undertakes to construct, alter, repair, add to, subtract from, improve, move, wreck, or demolish any building, highway, road, parking facility, railroad, excavation, or other structure, project, development, or improvement. Certain work performed in connection with these tasks, such as cleaning or erecting scaffolding or preparing and removing roadway construction zones, lane closures, flagging, or traffic diversions, or installing, repairing, maintaining, or calibrating monitoring equipment for underground storage tanks, is also the work of a contractor. Note that there is no requirement that the above work involve the addition of any material or article of merchandise [*Bus. & Prof. Code § 7026*].

"Contractor" specifically includes subcontractors and specialty contractors [*Bus. & Prof. Code § 7026*]. In addition, the term includes persons who engage in the following activities:

- Servicing air conditioning, heating, or refrigeration equipment that is a fixed part of the structure to which it is attached [*Bus. & Prof. Code § 7026.1(a)*; *but see Bus. & Prof. Code § 7053* ("contractor" does not include employee who does not customarily engage in independently established business, and who does not have control over work)];

- Undertaking, offering to undertake, purporting to have the capacity to undertake, or submitting a bid to construct buildings or home improvement projects [*Bus. & Prof. Code § 7026.1(b)*];

- A temporary-labor service agency that, as the employer, provides employees to perform work for which a license is required [*Bus. & Prof. Code § 7026.1(c)*];

- Trimming or removing trees (except incidental pruning by a nursery person or gardener) [*Bus. & Prof. Code § 7026.1(d)*];

- Drilling water wells [*Bus. & Prof. Code § 7026.1(e)*];

- Installing carpet (not including the sale of installed carpet by the holder of a retail furniture dealer's license if the carpet is installed by a licensed contractor and that fact is properly certified by the seller) [*Bus. & Prof. Code § 7026.3*; *see Bus. & Prof. Code § 19051* (retail furniture dealer's license)];

- Working on mobilehomes or mobilehome accessory buildings and structures for the purpose of occupancy as a dwelling [*Bus. & Prof. Code § 7026.2(a)*; *see Bus. & Prof. Code §§ 7045*, *7046*]; and

- Installing home improvement goods [*Bus. & Prof. Code § 7045*; *see Bus. & Prof. Code § 7151* ("home improvement goods" defined)].

The term "contractor" does not include persons who perform construction management services [*The Fifth Day LLC v. Bolotin, (2009) 172 Cal. App. 4th 939, 950, 91 Cal. Rptr. 3d 633]* .

Any person who indicates to the public that he or she is a contractor is subject to the Contractors' State License Law, whether or not his or her operations are specifically exempted from its requirements [*Bus. & Prof. Code § 7027*].

Some persons and entities falling within the above definition are specifically exempted from the requirements of the Contractors State License Law [*see § 88.110*].

For the definition of "home improvement contractor," see *§ 88.20[1]*.

Legal Topics:

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§ 88.12 Classifications of Contractors

[1] Classification Process

Because the definition of "contractor" is extremely broad and the varied activities of contractors require different experience, skills, and qualifications, licensees are classified according to their talents [*see 16 Cal. Code Reg. §§ 830, 834*]. Consequently, each applicant for an original license must give on the application form [*see § 88.200[2]*] a statement of the classification applied for. After passing an examination that is tailored to the specified classification [*see § 88.13[1]*], the licensee will be classified by the Registrar [*16 Cal. Code Reg. §§ 830(a), 832*]. Licensees are generally prohibited from contracting outside of the classification in which they are licensed [*16 Cal. Code Reg. § 830*; *see* [5], *below*, for an exception to this prohibition].

[2] Categories for All Contractors

Every licensed contractor is classified into one or more of the following categories (also referred to as "branches") by the Registrar [*Bus. & Prof. Code § 7055*; *16 Cal. Code Reg. § 830(a)*]:

- General engineering contractor;
- General building contractor; and
- Specialty contractor.

A general engineering contractor deals primarily with fixed works requiring specialized engineering knowledge and skill, such as irrigation projects, highways, and excavations [*Bus. & Prof. Code § 7056*]. A general building contractor's principal contracting business involves structures used for persons, animals, chattels, or any kind of movable property, requiring in their construction the use of at least two unrelated building trades or crafts [*Bus. & Prof. Code § 7057(a)*]. The Transaction Guide contains the nonexclusive statutory list of projects falling within those two classifications [*see § 88.110*, P 3]. Finally, specialty contractors perform specialized tasks that are subclassified into specific categories for licensing purposes [*see* [4], *below*].

[3] Restrictions on General Building Contractors' Contracts and Work

A general building contractor may take a prime contract or a subcontract for a framing or carpentry project. However, to protect the public against contractors who have not demonstrated competence in specified specialty aspects of work for which a specialty license is required [*see* 1996 Stats., ch. 812, § 9(b)], a general building contractor may not take a prime contract for any project involving trades other than framing or carpentry unless one of the following occur [*Bus. & Prof. Code § 7057(b)*]:

- The prime contract requires at least two unrelated building trades or crafts other than framing or carpentry;
- The general contractor holds the appropriate license classification; or
- The general contractor subcontracts with an appropriately licensed contractor to perform the work.

The same conditions apply to a general building contractor who seeks a subcontract involving trades other than framing or carpentry, i.e., either the subcontract must require at least two unrelated trades or crafts other than framing or carpentry, or the general contractor must hold the required license classification [*Bus. & Prof. Code § 7057(b)*].

In either situation, the general contractor may not count framing or carpentry in calculating the two unrelated trades necessary for the contractor to be able to take the prime contract or subcontract [*Bus. & Prof. Code § 7057(b)*].

A general building contractor is specifically prohibited from performing fire protection or well drilling contracting work unless he or she holds the license classification or subcontracts with an appropriately licensed contractor [*Bus. & Prof. Code § 7057(c)*].

The 1997 legislation that specifically limited the ability of general building contractors to perform work for which a specialty license is required was a response to two decisions in which the courts voided a long-standing Board regulation that generally prohibited a general building contractor from contracting for a job requiring fewer than three unrelated building trades. The courts ruled that the "three-trade" regulation was inconsistent with the definition of a general building contractor. The courts also ruled that the regulation was invalid on the technical issue that it went beyond the Board's rule-making authority [*see Hazard, Jr. Enterprises, Inc. v. Insurance Co. of the West (1997) 52 Cal. App. 4th 1088, 60 Cal. Rptr. 2d 921* ; *Home Depot U.S.A., Inc. v. Contractors' State License Bd. (1996) 41 Cal. App. 4th 1592, 1600-1603, 49 Cal. Rptr. 2d 302]* . The courts' invalidation of the regulation technically opened the door for general building contractors, who generally are experienced only in carpentry and framing, to undertake any of the specialties [*see* [4], *below*] that they may not necessarily be qualified to do. In enacting the 1997 legislation, the Legislature expressed its intent to modify the *Home Depot* and *Hazard Enterprises* holdings to the extent that they could be construed to support the proposition that any entity possessing a general building contractor's license may perform any work that otherwise requires a specialty license [*see* 1997 Stats., ch. 812, § 9(a)].

[4] Subclassification of Specialty Contractors

Specialty contractors perform construction work that requires special skill and involves the use of specialized building trades or crafts [*Bus. & Prof. Code § 7058(a)*]. Specialty contractors include contractors (1) who service or test fire extinguishing systems [*Bus. & Prof. Code § 7058(b)*]; (2) who install and lay carpets, linoleum, and resilient floor covering [*Bus. & Prof. Code § 7058(c)*]; and (3) whose operations are concerned with preparing or removing roadway construction zones, lane closures, flagging, or traffic diversions on roadways [*Bus. & Prof. Code § 7058(d)*]. Because of the skills required for specialty contracting, specialty contractors must qualify for licensing in one or more of the following subclassifications that are, as their names imply, based on specialized skills:

- Boiler, hot-water heating, and steam-fitting [*see 16 Cal. Code Reg. § 832.04*].
- Building moving and demolition [*see 16 Cal. Code Reg. § 832.21*].
- Cabinet, millwork, and finish carpentry [*see 16 Cal. Code Reg. § 832.06*].
- Communications and low-voltage systems [*see 16 Cal. Code Reg. § 832.07*].
- Concrete [*see 16 Cal. Code Reg. § 832.08*].
- Drywall [*see 16 Cal. Code Reg. § 832.09*].
- Earthwork and paving [*see 16 Cal. Code Reg. § 832.12*].
- Electrical (general) [*see 16 Cal. Code Reg. § 832.10*].
- Electrical sign [*see 16 Cal. Code Reg. § 832.45*].
- Elevator [*see 16 Cal. Code Reg. § 832.11*].
- Fencing [*see 16 Cal. Code Reg. § 832.13*].
- Fire protection [*see 16 Cal. Code Reg. § 832.16*].
- Flooring and floor covering [*see 16 Cal. Code Reg. § 832.15*].
- General manufactured housing [*see 16 Cal. Code Reg. § 832.47*].
- Glazing [*see 16 Cal. Code Reg. § 832.17*].
- Insulation and acoustical [*see 16 Cal. Code Reg. § 832.02*].
- Landscaping [*see 16 Cal. Code Reg. § 832.27*].
- Lathing and plastering [*see 16 Cal. Code Reg. § 832.35*].
- Limited specialty [*see 16 Cal. Code Reg. § 832.61*].
- Masonry [*see 16 Cal. Code Reg. § 832.29*].
- Ornamental metal [*see 16 Cal. Code Reg. § 832.23*].
- Painting and decorating [*see 16 Cal. Code Reg. § 832.33*].
- Parking and highway improvement [*see 16 Cal. Code Reg. § 832.32*].
- Pipeline [*see 16 Cal. Code Reg. § 832.34*].
- Plumbing [*see 16 Cal. Code Reg. § 832.36*].

- Refrigeration [*see 16 Cal. Code Reg. § 832.38*].
- Roofing [*see 16 Cal. Code Reg. § 832.39*].
- Sanitation system [*see 16 Cal. Code Reg. § 832.42*].
- Sheet metal [*see 16 Cal. Code Reg. § 832.43*].
- Solar [*see 16 Cal. Code Reg. §§ 832.46, 832.62*].
- Steel reinforcing [*see 16 Cal. Code Reg. § 832.50*].
- Steel, structural [*see 16 Cal. Code Reg. § 832.51*].
- Swimming pool [*see 16 Cal. Code Reg. § 832.53*].
- Tile (ceramic and mosaic) [*see 16 Cal. Code Reg. § 832.54*].
- Warm-air heating, ventilating, and air-conditioning [*see 16 Cal. Code Reg. § 832.20*].
- Water conditioning [*see 16 Cal. Code Reg. § 832.55*].
- Welding [*see 16 Cal. Code Reg. § 832.60*].
- Well drilling [*see 16 Cal. Code Reg. § 832.57*].

Under certain circumstances, specialty contractors may perform work in trades for which they are not licensed [*see* [5], *below*].

[5] Additional Classifications

A contractor may be licensed in more than one classification by meeting the qualifications required for the additional classification or classifications [*Bus. & Prof. Code § 7059(a)*].

A specialty contractor may take and execute a contract involving the use of two or more crafts or trades if any work performed in crafts or trades for which the contractor is not licensed is incidental and supplemental to work for which the specialty contractor is licensed [*Bus. & Prof. Code § 7059(a)*; *16 Cal. Code Reg. § 834(c)*]. Work in another classification is "incidental and supplemental" to the work for which a specialty contractor is licensed, if that work is essential to accomplish the work for which the contractor is licensed. A specialty contractor may use subcontractors or his or her own employees to complete the incidental and supplemental work [*16 Cal. Code Reg. § 831*].

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§ 88.13 License Application Process

[1] Written Application and Examination

Applicants for contractors' licenses must complete a written application form [*see § 88.200[2]*] and demonstrate sufficient knowledge and experience in the classification applied for and sufficient knowledge of the laws and administrative principles applicable to the contracting business [*Bus. & Prof. Code § 7068(a)*]. Ordinarily, this knowledge and experience must be demonstrated by passing a written examination and by submitting proof of experience in the appropriate contracting classification. However, no examination is required of a qualifying individual [*see* [2], *below*] if within the five years preceding the application, the qualifying individual has either personally passed the written test for the same classification or served as the qualifying individual for a licensee in good standing in the same qualification [*Bus. & Prof. Code § 7065*]. The examination requirement may be waived for an applicant whose experience satisfies statutory standards [*Bus. & Prof. Code § 7065.1*; *see § 88.122*], or for one who has previously held a valid California contractor's license and has been acting as a contractor for the federal government in a position exempt from state licensing [*Bus. & Prof. Code § 7065.2*].

The Registrar is required to review experience gained by applicants from other states to determine if all of that experience was gained in a lawful manner in those states [*Bus. & Prof. Code § 7068(h)*].

[2] Qualifying Individual

Individual applicants (that is, applicants for sole proprietorship contractors' licenses) may choose to satisfy the application requirements personally. Applicants that are entities must, and individual applicants may, have a "qualifying individual" take the written examination and satisfy the experience requirement on the applicant's behalf. There is no requirement that any other employee of the applicant meet these criteria or possess a contractor's license. A qualifying individual must be a member of the applicant entity, such as a partner, or a "responsible managing employee" (RME) [*Bus. & Prof. Code § 7068(b)*]. An RME must be a "bona fide employee" of the applicant actively engaged in the classification for which he or she is the qualifying individual [*Bus. & Prof. Code § 7068(c)*; *see Handyman Connection of Sacramento, Inc. v. Sands (2004) 123 Cal. App. 4th 867, 889-890, 20 Cal. Rptr. 3d 727* (salesperson licensed only in specialty classification unrelated to home improvement goods and services that he sold was not exempt from registration requirement as qualifying individual)]. A "bona fide employee" is an employee permanently employed by

the applicant and actively engaged in the operation of the applicant's contracting business for at least 32 hours per week or 80 percent of the total hours per week the business is in operation, whichever is less [*16 Cal. Code Reg. § 823(a)*]. Furthermore, the RME must be qualified for the same license classification as the classification being applied for, and must possess sufficient experience [*Bus. & Prof. Code § 7068(a), (b)*].

Once a license has been issued, the qualifying individual need not directly and continuously supervise every construction project, but must see to it that the construction operations of the licensee comply with all applicable laws. Furthermore, the individual may not serve as the qualifying individual for any other licensee unless the licensees are related in one of the three ways specified by statute [*see* discussion of *Bus. & Prof. Code § 7068.1* in *§ 88.120*]. Moreover, a qualifying individual may act as the qualifier for no more than three firms in any one-year period [*Bus. & Prof. Code § 7068.1(d)*].

[3] Financial Qualifications

[a] Minimum Operating Capital and Contractor's Bond

An applicant for any contractor's license, except a joint venture license [*see Bus. & Prof. Code § 7029*], must have operating capital exceeding $2,500 [*Bus. & Prof. Code § 7067.5*]. Furthermore, as a condition precedent to the issuance of a license, the applicant must file a contractor's bond in the amount set by statute and, if applicable, a judgment bond to cover any unsatisfied final judgment [*Bus. & Prof. Code §§ 7071.6(a), 7071.17(a)*; *see Bus. & Prof. Code § 7071.12* (acceptable cash deposits)]. Certain qualifying individuals must also file a separate bond [*Bus. & Prof. Code § 7071.9(a)*; *see Bus. & Prof. Code § 7071.10* (form of bond)]. Finally, if the applicant or certain key employees or members of the applicant have had a contractor's license suspended or revoked, an additional bond will be required in a sum to be fixed by the Registrar and based on the seriousness of the violation [*Bus. & Prof. Code § 7071.8*; *see § 88.17* (suspension or revocation of licenses)]. Before 1999, a deposit of money or other securities could be given to the Secretary of State instead of a bond as provided in *Code Civ. Proc. § 995.710 et seq.* [*Bus. & Prof. Code § 7071.12*]. Any contractor who made a deposit in lieu of posting a bond before 1999 may continue to use the deposit in lieu of a bond; however, the deposit cannot be renewed [*Code Civ. Proc. § 995.710(e)*]. If the licensee fails to maintain a sufficient bond, the license is subject to suspension or revocation [*Bus. & Prof. Code § 7071.15*].

[b] Workers' Compensation Insurance

All applicants or licensees seeking issuance, reinstatement, reactivation, renewal, or continued maintenance of a license must file or have on file a Certificate of Workers' Compensation Insurance issued by one or more insurers licensed to write that insurance, or must secure a certificate of consent to self-insurance [*see Lab. Code § 3700*] from the Director of Industrial Relations [*Bus. & Prof. Code § 7125*; *see also § 88.14*]. Failing to provide for workers' compensation insurance is cause for citation or suspension of a contractor's license [*see Bus. & Prof. Code § 7109.2*].

[4] Group Qualifications

In addition to the criteria that must be satisfied solely by the applicant or its qualifying individual, a few requirements apply to both the applicant and several key members of its personnel, including its qualifying individual. Specifically, they must not have committed acts or crimes that are grounds for denial of licensure [*Bus. & Prof. Code § 7069(a)*; *see Bus. & Prof. Code § 480*]. They also must never have been refused a license or had a license revoked for reasons that would preclude the granting of the license applied for [*Bus. & Prof. Code § 7070*].

[5] License for Joint Venture

A joint venture license is a license issued to any combination of individuals, corporations, partnerships, or other joint ventures, each of which holds a current, active license in good standing. A joint venture license may be issued in any classification in which at least one of the entities is licensed. An active joint venture license will be automatically

suspended by operation of law during any period in which any member of the venture does not hold a current, active license in good standing [*Bus. & Prof. Code § 7029*].

Licensees must secure a joint venture license before being awarded a joint contract or otherwise acting as joint contractors, even when each of them is licensed to act separately as a contractor in California. Failure to do so is grounds for disciplinary action. If a combination of licensees bids to perform work that requires a joint venture license, the failure to get that license will not prevent the imposition of any penalty set by law for the failure of a bidding contractor to enter into a contract pursuant to the bid [*Bus. & Prof. Code § 7029.1*].

For coverage of joint ventures generally, see Ch. 29A, *Joint Ventures* .

[6] Probationary License

Every original contractor's license, except an additional classification [*see Bus. & Prof. Code § 7059*; *see also § 88.12[5]*], will be a probationary license until the license is renewed. During the probationary period, if information regarding any act or omission of the licensee constituting grounds for denial, revocation, or suspension of an application or license is brought to the attention of the Registrar, the Registrar must conduct a hearing to determine whether the probationary license should be revoked [*Bus. & Prof. Code §§ 7073(e), 7077*; *see Gov. Code §§ 11500-11529*].

[7] Voiding of Application

An application for an original license, for an additional classification [*see § 88.12[5]*], or for a change of qualifier [*see* [2], *above*] becomes void when [*Bus. & Prof. Code § 7074(a)(1)-(8)*]:

- The applicant or examinee for the applicant has failed to appear for the scheduled qualifying examination [*see* [1], *above*] and fails to request and pay the fee for rescheduling within 90 days of notification of failure to appear, or, after being rescheduled, has failed to appear for a second examination.

- The applicant or examinee for the applicant has failed to achieve a passing grade in the scheduled qualifying examination, and fails to request and pay the fee for rescheduling within 90 days of notification of failure to pass the examination.

- The applicant or the examinee for the applicant has failed to achieve a passing grade in the qualifying examination within 18 months after the application has been deemed acceptable by the Board.

- The applicant for an original license, after having been notified to do so, fails to pay the initial license fee within 90 days from the date of the notice.

- The applicant, after having been notified to do so, fails to file within 90 days from the date of the notice any bond or cash deposit or other documents that may be required for issuance or granting pursuant to Contractors' State License Law.

- After filing, the applicant withdraws the application.

- The applicant fails to return the application rejected by the Board for insufficiency or incompleteness within 90 days from the date of original notice or rejection.

- The application is denied after disciplinary proceedings conducted in accordance with the provisions of the Business & Professions Code.

The void date on an application may be extended up to 90 days or one examination may be rescheduled without a fee on documented evidence by the applicant that the failure to complete the application process or to appear for an examination was due to a medical emergency or other circumstance beyond the applicant's control [*Bus. & Prof. Code § 7074(b)*].

An application voided in accordance with *Bus. & Prof. Code § 7074* remains in the Registrar's possession for the period as the Registrar deems necessary and will not be returned to the applicant. Any reapplication for a license must be accompanied by the fee fixed by this chapter [*Bus. & Prof. Code § 7074(c)*; *see Bus. & Prof. Code §§ 7137-7138.1* (fees)].

Legal Topics:

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§ 88.14 Workers' Compensation Insurance Requirement

An applicant or licensee must at all times have on file with the Contractors' State License Board a current and valid Certificate of Workers' Compensation Insurance or Certification of Self-Insurance as a condition precedent to the issuance, reinstatement, reactivation, renewal, or continued maintenance of a license [*Bus. & Prof. Code § 7125(a)*]. This requirement does not apply to an applicant or licensee who has no employees, provided that he or she files a statement to that effect with the Registrar on a prescribed form. Filing a false statement is cause for disciplinary action [*Bus. & Prof. Code § 7125(b)*; *see Bus. & Prof. Code § 7125.4*]. It also does not apply to the holder of an inactive license [*Bus. & Prof. Code § 7125(c)*]. If a contractor's policy is subsequently canceled for any reason, the insurer, including the State Compensation Insurance Fund, must report to the Registrar specified information about the policy, including the dates that coverage is scheduled to commence and lapse and any applicable cancellation date [*Bus. & Prof. Code § 7125(d)*]. Once a contractor is licensed, the license is subject to automatic suspension by operation of law if the licensee is required to maintain workers' compensation insurance and fails to do so [*Bus. & Prof. Code § 7125.2(a)*].

Until January 1, 2011, a roofing contractor holding an active C-39 license may be exempt from the workers' compensation certificate requirement for up to one year after which he or she will be placed on inactive status [*see* Bus. & Prof. Code § 7125(e), (f)].

For further coverage of employers' workers' compensation insurance requirements, see *Hanna, California Law of Employee Injuries and Workers' Compensation, §§ 2.10-2.17* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 88.15 Local Permits, Inspections, and Licenses

A city or county may not regulate the licensing of contractors. However, a city or county may regulate the quality and character of installations made by contractors through permits and inspections that are designed to implement applicable state and local building laws, and may enforce other local laws necessary for the protection of the public health and safety. Furthermore, a city or county may insist on approving any plans and specifications for an installation before the commencement of construction [*Bus. & Prof. Code § 7032*]. An applicant for a local construction permit, or for a local business license that is required for a regulated contracting activity, must file a signed statement with the local government stating that the applicant is licensed under the Contractors' State License Law or indicating that the applicant is exempt from that law [*Bus. & Prof. Code §§ 7031.5, 7033*]. Most local permit/license applications contain such a statement.

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§ 88.16 Renewal of Licenses

A contractor's license expires two years from the last day of the month in which the license was issued, or two years from the date on which the renewed license last expired [*16 Cal. Code Reg. § 852*]. The Registrar will mail a renewal form with instructions to each licensee before the license expires [*16 Cal. Code Reg. § 853(a)*]. If the application and the appropriate renewal fee [*see Bus. & Prof. Code § 7137(e)*] are not submitted before the expiration date [*see Bus. & Prof. Code § 7140*; *16 Cal. Code Reg. § 853(b)* (renewal application not postmarked by expiration date is delinquent)], the license may still be renewed at any time within five years of its expiration, but the applicant must pay a delinquency fee [*Bus. & Prof. Code §§ 7137(f), 7141*; *16 Cal. Code Reg. § 853(d)*]. If a license is not renewed within three years, the licensee must again apply for an original license [*Bus. & Prof. Code § 7141*; *see § 88.13* (license application process)].

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§ 88.17 Suspension or Revocation of License

The Registrar may deny the licensure or the renewal of licensure of, or cite, suspend, or revoke a contractor's license if the holder is guilty of or commits certain acts or omissions that constitute causes for disciplinary action under the Contractors' State License Law [*Bus. & Prof. Code § 7090*], such as abandoning a project [*see Bus. & Prof. Code § 7107*]. Within five days of a license suspension, revocation, or denial of renewal, the contractor must surrender to the Board the plasticized identification card that evidences the contractor's license status [*Bus. & Prof. Code § 7072.5(a)*]. In addition, when a person to whom an identification card has been issued leaves the employ of a licensed contractor, the former employee must surrender the card to the licensee who must then mail or deliver it to the Board for cancellation [*Bus. & Prof. Code § 7072.5(b)*].

A suspended license may be reinstated by the Registrar once the contractor has complied with the reinstatement provisions specified in the suspension decision or, in the absence of a decision or reinstatement provisions, in the sound discretion of the Registrar [*Bus. & Prof. Code § 7102*]. After revocation, a license may not be reinstated or reissued, nor may a license be issued to implicated personnel of the former licensee, for a minimum of one year up to a maximum of five years. In considering whether to extend the minimum period, the Registrar will consider (1) the gravity of the violation, (2) the history of previous violations, and (3) any criminal convictions. Even at the end of this period, a license may be issued, reissued, or reinstated only if a proper showing is made that all loss caused by the act or omission prompting the revocation has been fully satisfied and that all conditions imposed by the decision of revocation have been complied with. However, when the loss has been reduced to a monetary obligation or debt, the obligation or debt need not be satisfied if it has been adjudicated in a bankruptcy proceeding. Any nonmonetary condition not adjudicated in a bankruptcy proceeding must be complied with before the issuance, reissuance, or reinstatement of a license [*Bus. & Prof. Code § 7102*].

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29-88 California Legal Forms--Transaction Guide § 88.17A

§ 88.17A Prohibitions Related to Individual With Revoked License Who Performs Acts for Which License Is Required

[1] Acts Performed by Individual Whose License Has Been Revoked

An individual is prohibited from performing any act regulated under the Contractors' License Law for or on behalf of a licensee, other than as a bona fide nonsupervising employee, when that individual [Bus. & Prof. Code § 7121.6(a)]:

- Was a member, officer, director, owner, or partner of a license that was revoked;
- Had knowledge of or participated in any act or omission for which the license was revoked; and
- Is not eligible for license reinstatement.

An individual also is prohibited from performing any act regulated under the License Law for or on behalf of a licensee, other than as a bona fide nonsupervising employee, when that individual [Bus. & Prof. Code § 7121.6(b)]:

- Furnished the qualifications for licensure and that license was revoked [*see* Bus. & Prof. Code § 7068];
- Served in the capacity of the qualifying individual during the commission or omission of any of the acts that resulted in the license revocation, whether or not the individual had knowledge of or participated in those acts; and
- Is not eligible for license reinstatement.

A "bona fide nonsupervising employee" is a person who is exempt from the license requirement because he or she (1) receives wages as his or her sole compensation, (2) does not customarily engage in an independently established business, (3) does not have the right to control or discretion as to the manner of performance so as to determine the final results of the work performed, and (4) does not otherwise meet the test of an independent contractor [Bus. & Prof. Code

§ 7121.8; *see* Bus. & Prof. Code § 7053; Labor Code § 2750.5].

A violation of these prohibitions is a misdemeanor punishable by a fine of not less than $4,500, and/or imprisonment in county jail for not less than 90 days nor more than one year [Bus. & Prof. Code § 7121.6(c)]. An indictment for violating either of these prohibitions must be found, or an information or complaint must be filed within four years of the prohibited act [Bus. & Prof. Code § 7121.6(d)].

Before becoming an employee in any capacity by an entity that is subject to the contractors' license requirements, an individual described in *Bus. & Prof. Code § 7121.6(a)* or *(b)*, described above, must provide the prospective employer with written notice of the revocation [Bus. & Prof. Code § 7121.65].

[2] Acts by Licensee Employing Individual Whose License Has Been Revoked

A qualifying individual, officer, partner, or other person named on a license is prohibited from knowingly employing an individual who is violating *Bus. & Prof. Code § 7121.6(a)* or *(b)*, described § 88.17A[1], except as a bona fide nonsupervising employee [Bus. & Prof. Code § 7121.7(a); *see* Bus. & Prof. Code § 7121.8 ("bona fide nonsupervising employee" defined)].

A violation of this prohibition is a misdemeanor punishable by a fine of not less than $4,500, and/or imprisonment in county jail for not less than 30 days nor more than one year [Bus. & Prof. Code § 7121.7(b)]. An indictment for violating this prohibition must be found, or an information or complaint must be filed within four years of the prohibited act [Bus. & Prof. Code § 7121.7(c)].

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§ 88.18 Failure to Obtain License

In general, no person engaged in the business or acting in the capacity of a contractor may bring or maintain any action, or recover in law or equity in any action, to collect compensation for performing any act or contract for which a license is required without alleging that he or she was a duly licensed contractor at all times during the performance of the act or contract, regardless of the merits of the cause of action [*Bus. & Prof. Code § 7031(a)*; *MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co. (2005) 36 Cal. 4th 412, 430-431, 30 Cal. Rptr. 3d 755, 115 P.3d 41*]. Section 7031 does not allow a contractor who was unlicensed at any time during contractual performance to recover compensation for individual acts performed while he or she was duly licensed [*MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co. (2005) 36 Cal. 4th 412, 425, 30 Cal. Rptr. 3d 755, 115 P.3d 41]* . However, if fully licensed at all times during contractual performance, a contractor is not barred from recovering compensation for the work solely because he or she was unlicensed when the contract was executed [*MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co. (2005) 36 Cal. 4th 412, 440, 30 Cal. Rptr. 3d 755, 115 P.3d 41]* .

The prohibition applies regardless of the merits of the cause of action. For example, the prohibition applied to a licensed contractor whose unlicensed corporation entered in a subcontract with a general contractor who could not sue to recover compensation, even though the contractor's license number appeared on all documents relating to the contract. The corporation was the contracting party, and recovery therefore was barred [*Opp v. State Farm Fire & Marine Ins. Co. (2007) 154 Cal. App. 4th 71, 76, 64 Cal. Rptr. 3d 260]* . However, It does not apply to contractors who are each individually licensed but who fail to comply with the joint venture license requirement [*Bus. & Prof. Code § 7031(a)*; *see Bus. & Prof. Code § 7029*; *see also § 88.13[5]*]. The prohibition also does not apply to a corporation that simply furnishes laborers to another, and does not actually perform or supervise any construction services or contract, bid, or promise to do so. A person or company in the business of supplying equipment or hiring out laborers to be supervised by others does not act in the capacity of a contractor and is not required to have a license [*see Contractors Labor Pool, Inc. v. Westway Contractors, Inc. (1997) 53 Cal. App. 4th 152, 163-165, 61 Cal. Rptr. 2d 715* (corporation that furnished labor to work of public improvement entitled to recover against payment bond); *see also Contractors Dump Truck Service, Inc. v. Gregg Constr. Co. (1965) 237 Cal. App. 2d 1, 7, 46 Cal. Rptr. 738* (appellant not entitled to raise lack of contractor's license for first time on appeal)].

If an unlicensed contractor is paid for performing work for which a professional license is required, the person who

utilized the contractor's services and paid the compensation has a cause of action against the contractor to recover all compensation paid for work for which a licensed was required [*Bus. & Prof. Code § 7031(b)*].

A person who obtains a security interest to secure payment for performing an act or contract for which a license is required must be duly licensed at all times while performing the act or contract; otherwise the security interest is unenforceable [*Bus. & Prof. Code § 7031(c)*]. Under narrow circumstances defined by statute, an unlicensed person may be able to avoid the bar to compensation by alleging that he or she substantially complied with the licensure requirements [*see Bus. & Prof. Code § 7031(e), (f)*].

For further discussion of the consequences faced by unlicensed persons who perform acts for which a license is required, see *California Real Estate Law and Practice, Ch. 430, Licensing of Contractors, §§ 430.70-430.72* (Matthew Bender).

Not only does the unlicensed person run the risk of being barred from compensation, but performing contracting services without a license is also punishable as a misdemeanor [*Bus. & Prof. Code § 7028(a)*]. Continuing violations may be enjoined [*Bus. & Prof. Code §§ 7028.3, 7028.4*]. It is also a misdemeanor for a person to advertise for construction work covered by the Contractors' State License Law unless that person is licensed in the classification advertised, except that a licensed building or engineering contractor may advertise as a general contractor [*Bus. & Prof. Code § 7027.1*]. Submitting a bid to a public agency to engage in the business or act in the capacity of a contractor without having a license, except in limited circumstances, is a misdemeanor [*Bus. & Prof. Code § 7028.15*]; and an unlicensed person who engages in the business or acts in the capacity of a contractor in connection with repairs caused by a natural disaster for which a state of emergency has been declared is subject to fine, imprisonment, or both [*Bus. & Prof. Code § 7028.16*; *see Gov. Code § 8625*]. In addition, a person who utilized the services of the unlicensed contractor is a victim of crime regardless of whether that person had knowledge that the contractor was unlicensed [*Bus. & Prof. Code § 7028.16*]. The Registrar may also issue citations containing abatement orders and imposing civil penalties on unlicensed persons performing acts for which a license is required [*see Bus. & Prof. Code §§ 7028.6-7028.14*].

Legal Topics:

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§ 88.19 Starting Contracting Business

Attorneys are often retained by licensed contractors who want to start a contracting business. An attorney in this position should use this chapter in conjunction with Chapters 1A-1F regarding starting a new business. These chapters reference other chapters that may be relevant depending on the type of business entity involved, such as Chapter 2A, *Incorporating a Going Business*, and Chapter 15, *General Partnerships*.

Several of the topics discussed in this chapter should be carefully reviewed in connection with the establishment of a contracting business. The most important consideration is whether or not the proposed business will be exempt from the requirements of the Contractors' State License Law [*see § 88.110*]. Another important issue is whether a currently licensed contractor or an ex-employee of a licensee may be the qualifying individual. If so, the examination requirement may be waived [*see § 88.122*]. If two or more licensees are involved, a joint license should be considered [*see § 88.13[5]*]. Other potential concerns include:

- Establishing the character qualifications of the applicant's personnel [*see § 88.110*];
- Making proper disclosures when applying for a local business license [*see § 88.136*];
- Determining whether the business will hire licensed "employees" [*see § 88.110*]; and
- Deciding on the proper classifications [*see § 88.110*].

Legal Topics:

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§ 88.20 Home Improvement

[1] Contractors

Certain persons involved in the home improvement business, including those entering into service and repair contracts [*see Bus. & Prof. Code § 7159.10*], are subject to licensing and registration requirements imposed by the Contractors' State License Law [*see Bus. & Prof. Code §§ 7150-7168*]. "Home improvement" means repairing, remodeling, altering, converting, modernizing, or adding to residential property. That definition specifically includes, but is not limited to, the construction, erection, replacement, or improvement of driveways, swimming pools, including spas and hot tubs, terraces, patios, landscaping, fences, porches, garages, fallout shelters, basements, and other improvements of the structures or land that is adjacent to a dwelling house [*Bus. & Prof. Code § 7151*].

"Home improvement" also means the installation of home improvement goods or the furnishing of home improvement services. "Home improvement goods or services" means goods and services, as defined in *Civ. Code § 1689.5*, which are bought in connection with the improvement of real property. These goods and services include, but are not limited to, carpeting, texture coating, fencing, air conditioning or heating equipment, and termite extermination. Home improvement goods also include goods that are affixed to, but not necessarily severable from, real property in such a manner that they become a part of the real property [*Bus. & Prof. Code § 7151*].

The term "home improvement contractor" means a contractor licensed under the Contractors' State License Law who is engaged in the business of home improvement either full time or part time, and includes a swimming pool contractor [*Bus. & Prof. Code § 7150.1*]. Most home improvement contractors are licensed as general building contractors. Special provisions govern the form and contents of home improvement contracts and service and repair contracts [*see Bus. & Prof. Code §§ 7030, 7030.1, 7159, 7159.10*].

Because the scope of this chapter is limited to licensing and registration requirements, the attorney should consult Chapter 89, *Home Improvement and Specialty Contracts*, for further discussion of other aspects of the home improvement business.

[2] Salespersons

A home improvement salesperson is a person employed by a licensed contractor to solicit, sell, negotiate, or execute home improvement contracts for the sale, installation, or furnishing of home improvement goods or services or to solicit, sell, negotiate, or execute swimming pool contracts [*Bus. & Prof. Code § 7152(a)*]. It is a misdemeanor to act as a home improvement salesperson without having a registration issued by the Registrar. A separate registration must be obtained for each home improvement contractor, if any, by whom the salesperson is employed [*Bus. & Prof. Code § 7153(a)*]. A home improvement contractor who employs an unregistered person to sell home improvement contracts is subject to disciplinary action [*Bus. & Prof. Code § 7154*; *see Handyman Connection of Sacramento, Inc. v. Sands (2004) 123 Cal. App. 4th 867, 889-890, 20 Cal. Rptr. 3d 727]* . Any security interest taken by a contractor to secure payment under a contract solicited by an unlicensed person on or after January 1, 1995, is unenforceable [*Bus. & Prof. Code § 7153(b)*].

The following need not register as home improvement salespersons [*Bus. & Prof. Code § 7152(b)*]:

- An officer of a licensed corporate contractor.
- A general partner listed on the license record of a licensed partnership.
- Qualifying individuals [*see Bus. & Prof. Code § 7068*; *see also § 88.13[2]*].
- A salesperson whose sales are all made in transactions initiated by the buyer at or with a general merchandise retailer that operates from a fixed location.
- A person who contacts prospective buyers to schedule appointments for registered salespersons.
- Persons employed by licensed contractors to make repairs requested by buyers.

The exemption provided to the first three categories listed above applies only to those individuals who, at the time of the sales transaction, are listed as personnel of record for the licensee responsible for soliciting, negotiating, or contracting for a service or improvement that is subject to the statutes governing the home improvement business [Bus. & Prof. Code § 7152(c); *see* Bus. & Prof. Code § 7150 et seq.].

Legal Topics:

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[Reserved]

§§ 88.21[Reserved]

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§ 88.100 Facts

1. Status of applicant:

a. Individual.

b. Partnership.

c. Corporation.

d. Other organization.

2. Name and address of applicant and of following members of applicant's personnel, as appropriate:

NOTE:
The official application for an original contractor's license [***see*** *§ 88.200*] requires full legal names; initials may be used only if the legal name contains initials only. If a full street address is not available, the applicant must provide the name of a road or district and the nearest cross streets; in these cases, any other designations (e.g., P.O. Boxes, General Delivery, etc.) are unacceptable.

a. If applicant is partnership, all partners.

b. If applicant is corporation, association, or other organization:
(1) President.

(2) Secretary.

(3) Treasurer.

(4) Responsible managing officer(s) or responsible managing employee.

c. If applicant is individual or partnership, responsible managing employee who will attempt to satisfy applicant's experience and knowledge qualifications [*see § 88.120*], if already selected.

3. If applicant is corporation, corporate number assigned by Secretary of State.

4. Complete statement of general nature of proposed contracting business.

5. Concise statement of classification(s) under which applicant wishes to be qualified.

6. If more than one classification is desired, principal business area in which applicant intends to fully qualify (i.e., primary classification).

7. Previous related experience of applicant or responsible managing employee.

8. If applicant or any member of applicant's personnel has been previously licensed:

a. Firm name, name-style, date and location of written examination, and classification.

b. Details concerning any denial, suspension, or revocation of contractor's license or any other professional or vocational license.

9. Amount of applicant's operating capital.

10. Concerning all members of applicant's personnel:

NOTE:
Although the following information need not be obtained at the initial client interview, it must be compiled before the official application for an original license is completed.

a. Birthdates.

b. Details concerning any convictions other than for acting in unlicensed capacity.

Legal Topics:

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§ 88.101 Documents

1. Any current contractor's license certificate issued to applicant or applicant's personnel.

2. Any working relationship agreement used or to be used by applicant for any qualifying individual.

3. Copy of any current licensing-related bond recorded by applicant or applicant's personnel.

4. If new contracting business is to be started:

    a. Any proposed leases for property to be occupied.

    b. Any proposed contracts between business and prospective employees.

    c. Any proposed contracts between business and prospective suppliers or customers.

5. Copies of any documents relating to:

    a. Pending claims for labor, materials, or services;

    b. Recorded or pending liens, suits, or judgments;

    c. Liens of governmental taxing or regulatory authorities;

    d. Bankruptcies of listed individuals or firms; and

    e. Assignments of assets in settlement of construction obligations for less than amount of

indebtedness.

6. Experience record of qualifying person in any of following capacities:

a. Journeyman;

b. Foreman;

c. Supervising employee;

d. Contractor; or

e. Self-employed person.

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B. Preliminary Determinations

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§ 88.110 Obtaining License

1. Determine whether proposed business or project is of type that normally would require contractor's license [*see §§ 88.10[2], 88.12*].

2. Ascertain whether applicant, proposed business, or project fits into any of the following categories, which are exempt from licensing requirements:

a. Owner of property if [*Bus. & Prof. Code § 7044(a)(1)*]:
(1) Proposed project involves building or improving structure on owner's own property; and

(2) Work is to be done by:
(a) Owner; or

(b) Owner's employees with wages as their sole compensation.

b. Owner of property if [*Bus. & Prof. Code § 7044(a)(2)*]:

(1) Proposed project involves building or improving structure on owner's own property;

(2) Owner directly contracts with licensees who are fully licensed to contract for work of respective trades involved in completing project; and

(3) If project involves single-family residential structures, no more than four of these are intended or offered for sale in calendar year.

NOTE:

If the owner contracts with a general contractor for the construction, (3) does not apply [*Bus. & Prof. Code § 7044(a)(2)(C)*].

c. Homeowner improving own principal residence or its appurtenances, provided [*Bus. & Prof. Code § 7044(a)(3)*]:

(1) Work is performed before sale;

(2) Homeowner actually resided in residence for 12 months before completion of work; and

(3) During any three-year period, homeowner has not claimed this specific exemption on more than two structures.

NOTE:

With regard to (a)-(c), above, proof that an owner-builder sold or offered a structure for sale within one year after completion of the project raises a rebuttable presumption that a sale was intended [*Bus. & Prof. Code § 7044(b)(1)*]. Proof that the owner-builder sold or offered five or more structures for sale within one year after completion of the projects constitutes a conclusive presumption that sales were intended [*Bus. & Prof. Code § 7044(b)(2)*].

d. Sale or installation of finished products, materials, or articles of merchandise if they [*Bus. & Prof. Code § 7045*]:

(1) Do not become fixed part of structure; or

(2) Are furnished by material supplier or manufacturer who does not install or contract for installation of those items.

NOTE:

The term "finished products" does not include installed carpets, mobilehomes, or mobilehome accessory structures [*Bus. & Prof. Code § 7045*; ***see*** *Bus. & Prof. Code § 7026.2*]. The exemption for finished products, materials, or merchandise does not apply to the installation of home improvement goods [*Bus. & Prof. Code § 7045*; ***see*** *Bus. & Prof. Code § 7151*].

e. Any work or operation on one undertaking or project by one or more contracts with aggregate contract price of less than $500, unless [*Bus. & Prof. Code § 7048*]:

(1) Work is only part of larger or major operation, whether undertaken by same or different contractor;

(2) Division of operation is made in contracts of amounts less than $500, whether or not for purpose of evasion of Contractors' State License Law; or

(3) Work done by person who advertises that he or she is contractor or is qualified to engage in contracting business.

f. Any person furnishing materials or supplies without fabricating them into, or consuming them in performance of, contractor's work [*Bus. & Prof. Code § 7052*].

g. Any person who engages in regulated contracting activities as employee who [*Bus. & Prof. Code § 7053*; *but see Bus. & Prof. Code §§ 7152, 7153*]:

(1) Receives wages as sole compensation;

(2) Does not customarily engage in independently established business; and

(3) Does not have right to control or discretion as to manner of performance so as to determine final results of work performed.

NOTE:
An attorney who has been retained to start a new contracting business should not utilize this employee exemption without consulting the discussion surrounding starting a new business [***see*** Chs. 1A- 1F].

h. Any construction, alteration, improvement, or repair of personal property except mobilehomes and mobilehome accessory buildings [*Bus. & Prof. Code § 7046*].

i. Authorized representatives of governmental entities [*see Bus. & Prof. Code § 7040*].

NOTE:
Neither the state nor its representative may enter into or authorize a contract with an unlicensed contractor if the work to be done requires a licensed contractor [*Bus. & Prof. Code § 7040(b)*].

j. Court officers acting within scope of their office [*Bus. & Prof. Code § 7041*].

k. Public utilities operating under regulation of State Railroad Commission on construction, maintenance, and development work incidental to their own business [*Bus. & Prof. Code § 7042*; *see Bus. & Prof. Code § 7042.1*].

l. Projects incidental to discovering or producing petroleum or gas, or performed by an owner or lessee of, and affecting, a petroleum or gas well [*Bus. & Prof. Code § 7043*].

m. Certain projects involving irrigation, reclamation, fire prevention, or agricultural work [*see Bus. & Prof. Code § 7049*].

n. Licensed architect or registered civil or professional engineer acting solely in his or her professional capacity [*Bus. & Prof. Code § 7051*].

o. Licensed structural pest control operator acting within scope of his or her license [*Bus. & Prof. Code § 7051*].

p. Licensee operating within scope of Geologist and Geophysicist Act [*Bus. & Prof. Code § 7051*; *see Bus. & Prof. Code § 7800 et seq.* (Geologist and Geophysicist Act)].

q. Any licensed alarm company operator [*Bus. & Prof. Code § 7054*; *see Bus. & Prof. Code § 7590 et seq.* (Alarm Company Act)].

r. Persons registered with Bureau of Electronic and Appliance Repair performing installations of satellite antenna systems on residential structures or property [*Bus. & Prof. Code § 7054.5*; *see Bus. & Prof. Code § 9800 et seq.*].

s. Real estate licensee acting within course and scope of his or her license [*Bus. & Prof. Code § 7044.1*].

NOTE:
This does not authorize a real estate licensee or property manager to act in the capacity of a contractor

without being licensed as a contractor [*Bus. & Prof. Code § 7044.1*].

t. Admitted surety insurer that engages contractor to complete contract on which performance or completion bond was issued by surety insurer [*Bus. & Prof. Code § 7044.2*].

NOTE:

For this exemption to apply, all actual construction work must be performed by licensed contractors [*Bus. & Prof. Code § 7044.2*].

3. Determine whether applicant has selected appropriate classification(s).

a. General engineering contracting.

NOTE:

A general engineering contractor deals principally with fixed works requiring specialized engineering knowledge and skill, including the following divisions or subjects [*Bus. & Prof. Code § 7056*]: irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, docks and wharves, shipyards and ports, dams and hydroelectric projects, levees, river control and reclamation works, railroads, highways, streets and roads, tunnels, airports and airways, sewers and sewage disposal plants and systems, waste reduction plants, bridges, overpasses, underpasses and other similar works, pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances, parks, playgrounds and other recreational works, refineries, chemical plants and similar industrial plants requiring specialized engineering knowledge and skill, powerhouses, power plants and other utility plants and installations, mines and metallurgical plants, land leveling and earthmoving projects, excavating, grading, trenching, paving and surfacing work and cement and concrete works in connection with the above fixed works. A licensed general engineering contractor must operate only within the scope defined above [*16 Cal. Code Reg. § 834(a)*].

b. General building contractor.

NOTE:

A general building contractor's principal contracting business involves the use of at least two unrelated building trades or crafts in the construction of any structure for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind. Specifically excluded from the definition of general building contractor is anyone who merely furnishes materials or supplies under *Bus. & Prof. Code § 7045* [***see** § 88.110*] without fabricating them into or consuming them in the performance of the work of the general building contractor [*Bus. & Prof. Code § 7057(a)*]. Unless he or she is willing to risk disciplinary action by the Contractors' State License Board, a general building contractor may not undertake a contract for any project involving trades other than framing or carpentry unless (1) the project requires at least two trades that are unrelated to framing or carpentry, (2) the contractor holds the appropriate license classification, or (3) the contractor subcontracts with an appropriately licensed contractor [*Bus. & Prof. Code § 7057(b)*; ***see** § 88.12*]. In most instances, the general building contractor will sub out the specialty work to licensed specialty contractors.

c. Specialty contractor [*see § 88.12[4]*].

4. If joint venture license is desired, determine whether every member entity has current, active contractor's license in good standing [*16 Cal. Code Reg. § 821*].

5. Determine whether applicant's operating capital exceeds $2,500 [*Bus. & Prof. Code § 7067.5*].

NOTE:

"Operating capital" is defined as the difference between current assets and current liabilities [*16 Cal. Code Reg. § 817(a)*]. "Current assets" include cash and other assets or resources reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business [*16 Cal. Code Reg. § 817(b)*]. "Current liabilities" include those obligations whose liquidation is reasonably expected to require the use of existing resources properly identifiable as current assets or the creation of other current liabilities [*16 Cal. Code Reg. § 817(c)*].

6. Determine whether applicant will designate qualifying individual [*see § 88.13[2]*].

7. Determine whether all character qualifications have been met by applicant and its personnel.

NOTE:

For purposes of the character criteria listed below, "personnel" refers to any responsible officer or director of an applicant that is a corporation or similar organization, and to any member of a partnership applicant [*Bus. & Prof. Code § 7071*].

a. Ascertain whether applicant or any of its personnel has committed or been subjected to any of following acts constituting grounds for denial of licensure [*Bus. & Prof. Code § 7069(a)*; *see Bus. & Prof. Code § 480*]:

NOTE:

In addition to the personnel identified in the NOTE to Paragraph 7, ***above***, the requirement set forth in this Subparagraph 7(a) also applies to associates and any responsible managing employee [*Bus. & Prof. Code § 7069(a)*].

The Board may deny a license on one of the first three grounds specified below only if the crime or act is substantially related to the qualifications, functions, or duties of the contracting profession [***see*** *Bus. & Prof. Code § 480*]. A crime or act is "substantially related" if it evidences that the applicant or licensee is presently or potentially unfit to perform the functions authorized by the license in a manner consistent with the public health, safety, and welfare [*16 Cal. Code Reg. § 868*]. A license will not be denied solely on the basis that an applicant has been (1) convicted of a felony if the applicant has obtained a certificate of rehabilitation under the Penal Code [***see*** *Penal Code § 4852.01*], or (2) convicted of a misdemeanor if the applicant has met all applicable requirements of the criteria of rehabilitation developed by the Board [*Bus. & Prof. Code § 480*; ***see*** *16 Cal. Code Reg. § 869* (criteria of rehabilitation)]. The earliest date on which an applicant may reapply for licensure depends on the original reason for denial [*see* 16 Cal. Code Reg. § 868.9 (criteria to aid in determining earliest date denied applicant may reapply for licensure)].

To facilitate a criminal history record check, applicants are required to furnish a full set of fingerprints as part of the application process [*Bus. & Prof. Code § 7069(b)*].

(1) Convicted of a crime;

(2) Committed any act involving dishonesty, fraud, or deceit with intent to substantially benefit or substantially injure any person;

(3) Committed any act that, if done by licensed contractor, would be grounds for suspension or revocation of license; or

(4) Knowingly made false statement of fact required to be revealed in application.

b. Ascertain whether applicant or any member of its personnel has ever had a license refused or revoked for reasons that would preclude approval of current application [*Bus. & Prof. Code § 7070*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesLabor & Employment LawEmployment RelationshipsIndependent ContractorsReal Property LawConstruction LawContractors & Subcontractors

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DIVISION VI: PERFORMANCE OF SERVICES
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B. Preliminary Determinations

29-88 California Legal Forms--Transaction Guide §§ 88.111-88.119

[Reserved]

§§ 88.111[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 88 LICENSING OF CONTRACTORS
PART III. TRANSACTION GUIDE
C. Procedure for Obtaining Contractor's License

29-88 California Legal Forms--Transaction Guide § 88.120

§ 88.120 Preparing and Submitting Application for Original License

1. Unless applicant is individual who plans to personally satisfy all licensing requirements, have applicant designate qualifying individual as follows:

a. Instruct applicant to select qualifying individual who:
(1) Is a responsible managing employee (RME) [*Bus. & Prof. Code § 7068*; *16 Cal. Code Reg. § 825(e)*; *see § 88.13[2]*] or a member of applicant entity.

NOTE:
The following persons and officers are considered members of applicant entities for purposes of the above requirement [*Bus. & Prof. Code § 7068*]: (1) if the applicant is an individual, the applicant; (2) if the applicant is a partnership, a general partner; and (3) if the applicant is a corporation or any other combination or organization, a responsible managing officer.

(2) Will be responsible for supervising and controlling construction operations to extent necessary to secure full compliance with applicable laws, rules, and regulations [*Bus. & Prof. Code § 7068.1*].

NOTE:
The Contractors' State License Law provides that the Board must require every applicant or licensee qualifying by the appearance of a qualifying individual to submit detailed information on that individual's duties and responsibilities for the above supervision and control [*Bus. & Prof. Code § 7068.1*]

(3) Within last 10 years immediately preceding filing of application, had at least four years experience as journeyman, foreman, supervising employee, or contractor in particular class within which applicant intends to be licensed [*Bus. & Prof. Code § 7068*; *16 Cal. Code Reg. § 825(a)*], or has equivalent experience [*see* Paragraph 1(b), *below*].

NOTE:

If the proposed qualifying individual was formerly a qualifier on a license in the classification now being applied for, the requisite four years experience need not have been obtained within the last 10 years [*16 Cal. Code Reg. § 825(b)*]. Any time spent in the United States armed forces during a national emergency will not be counted for purposes of computing the 10-year period [*16 Cal. Code Reg. § 825(c)*].

Acceptable technical training in an accredited school or completion of an approved apprenticeship program in accordance with the California Labor Code (or its equivalent as approved by the Registrar) will be counted as up to three years experience [*16 Cal. Code Reg. § 825(d)*].

The Registrar must review experience gained by any applicants from another state to determine if the experience was gained in accordance with the contractors' licensing law of that other state [*Bus. & Prof. Code § 7068(h)*].

b. If proposed qualifying person does not possess experience specified in Paragraph (1)(a)(3), *above*, but has equivalent knowledge, training, or experience, then at time of application submit request to Registrar for certification of adequacy of equivalent skills [*see 16 Cal. Code Reg. § 826*].

c. If proposed qualifying individual already serves as qualifying individual for another individual or firm, confirm that one of following conditions exists [*Bus. & Prof. Code § 7068.1*]:

NOTE:

As used in this Subparagraph c, "firm" means a partnership, corporation, or any other combination or organization described in *Bus. & Prof. Code § 7068*, and "persons" means natural persons [*Bus. & Prof. Code § 7068.1*].

A qualifying individual may act as qualifier for no more than three firms in any one-year period [*Bus. & Prof. Code § 7068.1(d)*; ***see*** *Bus. & Prof. Code § 7068.1(d), (e)* (transitional rule)].

(1) There is common ownership of at least 20 percent of equity of each individual or firm for which person acts in qualifying capacity.

(2) If applicant is firm, it is subsidiary of or joint venture with entity for which proposed qualifying individual currently serves as qualifying individual.

NOTE:

"Subsidiary" means any firm at least 20 percent of the equity of which is owned by the other firm [*Bus. & Prof. Code § 7068.1*].

(3) With regard to licensed corporations or partnerships, majority of partners or officers are same for each firm for which person acts as qualifying individual.

2. If applicant is individual who will not appoint qualifying individual, confirm that applicant meets experience qualification discussed in Paragraph (1)(a)(3), *above* [*Bus. & Prof. Code § 7068*; *see 16 Cal. Code Reg. § 825*].

3. Complete official application form for original license [*see § 88.200*].

NOTE:
Application forms for an Original Contractor's License may be ordered from the Contractors' State License Board by phone at 1-800-321-CSLB (2752), or online atwww.cslb.ca.gov/services/forms.asp. They may also be downloaded and printed out from the same web address. In addition, applicants may use other forms approved by the Registrar of Contractors [*Bus. & Prof. Code § 7066.5*].

4. Include following in application package:

a. One or more official certificates verifying experience claimed on application [*Bus. & Prof. Code § 7068*].

NOTE:
These certificates are available from the Board. Each certificate must be completed by a qualified and responsible person who has direct knowledge of the experience qualifications of the applicant or its qualifying individual, as the case may be.

b. If applicant is a corporation, certificate (obtained from Board) showing that applicant has registered with Secretary of State [*16 Cal. Code Reg. § 819*].

c. If appropriate, a request for waiver of examination requirement [*see Bus. & Prof. Code § 7065.1*; *see also § 88.122*].

d. Any other information requested by Registrar.

5. Submit application, appropriate supporting documents, and appropriate fee [*see Bus. & Prof. Code §§ 7137, 7138.1*; *16 Cal. Code Reg. § 816(c)*] to: Contractors' State License Board, P.O. Box 26000, Sacramento, CA 95826-0026.

NOTE:
On receiving an application, the Board will send an acknowledgment explaining how to check the status of the application online at www.cslb.ca.gov.

6. If application is rejected as incomplete or insufficient and license is still desired:

a. Rectify all flaws identified by Registrar at time application is returned [*see 16 Cal. Code Reg. § 818(b)*]; and

b. Resubmit application within 90 days from date of original notification of rejection [*16 Cal. Code Reg. § 813(a)*].

NOTE:
An application is void when the applicant fails to return the application rejected for insufficiency or incompleteness within 90 days from the date of original notice or rejection [*Bus. & Prof. Code § 7074(a)(7)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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29-88 California Legal Forms--Transaction Guide § 88.121

§ 88.121 Applying for Joint License

NOTE:

For a definition of a joint license, see *§ 88.13[5]*.

An applicant for a joint license need not take an examination [*16 Cal. Code Reg. § 822*]. Therefore, after complying with the procedures set forth below, the attorney should refer to the security requirements discussed in *§ 88.123*.

1. Complete official application (available from Board online atwww.cslb.ca.gov/services/forms.asp).

2. Have application signed by one member of each licensee constituting joint venture [*16 Cal. Code Reg. § 822*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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29-88 California Legal Forms--Transaction Guide § 88.122

§ 88.122 Satisfying Examination Requirement

1. If qualifying individual has been selected, determine whether examination will be waived because qualifying individual, within five-year period immediately preceding application, either [*Bus. & Prof. Code § 7065*]:

a. Personally passed written examination for same classification currently being applied for; or

b. Served as qualifying individual for licensee whose license was:
(1) In good standing at any time during that five-year period; and

(2) In same classification being applied for.

2. Attach letter to application requesting waiver of examination requirement if qualifying individual meets any of following requirements:

a. For five of seven years immediately preceding application, has been listed in Board's records as member of personnel of licensee [*Bus. & Prof. Code § 7065.1(a)*]:

(1) Whose license was active and in good standing;

(2) Whose license was in same classification being applied for; and

(3) Who during period listed on license has been actively engaged in licensee's construction activities in same classification within which applicant applies for license.

b. Is immediate member of family of licensee whose individual license was active and in good standing for five of seven years immediately preceding application, and all of following apply [*Bus. & Prof. Code § 7065.1(b)*]:

(1) Qualifying individual has been actively engaged in licensee's business for five of seven years immediately preceding application for licensure;

(2) License is needed to continue existing family business in event of licensee's absence or death; and

(3) Current application is for same classification(s) in which licensee is or was licensed.

c. Is employee of corporation seeking to replace its former qualifying individual, and following conditions have existed for five of seven years immediately preceding application [*Bus. & Prof. Code § 7065.1(c)*]:

NOTE:
For purposes of this provision, "employee" includes, but is not limited to, the officers of a corporation [*Bus. & Prof. Code § 7065.1*].

(1) Qualifying individual has been continually employed by corporation in supervisory capacity in same classifications being applied for; and

(2) Corporation has held active license in good standing in same classifications being applied for.

(3) Corporation has not requested waiver within last five years.

d. Has previously held valid California contractor's license and has been acting as contractor for federal government in position exempt from state licensing [*Bus. & Prof. Code § 7065.2*].

3. If applicant is licensed in similar classification in another state, provide written certification from that state that license has been in good standing for previous five years [*Bus. & Prof. Code § 7065.4*].

NOTE:
The Registrar may waive the examination if (1) the other state accepts the qualifications of California contractors for licensure in that state, (2) the Board ascertains that the professional qualifications and conditions of good standing for licensure and continued licensure are at least the same or greater in that state as in California, and (3) the applicant provides the required certification [*Bus. & Prof. Code § 7065.4*].

4. If waiver is not available, have examinee take examination at place and on date prescribed in examination notification letter.

5. If applicant or examinee for applicant does not show up for examination, request rescheduling of examination and pay rescheduling fee [*Bus. & Prof. Code § 7137(b), (c)*] within 90 days of notification of failure to appear [*Bus. & Prof. Code § 7074(a)(1)*; *16 Cal. Code Reg. § 842*].

NOTE:
The rescheduling request must be made and the fee paid within 90 days of the notification of failure to

appear, or the application becomes void. The application is also void if the applicant or examinee fails to appear at the rescheduled examination [*Bus. & Prof. Code § 7074(a)(1)*].

6. If applicant or examinee for applicant fails examination and wants to be reexamined, request rescheduling of examination and pay rescheduling fee [*Bus. & Prof. Code § 7137(b)*] within 90 days of notification of failure to pass examination [*Bus. & Prof. Code § 7074(a)(2)*; *16 Cal. Code Reg. § 842*].

NOTE:

The rescheduling request must be made and the fee paid within 90 days of the notification of failure to pass, or the application becomes void [*Bus. & Prof. Code § 7074(a)(2)*]. The application is also void if the applicant or the examinee for the applicant fails to pass within 18 months after the application has been deemed acceptable by the Board [*Bus. & Prof. Code § 7074(a)(3)*].

Legal Topics:

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29-88 California Legal Forms--Transaction Guide § 88.123

§ 88.123 Posting Adequate Security

1. File bond with Registrar [*Bus. & Prof. Code § 7071.6*].

NOTE:

A contractor's bond must be executed by an admitted surety in favor of the State of California in a form acceptable to the Registrar of Contractors. The bond must be filed with the Registrar by the licensee or applicant [*Bus. & Prof. Code § 7071.5*].

The sum of the bond required for all contractors with an active license is $12,500 [*Bus. & Prof. Code § 7071.6(a)*]. Under specified circumstances related to an applicant's citation or conviction for contracting without a license, the applicant may be required to post a bond for twice the statutory amount [*Bus. & Prof. Code § 7071.6(d)*].

For a list of the persons to be benefited by the bond, see *Bus. & Prof. Code § 7071.5*.

2. If required, file judgment bond for amount of unsatisfied judgment for failure or refusal to pay contractor, subcontractor, consumer, materials supplier, or employee [*Bus. & Prof. Code § 7071.17(a)*].

NOTE:

As a condition precedent to accepting an application for licensure, renewal, reinstatement, or to change officers or other personnel of record, and in addition to the normal contractor's bond, an applicant or licensee previously found to have failed or refused to pay a contractor, subcontractor, consumer, materials supplier, or employee based on an unsatisfied final judgment must file with the Board a judgment bond or secured equivalent equal to the amount of the unsatisfied judgment [*Bus. & Prof. Code § 7071.17(a)*; ***see*** *Bus. & Prof. Code § 7071.17(i)* ("judgment" includes final arbitration award)]. For the bond requirement to apply, the judgment must be substantially related to the

qualifications, functions, or duties of the license [*Bus. & Prof. Code § 7071.17(e)*]. In lieu of filing a bond, the licensee may provide the Board with a notarized copy of any accord reached with the creditor holding an unsatisfied final judgment. As part of the application process, the applicant is required to state, under penalty of perjury, whether he or she has any unpaid judgments. If the statement is falsified and a license is issued, it will be retroactively suspended until the judgment bond is filed [*Bus. & Prof. Code § 7071.17(a)*].

The judgment bond requirement does not apply when the financial obligation for which a bond or other security is required has been discharged in bankruptcy [*Bus. & Prof. Code § 7071.17(f)*].

A licensee must notify the Registrar in writing of any unsatisfied final judgments within 90 days from the date of judgment. Failure to report the judgment will result in an automatic license suspension that will not be removed until proof of satisfaction of judgment is submitted to the Registrar [*Bus. & Prof. Code § 7071.17(b)*].

If the licensee notifies the Registrar within 90 days of any unsatisfied final judgments, the licensee may maintain the validity of the license by posting a judgment bond or other security sufficient to guarantee payment of the unsatisfied judgments. The bond or other security must be filed within 90 days or the license will be suspended [*Bus. & Prof. Code § 7071.17(b)*].

The qualifying person and any member or other personnel of the license named as a judgment debtor on the unsatisfied judgment is automatically prohibited from serving as an officer, director, associate, partner, owner, qualifying individual, or other personnel of record of another licensee. This prohibition will also cause the suspension of the license of any other existing renewable licensed entity with any of the same personnel of record as the judgment debtor licensee. The suspension will last until either the judgment debtor's license is reinstated, or those same personnel of record disassociate themselves from the renewable licensed entity [*Bus. & Prof. Code § 7071.17(j)*; ***see*** *Bus. & Prof. Code § 7068.2* (disassociation)].

3. File additional bond (or deposit) of $12,500 if applicant has designated qualifying individual who is not [*Bus. & Prof. Code § 7071.9(a), (c)*]:

NOTE:

If a bond is to be furnished, it must be executed by an admitted surety insurer in favor of the State of California, and in a form acceptable to the Registrar. The bond must be filed with the Registrar by the qualifying individual [*Bus. & Prof. Code § 7071.10(a)*].

For a list of the persons to be benefited by the above bond, see *Bus. & Prof. Code § 7071.10(a).*

a. Proprietor;

b. General partner;

c. Joint licensee; or

d. Reponsible managing officer of corporation who owns at least 10 percent or more of voting stock of that corporation.

4. File special bond in amount fixed by Registrar if application is for license, for renewal or restoration of license, for change in corporate officers, or for continued valid use of license that has been subject of disciplinary proceedings, and applicant is any of following [*Bus. & Prof. Code § 7071.8(a)*]:

a. Person whose license has been suspended or revoked in disciplinary action, or person who was qualifying individual for licensee any time during which cause for disciplinary action occurred resulting in suspension or revocation of license, regardless of whether individual knew of or participated in prohibited act or omission.

NOTE:
The amount of the bond or deposit [***see*** *Bus. & Prof. Code § 7071.12* (any required bond may be replaced by deposit)] required as the result of a suspension or revocation will depend on the seriousness of the violation, but will not be less than $15,000 or more than 10 times the standard bond for a contractor's license [*Bus. & Prof. Code § 7071.8(b)*; ***see*** *Bus. & Prof. Code § 7071.6* (standard contractor's license bond)]. The bond, which is in addition to any other required bond, must remain on file with the Registrar for at least two years and for any additional time required by the Registrar. The bond period will run only while the license is current, active, and in good standing and will be extended until the license has been current, active, and in good standing for the required period. Each applicant or licensee will be required to file only one disciplinary contractor's bond of this type for each application or license subject to this bond requirement [*Bus. & Prof. Code § 7071.8(c)*].

b. Person who, at time license was suspended or revoked as result of disciplinary action, was:

(1) Officer, director, member, partner, or qualifying individual of disciplined licensee; and

(2) Knew of or participated in act or omission that caused disciplinary action.

c. Partnership, corporation, firm, or association of which any existing or new officer, director, member, partner, or qualifying person either:

(1) Has had license suspended or revoked in disciplinary action; or

(2) Was member, officer, director, partner, or qualifying person of licensee at any time during which license was suspended or revoked in disciplinary action, and knew of or participated in act or omission resulting in disciplinary action.

5. File bond required by Paragraphs (1), (2), or (3) within 90 days of effective date of bond, or show that failure to have bond on file was due to circumstances beyond licensee's control.

NOTE:
A bond required by *Bus. & Prof. Code § 7071.6*, *7071.8*, or *7071.9* that is received by the Registrar within 90 days of the effective date shown on the bond will be accepted as of that date [*Bus. & Prof. Code § 7071.7(a)*]. For a bond filed after that time to be accepted as of its effective date, the licensee

must show that the failure to have a bond on file was due to circumstances beyond the licensee's control [*Bus. & Prof. Code § 7071.7(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesLabor & Employment LawEmployment RelationshipsIndependent ContractorsReal Property LawConstruction LawContractors & Subcontractors

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29-88 California Legal Forms--Transaction Guide § 88.124

§ 88.124 Satisfying Remaining Requirements

1. On receipt of notification to do so, have applicant:

a. Pay initial license fee within 90 days from date of notice [*Bus. & Prof. Code § 7074(a)(4)*; *see Bus. & Prof. Code §§ 7137, 7138.1*].

b. File any required [*see Bus. & Prof. Code § 7074(a)(5)*]:
(1) Bond or cash deposit.

(2) Other documents.

2. Have licensee display license in licensee's main office or chief place of business [*Bus. & Prof. Code § 7075*].

3. File one of following with Registrar [*Bus. & Prof. Code § 7125(a)*]:

NOTE:
These requirements do not apply to an applicant who has no employees; however, a person with no employees must file a statement to that effect with the Board on a form provided by the Registrar. Filing a false statement is cause for disciplinary action [*Bus. & Prof. Code § 7125(b), (c)*].

a. Certificate of Workers' Compensation Insurance issued and filed by one or more insurers duly licensed to write workers' compensation insurance in California; or

b. Certification of Self-Insurance issued and filed by Director of Industrial Relations.

4. If licensee is corporation licensed to do business in California, ensure that it is registered and in good standing with

Secretary of State [*Bus. & Prof. Code § 7076.2*].

NOTE:

Failure of contractor licensed to do business as a corporation in California to be registered and in good standing with the Secretary of State after notice from the Registrar will result in automatic suspension of the corporate license by operation of law. Reinstatement may be made at any time following suspension by providing proof that the corporate license is properly registered and in good standing with the Secretary of State [*Bus. & Prof. Code § 7076.2*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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29-88 California Legal Forms--Transaction Guide §§ 88.125-88.129

[Reserved]

§§ 88.125[Reserved]

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 88 LICENSING OF CONTRACTORS
PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures

29-88 California Legal Forms--Transaction Guide § 88.130

§ 88.130 Renewing License

1. Submit official application for renewal and pay renewal fee before expiration date of license, which will be two years from last day of month in which license was issued [*Bus. & Prof. Code § 7140*; *see 16 Cal. Code Reg. §§ 853, 854* (renewal applicaiton and renewal fee)].

NOTE:
The Registrar will provide the renewal application. The renewal will be effective on the date on which the application is filed with the Board. Except as provided in Paragraph 3, ***below***, the licensee will be considered unlicensed during the time, if any, between the expiration date and the date the renewal becomes effective [*Bus. & Prof. Code § 7141*].

2. At time of application, have responsible managing individual file a statement (on an official form) verifying individual's capacity as responsible managing employee [*Bus. & Prof. Code § 7068*].

3. If renewal application is returned incomplete or delinquent [*see 16 Cal. Code Reg. § 853(b)-(d)*]:

a. Correct insufficiencies identified by Registrar; and

b. Pay any delinquent fee that may have accrued [*see Bus. & Prof. Code § 7137(f)*].

NOTE:
The delinquency fee is 50 percent of the renewal fee [*Bus. & Prof. Code § 7137(f)*].

4. If renewal is desired after license expires:

a. File application for renewal any time within three years after expiration [*Bus. & Prof. Code § 7141*]:

NOTE:
If a license is not renewed within three years, the contractor must apply for a license [*Bus. & Prof. Code § 7141*; ***see*** *Bus. & Prof. Code § 7066*]:

(1) On official application form [*see § 88.200*].

(2) Accompanied by current renewal and delinquency fees [*see Bus. & Prof. Code § 7137(e), (f)*].

b. If application is filed within first 90 days after original date for renewal, file all of the following [*Bus. & Prof. Code § 7141.5*]:

(1) Petition requesting retroactive renewal;

(2) Application for renewal;

(3) Proof that failure to renew was caused by circumstances beyond licensee's control; and

(4) Payment of required renewal and delinquency fees.

5. If client's license has been suspended, take following steps [*Bus. & Prof. Code § 7143*]:

a. Follow standard renewal procedure; and

b. Inform licensee that license may only be renewed as inactive and that renewal does not entitle licensee to engage in licensed activity while suspended or to violate order or judgment suspending license.

6. Ensure that Registrar has either of following on file [*Bus. & Prof. Code § 7125(a)*]:

NOTE:
These requirements do not apply to (1) a licensee who has no employees, or (2) a holder of an inactive license. A person with no employees must file a statement to that effect with the Board on a form provided by the Registrar. Filing a false statement is cause for disciplinary action [*Bus. & Prof. Code § 7125(b), (c)*; ***see*** *Bus. & Prof. Code § 7125.4*].

a. Current and valid Certificate of Workers' Compensation Insurance issued and filed by one or more insurers duly licensed to write workers' compensation insurance in California; or

b. Current and valid Certification of Self-Insurance issued and filed by Director of Industrial Relations.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesLabor & Employment LawEmployment RelationshipsIndependent ContractorsReal Property LawConstruction LawContractors & Subcontractors

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29-88 California Legal Forms--Transaction Guide § 88.131

§ 88.131 Obtaining Changes in Licensee's Classification

1. If licensee desires to change its primary classification, instruct licensee to reapply [*see § 88.120*] and take examination [*see § 88.122*] in new classification.

2. If licensee wants to add supplemental classification, file Official Form No. 13A-2, "Application for Additional Classification," with Registrar.

NOTE:

Relevant forms, including the additional classification form, may be ordered from the Contractors' State License Board by phone at 1-800-321-CSLB (2752), or online atwww.cslb.ca.gov/services/forms.asp. They may also be downloaded and printed out from the same web address.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicenses

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29-88 California Legal Forms--Transaction Guide § 88.132

§ 88.132 Handling Disassociation of Qualifying Individual

1. If responsible managing officer or responsible managing employee disassociates from licensed entity, have licensee or qualifying individual notify Registrar within 90 days after date of disassociation [*Bus. & Prof. Code § 7068.2*].

NOTE:

Compliance with the above requirement will prolong the effectiveness of the license for a period of 90 days from the date of disassociation. Failure to replace the qualifier within 90 days of disassociation will result in automatic suspension of the license or removal of the classification at the end of the 90 days. The failure of the licensee or the qualifier to notify the Registrar within 90 days will result in automatic suspension of the license and the removal of the qualifier from the license, effective as of the date the written notice is received at the Contractors State License Board's headquarters office. This failure to notify is grounds for disciplinary action [*Bus. & Prof. Code § 7068.2*].

The qualifying individual will be responsible for the licensee's construction operations until the Contractors State License Board receives the written notice of disassociation [*Bus. & Prof. Code § 7068.2*].

2. To replace qualifying responsible managing officer or responsible managing employee, have licensee file following with Registrar [*Bus. & Prof. Code § 7068.2*]:

a. Application prescribed by Registrar; and

b. Appropriate fee [*see Bus. & Prof. Code § 7137(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicenses

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29-88 California Legal Forms--Transaction Guide § 88.133

§ 88.133 Handling Death of Sole Proprietor, Death or Disassociation of Partner, or Dissolution of Corporation

NOTE:
An individual license is canceled on the licensed person's death [*Bus. & Prof. Code § 7076(a)*]. A partnership license is canceled when a general partner dies or is disassociated, or when the partnership is dissolved. Death of a limited partner does not affect the partnership license unless there is only one limited partner [*Bus. & Prof. Code § 7076(b), (c)*]. A joint venture license is canceled when any of its entity licenses are canceled, revoked, or disassociated, or when the joint venture itself is dissolved [*Bus. & Prof. Code § 7076(f)*]. A corporation license is canceled when the corporation is dissolved or merged, or when it surrenders its right to do business in California [*Bus. & Prof. Code § 7076(i)*].

1. On death of sole proprietor licensed as individual contractor [*Bus. & Prof. Code § 7076(a)*]:

a. Inform immediate family of right to request license continuance to complete projects in progress and undertake new work as permitted by Board's rules.

b. If continuance of license is desired:
(1) Draft and file written request at Board's headquarters office within 90 days after sole proprietor's death.

NOTE:
Approval of a continuance may be contingent on satisfying the bond requirements discussed in *§ 88.123* [*Bus. & Prof. Code § 7076(a)*; ***see*** *Bus. & Prof. Code §§ 7071.5, 7071.6*].

(2) Ensure that family member requesting continuance prepares and files application for own license before continuance expires.

2. On death of general partner [*Bus. & Prof. Code § 7076(b)*]:

NOTE:
The requirements for continuing a limited partnership when the sole limited partner dies are virtually the same as those that apply when a general partner dies, except that the license will not be canceled at all if a new limited partner is added within 90 days of death [***see** Bus. & Prof. Code § 7076(d)*].

a. Have remaining partner or partners notify Registrar of partner's death in writing within 90 days.

NOTE:
Failure to notify the Registrar of a partner's death within 90 days is grounds for disciplinary action [*Bus. & Prof. Code § 7076(b)*].

b. Inform remaining partner or partners of right to request license continuance to complete projects in progress and undertake new work as permitted by Board's rules.

c. If continuance of license is desired:

(1) Draft and file written request at Board's headquarters office within 90 days after partner's death.

(2) Ensure that surviving partners prepare and file application for new license to continue contracting after continuance expires.

3. On disassociation of general partner or dissolution of partnership [*Bus. & Prof. Code § 7076(c)*]:

a. Have disassociating partner or remaining partner or partners notify Registrar in writing within 90 days of general partner's disassociation or partnership's dissolution.

NOTE:
If written notification does not reach the Registrar within the 90-day period, the license will be canceled effective on the date an untimely written notification is received at the Board's headquarters office. Failure to notify the Registrar of the disassociation or dissolution within 90 days is grounds for disciplinary action [*Bus. & Prof. Code § 7076(c)*]. This same notice is required when a limited partner is disassociated [*Bus. & Prof. Code § 7076(e)*].

b. Inform remaining partner or partners of right to request license continuance to complete projects in progress and undertake new work as permitted by Board's rules.

c. If continuance of license is desired:

(1) Draft and file written request at Board's headquarters office within 90 days after disassociation or dissolution.

(2) Ensure that remaining general partner or partners prepare and file application for new license to continue contracting after continuance expires.

4. On cancellation, revocation, or disassociation of license of joint venture entity, or dissolution of joint venture [*Bus. & Prof. Code § 7076(f)*]:

a. See that Registrar is notified in writing within 90 days of disassociation of entity or dissolution of joint venture.

NOTE:
If written notice does not reach the Registrar within the 90-day period, the license will be canceled effective the date an untimely written notification is received at the Board's headquarters office. Failure to notify the Registrar of the disassociation or dissolution within 90 days is grounds for disciplinary action [*Bus. & Prof. Code § 7076(e)*].

b. Inform any remaining joint venture entities of right to request license continuance to complete projects in progress and undertake new work as permitted by Board's rules.

c. If continuance of license is desired:

(1) Draft and file written request at Board's headquarters office within 90 days after disassociation or dissolution.

(2) Ensure that remaining entity or entities prepare and file application for new license to continue contracting after continuance expires.

5. On dissolution, merger, or surrender of corporation's right to do business in California, ensure that Registrar is notified in writing within 90 days of event [*Bus. & Prof. Code § 7076(h)*].

NOTE:
If written notification does not reach the Registrar within the 90-day period, the license will be canceled effective on the date an untimely written notification is received at the Board's headquarters office. If the corporation fails to notify the Board of the dissolution, merger, or surrender, the license will be canceled 60 days after the Board discovers the dissolution, merger, or surrender by researching the Secretary of State's corporate records. Failure to notify the Registrar of the dissolution, merger, or surrender within 90 days is grounds for disciplinary action [*Bus. & Prof. Code § 7076(h)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawCorporationsDissolution & ReceivershipGeneral OverviewBusiness & Corporate LawCorporationsDissolution & ReceivershipTermination & Winding UpGeneral OverviewBusiness & Corporate LawGeneral PartnershipsDissolution & Winding UpGeneral OverviewGovernmentsState & Territorial GovernmentsLicenses

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29-88 California Legal Forms--Transaction Guide § 88.134

§ 88.134 Handling Inactive Licenses

NOTE:
Inactive status should be requested if the licensee will not be using the license for a significant period of time, because the renewal fee for inactive licenses is much lower than for active licenses [***see*** *Bus. & Prof. Code § 7137(e)*].

1. If licensee wants to inactivate license, submit following documents to Registrar [*Bus. & Prof. Code § 7076.5(a)*]:

NOTE:
Any licensed contractor not engaged in work or activities that require a license may apply for an inactive license [*Bus. & Prof. Code § 7076.5(b)*].

a. Official request form; and

b. Current active license certificate.

NOTE:
If the current license certificate has been lost, the licensee must pay the required fee and replace the license [*Bus. & Prof. Code § 7076.5(a)*].

2. Inform holder of inactive license that:

a. Holder may not practice as contractor until license is reinstated [*Bus. & Prof. Code § 7076.5(a)*].

b. Inactive status will not bar any disciplinary action by Board against licensee under Contractors' State License Law [*Bus. & Prof. Code § 7076.5(h)*].

c. Bonding requirements [*Bus. & Prof. Code §§ 7071.6, 7071.8, 7071.9*] will not apply [*Bus. & Prof. Code § 7076.5(d)*].

d. Qualifier requirement [*Bus. & Prof. Code § 7068*] will not apply [*Bus. & Prof. Code § 7076.5(d)*].

3. Renew inactive license on each established renewal date [*see § 88.130*] by submitting renewal application and paying inactive renewal fee [*Bus. & Prof. Code § 7076.5(f)*; *see Bus. & Prof. Code § 7137(e)*].

4. To reactivate inactive license, submit following to Registrar at any time within period for which license was issued [*Bus. & Prof. Code § 7076.5(g)*; *see Bus. & Prof. Code § 7137(e)*; *16 Cal. Code Reg. § 867*]:

NOTE:
No examination is required to reactivate an inactive license [*Bus. & Prof. Code § 7076.5(g)*].

a. Official application form; and

b. Renewal fee.

5. If licensee does not want reinstatement to be effective on later of date on which request is received or date on which full renewal fee is paid, request later effective date [*16 Cal. Code Reg. § 867(a)*].

6. If license is suspended and licensee desires reinstatement, take following steps [*Bus. & Prof. Code § 7102*]:

a. Comply with any provisions of reinstatement decision and submit proof of compliance to Registrar.

NOTE:
In the absence of any reinstatement provisions, reinstatement may be granted in the Registrar's sound discretion [*Bus. & Prof. Code § 7102*].

b. File special bond or cash deposit [*Bus. & Prof. Code § 7071.8*; *see § 88.123*].

c. Ensure that Registrar has either of following on file [*Bus. & Prof. Code § 7125(a)*]:

NOTE:
These requirements do not apply to (1) a licensee who has no employees, or (2) a holder of an inactive license. A person with no employees must file a statement to that effect with the Board on a form provided by the Registrar. Filing a false statement is cause for disciplinary action [*Bus. & Prof. Code §§ 7125(b), (c), 7125.4*].

(1) Current and valid Certificate of Workers' Compensation Insurance issued and filed by one or more insurers duly licensed to write workers' compensation insurance in California; or

(2) Current and valid Certification of Self-Insurance issued and filed by Director of Industrial Relations.

7. If license has been revoked and former licensee desires reinstatement or reissuance, take following action:

a. After one year has passed since final decision of revocation, make proper showing of each of following [*Bus. & Prof. Code § 7102*]:

NOTE:
A revoked license may not be reinstated for a minimum of one year or a maximum of five years after the final decision of revocation. In considering whether to extend the minimum period, the Registrar will consider the gravity of the violation, the history of previous violations, and criminal convictions [*Bus. & Prof. Code § 7102*].

(1) All loss caused by act or omission for which license revoked has been fully satisfied; and

NOTE:
However, if the above loss has been reduced to a monetary obligation or debt and the debt or obligation has been adjudicated in a bankruptcy proceeding, then the satisfaction of that debt or obligation is not a prerequisite for the license's reinstatement or reissuance. Any nonmonetary condition not adjudicated in a bankruptcy proceeding must be complied with [*Bus. & Prof. Code § 7102*].

(2) All conditions imposed by revocation decision have been complied with.

b. File special bond or cash deposit [*Bus. & Prof. Code § 7071.8*; *see § 88.123*].

c. If former licensee has failed or refused to pay contractor, subcontractor, consumer, materials supplier, or employee, post bond to cover that debt if it is established by recorded and unsatisfied judgment or unsatisfied arbitration award [*Bus. & Prof. Code § 7071.17*; *see § 88.123*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicenses

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29-88 California Legal Forms--Transaction Guide § 88.135

§ 88.135 Complying With Advertising Restrictions

1. If client is not licensed contractor and wants to advertise for work covered by Contractors' State License Law, instruct client to:

NOTE:
Violation of the following disclosure requirements is a misdemeanor [***see*** *Bus. & Prof. Code § 7027.1*].

a. State in advertisement that he or she is not licensed contractor [*Bus. & Prof. Code § 7027.2*].

b. Refrain from listing name in classified advertisement or directory under classification for work covered by Contractors' State License Law [*Bus. & Prof. Code § 7027*].

c. Refrain from advertising or putting out any sign, card, or other device indicating to public that client is licensed contractor [*Bus. & Prof. Code § 7027*].

2. If client is licensed contractor, instruct client to comply with advertising requirements as follows:

a. Advertise only for classification in which licensed.

NOTE:
The only exception to this requirement provides that a licensed building or engineering contractor may advertise as a general contractor [*Bus. & Prof. Code § 7027.1(a)*].

b. Include license number in all of following [*Bus. & Prof. Code § 7030.5*; *16 Cal. Code Reg. § 861*]:

(1) Construction contracts;

(2) Subcontracts and calls for bid; and

(3) Most forms of advertising.

NOTE:
The following forms of advertising are subject to the above requirement [*16 Cal. Code Reg. § 861*]: Any cards, contract proposals, signs, billboards, brochures, pamphlets, circulars, newspapers, magazines, airwave or electronic transmissions, and any directory listing for "contractors" or any other category of work for which a contractor's license is required.

c. Do not include in advertisement any reference to any bond required under Contractors' State License Law [*Bus. & Prof. Code § 7071.13*].

d. If name or position of public official is to be used in advertisement or promotional material, obtain official's written authorization [*Bus. & Prof. Code § 7190(a)*; *see Bus. & Prof. Code § 7190(b)* ("public official" defined)].

NOTE:
In addition to a written authorization, any advertisement or promotional material must include the following disclaimer: "The name of [***specify name of public official***] does not imply that [***specify name of public official***] endorses this product or service in [his ***or*** her] official capacity and does not imply an endorsement by any governmental entity." If the advertisement is printed, it must be in at least 10-point roman boldface type in a color or print that contrasts with the background so as to be easily legible, and set apart from any other printed matter. If it is broadcast, the disclaimer must be read in a clearly audible tone of voice [*Bus. & Prof. Code § 7190(a)*].

3. If client is engaged in asbestos-related services, include certification and registration numbers in advertisement [*Bus. & Prof. Code § 7099.11(a)*].

NOTE:
Contractors engaged in asbestos-related activities must be certified by the Contractors' State License Board and registered with the Division of Occupational Safety and Health [*Bus. & Prof. Code § 7058.5(a)*; *Lab. Code § 6501.5*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsGovernmentsState & Territorial GovernmentsLicenses

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DIVISION VI: PERFORMANCE OF SERVICES
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29-88 California Legal Forms--Transaction Guide § 88.136

§ 88.136 Complying With Miscellaneous Requirements

1. Report to Registrar, on a prescribed form, all changes of information under Contractors' State License Law within 90 days after changes are made [*Bus. & Prof. Code § 7083*].

NOTE:
These changes include, but are not limited to, changes in address, personnel, business name, qualifying individual bond exemption, or exemption to qualify multiple licenses [*Bus. & Prof. Code § 7083*; ***see*** *Bus. & Prof. Code §§ 7071.9* (qualifying individual bond exemption), 7068.1 (exemption to qualify multiple licenses)]. The licensee's failure to notify the Registrar of these changes within 90 days is grounds for disciplinary action, and will cause the change to be effective only as of the date the written notification is received at the Board's headquarters office [*Bus. & Prof. Code § 7083*].

2. Within 90 days after any workers' compensation insurance policy is issued to licensed contractor, take following steps [*Bus. & Prof. Code § 7125*]:

a. Provide Registrar with written report indicating name and address of insurer; and

b. Send copy of above report to insurer.

3. If proposed project requires construction permit from city or county as condition precedent to issuance of permit, file signed statement containing [*Bus. & Prof. Code § 7031.5*]:

NOTE:
Any violation of this requirement will be subject to a civil penalty of not more than $500 [*Bus. & Prof. Code § 7031.5*].

a. If applicant is licensed, all of following information:
(1) Allegation that applicant is properly licensed;

(2) Applicant's license number; and

(3) Allegation that license is in full force and effect.

b. If applicant is exempt from Contractors' State License Law, basis for exemption.

4. If client is practicing contracting business in city or county that requires issuance of business license, submit following to local jurisdiction [*Bus. & Prof. Code § 7033*]:

a. If client is licensed, signed statement that:

(1) Applicant possesses contractor's license; and

(2) License is in full force and effect.

b. If client is not licensed, proof of facts that entitle client to exemption.

5. If qualifying individual wishes to serve in same capacity for additional individual or firm, inform him or her of need to satisfy conditions specified in § 88.120 [*see Bus. & Prof. Code § 7068.1*].

6. If licensee enters United States Armed Forces, provide Registrar, within 30 days after entry, with:

a. Renewal fee; and

b. Name(s) of responsible managing person or persons who [*Bus. & Prof. Code § 7071.3*]:

NOTE:
The license will remain in effect only for the 30-day period. Any person or persons designated to conduct the licensee's business may be qualified by the Registrar. Those persons must possess the good character required of an applicant for a contractor's license, and will be removed from the licensee's business (after a hearing) if they commit any of the acts or crimes specified in *Bus. & Prof. Code § 480* [*Bus. & Prof. Code § 7071.3*].

(1) Will act for licensee during term of service;

(2) Have not committed acts or crimes constituting grounds for denial of licensure under *Bus. & Prof. Code § 480* [*see § 88.110*]; and

(3) If approved by Registrar, will have authority to act for maximum of one year after licensee's discharge [*Bus. & Prof. Code § 7071.3*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsGovernmentsState & Territorial GovernmentsLicenses

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29-88 California Legal Forms--Transaction Guide §§ 88.137-88.199

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DIVISION VI: PERFORMANCE OF SERVICES
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PART IV. FORMS

29-88 California Legal Forms--Transaction Guide § 88.200

§ 88.200 Application for Original Contractor's License

[1] Comment

[a] Use of Form

This form is the official application for an original contractor's license. It must be submitted along with an application fee [*see Bus. & Prof. Code § 7137(a)*] to the Contractors' State License Board in Sacramento. An "original license" is the first contractor's license obtained by a particular licensee.

Before completing this form, the attorney should check to see if the applicant or the proposed business or project is exempt from the requirements of the Contractors' State License Law [*see § 88.110*].

Application forms for an Original Contractor's License may be ordered from the Contractors' State License Board by phone at 1-800-321-CSLB (2752), or online at http://www.cslb.ca.gov/GeneralInformation/Library/FormsAndApplications.asp. In addition, applicants may use other forms approved by the Registrar of Contractors [*Bus. & Prof. Code § 7066.5*].

[b] Information to Be Furnished

The following information must be included in any application for an original contractor's license:

- Evidence of financial solvency [*Bus. & Prof. Code § 7067.5* (operating capital in excess of $2,500); *16 Cal. Code Reg. § 816(a)(1)*].

- Description of experience in the classification applied for [*Bus. & Prof. Code § 7068(a)*; *16 Cal. Code Reg. § 816(a)(2)*; *see* "Certification of Work Experience" portion of form].

- Information on the qualifying individual's duties and responsibilities for supervision and control of the applicant's construction operations [*Bus. & Prof. Code § 7068.1*].

- Whether applicant or applicant's personnel or anyone with whom applicant or applicant's personnel has been associated in the contracting vocation has ever been licensed or had a professional or vocational license refused or revoked [*16 Cal. Code Reg. § 816(a)(3)*].

- A current and valid Certificate of Workers' Compensation Insurance or Certificate of Self-Insurance, unless the applicant has no employees, in which case he or she must file a statement to that effect with the Registrar on a prescribed form [*Bus. & Prof. Code § 7125(a), (b)*].

The Registrar is also authorized to seek additional information relating to the applicant's qualifications [*see 16 Cal. Code Reg. § 816(c)* (Registrar has authority to require applicant to provide additional information necessary to determine applicant's qualifications)].

[c] Insufficient Applications

No license will be issued until the applicant provides the information required in the application form [*16 Cal. Code Reg. § 818(a)*; *see 16 Cal. Code Reg. § 816* (required information); *see also* [b], *above*]. Incomplete or insufficient applications will be rejected and returned to the applicant with a statement of the reasons for the rejection [*16 Cal. Code Reg. § 818(b)*; *see Bus. & Prof. Code § 7074(a)(7)* (application becomes void when applicant fails to return application rejected by Board for insufficiency or incompleteness within 90 days from date of original notice or rejection)]. An application, other than a renewal application, that is rejected for insufficiency or incompleteness must be returned within 90 days from the date of the original notice of rejection or the application will be deemed abandoned. However, the Registrar may extend this 90-day period for good cause [*16 Cal. Code Reg. § 813(a)*]. An abandoned application may not be reinstated, but the applicant may file a new application with the required fee [*16 Cal. Code Reg. § 813(b)*].

[d] Waiver of Certain Disclosure Requirements

If the applicant is eligible for waiver of the examination requirement [*see Bus. & Prof. Code § 7065.1*; *see also § 88.122*] or does not have to take the examination [*see Bus. & Prof. Code § 7065*; *see also § 88.122*], then the Registrar may exempt the applicant from supplying information about the qualifying individual's previous experience in the classification applied for [*16 Cal. Code Reg. § 816(c)*].

[e] Execution and Verification

The application must be signed under penalty of perjury [*16 Cal. Code Reg. § 816(b)*] by the qualifying individual, if any, and by the applicant [*Bus. & Prof. Code § 7067.6*]. The signature or signatures for the applicant must be by each member of its personnel [*16 Cal. Code Reg. § 816(b)*]. The personnel of an applicant include the following:

- If the applicant is an individual, the owner.

- If the applicant is a partnership, all the partners.

- If the applicant is a corporation, all the officers, including at least the president, secretary, and treasurer.

[f] Denial of Application

The Registrar of Contractors may deny any application if the applicant fails to comply with any rule or regulation adopted under the Contractors' State License Law [*see Bus. & Prof. Code § 7000 et seq.*] or if there are grounds for denial under *Bus. & Prof. Code § 480* [*Bus. & Prof. Code § 7073*; for discussion of the grounds for denial of a license under *Bus. & Prof. Code § 480*, *see § 88.110*; *see also Bus. & Prof. Code § 7074(a)* (grounds for voiding of application)]. The Registrar may also deny an application if an investigation of the applicant's activities shows that the

applicant is guilty of or has committed one or more acts or omissions constituting cause for disciplinary action [*Bus. & Prof. Code § 7090*]. The failure to pay a civil penalty or to comply with an order of correction or an order to pay a specified sum to an injured party in lieu of correction once the order has become final are also grounds for denial of (or refusal to renew) a license [*Bus. & Prof. Code § 7090.1(a)(1)*].

A licensee cited under the provisions of *Bus. & Prof. Code § 7090.1* is also automatically prohibited from serving as an officer, director, associate, partner, or qualifying individual of another licensee. The employment, election, or association of the cited licensee by any other licensee will subject the other licensee to disciplinary action. Any qualifying individual who is disassociated from a licensee pursuant to *Bus. & Prof. Code § 7090.1* must be replaced within 90 days of the date of disassociation, and failure to do so will result in the automatic suspension of the license of the other licensee [*Bus. & Prof. Code § 7090.1(b)*; *see Bus. & Prof. Code §§ 7068, 7068.2* (qualification)].

In lieu of denying licensure, the registrar may issue an applicant a probationary license with terms and conditions. During the probationary period, if information is brought to the registrar's attention regarding any act or omission of the licensee constituting grounds for discipline or denial of licensure for which the registrar determines that revocation of the probationary license would be proper, the registrar will notify the applicant to show cause within 30 days why the probationary license should not be revoked. A probationary license cannot be renewed during any period in which a show cause proceeding is pending [*Bus. & Prof. Code § 7073(e)*; *see Gov. Code § 11500 et seq.* (procedure governing show cause proceedings)].

[2] FORM

Application for Original Contractor's License

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Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsLicensesLabor & Employment LawEmployment RelationshipsIndependent ContractorsReal Property LawConstruction LawContractors & Subcontractors

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[2] FORM

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 89 HOME IMPROVEMENT AND SPECIALTY CONTRACTS

29-89 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers home improvement, service and repair, and specialty contracts. It discusses what constitutes a home improvement and focuses on the consumer protection legislation that regulates the home improvement business. It explains the statutory requirements for language in home improvement contracts. There is a limited discussion of home solicitation contracts and the regulations governing consumer credit transactions. This chapter discusses the role of specialty contractors as general contractors and as subcontractors and explains the limitations imposed on the work they may perform. It also covers the separate requirements relating to swimming pool construction contracts.

The Transaction Guide provides the information necessary to determine the laws applicable to a proposed home improvement, service and repair, swimming pool construction, or specialty construction project. It also contains a checklist of mandatory and optional provisions to be included in contracts for those projects.

The forms provide complete representative home improvement contracts and related notices. They include provisions for both financed and nonfinanced projects, and general as well as particularized specialty contracts.

This chapter does not cover the contractor's actual performance under a home improvement, service and repair, or specialty contract. For a discussion of general contract principles (for example, capacity to contract) and home solicitation contracts, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* . For discussion of the licensing and regulation of home improvement contractors, specialty contractors, and home improvement salespersons, see Ch. 88, *Licensing of Contractors* .

For an analysis of the law and forms relating to contracts and financing for the construction of homes and other large scale construction projects, and a discussion of contractors' liability for defective materials, see Ch. 30D, *Construction Contracts and Subcontracts* . For an analysis of the law and forms relating to publicly financed construction projects, see Ch. 90A, *State Government Contracts* , and Ch. 90B, *Federal Government Contracts* . For a more detailed discussion of the law governing performance bonds, see Ch. 79, *Suretyship, Guaranty, and Indemnity* .

Contract bidding procedures are not covered in this chapter, although bids should normally be solicited for home improvement or specialty projects. For an analysis of the laws governing bidding, and a representative set of related forms, see Ch. 30D, *Construction Contracts and Subcontracts* .

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[1] California Statutes

Contractors' License Law. *Bus. & Prof. Code § 7000 et seq.*

Proscribed contractual provisions. *Bus. & Prof. Code § 7034.*

Home improvement business. *Bus. & Prof. Code § 7150 et seq.*

Definitions. *Bus. & Prof. Code §§ 7150-7152.*

Prohibited business practices. *Bus. & Prof. Code §§ 7153-7158, 7160, 7161, 7163.*

Contract requirements. *Bus. & Prof. Code §§ 7159, 7159.1, 7159.2, 7159.6.*

Service and repair contract requirements. *Bus. & Prof. Code § 7159.10.*

Representations. *Bus. & Prof. Code § 7162.*

Swimming pool construction contracts. *Bus. & Prof. Code §§ 7165-7168.*

Home solicitation contracts. *Civ. Code §§ 1689.5-1693.*

Seminar sales solicitation contracts. *Civ. Code §§ 1689.20-1689.24.*

Song-Beverly Consumer Warranty Act. *Civ. Code § 1790 et seq.*

Unruh Act. *Civ. Code § 1801 et seq.* (retail installment sales).

Definitions. *Civ. Code §§ 1802.1, 1802.18.*

Required contractual provisions. *Civ. Code § 1803.3.*

Proscribed contractual provisions. *Civ. Code § 1804.1.*

Assessment of finance charge under home improvement retail sales account. *Civ. Code § 1810.10(c).*

Mechanics' liens and protection on work of improvement. *Civ. Code §§ 3082-3267.*

Notice of recordation of lien release bond. *Civ. Code § 3144.5.*

Local building regulations. *Health & Safety Code §§ 17951, 17958, 17958.5, 17958.7.*

Earthquake protection. *Health & Safety Code § 19100 et seq.*

Employment regulation and supervision. *Lab. Code § 200 et seq.*

[2] California Regulations

Limitation of work specialty contractors are allowed to undertake. *16 Cal. Code Reg. § 830(b).*

Classifications of specialty contractors. *16 Cal. Code Reg. § 832.*

Notice to owner requirement. *16 Cal. Code Reg. § 862(b).*

Checklist for homeowners. *16 Cal. Code Reg. § 872.1.*

[3] California Attorney General Opinions

Specialty classification for fix-it or handyman contractor. *55 Ops. Cal. Atty. Gen. 138 (1972)* .

Window cleaners and persons hired for general cleanup excluded from specialty contractor category. *29 Ops. Cal. Atty. Gen. 68 (1957)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawGeneral Overview

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Truth in Lending Act. *15 U.S.C. § 1601 et seq.*

Magnuson-Moss Warranty--Federal Trade Commission Improvement Act. *15 U.S.C. § 2301 et seq.*

Legal Topics:

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Banking LawConsumer ProtectionTruth in LendingGeneral Overview

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B. Secondary Sources

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§ 89.05 Law Reviews

Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection, 16 Emory Int'l L. Rev. 1 (2002).*

Imel, *Notes and Comments: Substantial Compliance with the Contractors' State License Law: An Equitable Doctrine Producing Inequitable Results, 34 Loy. L.A. L. Rev. 1539 (2001).*

Comment, *Arbitrating Consumer Claims under the Magnuson-Moss Warranty Act, 68 U. Chi. L. Rev. 1459 (2001).*

Comment, *Constructing a Solution to California's Construction Defect Problem, 30 McGeorge L. Rev. 299 (1999).*

Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System, 1998 Wis. L. Rev. 463 (1998).*

Allenby, *Perspective: Home Depot U.S.A., Inc. v. Contractors' State Licensing Board: A Lesson in Grammar for California Contractors, 19 T. Jefferson L. Rev. 295 (1997).*

Forrester, *Constructing a New Theoretical Framework for Home Improvement Financing, 75 Or. L. Rev. 1095 (1996).*

Lewis, *Trade Associations: Certifying Safety?* 27 Trial 78 (1991).

Griffith, *Truth in Lending--The Right of Rescission, Disclosure of the Finance Charge, and Itemization of the Amount Financed in Closedend Transactions, 6 Geo. Mason L. Rev. 191 (1988).*

Mair, *Unconscionability and the Enforcement of Standardized Contracts, 16 Pac. L.J. 247 (1984).*

Comment, *Release Bond Statutes: Achieving Balance in the Mechanics' Liens Laws, 28 UCLA L. Rev. 95 (1980).*

Note, *Liabilities of California Building Contractors and Construction Professionals: The Need for Equality in Legal Responsibilities, 15 Cal. W. L. Rev. 305 (1979)*.

Note, *An Empirical Study of Magnuson-Moss Warranty Act, 31 Stan. L. Rev. 1117 (1979)*.

Landers and Rohner, *A Functional Analysis of Truth in Lending, 26 UCLA L. Rev. 711 (1979)*.

Moss, *Application of the Doctrine of Estoppel in Construction Industry Litigation, 49 L.A. B. Bull. 250 (1974)*.

Comment, *Bid Shopping and Peddling in the Subcontract Construction Industry, 18 UCLA L. Rev. 389 (1970)*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 89.06 Annotations

Modern Status of Rules Regarding Tort Liability of Building or Construction Contractor for Injury or Damage to Third Person Occurring after Completion and Acceptance of Work, 75 A.L.R.5th 513 (2000) .

Annot., Products Liability-- Swimming Pools and Accessories, 65 A.L.R.5th 105 (1999) .

Annot., Stop Notice, Construction and Effect of Statutes Requiring Construction Fundholder to Withhold Payments upon Stop Notice from Subcontractor, Materialman, or Other Person Entitled to Funds, 4 A.L.R.5th 772 (1992) .

Annot., Violation of Governmental Regulations as to Conditions and Facilities of Swimming Pools as Affecting Liability in Negligence, 79 A.L.R.4th 461 (1990) .

Annot., Claim of Fraud in Inducement of Contract as Subject to Compulsory Arbitration Clause Contained in Contract, 11 A.L.R.4th 774 (1982) .

Annot., Consumer Product Warranty Suits in Federal Court Under Magnuson-Moss Warranty--Federal Trade Commission Improvement Act (*15 U.S.C. § 2301 et seq.*), *59 A.L.R. Fed. 461 (1982)* .

Annot., Good Faith Defense to Truth in Lending Act Liability, Under Section 130(f) of Act (*15 U.S.C. § 1640(f)*), *50 A.L.R. Fed. 201 (1980)* .

Annot., Liabilities or Risks of Loss Arising out of Contract for Repairs or Additions to, or Installments in, Existing Building That, Without Fault of Either Party, Is Destroyed Pending Performance, 28 A.L.R.3d 788 (1969) .

Annot., Building Contractor's Liability, Upon Bond or Other Agreement to Indemnify Owner, for Injury or Death of Third Persons Resulting From Owner's Negligence, 27 A.L.R.3d 663 (1969) .

Annot., Failure of Artisan or Construction Contractor to Comply With Statute or Regulation Requiring a Work Permit or Submission of Plans as Affecting His Right to Recover Compensation From Contractee, 26 A.L.R.3d 1395 (1969) .

Legal Topics:

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§ 89.07 Text References

[1] Matthew Bender Sources

California Legal Forms (Matthew Bender).
Ch. 25A, *Security Instruments for Real Estate Financing* .
Ch. 30A, *Construction Financing* .
Ch. 30B, *Zoning, Building, and Environmental Entitlements and Permits* .
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Ch. 30D, *Construction Contracts and Subcontracts* .
Ch. 31, *Mechanics' Liens* .
Ch. 45, *Consumer Installment Loans and Credit Sales* .
Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .
Ch. 79, Suretyship, Guaranty, and Indemnity, § 79.240 et seq. (construction contract bonds).
Ch. 88, *Licensing of Contractors* .
Ch. 92, *Service Contracts* .

California Forms of Pleading and Practice (Matthew Bender).
Ch. 56, *Architects* .
Ch. 104, *Building Contracts* .
Ch. 127, *Consumer Protection* .
Ch. 177, *Damages* .

California Real Estate Law and Practice (Matthew Bender).
Ch. 430, *Licensing of Contractors* , Part F (regulation of home improvement business).
Ch. 431, *The Owner-Architect Relationship and Contract.*
Ch. 432, *The Owner-Prime Contractor Relationship and Contract* .
Ch. 433, *Subcontractors and Subcontracts.*
Ch. 440, *Construction Contract Remedies* .

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Ch. 450, *Introduction to the Mechanics' Lien Law* .
Ch. 451, *Mechanics' Liens* .
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PART II. LEGAL BACKGROUND

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§ 89.10 Statutory Requirements Applicable to All Construction Contracts

[1] Contents of Written Contract

To accommodate those entitled to give preliminary 20-day notice in connection with private works of improvement, every written contract between a property owner and an original contractor must provide space for the owner to enter his or her name and residential and business addresses. If the contract is not one for home improvements or swimming pool construction, it must also include space for the owner to enter the name and address of any construction lenders. The original contractor must make the owner's and lender's information available to anyone seeking to serve a preliminary 20-day notice [*Civ. Code § 3097(l), (m)*]. If a private work of improvement involves subcontracting any of the work, any contract between an original contractor and a subcontractor, or between subcontractors, must provide space for the name and address of the owner, original contractor, and any construction lender [*Civ. Code § 3097(l), (m)*]. If the owner secures construction financing after construction is underway, he or she must provide all lenders' names and addresses to each person who has given the owner a preliminary 20-day notice [*Civ. Code § 3097(n)*]. For discussion of the preliminary 20-day notice requirement for private works of improvement, see *Ch. 31, Mechanics' Liens, § 31.202[1]*.

[2] Licensing Requirements

In general, no person engaged in the business or acting in the capacity of a contractor may bring or maintain any action, or recover in law or equity in any action, to collect compensation for performing any act or contract for which a license is required without alleging that he or she was a duly licensed contractor at all times during the performance of the act or contract, regardless of the merits of the cause of action [*Bus. & Prof. Code § 7031(a)*; *MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co. (2005) 36 Cal. 4th 412, 430-431, 30 Cal. Rptr. 3d 755, 115 P.3d 41]* . Section 7031 does not allow a contractor who was unlicensed at any time during contractual performance to recover compensation for individual acts performed while he or she was duly licensed [*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co. (2005) 36 Cal. 4th 412, 425, 30 Cal. Rptr. 3d 755, 115 P.3d 41]* . Furthermore, owners or tenants who use unlicensed contractors may not be able to pursue complaints through the Contractors State License Board. The only remedy may be in civil court.

In addition, the owner or tenant may be liable for damages arising out of any injuries to the unlicensed contractor or the

unlicensed contractor's employees [*see Heiman v. Workers' Comp. Appeals Bd. (2007) 149 Cal. App. 4th 724, 735* (owner or occupant of residential dwelling who hires unlicensed contractor whose employee is injured may be "employer" liable for workers' compensation under *Lab. Code § 2750.5* or *3351(d)* if the employee worked sufficient hours under *Lab. Code § 3352(h)*, and may also be liable in tort under *Lab. Code § 2750.5*); *see also Mendoza v. Brodeur (2006) 142 Cal. App. 4th 72, 47 Cal. Rptr. 3d 310]* . In such cases, homeowners may not have workers' compensation coverage under their homeowners' policies, which often require that the contractor be licensed for coverage to apply.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsPublic Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 89 HOME IMPROVEMENT AND SPECIALTY CONTRACTS
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§ 89.11 Home Improvement Contracts

[1] Governing Statutes

With the exception of certain agreements for the construction of swimming pools [*see Bus. & Prof. Code §§ 7165-7168*; *see also § 89.13*], home improvement contracts are governed by *Bus. & Prof. Code § 7150 et seq.*

[2] Types of Home Improvement Contracts

[a] Agreement for Performance of Home Improvement

There are two types of "home improvement contracts." The first is an agreement between a contractor and an owner or tenant for the performance of a home improvement [*Bus. & Prof. Code § 7151.2*]. Any work (for example, repair, modernization, conversion, or addition) performed on residential property is a "home improvement." Specifically, home improvements include work affecting structures or land (for example, driveways, terraces, patios, landscaping, fences, porches, garages, fallout shelters, and basements) adjacent to dwellings.

[b] Agreement for Sale, Furnishing, or Installation of Goods or Services

The second type of home improvement contract is an agreement between a salesperson and an owner or tenant for the sale, furnishing, or installation of home improvement goods or services [*Bus. & Prof. Code § 7151.2*]. "Home improvement goods and services" are tangible chattels (for example, fencing, carpeting, texture coating, and heating or air conditioning equipment) and labor (for example, termite extermination) bought in connection with the improvement of real property [*Bus. & Prof. Code § 7151*; *see Civ. Code § 1689.5(c), (d)*]. Contracts for home improvement goods and services secured by a lien on real property must meet specific requirements [*see Bus. & Prof. Code §§ 7159.1, 7159.2*; *see also § 89.11[7]*].

[c] Service and Repair Contracts

Like home improvement contracts, service and repair contracts are also subject to specific requirements. A service and repair contract is an agreement between a general or specialty contractor, or salesperson for such a contractor, who is

licensed or subject to be licensed with regard to the transaction, and a homeowner or a tenant, for the performance of a home improvement, that conforms to specified requirements [*see Bus. & Prof. Code § 7159.10(a)(1)*].

Some contracts that fall within these general definitions must include specific information and statutory disclosures and therefore must be in writing [*see Bus. & Prof. Code §§ 7159-7159.14*; *see also § 89.11[3]*].

[3] Requirements for Written Home Improvement and Service and Repair Contracts

[a] Home Improvement Contracts

Although *Bus. & Prof. Code § 7159*, which sets forth the content requirements for a home improvement contract, provides that such contracts may be oral or written, there is no practical way to satisfy those requirements in the absence of a writing; though the contract may consist of more than one document. Thus, the following discussion assumes that a writing is required for a home improvement contract that is between a contractor and an owner or between a contractor and a tenant, regardless of the number of residence or dwelling units contained in the building in which the owner or tenant resides, if [*Bus. & Prof. Code § 7159(b)*]:

- The work is to be performed in, to, or on the owner's or tenant's residence or dwelling unit;

- The contract is for the performance of a home improvement, and includes all labor, services, and materials to be furnished and performed by the contractor [*see Bus. & Prof. Code § 7151* ("home improvement defined")]; and

- The aggregate contract price specified in the contract, including all labor, services, and materials to be furnished by the contractor, exceeds $500.

The home improvement contract content requirements do not apply to service and repair contracts, which are subject to their own requirements [*see* Bus. & Prof. Code § 7159.10; *see also § 89.11[3][b]*]. These requirements also do not apply to contracts for the sale, installation, and servicing of a fire alarm sold in conjunction with an alarm system, provided (1) all costs attributable to making the system operable do not exceed $500, and (2) the licensee complies with the requirements that are specific to the sale, installation, and servicing of fire alarm systems [Bus. & Prof. Code § 7159(a)(3), (4); *see* Bus. & Prof. Code § 7159.9].

A writing is also required for an agreement between a salesperson, whether or not he or she is a home improvement salesperson, and an owner or tenant, regardless of the number of residence or dwelling units contained the building in which the owner or tenant resides, which provides for the sale, installation, or furnishing of home improvement goods or services [*Bus. & Prof. Code § 7159(b)*; *see Bus. & Prof. Code §§ 7151, 7152* ("home improvement goods and services" and "home improvement salesperson" defined)].

[b] Service and Repair Contracts

A service and repair contract is an agreement between a general or specialty contractor, or salesperson for such a contractor [*see Bus. & Prof. Code § 7159.10(f)*], who is licensed or subject to be licensed with regard to the transaction, and a homeowner or a tenant, for the performance of a home improvement that meets the following conforming requirements [*Bus. & Prof. Code § 7159.10(a)(1)*]:

- The contract amount can be no more than $750;

- The prospective buyer must initiate contact with the contractor to request the work;

- The contractor may not sell the buyer goods or services beyond those reasonably necessary to take care of the particular problem that caused the buyer to contact the contractor; and

- No payment will be due, or accepted by the contractor, until the work is completed [*see Bus. & Prof. Code § 7159.10(a)(2)* ("work is completed" defined)].

If all of these conforming requirements are *not* met, a contract that is presented to the buyer as a service and repair contract will be treated as a home improvement contract, and must satisfy the requirements for such a contract, including any rights to rescind, regardless of the aggregate contract price [*Bus. & Prof. Code § 7159.10(b)*; *Civ. Code § 1689.6(a)(3)(B)*; *see Bus. & Prof. Code § 7159(c)-(e)* (applicable home improvement contract requirements); *Civ. Code §§ 1689.6, 1689.7* (applicable rescission rights)].

If all of the conforming requirements are met, the notices and requirements described in *Bus. & Prof. Code § 7159.10(c)* must be included [*see §§ 89.131, 89.201[1]*].

[c] Enforcement of Oral Agreements

A contractor who undertakes a home improvement project under an oral contract in violation of the requirements for a written contract [*see Bus. & Prof. Code § 7159*] is subject to a criminal fine or imprisonment [*see Bus. & Prof. Code § 7159*]. However, contrary to the general rule that illegal contracts are void, the oral contract may be enforceable. Whether or not it will be enforced depends on a factual analysis and a balancing of public policy considerations. The writing requirement is intended to protect consumers in an economic area that would otherwise provide an opportunity for abuse by contractors. Thus, an oral home improvement contract may be enforced if [*see* Calwood Structures, Inc. v. Herskovic (1980) 105 Cal. App. 3d 519, 522, 164 Cal. Rptr. 463 , overruled on other grounds, Asdourian v. Araj (1985) 38 Cal. 3d 276, 293 n.11, 211 Cal. Rptr. 703, 696 P.2d 95] :

- The project is completed;

- The violation of the writing requirement does not involve moral turpitude;

- The penalty resulting from denial of enforcement is disproportionately harsh in relation to the violation; and

- The owner or tenant would be unjustly enriched at the contractor's expense.

The requirement for a written home improvement contract for an amount exceeding $500 [*Bus. & Prof. Code § 7159*] applies to a home improvement contract entered into by a real estate investor [Asdourian v. Araj (1985) 38 Cal. 3d 276, 291, 211 Cal. Rptr. 703, 696 P.2d 95]. Although a contract that violates this requirement would generally be void, that rule is not inflexible. In compelling cases, illegal contracts will be enforced to avoid unjust enrichment to one party and a disproportionately harsh penalty against the other. Thus, an unwritten home improvement contract for an amount exceeding $500 may be enforced [Asdourian v. Araj (1985) 38 Cal. 3d 276, 291-292, 211 Cal. Rptr. 703, 696 P.2d 95]. Moreover, such contracts do not involve the kind of illegality that automatically renders an agreement void [Asdourian v. Araj (1985) 38 Cal. 3d 276, 293, 211 Cal. Rptr. 703, 696 P.2d 95].

PRACTICE TIP:

Effect of Failure to Obtain Permit. The applicable statute does not clarify whether the home improvement contract is unenforceable if the "home improvement contractor" does not obtain a permit as required by local law. Arguably, the homeowner could defend enforcement of the contact on the ground that it was illegal. The contractor might reply that if it was illegal, it was the homeowner's responsibility to obtain the permit; the homeowner might then reply that it had delegated that responsibility to the home

improvement contractor. Most likely, a court would resolve the claim by finding that the parties were "in pari delicto" and at least award to the home improvement contractor a restitution remedy equal to the fair market value of the services rendered or the value added to the property by the contractor. *Commentary by Timothy F. O'Leary.*

[4] Parties

[a] In General

Home improvement contracts may be entered into by contractors [*see § 89.11[4][b]*], salespersons [*see § 89.11[4][c]*], property owners, and tenants. If the party contracting to have work performed is a tenant, the work must affect the unit in which that tenant resides [*see Bus. & Prof. Code § 7151.2*]. It is also important to identify the capacity under which a contractor will work on a construction project since the contractor may only perform activities for which he or she is licensed [*see* Ch. 88, *Licensing of Contractors* ; *see also* Ch. 30D, *Construction Contracts and Subcontracts*].

For a more detailed discussion of home improvement contractors, home improvement salespersons, and the licensing and registration regulations with which they must comply, see Ch. 88, *Licensing of Contractors* .

[b] "Home Improvement Contractor"

A "home improvement contractor," including a swimming pool contractor, is a contractor as defined and licensed under the Contractors' State License Law [*see Bus. & Prof. Code § 7100 et seq.*] who is engaged in the business of home improvement either full or part time [*Bus. & Prof. Code § 7150.1*]. Home improvement contractors may be either general building contractors [*see Bus. & Prof. Code § 7057*] or specialty contractors [*see Bus. & Prof. Code § 7058*; *see also § 89.12[1]*].

[c] "Home Improvement Salesperson"

A "home improvement salesperson" is a person employed by a licensed home improvement contractor to solicit, sell, negotiate, or execute contracts for home improvements, for the sale, installation, or furnishing of home improvemente goods or services, or of swimming pools, spas, or hot tubs [*Bus. & Prof. Code § 7152(a)*]. The following individuals are specifically excluded from the home improvement salesperson classification [*Bus. & Prof. Code § 7152(b)*]:

- Officers of corporations licensed under the Contractors' State License Law.

- General partners listed on the license records of licensed partnerships.

- Persons who qualify as contractors on behalf of other firms or individuals [*see Bus. & Prof. Code § 7068*; *but see Handyman Connection of Sacramento, Inc. v. Sands (2004) 123 Cal. App. 4th 867, 889-890, 20 Cal. Rptr. 3d 727* (salesperson licensed only in specialty classification unrelated to home improvement goods and services that he sold was not exempt from registration requirement as qualifying individual)].

- Salespersons who make all their sales pursuant to negotiations between the parties if the negotiations are initiated by the prospective buyer at or with a general merchandise retail establishment that operates from a fixed location where goods or services are offered for sale.

- Persons who contact prospective buyers for the exclusive purpose of scheduling appointments for a registered home improvement salesperson.

- Bona fide service repairpersons employed by a licensed contractor and responding to a

buyer-initiated service, repair, or emergency repair call.

The exemption provided to the first three categories listed above applies only to those individuals who, at the time of the sales transaction, are listed as personnel of record for the licensee responsible for soliciting, negotiating, or contracting for a service or improvement that is subject to the statutes governing the home improvement business [Bus. & Prof. Code § 7152(c); *see* Bus. & Prof. Code § 7150 et seq.].

[5] Required Contents

[a] Home Improvement Contracts

If the aggregate price of a home improvement contract exceeds $500, the contract must contain certain statements and notices specified by statute. It must include information regarding the parties and must also describe the work to be done, the materials to be used, and the terms under which payments will be made [*Bus. & Prof. Code § 7159*; *see § 89.130*, P 1]. A contractor's failure to include the required information in a home improvement contract is a misdemeanor [*see Bus. & Prof. Code § 7159*].

For a list of the provisions that must be included in a contract for a home improvement if the aggregate price exceeds $500, see *§ 89.200[1][f][i]*.

PRACTICE TIP:

Disclosure Requirements. A fertile area for legal actions brought by buyers of residential real estate is the failure of the seller to disclose that home improvement contracts were performed without the benefit of a permit. The Transfer Disclosure Statute requires that the seller state whether the work was performed without a permit or without being in compliance with building codes [*see Civ. Code § 1102.6*]. Practitioners should always recommend to sellers that they disclose any home improvement contracts that the sellers have had performed. If the seller is not aware whether the work was performed with a permit when it should have been, or whether it was in compliance with building codes, then at least the disclosure of the contract's existence, the identity of the contractor, and the description of the work performed might place the onus of investigation on the buyer and relieve the seller of liability. *Commentary by Timothy F. O'Leary.*

[b] Service and Repair Contracts

Similar to a home improvement contract, a service and repair contract, which by definition has an upper limit of $750 [*see Bus. & Prof. Code § 7159.10(a)*], also must include statements and notices specified by statute, as well as information regarding the parties and a description of the work to be done [*see Bus. & Prof. Code § 7159.10(c)*]. For a list of the required provisions and notices, see *§§ 89.131* and *89.201[1]*.

[6] Provisions for Loans

[a] Contract Is Unenforceable Under Certain Conditions

A home improvement contract is unenforceable against the buyer if obtaining a loan for all or part of the contract price is a condition precedent to the contract or if the contractor provides financing, in any way helps the buyer obtain a loan, or refers the buyer to a lender or loan arranger, unless certain requirements are satisfied. These requirements are that the lender must in fact agree to make the loan, the buyer must agree to accept the loan, and the buyer must not rescind the loan or financing transaction within the three-day period prescribed by the federal Truth in Lending Act [*Bus. & Prof. Code § 7163(a)*; *see 15 U.S.C. § 1635*].

Until these requirements are satisfied, the contractor may not deliver any property or perform any services other than obtaining building permits or other similar services preliminary to the commencement of the home improvement for which no mechanics' lien can be claimed [*Bus. & Prof. Code § 7163(b)(1)*], or represent in any manner that the contract is enforceable or that the buyer has any obligation under the contract [*Bus. & Prof. Code § 7163(b)(2)*]. If the contractor performs any of these acts, the contract is rendered unenforceable [*Bus. & Prof. Code § 7163(b)*].

[b] Refund of Consideration and Return of Property

If the contract is unenforceable under the provisions in [a], *above*, the contractor must immediately and unconditionally refund all consideration given by the buyer. If the buyer gave property as consideration and the contractor does not or cannot return it, he or she must immediately return its fair market value or the value specified for it in the contract, whichever is greater [*Bus. & Prof. Code § 7163(c)*].

The buyer must make any property delivered by the contractor under an unenforceable contract available for return to the contractor if it is practical to return it without causing damage to the buyer, if the contractor returns any consideration received, and if the contractor picks up the property at its expense within 60 days after execution of the contract [*see Bus. & Prof. Code § 7163(d)(2)*]. Otherwise, the buyer may retain, without obligation, any services or property provided under the contract [*Bus. & Prof. Code § 7163(d)(1)*].

These rules apply to home improvement contracts. "Goods" are covered regardless of whether they are to become fixtures or not [*Bus. & Prof. Code § 7163(e)*]. The rights and remedies discussed above are nonexclusive and cumulative with other legal rights and remedies [*Bus. & Prof. Code § 7163(f)*].

[c] Waiver

In general, any waiver of the requirements of *Bus. & Prof. Code § 7163* is contrary to public policy, void, and unenforceable [*Bus. & Prof. Code § 7163(g)*]. However, the buyer may waive the provisions of *Bus. & Prof. Code § 7163(a)* and *(b)* to the extent that the contract is executed in connection with emergency repairs or services necessary for the immediate protection of people or property. The buyer's waiver for emergency repairs or services must be in a dated written statement. The statement must (1) describe the emergency, (2) state that the contractor has informed the buyer of *Bus. & Prof. Code § 7163(a)* and *(b)* and that the buyer waives those provisions, and (3) be signed by each owner of the property. Waivers on printed forms are void and unenforceable [*Bus. & Prof. Code § 7163(g)*].

For a form meeting the statutory requirements for such a waiver, see *§ 89.206[2]*.

[d] Swimming Pool Contracts

If a swimming pool contract is to be financed by a third party lender and certain statutory conditions are met, the requirements of *Bus. & Prof. Code § 7165* may be substituted for those of *Bus. & Prof. Code § 7163(a)(1)-(3)* [*Bus. & Prof. Code § 7165*]. For a form containing the required disclosures, see *§ 89.202[2]*.

[7] Requirements for Contracts Secured by Real Property

No home improvement goods or services contract of $5,000 or less may provide for a security interest in real property, except a mechanic's lien or other interest that arises by operation of law. Any lien purportedly created by such a contract is void and unenforceable [*Bus. & Prof. Code § 7159.2(a)*].

When a home improvement goods or services contract of more than $5,000 is secured by a mortgage or deed of trust on real property, the person or entity making the loan may pay the contractor only by an instrument payable to the borrower or jointly to the borrower and contractor or, if the borrower so elects, through a third-party escrow agent under

the terms of a written agreement signed by the parties before the funds are disbursed [*Bus. & Prof. Code § 7159.2(b)*].

With specified exceptions, any contract for the sale of home improvement goods or services offered by door-to-door sale that contains or is secured by a lien on real property must be accompanied by a prescribed notice [*Bus. & Prof. Code § 7159.1*]. For a form of notice, see *§ 89.208[2]*. A security interest created in any door-to-door sales contract that does not provide the notice is void and unenforceable [*Bus. & Prof. Code § 7159.1*].

The notice requirement does not apply to any of the following [*Bus. & Prof. Code § 7159.1(a)-(c)*]:

- Contracts subject to the Unruh Act [*see Civ. Code § 1801 et seq.*; *see also § 89.18[1]*];
- Mechanics' liens [*see Civ. Code § 3109 et seq.*; *see also* Ch. 31, *Mechanics' Liens*]; and
- Home improvement goods or services contracts of $5,000 or less [*see Bus. & Prof. Code § 7159.2(a)*; *see* discussion *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 89.12 Specialty Contractors

[1] Definitions

Many home improvement projects are performed by general building contractors who let out specialty work (e.g., plumbing, electrical wiring, and painting) to subcontractors. A "general building contractor" is a contractor who works on structures for support or shelter of persons, animals, or chattels and who, in doing so, uses at least two unrelated building trades or crafts [*see Bus. & Prof. Code § 7057(a)*].

A "specialty contractor" is one whose work requires a particular skill and who uses specialized building trades or crafts in his or her principal contracting business [*see Bus. & Prof. Code § 7058*]. For a list of classes of specialty contractors and a discussion of contractor classifications, see Ch. 88, *Licensing of Contractors* .

[2] Incidental and Supplemental Work

A specialty contractor may perform work in multiple crafts or trades in which he or she is not licensed, provided that the work is incidental and supplemental to work in the craft for which the specialty contractor is licensed [*Bus. & Prof. Code § 7059(a)*].

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§ 89.13 Swimming Pool Contracts

[1] Treated as Home Improvement Contracts, Generally

Contracts for the repair, remodeling, altering, converting, modernizing, or construction of swimming pools (including spas and hot tubs) adjacent to dwelling houses are home improvement contracts [*Bus. & Prof. Code §§ 7151.2, 7151*]. Therefore, they are subject to the provisions governing home improvement contracts [*Bus. & Prof. Code § 7150 et seq.*; *see § 89.11*]. However, swimming pool contracts are also subject to additional rules [*see Bus. & Prof. Code §§ 7165-7168*]. In addition, certain swimming pool contracts are exempt from the rules governing home improvement contracts [*see § 89.13[4]*].

[2] Special Provisions Regarding Loans

As with other home improvement contracts [*see § 89.11[6]*], if obtaining a loan is a condition precedent to the contract, or if the contractor provides or assists in obtaining financing, a swimming pool contract is not normally enforceable until a third party agrees to make a loan to finance the construction cost of the swimming pool, the buyer agrees to accept the loan, and the buyer does not cancel the loan within the period prescribed by the Truth in Lending Act [*see 15 U.S.C. § 1601 et seq.*] or Regulation Z [*Bus. & Prof. Code § 7163(a), (b)*; *see* 12 C.F.R. pt. 226].

However, an alternative procedure is available for swimming pool contracts. The buyer may ask the contractor to start work and deliver materials before the cancellation period of the loan is over if [*Bus. & Prof. Code § 7165(e), (f)*]:

- The lender has agreed in writing to provide financing for the maximum estimated construction cost of the swimming pool.

- The lender has given the buyer a written copy of the terms and conditions of a loan for the maximum estimated cost, including the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and a description of the security interest to be taken.

- The lender has agreed that if the construction cost is determined after completion of excavation to be a smaller amount than the maximum estimated construction cost, the lender will offer a loan for that

smaller amount on the same terms and conditions.

- The lender has agreed in writing to offer those terms and conditions for a period of not less than 15 days following completion of the excavation of the swimming pool.

- The required statutory notice is set forth on a document separate and apart from the swimming pool contract in the required form.

- The buyer acknowledges receipt of all required writings and, no sooner than three business days after receiving them, signs the notice form to request the contractor to begin construction before the expiration of the buyer's loan rescission period.

- The contractor provides the buyer with a copy of the buyer's signed request at the time of its execution.

These requirements apply to each buyer who signs the swimming pool contract or the promissory note, other evidence of indebtedness, or security interest incident to the loan for swimming pool construction [*Bus. & Prof. Code § 7165(c), (g)*].

For a discussion of the notice and disclosure requirements and the text of the statutory form, see *§ 89.202*.

[3] Drafting Requirements

Any contract whose primary purpose is the construction of a swimming pool must comply with certain drafting requirements or the contract is void and unenforceable by the contractor as contrary to public policy [*Bus. & Prof. Code § 7167(a)*; *see Bus. & Prof. Code § 7159(c)(4), (5), (d)(7)-(9)* (applicable requirements)].

[4] Certain Swimming Pool Contracts Exempt from Home Improvement Contract Requirements

In addition to the alternative lending procedures described in § 89.14[2], swimming pool contracts are treated differently from other home improvement contracts in other ways. Contracts for the construction of swimming pools to be built for the use and enjoyment of other than a single-family unit on or contiguous to premises occupied only by a single-family unit, or for the construction of swimming pools built as part of an original building plan by the same contractor who builds a single-family dwelling unit on the premises, are exempt from home improvement contract requirements [*Bus. & Prof. Code § 7166*].

[5] Attorneys' Fees

In any action arising out of a swimming pool construction contract the prevailing party is entitled to reasonable attorneys' fees [*Bus. & Prof. Code § 7168*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 89.14 Installation and Warranty of Goods

[1] Implied Warranty

An implied warranty that goods furnished under a home improvement contract are reasonably suitable for their ordinary use may be imposed in certain cases. When the contractor or subcontractor who performs the home improvement furnishes the materials with which the work is performed, he or she may be liable for any defect in those materials under a theory similar to the implied warranty of merchantability established by the Uniform Commercial Code [*see* Aced v. Hobbs-Sesack Plumbing Co. (1961) 55 Cal. 2d 573, 582-583, 12 Cal. Rptr. 257, 360 P.2d 897 ; *see also Com. Code § 2314*].

PRACTICE TIP:

Presumption That Defect Is Repaired. Sellers often fall into the trap of presuming that the home improvement contractor successfully has repaired the defect. Practitioners should conservatively recommend to sellers that they describe generally the work performed pursuant to a home improvement contract, the identity of the contractor, and if it is still available, provide a copy of the contract. Sellers who fail to disclose the existence of the home improvement contract may do so thinking that the defect has been repaired, and thus since no material defect exists, it need not be disclosed. However, if after the close of escrow the new buyer discovers that the condition persists, this innocent intent might well be misconstrued by the buyer. The buyer may claim that the home improvement repairs were cosmetic, and that the seller's failure to disclose the home improvement contract was at least negligent, or worse, evidence of an intent to conceal a material defect. *Commentary by Timothy F. O'Leary*

[2] Magnuson-Moss Warranty--Federal Trade Commission Improvement Act

[a] "Consumer Product" Defined

A home improvement contractor or salesperson who offers a written warranty covering home improvement goods is a warrantor who must comply with the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act [*15 U.S.C. § 2301 et seq.*], which governs warranties of consumer products. For purposes of the Act, a "consumer product" is any tangible personal property distributed in commerce and normally used for personal, family, or household

purposes including goods intended to be installed in real property [*see 15 U.S.C. § 2301(1)*]. Accordingly, the definitions of "consumer products" and "home improvement goods" are functionally identical. Both definitions encompass major kitchen appliances, furnaces, air conditioners, water heaters, and similar items.

For additional coverage of the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act, see Ch. 52, *Sale of Goods Under the Uniform Commercial Code* , Part III(I)(7) of the Transaction Guide.

[b] Contents of Warranty

The Act requires that the terms of a written warranty of consumer goods be set forth conspicuously and in understandable language. The warranty must include certain detailed statements [*see 15 U.S.C. § 2302(a)*; *see also § 89.130*, P 4]. The required statements are intended to let the consumer know the warranty's limits and to provide the consumer with all information necessary to obtain the warrantor's performance under its terms.

[c] Duties of Warrantors, Suppliers, Contractors, and Sellers

The warrantor must agree to perform in a specified manner in order to meet federal minimum standards for warranties. If the goods malfunction, are defective, or fail to conform with the written warranty, the warrantor must remedy the problem within a reasonable time and without charge. There can be no limitation on the duration of an implied warranty [for an analysis of implied warranties, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* , Part III(J) of the Transaction Guide]. The warrantor may not exclude or limit consequential damages for breach of the warranty unless the exclusion or limitation appears conspicuously on the face of the warranty. If, after a reasonable number of attempts, the warrantor is unable to repair a defective product, it must permit the consumer to elect either a replacement of the product without charge or a refund [*see 15 U.S.C. § 2304(a)(1)-(4)*].

The Act restricts the ability of suppliers [*see 15 U.S.C. § 2301(4)*] who make written warranties of consumer products or who, no later than 90 days after sale, enter into service contracts with consumers, to disclaim or modify any implied warranties they may have made [*see 15 U.S.C. § 2308*]. Warrantors are encouraged to establish informal dispute resolution procedures [*15 U.S.C. § 2310(a)(1)*] and, if they do so, they must include an explanation of those procedures in their warranties [*see 15 U.S.C. § 2302(a)(7)*].

A contractor who makes an express warranty of consumer goods may also have to comply with the provisions of the Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*]. For a complete discussion of the requirements of the Song-Beverly Consumer Warranty Act, see *Ch. 92, Service Contracts, §§ 92.51, 92.52[2], 92.222, 92.223.*

A seller may not, directly or indirectly, enter into a consumer credit contract for the sale of goods or services which does not contain a notice of the consumer's claims and defenses afforded by applicable federal regulations [*see 16 C.F.R. § 433.2*].

[d] Remedies

Any violation of the Act constitutes a method of unfair competition and subjects the violating party to federal criminal penalties [*15 U.S.C. § 2310(b); see 15 U.S.C. § 45(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsImplied WarrantiesGeneral OverviewContracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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§ 89.15 Representations Regarding Brand Names or Trademarks

Any representation that a contractor makes regarding the brand name, trademark, quality, or size of goods or materials that he or she will provide pursuant to a home improvement contract must be set out in writing in the contract. Written confirmation of the representation must appear in the contract specifications and must include a description of the goods or materials as well as any brand name, model number, or similar designation [*Bus. & Prof. Code § 7162(a)*]. A contractor who fails to provide goods or materials conforming to these representations is subject to disciplinary action [*Bus. & Prof. Code § 7162(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsTrademark LawSubject MatterNamesGeneral Overview

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29-89 California Legal Forms--Transaction Guide § 89.16

§ 89.16 Bonding Requirements

All contractors licensed in California must be bonded [*see* Ch. 88, *Licensing of Contractors*]. However, if an owner or general contractor wants to assure that the investment in a construction project is protected and that work will proceed, he or she must specifically require the contractor to secure payment and performance bonds. For a more detailed discussion of bonding and representative payment and performance bonds, see Ch. 79, *Suretyship, Guaranty, and Indemnity* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewGovernmentsState & Territorial GovernmentsLicensesReal Property LawConstruction LawContractors & Subcontractors

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29-89 California Legal Forms--Transaction Guide § 89.17

§ 89.17 Home Solicitation Contracts

[1] Definitions

A "home solicitation contract or offer" is any contract or offer for goods and/or services that is made at some location other than business or trade premises [*see Civ. Code § 1689.5(a)*]. The emphasis in characterizing a transaction as a home solicitation contract is on the place at which the contract is made and not on which party initiated the steps leading up to execution of the agreement [*Williams v. Kapilow & Son, Inc. (1980) 105 Cal. App. 3d 156, 161, 164 Cal. Rptr. 176]* . For purposes of the law governing home solicitation contracts, the definitions of "goods" and "services" [*see Civ. Code § 1689.5(c), (d)*] are functionally identical to the definitions of those terms contained in the Contractors' State License Law [*see Bus. & Prof. Code § 7151*; *see also § 89.11[2]*].

[2] Purpose of Regulation

The regulation of home solicitations focuses on protecting consumers against pressures that arise when salespersons appear at their homes [*see Weatherall Aluminum Products Co. v. Scott (1977) 71 Cal. App. 3d 245, 248, 139 Cal. Rptr. 329* ; *see also Civ. Code §§ 1689.6, 1689.7*]. Any confession of judgment or waiver of a consumer's rights under the laws governing home solicitations is void as against public policy [*Civ. Code § 1689.12*]. The contract must be written in the same language that was principally used in the oral sales presentation [*Civ. Code § 1689.7(a)(1)*].

[3] Exemptions from Laws Governing Home Solicitation Contracts

The laws governing home solicitation contracts do not apply to any transaction in which the consumer has rescission rights under the Truth in Lending Act [*Civ. Code § 1689.5(a)*; *see § 89.18[1]*].

Furthermore, the laws governing home solicitation contracts do not apply to any contract for repair services with a licensed contractor for less than $100, when (1) the negotiation between the parties was initiated by the prospective purchaser, and (2) the contract contains a written and dated statement signed by the prospective purchaser stating that the prospective purchaser initiated the contract negotiation [*Civ. Code § 1689.5(a)*].

[4] Right of Buyer to Cancel Contract or Offer

[a] Cancellation Period

Except for a home solicitation contract written pursuant to *Bus. & Prof. Code § 7151.2* or *7159.10*, which respectively govern home improvement and service and repair contracts, the buyer has an absolute right to cancel a home solicitation contract or offer until midnight of the third business day after he or she executes it [*Civ. Code § 1689.6(a)(1)*]. Three days is also the cancellation period applicable to home improvement and service and repair contracts written pursuant to *Bus. & Prof. Code §§ 7151.2* and *7159.10*, but the period does not begin to run until the buyer receives a signed and dated copy of the contract or offer to purchase [*see Civ. Code § 1689.6(a)(2), (3)*; *see also Bus. & Prof. Code §§ 7159(e)(6), 7159.10(e)(12)*].

In addition to any other right to revoke an offer, a buyer has the right to cancel a home solicitation contract or offer to repair or restore residential premises damaged by a disaster that was not void pursuant to *Civ. Code § 1689.14*, until midnight of the seventh business day after the buyer executes the contract, unless the provisions of *Civ. Code § 1689.15* apply [*Civ. Code § 1689.6(c)*; *see Bus. & Prof. Code § 7159(e)(7)*]. *Civ. Code § 1689.14* provides that any home solicitation contract or offer for the repair or restoration of residential premises signed by the buyer on or after the date on which a disaster causes damage to the residential premises, but not later than midnight of the seventh business day after that date, will be void, unless the buyer or his or her agent or insurance representative solicited the contract or offer at the seller's trade premises [*Civ. Code § 1689.14*]. *Civ. Code § 1689.15* relates to service and repair contracts written pursuant to *Bus. & Prof. Code § 7159.10* and permits a licensed contractor to commence work on a service and repair project as soon as the buyer receives a signed and dated copy of the contract that meets all of the requirements of *§ 7159.10*, at which time any right to cancel is extinguished by operation of law. Until the buyer receives such a copy and the contractor in fact commences work, the buyer retains the seven-day right to cancel the contract [*Civ. Code § 1689.15*].

The period is also seven days for home solicitation contracts or offers for simple personal emergency response units [*Civ. Code § 1689.6(b)*]. However, the three-day cancellation period applies to home solicitation contracts or offers for personal emergency response units that (1) are installed by licensed alarm company operators as part of a home security alarm system subject to the Alarm Company Act [*see Bus. & Prof. Code § 7590 et seq.*], and (2) have two or more stationary protective devices used to enunciate an intrusion or fire [*Civ. Code § 1689.6(b)*].

[b] Duties of Seller

Except for a home solicitation contract written pursuant to *Bus. & Prof. Code § 7151.2* or *7159.10*, which respectively govern home improvement and service and repair contracts, the seller must attach to the contract a copy of a duly completed notice that explains the buyer's right to cancel and serves as a form that the buyer may use to effect a cancellation [*Civ. Code § 1689.7(c)*; *see § 89.203[2]*]. A conspicuous statement must appear on the contract in immediate proximity to the space reserved for the buyer's signature, notifying the buyer of these cancellation rights and referring to the attached notice of cancellation [*Civ. Code § 1689.7(a)(1)*]. The seller must provide the buyer with a copy of the contract or offer and the attached notice of cancellation. In addition, at the time the contract or offer to purchase is executed, the seller must orally inform the buyer of his or her right to cancel, and of the requirement that the cancellation be in writing [*Civ. Code § 1689.7(f)*]. If the seller fails to provide proper notice of the buyer's right to cancel, the buyer may cancel at any time until the seller complies with notice requirements [*Civ. Code § 1689.7(g)*].

In the case of a home solicitation contract written pursuant to the home improvement contract requirements of *Bus. & Prof. Code § 7151.2*, the seller has a similar duty to include in the contract itself a statutory statement explaining the right to cancel [*see Civ. Code § 1689.7(a)(4), (e)*; *see also Bus. & Prof. Code § 7159(e)(6)(B), (7)(A)*], as well as to attach a notice of cancellation form to be given to the seller if the right to cancel is exercised [*see Bus. & Prof. Code § 7159(e)(6)(C), (7)(B)*].

[c] Exception to Buyer's Right of Cancellation

There is one important exception to the buyer's general rights of cancellation under a home improvement contract. If the contract is for the sale of goods to be affixed to real property and the buyer, after signing the contract, sells the property to a bona fide purchaser or encumbers it to a person who was not a party to the contract or to a related loan agreement, the buyer does not have the automatic right to cancel the contract within three days from executing it [*Civ. Code § 1689.9*].

[5] Seminar Sales Solication Contracts and Contracts Offered Door-to-Door

Seminar sales solicitation contracts are governed by a statutory scheme that parallels the one applicable to home solicitation contracts [*see Civ. Code §§ 1689.20-1689.24*]. For further discussion of the requirements for both kinds of contracts, see *§ 89.203[1]*.

Some contracts for the sale of home improvement goods or services offered by door-to-door sale that contain or are secured by a lien on real property must include a notice warning the buyer of the consequences of default [*see Bus. & Prof. Code § 7159.1*]. For more specific discussion, see *§ 89.11[7]*. For a form of notice, see *§ 89.208*.

[6] Consumer Legal Remedies Act

Under the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*], in some circumstances it is unlawful to enter into any transaction at a senior citizen's primary residence, when the transaction is not initiated by the senior citizen and it results in the making of a loan that encumbers the citizen's primary residence for the purpose of paying for home improvements. To be unlawful, the transaction must be part of a pattern or practice that violates provisions of the Truth in Lending Act, which prohibit granting credit secured by real property without regard to the mortgagee's ability to pay and establish requirements for payments under home improvement contracts [*Civ. Code § 1770(a)(23)*; *see Civ. Code § 1761(h)* (definition of "home solicitation" for these purposes); *see also 15 U.S.C. § 1639(h), (i)*; *12 C.F.R. § 226.32(e)* (relevant provisions of Truth in Lending Act)]. For further coverage of the Consumers Legal Remedies Act, see Ch. 92, *Service Contracts* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview

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§ 89.18 Truth in Lending and Unruh Acts

[1] Applicability

[a] "Consumer Credit Transactions"

An owner or tenant will sometimes arrange financing for a home improvement through the contractor who will perform the work. The contractor may assign the owner's or tenant's obligation to a bank or may personally handle the extension of credit [*see* Ch. 45, *Consumer Installment Loans and Credit Sales*]. In either case, the arrangement may constitute a "consumer credit transaction" in which the contractor is a creditor [*see 12 C.F.R. § 226.2(a)*] and to which the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] and/or the Unruh Act [*Civ. Code § 1801 et seq.*; *see § 89.18[1][b]*] apply. Determining whether either or both of these Acts applies to a particular transaction is important since it will determine whether certain disclosures and other statements must appear in the contract [*see § 89.18[2]*]. For an analysis of consumer credit transactions, see Ch. 45, *Consumer Installment Loans and Credit Sales* .

A transaction in which credit is extended or goods are purchased primarily for personal, family, or household use is a "consumer credit transaction" for purposes of the Truth in Lending and the Unruh Acts [*15 U.S.C. § 1602(h)*; *12 C.F.R. § 226.2(a)*; *see Civ. Code § 1802.1*]. The Truth in Lending Act applies to consumer credit transactions in which the credit extended is subject to a finance charge and/or is payable in more than four installments [*12 C.F.R. § 226.1(c)*]. An extension of credit exceeding $25,000, or in which there is an express written commitment to extend credit in excess of $25,000, is not governed by the Act unless it is secured by real property or by personal property used or expected to be used as the consumer's principal dwelling [*12 C.F.R. § 226.3(b)*]. If a contractor regularly extends, or arranges the extension of, consumer credit payable by agreement in more than four installments or for which a finance charge may be imposed, he or she is a creditor to whom the Truth in Lending Act applies [*15 U.S.C. § 1602(f)*].

[b] Unruh Act Provisions

The Unruh Act does not contain a similar exemption for low-volume creditors. Every home improvement contract or offer for home improvement goods or services that provides for a lien on real property is subject to the Unruh Act [*Civ. Code § 1689.8(a)*; *see § 89.18[3]*]. The Unruh Act also governs contracts for retail installment sales of consumer goods and services regardless of whether they create liens on realty. For purposes of the Unruh Act, a "retail installment

contract" is an agreement for the sale of goods or services for a deferred price payable in installments and under which [*Civ. Code § 1802.6*]:

- The buyer agrees to pay a finance charge;
- The buyer does not agree to pay a finance charge but would have received more or better quality goods for a cash payment or paid a lesser price for a credit card or cash payment; or
- Payment will be made in more than four installments.

A contractor must comply with the Unruh Act if he or she engages in the business of selling goods or furnishing services under retail installment contracts to persons who do not purchase those goods or services primarily for resale [*see Civ. Code §§ 1803.2-1803.6*].

[2] Disclosure Requirements

[a] Under Truth in Lending Act

Regulation Z [*see* 12 C.F.R. pt. 226] contains the disclosure requirements for consumer credit transactions governed by the Truth in Lending Act [*see* Ch. 45, *Consumer Installment Loans and Credit Sales*]. These disclosures must be made in writing in a form that the consumer (i.e., owner or tenant) may keep [*see 12 C.F.R. § 226.17(a)*]. However, the disclosures need not be set out in any particular manner. The Federal Reserve Board issues model disclosure documents complying with Regulation Z [*see* 12 C.F.R. pt. 226, app. H].

[b] Under Unruh Act

If a home improvement or specialty contract is a retail installment sale subject to the provisions of the Unruh Act, the parties' entire agreement must be contained in a single written document executed by the owner or tenant [*see Civ. Code §§ 1803.1, 1803.2(a)*]. The contract must include specific information and disclosures [*see Civ. Code §§ 1803.2, 1803.3*; *see also* Ch. 45, *Consumer Installment Loans and Credit Sales*]. With the exception of the itemization of the amount financed [*see Civ. Code § 1803.3(c)*], the disclosures required by the Unruh Act may be made in any manner or terminology required by Regulation Z as long as all additional requirements of the Unruh Act are satisfied [*Civ. Code § 1801.5*; *see Civ. Code § 1802.18*; *see also Civ. Code § 1803.3(b)*].

[3] Transactions Creating Liens on Dwellings

[a] Truth in Lending Act Provisions

The owner's or tenant's obligation to the contractor under a home improvement contract will sometimes be secured by a lien on the improved dwelling. Both the Truth in Lending Act and the Unruh Act impose additional requirements for contracts that contain this type of security agreement.

Under the Truth in Lending Act, a person whose ownership interest is subject to a seller's security interest in a dwelling normally has the right to rescind a contract that provides for a lien on his or her dwelling [*15 U.S.C. § 1635(a)*; *see 12 C.F.R. § 226.23(a)*]. The purchaser's right to rescind may be exercised at any time until midnight of the third business day following consummation, delivery of a required notice of rescission rights, or delivery of all material Truth in Lending disclosures, whichever occurs last [*12 C.F.R. § 226.23(a)(3)*]. For an analysis of the Truth in Lending Act's rescission provisions, see Ch. 25, *Real Estate Loans* .

[b] Unruh Act Provisions

A retail installment contract for goods may not provide for a security interest in real property unless the goods are to be attached to that property [*Civ. Code § 1804.3(b)*]. The Unruh Act requires that any contract providing for a security interest in real property must include a warning alerting the buyer to the fact that he or she will create a security interest in realty by signing the agreement. The warning must be set out in specified language and format [*see Civ. Code § 1803.2(b)(3)*].

A contract for home improvement goods and services that is secured by a lien on real property may also be subject to additional requirements [*see Bus. & Prof. Code §§ 7159.1, 7159.2*], as discussed in *§ 89.11[7]*.

[c] Consumer Legal Remedies Act Provisions

The Consumers Legal Remedies Act prohibits certain home solicitation transactions involving senior citizens that result in a loan for home improvements secured by the citizen's primary residence [*see Civ. Code § 1770(a)(23)*; *see also § 89.17*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionTruth in LendingGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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§ 89.19 Illegal Practices in Home Improvement Business

[1] Salespersons and Contractors

[a] Prohibited Acts

Salespersons must turn over all proceeds received in connection with home improvement transactions to their contractor-principals, and all contract forms that they use must disclose the names of those principals [*Bus. & Prof. Code § 7156*]. In general, no one may offer compensation to or otherwise reward an owner for procuring or placing home improvement business with others [*Bus. & Prof. Code § 7157(a)*]. However, a contractor or his or her agent or salesperson may give a prospective customer a one-time unconditional gift of a tangible item whose value does not exceed five dollars [*see Bus. & Prof. Code § 7157(b)*]. Contractors' salespersons and agents are precluded from accepting or making payment relating to home improvement transactions on behalf of anyone other than their contractor-principals [*see Bus. & Prof. Code § 7157(c)*]. Similarly, contractors may not pay an unlicensed person for home improvement work unless the person to whom payment is made is exempt from the licensing requirements of, or the transaction is not subject to the provisions of, the Contractors' State License Law [*see Bus. & Prof. Code § 7157(d)*].

In addition, a contractor may not directly or indirectly publish any advertisement relating to home improvements or other works of improvement that contains a false or misleading statement. A contractor may not advertise or purport to offer to the general public any improvement work with the intent not to accept a contract for that work or not to perform it at the price that is advertised or offered. However, any advertisement that is subject to and complies with the existing rules, regulations, or guides of the Federal Trade Commission will not be deemed false, deceptive, or misleading [*Bus. & Prof. Code § 7161(e)*]. A contractor who arranges financing for a project must not overstate the purchaser's obligation (e.g., improper computations of finance charges) or alter any document incident to the improvement project [*see Bus. & Prof. Code § 7161(c), (d)*].

[b] Restitution, Fines, and Penalties

A contractor who commits any of these acts is guilty of a misdemeanor and subject to disciplinary action by the Contractors' State License Board. If any of these violations are committed as part of a plan or scheme to defraud an owner in connection with repairs necessitated by a natural disaster, the guilty contractor will also be required to make

full restitution based on his or her ability to pay, and pay a fine of between $500 and $25,000 also based on the party's ability to pay [*Bus. & Prof. Code § 7161(f)*; *see Penal Code § 1203.1b* ("ability to pay" defined)].

It is unlawful to knowingly accept or receive a false completion certificate on a work of improvement and use that certificate in connection with an assignment or other negotiation of payment rights or for the purpose of obtaining or granting credit. Anyone who does so is guilty of a misdemeanor punishable by a fine of $500 to $5,000 or imprisonment for a term of one month to one year [*see Bus. & Prof. Code § 7158(a)*]. If the violation is committed as part of a plan or scheme to defraud an owner in connection with repairs necessitated by a natural disaster, the guilty party will also be required to make full restitution based on that party's ability to pay, and the fine may be increased up to $25,000, also based on the party's ability to pay [*Bus. & Prof. Code § 7158(b)*; *see Penal Code § 1203.1b* ("ability to pay" defined)].

Anyone who has been fraudulently induced to enter into a home improvement contract can collect a civil penalty of $500 from the contractor, in addition to damages and attorneys' fees [*see Bus. & Prof. Code § 7160*].

[2] Prohibited Acts of Mortgage Brokers and Lenders

It is an unfair or deceptive practice for a mortgage broker or lender to directly or indirectly use a home improvement contractor to negotiate the terms of any loan that is secured by the borrower's residence and used to finance a home improvement contract [*Civ. Code § 1770(b)(1)*]. However, a home improvement contractor may refer a consumer to a mortgage lender or broker provided the referral does not violate *Bus. & Prof. Code § 7157*, discussed in *§ 89.19[1][a]*.

[3] Consumers Legal Remedies Act Provisions

The Consumers Legal Remedies Act prohibits certain home solicitation transactions involving senior citizens that result in a loan for home improvements secured by the citizen's primary residence [*see Civ. Code § 1770(a)(23)*; *see also § 89.17*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionGeneral OverviewContracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsConstruction Contracts

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[Reserved]

§§ 89.20[Reserved]

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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

29-89 California Legal Forms--Transaction Guide § 89.100

§ 89.100 Facts

1. Identity of property owner or tenant.

    a. Name and address.

    b. Legal status (e.g., corporation, individual, joint venture).

    c. Financial status.

2. Identity of contractor.

    a. Name and address.

    b. Legal status.

    c. Classifications in which contractor is licensed.

    d. Contractor's state license number(s).

    e. Extent of contractor's bonding and insurance.

    NOTE:
    All licensed contractors must have license bonds (in an amount set by statute) on file with the Contractors' State License Board [*Bus. & Prof. Code § 7071.6*; ***see*** Ch. 88, ***Licensing of Contractors*** (discussion of bonding requirements)].

3. Nature of project.

a. Construction work.

b. Installation of goods.

c. Performance of services.

4. Location of property on which work will be performed.

a. Street address.

b. Legal description.

5. Estimated cost of project.

a. Labor and materials.

b. Equipment.

6. Number of trades and/or crafts likely to be involved in completing project.

7. How owner or tenant will pay for project.

a. Owner's or tenant's own funds.

b. Construction loan.

8. If project will be financed, arranged or contemplated method of financing.

a. Credit personally extended by contractor.

b. Credit extended to owner or tenant by contractor with debt subsequently assigned to lending institution.

c. Owner or tenant securing loan directly from institutional lender such as:

(1) Bank.

(2) Savings and Loan Association.

(3) Mortgage Company.

(4) Credit Union.

(5) Loan against life insurance.

9. If institutional lender is already involved:

a. Name and address of lender.

b. Amount of loan.

c. Terms governing disbursement and repayment of loan.

d. Security for loan (e.g., construction deed of trust).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationGeneral OverviewContracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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29-89 California Legal Forms--Transaction Guide § 89.101

§ 89.101 Documents

1. Deed or other documentary evidence of legal title to property on which work will be done.

2. If tenant orders work of improvement, copy of any rental agreement or lease.

3. Instrument showing legal description of property.

4. If financing is already arranged through institutional lender:

a. Copies of all documents relating to loan (e.g., disclosure statements).

b. Copy of security agreement.

5. Copy of contractor's license bond.

6. Technical specifications.

NOTE:
The technical specifications for any construction or improvement project are the detailed descriptions identifying the nature and quality of the materials that will be used.

7. Copies of any manufacturers' warranties of goods to be installed as part of project.

8. Architect's drawings, if any.

9. If contract is between general building contractor and specialty contractor, copy of prime contract between general building contractor and property owner.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationGeneral OverviewContracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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29-89 California Legal Forms--Transaction Guide §§ 89.102-89.109

[Reserved]

§§ 89.102[Reserved]

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B. Preliminary Determinations

29-89 California Legal Forms--Transaction Guide § 89.110

§ 89.110 Classification of Contract

NOTE:
If the work will be performed on residential property and otherwise falls within the categories outlined in PP 1 and 2, ***below***, it is a "home improvement." If the contract is between a contractor and an owner or tenant, it must contain specific language and information required by statute [***see*** *Bus. & Prof. Code §§ 7159, 7159.1, 7159.10*; ***see also*** *§ 89.130*].

1. Ascertain where proposed work will be performed.

a. Residential property, such as:
(1) House.

(2) Dwelling unit in apartment building.

(3) Other type of multiple dwelling unit (e.g., duplex).

b. Commercial property.

NOTE:
If the contemplated work will be performed on commercial property and involves anything other than specialty work [***see*** *§ 89.12*], see Ch. 30D, ***Construction Contracts and Subcontracts*** , for a discussion of general contracting law and representative forms.

2. Determine whether proposed work on residential premises will involve any of the following [*see Bus. & Prof. Code §§ 7151, 7151.2*]:

a. Construction.

b. Installation of goods that will become part of property.

c. Performance of services.

3. Determine whether proposed work will involve swimming pool repair or construction adjacent to existing residence.

NOTE:

Except as provided by *Bus. & Prof. Code § 7166* (see below), any contract to construct or repair a swimming pool adjacent to an existing dwelling house is a home improvement contract [***see** Bus. & Prof. Code § 7151*]. In addition if the aggregate contract price exceeds $500, the contract must conform to the drafting requirements applicable to such contracts [*see Bus. & Prof. Code § 7159*]. Certain of these drafting requirements must be met for a contract the primary purpose of which is the construction of a swimming pool, or the contract is void and unenforceable by the contractor as a matter of public policy [*Bus. & Prof. Code § 7167(a)*; ***see** Bus. & Prof. Code § 7159(c)(4), (5), (d)(7)-(9)*; ***see also** § 89.131*]. However, the contractor's failure to comply with *Bus. & Prof. Code § 7159(c)(5),* which requires the inclusion of a statement in the contract that the contractor must furnish a release of any claims related to any portion of the work performed for which payment has been made, does not preclude the contractor from recovering compensation for work performed based on quasi-contract, quantum meruit, restitution, or other similar legal or equitable remedies designed to prevent unjust enrichment [*Bus. & Prof. Code § 7167(b)*].

A contract for the construction of a swimming pool to be built for the use and enjoyment of other than a single-family unit on or contiguous to premises occupied only by a single-family unit, or for the construction of a swimming pool built as part of an original plan by the same contractor who builds a single-family dwelling unit on the premises, is not a home improvement contract [*Bus. & Prof. Code § 7166*].

4. Determine whether contract will be executed at place other than contractor's business premises.

NOTE:

If a contract for home improvement or specialty work is executed at some place other than the contractor's or salesperson's trade premises in amount of $25 or more, including interest and service charges, that contract is a "home solicitation contract" and must include a notice of the purchaser's cancellation rights [***see** Civ. Code §§ 1689.5(a), (b), 1689.6, 1689.7*; ***see also** § 89.17*]. If a home solicitation contract is a home improvement contract, the contract price of which exceeds $500 [***see** Bus. & Prof. Code § 7159(a)*], or a service and repair contact [***see** Bus. & Prof. Code § 7159.10(a)*], a slightly different notice of cancellation is required [***see** Civ. Code §§ 1689.6(a)(2), (3), 1689.7(a)(4), (e)*; *Bus. & Prof. Code §§ 7159(e)(6), (7), 7159.10(e)(12)*].

Laws governing home solicitation contracts do not apply to any transaction in which the consumer has rescission rights under the federal Truth in Lending Act [***see** Civ. Code § 1689.5(a)*; ***see also** § 89.18[1]*].

5. Ascertain whether contractor will need special skills to perform work [*see* Ch. 88, *Licensing of Contractors* , for list of categories of work for which contractors must hold specialty licenses].

6. Ascertain whether contractor's license is valid.

NOTE:

Contractors may present state license numbers that are no longer valid. It is important for an owner or tenant to verify the existence of a current valid license since an unlicensed contractor may not be adequately insured or bonded. If an unlicensed contractor is used, the Contractors' State License Board may not be able to help the owner or tenant resolve a complaint. The only remedy may be in civil court, and the owner or tenant may be liable for damages arising out of any injuries to the unlicensed contractor or the unlicensed contractor's employees. The current status of licenses can be verified through the Contractors' State License Board (CSLB) Office at (800) 321-2752 or on the internet at http://www.cslb.ca.gov/. Legal action history information is available from the CSLB Northern or Southern Regional Legal Action Disclosure telephone numbers. The Northern number is (916) 255-4041; the Southern Region can be reached at (562) 466-6021.

7. Determine what quality materials or goods will be used in performing work, and:

a. Whether they are warranted against defects by independent manufacturer.

b. Whether contractor will provide separate warranty against defects.

c. Whether contractor will make any specific representations regarding brand or trademark of materials or goods [*see Bus. & Prof. Code § 7162*; *see also § 89.130*, P 3].

NOTE:
If the contractor provides a warranty for consumer goods (e.g., major kitchen appliances), that warranty must conform to the requirements of the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act [***see** § 89.14[2]*].

8. Determine whether contractor will be financially able to advance payments for materials.

NOTE:
The contractor's ability to afford materials will determine what, if any, down payment should be required, and may affect any payment schedule to be included in the contract.

9. Determine whether contractor should be required to post payment and/or performance bonds.

NOTE:
Often the property owner for whom work will be performed will require the contractor to post a payment bond guaranteeing that all subcontractors and material suppliers will be paid for their services on the project. Payment bonds help protect the property owner from liability for mechanics' liens following completion of the project. The payment bond should be for 50 percent or more of the total contract price [***see** Civ. Code § 3235*; ***see also** § 89.16*].

Home improvement contracts must contain a notice in close proximity to the signatures of the owner and the contractor stating that the owner has the right to require the contractor to have a performance and payment bond [*Bus. & Prof. Code § 7159(c)(6)*].

A contractor who furnishes a payment and performance bond, lien and completion bond, or a bond equivalent or joint control approved by the registrar covering full performance and payment need not include as part of the contract either the statement regarding the downpayment, the details and statement regarding progress payments, or the Mechanics' Lien Warning [Bus. & Prof. Code § 7159.5(a)(8); *see* Bus. & Prof. Code § 7159(d)(8)(C), (9), (e)(4)].

10. Determine whether property owner or tenant will use any areas on jobsite during course of work.

NOTE:

Property owners and tenants normally continue to occupy their homes while improvement work is being done. If the project is major, those occupants will probably experience certain inconveniences caused by interruptions in water and/or power supplies and similar disruptions related to construction work on residences. Before executing the agreement, the parties should reach a clear understanding regarding the extent to which the owner or tenant will be inconvenienced by the contractor's presence so that appropriate preparations can be made.

11. Determine what building permits must be secured before work on project can commence.

NOTE:

Securing the necessary permits for a construction project can be handled in several ways. The contractor may draw the plans, obtain the permits, and include the cost in the bid. Alternatively, the contractor may draw the plans and obtains the permits, but may specify that the permit costs are in excess of the bid and will be paid by the homeowner either directly to the local entity or through the contractor as an additional expense. Finally, the homeowner may personally obtain the permits. Which arrangement is actually used may be dictated to a certain extent by the size of the project and the owner's sophistication in construction matters. If the owner is unsophisticated, the contractor will need to be more actively involved in obtaining the proper permits. For an analysis of the regulations governing building permits and representative forms, see Ch. 30B, ***Zoning, Building, and Environmental Entitlements and Permits*** .

12. Determine whether there are any zoning restrictions at proposed job site that would prevent performance of contemplated work [*see §§ 30B.200-30B.202*].

13. Try to determine what types of accidents are most likely to occur on project.

NOTE:

It is important to consider the risks inherent in the project such that adequate and appropriate bonding and insurance can be arranged.

14. Anticipating that dispute may arise between parties during performance of contract, ascertain how long will it take to go to trial in particular jurisdiction.

a. Determine whether contractor can afford to carry outstanding obligation on his or her books for that period of time.

b. Determine whether owner or tenant can afford delay in completion of project.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 89 HOME IMPROVEMENT AND SPECIALTY CONTRACTS
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

29-89 California Legal Forms--Transaction Guide § 89.111

§ 89.111 Financing Arrangements

1. If owner or tenant has independently arranged financing for project:

NOTE:

No home improvement goods or services contract of $5,000 or less can provide for a security interest in real property, except a mechanic's lien or other interest that arises by operation of law. Any lien purportedly created by such a contract is void and unenforceable [*Bus. & Prof. Code § 7159.2(a)*].

When a home improvement goods or services contract of more than $5,000 is secured by a mortgage or deed of trust on real property, the person or entity making the loan may pay the contractor only by an instrument payable to the borrower or jointly to the borrower and contractor or, if the borrower so elects, through a third-party escrow agent pursuant to the terms of a written agreement signed by the parties before the funds are disbursed [*Bus. & Prof. Code § 7159.2(b)*].

a. Determine what he or she has pledged as security.

b. Determine how loan proceeds will be disbursed (e.g., periodic payments).

2. If owner does not plan to finance project, determine whether he or she has sufficient personal assets with which to pay contractor.

NOTE:

Most persons will require some type of financial assistance for a construction or home improvement project unless that project is quite minor (e.g., installation of fencing around

a yard).

3. Determine what liens or other security interests have already been recorded against property on which work will be done.

4. If contractor is prepared to extend credit, determine whether he or she will need to assign owner's or tenant's obligation to bank or other institutional lender.

NOTE:
When interest rates rise, many major banks discontinue their "dealer loan" home improvement programs that involve taking back paper from contractors who have extended credit to owners or tenants. A contractor who intends to make this type of assignment should have a firm understanding with the bank before he or she agrees to extend credit to the owner or tenant.

5. If contractor will extend credit necessary to finance project:

NOTE:
If the contractor fits the descriptions outlined below, he or she is a "creditor" for purposes of the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] and normally must make certain disclosures required under the Act [***see*** *§§ 89.18[2], 89.203*].

a. Determine whether principal obligation is initially payable to contractor [*see 15 U.S.C. § 1602(f)*; *12 C.F.R. § 226.2(a)(17)*].

b. Determine whether contractor regularly extends consumer credit [*15 U.S.C. § 1602(f)*]:

NOTE:
"Consumer credit" is credit offered or extended to a consumer primarily for personal, family, or household expenses [*12 C.F.R. § 226.2(a)(12)*; ***see*** *12 C.F.R. § 226.2(a)(11)* (definition of "consumer")].

(1) Payable in more than four installments; or

(2) For which finance charge is or may be required.

6. Determine whether contractor will extend credit for retail sale of consumer goods or services under conditions requiring repayment in [*see Civ. Code §§ 1802.3, 1803.6*]:

NOTE:
If the contemplated financing arrangement fits into either category listed below, the contractor is a retail seller under a retail installment contract and must comply with the disclosure requirements of the Unruh Act [*Civ. Code § 1801 et seq.*; ***see*** *§ 89.18*].

a. More than four installments.

b. Four or fewer installments when:

(1) Buyer agrees to pay finance charge; or

(2) Buyer does not agree to pay finance charge but would have paid less if he or she paid with cash or a credit card.

7. If contractor will extend credit:

NOTE:
The following information will be needed to draft an agreement that will comply with the Truth in Lending and Unruh Acts.

a. Determine amount of total contract price that will be financed [*see 15 U.S.C. § 1638(a)(2)(A)*; *Civ. Code § 1803.3(c)(7)*].

b. Determine what finance charge will be [*see 15 U.S.C. § 1638(a)(3)*].

c. Determine what annual percentage rate will be [*see 15 U.S.C. § 1638(a)(4)*; *Civ. Code § 1803.3(c)(7)*].

d. Determine how payment obligation will be scheduled [*see 15 U.S.C. § 1638(a)(6)*; *Civ. Code § 1803.3(d)*].

e. Determine what owner's or tenant's total payments (i.e., amount financed plus finance charge) will be [*see 15 U.S.C. § 1638(a)(5)*].

f. Determine what total sales price (i.e., cash price of property or services plus additional charges, plus finance charges) will be [*see 15 U.S.C. § 1638(a)(7)*].

g. Determine whether contractor will be able to penalize owner or tenant for late payments [*see 15 U.S.C. § 1638(a)(10)*].

h. Determine whether amount financed will include any insurance taken out on project [*see Civ. Code § 1803.3(c)(3)*; *see also 12 C.F.R. § 226.4(b)(5)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
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29-89 California Legal Forms--Transaction Guide §§ 89.112-89.119

[Reserved]

§§ 89.112[Reserved]

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C. Procedural Guide to Home Improvement, Service and Repair, and Specialty Contracts

29-89 California Legal Forms--Transaction Guide § 89.120

§ 89.120 Procedures Before Award of Contract

1. Secure copies of:

a. Architect's drawings or plans, if any.

b. Project specifications.

2. If contractor will subcontract out any portion of work:

a. If representing contractor, obtain written bids from potential subcontractors.

b. If representing owner or tenant, request itemization of bids from subcontractors.

3. Contact local building department to check whether specifications and plans comply with applicable local standards.

NOTE:
For discussion and forms relating to zoning restrictions and building and environmental permits, see Ch. 30B, ***Zoning, Building, and Environmental Entitlements and Permits*** .

4. If there is no local building department, contact California Department of Housing and Community Development, Codes and Standards Division, to determine compliance.

5. Contact local planning agencies to verify that proposed project complies with applicable zoning ordinances.

6. Collate all data and submit written bid to owner or tenant.

NOTE:

If the bid is for work to be performed on residential property with four or fewer units, include required notice and discipline disclosure [***see*** *Bus. & Prof. Code § 7030.1(a), (b)*; ***see also*** *§ 89.207*]. For coverage of the law governing construction bids and representative bid forms, see Ch. 30D, ***Construction Contracts and Subcontracts*** .

7. If bid is accepted, draft contract [*see §§ 89.130-89.132*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawConstruction LawGeneral OverviewTortsPremises Liability & PropertyGeneral Premises LiabilityDefensesIndependent Contractors

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29-89 California Legal Forms--Transaction Guide § 89.121

§ 89.121 Procedures After Award of Contract

1. Before work commences, deliver copy of contract signed by contractor to owner or tenant.

NOTE:

In the case of a home improvement contract written pursuant to *Bus. & Prof. Code § 7159* or a service and repair contract written pursuant to *Bus. & Prof. Code § 7159.10*, the buyer is entitled to receive a completely filled in and signed copy of the contract before any work may be started [*Bus. & Prof. Code §§ 7159(d)(4), 7159.10(d)(4)*]. In addition, the time period for the buyer's right to rescind a § 7159 home improvement contract does not begin to run until he or she receives a signed and dated copy of the contract. Assuming a § 7159.10 service and repair contract conforms to the basic requirements for such contracts [***see*** *Bus. & Prof. Code § 7159.10(a)(1)(A)-(D)*], delivery to the buyer of a signed copy of the contract and commencement of work cuts off the buyer's rescission rights [*Bus. & Prof. Code § 7159.10(e)(12)*; ***see*** *Civ. Code § 1689.5(a)(3)(A)*].

2. Obtain all payment and/or performance bonds required by property owner or lender [*see §§ 89.110* P 9, 89.220].

NOTE:

For a discussion of the law regulating performance and payment bonds, see California Real Estate Law and Practice, Ch. 422, ***Insurance and Bonding Practice*** , and Ch. 453, ***Payment Bonds*** (Matthew Bender). For a performance bond, see *Ch. 79*, ***Suretyship, Guaranty, and Indemnity, § 79.241*** .

3. Before work commences, file original contract in recorder's office for county where property is located [*see Civ. Code § 3235*].

4. Before work commences, record payment bond in office of county recorder where contract is recorded [*see Civ. Code § 3235*].

5. If financed project provides for security interest in owner's or tenant's principal dwelling, deliver two copies of notice of rescission to owner or tenant [*see 15 U.S.C. § 1635(a)*].

NOTE:

Whenever a person has a right to rescind a transaction under the Truth in Lending Act, the creditor must provide two copies of a statutory notice of rescission. The notice must be printed in capital and lower case letters of at least 12-point boldface type and must recite the creditor's name and business address and the date on which the transaction was consummated. The owner or tenant may cancel the transaction by executing one of the forms and returning it to the creditor within the three-day grace period [***see*** *12 C.F.R. §§ 226.15*, *226.23*].

For a detailed analysis of transactions involving liens on real property, see Ch. 25A, ***Security Instruments for Real Estate Financing*** .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors

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29-89 California Legal Forms--Transaction Guide §§ 89.122-89.129

[Reserved]

§§ 89.122[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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D. Drafting Guide

29-89 California Legal Forms--Transaction Guide § 89.130

§ 89.130 Home Improvement and Specialty Contracts

1. If contract is for home improvement and aggregate contract price exceeds $500, include following information [*Bus. & Prof. Code § 7159(c)-(e)*]:

NOTE:

If the home improvement contract is between a contractor and an owner or tenant and the aggregate contract price, including all labor, services, and materials furnished by the contractor, exceeds $500, the contract must include the information listed below [*Bus. & Prof. Code § 7159(a)(1), (b)*]. This does not apply to service and repair contracts, which are subject to *Bus. & Prof. Code § 7159.10*, provided the contract for the applicable services complies with the statutes governing such contracts [*Bus. & Prof. Code § 7159(a)(2)*; ***see*** *Bus. & Prof. Code §§ 7159.10-7159.14*; ***see also*** *§ 89.132*]. Noncompliance by a licensed contractor, or his or her agent or salesperson, is cause for discipline [*Bus. & Prof. Code § 7159(a)(3)*].

a. Contractor's name, business address, and license number.

b. If applicable, name and registration number of any home improvement salesperson that solicited or negotiated contract.

c. Heading "Home Improvement" in at least 10-point boldface type;

d. Twelve-point boldface statement informing buyer that he or she is entitled to completely filled-in and signed copy of contract before work may be started;

e. Heading "Contract Price" followed by amount of contract [*see Bus. & Prof. Code §*

7159.5(a)(1)].

f. If applicable, heading "Finance Charge" followed by amount of charge [*see Bus. & Prof. Code § 7159.5(a)(2)*].

g. Heading "Description of the Project and Description of the Significant Materials to be Used and Equipment to be Installed" followed by that information.

NOTE:
If relevant, this should include, as an incorporated attachment, a plan and scale drawing of any swimming pool to be installed including the construction and equipment specifications [*Bus. & Prof. Code § 7159(d)(7)*]. A swimming pool construction contract that does not comply with the description requirements is void and unenforceable by the contractor as contrary to public policy [*Bus. & Prof. Code § 7167(a)*].

A contract, the primary purpose of which is to construct a swimming pool, which does not substantially comply with this requirement and the requirements described in PP h. and i, ***below***, is void and unenforceable by the contractor as contrary to public policy [Civ. Code § 7167(a)].

h. Details of any downpayment to be charged.

NOTE:
A downpayment may not exceed the lesser of $1,000 or 10 percent of the contract price and its details must be set forth in a statutory format [***see*** *Bus. & Prof. Code § 7159(d)(8)(A)-(C)*; ***see also*** *Bus. & Prof. Code § 7159.5(a)(3)* (downpayment limitation)]. A swimming pool construction contract that does not comply with this requirement is void and unenforceable by the contractor as contrary to public policy [*Bus. & Prof. Code § 7167(a)*].

A contractor who furnishes a payment and performance bond, lien and completion bond, or a bond equivalent or joint control approved by the registrar covering full performance and payment, is exempt from the downpayment limitation [*Bus. & Prof. Code § 7159.5(a)(8)*].

i. Schedule of progress payments.

NOTE:
If any progress payments are to be made, the contract must include (1) a schedule of those payments with specific reference to the amount of each payment and the amount of work or services to be performed and any materials and equipment to be supplied in connection with each payment, and (2) a statutorily-prescribed statement informing the buyer about the nature of the schedule with a notice that, while a contractor may require a downpayment, it is unlawful for the contractor to collect payment for work not completed or materials not yet delivered [***see*** *Bus. & Prof. Code §§ 7159(d)(9)(C), 7159.5(a)(4), (5)*]. A swimming pool construction contract that does not comply with this requirement is void and unenforceable by the contractor as contrary to public policy [*Bus. & Prof. Code § 7167(a)*].

If the contract provides for payment of a salesperson's commission out of the contract

price, that payment must be made on a pro rata basis in proportion to the schedule of progress payments [*Bus. & Prof. Code § 7159.5(a)(7)*].

A contractor who furnishes a payment and performance bond, lien and completion bond, or a bond equivalent or joint control approved by the registrar covering full performance and payment, is relieved from the requirement that the contract include a schedule of progress payments [Bus. & Prof. Code § 7159.5(a)(8); *see* Bus. & Prof. Code § 7159(d)(9)].

j. Statement that contractor will furnish full and unconditional release from any potential lien claimant or authorized mechanics' lien for work that has been performed and paid for.

NOTE:

The release must be furnished prior to any further payment being made, and must encompass any potential lien claimant or mechanics' lien authorized pursuant to *Civ. Code § 3114* for the portion of the work for which payment has been made [*Bus. & Prof. Code § 7159(c)(4)*]. A swimming pool construction contract that does not include this statement is void and unenforceable by the contractor as contrary to public policy [*Bus. & Prof. Code § 7167(a)*].

k. Heading "Approximate Start Date" followed by statement describing what constitutes substantial commencement of work and an approximate date for that commencement.

l. Heading "Approximate Completion Date" followed by that date.

m. If applicable, heading "List of Documents to be Incorporated into the Contract" followed by that list.

NOTE:

If the contract is for construction of a swimming pool, the plan and a scale drawing of the pool including its shape, size, dimensions, and construction and equipment specifications must be incorporated [*Bus. & Prof. Code § 7159(d)(7)*]. If a swimming pool contract is to be financed by a third party, but the parties want to avoid the buyer's loan rescission period, a notice and request for immediate commencement of construction must also be included [*Bus. & Prof. Code § 7165*; ***see*** *§ 89.202*]. Other incorporated documents might include the required noticed described in P p, ***below***.

n. Heading "Note about Extra Work and Change Orders" followed by statutorily-prescribed statement informing buyer of nature and effect of change orders [*see Bus. & Prof. Code § 7159(d)(13)*].

o. Statement that buyer has right to require contractor to have performance and payment bond.

p. Required Notices [*see Bus. & Prof. Code § 7159(e)*]:

NOTE:

Statutory notices concerning the following subject matter must be either included as part of the contract form, or, if otherwise specified, provided as an attachment to the form [*Bus. & Prof. Code § 7159(e)*].

(1) Commercial general liability insurance.

NOTE:

It is important that the owner or tenant (1) arrange for adequate insurance against destruction of the contractor's work, and (2) assure that there are no gaps in coverage. The contractor will want to be paid for work performed even if it is destroyed. Normally, adequate insurance will cover the owner or tenant's obligation to the contractor and there will be no delay in payments unless the loss is due to extreme vandalism, fire, earthquake, or other unusual causes.

(2) Workers' compensation insurance.

(3) Information concerning performance of extra or change-order work [*see Bus. & Prof. Code § 7159.6*].

(4) Mechanic's lien warning.

NOTE:

A contractor who furnishes a payment and performance bond, lien and completion bond, or a bond equivalent or joint control approved by the registrar covering full performance and payment, need not include the mechanics' lien warning [*Bus. & Prof. Code § 7159.5(a)(8)*].

(5) Information about role of the Contractors' State License Board, including how to contact Board.

(6) If applicable, notice of buyer's three-day right to cancel [*see Bus. & Prof. Code § 7159(e)(6)(B)* (wording of notice), (C) (format and location of notice in contract)].

NOTE:

The three-day notice is required unless (1) the contract is negotiated in the contractor's place of business, (2) the contract is to repair or restore residential premises damaged by a sudden or catastrophic event, or (3) the contractor is subject to licensure under the Alarm Company Act [*Bus. & Prof. Code § 7159(e)(6)(A)*; ***see*** *Bus. & Prof. Code § 7590 et seq.* (Alarm Company Act)].

(7) If contract involves repairing or restoring a residence damaged or destroyed by sudden or catastrophic event for which state of emergency has been declared, notice of buyer's seven-day right to cancel [*see Bus. & Prof. Code § 7159(e)(7)(A)* (wording of notice), (B) (format and location of notice in contract)].

q. If contract is for sale of home improvement goods or services offered by door-to-door sale that contains or is secured by lien on real property, include required notice to buyer [*Bus. & Prof. Code § 7159.1*; *see § 89.208[2]*].

NOTE:

A security interest created in any door-to-door sale contract that does not provide the notice is void and unenforceable [*Bus. & Prof. Code § 7159.1*].

The notice requirement does not apply to contracts subject to the Unruh Act [*Civ. Code § 1801 et seq.*], mechanics' liens [***see*** *Civ. Code § 3109 et seq.*], or home improvement goods or services contracts of $5,000 or less [***see*** *Bus. & Prof. Code § 7159.1(a)-(c)*; ***see also*** *Bus. & Prof. Code § 7159.2(a)*].

2. If agreement is in form of subcontract [*see § 89.223[2]*], include:

a. General contractor's name and business address.

b. Owner's or tenant's name, residential address, and business address, if any.

c. Identification of area in which subcontractor will work.

d. Provision protecting subcontractor from responsibility for delays resulting from interference from other subcontractors working on project.

3. If contractor makes representation regarding brand or trademark of goods or materials he or she provides [*see Bus. & Prof. Code § 7162(a)*]:

a. Describe goods or materials with regard to which representation was made.

b. Include designation such as brand name or model number.

NOTE:
A contractor who fails to install goods or materials that conform to the description by brand name or trademark used in the contract will be subject to disciplinary action [*Bus. & Prof. Code § 7162(b)*; ***see*** Ch. 88, ***Licensing of Contractors***].

4. If contractor warrants home improvement goods [*see 15 U.S.C. § 2302(a)*; *see also § 89.205[2]*]:

a. Include warrantor-contractor's name and address.

b. Identify person to whom warranty is extended.

NOTE:
As a matter of practice, a warranty of home improvement goods should be extended to a limited class of persons (e.g., the owner or tenant who buys the goods and his or her successors in interest).

c. Identify products or parts warranted.

d. State what contractor will do if goods are defective, malfunction, or fail to conform, including:

(1) At whose expense contractor will act.

(2) For what period of time contractor will undertake to correct problems.

e. State what owner or tenant must do and what expenses he or she must assume.

f. Set out any exceptions and/or exclusions from warranty.

g. Explain step-by-step procedure owner or tenant must take to obtain contractor's performance of warranty obligations.

h. Identify any person or class of persons authorized to perform warranty obligation.

i. Identify any informal dispute resolution procedure offered by contractor.

j. Specify whether owner or tenant must resort to informal dispute resolution procedures offered by contractor before pursuing legal or equitable remedies in courts.

k. Describe legal remedies available to owner or tenant.

l. Specify period of time within which, after receiving notice of defect, malfunction, or failure to conform, contractor will perform warranty obligations.

m. Specify time (e.g., within regular business hours of any day Monday through Friday) at which contractor will perform warranty obligations.

n. Specify characteristics or properties of products or parts not covered by warranty.

o. Explain elements of warranty in words or phrases that would not mislead average consumer with regard to nature or scope of warranty.

5. Identify matters that will constitute additional work (e.g., change-orders made necessary by modification of plans by public inspector) [*see § 89.200[2]*] and require that additional work or change-orders be covered by subsequent writings that clearly set forth scope of work encompassed by additional work or change-order and price to be charged [*see Bus. & Prof. Code § 7159(e)(3)*].

NOTE:

A change order form for changes or extra work will be incorporated into, and become part of, the contract only if it is in writing and signed by the parties before commencement of any work covered by the change order [*Bus. & Prof. Code § 7159(c)(5)*]. A swimming pool construction contract that does not include a provision to this effect is void and unenforceable by the contractor as contrary to public policy [*Bus. & Prof. Code § 7167(a)*].

A change order is not enforceable against a buyer unless it sets forth (1) the scope of work encompassed by the order, (2) the amount to be added or subtracted from the contract, and (3) the effect the order will make in the progress payments or the completion date. The buyer may not require a contractor to perform extra or change-order work without providing written authorization. Failure to comply with these requirements does not preclude the recovery of compensation for work performed based on legal or equitable remedies designed to prevent unjust enrichment [*Bus. & Prof. Code § 7159.6*].

6. If desired, apportion responsibility for specific job site safety precautions (e.g., locking away hazardous equipment on daily basis) between parties [*see § 89.220[2]*].

7. Specify rights of respective parties in case of default [*see § 89.220[2]*].

NOTE:

The parties may agree on any number of events and activities that will constitute default under their agreement. Typically, the property owner will want the default clauses triggered on the occurrence of any of the following: (1) a failure to complete the project on time without good excuse; (2) material breach of agreement; (3) act or omission by contractor resulting in liability to owner; (4) significant violations of health or safety laws; and (5) failure to pay subcontractors or materialmen. An attorney representing the contractor, on the other hand, will normally want to limit to the greatest extent possible the events that will constitute default.

8. If desired, include indemnity and hold-harmless provision [*see § 89.223[2]*]:

a. Specifying items for which contractor will indemnify owner.

b. If desired, allowing owner right to select own counsel.

NOTE:
Indemnity provisions are particularly important to the property owner. The owner will want indemnity for anything that might go wrong on the project. In return, the contractor will want to be indemnified against any damage caused by others (e.g., workers not under contractor's control).

9. Do not include provision purporting to indemnify contractor against liability for:

a. Any of the following which may occur from negligence or willful misconduct of contractor or contractor's agents or independent contractors directly responsible to contractor [*see Civ. Code § 2782*]:

(1) Death or bodily injury.

(2) Property damage.

(3) Other loss, damage, or expense.

b. Do not include any provision indemnifying contractor against liability for defects in design furnished by contractor [*see Civ. Code §§ 2782.1, 2782.2, 2782.5, 2782.6* (exceptions); *see also § 89.200[1][k]*].

10. Apportion responsibility for cleanup after completion of project and specify condition in which workers and/or contractor must leave job site.

11. If desired, include provision requiring parties to submit disputes to binding arbitration and specifying rules under which it will be conducted, such as:

a. Rules of American Arbitration Association; or

b. Other rules agreed on by parties.

NOTE:
Once a construction or improvement project commences, an imbalance of power develops between the owner or tenant and the contractor. In some cases, the owner or tenant is more concerned about prompt completion of the project than the contractor is about being paid. In other cases, the reverse is true. Arbitration clauses benefit the weaker party because they provide an avenue for quick resolution of disputes. The American Arbitration Association arbitrators are experienced in the construction industry. If either party objects to a proposed arbitration, he or she is granted a hearing within a specified number of days. Arbitrators may allow prearbitration discovery. Contractors are often opposed to discovery, since it allows the owner or tenant to inspect the contractor's paperwork and interview the project foreman.

If the contract is for work on residential property with four or fewer units and includes an

arbitration provision, it must also include a disclosure statement to be initialed by both parties. In such contracts, both the arbitration provision itself, and the disclosure must be set out either in at least 10-point roman boldface type or in contrasting red print in at least 8-point roman boldface type. If the contract is typed, the provision and disclosure must be set out in capital letters. Failure to comply with these requirements will preclude the contractor from enforcing the contract [*Bus. & Prof. Code § 7191*; ***see***, ***e.g.***, *§ 89.200[2]*].

12. Specify, if desired, that prevailing party in any dispute may recover attorneys' fees.

NOTE:
The prevailing party in an action arising from a home improvement contract to construct a swimming pool has a statutory right to an award of reasonable attorneys' fees [*Bus. & Prof. Code § 7168*].

13. If owner or tenant has arranged own financing, include provision documenting owner's or tenant's representation of that fact to contractor [*see § 89.200[2]*].

14. Specify whether either or both parties may assign rights and obligations under contract [*see § 89.220[2]*]:

a. If other party's consent to assignment is required, provide that consent may not be withheld unreasonably.

b. Specify what effect contractor's inability to continue performance will have on assignability of contract.

15. If contract is in form of a proposal, specify amount of time within which owner, tenant, or general contractor must accept [*see §§ 89.220[2], 89.221[2]*].

16. If contract arose from home solicitation [*see § 89.110*, P 4], include notice of buyer's right to cancel [*see Civ. Code §§ 1689.6, 1689.7, 1689.8*; *see also § 89.17[4]*]:

NOTE:
The right to cancel a home solicitation contract that is a home improvement contract written pursuant to *Bus. & Prof. Code § 7151.2* or a service and repair contract written pursuant to *Bus. & Prof. Code § 7159.10* have slightly different requirements and the relevant contract cancellation provisions are prescribed by *Bus. & Prof. Code § 7159(e)(6), (7)* and *Bus. & Prof. Code § 7159.10(e)(12)*, respectively [***see also*** *Civ. Code §§ 1689.6(a)(3), 1689.7(a)(4), (e), 1689.15*].

a. In at least 10-point boldface type.

b. In same language (e.g., Spanish) as was principally used in oral sales presentation.

c. Placed in close proximity to space reserved for owner's or tenant's signature.

d. Cross-referring to cancellation notice attached to contract [*see § 89.203[2]*; *see also § 89.121*, P 5.b].

17. If contract arose from negotiations initiated by prospective purchaser for repair services by licensed contractor in amount less than $100, include purchaser's statement regarding negotiations [*Civ. Code § 1689.5*].

NOTE:

Contracts of this type are excluded from the definition of "home solicitation contracts" [***see*** *Civ. Code § 1689.5(a)*]. This exclusion deprives the purchaser of certain statutory protections [***see*** *Civ. Code §§ 1689.6-1689.11*; ***see also*** *§ 89.203[1]*].

18. Paginate entire contract to reflect total number of pages in document (e.g., Page 1 of 20 Pages).

NOTE:

This manner of pagination may be useful if, after work on the project commences, disputes arise over what was contained in the original contract. It is particularly advisable in home improvement contracts that must be contained in single documents [***see*** *Bus. & Prof. Code § 7159*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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29-89 California Legal Forms--Transaction Guide § 89.131

§ 89.131 Service and Repair Contracts

1. Ensure all conforming requirements for service and repair contract are met [*see Bus. & Prof. Code § 7159.10(a)(1)*].

NOTE:

A service and repair contract is an agreement between a contractor or salesperson for a contractor, whether a general contractor or specialty contractor, who is licensed to perform the work contracted for, and a homeowner or tenant, for the performance of a home improvement as defined by *Bus. & Prof. Code § 7151*, that conforms to the following requirements: (1) the contract amount is $750 or less; (2) the prospective buyer initiated contact with the contractor to request the work; (3) the contractor does not sell the buyer goods or services beyond those reasonably necessary to take care of the particular problem that caused the buyer to contact the contractor; and (4) no payment is due, or accepted by the contractor, until the work is completed [*Bus. & Prof. Code § 7159.10(a)(1)*; ***see*** *Bus. & Prof. Code § 7159.10(a)(2)* ("work is completed" defined)]. If all four of these conforming requirements are not met, any contract presented to the buyer as a service and repair contract will be a home improvement contract subject to the requirements set forth in *Bus. & Prof. Code § 7159(c), (d)*, and *(e)*, including rescission rights, regardless of the contract price [*Bus. & Prof. Code § 7159.10(b)*; ***see*** *§ 89.130*].

2. Ensure contract is legibly written in same language as principally used in any oral sales presentation, and that any printed forms are in at least 10-point typeface (unless otherwise described below) with boldface headings [*Bus. & Prof. Code § 7159.10(d)(1)-(4)*].

3. Draft contract to include following information, notices, and disclosures [Bus. & Prof. Code § 7159.20(d)(7), (8), (e)]:

a. Notice with heading "Commercial General Liability Insurance" followed by prescribed statement indicating whether or not contractor carries such insurance, or is self-insured.

NOTE:
The notice may be provided as an attachment to the contract.

b. Notice with heading "Workers' Compensation Insurance" followed by prescribed statement indicating whether contractor carries such insurance or is exempt.

NOTE:
The notice may be provided as an attachment to the contract.

c. Heading "Service and Repair" in at least 10-point boldface type.

d. "Notice to the Buyer" in at least 12-point boldface type informing buyer of conforming requirements for service and repair contract [*see Bus. & Prof. Code § 7159.10(a)(1)(A)-(D)*].

e. Twelve-point boldface notice informing buyer of his or her right to receive completely filled in and signed copy of contract before work begins.

f. If applicable, "List of Documents to be Incorporated into the Contract."

g. When contract is for fixed amount, heading "Contract Price" followed by relevant amount.

h. If there is a finance charge, heading "Finance Charge" followed by amount, which must be set out separately from contract amount.

i. If contract is estimated by time and materials formula, heading "Estimated Contract Price" followed by estimated contract amount.

NOTE:
The contract must disclose the set rate and estimated cost of materials. It also must disclose how time will be computed, e.g., in increments of quarter hours, half hours, or hours, and the following statement: "The actual contract amount of a time and materials contract may not exceed the estimated contract amount without written authorization from the buyer" [*Bus. & Prof. Code § 7159.10(e)(7)*].

j. Heading "Description of the Project and Materials to be Used and Equipment to be Installed" followed by that description.

k. Prescribed statement informing buyer that contractor is obligated to offer buyer any replaced parts with checkbox to be initialed if buyer does not want them.

l. If applicable, heading "Amount of Service Charge" followed by service charge and prescribed statement informing buyer that he or she may be charged only one service charge.

m. In immediate proximity to the space reserved for buyer's signature, 12-point boldface notice, wording of which is prescribed by statute, informing buyer of his or her cancellation rights.

NOTE:
The notice may be included as an attachment, in which case it must be signed and dated

by the buyer [***see*** *Bus. & Prof. Code § 7159.10(e)(12)(C)*; ***see also*** *Civ. Code § 1689.6(a)* (cancellation rights)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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29-89 California Legal Forms--Transaction Guide § 89.132

§ 89.132 Additional Provisions for Financed Projects

1. If contractor has extended consumer credit to owner or tenant:

NOTE:
For a definition of "consumer credit," see NOTE to *§ 89.111*, P 5 b.

a. Include disclosures required under federal Truth in Lending Act [*see 15 U.S.C. § 1601 et seq.*].

NOTE:
For a complete checklist of provisions and format of disclosure statements for transactions governed by the Truth in Lending Act, see *Ch. 45, **Consumer Installment Loans and Credit Sales**, § 45.123*.

b. If obligation of owner or tenant is secured by his or her principal dwelling, include Notice of Rescission in separate form disclosing [*15 U.S.C. § 1635*; *see 12 C.F.R. § 226.15*; *see also* Ch. 25A, *Security Instruments for Real Estate Financing*]:

(1) Fact of retention or acquisition of a security interest in owner's or tenant's dwelling.

(2) Right of each person whose ownership interest is or will be subject to security interest to rescind transaction.

(3) How to exercise rescission rights.

(4) Effects of rescission [*see 12 C.F.R. § 226.23(d)*].

(5) Date rescission period expires.

2. If contractor has extended credit to owner or tenant for sale of consumer goods or services under retail installment contract [*see § 89.18[1]*], include mandatory Unruh Act disclosures as part of contract [*see Civ. Code § 1803.3(c)*].

NOTE:

For a complete checklist of provisions and format of disclosure statements for transactions governed by the Unruh Act [*Civ. Code § 1801 et seq.*], see *§§ 45.124*, *45.125*.

3. Specify property pledged by owner or tenant to secure loan.

NOTE:

For a complete analysis of the law governing security interests in realty, see Ch. 25A, ***Security Instruments for Real Estate Financing*** .

4. If swimming pool contract is financed by third party lender, prepare notice of alternative procedure permitting commencement of construction before expiration of loan rescission period [*see Bus. & Prof. Code § 7165(e)*; *see also § 89.202[2]* (statutory notice)].

5. If contract is to provide home improvement goods or services and loan is more than $5,000 and secured by lien on real property, specify one of following payment methods [*Bus. & Prof. Code § 7159.2(b)*]:

NOTE:

No home improvement goods or services contract of $5,000 or less can provide for a security interest in real property, except a mechanic's lien or other interest that arises by operation of law. Any lien purportedly created by such a contract is void and unenforceable [*Bus. & Prof. Code § 7159.2(a)*].

a. Payment by instrument payable to borrower or jointly to borrower and contractor; or

b. At borrower's election, payment through third-party escrow agent under terms of written agreement signed before disbursement by borrower, lender, and contractor.

Legal Topics:

For related research and practice materials, see the following legal topics:
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29-89 California Legal Forms--Transaction Guide §§ 89.133-89.139

[Reserved]

§§ 89.133[Reserved]

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E. Related and Subsequent Procedures

29-89 California Legal Forms--Transaction Guide § 89.140

§ 89.140 Post-Construction Notices

NOTE:

There are detailed procedures for filing post-construction notices. A discussion of that subject is beyond the scope of this chapter. For an analysis of the law in this area and representative forms, see Ch. 31, ***Mechanics' Liens*** .

1. Record Notice of Completion [*see Civ. Code § 3093*]:

NOTE:

When the owner or tenant files a Notice of Completion, the time period in which contractors, mechanics, and material suppliers may file liens on the improved property commences [***see*** *Civ. Code §§ 3115, 3116*].

a. No later than 10 days after project is completed.

b. In office of recorder for county where work was performed.

2. Deliver preliminary 20-Day Notice [*see Civ. Code §§ 3097, 3098*] with affidavit of service:

NOTE:

A preliminary notice alerts the property owner, general contractor, and construction lender to the existence of persons who are entitled to record mechanics' liens, file stop notices, or assert claims against a payment bond for private works of improvement, and file stop notices or assert payment bond claims against public works. The preliminary notice will also inform the person served of the amount claimed.

a. For value of labor, material, services, or equipment furnished.

b. To property owner, general contractor, and construction lender, if any.

3. If contract was home solicitation contract and customer cancels within three-day grace period, return any negotiable instrument or property received from customer within 10 days after receiving notice of cancellation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContracts

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29-89 California Legal Forms--Transaction Guide § 89.141

§ 89.141 Liens

NOTE:

For an analysis of the law relating to liens, including representative forms, see Ch. 31, ***Mechanics' Liens*** .

1. Record lien on improved property for value of work and/or goods supplied by any of the following [*see Cal. Const., art. XIV, § 3*; *see also Civ. Code §§ 3067-3082*]:

a. Mechanics.

b. Material suppliers.

c. Laborers.

d. Artisans.

2. If desired, on owner's or tenant's final payment to contractor, execute and record waiver of liens in office of recorder for county in which work was performed [*see § 89.224[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Real Property LawNonmortgage LiensGeneral Overview

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29-89 California Legal Forms--Transaction Guide §§ 89.142-89.199

[Reserved]

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PART IV. FORMS
A. Home Improvement and Service and Repair Contracts

29-89 California Legal Forms--Transaction Guide § 89.200

§ 89.200 Home Improvement Contract [Bus. & Prof. Code § 7159]

[1] Comment

[a] Use of Form

This form is a home improvement contract that satisfies all requirements of *Bus. & Prof. Code § 7159* [*see § 89.200[1][f]*]. *Bus. & Prof. Code § 7159* applies to a contract between an owner or tenant and a licensed contractor for performance of a home improvement, when the aggregate contract price, including all labor, services, and materials, exceeds $500 [*see Bus. & Prof. Code § 7159(b)*; *see also Bus. & Prof. Code § 7151* ("home improvement" defined), and *§ 89.200[1][b]*].

[b] Projects Constituting Home Improvements

A "home improvement" is any work (e.g., repair, modernization, conversion, or addition) performed on residential property. Home improvements include work affecting structures or land (e.g., driveways, terraces, patios, landscaping, fences, porches, garages, fallout shelters, and basements) adjacent to dwellings [*Bus. & Prof. Code § 7151*]. For purposes of the Contractors' State License Law, "home improvements" also include the sale, furnishing, or installation of home improvement goods or services [*Bus. & Prof. Code § 7151.2*]. "Home improvement goods and services" are tangible chattels (e.g., fencing, carpeting, texture coating, and heating or air conditioning equipment) and labor (e.g., termite extermination) bought in connection with the improvement of real property [*Bus. & Prof. Code § 7151*; *see Civ. Code § 1689.5(c), (d)*; *see also § 89.200[1][d], [e]*].

The home improvement operator must be a contractor unless he or she is exempt from the licensing requirements of the Contractors' State License Law [*Bus. & Prof. Code § 7150.1*; *see § 89.12[1]*]. For an analysis of the various parties likely to be involved in home improvement transactions and the limits on their capacities to act, see *§ 89.11[4]*. For a list of contractor classifications and the types of work specific licensees are authorized to perform, see Ch. 88, *Licensing of Contractors* .

[c] Requirement for Written Agreement

If the aggregate contract price exceeds $500, an agreement between a contractor and an owner or tenant for improvement to a building or other structure must be in writing and must contain specific information [*Bus. & Prof. Code § 7159*; *see* Asdourian v. Araj (1985) 38 Cal. 3d 276, 290-294, 211 Cal. Rptr. 703, 696 P.2d 95 ; *see also 89.200[1][f]*]. All other home improvement contracts may be oral or, if written, contained in multiple documents [*Bus. & Prof. Code § 7151.2*].

[d] Home Improvement Services

"Home improvement services" are services purchased in connection with a real property improvement [*Bus. & Prof. Code § 7151*]. They include services furnished in improving residential premises (e.g., termite extermination) as well as services connected with the sale or repair of tangible chattels that become part of real property (e.g., installation of carpets) [*see Bus. & Prof. Code § 7151*; *see also Civ. Code §§ 1689.5(d), 1802.1*]. Courses of instruction, such as classes on home electrical wiring or the construction of patios, are home improvement services [*see Bus. & Prof. Code § 7151*; *see also Civ. Code § 1689.5(d)*]. However, the services of attorneys, investment counselors, real estate brokers, and other professionals are specifically excluded from the category of home improvement services and, accordingly, are not governed by the Contractors' State License Law [*see Civ. Code § 1689.5(d)*].

[e] Home Improvement Goods

"Home improvement goods" are tangible chattels (or certificates exchangeable for tangible chattels) bought in connection with the improvement of real property and used primarily for personal, family, or household purposes [*see Bus. & Prof. Code § 7151*; *see also Civ. Code § 1689.5(c)*]. Goods intended to be affixed to real property so as to become part of that property, regardless of whether they can be severed from it, are home improvement goods [*Bus. & Prof. Code § 7151*].

A home improvement contractor or salesperson who offers a written warranty covering home improvement goods is a warrantor who must comply with the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act [*15 U.S.C. § 2301 et seq.*], which governs warranties of consumer products. For further analysis of the Act's requirements and a representative warranty, see *§ 89.205[1]*.

[f] Home Improvement Contracts

[i] General Requirements

A home improvement contract must be legible, or if it is printed, it must be readable and printed in at least 10-point typeface with 10-point boldface headings [*Bus. & Prof. Code § 7159(c)(1), (2)*]. Before work is commenced, the contractor must give the buyer a copy of the contract signed and dated by both parties [*see Bus. & Prof. Code § 7159(d)(4)*]. Because the buyer's receipt of the copy initiates the buyer's cancellation rights, the first page must include the date the buyer signed the contract along with the contractor's name and address to which a Notice of Cancellation must be mailed [*Bus. & Prof. Code § 7159(3)*].

The contract must also include a statement that, on satisfactory payment being made for partial performance, the contractor must, before any further payment is made, furnish a person contracting for home improvement or swimming pool work a full and unconditional release from any potential lien claimant or authorized mechanics' lien for the portion of the work for which payment has been made [*Bus. & Prof. Code § 7159(c)(4)*].

A change-order form for changes or extra work must be incorporated into and become part of the contract only if it is in writing and signed by the parties before any work covered by the change order has begun [*Bus. & Prof. Code § 7159(c)(5)*]. In close proximity to the parties' signatures there must be a notice stating that the owner or tenant has the right to require the contractor to have a performance and payment bond [*Bus. & Prof. Code § 7159(c)(6)*]. A contract,

the primary purpose of which is to construct a swimming pool, which does not substantially comply with either of these requirements, is void and unenforceable by the contractor as contrary to public policy. However, the contractor's failure to satisfy the change-order form requirement will not preclude him or her from recovering compensation for work performed based on quasi-contract, quantum meruit, restitution, or other similar legal or equitable remedies designed to prevent unjust enrichment [*Bus. & Prof. Code § 7167*].

If the contract provides for a contractor to furnish joint control, the contractor may not have any financial or other interest in the joint control [*Bus. & Prof. Code § 7159(c)(7)*].

As described in *§ 89.200[1][f][ii]* and *[iii]*, home improvement contracts have other, very specific, requirements for disclosures and other information that must be included in the writing.

[ii] Specific Requirements

A home improvement contract must include all of the following information [*Bus. & Prof. Code § 7159(d)*]:

1. The contractor's name, business address, and license number.

2. If applicable, the name and registration number of any home improvement salesperson that solicited or negotiated the contract.

3. The heading "Home Improvement" in at least 10-point boldface type.

4. A 12-point boldface statement informing the buyer that he or she is entitled to a completely filled-in and signed copy of the contract before work may be started.

5. The heading "Contract Price" followed by the amount of the contract [*see Bus. & Prof. Code § 7159.5(a)(1)*].

6. If applicable, the heading "Finance Charge" followed by the amount of the charge [*see Bus. & Prof. Code § 7159.5(a)(2)*].

7. The heading "Description of the Project and Description of the Significant Materials to be Used and Equipment to be Installed" followed by that information, including, if relevant, a plan and scale drawing of any swimming pool to be installed including the construction and equipment specifications.

8. If a downpayment will be charged, it may not exceed the lesser of $1,000 or 10 percent of the contract price and its details must be set forth in a statutory format [*see Bus. & Prof. Code § 7159(d)(8)(A)-(C)*; *see also Bus. & Prof. Code § 7159.5(a)(3)* (down payment limitation)].

9. If any progress payments are to be made, the contract must include (a) a schedule of those payments with specific reference to the amount of each payment and the amount of work or services to be performed and any materials and equipment to be supplied in connection with each payment; and (b) a statutorily-prescribed statement informing the buyer about the nature of the schedule with a notice that, while a contractor may require a downpayment, it is unlawful for the contractor to collect payment for work not completed or materials not yet delivered [*see Bus. & Prof. Code §§ 7159(d)(9)(C), 7159.5(a)(4), (5)*].

10. The heading "Approximate Start Date" followed by a statement describing what constitutes substantial commencement of work and an approximate date for that commencement.

11. The heading "Approximate Completion Date" followed by that date.

12. If applicable, the heading "List of Documents to be Incorporated into the Contract" followed by that list.

13. The heading "Note about Extra Work and Change Orders" followed by a statutorily-prescribed statement informing the buyer of the nature and effect of change orders [*see Bus. & Prof. Code § 7159(d)(13)*].

A contractor who furnishes a payment and performance bond, lien and completion bond, or a bond equivalent or joint control approved by the registrar covering full performance and payment, is exempt from the down payment limitation described in 8., *above*. The contractor who provides such security for his or her performance is also relieved the requirement that the contract include a schedule of progress payments, as described in 9., *above* [Bus. & Prof. Code § 7159.5(a)(8); *see* Bus. & Prof. Code § 7159(d)(9)].

If the contract provides for a payment of a salesperson's commission out of the contract price, that payment must be made on a pro rata basis in proportion to the schedule of progress payments described in 9., *above* [*Bus. & Prof. Code § 7159.5(a)(7)*].

A contract, the primary purpose of which is to construct a swimming pool, which does not substantially comply with the requirements enumerated in 7-9., *above*, is void and unenforceable by the contractor as contrary to public policy [*Bus. & Prof. Code § 7167(a)*].

[iii] Required Notices

Notices concerning the following subjects must be either included as part of the contract form, or, if otherwise specified, provided as an attachment to the form [*Bus. & Prof. Code § 7159(e)*]:

1. Commercial general liability insurance.

2. Workers' compensation insurance.

3. Information concerning the performance of extra or change-order work.

4. A mechanic's lien warning the wording of which is prescribed by statute [*see Bus. & Prof. Code § 7159(e)(4)*].

5. Information about the role of the Contractors' State License Board, including how to contact the Board.

6. If applicable, a notice informing the buyer that he or she has three days within which to cancel the contract the effect of which would be to place the parties in their pre-contract positions [*see Bus. & Prof. Code § 7159(e)(6)(B)* (wording of notice), (C) (format and location of notice in contract)]. The three-day notice is required unless (a) the contract is negotiated in the contractor's place of business, (b) the contract is to repair or restore residential premises damaged by a sudden or catastrophic event, or (c) the contractor is subject to licensure under the Alarm Company Act [*Bus. & Prof. Code § 7159(e)(6)(A)*; *see Bus. & Prof. Code § 7590 et seq.* (Alarm Company Act)].

7. If the contract involves repairing or restoring a residence damaged or destroyed by a sudden or

catastrophic event for which a state of emergency has been declared, a notice informing the buyer that he or she has seven days within which to cancel the contract the effect of which would be to place the parties in their pre-contract positions [*see Bus. & Prof. Code § 7159(e)(7)(A)* (wording of notice), (B) (format and location of notice in contract)].

A contractor who furnishes a payment and performance bond, lien and completion bond, or a bond equivalent or joint control approved by the registrar covering full performance and payment, need not include the mechanics' lien warning described in 4., *above* [*Bus. & Prof. Code § 7159.5(a)(8)*].

The three-day or seven-day notice to cancel described in 6., and 7., *above*, must be accompanied by a completed form in duplicate captioned "Notice of Cancellation," which must also be attached to the contract and be easily detachable. The wording of the notice of prescribed by statute must be written in the same language as used in the contract [*Bus. & Prof. Code § 7159(e)(6)(C)(vi), (7)(B)(vi)*].

[iv] Release for Partial Payment

On any payment by the buyer, and before any further payment is made, the contractor must, at the other buyer's request, obtain and furnish a full and unconditional release from any potential lien claimant claim or mechanics' lien authorized pursuant to *Civ. Code § 3110* for any portion of the work for which payment has been made. The buyer may withhold all further payments until these releases are furnished [*Bus. & Prof. Code § 7159.5(a)(6)*].

[v] Penalties for Violation of Requirements

Failure by a licensee, or a person subject to be licensed under the Contractors' State License Law, or by his or her agent or salesperson, to provide the required information, notices, and disclosures in a contract, or to comply with them, is cause for discipline [*Bus. & Prof. Code § 7159.5(a)*]. In addition, misrepresentation of, or failure to include, the contract price, violating the down payment limitations, or requesting or accepting payment that exceeds the value of work performed or material delivered is a misdemeanor punishable by a fine of between $100 and $5,000 and/or imprisonment for up to one year [*Bus. & Prof. Code § 7159.5(b)*].

Any person who violates the requirements described in *Bus. & Prof. Code § 7159.5(a)*, which generally relate to the contract requirements for contract price, finance charge, down payment, and progress payments, as part of a plan or scheme to defraud an owner or tenant of a residential or nonresidential structure, including a mobilehome or manufactured home, in connection with the offer or performance of repairs to the structure for damage caused by a natural disaster, will be ordered to make full restitution to the victim based on the person's ability to pay, as defined in *Penal Code § 1203.1b(e)*. In addition to full restitution, and imprisonment for up to one year, the court may impose a fine of not less than $500 nor more than $25,000, also based on the defendant's ability to pay. This applies to natural disasters for which the Governor proclaims a state of emergency, or for which an emergency or major disaster is declared by the President of the United States [*Bus. & Prof. Code § 7159.5(c)*].

[g] Requirements for Contracts Secured by Real Property

No home improvement goods or services contract of $5,000 or less can provide for a security interest in real property, except a mechanic's lien or other interest that arises by operation of law. Any lien purportedly created by such a contract is void and unenforceable [*Bus. & Prof. Code § 7159.2(a)*].

When a home improvement goods or services contract of more than $5,000 is secured by a mortgage or deed of trust on real property, the person or entity making the loan must pay the contractor either by an instrument payable to the borrower or jointly to the borrower and contractor or, if the borrower so elects, through a third-party escrow agent pursuant to the terms of a written agreement signed by the parties before the funds are disbursed [*Bus. & Prof. Code §*

7159.2(b)].

[h] Notice Requirement for Certain Door-to-Door Sales Contracts

With specified exceptions, any contract for the sale of home improvement goods or services offered by door-to-door sale that contains or is secured by a lien on real property must be accompanied by a prescribed notice [*Bus. & Prof. Code § 7159.1*]. A security interest created in any door-to-door sale contract that does not provide the notice is void and unenforceable [*Bus. & Prof. Code § 7159.1*]. For additional discussion and the required form, see *§ 89.208*.

[i] Use of Provisions for Loans

A home improvement contract is unenforceable against the buyer if obtaining a loan for all or part of the contract price is a condition precedent to the contract or if the contractor provides financing, in any way helps the buyer obtain a loan, or refers the buyer to a lender or loan arranger unless certain requirements are satisfied. These requirements are that the lender must in fact agree to make the loan, the buyer must agree to accept the loan, and the buyer must not rescind the loan or financing transaction within the three-day period prescribed by the federal Truth in Lending Act [*Bus. & Prof. Code § 7163(a)*; *see 15 U.S.C. § 1635*].

Until the requirements of *Bus. & Prof. Code § 7163(a)* are satisfied, the contractor must not deliver any property or perform any services other than obtaining building permits or other similar services preliminary to the commencement of the home improvement for which no mechanic's lien can be claimed [*Bus. & Prof. Code § 7163(b)(1)*]. Additionally, the contractor must not represent in any manner that the contract is enforceable or that the buyer has an obligation under the contract [*Bus. & Prof. Code § 7163(b)(2)*]. Any violation of these prohibitions renders the contract unenforceable [*Bus. & Prof. Code § 7163(b)*].

If the contract is unenforceable under these provisions, the contractor must immediately and unconditionally refund all consideration given by the buyer. If the buyer gave property as consideration and the contractor does not or cannot return it, the contractor must immediately return its fair market value or the value specified for it in the contract, whichever is greater [*Bus. & Prof. Code § 7163(c)*].

The buyer must make any property delivered by the contractor under an unenforceable contract available for return to the contractor if it is practical to return it without causing damage to the buyer, if the contractor returns any consideration received, and if the contractor picks up the property at its expense within 60 days after execution of the contract [*see Bus. & Prof. Code § 7163(d)(2)*]. Otherwise, the buyer may retain, without obligation, any services or property provided under the contract [*Bus. & Prof. Code § 7163(d)(1)*].

These rules apply to home improvement contracts. "Goods" are covered regardless of whether they are to become fixtures or not [*Bus. & Prof. Code § 7163(e)*]. The rights and remedies discussed above are nonexclusive and cumulative with other legal rights and remedies [*Bus. & Prof. Code § 7163(f)*]. Normally, a waiver of any rights under *Bus. & Prof. Code § 7163* is void and unenforceable. However, a limited exception exists when the contract is for emergency repairs necessary for the immediate protection of people and property [*Bus. & Prof. Code § 7163(g)*; *see § 89.206[1]*].

For swimming pool contracts, alternative procedures are available that will permit the contractor to begin work before expiration of the buyer's loan cancellation period without affecting the contract's enforceability. To invoke these procedures, certain conditions must be met and a statutory notice set forth [*see Bus. & Prof. Code § 7165*]. For a description of these procedures and the text of the required notice, see *§ 89.202*.

[j] Applicability of Truth in Lending Act and Unruh Act

If the home improvement project is financed, counsel must consider the potential applicability of the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] and/or California's Unruh Act [*Civ. Code § 1801 et seq.*]. Determining whether either or both of these Acts applies to a particular transaction is important since it will determine whether certain disclosures and other statements must be part of the contract [*see § 89.18*; *see also* Ch. 45, *Consumer Installment Sales and Credit Sales*].

[k] Home Solicitation Contract Requirements

A contract that is made at a location other than trade or business premises and that is subject to approval for work, labor, or services furnished in connection with work on residential premises is a "home solicitation contract or offer" unless the buyer has absolute rescission rights afforded by the federal Truth in Lending Act [*see Civ. Code § 1689.5(a), (d)*; *see also 15 U.S.C. § 1601 et seq.*]. A nonfinanced home improvement contract will normally be a home solicitation contract. However, it is important to note that if a home solicitation contract or offer for home improvement goods or services provides for a lien on real property, that contract is subject to the Unruh Act [*see Civ. Code §§ 1689.5, 1801 et seq.*; *see also § 89.18[1]*].

The regulation of home solicitations focuses on protecting consumers against pressures that arise when salespersons appear at their homes [*see Weatherall Aluminum Products Co. v. Scott (1977) 71 Cal. App. 3d 245, 248, 139 Cal. Rptr. 329* ; *see also Civ. Code §§ 1689.6, 1689.7*]. Any confession of judgment or waiver of a consumer's rights under the laws governing home solicitations is void as against public policy [*see* Civ. Code § 1689.12]. The contract must be written in the same language that was principally used in the oral sales presentation [*Civ. Code § 1689.7(a)(1)*].

In the case of a home improvement contract that is also a home solicitation contract, the buyer has an absolute right to cancel until midnight of the third business day after the buyer receives a signed and dated copy of the contract [*see Civ. Code § 1689.6(a)(2)*; *Bus. & Prof. Code § 7159(e)(6)*]. If the purpose of the contract is to repair or restore residential premises damaged by a disaster, the cancellation period is seven days, which also begins to run when the buyer receives a signed and dated copy of the contract [*Civ. Code § 1689.7(e)*; *see Bus. & Prof. Code § 7159(e)(7)*].

[l] Proscribed Contractual Provisions

A contractor may not insert a provision in any construction contract that purports to indemnify a contractor against liability for damages due to death or bodily injury to persons, injury to property, or any other loss, damage, or expense arising from the sole negligence or willful misconduct of the contractor, the contractor's agents, servants, or independent contractors who are directly responsible to the contractor, or for defects in design furnished by those persons [*Bus. & Prof. Code § 7034(a)*; *Civ. Code § 2782(a)*]. Prohibited provisions of this type, whether contained in or collateral to a construction contract, are generally void as against public policy and will not be enforced [*Civ. Code § 2782(b)*; *see National Union Fire Ins. Co. v. Nationwide Ins. Co. (1999) 69 Cal. App. 4th 709, 717-718, 82 Cal. Rptr. 2d 16]* ; *see also § 30D.15[3]* for further discussion of prohibited indemnity provisions.

However, the provisions of *Civ. Code § 2782* do not void an agreement by which a contractor indemnifies a person, firm, corporation, or state or other agency for whose account a construction contract is not being performed but who, as an accommodation to the contractor, permits the latter to enter upon the accommodating party's property for the purpose of performing a construction contract for others [*Civ. Code § 2782.1*]. Likewise, if the self-insured owner of a plant or facility has a net worth exceeding $10,000,000 and is audited annually, the owner may enter into a valid agreement to indemnify a professional engineer against liability exceeding $250,000 for negligent inspection services to the plant or facility provided by the engineer or the engineer's agents or employees [*Civ. Code § 2782.2*]. Parties may also negotiate and make an agreement regarding the allocation, release, liquidation, exclusion, or limitation of the promisee's or promisor's liability for damages attributable to design defects [*see Civ. Code § 2782.5*]. Furthermore, an agreement to indemnify professional engineers or geologists (or their agents, contractors, subsidiaries, or employees) from liability in providing hazardous materials identification, evaluation, preliminary assessment, design, remediation services, or other

specified services is not against public policy and therefore is permitted if statutory criteria are satisfied [*Civ. Code § 2782.6*; *see Health & Safety Code §§ 25322, 25323*; 40 C.F.R. pt. 300 (other services covered)].

[m] Swimming Pool Contracts

Contracts to repair, remodel, alter, convert, modernize, add to, replace, or improve swimming pools, spas, or hot tubs adjacent to dwelling houses are home improvement contracts [*Bus. & Prof. Code §§ 7151, 7151.2*]. Thus, they are subject to the same requirements as other home improvement contracts [*see Bus. & Prof. Code § 7159*; *see also § 89.200[1][f]*]. If the construction is financed by a third party lender, alternative procedures to those required by *Bus. & Prof. Code § 7163(a)* [*see § 89.200[1][i]*] are available that will permit the contractor to begin work before expiration of the buyer's loan cancellation period without affecting the enforceability of the contract [*see Bus. & Prof. Code § 7165*; *see also § 89.202*].

[n] Arbitration Disclosure for Small Residential Projects

Because the form in [2], *below*, includes an arbitration provision, it also includes the disclosure provision that is required for all contracts for work on residential property with four or fewer units that include an arbitration provision. In such contracts, both the arbitration provision itself, and the disclosure must be set out either in at least 10-point roman boldface type or in contrasting red print in at least 8-point roman boldface type. If the contract is typed, the provision and disclosure must be set out in capital letters. Failure to comply with these requirements will preclude the contractor from enforcing the contract [*Bus. & Prof. Code § 7191*].

[2] FORM

Home Improvement Contract [Bus. & Prof. Code § 7159]

HOME IMPROVEMENT

You are entitled to a completely filled in copy of this agreement, signed by both you and the Contractor, before any work may be started.

This contract was signed by Buyer on _____[*date*].

Notice of Cancellation of this Contract may be sent to Contractor at the address below.

Contractor: _____ [*name*]
_____ [*business address*]
_____ [*telephone*]
_____ [*email*]

License no. _____ [*contractor's license number*]

[*Include if home improvement salesperson solicited or negotiated contract:*]

Salesperson: _____ [*name*]
_____ [*registration number*]

[*Continue:*]

Buyer: _____ [*name*]

_____ [*address*]
_____ [*telephone*]
_____ [*email*]

Contract Price: $_____.

[*If applicable, add:*]

Downpayment: $_____.

THE DOWNPAYMENT MAY NOT EXCEED $1,000 OR 10 PERCENT OF THE CONTRACT PRICE, WHICHEVER IS LESS.

[*If applicable, add:*]

Finance Charge: $_____.

[*If applicable, add:*]

Schedule of Progress Payments:

Payment 1: $_____ shall be due [on completion of *and/or* delivery of] _____ [*specify amount of work or services to be performed and any materials and equipment to be supplied*].

Payment 2: $_____ shall be due [on completion of *and/or* delivery of] _____ [*specify amount of work or services to be performed and any materials and equipment to be supplied*].

[*Continue with further progress payments as appropriate.*]

The schedule of progress payments must specifically describe each phase of work, including the type and amount of work or services scheduled to be supplied in each phase, along with the amount of each proposed progress payment. IT IS AGAINST THE LAW FOR A CONTRACTOR TO COLLECT PAYMENT FOR WORK NOT YET COMPLETED, OR FOR MATERIALS NOT YET DELIVERED. HOWEVER, THE CONTRACTOR MAY REQUIRE A DOWNPAYMENT.

[*Continue:*]

Release from Claim or Mechanics' Lien for Work That Has Been Paid For. Upon satisfactory payment being made for any portion of the work performed, the Contractor shall, prior to any further payment being made, furnish to the Buyer a full and unconditional release from any potential lien claimant or mechanics' lien authorized pursuant to *Section 3114 of the Civil Code* for that portion of the work for which payment has been made.

Description of the Project and Description of the Significant Materials to be Used and Equipment to be Installed: [*Describe project and significant materials to be used and equipment to be installed. For swimming pool, attach plan and scale drawing showing shape, size, dimensions, and construction and equipment specifications*].

Approximate Start Date: _____[*date*].

Work under this Contract shall be deemed to have substantially commenced [*describe what constitutes substantial commencement of work, e.g.*, when Contractor moves equipment onto the work site, *or* on the first delivery of project materials to the work site].

Approximate Completion Date: _____[*date*].

[*If applicable, add:*]

List of Documents to be Incorporated into the Contract:

1. _____ [*e.g., plan and scale drawing of swimming pool showing shape, size, dimensions, and construction and equipment specifications*].

2. _____ [*list additional documents as appropriate*].

[*Continue:*]

Extra Work and Change Orders: The Buyer may not require the Contractor to perform extra or change order work without providing written authorization prior to the commencement of any work covered by the new change order. Extra work or a change order is not enforceable against the Buyer unless the change order also identifies all of the following in writing prior to the commencement of any work covered by the new change order: (1) the scope of the work encompassed by the order, (2) the amount to be added or subtracted from the Contract, and (3) the effect the order will make in the progress payments or the completion date. The Contractor's failure to comply with these requirements does not preclude the recovery of compensation for work performed based upon legal or equitable remedies designed to prevent unjust enrichment.

Note about Extra Work and Change Orders: Extra Work and Change Orders become part of the contract once the order is prepared in writing and signed by the parties prior to the commencement of any work covered by the new change order. The order must describe the scope of the extra work or change, the cost to be added or subtracted from the contract, and the effect the order will have on the schedule of progress payments.

[*Either:*]

Commercial General Liability Insurance (CGL): A notice concerning commercial general liability insurance is attached to this contract.

[*Or:*]

Commercial General Liability Insurance (CGL): [*Choose as appropriate:* This Contractor does not carry commercial general liability insurance *or* This Contractor carries commercial general liability insurance written by _____ (*insurance company*). You may call _____ (*insurance company*) at _____ (*phone number*) to check the Contractor's insurance coverage *or* This contractor is self-insured.]

[*Either:*]

Workers' Compensation Insurance: A notice concerning workers' compensation insurance is attached to this Contract.

[*Or:*]

Workers' Compensation Insurance: [*Choose as appropriate:* This Contractor has no employees and is exempt from workers' compensation requirements *or* This contractor carries workers' compensation insurance for all employees.]

Mechanics' Lien Warning:

Anyone who helps improve your property, but who is not paid, may record what is called a mechanics' lien on your property. A mechanics' lien is a claim, like a mortgage or home equity loan, made against your property and recorded with the county recorder.

Even if you pay your contractor in full, unpaid subcontractors, suppliers, and laborers who helped to improve your property may record mechanics' liens and sue you in court to foreclose the lien. If a court finds the lien is valid, you could be forced to pay twice or have a court officer sell your home to pay the lien. Liens can also affect your credit.

To preserve their right to record a lien, each subcontractor and material supplier must provide you with a document called a '20-day Preliminary Notice.' This notice is not a lien. The purpose of the notice is to let you know that the person who sends you the notice has the right to record a lien on your property if he or she is not paid.

BE CAREFUL. The Preliminary Notice can be sent up to 20 days after the subcontractor starts work or the supplier provides material. This can be a big problem if you pay your contractor before you have received the Preliminary Notices.

You will not get Preliminary Notices from your prime contractor or from laborers who work on your project. The law assumes that you already know they are improving your property.

PROTECT YOURSELF FROM LIENS. You can protect yourself from liens by getting a list from your contractor of all the subcontractors and material suppliers that work on your project. Find out from your contractor when these subcontractors started work and when these suppliers delivered goods or materials. Then wait 20 days, paying attention to the Preliminary Notices you receive.

PAY WITH JOINT CHECKS. One way to protect yourself is to pay with a joint check. When your contractor tells you it is time to pay for the work of a subcontractor or supplier who has provided you with a Preliminary Notice, write a joint check payable to both the contractor and the subcontractor or material supplier.

For other ways to prevent liens, visit CSLB's Internet Web site at www.cslb.ca.gov or call CSLB at 800-321-CSLB (2752).

REMEMBER, IF YOU DO NOTHING, YOU RISK HAVING A LIEN PLACED ON YOUR HOME. This can mean that you may have to pay twice, or face the forced sale of your home to pay what you owe.

[*If contract is for work on residential property with four or fewer units, arbitration provision and disclosure that follows must be in 10-point boldface type or 8-point red boldface type; if contract is typed, provision must be in capital letters (Bus. & Prof. Code § 7191(a)).*]

Arbitration of Disputes: Any controversy that develops between Contractor and Buyer with regard to matters arising out of, or relating to, this Contract, and that the parties do not promptly resolve, shall be decided by arbitration administered by and in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association unless the parties agree otherwise in writing. This Paragraph shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered on it in any court of competent jurisdiction.

[*Include if contract is for work on residential property with four or fewer units (Bus. & Prof. Code § 7191(b)):*]

NOTICE:

BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE BUSINESS AND PROFESSIONS CODE OR OTHER APPLICABLE LAWS. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY. WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

_____
Buyer's Initials

_____
Contractor's Initials

Information about the Contractors' State License Board (CSLB):

CSLB is the state consumer protection agency that licenses and regulates construction contractors.

Contact CSLB for information about the licensed contractor you are considering, including information about disclosable complaints, disciplinary actions, and civil judgments that are reported to CSLB.

Use only licensed contractors. If you file a complaint against a licensed contractor within the legal deadline (usually four years), CSLB has authority to investigate the complaint. If you use an unlicensed contractor, CSLB may not be able to help you resolve your complaint. Your only remedy may be in civil court, and you may be liable for damages arising out of any injuries to the unlicensed contractor or the unlicensed contractor's employees.

For more information:

Visit CSLB's Internet Web site at www.cslb.ca.gov.

Call CSLB at 800-321-CSLB (2752).

Write CSLB at P.O. Box 26000, Sacramento, CA 95826.

[*Either:*]

[*Include Three-Day Right to Cancel unless contract is (1) negotiated at contractor's place of business, (2) subject to seven-day right to cancel (see Bus. & Prof. Code § 7159(e)(7)), or (3) subject to licensure under Alarm Company Act (Bus. & Prof. Code § 7590 et seq.), provided alarm company licensee complies with Civ. Code §§ 1689.5, 1689.6, and 1689.7 (see Bus. & Prof. Code § 7159(e)(6)).*]

Three-Day Right to Cancel:

_____ The law requires that the Contractor give you a notice explaining your right to cancel. Initial the checkbox if the Contractor has given you a "Notice of the Three-Day Right to Cancel."

[*Or:*]

[*Include instead of Three-Day Right to Cancel if contract is written for repair or restoration of residential premises damaged by sudden or catastrophic event for which local, state, or federal state of emergency has been declared (see Bus. & Prof. Code § 7159(e)(7)).*]

Seven-Day Right to Cancel:

_____ The law requires that the Contractor give you a notice explaining your right to cancel. Initial the checkbox if the Contractor has given you a "Notice of the Seven-Day Right to Cancel."

Performance and Payment Bond. The Buyer shall have the right to require the Contractor to obtain a performance and Payment Bond, the expense of which may be borne by the Buyer.

Executed on _____[*date*].

BUYER
_____ [*signature*]
[*typed name*]
CONTRACTOR
_____[*signature*]
[*typed name*]

ATTACHMENTS

[*Either:*]

[*Include Three-Day Right to Cancel unless contract is (1) negotiated at contractor's place of business, (2) subject to seven-day right to cancel (see Bus. & Prof. Code § 7159(e)(7)), or (3) subject to licensure under Alarm Company Act (*

Bus. & Prof. Code § 7590 et seq.), provided alarm company licensee complies with Civ. Code §§ 1689.5, 1689.6, and 1689.7 (see Bus. & Prof. Code § 7159(e)(6)). If three-day right to cancel applies, appropriate form of notice in duplicate must also be attached to contract.]

NOTICE OF THREE-DAY RIGHT TO CANCEL

You, the Buyer, have the right to cancel this contract within three business days. You may cancel by e-mailing, mailing, faxing, or delivering a written notice to the Contractor at the Contractor's place of business by midnight of the third business day after you received a signed and dated copy of the contract that includes this notice. Include your name, your address, and the date you received the signed copy of the contract and this notice.

If you cancel, the contractor must return to you anything you paid within 10 days of receiving the notice of cancellation. For you part, you must make available to the Contractor at your residence, in substantially as good condition as you received them, any goods delivered to you under this contract or sale. Or, you may, if you wish, comply with the Contractor's instructions on how to return the goods at the Contractor's expense and risk. If you do make the goods available to the Contractor and the Contractor does not pick them up within 20 days of the date of your notice of cancellation, you may keep them without any further obligation. If you fail to make the goods available to the Contractor, or if you agree to return the goods to the Contractor and fail to do so, then you remain liable for performance of all obligations under the Contract.

Buyer hereby acknowledges receipt of this Notice:

_____ [*date*]
_____ [*buyer's signature*]
Buyer

[*Or:*]

[*Include instead of Three-Day Right to Cancel if contract is written for repair or restoration of residential premises damaged by sudden or catastrophic event for which local, state, or federal state of emergency has been declared (see Bus. & Prof. Code § 7159(e)(7)). If seven-day right to cancel applies, appropriate form of notice in duplicate must also be attached to contract.*]

NOTICE OF SEVEN-DAY RIGHT TO CANCEL

You, the Buyer, have the right to cancel this contract within seven business days. You may cancel by e-mailing, mailing, faxing, or delivering a written notice to the Contractor at the Contractor's place of business by midnight of the seventh business day after you received a signed and dated copy of the contract that includes this notice. Include your name, your address, and the date you received the signed copy of the contract and this notice.

If you cancel, the contractor must return to you anything you paid within 10 days of receiving the notice of cancellation. For you part, you must make available to the Contractor at your residence, in substantially as good condition as you received it, any goods delivered to you under this contract or sale. Or, you may, if you wish, comply with the Contractor's instructions on how to return the goods at the Contractor's expense and risk. If you do make the goods available to the Contractor and the Contractor does not pick them up within 20 days of the date of your notice of

cancellation, you may keep them without any further obligation. If you fail to make the goods available to the Contractor, or if you agree to return the goods to the Contractor and fail to do so, then you remain liable for performance of all obligations under the Contract.

Buyer hereby acknowledges receipt of this Notice:

_____ [*date*]
_____ [*buyer's signature*]
Buyer

[*Complete and attach this form in duplicate for buyer's signature so it may be easily detached and sent to contractor (see Bus. & Prof. Code § 7159(e)(6)(C)(vi), (7)(B)(vi)).*]

Notice of Cancellation

[*transaction date, i.e., date buyer received executed copy of contract*]

You may cancel this transaction, without any penalty or obligation, within [three *or* seven] business days from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within 10 days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale, or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, or send a telegram to:

_____[*contractor's name*] at [*contractor's place of business*] not later than midnight of _____[*date either three or seven days following transaction date*].

I hereby cancel this transaction.

_____ [*date executed*]
_____ [*buyer's signature*]
Buyer

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 89 HOME IMPROVEMENT AND SPECIALTY CONTRACTS
PART IV. FORMS
A. Home Improvement and Service and Repair Contracts

29-89 California Legal Forms--Transaction Guide § 89.201

§ 89.201 Service and Repair Contract [Bus. & Prof. Code § 7159.10]

[1] Comment

[a] Use of Form

This form is a service and repair contract. Like home improvement contracts [*see § 89.200*], service and repair contracts are also subject to specific requirements.

A service and repair contract is an agreement between a general or specialty contractor, or salesperson for such a contractor, who is licensed or subject to be licensed with regard to the transaction, and a homeowner or a tenant, for the performance of a home improvement, that conforms to specified requirements [*Bus. & Prof. Code § 7159.10(a)(1)*; *see § 89.201[1][b]*].

[b] Requirements for Service and Repair Contracts

[i] General Requirements

A service and repair contract is an agreement between a general or specialty contractor, or salesperson for such a contractor [*see Bus. & Prof. Code § 7159.10(f)*], who is licensed or subject to be licensed with regard to the transaction, and a homeowner or a tenant, for the performance of a home improvement that meets all of the following conforming requirements [*Bus. & Prof. Code § 7159.10(a)(1)*]:

- The contract amount can be no more than $750;
- The prospective buyer must initiate contact with the contractor to request the work;
- The contractor may not sell the buyer goods or services beyond those reasonably necessary to take care of the particular problem that caused the buyer to contact the contractor; and

- No payment will be due, or accepted by the contractor, until the work is completed [*see Bus. & Prof. Code § 7159.10(a)(2)* ("work is completed" defined)].

For any contract written pursuant to *Bus. & Prof. Code § 7159.10(a)* or otherwise presented to the buyer as a service and repair contract, unless all of the conforming requirements for service and repair contracts specified in subdivision *Bus. & Prof. Code § 7159.10(a)* are met, the contract requirements for home improvements will be applicable, including any rights to rescind the contract, regardless of the aggregate contract price [*Bus. & Prof. Code § 7159.10(b)*; *Civ. Code § 1689.6(a)(3)(B)*; *see Bus. & Prof. Code § 7159(c)-(e)* (applicable home improvement contract requirements); *Civ. Code §§ 1689.6, 1689.7* (applicable rescission rights)].

If all of the conforming requirements are met, the notices and requirements described in *§ 89.201[1][b][ii]* will apply to the contract [*Bus. & Prof. Code § 7159.10(c)*].

[ii] Specific Requirements

A service and repair contract, and any changes or attachments to the contract, must be written in the same language as was principally used in any oral sales presentation and signed or acknowledged by the parties. If the contract is written, it must be legibly written. If it is printed, it must be readable and in at least 10-point typeface with 10-point boldface headings, unless specified otherwise [Bus. & Prof. Code § 1759.10(d)(1)-(3)].

Before work is started, the contractor must give the buyer a copy of the contract signed by both parties with the contractor's name, business address, and license number, and the date it was signed [*Bus. & Prof. Code § 7159.10(4)-(6)*].

The contract must include the following information, notices, and disclosures [Bus. & Prof. Code § 7159.20(d)(7), (8), (e); *but see Bus. & Prof. Code § 7159.10(g)* (contractor not relieved from compliance with other applicable laws)]:

1. A notice, which may be provided as an attachment, with the heading "Commercial General Liability Insurance" followed by a prescribed statement indicating whether or not the contractor carries such insurance, or is self-insured.

2. A notice, which may be provided as an attachment, with the heading "Workers' Compensation Insurance" followed by a prescribed statement indicating whether the contractor carries such insurance or is exempt.

3. A "Service and Repair" heading in at least 10-point boldface type.

4. A "Notice to the Buyer" in at least 12-point boldface type informing the buyer of the conforming requirements for a service and repair contract [*see Bus. & Prof. Code § 7159.10(a)(1)(A)-(D)*; *see also § 89.201[1][b][i]*].

5. A12-point boldface notice informing the buyer of his or her right to a completely filled in and signed copy of the contract before work begins.

6. If applicable, a "List of Documents to be Incorporated into the Contract."

7. When the contract is for a fixed amount, the heading "Contract Price" followed by the relevant amount.

8. If there will be a finance charge, the heading "Finance Charge" followed by the amount, which must

be set out separately from the contract amount.

9. If the contract is estimated by a time and materials formula, the heading "Estimated Contract Price" followed by the estimated contract amount. The contract must disclose the set rate and estimated cost of materials. It also must disclose how time will be computed, e.g., in increments of quarter hours, half hours, or hours, and the statement: "The actual contract amount of a time and materials contract may not exceed the estimated contract amount without written authorization from the buyer."

10. The heading "Description of the Project and Materials to be Used and Equipment to be Installed" followed by that description.

11. A prescribed statement informing the buyer that the contractor is obligated to offer the buyer any replaced parts with a checkbox to be initialed if the buyer does not want the parts.

12. If applicable, the heading "Amount of Service Charge" followed by the service charge and a prescribed statement informing the buyer that he or she may be charged only one service charge.

13. In immediate proximity to the space reserved for the buyer's signature, a 12-point boldface notice, the wording of which is prescribed by statute, informing the buyer of his or her cancellation rights. The notice may be included as an attachment in which case it must be signed and dated by the buyer [*see Bus. & Prof. Code § 7159.10(e)(12)(C)*; *see also Civ. Code § 1689.6(a)(3)*].

The notice of cancellation rights described in 13., *above*, informs the buyer that he or she may cancel the contract anytime before work begins. Even after work has begun, the buyer may cancel within three business days of signing a contract for normal service and repairs, or within seven business if the contract is to repair and correct conditions resulting from a sudden or catastrophic event for which a state of emergency has been declared, if the contract does not conform to any of the four basic requirements for a service and repair contract specified by *Bus. & Prof. Code § 7159.10(a)(1)(A)-(D)* [*see § 89.201[1][b][i]*]. The right to cancel may be exercised by email, postal mail, fax, or personal deliver to the contractor at his or her place of business with the relevant 3- or 7-day period. The cancellation must include the buyer's name, address, and the date he or she received a signed copy of the notice of cancellation rights. The effect of cancellation is to return the parties to their pre-contract positions [*Bus. & Prof. Code § 7159.10(e)(12)(A)*]. The cancellation notice does not apply to home improvement contracts entered into by a licensed alarm company operator provided the operator complies with the cancellation provisions applicable to such contracts under the law governing home solicitation contracts [*Bus. & Prof. Code § 7159.10(e)(12)(B)*; *see Civ. Code §§ 1689.5-1689.7*].

[iii] Release for Partial Payment

On any payment by the buyer, the contractor must, at the buyer's request, obtain and furnish a full and unconditional release from any potential lien claimant claim or mechanics' lien authorized pursuant to *Civ. Code § 3110* for any portion of the work for which payment has been made [*Bus. & Prof. Code § 7159.14(a)(11)*].

[iv] Penalties for Violation of Requirements

Failure by a licensee, or a person subject to be licensed under the Contractors' State License Law, or by his or her agent or salesperson, to provide the required information, notices, and disclosures in a contract, or to comply with them, is cause for discipline [*Bus. & Prof. Code §§ 7159.11, 7159.14(a)*]. In addition, misrepresentation of, or failure to include the contract price, violating the down payment limitations, or requesting or accepting payment that exceeds the value of work performed or material delivered, is a misdemeanor punishable by a fine of between $100 and $5,000 and/or imprisonment for up to one year [*Bus. & Prof. Code § 7159.14(b)*].

Any person who commits any of these, or other related violations [*see Bus. & Prof. Code § 7159.14(a)*], as part of a plan or scheme to defraud an owner or tenant of a residential or nonresidential structure, including a mobilehome or manufactured home, in connection with the offer or performance of repairs to the structure for damage caused by a natural disaster, will be ordered to make full restitution to the victim based on the person's ability to pay, as defined in *Penal Code § 1202.4*. In addition to full restitution, and imprisonment for up to one year, the court may impose a fine of not less than $500 nor more than $25,000, also based on the defendant's ability to pay. This applies to natural disasters for which the Governor proclaims a state of emergency, or for which an emergency or major disaster is declared by the President of the United States [*Bus. & Prof. Code § 7159.14(c)*].

[2] FORM

Service and Repair Contract [Bus. & Prof. Code § 7159.10]

SERVICE AND REPAIR CONTRACT

Notice to the Buyer:

The law requires that service and repair contracts must meet all of the following requirements:

(A) The price must be no more than seven hundred and fifty dollars ($750).

(B) You, the Buyer, must have initiated contact with the Contractor to request the work.

(C) The Contractor must not sell you goods or services beyond those reasonably necessary to take care of the particular problem that caused you to contact the Contractor.

(D) No payment is due and the contractor may not accept any payment until the work is completed.

I acknowledge that I have read this Notice:

_____ **[*date*]**
_____ **[*buyer's signature*]**
Buyer

Notice to the Buyer: You are entitled to a completely filled in and signed copy of this agreement before any work may be started.

Contractor: _____ [*name*]
_____ [*business address*]
_____ [*telephone*]
_____ [*fax*]
_____ [*email*]
License no. _____ [*contractor's license number*]
Buyer: _____ [*name*]
_____ [*address*]
_____ [*telephone*]
_____ [*email*]

This contract was signed on _____[*date*].

[*Either, if contract is for fixed amount:*]

Contract Price: $_____.

[*Or, if contract is estimated by time and materials formula:*]

Estimated Contract Price: $_____ . The Estimated Contract Price is based on a cost of labor at $_____ per hour computed in [*e.g.,* quarter- hour *or* half-hour] increments, and an estimated cost of materials of $_____.

The actual contract amount of a time and materials contract may not exceed the estimated contract amount without written authorization from the Buyer.

[*If applicable, add:*]

Finance Charge: $_____.

[*If applicable, add:*]

Amount of Service Charge: $_____.

You may be charged only one service charge, including any trip charge or inspection fee.

[*Continue:*]

Description of the Project Materials to be Used and Equipment to be Installed: [*Describe project and materials to be used and equipment to be installed*].

Replaced Parts: The law requires that the Contractor offer you any parts that were replaced during the service call. If you do not want the part, initial the checkbox labeled "OK for Contractor to take replaced parts."

squ; OK for Contractor to take replaced parts.

[*If applicable, add:*]

List of Documents to be Incorporated into the Contract:

1. _____ [*e.g., plan and scale drawing of swimming pool showing shape, size, dimensions, and construction and equipment specifications*].

2. _____ [*list additional documents as appropriate*].

[*Continue with either:*]

Commercial General Liability Insurance (CGL): A notice concerning commercial general liability insurance is attached to this contract.

[*Or:*]

Commercial General Liability Insurance (CGL): [*Choose as appropriate:* This Contractor does not carry commercial general liability insurance *or* This Contractor carries commercial general liability insurance written by _____ (*insurance company*). You may call _____ (*insurance company*) at _____ (*phone number*) to check the Contractor's insurance coverage *or* This contractor is self-insured.]

[*Continue with either:*]

Workers' Compensation Insurance: A notice concerning workers' compensation insurance is attached to this Contract.

[*Or:*]

Workers' Compensation Insurance: [*Choose as appropriate:* This Contractor has no employees and is exempt from workers' compensation requirements *or* This contractor carries workers' compensation insurance for all employees.]

Changes to Contract: Any changes to this Contract, and any attachments must be in writing and signed or acknowledged by the parties.

[*Continue (see Bus. & Prof. Code § 7030(b)):*]

Information about the Contractors' State License Board (CSLB):

CSLB is the state consumer protection agency that licenses and regulates construction contractors.

Contact CSLB for information about the licensed contractor you are considering, including information about disclosable complaints, disciplinary actions and civil judgments that are reported to CSLB.

Use only licensed contractors. If you file a complaint against a licensed contractor within the legal deadline (usually four years), CSLB has authority to investigate the complaint. If you use an unlicensed contractor, CSLB may not be able to help you resolve your complaint. Your only remedy may be in civil court, and you may be liable for damages arising out of any injuries to the unlicensed contractor or the unlicensed contractor's employees.

For more information:

Visit CSLB's Web site at www.cslb.ca.gov.

Call CSLB at 800-321-CSLB (2752).

Write CSLB at P.O. Box 26000, Sacramento, CA 95826.

[*Include, unless contractor holds alarm company operator's license (see Bus. & Prof. Code § 7590 et seq.) and complies with Civ. Code §§ 1689.5, 1689.6, and 1689.7, as applicable:*]

Right to Cancel:

[*Either:*]

_____ The law requires that the Contractor give you a notice explaining your right to cancel. Initial the checkbox if the Contractor has given you a "Notice of Your Right to Cancel."

[*Or, if contract is to repair or restore premises damaged by disaster:*]

_____ The law requires that the Contractor give you a notice explaining your right to cancel contracts for the repair or restoration of residential premises damaged by a disaster. Initial the checkbox if the Contractor has given you a "Notice of Your Right to Cancel."

Executed on _____[*date*].

BUYER
_____ [*signature*]
CONTRACTOR OR CONTRACTOR'S AUTHORIZED SERVICE REPAIRPERSON
_____ [*signature*]

ATTACHMENTS

[*Include, unless contractor holds alarm company operator's license (see Bus. & Prof. Code § 7590 et seq.) and complies with Civ. Code §§ 1689.5, 1689.6, and 1689.7, as applicable:*]

YOUR RIGHTS TO CANCEL BEFORE WORK BEGINS

(A) You, the buyer, have the right to cancel this contract until:

1. You receive a copy of this contract signed and dated by you and the contractor; and

2. The contractor starts work

(B) However, even if the work has begun you, the buyer, may still cancel the contract for any of the reasons specified in items 1 through 4 of this paragraph. If any of these reasons occur, you may cancel the contract within three business days of signing the contract for normal service and repairs, or within seven business days of signing a contract to repair or correct conditions resulting from any sudden or catastrophic event for which a state of emergency has been declared by the President of the United States or the Governor, or for which a local emergency has been declared by the

executive officer or governing body of any city, county, or city and county:

1. You may cancel the contract if the price, including all labor and materials, is more than seven hundred fifty dollars ($750).

2. You may cancel the contract if you did not initiate the contact with the contractor to request the work.

3. You may cancel the contract if the contractor sold you goods or services beyond those reasonably necessary to take care of the particular problem that caused you to contact the contractor.

4. You may cancel the contract if the payment was due or the contractor accepted any money before the work was complete.

(C) If any of these reasons for canceling occurred, you may cancel the contract as specified under paragraph (B) above by e-mailing, mailing, faxing, or delivering a written notice to the contractor at the contractor's place of business within three business days or, if applicable, seven business days of the date you received a signed and dated copy of this contract. Include your name, your address, and the date you received a signed copy of the contract and this notice.

If you cancel, the contractor must return to you anything you paid within 10 days of receiving the notice of cancellation. For your part, you must make available to the contractor at your residence, in substantially as good condition as you received it, any goods delivered to you under this contract. Or, you may, if you wish, comply with the contractor's instructions on how to return the goods at the contractor's expense and risk. If you make the goods available to the contractor and the contractor does not pick them up within 20 days of the date of your notice of cancellation, you may keep them without any further obligation. If you fail to make the goods available to the contractor, or if you agree to return the goods to the contractor and fail to do so, then you remain liable for performance of all obligations under the contract.

Buyer hereby acknowledges receipt of this Notice:

_____ [*date*]
_____ [*buyer's signature*]
Buyer

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 89 HOME IMPROVEMENT AND SPECIALTY CONTRACTS
PART IV. FORMS
A. Home Improvement and Service and Repair Contracts

29-89 California Legal Forms--Transaction Guide § 89.202

§ 89.202 Notice and Request for Immediate Commencement of Construction Under Third Party Financed Swimming Pool Construction Contract [Bus. & Prof. Code § 7165]

[1] Comment

[a] Use of Form

This form is a notice to the buyer under a third party financed swimming pool construction contract of the availability of a special procedure permitting the contractor to begin construction without waiting until the expiration of the buyer's loan rescission period, as is otherwise required by law for financed home improvement contracts [*Bus. & Prof. Code § 7165*; *see Bus. & Prof. Code § 7163(a), (b)*]. The form also serves as the document on which the buyer may request that the contractor begin performance pursuant to this alternative procedure [*see Bus. & Prof. Code § 7165(e)*].

No home improvement contract, including a swimming pool contract, is enforceable against the buyer if obtaining a loan for all or a portion of the contract price is a condition precedent to a contract, or if a contractor provides financing or in any way arranges for financing, unless a third party agrees to make the loan, the buyer agrees to accept the loan, and the buyer does not rescind within the period permitted by applicable federal law [*Bus. & Prof. Code § 7163(a)*; *see 15 U.S.C. § 1601 et seq.* (Truth in Lending Act); 12 C.F.R. pt. 226 (Regulation Z)]. Until these requirements are met, it is unlawful for a contractor to deliver any property or perform any service other than obtaining building permits or other preliminary services for which no mechanics' lien can be claimed, or to represent that the contract is enforceable or that a buyer has any obligation [*Bus. & Prof. Code § 7163(b)*].

For swimming pool contracts, alternative procedures are available that permit the buyer to waive these protections and request the contractor to begin work before the expiration of the buyer's loan cancellation period without affecting the enforceability of the contract. To invoke these procedures, certain statutory conditions must be met [*see Bus. & Prof. Code § 7165*; *see also § 89.202[1][b]*].

[b] Statutory Requirements

The requirements listed below may be substituted for the requirements ordinarily applicable to financed home

improvement contracts [*see Bus. & Prof. Code § 7163(a)(1)-(3)*, discussed in *§ 89.202[1][a]*] if the swimming pool contract is to be financed by a third party lender and all of the following listed conditions are met [*Bus. & Prof. Code § 7165*]:

1. The third party lender has agreed, in writing, to provide financing to the buyer for the maximum estimated construction cost of the swimming pool.

2. The lender has provided the buyer with a written copy of the terms and conditions of the loan for the maximum estimated construction cost, including terms disclosed in the manner required by the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] and Regulation Z [12 C.F.R. pt. 226] concerning the annual percentage rate, the finance charge, the amount financed, the total number of payments, the payment schedule, and a description of the security interest to be taken by the lender.

3. The lender has agreed in writing to offer a loan for the maximum estimated construction cost on the terms and conditions in 2., *above*.

4. If the construction cost of the swimming pool is determined after the completion of excavation to be less than the maximum estimated construction cost, the lender has agreed, in writing, to offer to loan the lesser amount needed to complete the construction on the same security as, and at an annual percentage rate and monthly payment amount not to exceed, that disclosed in 2., *above*.

5. The lender's written agreement specified in 3. and 4., *above*, states the duration of the offer, which cannot be less than 15 days following completion of the excavation of the swimming pool.

6. The buyer acknowledges receipt of the writings described in 1. through 5., *above*, and, no sooner than three business days after receiving all of these writings, requests on the form set out below that the contractor begin performance of the swimming pool contract before the expiration of any rescission period applicable to the loan [*see Bus. & Prof. Code § 7165(h)*; *see also Civ. Code § 9* ("business day" defined)].

7. The buyer's request is set forth on a document separate and apart from the swimming pool contract and contains statutory provisions in specified language and type size as set forth in this form.

8. The contractor provides the buyer with a copy of the buyer's signed request at the time of signature.

These requirements apply to each buyer who signs the swimming pool contract or the promissory note, other evidence of indebtedness, or security interest incident to the loan for swimming pool construction [*Bus. & Prof. Code § 7165(g)*].

[2] FORM

Notice and Request for Immediate Commencement of Construction Under Third Party Financed Swimming Pool Construction Contract [Bus. & Prof. Code § 7165]

NOTICE

Under the law, this contract is not enforceable until:

1. A third party agrees to make a loan to finance the construction cost of the swimming pool;

2. You agree to accept the loan; and

3. You do not cancel the loan within the period prescribed for cancellation under the federal Truth in Lending Act or Regulation Z (usually three business days after the loan is consummated).

Until the cancellation period is over, the contractor cannot deliver any materials or perform any services except preliminary services for which no mechanics' lien can be claimed.

However, as an alternative to the above, you can ask the contractor to start work and deliver materials before the cancellation period on the loan is over if all of the following have occurred:

1. The lender has agreed, in writing, to provide you with financing for up to the maximum estimated construction cost of the swimming pool.

2. The lender has provided you with a written copy of the terms and conditions of a loan for the maximum estimated cost, including the annual percentage rate, the finance charge, the amount financed, the total of payments, the payment schedule, and a description of the security interest to be taken by the lender.

3. The lender has agreed in writing to offer these terms and conditions for a period of not less than 15 days following completion of the excavation of the swimming pool.

4. Three business days have passed since you received the writing mentioned in paragraphs 1., 2., and 3., and you then sign a copy of this form to request that the contractor begin construction of the swimming pool before the cancellation period on your loan is over.

The first day you can sign the request for the contractor to begin construction of the swimming pool is [*insert third business day after buyer receives writings described in Bus. & Prof. Code § 165(a)-(c)*].

If you sign this request, the contractor will be permitted to immediately begin performance of the contract, and if the contractor is not paid in accordance with the terms of the contract, he or she may file a lien against your property for the value of the labor and materials provided.

REQUEST

I/we request that the contractor immediately start construction of the swimming pool.

_____ [*date*]
_____ [*signature*]
Buyer

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 89 HOME IMPROVEMENT AND SPECIALTY CONTRACTS
PART IV. FORMS
A. Home Improvement and Service and Repair Contracts

29-89 California Legal Forms--Transaction Guide § 89.203

§ 89.203 Notice of Cancellation of Home or Seminar Sales Solicitation Contract [Civ. Code § 1689.7]

[1] Comment

[a] Use of Form

This form sets forth the statement referring to, depending on the circumstances, the buyer's three- or seven-day right to cancel that must be placed in proximity to the space for the buyer's signature on a home solicitation contract or offer that is not a home improvement contract written pursuant to *Bus. & Prof. Code § 7151.2* or a service and repair contract written pursuant to *Bus. & Prof. Code § 7159.10* [*see Civ. Code § 1689.7(a)(1)-(3)*]. The statement is followed by the notice of the buyer's right to cancel, which must be filled in by the seller and attached to the contract or offer to be signed and returned by the buyer if he or she exercises that right [*see Civ. Code § 1689.7(c)*].

A "home solicitation contract or offer" is broadly defined as any contract or offer, which is subject to approval, for the sale, lease, or rental of goods or services or both, made at a place other than the seller's trade premises for $25 or more [*Civ. Code § 1689.5(a)*]. Although this definition includes home improvement and service and repair contracts [*compare Bus. & Prof. Code §§ 7151, 7151.2, 7159.10*], the buyer's right to cancel a home solicitation contract is governed by other statutes [*see Bus. & Prof. Code §§ 7159(e)(6), (7), 7159.10(e)(12)*; *Civ. Code §§ 1689.7(a)(4), (e), 1689.15*]. However, the notice requirements for all of these contracts are virtually the same. The sole difference is that the three- or seven-day right to cancel a home improvement or service and repair contract does not begin to run until the buyer has received a signed and dated copy of the contract [*see, e.g., Bus. & Prof. Code § 7159(c)(3)*; *see also §§ 89.200[2], 89.201[2]*].

This form may also be modified and used to cancel "seminar sales solicitation contracts and offers" [*Civ. Code § 1689.24(a)* (definition)]. Generally, these contracts are identical to home solicitation contracts except that they are made using selling techniques in a seminar setting [*see Civ. Code § 1689.24(a), (b)*]. For further discussion, see *§ 89.203[1][g]*.

[b] Right to Cancel

[i] Conditions

In addition to any other legal right to revoke an offer, a buyer has the right to cancel a home solicitation contract or offer, other than a contract written pursuant to *Bus. & Prof. Code § 7151.2* or *7159.10*, until midnight of the third "business day" [*see Civ. Code § 1689.5(e)*] after the day on which he or she signs it [*Civ. Code § 1689.6(a)*]. Cancellation occurs when the buyer gives written notice of cancellation to the seller at the address specified in the agreement or offer [*Civ. Code § 1689.6(d)*]. If the seller fails to comply with the notice and other requirements of *Civ. Code § 1689.7*, the buyer may cancel the contract or offer at any time before the seller complies [*Civ. Code § 1689.7(g)*]. For discussion of these requirements, see *§ 89.203[1][c]*.

If the goods sold under a home solicitation contract are so affixed to real property as to become a part of it, whether or not severable from it, the buyer does not have an unrestricted right to cancel (either within three days or indefinitely). There is no right to cancel if, subsequent to signing the contract, the buyer has sold or encumbered the real property involved to a bona fide purchaser or encumbrancer who was not a party to the sale of goods or to any loan agreement in connection with the sale [*Civ. Code § 1689.9*].

[ii] Contracts to Repair or Restore Residential Premises Damaged by Disaster

In addition to any other legal right to revoke an offer, a buyer has the right to cancel a home solicitation contract or offer, which was not otherwise void, for the repair or restoration of residential premises damaged by a disaster until midnight of the seventh business day after the buyer signs and dates the contract, unless (1) the contract meets the requirements for a service and repair contract pursuant to *Bus. & Prof. Code § 7159.10* [*see § 89.201*], (2) the buyer has received a signed and dated copy of the contract, and (3) the contractor has commenced work, in which case any cancellation rights are extinguished by operation of law [*Civ. Code § 1689.6(c)*; *see Civ. Code § 1689.15*].

Any home solicitation contract or offer to repair or restore residential premises signed by the buyer on or after the date on which a disaster causes damages to the residential premises, but not later than midnight of the seventh business day after that date, is void, unless the buyer or his or her agent or insurance representative solicited the contract or offer at the seller's appropriate trade premises. Any contract or offer to repair or restore residential premises after a disaster is not void if it is solicited by the buyer or his or her agent or insurance representative regardless of where the contract is made. Buyer solicitation includes a telephone call from the buyer to the seller's appropriate trade premises whether or not the call is in response to a prior home solicitation [*Civ. Code § 1689.14*].

[iii] Contracts for Personal Emergency Response Units

If purchasing a personal emergency response unit alone [*see Civ. Code § 1689.6(g)* (definition)], the buyer may cancel the home solicitation contract or offer until midnight of the seventh business day after the day on which he or she signs it. However, the cancellation period is three business days for contracts or offers for personal emergency response units that (1) are installed by licensed alarm company operators as part of a home security alarm system subject to the Alarm Company Act [*Bus. & Prof. Code § 7590 et seq.*], and (2) have two or more stationary protective devices used to enunciate an intrusion or fire [*Civ. Code § 1689.6(b)*]. This form includes optional text to provide for both three-day and seven-day cancellation periods [*see Civ. Code § 1689.7(a)(2), (d)*]. In all other respects, contracts and offers for personal emergency response units are subject to the same cancellation provisions as other home solicitation contracts and offers.

[iv] Exercise of Right to Cancel

A notice from the buyer of his or her exercise of the right to cancel, if given by mail, is effective when deposited in the mail properly addressed and with postage prepaid [*Civ. Code § 1689.6(d), (e)*]. This notice need not follow the particular statutory language included in this form [*see* [c][iii], *below*]. No matter how the buyer expresses his or her

notice of cancellation, it is effective if it indicates the intention of the buyer not to be bound [*Civ. Code § 1689.6(f)*].

[v] Waiver of Right Not Enforceable

Any confession of judgment or waiver of the right to cancel a home solicitation contract is deemed contrary to public policy. Any waiver or confession of judgment is void and unenforceable [*Civ. Code § 1689.12*].

[vi] Contracts Initiated by Buyer

Neither the right to cancel [*Civ. Code § 1689.6*], the statutory notice requirements [*Civ. Code § 1689.7*], nor any of the other safeguards available to a buyer under a home solicitation contract or offer [*see Civ. Code §§ 1689.6-1689.12, 1689.14*] apply to a contract that is initiated by the buyer or his or her agent or insurance representative and that is executed in connection with the making of emergency or immediate necessity repairs or services that are necessary for the immediate protection of persons or real or personal property; provided that the buyer furnishes the seller with a separate dated and signed personal statement describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within three or seven business days, whichever applies [*Civ. Code § 1689.13*].

[c] Home Solicitation Contracts

[i] Formal Requirements

The first page of any agreement or offer that meets the definition of a home solicitation contract or offer must set forth the name and address of the seller to which the notice of cancellation is to be mailed and the date the buyer signed the agreement. These must be in a type no smaller than that generally used in the body of the document [*Civ. Code § 1689.7(b)*]. Home solicitation contracts or offers must be written in the same language (for example, Spanish) that is used in the oral sales presentation. They must also be dated and signed by the buyer [*Civ. Code § 1689.7(a)(1)*].

The seller must give the buyer a copy of the contract or offer and the attached notice of cancellation. The seller must also inform the buyer orally of his or her right to cancel at the time it is executed [*Civ. Code § 1689.7(f)*].

[ii] Notice Advising of Right to Cancel

Every home solicitation contract or offer must include, in immediate proximity to the space reserved for the buyer's signature, a conspicuous statement in a size equal to at least 10-point bold type advising the buyer of his or her right to cancel and referring the buyer to an attached notice and explanation of that right [*Civ. Code § 1689.7(a)(1)*]. The form in [2], *below*, sets forth that notice.

[iii] Notice of Cancellation and Cancellation Form

Every home solicitation contract or offer must be accompanied by a completed form in duplicate. The form must be captioned "Notice of Cancellation," must be attached to the agreement or offer, and must be easily detachable. The notice must be printed in at least 10-point type and in the same language (for example, Spanish) that is used in the contract [*Civ. Code § 1689.7(c), (d)*].

[d] Definitions

[i] "Home Solicitation Contract or Offer"

A "home solicitation contract or offer" is any contract, or any offer that is subject to approval, for the sale, lease, or rental of goods or services, or both, made at other than appropriate trade premises in an amount of $25 or more.

Contracts that the buyer has the right to rescind under the federal Truth in Lending Act are excluded from coverage by this term [*Civ. Code § 1689.5(a)*; *see 15 U.S.C. § 1635*; *see also Ch. 25, Real Estate Loans, § 25.230*].

[ii] "Appropriate Trade Premises"

"Appropriate trade premises" means those where either the owner or seller normally carries on a business, or where goods are normally offered or exposed for sale in the course of a business carried on there [*Civ. Code § 1689.5(b)*].

[iii] "Goods" and "Services"

"Goods," for the purposes of home solicitation contracts, are tangible chattels bought for use primarily for personal, family, or household purposes, including certificates or coupons exchangeable for such goods, and including goods that, at the time of the sale or subsequently, are to be so affixed to real property as to become a part of it, whether or not severable. The term does not include vehicles required to be registered, nor any goods sold with such a vehicle if under a contract governed by *Civ. Code § 2982* [*Civ. Code § 1689.5(c)*]. Mobilehomes and goods sold with mobilehomes are also excepted from the definition of "goods" if either are sold under a contract subject to *Health & Safety Code § 18036.5* [*Civ. Code § 1689.5(c)*; *see Health & Safety Code § 18008*].

"Services" means work, labor, and services furnished in connection with the repair, restoration, alteration, or improvement of residential premises, including services furnished in connection with the sale or repair of goods as defined in *Civ. Code § 1802.1* and courses of instruction [*Civ. Code § 1689.5(d)*]. The term also includes the services of a public insurance adjusting firm that appears at a buyer's demolished home and contracts with the buyer to negotiate his or her claims against a fire insurance carrier [*Williams v. Kapilow & Son, Inc. (1980) 105 Cal. App. 3d 156, 161, 164 Cal. Rptr. 176]* .

"Services" does not include the services of attorneys, real estate brokers and salesmen, securities dealers or investment advisers, physicians, optometrists, or dentists, or the sale of insurance that is not connected with the sale of goods or services in this context, or services for which the tariffs, rates, charges, costs, or expenses, including in each instance the deferred payment price, are required by law to be filed with and approved by an agency of the federal or state government [*Civ. Code § 1689.5(d)*].

The financial services of banks, savings institutions, credit unions, industrial loan companies, personal property brokers, consumer finance lenders, or commercial finance lenders that are not connected with the sale involved are not services for these purposes [*Civ. Code § 1689.5(d)*].

[e] Seller's Rights and Obligations on Cancellation

Within 10 days after a home solicitation contract or offer has been cancelled, the seller must tender to the buyer any payments made and any note or other evidence of indebtedness given [*Civ. Code § 1689.10(a)*]. If the downpayment includes goods traded in, the goods must be tendered in substantially as good condition as when received [*Civ. Code § 1689.10(b)*]. The seller may reacquire any delivered goods from the buyer at the latter's address within 20 days after cancellation [*Civ. Code § 1689.11(a)*].

[f] Buyer's Rights and Obligations on Cancellation

Until the seller has complied with its obligations [*see* [e], *above*], the buyer may retain possession of any goods delivered by the seller and has a lien on them for any recovery to which he or she is entitled [*Civ. Code § 1689.10(c)*]. Otherwise, within 20 days after a home solicitation contract or offer has been cancelled, the buyer, on demand, must tender to the seller any goods delivered by the seller pursuant to the sale or offer. The buyer is not obligated to tender at any place other than his or her own address. If the seller fails to take possession within that time, the goods become the property of the buyer without obligation to pay for them. The buyer meanwhile has a duty to take reasonable care of the

goods in his or her possession, both before cancellation and during the 20 days following. However, the goods are at the seller's risk during the 20-day period after cancellation [*Civ. Code § 1689.11(a), (b)*].

The seller is entitled to no compensation for any services it may have performed before cancellation. If the seller's services result in the alteration of property of the buyer, the seller must restore it to substantially as good condition as it was at the time the services were rendered [*Civ. Code § 1689.11(c)*].

[g] Seminar Sales Solicitation Contracts

This form may be adapted for use with "seminar sales solicitation contracts or offers" by substituting that term for "home solicitation contract" in the heading of the form [*see Civ. Code § 1689.21(c)* (form)]. A seminar sales solicitation contract is identical to a home solicitation contract except that the former is made using selling techniques in a seminar setting [*see Civ. Code § 1689.24(a), (b)*]. The following requirements regarding home solicitation contracts apply to seminar sales solicitation contracts [*see Civ. Code §§ 1689.20-1689.23*]:

- Cancellation rights [*see Civ. Code § 1689.20*; *see also § 89.203[1][b]*];
- Specific format and clause requirements for contracts, including the statutory notice of cancellation [*see Civ. Code § 1689.21*; *see also* [c], *above*]; and
- Buyers' and sellers' rights and obligations on cancellation [*see Civ. Code §§ 1689.22, 1689.23*; *see also* [e], [f], *above*].

For a discussion of the definition of "goods" and "services," see [d][iii], *above*.

[2] FORM

Notice of Cancellation of Home or Seminar Sales Solicitation Contract [Civ. Code § 1689.7]

Right to Cancel

[*Either (see Civ. Code § 1689.7(a)(1)):*]

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached Notice of Cancellation form for an explanation of this right.

[*Or, if contract is for repair or restoration of residential premises damaged by disaster, or for personal emergency response unit or installed with and as part of home security alarm system subject to Alarm Company Act (see Civ. Code § 1689.7(a)(2), (3)):*]

You, the buyer, may cancel this transaction at any time prior to midnight of the seventh business day after the date of this transaction. See the attached Notice of Cancellation form for an explanation of this right.

[*Attach duplicate filled in copies of following notice to home solicitation contract (see Civ. Code § 1689.7(c)):*]

Notice of Cancellation

_____[*date*]

You may cancel this transaction, without any penalty or obligation, within [three *or, if Civ. Code § 1689.7(a)(2) or (3) applies,* seven] business days from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within 10 days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled. If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale, or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk. If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, or send a telegram to _____[*seller's name*] at _____[*seller's business address*] not later than midnight of _____[*date*].

Cancellation by Buyer

I hereby cancel this transaction. _____[*date*].

_____ [*buyer's signature*]
Buyer

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceGeneral OverviewContracts LawTypes of ContractsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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A. Home Improvement and Service and Repair Contracts

29-89 California Legal Forms--Transaction Guide § 89.204

§ 89.204 Customer's Warranty of Authority

[1] Comment--Use of Form

This form is a customer's representation of authority to enter into a home improvement contract. It may be used as a separate document to be attached to the home improvement contract, or the language may be incorporated into the body of the home improvement contract itself.

Tenants may order works of improvement to dwellings that they reside in but do not own [*see Bus. & Prof. Code § 7151.2*]. If the contemplated home improvement is relatively minor (e.g., painting or wallpapering a room), the contractor may not be concerned about the tenant's authority to act. However, if the project will involve substantial alterations to the property, the contractor should be certain that the tenant or, in appropriate cases, the manager or other representative of the property owner, has authority to act. If possible, the contractor should examine any rental agreement or lease to determine whether the tenant's authority to alter the property is specifically restricted.

For a discussion of the laws regulating a property owner's notice of nonresponsibility for construction work on the property in which he or she has an interest, see *Ch. 31, Mechanics' Liens, § 31.201[1]*.

[2] FORM

Customer's Warranty of Authority

Representation of Authority by Customer

Customer represents that _____[he *or* she] is properly authorized, whether by virtue of [*specify, e.g.*, tenancy interest *or* an agency relationship with the property owner *or otherwise, e.g.*, a specified attached document], to enter into this Agreement for Contractor's services and goods. Customer will keep the property and any improvements or materials on it free from any obstructive or conflicting claims that would tend to impede Contractor's work or interfere with _____[his *or* her] performance.

Executed on _____[*date*].

OWNER
_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsExpress WarrantiesContracts LawTypes of ContractsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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29-89 California Legal Forms--Transaction Guide § 89.205

§ 89.205 Warranty of Home Improvement Goods

[1] Comment

[a] Use of Form

This form is a warranty for home improvement goods. It should be included in a home improvement contract if the contractor intends to warrant the quality of materials used or goods installed in completing the home improvement project. If desired, the warranty in this form can be inserted as an additional paragraph in the *form in § 89.200[2]*. This form complies with the federal requirements for warranties of consumer goods. For a detailed discussion of sales of consumer goods, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

This form complies with the requirements of the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act [*15 U.S.C. § 2301 et seq.*] and the Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*]. However, it is not designed for use by contractors or salespersons who provide repair facilities within California. For appropriate warranties to be used by persons who provide in-state repair facilities, see *Ch. 92, Service Contracts, §§ 92.220-92.222*.

[b] Magnuson-Moss Act and Song-Beverly Consumer Warranty Act

[i] Requirements

A home improvement contractor or salesperson who offers a written warranty covering home improvement goods is a warrantor who must comply with the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act [*15 U.S.C. § 2301 et seq.*]. If the contractor or salesperson engages in the business of selling consumer goods to retail buyers, he or she is a "retail seller" who must comply with the provisions of the Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*]. The Magnuson-Moss Act requires that written warranties of consumer goods contain specific provisions [*see § 89.205[1][b][iii]*]. The Song-Beverly Act requires that written warranties for consumer goods conform to the standards set forth in the Magnuson-Moss Act [*see Civ. Code § 1793.1*]. However, if the warrantor or seller provides repair facilities within the State of California, the Song-Beverly Act requires that additional provisions be included in the warranty [*see Civ. Code § 1793.1(b)*]. For express warranties to be used by sellers or warrantors who

provide repair facilities within this state, see *Ch. 92, Service Contracts, §§ 92.220-92.221*.

[ii] Home Improvement Goods as Consumer Products

For purposes of the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act, a "consumer product" is any tangible property distributed in commerce and normally used for personal, family, or household purposes, including property goods intended to be installed in real property [*see 15 U.S.C. § 2301(1)*]. For purposes of the Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*], "consumer goods" includes new and certain used goods either bought or leased primarily for personal, family, or household purposes, other than clothing and consumables [*Civ. Code § 1791(a)*]. A lease for these purposes is any contract for the lease or bailment for the use of consumer goods by an individual for a term exceeding four months [*Civ. Code § 1791(g)*].

[iii] Terms of Written Warranty

The terms of a written warranty must be understandable and conspicuous. The warranty must include certain detailed statements [*see 15 U.S.C. § 2302(a)*; *see also § 89.130*, P 4]. The required statements are intended to let the consumer know the warranty's limits and to provide him or her with all information necessary to obtain the warrantor's performance under its terms.

The warrantor must agree to perform in a specied manner in order to meet federal minimum standards for warranties. If the goods malfunction, are defective, or fail to conform with the written warranty, the warrantor must remedy the problem within a reasonable time and without charge. There can be no limitation on the duration of an implied warranty [for an analysis of implied warranties, see pt. III(J) of the Transaction Guide in Ch. 52, *Sales of Goods Under the Uniform Commercial Code*]. The warrantor may not exclude or limit consequential damages for breach of the warranty unless the exclusion or limitation appears conspicuously on the face of the warranty. If, after a reasonable number of attempts, the warrantor is unable to repair a defective product, he or she must permit the consumer to elect either a replacement of the product without charge or a refund [*see 15 U.S.C. § 2304(a)(1)-(4)*].

[iv] Disclaimer of Warranty

The Magnuson-Moss Warranty--Federal Trade Commission Improvement Act restricts the ability of suppliers [*see 15 U.S.C. § 2301(4)*] to disclaim or modify implied warranties if they make written warranties of consumer products or if, no later than 90 days after sale, those suppliers enter into service contracts with consumers [*see 15 U.S.C. § 2308*]. Warrantors are encouraged to establish informal dispute resolution procedures [*15 U.S.C. § 2310(a)(1)*] and, if they do so, must explain those procedures in the warranties [*see 15 U.S.C. § 2302(a)(7)*].

Any violation of the Act constitutes a method of unfair competition and subjects the violating party to federal criminal penalties [*15 U.S.C. § 2310(b)*; *see 15 U.S.C. § 45(a)(1)*].

For additional analysis of the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act, see the Transaction Guide in Ch. 52, *Sales of Goods Under the Uniform Commercial Code*.

[c] Contractor's Potential Liability Under Implied Warranty

When the contractor or subcontractor who performs the home improvement furnishes the materials with which the work is performed, he or she may be liable for any defect in those materials under a theory similar to the implied warranty of merchantability established by the Uniform Commercial Code [*see* Aced v. Hobbs-Sesack Plumbing Co. (1961) 55 Cal. 2d 573, 582, 583, 12 Cal. Rptr. 257, 360 P.2d 897 ; *see also Com. Code § 2314*].

[d] Representations Regarding Brand Name or Trademark

Any representation that a contractor makes regarding the brand name, trademark, quality, or size of goods or materials that he or she will provide pursuant to a home improvement contract must be set out in writing in the contract. Written confirmation of the representation must appear in the contract specifications and must include a description of the goods or materials as well as any brand name, model number, or similar designation [*Bus. & Prof. Code § 7162(a)*]. A contractor who fails to provide goods or materials conforming to these representations is subject to disciplinary action [*Bus. & Prof. Code § 7162(b)*].

[2] FORM

Warranty of Home Improvement Goods

Warranty of Home Improvement Goods

By Contractor

_____[*contractor's name*], "Contractor," State Contractor's License No. _____, whose business address is located at _____, extends this warranty to Customer [*or* Owner] and to Customer's successors in interest in the property on which work covered by this Agreement will be performed.

Contractor warrants the following goods: [*describe particular items, or refer to items in plans or specifications*], against original defects in material or workmanship for a period of [*specify time period, e.g.*, one year] from the date of completion of the work covered by this Agreement [*or other time, e.g.*, completion of entire construction project or the time Contractor's unit of work becomes functional].

During this period Contractor will repair or replace any defective component of the warranted goods at Contractor's own expense and at no cost to Customer except for [*specify costs that owner or tenant must assume, e.g.*, conveyance or lodging of workers]. However, Contractor will not remedy, replace, or pay for any work done on warranted goods by any parties other than Contractor and/or Contractor's authorized agents.

This warranty applies only to services and goods supplied by Contractor and not to effects on, or from, any other person or thing. The guarantee does not apply in any way to work performed by Contractor on materials, or according to plans or specifications provided by other sources.

To obtain Contractor's performance under this warranty, Customer must notify Contractor of any defect, malfunction, or nonconformity of the warranted goods or services in a writing addressed to Contractor's place of business. Within [*specify number*] business days after receipt of Customer's notice, Contractor shall begin to repair or replace the nonconforming, defective, or malfunctioning goods. Contractor shall perform repair or replacement work during the hours of _____ to _____, Monday through Friday.

Customer has the right to bring any action at law or equity to resolve disputes concerning, or to enforce the provisions of, this warranty.

[*Add if contractor provides informal dispute resolution procedure:*]

If Customer and Contractor disagree over either's performance under the terms of this warranty, Customer may submit the matter for resolution to [*identify panel or other body that will arbitrate dispute*]. Customer shall not be responsible for expenses incurred in submitting a dispute for resolution under the terms of this paragraph. Customer is [*or* is not] required to submit any dispute for resolution under this paragraph before pursuing any legal or equitable remedies to which _____[he *or* she] may be entitled.

Legal Topics:

For related research and practice materials, see the following legal topics:
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29-89 California Legal Forms--Transaction Guide § 89.206

§ 89.206 Waiver of Buyer's Rights in Connection With Home Improvement Contract for Emergency Repairs or Services [Bus. & Prof. Code § 7163(a), (b), (g)]

[1] Comment

[a] Use of Form

This form is a buyer's waiver of rights under *Bus. & Prof. Code § 7163(a)* and *(b)* in connection with a home improvement contract for emergency repairs or protective services. Among other things, it permits the contractor to commence the repairs or services immediately, without waiting for financing arrangements to be finalized [*see § 89.206[1][c]*].

This type of waiver is subject to important statutory requirements that must be strictly followed or the waiver (and the contract itself) will be void and unenforceable [*Bus. & Prof. Code § 7163(b), (g)*]. For discussion of these requirements, see *§ 89.206[1][d]*.

[b] Buyer's Rights Relating to Contract Financing

Bus. & Prof. Code § 7163 protects buyers under home improvement contracts when obtaining a loan for all of the contract price as a condition precedent to the contract, or when the contractor provides financing, or in any manner assists the buyer to obtain a loan, or refers the buyer to any person who may make or arrange a loan for all or part of the contract price [*see Bus. & Prof. Code § 7163(a)*]. In these situations, a home improvement contract ordinarily is unenforceable unless (1) the third party, if any, agrees to make the loan; (2) the buyer agrees to accept the loan or financing; and (3) the buyer does not rescind the loan or financing within the period specified in the Federal Truth in Lending Act or Regulation Z, if applicable [*Bus. & Prof. Code § 7163(a)*; *see 15 U.S.C. § 1635*; *12 C.F.R. § 226.23*]. Further, until the three requirements listed above are satisfied, it is unlawful for the contractor to perform any services or deliver any property, or to represent that the contract is enforceable or that the buyer has any obligation under the contract [*Bus. & Prof. Code § 7163(b)*]. *Bus. & Prof. Code § 7163* also grants the buyer other rights and remedies that are not relevant to this form because they cannot be waived. For discussion of these rights and remedies, see *§ 89.11[6]*.

[c] Waiver of Statutory Rights

Ordinarily, any waiver by the buyer of any rights under *Bus. & Prof. Code § 7163* is to be deemed contrary to public policy, void, and unenforceable [*Bus. & Prof. Code § 7163(g)*]. However, a limited exception permits the buyer to waive the provisions of *Bus. & Prof. Code § 7163(a)* and *(b)* (discussed in *§ 89.206[1][b]*) to the extent that the contract is executed in connection with emergency repairs or services necessary for the immediate protection of people or property [*Bus. & Prof. Code § 7163(g)*].

A buyer's waiver for emergency repairs or services must be made in a dated written statement. The statement must (1) describe the emergency, (2) state that the contractor has informed the buyer of *Bus. & Prof. Code § 7163(a)* and *(b)* and that the buyer waives those provisions, and (3) be signed by each owner of the property [*Bus. & Prof. Code § 7163(g)*].

Waivers on printed forms are void and unenforceable [*Bus. & Prof. Code § 7163(g)*]. Thus, such a waiver may not be incorporated into the contract or prepared as a preprinted standard form, but rather must be individually prepared for each contract.

[2] FORM

Waiver of Buyer's Rights in Connection With Home Improvement Contract for Emergency Repairs or Services [Bus. & Prof. Code § 7163(a), (b), (g)]

WAIVER OF BUYER'S RIGHTS

_____[*name of buyer*] ("Buyer") acknowledges that [*name of contractor*] ("Contractor") has informed Buyer of the provisions of *California Business and Professions Code Section 7163(a)* and *(b)*, which provide as follows:

(a) No contract for home improvement shall be enforceable against the buyer if the obtaining of a loan for all or a portion of the contract price is a condition precedent to the contract or if the contractor provides financing, or in any manner assists the buyer to obtain a loan or refers the buyer to any person who may loan or arrange a loan for all or a portion of the contract price unless all of the following requirements are satisfied:

(1) The third party, if any, agrees to make the loan.

(2) The buyer agrees to accept the loan or financing.

(3) The buyer does not rescind the loan or financing transaction, within the period prescribed for rescission, pursuant to the federal Truth in Lending Act (*15 U.S.C. § 1601 et seq.*) or Regulation Z, if applicable.

(b) Until the requirements of paragraphs (1), (2), and (3) of subdivision (a) are satisfied, it shall be unlawful for the contractor to do any of the following:

(1) Deliver any property or perform any services other than obtaining building permits or other similar services preliminary to the commencement of the home improvement for which no mechanics' lien can be claimed.

(2) Represent in any manner that the contract is enforceable or that the buyer has any obligation thereunder.

Buyer acknowledges that _____[he *or* she] has read and understands the provisions set forth above.

Buyer hereby waives _____[his *or* her] rights under the foregoing provisions in connection with the

[repairs to be made *or* services to be provided] under that Contract between Buyer and Contractor dated _____[*date*]. Buyer understands that the effects of this waiver are that (1) Contractor may provide services or deliver property under that Contract before financing has been obtained and (2) the Contract will be enforceable against Buyer, and Buyer will be required to pay for all [repairs *or* services] (including materials) provided in accordance with the Contract, even if Buyer is unable to obtain financing, does not agree to accept financing on the available terms, or subsequently rescinds the loan or financing transaction.

This waiver is executed pursuant to *California Business and Professions Code Section 7163(g)*, which permits a buyer to waive his or her rights under *California Business and Professions Code Section 7163(a)* and *(b)* to the extent that a contract is executed in connection with emergency repairs or services necessary for the immediate protection of people or property. The [repairs *or* services] provided under this Contract are necessary because [*describe emergency, including immediate need and persons or property to be protected, e.g.*, a tree fell on the roof of Buyer's residence and caused damage that must be repaired before the next rain in order to protect the interior of Buyer's residence from potentially severe water damage].

_____[*date*]

_____ [*signature of buyer*]
[*typed name*]

[*Include signature of each owner of the property involved*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsWaiversGeneral OverviewContracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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29-89 California Legal Forms--Transaction Guide § 89.207

§ 89.207 Discipline Disclosure in Small Residential Contracts [Bus. & Prof. Code § 7030.1(a), (b)]

[1] Comment--Use of Form

This form is a disclosure that, under appropriate circumstances, must be provided in a bid, estimate, or other document before entering into a contract to perform work on residential property with four or fewer units. The disclosure must be given by any contractor who has had his or her license suspended or revoked two or more times within an eight-year period. The contractor must disclose any disciplinary license suspension or revocation during the last eight years resulting from any violation of the Contractors' License Law, whether or not the suspension or revocation was stayed. Like the first part of this form, this disclosure must appear in capital 10-point roman boldface type or in contrasting red 8-point roman boldface type [*Bus. & Prof. Code § 7030.1(a), (b)*]. Failure to make this disclosure when required will subject the contractor to the following penalties [*Bus. & Prof. Code § 7030.1(c)*]:

- First violation: $1,000.
- Second violation: $2,500.
- Third violation: $5,000 and a one-year license suspension by operation of law.
- Fourth violation: License revocation.

[2] FORM

Discipline Disclosure in Small Residential Contracts [Bus. & Prof. Code § 7030.1(a), (b)]

DURING THE LAST EIGHT YEARS, LICENSEE HAS BEEN SUBJECT TO DISCIPLINARY LICENSE [*choose as appropriate*: SUSPENSION *or* REVOCATION] BY THE CONTRACTORS' STATE LICENSE BOARD AS A RESULT OF VIOLATING THE CONTRACTORS' STATE LICENSE LAW.

Receipt Acknowledged: _____

_____[*date*]

_____ [*Owner's signature*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawBidsReal Property LawConstruction LawContracts

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29-89 California Legal Forms--Transaction Guide § 89.208

§ 89.208 Notice to Buyer--Contract for Home Improvement Goods or Services Secured by Real Property and Sold Door-to-Door [Bus. & Prof. Code § 7159.1]

[1] Comment--Use of Form

This form is the statutory warning that must accompany a contract for the sale of home improvement goods or services offered by door-to-door sale if the contract contains or is secured by a lien on real property [*Bus. & Prof. Code § 7159.1*]. A security interest created in any door-to-door sale contract that does not provide the notice is void and unenforceable [*Bus. & Prof. Code § 7159.1*].

The notice must be in 18-point boldface type and in the same language as the rest of the contract. It must be on a separate piece of paper from the rest of the contract and must be signed and dated by the buyer. The home improvement contractor or salesperson must deliver to the buyer a legible copy of the signed and dated notice at the time it is signed [*Bus. & Prof. Code § 7159.1*].

The notice requirement does not apply to any of the following [*Bus. & Prof. Code § 7159.1(a)-(c)*]:

- Contracts subject to the Unruh Act [*Civ. Code § 1801 et seq.*; *see § 89.18[1]*];
- Mechanics' liens [*see Civ. Code § 3109 et seq.*; *see also* Ch. 31, *Mechanics' Liens*]; and
- Home improvement goods or services contracts of $5,000 or less [*see Bus. & Prof. Code § 7159.2(a)*; *see also § 89.11[7]*].

[2] FORM

Notice to Buyer--Contract for Home Improvement Goods or Services Secured by Real Property and Sold Door-to-Door [Bus. & Prof. Code § 7159.1]

Notice to Buyer

WARNING TO BUYER: IF YOU SIGN THE CONTRACT WHICH ACCOMPANIES THIS NOTICE, YOU WILL BE PUTTING UP YOUR HOME AS SECURITY. THIS MEANS THAT YOUR HOME COULD BE SOLD WITHOUT YOUR PERMISSION AND WITHOUT ANY COURT ACTION IF YOU MISS ANY PAYMENT REQUIRED BY THIS CONTRACT.

Date: _____

Signed: _____ [*buyer's signature*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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[Reserved]

§§ 89.209[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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PART IV. FORMS
B. General Specialty Construction Contracts

29-89 California Legal Forms--Transaction Guide § 89.220

§ 89.220 Specialty Contract--General Long Form

[1] Comment

[a] Use of Form

This form is a general long-form specialty construction contract that can be used if the specialty contractor is either acting as a subcontractor or contracting directly with the property owner. Occasionally, specialty contractors will be hired by the owner or manager of property to perform work under a direct contract during the course of a larger construction project. Contractors in most of the specialty classifications [*see* Ch. 88, *Licensing of Contractors*] can use this form to document direct contract agreements with property owners or managers. For a less detailed general specialty contract that would be appropriate for simpler projects, see *§ 89.221*. For a detailed subcontract, see Ch. 30D, *Construction Contracts and Subcontracts* . For a short-form subcontract, see *§ 89.223*.

If this form is used as an agreement between an owner or tenant and a contractor for work on residential property, it should be combined with the form in *§ 89.200[2]* to assure compliance with the statutory requirements for the contents of home improvement contracts [*see Bus. & Prof. Code § 7159*]. For a discussion of the law regulating home improvement contracts, see *§ 89.200[1]*.

Because this form includes an arbitration provision, it also includes the disclosure provision that is required for all contracts for work on residential property with four or fewer units that include an arbitration provision. In such contracts, both the arbitration provision itself and the disclosure must be set out either in at least 10-point roman boldface type or in contrasting red print in at least 8-point roman boldface type. If the contract is typed, the provision and disclosure must be set out in capital letters. Failure to comply with these requirements will preclude the contractor from enforcing the contract [*Bus. & Prof. Code § 7191*].

This form is not designed for use in financed home improvement projects. If the project will be financed by the contractor, follow the guidelines in Ch. 45, *Consumer Installment Loans and Credit Sales*, to ensure compliance with the applicable provisions of the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] and the Unruh Act [*Civ. Code § 1801 et seq.*].

[b] Format of Specialty Contracts

Specialty contractors usually present proposed contracts to property owners or managers in the form of proposals or bids which become binding when signed by both parties. Proposal contracts were originally developed for subcontract purposes since the solicited proposals allowed the general contractor to document his or her estimated costs for the developer or owner.

Every written contract entered into between a property owner and an original contractor must provide space for the owner to enter his or her name, residence, and place of business, if any. In addition, if this form is used for any contract between a property owner and an original contractor other than a home improvement contract or swimming pool contract [*see Bus. & Prof. Code §§ 7151, 7152*; *see also §§ 89.11[2], 89.13*], it must provide space for the owner to enter the name and address of the construction lender or lenders. If it is adapted for use as a contract between an original contractor and subcontractor, or between subcontractors, it must also provide a space for the name and address of the owner, original contractor, and any construction lender [*Civ. Code § 3097(m)*]. The original contractor must make available the owner's name and residence address, and the name and address of any construction lender, to any person seeking to serve a preliminary 20-day notice in connection with a mechanic's lien or stop notice [*Civ. Code § 3097(l), (m)*]. For discussion of the 20-day notice requirement, see *§ 31.202[1]*.

[c] Specialty Contractors

In most construction projects, the property owner or manager enters into an agreement with a general building contractor for the performance of the desired construction work. The general building contractor then enters into subcontracts with specialty contractors for the performance of skilled work necessary to the project. A contractor who works on structures for support or shelter of persons, animals, or chattels and who, in doing so, uses at least two unrelated building trades or crafts is a "general building contractor" [*see Bus. & Prof. Code § 7057(a)*]. A "specialty contractor" is one whose work requires a particular skill and who uses specialized building trades or crafts in his or her principal contracting business. Specialty contractors include contractors who service or test fire extinguishing systems, contractors who install carpet, linoleum, and resilient floor coverings, and contractors whose operations are concerned with preparing or removing roadway construction zones, lane closures, flagging, or traffic diversions on roadways [*Bus. & Prof. Code § 7058*].

For a list of the classes of specialty contractors and a discussion of contractor classifications, see Ch. 88, *Licensing of Contractors* .

[d] Incidental and Supplemental Work

A specialty contractor may perform work in multiple crafts or trades in which he or she is not licensed provided that the work is incidental and supplemental to work in the craft for which the specialty contractor is licensed [*Bus. & Prof. Code § 7059(a)*]. For example, a specialty contractor who is licensed to work on sewage disposal may install drains even though a general engineering contractor is also authorized to do so [*see 40 Ops. Cal. Atty. Gen. 112 (1962)]* .

[e] Warranties

Specialty contractors often install goods and/or equipment as part of their performance under a construction contract. These contractors sometimes offer warranties for the products they install. If the particular transaction constitutes the sale of consumer goods, any warranty given by the specialty subcontractor must comply with the requirements of the Magnuson-Moss Warranty--Federal Trade Commission Improvement Act [*15 U.S.C. § 2301 et seq.*]. This form does not contain a warranty provision. For a discussion of the Magnuson-Moss requirements and a representative warranty that can be included as an additional provision in a specialty contract, see *§ 89.205*.

[2] FORM

Specialty Contract--General Long Form

ARTICLE 1. BASIC AGREEMENT

Section 1.01. _____[*contractor's name*], _____ State Contractor's License No. _____, whose business address is located at _____[*business address*], and who is referred to as "Contractor" in this Agreement, proposes to furnish all services, including labor, equipment, and materials to perform the work of [*contracting specialty, e.g.*, painting and decorating] on the [*structure or site, e.g.*, office building] at [*describe building or grounds*] for the price stated and according to the plans and specifications listed below [*or describe document containing plans and specifications*] for _____[*name of property owner or manager*] who resides at _____[*address of residence*] and whose business is located at _____[*business address*] and who is referred to in this Agreement as "Customer," who, on properly executed acceptance of this proposal [*or* contract], referred to as "Agreement," promises to purchase those services and goods, subject to all other terms and conditions of this Agreement. This proposal, unless accepted sooner, automatically expires at [*time, e.g.*, midnight] on _____[*date*].

ARTICLE 2. PRICE

Agreed Payment

Section 2.01. The price for the supply of services and goods will be $[*or* will be the actual cost to Contractor for all labor and materials plus _____ percent of that cost] including all applicable taxes. Customer will pay Contractor [*periodic interval, e.g.*, weekly for work done to date as indicated by invoices submitted to Customer or $_____ (*or* _____ percent) after completion of _____ (*particular stage of job, or after described inspection*)], holding _____ percent in reserve toward completion, and $[*or* _____ percent] on completion of job and after final inspection, including any amounts previously held in reserve.

Adjustment of Compensation

Section 2.02. If, according to [*specify indicator*] there is a rise or fall in the price of labor in Contractor's market in the area in which the work is to be performed, then the price stated in Section 2.01 of this Agreement, which is based on currently prevailing wages in the area, will be increased or decreased to reflect the portion represented by the change in the labor rate for the time period affected.

ARTICLE 3. WORK DESCRIPTION

General Job Description

Section 3.01. The work to be performed under this Agreement is generally as follows: [*describe work, e.g.*, Painting all surfaces exposed to normal or likely public sight of the building constructed on the premises described in Section 1.01 of this Agreement, according to plans and specifications listed below, with Contractor providing all labor and materials].

Plans

Section 3.02. The portions of the structure on which work is to be performed, the correct indications of what type of work is to be performed, and the appropriate use or placement of particular equipment or materials, are set out in Schedule A, which is attached to this Agreement and incorporated herein by reference.

Specifications

Section 3.03. In performing this Agreement, Contractor will generally provide the types of workmanship, equipment, or materials that are listed in Schedule B, attached to this Agreement and incorporated herein by reference. All surfaces will be properly prepared and treated to receive the first coat before original application. All surfaces will receive two coats with a minimum 12 hours drying period in between, during which the painted surfaces will be reexamined and brought to appropriate condition to receive subsequent coats.

ARTICLE 4. TIME FOR PERFORMANCE

Section 4.01. The work under this Agreement will commence [*on/about/not later than*] _____[*date*], and must be completed by _____[*date*]. If the work is not properly completed by that date because of circumstances beyond Contractor's control rendering completion objectively impossible, the work will be completed as soon thereafter as is reasonably possible. Obstructive circumstances include, but are not limited to, natural elements (including inclement weather), strikes, fire, and acts or omissions of other persons (including other contractors or customers). Customer shall be responsible for any increase in costs to Contractor resulting from any obstruction or delay for which Contractor is not responsible, including destruction of work performed or removal of materials, as if those costs had originally been included in this Agreement.

ARTICLE 5. SUBSEQUENT CHANGES

Section 5.01. Any changes from or additions to the work covered in this Agreement (other than as a result of delay or destruction) shall be set forth in a writing signed by both parties before the changed or additional work is required to be performed. In the absence of a written change-order contract, Customer will have no cause of action against Contractor for failure to deviate from the terms of this Agreement on the basis of an alleged oral contract; and Contractor will have no cause of action against Customer for failure to compensate Contractor for work deviating from the terms of this Agreement on the basis of an alleged oral contract. If the parties execute a written change-order contract, its terms will govern over those of any prior contract in this transaction. Otherwise, it will be automatically incorporated along with all prior change-order contracts into this initial Agreement.

ARTICLE 6. COMPLETION OF JOB

Section 6.01. On or before the date set for completion of the work [*or* On the following dates: _____ (*list dates*)], Contractor will notify Customer that the completed work [*or* work completed to the agreed stage] is finished and ready for inspection, at which time, or as soon as reasonably possible, Customer will inspect the work to ascertain whether or not it is in accordance with this Agreement. On demonstration that the completed work is not acceptable under this Agreement, Contractor will remedy any defective work as soon as reasonably possible and in keeping with the date for completion, or, if impossible, then as soon as reasonably possible after that date and without reference to any cause for damages which Customer might have for work unfinished by the date for completion. If work is satisfactory under this Agreement, Customer will promptly complete, and submit to the proper party, a certificate of completion in order that Contractor may be paid and, if the work is finished, remove workers and materials from the premises. If Customer fails to inspect the work within a reasonable time after receiving notice, Customer must nevertheless immediately fill out and submit a certificate of completion.

ARTICLE 7. PRECAUTIONARY PROCEDURES

Safety

Section 7.01. Contractor will take all necessary and customary precautions in introducing and maintaining safety measures against all hazards connected with the work under this Agreement. Contractor will make protective arrangements so as to prevent work operations from damaging the premises, or other work or operations.

Storage

Section 7.02. Contractor will keep all materials, equipment, or goods involved in Contractor's services stored in appropriate containers or at adequately marked and secured stations, for which Customer will provide sufficient space on the premises with reasonable access to Contractor's work areas.

Cleanup

Section 7.03. Contractor will perform all work as tidily as is consistent with correct performance in Contractor's specialty [*optional:* and will keep the premises clean from all work-related trash, rubble, clutter, and refuse on a daily basis]. Contractor will promptly remove all equipment and materials on completion of the work and payment, and will leave the premises free from all refuse in a manner consistent with correct completion of the Contractor's operation.

Permission to Operate on Neighboring Properties

Section 7.04. Contractor will be responsible for obtaining permission, whenever and wherever necessary during the course of the work, from the appropriate parties or authorities with respect to performing operations on or from adjoining properties. Contractor will fully indemnify the ownership or tenancy interests of those properties if required. However, Contractor will not be liable for any payment required to obtain that permission. Inability to obtain that permission on the basis of payment not forthcoming shall constitute an obstruction to work beyond Contractor's control. Inability of Contractor to obtain permission as a result of unreasonable refusal by persons representing adjoining property interests shall also constitute an obstruction to work beyond Contractor's control.

ARTICLE 8. OFFICIAL REQUIREMENTS

Permits

Section 8.01. Contractor will obtain all necessary licenses and permits (except for zoning changes) required for all or any portion of the work to be performed under this Agreement. Contractor will furnish to Customer, at Customer's request, copies of any certificates or other documents evidencing compliance with applicable laws, ordinances, or other regulations of the various agencies or departments involved.

Bonds

Section 8.02. Contractor will obtain and furnish to Customer a performance [*or* completion] bond for the work covered by this Agreement. The bond shall be in the sum of $_____, and appropriately executed with a surety in a form acceptable to Customer. The premium for the bond is included in the quoted price.

License

Section 8.03. Contractor presently holds a valid California contractor's license.

[*Include following notice in all contracts in which licensee is prime contractor except home improvement and service and repair contracts written pursuant to Bus. & Prof. Code §§ 7151.2 and 7159.10 (Bus. & Prof. Code § 7030(a)):*]

CONTRACTORS ARE REQUIRED BY LAW TO BE LICENSED AND REGULATED BY THE CONTRACTORS' STATE LICENSE BOARD, WHICH HAS JURISDICTION TO INVESTIGATE COMPLAINTS AGAINST CONTRACTORS IF A COMPLAINT REGARDING A PATENT ACT OR OMISSION IS FILED WITHIN FOUR YEARS OF THE DATE OF THE ALLEGED VIOLATION. A COMPLAINT REGARDING A LATENT ACT OR OMISSION PERTAINING TO STRUCTURAL DEFECTS MUST BE FILED WITHIN 10 YEARS OF THE DATE OF THE ALLEGED VIOLATION. ANY QUESTIONS CONCERNING A CONTRACTOR MAY BE REFERRED TO THE REGISTRAR, CONTRACTORS' STATE LICENSE BOARD, P.O. BOX 26000, SACRAMENTO, CA 95826.

ARTICLE 9. ASSIGNMENT

By Contractor

Section 9.01. Contractor has been selected to perform the work covered by this Agreement on the basis of Contractor's personal service and, under normal circumstances, may not delegate any duties or responsibilities imposed by this Agreement. However, if Contractor, for any reason, becomes incapable of continuing performance under this Agreement, Contractor may, with Customer's written consent, assign Contractor's rights and obligations under this Agreement to another contractor of at least equivalent reputation for performance. Customer may not, under those circumstances, unreasonably withhold consent to an assignment. By consenting to an assignment, Customer will not waive any cause of action against Contractor arising out of circumstances preceding the assignment. Contractor may assign Contractor's right to payment under this Agreement at any time and to any source.

By Customer

Section 9.02. Customer may assign the benefits of this Agreement and receipt of Contractor's performance to any successor to the title or ownership or tenancy interest that Customer presently holds directly or for which Customer is the agent. Customer may delegate the duty of paying Contractor's compensation under this Agreement. However, Contractor retains the right to hold Customer personally liable for all payments until the requirement of compensation under this Agreement is completely satisfied.

ARTICLE 10. INSURANCE

By Customer

Section 10.01. While work is being performed under this Agreement, Customer shall continuously provide, entirely at Customer's own expense, adequate property damage and public liability insurance to cover the scope of all contemplated activities and the value of all services, labor, materials, and goods involved in this work, as well as all reasonable claims liable to occur during the course of the work.

By Contractor

Section 10.02. While work is being performed under this Agreement, Contractor shall continuously provide, entirely at Contractor's own expense, appropriate workers compensation coverage and liability insurance to protect against any results of Contractor's own negligence.

ARTICLE 11. DISPUTES

[*If contract is for work on residential property with four or fewer units, arbitration provision and disclosure that follows must be in 10-point boldface type or 8-point red boldface type; if contract is typed, provision must be in capital letters (Bus. & Prof. Code § 7191(a)):*]

Arbitration of Disputes

Section 11.01. Any dispute regarding performance under this Agreement shall be raised and settled in an arbitration proceeding held in accordance with [*e.g.*, the Construction Industry Rules of the American Arbitration Association then in effect *or* Part III, Title 9 of the Code of Civil Procedure].

[*Include if contract is for work on residential property with four or fewer units (Bus. & Prof. Code § 7191(b)):*]

NOTICE:

BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE BUSINESS AND PROFESSIONS CODE OR OTHER APPLICABLE LAWS. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY. WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

_____
Customer's Initials

_____
Contractor's Initials

Attorneys' Fees

Section 11.02. In any litigation or arbitration between the parties regarding the terms of or performance under this Agreement, the prevailing party shall be entitled to an award of reasonable attorneys' fees incurred in prosecuting or defending the proceeding.

ARTICLE 12. DEFAULT

Remedies of Contractor

Section 12.01. If Customer fails to compensate Contractor according to the terms of this Agreement for a period of _____ days after compensation is due, Contractor, in addition to any other legal remedies or processes available, may terminate the Agreement and enter the premises and remove any portion of, or all, materials or goods installed at or affixed to the premises under this Agreement to the extent that they represent in their then current condition the portion of the price then owing to Contractor. However, the work of removal shall not substantially interfere with any materials or goods installed outside of this Agreement.

Remedies of Customer

Section 12.02. If Contractor becomes incapable of continuing performance under this Agreement, whether due to circumstances within or outside of Contractor's control, or voluntarily delays that performance for an unreasonable period of time when another contractor engaged in the same specialty work might be available and capable of continuing the work, Customer may terminate the Agreement and arrange to have the work continued within a reasonable amount of time. If Customer terminates the Agreement according to the terms of this Paragraph, Customer must, within 30 days after that termination, make other arrangements for the work to proceed.

ARTICLE 13. RETENTION OF TITLE

Section 13.01. Contractor shall retain title to any materials that Contractor supplies. Title shall not pass to Customer until satisfactory payment is made for any portion of the work performed, including subsequent extra work. Materials shall not be deemed to become a part of real property, regardless of their severability, until Customer makes the entire contract payment. Contractor may remove an amount or portion of materials equivalent in value to any payment then in default. No part of this provision may be asserted against any prior or subsequent lienholder whose lien has been granted as a security interest in the property for purposes of financing its improvement in any manner, or any assignee or successor of such a lienholder.

[*Include the following if contract is between original contractor and property owner and is for anything other than home improvements or swimming pool:*]

Construction Lenders

The following name[s] and address[es] of the construction lender[s] for the above project are provided by Customer pursuant to *California Civil Code Section 3097(m)*:

_____ [*name of lender*]
_____ [*address*]

[*Repeat for each additional lender*]

[*Continue with the following:*]

[*Include following provision in at least 10-point boldface type if transaction is home solicitation contract or offer:*]

Cancellation Notice

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

Execution

Executed at [*county*], California, on _____[*date*].

CUSTOMER
_____ [*signature*]
[*typed name*]
CONTRACTOR
_____ [*signature*]
[*typed name*]

[*If transaction is home solicitation contract or offer, attach two copies of notice of cancellation in § 89.203 so that they can be easily detached by owner.*]

SCHEDULE A

Plans

[*Attach plans drawn to scale, with direct references to specifications in Section 3.02 of this agreement.*]

SCHEDULE B

Specifications

[*List materials that contractor will use and specifications that apply to job.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 89 HOME IMPROVEMENT AND SPECIALTY CONTRACTS
PART IV. FORMS
B. General Specialty Construction Contracts

29-89 California Legal Forms--Transaction Guide § 89.221

§ 89.221 Proposal by Specialty Contractor--General Short Form

[1] Comment--Use of Form

This form is a general short-form specialty construction contract. It is a proposal made by the specialty contractor to the general contractor and can be adapted for use by contractors licensed in any of the various specialties [*see* Ch. 88, *Licensing of Contractors* , for a list of the specialty classifications]. Specialty contractors usually work under a subcontract for a general building contractor but may work under a prime contract directly for a property owner. This form can be used in either situation, but if it is a direct contract between an owner or tenant and the contractor, it is a home improvement contract [*see Bus. & Prof. Code §§ 7151, 7151.2*]. If the aggregate contract price, including all labor, services, and materials, exceeds $500, the contract must satisfy the requirements of *Bus. & Prof. Code § 7159* [*see Bus. & Prof. Code § 7159(b)*], in which case this form should be combined with the *form in § 89.200[2]*. Similarly, if the conforming requirements for a service and repair contract are present [*see Bus. & Prof. Code § 7159.10(a)(1)(A)-(D)*; *see also § 89.201[1]*], this form should be combined with the *form in § 89.201[2]*.

For a detailed proposal contract appropriate for more complex projects, see *§ 89.220*. For more detailed subcontracts, see Ch. 30D, *Construction Contracts and Subcontracts* . For a short-form subcontract, see *§ 89.223*. For a discussion of specialty contracts and their contents, see *§ 89.220[1]*.

Every written contract between a property owner and an original contractor must provide space for the owner to enter his or her name, residence address, and place of business (if any) [*Civ. Code § 3097(l)*]. In addition, if this form is used for any contract between a property owner and an original contractor other than a home improvement contract or swimming pool contract [*see Bus. & Prof. Code §§ 7151, 7151.2*; *see also §§ 89.11[2], 89.13*], it must also provide space for the owner to enter the name and address of the construction lender or lenders. If it is adapted for use as a contract between an original contractor and subcontractor, or between subcontractors, it must also provide a space for the name and address of the owner, original contractor, and any construction lender [*Civ. Code § 3097(m)*].

If the project will be financed by the contractor, follow the guidelines in Ch. 45, *Consumer Installment Loans and Credit Sales*, to assure compliance with the applicable provisions of the federal Truth in Lending Act [*15 U.S.C. § 1601*

et seq.] and the Unruh Act [*Civ. Code § 1801 et seq.*].

[2] FORM

Proposal by Specialty Contractor--General Short Form

_____
[*name of specialty contractor*]

_____
[*address*]
State Contractor's License No.
_____

[*Name of specialty contractor*], _____[*address*], State Contractor's License No. _____, is hereby requested and authorized to perform the following work: [*describe work, e.g.*, installation of plumbing and bathroom fixtures], Job No. _____ located at [*location of work site*], for which [*name of prime contractor or owner*] promises to pay on completion and receipt of invoice as follows:

_____ A. At same unit price as provided in basic contract.

_____ B. As provided for extra work in basic contract.

_____ C. At direct costs plus overhead costs and profit.

_____ D. At unit prices indicated below.

_____ E. For an agreed lump-sum amount of $_____.

_____ F. [*Specify any special conditions*].

No extra or change-order work shall be required to be performed without prior written authorization of Owner. Any change-order forms for changes or extra work shall be incorporated into, and become part of, this agreement.

Contractor currently holds a valid California contractor's license.

[*Include following notice in all contracts in which licensee is prime contractor except home improvement and service and repair contracts written pursuant to Bus. & Prof. Code §§ 7151.2 and 7159.10 (Bus. & Prof. Code § 7030(a)):*]

CONTRACTORS ARE REQUIRED BY LAW TO BE LICENSED AND REGULATED BY THE CONTRACTORS' STATE LICENSE BOARD, WHICH HAS JURISDICTION TO INVESTIGATE COMPLAINTS AGAINST CONTRACTORS IF A COMPLAINT REGARDING A PATENT ACT OR OMISSION IS FILED WITHIN FOUR YEARS OF THE DATE OF THE ALLEGED VIOLATION. A COMPLAINT REGARDING A LATENT ACT OR OMISSION PERTAINING TO STRUCTURAL DEFECTS MUST BE FILED WITHIN 10 YEARS OF THE DATE OF THE ALLEGED VIOLATION. ANY QUESTIONS CONCERNING A CONTRACTOR MAY BE REFERRED TO THE REGISTRAR, CONTRACTORS' STATE LICENSE BOARD, P.O. BOX 26000, SACRAMENTO, CA 95826.

TERMS: Payable net 10 days after completion. If not timely paid, interest shall accrue on the unpaid balance at the rate of one percent per month. If suit is commenced to collect this obligation, debtor shall pay all costs of collection, including reasonable attorneys' fees.

This proposal may be withdrawn if it is not accepted within 30 days from _____[*date*]. To accept this proposal, please sign in the space below for Owner [*or* General Contractor] and return the signed agreement to: [*name of specialty contractor*] at _____[*contractor's address*].

[*Include the following if contract is between original contractor and property owner and is for anything other than home improvements or swimming pool:*]

The following name[s] and address[es] of the construction lender[s] for the above project are provided by Owner in accordance with *California Civil Code Section 3097(m)*:

_____ [*name of lender*]
_____ [*address*]

[*Repeat for each additional lender*]

[*Continue with the following:*]

[*If contract is home solicitation contract, add following provision in at least 10-point boldface type:*]

Cancellation Notice

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

OWNER [*or* GENERAL CONTRACTOR]
_____ [*signature*]
[*typed name*]

[*Add if party is property owner:*]

Address of residence: _____
Business address: _____
CONTRACTOR
_____ [*signature*]
[*typed name*]

[*If transaction is home solicitation contract or offer, attach two copies of notice of cancellation in § 89.203[2] so that they can be easily detached by owner.*]

SCHEDULE A

Plans and Specifications

[*Attach plans drawn to scale showing shape, size dimensions, and construction and equipment specifications, and include description of work to be done and description of materials to be used and equipment to be used or installed*.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 89 HOME IMPROVEMENT AND SPECIALTY CONTRACTS
PART IV. FORMS
B. General Specialty Construction Contracts

29-89 California Legal Forms--Transaction Guide § 89.222

§ 89.222 Provision for Progress Payments

[1] Comment--Use of Form

This form is a provision for progress payments during the course of a construction project. This provision can be used in place of the payment provisions in *§§ 89.230[2]-89.235[2]*. It also may be used to replace Section 2.01 in the Owner-Specialty Contractor primary form set out in *§ 89.220[2]*. A specialty contractor who will either be engaged in a lengthy project or be interrupted by workers performing under other contracts and/or subcontracts may want to collect progress payments instead of waiting for lump-sum compensation on completion of the job.

For more detailed subcontracts, see Ch. 30D, *Construction Contracts and Subcontracts* .

[2] FORM

Provision for Progress Payments

Payments

Customer [*or* General Contractor] shall compensate Contractor [*or* Specialty Contractor] on a periodic basis. Customer [*or* General Contractor] shall pay to Contractor [*or* Specialty Contractor] 90 percent of the amount due for the work performed by Contractor [*or* Specialty Contractor] during any calendar month within 20 days of the last day of that calendar month. The remaining 10 percent shall be paid 45 days following the date that all work on the project is completed [*or, if the contractor is required to file a notice of completion:* within 20 days after the notice of completion is filed].

Contractor [*or* Subcontractor] will provide waivers of lien rights against the property only after payments have been made as agreed. Owner [*or* Contractor] agrees to pay to Contractor [*or* Subcontractor] interest on any delinquent balance at the rate of [*specify, e.g.*, 3/4 of 1 percent per month]. If suit is commenced to collect any unpaid balance due on this contract, the prevailing party shall pay all costs of collection, including reasonable attorneys' fees.

[*Add if this provision is executed as an addendum to an original contract or subcontract:*]

The provisions of this addendum shall supersede any provisions in the printed Agreement with which the provisions of this addendum conflict.

Executed on _____[*date*].

CUSTOMER [*or* CONTRACTOR]
_____ [*signature*]
[*typed name*]
State Contractor's License No. _____
CONTRACTOR [*or* SUBCONTRACTOR]
_____ [*signature*]
[*typed name*]
State Contractor's License No. _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 89 HOME IMPROVEMENT AND SPECIALTY CONTRACTS
PART IV. FORMS
B. General Specialty Construction Contracts

29-89 California Legal Forms--Transaction Guide § 89.223

§ 89.223 Subcontract Between General Contractor and Specialty Contractor

[1] Comment

[a] Use of Form

This form is a short-form subcontract between a general building contractor and a specialty subcontractor. It can be adapted for use by a specialty contractor who is already working on a job and who wants to subcontract out a portion of the work. The agreement contains provisions incorporating all prime contract provisions and allowing attachment of any relevant federal contract requirements [*see* Ch. 90B, *Federal Government Contracts*]. For forms of detailed construction subcontracts, see Ch. 30D, *Construction Contracts and Subcontracts* .

This form provides that the subcontractor will be paid on a pro rata basis when the general contractor is paid by the property owner. For an alternative provision requiring progress payments to the subcontractor, see *§ 89.222[2]*.

For an analysis of the law and considerations governing construction projects carried out through subcontractors working under a general building contractor, see *§ 30D.30*.

[b] Bonding Requirements

This form requires the specialty subcontractor to secure payment and performance bonds covering the subcontracting work. All contractors licensed in California must be bonded [*see* Ch. 88, *Licensing of Contractors*]. However, if an owner or general contractor wants to assure that the investment made in a construction project is protected and that work will proceed, he or she must specifically require payment and/or performance bonds. For representative payment and performance bonds, see Ch. 79, *Suretyship, Guaranty, and Indemnity* .

[2] FORM

Subcontract Between General Contractor and Specialty Contractor

SUBCONTRACT

Date: _____

Render Invoices in Triplicate

Full Job Address or Location:
_____ _____

Name and Address of Construction Lender:
_____ _____

Owner's Name and Business and Residential Addresses:
_____ _____

Name and Address of General Contractor:
_____ _____
_____ _____

This subcontract between [*name of general contractor*], State Contractor's License No. _____, "Contractor," and [*name of subcontractor*], State Contractor's License No. _____, "Subcontractor," is subject to the terms and conditions stated on the reverse side of this document and expressly incorporated into this document by reference. The parties have read, and agree to be bound by, those terms and conditions.

Insurance Certificate Required:

Yes _____ No _____
Date received: _____
Received by: _____

Bond Required:

Yes _____ No _____
Date received: _____
Received by: _____

Federal Contract Requirements:

Yes _____ No _____
Date attached: _____
Attached by: _____

Job No. _____

TERMS AND CONDITIONS

SUBCONTRACTOR AGREES:

1. To furnish all materials and perform all work according to the terms and conditions of the contract between Owner and General Contractor or Contractor and between General Contractor and Contractor that are incorporated into and made part of this Subcontract.

2. To complete the work in a timely manner so as to enable Contractor and General Contractor to timely perform and complete their obligations to each other and to Owner.

3. To the extent of the work and materials called for under this subcontract, to be bound to Contractor by all the terms, general conditions, plans, drawings, and specifications between Contractor and General Contractor or Owner and to assume toward Contractor all of the obligations and responsibilities that Contractor assumes toward General Contractor or Owner.

4. To hold Contractor harmless from and indemnify Contractor against all cost, liability, or expense, including attorneys' fees, with respect to any claim or demand of the Owner, General Contractor or any other person concerning the work performed and materials provided by Subcontractor.

5. To provide, before commencing work, and maintain at Subcontractor's expense insurance coverage for public liability, property damage, and workers compensation insurance in a form, amount, and with a carrier satisfactory to Contractor and, when required, to arrange for Certificates of Insurance to be issued to Contractor from the carriers, which shall include clauses providing that the insurance shall not be canceled or reduced without 10 days' advance written notice to Contractor.

6. When required, before commencing work, to provide at Subcontractor's expense corporate surety bonds satisfactory to Contractor for the full and faithful performance of this Subcontract and the payment for labor and materials.

7. No additional work or changes in the work shall be done by Subcontractor except on the execution of a previous order in writing by Contractor agreeing to pay for that work. If additional work or change-orders are performed without the order required under this Paragraph, the Subcontractor shall not be entitled to any additional payment for that performance.

8. On federally-assisted contracts in which a "Federal Contract Requirements" schedule has been attached to and incorporated in this Subcontract, to perform in accord with the Federal Contract Requirements, Executive Order 11246 (relating to the elimination of discrimination because of race, creed, color, or national origin), and all applicable provisions of the Code of Federal Regulations, with respect to all work and materials covered by this Subcontract. Subcontractor shall include the Federal Contract Requirements in any lower tier subcontracts which Subcontractor may enter into, together with a clause requiring inclusion of those requirements in any further subcontracts that may be made. Subcontractor's breach of this Paragraph shall constitute ground for termination of this Subcontract by Contractor. If Contractor is injured by any such breach, Contractor shall have the right of legal action against Subcontractor to recover all damages incurred as a result thereof.

9. To pay Contractor all sums the court may fix as attorneys' fees in any suit instituted to enforce Subcontractor's obligations under this Subcontract.

CONTRACTOR AGREES:

1. To be bound by all the obligations set forth in the primary contract, including all general conditions, plans, drawings, and specifications.

2. To pay Subcontractor for work performed according to the terms and conditions of this Subcontract on receipt of payments from the Owner or General Contractor, pro rata as the value of Subcontractor's performance to date bears to the whole of Contractor's.

[*Include following notice in all contracts in which licensee is prime contractor except home improvement and service and repair contracts written pursuant to Bus. & Prof. Code §§ 7151.2 and 7159.10 (Bus. & Prof. Code § 7030(a)):*]

CONTRACTORS ARE REQUIRED BY LAW TO BE LICENSED AND REGULATED BY THE CONTRACTORS' STATE LICENSE BOARD, WHICH HAS JURISDICTION TO INVESTIGATE COMPLAINTS AGAINST CONTRACTORS IF A COMPLAINT REGARDING A PATENT ACT OR OMISSION IS FILED WITHIN FOUR YEARS OF THE DATE OF THE ALLEGED VIOLATION. A COMPLAINT REGARDING A LATENT ACT OR OMISSION PERTAINING TO STRUCTURAL DEFECTS MUST BE FILED WITHIN 10 YEARS OF THE DATE OF THE ALLEGED VIOLATION. ANY QUESTIONS CONCERNING A CONTRACTOR MAY BE REFERRED TO THE REGISTRAR, CONTRACTORS' STATE LICENSE BOARD, P.O. BOX 26000, SACRAMENTO, CA 95826.

Executed on _____[*date*].

CONTRACTOR
_____ [*signature*]
[*typed name*]
SUBCONTRACTOR
_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 89 HOME IMPROVEMENT AND SPECIALTY CONTRACTS
PART IV. FORMS
B. General Specialty Construction Contracts

29-89 California Legal Forms--Transaction Guide § 89.224

§ 89.224 Waiver of Liens by General Contractor With Representation That No Specialty Contractor May Claim Liens

[1] Comment--Use of Form

This form is a waiver of liens by a general contractor. It is designed to be used when all work on the project is completed and the owner makes the final payment to the contractor in charge of the project. At that time, the owner will normally ask for an assurance that all subcontractors under that contractor's supervision have been paid and that none of them is entitled to claim a lien on the owner's property. This form includes a representation to the owner that no specialty contractor who worked on the project under a subcontract will be able to claim liens against the owner's property. When the general contractor receives his or her final payment, all disbursements relating to the project should be made and no workers should have claims outstanding.

Construction funds may be processed through joint control agencies to regulate the disbursement and accounting of those funds and to assure a regular cash flow. For a discussion of joint control agencies, see Ch. 30E, *Joint (Builders') Control Agreements* . If a project is minor, contract provisions requiring the contractor and/or subcontractor to secure payment and performance bonds may be sufficient to assure that funds will be available for the payments due under the contract in case the obligor-contractor defaults [*see § 89.223[1][b]*].

This form may be acknowledged and recorded along with any other documents relating to the construction project (such as the Notice of Completion). Recordation may serve an evidentiary function in any subsequent disputes but will not invalidate properly filed liens. Any material supplier, laborer, or subcontractor who also executes this waiver relinquishes his or her lien rights against the owner's or tenant's property.

For a brief analysis of the law relating to liens on real property, see *§ 89.18[3]*.

[2] FORM

Waiver of Liens by General Contractor With Representation That No Specialty Contractor May Claim Liens

AFFIDAVIT AND WAIVER OF LIEN

STATE OF CALIFORNIA, COUNTY OF _____

_____[*name*], "Contractor," State Contractor's License No. _____, being first duly sworn says that _____[he *or* she] is the _____[*specify capacity or office, e.g.*, president or sole proprietor] of [*name of contracting firm*] and is familiar with the facts stated in this document. Contractor performed work, furnished labor, equipment, and/or materials for use in the construction of certain buildings, improvements, and/or equipment on premises owned by _____[*name of owner*] and located at [*describe premises*]. The last day that work, labor, equipment, and/or materials were furnished on those premises was on _____[*date*].

Contractor has made full payment to all workers, laborers, subcontractors, and suppliers of equipment and material, who performed, or provided materials or equipment used in performing, work on those premises.

The balance remaining due from the Owner, or Owner's Agent, to the Contractor is the sum of $_____. On Contractor's receipt of that sum from Owner, Agent, or Assignee, Contractor hereby waives all liens and claims against the Owner and/or Owner's premises and property for all work performed through _____[*date*].

Contractor represents that no other person or party has any right to a lien on account of any work performed or material furnished to or on behalf of Contractor for use on the above premises.

_____ [*signature of contractor*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsReal Property LawNonmortgage LiensGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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B. General Specialty Construction Contracts

29-89 California Legal Forms--Transaction Guide §§ 89.225-89.229

[Reserved]

§§ 89.225[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 89 HOME IMPROVEMENT AND SPECIALTY CONTRACTS
PART IV. FORMS
C. Contracts for Work in Particular Specialties

29-89 California Legal Forms--Transaction Guide § 89.230

§ 89.230 Acoustical Contract

[1] Comment--Use of Form

This form is a contract between a specialty contractor and a real property owner for the installation of acoustical materials in a residence. It is a home improvement contract [*see Bus. & Prof. Code §§ 7151, 7151.2*] and therefore includes certain language required by statute [*see Bus. & Prof. Code § 7030(b)*]. If the aggregate contract price, including all labor, services, and materials, exceeds $500, the contract must satisfy the requirements of *Bus. & Prof. Code § 7159* [*see Bus. & Prof. Code § 7159(b)*], in which case this form should be combined with the form in *§ 89.200[2]*. Similarly, if the conforming requirements for a service and repair contract are present [*see Bus. & Prof. Code § 7159.10(a)(1)(A)-(D)*; *see also § 89.201[1]*], this form should be combined with the form in *§ 89.201[2]*.

This form is a short form specialty contract set forth as a proposal [*see § 89.220[1][b]*]. It is designed to be used in a direct owner-contractor transaction but can be adapted for use as a subcontract [*see § 89.223*]. If this form is modified for any contract between a property owner and an original contractor other than a home improvement contract [*see Bus. & Prof. Code §§ 7151, 7151.2*; *see also § 89.11[2]*], it must also provide space for the owner to enter the name and address of the construction lender or lenders. If it is adapted for use as a contract between an original contractor and subcontractor, or between subcontractors, it must also provide a space for the name and address of the owner, original contractor, and any construction lender [*Civ. Code § 3097(m)*; *see § 89.220*].

This form is not designed for use in financed home improvement projects. If the acoustical project will be financed by the contractor, follow the guidelines in Ch. 45, *Consumer Installment Loans and Credit Sales*, to assure compliance with the applicable provisions of the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] and the Unruh Act [*Civ. Code § 1801 et seq.*].

[2] FORM

Acoustical Contract

Acoustical Contract

PROPOSAL: _____ [*date*]

Proposal Submitted to: _____
Residential Address: _____
Business Address: _____
Telephone: _____
Job Name: _____
Job Location: _____
Job Telephone: _____
Referral: _____
By: [*name of contractor*], State Contractor's License No.: _____, with offices located at _____[*contractor's business address*].

[*name of contractor*], "Contractor," proposes to furnish the materials and perform the labor for the completion of the following acoustical work: [*describe project, e.g.*, soundproofing a cellar] in accordance with the specifications set forth in Schedule A, attached to this Proposal and incorporated by reference, and in accordance with the following terms and conditions.

Contractor proposes to furnish all material and labor in accordance with the specifications contained in Schedule A for the sum of $_____.

On acceptance of this proposal by Owner, this proposal shall constitute a contract between Contractor and Owner.

TERMS AND CONDITIONS

Licensing

1. Contractor presently holds a valid California contractor's license.

[*Include following in home improvement contracts written pursuant to Bus. & Prof. Code § 7151.2 with aggregate contract price of $500 or less and therefore not subject to requirements of Bus. & Prof. Code § 7159 (see Bus. & Prof. Code §§ 7030(b), 7159(b)):*]

Information about the Contractors' State License Board (CSLB):

CSLB is the state consumer protection agency that licenses and regulates construction contractors.

Contact CSLB for information about the licensed contractor you are considering, including information about disclosable complaints, disciplinary actions and civil judgments that are reported to CSLB.

Use only licensed contractors. If you file a complaint against a licensed contractor within the legal deadline (usually four years), CSLB has authority to investigate the complaint. If you use an unlicensed contractor, CSLB may not be able to help you resolve your complaint. Your only remedy may be in civil court, and you may be liable for damages arising out of any injuries to the unlicensed contractor or the unlicensed contractor's employees.

For more information:

Visit CSLB's Web site at www.cslb.ca.gov.

Call CSLB at 800-321-CSLB (2752).

Write CSLB at P.O. Box 26000, Sacramento, CA 95826.

Time for Completion

2. Work under this contract shall commence within approximately _____ days after acceptance of this proposal by Owner. All construction shall be completed approximately on _____[*date*]. The completion date shall be extended for any delays caused by inclement weather, strikes or actions by labor unions, accidents, delays by carriers, shortages of materials and labor, and other delays unavoidable or beyond Contractor's control. Contractor's failure, without lawful excuse, to commence work within 20 days from the date specified in this agreement shall constitute a violation of the Contractors' State License Law. Contractor shall be deemed to have substantially commenced work when Contractor moves equipment onto the jobsite.

Payment Schedule

3. The payment schedule shall be as follows: 90 percent of the value of the work completed each month shall be due on or before the tenth day of the following month. The 10 percent balance shall be due within 35 days after completion of all spraying. If the sums called for in this contract are not paid when due, they shall be considered delinquent accounts and the Contractor shall be entitled to add 1 percent interest per month on all delinquent accounts.

Limitation Period on Acceptance

4. The quotations in this proposal are made for immediate acceptance and are subject to change unless accepted within 20 business days from the date appearing on the face of this proposal. If Contractor brings any action to enforce the terms or conditions of this instrument, or if Contractor is called on to defend any action brought to enforce these terms or conditions, Contractor shall be entitled to a reasonable sum for attorneys' fees and costs incurred as a result of that action.

Owner's Responsibilities

5. Owner shall be responsible for preparing the room for acoustical work by removing all drapes and rods and any small effects from the room. Owner shall also be responsible for the small amount of vacuuming required two to three hours after completion of the job. Owner shall secure the room in which acoustical work will be performed so as to prevent access to that room by any persons other than Owner, Contractor, or Contractor's workers and suppliers.

Existing Conditions

6. Contractor shall not be responsible for any preparation to the room that was done by others. Contractor shall not be responsible for peeling paint, wallpaper, or loose plaster unless otherwise noted.

Exclusions

7. Glitter will be added only at Owner's express written request. That request must be made, if at all, within five working days before the proposed time of spray. Addition of glitter shall be at no extra charge to Owner.

Additional Work or Changes

8. No extra or change-order work shall be required to be performed without prior written authorization of Owner. Any change-order forms for changes or extra work shall be incorporated into, and become part of, this agreement.

ACCEPTANCE OF PROPOSAL

The above prices, specifications, and conditions are satisfactory and are accepted. You are authorized to do the work as specified. Payment will be made as provided above.

Date of acceptance: _____
Owner's residence address: _____
Owner's place of business: _____

[*If contract is home solicitation contract, add following provision in at least 10-point boldface type:*]

Cancellation Notice

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

CONTRACTOR
_____ [*signature*]
[*typed name*]
OWNER
_____ [*signature*]
[*typed name*]

[*If transaction is home solicitation contract or offer, attach two copies of notice of cancellation in § 89.203 so that they can be easily detached by owner.*]

ATTACHMENTS

SCHEDULE A

Plans and Specifications

[*Attach plans drawn to scale showing shape, size dimensions, and construction and equipment specifications, and include description of work to be done and description of materials to be used and equipment to be used or installed*.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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DIVISION VI: PERFORMANCE OF SERVICES
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29-89 California Legal Forms--Transaction Guide § 89.231

§ 89.231 Painting and Decorating Contract

[1] Comment--Use of Form

This form is a short proposal-style contract [*see § 89.220[1][b]*] for the painting and decorating of a residence. It is a home improvement contract [*see Bus. & Prof. Code §§ 7151, 7151.2*] and therefore includes certain language required by statute [*see Bus. & Prof. Code § 7030(b)*]. If the aggregate contract price, including all labor, services, and materials, exceeds $500, the contract must satisfy the requirements of *Bus. & Prof. Code § 7159* [*see Bus. & Prof. Code § 7159(b)*], in which case this form should be combined with the form in *§ 89.200[2]*. Similarly, if the conforming requirements for a service and repair contract are present [*see Bus. & Prof. Code § 7159.10(a)(1)(A)-(D)*; *see also § 89.201[1]*], this form should be combined with the form in *§ 89.201[2]*.

This form is designed to be used in a direct owner-contractor transaction but can be adapted for use as a subcontract [*see § 89.223*]. If this form is modified for any contract between a property owner and an original contractor other than a home improvement contract [*see Bus. & Prof. Code §§ 7151, 7151.2*; *see also § 89.11[2]*], it must also provide space for the owner to enter the name and address of the construction lender or lenders [*Civ. Code § 3097(m)*; *see § 89.220*].

This form is not designed for use in financed home improvement projects. If the painting and decorating project will be financed by the contractor, follow the guidelines in Ch. 45, *Consumer Installment Loans and Credit Sales* , to assure compliance with the applicable provisions of the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] and the Unruh Act [*Civ. Code § 1801 et seq.*].

[2] FORM

Painting and Decorating Contract

PROPOSAL AND PAINTING AND DECORATING CONTRACT

[*name of contractor*]
State Contractor's License No.: _____

Date: _____
Job: _____

To: _____[*name of owner*]

We will furnish at the above-captioned job all labor, materials, tools, equipment, supervision, workers compensation, and property damage and liability insurance necessary to complete the following job in a workmanlike manner:

Scope of Job: _____
Materials: _____
For the Sum of $_____
Payment Terms: _____

This proposal is based on prices and availability of supplies as of this date. If the costs of labor and/or material increase before the completion of work, that increase shall be added to the contract price. Our performance under this contract is contingent on the nonoccurrence of strikes, fires, accidents, or any other causes beyond our control. This contract is subject to the conditions stated below [*or* on the reverse side of this sheet].

[*Include following in home improvement contracts written pursuant to Bus. & Prof. Code § 7151.2 with aggregate contract price of $500 or less and therefore not subject to requirements of Bus. & Prof. Code § 7159 (see Bus. & Prof. Code §§ 7030(b), 7159(b)):*]

Information about the Contractors' State License Board (CSLB):

CSLB is the state consumer protection agency that licenses and regulates construction contractors.

Contact CSLB for information about the licensed contractor you are considering, including information about disclosable complaints, disciplinary actions and civil judgments that are reported to CSLB.

Use only licensed contractors. If you file a complaint against a licensed contractor within the legal deadline (usually four years), CSLB has authority to investigate the complaint. If you use an unlicensed contractor, CSLB may not be able to help you resolve your complaint. Your only remedy may be in civil court, and you may be liable for damages arising out of any injuries to the unlicensed contractor or the unlicensed contractor's employees.

For more information:

Visit CSLB's Web site at www.cslb.ca.gov.

Call CSLB at 800-321-CSLB (2752).

Write CSLB at P.O. Box 26000, Sacramento, CA 95826.

Respectfully submitted,

Date: _____
Contractor: _____ [*name of firm or contractor*]

ACCEPTANCE:

I [*or* We] accept this proposal on _____[*date*].

[*Include following provision in at least 10-point boldface type if transaction is home solicitation contract or offer:*]

Cancellation Notice

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

[*If contract is with property owner:*]

_____ [*signature of owner*]
[*typed name*]
Address of residence: _____
Business address: _____

[*If contract is with general contractor:*]

_____ [*name of contracting firm*]
By _____ [*signature*]
[*typed name and title*]
State Contractor's License No. _____
_____ [*address*]

[*If transaction is home solicitation contract or offer, attach two copies of notice of cancellation in § 89.203[2] so that they can be easily detached by owner*.]

CONDITIONS

The following conditions are a part of this proposal. By signing the acceptance set out above [or on the reverse page], the Owner agrees that these conditions shall be part of the contract between us. The right to recover on any claim arising from this contract shall be contingent on performance of these conditions.

This contract constitutes the entire agreement between the parties and shall not be modified by any oral agreement.

Time

1. Work under this contract shall commence within approximately _____ days after acceptance of this proposal by Owner. The work shall be completed approximately _____ days after it is commenced. The completion date shall be extended for any delays caused by inclement weather, strikes or actions by labor unions,

accidents, delays by carriers, shortages of materials and labor, and other delays unavoidable or beyond Contractor's control. Contractor's failure, without lawful excuse, to commence work within 20 days from the date specified in this agreement shall constitute a violation of the Contractors' State License Law. Contractor shall be deemed to have substantially commenced work when Contractor moves equipment onto the jobsite.

Storage and Service

2. Owner shall furnish, at no cost to Contractor, a convenient room on the premises that can be kept locked, in which to store materials and equipment, and to supply all necessary heat, light, electricity, elevator or hoist service, and water.

Scaffolding

3. If scaffolding or swing staging is needed to do this work, it will be furnished by Contractor unless otherwise agreed to in writing. If necessary to the work, Owner shall secure permission to work on or over adjoining property at no cost to Contractor.

Payment

4. Payment of all or any part of the amount due to Contractor under this contract shall in no way be contingent on the acceptance of work done by others and over which Contractor has no control and Contractor assumes no responsibility for work done by others. Progress payments will be paid as agreed on. If Contractor incurs any expense in collecting money due under this contract, including reasonable attorneys' fees, Owner shall reimburse Contractor for that expense. The maximum legal rate of interest shall be charged on accounts not paid within 30 days from billing. Interest shall commence to run on the thirty-first day.

Additional Work or Changes

5. No extra or change-order work shall be required to be performed without prior written authorization of Owner. Any change-order forms for changes or extra work shall be incorporated into, and become part of, this agreement. Additions, alternations, or deviations to work covered by this contract shall be charged at cost of labor and materials plus overhead and profit.

Claims

6. Claims by either party for nonfulfillment of this contract shall be made in writing and shall be delivered to the other party not later than 30 days after completion of the work.

Unforeseen Conditions

7. This contract is based on visually observed conditions. If unforeseen conditions arise that could not be determined by visual inspection prior to starting work, additional work shall be performed on a Time and Material or Firm Bid Basis, after Owner or Owner's agent has been notified that additional work is necessary.

Sandblasting

8. If sandblasting is to be performed, Contractor shall use diligence and care to protect underlying and adjoining surfaces but shall not be responsible for damage to those surfaces.

Signs

9. Contractor shall exercise care in working around signs on buildings. However, Owner and Contractor agree that the signs are delicately constructed and that Contractor shall not be held liable for damage to signs.

Contingencies

10. Contractor's performance under this contract is contingent on the nonoccurrence of strikes, boycotts, accidents, inclement weather, earthquakes, or other acts of God which Contractor could not have reasonably foreseen or provided for or against.

[*Include if contractor has not furnished performance bond or provided for joint control:*]

Release for Payment

11. On satisfactory payment made for any portion of the work performed, Contractor shall, before any further payment is made, furnish to Owner a full and unconditional release from any claim or mechanics' lien for that portion of the work for which payment has been made.

SCHEDULE A

Plans and Specifications

[*Attach plans drawn to scale showing shape, size dimensions, and construction and equipment specifications, and include a description of the work to be done and a description of the materials to be used and the equipment to be used or installed.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawDesign Professionals

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DIVISION VI: PERFORMANCE OF SERVICES
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29-89 California Legal Forms--Transaction Guide § 89.232

§ 89.232 Masonry Contract

[1] Comment--Use of Form

This form is a proposal-style [*see § 89.220[1][b]*] contract for masonry work. It is a home improvement contract [*see Bus. & Prof. Code §§ 7151*, *7151.2*] and therefore includes certain language required by statute [*see Bus. & Prof. Code § 7030(b)*]. If the aggregate contract price, including all labor, services, and materials, exceeds $500, the contract must satisfy the requirements of *Bus. & Prof. Code § 7159* [*see Bus. & Prof. Code § 7159(b)*], in which case this form should be combined with the form in *§ 89.200[2]*. Similarly, if the conforming requirements for a service and repair contract are present [*see Bus. & Prof. Code § 7159.10(a)(1)(A)-(D)*; *see also § 89.201[1]*], this form should be combined with the form in *§ 89.201[2]*.

This form is designed to be used in a direct owner-contractor transaction but can be adapted for use as a subcontract [*see § 89.223*]. If this form is modified for any contract between a property owner and an original contractor other than a home improvement contract [*see Bus. & Prof. Code §§ 7151*, *7151.2*; *see also § 89.11[2]*], it must also provide space for the owner to enter the name and address of the construction lender or lenders. If it is adapted for use as a contract between an original contractor and subcontractor, or between subcontractors, it must also provide a space for the name and address of the owner, original contractor, and any construction lender [*Civ. Code § 3097(m)*; *see § 89.220*].

Because this form includes an arbitration provision, it also includes the disclosure provision that is required for all contracts for work on residential property with four or fewer units that include an arbitration provision. In such contracts, both the arbitration provision itself, and the disclosure must be set out either in at least 10-point roman boldface type or in contrasting red print in at least 8-point roman boldface type. If the contract is typed, the provision and disclosure must be set out in capital letters. Failure to comply with these requirements will preclude the contractor from enforcing the contract [*Bus. & Prof. Code § 7191*].

For an analysis of the law governing home improvement projects, see *§ 89.200[1]*. See Ch. 88, *Licensing of Contractors* , for a brief discussion of the various specialty classifications.

This form is not designed for use in financed home improvement projects. If the masonry project will be financed by the contractor, follow the guidelines in Ch. 45, *Consumer Installment Loans and Credit Sales* , to assure compliance with the applicable provisions of the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] and the Unruh Act [*Civ. Code § 1801 et seq.*].

[2] FORM

Masonry Contract

PROPOSAL AND MASONRY CONTRACT

[*name of contractor*]
State Contractor's License No.: _____
Date: _____
Job: _____

To: _____[*name of owner*]

[*name of contractor*], "Contractor," proposes to furnish the materials and perform the labor for the erection and completion of the following: [*describe masonry work, e.g.*, a brick wall or masonry construction] as set forth in Section(s) _____ of the specifications and in accordance with plans furnished by _____[*name of contractor, architect, or engineer who furnished plans*] dated _____ for work on the building erected for _____[*name of owner*], "Owner," on Lot _____, Block _____, Tract _____, No. _____, Street _____, City of _____, State of California. The contract price is $_____.

The payment schedule shall be as follows: 90 percent of the value of the work completed each month shall be due on or before the tenth day of the following month. The 10 percent balance shall be due within 35 days after completion of all work covered by this contract. If the sums called for in this contract are not paid when due, they shall be considered delinquent accounts and the Contractor shall be entitled to add 1 percent interest per month on all delinquent accounts.

This contract does not include any of the following: furnishing of reinforcing steel, placing of steel sash or door frames, shoring for openings and bond beams, water or electricity used during construction, or [*specify any additional exclusions*].

Work under this contract shall commence within approximately _____ days after acceptance of this proposal by Owner. If Contractor fails to commence work within 20 days from the approximate date of completion, Contractor shall be in violation of the Contractors' State License Law. Contractor shall be deemed to have substantially commenced work when Contractor brings equipment and on to the job site. The work shall be completed approximately _____ days after it is commenced. The completion date shall be extended for any delays caused by inclement weather, strikes or actions by labor unions, accidents, delays by carriers, shortages of materials and labor, strikes or actions by labor unions, and other delays unavoidable or beyond Contractor's control. The quotations in this proposal are made for immediate acceptance and are subject to change unless accepted within [*number*] days from the date hereof. If Contractor brings a contract action to enforce the terms or conditions of this instrument, or if Contractor is called on to defend a contract action brought to enforce these terms or conditions, Contractor shall be entitled to a reasonable sum for attorneys' fees and costs incurred as a result of that action.

On acceptance of this proposal by Owner, this proposal shall constitute a contract between Contractor and Owner. All conditions set out below [*or* on the reverse side of this proposal] are incorporated into and become a part of the

agreement between Contractor and Owner.

Respectfully submitted,

Date: _____
Contractor: _____ [*name of firm or contractor*]
State Contractor's License No.: _____

ACCEPTANCE:

I [*or* we] accept the above proposal on _____[*date*].

[*Include following provision in at least 10-point boldface type if transaction is home solicitation contract or offer:*]

Cancellation Notice

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

[*If contract is with property owner:*]

_____ [*signature of owner*]
[*typed name*]
Address of residence: _____
Business address: _____

[*If contract is with general contractor:*]

_____ [*name of contracting firm*]
By _____ [*signature*]
[*typed name and title*]
State Contractor's License No. _____

[*If transaction is home solicitation contract or offer, attach two copies of notice of cancellation in § 89.203 so that they can be easily detached by owner.*]

TERMS AND CONDITIONS

Equipment and Materials

1. Unless otherwise specified in the plans and specifications, Contractor shall have the right to select all equipment and materials. When specified equipment or materials are unavailable, Contractor shall have the right to substitute other

materials of equal or better quality for the specified materials.

Additional Work or Changes

2. No extra or change-order work shall be required to be performed without prior written authorization of Owner. Any change-order forms for changes or extra work shall be incorporated into, and become part of, this agreement. Additions or alterations to, or deviations from, work covered by this contract shall be charged at cost of labor and materials plus overhead and profit.

Contract Payments

3. Contractor shall have the right to suspend construction and/or terminate this contract if there are defaults in payments required under this contract.

Unavoidable Interruptions

4. Contractor shall not be held responsible or liable for any loss, damage, or delay caused by fire, strikes, civil or military authority, or by any other cause beyond Contractor's control.

Exclusions

5. This contract does not include any labor and/or materials not specifically mentioned.

Local Regulations

6. Requirements of governmental building codes, officials, or departments that are not provided for in the plans and specifications shall constitute additional work and shall be charged for as provided in Paragraph 2 of this contract.

Hold-Harmless Agreement

7. Contractor shall be held harmless from and against any and all loss, liability, claims, demands, suits at law or in equity, and judgments (including judgments for attorneys' fees and court costs) and awards, regardless of their merits, on account of any loss or damage to any person or property, alleged against Contractor and caused in whole or in part by the use of Contractor's equipment, owned or rented, used on the construction project by anyone other than Contractor's employees.

Arbitration of Disputes

[*If contract is for work on residential property with four or fewer units, arbitration provision and disclosure that follows must be in 10-point boldface type or 8-point red boldface type; if contract is typed, provision must be in capital letters (Bus. & Prof. Code § 7191(a)):*]

8. If a dispute arises over a matter other than payment of the contract price, the parties shall make a diligent effort to settle the dispute. If that effort fails, the dispute shall be arbitrated in accordance with the rules of the American Arbitration Association and the findings of the arbitration shall be binding on all parties to this contract.

[*Include if contract is for work on residential property with four or fewer units (Bus. & Prof. Code § 7191(b)):*]

NOTICE:
BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THOSE RIGHTS ARE SPECIFICALLY INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE BUSINESS AND PROFESSIONS CODE OR OTHER APPLICABLE LAWS. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY. WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE "ARBITRATION OF DISPUTES" PROVISION TO NEUTRAL ARBITRATION.

_____
Owner's Initials

_____
Contractor's Initials

Contractor Licensing

9. Contractor presently holds a valid California contractor's license.

[*Include following in home improvement contracts written pursuant to Bus. & Prof. Code § 7151.2 with aggregate contract price of $500 or less and therefore not subject to requirements of Bus. & Prof. Code § 7159 (see Bus. & Prof. Code §§ 7030(b), 7159(b)):*]

Information about the Contractors' State License Board (CSLB):

CSLB is the state consumer protection agency that licenses and regulates construction contractors.

Contact CSLB for information about the licensed contractor you are considering, including information about disclosable complaints, disciplinary actions and civil judgments that are reported to CSLB.

Use only licensed contractors. If you file a complaint against a licensed contractor within the legal deadline (usually four years), CSLB has authority to investigate the complaint. If you use an unlicensed contractor, CSLB may not be able to help you resolve your complaint. Your only remedy may be in civil court, and you may be liable for damages

arising out of any injuries to the unlicensed contractor or the unlicensed contractor's employees.

For more information:

Visit CSLB's Web site at www.cslb.ca.gov.

Call CSLB at 800-321-CSLB (2752).

Write CSLB at P.O. Box 26000, Sacramento, CA 95826.

[*Include if contractor has not furnished performance bond or provided for joint control:*]

Release for Payment

10. On satisfactory payment made for any portion of the work performed, Contractor shall, before any further payment is made, furnish to Owner a full and unconditional release from any claim or mechanics' lien for that portion of the work for which payment has been made.

SCHEDULE A

Plans and Specifications

[*Attach plans drawn to scale showing shape, size dimensions, and construction and equipment specifications, and include a description of the work to be done and a description of the materials to be used and the equipment to be used or installed.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 89 HOME IMPROVEMENT AND SPECIALTY CONTRACTS
PART IV. FORMS
C. Contracts for Work in Particular Specialties

29-89 California Legal Forms--Transaction Guide § 89.233

§ 89.233 Electrical Contract--Short Form

[1] Comment--Use of Form

This form is a short proposal-style contract for electrical work. It is designed to be used in a direct owner-contractor transaction but can be adapted for use as a subcontract [*see § 89.223*]. It should be used on relatively minor projects that do not require detailed terms and conditions. For a form to be used on more complex projects, see *§ 89.234*.

This form is a home improvement contract [*see Bus. & Prof. Code §§ 7151, 7151.2*] and therefore includes certain language required by statute [*see Bus. & Prof. Code § 7030(b)*]. If the aggregate contract price, including all labor, services, and materials, exceeds $500, the contract must satisfy the requirements of *Bus. & Prof. Code § 7159* [*see Bus. & Prof. Code § 7159(b)*], in which case this form should be combined with the *form in § 89.200[2]*. Similarly, if the conforming requirements for a service and repair contract are present [*see Bus. & Prof. Code § 7159.10(a)(1)(A)-(D)*; *see also § 89.201[1]*], this form should be combined with the *form in § 89.201[2]*.

Every written contract between a property owner and an original contractor must provide space for the owner to enter his or her name, residence address, and place of business (if any) [*Civ. Code § 3097(l)*]. If this form is modified for any contract between a property owner and an original contractor other than a home improvement contract [*see Bus. & Prof. Code §§ 7151, 7151.2*; *see also § 89.11[2]*], it must also provide space for the owner to enter the name and address of the construction lender or lenders. If it is adapted for use as a contract between an original contractor and subcontractor, or between subcontractors, it must also provide a space for the name and address of the owner, original contractor, and any construction lender [*Civ. Code § 3097(m)*; *see § 89.220*].

This form is not designed for use in financed home improvement projects. If the project will be financed by the contractor, follow the guidelines in Ch. 45, *Consumer Installment Loans and Credit Sales* , to assure compliance with the applicable provisions of the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] and the Unruh Act [*Civ. Code § 1801 et seq.*].

[2] FORM

Electrical Contract--Short Form

PROPOSAL

_____[*date*]

Proposal submitted to:

Name: _____
Residence address: _____
Business address: _____
Telephone: _____
Job name: _____
Street: _____
City: _____
State: _____
Architect: _____
Date of plans: _____

[*name of contractor*] proposes to furnish all labor and material necessary to provide the installation of electrical material in [*describe job*] according to the terms and conditions stated below [*or* on the reverse side of this sheet].

The price for the work described above will be $_____ with payments to be made as follows: 90 percent of the value of the work completed each month shall be due on or before the tenth day of the following month. The 10 percent balance shall be due within 35 days after completion of all work covered by this contract. If the sums called for in this contract are not paid when due, they shall be considered delinquent accounts and the Contractor shall be entitled to add 1 percent interest per month on all delinquent accounts.

Work under this contract shall commence within approximately _____ days after acceptance of this proposal by Owner. All construction shall be completed approximately on _____[*date*]. The completion date shall be extended for any delays caused by inclement weather, strikes or actions by labor unions, accidents, delays by carriers, shortages of materials and labor, and other delays unavoidable or beyond Contractor's control. Contractor's failure, without lawful excuse, to commence work within 20 days from the date specified in this agreement shall constitute a violation of the Contractors' State License Law. Contractor shall be deemed to have substantially commenced work when Contractor moves equipment onto the jobsite. We may withdraw this proposal if it is not accepted by _____[*date*].

_____ [*signature of contractor*]
[*typed name*]
State Contractor's License No. _____
_____ [*address*]

ACCEPTANCE OF PROPOSAL

The above prices, specifications, and conditions are accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

If accepted, please sign and return the [*specify, e.g.*, white] copy.

Accepted:
Date: _____

[*Include following if contract is between original contractor and property owner and is for anything other than home improvements:*]

The following name[s] and address[es] of the construction lender[s] for the above project are provided by Owner pursuant to *California Civil Code Section 3097(m)*:

_____ [*name of lender*]
_____ [*address*]

[*Repeat for each additional lender.*]

[*Continue with the following:*]

[*Include following provision in at least 10-point boldface type if transaction is home solicitation contract or offer:*]

Cancellation Notice

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

_____ [*signature of owner*]
[*typed name*]
Address of residence: _____
Business address: _____

[*If transaction is home solicitation contract or offer, attach two copies of notice of cancellation in § 89.203[2] so that they can be easily detached by owner.*]

CONDITIONS

Wiring Standard

1. All workmanship and materials shall comply with the requirements of the National Electrical Code and the applicable local ordinances and the electrical plans and specifications specifically applicable to the job.

Scope of Work

2. Unless otherwise stated in this proposal, the scope of work covered by the proposal is limited to that work specifically covered by the electrical drawings and the electrical section of the specifications.

Lighting Fixtures

3. Unless it is specifically included in the electrical drawings and the electrical section of the specifications or specifically stated in this proposal, the furnishing and installing of electrical lighting fixtures and lamps is not included in this proposal.

Additional Work or Changes

4. Owner may order additional work or changes in writing at any time, at a price agreed on or at our regular rates for time and material used in additional work or change-orders. However, no extra or change-order work shall be required to be performed without prior written authorization of Owner. Any change-order forms for changes or extra work shall be incorporated into, and become part of, this agreement.

Written Orders

5. Contractor shall receive written orders for all additional work or changes signed by an authorized person before proceeding with any extra work or changes.

Payments for Additional Work or Changes

6. Payments for additional work or changes shall be made under the same terms and conditions set forth in the original contract.

Contract Payments

7. Contractor shall not be required to proceed with work if the payments due to Contractor have not been made as specified in this contract.

Unavoidable Interruptions

8. Contractor shall not be held responsible or liable for any loss, damage, or delay caused by fire, strikes, civil or military authority, or any other cause beyond Contractor's control.

Charges to the Contractor

9. Contractor shall not be liable for any charges for temporary wiring, electrical energy, heat, job cleanup, hoisting, job telephone, job office or storage space, etc., unless specifically stated in this contract.

Damages

10. Contractor shall not be liable for any damages resulting from delay in completion of the work caused by factors beyond Contractor's control.

Acceleration of Obligation on Transfer of Title

11. If Owner disposes of the property on which work is pending under this contract by sale or otherwise, prior to completion of all payments, the full amount remaining unpaid on this contract shall be due at once and payable within 48 hours after date of disposal.

Arbitration

12. Any controversy or claim relating to this contract shall be submitted to arbitration in accordance with the rules of the American Arbitration Association. The result of that arbitration shall be binding on the parties to this contract. Judgment on any arbitration award may be entered in any court having appropriate jurisdiction.

Default

13. If Owner does any of the following, Owner shall be deemed in default under this Agreement: fails to pay any installment or installments on the contract price when due; declares bankruptcy; makes an assignment for the benefit of creditors; or permits an attachment or execution to be levied against Owner. If Owner is in default according to the terms of this Paragraph, then as long as Owner remains on the premises, Contractor, at Contractor's option, may remove from those premises any materials or fixtures that have been installed or delivered by Contractor and may sell those materials or fixtures at private sale without notice, that notice being expressly waived. Contractor shall apply any amount received in that private sale on account for any indebtedness due to Contractor on the contract. The option provided for in this Paragraph shall be in addition to any and all other remedies Contractor may have to enforce this contract. If Contractor initiates legal proceedings against Owner to retake possession of or collect any money due under this contract, Owner agrees to pay all costs, interests, and reasonable attorneys' fees.

Contractor Licensing

14. Contractor presently holds a valid California contractor's license.

[*Include following in home improvement contracts written pursuant to Bus. & Prof. Code § 7151.2 with aggregate contract price of $500 or less and therefore not subject to requirements of Bus. & Prof. Code § 7159 (see Bus. & Prof. Code §§ 7030(b), 7159(b)):*]

Information about the Contractors' State License Board (CSLB):

CSLB is the state consumer protection agency that licenses and regulates construction contractors.

Contact CSLB for information about the licensed contractor you are considering, including information about disclosable complaints, disciplinary actions and civil judgments that are reported to CSLB.

Use only licensed contractors. If you file a complaint against a licensed contractor within the legal deadline (usually four years), CSLB has authority to investigate the complaint. If you use an unlicensed contractor, CSLB may not be able to help you resolve your complaint. Your only remedy may be in civil court, and you may be liable for damages arising out of any injuries to the unlicensed contractor or the unlicensed contractor's employees.

For more information:

Visit CSLB's Web site at www.cslb.ca.gov.

Call CSLB at 800-321-CSLB (2752).

Write CSLB at P.O. Box 26000, Sacramento, CA 95826.

[*Include if contractor has not furnished a performance bond or provided for joint control:*]

Release for Payment

15. On satisfactory payment made for any portion of the work performed, Contractor shall, before any further payment is made, furnish to Owner a full and unconditional release from any claim or mechanics' lien for that portion of the work for which payment has been made.

SCHEDULE A

Plans and Specifications

[*Attach plans drawn to scale showing shape, size dimensions, and construction and equipment specifications, and include description of work to be done and description of materials to be used and equipment to be used or installed.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 89 HOME IMPROVEMENT AND SPECIALTY CONTRACTS
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29-89 California Legal Forms--Transaction Guide § 89.234

§ 89.234 Electrical Subcontract--Detailed Subcontract

[1] Comment--Use of Form

This form is a detailed subcontract for electrical work between a specialty contractor and a general building contractor. It is designed to be used in major construction projects. For a shorter proposal-style electrical contract between a specialty contractor and a property owner or tenant, see *§ 89.233*.

This form is not designed to be used in a direct contractor-owner transaction. However, it may be adapted for that purpose by combining it with the form in *§ 89.220[2]*. If this form is used as a prime contract with a property owner or tenant for work on residential premises, it should be combined with the form in *§ 89.200[2]* to assure compliance with the requirements of *Bus. & Prof. Code § 7159*, governing the contents of home improvement contracts [*see §§ 89.10, 89.11[1], [3], [5]*]. For a discussion of the law governing home improvement projects, see *§ 89.200[1]*. See Ch. 88, *Licensing of Contractors* , for a brief discussion of the various specialty classifications.

This form is not designed for use in financed projects. If the project will be financed by the contractor, follow the guidelines in Ch. 45, *Consumer Installment Loans and Credit Sales* , to assure compliance with the applicable provisions of the federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*] and the Unruh Act [*Civ. Code § 1801 et seq.*].

This form is not designed to be used in a home solicitation transaction. See *§ 89.203[1]* for a discussion of the law governing home solicitation contracts.

[2] FORM

Electrical Subcontract--Detailed Subcontract

SUBCONTRACT WITH ELECTRICAL CONTRACTOR

THIS AGREEMENT is entered into at [*location*] on _____[*date*], between [*name of general building contractor*], "Contractor," and [*name of specialty electrical contractor*], "Subcontractor," with principal offices at [

location].

Recitals

On _____[*date*], Contractor entered into a prime contract with _____[*name of property owner*], "Owner," to perform the following construction work: [*briefly describe primary project*].

Work under this subcontract is to be performed in accordance with the prime contract, plans, and specifications prepared by [*name of architect who designed project*], "Architect."

Subcontractor certifies that Subcontractor is fully familiar with all of the terms, conditions, and obligations of the Contract Documents, as defined below, the location of the jobsite, and the conditions under which the work is to be performed, and that Subcontractor enters into this subcontract based on Subcontractor's own investigation of all these matters and is in no way relying on any opinions and representations of the Contractor, except as follows: [*specify, or, if no exceptions, insert:* None].

This subcontract represents the entire Agreement between Contractor and Subcontractor. All Contract Documents are incorporated in this Agreement by reference and shall have the same force and effect as if they were fully set forth in this subcontract. Contractor warrants that prior to the execution of this subcontract, Contractor delivered to Subcontractor copies of all Contract Documents. Contractor and all Subcontractors shall be bound by any and all of the Contract Documents insofar as they relate in any way, directly or indirectly, to the work covered by this Subcontract. For purposes of this Subcontract, the phrase "Contract Documents" means: [*list only documents delivered to subcontractor*].

Scope

Subcontractor agrees to furnish all labor, materials, installations, cartage, supplies, equipment, scaffolding, tools, and other facilities of every kind and description necessary to perform the work described under this Subcontract in strict accordance with the Contract Documents and as more particularly, though not exclusively, as provided in the specifications, except the following parts of the specifications: [*if no exceptions, insert:* None].

Contract Price

Contractor's payment obligations under this Section shall be subject to additions and deductions for any change-orders that the parties may agree on. Contractor agrees to pay Subcontractor the sum of $_____ in accordance with the payment schedule set forth in Section 3 for the performance of Subcontractor's work.

Payment Schedule

Contractor agrees to pay to Subcontractor as follows: on or before the _____ day of each month, the value of 90 percent of all labor and materials which have been placed in position; the remaining 10 percent to be retained by Contractor until 30 days after the work has been fully completed according to this contract and delivered to and accepted by the Owner, Architect, or Contractor. Monthly payments shall include the value of materials delivered to the jobsite when the monthly or progress payments of Owner to Contractor on the prime contract include payments for those materials. If retention between Owner and Contractor is reduced at any time, then the retention between Contractor and Subcontractor shall be automatically reduced to the same percentage retention as then exists between

Owner and Contractor, and Contractor shall pay the difference to Subcontractor. Subcontractor agrees to furnish, if and when required by Contractor, payroll affidavits, receipts, vouchers, and releases of claims of labor, materialmen, and subcontractors performing work or furnishing major items of material under this subcontract, and it is agreed that no payment shall be made, except at Contractor's option, until Subcontractor furnishes lien releases.

Special Provisions

[*Add any provisions necessitated by the particular contract; otherwise, insert:* NONE.]

This Subcontract shall be binding on the parties, their heirs, executors, successors, administrators, and assignees.

Executed _____[*date*].

CONTRACTOR
_____ [*signature*]
[*typed name*]
Contractor's State License No. _____
SUBCONTRACTOR
_____ [*signature*]
[*typed name*]
Contractor's State License No. _____

CONDITIONS

Insurance

1. If Subcontractor performs any work or prepares or delivers materials to the jobsite before work starts, Subcontractor shall furnish certificates of insurance covering workers compensation in the amount of $_____, covering bodily injury and property damage in the amount of $_____, and fully protecting Contractor against all claims arising from Subcontractor's negligence.

Subcontractor shall indemnify Contractor and Owner for, and hold them harmless against, all claims, actions, demands, or damages made or awarded against them for personal injury, death, property damage, or other loss arising out of Subcontractor's negligence.

Workmanship

2. Subcontractor shall perform all work called for under this Agreement in a workmanlike manner and in accordance with the Contract Documents. All materials furnished by Subcontractor shall be new and shall be supplied in quantities sufficient to allow work to progress as expeditiously as possible unless specified otherwise in the Contract Documents. All questions regarding workmanship shall be judged by prevailing industry standards.

Satisfactory Employees

3. Workers shall be employed by Subcontractor under conditions that are satisfactory to Contractor. Subcontractor shall remove from the project any employee whom Contractor considers unsatisfactory. However, Contractor may not unreasonably withhold approval of any worker employed by Subcontractor and may not require the removal of an employee if that removal would conflict with any labor contract maintained by Subcontractor. Contractor shall indemnify and hold Subcontractor harmless against all claims, actions, demands, damages, liabilities, and expenses, including attorneys' fees, arising out of removal of a worker at Contractor's behest.

If a dispute arises over labor union jurisdiction covering any portion of Subcontractor's work, allowances will be made for work awarded to others and not performed by Subcontractor. Contractor shall reimburse Subcontractor for any additional work performed, but not included in this Subcontract, because of a labor jurisdiction award.

Provision for Inspection

4. Subcontractor shall furnish Contractor reasonable facilities and opportunities for inspecting materials at the jobsite, at the shops, or at any place where materials for use under this Agreement are being prepared, processed, manufactured, or treated.

Construction Progress Schedule

5. Contractor shall promptly furnish Subcontractor with a copy of the construction schedule for the project. That schedule shall include the approximate dates on which Subcontractor will perform work and Contractor shall provide reasonable notice of any change in the schedule. As often as is reasonably necessary, Subcontractor shall furnish to Contractor full reports regarding the progress of work at any place where materials under this Agreement are being prepared or manufactured. Those reports shall indicate the progress of preparation or manufacturing in whatever detail Contractor reasonably requires, including, but not limited to, drawings and/or diagrams.

Time

6. Time is of the essence in this Agreement. Subcontractor shall make every effort to conform to Contractor's progress schedule which is incorporated by reference and made part of this subcontract. To the extent required by the Contract Documents, Subcontractor shall prepare and obtain approval for all shop drawings, details, and samples. Subcontractor shall coordinate the work covered by this Subcontract with all other subcontractors and contractors in a manner that will facilitate completion of the entire project. If Subcontractor notifies Contractor that work under this Subcontract is being delayed by Contractor or other subcontractors, and specifies the nature of that delay, then Contractor shall pay for any additional crews necessary for Subcontractor to maintain the scheduled progress as an extra-work item. Contractor shall have complete control over the jobsite and the right to decide the time or order in which the various portions of the work will be installed, subject to the provisions of this Subcontract, and the duty to conduct all work on the project in a timely and orderly manner.

Default

7. If, at any time, Subcontractor refuses or neglects to supply a sufficient number of properly skilled workers or materials of adequate quality and quantity, is adjudicated a bankrupt, files an arrangement proceeding, commits any act of insolvency, makes an assignment for the benefit of creditors without Contractor's consent, fails to promptly pay for materials or labor, or fails to properly perform according to the terms of this Subcontract, Contractor shall, on giving Subcontractor 48 hours written notice, have the option to pay for any necessary labor and/or materials and deduct the

amount of that payment from any money due, or to become due, to Subcontractor. As an alternative, Contractor shall have the option to terminate Subcontractor's right to proceed with the work. If Contractor exercises that option, Contractor shall have the right to enter the jobsite and take possession of all materials, tools, and appliances and to employ other persons to finish the work and supply additional materials.

If Contractor revokes Subcontractor's right to proceed with the work, Subcontractor shall not be entitled to receive further payments under this Agreement until the Contractor completes the prime contract. At that time, if the unpaid balance of the amount due to Subcontractor under this Agreement exceeds the expenses incurred by Contractor in completing Subcontractor's work, Contractor shall pay the excess to Subcontractor. However, if the expenses exceed the unpaid balance, Subcontractor shall promptly pay Contractor the amount of the difference. Subcontractor shall be liable to Contractor for any expenses Contractor incurs in finishing Subcontractor's work and any damages suffered by Contractor as a result of Subcontractor's default.

Damages Caused by Delays

8. The prime contract contains a liquidated damages clause in the amount of $_____. Subcontractor shall be liable for its share of any liquidated damages sustained by Contractor as a result of delays caused by Subcontractor's default. However, Subcontractor shall not be liable under this Paragraph if the delays were caused by strikes, lockouts, other labor activity, Acts of God, or reasons beyond Subcontractor's control.

Liens

9. Subcontractor shall indemnify and hold Contractor harmless against liability for claims and/or liens of Subcontractor's laborers and/or materialmen, including costs of attorneys' fees. Subcontractor may litigate any lien or suit arising from such claims or liens provided that Subcontractor first removes the subject matter of the litigation from the jobsite and takes all steps necessary to assure that Owner does not, because of the claims or liens, withhold monies owed to Contractor.

Arbitration

10. All disputes regarding this Subcontract and/or performance under its terms that are not promptly resolved by the parties shall be submitted to arbitration for resolution. Each party shall select an arbitrator. The arbitrators selected by the parties shall select a third arbitrator. The matter shall be submitted to the panel of three arbitrators and the parties shall be bound by the arbitrators' decision.

Changes in the Work

11. Customer may order additional work or changes in writing at any time, at a price agreed on or at our regular rates for time and material used in additional work or change-orders. However, no extra or change-order work shall be required to be performed without prior written authorization of Owner. Any change-order forms for changes or extra work shall be incorporated into, and become part of, this agreement.

Subcontractor shall make changes or deviations from the original plans and specifications on receiving a written order to do so from Contractor. Contractor shall diligently process all change-orders and shall afford Subcontractor reasonable notice and time in which to perform them. Contractor is not liable for payments for any additional work and deviations from plans and specifications performed without written authorization. Prior to commencing work on a change-order,

Subcontractor shall submit to Contractor written copies of all costs or credit proposals for that work.

Assignment of Contract

12. Absent Contractor's written consent, Subcontractor shall not assign, transfer, or sublet any part of the work under this Agreement, or assign payments for work performed under this Agreement to others. Absent Subcontractor's written consent, Contractor shall not assign this Subcontract. Neither party shall unreasonably withhold consent to an assignment.

Protection of Subcontractor's Work

13. Subcontractor shall protect the work performed and the materials furnished under this Subcontract and shall assume full responsibility for the condition of that work and material until it is in its place in the building or structure on the jobsite.

Responsibility for Damage to Work in Place

14. Subcontractor shall be liable for loss of or damage to work in place and/or equipment at the jobsite caused by Subcontractor's negligence.

Layout Responsibility

15. Contractor shall establish principal axis lines and levels and Subcontractor shall lay out and be responsible for the accuracy of work under this Subcontract. Subcontractor shall be liable to other contractors working on the jobsite for loss or damage sustained as a result of Subcontractor's failure to lay out or perform work correctly. Subcontractor shall make every effort to assure that final conditions and details result in suitable alignment of finished surfaces. Subcontractor shall not be liable for any failures in layout due to changes or deviations in Contractor's work or the work of other subcontractors.

Cleanup

16. During the course of construction, Subcontractor shall remove waste materials from the jobsite as regularly as necessary to maintain the premises in a clean and orderly condition. On completion of the work under this Agreement, Subcontractor shall remove from the jobsite all temporary structures, debris, and waste left from that work. If Subcontractor fails to perform a proper cleanup within two days after receiving Contractor's instruction to do so, Contractor may proceed with the cleanup and may deduct the cost of doing so from amounts due to Subcontractor under this Agreement.

Guarantee

17. Subcontractor guarantees that all work under this Agreement shall be free from defect in materials and workmanship. Subcontractor shall replace, at Subcontractor's own expense and according to specifications, all material that proves defective or improperly installed at any time within one year from the completion and acceptance of Subcontractor's work.

Bonding of Subcontractor

18. Concurrently with the execution of this Agreement, Subcontractor shall [*optional:*, at Contractor's expense,] obtain a Labor and Material Bond and a Performance Bond in any amount requested by Contractor but not to exceed 100 percent of the contract price. Bonds obtained under this Paragraph shall be secured by an admitted surety insurer.

Independent Contractor

19. Subcontractor is an independent contractor and shall not be responsible for design or engineering work performed by others. Subcontractor shall be responsible for material and workmanship supplied under this Agreement and without increase in the contract price, and shall do all of the following: comply with all laws, rules, ordinances, and regulations of all federal, state, and local bodies having jurisdiction over the work; obtain all necessary permits and licenses for the work; and pay all manufacturers' taxes, federal and state taxes, sales taxes, use taxes, processing taxes, insurance, and contributions for social security and unemployment that are measured by wages, salaries, or other remuneration paid to employees and levied under existing laws, rules, or regulations.

Attorneys' Fees

20. If either party files an action at law or equity or initiates an arbitration proceeding to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to an award of reasonable attorneys' fees as part of the judgment or arbitration award.

When "Contractor" Refers to "Owner"

21. If there is no prime contractor and this Agreement is entered into by the property owner, this fact shall be indicated under the Owner's signature and whenever the word "Contractor" appears in this Agreement it shall be deemed that the word "Owner" has been substituted in its place.

Contractor Licensing

22. Contractor presently holds a valid California contractor's license.

[*Include following notice in all contracts in which licensee is prime contractor (Bus. & Prof. Code § 7030(a)):*]

CONTRACTORS ARE REQUIRED BY LAW TO BE LICENSED AND REGULATED BY THE CONTRACTORS' STATE LICENSE BOARD, WHICH HAS JURISDICTION TO INVESTIGATE COMPLAINTS AGAINST CONTRACTORS IF A COMPLAINT REGARDING A PATENT ACT OR OMISSION IS FILED WITHIN FOUR YEARS OF THE DATE OF THE ALLEGED VIOLATION. A COMPLAINT REGARDING A LATENT ACT OR OMISSION PERTAINING TO STRUCTURAL DEFECTS MUST BE FILED WITHIN 10 YEARS OF THE DATE OF THE ALLEGED VIOLATION. ANY QUESTIONS CONCERNING A CONTRACTOR MAY BE REFERRED TO THE REGISTRAR, CONTRACTORS' STATE LICENSE BOARD, P.O. BOX 26000, SACRAMENTO, CA 95826.

SCHEDULE A

Plans and Specifications

[*Attach plans drawn to scale showing shape, size dimensions, and construction and equipment specifications, and include description of work to be done and description of materials to be used and equipment to be used or installed*.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & Subcontractors

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 89 HOME IMPROVEMENT AND SPECIALTY CONTRACTS
PART IV. FORMS
C. Contracts for Work in Particular Specialties

29-89 California Legal Forms--Transaction Guide § 89.235

§ 89.235 Heating and Cooling Contract

[1] Comment

[a] Use of Form

This form is a heating and cooling proposal-style contract. It should be used for projects that involve the installation of warm-air heating, air-conditioning, or ventilation systems. This is a home improvement contract [*see Bus. & Prof. Code §§ 7151, 7151.2*] and therefore includes certain language required by statute [*see Bus. & Prof. Code § 7030(b)*]. If the aggregate contract price, including all labor, services, and materials, exceeds $500, the contract must satisfy the requirements of *Bus. & Prof. Code § 7159* [*see Bus. & Prof. Code § 7159(b)*], in which case this form should be combined with the form in *§ 89.200[2]*. Similarly, if the conforming requirements for a service and repair contract are present [*see Bus. & Prof. Code § 7159.10(a)(1)(A)-(D)*; *see also § 89.201[1]*], this form should be combined with the form in *§ 89.201[2]*.

Work in the heating, air-conditioning, and ventilation specialty normally requires the use of expensive large machinery. Contractors who hold licenses in this specialty as well as in plumbing, boiler installations, or refrigeration construction are frequently referred to as "mechanical contractors," although the Contractors' State License Law does not include this as a separate specialty category. See Ch. 88, *Licensing of Contractors* , for a discussion of the various specialty classifications.

[b] Installation of Equipment Provided by Contractor

This form provides that the specialty contractor performing work under its terms will select and install the equipment and provides a limited guarantee with regard to that equipment. Even if the contractor does not expressly warrant the quality of the equipment it provides, an implied warranty of fitness for a particular purpose may be imposed if the equipment proves defective. For an analysis of the law governing this area and a more detailed representative warranty that can be substituted for the guarantee in this form, see *§ 89.205*.

[c] Name and Address of Owner and Construction Lender

Every written contract between a property owner and an original contractor must provide space for the owner to enter his or her name, residence address, and place of business (if any) [*Civ. Code § 3097(l)*]. If this form is used for any contract between a property owner and an original contractor other than a home improvement contract [*see Bus. & Prof. Code §§ 7151*, *7151.2*; *see also § 89.11[2]*], it must also provide space for the owner to enter the name and address of the construction lender or lenders. If it is adapted for use as a contract between an original contractor and subcontractor, or between subcontractors, it must also provide a space for the name and address of the owner, original contractor, and any construction lender [*Civ. Code § 3097(m)*; *see § 89.220*].

[2] FORM

Heating and Cooling Contract

PROPOSAL AND AGREEMENT

Basic Agreement

This agreement is between [*name of specialty contractor*], "Contractor," who agrees to furnish and install the equipment listed below to _____[*name of property owner or acting agent*], "Owner" on the premises located at _____[*address*], occupied by _____[*name of tenant*], and owned by _____[*name of property owner*].

The equipment schedule is as follows:

Quantity	Mfr.	Model No.	Remarks
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Time for Performance

Work under this contract shall commence within approximately _____ days after acceptance of this proposal by Owner. The work shall be completed approximately _____ days after it is commenced. The completion date shall be extended for any delays caused by inclement weather, strikes or actions by labor unions, accidents, delays by carriers, shortages of materials and labor, and other delays unavoidable or beyond Contractor's control. Contractor's failure, without lawful excuse, to commence work within 20 days from the date specified in this agreement shall constitute a violation of the Contractors' State License Law. Contractor shall be deemed to have substantially commenced work when Contractor moves equipment onto the jobsite.

Installation

Contractor shall install the equipment and all necessary ductwork in accordance with the plans and specifications as listed in Schedule A, attached to this Agreement and incorporated by reference. Existing materials will be used when, in

Contractor's opinion, they are suitable. Materials and equipment being replaced will become Owner's property unless the parties specifically agree otherwise in writing.

Responsibility

The following responsibilities shall be assumed by the Owner (O) or the Contractor (P), as indicated:

1. Equipment foundation: _____

2. Wiring to panel (_____ phase): _____

3. Wiring from panel to equipment: _____

4. Wiring of control system: _____

5. Cutting and patching: _____

6. Replacing flooring and framing: _____

7. Decorating and painting: _____

8. Plumbing and piping: _____

9. Pipe insulation: _____

10. Flue: _____

11. Removing existing equipment: _____

Performance Guarantee

Contractor guarantees that all work will be performed in a workmanlike manner and will comply with existing codes and regulations governing that work.

When installed as specified under "Installation," and operated according to Owner's instructions, the equipment is guaranteed to have sufficient capacity to condition the spaces in the installation plan as follows:

Summer duty: To cool the [*specify area*] to an average temperature of _____ degrees Fahrenheit, when the outside dry bulb temperature is _____ degrees Fahrenheit, the outside wet bulb temperature is _____ degrees Fahrenheit, and when the total heat introduced into or generated within the spaces is that originating from natural inleakage through enclosing walls and from the sources named in the spaces to be conditioned.

Winter Duty: To heat [*specify area*], to an average temperature of not less than _____ degrees Fahrenheit, with an outside temperature of not less than _____ degrees Fahrenheit.

This performance guarantee is contingent on the following:

1. Doors to nonconditioned spaces being kept closed except for normal passage of persons.

2. Windows being kept closed at all times.

3. Factors controlling heat gain, such as awnings, window shades, and heat-producing equipment within the conditioned areas being used as contemplated in the installation plan.

4. The system being under 24-hour thermostat control both summer and winter.

Contractor guarantees all work performed under this Agreement to be free from defects in materials and workmanship for a period of one year from the date of shipment or installation, whichever occurs first. However, no warranty or guarantee whatsoever is made with respect to motors, controls, or other apparatus that Contractor does not manufacture or fabricate, since these products are separately warranted by their respective manufacturers.

Service under this warranty, except for emergency calls, will be provided only during normal working hours. Service does not include filter or fuse replacement.

General Conditions

Owner shall have 30 days within which to accept this proposal. This proposal shall not be construed as an offer. Any subsequent agreements relating to the contents of this proposal shall be written and subject to approval by Contractor's _____[*address*] office, and shall be contingent upon strikes, acts of God, or other causes beyond Contractor's control. Contractor's liability under any subsequent agreement shall not exceed the price of goods, wares, and merchandise furnished by Contractor.

All installation work will be performed during normal working hours.

Seller shall retain title to the equipment until Owner has made all payments due under this Agreement, and Owner shall not delay any payment because of lack of suitable weather in which to test any part of the equipment.

Contractor shall have the right to transfer any or all notes held under this Agreement, and title or right of possession will pass to the legal holders of the notes.

Contractor shall take all reasonable precautions to avoid injury to persons and damage to property when installing equipment under this Agreement.

Owner shall pay for all equipment or labor furnished by Contractor in addition to that specified as required in this Agreement as an extra at Owner's normal rates.

This proposal shall become a contract between Owner and Contractor if approved by Owner and thereafter approved in writing by an authorized representative of Contractor.

This proposal sets forth the entire contract between the parties.

After equipment is installed, a qualified representative of Contractor will start, test, and provide instruction on the use of that equipment.

Contractor shall have 20 business days within which to approve this Proposal after it has been accepted by Owner.

Price and Terms

The net cash price of the work to be performed under this Agreement is as follows:

$_____ for [*specify item, e.g.*, foam insulation material].

$_____ for [*specify additional item, e.g.*, loose-fill insulation material].

$_____ for [*specify additional charges*].

Total Price: $_____

Payment under this Agreement shall be made as follows: on or before the _____ day of each month, the value of 90 percent of all labor and materials that have been placed in position shall be paid to Contractor. The remaining 10 percent shall be retained by Owner until 30 days after all work has been fully completed according to this Agreement. Monthly payments shall include the value of materials installed to the point at which payment is made.

Additional Work or Changes

Owner may order additional work or changes in writing at any time, at a price agreed on or at our regular rates for time and material used in additional work or change-orders. However, no extra or change-order work shall be required to be performed without prior written authorization of Owner. Any change-order forms for changes or extra work shall be incorporated into, and become part of, this agreement.

Default

At any time Owner defaults in payment, Contractor may serve on Owner written notice of Contractor's intent to enter the premises and remove any equipment to which Contractor has title. Within 12 hours after receiving that written notice, Owner shall allow Contractor to enter the premises and to remove that equipment.

Licensing

[*Include following in home improvement contracts written pursuant to Bus. & Prof. Code § 7151.2 with aggregate contract price of $500 or less and therefore not subject to requirements of Bus. & Prof. Code § 7159 (see Bus. & Prof. Code § 7030(b), 7159(b)):*]

Information about the Contractors' State License Board (CSLB):

CSLB is the state consumer protection agency that licenses and regulates construction contractors.

Contact CSLB for information about the licensed contractor you are considering, including information about disclosable complaints, disciplinary actions and civil judgments that are reported to CSLB.

Use only licensed contractors. If you file a complaint against a licensed contractor within the legal deadline (usually

four years), CSLB has authority to investigate the complaint. If you use an unlicensed contractor, CSLB may not be able to help you resolve your complaint. Your only remedy may be in civil court, and you may be liable for damages arising out of any injuries to the unlicensed contractor or the unlicensed contractor's employees.

For more information:

Visit CSLB's Web site at www.cslb.ca.gov.

Call CSLB at 800-321-CSLB (2752).

Write CSLB at P.O. Box 26000, Sacramento, CA 95826.

[*Include following if contract is between original contractor and property owner and is for anything other than home improvements:*]

The following name[s] and address[es] of the construction lender[s] for the above project are provided by Customer pursuant to *California Civil Code Section 3097(m)*:

_____ [*name of lender*]
_____ [*address*]

[*Repeat for each additional lender*.]

[*Continue with the following:*]

[*Include following provision in at least 10-point boldface type if transaction is home solicitation contract or offer:*]

Cancellation Notice

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

Acceptance and Approval

This proposal is accepted by:
_____ [*signature of owner*]
[*typed name*]
_____ Residence address
_____ Business address
Date: _____
This proposal is approved by:
_____ [*signature of contractor*]
[*typed name*]
State Contractor's License No. _____

Date: _____

[*If transaction is home solicitation contract or offer, attach two copies of notice of cancellation in § 89.203[2] so that they can be easily detached by owner*.]

ATTACHMENTS

SCHEDULE A

Plans and Specifications

[*Attach plans drawn to scale showing shape, size dimensions, and construction and equipment specifications, and include description of work to be done and description of materials to be used and equipment to be used or installed*.]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsReal Property LawConstruction LawContracts

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DIVISION VI: PERFORMANCE OF SERVICES
Chapter 90 [Reserved]

29-90 California Legal Forms--Transaction Guide Chapter 90

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Chapter 90[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 90A STATE GOVERNMENT CONTRACTS

29-90A California Legal Forms--Transaction Guide 90A.syn

§ 90A.syn Synopsis to Chapter 90A: STATE GOVERNMENT CONTRACTS

§ 90A.01 California Sources

[1] Statutes

[2] Regulations

[3] California Attorney General Opinions

§§ 90A.02-90A.04 [Reserved]

§ 90A.05 Law Reviews and Periodicals

§ 90A.06 Annotations

§ 90A.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 90A.08-90A.09 [Reserved]

§ 90A.10 Authority for Construction Projects

[1] In General

[2] Authority for Counties, Cities, and Local Agencies

§ 90A.11 Authority for School Construction

[1] University of California

[2] California State University

[3] School Districts and Community Colleges

§ 90A.12 Authority for Acquisition of Goods and Services

§ 90A.13 Rules for Certain Professional Service Contracts

[1] In General

[2] Use of Private Contractors for Engineering and Architectural Services

§ 90A.14 Agencies Overseeing Construction Contracts

§ 90A.15 Contracts with Expatriate Corporations

§§ 90A.16-90A.19 [Reserved]

§ 90A.20 Licensing of Contractors

§ 90A.21 Construction Contracts Under State Contract Act

[1] Advertising for Contract Bids

[2] Prequalification of Bidders

[3] The Bidding Process

[4] Award of Contract

[5] Contract Requirements

[6] Modification of Contract

§ 90A.22 Acquisition of Goods and Services

[1] Acquisition of Goods

[a] Authority

[b] Competitive Bidding Procedure

[2] Acquisition of Information Technology Goods and Services

[3] Procurement of Services

[a] Authority

[b] Competitive Bidding Procedure

[c] Request for Proposal Procedure

§ 90A.23 Consulting Services Contracts

[1] Authority

[2] Rules Specifically Applicable to Consulting Services Contracts

[a] In General

[b] Contents of Contracts

[c] Approval Procedures

[3] Limitations on Successful Bidders

[4] Negotiations With Professional Consulting Services

§ 90A.24 Contracts With the University of California

[1] Authority

[2] Advertising for Contract Bids

[3] Awarding of Contract

§ 90A.25 Contracts With the California State University

[1] Authority

[2] Advertising for Contract Bids

[3] Prequalification of Bidders

[4] Submission of Bids

[5] Awarding of Contract

[6] Contract Requirements

[7] Modification of Contract

§ 90A.26 Contract Payments

[1] In General

[2] Under State Contract Act

[3] Under Contracts for Local Agency Public Construction

[4] Under Contracts for Acquisition of Goods and Services

§ 90A.27 Suspension of Bidders

[1] Violation of Antitrust Laws

[2] Determination of Eligibility

[3] Determination Prior to Suspension

[4] Termination of Suspension

§ 90A.28 Listing of Subcontractors

§ 90A.29 Equal Employment Opportunity Requirements

§ 90A.30 Application of California Public Records Act

[1] Duty to Disclose Public Records

[2] Exemptions From Disclosure

§§ 90A.31-90A.39 [Reserved]

§ 90A.40 Construction Contracting by Local Entities

[1] In General

[2] Counties With Population of More Than 500,000

[3] Counties With Population of 500,000 or Less

[4] Cities

[5] School Districts

[6] Other Local Districts and Agencies

[7] Alternative Bidding Methods

[8] Hazardous Waste Clauses Required in Local Excavation Contracts

§§ 90A.41-90A.49 [Reserved]

§ 90A.50 Remedies of Bidder for Misaward of Contract

[1] In General

[2] Protest Against Award of Contract for Goods

[3] Protest Against Award of Contract for Services

[a] Contracts Awarded Under Competitive Bidding Procedure

[b] Contracts Awarded Using Request for Proposal

[4] Protest Against Award of Contract for Information Technology Goods and Services

§ 90A.51 Relief of Successful Bidder From Bid Mistake

§ 90A.52 Resolution of Claims and Disputes

[1] In General

[2] Construction Contracts

§ 90A.53 California Taxpayers' Right to Customer Service

§§ 90A.54-90A.59 [Reserved]

§ 90A.60 Procurement Assistance for Small Businesses

§ 90A.61 Small Business Preference

§ 90A.62 California Business Preference in Construction Contracts

§ 90A.63 Distressed Area Preference in Contracts for Goods and Services

§ 90A.64 Participation Goals for Certain Business Enterprises

[1] Businesses of Disabled Veterans

[2] Businesses of Minority and Women Entrepreneurs

[3] Joint Powers Agreements

§ 90A.65 Procurement Mandates for Recycled Products

§§ 90A.66-90A.99 [Reserved]

§ 90A.100 Prequalification of Construction Contract Bidder

[1] Facts

Scope

[2] Documents

Scope

§ 90A.101 Prequalification of Vendor of Goods and Services

[1] Facts

Scope

[2] Documents

Scope

§ 90A.102 Qualification for Small Business Status

[1] Facts

Scope

[2] Documents

Scope

§§ 90A.103-90A.109 [Reserved]

§ 90A.110 Qualification for Small Business Preference

Scope

§ 90A.111 Qualification for Distressed Area Preference

Scope

§ 90A.112 Qualifying as Disabled Veteran Business Enterprise

Scope

§ 90A.113 Qualification of Vendor of Goods and Services

Scope

§§ 90A.114-90A.119 [Reserved]

§ 90A.120 Prequalification for Construction Contracts

Scope

§ 90A.121 Prequalification for Vendors of Goods and Services

Scope

§ 90A.122 Submission of Bids

Scope

§ 90A.123 Bid Mistakes

Scope

§ 90A.124 Protest Against Award of Contract for Goods

Scope

§ 90A.125 Protest Against Award of Contract for Services

Scope

§ 90A.126 Misaward of Construction Contract

Scope

§§ 90A.127-90A.139 [Reserved]

§ 90A.140 Substitution of Subcontractors After Contract Award

Scope

§ 90A.141 Arbitration Proceedings for Determination of Claims Arising Under State Contract Act

Scope

§ 90A.142 Posting Payment and Performance Bonds

Scope

§§ 90A.143-90A.199 [Reserved]

§ 90A.200 Request for Proposal--Primary

[1] Comment

[a] Use of Form

[b] Advertisements for Bids

[c] Primary and Secondary RFP Methods Defined

[d] Prequalification of Prospective Bidders

[e] Required List of Subcontractors for Bids for Construction of Any Public Work or Improvement

[f] Small Business Preference

[g] Noncollusion Affidavit Required for Public Work Contracts

[h] Submission of Bids and Bid Security

[i] Withdrawal of Bids

[j] Award of Contract to Lowest Responsible Bidder

[k] Notice of Nonresponsibility to Lowest Bidder Before Award

[2] FORM

Construction Contract Bid Proposal

§ 90A.201 [Reserved]

§ 90A.202 Documentation of Disabled Veteran Business Enterprise Requirements [STD.840]

[1] Comment

[a] Use of Form

[b] Bidder Declaration

[c] Participation Goals

[d] Certification As Disabled Veteran Business Enterprise

[2] FORM

Disabled Veteran Business Enterprise Participation Summary and Good Faith Effort Documentation Form

§ 90A.203 Bidder Declaration [GSPD 05-105]

[1] Comment--Use of Form

[2] FORM

Certification Letter for Disabled Veteran Business Enterprise

§ 90A.204 Drug-Free Workplace Certification [STD.21]

[1] Comment

[a] Use of Form

[b] Duty to Provide Drug-Free Workplace

[2] FORM

Certification of Drug-Free Workplace Certification of Drug-Free Workplace

§§ 90A.205-90A.219 [Reserved]

§ 90A.220 Escrow Agreement for Security Deposits in Lieu of Retention

[1] Comment

[a] Use of Form

[b] Withholding of Payments

[c] Substitution Provision Required

[d] Exceptions to Substitution Rule

[e] Procedure for Substitution

[2] FORM

Escrow Agreement for Security Deposits in Lieu of Retention

§§ 90A.221-90A.229 [Reserved]

§ 90A.230 Small Business and Disabled Veteran Business Enterprise (DVBE) Certification Application [STD.812]

[1] Comment

[a] Use of Form

[b] Comparison: Small Business and DVBE Certifications

[c] Small Business Preference and Certification

[d] Disabled Veteran Business Enterprise Preference and Certification

[2] FORM

Small Business Certification Application (STD.813)

§§ 90A.231-90A.239 [Reserved]

§ 90A.240 Notice of Mistake in Bid

[1] Comment

[a] Use of Form

[b] Grounds for Relief From Bid Mistake

[c] Contents of Notice

[2] FORM

Notice of Mistake in Bid

§§ 90A.241-90A.249 [Reserved]

§ 90A.250 Protest Against Award of Services or Goods Contract

[1] Comment

[a] Use of Form

[b] "Award of Contract" Defined

[c] Protest Against Award of Contract for Goods

[d] Protest Against Award of Contract for Services

[2] FORM

Protest Against Award of Services or Goods Contract

§ 90A.251 Protest Against Award of Contract for Services Under Request for Proposal

[1] Comment

[a] Use of Form

[b] Grounds for Protest

[c] Time Limits for Protest

[2] FORM

Protest Against Award of Contract for Services Under Request for Proposal

§ 90A.252 Protest Against Award of Contract for Construction Project

[1] Comment--Use of Form

[2] FORM

Protest Against Award of Contract for Construction Project

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 90A STATE GOVERNMENT CONTRACTS

29-90A California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses the law under which state and local agencies contract for construction projects, goods, and services. The chapter focuses on prequalification of prospective bidders, bidding procedures, protests against misawards of contracts, bidder relief in construction contracting, and contract dispute resolution procedures. It covers the laws governing state and local contracts and the qualifying, bidding, and awarding process. It also includes discussion of the types of special assistance available to small businesses, businesses in distressed areas, disabled veteran owned businesses.

The Transaction Guide enumerates the determinations the attorney must make before he or she can assist a client in qualifying as a responsible bidder and in obtaining the small business, distressed area, program area, and disabled veteran business preferences that are available to eligible firms. It includes the procedures for prequalifying a prospective bidder to bid on contracts for construction projects, supplies, or services, a guide to the submission of bids, the procedures for the limited relief available for bid mistakes in construction contracting, and protests against the award of contracts. Also covered are procedures governing the substitution of subcontractors after the award of a contract, and the resolution of contract disputes.

Forms include an illustrative bid proposal package for the State Contract Act, a small business and/or disabled veteran business enterprise application, an escrow agreement for use in lieu of a performance bond, a supplier's application for state bidders list, and forms for protesting awards and claiming bidder relief.

For coverage of contracts with the federal government, see Ch. 90B, *Federal Government Contracts* . For discussion of construction issues, see Ch. 30A, *Construction Financing* , Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals* , and Ch. 30D, *Construction Contracts and Subcontracts* . Discussion of a contractor's duty to be licensed is covered in Ch. 88, *Licensing of Contractors* . For general coverage of contract issues, refer to Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , and Ch. 77, *Discharge of Obligations* .

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 90A STATE GOVERNMENT CONTRACTS
PART I. RESEARCH GUIDE
A. Primary Sources

29-90A California Legal Forms--Transaction Guide § 90A.01

§ 90A.01 California Sources

[1] Statutes

Construction contract dispute resolution by arbitration or litigation. *CC § 1670*.

Community college district procurement of computers and software. *Ed Code §§ 81645, 81645.5*.

Contracting for energy management systems by community college districts. *Ed Code §§ 81660-81663*.

Liability of concessionaire operating hazardous recreational activity on public property. *Gov. Code § 831.7(d)*.

Prompt payment of claims. *Gov. Code § 927 et seq.*

Prompt payment of undisputed invoices by state agencies. *Gov. Code § 927.1*.

Penalties against state agency for late payments on contracts for property or services. *Gov. Code § 927.6*.

Penalties against State Controller for late payments on contracts for property or services. *Gov. Code § 927.7*.

Emergency termination of public contracts. *Gov. Code §§ 4400-4412*.

Procurement from contractors in violation of air or water pollution requirements prohibited. *Gov. Code §§ 4475-4482*.

Procurement of architectural, engineering, land surveying, environmental, and construction project management services. *Gov. Code §§ 4525-4529.5*.

Distressed area contract preference. *Gov. Code §§ 4530-4535.3*.

Assignment of antitrust claims to contracting agency required. *Gov. Code §§ 4550-4554*.

Enterprise Zone Act. *Gov. Code § 7070 et seq.*

Five percent preference for company certifying at least half of labor required under contract will be performed in high-density unemployment area or enterprise zone. *Gov. Code § 7084(a),(b)*.

Additional preference to company agreeing to hire specified percentages of persons living in targeted employment area or enterprise zone. *Gov. Code § 7084(c)*.

Certification of drug-free work place. *Gov. Code §§ 8355-8357*.

Authority for publication of California State Contracts Register. *Gov. Code §§ 14825-14829.2*.

Small business procurement. *Gov. Code §§ 14835-14843*.

Construction of state buildings. *Gov. Code § 15800 et seq.*

Personal services contracting criteria and procedures. *Gov. Code §§ 19130-19133*.

Publication of notice and intent of county supervisors to purchase land. *Gov. Code § 25350*.

Transfers of county real or personal property by board of supervisors. *Gov. Code §§ 25365, 25366.5*.

County authority to hire independent contractors to perform services. *Gov. Code §§ 25502.3, 25502.5, 25502.7*.

Development of public property. *Gov. Code §§ 25515-25515.5*.

Local public entities required to pay interest on cash performance security. *Gov. Code § 53079*.

Certification of disabled veteran business enterprise. M&V Code § 999.

Application of Public Contract Code to most public entities and their contractors and subcontractors, and to charter cities, absent an express exemption or city charter provision or ordinance that conflicts with that code. PC Code § 1100.7.

Public entities required to specify contractor license classification required when contract awarded. PC Code § 3300.

Brand or trade name specifications. PC Code § 3400.

Subletting and subcontracting provisions. PC Code §§ 4100-4114.

Relief of bidders from bid mistakes. PC Code §§ 5100-5107.

Awarding of contracts. PC Code §§ 6100-6109.

Required and prohibited contract clauses. PC Code §§ 7100-7110, 7200.

Contract claims and disputes. PC Code §§ 9201, 9203.

State Contract Act. PC Code § 10100 et seq.

Contracts not subject to State Contract Act. PC Code §§ 10101-10103.5.

Participation goals for disabled veteran business enterprises. PC Code §§ 10115-10115.15.

Provisions concerning bids and bidders. PC Code §§ 10160-10169.

Award of contracts. PC Code §§ 10180-10185.

Contract requirements. PC Code §§ 10220-10232.

Contract claims resolution. PC Code §§ 10240-10240.13.

Performance, modification, and payment. PC Code §§ 10250-10265.

Suspension of bidders for violation of antitrust laws. PC Code §§ 10285-10285.5.

California Taxpayer and Shareholder Protection Act of 2003. PC Code § 10286 et seq.

Contracts with expatriate corporations. PC Code § 10286.1

State procurement of goods and services. PC Code § 10290 et seq.

Approval of contracts. PC Code §§ 10295-10298.

Competitive bidding. PC Code §§ 10301-10334.

Contracts for services. PC Code §§ 10335-10353.

Consulting services contracts. PC Code §§ 10359-10381.

Conflicts of interest. PC Code §§ 10410-10412.

Remedies and penalties. PC Code §§ 10420-10425.

University of California procurement. PC Code § 10500 et seq.

Procurement of construction. PC Code §§ 10500-10506.

Procurement of materials, goods, and services. PC Code §§ 10508-10510.

Sale of real property. PC Code §§ 10511-10513.

California State University procurement. PC Code §§ 10700-10874.

When competitive bidding is required. PC Code § 10705.

Prebid procedures. PC Code §§ 10720-10743.

Bids and bidders. PC Code §§ 10760-10767.

Award of contracts. PC Code §§ 10780-10785.

Contract requirements. PC Code § 10820 et seq.

Modification, performance, and payment. PC Code §§ 10840-10853.

Acquisition of electronic data processing and telecommunications goods and services. PC Code §§ 12100-12121.

Contract purchases of recycled products. PC Code § 12200 et seq.

Prerequisites to presentation of action or arbitration proceeding for money or damages on contract with state. PC Code §§ 19100, 19102.

Local Agency Public Construction Act. PC Code § 20100 et seq.

Performance of work by day's labor. PC Code § 20102.

Contracts awarded by school districts. PC Code §§ 20105-20118.4.

Contracts awarded by counties. PC Code §§ 20120-20150.14.

Contracts awarded by cities. PC Code §§ 20160-20175.

Earthquake relief contracts awarded by local agencies. PC Code §§ 20185-20189.

Municipal utility district construction. PC Code §§ 20190-20192.

Public utility district contracting. PC Code §§ 20200-20207.7.

Public transit district contracting. PC Code § 20209 et seq.

Highway, boulevard, bridge, subway, and grade separation construction. PC Code § 20390 et seq., 20530-20557.

Street lighting contracts. PC Code §§ 20500-20522.

Contracts relating to irrigation districts, water facilities, water districts, drainage districts, and levee districts. PC Code § 20560 et seq.

Community college district contracting. PC Code §§ 20650-20660.

Leaseback procurement authority. PC Code §§ 20670-20675.

Community service district contracting. PC Code §§ 20680-20685.5.

Redevelopment agency procurement. PC Code §§ 20688.1-20688.4.

Harbor and port district contracting. PC Code § 20690 et seq.

Sanitation and sewer maintenance district contracting. PC Code §§ 20780-20806.

Fire protection district contracting. PC Code §§ 20810-20813.

Community facilities contracting. PC Code §§ 20820-20826.

Highway lighting district contracting. PC Code §§ 20830-20832.5.

Maintenance district contracting. PC Code §§ 20840-20843.5.

Contracting for improvements to streets with railroad or other tracks. PC Code §§ 20850-20874.

Tree planting contracts. PC Code §§ 20890-20898.

Bridge and highway district contracting. PC Code §§ 20910-20918.

Reclamation district contracts. PC Code §§ 20920-20927.

Water district procurements. PC Code § 20930 et seq.

Uniform Public Construction Cost Accounting Act. PC Code §§ 22000-22045.

Repair of public facilities in emergency. PC Code § 22050.

Acquisition of electronic data processing equipment, goods, and services by Southern California Rapid Transit District. PC Code §§ 22101-22109.

Arbitration of public works contracts. PC Code §§ 22200, 22201.

Substitution of securities. PC Code § 22300.

Contracting for concessions in state parks. PR Code § 5080.20.

Contracts with regional park or open-space districts. PR Code §§ 5549, 5594.

[2] Regulations

State Board of Control hearings in protests against awards of contracts for supplies or equipment. *2 Cal. Code Reg. §§ 870-874.1*.

Contract protest procedures. *2 Cal. Code Reg. §§ 1195-1195.6*.

Prequalification of vendors. *2 Cal. Code Reg. § 1890*.

Purchases by Department of General Services on behalf of local agencies. *2 Cal. Code Reg. §§ 1895.1-1895.16*.

Small business preference. *2 Cal. Code Reg. §§ 1896.2-1896.22*.

Distressed area procurement preference. *2 Cal. Code Reg. §§ 1896.30-1896.41*.

Disabled veteran business enterprise participation goals. *2 Cal. Code Reg. §§ 1896.60-1896.95*.

Program area preference. *2 Cal. Code Reg. §§ 1896.100-1896.111*.

[3] California Attorney General Opinions

California Buy American Act unconstitutional and void as to public contracts. *53 Ops. Cal. Atty. Gen. 72 (1970)* .

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§ 90A.05 Law Reviews and Periodicals

Montgomery, *Bid Imperfections in California Public Contracting: Carving Out a Good Faith Exception to the Void Contract Rule, 38 Santa Clara L. Rev. 205 (1997).*

Recent Cases, *Constitutional Law--Contract Clause--Fourth Circuit Upholds City's Payroll Reduction Plan as a Reasonable and Necessary Impairment of Public Contract, 107 Harv. L. Rev. 949 (1994).*

Long, *Waiver of the Contract Completion Date in Government Contracts, 12 Construction Law. 3 (Apr. 1992).*

Seymour, *Liability of Government Contractors for Environmental Damage, 21 Pub. Cont. L.J. 491 (1992).*

Shannon, *The Government-Wide Debarment and Suspension Regulations After a Decade--A Constitutional Framework--Yet, Some Issues Remain in Transition, 21 Pub. Cont. L.J. 370 (1992).*

Tomko & Weinberg, *After the Fall: Conviction, Debarment, and Double Jeopardy, 21 Pub. Cont. L.J. 355 (1992).*

Vogel, *Eligibility Requirements for Relators Under Qui Tam Provisions of the False Claim Act, 21 Pub. Cont. L.J. 593 (1992*).

Boyd, *Implied-in-Fact Contract: Contractual Recovery Against the Government Without an Express Agreement, 21 Pub. Cont. L.J. 84 (1991).*

Redman, *Understanding MBEs in the 90s, 11 Construction Law. 13 (Oct. 1991).*

Jackson, *Prequalification and Qualification: Discouragement of New Competitors, 19 Pub. Cont. L.J. 702 (1990).*

Pilligian, *Resident Preference Laws and the Award of Public Contracts*, 10 Construction Law. 10 (May 1990).

Toomey, Fisher, & Curry, *Good Faith and Fair Dealing: The Well-Nigh Irrefragable Need for a New Standard in Public Contract Law, 20 Pub. Cont. L.J. 87 (1990).*

Williamson, *Facsimile Bids and Proposals: A New Option for Contracting, 19 Pub. Cont. L.J. 689 (1990).*

Zimmerman, *Interest on Government Construction Claims in California, 10 Construction Law. 18 (Jan. 1990).*

Borchers & Dauer, *Taming the New Breed of Nuclear Free Zone Ordinances: Statutory and Constitutional Infirmities in Local Procurement Ordinances Blacklisting the Producers of Nuclear Weapons Components, 40 Hastings L.J. 87 (1988).*

Combs, *Business Associations and Professions; Public Works Contracts--Specialty Contractors (Review of Selected 1987 California Legislation), 19 Pac. L.J. 478 (1988).*

Note, *Boyle v. United Technologies Corp.: The Turning Point for the Government Contractor Defense? 21 Loy. L.A. L. Rev. 935 (1988).*

Overly, *Government Contractors, Beware: Civil and Criminal Penalties Abound for Defective Pricing, 20 Loy. L.A. L. Rev. 597 (1987).*

Rosegren & Librizzi, *Bid Protests: Substance and Procedure on Publicly Funded Construction Projects, 7 Construction Law. 1 (Jan. 1987).*

Moss, *Substantial Compliance With the Contractor's Licensing Law, 9 L.A. Law. 49 (July 1986).*

Legal Topics:

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§ 90A.06 Annotations

Annot., Validity, Construction, and Effect of Requirement Under State Statute or Local Ordinance Giving Local or Locally Qualified Contractors a Percentage Preference in Determining Lowest Bid, 89 A.L.R.4th 587 (1991).

Annot., Validity, Construction, and Effect of State and Local Laws Requiring Governmental Units to Give "Purchase Preference" to Goods Manufactured or Services Performed in State, 84 A.L.R.4th 419 (1991).

Annot., Public Contracts: Low Bidder's Monetary Relief Against State or Local Agency for Nonaward of Contract, 65 A.L.R.4th 93 (1988).

Annot., Construction and Effect of "Changed Conditions" Clause in Public Works or Construction Contract With State or Its Subdivision, 56 A.L.R.4th 1042 (1987).

Annot., Public Contracts: Authority of State or Its Subdivision to Reject All Bids, 52 A.L.R.4th 186 (1987).

Annot., What Constitutes "Public Work" Within Statute Relating to Contractor's Bond, 48 A.L.R.4th 1170 (1986).

Annot., Failure of Building and Construction Artisan or Contractor to Procure Business or Occupational License as Affecting Enforceability of Contract or Right of Recovery for Work Done--Modern Cases, 44 A.L.R.4th 271 (1986).

Annot., Waiver of Competitive Bidding Requirements for State and Local Public Building and Construction Contracts, 40 A.L.R.4th 968 (1985).

Annot., Amount of Appropriation as Limitation on Damages for Breach of Contract Recoverable by One Contracting With Government Agency, 40 A.L.R.4th 998 (1985).

Annot., Validity of State Statute or Local Ordinance Requiring, or Giving Preference to, the Employment of Residents

by Contractors or Subcontractors Engaged in, or Awarded Contracts for, the Construction of Public Works or Improvements, 36 A.L.R.4th 941 (1985).

Legal Topics:

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§ 90A.07 Text References

[1] Matthew Bender Sources

California Forms of Pleading and Practice(Matthew Bender).

Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* .

Ch. 56, *Architects* .

Ch. 104, *Building Contracts* .

Ch. 140, *Contracts* .

Ch. 481, *Public Works* .

California Legal Forms(Matthew Bender).

Ch. 30A, *Construction Financing* .

Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals* .

Ch. 30D, *Construction Contracts and Subcontracts* .

Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

Ch. 77, *Discharge of Obligations* .

Ch. 88, *Licensing of Contractors* .

Ch. 90B, *Federal Government Contracts* .

McBride & Touey, Government Contracts(Matthew Bender).

[2] Additional Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 976-1001 (10th ed. 2005).

Legal Topics:

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§ 90A.10 Authority for Construction Projects

[1] In General

Projects involving the construction, alteration, repair, or improvement of any state structure, improvement, or road are subject to the State Contract Act [*see* PC Code § 10100 et seq.; *but see Zumbrun Law Firm v. California Legislature (2008) 165 Cal. App. 4th 1603, 1616-1617, 82 Cal. Rptr. 3d 525* (Public Contract Code does not apply to contracts by California Legislature)] if the cost exceeds $100,000, adjusted as provided by statute [*see* PC Code § 10105(b)]. For calendar year 1995 and at two-year intervals thereafter, the Director of Finance will adjust the total cost limit to reflect the percentage change in the annual California Construction Index [PC Code § 10105(b)]. Covered projects include construction projects originated by the Department of Water Resources, the Department of General Services, the Department of Boating and Waterways, the Department of Corrections, and the Department of Transportation [PC Code § 10106]. However, notwithstanding the monetary limit stated above, work on a project in excess of $25,000 that would otherwise constitute a project may not be done by day labor unless the statutory requirements for a day labor contract are met [PC Code § 10122.6; *see* PC Code § 10122 (requirements for day labor contract)].

The State Building Construction Act of 1955 ("Building Construction Act") [*see Gov. Code § 15800 et seq.*] provides that the State Public Works Board [*Gov. Code § 15802(a)* ("Board")] may acquire and construct public buildings when the legislature authorizes it to do so [*Gov. Code § 15808*; *see Gov. Code § 15809* (powers of Board)]. However, the Board's construction projects generally are subject to the State Contract Act [*Gov. Code § 15815(a)*; *see Gov. Code § 15815(b)* (exceptions for University of California and California State University), discussed in*§ 90A.11*; *Gov. Code § 15815(c)* (exception for court facilities constructed under auspices of Administrative Office of the Courts in accordance with *Gov. Code § 70374*)], and the Building Construction Act itself is merely supplemental to powers conferred by other laws (including the State Contract Act) [*Gov. Code § 15803*]. Consequently, although the State Public Works Board may be in charge of a construction project, contracting for the project will be governed by the State Contract Act as well as the State Building Construction Act.

[2] Authority for Counties, Cities, and Local Agencies

Construction contracts for counties, cities, and local districts and agencies are governed by the Local Agency Public

Construction Act [*see* PC Code § 20100 et seq.]. For discussion of relevant provisions of the Act, see*§ 90A.40*.

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§ 90A.11 Authority for School Construction

[1] University of California

For construction or improvement projects exceeding $50,000 [*see* PC Code § 10500 ("project" defined)], the University of California must engage in competitive bidding [PC Code § 10501; *see* PC Code § 10500-10506 (purpose and procedures); *see also Gov. Code § 15815(b)(1)* (exempting Regents of University of California from certain rules relating to state building construction)]. For further discussion of University of California bidding procedures and coverage of University supplies contracts, see*§ 90A.24*.

[2] California State University

The California State University must award contracts for construction, repair, and improvement projects estimated to cost more than $5,000 [*see* PC Code § 10701(a) ("project" defined)] by competitive bidding [PC Code § 10705(b); *see Gov. Code § 15815(b)(2)*]. However, if the state's best interests are served, the Trustees of the University may carry out work that exceeds $5,000, but not more than $20,000, by day labor [PC Code § 10705(b)]. For further discussion of contracts with the California State University and coverage of State University supplies contracts, see*§ 90A.25*.

[3] School Districts and Community Colleges

The State School Building Aid Law of 1949 [*see Ed Code § 15700 et seq.*] requires that school district and community college construction contracts must be let under competitive bidding [PC Code § 20106; *see* PC Code §§ 20105-20107 (procedures)]. The Department of General Services administers the State School Building Aid Law [*Ed Code § 15702*; *see Gov. Code § 14651* (Department's duties and powers)]. Other school district contracts for public projects involving an expenditure of $15,000 or more are also subject to competitive bidding [PC Code § 20111(b); *see* PC Code §§ 20110-20118.4 (procedures)]. However, in connection with the procurement of computers, software, telecommunications equipment, microwave equipment, and related electronic equipment, a school district may use alternate competitive negotiation methods instead of competitive bidding [*see* PC Code § 20118.2(a); *see* PC Code § 20118.2(d) ("competitive negotiation" discussed)].

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§ 90A.12 Authority for Acquisition of Goods and Services

In general, all state agency contracts for (1) the acquisition of goods or elementary school textbooks, (2) services, (3) the construction, alteration, improvement, repair, or maintenance of property, or (4) the performance of services by the agency for or in conjunction with a private person or public agency must be approved by the Department of General Services [PC Code § 10295(a); *see* PC Code § 10290(d) (*goods* means all types of tangible personal property, including materials, supplies, and equipment)]. These contracts are subject to competitive bidding requirements and other procedures [*see* PC Code § 10290 et seq.]. State agencies seeking to acquire information technology goods or services must comply with a specific separate statutory scheme [*see* PC Code §§ 12100-12113]. In addition, state agencies are encouraged to use products made from recycled materials [*see* PC Code § 12153].

There is no statutory definition of "state agency" as the term is used in PC Code § 10295. However, the term does not include any agency in the judicial branch [*Los Angeles County Dependency Attorneys, Inc. v. Department of Gen. Servs. (2008) 161 Cal. App. 4th 230, 240, 73 Cal. Rptr. 3d 817* (Administrative Office of the Courts is not state agency required submit contract for services to Department of General Services for review and approval)].

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§ 90A.13 Rules for Certain Professional Service Contracts

[1] In General

A state or local agency head [*see Gov. Code § 4525(b),(c)* (definitions)] must select certain professional services on the basis of demonstrated competence and on the professional qualifications necessary for the satisfactory performance of the services required, rather than on the basis of competitive bidding. Professional services subject to this rule include private architectural, landscape architectural, engineering, environmental, land surveying, and construction project management firms [*Gov. Code § 4526*; *see Gov. Code § 4525(d)-(f)* (definitions)]. Agency heads must adopt procedures that ensure that these services will be engaged on the basis of demonstrated competence and relevant qualifications, and at fair and reasonable prices to the public agencies. The procedures must also ensure maximum participation of small business firms [*see Gov. Code § 14837(d)* ("small business" defined)]. In addition, the procedures must specifically prohibit practices that might result in unlawful activity (such as rebates, kickbacks, or other unlawful consideration), and must specifically prohibit interested government agency employees from participating in the selection process [*Gov. Code § 4526*; *see Gov. Code § 87100* (public officials must avoid conflicts of interest)].

Any firm proposing to provide construction project management services must provide evidence of expertise and experience in construction project design review and evaluation, construction mobilization and supervision, bid evaluation, project scheduling, cost-benefit analysis, claims review and negotiation, and general management and administration of a construction project [*Gov. Code § 4529.5*]. State agency heads must encourage firms to submit this data annually [*Gov. Code § 4527*]. If the selection is made by a state agency head, that official must make a statewide announcement of all projects requiring architectural, landscape architectural, engineering, environmental, land surveying, or construction project management services through publications of the respective professional societies [*Gov. Code § 4527(a)*]. State agency heads must evaluate current statements on file, and all those submitted for the project, and must discuss the requirements of the project with at least three firms, selecting (in order of preference) at least three of those firms deemed most qualified [*Gov. Code § 4527(a)*]. When a firm is selected, the state agency head must provide the selected firm with written instructions and other information necessary to proceed with the negotiation and execution of the contract in an orderly and timely fashion [*Gov. Code § 4526.5*; PC Code § 6106], and must follow statutory negotiation procedures [*see Gov. Code § 4528*].

When the selection is to be made by a local agency head, the procedures outlined above are optional, except for those involving the prohibition of unlawful activity and participation in the selection process by interested agency employees [*Gov. Code §§ 4527(b), 4528(b)*]. None of these procedures applies if the state or local agency head determines that the services needed are of a more technical nature and involve little professional judgment, and that requiring bids would be in the public interest [*Gov. Code § 4529*].

[2] Use of Private Contractors for Engineering and Architectural Services

Cal. Const., art. XXII, and The Fair Competition and Taxpayer Savings Act (Act) [*Gov. Code § 4529.10 et seq.*], approved by California voters on November 7, 2000, allow the state and local governments to contract with qualified private entities for architectural and engineering services for all phases of a public works project [*see* Cal. Const., art. XXII; *see also Gov. Code § 4529.20* (Act applies to charter cities as well as all other governmental entities)]. "Architectural and engineering services" include, in this context, all architectural, landscape architectural, environmental, engineering, land surveying, and construction project management services [*Gov. Code § 4529.10*; *see Gov. Code § 4529.15*]. In addition, all projects in the State Transportation Improvement Program (STIP) are covered by the requirements of Cal. Const., art. XXII [*see Gov. Code § 4529.11*]. The STIP includes public work projects to increase the capacity of the state's highways and to provide transit capital improvements, such as new freeways, new interchanges, and passenger rail rights-of-way. However, the Act does not prohibit or restrict the legislature's authority to provide different procurement methods for design-build projects or design-build-and-operate projects [*Gov. Code § 4529.13*].

All architectural and engineering services must be procured through a fair, competitive selection process that avoids conflicts of interest or unlawful activities [*Gov. Code § 4529.12*].

Private firms contracting for architectural and engineering services with governmental entities must meet established design, seismic, safety, or construction standards [*Gov. Code § 4529.13*]. Private firms must also comply with standard accounting practices and permit financial and performance audits, as necessary, to ensure that contract services are delivered within the agreed schedule and budget [*Gov. Code § 4529.14*].

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§ 90A.14 Agencies Overseeing Construction Contracts

The Department of General Services provides centralized services, including the construction of state buildings [*see Gov. Code § 14600*], and is authorized to exercise all functions and powers vested in the Department of Transportation, the Division of Architecture, or the State Architect with respect to the construction, alteration, repair, or improvement of state buildings [*see Gov. Code §§ 14650, 14651, 14654*]. It also has jurisdiction over the construction of school and state college buildings [*Gov. Code § 14651*].

If a project is not placed by law under the jurisdiction of the Department of General Services [*see Gov. Code § 14600*], the Department of Water Resources [*see Water Code § 120*], the Department of Boating and Waterways [*see H&N Code § 65*], or the Department of Corrections [*see Pen Code § 7000*], the project will be administered by the Department of Transportation [PC Code § 10107]. However, any department may delegate contracting authority to other state agencies for projects costing $400,000 or less [*see* PC Code § 10108], and the Department of Parks and Recreation may be authorized to carry out historic restoration work for state parks [*see* PC Code § 10110].

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§ 90A.15 Contracts with Expatriate Corporations

Absent a compelling public interest, the state generally may not enter into any agreement or contract with any publicly held expatriate corporation [PC Code § 10286.1(a); see PC Code § 10286.1(b)(2), (c)(f) (exceptions)]. For these purposes, an "expatriate corporation" is a United States-based company that has moved in name and on paper only to a tax haven country and has no substantial business activity in the country of reincorporation [see PC Code § 10286.1(b)(1); 2003 Stats., ch. 567, § 1 (statement of legislative intent)].

All state agencies, as a condition of the contract, must require any vendor that is offered a contract to do business with the state to submit a declaration stating that the vendor is eligible to contract with the state, in accordance with PC Code § 10286.1 [PC Code § 10286.1(d)(2)].

With two exceptions, this law applies to contracts entered into on or after January 1, 2004 [PC Code § 10286.1(e)(1)]. First, with respect to an entity that was a expatriate corporation before January 1, 2004, this law applies to contracts entered into on or after April 1, 2004 [PC Code § 10286.1(e)(2)]. Second, this law does not apply to a credit card purchase of goods of $2,500 or less, provided that the total amount of the exemption does not exceed $7,500 per year for each company from which a state agency is purchasing goods by credit card [PC Code § 10286.1(f)].

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 90A STATE GOVERNMENT CONTRACTS
PART II. LEGAL BACKGROUND
A. Governing Law

29-90A California Legal Forms--Transaction Guide §§ 90A.16-90A.19

[Reserved]

§§ 90A.16[Reserved]

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29-90A California Legal Forms--Transaction Guide § 90A.20

§ 90A.20 Licensing of Contractors

Contractors are subject to the Contractors' State License Law [*see B&P Code § 7000 et seq.*; *see also* Ch. 88, *Licensing of Contractors*]. It is a misdemeanor to engage in the business or act in the capacity of a contractor without a contractor's license, unless the person is particularly exempted from the provisions governing contractors [*B&P Code § 7028(a)*; *see B&P Code § 7040 et seq.* (exemptions)]. However, when federal funds are involved, a bidder is not required to have a California contractor's license at the time of the bid, but must be properly licensed at the time of the award. Any bidder or contractor not properly licensed is subject to penalties. Moreover, the failure to obtain licensing for an award will constitute a failure to execute the contract and result in forfeiture of the bid security [PC Code § 10164].

In public works contracts [*see* PC Code § 1101 ("public works contract" defined)], the awarding authority will determine the license category necessary to bid and perform the project. The awarding authority may not award a prime contract to a specialty contractor whose classification constitutes less than a majority of the project. When a specialty contractor does bid a project, all work to be done outside of that contractor's license specialty must be done by a licensed subcontractor, except for incidental and supplemental work [*B&P Code § 7059(b)*; *see M & B Construction v. Yuba County Water Agency (1999) 68 Cal. App. 4th 1353, 1360-1362, 81 Cal. Rptr. 2d 231* (*B&P Code § 7059(b)* expressly grants authority to consider license classifications in determining whether bidder is qualified to bid on contract; therefore, in soliciting bids for canal and pipeline project, agency could restrict bidding to contractors holding particular class of license)]. For discussion of the incidental and supplemental work a contractor may perform outside of his or her classification, see Ch. 88, *Licensing of Contractors* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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29-90A California Legal Forms--Transaction Guide § 90A.21

§ 90A.21 Construction Contracts Under State Contract Act

[1] Advertising for Contract Bids

For most state construction projects [*see § 90A.10*], contracting agencies must solicit bids when the estimated cost of the construction project will exceed $25,000. However, informal day labor contracts may be available for up to $35,000 ($50,000 for contracts for district agricultural association fair projects) if the director of the contracting agency determines that the best interests of the state would not be served by the usual bidding procedures [PC Code § 10108; *see* PC Code § 10122 (performance of work by day labor in emergency situations or when bid procedure would not be in best interest of state)].

Public notice of a proposed project must be given by publication once a week for at least two consecutive weeks in a newspaper of general circulation in the county involved (or, if more than one county is involved, in a newspaper in the county where a major portion of the work is to be done) [PC Code § 10140(a)], and in a trade paper of general circulation in Los Angeles for projects located in Southern California (San Luis Obispo, Kern, Mono, Tulare, Inyo, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, San Diego, and Imperial counties) or in San Francisco for the counties located in Northern California [PC Code § 10140(b); *see Gov. Code §§ 6000-6008* (publications and official advertising); *see also* S&H Code § 187 (county groupings for purpose of allocating state highway funds)].

The notice must state the time and place for receiving and opening the sealed bids, and describe the work to be done in general terms. It must also state that bids will be required for the entire project or for the performance of separate designated parts of the project if the Department of General Services determines that division of the project into smaller parts is advisable [PC Code § 10141].

[2] Prequalification of Bidders

Prospective bidders may be required to prequalify before submitting a bid on projects. A contracting department has discretion to require prospective bidders to prequalify, that is, to complete, verify, and submit a standard questionnaire and financial statement, including a complete statement of the prospective bidder's financial ability and experience in

performing public works. Whenever a contracting department requires any bidder to prequalify on a contract, the department must require all prospective bidders to that contract to prequalify [PC Code § 10160].

Prequalification is initiated by answering a confidential financial statement and questionnaire [PC Code §§ 10160, 10165; *see § 90A.100*]. The Department of General Services applies a uniform system in evaluating prospective bidders for prequalification, rating them on the basis of the financial and other data included in their completed questionnaires [*see* PC Code § 10163].

Bids must be presented on standard proposal forms furnished by the Department. Because the Department will not furnish proposal forms to those who are required to submit the questionnaire and financial statement but who have not been prequalified by the Department on the basis of those forms at least five days before the date fixed for opening bids [*see* PC Code § 10166], it is crucial for any firm likely to bid on a California state construction contract to prequalify. For a discussion of the bidding process, see [3], *below*.

When bids for more than one project are to be received at the same bid opening, a bidder may submit bids for each project within the dollar amount of its prequalification rating, even if the rating is insufficient to permit the bidder to be awarded a contract for each project [PC Code § 10163]. However, the bidder will not be awarded a contract if the award would result in the bidder having contract work in excess of the amount authorized by the prequalification rating. If it is ultimately determined that the bidder would be awarded the contract for more than one project, but the rating is inadequate to handle all of the projects to be awarded, the Department will determine which bids will be accepted and which will be disregarded by making awards that will result in the lowest total cost for all projects involved [PC Code Contract Code § 10163].

The Department may also require prospective bidders to complete a standard questionnaire concerning the past safety record of the bidder, any officer of the bidder, and any managing employee of the bidder. A prospective bidder may be refused prequalification if it fails to submit the completed questionnaire when required, or if the information contained in the questionnaire indicates a continuing unsatisfactory safety record [PC Code § 10161].

All prospective bidders are required to complete a questionnaire indicating whether the bidder, any of its officers, or any of its employees having a proprietary interest in the bidder have ever been disqualified, removed, or otherwise prevented from bidding on or completing any government project because of a violation of law or a safety regulation. If there is any such history, the bidder must explain the circumstances. A bid may be rejected if the questionnaire reveals that the bidder has been disqualified, removed, or otherwise barred [PC Code § 10162].

[3] The Bidding Process

Bids must be submitted on forms provided by the Department [PC Code § 10166; *see, e.g., § 90A.200[2]*].

All bids must be sealed and accompanied by a bond or other undertaking, cash, certified check, or cashier's check equal to at least 10 percent of the amount bid [PC Code § 10167; *see CCP § 995.210(a)* (undertaking may satisfy requirement of statutory bond)]. Bids may not be received after the time stated in the public notice of the procurement for the opening of bids [PC Code § 10168]. A bid may be withdrawn any time before actual opening, on written request of the bidder filed with the Department for which the work is to be performed [PC Code § 10169].

[4] Award of Contract

On the day specified in the public notice, the Department will open the sealed bids and award the contract to the lowest responsible bidder [PC Code § 10180]. The director of the department receiving bids may, however, determine that accepting the lowest responsible bid is not in the best interest of the state and, after stating the reason for rejection, may reject all bids and complete the project by day labor or advertise it again for bids [PC Code § 10185]. The bidder who

submits the lowest bid does not have the right to have that bid accepted when all bids are rejected, even when the Department's cost estimate is not accurate. Rejection of all bids in the best interest of the state is allowed if the Department doubts that a contract based on such an estimate would be legally valid [*Charles L. Harney, Inc. v. Durkee (1951) 107 Cal. App. 2d 570, 579-580, 237 P.2d 561]* .

If the successful bidder refuses to execute the contract and the Department deems it in the best interest of the state, the contract may be awarded to the next lowest bidder [PC Code § 10182].

An "award" occurs when a written contract is tendered by the state to the successful bidder for execution [*Saliba-Kringlen Corp. v. Allen Engineering Co. (1971) 15 Cal. App. 3d 95, 107, 92 Cal. Rptr. 799]* . If the successful bidder fails to execute the contract, any bond or other security submitted with the bid will be forfeited [PC Code § 10181]. Failure to furnish any required payment or performance bond constitutes a failure to execute the contract [PC Code § 10183]. However, there is the possibility that the forfeiture can be recovered following the timely filing of a notice of bid mistake [*see § 90A.51*]. Awarded contracts are not binding on the state until approved by the Attorney General or the attorney authorized to represent the department under which it is to be performed [*see* PC Code § 10220].

Before awarding a contract for work to be performed by a contractor, a state agency [*see* PC Code § 10335.7 (definition)] must verify that the person seeking the contract is licensed in a classification appropriate to the work to be undertaken. Verification may be accomplished by checking with the Contractors' State License Board or by requiring the person seeking the contract to present his or her pocket license and to provide a signed statement regarding the validity of the license [PC Code § 6100].

A state agency must not award a public works or purchase contract to a bidder or contractor who, in the preceding five years, has been convicted of violating a state or federal law regarding the employment of undocumented aliens [PC Code § 6101].

[5] Contract Requirements

Contracts under the State Contract Act must be approved by the appropriate state attorney before they are binding on the state [*see* PC Code § 10220]. All contracts must provide that performance and payment bonds be filed by the contractor [PC Code § 10221; *see* PC Code § 10222 et seq. (purpose and procedures)]. Contracts must also specify completion times, and provide for decreased compensation for delays [*see* PC Code § 10226]. Contracts must allow the Department to make changes in plans and specifications [PC Code § 10227]. Contractors are required to certify that they will comply with pollution and recycled product requirements [*see* PC Code §§ 10231, 12200 et seq.].

[6] Modification of Contract

The State Contract Act allows the Department of General Services to alter contracts. The Department may revise the amount of work to be done under a unit-basis contract [PC Code § 10250]. In any contract, the Department may require extra work and additional materials if all bidders had an equal opportunity to know the proposed terms of the extra work [PC Code § 10251]. If necessary, the Department may grant time extensions to complete extra work [PC Code § 10252]. The Department may seek remedies against contractors who default in performing additional work [*see* PC Code § 10253 et seq.], and may complete the work by informal contracts [*see* PC Code § 10255 et seq.].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90A.22 Acquisition of Goods and Services

[1] Acquisition of Goods

[a] Authority

The Department of General Services has general authority to establish statewide acquisition standards to ensure the necessary quality of goods acquired by and under the supervision of the Department and to permit consolidation of acquisitions to effect greater economies in state contracting [*see* PC Code §§ 10307, 10308; *see also* PC Code § 10295 et seq. (contracts void unless approved by Department)]. Virtually every acquisition of goods in excess of $100 for any state agency is made by or under the supervision of the Department [*see* PC Code § 10308], although authority may be delegated by the Department to individual state agencies [*see* PC Code §§ 10309, 10332, 10333].

[b] Competitive Bidding Procedure

Contracts for the acquisition or lease of goods amounting to $25,000, or a higher amount as established by the Director of the Department of General Services, must be awarded to the lowest responsible bidder meeting the specifications [PC Code § 10301]. The state agency, however, may specify the quality of goods to be acquired. If the quality of goods specified is inconsistent with the statewide standards established by the Department of General Services (*see* [a], *above*), but the agency nevertheless is of the opinion that the state's interests would be best served by the acquisition of the particular goods, the agency may request a hearing before the State Board of Control. If the State Board of Control approves the purchase of the goods, the Department must issue a contract [PC Code § 10308]. Competitive bidding is not required in emergencies when immediate purchase of goods without bid is necessary for the protection of public health, welfare, or safety [PC Code § 10302].

When the Department contracts for goods in excess $25,000, or a higher amount as established by the Director, the Department must advertise in the California State Contracts Register. On request, the Department must furnish interested suppliers with copies of the solicitation [PC Code § 10302]. The department also must post a public copy of the solicitation until seven days after an award has been made [PC Code § 10302]. The Department must adopt and apply uniform standards for vendors based on questionnaires and statements, and may publish lists of qualified vendors

[PC Code § 10303].

All bids must be sealed, and will be publicly opened and read at the time stated in the solicitation. Late bids will not be considered [PC Code § 10304]. Tabulations of bids must be completed within seven days [PC Code § 10305]. Ordinarily, the award is made to the lowest responsible bidder [*see* PC Code § 10301]. If the award is not made to the lowest bidder, the lowest bidder must be notified before awarding the contract to another bidder [PC Code § 10306]. Protests may be filed [*see* PC Code § 10306; *see also §§ 90A.50[2]*].

[2] Acquisition of Information Technology Goods and Services

The Department of General Services has authority to acquire information technology goods and services [PC Code § 12100]. This authority may be delegated to other agencies [PC Code § 12101(c)]. Acquisitions generally must be made competitively [PC Code § 12101(b); *see* PC Code § 12102(a) (exceptions)].

[3] Procurement of Services

[a] Authority

Except as provided in PC Code § 10351, governing contracts under $75,000, contracts for the procurement of services must be approved by the Department of General Services and competitively bid [*see* PC Code § 10335(a); *see also* PC Code §§ 10336, 10337 (review of contracts by Department of Finance and by State Personnel Board, respectively)]. This approval and bidding requirement applies to all contracts, including amendments, entered into by any state agency for services to be rendered to the state government, regardless of whether the services involve the furnishing and use of equipment, materials, or supplies, or are performed by an independent contractor [PC Code § 10335(a); *see* PC Code § 10335.7 ("state agency" defined); *see also* PC Code § 10335(d) (exceptions to requirement that Department approve contract modifications or amendments)].

Until January 1, 2001, contracts for consulting and personal services [*see* former PC Code § 10356(a) ("consulting services contract" defined)] were subject to separate standards and regulation under former Article 5 of the Public Contract Code, "Consulting Services Contracts" [former PC Code § 10355 et seq.]. Effective January 1, 2001, however, the provisions regulating procedures for the procurement of consulting services and personal services [*see* PC Code § 10335.5 ("consulting services contract" defined)] were consolidated with those regulating contracts for services generally [*see* PC Code § 10335(a); 2000 Stats., Ch. 759]. Specific provisions applicable to consulting services contracts are discussed in*§ 90A.23*.

The following contracts are not subject to Article 4 of the Public Contract Code (*see* PC Code § 10335 et seq.), governing contracts for services [PC Code § 10335(a)]:

- Contracts for the construction, alteration, improvement, repair, or maintenance of real or personal property.

- Contracts for services subject to *Gov. Code § 4525 et seq.*, governing construction project management firms.

- Contracts listed as exceptions to PC Code § 10295 [*see § 90A.12*].

- Contracts of less than $5,000, or contracts of less that $5,000 when only per diem or travel expenses, or a combination of the two, are to be paid.

- Contracts between state agencies, or contracts between a state agency and a local agency or federal

agency.

[b] Competitive Bidding Procedure

Competitive bidding with at least three bids or proposals is generally required for contracts for services [*see* PC Code § 10340(a)]. However, three competitive bids or proposals are not required in any of the following cases:

- In emergency procurements [PC Code § 10340(b)(1)].

- When the agency awarding the contract has advertised the contract in the California State Contracts Register and the agency has solicited all known potential contractors but received less than three bids or proposals [PC Code § 10340(b)(2)].

- When the contract is with certain governmental bodies [*see* PC Code § 10340(b)(3)].

- When the contract meets the conditions prescribed by the Department for awards without competition and determinations of cost reasonableness [PC Code § 10340(b)(4); *see* PC Code § 10348(a) (required conditions)].

- When the contract was awarded without advertising or invitations for bids under *W&I Code § 19404*, governing use of material, supplies and labor provided by community rehabilitation programs [PC Code § 10340(b)(5)].

- Contracts entered into in accordance with *Gov. Code § 14838.5* (awards of contracts with value of greater than $5,000 and less than $250,000 to small businesses) [PC Code § 10340(b)(6); *see Gov. Code § 14838.5(a)*].

- Contracts for the development, maintenance, administration, or use of licensing or proficiency testing examinations [PC Code § 10340(b)(7)].

When competitive bidding is required, solicitations for bids may not be drafted in a manner that limits bidding directly or indirectly to only one bidder [PC Code § 10339(a)].

Bids received before the closing time stated in the solicitation must be publicly opened at the stated time, and the dollar amount of each bid must be read [PC Code § 10341]. Late bids will not be considered [*see* PC Code § 10341]. After bid opening, all bids will be available for public inspection [PC Code § 10342].

Ordinarily, the award is made to the lowest responsible bidder [*see* PC Code § 10345(a)]. If the award is not made to the lowest bidder, the lowest bidder must be notified before awarding the contract to another bidder [*see* PC Code § 10345(a)]. Protests may be filed [*see* PC Code § 10345(a)(2); *see also § 90A.50[3]*].

A contract for the procurement of services in excess of $200,000, other than consulting services contracts, must include a provision requiring the contractor to give priority consideration in filling vacancies in positions funded by the contract to persons receiving payments from the California Work Opportunity and Responsibility to Kids (CalWORKS) program [PC Code § 10353; *see W&I Code § 11200 et seq.*]. However, this requirement will not be construed to interfere with or violate any union contract or federal affirmative action or veterans' preference, require the contractor to hire unqualified persons, or result in discrimination [PC Code § 10353].

[c] Request for Proposal Procedure

Contracts for services may also be awarded under a procedure that makes use of a request for proposal [*see* PC Code § 10344]. In general, the contracting agency must issue a request for proposal that describes the work to be performed or services to be provided, describes the format for proposals, states the standards that the agency will use to evaluate proposals, and sets forth the deadline for submission [PC Code § 10344(a)]. Proposals must be evaluated and the contract awarded according to established requirements and standards [*see* PC Code § 10344(b),*(c)*]. The contract must be awarded to the lowest responsible bidder meeting the standards [PC Code § 10344(b)(3)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90A.23 Consulting Services Contracts

[1] Authority

Contracts for consulting services, including any amendments to those contracts, must be approved by the Department of General Services [*see* PC Code § 10335(a) (requiring Department approval for all contracts, except those under $75,000, if specified conditions are met); *see also § 90A.22[3][a]*]. "Consulting services contracts" cover services that do all of the following [PC Code § 10335.5(a)]:

- Are of an advisory nature.
- Provide a recommended course of action or personal expertise.
- Have an end product that is (basically) a transmittal of information, either written or verbal, that is related to the governmental functions of state agency administration and management and program management or innovation [*see* PC Code § 10335.7 ("state agency" defined)].
- Are obtained by awarding a contract, a grant, or any other payment of funds for services of the above type. The product may include anything from answers to specific questions to design of a system or plan, and includes workshops, seminars, retreats, and conferences for which paid expertise is retained by contract.

However, the following consulting services contracts are exempt from the advertising and bidding requirements of Article 4 of the Public Contract Code (PC Code § 10335 et seq.) [PC Code § 10335.5(c); *see* PC Code § 10340 et seq. (advertising and bidding procedures); *see also § 90A.22[3][b]*]:

- Contracts that are temporary or time-limited appointments to a nontesting civil service classification for the purpose of meeting a time-limited employment need. Selection and compensation for these appointments must be made in accordance with state civil service requirements. Payment under a

consulting service contract may be on the basis of each hour or day devoted to the task or in one lump sum for the end product.

- Contracts that can only be performed by a public entity (*see UI Code § 605(b)* (definition).
- Contracts solely for the purpose of obtaining expert witnesses for litigation.
- Contracts for legal defense, legal advice, or legal services.
- Contracts in an amount of less than $5,000.
- Contracts entered into pursuant to *Gov. Code § 14838.5* (awards of contracts with value of greater than $5,000 and less than $250,000) [*see Gov. Code § 14838.5(a)*].

In addition, consulting services contracts do not include the following [PC Code § 10335.5(b)]:

- Contracts between a state agency (*see* PC Code § 10335.7 (definition)) and the federal government.
- Contracts with local agencies (*see* R&T Code § 2211 (definition)) to subvene federal funds for which no matching state funds are required.

Advertising and bidding procedures generally applicable to consulting services contracts are discussed in *§ 90A.22[3][b]*.

[2] Rules Specifically Applicable to Consulting Services Contracts

[a] In General

Each state agency may, regardless of the fiscal amount involved, use private resources for consulting services contracts only when the quality of work of the private resources is at least equal to the quality of state agency operated resources [PC Code § 10371(a)].

[b] Contents of Contracts

The Department of General Services will ensure that every consultant services contract contains standard language that fully informs the contractor of his or her duties, obligations, and rights under Article 4 of the Public Contract Code [PC Code § 10335 et seq.] and any additional contractor rights and obligations which the Department determines should be included [PC Code § 10381(b); *cf.* PC Code § 10367(a) (contractor of services must be advised in writing on standard contract form that contractor's or contractor's firm's performance under the contract will be evaluated)]. Each consulting services contract must have a provision for settlement of contract disputes [PC Code § 10381(c)].

[c] Approval Procedures

Any state agency that enters into or expects to enter into more than one consulting services contract with the same individual, business firm, or corporation within a 12-month period for an aggregate amount of $12,500 or more, must notify the Department in writing and must have Department approval for each contract that exceeds an aggregate amount of $12,500 [PC Code § 10371(b)]. Further, before signing a consulting services contract totaling $5,000 or more, each state agency must prepare detailed criteria and a mandatory progress schedule for the performance of the contract. The state agency also must require each selected contractor to provide a detailed analysis of the costs of performing the contract [PC Code § 10371(c)].

In addition, no consulting services contractor may be awarded a contract totaling $5,000, or more, unless all of the following apply [PC Code § 10371(e)(1), (2)]:

- The state agency has reviewed any contractor evaluation form on file with the department in accordance with PC Code § 10369 (requiring completion of post-evaluation form) [*see* PC Code § 10371(f) (special evaluation procedures beyond the post-evaluation); *see also* PC Code § 10371(h) (enforcement of proper use of post-evaluation forms)].

- A completed resume for each contract participant who will exercise a major administrative role or major policy or consultant role, as identified by the contractor, is attached to the contract for public record and is made a part of the contract.

The department must notify a state agency seeking approval of a proposed contract within 10 working days if it has a negative evaluation in its files on a previous contract awarded to this contractor [PC Code § 10371(e)(3)].

Except in an emergency [*see* PC Code § 10371(d) (definition)], no consulting services contract may be begun without formal approval by the Department or, if the Department's approval is not otherwise required, by the director of the state agency. No payments for any consulting services contract may be made before this approval of the award [PC Code § 10371(d)].

Sole-source contracts must be listed in the California State Contracts Register [*see* PC Code § 10371(g)].

These approval procedures apply to all consulting services contracts [PC Code § 10371].

[3] Limitations on Successful Bidders

Once a person, firm, or subsidiary of a firm receives a consulting services contract, it may not bid on or receive another contract for the provision of services, the acquisition of goods or supplies, or any other related action that is required, suggested, or otherwise deemed appropriate as an end product of the consulting services contract [PC Code § 10365.5(a)]. Persons, firms, or subsidiaries of firms receiving a subcontract of a consulting service contract that is no more than 10 percent of the total monetary value of the contract are exempt from this limitation, as are consulting contracts with professional architecture and engineering firms [PC Code § 10365.5(b), (c)].

[4] Negotiations With Professional Consulting Services

State agencies or departments negotiating fees and executing contracts for the professional consulting services of a private architectural, engineering, land surveying, environmental, or construction project management firm must provide written instructions for negotiation after notifying the successful firm of its selection [PC Code § 6106(a)]. Negotiation must begin within 14 days after notification of selection, or on receipt of the cost proposal. If additional time is necessary to begin negotiations, the state should notify the contractor [PC Code § 6106(b)]. On completion of negotiations, the state and private firm must proceed so that the state may complete the contracting process within 45 days. If the state requires more than 45 days, it should notify the contractor. Both the state and the private firm must work together to ensure the successful delivery of the requested services in a timely manner [PC Code § 6106(c)]. If an impasse is reached, the state has the option to terminate the negotiations and enter into negotiations with the next most qualified firm [PC Code § 6106(d); *see Gov. Code § 4528* (negotiation requirements)].

Legal Topics:

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29-90A California Legal Forms--Transaction Guide § 90A.24

§ 90A.24 Contracts With the University of California

[1] Authority

Under the University of California competitive bidding statutes [*see* PC Code § 10500 et seq.], for construction or improvement projects exceeding $50,000, the Regents of the University of California must award contracts by competitive bidding [PC Code § 10501; *see* PC Code § 10500 ("project" defined)]. The Regents must also award all contracts for acquiring University goods and materials of more than $50,000 to the lowest responsible bidder [PC Code § 10507.7]. However, the Regents do not need to provide for competitive bidding for certain unique products and services, as long as the price is determined to be reasonable [PC Code § 10508].

[2] Advertising for Contract Bids

The Regents must give public notice of a project by publication twice within the 60-day period preceding the day set for receiving bids [PC Code § 10502]. The notice must appear in a newspaper of general circulation published in the county where the major portion of the project is located and in a trade paper circulated in that county [PC Code § 10502(a)]. The notice must state the time and place for receiving and opening the sealed bids, describe the work to be done, and describe how the lowest responsible bidder will be selected [PC Code § 10502(b)].

[3] Awarding of Contract

The Regents must award the contract to the lowest responsible bidder or reject all bids. If one or more bids is substantially equal to the lowest bid, and at least one of those bidders is a disadvantaged business enterprise or disabled veteran business enterprise, the contract may be awarded to that bidder [*see* PC Code § 10500.5]. If a successful bidder refuses or fails to execute a tendered contract, the contract may be awarded to the second lowest responsible bidder [*see* PC Code § 10501].

Before entering into a contract for any project, the Regents must prepare certain estimates, documents, and plans [*see* PC Code § 10503].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90A.25 Contracts With the California State University

[1] Authority

Under the California State University Contract Law [*see* PC Code § 10700 et seq.], the Trustees of the California State University generally must award contracts for construction, repair, and improvement projects estimated to cost more than $5,000 to the lowest responsible bidder or reject all bids [*see* PC Code § 10705(b); *see also* PC Code § 10701(a) ("project" defined)]. However, if the state's best interests are served, the trustees may carry out work for up to $20,000 by day labor [PC Code § 10705(b)]. Moreover, if the trustees determine, based on the nature of the work, that the application of all the provisions of the California State Contracting Law is not required, they may carry out a project if the estimated cost does not exceed $250,000 [PC Code § 10705(a)]. The trustees may contract with the Department of General Services to carry out their functions in construction contracting [PC Code § 10706], subject to the sole and direct control of the trustees [*see* PC Code § 10704]. The trustees may select a contractor both to design and to build a project; however, the contractor must be chosen through a competitive bidding process [PC Code § 10708(a), (b)].

The trustees also may enter into service contracts [*see* PC Code § 10707].

[2] Advertising for Contract Bids

For contract prices estimated to be $15,000 or less, notice must be published in Los Angeles or San Francisco for two consecutive weeks in a general circulation weekly contract trade paper, and once a week for two consecutive weeks in a newspaper of general circulation in the county where the project is located [PC Code § 10740]. The notice must state the time and place for receiving and opening sealed bids and describe the work to be done [PC Code § 10741].

For contract prices estimated to exceed $15,000, notice must be published once a week for at least two consecutive weeks (or longer as determined by the Trustees) preceding the day set for receiving bids [PC Code § 10742]. Notice must be published in Los Angeles or San Francisco for two consecutive weeks in a general circulation weekly contract trade paper, or, if the trustees so determine, in a newspaper of general circulation in the county where the project is located and in a trade paper in the county group [PC Code § 10742(a), (b); *see* S&H Code § 187 ("county group" defined)]. The notice must state the time and place for receiving and opening sealed bids and that bids are required for

the entire project or for segregate designated parts of the project, if the trustees determine that segregation is advisable [PC Code § 10743].

[3] Prequalification of Bidders

For contracts with the California State University estimated to exceed the value of a minor capital outlay project [*see* PC Code § 10108], and for other contracts as the Trustees determine, prospective bidders must complete a form questionnaire and provide a financial statement, intended to show the bidder's financial ability and experience in performing public works. The questionnaire and financial statement must be verified under oath [PC Code § 10760; *see* PC Code § 10763 (questionnaires and financial statements are not public)]. The Trustees must adopt and apply a uniform system for rating bidders, based on the questionnaire and financial statement [PC Code § 10761].

[4] Submission of Bids

Sealed bids must be submitted on furnished standard proposal forms and must be accompanied by bid security [PC Code §§ 10764, 10765(a)]. Bids may be submitted electronically, provided the bidder submits the required security within 24 hours after the opening of bids [PC Code § 10765(b); *see* PC Code § 1601 (authority to receive bids and supporting materially over the Internet)]. Bids may not be accepted after the time specified for opening bids [PC Code § 10766]. Bids may be withdrawn before the time for opening of bids only on written request filed with the Trustees. Bids may not be withdrawn after that time [PC Code § 10767].

[5] Awarding of Contract

On the day stated in the notice, the Trustees must publicly open the sealed bids and award the contract to the lowest responsible bidder [PC Code § 10780; *see* PC Code § 10780.5 (procedures for determining lowest bidder if additions or deletions from base bid are considered)]. If the successful bidder refuses or fails to execute the tendered contract, that bidder's security is forfeited and the contract may be awarded to the second lowest responsible bidder [PC Code §§ 10781, 10782; *see* PC Code §§ 10820-10827 (contract requirements)].

Ordinarily, work on all projects must be done under contract awarded to the lowest responsible bidder [PC Code §§ 10722, 10780]. However, in emergencies or when the best interests of the state otherwise dictate, work may be performed by day labor under the direction of the Trustees [PC Code § 10722(a), (b)]. When employing day labor, work may be let by contract on informal bids [PC Code § 10723].

[6] Contract Requirements

Contracts with the California State University are not binding on the state until approved by an authorized attorney [PC Code § 10820]. All contracts must provide for the filing of separate performance and payments bonds in specified amounts [*see* PC Code §§ 10821-10824]. Contracts also must specify a time when work will be completed, and must provide that the Trustees may make contract changes [*see* PC Code §§ 10826, 10827].

[7] Modification of Contract

The Trustees may revise the amount of work to be done under a unit-basis contract [PC Code § 10840]. In any contract, the Trustees may require extra work and additional materials if all bidders had an equal opportunity to know the proposed terms of the extra work [PC Code § 10841]. If necessary, the Trustees may grant time extensions to complete extra work [PC Code § 10842]. The Trustees may seek remedies against contractors who default in performing additional work [*see* PC Code §§ 10843-10845], and complete the work by informal contracts [*see* PC Code §§ 10845-10847].

Legal Topics:

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§ 90A.26 Contract Payments

[1] In General

A state agency that acquires property or services pursuant to a contract with a business, including any approved change order or contract amendment, must make payment to the person or business on the date required by the contract and as required by *Gov. Code § 927.4*, or be subject to a late payment penalty [*Gov. Code § 927.1(a)(1)*; *see Gov. Code § 927.4* (time frames for state agency to issue warrant for payment on undisputed invoices in order to avoid late payment fees). Except in the event of a specified emergency [*see Gov. Code § 927.11*], the late payment penalties specified in the California Prompt Payment of Claims Act [*Gov. Code § 927 et seq.*] may not be waived, altered, or limited by a state agency acquiring property or services pursuant to a contract or by any person or business contracting with a state agency to provide property or services [*Gov. Code § 927.1(b)*].

Except in the case of a contract with a certified small business [*see Gov. Code § 927.2(l)* (definition)], a nonprofit organization, or a nonprofit public benefit corporation [*see Gov. Code § 927.2(e)* (definition)], if an invoice from a business under contract with the Department of Forestry and Fire Protection would become subject to late payment penalties during the annually declared fire season, the required payment approval date will be extended by 30 calendar days [*Gov. Code § 927.11(a)*].

No nonprofit public benefit corporation is eligible for a late payment penalty if a state agency fails to make timely payment because no Budget Act has been enacted [*Gov. Code § 927.11(b)*; *see Gov. Code § 927.11(d)* (penalties available in other circumstances)]. Further, if a state agency or the Controller is unable to promptly pay an invoice due to a major calamity, disaster, or criminal act, the applicable late payment penalty provisions contained in *Gov. Code § 927.6* and *927.7* will be suspended, except as they apply to specified claimants [*see Gov. Code § 927.11(c)*]. This suspension will remain in effect until the State Director of Finance determines that the suspended late payment provisions should be reinstated [*Gov. Code § 927.11(c)*].

Except when payment is made directly by a state agency [*see Gov. Code § 927.6* (applicable penalties for state agencies)], any undisputed invoice received by a state agency must be submitted to the Controller for payment by the

required payment approval date [*Gov. Code § 927.3*; *see Gov. Code § 927.2(j)* (required payment approval date is date specified in contract or, if no date is specified, 30 calendar days following date on which undisputed invoice is received by state agency); *see also Gov. Code § 927.2(i)* ("received by state agency" defined)]. A state agency may dispute an invoice for reasonable cause if the agency notifies the claimant within 15 working days from receipt of the invoice, or delivery of the property or services, whichever is later [*Gov. Code § 927.3*]. State employees may not dispute an invoice on the basis of minor or technical defects [*Gov. Code § 927.3*].

To avoid late payment penalties, a state agency must pay undisputed invoices within 45 calendar days from the date of receipt. If payment is not issued within these 45 calendar days, late payment penalties must be paid to the claimant in accordance with *Gov. Code §§ 927.6* and *927.7* [*Gov. Code § 927.4*].

The preceding rules do not apply to claims for reimbursement for health care services provided under Medi-Cal, unless the Medi-Cal health care service provider is a small business or nonprofit organization [*Gov. Code § 927.5*; *see Gov. Code § 927.2(l), (m)* ("small businesses" and "nonprofit organizations" defined for purposes of Medi-Cal); *W&I Code § 14000 et seq.* (Medi-Cal)].

For a discussion of the withholding of payments to ensure complete contractual performance, and the requirement of substitution of securities for money to be withheld, see *§ 90A.220[1][b]*.

[2] Under State Contract Act

Payments on contracts let under the State Contract Act are made by the Department of General Services on estimates it has made and approved. In general, progress payments will not be made in excess of 95 percent of the percentage of actual work completed or material delivered or stored and under state control. The Department will withhold not less than 5 percent of the contract price until final completion and acceptance of the project [PC Code § 10261].

At any time after 95 percent of the work has been completed, the Department may reduce the funds withheld to an amount not less than 125 percent of the estimated value of the work yet to be completed, subject to written approval of the sureties on the performance and payment bonds [PC Code § 10261]. The funds may be released by electronic funds transfer if that procedure is requested by the contractor in writing and the public entity has the mechanism for the transfer in place at the time of the request [PC Code § 10261].

A state agency that fails to make a progress payment pursuant to an undisputed and properly submitted payment request from a contractor on a construction contract within 30 days of receiving the request is liable for interest on the payment [PC Code § 10261.5].

[3] Under Contracts for Local Agency Public Construction

Progress payments on local agency construction projects in excess of $5,000 may not exceed 95 percent of the percentage of actual work completed plus a like percentage of the value of material delivered to the site ready for use. Not less than 5 percent of the contract price must be withheld until final completion and acceptance of the project. At any time after half of the work has been completed, the legislative body of the local entity, if it finds that satisfactory progress is being made, may make any of the remaining progress payments in full for actual work completed [PC Code § 9203(a); *see* PC Code § 9203(b) ($25,000 limitation for county water authority)].

A local agency that fails to make a progress payment within 30 days after receipt of an undisputed and properly submitted payment request from a contractor must pay the contractor interest at the legal rate for money judgments [PC Code § 20104.50(b); *see CCP § 685.010(a)* (rate interest accrues)].

[4] Under Contracts for Acquisition of Goods and Services

When a contract is for goods or services purchased through the Department of General Services, payment will be made after transmission of an invoice or demand for payment by the disbursing officer to the Controller. The invoice or demand for payment is accompanied by the disbursing officer's sworn statement that the goods or services have been provided to the state agency in accordance with the contract and law [PC Code § 10312].

If the contract is for services, the contract may provide for progress payments for work performed or costs incurred in performing the contract. Not less than 10 percent of the contract amount must be retained pending completion of the contract and evaluation of the contractor's work. However, if the contract is for the performance of separate and distinct tasks, any funds withheld with regard to a particular task may be paid on completion of that task [PC Code § 10346].

Legal Topics:

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§ 90A.27 Suspension of Bidders

[1] Violation of Antitrust Laws

The right of any person to bid on or be awarded public works or services contracts or to be a subcontractor at any tier can be suspended if that person has been convicted of state or federal antitrust law violations [PC Code § 10285.1; *see* PC Code § 10285 ("person" defined)]. Any state agency may order a suspension for a period of up to three years from the date of conviction. The suspension may be applied if the person or its partner, member, officer, director, responsible managing officer, or responsible managing employee has been convicted of any charge of fraud, bribery, collusion, conspiracy, or any other act in violation of the antitrust laws. However, the violation must have been in connection with bidding on, award of, or performance of any public works contract with any public entity (including the University of California and the California State University) [PC Code § 10285.1].

Moreover, the Public Contract Code does not require any state agency to contract with any person, or permit the employment of a person as a subcontractor, on a project funded in whole or in part by federal funds, if the person has been suspended or debarred by the federal agency providing the funds [PC Code § 10285.5].

[2] Determination of Eligibility

Any state agency may determine the eligibility of a person to enter into public works or services contracts. Toward that end, it may require a bidder or potential contractor to submit a statement under penalty of perjury declaring that neither that person nor any of its subcontractors has been convicted of any fraud, bribery, collusion, or conspiracy in connection with bidding on, award, or performance of any public works contract with any public entity within the preceding three-year period [PC Code § 10285.1].

[3] Determination Prior to Suspension

Before it suspends a person, a state agency must provide a hearing following reasonable notice. In determining whether to suspend, and the duration of the suspension period, the agency must consider all relevant factors, including the degree to which the person cooperated with state or federal authorities in the criminal proceeding and the degree to

which that person has agreed to restitution for damages incurred by the public entity as a result of the acts on which the conviction was based [PC Code § 10285.2]. Once a suspension has been ordered, other state agencies must adopt the terms of that suspension without further notice or hearing [PC Code § 10285.3].

[4] Termination of Suspension

If a state agency has ordered a suspension, it may terminate the suspension if it determines that termination is in the best interest of the agency. Any suspension order adopted by another agency under PC Code § 10285.3 must be terminated when the original suspending agency terminates its suspension [PC Code § 10285.4].

Legal Topics:

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§ 90A.28 Listing of Subcontractors

To prevent successful bidders from "bid peddling" and "bid shopping" to obtain better subcontract prices after a contract is awarded, the Subletting and Subcontracting Fair Practices Act [*see* PC Code §§ 4100-4114] requires bids in procurements to specify names and business locations of subcontractors who will perform subcontract work valued in excess of one-half of one percent of the prime contractor's total bid and the portion of the work to be done by each specified subcontractor. In the case of bids or offers for the construction of streets or highways, including bridges, the person making the bid must specify the names and business locations of the subcontractors performing work in excess of one half of one percent or $10,000, whichever is greater [PC Code § 4104(a)(1)]. Only one subcontractor may be listed for each portion of the prime contract work [PC Code § 4104(b); *see R.J. Land & Assocs. Constr. Co. v. Kiewit-Shea (1999) 69 Cal. App. 4th 416, 424-428, 81 Cal. Rptr. 2d 615* (listed subcontractor sued prime contractor of public work who substituted another subcontractor to do work; because contractor failed to correct its error in listing subcontractors in bid, listed subcontractor had right to perform subcontract)]. Bids also must include the name and business address of any off-site subcontractor who will specially fabricate a portion of the work under the contract plans and specifications if the value of the work will exceed one-half of one percent of the prime contractor's total bid [PC Code § 4104(a)(1)]. This requirement does not affect the rights of the contracting parties in any other way [PC Code § 4103]. Subject to a state or local agency's option to implement this provision, the prime contractor may submit any information requested by the officer, department, board, or commission concerning any subcontractor whom the prime contractor is required to list in the bid package, other than the subcontractor's name and location of business, up to 24 hours after the deadline established for receipt of bids by prime contractors [PC Code § 4104(a)(2); *see also* PC Code § 4104.5 (extension of time for submission of bids by prime contractor in event of material change to bid invitation)].

Failure to specify a subcontractor when required, or specification of more than one subcontractor for any portion of the contract work, is construed as representing that the prime contractor will perform the work [PC Code § 4106]. An attempt to subcontract the work after failing to correctly specify a subcontractor under these circumstances, or an impermissible substitution of one subcontractor for another after the award of a contract, may result in cancellation of the contract by the awarding authority, assessment of a monetary penalty of not more than 10 percent of the amount of the subcontract involved, and disciplinary action by the Contractors' State License Board [PC Code §§ 4110, 4111].

The bidder for a prime contract (that is, one bidding directly with the state) may not list another general or specialty contractor who intends, in turn, to sublet portions constituting the majority of the work covered by the prime contract [PC Code § 4105; *see* PC Code § 4113 ("prime contractor" defined)]. Once the bid is accepted, the prime contractor may not unilaterally substitute another subcontractor in place of any listed in the bid except in certain prescribed situations with the consent of the awarding authority [*see* PC Code § 4107(a); *see also § 90A.140* (list of situations and procedures for substitution)], permit the subcontract to be voluntarily assigned or transferred, allow it to be performed by anyone other than the listed subcontractor, or subcontract any portion of the work (except for change orders) for which a subcontractor should have been listed but was not [PC Code § 4107(b),*(c)*]. PC Code § 4107 contemplates that the awarding authority's consent to substituting out a listed subcontractor and substituting in a replacement subcontractor will occur before the prime contractor permits the replacement subcontractor to perform any work. However, a deviation from this sequence is permissible as long as the procedure used actually complies with the substance of the reasonable objectives of the statute, which are (1) to prevent bid peddling and bid shopping after the award of a public works contract and (2) to provide an opportunity to the awarding authority to investigate the proposed replacement subcontractor before consenting to substitution [*Titan Elec. Corp. v. Los Angeles Unified Sch. Dist. (2008) 160 Cal. App. 4th 188, 193, 72 Cal. Rptr. 3d 570]* .

A listed subcontractor need not be licensed at the time the prime contractor's bid is submitted, unless the call for bids or bid specifications package expressly requires that listed subcontractors be licensed at the time the prime contractor submits a bid. The prime contractor's bid is not nonresponsive merely because a listed subcontractor is unlicensed. However, the deliberate listing of an unlicensed subcontractor, with no legitimate intention of using that subcontractor, could be a ground for determining that the prime contractor is not a responsible bidder [*D.H. Williams Constr., Inc. v. Clovis Unified Sch. Dist. (2007) 146 Cal. App. 4th 757, 771, 53 Cal. Rptr. 3d 345]* .

Legal Topics:

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§ 90A.29 Equal Employment Opportunity Requirements

Any employer who seeks a contract with the state for construction work or the supply of goods or services is subject to statutory prohibitions against discrimination in employment [*see Gov. Code § 12990(a)*]. Before becoming a contractor or a subcontractor in a state procurement, the bidder may be required to submit a nondiscrimination program to the Department of Fair Employment and Housing for approval and certification [*Gov. Code § 12990(b),(e)*]. All state contracts contain a clause prohibiting discrimination [*see Gov. Code § 12940(a),(c)-(f)*] by contractors and subcontractors and requiring them to give written notice of their obligations under that clause to their unions [*see Gov. Code § 12990(c)*]. However, *Gov. Code § 12990(c)* does not apply to a credit card purchase of goods of $2500 or less, provided that the total amount of this exemption does not exceed $7500 per year for each company from which a state agency is purchasing goods by credit card [*Gov. Code § 12990(c)*].

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§ 90A.30 Application of California Public Records Act

[1] Duty to Disclose Public Records

Under the California Public Records Act [*see Gov. Code § 6250 et seq.*], the public has a right to information concerning the conduct of public business [*see Gov. Code § 6250*]. A public agency must make its public records accessible to the public and to elected members or officers of any state or local agency [*Gov. Code § 6253(a)*; *see Gov. Code § 6252(d)* (public agency means any state or local agency); *see also Gov. Code §§ 6252(b)* ("member of the public" defined), *6252.5* (ability of elected members or officers to access public records)], unless a statutory exemption applies [*see Gov. Code §§ 6254, 6255*]. Every agency may adopt regulations stating the procedures to be followed when making its records available [*Gov. Code § 6253.4*] and may adopt requirements that allow for faster, more efficient, or greater access to records than the minimum prescribed standards for access and copying [*Gov. Code § 6253(e)*; *see Gov. Code § 6253(c)* (determination, within 10 days, as to whether request seeks disclosable public records and "prompt" notification of requesting party, absent "unusual circumstances," justifying extension by written notice of no more than 14 days)]. However, an agency may justify withholding a record by showing that the record is specifically exempted from disclosure under a statutory provision or by showing that the public interest served by nondisclosure outweighs the public interest served by disclosure [*see Gov. Code § 6255*; *see also* [2], *below*].

"Public records" includes any writing containing information relating to the conduct of the public's business, prepared, owned, used, or retained by any public agency [*see Gov. Code § 6252(e)*; *see Gov. Code § 6252(g)* ("writing" defined)]. The Attorney General has ruled that this definition is intended to cover every conceivable kind of record involved in the governmental process and that only purely personal information is exempt *[58 Ops. Cal. Atty. Gen. 629, 634 (1975)]* . Any record required by law or kept as necessary or convenient to the discharge of a government official's official duty is a public record [*City Council v. Superior Court (1962) 204 Cal. App. 2d 68, 73, 21 Cal. Rptr. 896]* .

Thus, for example, the financial reports a city received from its waste disposal contractor in support of an application for a rate increase were subject to public disclosure because the information constituted a public record that was not within the exemptions from disclosure granted by law [*San Gabriel Tribune v. Superior Court (1983) 143 Cal. App. 3d 762, 775-778, 192 Cal. Rptr. 415* ; *see* discussion of financial statements exemption in [2], *below*]. Moreover, the

contractor waived any privacy interests it may have had by using the disputed data as it did [*San Gabriel Tribune v. Superior Court (1983) 143 Cal. App. 3d 762, 781, 192 Cal. Rptr. 415]* . The financial records constituted a "public record" because the city had delegated its public duty of trash collection to the contractor while retaining the power and duty to monitor its performance. The city's assurances to the contractor that the data would remain confidential were insufficient to convert what was a public record into a private record [*San Gabriel Tribune v. Superior Court (1983) 143 Cal. App. 3d 762, 775, 192 Cal. Rptr. 415]* .

[2] Exemptions From Disclosure

Records that are exempted from disclosure under federal or state law are exempt from disclosure under the Public Records Act [*see Gov. Code § 6254(k)*; *see also Gov. Code § 6275 et seq.* (listing statutes exempting information contained in public record from disclosure in accordance with *Gov. Code § 6254(k)*)]. These include, for example, "official information" acquired in confidence [*Gov. Code § 6276.32*; *see Evid. Code § 1040* (privilege to refuse to disclose "official information")] and trade secrets [*Gov. Code § 6276.44*; *see Evid. Code § 1060* (trade secrets privilege)]. However, *Evid. Code § 1040* grants a privilege of nondisclosure if disclosure is against public interest because there is a need to preserve confidentiality that outweighs the need for disclosure in the interest of justice [*see Evid. Code § 1040(b)(2)*]. Thus, in the absence of any evidence that disclosure would be against the public interest, when disclosure is shown to favor the public's interest, the privilege of nondisclosure will not be applied [*San Gabriel Tribune v. Superior Court (1983) 143 Cal. App. 3d 762, 776, 192 Cal. Rptr. 415]* .

The fact that disclosure may invade the contractor's privacy interests and have a chilling effect on obtaining information in future transactions are not sufficient reason to withhold disclosure in the name of the public interest [*see Gov. Code § 6255*] and do not outweigh the public's need to be informed with respect to governmental services contracted on their behalf [*San Gabriel Tribune v. Superior Court (1983) 143 Cal. App. 3d 762, 780, 192 Cal. Rptr. 415]* . In addition, the trade secret exemption does not apply when an agency states that the basis for its decision or order is stated in the data involved. Therefore, a city could not call for concealment after it used the data in its decision-making process [*San Gabriel Tribune v. Superior Court (1983) 143 Cal. App. 3d 762, 778, 192 Cal. Rptr. 415* ; *see Gov. Code § 6254(k)*; *Evid. Code § 1060*].

Statements of personal worth or data required by a licensing agency and filed by an applicant to establish personal qualification for a license are also exempt [*Gov. Code § 6254(k)*]. However, this exemption does not extend to contracts [*see Gov. Code § 6254(n)*]. The term "license" will be construed narrowly in order to give effect to the legislative intent that favors disclosure over secrecy [*San Gabriel Tribune v. Superior Court (1983) 143 Cal. App. 3d 762, 779-780, 192 Cal. Rptr. 415]* . Note that questionnaires and financial statements submitted to prequalify under the State Contract Act are not public records and are not open to public inspection [PC Code § 10165].

Computer software developed by a state or local agency, including computer mapping systems, computer programs, and computer graphic systems, are exempt from public records access [*Gov. Code § 6254.9(a),(b)*]. However, exemption does not alter the public record status of information merely because it is stored in a computer [*Gov. Code § 6254.9(d)*].

Public records access does not apply to archaeological site information and reports maintained by, or in the possession of, the Department of Parks and Recreation, the State Historical Resources Commission, the State Lands Commission, the Native American Heritage Commission, another state agency, or a local agency, including the records that the agency obtains through a consultation process between a California Native American tribe and state or local agency [*Gov. Code § 6254.10*].

Legal Topics:

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[Reserved]

§§ 90A.31[Reserved]

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§ 90A.40 Construction Contracting by Local Entities

[1] In General

Contracting by counties, cities, and local agencies is generally governed by the Local Agency Public Construction Act [*see* PC Code § 20100 et seq.]. Procedures and requirements vary depending on the type and size of the governmental entity [*see* [2]-[6], *below*].

In general, the Act requires that any procurement within its purview be advertised and competitive bids be received before the award of a contract to the lowest responsible bidder. For example, the procurement of county highway construction must be advertised [*see* PC Code §§ 20390, 20392] and contracts must be let to the lowest responsible bidder [*see* PC Code § 20393]. Similar requirements apply to the construction of county bridges or subways [*see* PC Code §§ 20400, *20404*, *20405*], and the construction of streets and highways by any legislative body or joint highway districts [*see* PC Code §§ 20410, *20412*, *20415*, *20482*, *20531*]. The main types of county and city procurement contracting procedures are described in [2]-[4], *below*.

In an emergency, a local public agency, after a four-fifths vote of its governing body, may repair or replace a public facility, take any other action required by the emergency, and procure the necessary equipment, services, and supplies for those purposes, without giving notice for bids to let contracts [PC Code § 22050(a)(1); *see* PC Code § 1102 ("emergency" defined)]. Before taking any such action, the governing body must make a finding based on substantial evidence set forth in the minutes of its meeting that the emergency will not permit a delay resulting from competitive bidding and that the action is necessary to respond to the emergency [PC Code § 22050(a)(2)].

[2] Counties With Population of More Than 500,000

For counties with a population of more than 500,000, most projects for construction or repairs estimated to cost more than $4,000 must be performed under contract [PC Code § 20121; *see* PC Code § 20131 (counties with purchasing agents); *see also* PC Code § 20120 (Local Agency Public Construction Act applicable to counties subject to *Gov. Code § 23000 et seq.*, covering government of counties)]. However, counties are not required to contract for grading, drainage, pipe laying, fencing, landscaping, instrument installation, and similar construction and repair work necessary

for day-to-day landfill operations [PC Code § 20121.1]. Prospective contracts for the construction or repair of public buildings [*see* PC Code § 20121] involving more than $6,500 in counties with a population of 500,000 or more [*see* PC Code § 20122], or $50,000 in counties with a population exceeding 2,000,000 [*see* PC Code § 20123] must be advertised [*see* PC Code § 20125]. An advertisement for bids must be published for 10 days in a daily or weekly newspaper of general circulation published in the county involved [*see Gov. Code §§ 6062, 6066*] or posted in three public places for at least two weeks, if no newspaper is published in the county [PC Code § 20125]. Bidders must be given the opportunity to examine plans, specifications, and working details [PC Code § 20127]. Bids for construction work must be sealed and must be accompanied by bid security [*see* PC Code § 20129(a)].

The contract must be awarded to the lowest responsible bidder [PC Code § 20128; *see M.G.M. Constr. Co. v. Alameda County (N.D. Cal. 1985) 615 F. Supp. 149, 150* (county affirmative action program illegal to extent it authorizes rejection of low bid on basis of bidder's failure to comply with local minority subcontractor participation requirements)]. However, for contracts for certain shipping facilities, all bids may be rejected and the work may be done by day labor if the county board of supervisors is advised that the work can be done for less than the lowest responsible bid [PC Code § 20130].

Contractors are required to perform in accordance with contract plans, specifications, and other documents unless the contract is modified by a four-fifths vote of the board of supervisors [PC Code § 20128]. However, the plans and specifications can be altered by a two-thirds vote of the board [PC Code § 20135] and contracts can be changed by a vote of two thirds of the board with the consent of the contractor [*see* PC Code § 20136(c)] or as provided by the contract [PC Code § 20136(b)]. Changes must be ordered in writing and must be within specified dollar limits [*see* PC Code § 20142].

[3] Counties With Population of 500,000 or Less

In counties with a population of 500,000 or less, projects involving the construction or repair of public buildings estimated to cost more than $4,000 must be performed under contract [PC Code § 20121] and must employ either formal or informal bidding procedures [*see* PC Code §§ 20150.1-20150.5] prescribed by PC Code §§ 20150-20150.14 [PC Code § 20150; *but see* PC Code § 20131 (counties with purchasing agents)]. However, counties are not required to contract for grading, drainage, pipe laying, fencing, landscaping, instrument installation, and similar construction and repair work necessary for day-to-day landfill operations [PC Code § 20121.1].

Projects between $4,000 and $10,000 may be let to contract by either informal or formal bidding procedures. Formal procedures must be employed for projects above $10,000 [PC Code § 20150.4]. Expenditures for public projects do not include costs for plans, specifications, engineering, and advertising, or material acquired by a public agency for timely completion [PC Code § 20150.3].

As soon as practicable after the time for renewal of contractors' licenses, the county must notify each contractor in the county of the opportunity to register to receive notices of informal bidding proceedings [PC Code § 20150.6]. Notice inviting informal bids must describe the project in general terms and must state a closing date for submission of bids. The notice must be published at least twice in a newspaper of general circulation published in the county, in a newspaper of general circulation distributed in the county, or posted in three public places in the county. Notice must be published at least 24 hours before the time scheduled for opening bids. Published or posted notice may be supplemented by published notice in a trade paper [PC Code § 20150.7; *see* PC Code 6061].

If formal bidding procedures are required, the notice inviting formal bids must state the time and place for receiving and opening sealed bids, and must describe the project to be done. The first notice must be at least ten days before the date for opening bids. The notice must be published at least twice, not less than five days apart, in a newspaper of general circulation published in the county, in a newspaper of general circulation distributed in the county, or posted in three public places in the county. Published or posted notice may be supplemented by published notice in a trade paper [PC

Code § 20150.8].

The county is entitled to reject any bids presented. If the county rejects all bids, after reevaluating its cost estimates, the county may abandon the project or readvertise for bids. If after readvertising, the county rejects all bids again, it may use county personnel on the project or readvertise again. If two bids tie for lowest position, the county may choose one. If no bids are received, the county may have the project done without further bidding [PC Code § 20150.9]. Alternatively, on projects of less than $75,000, after rejection of all bids and on resolution of the board of supervisors, the county may abandon the formalities of bidding and either negotiate with the original bidders at a lower price than any of the bids, or use county personnel [PC Code § 20150.10].

In all other respects, contracting procedures for counties of 500,000 or less is the same as for counties of more than 500,000 [*see* [2], *above*].

[4] Cities

City contracts for public projects exceeding $5,000 must be let to the lowest responsible bidder after notice [PC Code § 20162; *see* PC Code § 20161 ("public project" defined)]. The first notice of a city project must be given at least ten days before the date specified in the notice for the opening of bids. Notice must be published at least twice, not less than five days apart, in a newspaper of general circulation published in the city or, if there is no paper, notice must be posted in at least three public places designated for that purpose [PC Code § 20164].

The city legislative body may reject any bids and readvertise. If there are two or more equal lowest bids, the legislative body may choose one bid. If no bids are received, the legislative body may proceed with the work as it chooses [PC Code § 20166]. If all bids are rejected, the city may proceed by day labor or purchase of supplies in the open market if four fifths of the members of its legislative body find that the work can be performed more economically [PC Code § 20167].

All bids must be submitted under sealed cover and accompanied by bid security [*see* PC Code § 20170]. Bid security must be in an amount not less than 10 percent of the amount bid. The absence of the requisite bid security will preclude consideration of the bid [PC Code § 20171]. The successful bidder's security is subject to forfeiture if the bidder fails to execute the contract awarded to it [PC Code § 20172]. If the successful bidder fails or refuses to execute the contract, the city may award the contract to the second lowest bidder and the amount of the security forfeited must be applied to the difference between the two contracts. Any surplus will be refunded to the lowest bidder [*see* PC Code § 20174].

In an emergency, after passing a required resolution, a city may spend any sum necessary to deal with the emergency [PC Code § 20168; *see* PC Code § 22050 et seq. (emergency contracting procedures)].

Bidding requirements for city street lighting projects are also specified by the Public Contract Code [*see* PC Code §§ 20500, *20501, 20505, 20511, 20521*]. In addition, local ordinances may govern bidding and award procedures.

[5] School Districts

Local school districts [PC Code § 20110; *see Ed Code § 35000 et seq.*] must provide for competitive bidding for any contract involving an expenditure of more than $50,000 for (1) the purchase of equipment, materials, or supplies to be furnished, sold, or leased to the district; (2) services, except construction services; or (3) repairs, including maintenance as defined in PC Code § 20115 that are not a public project as defined in PC Code 22002(c) [PC Code § 20111(a)]. The contract must be awarded to the lowest responsible bidder who must give security as the board requires, or all bids must be rejected [PC Code § 20111(a); *see* PC Code § 20111(d)(requiring annual adjustment in minimum contract amount)]. For projects involving less expenditure, districts may proceed by use of day labor [*see* PC Code § 20114]. In emergencies, school districts may proceed by contracting without formal bidding, or by using day labor [*see* PC Code §

20113].

Notice must be published at least once a week for two weeks in a newspaper of general circulation published in the school district. If there is no such paper, notice must be published in a newspaper circulated in the county. Notice may also be posted on the district's web site or through an electronic portal. The notice must call for bids, state the work to be done or materials or supplies to be furnished, and state the time and place where bids will be opened. Bids may not be received after that time [PC Code § 20112]. Any contract for a public project [*see* PC Code § 22002(c) (definition)] involving an expenditure of $15,000 or more must be awarded to the lowest responsible bidder who must give security as the board requires, or all bids must be rejected. All bids for construction work must be presented under sealed cover and must be accompanied by one forms of bidder's security specified by statute [PC Code § 20111(b) (includes specification of acceptable forms of bidder's security)].

[6] Other Local Districts and Agencies

Other specific statutory schemes govern the making of contracts between private contractors and many types of local districts and agencies [*see* PC Code § 20185 et seq.]. For a list of these statutes, see*§ 90A.01[1]*.

[7] Alternative Bidding Methods

Qualifying local agencies may initiate projects under an alternative bidding procedure authorized by the Uniform Public Construction Cost Accounting Act [*see* PC Code §§ 22000-22045]. The Act's cost accounting standards and alternative bid methods are intended to promote uniformity of cost accounting standards and bidding procedures on construction, maintenance, and other work projects performed or contracted by public entities in California [PC Code § 22001]. Local agencies that elect to become subject to the uniform construction cost accounting procedures become eligible to use the alternative bidding methods [PC Code § 22003; *see* PC Code § 22030 et seq. (bidding procedures)].

Under the alternative methods, projects of $30,000 or less may be performed by the employees of a public agency by force account, by negotiated contract, or by purchase order [PC Code § 22032(a)]. Projects of $125,000 or less may be let to contract by informal procedures [PC Code § 22032(b); *see* PC Code § 22034 (informal procedure)]. Generally, projects of more than $125,000 must be let to contract by formal bidding procedures [PC Code § 22032(c); *see* PC Code § 22037 (notice inviting formal bids); *see also* PC Code § 22038(b) (award to lowest responsible bidder)].

[8] Hazardous Waste Clauses Required in Local Excavation Contracts

Any public works contract of a local public entity involving the digging of trenches or other excavations deeper than four feet below the surface must include specified clauses concerning hazardous waste. The contract must require the contractor to notify the public entity in writing before any of the following conditions are disturbed [PC Code § 7104(a)]:

- Material believed to be hazardous waste that is required to be removed to a designated disposal site [*see H&S Code § 25117* ("hazardous waste" defined)].

- Subsurface or latent physical conditions at the site differing from those indicated by information about the site made available to bidders before the deadline for submitting bids.

- Unknown physical conditions at the site of any unusual nature, materially different from those ordinarily encountered and generally recognized as inherent in similar projects.

The contract must state that the local public entity will promptly investigate the conditions at the site to determine if the conditions do materially differ from those indicated or involve hazardous waste, and if the conditions cause a decrease

or increase in the contractor's cost of, or the time required for, performance of any part of the work. The contract must also state that if these requirements are satisfied, the public entity will issue a change order under the procedures described in the contract [PC Code § 7104(b)].

In addition, the contract must state that if a dispute arises between the local public entity and the contractor as to whether conditions materially differ, involve hazardous waste, or cause an increase or decrease in the contractor's time or materials, the contractor may not be excused from any scheduled completion date stated in the contract but must proceed with all work to be performed under the contract. The contract must also state that the contractor will retain any and all rights provided either by the contract or by law that pertain to the resolution of disputes and protests between the contracting parties [PC Code § 7104(c)].

For further discussion of hazardous waste issues, see California Environmental Law and Land Use Practice, Div. VI, *Hazardous Waste and Toxic Substance Control* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsGovernmentsState & Territorial GovernmentsGeneral OverviewPublic Contracts LawTypes of ContractsConstruction Contracts

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[Reserved]

§§ 90A.41[Reserved]

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§ 90A.50 Remedies of Bidder for Misaward of Contract

[1] In General

Generally, an award to a bidder other than the lowest responsible bidder must be set aside [*see City of Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 870, 103 Cal. Rptr. 689, 500 P.2d 601* (construction contract)]. Note that in certain situations, if the lowest bidder refuses to execute the contract and the agency determines that it is in the best interest of the state, the contract may be awarded to the next lowest bidder [*see, e.g.*, PC Code § 10182]. Before awarding a public works contract to a bidder other than the lowest bidder, the public entity must notify the lowest bidder of any evidence reflecting on its responsibility received from others or adduced as a result of independent investigation, afford it an opportunity to rebut that adverse evidence, and permit it to present evidence that it is qualified to perform the contract [*City of Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 871, 103 Cal. Rptr. 689, 500 P.2d 601]* . In the absence of a statutory remedy, it would appear that the first remedy of the lowest responsible bidder is to demand the opportunity to show that it meets the responsibility criteria and, pending the outcome of that proceeding, seek a judicial order prohibiting any award. However, many competitive bidding schemes now provide for a review by the awarding agency on demand [*see, e.g.*, PC Code §§ 10306, *10345(a)*, *12102(h)*].

In the absence of any preliminary effort to halt proceedings and keep the contract from being awarded, an unsuccessful bidder's remedies are limited to damages. Because competitive bidding requirements are imposed solely for the benefit and protection of the public rather than for the benefit of the bidders, a misaward by a public entity of a public works contract to a bidder other than the lowest responsible bidder does not give the latter a cause of action in tort for monetary damages against the public entity [*Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority (1974) 40 Cal. App. 3d 98, 101-103, 114 Cal. Rptr. 834* ; *see Rubino v. Lolli (1970) 10 Cal. App. 3d 1059, 1061-1063, 89 Cal. Rptr. 320]* .

However, a public entity may be liable for monetary damages for the misaward of a public works contract under a theory of promissory estoppel [*see Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority (1974) 40 Cal. App. 3d 98, 103-105, 114 Cal. Rptr. 834* ; *see also US Ecology, Inc. v. State (2005) 129 Cal. App. 4th*

887, 891, 908, 28 Cal. Rptr. 3d 894 (as in ordinary contract actions, plaintiff seeking recovery on promissory estoppel theory must prove that defendant's breach of promise was substantial factor in causing plaintiff's injury)]. When the public entity in its bid solicitation promises to award the contract to the lowest responsible bidder, the reliance by a contractor who qualifies as a responsible bidder in preparing and submitting a bid is sufficient to create an informal contract entitling the lowest responsible bidder to damages if the contract is not awarded to it. The damages may, however, be limited to those sustained directly by the disappointed bidder by reason of its justifiable reliance on the entity's promise--the expenses incurred in its fruitless participation in the competitive bidding process [*see Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority (1974) 40 Cal. App. 3d 98, 104-105, 114 Cal. Rptr. 834]* .

[2] Protest Against Award of Contract for Goods

Any bidder in a procurement for goods may protest a proposed award on the ground that it, rather than the party to whom the award is proposed, is the lowest responsible bidder meeting the procurement specifications. The protest must be filed with the Department of General Services, Procurement Division, before the award is made [*see* PC Code § 10306].

A bidder will be informed of an impending award under either of the following circumstances [PC Code § 10306]:

- When the contract is not to be awarded to the lowest bidder, that party will be notified 24 hours prior to the award.

- If a bidder has submitted a written request that notice of the proposed award be posted in a public place in the offices of the Department at least 24 hours before the award and the fact of the proposed award is somehow communicated to the bidder.

Saturdays, Sundays, and legal holidays are excluded in computing the 24-hour period [PC Code § 10306].

After the initial protest, a statement must be filed with the State Board of Control. The statement must be filed within 10 days of the original protest and must specify in detail the ground for the protest and the supporting facts. If a protest is filed before an award, the Department may not make the award until either the protest has been withdrawn or the State Board of Control has made a final decision on the issue [PC Code § 10306].

The protesting bidder may receive assistance from a Customer and Supplier Advocate in the Department of General Services [*see* PC Code § 10300(a),*(b)*]. Notification to bidders regarding the availability of services by the advocate, as well as procedures and time lines for these services, must be included in the solicitation [PC Code § 10300(c)].

For further coverage of the protest procedure, see*§ 90A.124*. For a form for protesting an award of a contract for goods, see*§ 90A.250*.

[3] Protest Against Award of Contract for Services

[a] Contracts Awarded Under Competitive Bidding Procedure

If a contract for services awarded under a procedure providing for competitive bidding is not awarded to the low bidder, the low bidder must be notified by telegram, electronic facsimile transmission, overnight courier, Internet transmission, or personal delivery five working days before the award [PC Code § 10345(a)]. In addition, any bidder may submit a written request that notice of the proposed award be posted in a place accessible by the general public, including any Internet site identified in the invitation for bids at least five working days before the award [PC Code § 10345(a)(1)].

If any bidder files a protest before the award, protesting the award of the contract on the grounds that he or she is the lowest responsible bidder meeting the specifications for the contract, the contract may not be awarded until either the protest has been withdrawn or the Department has decided the matter [PC Code § 10345(a)(2)]. "Lowest responsible bidder" has been construed to mean "the lowest bidder whose offer best responds in quality, fitness, and capacity for the particular requirements of the proposed work" [*City of Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 867, 103 Cal. Rptr. 689, 500 P.2d 601* (holding, despite use of term "best," that lowest responsible bidder must be selected without consideration of relative superiority vis-'a-vis other bidders); *see § 90A.252*]. Notably, this definition emphasizes the element of "responsiveness." A responsible bid is thus one that responds to all proper bid specifications, and, in setting those specification, the public agency must be accorded considerable latitude [*Associated Builders and Contractors, Inc. v. San Francisco Airports Comm'n (1999) 21 Cal. 4th 352, 366, 87 Cal. Rptr. 2d 654, 981 P.2d 499* ; *see, e.g., Domar Electric, Inc. v. City of Los Angeles (1994) 9 Cal. 4th 161, 174, 36 Cal. Rptr. 2d 521, 885 P.2d 934* (rejecting lowest monetary bidder absent required good faith documentation demonstrating compliance with city's outreach program for women and minority owned businesses)]. By necessary implication, the direct cost of the project need not be the agency's sole consideration in setting bid specifications. Rather, any requirements reasonably related to the "quality, fitness and capacity of the bidder to satisfactorily perform the proposed work" generally are permissible [*Associated Builders and Contractors, Inc. v. San Francisco Airports Comm'n (1999) 21 Cal. 4th 352, 366, 87 Cal. Rptr. 2d 654, 981 P.2d 499* , quoting *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 867, 103 Cal. Rptr. 689, 500 P.2d 601* (prehire agreement, requiring among other things, payment of union wages, did not violate competitive bidding laws)].

Any protest filed before the award must be filed with the awarding state agency and the Department of General Services [PC Code § 10345(a)(2)]. Within five days after filing the protest, the protesting bidder must file with the Department and the awarding state agency a full and complete written statement specifying the grounds for the protest [PC Code § 10345(a)(3)].

[b] Contracts Awarded Using Request for Proposal

Contracts awarded under the procedure which makes use of a request for proposal [*see* PC Code § 10344; *see also §§ 90A.22[3][c]*] may be awarded only after a notice of the proposed award has been posted in a place accessible by the general public, including any Internet site identified in the request for proposal, for five working days [PC Code § 10345(b)]. If any bidder files a protest before the award with the awarding state agency and the Department against the awarding of the contract, the contract may not be awarded until either the protest has been withdrawn or the Department has decided the matter [PC Code § 10345(b)(1)]. Within five days after filing the protest, the protesting bidder must file with the Department and awarding state agency a full and complete written statement specifying the grounds for the protest [PC Code § 10345(b)(2); *see* PC Code § 10345(b)(2)(A)-(E) (grounds for protests)].

For further coverage of the protest procedure, see*§ 90A.125*. For a form for protesting an award of a contract for services, see*§ 90A.250*. For a form for protesting an award of a contract for services under a request for proposal, see*§ 90A.251*.

[4] Protest Against Award of Contract for Information Technology Goods and Services

Bidders who participate in procurements of information goods and services [*see* PC Code §§ 12100-12113] will be given an opportunity to protest any acquisition of those goods or services by the state. The Department of General Services is authorized to make final decisions on initial protests. If, before an award, a bidder has submitted an initial protest to the Department on the ground that its bid should have been selected in accordance with the selection criteria of the solicitation, no contract may be awarded until either the protest has been withdrawn or the State Board of Control has made a final decision as to the action to be taken on the protest. The protesting bidder has 10 days from the time it files a protest to file full substantiation with the Board [PC Code § 12102(h); *see United Systems of Arkansas, Inc. v.*

Stamison (1998) 63 Cal. App. 4th 1001, 1011-1012, 74 Cal. Rptr. 2d 407 (review of protest by Department of General Services cannot be considered substantial compliance with requirement of review and determination of protest by Board of Control)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesGeneral OverviewContracts LawTypes of ContractsConstruction ContractsPublic Contracts LawDispute ResolutionGeneral OverviewPublic Contracts LawTypes of ContractsConstruction ContractsPublic Contracts LawVoiding the ContractAmbiguity & MistakeGeneral Overview

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§ 90A.51 Relief of Successful Bidder From Bid Mistake

A successful bidder may not be relieved of a bid without the awarding agency's consent, nor may any changes be made in the bid on the ground that a mistake has been made [PC Code § 5101(a)]. If an awarding authority consents to relieve a bidder of a bid because of mistake, it must prepare a report documenting the facts establishing the existence of each element required by PC Code § 5103 [PC Code § 5101(b)]. These elements are the following [PC Code § 5103]:

- That a mistake was made.
- That the bidder gave the agency written notice of the mistake within five days after the opening of bids, specifying how the mistake occurred.
- That the mistake made the bid materially different than intended.
- That the mistake was made in filling out the bid rather than as an error in judgment or the result of carelessness in site inspection or in reading plans or specifications.

The report is a public record and must be filed with the State Board of Control (or the Regents of the University of California or the Trustees of a California State University if one of these is the awarding authority) [PC Code § 5101(b); *see § 90A.240*].

If the bidder forfeits the bid security as a result of its failure to execute the contract [*see* PC Code § 10181], it may bring an action against the agency in the county where the bids were opened to recover the amount forfeited, without interest or costs [PC Code § 5101(a)], on written notice within five working days, excluding Saturdays, Sundays, and state holidays, to the agency of the fact that a mistake had occurred and a detailed statement of how it occurred [PC Code § 5103(b); *see § 90A.123*, P 2; *see also § 90A.240* (form for notice of bid mistake)]. If the bidder is unsuccessful in court, it will be required to pay all costs incurred by the agency including reasonable attorneys' fees fixed by the court [PC Code § 5101(a)].

Other than the notice to the agency, no claim need be filed before bringing suit to reclaim any amounts forfeited [PC Code § 5104; *see* PC Code § 5103(b) (written notice requirement)]. The bidder who claims a bid mistake or forfeits bid security may not participate in further bidding on the same project [PC Code § 5105], and the agency may then award a contract to the second lowest bidder [PC Code § 5106].

These statutory provisions for the relief of bidders establish the exclusive procedure for relieving a bidder from a mistaken bid [*A & A Electric, Inc. v. City of King (1976) 54 Cal. App. 3d 457, 464, 126 Cal. Rptr. 585]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90A.52 Resolution of Claims and Disputes

[1] In General

All public entities have full authority to compromise or otherwise settle any claim relating to a contract at any time [PC Code § 9201(a)]. When a state agency is involved, the presentation of a claim [*see Gov. Code § 900 et seq.* (governing claims against public entities)] is not required to commence a legal action or arbitration proceeding for money or damages on a contract. However, an action or proceeding must be commenced not later than six months after either the contracting agency's final written decision under the contract claim provisions or the accrual of a cause of action, if there are no such provisions [PC Code § 19100(a)]. These time limits do not apply to a claim that is subject to PC Code § 10240.1 [PC Code § 19100(b); *see* PC Code § 10240.1 (time limit for initiating arbitration)]. These time limits must be kept in mind when a dispute arises under a construction contract governed by the State Contract Act [*see* [2], *below*].

Public entities are required to include provisions in public works contracts for timely notification of the contractor of the receipt of any third-party claims relating to the contract [PC Code § 9201(b)].

[2] Construction Contracts

Arbitration is the remedy for claims arising under a construction contract entered into under the State Contract Act [PC Code § 10240], unless both parties to the contract agree to waive the governing statutory requirements [*see* PC Code §§ 10240-10240.13] and litigate instead [*see* PC Code § 10240.10]. A claimant's failure to diligently pursue and exhaust the administrative procedures contained in the contract will bar arbitration. However, if more than 240 days elapse after acceptance of the work by the Department, a claimant may commence arbitration proceedings even if the administrative procedures have not been concluded [PC Code § 10240.2].

Arbitration must be initiated not later than 90 days after the date the Department's final written decision on the claim is served on the claimant. However, that limitation does not apply to claims founded on any cost audit, latent defect, warranty, or guarantee under the contract [PC Code § 10240.1].

These rules governing arbitration also apply to public works contracts not awarded under the State Contract Act

involving construction work on real property [*see* PC Code §§ 22200, *22201*].

Claims of $375,000 or less that arise between a contractor and a local agency may be resolved through the informal methods described in PC Code §§ 20104-20104.6, if the local agency has not elected arbitration procedures outlined in PC Code §§ 10240-10240.13 [*see* PC Code § 20104(a)]. If the informal claim procedures are to apply, the relevant provisions (or a summary of them) must be set forth in the plans or specifications for work that may give rise to a qualifying claim [PC Code § 20104(c)].

For coverage of the procedures governing arbitration, see*§ 90A.141*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90A.53 California Taxpayers' Right to Customer Service

Every state agency that issues permits or licenses or accepts applications, proposals, bids, or similar requests, must post on a website, no later than January 1, 2007, "customer service" links that contain specified information for frequently asked questions, forms, applications, and appeal-related documents, and instructions for filing complaints in electronic format via the internet [*Gov. Code § 7528(a)*]. These rules will remain in effect until January 1, 2012 [*Gov. Code § 7528.1*]. These requirements apply only to state agencies that otherwise have an internet website and are in addition to any other information that is otherwise required by law [*Gov. Code § 7528(c)*].

Legal Topics:

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29-90A California Legal Forms--Transaction Guide § 90A.60

§ 90A.60 Procurement Assistance for Small Businesses

In accordance with the Small Business Procurement and Contract Act [*see Gov. Code § 14835 et seq.*], the Office of Small Business and Disabled Veteran Business Enterprise Services facilitates small business participation in state procurement of supplies and construction [*Gov. Code § 14839*]. To that end, the Department of General Services publishes the California State Contracts Register, a semi-monthly publication advertising procurements of construction and services by the state government as well as a wide range of other contracting opportunities [*see Gov. Code §§ 14825-14829.2*]. The Office of Small Business and Disabled Veteran Business Enterprise Services also assists small business firms in preparing all required prequalification questionnaires, obtaining necessary licensing, bonding, and insurance, preparing bids, and understanding the applicable statutes [*Gov. Code §§ 14838(d)*, *14839*].

In addition, the small business advocate in the California Department of General Services provides assistance to certified small businesses and certified disabled veteran business enterprises by providing information regarding potential contracting opportunities, solicitation protest procedures and time lines, and prompt payment procedures [*Gov. Code § 14845(a)*]. The advocate also promotes the availability of certified small business and certified disabled veteran business enterprise suppliers who deliver or provide commonly used goods and services to governmental agencies [*Gov. Code § 14845(b)*]. Further, each state agency that has contracting relations with small businesses is required to designate a small business advocate as the single point of contact for, and a liaison to, small business providers [*Gov. Code § 14846(a)(1)*]. At a minimum, these small business advocates must make information regarding pending solicitations available to, and consider offers from, California small business suppliers and must ensure that payments due on a contract with a small business are made promptly [*Gov. Code § 14846(a)(2)*; *see Gov. Code § 14846(a)(3)* (exception for state agencies whose contracting expenditures total less than $100,000 annually)].

In general, a "small business" is a California-based business that is independently owned and operated and not dominant in its field of operation [*see Gov. Code § 14837(d)(1)*; *see also 2 Cal. Code Reg. §§ 1896.4(w)*, *1896.12(a)* (definition; eligibility requirements for certification as small business)]. For the purposes of the implementing regulations, the term "small business" includes a microbusiness [*2 Cal. Code Reg. § 1896.4(w)*; *see Gov. Code § 14837(d)(2)*; *2 Cal. Code Reg. § 1896.4(q)* (definition)]. For a detailed listing of factors relevant to determining whether a prospective bidder qualifies as a small business, see*§ 90A.110*.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsState & Territorial GovernmentsGeneral OverviewPublic Contracts LawBusiness Aids & AssistanceSmall Businesses

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 90A STATE GOVERNMENT CONTRACTS
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29-90A California Legal Forms--Transaction Guide § 90A.61

§ 90A.61 Small Business Preference

The Small Business Procurement and Contract Act provides for a small business preference under which, when responsibility and quality are equal, prequalified small businesses (including microbusinesses) may be granted a preference of 5 percent of the lowest responsible bid submitted by a bidder other than a small business, and given special consideration in qualifying for services, construction, or supplies contracts [*see Gov. Code § 14838(b),(c)*; *see also 2 Cal. Code Reg. §§ 1896.2-1896.22*]. A "non-small business" that is subcontracting a minimum of 25 percent of its net price bid to small businesses is also eligible for a 5-percent preference [*see 2 Cal. Code Reg. §§ 1896.6(b), 1896.8*; *see also 2 Cal. Code Reg. § 1896.4(t)* ("non-small business" means responsible bidder that is not certified as small business)]. The small business (or non-small business subcontractor) preference of 5 percent is calculated as specified in the implementing regulations [*see 2 Cal. Code Reg. § 1896.8(b)*]. If, after applying the small business preference to the small business's bid, that bid is equal to the lowest priced bid from a responsible non-small business, or is equal to the highest scored bid [*see 2 Cal. Code Reg. § 1896.8(b)(1)(B)*] of a non-small business, the contract must be awarded to the small business for the amount of its bid [*2 Cal. Code Reg. § 1896.8(c)*]. If, after application of the non-small business subcontractor preference, a non-small business has submitted the lowest bid, and does not displace a small business from winning the award, the contract must be awarded to the non-small business for the amount of its bid [*2 Cal. Code Reg. § 1896.8(d)*].

The small business or non-small business subcontractor preferences may not exceed $50,000 for any bid [*Gov. Code § 14838(b)*; *2 Cal. Code Reg. § 1896.8(e)*]. Further, the combined cost of the small business or non-small business subcontractor preference and preferences awarded under any other law may not exceed $100,000 [*2 Cal. Code Reg. § 1896.8(e)*]; and no preference will be allowed if doing so would result in a bid by the small business firm in excess of the funding for the project [*see Gov. Code § 14838.4*]. When a solicitation for bids reserves to the state the right to make multiple awards, the $50,000 maximum preference will be applied, to the extent possible, to maximize the dollar participation of small businesses, including microbusinesses, in the award [*Gov. Code § 14838(b)*; *2 Cal. Code Reg. § 1896.8(e)*].

If a large business bidder is entitled to a preference under any other provision of law, a qualified small business bidder in the same procurement will have precedence in that the application of the preference favoring the larger firm may not

result in denial of the award to the small firm. This rule will apply when the small bidder is also the lowest responsible bidder as well as when the small bidder is eligible for the 5 percent small business preference [*Gov. Code § 14838(f)*]. However, in the event of a precise tie between the low responsible bid of a qualified small business bidder and the low responsible bid of a bidder meeting the specifications of a disabled-veteran-owned small business, the contract will be awarded to the latter [*Gov. Code § 14838(f)*; *2 Cal. Code Reg. § 1896.8(f)*]. A "disabled veteran business enterprise" is a small business concern that is (1) at least 51 percent owned by one or more disabled veterans, (2) managed by, and the daily business operations controlled by, one or more disabled veterans, and (3) a sole proprietorship, corporation, or partnership with its home office located in the United States, which is not a branch or subsidiary of a foreign corporation, foreign firm, or other foreign-based business [*Gov. Code § 14837(e)*; M&V Code § 999(b)(7); *see also 2 Cal. Code Reg. §§ 1896.60-1896.95* (disabled veteran business participation goals)].

In addition, each state agency [*see Gov. Code § 14838.1(d)* (definition)] awarding contracts for the construction, alteration, demolition, repair, or improvement of the state's infrastructure financed with the proceeds of the infrastructure-related bond acts of 2006 [*see Gov. Code § 14838.1(c)* (listing relevant bond acts)] must establish a 25 percent goal for participation of small businesses [*Gov. Code § 14838.1(a)(1)*; *see Gov. Code § 14838.1(b)* ("small business" has same meaning as in *Gov. Code § 14837(d)*); *see also § 90A.60*]. State agencies must advertise all upcoming opportunities to bid on contracts for projects funded by those bond acts, and include in the advertisement an Internet link to information for prospective bidders, including bidding procedures and how to prepare a bid [*see Gov. Code § 14838.1(a)(2)*]. State agencies also must provide California small businesses with information about available training and technical assistance for understanding and bidding on contracts for projects funded by those bond acts [*see Gov. Code § 14838.1(a)(3)*].

For a procedural guide to qualifying for the small business preference, see*§ 90A.110*. For a form that contains a request for small business preference and certification that the bidder is a small business, see*§ 90A.200[2]*. For a small business certification and a disabled veteran business enterprise certification application, see*§ 90A.230[2]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBusiness Aids & AssistanceSmall BusinessesPublic Contracts LawBusiness Aids & AssistanceSource Preference

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29-90A California Legal Forms--Transaction Guide § 90A.62

§ 90A.62 California Business Preference in Construction Contracts

When awarding a public construction contract, a state agency must give a California company [*see* PC Code § 6107(a) ("California company" defined)] preference over a nonresident contractor from a state that provides a home-state contractor preference [PC Code § 6107(b)(1); *see* PC Code § 6107(b)(2) (amount of preference)]. To be eligible for the preference, the bidder must certify that it qualifies as a California company [PC Code § 6107(c)]. The preference is unavailable if its use might jeopardize the receipt of federal funds, or if the nonresident contractor certifies in its bid that its state of residency does not give a home-state preference in public construction contracts [PC Code § 6107(e)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsPublic Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBusiness Aids & AssistanceSource PreferencePublic Contracts LawTypes of ContractsConstruction Contracts

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29-90A California Legal Forms--Transaction Guide § 90A.63

§ 90A.63 Distressed Area Preference in Contracts for Goods and Services

The Target Area Contract Preference Act [*see Gov. Code §§ 4530-4535.3*; *see also 2 Cal. Code Reg. §§ 1896.30-1896.41*] provides bidding preferences designed to encourage employment of persons with a high risk of unemployment [*see Gov. Code § 4532(f)* (definition)] in distressed areas by California-based companies bidding for contracts to supply more than $100,000 worth of goods or services [*see Gov. Code § 4531*]. A "distressed" area is a California urban area identified by the California Office of Planning and Research as such and identified as containing a population meeting income, age, racial, and educational criteria specified by law [*see Gov. Code § 4532(d)*; *see also § 90A.111*].

The Act provides for two categories of preference. First, a 5 percent preference is awarded to California companies certifying under penalty of perjury that, for goods contracts, at least 50 percent of the total labor hours required to perform the contract will be accomplished in a distressed area or, for service contracts, not less than 90 percent of the total labor hours required to perform the contract will be accomplished in a distressed area [*Gov. Code §§ 4533, 4534*; *see 2 Cal. Code Reg. §§ 1896.31, 1896.34*]. Second, if a bidder on a goods contract certifies that under penalty of perjury he or she will perform at least half the labor required in a distressed area [*see Gov. Code § 4533*], or if the worksite where at least half of the labor required to perform the contract is within commuting distance of a distressed area, an additional preference (up to 4 percent) is available based on the percentage of workers with a high risk of unemployment agreed to be hired [*Gov. Code §§ 4533.1, 4534.1*; *see 2 Cal. Code Reg. §§ 1896.32, 1896.35*]. For a checklist to determine eligibility for this preference, see*§ 90A.111*.

The maximum preference and incentive a bidder may be awarded under the distressed area preference and any other provision of the law is 15 percent. The maximum preference and incentive cost may not exceed $50,000 for any bid, and the combined cost of all preferences granted to a bidder under the distressed area preference and any other provision of law may not exceed $100,000. If the 15 percent cumulated preference and incentive cost would exceed this $100,000 limit, the $100,000 limit applies to bar award of the full 15 percent [*Gov. Code § 4535.2(a)*].

Notwithstanding the statutory provisions for the distressed area preference, small business bidders qualified for the small business preference have precedence over non-small-business bidders in that the application of any preference for

which non-small-business bidders may be eligible, including the distressed area preference, may not result in denial of an award to the small business bidder. This rule applies to cases in which the small business bidder is the lowest responsible bidder, as well as to cases in which the small business bidder is eligible for award as a result of application of the small business bidder preference and incentive [*Gov. Code § 4535.2(b); see Gov. Code § 14838*]. For a list of the specific factors involved, see*§ 90A.111*.

No preference will be granted unless the lowest responsible bid or proposal received is in excess of $100,000. Moreover, if the solicitation issued by the awarding authority has [Reserved] the right to award multiple contracts, no preference will be granted unless the lowest responsible bid for the particular contract involved exceeds $100,000 [*2 Cal. Code Reg. § 1896.37*].

Contracts awarded under this program must include conditions designed to ensure that the contractor actually performs the contract at the location specified and meets any commitment to employ persons with a high risk of unemployment [*Gov. Code § 4535*]. A business that requests and is given a preference as a result of false certification is subject to penalties and will be ineligible to transact business directly or indirectly with the state for a period of six to 36 months [*Gov. Code § 4535.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBusiness Aids & AssistanceSource PreferencePublic Contracts LawTypes of ContractsGeneral Overview

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29-90A California Legal Forms--Transaction Guide § 90A.64

§ 90A.64 Participation Goals for Certain Business Enterprises

[1] Businesses of Disabled Veterans

All contracts awarded by any state entity for materials, supplies, or equipment must comply with specified participation goals for disabled veteran business enterprises (DVBEs) [PC Code § 10115(c); *see* M&V Code § 999(b)(7) (definition); *see also 2 Cal. Code Reg. §§ 1896.60-1989.95* (disabled veteran business goals)]. These goals apply to the overall dollar amount spent each year by the awarding department [PC Code § 10115(c); *see* PC Code § 10115.1(a) ("awarding department" defined)]. The participation goal for DVBEs is 3 percent [PC Code § 10115(c)].

In awarding contracts to the lowest responsible bidder, the awarding department must consider the efforts of a bidder to meet DVBE goals [PC Code § 10115.2(a); *see 2 Cal. Code Reg. §§ 1896.60-1896.95*]. To qualify, a bidder must either meet the statewide participation goals noted above or demonstrate that a good faith effort was made to meet them [PC Code § 10115.2(a); *2 Cal. Code Reg. § 1896.62*; *see* PC Code § 10115.2(b); *2 Cal. Code Reg. § 1896.63* (elements of good faith effort)].

A business enterprise will be certified by a governmental agency as a DVBE if it meets certain established criteria [*see* M&V Code § 999(b)(7)(A)]. For a checklist to determine eligibility for DVBE preferences, see*§ 90A.112*.

Similar participation requirements may be applied to public utility procurement contracts providing subcontracting opportunities [*see* PU Code § 8281 et seq.].

[2] Businesses of Minority and Women Entrepreneurs

State law provides that in awarding contracts to the lowest responsible bidder, state departments must consider the efforts of the bidder to meet specified minority, women, and disabled veteran business goals, and award contracts to the lowest responsible bidder meeting or making good faith efforts to meet these goals [PC Code § 10115.2(a)]. Under the statutory scheme, a state department cannot award a contract to a bidder who neither meets nor makes a good faith effort to meet the percentage participation goals. To satisfy the requirement of "good faith efforts," the bidder must submit documentary evidence of actions taken to identify, focus advertising on, solicit, and consider bids from

subcontracting firms in the designated business enterprise groups [PC Code § 10115.2(b)]. When specifying the general conditions under which bids are taken in connection with the award of any contract, awarding departments must advise persons submitting bids to identify "each subcontractor certified as a minority, women, or disabled veteran business enterprise who will perform work or labor or render services to the prime contractor in connection with the performance of the contract and who will be used by the prime contractor to fulfill minority, women, or disabled veteran business enterprise participation goals" [PC Code § 10115.12]. Awarding departments are also compelled to establish a method of monitoring adherence to the stated participation goals, along with "rules and regulations for the purpose of implementing the article" [PC Code § 10115.3].

The Ninth Circuit in 1997 held that the participation goals for women and minority firms, and the requirement that contractors make good faith efforts to do outreach to women and minority firms, contained in PC Code § 10115 et seq., violated the *Equal Protection Clause* [*Monterey Mechanical Co. v. Wilson (9th Cir. 1997) 125 F.3d 702, 714-715]* . The court concluded that the mandates of the law classify "contractors differently according to their ethnicity and sex, with regard to the good faith requirement" [*Monterey Mechanical Co. v. Wilson (9th Cir. 1997) 125 F.3d 702, 711]* . The statutory compliance "also imposes higher compliance expenses on some firms than others, according to ethnicity and sex" [*Monterey Mechanical Co. v. Wilson (9th Cir. 1997) 125 F.3d 702, 712]* . Thus, the court determined that "[t]he statute benefits bidders and subcontractors who fit the classification 'minority business enterprise' and 'women business enterprise' " [*Monterey Mechanical Co. v. Wilson (9th Cir. 1997) 125 F.3d 702, 713-714]* . The court also concluded that "racial classification" imposed by the statutory scheme did not survive the "strict scrutiny" test of justification, which demands proof of "a narrowly tailored remedy for past discrimination, active or passive, by the governmental entity making the classification" [*Monterey Mechanical Co. v. Wilson (9th Cir. 1997) 125 F.3d 702, 713]* .

In response to the Ninth Circuit's opinion in *Monterey Mechanical*, the Governor of California issued Executive Order No. W-172-98. The order directed all state agencies and departments to "cease any enforcement of minority and business enterprise participation goals and the good faith efforts requirements related thereto under PC Code § 10115 et seq." entered into on or after March 10, 1998. The order further stated: "All actions, programs, and regulations which seek to monitor, promote, or comply with the minority or women business enterprise goals or the good faith efforts related thereto under PC Code § 10115 et seq. shall no longer be administered and where appropriate, be repealed."

This order does not apply to state contracts administered under other statutes that are federally funded or to contracts with entities such as cities, counties, port authorities, and utility companies [*see Monterey Mechanical Co. v. Wilson (9th Cir. 1997) 125 F.3d 702, 714-715* ; Executive Order No. W-172-98; Management Memo 98-04]. Programs not impacted by the *Monterey Mechanical* decision that remain in effect include the small business certification program and the disabled veterans business enterprise program [*see Monterey Mechanical Co. v. Wilson (9th Cir. 1997) 125 F.3d 702, 714-715* ; Executive Order No. W-172-98; Management Memo 98-04; *see also* PU Code § 8281 et seq. (participation requirements applicable to public utility procurement contracts providing subcontracting opportunities for minority and women entrepreneurs)].

[3] Joint Powers Agreements

Participation goals have been extended to include relationships between state agencies and other governmental entities. State agencies or departments that enter into joint powers agreements with a federal, county, or city government or agency or public district must ensure that participation goals are met [*Gov. Code § 6522*]. "Joint powers agreements" are agreements in which the contracting parties may jointly exercise any power inherent to either party [*see Gov. Code § 6502*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGeneral OverviewPublic Contracts LawBusiness Aids & AssistanceSource PreferencePublic Contracts LawTypes of ContractsGeneral Overview

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29-90A California Legal Forms--Transaction Guide § 90A.65

§ 90A.65 Procurement Mandates for Recycled Products

Under the State Agency Buy Recycled Campaign (SABRC) [PC Code § 12200 et seq.], state agencies must purchase recycled products, instead of nonrecycled products, whenever recycled products of equal fitness and quality are available at the same, or lesser, total cost [PC Code § 12201(c); *see* PC Code § 12200(j) ("recycled product purchase" defined)]. Each state agency must ensure that at least 50 percent of reportable purchases for specified product categories are recycled products [PC Code § 12203(a),*(b)*; *see* PC Code § 12207 (applicable product categories)]. Each state agency also must require all businesses [PC Code § 12200(b) (definition)] to certify in writing the minimum percentage, if not the exact percentage, of post-consumer material in the products, materials, goods, or supplies offered or sold to the state, regardless of whether the product meets the defined minimum post-consumer content requirements [*see* PC Code § 12205(a)(1),*(b)(1)*; *see also* PC Code § 12209 (minimum post-consumer content requirements)].

Local governments are encouraged to purchase recycled products whenever they are available at the same, or a lesser, total cost than nonrecycled products [PC Code § 22150(a)]. Local public entities may give preference to suppliers of recycled products, and may define the amount of this preference [PC Code § 22150(b),*(c)*]. Local public entities must require all businesses to certify in writing the minimum, if not the exact, percentage of post-consumer material in the products, materials, goods, or supplies offered or sold [*see* PC Code § 22152(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewPublic Contracts LawBusiness Aids & AssistanceSource PreferencePublic Contracts LawTypes of ContractsGeneral Overview

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29-90A California Legal Forms--Transaction Guide §§ 90A.66-90A.99

[Reserved]

§§ 90A.66[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 90A STATE GOVERNMENT CONTRACTS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

29-90A California Legal Forms--Transaction Guide § 90A.100

§ 90A.100 Prequalification of Construction Contract Bidder

NOTE:

Whenever a contracting department requires any bidder to prequalify on a contract, the department must require all prospective bidders to that contract to prequalify [PC Code § 10160]. Prequalification is initiated by answering a confidential financial statement and questionnaire [PC Code §§ 10160, *10165*]. The following information is needed to complete the prequalification questionnaire that the contracting department will furnish to a first-time prospective bidder. Because the prequalification questionnaire requires financial information and other accounting data, the assistance of the client's accountant may be required.

The information listed here can also be useful to prequalify for other types of contracts that require prequalification such as contracts with the California State University [***see*** PC Code § 10760; ***see also*** *§ 90A.25*].

[1] Facts

1. Name, corresponding with that on contractor's license issued to bidder.

2. Type of business entity:

a. Corporation.

b. Partnership.

c. Sole proprietorship.

d. Combination of businesses, and, if so, type of each component entity.

NOTE:
If business entity is another type (for example, a limited liability company), that fact should be indicated on the questionnaire.

3. Address of principal office.

4. Whether prospective bidder has contractor's license issued by state.

NOTE:
It is a misdemeanor for an unlicensed person to engage in the business or act as a contractor by submitting a bid to a public agency, unless the person is particularly exempted or the bid is submitted on certain state projects [***see*** PC Code § 10164] or certain local agency projects [***see*** PC Code § 20103.5] allowing for proper licensing up to the time the contract is awarded [*B&P Code § 7028.15(a)*]. These requirements do not apply to joint venture licenses [*B&P Code § 7028.15(c)*].

a. License number.

b. Type or specialty.

c. Date of issue.

5. Bidder's experience:

a. Type of work.

b. Number of years of experience in that type of work as:

(1) General contractor.

(2) Subcontractor.

6. Projects completed by bidder during last three years:

a. Type of work.

b. Value of work performed.

c. Location of work.

d. Name of person for whom work was performed.

e. Year completed.

7. Contracts not completed:

a. By bidder, bidder's organization, or any officer or partner.

b. Details, including:

(1) Type of work.

(2) Name of person for whom work was to be performed.

(3) Reasons for noncompletion.

8. Name of any firms currently prequalified with state in which bidder has controlling interest.

9. Names of other businesses in which bidder has financial interests.

10. Names of persons with whom bidder has been associated in business as partners or associates for last five years.

11. Construction experience of principal members of bidder's present organization:

a. Name of individual.

b. Position with bidder.

c. Years of construction experience.

d. Magnitude and type of work.

e. Capacity in which individual performed each type of work.

12. If bidder is a corporation:

a. Capital paid in cash.

b. Date of incorporation.

c. State of incorporation.

d. If foreign corporation, date of qualification to do business in California.

e. Names of officers:

(1) President.

(2) Vice-president.

(3) Secretary.

(4) Treasurer.

13. If bidder is partnership:

a. Whether general, limited, or association.

b. Name and address of each partner.

14. If bidder is limited liability company or another entity:

a. Names and addresses of members, as applicable.

b. Other information as required.

15. Year in which bidder was last prequalified as bidder for state construction projects.

16. Bidder's cash assets:

a. Amount on hand.

b. Amount on deposit in bank, including:

(1) Name of bank.

(2) Location of bank.

(3) Name in which deposit made.

17. Notes receivable:

a. Amount due.

b. Due dates:

(1) Within one year.

(2) After one year.

(3) Past due.

c. Names of persons from whom due.

d. Reason for note.

e. Maturity date.

f. Description of security.

g. If any note has been sold or discounted:

(1) Amount.

(2) Name of holder.

(3) Reason for sale or discount.

18. Accounts receivable from completed construction contracts exclusive of claims not approved for payment:

a. Amounts due.

b. Name of person from whom due.

c. Type of work involved.

d. Contract amount.

e. If any account receivable has been assigned, sold, or pledged:

(1) Amount.

(2) Name of holder.

(3) Reason for assignment, sale, or pledge.

19. Accounts receivable from sources other than construction contracts:

a. Name of person from whom receivable.

b. Reason for account.

c. Due date.

d. Contract amount.

e. Amount past due.

f. Amount assigned, sold, or pledged.

20. Amounts earned on incomplete contracts (based on architect or engineer estimates):

a. Amounts due.

b. Name of person from whom due.

c. Type of work involved.

d. Contract amount.

21. Advances to construction joint ventures:

a. Name of joint venture.

b. Type of work.

c. Amount.

d. Amount assigned, sold, or pledged.

22. Materials in stock:

a. Description and quantity of each type.

b. Inventory value of these materials in following categories:

(1) Held for use on incomplete contracts.

(2) Future operations.

(3) Sale.

23. Negotiable securities:

a. Present market value of listed securities and present value of unlisted securities:

(1) Unit price.

(2) Amount.

b. Name of issuer.

c. Class of security.

d. Quantity.

e. Book value:

(1) Unit price.

(2) Amount.

f. Name of person who has possession.

g. If pledged or in escrow:

(1) For whom.

(2) Reason.

(3) Amount.

24. Description and amount of other current assets, including:

a. Bid deposits.

b. Prepaid expenses.

c. Cash value of life insurance.

d. Accrued interest.

25. Real estate:

a. Book value.

b. Location.

c. Description.

d. Name of titleholder.

e. Whether or not used for business purposes.

26. Value of construction plant and equipment.

27. Approximate annual income from rental of equipment owned by prospective bidder, exclusive of income from associated concerns.

28. Value of furniture and fixtures:

a. Appraised value if shown on appraisal schedule prepared by independent appraiser; or

b. Book value (cost less depreciation) if no appraisal schedule is available.

29. Description and value of noncurrent investments and assets.

30. Notes payable (other than equipment and real estate obligations):

a. To whom payable.

b. Security for note.

c. Due date.

d. Amount.

31. Accounts payable:

a. To whom payable.

b. For what due.

c. Due date.

d. Amounts not past due and amounts past due.

32. Description and amount of other current liabilities:

a. Accrued interest.

b. Taxes.

c. Insurance.

d. Salaries and payroll.

e. Dividends.

33. Amount of real estate encumbrances.

34. Construction equipment obligations secured by equipment:

a. Total payments due within and after six months.

b. Name of obligee.

c. Amount and frequency of installment payments.

d. Total amount.

35. Other noncurrent liabilities and notes payable:

a. Description.

b. Reason incurred.

c. Due date.

d. Amount.

36. Description and amount of reserves.

37. Dollar amount of capital stock (separated into common and preferred).

38. Net worth.

[2] Documents

NOTE:
If the client is a type of entity other than those listed below, obtain the appropriate documentation relating to formation and management.

1. Contractor's license issued by state.

2. If partnership, partnership agreement.

3. If corporation:

a. Articles of incorporation.

b. Bylaws.

4. Fictitious business name statement.

5. Certificate of qualification to do business in California if client is foreign corporation or limited partnership.

6. Contracts for work similar to that involved in prospective government contract:

a. Contracts for work currently in progress.

b. Contracts for work performed within last three years.

7. Prequalification certificate previously issued by any state contracting entity.

8. Inventory of assets.

9. Notes receivable.

10. Bank documents, such as:

a. Statements.

b. Passbook.

c. CD certificate.

11. Evidence of negotiable securities.

12. Notes payable.

13. Accounting statements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsPublic Contracts LawBids & FormationGeneral OverviewPublic Contracts LawTypes of ContractsConstruction Contracts

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 90A STATE GOVERNMENT CONTRACTS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

29-90A California Legal Forms--Transaction Guide § 90A.101

§ 90A.101 Prequalification of Vendor of Goods and Services

NOTE:

This information is required to complete the questionnaire used by the California Department of General Services to prequalify potential vendors of goods [***see*** PC Code § 10303 (lists of qualified bidders); ***see also*** *§ 90A.22[1][b]*]. The Department may adopt and publish lists of qualified bidders. However, the Department may not preclude a qualified bidder not on the list from submitting a bid or bids and from being awarded a contract or contracts as the successful bidder [PC Code § 10303]. For a copy of the questionnaire, write the Department of General Services, Procurement Division, 1823 14th Street, Sacramento, CA 95814, or call (916) 445-6942 (Technical Staff). The Procurement Division operates as a clearinghouse of information for vendors and contractors seeking to do business with the state.

[1] Facts

1. Name and address.

2. Geographical description of marketing area served by client.

3. Description of service provided by client to accounts in areas beyond those normally served by its offices, warehouses, or other facilities.

NOTE:

A prospective vendor must show evidence of satisfactory service to accounts in the area it serves [*2 Cal. Code Reg. § 1890(b)(2)*].

4. Products offered by client.

NOTE:

A prospective vendor must show that the products it offers comply with standard state specifications [*2 Cal. Code Reg. § 1890(b)(3)*].

5. Amount of experience client has in selling its products.

6. Amount of experience client has in providing post-purchase service to its accounts, when applicable:

a. Number of years.

b. Availability of appropriate personnel.

NOTE:
A prospective vendor must show evidence of experience in selling and providing post-purchase service to accounts with requirements similar to the state [*2 Cal. Code Reg. § 1890(b)(4),(6)*].

7. Evidence of client's ability to supply products it offers:

a. Inventories readily available to client:

(1) New products and, if applicable, replacement or repair parts; or

(2) Ability to augment its inventory from other sources adequate to assure timely delivery.

NOTE:
A vendor must have a readily available inventory of products and replacement or repair parts, if applicable [*2 Cal. Code Reg. § 1890(b)(5)*].

b. Ready availability of facilities and personnel capable of manufacturing those products.

NOTE:
When pertinent, the client will have to show that it is capable of manufacturing products to state specifications [*2 Cal. Code Reg. § 1890(b)(8)*].

8. Whether client has any licenses or permits necessary to furnish goods or perform services it offers.

NOTE:
A vendor must have all licenses and permits required to furnish materials or perform labor under the contract [*2 Cal. Code Reg. § 1890(b)(7)*].

9. If client qualifies as small business [*see Gov. Code § 14837(d)(1)*; *2 Cal. Code Reg. § 1896.4(w)* (definition) or microbusiness [*see Gov. Code § 14837(d)(2)*; *2 Cal. Code Reg. § 1896.4(q)* (definition)], evidence of [*see 2 Cal. Code Reg. § 1896.12(d)(1)*]:

NOTE:
Special consideration is given to small businesses and microbusinesses by reducing both the experience required and the level of inventory normally required [*Gov. Code § 14838(c)*; ***see*** *2 Cal. Code Reg. § 1890* (inventory and experience normally required); PP 1-8, NOTES, ***above***].

a. Organizational structure.

b. Operations during previous three tax years (or years business has been in existence if fewer than three tax years).

c. Business relationships during previous three tax years.

[2] Documents

NOTE:
The documents listed here are those particularly required to prequalify as vendor of goods or services. For a list of documents generally applicable to all government contract proposals, see *§ 90A.100[2]*.

1. Licenses and permits issued by public entities.

2. Evidence of sufficient experience.

3. List of inventory on hand or readily obtainable.

4. Evidence of sufficient personnel.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewPublic Contracts LawBids & FormationGeneral OverviewPublic Contracts LawTypes of ContractsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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A. Client Interview--Facts and Documents

29-90A California Legal Forms--Transaction Guide § 90A.102

§ 90A.102 Qualification for Small Business Status

NOTE:

"Small business" means an independently owned and operated business that is not dominant in its field of operation, the principal office of which is located in California, the officers of which are domiciled in California, and which, together with affiliates, has 100 or fewer employees, and average annual gross receipts of $10,000,000 or less over the previous three years, or is a manufacturer [***see*** *Gov. Code § 14837(c)* (definition)] with 100 or fewer employees [*Gov. Code § 14837(d)(1)*; ***see*** *2 Cal. Code Reg. § 1896.4(w)* ("small business" means business that meets eligibility requirements and has been certified by Department of General Services as small business)]. For the purposes of the implementing regulations, the term "small business" includes a microbusiness [*2 Cal. Code Reg. § 1896.4(w)*]. A "microbusiness" is a small business which, together with affiliates, has average annual gross receipts of $2,500,000 or less over the previous three years, or is a manufacturer [***see*** *Gov. Code § 14837(c)* (definition)], with 25 or fewer employees [*Gov. Code § 14837(d)(2)*; *2 Cal. Code Reg. § 1896.4(q)*].

[1] Facts

1. Name and address of:

a. Principal office of prospective applicant for small business certification.

b. Any affiliate.

NOTE:

An "affiliate" or "affiliation" refers to a relationship of direct or indirect control or shared interests between the applicant or a small business and another business [*2 Cal. Code Reg. § 1896.4(a)*; ***see*** *2 Cal. Code Reg. § 1896.12(d)(7)* (factors used to determine affiliation)].

2. Following information for applicant or applicant and affiliate combined [*2 Cal. Code Reg. § 1896.12(a),(d)(9)*]:

a. Annual dollar volume of business.

b. Number of employees.

c. Financial resources.

d. Competitive status or position.

NOTE:
An applicant business that exercises or has the ability to exercise a controlling or major influence, on a statewide basis, in a kind of business activity or field of operation in which a number of business concerns are primarily engaged, is considered dominant in its field of operation [*2 Cal. Code Reg. § 1896.12(d)(9)*].

e. Ownership or control of materials or processes.

f. License agreements.

g. Facilities.

h. Sales territory.

i. Nature of business activity.

3. Addresses of firm's officers.

4. Type of work firm specializes in:

a. Construction contracting.

b. Non-manufacturer engaged in contracting to supply goods.

c. Manufacturer engaged in contracting to supply goods.

5. Aggregate amount of gross receipts from business operations of firm and its affiliates for preceding three years [*see 2 Cal. Code Reg. § 1896.12(a)(5)(A),(b)(1)*].

6. Information relating to [*see 2 Cal. Code Reg. § 1896.12(d)(1)*]:

a. Organizational structure.

b. Operations during previous three tax years (or years business has been in existence if fewer than three tax years).

c. Business relationships during previous three tax years.

7. Whether any owners or managers are disabled veterans.

NOTE:

Disabled veteran business enterprise [***see*** *Gov. Code § 14837(e)*, M&V Code § 999(b)(7) (definition)] are given preference in the event of a tie between low bidders eligible for preferred status [*Gov. Code § 14838(f)*; ***see*** *§ 90A.61*].

[2] Documents

NOTE:

The documents listed here are those particularly required to qualify as a small business. For a list of documents generally applicable to all government contract proposals, see *§ 90A.100[2]*.

1. Financial information for business and affiliate.

2. Tax returns for previous three tax years (or years business has been in existence if fewer than three) [*see 2 Cal. Code Reg. § 1896.12(d)(1)*]:

a. Filed with Internal Revenue Service.

b. Filed with Franchise Tax Board.

3. Evidence of qualification as disabled veteran business, such as [*see 2 Cal. Code Reg. § 1896.70(b)*; *see also § 90A.112[3]*]:

a. Completed Small Business Certification Application, STD.812 [*see § 90A.230[2]*], and/or Disabled Veteran Business Certification Application, STD.812 [*see 2 Cal. Code Reg. § 1896.95* (required forms); *see also § 90A.230[2]*].

NOTE:

The implementing regulations concerning small business certification are contained in *2 Cal. Code Reg. § 1896.2 et seq.* The implementing regulations concerning disabled veteran business enterprises are contained in *2 Cal. Code Reg. § 1896.60 et seq.*

b. Copy of Award of Entitlement letter from Department of Veterans Affairs or Department of Defense.

4. Evidence of [*see 2 Cal. Code Reg. § 1896.12(d)(1)*]:

a. Organizational structure.

b. Operations during previous three tax years (or years business has been in existence if fewer than three tax years).

c. Business relationships during previous three tax years.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewPublic Contracts LawBusiness Aids & AssistanceSmall BusinessesPublic Contracts LawTypes of ContractsGeneral Overview

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29-90A California Legal Forms--Transaction Guide §§ 90A.103-90A.109

[Reserved]

§§ 90A.103[Reserved]

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29-90A California Legal Forms--Transaction Guide § 90A.110

§ 90A.110 Qualification for Small Business Preference

NOTE:

A firm that has been found to qualify as a small business or as a microbusiness may be granted a preference of 5 percent of the lowest responsible bid submitted by a bidder other than a small business, and given special consideration in qualifying for construction, services, and supplies contracts [***see*** *Gov. Code § 14838(b),(c)*; ***see also*** *§ 90A.61*]. "Small business" means an independently owned and operated business that is not dominant in its field of operation, the principal office of which is located in California, the officers of which are domiciled in California, and which, together with affiliates, has 100 or fewer employees, and average annual gross receipts of $10,000,000 or less over the previous three years, or is a manufacturer [***see*** *Gov. Code § 14837(c)* (definition)] with 100 or fewer employees [*Gov. Code § 14837(d)(1)*; ***see*** *2 Cal. Code Reg. § 1896.4(w)* ("small business" means business that meets eligibility requirements and has been certified by Department of General Services as small business)]. For the purposes of the implementing regulations, the term "small business" includes a microbusiness [*2 Cal. Code Reg. § 1896.4(w)*]. A "microbusiness" is a small business which, together with affiliates, has average annual gross receipts of $2,500,000) or less over the previous three years, or is a manufacturer [***see*** *Gov. Code § 14837(c)* (definition)], with 25 or fewer employees [*Gov. Code § 14837(d)(2)*; *2 Cal. Code Reg. § 1896.4(q)*].

Disabled veteran business enterprise [***see*** *Gov. Code § 14837(e), Mil. & Vet. Code § 999(b)(7)* (definition)] are given preference in the event of a tie between low bidders eligible for preferred status [*Gov. Code § 14838(f)*; ***see*** *§ 90A.61*].

Qualified small businesses should keep in mind that state agencies are authorized to apply certain considerations to business awards made to small businesses, including the following [*Gov. Code § 14847(a)*]:

- Whether the bidder has the necessary facilities, organizational capacity, experience, managerial and technical competency and skills, and financial resources to fulfill the terms of the contract.

- Whether the bidder has the capability to comply with the required delivery or performance schedule, taking into consideration other business commitments.

- Whether the bidder has a history of satisfactory or better performance, as demonstrated by a results-oriented track record, written performance evaluations, or other information obtained from references.

A business that has been certified by another governmental organization may be eligible for certification as a small business if the organization uses substantially the same definitions as those set forth in *Gov. Code § 14837* (or more stringent definitions) and substantially the same certification analysis process as used by the Department of General Services (or a more stringent process) [*2 Cal. Code Reg. § 1896.12(f)*].

1. Does firm satisfy following requirements for qualification as small business or microbusiness for purposes of small business preference [*see Gov. Code § 14837*; *2 Cal. Code Reg. § 1896.12(a)*]:

a. Is firm independently owned and operated?

NOTE:
For a list of factors that presumptively show that an applicant business is not independently owned and operated, see *2 Cal. Code Reg. 1896.12(d)(8)*.

b. Is its principal office located in California?

NOTE:
For considerations in determining location of principal office, see *2 Cal. Code Reg. 1896.12(d)(6)*.

c. If firm is corporation, are its officers and/or managers domiciled in California?

NOTE:
For considerations in determining domicile, see *2 Cal. Code Reg. 1896.12(d)(5)*.

d. If firm is limited liability company, are officers and/or managers domiciled in California, or in absence of officers and/or managers, are all members domiciled in California?

e. If firm is any other type of business entity, are owners domiciled in California?

f. Does firm satisfy requirement that it may not itself, or together with any affiliate, be dominant in its field of operations, based on consideration of following factors [*see 2 Cal. Code Reg. § 1896.12(d)(9)*]?

NOTE:
"Affiliate" or "affiliation" refers to a relationship of direct or indirect control or shared interests between the applicant or a small business and another business [*2 Cal. Code Reg. § 1896.4(a)*; ***see*** *2 Cal. Code Reg. § 1896.12(d)(7)* (factors considered in determining affiliation)].

(1) Volume of business [*see* PP 2-4, *below*].

(2) Number of employees.

NOTE:

A small business, together with all affiliates, must have 100 or fewer employees [*2 Cal. Code Reg. § 1896.12(a)(5)(A)*]. A manufacturer seeking to qualify for small business certification, together with all affiliates, must have 100 or fewer employees [*2 Cal. Code Reg. § 1896.12(a)(5)(B)*]. Manufacturer, in this context, means a business as defined in *Gov. Code § 14837(c)* that meets the eligibility criteria for small business certification [*2 Cal. Code Reg. § 1896.4(p)*; ***see*** *2 Cal. Code Reg. § 1896.12(d)(4)* (consideration in determining whether business is manufacturer)].

A microbusiness must have 25 or fewer employees [*2 Cal. Code Reg. § 1896.12(q)*]. A manufacturer seeking to qualify for microbusiness certification, together with all affiliates, must have 25 or fewer employees [*2 Cal. Code Reg. § 1896.12(b)(2)*]. Joint ventures must be certified on a bid-by-bid basis. The joint venture is not subject to the average annual gross receipts and employee limits imposed by the Small Business Procurement and Contract Act [***see*** *Gov. Code § 14835 et seq.*]. However, each individual business participating in the joint venture must be certified as a small business [*2 Cal. Code Reg. § 1896.12(c)*].

(3) Financial resources.

NOTE:

The regulations do not specify a particular amount of financial resources.

(4) Competitive status or position.

NOTE:

A firm that can qualify as a small business eligible for assistance in state contracting is one that is not itself, or together with any affiliate, dominant in its field of operations [***see*** *2 Cal. Code Reg. § 1896.12(a)(4)*]. An applicant business that exercises or has the ability to exercise a controlling or major influence, on a statewide basis, in a kind of business activity or field of operation in which a number of business concerns are primarily engaged, is considered dominant in its field of operation [*2 Cal. Code Reg. § 1896.12(d)(9)*].

(5) Ownership or control of materials or processes.

(6) License agreements.

(7) Facilities.

(8) Sales territory.

(9) Nature of the business activity.

g. Does firm have average annual gross receipts of $10,000,000 or less over previous three years, if applying for small business certification [*see Gov. Code § 14837(d)(1)*; *2 Cal. Code Reg. § 1896.12(a)(5)(A)*]?

h. Does firm have average annual gross receipts of $2,500,000 or less over previous three years, as adjusted in accordance with *Gov. Code § 14837(d)*, if applying for designation as microbusiness [*see Gov. Code § 14837(d)(2)*; *2 Cal. Code Reg. § 1896.12(b)(1)*]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewPublic Contracts LawBusiness Aids & AssistanceSmall BusinessesPublic Contracts LawTypes of ContractsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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29-90A California Legal Forms--Transaction Guide § 90A.111

§ 90A.111 Qualification for Distressed Area Preference

NOTE:

If an invitation for bids does not fix a worksite, the state will award a 5 percent preference to California companies bidding on goods and services contracts that certify that a qualifying amount of labor to perform a contract will be accomplished in a distressed area [***see*** *Gov. Code §§ 4533, 4534*]. A "distressed area" is a California urban area identified by the California Office of Planning and Research as such and as containing a population meeting income, age, racial, and educational criteria specified by law [***see*** *Gov. Code § 4532(d)*]. The Department of General Services, Procurement Division, in cooperation with the state Office of Planning and Research, will assist prospective bidders in identifying distressed areas [***see*** *2 Cal. Code Reg. § 1896.38*]. For further discussion, see *§ 90A.63*.

1. Can potential bidder certify as follows:

a. If procurement is for goods, that no less than half of labor required to perform contract will be accomplished at identified worksites located [*Gov. Code §§ 4533, 4533.1*]:
(1) In distressed area; or

(2) Within commuting distance of distressed area.

b. If procurement is for services, that not less than 90 percent of total labor hours required to perform contract will be accomplished at identified worksites located in distressed area [*Gov. Code § 4534*]?

2. What percentage of workforce of certifying bidder can be employed from among population with high risk of unemployment [*see Gov. Code §§ 4533.1, 4534.1*]?

NOTE:

If a bidder can certify the a qualifying percentage of persons with a high risk of unemployment will be hired, the state will grant the additional preferences listed below [*Gov. Code §§ 4533.1, 4534.1*]. A "person with a high risk of unemployment" is one who qualifies an employer for the work opportunity credit component of the general business credit [***see** I.R.C. § 38(b)(2)*], determined under *I.R.C. § 51(a)*. Qualifying employees include economically disadvantaged youth, Vietnam veterans, ex-convicts, SSI recipients, and others [***see** Gov. Code § 4532(f)(1)*], as well as recipients of CalWORKS [***see** Gov. Code § 4532(f)(2)*]. The Employment Development Department will assist prospective bidders to certify that they will employ persons with a high risk of unemployment [*2 Cal. Code Reg. § 1896.39*].

a. From 5 to 9 percent of workforce (1-percent preference).

b. From 10 to 14 percent of workforce (2-percent preference).

c. From 15 to 19 percent of workforce (3-percent preference).

d. Twenty percent or more of workforce (4-percent preference).

Legal Topics:

For related research and practice materials, see the following legal topics:
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DIVISION VI: PERFORMANCE OF SERVICES
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29-90A California Legal Forms--Transaction Guide § 90A.112

§ 90A.112 Qualifying as Disabled Veteran Business Enterprise

NOTE:

All state contracts for construction, professional services, materials, supplies, equipment, alteration, repair, or improvement must comply with specified participation goals for disabled veteran business enterprises [PC Code § 10115(c)]. These goals apply to the overall dollar amount spent each year by the awarding department [***see*** PC Code § 10115.1(a) (definition)]. These goals are usually met by prime contractors subcontracting the required percentages of contract work to qualifying businesses. It is therefore advantageous to qualify as a disabled veteran business enterprises. A business enterprise will be certified by a governmental agency as a qualifying business enterprise if it meets the criteria set forth below [M&V Code § 999(b)(7)(A)]. For further discussion of these participation goals, see *§ 90A.64*.

In certain types of contracts, such as University of California procurement contracts, business enterprises meeting the criteria specified here receive preference in the event of a tie [***see*** PC Code § 10501].

A "disabled veteran" is a veteran of the military, naval, or air service of the United States who has at least 10 percent service-connected disability and who is domiciled in California [M&V Code § 999(b)(6)]. In order to obtain disabled veteran business enterprise (DVBE) certification, all of the following criteria must be met [*2 Cal. Code Reg. § 1896.70*; ***see*** M&V Code § 999 et seq. (disabled veteran participation goals for state contracts)].

Regardless of PP 1-4, ***below***, a business that qualified as a disabled business enterprise before the death or permanent disability of the disabled veteran who is a majority owner of that business is deemed to be, solely for the purpose of any contract entered into before that death or certification of permanent disability, a disabled business enterprise for a period not to exceed three years after the death or certification, if the business is inherited or controlled by the spouse or child of the majority owner, or by both those persons [M&V Code § 999(b)(7)(B)].

1. Is business sole proprietorship, subsidiary, corporation, or joint venture:

a. At least 51 percent owned by one or more disabled veterans; or

b. For business whose stock is publicly held, one for which at least 51 percent of stock is owned by one or more disabled veterans?

2. Are management and daily operations of business controlled by one or more disabled veterans who own business?

NOTE:

To have operational control, the qualifying disabled veteran must demonstrate that he or she independently makes basic decisions in daily operations. He or she must maintain an active role in controlling the business [*2 Cal. Code Reg. § 1896.61(f)*]. A business's certification as a DVBE can be suspended by the Department of General Services if this requirement is not substantially and continuously met [*e.g., Niles Freeman Equip. v. Joseph (2008) 161 Cal. App. 4th 765, 770-771, 74 Cal. Rptr. 3d 690* (business entity was 51-percent owned by disabled veteran in partnership with other person, but certified status as DVBE was properly suspended because that veteran actually received very small portion of profits and had no significant role in business operations, while partner ran business and took most profits)].

3. Does business have home office located in United States?

4. Is business not branch or subsidiary of foreign business?

5. Can business provide required certification [*see § 90A.230*; *see also § 90A.202[1][c]*]?

6. Does business perform "commercially useful function?"

NOTE:

A DVBE contractor, subcontractor, or supplier is considered to perform a commercially useful function if (1) the business, person, or entity is responsible for the execution of a distinct element of the work of the contract, carrying out its obligation by actually performing, managing, or supervising the work involved, and performing work that is normal for its business services and functions; and (2) the business, person, or entity is not further subcontracting a greater portion of the work than would be expected by normal industry practices [M&V Code § 999(b)(5)(B); *2 Cal. Code Reg. § 1896.61*(***I***)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewPublic Contracts LawBusiness Aids & AssistanceMinority, Women-Owned & Disadvantaged BusinessesDisabled-Owned BusinessesPublic Contracts LawTypes of ContractsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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29-90A California Legal Forms--Transaction Guide § 90A.113

§ 90A.113 Qualification of Vendor of Goods and Services

NOTE:

Vendors seeking to qualify to do business with the state must present evidence that they have the ability, resources, and facilities to adequately supply the state. The Department of General Services will consider all of the following in reviewing vendor applications [*2 Cal. Code Reg. § 1890(b)*].

1. Can prospective vendor prequalify as one adequately able to supply state [*see 2 Cal. Code Reg. § 1890(b)*]:

a. Does it provide satisfactory service to accounts in areas beyond those normally served by its offices, warehouses, or other facilities [*2 Cal. Code Reg. § 1890(b)(2)*]?

b. Do products it offers comply with standard state specifications [*2 Cal. Code Reg. § 1890(b)(3)*]?

NOTE:

The specifications are available from the agency awarding the contract.

c. Does it have adequate experience in selling and providing post-purchase service to accounts with requirements similar to those of state [*2 Cal. Code Reg. § 1890(b)(4)*; *but see* P h, *below* (small businesses)]?

NOTE:

The prospective bidder should provide proof that it has provided post-purchase service to accounts with requirements similar to those indicated in the state's solicitation for offers, as well as the period of time over which it has done so. Vendors with less than two years experience in selling the products involved

must show evidence of satisfactory service to other purchasing accounts in quantities and qualities similar to that normally required by the state [*2 Cal. Code Reg. § 1890(b)(4)*]. The determination that the applicant has demonstrated adequate experience, or that a small business vendor has provided satisfactory service, is made on a case-by-case basis by the Department.

d. Is there ready availability of inventories [*2 Cal. Code Reg. § 1890(b)(5)*; *but see* P h, *below* (small businesses)]:

(1) New products and, if applicable, replacement or repair parts; or

(2) Ability to augment its inventory from other sources adequate to assure timely delivery?

e. Are appropriate personnel available to provide post-purchase service or technical assistance on timely basis, when applicable [*2 Cal. Code Reg. § 1890(b)(6)*]?

f. Does prospective vendor have all licenses and permits needed to furnish required supplies or perform required services [*2 Cal. Code Reg. § 1890(b)(7)*]?

g. Does prospective vendor have facilities and personnel capable of manufacturing products to state specifications readily available, when applicable [*2 Cal. Code Reg. § 1890(b)(8)*]?

h. Does prospective vendor qualifies as small business [*see § 90A.110*]?

2. Does prospective vendor have other attributes contributing to determination of responsibility at time of award, such as [*2 Cal. Code Reg. § 1890(d)*]:

NOTE:

A contract for the acquisition or lease of goods will be awarded to the lowest responsible bidder who meets the specifications for the contract. The question of whether a bidder is "responsible" involves evaluation of the following factors at the time of award [***see** 2 Cal. Code Reg. § 1890(d)*].

In prequalifying, a prospective vendor must show that it satisfies some of these requirements [***see** 2 Cal. Code Reg. § 1890(b)*; ***see also** § 90A.121*]. The fact that it is prequalified will be considered, but the awarding state agency may still make a determination of nonresponsibility at the time of a particular award [*2 Cal. Code Reg. § 1890(d)*].

a. Experience.

b. Facilities.

c. Reputation.

d. Financial resources.

e. Other factors existing at time of award.

NOTE:

Although the regulations do not spell out what these factors might be, the contracting agency will likely consider past performance of other contracts as one of the most important factors relating to any particular bidder's responsibility.

3. If prospective bidder qualifies as small business [*see § 90A.110*], would that bidder be considered responsible without regard to fact that it may be entitled to small business preference?

NOTE:

For purposes of the small business preference, the "lowest responsible bid" is the one that, under the criteria set forth in the invitation for bids, would be entitled to an award without regard to any preference [*2 Cal. Code Reg. § 1896.30(i)*].

4. Is vendor in violation of air or water pollution requirements?

NOTE:

No state agency may purchase supplies, equipment, or services from any vendor in violation of state or federal air or water pollution requirements [***see*** *Gov. Code § 4477*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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29-90A California Legal Forms--Transaction Guide § 90A.120

§ 90A.120 Prequalification for Construction Contracts

1. Advise prospective bidder to prequalify for right to submit bids [*see* PC Code § 10160 (questionnaire and financial statement); *see also* PC Code § 10163 (rating bidders based on prequalification rating)]:

NOTE:

A contracting department may require prospective bidders to prequalify, that is, to complete, verify, and submit a standard questionnaire and financial statement, including a complete statement of the prospective bidder's financial ability and experience in performing public works; whenever a department requires any bidder to prequalify on a contract, the department must require all prospective bidders to that contract to prequalify [PC Code § 10160].

If prequalification is mandatory [***see*** PC Code § 10160], the questionnaire must be obtained from the contracting department, completed, and submitted to it before the department will furnish a proposal form. The contracting department may not furnish proposal forms to any prospective bidder who, although required to submit prequalification documents, has not submitted the prequalification documents at least five days, and been prequalified for at least one day, before the date for opening bids [PC Code § 10166]. If prequalification is not mandatory, the questionnaire is often provided as part of the bid package. For further discussion, see *§ 90A.21[2]*.

a. Complete questionnaire obtained in advance from Department or furnished by it with bid package, detailing prospective bidder's financial ability and experience.

b. Verify questionnaire under oath [*see* PC Code § 10160].

2. Advise prospective bidder to complete questionnaire concerning any prior disqualification, removal, or debarment in government contracting, including [PC Code § 10162]:

NOTE:
A bid may be rejected on the ground that the bidder, any of its officers, or any of its employees who have a proprietary interest in the firm have been disqualified, removed, or otherwise prevented from bidding on or completing a government contract for violation of law or a safety regulation [PC Code § 10162].

a. Whether bidder or any of its officers or employees who have proprietary interest in bidder has ever been disqualified, removed, or otherwise prevented from bidding on or completing any federal, state, or local government project for violation of:
(1) Law; or

(2) Safety regulation.

b. Under what circumstances disqualification, removal, or debarment occurred.

3. Advise prospective bidder that it may be required to complete questionnaire concerning past safety record of [PC Code § 10161]:

NOTE:
The Department of General Services may refuse to prequalify a prospective bidder who fails to submit a completed questionnaire when required. Prequalification may also be refused if information disclosed in the questionnaire or otherwise known to the department indicates a continuing unsatisfactory safety record [PC Code § 10161].

a. Bidder itself;

b. Any officer of bidder; and

c. Any managing employee of bidder.

4. Advise prospective bidder that it must be licensed to perform contracting work involved.

a. If project does not involve use of federal funds, advise bidder that it must be properly licensed before bidding.

NOTE:
It is a misdemeanor to engage in the business or act in the capacity of a contractor without a contractor's license, unless the person is particularly exempted from the provisions governing contractors [*B&P Code § 7028(a)*, (b); ***see*** *B&P Code § 7040 et seq.* (exemptions)]. For discussion of contractor licensing, see Ch. 88, ***Licensing of Contractors*** . A prospective bidder must be appropriate to the project. If the classification is not self-evident in the specifications for any particular proposed project, clarification may be obtained by contacting the Department of General Services, Contract Management Office.

b. If project involves federal funds and bidder is not licensed at time of bid, advise it to become properly licensed before first payment for work or material may be made [PC Code § 10164].

NOTE:

In the case of a federally funded project, a bidder need not be properly licensed prior to submission of bid or award of contract [PC Code § 10164]. For discussion of the licensing requirements applicable to contractors who bid on public works projects, see *§ 90A.20*.

5. If prospective bidder appears qualified as small business [*see § 90A.110*]:

a. Complete form requesting that it be qualified as small business [*see § 90A.230[2]*].

b. Include proof of certification, if certified, in bid package.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsPublic Contracts LawBids & FormationGeneral OverviewPublic Contracts LawTypes of ContractsConstruction Contracts

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29-90A California Legal Forms--Transaction Guide § 90A.121

§ 90A.121 Prequalification for Vendors of Goods and Services

NOTE:

Prequalification is only one factor considered by the Department of General Services in reviewing vendor applications to determine whether a vendor will be viewed as a "responsible" bidder within the meaning of PC Code § 10301, which requires award of a contract for the acquisition or lease of goods in the amount of $25,000 or more be made to the lowest responsible bidder meeting specifications [***see*** PC Code § 10301; ***see also*** *2 Cal. Code Reg. § 1890*]. The other factors involved are outlined in *§ 90A.113*.

1. Advise prospective vendor that it must prequalify for right to submit bids [*see* PC Code § 10303].

NOTE:

The Department of General Services, Procurement Division, is required to rate bidders on the basis of questionnaires and required statements furnished by the Department and completed by prospective bidders to determine whether they prequalify as vendors of goods or services [***see*** PC Code § 10303; ***see also*** *2 Cal. Code Reg. § 1890*]. Special rules apply for small business bidders [***see*** *§ 90A.113*, P 1h].

2. Obtain copy of standard application form from Department of General Services, Procurement Division, Supplier Qualifications Unit, 1823 14th Street, Sacramento, CA 95814 [*see 2 Cal. Code Reg. § 1890(c)*].

3. Have prospective vendor complete questionnaire detailing its ability, resources, and facilities to supply state adequately, including evidence set forth in*§ 90A.113*, P 1 [*see 2 Cal. Code Reg. § 1890(b)* (test applied by Department in considering vendor application for prequalification)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewPublic Contracts LawBids & FormationGeneral OverviewPublic Contracts LawTypes of ContractsGeneral Overview

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29-90A California Legal Forms--Transaction Guide § 90A.122

§ 90A.122 Submission of Bids

NOTE:

Contracts made without complying with the competitive bidding process are void and unenforceable unless exempted by statute [*Shore v. Central Contra Costa Sanitary Dist. (1962) 208 Cal. App. 2d 465, 468, 25 Cal. Rptr. 419]* .

1. Advise prospective bidder to obtain bid package from contracting entity.

NOTE:

If prequalification is required, it must be accomplished before the department will furnish a bid package [***see*** PC Code § 10166]. See*§§ 90A.120* and *90A.121* for the applicable prequalification procedures. The advertisement for the procurement will inform the prospective bidder of the bidding opportunity and the address from which the bid package can be obtained. One convenient resource is the California State Contracts Register, published by the Department of General Services, Office of Small Business and Disabled Veteran Business Enterprise Services, 1531 I Street, Second Floor, Sacramento, CA 95814-2016. The contracts register may be accessed on the internet at http://www.osmb.dgs.ca.gov.

For state construction projects, bid packages are obtained from, and completed bids submitted to, the contracting agency.

2. Advise prospective bidder that after receipt of bid package it should review plans and specifications carefully to understand what is required and determine that there are no errors or inconsistencies in them.

NOTE:

Specifications may not, directly or indirectly, limit the bidding to the product or material of any one specific concern, or call for the use of any product, material, or service by specific brand or trade name unless the specification is followed by the words "or equal" [PC Code § 3400(a)]. If the contracting agency is aware of an equal product manufactured in California, that product must be named in the specification [PC Code § 3400(a)]. Exceptions are allowed when the product is designed to match others on a particular public project either completed or in the course of completion, if the awarding agency finds that a particular material, product, or service is particularly called for in order that a field test or experiment may be made to determine its suitability for future use, or in order to obtain a necessary item that is only available from one source, or in order to respond to specified emergencies [***see*** PC Code § 3400(b)].

3. Advise prospective bidder to complete proposal contained in bid package [*see generally § 90A.200*]. Proposal for state construction contract will require bidder to:

a. Propose price for which bidder will supply all materials and services and perform all work required by plans and specifications contained in bid package.

NOTE:

The attorney advising a prospective bidder should bear in mind several important cost factors that must be considered in estimating a bid price, including complying with wage, working hour, and workers' compensation requirements [***see*** PC Code § 10128; ***see also*** *Lab. Code § 1720 et seq.* (employment regulation and supervision for public works contracts)], as well as payment and performance bonds [***see*** PC Code § 10221] and bodily injury and property damage liability insurance [***see*** *Gov. Code §§ 4420-4422* (unfair and coercive insurance requirements)].

b. State, in figures, all unit prices, lump-sum prices, and extensions.

c. Specify that bid is to be construed as offering all described items completed and in place.

d. Bid on all items listed unless otherwise indicated in bid proposal form.

4. Advise bidder to include following information about subcontractors in bid package [*see* PC Code § 4104]:

NOTE:

If a bidder for a prime contract fails to specify a subcontractor for any portion of the work, or if it specifies more than one subcontractor for the same portion of the work (in excess of one half of one percent of the total bid), the bidder is presumed by statute to have agreed that it is fully qualified to perform and will perform the work involved [PC Code § 4106].

a. Name and location of place of business of each subcontractor who will [PC Code § 4104(a)(1)]:

NOTE:

Subject to a state or local agency's option to implement this provision, the prime contractor may submit any information requested by the officer, department, board, or commission concerning any subcontractor whom the prime contractor is required to list in the bid package, other than the subcontractor's name and location of business, up to 24 hours after the deadline established for receipt of bids by prime contractors [PC Code §

4101(a)(2)].

A bidder may not list another contractor who will in turn sublet a majority of the work to be done under its prime contract [PC Code § 4105].

(1) Perform work or labor or render service to general contractor in amount exceeding one half of one percent of bidder's total bid.

(2) Specially fabricate and install portion of the work, according to contract plans and specifications, in amount exceeding one half of one percent of bidder's total bid.

(3) Perform construction work on streets or highways, including bridges, in amount exceeding one half of 1 percent of total bid or $10,000, whichever is greater.

b. Portion of contract work to be done by each subcontractor [PC Code § 4104(b)].

NOTE:
Only one subcontractor may be listed for each portion of the contract work as defined by the bidder in its bid [PC Code § 4104(b); ***see*** *R.J. Land & Assocs. Constr. Co. v. Kiewit-Shea (1999) 69 Cal. App. 4th 416, 424-428, 81 Cal. Rptr. 2d 615* (listed subcontractor sued prime contractor of public work who substituted another subcontractor to do work; because contractor failed to correct its error in listing subcontractors in bid, listed subcontractor had right to perform subcontract)].

5. Advise bidder to comply with any disabled veteran business enterprise participation requirements by doing all of following:

NOTE:
Bidders on most state contracts must certify compliance (or a good faith effort at compliance) with participation goals for disabled veteran enterprises, as required [***see*** PC Code § 10115]. These goals can be met by subcontracting the required percentage or percentages of contract work to qualifying businesses. Bids that fail to meet required participation goals will not be accepted [*see § 90A.200[1][a],[2]*]. For further discussion of this program, see*§ 90A.64*.

a. Meet good faith effort requirements [*see 2 Cal. Code Reg. § 1896.63*].

b. Provide information supporting compliance with participation goals [*see § 90A.202* (participation program requirements and forms)].

6. Advise bidder that bid security payable to director of contracting department must be enclosed with its bid [PC Code § 10167].

a. Bid security may be in form of one of following:

NOTE:
Bid security in other than one of the types listed below will preclude consideration of a bid[PC Code § 10167].

(1) Cash.

(2) Cashier's check.

(3) Certified check.

(4) Bidder's bond, executed by admitted surety insurer (or undertaking that otherwise satisfies bond requirements [*see CCP § 995.210*]).

b. Bid security must be equal to at least 10 percent of amount bid.

7. If bid is signed by agent other than owner, partner, or corporate officer, have bidder accompany bid with power of attorney.

NOTE:
The instructions accompanying the bid package will require submission of a power of attorney. For coverage of powers of attorney, see Ch. 98, ***Powers of Attorney*** .

8. Have bidder execute noncollusion affidavit and submit with bid [PC Code § 7106; *see § 90A.200[1][g]*].

9. Have bidder execute any required statement of compliance with nondiscrimination laws [*see Gov. Code § 12990*].

10. Have bidder present bid and all accompanying documents in sealed envelope no later than time fixed by public notice for opening of bids [PC Code §§ 10167, *10168*].

11. If bid is on contract for goods or services, advise bidder to include request that notice of proposed award be:

a. Posted:

(1) In public place in office of Department of General Services at least 24 hours before award of contract for goods [*see* PC Code § 10306 (contracts for goods)].

(2) In place accessible by general public, including any Internet site identified in invitation for bids at least five working days before award [*see* PC Code § 10345(a)(1),*(b)* (contracts for services by competitive bidding and contracts for services awarded under request for proposal)].

b. Sent by telegram, electronic facsimile transmission, overnight courier, Internet transmission, or personal delivery five working days before the award to bidder if it is not found to be lowest responsible bidder meeting specifications [*see* PC Code § 10345(a) (contract for services awarded by competitive bidding)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewPublic Contracts LawBids & FormationGeneral OverviewPublic Contracts LawTypes of ContractsState Contracts Generally

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29-90A California Legal Forms--Transaction Guide § 90A.123

§ 90A.123 Bid Mistakes

1. Advise bidder for contract under State Contract Act that bid may be withdrawn at any time before time fixed for opening, as follows [PC Code § 10169]:

NOTE:
Bids may be withdrawn before the time fixed for opening only on written request. Bids may not be withdrawn after the time fixed for opening [PC Code § 10169]. A bidder who has submitted the lowest responsible but mistaken bid may request the awarding authority's relief from the mistaken bid, and may sue for return of any forfeited bid security [***see*** P 2, ***below***].

a. Advise bidder that it or its duly authorized representative must execute written request for withdrawal of its bid.

b. File written request with director of department or chief of division for which work is to be performed.

c. Advise bidder that if time remains before bid opening, it may submit new bid.

2. If bidder fails to realize existence of bid mistake until after bid has been accepted by contracting agency, advise bidder to seek relief [*see § 90A.51*].

a. Send contracting agency written notice [*see § 90A.240*]:
(1) Requesting its consent to relief of bidder from its bid [PC Code § 5101].

(2) Specifying in detail how mistake occurred [PC Code § 5103(b)].

(3) Within five working days, excluding Saturdays, Sundays, and state holidays, after bid opening [PC Code § 5103(b)].

b. If bid security is forfeited for bidder's failure to execute contract, file complaint and serve summons on director of department or chief of division or other head of agency under which work is to be performed or appearance is to be made within 90 days after bid opening [*see* PC Code § 5102].

NOTE:

No other claim need be filed before bringing a legal action[PC Code § 5104]. The plaintiff must establish the following to the court's satisfaction [PC Code § 5103]:

- That a mistake was made;
- That the public entity was given written notice within five days after the opening of bids of how the mistake occurred;
- That the mistake made the bid materially different than intended; and
- That the mistake was made in filling out the bid and was not due to error in judgment or carelessness in inspecting the work site or in reading the plans or specifications.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewPublic Contracts LawBids & FormationGeneral OverviewPublic Contracts LawTypes of ContractsGeneral OverviewPublic Contracts LawVoiding the ContractAmbiguity & MistakeGeneral Overview

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29-90A California Legal Forms--Transaction Guide § 90A.124

§ 90A.124 Protest Against Award of Contract for Goods

NOTE:
For discussion of protests against the award of contracts for goods, see*§ 90A.50[2]*. The term "goods" means all types of tangible personal property, including materials, supplies, and equipment [PC Code § 10300(d)].

1. Advise unsuccessful bidder ("protesting bidder") to file protest against award of contract or purchase order to another bidder [*see* PC Code § 10306; *see also § 90A.250*]:

NOTE:
In practice, this protest is either filed at the time and place of bid opening by the protesting bidder or its representative or immediately thereafter.

a. Before award.

b. On ground that protesting bidder is lowest responsible bidder meeting specifications.

NOTE:
For a guide to determining whether the protesting bidder is responsible under the circumstances at the time of award, see*§ 90A.113*. The questions of whether a bidder is the lowest bidder or whether its bid meets the specifications are determined on a case-by-case basis. The specifications are available from the protesting bidder and expert opinion should be sought for a determination that the protesting bidder's bid met the specifications. After bid opening, all bids must be read in public (if any person present at the bid opening so desires) [PC Code § 10304] and are available for public inspection (but

tabulations may take as long as seven days to complete) [PC Code § 10305].

2. Have protesting bidder file notice of protest of proposed award of contract with Department of General Services before award of contract governed by PC Code § 10306 [*2 Cal. Code Reg. § 872.1*].

3. Have protesting bidder file full and complete written statement of protest with State Board of Control [PC Code § 10306; *2 Cal. Code Reg. § 872.7* (detailed statement of protest required)]:

a. Specify grounds of protest in detail:

(1) That bid was lowest and was responsive to specifications, and that protesting bidder is responsible; or

(2) That successful (lowest) bidder is not responsible while protesting bidder is responsible and its bid was responsive.

b. Support all allegations with facts.

c. Include request for hearing [*see 2 Cal. Code Reg. § 872.11* (assignment and scheduling for hearing)].

d. Mail or deliver protest to State Board of Control, 926 J Street, Suite 300, Sacramento, CA 95814, within 10 calendar days after filing initial protest with department.

NOTE:

At the hearing, the protesting bidder must prove that it is was the lowest responsible bidder meeting specifications in order for the protest to be granted [*2 Cal. Code Reg. § 873.7*; ***see*** *2 Cal. Code Reg. § 873.1 et seq.* (hearing procedure)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawDispute ResolutionBid Protests

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29-90A California Legal Forms--Transaction Guide § 90A.125

§ 90A.125 Protest Against Award of Contract for Services

1. Advise unsuccessful bidder ("protesting bidder") that it may protest proposed award on ground that it is lowest responsible bidder meeting procurement specifications [*see* PC Code § 10345(a) (competitive bids); PC Code § 10345(b) (offers in response to request for proposals ("RFP")); *see also* PC Code § 10344 (use of RFP)].

NOTE:
For discussion of protests against the award of contracts for goods, see*§ 90A.50[2]*. For a guide to determining whether the protesting bidder is responsible under the circumstances at the time of award, see*§ 90A.113*.

2. Before award of contract, file initial protest with both [PC Code § 10345(a)(2) (competitive bids for services), (b)(1) (offers for services under RFP)]:

a. Awarding state agency; and

b. Department of General Services.

3. In addition, file complete written statement specifying grounds for protest [PC Code § 10345(a)(3),*(b)(2)*]:

a. With Department of General Services; and

NOTE:
The Department of General Services will establish written procedures for deciding protests under PC Code § 10345 [PC Code § 10345(c)].

b. With awarding state agency.

c. Within five days after filing initial protest [*see* P 2, *above*].

d. Specify ground of protest in detail:

(1) If procurement involves competitive bidding [*see § 90A.50[3]* (discussing "lowest responsible bidder"]:
(a) That protesting bidder's bid was responsive to specifications and lowest and that protesting bidder is responsible; or

(b) That protesting bidder is responsible and its bid was both responsive and next lowest while lowest bidder is not responsible.

(2) If procurement is noncompetitive (that is, pursuant to RFP) on grounds that state agency did one or more of following [PC Code § 10345(b)(2)]:

(a) Failed to follow required evaluation and selection procedures [*see* PC Code § 10344(b),*(c)* (procedures)].

(b) Failed to apply correctly its standards for reviewing format requirements or evaluating proposals as specified in its RFP.

(c) Used appropriate evaluation and selection procedure [*see* PC Code § 10344(b)], but is proposing to make award to bidder other than lowest responsible bidder.

(d) Used appropriate evaluation and selection procedure [*see* PC Code § 10344(c)], but failed to follow methods for evaluating and scoring stated in RFP.

(e) Used appropriate evaluation and selection procedure [*see* PC Code § 10344(c)], but is proposing to make award to bidder other than the one given highest score by its evaluation committee.

d. Support all allegations with facts.

4. If procurement is for information technology goods and services, advise unsuccessful bidder to protest award on ground that its bid should have been selected in accordance with selection criteria of solicitation [PC Code § 12102(h); *see, e.g., United Systems of Arkansas, Inc. v. Stamison (1998) 63 Cal. App. 4th 1001, 1011-1012, 74 Cal. Rptr. 2d 407* (out-of-state bidder protested DMV's award of contract for certified mail forms, attendant software, and printers to another bidder)]:

a. Initially to Department of General Services.

b. To State Board of Control within 10 days from the time it files initial protest with full substantiation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewPublic Contracts LawDispute ResolutionBid Protests

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29-90A California Legal Forms--Transaction Guide § 90A.126

§ 90A.126 Misaward of Construction Contract

1. If agency proposes to award contract to party other than lowest bidder, advise lowest bidder to demand [*see § 90A.252*]:

a. All evidence reflecting on its responsibility.

b. Opportunity to rebut that adverse evidence.

2. If opportunity to rebut adverse evidence is granted, have lowest bidder present evidence to agency showing that it is qualified to perform contract and must be awarded contract.

NOTE:

Absent a statute that provides otherwise, an award to a bidder other than the lowest responsible bidder must be set aside [***see*** *City of Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 870, 103 Cal. Rptr. 689, 500 P.2d 601* (construction contract)].

3. Advise lowest bidder that concurrently with demand for opportunity to present evidence bearing on its qualifications:

a. It should seek judicial order prohibiting any award and prosecute that action if administrative opportunity to rebut adverse evidence is denied.

b. If award is not halted as result of lowest bidder's protest, advise lowest bidder that it should also seek damages under theory of promissory estoppel.

NOTE:

When the public entity promises to award the contract to the lowest responsible bidder, the reliance by a contractor who qualifies as a responsible bidder in preparing and submitting a bid is sufficient to create

an informal contract entitling the lowest responsible bidder to damages under a theory of promissory estoppel if the contract is not awarded to that bidder [***see*** *Swinerton & Walberg Co. v. City of Inglewood-L.A. County Civic Center Authority (1974) 40 Cal. App. 3d 98, 104, 105, 114 Cal. Rptr. 834]* . For discussion of the measure of damages in such a case, see*§ 90A.50[1]*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsPublic Contracts LawTypes of ContractsConstruction ContractsPublic Contracts LawVoiding the ContractGeneral Overview

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29-90A California Legal Forms--Transaction Guide §§ 90A.127-90A.139

[Reserved]

§§ 90A.127[Reserved]

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D. Related and Subsequent Procedures

29-90A California Legal Forms--Transaction Guide § 90A.140

§ 90A.140 Substitution of Subcontractors After Contract Award

NOTE:
The practice of shopping for the lowest bid among several potential subcontractors ***before*** the award of a contract is regarded as a normal, competitive open-market procedure. However, the same practice ***after*** the contract has been awarded is illegal except under the circumstances indicated below [***see*** PC Code § 4107].

1. Advise contractor (or subcontractor) that substituting another subcontractor for subcontractor listed in original bid is prohibited, *except* when awarding authority consents in any of following situations [*see* PC Code § 4107(a)]:

NOTE:
Before approving a prime contractor's request for substitution, the awarding authority must give the subcontractor listed in the bid written notice of the request and the reasons for the request. The notice must be served by certified or registered mail to the last known address of the subcontractor. The listed subcontractor then has five working days to submit written objections to the substitution to the awarding authority. Failure to file written objections constitutes the listed subcontractor's consent to the substitution [PC Code § 4107(a)].

PC Code § 4107 contemplates that the awarding authority's consent to substituting out a listed subcontractor and substituting in a replacement subcontractor will occur before the prime contractor permits the replacement subcontractor to perform any work. However, a deviation from this sequence is permissible as long as the procedure used actually complies with the substance of the reasonable objectives of the statute, which are (1) to prevent bid peddling and bid shopping after the award

of a public works contract and (2) to provide an opportunity to the awarding authority to investigate the proposed replacement subcontractor before consenting to substitution [*Titan Elec. Corp. v. Los Angeles Unified Sch. Dist. (2008) 160 Cal. App. 4th 188, 193, 72 Cal. Rptr. 3d 570]* .

a. When listed subcontractor, after reasonable opportunity, fails or refuses to execute written contract for scope of work specified in subcontractor's bid and at price specified in subcontractor's bid, when written contract, based on general terms, conditions, plans, and specifications of project is presented to subcontractor by prime contractor.

b. When listed subcontractor becomes bankrupt or insolvent.

c. When listed subcontractor fails or refuses to perform subcontract.

d. When listed subcontractor fails or refuses to meet bond requirements set by general contractor [*see* PC Code § 4108].

e. When general contractor demonstrates that subcontractor's name was listed as result of inadvertent clerical error [*see* P 2, *below*].

f. When listed subcontractor is not properly licensed under Contractors' State License Law.

g. When awarding authority determines that work performed by listed subcontractor is substantially unsatisfactory and not in substantial accordance with plans and specifications.

h. When awarding authority determines that subcontractor is substantially delaying or disrupting progress of work.

i. When subcontractor is ineligible to work on public works project under *Lab. Code § 1777.1* (willful violations of *Lab. Code § 1720 et seq.* (public works)) or *Lab. Code § 1777.7* (noncompliance with provisions involving employment of apprentices).

j. When awarding authority determines that listed subcontractor is not a responsible contractor.

2. If general contractor makes inadvertent error in listing subcontractor, advise general contractor to assert claim as follows [PC Code § 4107.5; *see R.J. Land & Assocs. Constr. Co. v. Kiewit-Shea (1999) 69 Cal. App. 4th 416, 427, 81 Cal. Rptr. 2d 615* (contractor that contended it had made inadvertent error in listing subcontractors failed to timely invoke statutory procedure)]:

a. Give written notice of error to awarding authority within two working days after prime bid was opened.

b. Send or deliver copies of that notice to:
(1) Subcontractor that was erroneously listed.

(2) Subcontractor that general contractor actually intended to list ("intended

subcontractor").

NOTE:
The intended subcontractor must have submitted a bid on the same job to the general contractor before the bid opening. The erroneously listed subcontractor has six working days from the time of bid opening to submit a written objection to the claim to the general contractor and the awarding authority. The listed contractor's failure to file a written objection within the allotted time is primary evidence of its agreement that an inadvertent clerical error has been made [PC Code § 4107.5].

3. Advise contractor that awarding authority must hold public hearing and, absent compelling reasons to the contrary, consent to substitution of intended subcontractor if either [PC Code § 4107.5]:

a. Each of three parties involved admits, by affidavit or other evidence filed no more than eight days after bid opening, that inadvertent clerical error was made; or

b. Contractor and intended subcontractor file necessary affidavits within eight days after bid opening, and erroneously listed subcontractor does not submit written objection to claim of inadvertence within six working days to prime contractor and awarding authority.

NOTE:
If the erroneously listed subcontractor submits a written objection to the claim of inadvertent clerical error within six working days from the time the prime bid is opened, the awarding authority will conduct an investigation, hold a public hearing, and determine the validity of the claims [***see*** PC Code § 4107.5].

4. Advise contractor that no portion of work exceeding one half of one percent of total bid and for which no subcontractor was listed may be sublet or subcontracted except in cases of public emergency or necessity [PC Code § 4109].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewPublic Contracts LawDispute ResolutionSubcontractorsGeneral OverviewPublic Contracts LawTypes of ContractsConstruction Contracts

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DIVISION VI: PERFORMANCE OF SERVICES
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29-90A California Legal Forms--Transaction Guide § 90A.141

§ 90A.141 Arbitration Proceedings for Determination of Claims Arising Under State Contract Act

NOTE:

For discussion of the settlement of claims arising under contracts authorized under other statutes, see*§ 90A.52*. See also California Forms of Pleading and Practice, Ch. 32, ***Contractual Arbitration: Agreements and Compelling Arbitration*** ; Ch. 481, ***Public Works*** (Matthew Bender).

1. Advise client who has claim under construction contract that it may be compromised or otherwise settled at any time [PC Code § 9201(a)].

NOTE:

A "claim" is a demand for money or damages arising under or relating to the performance of a contract awarded under the State Contract Act [PC Code § 10240.6].

2. If claim is not compromised or settled, advise client that it:

NOTE:

There are time limits on the right to file complaints or seek arbitration [***see*** PC Code § 19100(a),*(b)*, PC Code § 10240.1; ***see also*** *§ 90A.52*].

a. May be resolved through litigation if parties mutually agree to waive all statutory provisions governing resolution of contract claims [*see* PC Code §§ 10240-10240.13] and to litigate instead [PC Code § 10240.10].

b. Must be resolved through arbitration, absent settlement or agreement of parties to litigate [*see* PC Code § 10240].

3. In absence of agreement to waive statute and litigate, advise contractor that administrative procedures prescribed in contract for resolution of disputes must be diligently pursued and exhausted as prerequisite to arbitration [PC Code § 10240.2].

NOTE:
Although these administrative procedures must be initiated and pursued, it is not necessary for the claimant to exhaust administrative procedures before initiating arbitration if more than 240 days have elapsed since the contracting department accepted the work [PC Code § 10240.2].

4. Initiate arbitration by filing claim not later than 90 days after date claimant is served with department's final written decision on claim [*see* PC Code §§ 10240.1, *19100(a)*].

NOTE:
The 90-day limitation is inapplicable if the claim arises from any cost audit, latent defect, warranty, or guarantee under the contract[PC Code § 10240.1; ***but see*** PC Code § 19100(a) (time limit for filing arbitration claim)].

Costs are shared equally by the parties, except for filing fees, witness fees, costs of discovery, or other costs necessarily incurred by one party. The arbitrator may allow the prevailing party to recover costs and necessary disbursements, other than attorneys' fees, in the same manner as in civil cases [***see*** *CCP §§ 1021-1038*]. If one party makes an offer of settlement more favorable than the arbitrator's award, the party who rejects the offer may not recover costs or interest after the date of the offer and the party who makes a reasonable settlement offer may recover reasonable attorneys' fees incurred after that date. Attorneys' fees may also be awarded against a party who acts frivolously or in bad faith [PC Code § 10240.13].

5. Join other parties in arbitration proceeding [PC Code § 10240.9]:

a. Any suppliers, subcontractors, design professionals, sureties, or other parties who have agreed to joinder.

b. If joinder is necessary to prevent substantial risk that joined party would otherwise be subject to inconsistent obligations or decisions.

6. Select arbitrator or arbitrators [*see* PC Code § 10240.3]:

a. Advise contractor that more than one arbitrator may be used if both parties agree.

NOTE:
As a practical matter, it is desirable to have more than one arbitrator and to have an odd number of arbitrators so that there is a clear majority to decide any issue. It is common for three arbitrators to be used: one selected by each party and a third selected by the other two arbitrators.

b. Advise contractor that, absent agreement, only one arbitrator may be used.

NOTE:
The arbitrator is chosen by the parties from a list created by Public Works Contract

Arbitration Committee. If the parties cannot agree on an arbitrator, either party may petition the superior court to appoint an arbitrator from the list [PC Code § 10240.3].

7. Represent client in arbitration proceeding.

NOTE:

Arbitration proceedings are conducted in accordance with the arbitration provisions of the Code of Civil Procedure [***see*** *CCP §§ 1280-1294.2*], pending adoption of uniform regulations by the Departments of General Services, Transportation, and Water Resources [PC Code §§ 10240.5, *10240.11*]. For detailed treatment of the conduct of arbitration proceedings, see California Forms of Pleading and Practice, Chs. 30- 39 (Matthew Bender).

The contracting department's decision on any issue will not be deemed conclusive by the arbitrator [***see*** PC Code § 10240.4]. *CCP § 1283.05(e)*, which provides that there is no right to take depositions for discovery without the leave of the arbitrator, does not apply to proceedings under the Public Contract Code [PC Code § 10240.11].

8. If arbitration award is not supported by substantial evidence or in accordance with California law, advise contractor that it may sue to have award vacated unless parties have agreed to waive requirements governing arbitration decision [*see* PC Code §§ 10240.8, 10240.12].

NOTE:

In the absence of any agreement among the parties to the contrary, the arbitration decision must be made under and in accordance with California law, must be supported by substantial evidence, and must state the basis for the decision, findings of fact, and conclusions of law [PC Code § 10240.8].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAlternative Dispute ResolutionArbitrationsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewPublic Contracts LawDispute ResolutionArbitration & MediationPublic Contracts LawTypes of ContractsState Contracts Generally

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29-90A California Legal Forms--Transaction Guide § 90A.142

§ 90A.142 Posting Payment and Performance Bonds

1. If contract is under State Contract Act, file following separate bonds (each in amount equal to half contract price) executed by admitted surety insurer [PC Code §§ 10221, 10222(a)]:

NOTE:
For projects with a contract price greater that $250 million, the Department of Transportation has the discretion to specify that the payment bond must equal not less than one-half the contract price or $500 million, whichever is less [PC Code § 10222(b)].

a. Performance bond.

b. Payment bond.

NOTE:
A successful bidder's failure to furnish a required bond constitutes failure to execute the contract [PC Code § 10183].

2. If contract is with California State University, file following separate bonds (each in amount equal to half contract price) executed by admitted surety insurer [PC Code §§ 10821, *10822*]:

a. Performance bond.

b. Payment bond.

NOTE:
On being awarded a public works contract over $5,000 from a state entity, or over $25,000 from a public

entity, an original contractor must file a payment bond with the officer or entity awarding the contract [PC Code § 7103; *CC § 3247*; ***see*** Ch. 31, ***Mechanics' Liens*** , Transaction Guide, Pt. VI]. These rules do not apply to contracts with the legislature, the courts, agencies of the judicial branch, or the University of California [PC Code § 7103(d)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewPublic Contracts LawBids & FormationGeneral OverviewPublic Contracts LawTypes of ContractsState Contracts Generally

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§§ 90A.143[Reserved]

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A. Bid Proposal Package

29-90A California Legal Forms--Transaction Guide § 90A.200

§ 90A.200 Request for Proposal--Primary

[1] Comment

[a] Use of Form

This form is a standard proposal package for use by a bidder to submit its bid for a state contract. The form is available on at the Department of General Services' website, at http://www.ols.dgs.ca.gov/Contracting+Info/formsandinstruction.htm. Requests for Proposal--Secondary are available at the same URL [*see* [c], *below*, for definitions of "primary" and "secondary"]. All agreements include by reference General Terms and Conditions and Contractor Certification Clauses that may be viewed and downloaded at www.ols.dgs.ca./gov Standard+Language [*see* [2], *below*]. For those who do not have Internet access, a hard copy is available from the state agency releasing the request for proposal. Use of the forms provided by the contracting department is mandatory [*see* PC Code § 10166].

This form is illustrative only, and is included to apprise attorneys and prospective bidders of the typical content of a bid package. The prospective bidder should obtain a bid package for the project it wishes to bid on from the appropriate state agency. That agency is frequently the Real Estate Services Division, or the Office of the State Architect, contracting for the construction (including alteration, demolition, repair, or improvement) of state facilities.

While "invitation to bid" and "request for proposal" are often used interchangeably, a request for proposal (RFP) must describe the work to be performed or services to be provided, describe the format for proposals, state the standards that the agency will use to evaluate proposals, and include the deadline for submission and the timetable the agency will follow in reviewing and evaluating proposals [PC Code § 10344(a); *see § 90A.22[3][c]*]. When properly filled out and submitted, a request for proposal constitutes a bid [PC Code § 10166].

A standardized "Invitation to Bid" form is also available at the Department of General Services' website, at http://www.ols.dgs.ca.gov/Contracting+Info/formsandinstruction.htm. That form is identical to the RFP reproduced in [2], *below*, with the exception of Section C, Bid Requirements and Information, which omits the subsections entitled "Work Plan and Work Schedule Requirements" and "Cost Detail Format Requirements."

The request for proposal package reproduced below includes the following:

- Purpose and Description of Services
- Minimum Qualifications for Bidders
- Proposal Requirements and Information, including
    - Key Action Dates
    - Pre-Proposal Conference/Walkthrough (if applicable)
    - Work Plan and Work Schedule Requirements
    - Cost Detail Format and Requirements
    - Submission of Proposal
    - Evaluation Process
    - Award and Protest
    - Disposition of Proposals
    - Agreement Execution and Performance
- Preference Programs, including, for example the Small Business Preference (defining "small business" and describing the small business preference [*see* [f], *below*]). Not all preference programs apply to every request for proposal [*see* [2], § D, *below*].
- Required Attachments, including the Disabled Veteran Business Enterprise (DVBE) Participation Program [see*§ 90A.202[2]*].
- Sample Standard Agreement (STD 213)
    - Scope of Work
    - Budget Detail and Payment Provisions
    - General Terms and Conditions
    - Special Terms and Conditions (if applicable)
    - Any Additional Provisions

In order for a proposal to be responsive, a bidder must provide all required information and include all required attachments [*see* [2], *below*].

[b] Advertisements for Bids

Advance advertisement is required for construction projects [*see* PC Code § 10140; *see also § 90A.21[1]*]. These advertisements are published in public newspapers in the area in which the project is located, as well as in the California State Contracts Register, the Pacific Builder, and The Green Sheet. Notices are also published in builder exchanges throughout the state and in the offices of the contracting agency [*see* PC Code § 10140(a),*(b)*].

Information about contracting opportunities is also available on the Department of General Services web site at http://www.dgs.ca.gov/pd/.

In addition, each state agency [*see Gov. Code § 14838.1(d)* (definition)] awarding contracts for the construction, alteration, demolition, repair, or improvement of the state's infrastructure financed with the proceeds of the infrastructure-related bond acts of 2006 [*see Gov. Code § 14838.1(c)* (listing relevant bond acts)] must advertise all upcoming opportunities to bid on contracts for projects funded by those bond acts [*see Gov. Code § 14838.1(a)(2)*; *see also § 90A.61*].

[c] Primary and Secondary RFP Methods Defined

The "primary RFP method" is a "two-envelope method" for evaluating proposals, in which qualifications and cost proposals are submitted in two separate sealed envelopes. Qualifications are first evaluated according to criteria set in the RFP. For bidders who meet the minimum qualifications standards, the awarding agency then evaluates the cost proposals. The award is made to the lowest bidder meeting the minimum qualifications [State Contracting Manual, Glossary of Terms, available at http://www.ols.dgs.ca.gov/Contract+Manual/GlossaryofTermsandIndex.htm].

The "secondary RFP method is the method for evaluating proposals obtained through an RFP, in which an evaluation panel assesses each proposal according to a set of criteria that must include cost. Each criterion is assigned a weight, with substantial weight going to cost. The award is made to the bidder whose proposal is given the highest score [State Contracting Manual, Glossary of Terms, available at http://www.ols.dgs.ca.gov/Contract+Manual/GlossaryofTermsandIndex.htm].

[d] Prequalification of Prospective Bidders

The contracting department may require prospective bidders to prequalify; that is, to complete, verify, and submit a standard questionnaire and financial statement, including a complete statement of the prospective bidder's financial ability and experience in performing public works. Whenever a contracting department requires any bidder to prequalify on a contract, the department must require all prospective bidders to that contract to prequalify [PC Code § 10160; *see § 90A.21[2]*].

If a potential bidder that has not been prequalified requests a copy of the standard proposal form and prequalification is required, the contracting department will refuse to furnish a proposal package [PC Code § 10166], and instead will inform the bidder of the need for prequalification and supply a copy of a prequalification questionnaire ("Contractor's Statement of Experience and Financial Condition"). The questionnaire must be submitted at least five days before the date on which sealed bids for the contract are to be publicly opened. The contracting agency will then assign the bidder a prequalification rating at least one day before that date [PC Code § 10166]. For a list of the facts needed to fill out a prequalification questionnaire, see*§ 90A.100*.

[e] Required List of Subcontractors for Bids for Construction of Any Public Work or Improvement

Any bid proposal for the construction of any public work or improvement must specify the name and business location of each subcontractor who will perform subcontract work in excess of one half of one percent of the prime contractor's total bid and the portion of the work to be done by each listed subcontractor [PC Code § 4104(a)(1)]. Only one

subcontractor may be specified for each portion of the prime contract work [PC Code § 4104(b); *see R.J. Land & Assocs. Constr. Co. v. Kiewit-Shea (1999) 69 Cal. App. 4th 416, 424-428, 81 Cal. Rptr. 2d 615* (listed subcontractor sued prime contractor of public work who substituted another subcontractor to do work; because contractor failed to correct its error in listing subcontractors in bid, listed subcontractor had right to perform subcontract)]. Bids must also include the name and business address of any off-site subcontractor who will specially fabricate a portion of the work under the contract plans and specifications if the value of the work will exceed one half of one percent of the prime contractor's total bid or $10,000, whichever is greater [PC Code § 4104(a)(1)]. Subject to a state or local agency's option to implement this provision, the prime contractor may submit any information requested by the officer, department, board, or commission concerning any subcontractor whom the prime contractor is required to list in the bid package, other than the subcontractor's name and location of business, up to 24 hours after the deadline established for receipt of bids by prime contractors [PC Code § 4101(a)(2)].

Failure to specify a subcontractor when required, or specifying more than one subcontractor for any portion of the contract work, is construed as representing that the prime contractor will perform the work [PC Code § 4106]. An attempt to subcontract the work after failure to correctly specify a subcontractor under these circumstances, or an impermissible substitution of one subcontractor for another after the award of a contract, may result in the cancellation of the contract by the awarding authority, the assessment of a monetary penalty of not more than 10 percent of the amount of the subcontract involved, or disciplinary action by the Contractors' State License Board [PC Code §§ 4110, 4111]. In addition, a contractor may not circumvent the requirement to list subcontractors by listing another contractor who will in turn sublet work covered by the prime contract [PC Code § 4105]. For further discussion of the law regarding subcontractors, see*§ 90A.28*.

A successful bidder may not substitute a subcontractor in place of a subcontractor listed in the original bid, except in certain prescribed situations with the consent of the awarding authority [*see* PC Code § 4107(a)]. For a list of these situations and the procedure for substitution, see*§ 90A.140*. In addition, the contractor may not permit a subcontract to be voluntarily assigned, transferred, or performed by anyone other than the original subcontractor listed in the original bid without the consent of the awarding authority [PC Code § 4107(b)].

[f] Small Business Preference

This form contains a request for small business preference and certification that the bidder is a small business [*see Gov. Code § 14837(d)(1)*; *see 2 Cal. Code Reg. § 1896.4(w)* ("small business" defined)]. A prequalified small business may be granted a preference of 5 percent of the lowest responsible bid submitted by a business other than a small business, and may be given special consideration in qualifying for service, construction, or supply contracts [*see Gov. Code § 14838(b),(c)*]. The small business preference may not exceed $ 50,000 for any bid [*Gov. Code § 14838(b)*; *2 Cal. Code Reg. § 1896.8(e)*]. Further, the combined cost of the small business preference and preferences awarded under any other law may not exceed $ 100,000 [*2 Cal. Code Reg. § 1896.8(e)*]; and no preference will be allowed if doing so would result in a bid by a small business firm in excess of the project's funding [*see Gov. Code § 14838.4*]. For further discussion of the small business preference in state contracts, see*§§ 90A.61* and *90A.62*.

To obtain the small business certification required to seek a small business preference on a state contract, the bidder must [*2 Cal. Code Reg. § 1896.14(a)*]:

- Submit a completed application to the Department of General Services, including all required substantiating documentation and information needed by the Department to determine the business's eligibility for small business certification;

- Respond to any deficiency notice from the Department, by the date and time specified by the Department, with all additional information requested, or provide reasons acceptable to the Department regarding why the deficiency request cannot be fulfilled; and

- Meet all eligibility requirements [*see 2 Cal Code Reg. § 1896.12*].

A small business must provide written notification to the Department of any changes in its operation or ownership during its certification period that may affect its continuing eligibility as a small business [*2 Cal. Code Reg. § 1896.14(b)*]. In the event that the business is sold during its certification period, certification is not transferable to the new owners [*2 Cal. Code Reg. § 1896.14(b)*].

Every business certified as a small business is subject to verification of status at any time. Failure by a small business to provide requested information that supports its continued eligibility as a small business, by the date and time specified by the Department, is a ground for decertification [*2 Cal. Code Reg. § 1896.14(d)*].

Once granted, certification is valid for up to 36 months [*2 Cal. Code Reg. § 1896.16(d)*]. Before the end of the certification period, the Department, at its discretion, may extend the certification period for up to 24 months [*see 2 Cal. Code Reg. § 1896.16(d)*]. Certification, including extensions, may not exceed 60 months. At the end of the 60-month period, the business may again apply for certification [*2 Cal. Code Reg. § 1896.16(d)*].

If a business furnishes incorrect supporting information that results in its classification as a small business and is awarded a contract to which it would not otherwise be entitled, it must pay the state the difference between the contract amount and what the state's cost would have been if the contract had been properly awarded. It will also be assessed a penalty of up to 10 percent of the contract amount, and will be ineligible to transact any business, directly or indirectly, with the Department of General Services for a 3-month to 24-month period [*2 Cal. Code Reg. § 1896.16(h)*].

[g] Noncollusion Affidavit Required for Public Work Contracts

Any public works contract must include an affidavit, in the form provided by statute, stating that the bidder has not engaged in any collusive act in preparing and submitting its bid [*see* PC Code § 7106]. The affidavit should be executed as part of the RFP, or bid, as required.

[h] Submission of Bids and Bid Security

Bids must be received by the time fixed in the public notice for the opening of bids or they will not be accepted [PC Code § 10168; *see* PC Code § 4104.5(a) (state agency taking bids for construction of any public work or improvement must specify in bid invitation and public notice the place prime contractors' bids will be received and the time by which bids must be received)]. The date and time will be extended by no less than 72 hours if the officer, department, board, or commission issues any material changes, additions, or deletions to the invitation later than 72 hours prior to the bid closing [PC Code § 4104.5(a)]. Any bids received after the time specified in the notice or any extension due to material changes will be returned unopened [PC Code § 4104.5(a)]. As used in this context, "material change" means a change with a substantial cost impact on the total bid as determined by the awarding agency [PC Code § 4104.5(b)].

Bids must be presented in a sealed envelope and accompanied by an acceptable form of bid security. A bid will not be considered unless proper security is included with the bid [PC Code § 10167].

[i] Withdrawal of Bids

A bid may be withdrawn at any time before the time specified for the opening of bids, but only on the written request of the bidder (oral, telegraphic, or telephonic requests to withdraw a bid proposal are not acceptable and will therefore be ineffective). The request must be executed by the bidder or its duly authorized representative and filed with the director of the department or the chief of the division under which the work is to be performed. However, the mere fact that a bidder has withdrawn its bid before bid opening does not prejudice its right to file a new bid [PC Code § 10169].

There is no right to withdraw a bid after the time fixed for the opening of bids [*see* PC Code § 10169], although a bidder may be able to recover the amount forfeited for nonperformance [PC Code § 10181] if the bid amount resulted from a mistake [PC Code § 5101; *see §§ 90A.51, 90A.240* (form)].

[j] Award of Contract to Lowest Responsible Bidder

In general, an award to a bidder other than the lowest responsible bidder must be set aside [*see City of Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 870, 103 Cal. Rptr. 689, 500 P.2d 601]* . A contract for a public construction project must be awarded to the lowest monetary bidder unless the public entity determines that the lowest bidder is not responsible. The awarding authority may not choose between the two lowest bidders on the basis of which is the best bidder; there is no basis for the application of a relative superiority concept [*City of Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 867, 103 Cal. Rptr. 689, 500 P.2d 601]* . However, if a successful bidder refuses to execute a contract, and the contracting agency deems it in the best interest of the state, the contract may be awarded to the next lowest bidder [PC Code § 10182].

"Lowest responsible bidder" refers to the bidder with the lowest monetary bid that is qualified to do the particular work under consideration. "Responsible" includes the attribute of trustworthiness and refers to the quality, fitness, and capacity of the lowest bidder to perform the proposed work satisfactorily [*City of Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 867, 103 Cal. Rptr. 689, 500 P.2d 601* ; *but see* PC Code § 10115 (participation goals for disabled veteran business enterprises); *see also § 90A.64*].

Before awarding a contract for work to be performed by a contractor, a state agency or department [*see* PC Code § 10357 (definition)] must verify that the person seeking the contract is licensed in a classification appropriate to the work to be undertaken. Verification may be accomplished by checking with the Contractors' State License Board or by requiring the person seeking the contract to present his or her pocket license and to provide a signed statement regarding the validity of the license [PC Code § 6100]. For discussion of contractor licensing generally, see Ch. 88, *Licensing of Contractors* .

A state agency or department [*see* PC Code § 10357 (definition)] must not award a public works or purchase contract to a bidder or contractor who, in the preceding five years, has been convicted of violating a state or federal law regarding the employment of undocumented aliens [PC Code § 6101].

[k] Notice of Nonresponsibility to Lowest Bidder Before Award

Before the award of a public works contract to a bidder other than the lowest bidder, the public entity must notify the lowest monetary bidder of any evidence reflecting on its responsibility received from others or adduced as a result of independent investigation, afford it an opportunity to rebut that adverse evidence, and permit it to present evidence that it is qualified to perform the contract [*City of Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 871, 103 Cal. Rptr. 689, 500 P.2d 601]* . For a guide to the procedures involved in protests against the award of contracts for goods and services, see*§§ 90A.124* and *90A.125*.

[2] FORM

Construction Contract Bid Proposal

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[Reserved]

§ 90A.201[Reserved]

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29-90A California Legal Forms--Transaction Guide § 90A.202

§ 90A.202 Documentation of Disabled Veteran Business Enterprise Requirements [STD.840]

[1] Comment

[a] Use of Form

This form, the Documentation of Disabled Veteran Business Enterprise Requirements, STD.840, is a bidder's statement of compliance with the disabled veteran business enterprise (DVBE) requirements in a standard Request for Proposal [*see § 90A.200*]. Using this form, the bidder certifies a commitment to meet the full DVBE participation requirement, or certifies that the bidder has performed and documented a good faith effort to obtain DVBE participation, or certifies approval of a DVBE Business Utilization Plan.

This form must be submitted with the completed Request for Proposal or Invitation to Bid [*see § 90A.200[1][a]*]. Bids are accepted only from bidders who certify that they have achieved participation goals, have made a good faith effort to achieve them, or have an approved DVBE Business Utilization Plan [*see § 90A.200[2],* § D (Preference Programs)].

This form may be downloaded from the Department of General Services website at http://www.documents.dgs.ca.gov/pd/poliproc/Std840webproof5.pdf

[b] Bidder Declaration

This form refers to the Bidder Declaration Form GSPD-05-105 [*see* [2], *below*]. The Bidder Declaration requires the prime bidder to identify any current California certifications, including disabled veteran business enterprise (DVBE), small business, and microbusiness, and to identify certifications of any subcontractors. For further discussion and a reproduction of the Bidder Declaration form, see*§ 90A.203*.

[c] Participation Goals

All contracts awarded by any state agency, department, officer, or other governmental entity for construction, professional services, materials, supplies, equipment, alteration, repair, or improvement (with the exception of contracts

for professional bond services of an underwriter obtained by competitive bid [*see Gov. Code § 16850(a)*]) must comply with specified participation goals for disabled veteran business enterprises [PC Code § 10115(c); *see* M&V Code § 999(b)(7) (definition); *see also 2 Cal. Code Reg. §§ 1896.60-1896.95* (disabled veteran business goals)]. These goals apply to the overall dollar amount spent each year by the awarding department [*see* PC Code § 10115.1(a) (definition)]. The participation goal for disabled veteran business enterprises, is 3 percent [PC Code § 10115(c)]. State agencies awarding the contracts described above require that each bidder meet (or make a good faith effort to meet) specified goals to be eligible [*see § 90A.64*; *see, e.g., § 90A.200[2]* (bidder must establish compliance with DVBE participation requirements)].

In awarding contracts to the lowest responsible bidder [*see § 90A.200[1][j]*], the awarding department must consider the efforts of a bidder to meet required participation goals [PC Code § 10115.2(a)]. To qualify, a bidder must either meet the statewide participation goals noted above, or demonstrate that a good faith effort was made to meet them [PC Code § 10115.2(a); *2 Cal. Code Reg. § 1896.62* (disabled veterans business enterprise participation goals); *see* PC Code § 10115.2(b); *2 Cal. Code Reg. § 1896.63* (elements of good faith effort)].

This form contains both a disabled veteran business enterprise participation summary and a good faith effort documentation form. Before preparing a bid response, the bidder must determine which of these two options the bidder will document to meet Disabled Veteran Business Enterprise Participation Program requirements [*see* [2], *below*, Article 2.1].

Similar participation requirements apply to public utility procurement contracts [*see* PU Code § 8281(b)]. For further discussion of these requirements, see*§ 90A.64*.

Information about the disabled veteran business enterprise program is available on the Department of General Services web site at http://www.pd.dgs.ca.gov/smbus/default.htm .

[d] Certification As Disabled Veteran Business Enterprise

A business will be certified by a government agency as a DVBE if it meets established criteria [*see* M&V Code § 999(b)(7)(A)]. For a checklist to qualify as a DVBE, see*§ 90A.112*. For further discussion and an application for certification as a small business, a disabled veteran business enterprise (DVBE), or both, see*§ 90A.230*.

[2] FORM

Disabled Veteran Business Enterprise Participation Summary and Good Faith Effort Documentation Form

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§ 90A.203 Bidder Declaration [GSPD 05-105]

[1] Comment--Use of Form

This form, a Bidder Declaration, GSPD 05-105, identifies the bidder's current certifications (small business, microbusiness, and disabled veteran business enterprise (DVBE)) and any certifications held by the bidder's subcontractors. The form is a required attachment to the standard Request for Proposal or Invitation to Bid [*see* 90A.200[1][b]].

The form is available at the Department of General Services, Procurement Division website, at http://www.documents.dgs.ca.gov/pd/delegations/GSPD105.pdf .

The form's purpose is to provide "buyers with a centralized location to evaluate the various factors required by law and policy as it relates to small business (SB), microbusiness (MB) and disabled veteran business enterprise (DVBE) programs. It also provides bidders and/or suppliers that submit responses to competitive solicitations or Request for Offers (RFO) a means to be compliant by targeting salient subcontractor requirements included in law and policy as well as making bidders and suppliers aware of a subcontractor's status" [http://www.documents.dgs.ca.gov/pd/delegations/BidDecNarBrdcst0106.pdf].

[2] FORM

Certification Letter for Disabled Veteran Business Enterprise

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 90A STATE GOVERNMENT CONTRACTS
PART IV. FORMS
A. Bid Proposal Package

29-90A California Legal Forms--Transaction Guide § 90A.204

§ 90A.204 Drug-Free Workplace Certification [STD.21]

[1] Comment

[a] Use of Form

This form is a certification of a drug-free workplace. The completed form should be submitted with requests for proposals or invitations to bid for any state property or service contract [*see Gov. Code § 8355(a)*; [b], *below*].

[b] Duty to Provide Drug-Free Workplace

A contractor awarded a contract for the procurement of property or services from a state agency must certify to the contracting agency that it will provide a drug-free workplace [*Gov. Code § 8355*]. The contractor must certify that it will do all of the following [*Gov. Code § 8355(a)-(c)*]:

- Publish a statement that notifies employees that making, distributing, dispensing, possessing, or using controlled substances in the workplace is prohibited, and that specifies the action that will be taken for violations.

- Establish a drug-free awareness program to inform employees about the dangers of drug abuse in the workplace, the company policy of maintaining a drug-free workplace, available drug counseling, rehabilitation, and employee assistance programs, and the penalties for drug abuse violations.

- Require that each employee engaged in performing the contract be given a copy of the statement about controlled substances noted above, and that as a condition of employment on the contract, each employee agrees to abide by the terms of the statement.

This certification requirement does not apply to a credit card purchase of goods of $2500 or less [*Gov. Code § 8355(b)(1)*]. However, the total amount of this exemption may not exceed $7500 per year for each company from which a state agency is purchasing goods by credit card [*Gov. Code § 8355(b)(2)*].

False certification is grounds for suspension of contract payments, termination of the contract, and debarment of the contractor [*see Gov. Code § 8356(a)*].

[2] FORM

Certification of Drug-Free Workplace Certification of Drug-Free Workplace

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A. Bid Proposal Package

29-90A California Legal Forms--Transaction Guide §§ 90A.205-90A.219

[Reserved]

§§ 90A.205[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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PART IV. FORMS
B. Security Agreements

29-90A California Legal Forms--Transaction Guide § 90A.220

§ 90A.220 Escrow Agreement for Security Deposits in Lieu of Retention

[1] Comment

[a] Use of Form

This form is an escrow agreement to be used when a contractor on a state contract wishes to deposit securities in escrow in place of having the public agency withhold money to ensure performance under the contract [*see* [b], [c], *below*]. The language of the form is taken from the escrow agreement set forth in PC Code § 22300. With limited exceptions [*see* [c], *below*], this agreement is applicable to any type of state contract. For a similar escrow agreement specifically applicable to the State Contract Act, see PC Code § 10263.

An escrow agreement is void and unenforceable unless it is substantially similar to the form presented in the statute [PC Code § 22300(f)]. This form complies with the requirements of the statute.

[b] Withholding of Payments

California law requires the withholding of part of the payment due on state contracts in order to ensure complete performance [*see* PC Code §§ 10261 (not less than 5 percent of payments from the Department of General Services on contracts under the State Contract Act),10346 (not less than 10 percent of progress payments on contracts for services),9203 (not less than 5 percent of progress payments on local agency construction projects)]. For further discussion of contract payments, see*§ 90A.26*.

[c] Substitution Provision Required

Provisions must be included in any invitation for bid and in any contract documents to allow the substitution of securities for any money withheld by a public agency to ensure contract performance. Failure to include these provisions in bid and contract documents will void any provisions for performance retentions in a public agency contract [PC Code § 22300(c)].

[d] Exceptions to Substitution Rule

There are two exceptions to the requirement of a substitution provision. Substitution provisions may not be included in contracts that involve financing provided by the Farmers Home Administration of the United States Department of Agriculture pursuant to the Consolidated Farm and Rural Development Act [*see 7 U.S.C. § 1921 et seq.*]. In addition, substitution provisions may not be included when federal regulations, federal policies, or both, do not allow the substitution of securities [PC Code § 22300(a)].

[e] Procedure for Substitution

At the request and expense of the contractor, securities equivalent to the amount withheld will be deposited with the public agency or with a state or federally chartered bank in California as the escrow agent. The agency or the escrow agent will then pay the withheld money to the contractor. On satisfactory completion of the contract, the securities will be returned to the contractor [PC Code § 22300(a)].

Alternatively, the contractor may request, and the agency must make, payment of the retentions earned directly to the escrow agent at the expense of the contractor. At the expense of the contractor, the contractor may direct the investment of the payments into securities and the contractor must receive the interest earned on the investments on the same terms as provided for by PC Code § 22300 for securities deposited by the contractor. On satisfactory completion of the contract, the contractor must receive from the escrow agent all securities, interest, and payments received by the escrow agent from the agency [PC Code § 22300(b)].

Securities that may be used for this purpose include the following [PC Code § 22300(c)]:

- Securities approved for investment of surplus state funds [*see Gov. Code § 16430* (securities eligible for investment of surplus moneys include bonds of state, federal, and local governments)].
- Prime quality commercial paper.
- Bankers acceptances, if eligible for purchase by the Federal Reserve System.
- Negotiable certificates of deposits.
- The portion of bank loans and obligations guaranteed by the federal SBA or FHA.
- Bank loans and obligations guaranteed by the Export-Import Bank.
- Federal student loan notes.
- Obligations issued, assumed, or guaranteed by various international development banks.
- Bonds, debentures, and notes of corporations organized and operating in the United States, (if rated in the top three by a nationally recognized ratings service).
- Bank or savings and loan certificates of deposit.
- Interest-bearing demand deposit accounts; standby letters of credit.
- Any other security mutually agreed to by the contractor and the public agency.

The contractor is the beneficial owner of any substituted securities and will receive any interest on those securities [PC Code § 22300(c)].

Any contractor who elects to receive interest on funds withheld in retention by a public agency must, at the request of any subcontractor performing more than 5 percent of the contractor's total bid, make that option available to the subcontractor regarding any funds withheld in retention by the contractor from the subcontractor [*see* PC Code § 22300(d)(1),*(2)* (effective for contracts entered into on or after January 1, 1999); *see also* former PC Code § 22300(b) (requiring, for contracts entered into before January 1, 1999, that contractor pay each subcontractor, not later than 20 days after receipt of payment, respective amount of interest earned, net of costs attributed to retention withheld from each subcontractor, on amount of retention withheld to ensure performance of contractor)].

[2] FORM

Escrow Agreement for Security Deposits in Lieu of Retention

ESCROW AGREEMENT FOR SECURITY DEPOSITS IN LIEU OF RETENTION

This Escrow Agreement is entered into by [*public agency*] ("Owner"), whose address is _____, [*name of contractor*] ("Contractor"), whose address is _____, and [*escrow agent*] ("Escrow Agent"), whose address is _____.

For the consideration set forth in this Agreement, the Owner, Contractor, and Escrow Agent agree as follows:

(1) Pursuant to *California Public Contract Code § 22300*, Contractor has the option to deposit securities with Escrow Agent as a substitute for retention earnings required to be withheld by Owner pursuant to the Construction Contract ("Contract") entered into between the Owner and Contractor for [*identify subject of contract*] in the amount of $_____, dated _____. Alternatively, on written request of the Contractor, the Owner shall make payments of the retention earnings directly to the Escrow Agent. When Contractor deposits the securities as a substitute for Contract earnings, the Escrow Agent shall notify the Owner within ten days of the deposit. The market value of the securities at the time of the substitution must be at least equal to the cash amount then required to be withheld as retention under the terms of the Contract between the Owner and Contractor. Securities shall be held in the name of _____, and shall designate the Contractor as the beneficial owner.

(2) The Owner shall make progress payments to the Contractor for such funds which otherwise would be withheld from progress payments pursuant to the Contract provisions, provided that the Escrow Agent holds securities in the form and amount specified above.

(3) When the Owner makes payment of retentions earned directly to the Escrow Agent, the Escrow Agent shall hold them for the benefit of the Contractor until such time as the escrow created under this contract is terminated. The Contractor may direct the investment of the payments into securities. All terms and conditions of this agreement and the rights and responsibilities of the parties shall be equally applicable and binding when the Owner pays the Escrow Agent directly.

(4) Contractor shall be responsible for paying all fees for the expenses incurred by Escrow Agent in administering the Escrow Account and all expenses of the Owner. These expenses and payment terms shall be determined by the Owner, Contractor, and Escrow Agent.

(5) The interest earned on the securities or the money market accounts held in escrow and all interest earned on that interest shall be for the sole account of Contractor and shall be subject to withdrawal by Contractor at any time and from time to time without notice to the Owner.

(6) Contractor shall have the right to withdraw all or any part of the principal in the Escrow Account only by written notice to the Escrow Agent accompanied by written authorization from the Owner to the Escrow Agent that Owner consents to the withdrawal of the amount sought to be withdrawn by Contractor.

(7) The Owner shall have a right to draw on the securities in the event of default by the Contractor. On seven days' written notice to the Escrow Agent from the Owner of the default, the Escrow Agent shall immediately convert the securities to cash and distribute the cash as instructed by the Owner.

(8) On receipt of written notification from the Owner certifying that the Contract is final and complete, and that the Contractor has complied with all requirements and procedures applicable to the Contract, Escrow Agent shall release to Contractor all securities and interest on deposit less escrow fees and charges of the Escrow Account. The escrow shall be closed immediately upon disbursement of all moneys and securities on deposit and payments of fees and charges.

(9) Escrow Agent shall rely on the written notifications from the Owner and the Contractor pursuant to Sections (6) through (8), inclusive, of this agreement and the Owner and Contractor shall hold Escrow Agent harmless from Escrow Agent's release and disbursement of the securities and interest as set forth above.

(10) The names of the persons who are authorized to give written notice or to receive written notice on behalf of the Owner and on behalf of Contractor in connection with the foregoing, and exemplars of their respective signatures are as follows:

On behalf of Owner:
_____ [*signature*]
[*typed name*]
_____ [*title*]
_____ [*address*]

On behalf of Contractor:
_____ [*signature*]
[*typed name*]
_____ [*title*]
_____ [*address*]

On behalf of Escrow Agent:
_____ [*signature*]
[*typed name*]
_____ [*title*]
_____ [*address*]

At the time the Escrow Account is opened, the Owner and Contractor shall deliver to the Escrow Agent a fully executed counterpart of this Agreement.

The parties have executed this Agreement by their proper officers on the date first set forth in Paragraph (1), *above*.

Owner
_____ [*title*]
[*typed name*]

_____ [*signature*]

Contractor
_____ [*title*]
[*typed name*]
_____ [*signature*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawTypes of ContractsState Contracts Generally

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[Reserved]

§§ 90A.221[Reserved]

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C. Prequalification Forms

29-90A California Legal Forms--Transaction Guide § 90A.230

§ 90A.230 Small Business and Disabled Veteran Business Enterprise (DVBE) Certification Application [STD.812]

[1] Comment

[a] Use of Form

This form, STD. 812, is an application for certification as a small business, a disabled veteran business enterprise (DVBE), or both. A business that wants to be eligible for the small business preference [*see* [c], *below*], the DVBE preference [*see* [d], *below*], or both, for service, construction, or supply contracts with the state must submit this form to the Office of Small Business and Disabled Veteran Business Enterprise Certification (OSDS), in the Procurement Division of the Department of General Services. An applicant's failure to provide requested information that supports its eligibility, by the date and time specified by the OSDS, is grounds for denial or decertification [*see* Application, page 4, reproduced in [2], *below*; *see also* Application, pages 5-6 (required supporting documentation)].

This certification application may be obtained from the Office of Small Business and Disabled Veteran Business Enterprise Certification, 707 Third Street, 1st Floor, Room 400, P.O. Box 989052, West Sacramento, CA 95798-9052, telephone (800) 559-5529 or (916) 375-4940. The application may also be downloaded from the Department of General Services web site at http://www.documents.dgs.ca.gov/pd/smallbus/std812rev020107c.pdf.

The applicant has the option of completing and submitting a new or renewal application online at http://www.pd.dgs.ca.gov/smbus/getcertified.htm .

The Standard Industrial Classification (SIC) codes necessary to complete the application may be obtained from the Department's web site at http://www.dgs.ca.gov/ or by calling the Department's business office at (800) 559-5529 or (916) 375-4940.

[b] Comparison: Small Business and DVBE Certifications

The primary differences between the small business and DVBE certifications lie in the eligibility requirements. A small

business's eligibility is primarily based on size standards (average gross annual receipts and number of employees) and a DVBE's eligibility focuses on the firm's disabled veteran owner or owners [*see* [2], *below*]. Common items considered in the certification process for both types of certification include: the business' structure, it's principal office location, business type, and the owners and their domicile [*see* [2], *below*].

How certification is applied in the state contracting arena also differs for small businesses and DVBEs. DVBE certification entitles the certified business to participate in the state's DVBE Participation Program, which establishes a goal of at least three percent of total overall annual state contracting dollars to be awarded to DVBEs [PC Code § 10115(c); *see* [d], *below*]. The small business participation goal is set at 25 percent [*see* Executive Orders (EO) EO D-37-01 (2001), EO S-02-06 (2006), and EO S-11-06 (2006); [c], *below*]. Small business certification also entitles the certified business to a five percent bid preference on applicable state contracts [*see Gov. Code § 14838(b),(c)*]. The five percent bid preference is only used for computational purposes to determine a contract award [*see 2 Cal. Code Reg. § 1896.8*].

Providing all eligibility and compliance requirements are met, a business may be certified as both small business and DVBE, and, accordingly, take advantage of the benefits of both certifications.

[c] Small Business Preference and Certification

A "small business" is a California-based business that is independently owned and operated and not dominant in its field of operation [*see Gov. Code § 14837(d)(1)*; *2* Cal. Code Reg. § 1896.4(w)]. For a list of factors relevant to determining whether a prospective bidder qualifies as a small business, see*§ 90A.110*.

The small business participation goal is 25 percent [*see* Executive Orders (EO) EO D-37-01 (2001), EO S-02-06 (2006), and EO S-11-06 (2006); *see also Gov. Code § 14838.1(a)(1)* (25 percent participation goal for contracts for the construction, alteration, demolition, repair, or improvement of the state's infrastructure financed with the proceeds of the infrastructure-related bond acts of 2006)].

When responsibility and quality are equal, prequalified small businesses may be granted a preference of five percent of the lowest responsible bid submitted by a bidder other than a small business, and may be given special consideration in qualifying for service, construction, or supplies contracts [*see Gov. Code § 14838(b),(c)*; *see also 2 Cal. Code Reg. §§ 1896.2*-1896.22]. The small business preference of five percent is calculated as specified in the implementing regulations [see *2 Cal. Code Reg. § 1896.8(b)*]. If, after applying the small business preference to the small business's bid, that bid is equal to the lowest priced bid from a responsible non-small business, or is equal to the highest scored bid [*see 2 Cal. Code Reg. § 1896.8(b)(1)(B)*] of a non-small business, the contract must be awarded to the small business for the amount of its bid [*2 Cal. Code Reg. § 1896.8(c)*]. For further discussion of the small business preference, see*§§ 90A.60*, *90A.61*, and *90A.110*.

[d] Disabled Veteran Business Enterprise Preference and Certification

"Disabled veteran business enterprise" means a business certified by the administering agency that meets all of the following requirements [*Mil. & Vet. Code § 999(b)(7)(A)*; *see 2 Cal. Code Reg. § 1896.70* (DVBE certification)]:

- Has one of the following forms:
    - A sole proprietorship with at least 51 percent owned by one or more disabled veterans.
    - A publicly owned business, in which at least 51 percent of its stock is owned by one or more disabled veterans.

- A subsidiary that is wholly owned by a parent corporation in which at least 51 percent of the voting stock of the parent corporation is owned by one or more disabled veterans.

- A joint venture in which at least 51 percent of the joint venture's management, control, and earnings are held by one or more disabled veterans.

- The management and control of the daily business operations are by one or more disabled veterans. The disabled veterans who exercise management and control are not required to be the same disabled veterans as the owners of the business.

- It is a sole proprietorship, corporation, or partnership with its home office located in the United States, which is not a branch or subsidiary of a foreign corporation, foreign firm, or other foreign-based business.

All contracts awarded by any state entity for materials, supplies, or equipment must comply with specified participation goals for disabled veteran business enterprises [PC Code § 10115(c); *see also 2 Cal. Code Reg. §§ 1896.60*-1896.95 (disabled veteran business goals)]. These goals apply to the overall dollar amount spent each year by the awarding department [*see* PC Code § 10115.1(a) (definition)]. The participation goal for disabled veteran business enterprises is three percent [PC Code § 10115(c)]. For further discussion of DVBE participation goals, see*§ 90A.64*. For a checklist to consult when applying for DVBE certification, see*§ 90A.112*.

[2] FORM

Small Business Certification Application (STD.813)

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§§ 90A.231[Reserved]

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D. Relief From Bid Mistakes

29-90A California Legal Forms--Transaction Guide § 90A.240

§ 90A.240 Notice of Mistake in Bid

[1] Comment

[a] Use of Form

This form is a notice that a bidder made a mistake in the bid that it submitted for a state contract [*see* [b], *below*]. This notice must be submitted to the contracting agency within five days after the opening of bids as a prerequisite to the bidder's right to sue for return of any bid security forfeited [*see* PC Code § 10181] because of the bidder's failure to execute a contract based on the allegedly erroneous bid [PC Code § 5103(b); *see* PC Code §§ 5101, *5102*].

[b] Grounds for Relief From Bid Mistake

A successful bidder may not be relieved of the bid without the awarding agency's consent [PC Code § 5101(a)]. If the agency consents to relieve the bidder of the bid because of mistake, it must prepare a report documenting the facts establishing the existence of each element required by PC Code § 5103 [PC Code § 5101(b)]. These elements are the following [PC Code § 5103]:

- That a mistake was made.
- That the bidder gave the agency written notice of the mistake within five days after the opening of bids, specifying how the mistake occurred.
- That the mistake made the bid materially different than intended.
- That the mistake was made in filling out the bid rather than as an error in judgment or the result of carelessness in site inspection or reading plans or specifications.

If the bidder forfeits the bid security as a result of its failure to execute the contract [*see* PC Code § 10181], it may bring an action against the agency in the county where the bids were opened to recover the amount forfeited, without interest

or costs [PC Code § 5101(a)], on written notice within five working days, excluding Saturdays, Sundays, and state holidays, to the agency of the fact that a mistake had occurred and a detailed statement of how it occurred [PC Code § 5103(b); *see § 90A.123*]. If the bidder is unsuccessful in court, it will be required to pay all costs incurred by the agency including reasonable attorneys' fees fixed by the court [PC Code § 5101(a)].

Other than the notice to the agency [*see* PC Code § 5103(b)], no claim need be filed before bringing suit to reclaim any amounts forfeited [PC Code § 5104]. However, a bidder who claims a bid mistake or forfeits bid security may not participate in further bidding on the same project [PC Code § 5105], and the agency may then award a contract to the second lowest bidder [PC Code § 5106]. These statutory provisions for the relief of bidders establish the exclusive procedure for relieving a bidder from a mistaken bid [*A & A Electric, Inc. v. City of King (1976) 54 Cal. App. 3d 457, 464, 126 Cal. Rptr. 585]* .

[c] Contents of Notice

The bidder must give the public entity written notice, within five working days, excluding Saturdays, Sundays, and state holidays, after the opening of bids, of the fact that a mistake has occurred and a detailed statement of how it occurred [PC Code § 5103(b)]. This form satisfies these minimum requirements. However, in court, the party seeking relief must show not only that it gave this notice, but also that a mistake was made, that the mistake made the bid materially different than intended, and that the mistake was made in filling out the bid and was not due to error in judgment or carelessness in inspecting the work site or in reading the plans or specifications [PC Code § 5103(a),*(c),(d)*]. As a matter of prudent practice, this form also fulfills these requirements.

Note that a bidder can be relieved of a bid if the awarding authority consents [*see* PC Code § 5101]. This form includes an optional request for that consent and adds evidence substantiating the claim that a mistake occurred.

[2] FORM

Notice of Mistake in Bid

NOTICE OF BID MISTAKE

Re: Bid of _____ [*name of claimant*]
Under I.F.B. No. _____,
Issued by _____ [*name of agency*],
Opened on _____ [*date*]
To: [*name of contracting agency*]
_____ [*address*]

Please take notice that the above referenced bid of _____[*name of claimant*] contains a mistake that makes it materially different than we intended it to be. The bid, which was opened on _____[*date*], was in the amount of $_____. That price, however, resulted from a mistake in the bid. The intended bid was $_____.

[*To request consent to withdrawal of bid, add:*]

We hereby request your consent to relief from our bid.

[*Continue with the following:*]

The bid price stated above is mistaken [*state in detail how mistake occurred (other than error in judgment or carelessness in inspecting work site or in reading plans or specifications), e.g.,* because of a clerical error in the assembly and transcription of quotes from the _____ (*specify type*) subcontractor], which resulted in _____[*state effect of mistake, e.g.,* a transposition of the subcontract price from $_____ (*correct price*) to $_____ (*incorrect price*)] so that the bid indicated a total price of $_____ instead of the intended $_____.

The following documents are submitted to support this claim of bid mistake: _____[*list documents, e.g.*, (1) quote of _____ (*name of subcontractor whose quote was mistakenly transposed*), (2) copy of our worksheet showing the transposition, (3) sworn statement of _____ (*name and title of person responsible for the mistake*) explaining the nature of the mistake, and (4) sworn statement of _____ (*name and title of bidder's treasurer, accountant, or comptroller*) explaining the effect of the mistake on other computations in our bid].

If there are any questions or if further evidence is required, please call _____[*name of individual making claim of bid mistake*], [*title*] of _____[*name of bidder*], at [*telephone number*] or email at _____[*email address*].
_____ Dated:

_____ [*name of bidder*]
By _____ [*signature*]
[*typed name*]
_____ [*title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawVoiding the ContractAmbiguity & MistakeGeneral Overview

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29-90A California Legal Forms--Transaction Guide §§ 90A.241-90A.249

[Reserved]

§§ 90A.241[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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E. Protest Against Misaward of Contract

29-90A California Legal Forms--Transaction Guide § 90A.250

§ 90A.250 Protest Against Award of Services or Goods Contract

[1] Comment

[a] Use of Form

This form is a notice of protest for use by an unsuccessful bidder in a competitive procurement of a contract for goods, governed by Article 3, PC Code § 10300 et seq. (Competitive Bidding and Other Procedures) [*see § 90A.22[1][b]*], or by an unsuccessful bidder in a competitive procurement of a contract for services, governed by Article 4, PC Code § 10335 et seq. (Contracts for Services) [*see § 90A.22[3][b]*].

The form is for use to protest the award to another bidder of the contract for services (including consulting services), whether or not the services involve the furnishing or use of equipment, materials, or supplies, on the ground that the protesting bidder is the lowest responsible bidder who is responsive to the specifications for the procurement [*see* PC Code § 10345 (protest procedure); *see also §§ 90A.50[3]*; *see also* PC Code § 10335(a) (services may involve furnishing or use of equipment, materials, or supplies)]. This form is not for use when the bidder in a procurement of services, including consulting services, pursuant to a request for proposal (as opposed to competitive bidding) desires to protest an impending award [*see § 90A.251*; *see also § 90A.22[3][a]* (contracts to which Article 4 is not applicable)].

This form also is for use to protest the award of a contract of goods, on the ground that the protesting bidder is the lowest responsible bidder who is responsive to the specifications for the procurement [*see* PC Code § 10306 (protest procedure); *see also § 90A.50[2]*].

For a form to make a bid protest with respect to a services contract awarded pursuant to a request for proposal, see*§ 90A.251*. For a form for protesting an award of a contract for construction, see*§ 90A.252*.

This form should be prepared in advance of the bid opening, and the bidder or bidder's representative should have it ready at the bid opening for submission immediately after it reasonably appears that the bidder will not be awarded the contract and that the bidder is nevertheless the lowest responsible responsive bidder. Alternatively, this form may be transmitted to the awarding authority as soon after the bid opening as practicable.

For discussion of the definition of "lowest responsible bidder," see*§ 90A.200[1][j]*. The factors leading to a determination that a prospective bidder is qualified to be a vendor of goods or services are *outlined in § 90A.113*.

If the protest is against the award of a contract for goods, the protest must be made to the Department of General Services [*see* PC Code § 10306; *see also* [c], *below*]. If it is against the award of a contract for services, including consulting services, the protest must be made to the Department and to the awarding state agency [*see* PC Code § 10345(a)(2),*(3)*; *see also* [d], *below*].

[b] "Award of Contract" Defined

The "award" of a contract occurs when the state tenders a written contract to the successful bidder for execution. When bids are opened and read in public, the fact that a particular bidder has made the lowest bid does not necessarily mean that it has been awarded a contract. Since a contract must be awarded to the lowest "responsible" bidder, an award cannot be made until the bids have been analyzed [*see Saliba-Kringlen Corp. v. Allen Engineering Co. (1971) 15 Cal. App. 3d 95, 108, 92 Cal. Rptr. 799* (construction contract); *see also § 90A.200[1][j]*].

[c] Protest Against Award of Contract for Goods

Any bidder in a contract for goods may protest a proposed award on the ground that it, rather than the party to whom the award is proposed, is the lowest responsible bidder meeting the procurement specifications. The protest must be filed with the Department of General Services, Procurement Division, before the award is made. The original protest must be followed by a formal protest filed with the State Board of Control. The formal protest must be filed with the Board of Control within ten days of the original protest and include a full and complete written statement detailing the basis for the protest and all supporting facts [PC Code § 10306].

For further coverage of the protest procedure, see*§§ 90A.50[2]* and *90A.124*.

[d] Protest Against Award of Contract for Services

Any bidder in a contract for services, including consulting services may protest a proposed award on the ground that it, rather than the party to whom the award is proposed, is the lowest responsible bidder meeting the specifications for the contract [*see* PC Code § 10345(a)]. If any bidder files a protest with the awarding state agency and the Department of General Services before the award, protesting the award of the contract on the grounds that he or she is the lowest responsible bidder meeting the specifications for the contract, the contract may not be awarded until either the protest has been withdrawn or the Department has decided the matter [PC Code § 10345(a)(2)]. Within five days after filing the protest, the protesting bidder must file with the Department and the awarding state agency a full and complete written statement specifying the grounds for the protest [PC Code § 10345(a)(3)].

For further coverage of the protest procedure, see*§§ 90A.50[3]* and *90A.125*.

[2] FORM

Protest Against Award of Services or Goods Contract

PROTEST AGAINST AWARD OF SERVICES OR GOODS CONTRACT

Re: Award of Contract
Under I.F.B. No. _____,
Dated: _____,

By _____ [*name of awarding authority*]
To: [*name of contracting agency*]
_____ [*address*]

The undersigned bidder protests the award of a contract for [*describe procurement*] pursuant to Invitation for Bids No. _____, dated _____, issued by _____[*name of procurement entity of issuing agency*]. Bids for this procurement were opened on _____[*date*].

The undersigned protests the award on the ground that the undersigned was the lowest responsive responsible bidder and should, therefore, receive the award. The undersigned was the lowest responsive responsible bidder because [*specify facts substantiating protesting bidder's claim*].

[*Add, if desired:*]

The successful bidder was not the lowest responsive responsible bidder because [*specify substantiating facts*].

[*Continue with the following:*]

_____ Dated:

_____ [*name of bidder*]
By _____ [*signature*]
[*typed name*]
_____ [*title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawDispute ResolutionBid Protests

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 90A STATE GOVERNMENT CONTRACTS
PART IV. FORMS
E. Protest Against Misaward of Contract

29-90A California Legal Forms--Transaction Guide § 90A.251

§ 90A.251 Protest Against Award of Contract for Services Under Request for Proposal

[1] Comment

[a] Use of Form

This form is a notice of protest for use by an unsuccessful offeror to protest the award of a contract to another bidder in a procurement of services, including consulting services, pursuant to a request for proposal (RFP). This protest must be filed with both the Department of General Services and the awarding state agency [PC Code § 10345(b)(1)]. Unlike protests against awards in procurements involving competitive bidding [*see* PC Code § 10345(a)], the basis of the protest is not necessarily that the protesting bidder is the lowest responsible bidder [*see* [b], *below*]. For a protest for use in a services contract awarded by competitive bidding, see*§ 90A.250*. For general discussion of contracts for services, including consulting services, see*§ 90A.22[3]*. For discussion of rules relating specifically to consulting contracts, refer to § 90A.23.

[b] Grounds for Protest

Protests against the award of a contract for services pursuant to a request for proposal are limited to the following grounds [PC Code § 10345(b)(2)]:

- The awarding agency failed to follow the required evaluation and selection procedure [*see* PC Code § 10344(b),*(c)* (procedures)].

- The awarding agency failed to correctly apply the standards for reviewing the format requirements or evaluating the proposals as specified in the RFP.

- The awarding agency used the appropriate evaluation and selection procedure [*see* PC Code § 10344(b)], but is proposing to award the contract to a bidder other than the lowest responsible bidder [*see § 90A.200[1][j]*].

- The awarding agency used the appropriate evaluation and selection procedure [*see* PC Code § 10344(c)], but failed to follow the methods for evaluating and scoring the proposals stated in the RFP.

- The awarding agency used the appropriate evaluation and selection procedure [*see* PC Code § 10344(c)], but is proposing to award the contract to a bidder other than the bidder given the highest score by the state agency evaluation committee.

[c] Time Limits for Protest

Contracts for services may be awarded only after a notice of the proposed award has been posted in a place accessible by the general public, including any Internet site identified in the RFP for five working days [PC Code § 10345(b)].If any bidder files a protest before the award [*see § 90A.250[1][b]* ("award of contract" defined)], the contract may not be awarded until either the protest has been withdrawn or the Department of General Services has decided the matter [PC Code § 10345(b)(1)]. Within five days after filing the protest, the protesting bidder must file a full and complete written statement with the Department of General Services and the awarding state agency, specifying the grounds for the protest [PC Code § 10345(b)(2); *see* [b], *above* (grounds for protest)].

[2] FORM

Protest Against Award of Contract for Services Under Request for Proposal

PROTEST AGAINST AWARD OF CONTRACT FOR [SERVICES *or* CONSULTING SERVICES] UNDER REQUEST FOR PROPOSAL

Re: Award of Contract
Under I.F.B. No. _____,
Dated: _____,
By _____ [*name of awarding authority*]
To: [*name of contracting agency*]
_____ [*address*]

The undersigned protests the award of a contract for [*describe procurement*] pursuant to Request for Proposal No. _____, dated _____, issued by _____[*name of procurement entity of issuing agency*]. Offers for this procurement were opened on _____[*date*].

The undersigned protests the award on the ground that (*see Public Contract Code Section 10345(b)(2)*)
_____[the awarding state agency *or* _____(*name of awarding state agency*)]

[*EITHER*]

failed to follow the required evaluation and selection procedures as specified in *Public Contract Code Section [10344(b) or 10344(c)*].

[*OR*]

failed to apply correctly the standards for reviewing the format requirements or evaluating the proposals as specified in the Request for Proposal.

[*OR*]

used the evaluation and selection procedure specified in *Public Contract Code Section 10344(b)*, but is proposing to award the contract to a bidder other than the lowest responsible bidder.

[*OR*]

used the appropriate evaluation and selection procedure specified in *Public Contract Code Section 10344(c)*, but failed to follow the methods for evaluating and scoring the proposals stated in the Request for Proposal.

[*OR*]

used the evaluation and selection procedure specified in *Public Contract Code Section 10344(c)*, but is proposing to award the contract to a bidder other than the bidder given the highest score by the agency's evaluation committee.

[*Continue with the following:*]

In support of its protest, the undersigned protesting bidder states [*specify facts substantiating protesting bidder's claim*].

[*Add: If ground of protest is that the contracting agency proposes to make an award to one other than the lowest responsible bidder:*]

The undersigned was the lowest responsible bidder because _____ (*specify facts substantiating claim*) and the successful bidder was not the lowest responsive responsible bidder because _____ (*specify substantiating facts*).

[*Continue with the following:*]

_____ Dated:

_____ [*name of bidder*]
By _____ [*signature*]
[*typed name*]
_____ [*title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawDispute ResolutionBid Protests

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29-90A California Legal Forms--Transaction Guide § 90A.252

§ 90A.252 Protest Against Award of Contract for Construction Project

[1] Comment--Use of Form

This form is a notice of protest for use by an unsuccessful lowest bidder against the award of a construction contract to any other bidder. It also includes the unsuccessful bidder's demand for the opportunity to present evidence of its responsibility to the agency. Before a public works contract is awarded to a bidder other than the lowest bidder, the public entity must notify the lowest bidder of any evidence reflecting upon its responsibility received from others or adduced as a result of independent investigation, afford it an opportunity to rebut that adverse evidence, and permit it to present evidence that it is qualified to perform the contract [*City of Inglewood-L.A. County Civic Center Auth. v. Superior Court (1972) 7 Cal. 3d 861, 871, 103 Cal. Rptr. 689, 500 P.2d 601* ; *see § 90A.50[1]*].

For the definition of "award," see*§ 90A.250[1][b]*. For discussion of the definition of "lowest responsible bidder," see*§ 90A.200[1][j]*.

[2] FORM

Protest Against Award of Contract for Construction Project

PROTEST AGAINST AWARD OF CONTRACT FOR CONSTRUCTION PROJECT

Re: Award of Contract
Under I.F.B. No. _____,
Dated: _____,
By _____ [*name of awarding authority*]
To: [*name of contracting agency*]
_____ [*address*]

The undersigned bidder protests the award of a contract for the construction of [*describe construction project*] pursuant

to Invitation for Bids No. _____, dated _____, issued by [*name of department or contracting agency*]. Bids for this project were opened on _____[*date*].

The undersigned protests the award on the ground that the undersigned was the lowest responsive responsible bidder and therefore should receive the award. The undersigned was the lowest responsive responsible bidder because [*specify facts substantiating protesting bidder's claim*].

[*Add, if desired:*]

The successful bidder was not the lowest responsive responsible bidder because [*specify substantiating facts*].

[*Continue with the following:*]

The undersigned further demands that [*name of department or contracting agency*] notify it of any evidence reflecting on its responsibility, afford it an opportunity to rebut that adverse evidence, and permit it to present evidence that it is qualified to perform the contract.
_____ Dated:

_____ [*name of bidder*]
By _____ [*signature*]
[*typed name*]
_____ [*title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawDispute ResolutionBid ProtestsPublic Contracts LawTypes of ContractsConstruction Contracts

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CHAPTER 90B FEDERAL GOVERNMENT CONTRACTS

30-90B California Legal Forms--Transaction Guide 90B.syn

§ 90B.syn Synopsis to Chapter 90B: FEDERAL GOVERNMENT CONTRACTS

§ 90B.01 California Statutes

§ 90B.02 Federal Sources

[1] Constitution

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§§ 90B.03-90B.04 [Reserved]

§ 90B.05 Law Reviews and Periodicals

§ 90B.06 Annotations

§ 90B.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 90B.08-90B.09 [Reserved]

§ 90B.10 Government Procurement

[1] In General

[2] Federal Acquisition Planning

§ 90B.11 The Federal Acquisition Regulations

[1] In General

[2] The Statutory Scheme

[a] In General

[b] Military Procurement

[3] Prescribed Clauses and Standard Forms Requirements

§ 90B.12 Contracts Prior to April 1, 1984--The Federal Procurement Regulations

§ 90B.13 Federal Procurement Authority

[1] Authority Under Constitution and Statute

[2] Authority of Agency Contracting Officer

§§ 90B.14-90B.19 [Reserved]

§ 90B.20 Obtaining Government Procurement Information

[1] Dissemination of Information Using Electronic Databases

[2] Central Contractor Registration

§ 90B.21 Competition in Contracting Requirement

[1] The Full and Open Competition Rule

[2] Exceptions

[a] Conditions Permitting Other Than Full and Open Competition

[b] Simplified Acquisition Procedures

§ 90B.22 Contractor Qualification

[1] The Responsible Contractor

[a] General Requirements

[b] Additional Federal and State Requirements

[2] The Qualified Manufacturer or Regular Dealer

[a] The Walsh-Healey Act

[b] Qualified Products Lists

[i] Qualification Procedures

[ii] Specifications and Standards for Qualified Products

[3] The Qualified Architect-Engineer

[4] The Qualified Small Business Concern

[5] Bonding Requirements for Construction Contractors

[a] Bid Bond

[b] Performance and Payment Bonds

§ 90B.23 Contractor Disqualification

[1] In General

[2] Debarment

[3] Suspension

[4] Ineligibility

§ 90B.24 The Competitive Bid

[1] The Invitation for Bids--The Sealed Bid

[a] In General

[b] When Required

[c] Elements of Bids

[d] Receipt and Opening of Bids

[e] Modification and Withdrawal

[f] Evaluation

[i] In General

[ii] Price and Price-Related Factors

[g] Correction of Bid Mistakes

[h] Cancellation of Bids

[i] Rejection of Bids

[j] Award and Protests

[2] The Two-Step Sealed Bid

§ 90B.25 The Negotiated Proposal

[1] The Request for Proposals

[a] In General

[b] When Permissible

[c] Elements of Proposals

[d] Receipt and Handling of Proposals

[e] Late Proposals and Modifications

[f] Contracting by Negotiation

[g] Proposal Evaluation

[h] Correction of Mistakes in Proposals

[i] Award and Protests

[2] The Unsolicited Proposal

§§ 90B.26-90B.39 [Reserved]

§ 90B.40 Categories of Procurement Contracts

[1] Supplies

[2] Services

[3] Construction

[a] In General

[b] Procurement Procedure

[4] Architect-Engineer Services

[a] In General

[b] Procurement Procedure

[c] Criteria for Award

[5] Additional Contract Categories

[a] In General

[b] Major Systems Acquisitions

[c] Research and Development

§ 90B.41 Types of Contracting Methods

[1] In General

[2] The Fixed-Price Contract

[3] The Cost-Reimbursement Contract

[4] The Incentive Contract

[5] Additional Contracting Methods

[a] In General

[b] Indefinite Delivery

[c] Time and Materials

[d] Letter Contracts

§ 90B.42 Contract Financing

[1] In General

[2] Assignment of Claims

§ 90B.43 Mandatory Work Standards and Compliance Requirements

[1] Government Policy

[2] The "Buy American" Requirement

[3] Wage, Hour, and Workplace Standards

[a] Wage and Hour Standards

[i] Supplies Contracts

[ii] Services Contracts

[iii] Construction Contracts

[b] Safety and Health Standards

[4] Affirmative Action Hiring Requirements

[a] Equal Employment Opportunity Act

[b] Rehabilitation Act

[c] Vietnam Veterans' Assistance Act

[5] Environmental and Conservation Requirements

[6] Disclosure Requirements

[a] Right of Privacy and Protection for Proprietary Information

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§ 90B.44 Contract Administration--Prescribed Clauses

[1] Contract Modification

[2] Changes Clause

[a] In General

[b] Equitable Claim Adjustment

[3] Termination for Convenience Clause

[4] Termination for Default Clause

[5] Inspection Requirement Clause

[6] Subcontracting Clause

[7] Disputes Clause

§ 90B.45 Requirements for Procurement Integrity

[1] Government Policy

[2] Prohibited Conduct

[3] Interest of Congressional Member

[4] Anti-Kickback Act

§§ 90B.46-90B.59 [Reserved]

§ 90B.60 Protests Against Awards

[1] In General

[2] Protest to Agency

[3] Protest to the General Accounting Office

[4] Protest to the General Services Administration Board of Contract Appeals

§ 90B.61 Resolution of Contract Claims and Disputes

[1] The Contract Disputes Act of 1978

[2] Submission of Claims

[a] Procedure in General

[b] Fraudulent Claims

[3] Appeals

§ 90B.62 Equal Access to Justice Act

§§ 90B.63-90B.69 [Reserved]

§ 90B.70 Small Business and Small Disadvantaged Business Preferences

[1] The Small Business Act Preference Programs

[a] In General

[b] Qualifying as a Small Business Concern

[i] Representation as a Small Business Concern

[ii] Obtaining a Certification of Competency

[c] Qualifying as a Small Disadvantaged Business Concern

[2] Set-Asides Under the Small Business Act

[3] Section 8a Subcontracting With the Small Business Administration

§ 90B.71 Indian Incentive Program

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§ 90B.100 Responsible Bidder or Offeror

[1] Facts

Scope

[2] Documents

Scope

§ 90B.101 Manufacturer or Regular Dealer

[1] Facts

Scope

[2] Documents

Scope

§ 90B.102 Architect-Engineer

[1] Facts

Scope

[2] Documents

Scope

§ 90B.103 Small Business or Small Disadvantaged Business

[1] Facts

Scope

[2] Documents

Scope

§§ 90B.104-90B.109 [Reserved]

§ 90B.110 Qualifying as a Responsible Bidder or Offeror

Scope

§ 90B.111 Qualifying as a Manufacturer or Regular Dealer

Scope

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Scope

§§ 90B.114-90B.119 [Reserved]

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Scope

§ 90B.121 Competing for Small Business Preferences--Representation as a Small Business Concern

Scope

§ 90B.122 Competing for Small Business Preferences--Obtaining a Certification of Competency

Scope

§ 90B.123 Competing for Architect-Engineer Contracts

Scope

§ 90B.124 Submission of Bid or Proposal

Scope

§ 90B.125 Withdrawal or Modification of Bid or Proposal

Scope

§ 90B.126 Correction of Mistakes in Bid or Proposal

Scope

§ 90B.127 Protests Against Awards

Scope

§§ 90B.128-90B.139 [Reserved]

§ 90B.140 Resolving Claims and Disputes

Scope

§ 90B.141 Posting Bonds for Construction Contracts

Scope

§§ 90B.142-90B.199 [Reserved]

§ 90B.200 Central Contractor Registration Worksheet

[1] Comment--Use of Form

[2] FORM

Central Contractor Registration Worksheet

§§ 90B.201-90B.209 [Reserved]

§ 90B.210 Request for Quotations--Standard Form 18

[1] Comment

[a] Use of Form

[b] Classification as Small Business

[c] Amendment and Modification

[2] FORM

Request for Quotations--Standard Form 18

§§ 90B.211-90B.219 [Reserved]

§ 90B.220 Solicitation, Offer, and Award--Standard Form 33

[1] Comment

[a] Use of Form

[b] Plans and Specifications

[c] Prescribed Contract Clauses

[d] Documents and Attachments

[e] Representations and Instructions

[f] Labor Laws

[g] Small Business Preference

[h] Submission, Withdrawal, and Award of Bid

[i] Bid Bond

[j] Modification

[2] FORM

Solicitation, Offer, and Award--Standard Form 33

§ 90B.221 Award/Contract--Standard Form 26

[1] Comment--Use of Form

[2] FORM

Award/Contract--Standard Form 26

§ 90B.222 Solicitation/Contract--Standard Form 1447

[1] Comment--Use of Form

[2] FORM

Solicitation/Contract--Standard Form 1447

§ 90B.223 Amendment of Solicitation/Modification of Contract--Standard Form 30

[1] Comment--Use of Form

[2] FORM

Amendment of Solicitation/Modification of Contract--Standard Form 30

§§ 90B.224-90B.229 [Reserved]

§ 90B.230 Solicitation, Offer and Award--Standard Form 1442

[1] Comment

[a] Use of Form

[b] Negotiation Procedures

[c] Specifications and Drawings

[d] Differing Site Conditions

[e] Subcontracting

[f] Labor Laws

[g] Liquidated Damages Clause

[h] Bonding

[2] FORM

Solicitation, Offer and Award--Standard Form 1442

§ 90B.231 Bid Bond--Standard Form 24

[1] Comment

[a] Use of Form

[b] When Bid Bond Is Required

[c] Amount of Bond

[2] FORM

Bid Bond--Standard Form 24

§ 90B.232 Performance Bond--Standard Form 25

[1] Comment

[a] Use of Form

[b] When Performance Bond Is Required

[c] Amount of Bond

[2] FORM

Performance Bond--Standard Form 25

§ 90B.233 Payment Bond--Standard Form 25A

[1] Comment

[a] Use of Form

[b] When Payment Bond Is Required

[c] Amount of Bond

[2] FORM

Payment Bond--Standard Form 25A

§ 90B.234 Affidavit of Individual Surety--Standard Form 28

[1] Comment

[a] Use of Form

[b] When Affidavit Is Required

[c] Use of Sureties

[2] FORM

Affidavit of Individual Surety--Standard Form 28

§§ 90B.235-90B.239 [Reserved]

§ 90B.240 Architect-Engineer Qualifications

[1] Comment

[a] Use of Form

[b] Procedures for Acquisition of Services

[2] FORM

Architect Questionnaire--Standard Form 254

§ 90B.241 Architect-Engineer Contract--Standard Form 252

[1] Comment

[a] Use of Form

[b] Evaluation and Selection

[2] FORM

Architect-Engineer Contract--Standard Form 252

§§ 90B.243-90B.249 [Reserved]

§ 90B.250 Request for Correction of Mistaken Bid Before Award

[1] Comment

[a] Use of Form

[b] Correction Before Award

[c] Correction After Award

[d] Supporting Evidence

[2] FORM

Request for Correction of Mistaken Bid Before Award

§§ 90B.251-90B.259 [Reserved]

§ 90B.260 Protest to Individual Agency or to General Accounting Office

[1] Comment

[a] Use of Form

[b] Notice of Bid Rejection

[c] Permitted Protests

[d] Agency Protest

[e] Protest to General Accounting Office

[f] Protest to the General Services Administration Board of Contract Appeals

[2] FORM

Protest to Individual Agency or to General Accounting Office

§§ 90B.261-90B.269 [Reserved]

§ 90B.270 Initial Claim of Contractor Under Disputes Clause--Claim Directed to Contracting Officer

[1] Comment

[a] Use of Form

[b] Claims Arising Under the Contract

[c] Fraudulent Claims

[d] Decision by Contracting Officer

[e] Interest on Amounts Due on Claims

[f] Contractor's Right of Appeal

[2] FORM

Initial Claim of Contractor Under Disputes Clause--Claim Directed to Contracting Officer

§ 90B.271 Notice of Appeal of Contracting Officer's Final Decision on Contract Claim to Agency Board of Contract Appeals

[1] Comment

[a] Use of Form

[b] Decision by Agency Board of Contract Appeals

[c] Review of Board's Decision

[d] Contractor's Duty to Continue Performance

[2] FORM

Notice of Appeal of Contracting Officer's Final Decision on Contract Claim to Agency Board of Contract Appeals

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 90B FEDERAL GOVERNMENT CONTRACTS

30-90B California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses the statutory scheme under which federal agencies contract for supplies and services, including construction, and for architect-engineer services. The focus of the chapter is on those areas in which an attorney is most likely to advise a client who is involved or about to become involved in contracting with federal agencies: bidding procedures, award, protests, and contract dispute resolution procedures.

The Legal Background discusses the procurement methods used by the federal government, award considerations, award protests, the administration of government contracts, and the general rules governing contract disputes. In addition, the Legal Background discusses types of special assistance to certain small and disadvantaged businesses and businesses in distressed areas.

The Transaction Guide includes guides for determining whether a client qualifies as a responsible bidder or offeror and as a small business eligible for a small business set-aside preferences. It includes coverage of qualification requirements for a prospective government contractor for supplies or services, including construction, and for architect-engineer services, a guide to the submission of bids, withdrawal or modification of bids, correction of bid mistakes, award protests, resolution of contract disputes, and posting of required bonds for construction contracts.

The Forms section contains the standard forms for contracting with the government as prescribed in the federal acquisition regulations, including forms for application for solicitation mailing lists, responding to a request for quotations from the government, making offers in response to invitations for bids or requests for proposals, and completing information necessary for qualifying as a selected architect-engineer firm. There are also forms for use in correcting bid mistakes, making a protest against an award of contract, filing a claim under a procurement contract against the government, and noticing an appeal of a decision of an agency's contracting officer to the agency's board of contract appeals.

For coverage of contracts with state and local governments, see Ch. 90A, *State Government Contracts* . For discussion of construction issues, see Ch. 30A, *Construction Financing* , Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals* , and Ch. 30D, *Construction Contracts and Subcontracts* . Discussion of a contractor's duty to be licensed by the state is covered in Ch. 88, *Licensing of Contractors* . For general coverage of contract issues, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , and Ch. 77, *Discharge of Obligations* . An

attorney practicing in the area of federal government contracts should also consult Federal Contract Management--A Manual for the Contract Professional(Matthew Bender).

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PART I. RESEARCH GUIDE
A. Primary Sources

30-90B California Legal Forms--Transaction Guide § 90B.01

§ 90B.01 California Statutes

Licensing and regulation of contractors. *B&P Code § 7000 et seq.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewGovernmentsFederal GovernmentGeneral OverviewPublic Contracts LawTypes of ContractsGeneral Overview

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A. Primary Sources

30-90B California Legal Forms--Transaction Guide § 90B.02

§ 90B.02 Federal Sources

[1] Constitution

Congressional appropriations bills limitation on procurement of supplies and services. U.S. Const., art. I, §§ 8, 9.

[2] Statutes

Equal Access to Justice Act. *5 U.S.C. § 504.*

Administrative Procedure Act. *5 U.S.C. § 551 et seq.*

Freedom of Information Act. *5 U.S.C. § 552.*

Privacy Act of 1974. *5 U.S.C. § 552a.*

Scope of review of final agency action. *5 U.S.C. § 706.*

Armed Forces Procurement Act. *10 U.S.C. § 2301 et seq.*

Small Business Act. *15 U.S.C. § 631 et seq.*

Section 8a contracting. *15 U.S.C. § 637(a).*

Criminal penalties for misrepresentation as small business. *15 U.S.C. § 645(d).*

Criminal penalties for false claims against the government. *18 U.S.C. § 287.*

Contracts with congressional members. *18 U.S.C. § 431 et seq.*

Kickback (Copeland) Act. *18 U.S.C. § 874*.

Criminal penalties for fraudulent claims against the government. *18 U.S.C. § 1001 et seq.*

Trade Agreements Act of 1979. *19 U.S.C. § 2501 et seq.*

Incentive to use Indian organization as sub-contractor. *25 U.S.C. § 1544*.

Fair Labor Standards Act of 1938. *29 U.S.C. § 201 et seq.*

Occupational Safety and Health Act. *29 U.S.C. § 651 et seq.*

Rehabilitation Act of 1973. *29 U.S.C. § 701 et seq.*

False Claims Act. *31 U.S.C. §§ 3729-3733*

Clean Water Act of 1977. *33 U.S.C. § 1251 et seq.*

Vietnam Era Veterans' Readjustment Assistance Act of 1972. *38 U.S.C. § 2012*.

Selection of Architects and Engineers. *40 U.S.C. § 1101 et seq.*

Public buildings, property, and works. *40 U.S.C. § 3101 et seq.*

Miller Act (bond requirements for construction contracts). *40 U.S.C. §§ 3131, 3133*.

Davis-Bacon Act (minimum wage requirements). *40 U.S.C. §§ 3141-3144, 3146, 3147*.

Anti-Kickback (Copeland) Act. *40 U.S.C. § 3145*.

Contract Work Hours and Safety Standards Act. *40 U.S.C. § 3701 et seq.*

Advertising Act. *41 U.S.C. § 5*.

Buy American Act. *41 U.S.C. §§ 10a-10d*.

Appropriations limitations on government acquisitions. *41 U.S.C. § 11(a)*.

Prohibition against interest of Congressional member. *41 U.S.C. § 22*.

Public Contracts Act. *41 U.S.C. § 35 et seq.*

Anti-Kickback Act. *41 U.S.C. § 51 et seq.*

Federal Procurement Procedures. *41 U.S.C. § 251 et seq.*

Competition in Contracting Act of 1984. *41 U.S.C. § 252 et seq.*

Disputes Act (Wunderlich Act). *41 U.S.C. § 321 et seq.*

Service Contract Act of 1965 (McNamara-O'Hara). *41 U.S.C. § 351 et seq.*

Office of Federal Procurement Policy Act. *41 U.S.C. § 401 et seq.*

Contract Disputes Act of 1978. *41 U.S.C. § 601 et seq.*

Fraudulent claims penalties in government contracting. *41 U.S.C. § 604*.

Clean Air Act. *42 U.S.C. § 7401 et seq.*

National Environmental Policy Act of 1969. *42 U.S.C. § 4321 et seq.*

Defense Production Act of 1950. *50 U.S.C. App. § 2061 et seq.*

[3] Regulations

Bid protest regulations for the General Accounting Office. 4 C.F.R. pt. 21 et seq.

Small Business Administration. 13 C.F.R. pt. 101 et seq.

Small Business Size Regulations. 13 C.F.R. pt. 121.

Government Contracting Programs. 13 C.F.R. pt. 125.

Department of Defense procurement procedure. *32 C.F.R. pt. 160 et seq.*

Defense Acquisition Regulations. Former 32 C.F.R. pt. 1 et seq.

Public contracts regulations. 41 C.F.R. pt. 50-201 et seq.
Affirmative action requirements under Rehabilitation Act and Equal Employment Opportunity Act. 41 C.F.R. pt. 60-2.
Federal Acquisition Regulations System. 48 C.F.R. pt. 1.
Improper business practices and conflicts of interest. 48 C.F.R. pt. 3.
Publicizing contract actions. 48 C.F.R. pt. 5.
Competition requirements. *48 C.F.R. pt. 6*.
Acquisition planning. 48 C.F.R. pt. 7.
Contractor qualifications. 48 C.F.R. pt. 9.
Market Research. 48 C.F.R. pt. 10.
Simplified Acquisition procedures. 48 C.F.R. pt. 13.
Sealed bidding. 48 C.F.R. pt. 14.
Contracting by negotiation. 48 C.F.R. pt. 15.
Types of contracts. 48 C.F.R. pt. 16.
Special contracting methods. 48 C.F.R. pt. 17.
Small business and small disadvantaged business concerns. *48 C.F.R. pt. 19*.
Application of labor laws to government procurement. *48 C.F.R. pt. 22*.
Workplace standards requirements. 48 C.F.R. pt. 23.
Disclosure requirements. 48 C.F.R. pt. 24.
Buy American and designated country end-products requirements. *48 C.F.R. pt. 25*.

Socioeconomic programs. 48 C.F.R. pt. 26.
B onding requirements. 48 C.F.R. pt. 28.
Contract financing. 48 C.F.R. pt. 32.
Protests, disputes, and appeals procedures. 48 C.F.R. pt. 33.
Major system acquisition. 48 C.F.R. pt. 34.
Research and development contracting. 48 C.F.R. pt. 35.
Construction and architect-engineer contracting. 48 C.F.R. pt. 36.
Service contracting. 48 C.F.R. pt. 37.
Supplies contracting. 48 C.F.R. pt. 38.
Acquisition of information resources. 48 C.F.R. pt. 39.
Contract modification. 48 C.F.R. pt. 43.
Termination of contracts. 48 C.F.R. pt. 49.
Prescribed provisions and contract clauses. 48 C.F.R. pt. 52.
Contract work hours and safety standards requirements. *48 C.F.R. § 52.222-4*.
Minimum wage requirements under Davis-Bacon Act. *48 C.F.R. § 52.222-6*.
Prescribed standard forms. 48 C.F.R. pt. 53.

Defense Federal Acquisition Regulations. 48 C.F.R. pts. 201 et seq.

Individual agency's authority to implement and supplement Federal Acquisition Regulations. *48 C.F.R. § 1.301 et seq.*
Department of Transportation. 48 C.F.R. pt. 1201 et seq.
National Aeronautics and Space Administration. 48 C.F.R. pt. 1801 et seq.
Department of the Army Acquisition Regulations. 48 C.F.R. pt. 5108 et seq.
Department of the Navy Acquisition Regulations. 48 C.F.R. pt. 5215 et seq.

Department of the Air Force Federal Acquisition Regulations Supplement. 48 C.F.R. pt. 5315 et seq.
General Services Administration Board of Contract Appeals. 48 C.F.R. pt. 6101.

[4] Executive Orders

Equal opportunity in federal employment policy. Executive Order 11246, *30 F.R. 12319, 12935 (1965)* .

Public policy against age discrimination in federal employment. Executive Order 11141, *29 F.R. 2477 (1964)* .

Drug-free workplace. Executive Order 12564, *51 F.R. 32889 (1986)* .

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B. Secondary Sources

30-90B California Legal Forms--Transaction Guide § 90B.05

§ 90B.05 Law Reviews and Periodicals

Friedman & Davis, *A Primer on Government Contracting* (Part 2), 40(5) Prac. Law. 81 (1994).

Schooner & Schooner, *Look Before You Lend: A Lender's Guide to Financing Government Contracts Pursuant to the Assignment of Claims Act, 48 Bus. Law 535 (1993).*

Brittin, *The Comptroller General's Dual Statutory Authority to Decide Bid Protests*, 22 Pub. Cont. L.J. 636 (1993).

D'Aloisio, *The Design Responsibility and Liability of Government Contractors*, 22 Pub. Cont. L.J. 515 (1993).

Reuben, *Ferreting Out Fraud: Qui Tam Suits Expose Fraud Against Government--But at Great Cost, 13 Cal. Law. 39*(4) (Dec. 1993).

Zupa, *When Is a Claim Not a Claim? 22 Pub. Cont. L.J. 654 (1993).*

Feldmen, *Agency Evaluators in Regulation Acquisitions*, 21 Pub. Cont. L.J. 279 (1992).

Renner, *Prompt Payment Act: an Interesting Remedy for Government Late Payment*, 21 Pub. Cont. L.J. 177 (1992).

Tomaszczuk & Jensen, *The Adjudicatory Arm of the Congress--the GAO's Sixty Year Role in Deciding Government Contract Bid Protests Comes Under Renewed Attack by the Department of Justice, 29 Harv. J. on Legis. 399 (1992).*

Worthington, *As Military Downsizes, Contract Terms Become a Challenge*, 173 J. Acct. 88(3) (1992).

Hordell & Lipman, *New Rules and a New Era of Bid Protection at GAO*, 26 Pub. Cont. Newsl. 3(6) (Spring 1991).

Kamnan, *Challenging Award Fee Determinations Under Federal Government Contracts*, 20 Pub. Cont. L.J. 197

(1991).

Koehler, *Certifying Claims Under the Contracts Disputes Act of 1978--the Ghost of Rickover Past*, 21 Pub. Cont. L.J. 25 (1991).

Lloyd, *Limitations on Subcontracting by Small Businesses: an Alternative View*, 20 Pub. Cont. L.J. 618 (1991).

MacManus, *Why Business Reluctance to Sell to the Government?* 51 Pub. Admin. Rev. 328 (1991).

McAvoy, *Bid Protests: Balancing Public and Private Interests, 34 A.F. L. Rev. 227 (1991).*

Murphy, *New Procedure for Bid Protests at GAO*, 27 Pub. Cont. Newsl. 3(7) (Fall 1991).

Rob, *Contractor Assertion of Claims Under the Contract Disputes Act, 133 Mil. L. Rev. 141 (1991).*

Shannon, *The Government-Wide Debarment and Suspension Regulations After a Decade--a Constitutional Framework--Yet, Some Issues Remain in Transition, 134 Mil. L. Rev. 1 (1991).*

Report of Committee on Federal Labor Standards Legislation, *Federal Labor Studies, 7 Lab.* Law. 701 (1991).

Brittin, *Alternate Dispute Resolution in Government Contract Appeals*, 19 Pub. Cont. L.J. 210 (1990).

Brody, *Recent Developments in Area of "Qui Tam" Lawsuits: A New Weapon for Challenging Those Who May Be Submitting False Claims to the Government*, 37 Fed. Bar News & J. 592 (1990).

Madsen, Williamson & Wolcott, *Management Contractors and Environmental Damages: Who Shall Pay? (The New Challenges of Government Contract Law)*, 37 Fed. Bar News & J. 601 (1990).

Rosen, *GSBCA Protests: Just Some Basic Blocking and Tackling-- Practical Advice for the Government and Contractors*, 37 Fed. Bar News & J. 598 (1990).

Toomey, *Good Faith and Fair Dealing: the Wellnigh Irrefragable Need for a New Standard in Public Contract Law*, 20 Pub. Cont. L.J. 87 (1990).

Zimmerman, *Interest on Government Contract Claims in California*, 10 Constr. L. 18(2) (Jan. 1990).

Hourcle, Lingo & Esposito, *Environmental Law in the Fourth Dimension: Issues of Responsibility and Indemnification with Government Owned-Contractor Operated Facilities, 31 A.F. L. Rev. 245 (1989).*

Maskin, *Understanding the Government Contractor Defense*, 13 A.L.I.--A.B.A. Course Mat. J. 53 (Feb. 1989).

Meyers, *Regulation of Federal Contractor Employment Patterns*, 49 Pub. Adm. Rev. 52 (1989).

Schwarz & Patrick, *U.S. Contracts: How Small Businesses Can Get Them*, 6 Compleat L. 55(6) (Fall 1989).

Antitrust and Government Procedures, *Application of Anti-Trust Laws to Government Contract Activities: Questions and Answers (Antitrust Section's 36th Annual Meeting, Toronto, 1988), 57 Antitrust L.J. 563 (1988).*

Harley, *Economic Duress and Unconscionability: How Fair Must the Government Be? 18 Pub. Cont. L.J. 76 (1988).*

Webber, *Bid Protests and Agency Discretion: Where and Why Do the GSBCA and the GAO Part Company*, 18 Pub. Cont. L.J. 1 (1988).

Smith & Beck, *Representing Government Contractors Accused of Misconduct, 7 Cal. Law. 55*(4) (May 1987).

Pachter, *The Need for a Comprehensive Judicial Remedy for Bid Protests*, 16 Pub. Cont. L.J. 47 (1986).

Susman, *Risky Business: Protecting Government Contract Information Under the FOIA*, 16 Pub. Cont. L.J. 15 (1986).

Boyd, *Changing World of Sole Source Negotiated Procurement,* 9 A.L.I.--A.B.A. Course Mat. J. 21 (Feb. 1985).

Crowell & Ralston, *The New Government Contracts Bid Protest Law*, 15 Pub. Cont. L.J. 177 (1985).

Lovitky, *The Problem of Government Contracting for Consulting Services*, 14 Pub. Cont. L.J. 332 (1984).

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§ 90B.06 Annotations

Annot., Application to Determination of Government's Liability Under Public Contract, of Doctrine of "Constructive" Invocation of Clause Authorizing Termination for Convenience of Government-Modern Cases, 104 A.L.R. Fed. 661 (1991) .

Annot., Notice Sufficiency of Notice to Public Works Contractor on United States Project Under Miller Act (*40 U.S.C. § 270b(a)*), *98 A.L.R. Fed. 778 (1990)* .

Annot., Judicial Review of Administrative Order Debarring Defense Contractor From Contracting With Federal Government, 91 A.L.R. Fed. 868 (1989).

Annot., Standing of Disappointed Bidder on Public Contract to Seek Damages Under *42 U.S.C.S. § 1983*, for Public Authorities' Alleged Violations of Bidding Procedure, 86 A.L.R. Fed. 904 (1988) .

Annot., Necessity and Sufficiency of Environmental Impact Statements Under § 102(2)(C) of National Environmental Policy Act of 1969 (*42 U.S.C.S. § 4332(2)(C)*), in *Cases Involving Projects Relating to Acquisition, Construction, Alteration, or Disposition of Government Facilities, 76 A.L.R. Fed. 279 (1986)* .

Annot., Amount of Appropriation as Limitation on Damages for Breach of Contract Recoverable by One Contracting With Government Agency, 40 A.L.R.4th 998 (1985).

Annot., Timeliness of Notice to Public Works Contractor on Federal Project, of Indebtedness for Labor or Materials Furnished, 69 A.L.R. Fed. 600 (1984) .

Annot., Award of Prejudgment Interest Under Miller Act (*40 U.S.C.S. § 270a et seq.*), *66 A.L.R. Fed. 901 (1984)* .

Legal Topics:

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§ 90B.07 Text References

[1] Matthew Bender Sources

California Legal Forms (Matthew Bender).
Ch. 30A, *Construction Financing* .
Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals* .
Ch. 30D, *Construction Contracts and Subcontracts* .
Ch. 43, *Commercial Loans* .
Ch. 90A, *State Government Contracts* .

Rabkin & Johnson, Current Legal Forms with Tax Analysis (Matthew Bender).
Ch. 2, *Joint Ventures and Business Trusts*.
Ch. 6, *Credit and Finance*.

[2] Additional Text References

Federal Administrative Procedure, vol. 2, *Government Contracts* (L. Ed. 1990).

Federal Procedure Forms, vol. 10, *Government Contracts* (L. Ed. 1990).

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§ 90B.10 Government Procurement

[1] In General

Extensive regulations govern the procurement of supplies, services, and construction by the federal government. These regulations describe in detail the procedures to be followed in contracting with the government, and include provisions regulating advertising and solicitation by government agencies, qualification of prospective contractors, negotiation of contracts, source selection procedures, prescribed contract clauses and forms, procedures in the event of default or termination of the contract, and procedures for protests against awards and claims relating to contracts.

The Federal Acquisition Regulations (FAR) govern procedures for both civilian and military procurement [48 C.F.R. pt. 1 et seq.; *see § 90B.11*].

[2] Federal Acquisition Planning

Federal acquisition planning is the process by which the efforts of all personnel responsible for a government acquisition are coordinated and integrated through a comprehensive plan for fulfilling the procuring agency's need in a timely manner and at a reasonable cost, and includes developing an overall strategy for managing the acquisition [*48 C.F.R. § 7.101*]. Pursuant to government policy to rely on private commercial sources for supplies and services [*48 C.F.R. § 7.301*], acquisition planning includes the following steps [*40 C.F.R. § 7.105*]:

- Acquisition plan approval by the procuring agency.
- Statement of work by the contracting officer.
- Specifications and descriptions of the required supplies or services.
- Data requirements.
- Completion of acquisitions-package preparation.

- Purchase request.
- Justification and approval for other than full and open competition when applicable.
- Issuance of synopses of proposed contract action.
- Advertisement in the form of issuance of solicitation for bids or proposals.
- Evaluation of bid offers or proposals.
- Negotiations of proposals.
- Contract preparation and clearance by procuring agency.
- The contract award.

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§ 90B.11 The Federal Acquisition Regulations

[1] In General

The Federal Acquisition Regulations System was established on September 19, 1983, for the codification and publication of uniform policies and procedures for acquisition by all executive agencies of the federal government, in accordance with the regulations of the Office of Federal Procurement Policy (OFPP) established by congressional act in 1974 [*48 C.F.R. § 1.102*; *see 41 U.S.C. § 401 et seq.*].

The Federal Acquisition Regulatory System consists of the Federal Acquisition Regulations (FAR), which is the primary document [48 C.F.R. pt. 1 et seq.], and individual agency acquisition regulations that implement or supplement the FAR [*48 C.F.R. § 1.301 et seq.*]. There are two principal procurement statutes on which the FAR is based: the Federal Procurement Procedures [*41 U.S.C. § 251 et seq.*], and the Armed Forces Procurement Procedures [*10 U.S.C. § 2301 et seq.*]. The FAR is prepared, issued, and maintained jointly by the Secretary of Defense, the General Services Administrator, and the National Aeronautics Space Administration Administrator under their several statutory authorities [*48 C.F.R. § 1.102*]. Subject to these three authorities, revisions of the FAR are issued through the coordinated action of two councils, the Defense Acquisition Regulatory Council, and the Civilian Agency Acquisition Council [*48 C.F.R. § 1.201-1*].

Intended as a unified and simplified procurement regulatory scheme, the FAR is applicable to procurements by both civilian and military agencies and is essentially a replication of three preexisting systems: the Federal Procurement Regulations of 1949 (FPR) applicable to civilian procurement [former 41 C.F.R. pt. 1 et seq.; *now see* 48 C.F.R. pt. 1 et seq.], the Defense Acquisition Regulations (DAR), applicable to military procurement [former 32 C.F.R. pt. 1 et seq.; *now see* 48 C.F.R. pt. 201 et seq.], and the National Aeronautics and Space Administration Procurement Regulations [former 41 C.F.R. § 18; *now see* 48 C.F.R. pt. 1801 et seq.; *see also* 41 C.F.R. subtitle A note]. For a brief discussion of the former regulations applicable to pre-1984 contracts, see *§ 90B.12*.

[2] The Statutory Scheme

[a] In General

Chapter 1 of the FAR consists of general provisions applicable to all agency procurement, both civilian and military [*see* 48 C.F.R. pt. 1 et seq.]. The remaining chapters consist of individual agency provisions implementing these general provisions and supplementing them [*see* 48 C.F.R. pt. 2 et seq.]. The individual agency provisions are issued under their several authorities [*48 C.F.R. § 1.301*; *see* [1], *above*].

[b] Military Procurement

Chapter 2 of the FAR consist of policies and procedures specifically applicable to Department of Defense Procurement (DFAR) [*see* 48 C.F.R. pt. 201 et seq.]. Additionally, provisions regarding procurement by the individual departments of the Armed Forces may be found in their relevant subparts in Chapter 1 of the FAR [*see* 48 C.F.R. pts. 1201 et seq. (Department of Transportation), 5108 et seq. (Department of the Army), 5215 et seq. (Department of the Navy), 5315 et seq. (Department of the Air Force)]. Provisions applicable to military procurement are contained in other titles of the Code of Federal Regulations [*see* 32 C.F.R. § 592 (Department of Army procurement procedures); 48 C.F.R. pt. 201 et seq. (Department of Defense procurement policies and procedures)].

[3] Prescribed Clauses and Standard Forms Requirements

As provided for in the FAR, there are prescribed contract clauses and standard forms that must be used in government procurement [*see 48 C.F.R. §§ 52.000 et seq.* (prescribed clauses), 53.000 et seq. (prescribed standard forms)]. For a discussion of some of the commonly used prescribed clauses, see *§§ 90B.43* (mandatory work standards and compliance requirements), 90B.44 (contract administration--prescribed clauses), and 90B.45 (requirements for procurement integrity). Prospective contractors and other interested parties may obtain copies of standard forms from the Superintendent of Documents, Government Printing Office, Washington, DC 20402; standard and optional forms not available from the Superintendent of Documents may be obtained from the prescribing agency [*48 C.F.R. § 53.107*]. For discussion and illustration of the basic prescribed standard forms, see *§§ 90B.200*-90B.242.

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§ 90B.12 Contracts Prior to April 1, 1984--The Federal Procurement Regulations

For contracts prior to April 1, 1984, there are two separate regulatory systems governing procurement with federal agencies: civilian procurement is governed by the Federal Procurement Regulations (FPR) [*see* former 41 C.F.R. § 1; now 48 C.F.R. pt. 1 et seq.], and military procurement is governed by the Defense Acquisition Regulations (DFAR) [former 32 C.F.R. §§ 1-39; *now see* 48 C.F.R. pt. 201 et seq.]. If issues arise relative to contracts formed prior to April 1, 1984, it is necessary to consult these former titles and sections of the Code of Federal Regulations to determine the applicable regulations. Both preexisting systems, the FPR and the DFAR, have been essentially replicated in the FAR under a different title and a different numbering system for contracts made on or after April 1, 1984 [*see § 90B.11[1], [2]*].

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§ 90B.13 Federal Procurement Authority

[1] Authority Under Constitution and Statute

The federal government is constitutionally authorized to purchase only those supplies and services that Congress votes to fund by appropriations bills [*see* U.S. Const., art. I, §§ 8, 9]. Thus, with certain limited exceptions, federal agencies cannot make a contract or purchase on behalf of the United States unless the action is authorized by law or is under an appropriation adequate to its fulfillment [*41 U.S.C. § 11(a)*].

[2] Authority of Agency Contracting Officer

Executive agency heads may delegate their authority to bind the federal government to contracting officers [*48 C.F.R. § 1.601*]. The contracting officer must be appointed in writing on a "Certificate of Appointment," which must state any limitation on the scope of authority to be exercised [*48 C.F.R. § 1.603-3*; *see 48 C.F.R. § 53.301-1402* (Standard Form 1402, Certificate of Appointment)].

Contracting officers have the authority to enter into, administer, or terminate contracts and make related determinations and findings (D & F) [*48 C.F.R. § 1.602-1*; *see* 48 C.F.R. § 1.7 (policies and procedures for use of determinations and findings)]. They exercise a wide latitude of business judgment in meeting the responsibility for ensuring that all requirements of law and of applicable processes have been met, that there is compliance with the terms of the contract, and that the contractors receive impartial, fair, and equitable treatment [48 C.F.R. § 1.602]. However, contracting officers may bind the government only to the extent of the authority delegated to them [*48 C.F.R. § 1.602-1*]. In certain cases an unauthorized commitment may be ratified by a properly qualified official of the contracting agency if the following conditions are met [*48 C.F.R. § 1.602-3(c)*]:

- The government will obtain or has already obtained the benefit resulting from the unauthorized commitment;

- The ratifying officer could have entered into the contractual commitment at the time it was made;

- The resulting contract would have been otherwise proper if made by the appropriate contracting officer; and

- The price is determined to be fair and reasonable.

- The contracting officer recommends payment and legal counsel concurs in the recommendation, unless agency procedures expressly do not require that concurrence.

- Funds are available and were available at the time the unauthorized commitment was made.

- The ratification is in accordance with any other limitations prescribed under agency procedures.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90B.20 Obtaining Government Procurement Information

[1] Dissemination of Information Using Electronic Databases

Electronic databases have replaced paper-based sources of contractor information. As part of this effort, the *Commerce Business Daily*, traditionally the source of information regarding government contracts, is no longer the publication media by which government agencies identify proposed contract actions and awards for procurements expected to exceed $25,000 [*see 68 Fed. Reg. 43655-43856 (2003)* (summary); *see also* former *48 C.F.R. § 5.101*]. Instead, the FedBizOpps.gov website is the single government point of entry (GPE) for federal government procurement opportunities over $25,000 [*see 48 C.F.R. §§ 5.101(a)(1), 5.201(d)*; http://www.FedBizOpps.gov]. Government buyers are able to publicize their business opportunities by posting information directly to this site, and commercial vendors seeking federal markets for their products and services can search, monitor and retrieve opportunities solicited by the entire Federal contracting community.

For acquisition of supplies and services, a contracting officer generally must transmit a notice to the GPE for any contract action expected to exceed $25,000, or any modification of an existing contract for additional services or supplies expected to exceed $25,000, or a contract action in any amount, if advantageous to the government [*48 C.F.R. § 5.201(b)(1)*; *see 48 C.F.R. § 5.202* (exceptions); *48 C.F.R. § 5.205* (special situations)].

For proposed contract actions expected to exceed $10,000, but not expected to exceed $25,000, contracting officers must disseminate information on proposed contract actions by displaying in a public place, or by any appropriate electronic means, an unclassified notice of the solicitation or a copy of the solicitation notice satisfying specified requirements [*48 C.F.R. § 5.101(a)(2)*; *see 48 C.F.R. § 5.207(c)* (requirements)].

Additional methods of dissemination of information include [*48 C.F.R. § 5.101(b)*]:

- Preparing periodic handouts and displaying them as provided in *48 C.F.R. § 5.101(a)(2)* (discussed above).

- Assisting local trade associations in disseminating information to their members.

- Making brief announcements of proposed contracts to newspapers, trade journals, magazines, or other mass media for publication, without any cost to the government.

- Placing paid advertisements in newspapers or other communications media, subject to specified limitations [*see 48 C.F.R. § 5.101(b)(4)*].

Whenever agencies are required to transmit a notice of proposed contract action to the GPE, the notice must be published at least 15 days before the solicitation, with certain exceptions for commercial items [*see 48 C.F.R. § 5.203(a)*]. Response time to a solicitation is generally 30 days, with 45 days allowed if the contract action is categorized as research and development [*see 48 C.F.R. § 5.203(b)-(d)*].

In order to broaden use and reliance on e-business applications, the Office of Federal Procurement Policy also has eliminated Form SF 129, Solicitation Mailing List Application, in favor of electronic databases and the Central Contractor Registration [*see 68 Fed. Reg. 43856 (2003)* ; *see also* former 48 C.F.R. § 53.301-129; *see also* [2], *below*].

[2] Central Contractor Registration

The Central Contractor Registration (CCR) is the primary government repository for contractor information that is required in order to conduct business with the United States government [*48 C.F.R. § 2.101*]. The CCR System is a centrally located, searchable database, accessible via the Internet, used by government agencies to develop, maintain, and provide sources for future procurements.

The Federal Acquisition Regulation (FAR) requires contractor registration in the CCR database prior to award of any contract, basic agreement, basic ordering agreement, or blanket purchase agreement on or after October 1, 2003 *[68 Fed. Reg. 43856 (2003)* ; Federal Acquisition Circular 2001-16; for full text of amendment to FAR, *see* http://www.acqnet.gov/far/FAC/fac01016.pdf.]. Contractors can register in the CCR database by going to the CCR website, located at http://www.ccr.gov. Pending changes to the FAR will require use of CCR as the single validated source of data on contractors doing business with the *Government [68 Fed. Reg. 43856 (2003)]* .

Legal Topics:

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§ 90B.21 Competition in Contracting Requirement

[1] The Full and Open Competition Rule

Under the Competition in Contracting Act of 1984 [*41 U.S.C. § 252 et seq.*], contracts for a certain minimum amount to furnish supplies or services to the public or for the construction or repair of public works are generally required to be let only after competitive bidding [*41 U.S.C. § 253(a), (b)*; *48 C.F.R. § 6.101(a)*]. The goal is to promote full and open competition in the acquisition process, which means that all responsible offerors are permitted to compete [*48 C.F.R. § 6.000*; for a discussion of the requirements of responsibility, *see § 90B.22[1]*]. The purpose of requiring competitive bidding in letting public contracts is to guard against favoritism, improvidence, extravagance, fraud, and corruption, to prevent waste of public funds, and to obtain the best economic result for the public [*Graydon v. Pasadena Redevelopment Agency (1980) 104 Cal. App. 3d 631, 636, 164 Cal. Rptr. 56]* .

The two competitive methods used by procuring agencies are the invitation for bids (IFB) and the request for proposals (RFP) [*48 C.F.R. § 6.102(a), (b)*; *see §§ 90B.24[1]* (IFB), 90B.25[1] (RFP)]. Because sealed bidding and competitive proposals are both acceptable procedures in providing for full and open competition, a contracting officer must exercise good judgment in selecting the method that best meets the needs of the government [*48 C.F.R. § 6.401*]. If the choice is to use the RFP, the contracting officer must submit a brief written explanation why the use of competitive sealed bids is not appropriate [*48 C.F.R. § 6.401*; *see § 90B.24[1][b]* (discussion of four conditions requiring use of sealed bids)]. Responses to a solicitation are considered "offers" that are binding only on acceptance by the government [*48 C.F.R. § 2.101*]. A solicitation is any request to submit offers or quotations to the government. Solicitations under sealed bid procedures are called "invitations for bids." Solicitations under negotiated procedures are called "requests for proposals." Solicitations under simplified acquisition procedures may require submission of either a quotation or an offer [*48 C.F.R. § 2.101*]. Responses to invitations for bids (sealed bidding) are offers called "bids" or "sealed bids"; responses to requests for proposals (negotiation) are offers called "proposals"; however, responses to requests for quotations (simplified acquisition) are "quotations", not offers [*48 C.F.R. § 2.101*].

The competitive bid and proposal methods are generally used for procuring contracts for supplies or services, including

construction, in excess of $25,000 [*see § 90B.40[1], [2]* (supplies and services), [3] (construction)]. There is a different competitive method prescribed for use for procurement of architect-engineer services [*see § 90B.40[4]*].

[2] Exceptions

[a] Conditions Permitting Other Than Full and Open Competition

A government agency may use a procedure other than the competitive process in procurement only in the following situations [*48 C.F.R. §§ 6.302-1-6.302-7*; *see 41 U.S.C. § 253(c)*]:

- There is only one responsible source and no other supplies or services will satisfy the required need;
- The need for property or services is of unusually compelling urgency;
- It is necessary to award the contract to a particular source in order to maintain the source in case of national emergency or to establish or maintain essential engineering, research, or development capability;
- The terms of a superseding agreement such as an international treaty require proceedings other than full and open competition;
- Other proceedings are expressly authorized by statute;
- Disclosure of need would compromise national security; or
- The agency head determines it is in the public interest and notifies Congress.

A contracting officer cannot award any contract without full and open competition unless there is justification in writing [*48 C.F.R. § 6.303-1(a)*]. The written justification must include information about efforts the government has undertaken to locate possible alternate suppliers and an explanation of the reason why specifications for full and open competition could not be developed [*48 C.F.R. § 6.303-2(a)*]. Special agency approval is required for contracts over $500,000 [*48 C.F.R. § 6.304(a)(2)*]. Under the Freedom of Information Act [*5 U.S.C. § 552*], the written justification (including related information) for the sole source procurement is available for public inspection on request [*48 C.F.R. § 6.305*].

[b] Simplified Acquisition Procedures

For purchases of supplies and services, including construction, research and development, and commercial items, the aggregate amount of which does not exceed $100,000 (or $200,000 in the case of certain contracts awarded and performed, or purchases to be made, outside the United States) [*see 48 C.F.R. § 2.201* ("simplified acquisition threshold" defined)], contracting officers use simplified procedures and have discretion to choose the procedure most suitable, efficient, and economic in the circumstances [*48 C.F.R. §§ 13.000, 13.104* (procedures); *see 48 C.F.R. § 6.001*]. For a "micro-purchase" in an amount up to $2,500 (or $2,000 in the case of construction) [*see 48 C.F.R. § 2.201* ("micro-purchase" defined)], a contract may be made without securing competitive quotations, provided the contracting officer considers the price reasonable [*48 C.F.R. § 13.106-1(a)(2)*]. For any purchase exceeding the micro-purchase threshold, the contracting officer will solicit quotations from a reasonable number of sources in order to promote competition to the maximum extent practicable and to ensure that the price is advantageous to the government [*see 48 C.F.R. § 13.106-2(a)*]. This exception to the advertising requirement [*see § 90B.20[1]*] is intended to aid small and minority businesses, and most small purchases must be made from small business concerns [*see* 48 C.F.R. pt. 102].

Quotations are usually solicited orally to the extent practicable when FACNET (the Federal Acquisition Computer Network, providing for electronic data exchange of acquisition information between the government and the public sector) [*see 48 C.F.R. § 2.201*] is not available or a written determination has been made that it is not practicable or cost-effective to purchase through FACNET [*48 C.F.R. § 13.106-2(a)(3)*]. However, oral solicitation may not be practicable for contract actions exceeding $25,000 [*see 48 C.F.R. § 13.106-2(a)(3)*; *see also 48 C.F.R. § 5.101* (synopsis requirement)]. When the contracting officer makes a written solicitation for a small purchase, Standard Form 18, Request for Quotations (RFQ), *48 C.F.R. § 53.301-18*, or other agency authorized form or automated format, is used to obtain price, cost, delivery, and related information from suppliers for negotiated acquisitions [12 C.F.R. § 107(b); *see § 90B.210* (form of request for quotation); *see also* 12 C.F.R.§ 107(a) (Standard Form 1449-->Solicitation/Contract/Order, which is for commercial items)]. A quotation is not an offer, and issuance by the contracting officer of a purchase order for supplies or services in response to a supplier's quotation does not establish a contract, but is an offer by the government to buy certain supplies or services on specified terms and conditions. A contract is established when the supplier accepts the government's offer or begins performance [48 C.F.R. § 13.108(a); *see 48 C.F.R. § 53.301-44* (Standard Form 44, Purchase Order-Invoice-Voucher)].

Legal Topics:

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§ 90B.22 Contractor Qualification

[1] The Responsible Contractor

[a] General Requirements

Government contracts for supplies and services, including construction, may be awarded only to responsible prospective contractors [*48 C.F.R. § 9.103*], whose responsibility also extends to their subcontractors [*48 C.F.R. § 9.104-4*]. No purchase or award of contract will be made unless the contracting officer makes an affirmative determination of responsibility [*48 C.F.R. § 9.103(b)*]. A "responsible" contractor for supplies, services, or construction must satisfy are the following conditions [*48 C.F.R. § 9.104-1*]:

- Have adequate financial resources to perform the contract or the ability to obtain them.
- Have the ability to comply with the required or proposed delivery or performance schedule.
- Have a satisfactory performance record.
- Have a satisfactory record of integrity and business ethics, including satisfactory compliance with the law including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws.
- Have the necessary organizational, accounting, and operational experience and technical skills or the ability to obtain them.
- Have command of the necessary production, construction, and technical equipment and facilities or the ability to obtain them.
- Be otherwise qualified and eligible to receive an award under applicable laws and regulations [*see 48*

C.F.R. § 52.209-2 (prohibition on contracting with inverted domestic corporations)].

When information on hand or readily available to the contracting officer is not sufficient to make a determination regarding the contractor's responsibility, a pre-award survey may be required to evaluate a prospective contractor's capability to properly perform the contract. However, if the proposed contract is for an amount less than $25,000 or is a fixed-price contract of less than $100,000 and for commercial products only, the contracting officer should not request a pre-award survey unless the cost is justified [*48 C.F.R. § 9.106-1(a)*]. A pre-award survey is used primarily by military contract agencies [*see 48 C.F.R. § 209.106*].

A prospective contractor that is, or recently has been, seriously deficient in contracting performance will be presumed to be non-responsible unless the contracting officer determines that circumstances were properly beyond the contractor's control, or the contractor takes appropriate corrective measures. Past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of non-responsibility [*48 C.F.R. § 9.104-3(d)*; *see § 90B.23*]. For discussion of contractor requirements regarding certification for procurement integrity, see *§ 90B.45*. For checklists for determining whether a prospective contractor meets all elements of responsibility, see *§§ 90B.100* and *90B.110*.

[b] Additional Federal and State Requirements

In addition to meeting qualifications of responsibility, a government contractor may also be required to meet specific federal requirements, depending on the type of contract. For example, certain national defense contractors and subcontractors must comply with specific Cost Accounting Standards (CAS) published by the Cost Accounting Standards Board and disclose in writing their cost accounting practices [*see 50 U.S.C. App. § 2061 et seq.* (Defense Products Act of 1950); 48 C.F.R. §§ 2.230, 2.990].

Because prospective contractors must be considered "otherwise qualified and eligible to receive an award under applicable laws and regulations" [*48 C.F.R. § 9.104-1(g)*], government contractors are also subject to the California Contractors' State License Law [*see B&P Code § 7000 et seq.*; *see also* Ch. 88, *Licensing of Contractors*].

[2] The Qualified Manufacturer or Regular Dealer

[a] The Walsh-Healey Act

Under the Walsh-Healey Public Contracts Act [*41 U.S.C. § 35 et seq.*], all public contracts subject to the Walsh-Healey Act and entered into by any government agency for the manufacture or furnishing of materials, supplies, articles, and equipment in an amount exceeding $10,000 must [*48 C.F.R. § 22.602*; *see 48 C.F.R. § 52.222-20* (prescribed certification provision)]:

- Be with a manufacturer or regular dealer in the supplies manufactured or used in performing the contract; and

- Include or incorporate by reference a representation that the contractor is a manufacturer or regular dealer of such supplies, and the stipulations required by the Walsh-Healey Act pertaining to such matters as minimum wages, maximum hours, convict labor, child labor, and safe and sanitary working conditions.

An offeror qualifies as a manufacturer if it shows before the award that it is one of the following [48 C.F.R. § 22.606-1(a)]:

- An established manufacturer; or

- New entrant into a manufacturing activity and has made all necessary arrangements and commitments for manufacturing space, equipment and personnel.

An offeror qualifies as a regular dealer if it shows before the award that it regularly deals in the particular supplies of the general character offered to the government [48 C.F.R. § 22.606-2]. The responsibility for applying these eligibility requirements as a manufacturer or regular dealer rests in the first instance with the contracting officer [48 C.F.R. § 22.608-2(a)]. When a question arises as to the validity of a contractor's representation that it is a manufacturer or regular dealer, a contracting officer must investigate and determine the eligibility of the offeror and not rely on the offeror's representation [48 C.F.R. § 22.608-2(b)]. Protests as to the validity of a contractor's representation may also be made by interested parties [48 C.F.R. § 22.608-3; *see § 90B.60* (protests)]. For checklists for determining whether a prospective contractor qualifies as a manufacturer or regular dealer, see *§§ 90B.101* and *90B.111*.

[b] Qualified Products Lists

[i] Qualification Procedures

If the procuring agency has specific qualifications requirements regarding commercial products, the procuring agency must urge potential sources to demonstrate their ability to meet the specification or standard for qualification before the award [*48 C.F.R. § 9.205*; *see 48 C.F.R. § 9.200 et seq.* (qualifications requirements)]. A "qualifications requirement" is a government requirement for testing or other quality assurance demonstration that must be completed before the award of a contract [*48 C.F.R. § 9.201*]. Successful testing qualifies prospective suppliers of commercial products for listing on the Qualified Bidders List, Qualified Manufacturers List, or Qualified Products List [*48 C.F.R. § 9.203(a)*; *see 48 C.F.R. § 9.201* (definitions of qualified lists)]. Synopses of proposed actions for acquisition of supplies and materials will then be sent to prospective contractors listed on the qualified mailing lists [*see 48 C.F.R. §§ 9.203, 9.201*]. For other procedures used for obtaining information on government contract opportunities, see *§ 90B.120*.

[ii] Specifications and Standards for Qualified Products

Mandatory specifications, standards, and other purchase descriptions for qualified commercial products generally procured by both civilian and military government agencies may be obtained in advance [*48 C.F.R. § 9.203(b)*]. Federal specifications or standards describing items and services procured by civilian agencies are issued by the General Services Administration (GSA) and listed in the GSA Index of Federal Specifications, Standards and Commercial Item Descriptions (IOFSS) [*see 48 C.F.R. § 10.001*]. Military specifications describing items and services purchased by the Department of Defense, are listed in the Department of Defense Index of Specifications and Standards (DODISS), that may be obtained directly from the Department of Defense [48 C.F.R. § 210.008; *see* 48 C.F.R. § 253.303-1425(requisition form for specifications and standards)]. Publications containing the federal and the military indexes, as well as instructions concerning qualification procedures, may also be obtained from the Superintendent of Documents, Government Printing Office, Washington DC 20402-9325 [*48 C.F.R. § 9.203(d)*].

[3] The Qualified Architect-Engineer

Under the FAR there are provisions for a special competitive method used for selection and award of architect-engineer services contracts [*see 48 C.F.R. § 36.000 et seq.*]. To be considered as possible sources for architect-engineer services, prospective firms must first file Standard Form 330, Architect-Engineer Qualifications [*48 C.F.R. § 53.301-330*], with the appropriate agency office, providing information on the following [*48 C.F.R. § 36.603(b), (c)*]:

- Location of the firm;
- Any specialized experience;
- The firm's professional capabilities; and

- The firm's capacity with respect to scope of work that can be undertaken.

A firm's ability and experience in computer-assisted design should be considered, when appropriate. For checklists for determining whether an architect-engineer firm qualifies for award of a government contract, see *§§ 90B.102* and *90B.112*. For illustration of the form used to qualify as an architect-engineer firm, see *§ 90B.240*.

[4] The Qualified Small Business Concern

To get preference as a small business, a firm must represent in good faith that it is a small business at the time of the written representation [*48 C.F.R. § 19.301-1(a)*]. A "small business concern" is one, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on government contracts, and one that meets size standards as established by the Small Business Administration (SBA) [*48 C.F.R. § 19.001*; *13 C.F.R. § 120.100*; *see 13 C.F.R. §§ 121.902, 121.601* (Standard Industrial Classification Codes and Size Eligibility Requirements); *48 C.F.R. § 19.102* (size eligibility requirements for small businesses and small disadvantaged businesses); *see also 13 C.F.R. §§ 125.2(a), 125.3* (contracting assistance for small business concerns)]. The validity of the representation as a small business by a firm may be challenged by any offeror, the SBA, or another interested party, including the procuring agency's contracting officer [*48 C.F.R. § 19.302*; *see § 90B.70[1][b]*]. However, for competitive "Section 8a contracts" [*see § 90B.70[3]*], the filing of a protest is limited to an offeror, the contracting officer, or the SBA [*48 C.F.R. § 19.302(a)*].

As a government contractor, a small business is also required to meet requirements of responsibility [*see* [1], *above*]. If an offer by a qualified small business concern is rejected because of a determination that the firm is non-responsible, the contracting officer must refer the matter to the SBA, which has the authority to issue a Certification of Competency for the small business concern on any element of responsibility [*48 C.F.R. § 19.601(a)*; *see § 90B.70[1][c]*]. For checklists for determining whether a business concern qualifies as a small business, see *§§ 90B.103* and *90B.113*. For the procedures used for making representation as a small business and for obtaining a Certification of Competency, see *§§ 90B.121* and *90B.122*.

[5] Bonding Requirements for Construction Contractors

[a] Bid Bond

A bid bond is a form of security assuring that the bidder will not withdraw within the period specified for acceptance and will execute a written contract and furnish required bonds within the time specified in the bid [*48 C.F.R. § 28.001*]. A bid bond is not required unless performance and payment bonds [*see* [b], *below*] are required [*48 C.F.R. § 28.101-1*; *see 48 C.F.R. § 53.301-24* (Standard Form 24, Bid Bond); *see also § 90B.231* (form)].

[b] Performance and Payment Bonds

Bonding requirements for construction contractors under government procurement contracts for public buildings or works are generally regulated by provisions of the Miller Act [*40 U.S.C. § 270(a)-(d)*], which requires performance and payment bonds for any construction contract exceeding $100,000 [*48 C.F.R. § 28.102-1(a)*]. Contractors providing construction for the government must furnish all bonds, including any necessary reinsurance agreements, before receiving notice to proceed with work or to start work [*48 C.F.R. § 28.102-1(b)*; *see 48 C.F.R. §§ 53.301-25* (Standard Form 25, Performance Bonds), 53.301-25-A (Standard Form 25-A, Payment Bond); *see also §§ 90B.232, 90B.233* (forms)]. In general, agencies are not required to demand payment and performance bonds for other than construction contracts, but in some cases may do so to protect government interests [*48 C.F.R. § 28.103-1*; *see 48 C.F.R. §§ 28.103-2, 28.103-3*]. Additionally, individual agencies have specific bonding requirements under the FAR [*see* 48 C.F.R. pts. 228 (Defense Department), 428 (Agriculture Department), 528 (General Services Administration), 728 (Agency for International Development), 828 (Veterans' Administration), 928, 970 (Energy Department), 1228

(Department of Transportation), 1828 (NASA), 2428 (Housing and Urban Development Department), 2828 (Justice Department), 2928 (Labor Department)]. For procedures used for posting bonds for construction contracts, see *§ 90B.141*. For illustration of the bid forms used, see *§§ 90B.232-90B.234*.

Legal Topics:

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§ 90B.23 Contractor Disqualification

[1] In General

The General Service Administration maintains a list of all contractors disqualified by federal agencies or by the General Accounting Office, including the names and addresses of disqualified contractors, the agency disqualifying, and the cause for disqualification [*48 C.F.R. §§ 9.403, 9.404*]. The effect of such a listing is that the contractors disqualified, suspended, or proposed for debarment are excluded from receiving contracts and agencies may not solicit offers from, award contracts to, or consent to subcontract with, those contractors, or with them as agents or representatives of other contractors [*48 C.F.R. § 9.405(a)*].

[2] Debarment

Debarment is an administrative action taken by a debarring official under provisions of the FAR to exclude a contractor from a government contract and government approved subcontractors for a reasonable specified period [*48 C.F.R. § 9.403*]. Causes for debarment include the following [*48 C.F.R. § 9.406-2*]:

- Committing fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public contract or subcontract.

- Violating a federal or state antitrust statute relating to the submission of offers.

- Committing embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.

- Intentionally affixing a label bearing a "Made in America" inscription (or similar inscription) to a product sold or shipped in the United States when it was not made in the United States.

- Committing any other offense indicating lack of business integrity or honesty.

- Violating terms of past government contracts.

- Violating the Drug-Free Workplace Act, pursuant to Executive Order 12564 *[51 Fed. Reg. 32889 (1986)]* .

- Committing an unfair trade practice [*see 48 C.F.R. § 9.403* (definition)].

- Any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor.

- Not complying with the Immigration and Nationality Act employment provisions, based on a determination by the Attorney General or the Secretary of Homeland Security [*48 C.F.R. 9.406-2(b)(2)*].

Debarment is generally not imposed for any period longer than necessary to protect the interests of the government [*48 C.F.R. § 9.402*]. The period is commensurate with the seriousness of the cause, but must be for a reasonable and definitely stated period of time. As a general rule, debarment may not exceed three years, although debarment under *48 C.F.R. 9.406-2(b)(2)* (for noncompliance with the Immigration and Nationality Act employment provisions) may be extended for additional periods of one year if the Attorney General or the Secretary of Homeland Security determines that the contractor continues to be in violation of those employment provisions [*48 C.F.R. § 9.406-4*]. Debarment is effective throughout the executive branch of the government unless an agency states in writing compelling reasons justifying continued business dealings between that agency and the debarred contractor [*48 C.F.R. § 9.406-1(c)*]. Under the Administrative Procedure Act [*5 U.S.C. § 551 et seq.*], debarment by a government agency is subject to judicial review [*Gonzalez v. Freeman (D.C. Cir. 1964) 334 F.2d 570, 576]* .

[3] Suspension

Suspension is an administrative action taken by the suspending officer under provisions of the FAR to disqualify a contractor temporarily from government contracting and government approved subcontracting [*48 C.F.R. § 9.403*]. Suspension is imposed for similar causes as for debarment [*48 C.F.R. § 9.407-2*; *see* [2], *above*]. The effect of suspension is the suspension of all divisions or other organizational elements of the suspended contractor [*48 C.F.R. § 9.407-1(c)*]. It is effective throughout the executive branch of the government unless a particular agency states in writing a compelling reason justifying continuing business between that agency and the suspended contractor [*48 C.F.R. § 9.407-1(d)*]. The suspension is ordered for a temporary period pending completion of an investigation or pending legal proceedings [*see 48 C.F.R. § 9.407-4*].

[4] Ineligibility

To be "ineligible" means to be excluded from government contracts and subcontracts pursuant to statute, executive order, or regulatory authority other than that of the FAR. For example, ineligibility can be pursuant to any of the following [*48 C.F.R. § 9.403*]: the Davis-Bacon Act [41 U.S.C. § 276a et seq.], the Service Contract Act [*41 U.S.C. § 351 et seq.*], the Equal Employment Opportunity Act, pursuant to Executive Order 11246 *[30 Fed. Reg. 12319, 12935 (1965)]* , the Walsh-Healey Act [*41 U.S.C. § 35 et seq.*], the Buy American Act [*41 U.S.C. § 10*], and the National Environmental Policy Act of 1969 [*42 U.S.C. § 4321 et seq.*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90B.24 The Competitive Bid

[1] The Invitation for Bids--The Sealed Bid

[a] In General

A bid is an offer or a response to the invitation for bids (IFB) [*48 C.F.R. § 2.101*]. The sealed bid method is used for acquisition of supplies or service, including construction under specified circumstances [*see 48 C.F.R. § 6.401(a)*; [b], *below*; *see also 48 C.F.R. § 14.103-1* (procedure)]. Advertised, competitive procurement of bids includes the following steps [*48 C.F.R. § 14.101*; *see 48 C.F.R. §§ 7.306* (evaluation), 14.000 et seq. (sealed bidding); *see also* [c]-[j], *below*]:

- Preparation of the IFB describing the government's requirements;
- Publicizing the IFB;
- Submission of bids;
- Evaluation of bids; and
- Following the public opening of bids, award of a contract to the responsible bidder whose bid is in conformance with the IFB and is most advantageous to the government, considering only price and price-related factors.

For procedures used for submission of bids, see *§ 90B.124*; and for the forms used, see *§§ 90B.220-90B.223*.

[b] When Required

The sealed bid method must be used in the following situations [*48 C.F.R. § 6.401(a)*; *see 41 U.S.C. § 253(a)(2)(A)*]:

- Time permits solicitation, submission, and evaluation of sealed bids;
- Award will be made on the basis of price and other price-related factors;
- It is not necessary to conduct a discussion with responding offerors about the bids; and
- There is reasonable expectation of receiving more than one bid.

[c] Elements of Bids

The written invitation or solicitation is issued on a Standard Form 33, Solicitation, Offer and Award, as prescribed [*48 C.F.R. § 53.301-33*; *see § 90B.220* (form)]. For soliciting offers and awarding contracts for construction estimated to be in excess of $25,000, use of Standard Form 1442, Solicitation, Offer and Award [*48 C.F.R. § 53.301-1442*], is prescribed [*48 C.F.R. § 53.236-1(d)*; *see § 90B.230* (form)]. As described in the FAR, the contract format has four main parts [*see 48 C.F.R. §§ 14.201-1* (Table 14-1, Uniform Contract Format), 14.201-2-14.201-5 (Parts I through IV)]:

- Part I--Schedule of price specifications and performance schedule;
- Part II--Contract clauses as required by law and under the FAR;
- Part III--List of documents, exhibits, and other attachments; and
- Part IV--Representations and instructions (provisions requiring representations, certifications, or submission of other information by the bidder).

Contracting officers must prepare invitations for bids and contracts using the uniform contract format outlined in Table 14-1 "to the maximum practicable extent" [*48 C.F.R. § 14.201-1(a)*; *see 48 C.F.R. § 14.201-1(a)(1)-(5)* (exceptions to use of uniform contract format)]. Information suitable for inclusion in invitations for bids under the uniform contract format must also be included in invitations for bids not subject to that format, if applicable [*48 C.F.R. § 14.201-1(b)*]. Solicitations to which the uniform contract format applies must include Table 14-1, Parts I, II, III, and IV. If any section of the uniform contract format does not apply, the contracting officer must mark that section in the solicitation [*48 C.F.R. § 14.201-1(c)*]. Award by acceptance of a bid on the award portion of Standard Form 33, Solicitation, Offer and Award (SF 33) [*see § 90B.220*], Standard Form 26, Award/Contract (SF 26) [*see § 90B.221*], or Standard Form 1447, Solicitation/Contract (SF 1447) [*see § 90B.222*], incorporates Section K, Representations, certifications, and other statements of bidders, in the resulting contract even though not physically attached [*48 C.F.R. § 14.201-1(c)*].

The IFB must describe the government's requirements clearly, accurately, and completely; must avoid unnecessarily restrictive specifications or requirements that might unduly limit the number of bidders; and must include a complete description of requirements for and rules governing the procurement [*48 C.F.R. § 14.101(a)*; *see 48 C.F.R. § 10.000 et seq.* (specifications, standards, and other purchase descriptions)]. Solicitations issued for standard competitions must include prescribed notices, including, as applicable, either a Notice of Competition [*see 48 C.F.R. § 52.207-1*], or a Notice of Streamlined Competition [*see 48 C.F.R. § 52.207-2*], and a Right of First Refusal of Employment [*48 C.F.R. § 7.305 see 48 C.F.R. § 52.207-3* (notice)].

If it becomes necessary to make changes in the terms of the solicitation (such as to quantity, specifications, delivery schedule, or opening dates), or to correct a defective or ambiguous invitation, the contracting officer will make such changes by using Standard Form 30, Amendment of Solicitation/Modification of Contract [*48 C.F.R. § 53.301-30*], and by issuing an amendment [*48 C.F.R. § 14.208(a)*; *see § 90B.223* (form)]. Response to the bid by the offeror must include acknowledgment of the amendment [*see 48 C.F.R. § 53.301-33* (item 14, acknowledgment of amendment)].

A pre-bid conference may be appropriate in complex acquisitions as a means of briefing prospective bidders and explaining complicated specifications and requirements to them [*48 C.F.R. § 14.207*]. Pre-bid conferences may not be used to amend defective or ambiguous invitations for bids. Any needed amendment or modification must be accomplished by use of Standard Form 30, Amendment of Solicitation/Modification of Contract [*48 C.F.R. § 14.208(a)*; *see 48 C.F.R. § 53.301-30*].

[d] Receipt and Opening of Bids

Bids must be submitted within the time for the opening date designated in the IFB [*48 C.F.R. § 14.302(a)*]. The offeror indicates its offer in the space provided on Standard Form 33, Solicitation, Offer and Award [*48 C.F.R. § 53.301-33*; *see* [c], *above*]. If the bidder uses its own bid form or a letter to submit a bid, the bid will be considered only if it accepts all the terms and conditions of the bid invitation and if award on the bid would result in a binding contract with terms and conditions that do not vary from the terms and conditions of the invitation [*48 C.F.R. § 14.301(d)*]. To be considered responsive, bid offers must be in full conformance with the elements of the IFB [*48 C.F.R. § 14.301(a)*; *see* [c], *above*].

All bids must be opened publicly at the time and place specified in the original advertisement [*48 C.F.R. § 14.101(c)*]. At that time, all bids will be publicly opened, read aloud to those present when practicable, and recorded [*48 C.F.R. § 14.402-1*]. Interested parties are generally permitted to examine the bids [*48 C.F.R. § 14.402-1(c)*]. If, as is the general rule, the solicitation provides that a bid for a government contract will be irrevocable once it has been opened, the courts will not permit revocation after bid opening [*see Refining Associates v. UnitedStates (Ct. Cl. 1953) 109 F. Supp. 259, 261-262]* .

[e] Modification and Withdrawal

Bids may be modified or withdrawn by written or telegraphic notice received in the agency office designated in the bid by opening date [*48 C.F.R. § 14.303(a)*]. To be accepted, a late bid, modification of a bid, or withdrawal of a bid must be received before the contract award, must be determined by the contracting officer not to unduly delay the acquisition, and, if transmitted through an electronic commerce method authorized by the invitation for bid, must be received not later than 5:00 p.m. on the day before the date specified for the receipt of bids, or, if transmitted using other methods authorized by the invitation to bid (regular mail or facsimile), there must acceptable evidence to establish that it was received and was under the government's control before the time set for the receipt of bids [*48 C.F.R. § 14.304(b)(1)*]. However, a late modification of an otherwise successful bid that makes its terms more favorable to the government will be considered at any time it is received [*48 C.F.R. § 14.304(b)(1)*].

All bids, including modifications received before the time set for opening, are kept unopened until the time set for bid opening [*48 C.F.R. § 14.401*]. For procedures used for modifying or withdrawing bids before the time for the opening of bids, see *§ 90B.125*.

[f] Evaluation

[i] In General

In the sealed bidding method the award is made to the lowest, responsive, responsible bidder [*48 C.F.R. §§ 14.404-1(a)(1), 7.306*]. Determination of the lowest bid is based on the price of the low bidder relative to the cost estimate for performance made by the government as indicated on the cost-comparison form [*48 C.F.R. §§ 14.407-1, 7.306(a)(1)(i)*-(iv)]. A bidder is considered "responsive" when its bid complies in all material respects with the invitation for the bid [*48 C.F.R. § 14.301(a)*; *see* [c], *above*]. A "responsible" bidder or offeror is one who has adequate financial resources, can comply with delivery schedule, has a satisfactory performance record, and is otherwise qualified to perform the contract [*48 C.F.R. § 9.104-1*; *see § 90B.22[1][a]*].

[ii] Price and Price-Related Factors

An award will be made only to the responsible bidder whose bid is fully responsive to the terms of the invitation for the bid and most advantageous to the government, considering only price and price-related factors included in the invitation [*48 C.F.R. § 14.103-2*; *see 48 C.F.R. § 14.000 et seq.* (provisions of bid solicitation)].

Procuring agencies must make a cost-comparison between contractor and government performance [*48 C.F.R. § 7.302(a)*]. The contracting officer will evaluate the sealed bid at the bid opening by entering on the cost-comparison form the price of the apparent low-bidder, and announcing the result conditioned on evaluation for responsiveness and responsibility and completion of the required agency process [*48 C.F.R. § 7.306(a)(1)(i)-(iii)*]. In making the award, price-related factors included in the invitation may also be considered [*48 C.F.R. § 14.407-1(a)*]. "Price-related factors" may include the following [*48 C.F.R. § 14.201-8*]:

- Foreseeable costs or delays to the government;
- Changes made or requested by the bidder;
- Advantages or disadvantages to the government that might result from making more than one award;
- Federal, state, and local taxes; and
- Origin of supplies.

Pursuant to the requirement that the abstract of bids and completed cost-comparison forms and any necessary additional data be made available for public review, the agency must resolve any requests for review of the cost comparison before the result is approved [*48 C.F.R. § 7.306(a)(1)(iv), (v)*].

[g] Correction of Bid Mistakes

Minor informalities, irregularities, or apparent clerical mistakes may be corrected by the bidder before the award [*48 C.F.R. §§ 14.405, 14.407-2*]. Additionally, and subject to the limitation that permission to correct mistakes not be used to make otherwise unresponsive bids responsive, on request by a bidder, permission to correct mistakes may be obtained and administrative determinations regarding any other mistakes alleged in the bids may also be made [*see 48 C.F.R. § 14.407-3*].

Mistakes in bids discovered after the award may be corrected by contract amendment if the correction is favorable to the government and does not change the essential requirements of the specifications [*48 C.F.R. § 14.407-4(a)*]. The bidder wishing to correct a mistake after the award must establish by clear and convincing evidence both the existence of the mistake and the bid actually intended. However, if correction would result in displacing lower bids, the correction will not be permitted unless the existence of the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself [*48 C.F.R. § 14.407-3(a)*]. Agencies also have the authority to make determinations to rescind, reform, or to otherwise leave the contract as is [*48 C.F.R. § 14.407-3(b)*]. For procedures used for correcting mistake bids, see *Section 90B.126*.

[h] Cancellation of Bids

Invitations may be cancelled and all bids rejected before award but after opening if, consistent with the preservation of the integrity of the system, the agency head determines in writing that [*48 C.F.R. § 14.404-1(c)*]:

(1) Inadequate or ambiguous specifications were cited in the invitation;

(2) Specifications have been revised;

(3) The supplies or services contracted for are no longer required;

(4) The invitation did not provide for consideration of all costs to the government;

(5) Bids received indicate that the needs of the government can be satisfied by a less expensive article differing from that solicited;

(6) All otherwise acceptable bids received are at unreasonable prices, or only one bid was received and the contracting officer cannot determine whether the bid price was reasonable;

(7) The bids were not independently arrived at in open competition, were collusive, or were submitted in bad faith;

(8) No responsive bid was received from a responsible bidder;

(9) The cost-comparison shows that government performance is more economical; or

(10) For other reasons cancellation is clearly in the public's interest.

When it is necessary to reject all bids, the contracting officer must notify each bidder that all have been rejected giving the reason for such action [*48 C.F.R. § 14.404-3*].

[i] Rejection of Bids

Bids may be rejected for the following reasons [*48 C.F.R. § 14.404-2(a)-(c), (f)-(j),* (*l*)]:

(1) Failure to conform to the essential requirements, to applicable specifications unless IBF authorized, or to the delivery schedule specified in the bid;

(2) Determination by the contracting officer that the bid price is unreasonable;

(3) Prices for line items or subline items are materially unbalanced;

(4) A bid is received from a bidder suspended, debarred, proposed for debarment, or declared ineligible as of the bid opening date, unless a compelling reason dictates otherwise [*see § 90B.23*];

(5) Bids are received from non-responsible persons [*see § 90B.22[1]*];

(6) Failure to provide required bid guarantee [*see § 90B.22[5]*];

(7) Transfer of a bidder's assets or that part of assets related to bid during bid opening and award, unless the transfer is effected by merger, operation of law, or other means not otherwise barred by applicable law; and

A bid may also be rejected because of imposition of conditions by the bidder that would modify the requirements of the IFB or limit the bidder's liability to the government as prejudicial to other bidders. However, conditions that are not substantial and that do not go to the price, quantity, quality, or delivery of items may be merely deleted from the bid and

the bid not rejected [*48 C.F.R. § 14.404-2(d), (e)*].

[j] Award and Protests

Award is by written or electronic notice, within the time for acceptance specified in the bid or an extension [*48 C.F.R. § 14.408-1(a)*; *see* 49 C.F.R. § 14.404-1(d) (extensions)]. With limited exceptions, contracting officers must synopsize through the government point-of-entry (GPE) awards exceeding $25,000 that are [*48 C.F.R. § 5.301(a)*]:

- Covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement; or

- Likely to result in the award of any subcontracts.

However, the dollar threshold is not a prohibition against publicizing an award of a smaller amount when publicizing would be advantageous to industry or to the government [*48 C.F.R. § 5.301(a)*].

FedBizOpps.gov is the single GPE for federal government procurement opportunities over $25,000. Government buyers are able to publicize their business opportunities by posting information directly to FedBizOpps via the Internet.

The GPE may be accessed via the Internet at http://www.fedbizopps.gov [*see 48 C.F.R. § 5.003*; http://www.fedbizopps.gov].

Award is generally made by using the Award portion of Standard Form (SF) 33, Solicitation, Offer, and Award [*see § 90B.220*], or SF 1447, Solicitation/Contract [*48 C.F.R. § 14.408-1(d)(1)*; *48 C.F.R. § 53.214*; *see § 90B.222*]. If an offer on an SF 33 leads to further changes, the resulting contract must be prepared as a bilateral document on SF 26, Award/Contract [*48 C.F.R. § 14.408-1(d)(1)*; *see § 90B.221*]. Use of the Award portion of SF 33, SF 26, or SF 1447, does not preclude the additional use of informal documents, including telegrams or electronic transmissions, as notices of awards [*48 C.F.R. § 14.408-1(d)(2)*].

For a discussion of protests regarding alleged misawards, see *Section 90B.60*. For a list of procedures used for making protests, see *Section 90B.127*.

[2] The Two-Step Sealed Bid

The two-step sealed bid is a hybrid negotiable bid used when inadequate specifications preclude the use of the conventional sealed bid method. To use the two-step sealed bid method, all of the following conditions must be met [*48 C.F.R. § 14.502*]:

(1) Available specifications or purchase descriptions are not definite or complete, or may be too restrictive;

(2) Definite criteria exist for evaluating technical proposals;

(3) More than one technical qualified source is expected to be available;

(4) Sufficient time is available for the two-step method; and

(5) A firm-fixed-price contract or a fixed-price contract with economic price adjustment will be used [*see § 90B.41[2]*].

In the two-step formal advertising method, the first step consists of a request for, and the submission, evaluation, and discussion of technical proposals without pricing [*see 48 C.F.R. §§ 14.501(a), 14.503-1*]. The second step involves the submission of sealed priced bids by those who submitted acceptable technical proposals in step one. Bids submitted in step two are evaluated and the awards made in accordance with 48 C.F.R. §§ 14.300 et seq. and *14.400 et seq.* [*48 C.F.R. §§ 14.501(b), 14.503-2*; *see § 90B.24[1]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBids & FormationSealed BidsGeneral OverviewPublic Contracts LawBids & FormationSealed BidsInvitations for Bids

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 90B FEDERAL GOVERNMENT CONTRACTS
PART II. LEGAL BACKGROUND
B. The Contracting Process
1. Initiating Procurement

30-90B California Legal Forms--Transaction Guide § 90B.25

§ 90B.25 The Negotiated Proposal

[1] The Request for Proposals

[a] In General

Any contract awarded without using sealed bidding procedures is a negotiated contract [*48 C.F.R. § 15.101*]. Requests for proposals (RFPs) are used in negotiated acquisitions to communicate government requirements to prospective contractors and to solicit proposals [*see 48 C.F.R. § 15.203(a)* (minimum requirements); *see 48 C.F.R. § 15.203(b)-(f)* (issuance of RFPs electronically, orally, by fax, letter, or government circular)]. The negotiated contract method is used for both solicited and unsolicited proposals [*see 48 C.F.R. § 15.600, [2], below*]. The general procedure for negotiating proposals includes receipt of proposals, evaluation, negotiation, and selection of the most advantageous proposal in accord with normal contract procedure [*see 48 C.F.R. § 15.200 et seq.*; *see also* [c]-[i], *below*]. The negotiated proposal permits bargaining and usually affords opportunity to revise the offer before award of contract; bargaining may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract [*48 C.F.R. § 15.306(d)*].

The request for quotations (RFQ) is also used in negotiated acquisitions of small purchases to communicate government requirements [*see 48 C.F.R. § 53.301-18*; § 90B.21[2][b]; *see also § 90B.210* (form)].

[b] When Permissible

If sealed bids are not considered appropriate [*see § 90B.24[1][b]*], the contracting officer may solicit competitive proposals [*48 C.F.R. § 6.401*]. A contracting officer normally issues an RFP when it is considered reasonable to expect prospective contractors to respond with offers even though they anticipate negotiations after receipt of offers [*see 48 C.F.R. § 15.203*].

A negotiated contract may also be appropriate when the IFB is cancelled because sealed bids are not required [*48 C.F.R. § 6.401*], or all bids have been rejected [*48 C.F.R. § 14.404-1(e)*; *see 48 C.F.R. § 14.404-3*]. In those circumstances, the contracting officer may negotiate (in accordance with 48 C.F.R. pt. 15, as appropriate) and make award without issuing

a new solicitation, provided [*48 C.F.R. § 14.404-1(f)*]:

- Each responsible bidder in the sealed bid acquisition has been given notice that negotiations will be conducted and has been given an opportunity to participate in negotiations; and

- The award is made to the responsible bidder offering the lowest negotiated price.

[c] Elements of Proposals

When the negotiated proposal procedure is used, the basic elements of the solicitation and contract are similar to those for bids [*see § 90B.24[1][c]*]. As with the IFB, the contracting officer issues a written solicitation according to a prescribed uniform contract format [*48 C.F.R. § 15.204-1* (Table 15-1)], using the prescribed standard form [*see 48 C.F.R. § 53.301-33* (Standard Form 33, Solicitation, Offer and Award); *see also § 90B.220* (form)]. If it becomes necessary to make changes to solicitations (such as a significant change in quantity, specifications, or delivery schedules, correction of defects or ambiguities, or a change in the closing date for receipt of proposals), a contracting officer will use Standard Form 30, Amendment of Solicitation/Modification of Contract [*48 C.F.R. § 15.210(b)*; *see 48 C.F.R. § 53.301-30*; *see also § 90B.223* (form)]. A pre-proposal conference may be held in a complex situation to brief prospective offerors after solicitations are issued, but before offers are submitted, to explain or clarify complicated specifications and requirements [*48 C.F.R. § 15.207*; *see 48 C.F.R. § 15.201* (conference procedures)].

[d] Receipt and Handling of Proposals

Proposals must be submitted by the date designated in the request for proposal [*48 C.F.R. § 15.208(a)*]. On receipt at the location specified in the solicitation, proposals and information received in response to a request for information (RFI) are be marked with the date and time of receipt and transmitted to the designated officials [*48 C.F.R. § 15.207(a)*; *see 48 C.F.R. § 15.207(b)* (requirement to safeguard confidentiality)]. If any portion of a proposal received by the contracting officer electronically or by fax is unreadable, the contracting officer immediately will notify the offeror and permit the offeror to resubmit the unreadable portion of the proposal. For the purpose of determining timeliness [*see 48 C.F.R. § 208(a)*], the resubmission will be considered as if it were received at the date and time of the original unreadable submission, provided the offeror complies with the time and format requirements for resubmission prescribed by the contracting officer [*48 C.F.R. § 15.207(c)*].

[e] Late Proposals and Modifications

Any proposal, modification, or revision that is received at the designated government office after the exact time specified for receipt of proposals is "late" and generally will not be considered [*see 48 C.F.R. § 15.208(b)(1)*]. However, a late proposal, modification, or revision will still be considered if [*48 C.F.R. § 15.208(b)(1)*]:

- It is received before award is made; and

- The contracting officer determines that accepting the late proposal would not unduly delay the acquisition; and

- If it were transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or

- Acceptable evidence establishes that it was received at the government installation designated for receipt of proposals and was under the government's control prior to the time set for receipt of proposals; or

- It was the only proposal received.

In addition, a late modification of an otherwise successful proposal that makes its terms more favorable to the government will be considered at any time it is received and may be accepted [*48 C.F.R. § 15.208(b)(2)*].

"Proposal modification" is a change made to a proposal before the solicitation closing date and time, or made in response to an amendment, or made to correct a mistake at any time before award [*48 C.F.R. § 15.001*].

"Proposal revision" is a change to a proposal made after the solicitation closing date, at the request of or as allowed by a contracting officer, as the result of negotiations [*48 C.F.R. § 15.001*].

[f] Contracting by Negotiation

The contracting officer's primary concern is the overall price the government will actually pay. The contracting officer's objective is to negotiate a contract of a type and with a price providing the contractor the greatest incentive for efficient and economical performance. The negotiation of a contract type and a price are related and should be considered together with the issues of risk and uncertainty to the contractor and the government. Therefore, the contracting officer should not become preoccupied with any single element and should balance the contract type, cost, and profit or fee negotiated to achieve a total result--a price that is fair and reasonable to both the government and the contractor [*48 C.F.R. § 15.405(b)*; *see 48 C.F.R. § 15.406-1* (pre-negotiation objectives)].

The contracting officer must document in the contract file the principal elements of the negotiated agreement [*see 48 C.F.R. § 15.406-3*].

[g] Proposal Evaluation

"Proposal evaluation" is an assessment of the proposal and the offeror's ability to perform the prospective contract successfully [*48 C.F.R. § 15.305(a)*]. An agency must evaluate competitive proposals and then assess their relative qualities solely on the factors and subfactors specified in the solicitation. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation must be documented in the contract file [*48 C.F.R. § 15.305(a)*; *see 48 C.F.R. § 15.304* (evaluation factors and significant subfactors)]. Normally, competition establishes price reasonableness [*48 C.F.R. § 15.305(a)(1)*].

The contracting authority may reject all proposals received in response to a solicitation, if doing so is in the best interest of the government [*48 C.F.R. § 15.305(b)*].

[h] Correction of Mistakes in Proposals

Mistakes in a contractor's proposal that are disclosed after award will be processed substantially in accordance with the procedures for mistakes in bids at 48 C.F.R. § 14.407-4 [*48 C.F.R. § 15.508*; *see § 90B.24[1][g]*]. For procedures used for correcting mistakes after the award, see *Section 90B.126*.

[i] Award and Protests

The contracting officer must award a contract to the successful offeror by furnishing the executed contract or other notice of the award to that offeror [*48 C.F.R. § 15.504*]. If the award document includes information that differs from the latest signed proposal, as amended by the offeror's written correspondence, both the offeror and the contracting officer must sign the contract award [*48 C.F.R. § 15.504(a)*].

Protests against award in negotiated acquisitions must be handled in accordance with 48 C.F.R. part 33 [*48 C.F.R. §*

15.507(a); *see 48 C.F.R. § 15.507(b)* (procedure when protest causes agency to issue new solicitation on protested contract award)]. Use of agency protest procedures that incorporate alternative dispute resolution provisions is encouraged for both preaward and postaward protests [*48 C.F.R. § 15.507(a)*].

For a discussion of protests regarding alleged misawards of contracts, see *Section 90B.60*. For the procedures used for making protests of alleged misawards, see *Section 90B.127*.

[2] The Unsolicited Proposal

Unsolicited proposals allow unique and innovative ideas or approaches to be made available to government agencies. Unsolicited proposals are offered with the intent that the government will enter into a contract with the offeror for research and development or other efforts supporting the government agency's mission, and often represent a substantial investment of time and effort by the offeror [*48 C.F.R. § 15.603(a)*].

"Unsolicited proposals" do not include advertising material, commercial item offers, contributions, or routine correspondence on technical issues [*48 C.F.R. § 15.603(b)*; *see 48 C.F.R. § 15.601* (definitions)].

A valid unsolicited proposal must [*48 C.F.R. § 15.603(c)*]:

- Be innovative and unique.
- Be independently originated and developed by the offeror.
- Be prepared without government supervision, endorsement, direction, or direct government involvement,
- Include sufficient detail to permit a determination that government support could be worthwhile and the proposed work could benefit the agency's research and development or other mission responsibilities.
- Not be an advance proposal for a known agency requirement that can be acquired by competitive methods; and
- Not address a previously published agency requirement.

Unsolicited proposals in response to a publicized general statement of agency needs are considered to be independently originated [*48 C.F.R. § 15.603(d)*].

A favorable evaluation of an unsolicited proposal does not, in itself, justify awarding a contract without providing for full and open competition. An unsolicited proposal will be returned to the offeror, citing reasons, when its substance [*48 C.F.R. § 15.607(a)*]:

- Is available to the government without restriction from another source;
- Closely resembles a pending competitive acquisition requirement;
- Does not relate to the activity's mission; or
- Does not demonstrate an innovative and unique method, approach, or concept;
- Or is otherwise not deemed a meritorious proposal.

The contracting officer may commence negotiations on a sole source basis only when [*48 C.F.R. § 15.607(b)*]:

- An unsolicited proposal has received a favorable comprehensive evaluation.
- A justification and approval has been obtained [*see 48 C.F.R. §§ 6.302-1(a)(2)(i)*, 6.303-2(b)].
- The agency technical office sponsoring the contract furnishes the necessary funds.
- The contracting officer has complied with the synopsis requirements of 48 C.F.R. subpart 5.2 (synopses for proposed contract actions)].

To prevent the use or disclosure of data or information in an unsolicited proposal for other than evaluation purposes, an offeror must mark the pages of the proposal as specified in *48 C.F.R. § 15.609* [*see 48 C.F.R. § 15.609(a), (b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral Overview

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[Reserved]

§§ 90B.26[Reserved]

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30-90B California Legal Forms--Transaction Guide § 90B.40

§ 90B.40 Categories of Procurement Contracts

[1] Supplies

For purposes of government procurement, "supplies" means all property except land or interests in land and includes, but is not limited to, public works, buildings, and facilities; ships, floating equipment, and vessels of every type together with parts and accessories; aircraft, aircraft parts, accessories, and equipment; machine tools; and the alteration or installation of any of the foregoing [*48 C.F.R. § 2.101*]. The Federal Supply Schedule Program, which is directed and managed by the General Services Administration, provides federal agencies with a simplified procedure for acquiring commonly used supplies and services in varying quantities and at lower prices while obtaining discounts associated with volume buying [*48 C.F.R. §§ 38.000-38.101(a)*]. Supplies contracts in excess of $25,000 are generally awarded through the competitive bids and negotiated proposals methods [*see §§ 90B.24* (bids), 90B.25 (proposals)]. A supplies contractor for federal procuring agencies must be a manufacturer or regular dealer of such supplies [48 C.F.R. §§ 22.606-1, 22.606-2; *see § 90B.22[2]*]. Supplies contracts must also comply with other federal wage and hour standards [*see § 90B.43[3][a][i]*]. For forms used for bidding for contracts for supplies, see *§§ 90B.220-90B.223*.

[2] Services

A contract for "services" is a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to provide an end item of supply [*48 C.F.R. § 37.101*]. A services contract may be either "personal," in which case persons rendering service appear to be government employees, or "non-personal," in which case persons rendering service are not subject to the supervision and control prevailing between the government and its employees. It can also cover a contract in which the services are performed by either professional or non-professional personnel, on either an individual or organizational basis [*48 C.F.R. § 37.101*]. It is government policy that agencies generally rely on the private sector for commercial services, but a contract may not be awarded for the performance of an inherently governmental function [*48 C.F.R. § 37.102(b), (c)*]. Services contracts are awarded through bids and competitive proposals [*see §§ 90B.24* (bids), 90B.25 (proposals)], and are subject to regulation under federal wage and hour standards [*see § 90B.43[3][a][ii]*]. For forms used for bidding on services contracts, including construction within the small purchase limitation, see *§§ 90B.220 through 90B.223*.

[3] Construction

[a] In General

A contract for "construction" is one for the construction, alteration, or repair of buildings, structures, or other real property. These terms include the improvement of all types of structures, such as bridges, dams, plants, highways, streets, subways, tunnels, sewers, mains, power lines, cemeteries, pumping stations, railways, airport facilities, terminals, docks, piers, and wharves. "Construction" does not include the manufacture, production, alteration, or repair of vessels, aircraft, or other kinds of personal property [*48 C.F.R. § 36.102*]. Construction contracts must comply with federal wage and hour standards [*see § 90B.43[3][a][iii]*].

[b] Procurement Procedure

Construction contracts are solicited through the sealed bid method whenever practicable, or through negotiated proposals, using procedures similar to those for soliciting and negotiating supplies or service contracts [*48 C.F.R. §§ 36.103* (bids), 36.402 (proposals); *see §§ 90B.24, 90B.25*]. Agencies generally use the firm-fixed-price method of contract to acquire construction [*48 C.F.R. § 36.207*]. Contracting officers are required to provide access to presolicitation notices electronically through the government point of entry (GPE), via the Internet, for federal government procurement opportunities over $25,000 [*see 48 C.F.R. § 5.204*; www.FedBizOpps.gov; § 90B.20[1]]. For purchase of construction within the small purchase limitation, Standard Form 33, Solicitation, Offer, and Award, and related forms are generally used [*see* [2], *above*]. For purchase of construction estimated to exceed $25,000, use of Standard Form 1442, Solicitation, Offer and Award (Construction, Alteration, or Repair) [*48 C.F.R. § 53.301-1442*], is prescribed [48 C.F.R. § 1101 et seq.]. There are bonding requirements for construction contract exceeding the small purchase limitation [*see § 90B.22[5]*]. For forms used for acquisition of construction, see *§§ 90B.230-90B.234*.

[4] Architect-Engineer Services

[a] In General

Architect-engineer services (A--E) include the following [*48 C.F.R. § 36.601-4*; *see 40 U.S.C. § 541(3)*]:

- Professional services of an architectural or engineering nature, as defined by state law, which are required to be performed or approved by persons so licensed, registered, or certified;
- Services associated with research, planning, development, design, construction, alteration, or repair of real property;
- Such other professional services of an architectural or engineering nature or incidental services that an architect or engineer may logically or justifiably perform; and
- Professional surveying and mapping services of an architectural or engineering nature.

[b] Procurement Procedure

The method used for procuring architectural and engineering services is a competitive procedure distinct from that prescribed for procuring supplies and services, including construction [*48 C.F.R. § 6.102(d)*; *see 48 C.F.R. § 36.601-3(a)*]. The government must publicly announce all requirements for A & E services estimated to be in excess of $10,000 and negotiate the contracts based on demonstrated competence and qualifications of prospective contractors to perform the services at a fair and reasonable price [*48 C.F.R. § 36.601-1*].

In order to be considered for A--E contracts, interested firms must have first filed Standard Form 330,

Architect-Engineer Qualifications [*48 C.F.R. § 53.301-330* (form); *see § 90B.240*] with the appropriate agencies seeking acquisition of A--E services [*48 C.F.R. § 36.702*]. After the procuring agency evaluation board has reviewed the information and data on the submitted questionnaires, the board makes recommendations of the most highly qualified firms to the agency head for final selection as to a specific contract [*48 C.F.R. § 36.602-3*]. The agency head then makes a final choice of the "selected firms," with whom the contracting officer will negotiate according to specific required procedure [*48 C.F.R. § 36.602-4(a), (b)*]. The contract is negotiated, starting with the firm first listed, and continues with successive firms until a firm is selected for award of the contract [*48 C.F.R. § 36.606(a)*].

[c] Criteria for Award

There are six selection criteria used in awarding a government A--E contract [*48 C.F.R. § 36.602-1(a)(1)-(6)*]:

- Professional qualifications necessary for satisfactory performance of the required services.
- Specialized experience and technical competence in the type of work required.
- Capacity to accomplish the work in the required time.
- Past performance on contracts with government agencies and private industry in terms of cost control, quality of work, and compliance with required schedules.
- The firm's location in the general geographical area of the project and knowledge of the locale of the project (applicable only if there remains a sufficient number of qualified firms, in relationship to the size and scope of the project, after application of this criterion).
- Acceptability under other appropriate evaluation criteria.

Award is made on Standard Form 252, Architect-Engineer Contract [*48 C.F.R. § 53.236-2(a)*; *see 48 C.F.R. § 53.301-252*]. For the procedures used for competing for A--E contracts, see *§ 90B.123*. For the form used, see *§ 90B.240*.

[5] Additional Contract Categories

[a] In General

Other categories of contracts commonly used by procuring agencies include major systems acquisition [*see 48 C.F.R. § 34.000 et seq.*], research and development contracting [*see 48 C.F.R. § 35.000 et seq.*], and information resources acquisition that includes acquisition of automatic data processing equipment [*see 48 C.F.R. § 39.000 et seq.*]. For further discussion, see [b] through [d], *below*.

[b] Major Systems Acquisitions

A "major systems acquisition" is a combination of elements that will function together to produce capabilities required to fulfill the agency's need; the elements may include hardware, equipment, software, or any combination thereof, but exclude construction or improvements to real property [*48 C.F.R. § 34.001*]. The program manager for the agency seeking acquisition is required to develop an acquisition strategy tailored to that particular major system acquisition program, and must promote full and open competition between sources as long as it is economically beneficial to do so [*48 C.F.R. §§ 34.004-34.005(a)*].

[c] Research and Development

As used in research and development (R & D) procurement contracts, "research" includes concepts of both basic research that is directed towards increased knowledge in science, and applied research that is the practical application of the knowledge that normally follows basic research, but that is not severable from it (and includes attempts to exploit the potential of scientific discovery and improvement, as well as to advance the state of art). "Development" is the systematic use of scientific and technical knowledge in the design, development, testing, or evaluation of a new product or service, or the improvement of existing products and service, to meet specific performance requirements or objectives [*48 C.F.R. § 35.001*; *see 48 C.F.R. § 27.000 et seq.* (provisions under the FAR regarding patents, data, and copyright)]. R & D contracts differ from contracts for supplies and services in that they are directed toward objectives for which the work or methods cannot be precisely described in advance [*48 C.F.R. § 35.002*]. The contract method is used only when the principal purpose is acquisition of supplies or services [*see* [1], [2], *above*] for the direct benefit or use of the government. When the principal purpose is to stimulate or support R & D for another public purpose, grants or cooperative agreements are used instead [*48 C.F.R. § 35.003*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90B.41 Types of Contracting Methods

[1] In General

A wide selection of contract types is available to the government and the contractor in order to provide the needed flexibility in acquiring the large variety and volume of supplies and services required by federal agencies. Types vary according to the degree and timing assumed by the contractor for costs of performance, and the amount and nature of the profit incentive offered to the contractor for achieving or exceeding specified standards or goals [*48 C.F.R. § 16.101(a)*]. The two broad categories used in government procurement are the fixed-price contract and the cost reimbursement, with a wide range of various incentive contracts in between [*48 C.F.R. § 16.101(b)*]. The general government objective is to negotiate a contract type and price that will result in reasonable contract risk for the contractor and provide incentive for efficient and economical performance [*48 C.F.R. § 16.103(a)*]. The factors for selecting and negotiating a contract type that the government will use include the following [*48 C.F.R. § 16.104*]:

- Price competition;
- Price analysis;
- Cost analysis;
- Type and complexity of contract requirement;
- Urgency of requirement;
- Period of performance or length of production run;
- Contractor's technical capability and financial responsibility;

- Adequacy of contractor's accounting system;
- Impact of concurrent contracts; and
- Extent and nature of proposed subcontracts.

[2] The Fixed-Price Contract

Fixed-price contracts provide for either a firm price or, in appropriate cases, an adjustable price [*48 C.F.R. § 16.201*]. The firm-fixed-price contract (FFP) provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract, places on the contractor maximum risk and full responsibility for all costs and resulting profit or loss, and provides maximum incentive for the contractor to control costs and to perform effectively [*48 C.F.R. § 16.202-1*]. It is suitable for acquisition of commercial products or other supplies or services on the basis of definite functional or detailed specifications that allows the contracting officer to estimate a fair and reasonable price at the outset [*48 C.F.R. § 16.202-2*].

A fixed-price contract with an economic price adjustment provides for an upward or downward revision of the stated contract price on the occurrence of specified contingencies, with the price adjustment based on either estimated prices, actual costs of labor or material, or on cost indexes of labor or material [*48 C.F.R. § 16.203-1*]. Economic price adjustments are used when there is serious doubt concerning the stability of the market [*48 C.F.R. § 16.203-2*].

[3] The Cost-Reimbursement Contract

Cost-reimbursement contracts provide for payment of allowable incurred costs to a maximum extent by establishing a ceiling that the contract may not exceed without approval of the contracting officer, and are used only when there is uncertainty involved in contract performance and the situation does not permit costs to be established with sufficient accuracy so as to allow the use of fixed-price [*see* [2], *above*] contracts [*48 C.F.R. §§ 16.301-1, 16.301-2*]. Cost-reimbursement contracts may be used only when all of the following conditions are met [*48 C.F.R. § 16.301-3*]:

(1) The contractor's accounting system is adequate for determining costs applicable to the contract;

(2) There are available appropriate government surveillance resources to provide reasonable assurance that efficient methods and effective cost controls are used; and

(3) On the determination and finding by the agency that this type of contract is less costly than any other, and most practical in the situation.

Cost-reimbursement contracts may be tailored to fit certain situations, and include other types of contracts, such as cost-sharing contracts [*48 C.F.R. § 16.303*], cost-plus-incentive-fee contracts [*48 C.F.R. § 16.304*], cost-plus-award-fee contracts [*48 C.F.R. § 16.305*], and cost-plus-fixed-fee contracts [*48 C.F.R. § 16.306*].

[4] The Incentive Contract

The incentive contract is used in situations where a fixed price contract is not appropriate and the required supplies or services can be acquired at lower costs because of results achievable through improved technical performance or delivery by relating the amount of profit or fee payable to the contract performance [*48 C.F.R. § 16.401(a)*].

[5] Additional Contracting Methods

[a] In General

Some other types of contract methods used by procuring agencies include: indefinite delivery contracts [*see 48 C.F.R. § 16.500 et seq.*], time and materials, labor-hours, and letter contracts [*see* 48 C.F.R. § 16.600 et seq.]. For further discussion, see [b] through [d], *below*.

[b] Indefinite Delivery

Indefinite delivery contracts may be used when exact times and/or quantities of future deliveries are not known. These contracts offer advantages to the government by allowing stocks to be maintained at minimal levels, providing flexibility in quantities and delivery scheduling, maintaining government obligations at a minimum, and encouraging faster deliveries when production lead-time is involved [48 C.F.R. § 16.501(a), (b)].

[c] Time and Materials

Time and materials (T & M) contracts provide for acquiring agency supplies or services on the basis of (1) direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and (2) materials at cost [*48 C.F.R. § 16.601(a)*]. A T & M contract may be used only when it is not possible, at the time of placing the contract, to establish accurately the extent or duration of the work, or to anticipate costs with any reasonable degree of confidence [*48 C.F.R. § 16.601(b)*]. However, since a T & M contract provides no incentive to the contractor for cost controls or labor efficiency, appropriate government surveillance is required to give reasonable assurance that efficient methods and effective cost controls are used [*48 C.F.R. § 16.601(b)(1)*]. A labor-hour contract is a variation of a T & M contract, differing only in that materials are not supplied by the contractor [*48 C.F.R. § 16.602*].

[d] Letter Contracts

A letter contract is a written preliminary contract instrument that authorizes the contractor to begin immediate manufacture of supplies or performance of services [*48 C.F.R. § 16.603-1*]. A letter contract is used when (1) government interests demand that a contractor be given a binding commitment so that work can start immediately; and (2) negotiating a definitive contract is not possible in time to meet the requirement [*48 C.F.R. § 16.603-2*]. Standard Form 26, Award/Contract [*48 C.F.R. § 53.301-26*], is prescribed for use by the contracting officer to definitize a letter contract [*48 C.F.R. § 43.103(a)*; *see § 90B.221* (form)].

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§ 90B.42 Contract Financing

[1] In General

The goal of government financing is to aid in acquisition by expediting performance. However, financing will be provided only to the extent actually needed for prompt and efficient performance, taking into consideration the availability of private financing, and the probable impact of working capital on the predelivery expenditures and production lead-times associated with the contract, or groups of contracts or orders [*48 C.F.R. § 32.104*]. Contract financing methods used by the government include the following [*48 C.F.R. § 32.102*]:

- Advance payments to a prime contractor in anticipation of, and for the purpose of, complete performance and expected to be liquidated from payments due to the contractor incident to the performance of the contract;

- Progress payments based on costs made on the basis of costs incurred by the contractor as work progresses under the contract. The progress payments method does not include payments based on the percentage or stage of completion accomplished, payments for partial deliveries accepted by the government, or partial payments for a contract termination proposal;

- Loan guarantees made by Federal Reserve banks on behalf of designated guaranteeing agencies to enable contractors to obtain private source financing;

- Partial payments for accepted supplies and services. Partial payments, while not generally treated as a method of contract financing, enable contractors to participate in government contracts without, or with minimal, contract financing; and

- Progress payments based on percentage of stage of completion as authorized by statutes.

[2] Assignment of Claims

Under the Assignment of Claims Act of 1940 [*31 U.S.C. § 3727*], a contractor may assign moneys due under a government contract if all the following conditions are met [*48 C.F.R. § 32.802*]:

- The contract specifies payments aggregating $1,000 or more;
- Assignment is made to a bank, trust company, or other financing institution, including any federal lending agency;
- The contract does not prohibit assignment;
- Unless otherwise expressly permitted in the contract, the assignment covers all unpaid amounts payable under the contract; the assignment is made to only one party or to one party as an agent for two or more parties participating in the financing of the contract; and the assignment is not subject to further assignment; and
- The assignee sends written notice of assignment together with a true copy of its instrument to the contracting officer or the agency head, the surety on any bond applicable to the contract, and the disbursing officer designated in the contract to make payment.

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§ 90B.43 Mandatory Work Standards and Compliance Requirements

[1] Government Policy

Government procuring agencies must cooperate with, and must encourage contractors to cooperate with, federal and state agencies responsible for enforcing labor requirements relating to safety, health, sanitation, maximum hours and minimum wages, equal employment opportunity, child and convict labor standards, age discrimination, disabled and Vietnam veteran employment, and employment of the handicapped [*48 C.F.R. § 22.102-1*; *see 48 C.F.R. § 22.000 et seq.* (application of labor laws to government acquisitions)]. Compliance under government contracts is also required with regard to conservation and environmental concerns [*see 48 C.F.R. § 23.000 et seq.*], use of American and designated country end-products [*see 48 C.F.R. § 25.000 et seq.*], and rights of privacy and of public access to government information [*see 48 C.F.R. § 24.000 et seq.*]. The contracting officer is required to ensure compliance with work standards and other requirements by inserting relevant prescribed clauses into solicitations, offers, and awards [*see 48 C.F.R. § 52.200 et seq.* (text of prescribed contract clauses); *see also* [2]-[6], *below*].

[2] The "Buy American" Requirement

The Buy American Act [*41 U.S.C. § 10a et seq.*] was designed during the depression as a device to foster and protect American industry, workers, and invested capital [*Textron, Inc., Bell Helicopter Textron Div. v. Adams (D.D.C. 1980) 493 F. Supp. 824, 830* ; Allis-Chalmers, Etc. v. Friedkin (3d Cir. [Pa.] 1980) *635 F.2d 248, 257]* . Under the Act, only manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States may be acquired for public use [*41 U.S.C. § 10a*].

The requirement for use of domestic construction material is applicable to procurement contracts except (1) when the cost would be unreasonable [*see* 48 C.F.R. § 25.303]; (2) when the head of the procuring agency determines that using a particular domestic construction material would be impracticable; or (3) when the head of the contracting activity or designee determines that the construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of satisfactory quality [*48 C.F.R. § 25.202(a)*].

Every contract for public works must contain a provision that the materials used were immediately produced or manufactured in the United States [*48 C.F.R. § 25.205*; *see* 48 C.F.R. §§ 52.225-52.225-5 (prescribed "Buy American" clauses)]. Contractors in violation of this requirement are subject to debarment [*48 C.F.R. § 25.204*; *see also 48 C.F.R. § 25.400* (preference for end products of United States and designated countries)].

[3] Wage, Hour, and Workplace Standards

[a] Wage and Hour Standards

[i] Supplies Contracts

Under the Fair Labor Standards Act of 1938 [*29 U.S.C. § 201 et seq.*], employees engaged in commerce or in production of goods for commerce, or employed in enterprise engaged in commerce or in production of goods for commerce must be paid the minimum wage and cannot work more than the specified maximum hours per day and per week without being paid overtime wages [*29 U.S.C. §§ 206, 207*]. Accordingly, under the Walsh-Healey Public Contracts Act [*41 U.S.C. § 35 et seq.*], in addition to meeting the requirement that they qualify as manufacturers or regular dealers of such supplies [*see § 90B.22 [2]*], contractors who furnish supplies to the government under contracts in excess of $10,000 must also do the following [*48 C.F.R. § 22.602*; *see 41 U.S.C. § 35(b)-(e)*; *see also 48 C.F.R. § 52.222-20* (prescribed clauses implementing supplies contractor requirements)]:

- Pay employees the prevailing wage;
- Not work employees in excess of maximum daily or weekly hours;
- Observe certain minimum ages of employment; and
- Not permit contracted performance under unsanitary, hazardous, or dangerous conditions.

[ii] Services Contracts

Pursuant to the Service Contracts Act of 1965 [*41 U.S.C. § 351 et seq.*], every government procurement contract (and therefore any bid specification) entered into by the government, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, must contain a provision for the statutory minimum wage as determined in accordance with prevailing rates for those employees and with minimum wage laws [*48 C.F.R. § 22.1002-1*; *see 48 C.F.R. §§ 52.222-40, 52.222-41* (prescribed clauses implementing the Service Contracts Act requirements); *see also 48 C.F.R. § 22.1002-4* (application of the Fair Labor Standards Act to service contracts)]. The Act covers a wide range of service contracts [*see 48 C.F.R. § 22.1003-5*]. Violation of the minimum wage requirement under the Act may result in debarment, contract termination, and withholding of contract funds [*48 C.F.R. § 22.1025*].

[iii] Construction Contracts

Under the Davis-Bacon Act [*40 U.S.C. §§ 3141-3144, 3146, 3147*], any government procurement contract in excess of $2,000 must include a provision that wages for laborers and mechanics employed under any contract for the construction, alteration, and/or repair of public buildings or of public works within the United States be the minimum prevailing wage [*48 C.F.R. § 22.403-1*; *see 48 C.F.R. § 52.222-6* (prescribed clause implementing minimum wage requirement under Davis-Bacon Act)].

Under the Contract Work Hours and Safety Standards Act [*40 U.S.C. § 3703 et seq.*], procurement contracts that may require or involve laborers or mechanics must contain a clause that no laborer or mechanic doing any part of the work

contemplated by the contract can be required or permitted to work more than 40 hours per week unless paid for all overtime hours at not less than one and one-half the basic rate of pay [*48 C.F.R. § 22.403-3*; *see* 29 C.F.R. pt. 5; *see also 48 C.F.R. § 52.222-4* (prescribed clause implementing overtime compensation requirement)].

Construction contracts are subject to the Anti-Kickback (Copeland) Act [*40 U.S.C. § 3145*], which makes it unlawful to induce by force, intimidation, threat of procuring dismissal from employment, or otherwise, any person employed in the construction or repair of public buildings or public works, financed in whole or part by the United States, to give up any part of the compensation to which that person is entitled under a contract of employment [*48 C.F.R. § 22.403-2*; *see 48 C.F.R. § 52.222-10* (prescribed kickback compliance clause)]. Construction contractors are also subject to the Anti-Kickback Act [*41 U.S.C. § 51 et seq.*], which prohibits kickback payments from subcontractors under negotiated construction contracts [*48 C.F.R. § 3.502-2*; *see § 90B.45[4]*].

[b] Safety and Health Standards

Under the Occupational Safety and Health Act of 1970 [*29 U.S.C. § 651 et seq.*], federal standards regulating safety and health conditions in the workplace are generally applicable to all employment performed within the United States or its territories [*29 U.S.C. § 653(a)*; *see 48 C.F.R. § 22.102-1* (general policy for enforcing labor regulations in procurement contracting), 23.302].

Pursuant to the Drug-Free Workplace Act, under Executive Order 12564 *[51 Fed. Reg. 32889 (1986)]* , no contractor is considered qualified or responsible for a government contract without making certification that a drug-free workplace will be provided [*48 C.F.R. § 23.505(a)*; *see 48 C.F.R. § 52.223-6* (prescribed provision for certification regarding drug-free workplace)].

[4] Affirmative Action Hiring Requirements

[a] Equal Employment Opportunity Act

Under Parts II and IV of Executive Order 11246 *[30 Fed. Reg. 12319, 12935 (1965)]* , setting forth the Equal Employment Opportunity Act clause, all government agencies must include an equal opportunity clause in all non-exempt government prime contracts and subcontracts and act to ensure compliance with the clause, as well as regulations of the Secretary of Labor, to promote equal employment opportunity regardless of race, color, religion, sex, or national origin [*48 C.F.R. § 22.802*; *see 48 C.F.R. § 52.222-21 et seq.* (prescribed clauses for affirmative action compliance requirements)]. Contracts that are exempt from this requirement include the following [*48 C.F.R. § 22.807(a), (b)*]:

- National security contracts as determined by the agency head;
- Contracts as specified by the Director of the Office of Federal Contract Compliance Programs, U.S. Department of Labor;
- Transactions of $10,000 or less;
- Work outside the United States;
- Contracts with state or local governments;
- Work on or near Indian reservations;
- Contractors' facilities not connected with the contract; and

- Indefinite quantity contracts not to exceed $10,000.
- Contracts with religious entities.

In addition, pursuant to Executive Order 11141 *[29 Fed. Reg. 2477 (1964)]* , stating the public policy against age discrimination in federal employment, government contractors and subcontractors, in connection with or in relation to employment, must not discriminate against persons because of age except upon the basis of bona fide occupational qualifications, retirement plan, or statutory requirement; use of a contract clause is not required [*48 C.F.R. § 22.901*].

[b] Rehabilitation Act

Under the Rehabilitation Act of 1973 [*29 U.S.C. § 701 et seq.*], any contract in excess of $10,000 entered into by a federal department or agency for procurement of supplies and services, including construction, must contain a provision requiring that the party contracting take affirmative action to employ and advance in employment qualified individuals with disabilities, without discrimination based on their physical or mental disability [*29 U.S.C. § 793*; *48 C.F.R. §§ 22.1401, 22.1402 see 48 C.F.R. § 52.222-36* (prescribed affirmative action for disabled workers clause); *see also 41 U.S.C. § 46 et seq.* (Wagner O'Day Act providing that all entities of government are required to purchase certain listed products and services from workshops for the blind and severely handicapped)].

[c] Vietnam Veterans' Assistance Act

Under the Vietnam Era Veterans' Readjustment Assistance Act of 1972 [*38 U.S.C. § 2012*], government contractors, when entering a contract with the government subject to the Act, are required to list all suitable employment openings with the local service employment office and take affirmative action to hire qualified special disabled veterans and veterans of the Vietnam era without discrimination based on their disability or veteran's status [*48 C.F.R. §§ 22.1300, 22.1301*; *see 48 C.F.R. §§ 52.222-35-52.222-37* (prescribed clauses for veteran employment compliance requirement)].

[5] Environmental and Conservation Requirements

Facilities of firms contracting with government agencies must be in compliance with the Clean Air Act and the Clean Water Act of 1977 [48 C.F.R. § 23.103(a); *see 42 U.S.C. § 7401 et seq.* (Clean Air Act); *33 U.S.C. § 1251 et seq.* (Clean Water Act); *see also 48 C.F.R. §§ 52.223-1, 52.223-2* (prescribed clauses for clean air and clean water compliance requirements)]. In addition, the National Environmental Policy Act contains provisions requiring all federal agencies to consider environmental factors in planning and decision making [*see 42 U.S.C. § 4321 et seq.*]. For example, government agencies must purchase "ENERGY STAR" or other energy-efficient items listed on the Department of Energy's Federal Energy Management Program (FEMP) Product Energy Efficiency Recommendations product list, if the products are cost-effective and available and meet the agency's need [*see 48 C.F.R. § 23.203(a)*]. Information is about ENERGY STAR is available online at http://www.energystar.gov/; and about FEMP at http://www.eere.energy.gov/femp/procurement [*48 C.F.R. § 23.203(b)*]. Under regulations issued by the Occupational Safety and Health Administration under the Occupational Safety and Health Act [*29 U.S.C. § 651 et seq.*], government contractors are also required to inform their employees about hazardous work conditions [*48 C.F.R. § 23.302*; *see 48 C.F.R. § 52.223-3* (prescribed clause for hazardous materials identification requirement)].

[6] Disclosure Requirements

[a] Right of Privacy and Protection for Proprietary Information

Pursuant to the Privacy Act of 1974 [*5 U.S.C. 552a*], when an agency contracts for the design, development, or operation of a system of records on individuals on behalf of the agency to accomplish an agency function, the agency must prohibit disclosure of records in its control regarding government contractors and contractors' employees working

on the contract [*48 C.F.R. §§ 24.000-24.101*; *see 48 C.F.R. §§ 52.224-1, 52.224-2* (prescribed clauses for Privacy Act requirements)].

Proprietary and source selection information is also protected from unauthorized disclosure [*48 C.F.R. § 3.104-5(a)*]. "Proprietary information" is information contained in bids or proposals or otherwise submitted to the government by competing contractors in response to agency procurement or information in unsolicited proposals that has been marked as proprietary information as required by law and the regulations [*48 C.F.R. § 3.104-4(j)(1)*; *see 48 C.F.R. §§ 52.203-9, 52.203-10* (prescribed clauses for procurement integrity requirements)].

[b] Right of Public Access to Agency Information

Under the Freedom of Information Act [*5 U.S.C. § 552*], agencies must make contracting records available on public request and comply with strict time standards for agency response, with the exception of certain specified records [*48 C.F.R. § 24.202*].

Legal Topics:

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§ 90B.44 Contract Administration--Prescribed Clauses

[1] Contract Modification

Government procurement contracts are generally not preceded by any real negotiations of general terms. Except for special agreements arrived at in the negotiation process for proposals [*see § 90B.25*], the government contracting officer issues a contract on a standard form containing mandatory clauses that must be accepted by the successful bidder or offeror [*see 48 C.F.R. §§ 42.000 et seq.* (contract administration), 52.000 et seq. (prescribed solicitation provisions and contract clauses); *see also §§ 90B.24[1][c]* (elements of bids), 90B.25[1][c] (elements of proposals)]. Even in negotiated procurements, there are prescribed clauses that must be joined with the negotiated portions of the contract [*see* 48 C.F.R. §§ 15.406, 15.407].

A contract modification may be either bilateral, arising from mutual agreement by the contractor and the government [*48 C.F.R. §§ 43.101, 43.103(a)*], or unilateral, arising by action on the part of the government alone [*48 C.F.R. § 43.103(b)*]. A "bilateral" modification or supplemental agreement is a contract modification that is signed by both the contractor and the government and is used to make a negotiated equitable adjustment [*see* [2][b], *below*], to make definite letter contracts [*see § 90B.41[5][d]*], and to reflect other agreements of the parties modifying the terms of the contract [*48 C.F.R. § 43.103(a)*]. The contracting officer will use Standard Form 26, Award/Contract [*48 C.F.R. § 53.301-26*], for bilateral modifications in both the sealed bid and negotiated proposal methods when the signatures of both parties on a single document are required [*48 C.F.R. §§ 14.407-1(d)* (bids), 15.414(b) (proposals); *see § 90B.221* (form)].

A "unilateral" modification of a contract is one signed only by the contracting officer and is used to do the following [*48 C.F.R. § 43.103(b)*]:

- Make administrative changes;
- Issue change orders [*see* [2][a], *below*];

- Make changes authorized by other than the changes clause [*see* [2], *below*]; and
- Issue termination notices [*see* [3], [4], *below*].

A contracting officer will use Standard Form 30, Amendment of Solicitation/Modification of Contract [*48 C.F.R. § 53.301-30*], to issue unilateral modifications [*48 C.F.R. § 43.301*; *see § 90B.223* (form)].

[2] Changes Clause

[a] In General

A changes clause permits a contracting officer to make unilateral changes within the general scope of a contract by means of a written change order to the contractor [*48 C.F.R. § 43.201(a)*]. A changes clause is mandatory in most procurement contracts [*see 48 C.F.R. § 43.205*; *see 48 C.F.R. §§ 52.243-1-52.243-7* (prescribed changes clauses)]. Under the changes clause, the contracting officer is authorized to issue unilateral written orders using Standard Form 30, Amendment of Solicitation/Modification of Contract [*48 C.F.R. §§ 43.205, 43.301(a)*; *see 48 C.F.R. § 53.301-30* (form)]. Once the contracting officer has ordered a change, the contractor has a duty imposed by the changes clause to proceed promptly with the changed work plan [*48 C.F.R. § 43.201(b)*].

A changes clause provides that changes may be ordered within the general scope of the contract [*48 C.F.R. § 48.201(a)*]. A contract modification that is so drastic as to go beyond scope of contract is considered a breach [*General Dynamics Corp. v. United States (Ct. Cl. 1978) 585 F.2d 457, 462* ; *Air-a-Plane Corporation v. United States (Ct. Cl. 1969) 408 F.2d 1030, 1033]* .

In some circumstances, a constructive change order, as distinct from a written order formalized in a change order, may result because of conduct on the part of the government that may allow an equitable adjustment for increased costs resulting from the change [*see Consolidated Diesel Elect. Co. v. United States (Ct. Cl. 1976) 533 F.2d 556, 576* (constructive change order resulting from government prohibition of substitution of one type of engine for another as originally provided for under contract for supply of quantities)].

[b] Equitable Claim Adjustment

A change order ordinarily requires two documents, a change order and a supplemental agreement reflecting the resulting equitable adjustment or corresponding modification of the contract agreed to by the government [*48 C.F.R. § 43.204(a)*]. An "equitable adjustment" is a modification of contract price or schedule to compensate the contractor for government-directed changes or other government actions [*see* [a], *above*]. Thus, when a change order causes either an increase or decrease in the estimated cost or time required to complete performance, an equitable adjustment reflecting the new cost or delivery schedule is made [*see 48 C.F.R. §§ 43.201-43.205*].

To obtain increased costs or other relief such as extra time for performance resulting from a change order, a contractor must file a claim for equitable adjustment before final payment and within 30 days of receiving the change order [*48 C.F.R. § 43.204*; *see 48 C.F.R. §§ 52.243-1-52.243-3*]. The parties must negotiate an equitable adjustment and resulting modification of contract [*48 C.F.R. § 43.204(b), (c)*]. Adjustment of the claim may be necessary if the contracting officer rejects the claim or the parties are unable to reach an agreement; the contractor may appeal the final decision of the contracting officer under the Contract Disputes Act of 1978 [*41 U.S.C. § 601 et seq.*], either to the appropriate agency's board of contract appeals or to the Court of Federal Claims [*see 48 C.F.R. § 52.243-1(e)*]. For discussion of resolution of claims and disputes under the Contract Disputes Act of 1978, see *§ 90B.61*. For the form provided for use for making a claim to a contracting officer, see *§ 90B.270*.

[3] Termination for Convenience Clause

Contracting officers are required to include a termination for convenience clause in most procurement contracts [*48 C.F.R. § 49.502*; *see 48 C.F.R. §§ 52.249-1-52.249-7* (prescribed clauses for termination for convenience)]. However, whether the clause is inserted or not, the government has the authority to terminate any contract for which such a clause is prescribed [*G.L. Christian and Associates v. United States (Ct. Cl. 1963) 312 F.2d 418, 424-425]* . A government contract may be terminated for convenience when it is determined that termination is in the best interest of the government or, if the contract was previously terminated for default, when a determination is made in the disputes resolution process that the contractor was not actually in default or that the default was excusable [*48 C.F.R. § 49.101(b)*]. The contract may be terminated for convenience only by written order to the contractor [*48 C.F.R. §§ 49.102(a), 49.402-3(g)*].

The notice of termination must contain the following [*48 C.F.R. § 49.102(a)*]:

- A statement that the contract is being terminated for the convenience of the government under the contract clause authorizing termination;
- The effective date of the termination;
- The extent of the termination;
- Any special instructions to the contractor; and
- The steps the contractor should take to minimize the effects of the termination on the work and the work force.

On receiving notice of termination for convenience, a contractor is required to stop work and to terminate all subcontracts related to the terminated portion of the contract [*48 C.F.R. § 49.104(a), (b)*]. An initial conference is then held to effect settlement [*48 C.F.R. § 49.105(c)*]. The contractor has the right to submit a settlement proposal setting forth the amount claimed by reason of termination [*48 C.F.R. § 49.206-1(a)*]. The proposal must be submitted on the prescribed form [48 C.F.R. § 49.206(1)(c); *see 48 C.F.R. §§ 53.301-1435-53.301-1438* (prescribed settlement proposal forms)]. Agencies must also establish procedures for review of proposed settlements [*48 C.F.R. § 49.111*].

[4] Termination for Default Clause

The termination for default clause gives the contracting officer the discretion to terminate, in whole or in part, a contractor's right to proceed because of the contractor's failure, whether actual or anticipated, to perform under the terms of the contract [*48 C.F.R. § 49.401(a)*]. The termination for default clause prescribes the government's right to terminate the contract for default, the effect of the termination, and the procedure in the event of default [*48 C.F.R. § 49.504*; *see 48 C.F.R. §§ 52.249-8-52.249-10* (prescribed clauses for termination for default)]. If the contractor can establish (or if it is otherwise determined) that the contractor was not in default or that the failure to perform was excusable and arose out of causes beyond the control of, and without negligence of, the contractor, the termination for default will be considered to have been a termination for the convenience of the government and the rights and obligations of the parties governed accordingly [*48 C.F.R. § 49.401(b)*]. The contracting officer has authority to reinstate a contractor if a written determination is made that the supplies or services are still required and reinstatement is advantageous to the government [*48 C.F.R. § 49.401(c)*]. Notice of termination for default must be given in writing [*48 C.F.R. § 49.102(a)*].

When there has been a termination for default, the government is not liable for the contractor's costs on undelivered work and is entitled to repayment of any advance payments or progress payments applicable to that work [*48 C.F.R. § 49.402-2(a)*]. However, the government will pay the contractor for work performed by the contractor and acquired by the government under the terms of the default clause [*48 C.F.R. § 49.402-2(c)*].

[5] Inspection Requirement Clause

In general, the government will rely on the contractor to accomplish all inspection and testing needed to ensure that the supplies or services acquired under small purchases conform to contract quality requirements before tender to the government [*48 C.F.R. § 46.202-1(a)*]. The contracting officer will insert an inspection clause, Contractor Inspection Requirements [*48 C.F.R. § 52.246-1*], in solicitations and contracts for supplies or services when the contract amount is expected to exceed the small purchase limitation and (1) inclusion of the clause is necessary to ensure an explicit understanding of the contractor's inspection responsibilities, or (2) inclusion is required under the procuring agency's procedures [*48 C.F.R. § 46.301*; *see 48 C.F.R. §§ 52.246-1-52.246-10* (prescribed clauses for standard inspection requirements)]. Standard inspection requirements clauses generally provide the following [*48 C.F.R. § 46.202-2(a)*]:

- A requirement that the contractor provide and maintain an inspection system that is acceptable to the government;

- The right of the government to make inspections and tests while the work is in progress; and

- A requirement that the contractor keep complete records of its inspections of work and make these records available to the government.

[6] Subcontracting Clause

If the contractor has an approved purchasing system, consent is required for subcontracts specifically identified by the contracting officer in the subcontracts clause of the contract [*48 C.F.R. § 44.201-1(a)*]. Consent may be required if the contracting officer for the government determines that it is necessary to protect the government adequately because of the subcontract type, complexity, or value, or because the subcontract needs special surveillance (subcontracts for critical systems, components, or services, for example) [*48 C.F.R. § 44.201-1(a)*]. However, even if the contractor has an approved purchasing system and consent to subcontract is not required under *48 C.F.R. § 44.201-1*, under cost-reimbursement contracts, the contractor is required to notify the contracting agency as follows [*48 C.F.R. § 44.201-2*; *see 10 U.S.C. § 2306(e)*; *41 U.S.C. § 254(b)* (notification requirements)]:

- For the Department of Defense, the Coast Guard, the National Aeronautics and Space Administration: before the award of any cost-plus-fixed-fee subcontract, or any fixed price subcontract that exceeds the greater of specified dollar amounts or percentages of the total estimated cost of the contract, unless the contractor maintains an approved purchasing system.

- For civil agencies other than the Coast Guard and the National Aeronautics and Space Administration, even if the contractor has an approved purchasing system, before the award of any cost-plus-fixed-fee subcontract, or any fixed price subcontract that exceeds specified dollar amounts or percentages of the total estimated cost of the contract.

If the contractor does not have an approved purchasing system, consent to subcontract is required for cost-reimbursement, time-and-materials, labor-hour, or letter contracts, and for unpriced actions under fixed price contracts that exceed the simplified acquisition threshold for cost-reimbursement, time-and-materials, and labor-hour subcontracts and for certain fixed price subcontracts that exceed either specified dollar amounts or percentages of the total estimated cost of the contract [*see 48 C.F.R. § 44.201-1(b)*; *see 48 C.F.R. §§ 44.204, 52.244-2* (subcontract clauses)].

Consent may also be required for subcontracts under prime contracts for architect-engineering services [*48 C.F.R. § 44.201-1(c)*; *see 48 C.F.R. §§ 44.204, 52.244-4* (subcontract clauses)].

The contracting officer's written authorization for the contractor to purchase from government sources constitutes consent [*48 C.F.R. § 44.201-1(d)*].

[7] Disputes Clause

The Contract Disputes Act of 1978 [*41 U.S.C. § 601 et seq.*] establishes procedures and requirements for asserting and resolving claims arising out of contracts with the government [*48 C.F.R. § 33.202*]. A disputes clause is a required component of most government contracts [*48 C.F.R. § 33.215*; *see* 48 C.F.R. § 32.233-1 (prescribed disputes clause)]. The disputes clause provides protection for the contractor against unjustified or wrong decisions by the contracting officer and entitles the contractor to pursue claims arising out of contract performance [*see 48 C.F.R. § 33.201 et seq.* (disputes and appeals)]. For a discussion of disputes resolution regarding claims arising out of procurement contracts, see *§ 90B.61*. For procedures used for making a claim under or relating to a procurement contract, see *§ 90B.140*.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 90B.45 Requirements for Procurement Integrity

[1] Government Policy

Government business must be conducted in a manner above reproach and, except as authorized by statute, with complete impartiality and with no preferential treatment. Transactions relating to the expenditure of public funds require the highest degree of public trust and impeccable standards of conduct. The general rule is to avoid any conflict of interest or even the appearance of conflict of interest [*48 C.F.R. § 3.101-1*].

Unless not required, all solicitations and contracts exceeding $100,000 must contain the Requirement for Certificate of Procurement Integrity clause [*48 C.F.R. § 52.203-8*], which certifies that the prospective contractor has no knowledge of any violation of the procurement regulations [48 C.F.R. § 3.104-10(a)].

For all solicitations and contracts exceeding $30,000, the contracting officer must insert the Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters clause [*48 C.F.R. § 52.209-5*], which certifies that the contractor is not disqualified because of disbarment, suspension, or proposed debarment, and requiring disclosure of such information by the contractor [*48 C.F.R. § 9.409*; *see § 90B.23* (contractor disqualification)].

[2] Prohibited Conduct

Under the Office of Federal Procurement Policy Act [*41 U.S.C. § 423*], certain conduct in government procurement is prohibited, including collusive conduct by competing contractors or procurement officers, unauthorized disclosures of procurement information, and certain improper post-employment practices by government procurement officials [*see 48 C.F.R. § 3.104-2*].

A contracting officer may not knowingly award a contract to a government employee or to a business concern or other organization owned, or substantially owned or controlled, by government employees [*48 C.F.R. § 3.601*]. No government employee may solicit or accept any gratuity or anything of monetary value from anyone seeking business with that employee's agency, conducting activities that are regulated by the employee's agency, or having interests that

may be substantially affected by the employee's performance or non-performance of official duties [*48 C.F.R. § 3.101-2*]. With limited exceptions, the prescribed gratuities clause must be inserted into all procurement contracts [*see 48 C.F.R. § 52.203-3* (prescribed gratuities clause)].

Contractors' arrangements to pay contingent fees for soliciting or obtaining government contracts are considered contrary to public policy because they may lead to attempted or actual exercise of improper influence [*48 C.F.R. § 3.402*]. Prospective contractors are generally required to disclose contingent fee arrangements in order to permit the government to evaluate such arrangements before award of a contract [*48 C.F.R. § 3.404*; *see 48 C.F.R. § 52.203-4* (prescribed contingent fee representation and agreement clause)].

In contracts procured with organizations, there may also be potential for organizational conflicts of interest resulting in the inability of a person within that organization to render impartial assistance or advice to the government, the impairment of that person's objectivity, or the possession by that person of unfair competitive advantage [*48 C.F.R. § 9.501*]. In such cases, when the nature of the work to be performed on a contract creates actual or potential conflict of interest on a future acquisition, some restriction on future activity may be required, or an agency may propose a course of action for limiting or avoiding potential conflict [*48 C.F.R. § 9.502(c)*]

[3] Interest of Congressional Member

Most government contracts are required to explicitly state that no member of Congress shall be admitted to any share or part of the contract or benefit arising from it. In addition, contracts must state that such violation may result in criminal penalties for both the employee awarding the contract and the member involved, voiding of the contract, and return of any consideration made by the government under the contract [*41 U.S.C. § 22*; 48 C.F.R. § 3.102-1; *48 C.F.R. § 52.203-1*(prescribed clause)].

[4] Anti-Kickback Act

The Anti-Kickback Act [*41 U.S.C. § 51 et seq.*], is intended to deter subcontractors from making payments, and contractors from accepting payments, for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contractor subcontract related to a prime contract [*48 C.F.R. § 3.502-2*]. The Act prohibits anyone from [*48 C.F.R. § 3.502-2(a)*]:

(1) Providing, attempting to provide, or offering to provide a kickback;

(2) Soliciting, accepting, or attempting to accept a kickback; or

(3) Including directly or indirectly the amount of any kickback in the contract price charged by the subcontractor to the prime contractor, with criminal penalties for knowing and willful violation.

The contracting officer must insert an anti-kickback clause into all solicitations and contracts [*48 C.F.R. § 3.502-3*; *see 48 C.F.R. § 52.203-7* (prescribed clause)].

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[Reserved]

§§ 90B.46[Reserved]

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§ 90B.60 Protests Against Awards

[1] In General

A protest is a written objection by an interested party to a solicitation by an agency for offers for a proposed contract for the acquisition of supplies or services or a written objection by an interested party to a proposed award or the award of such a contract [*48 C.F.R. § 33.101*]. When a bidder believes that its bid has not been given a fair appraisal, or has been evaluated or rejected in an injudicious manner (for example, through the acceptance of a late bid or a late bid modification) and that an award is about to be made or has been made improperly as a result, it may file a written protest to solicitations by an agency for offers for a proposed contract or to a proposed award or the award of such a contract. The protest is filed with the procuring agency, the General Office of Accounting (GAO), or, for acquisition of automatic data processing equipment, the General Services Board of Contract Appeals (GSBCA) [*48 C.F.R. §§ 33.101, 33.102*]. Contracting officers must consider all protests, whether submitted before or after an award, and whether filed directly with the agency or with the GAO or GSBCA [*48 C.F.R. § 33.102(a)*]. For procedures used for making a protest to an agency against a contract award, see *Section 90B.127*. For the form to be used in making the protest, see *Section 90B.260*. For a discussion of appeals of final agencies' decisions, see *Section 90B.61[3]*.

In appropriate circumstances, unsuccessful bidders on government contracts may also seek declaratory, equitable, and legal relief in the appropriate federal district court or in the Court of Federal Claims; exhaustion of remedies is not required before filing suit [*see A & M. Gregos, Inc. v. Robertory (E.D. Pa. 1974) 384 F. Supp. 187, 191-193]* . To sue regarding a protest against an award of contract in district court, the following conditions must be met [*Gull Airborne Instruments, Inc. v. Weinberger (D.C. Cir. 1982) 694 F.2d 838, 841]* :

(1) Injury in fact to complainant;

(2) Arbitrary or capricious action by the agency that injured an interest arguably within the zone of interests to be protected as required by statute; and

(3) No clear and convincing indication of legislative intent to withhold review.

[2] Protest to Agency

A party wishing to protest an award is encouraged to seek resolution within the agency before filing a protest with the GAO or GSBCA [*48 C.F.R. § 33.102(c)(1)*]. Agency protests are submitted to the individual or location designated in the Service of Protest Clause [*48 C.F.R. § 52.233-2*], on the proposal or bid form [*48 C.F.R. § 33.103(b)*]. Protests must include specifically required information including a detailed statement of the legal and factual grounds for the protest, a request for ruling by the agency, and a statement of the relief requested [*48 C.F.R. § 33.103(b)(3)*]. When a protest is made to an agency, an award cannot be made until a decision is issued or the matter is otherwise resolved, unless the contracting officer determines that the supplies or services to be contracted for are urgent, failure to make the award promptly will result in undue delay, or a prompt award is otherwise advantageous to the government [*48 C.F.R. § 33.103(a)*]. Protests received after an award and filed with the procuring agency must be handled in accord with agency procedures [*48 C.F.R. § 33.103(b)(2)*].

[3] Protest to the General Accounting Office

In accord with GAO bid protest regulations [*see* 4 C.F.R. pt. 21 et seq.], an interested party may protest an alleged misaward to the GAO [*48 C.F.R. § 33.102(c)(2)*]. The protester must furnish a copy of the complete protest to the soliciting official or location no later than one day after the protest is filed with the GAO; failure to do so may result in dismissal of the protest [*48 C.F.R. § 33.104(a)(1)*]. The agency involved in the protest must prepare a report when the protest is lodged with the GAO [*48 C.F.R. § 33.104*]. The GAO will issue its recommendation on a protest within the time as required by regulation, unless the GAO establishes a longer period [*48 C.F.R. § 33.104(f)*]. The GAO will also reconsider its decision on request by any interested party or the federal agency involved in the protest [*see 4 C.F.R. § 21.1(a), (b)*].

[4] Protest to the General Services Administration Board of Contract Appeals

The administrator of the General Services Administration (GSA) has authority over government acquisition of automatic data processing equipment (ADPE) procurement and authority to review decisions of the procuring officers regarding awards of contracts for such acquisition [*48 C.F.R. § 39.002(a)*; *see 48 C.F.R. § 6101.0*; *see also § 90B.40[5][d]*]. Review procedures are in accord with GSBCA rules of procedure [*48 C.F.R. § 33.102(a)*; *see* 48 C.F.R. pt. 61 (GSBCA rules of procedure)]. Protests against awards of contracts for acquisition of ADPE not otherwise authorized to be heard by the GSBCA may be heard by the procuring agency, the courts, or the GAO [*48 C.F.R. § 33.105(a)(1)*]. The GSBCA's final decision on a protest involving an ADPE acquisition may also be appealed by the agency or any interested party as provided for under the Contract Disputes Act [*48 C.F.R. § 33.105(g)*; *see 48 C.F.R. § 33.201 et seq.*].

Legal Topics:

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§ 90B.61 Resolution of Contract Claims and Disputes

[1] The Contract Disputes Act of 1978

The Contracts Disputes Act of 1978 [*41 U.S.C. § 601 et seq.*], contains procedures and requirements for asserting and resolving claims subject to it, including claims arising out of government procurement contracts [*48 C.F.R. § 33.202*]. The contracting agency is required to insert a disputes clause [*48 C.F.R. § 52.233-1*] in all solicitations and contracts [*48 C.F.R. § 33.215*]. Decisions by government officials under the disputes clause are final but subject to judicial review if the decisions are fraudulent, arbitrary and capricious, so grossly erroneous as to imply bad faith, or not supported by substantial evidence [*41 U.S.C. § 321* (scope of judicial review for agency actions under Wunderlich Act)].

[2] Submission of Claims

[a] Procedure in General

Under the Contract Disputes Act of 1978 [*see* [1], *above*], a contractor is required to submit disputes in writing, whether arising under the contract or by reason of an alleged breach of the contract by the government, to the agency contracting officer administering the contract [*48 C.F.R. § 33.206*; *see 41 U.S.C. § 605(a)*]. For claims exceeding $100,000 (or any claim, regardless of the amount when using alternate dispute resolution), the claim must be certified to be in good faith [*48 C.F.R. § 33.207*; *see § 90B.270[2]*, P 6].

The contracting officer is authorized to settle all claims relating to the contract and subject to the Contract Disputes Act [*48 C.F.R. § 33.210*]. Government policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level, and the contracting officer, before issuing a decision, is encouraged to use informal discussions or alternative dispute resolution to reach an agreement with the parties alleging a claim or dispute [*48 C.F.R. § 33.204*]. If a mutually agreed decision cannot be met, the contracting officer may seek assistance from legal and other advisers in making a determination [*48 C.F.R. § 33.211(a)(2)*]. Pending a final decision on a claim relating to a procurement contract, an agency is authorized to require the contractor to continue performance of the contract [*48 C.F.R. § 33.213(a)*].

If the claim is for $100,000 or less, the contracting officer's decision must be issued within 60 days from the time the contracting officer received the claim [*48 C.F.R. § 33.211(c)(1)*]. For claims greater than $100,000, if a decision is not issued within 60 days, the contracting officer must notify the contractor of the time within which a decision will be issued [*48 C.F.R. § 33.211(c)(2)*]. The decision must be issued within a reasonable time, taking into account such factors as the size and complexity of the claim and the adequacy of the supporting data provided by the contractor [*48 C.F.R. § 33.211(d)*]. The contracting officer has no obligation to render a final decision on any claim exceeding $100,000 that contains a defective certification, if within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why the attempted certification was defective [*48 C.F.R. § 33.211(e)*]. If there is undue delay on the part of the contracting officer, the contractor may ask the agency's board of contract appeals to issue a decision within a specified time to be determined by the appeals board [*48 C.F.R. § 33.211(f)*]. Failure of the contracting officer to issue a decision within the time required will be deemed a denial by the contracting officer and will authorize the contractor to file an appeal or suit on the claim [*48 C.F.R. § 33.211(g)*; *see* [3], *below*].

The decision of the contracting officer must contain the following information [*48 C.F.R. § 33.211(a)(4)*]:

- A description of the claim or dispute.
- Reference to pertinent contract terms.
- A statement of the factual areas of agreement and disagreement.
- A statement of the contracting officer's decision with supporting rationale.
- A prescribed statement that the decision is final and appealable [*see 48 C.F.R. § 33.211(a)(4)(v)*].
- A demand for payment if the decision finds that the contractor is indebted to the government.

A copy of the decision must be sent to the complainant by certified mail, return receipt requested, or by any other method that provides evidence of receipt [*48 C.F.R. § 33.211(b)*].

For procedures used for resolution of contract claims and disputes, see *§ 90B.140*. For the form to use for making a claim directly to the agency contracting officer, see *§ 90B.270*.

[b] Fraudulent Claims

If there is a suspected fraudulent claim (that is, if a contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor), the contracting officer must refer the matter to the agency office responsible for investigating fraud [*48 C.F.R. § 33.209*] Under the Contract Disputes Act of 1978 [*41 U.S.C. § 601 et seq.*], a contractor who is found liable for a fraudulent claim is liable to the government for an amount equal to the unsupported part of its claim in addition to all costs to the government attributable to the cost of reviewing the claim [*41 U.S.C. § 604*]. A contractor who knowingly makes false claims against the government is also subject to both civil liability and criminal penalties under other provisions of federal law [*see 31 U.S.C. §§ 3729-3733* (civil liability under False Claims Act); *18 U.S.C. § 287* (criminal penalties)].

[3] Appeals

If a contractor decides to appeal a final decision of the contracting officer, that contractor, within 90 days from the date of receipt of the decision, must furnish written notice to the appropriate agency board of contract appeals and provide a copy of the appeal to the contracting officer. The contractor may also bring the appeal directly in the Court of Federal

Claims within 12 months of the date of receipt of the decision, unless the claim arises out of a maritime contract. If appealing to the board of contract appeals, a contractor may elect to proceed under the board's small claims procedure if the claim is for $50,000 or less or, in the case of a small business concern [*see 48 C.F.R. § 19.001* (definition); § 90B.22[4]], $150,000 or less, or under the accelerated procedure if the claim is $100,000 or less [*48 C.F.R. § 33.211(a)(4)(v)*; *see 41 U.S.C. § 606* (right of appeal to agency board of contract appeals under the Contract Disputes Act of 1978); *28 U.S.C. § 1491(a)(1), (2)* (jurisdiction of Court of Federal Claims regarding claims on implied or express contracts with government)].

The decision of an agency board of contract appeals is considered final, and is appealable by an agency head or by a contractor within 120 days after receipt of a copy of the decision, by filing a notice of appeal with the Court of Appeals for the Federal Circuit [*41 U.S.C. § 607(g)(1)*]. For a discussion of the procedures for appeal of an agency decision, see *§ 90B.140*. For the form provided for use for noticing an appeal from a contracting officer's adverse disposition of a contract claim to the agency board of contract appeals, see *§ 90B.271*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewGovernmentsFederal GovernmentGeneral OverviewPublic Contracts LawDispute ResolutionGeneral OverviewPublic Contracts LawTypes of ContractsGeneral Overview

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§ 90B.62 Equal Access to Justice Act

Successful claimants against the government, who have been parties to a type of administrative proceeding known as an adversary adjudication may also be eligible for an award of attorney's fees and other adjudicated expenses [*see 5 U.S.C. § 504* (Equal Access to Justice Act); *Richlin Sec. Serv. Co. v. Chertoff (2008) 553 U.S. 571, 128 S. Ct. 2007, 2019, 170 L. Ed. 2d 960* (prevailing party that satisfies EAJA's other requirements may recover its paralegal fees from government at prevailing market rates, in addition to attorney's fees)]. An "adversary adjudication" is one that is required by statute to be determined on the record after opportunity for an agency hearing, and in which the position of the government was represented by counsel or otherwise [*see 5 U.S.C. § 554* (provision under Administrative Procedure Act)]. Parties may be able to receive awards over agencies unless the agency position in the proceedings was substantially justified or there are special circumstances that make an award unjust [*5 U.S.C. § 504(a)(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsFederal GovernmentGeneral OverviewGovernmentsFederal GovernmentClaims By & AgainstPublic Contracts LawDispute ResolutionGeneral OverviewPublic Contracts LawTypes of ContractsGeneral OverviewTortsDamagesCosts & Attorney FeesStatutory Availability

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[Reserved]

§§ 90B.63[Reserved]

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30-90B California Legal Forms--Transaction Guide § 90B.70

§ 90B.70 Small Business and Small Disadvantaged Business Preferences

[1] The Small Business Act Preference Programs

[a] In General

Under the Small Business Act [*15 U.S.C. § 631 et seq.*], it is the policy of the government, acting through the Small Business Administration (SBA), to provide maximum practicable opportunities in its acquisitions to small business concerns, HUBZone small business concern [*see 48 C.F.R. § 19.001* (definition)], small disadvantaged business concerns, and women-owned small business concerns, and to encourage participation as subcontractors in contracts awarded by any executive agency consistent with efficient contract performance [*48 C.F.R. § 19.201(a)*]. Through its procurement and technical assistance office, the SBA acts as an advocate for small businesses and small disadvantaged businesses to ensure their fair share of government procurement contracts [*48 C.F.R. § 19.401*; *see 48 C.F.R. § 19.201(a)*; *see also 15 U.S.C. § 637(a)*]. To ensure the opportunity for these business concerns to participate in performance of government contracts, qualified small business concerns and small disadvantaged business concerns may apply for total set-asides directly to individual agencies through the Office of Small and Disadvantaged Business Utilization (SADBU), or apply as subcontractors to the SBA under the Section 8(a) program [*see 48 C.F.R. §§ 19.501 et seq.* (set-asides for small businesses), 19.800 et seq. (contracting with the SBA as a small business); *see also* [2], [3], *below*]. For a checklist of facts and preliminary determinations for determining whether a firm qualifies as a small business or small disadvantaged business for business preferences, see *§§ 90B.103* and *90B.113*. For procedures used for competing for preferences as a small business concern or small disadvantaged business concern, see *§§ 90B.121* and *90B.122*.

[b] Qualifying as a Small Business Concern

[i] Representation as a Small Business Concern

To be eligible as a small business concern for obtaining a contract under the SBA's preference programs [*see* [a], *above*], an offeror must represent in good faith that it is a small business at the time of the written self-certification [*48 C.F.R. § 19.301-1(a)*; *see 48 C.F.R. § 52.219-1 et seq.* (prescribed clauses for representation as a small business

concern, a small disadvantaged business concern, and a women-owned small business concern)]. A firm may represent that it is a small business concern in connection with a specific solicitation if it meets the definition of a "small business concern" applicable to the solicitation and has not been determined otherwise by the SBA [*48 C.F.R. § 19.301-1(a)*; *see 13 C.F.R. §§ 121.902, 121.601* (SIC codes and size eligibility requirements); *48 C.F.R. § 19.102* (size eligibility requirements for small businesses and small disadvantaged businesses)]. For discussion of what constitutes a "qualified small business concern," see *§ 90B.22[4]*.

An offeror's representation that it is a small business is not binding on the SBA [*48 C.F.R. § 19.301-1(c)*]. Any offeror, the SBA, or other interested party, including a contracting officer, may protest the small business representation of an offeror in a specific offer [*48 C.F.R. § 19.302(a), (c)(1)*]. However, for competitive "Section 8a contracts" [*see* [3], *below*], the filing of a protest is limited to an offeror, the contracting officer, or the SBA [*48 C.F.R. § 19.302(a)*].

Misrepresentation as a small business concern in order to obtain a contract under the preference program is subject to criminal penalties and administrative sanctions [*see 48 C.F.R. § 19.301-1(d)*; *see also 13 C.F.R. § 121.108* (SBA regulations for penalties for misrepresentation as small business)]. For procedures used for making a representation as a small business, see *§ 90B.121*.

[ii] Obtaining a Certification of Competency

A Certificate of Competency (COC) is the certificate issued by the SBA stating that the holder is responsible (with respect to all elements of responsibility [*see § 90B.22[1]*]) for the purpose of receiving and performing a specific government contract [*48 C.F.R. § 19.601(a)*; *see 15 U.S.C. § 637(d)* (authorization for COC program under SBA)]. The certification is issued in response to a request for review by the contracting officer on determination that the responsive small business lacks certain elements of responsibility [*48 C.F.R. §§ 19.602-1, 19.602-2*]. On receipt of the request for review from the contracting officer, the SBA will notify the small business and offer it the opportunity to apply for a COC to the SBA regional office for the geographical area in which the small business is located [*48 C.F.R. § 19.602-2(a)*]. An SBA COC is conclusive with respect to all elements of responsibility of prospective small business contractors [*48 C.F.R. § 19.602-4(b)*]. For procedures used for obtaining a COC, see *§ 90B.122*.

[c] Qualifying as a Small Disadvantaged Business Concern

A small business that is also disadvantaged is also eligible for preference in government procurement [*48 C.F.R. § 19.202-1[b]*]. A "small disadvantaged business concern" means an offerer that represents, as part of its offer, that it is a small business under the size standard applicable to the acquisition and has received certification as a small disadvantaged business concern in accordance with 13 C.F.R. pt. 124, Subpart B (Small Disadvantaged Business Status Protest and Appeal Procedures) and that it meets other specified criteria, relating to certification, control and ownership [*48 C.F.R. § 19.001*; *see* 13 C.F.R. pt. 124; *see also 48 C.F.R. § 19.102* (size standard for small businesses and small disadvantaged businesses); 12 C.F.R. § 19001 ("concern" is business entity organized for profit--even if its ownership is in the hands of a nonprofit entity--located in United States and making significant contribution to U.S. economy by paying taxes)]. For prime contractors, a "small disadvantaged business concern" means an offerer that represents, as part of its offer, that it is a small business under the size standard applicable to the acquisition and has received certification as a small disadvantaged business concern in accordance with 13 C.F.R. pt. 124, Subpart B (Small Disadvantaged Business Status Protest and Appeal Procedures). However, a prime contractor also must represent that it has submitted a completed application to the SBA or a private certifier to be certified as a small business concern in accordance with 13 C.F.R. pt. 124, Subpart B (Small Disadvantaged Business Status Protest and Appeal Procedures), that a decision on that application is pending, and that no material change in disadvantaged ownership or control has occurred since its application was submitted [*48 C.F.R. § 19.001*]. In the event of any material change, a contractor must receive certification as a small disadvantaged business before the contract award [*48 C.F.R. § 19.001*].

Other definitions useful in the certification process include the following:

- A "socially disadvantaged individual" is one who has been subjected to racial or ethnic prejudice or cultural bias because of his or her identity as a member of a group without regard to qualifications as an individual [*48 C.F.R. § 19.001(a)*].

- An "economically disadvantaged individual" is one who is socially disadvantaged and whose ability to compete in the free enterprise system is impaired due to diminished economic opportunities as compared to an individual who is not socially disadvantaged. An individual who certifies that he or she is a member of certain named groups (including Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Subcontinent-Asian Americans) is considered socially and economically disadvantaged [*48 C.F.R. § 19.001(b)*].

- A "women-owned business concern" is a small business concern that is at least 51 percent owned by women (or in the case of any publicly owned business, at least 51 percent of the stock of which is owned by women) and whose management and daily business operations are controlled by women [12 C.F.R. § 19001(d)].

- A "labor surplus area" is a geographic area identified by the Department of Labor as an area of concentrated unemployment or an area of labor surplus. A "labor surplus area concern" is a concern that, together with its first tier subcontractors, will perform substantially in labor surplus areas [12 C.F.R. § 19001].

Heads of contracting activities are responsible for effectively implementing the Small Business and Small Disadvantaged Business Utilization Programs within their activities and to ensure participation of businesses in their agency contracting process [*48 C.F.R. § 19.201(c)*; *see* [2], *below*].

[2] Set-Asides Under the Small Business Act

A "set-aside" for small business is the reserving of an acquisition exclusively for participation by small business concerns [*48 C.F.R. § 19.501(a)*; *see 48 C.F.R. §§ 52.216-6-52.216-10*; *see also* 12 C.F.R. § 19001 ("concern" is business entity organized for profit located in United States and making significant contribution to U.S. economy by paying taxes); *48 C.F.R. §§ 52.219-1, 52.219-2* (prescribed clauses for notice of set-asides under Small Business Act)]. Information about set-asides generally is disseminated using electronic databases [*see 48 C.F.R. § 5.101*; § 90B.20[1]]. Pursuant to the small business preference program under the Small Business Act [*see* [1][a], *above*], each civilian and military agency that has a procurement office also has a SADBU office that is staffed by SADBU specialists [*see 48 C.F.R. § 19.201(c), (d)*]. Contracting officers must make affirmative efforts to ensure that small businesses and small disadvantaged businesses are afforded equitable opportunity to compete for all contracts they can perform to the extent consistent with government interest [*48 C.F.R. §§ 19.202, 19.202-1*]. The determination to make a set-aside may be made by the agency contracting officer alone, or may be a joint determination as recommended by the SBA procurement center representative and concurred in by the contracting officer [*48 C.F.R. § 19.501(b)*]. A set-aside may be offered by the agency directly to small businesses, or offered to the SBA for performance by small businesses participating in the Section 8a Program [*48 C.F.R. § 19.800*; *see* [3], *below*].

Set-asides may be either total or partial [*see 48 C.F.R. §§ 19.502-2, 19.502-3*]. With some exceptions, acquisitions for supplies or services estimated to cost more than $25,000 but not exceeding $100,000 must be reserved exclusively for small business concerns [*see 48 C.F.R. § 13.105* (small purchases set-asides)]. Contracts under total set-asides for small businesses are awarded by sealed bids or competitive proposals [*48 C.F.R. § 19.502-4(a)*]. When a procurement involves a partial set-aside, the portion not set aside is awarded in accordance with normal procurement procedures; thereafter, a contract for the set-aside portion will be awarded through negotiation with eligible concerns [*48 C.F.R. § 19.502-3(c)*].

To qualify for a set-aside as a small business, an offeror must certify itself as a small business at the time of making the offer [*48 C.F.R. § 19.301-1(a)*; *see* [1][b], *above*]. Additionally, if the contracting officer challenges the ability of the small business offeror to perform the contract, the small business should apply for a COC from the SBA [*48 C.F.R. § 19.601(a)*; *see* [1][b][ii], *above*].

[3] Section 8a Subcontracting With the Small Business Administration

Under the Section 8a Program of the Small Business Act [*15 U.S.C. § 637(a)*], it is the policy of the SBA to provide maximum practicable opportunities in its acquisitions to small business concerns, small disadvantaged business concerns, and women-owned small business concerns [*48 C.F.R. § 19.201*; *see 15 U.S.C. § 636(a)* (duty of SBA administrator to assist small businesses)]. Section 8a authorizes the SBA to enter into contracts with other government agencies and to let subcontracts for performance of those contracts to eligible firms; the SBA's subcontractors are referred to as "8(a) contractors" [*48 C.F.R. § 19.800(a)*]. Selecting concerns for the Section 8(a) program is the responsibility of the SBA [*see 48 C.F.R. § 19.800 et seq.*]. Small business concerns' capabilities are matched with agencies' requirements by the SBA [*48 C.F.R. § 19.803*]. The agency contracting officer is authorized, in his or her discretion, to award a contract to the SBA, certified as competent and responsible to perform a specific contract, based on mutually agreeable terms and conditions [*48 C.F.R. § 19.800(c)*; *see 48 C.F.R. §§ 52.219-11, 52.219-12* (prescribed clauses for special Section 8(a) contract conditions)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewGovernmentsFederal GovernmentGeneral OverviewPublic Contracts LawBusiness Aids & AssistanceSmall BusinessesPublic Contracts LawTypes of ContractsGeneral Overview

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§ 90B.71 Indian Incentive Program

It is government policy to provide incentives to prime contractors who use Indian organizations and Indian-owned economic entities as subcontractors [*see 25 U.S.C. § 1544*]. Accordingly, Indian organizations and Indian owned economic entities must be ensured maximum practicable opportunity to participate in performance of contracts awarded by government agencies [*48 C.F.R. § 26.102*]. Contracting officer and prime contractors, acting in good faith, may rely on the representation of an Indian organization or Indian-owned economic entity as to eligibility, subject to challenge [*48 C.F.R. § 26.103(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewGovernmentsFederal GovernmentGeneral OverviewPublic Contracts LawBusiness Aids & AssistanceSource PreferencePublic Contracts LawTypes of ContractsGeneral Overview

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[Reserved]

§§ 90B.72[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

30-90B California Legal Forms--Transaction Guide § 90B.100

§ 90B.100 Responsible Bidder or Offeror

NOTE:

Government contracts may be awarded only to contractors determined by the contracting officer to meet requirements of responsibility [*48 C.F.R. § 9.103*]. To be considered "responsible," a contractor must have adequate financial and technical ability, necessary personnel and facilities for performance, a satisfactory record of past performance and business integrity, and otherwise be considered eligible under applicable laws and regulations [***see*** *48 C.F.R. § 9.104-1*; ***see also*** *§ 90B.22[1]* (requirements for responsible contractor)].

[1] Facts

1. Name, corresponding with that on contractor's license issued to bidder/offeror.

2. Type of business entity:

    a. Corporation.

    b. Partnership.

    c. Sole proprietorship.

    d. Combination of businesses, and, if so, type of each business entity.

3. Address of principal office.

4. Contractor's license number, issued by state.

NOTE:

Contractors seeking to contract with the federal government must be otherwise qualified and eligible under applicable laws, including being licensed by the state [***see*** *48 C.F.R. § 9.104-1(g)*; ***see also*** *B&P Code § 7000 et seq.*].

5. Bidder/offeror's experience:

a. Type of work.

b. Number of years in that type of work as:
(1) General contractor.

(2) Subcontractor.

6. Projects completed by bidder/offeror during last three years:

a. Type of work.

b. Value of work performed.

c. Location of work.

d. Name of person for whom work was performed.

e. Year completed.

7. Contracts not completed:

a. By bidder/offeror, bidder/offeror's organization, or any officer or partner.

b. Details, including:

(1) Type of work.

(2) Name of person for whom work was to be performed.

(3) Reasons for noncompletion.

8. Name of any firms currently under contract with government in which bidder/offeror has controlling interest.

9. Names of other businesses in which bidder/offeror has financial interests.

10. Names of persons with whom bidder/offeror has been associated in business as partners or associates for last five years.

11. Specific experience of principal members of bidder/offeror's present organization:

a. Name of individual.

b. Position with bidder.

c. Years of experience.

d. Magnitude and type of work.

e. Capacity in which individual performed each type of work.

12. If bidder/offeror is corporation:

a. Capital paid in cash.

b. Date of incorporation.

c. State of incorporation.

d. If foreign corporation, date of qualification to do business in California.

e. Names of officers:

(1) President.

(2) Vice-president.

(3) Secretary.

(4) Treasurer.

13. If bidder/offeror is partnership:

a. Whether general, limited, or association.

b. Name and address of each partner.

14. Bidder/offeror's cash assets:

a. Amount on hand.

b. Amount on deposit in bank, including:

(1) Name of bank.

(2) Location of bank.

(3) Name in which deposit made.

15. Notes receivable:

a. Amount due.

b. Due dates:

(1) Within one year.

(2) After one year.

(3) Past due.

c. Names of persons from whom due.

d. Reason for note.

e. Maturity date.

f. Description of security.

g. If any note has been sold or discounted:

(1) Amount.

(2) Name of holder.

(3) Reason for sale or discount.

16. Accounts receivable from completed contracts exclusive of claims not approved for payment:

a. Amounts due.

b. Name of person from whom due.

c. Type of work involved.

d. Contract amount.

e. If any account receivable has been assigned, sold or pledged:

(1) Amount.

(2) Name of holder.

(3) Reason for assignment, sale, or pledge.

17. Accounts receivable from sources other than contracts:

a. Name of person from whom receivable.

b. Reason for account.

c. Due date.

d. Contract amount.

e. Amount past due.

f. Amount assigned, sold, or pledged.

18. Amounts earned on incomplete contracts:

a. Amounts due.

b. Name of person from whom due.

c. Type of work involved.

d. Contract amount.

19. Materials in stock:

a. Description and quantity of each type.

b. Inventory value of these materials in following categories:

(1) Held for use on incomplete contracts.

(2) Future operations.

(3) Sale.

20. Negotiable securities:

a. Present market value of listed securities and present value of unlisted securities:

(1) Unit price.

(2) Amount.

b. Name of issuer.

c. Class of security.

d. Quantity.

e. Book value:

(1) Unit price.

(2) Amount.

f. Name of person who has possession.

g. If pledged or in escrow:

(1) For whom.

(2) Reason.

(3) Amount.

21. Description and amount of other current assets, including:

a. Bid deposits.

b. Prepaid expenses.

c. Cash value of life insurance.

d. Accrued interest.

22. Real estate:

a. Book value.

b. Location.

c. Description.

d. Name of titleholder.

e. Whether or not used for business purposes.

23. Value of plant and equipment.

24. Approximate annual income from rental of equipment owned by prospective bidder/offeror, exclusive of rental from associated concerns.

25. Value of furniture and fixtures:

a. Appraised value if shown on appraisal schedule prepared by independent appraiser; or

b. Book value (cost less depreciation) if no appraisal schedule is available.

26. Description and value of noncurrent investments and assets.

27. Notes payable (other than equipment and real estate obligations):

a. To whom payable.

b. Security for note.

c. Due date.

d. Amount.

28. Accounts payable:

a. To whom payable.

b. For what due.

c. Due date.

d. Amounts not past due and amounts past due.

29. Description and amount of other current liabilities:

a. Accrued interest.

b. Taxes.

c. Insurance.

d. Salaries and payroll.

e. Dividends.

30. Amount of real estate encumbrances.

31. Equipment obligations insured by equipment:

a. Total payments due within and after six months.

b. Name of obligee.

c. Amount and frequency of installment payments.

d. Total amount.

32. Other noncurrent liabilities and notes payable:

a. Description.

b. Reason incurred.

c. Due date.

d. Amount.

33. Description and amount of reserves.

34. Dollar amount of capital stock (separated into common and preferred).

35. Net worth.

[2] Documents

1. Contractor's license, issued by state.

2. If partnership, partnership agreement.

3. If corporation:

    a. Articles of incorporation.

    b. Bylaws.

4. Fictitious name statement.

5. Contracts for work similar to that involved in prospective government contract:

    a. Contracts for work in progress.

    b. Contracts for work performed within last three years.

6. Inventory of assets.

7. Notes receivable.

8. Bank documents, such as:

    a. Statements.

    b. Passbook.

    c. CD certificate.

9. Evidence of negotiable securities.

10. Notes payable.

11. Accounting statements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewGovernmentsFederal GovernmentGeneral OverviewPublic Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral OverviewPublic Contracts LawTypes of ContractsGeneral Overview

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§ 90B.101 Manufacturer or Regular Dealer

NOTE:

Public contracts entered into by the government for the manufacture or furnishing of materials, supplies, articles, or equipment exceeding $10,000 must be with a manufacturer or regular dealer in the supplies manufactured or used in performing the contract [*48 C.F.R. § 22.602*; ***see*** *§ 90B.22 [2]*]. An offeror must certify itself as a manufacturer or regular dealer when responding to a solicitation [***see*** *48 C.F.R. § 52.222-20* (prescribed certification clause)]. To qualify as a manufacturer or regular dealer, an offeror must show before the award that it is either an established manufacturer, or newly entered into a manufacturing activity and has made all necessary arrangements and commitments for manufacturing space, equipment, and personnel [48 C.F.R. § 22.606-1(a)].

[1] Facts

NOTE:

The facts listed here are those particularly required to qualify as a manufacturer or regular dealer of supplies for procurement contracts whether already established or newly entered into the manufacturing activity [***see*** *48 C.F.R. § 22.602*]. For a list of facts required for a newly established manufacturer, see Paragraph 9, ***below***.

1. Name and address.

2. Geographical description of marketing area served by client.

3. Description of service beyond normal marketing area.

4. Products offered by client.

NOTE:

An established manufacturer must show before an award that it is an established manufacturer of the particular supplies of the general character sought by the government [48 C.F.R. § 22.606-1(a)(1)(i)].

5. Products' conformance to government qualifications requirements, specifications and standards.

NOTE:

Potential sources for government supplies of commercial products must meet any special "qualifications requirements" regarding commercial products required by the particular procuring agency [*48 C.F.R. § 9.205*]. Manufacturers that successfully meet testing and quality assurance demonstrations may be listed on qualified mailing lists [*48 C.F.R. § 9.203*; ***see*** *§ 90B.22[2][b][i]*]. Prospective vendors of supplies for government procurement must also show that their products comply with specifications and standards requirements issued by civilian and military agencies in published indexes [***see*** *§ 90B.22[2][b][ii]*].

6. Amount of experience client has in selling its product.

7. Evidence of client's ability to supply products it offers:

NOTE:

An established manufacturer must show before an award that it has a plant, equipment, and personnel to manufacture on the premises the items called for under the contract [48 C.F.R. § 22.606-1(a)(1)(ii)].

a. Inventories readily available to client:
(1) New products and, if applicable, replacement or repair parts; or

(2) Ability to augment its inventory from other sources adequate to assure timely delivery.

b. Ready availability of facilities and personnel capable of manufacturing those products.

8. Whether client has any licenses or permits necessary to furnish supplies it offers.

NOTE:

Contractors seeking to contract with the federal government must be otherwise qualified and eligible under applicable laws, including being licensed by the state [***see*** *48 C.F.R. § 9.104-1(g)*; ***see also*** *B&P Code § 7000 et seq.*].

9. If newly entered into manufacturing activity, ensure that prospective contractor has made all necessary arrangements and commitments for [48 C.F.R. § 22.606-1(a)(2)]:

a. Manufacturing space.

b. Equipment.

c. Sufficient personnel to perform on its own premises manufacturing operations required for fulfillment

of contract.

[2] Documents

1. Licenses and permits issued by public entities.

2. If already established manufacturer:

a. Evidence of sufficient experience.

b. List of inventory on hand or readily obtainable.

c. Evidence of sufficient personnel.

3. If newly entered into manufacturing activity, evidence of written, legally binding arrangements or commitments for:

NOTE:
A manufacturer or regular dealer cannot be barred from receiving an award merely because it has not yet done any contracting, even if its arrangements and commitments are contingent on receiving an award of contract [48 C.F.R. § 22.606-1(b)(1)].

a. Manufacturing space.

b. Necessary equipment.

c. Sufficient personnel to perform contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
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CHAPTER 90B FEDERAL GOVERNMENT CONTRACTS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

30-90B California Legal Forms--Transaction Guide § 90B.102

§ 90B.102 Architect-Engineer

NOTE:

An architect-engineer firm must prequalify as a "selected firm" before it may be considered for award of a contract [*48 C.F.R. § 36.602-3*; ***see*** *§ 90B.112* (preliminary determinations)]. Award to a firm is based on specified criteria regarding professional qualifications, experience and technical competence, capacity to perform the contract in the required time, and record of past performance on contracts with the government and with private industry [*48 C.F.R. § 36.602-1*]. For a discussion of the competitive procedure used in awarding a contract for architect-engineer services, see *Section 90B.40[4]*.

[1] Facts

1. Professional qualifications necessary to satisfy performance of required architect-engineer services contract.

2. Special experience and technical competence in type of work required, including special experience of principal members of firm.

3. Capacity to accomplish work in required time.

4. Past performance or contracts with government agencies and private industry in terms of:

a. Cost control.

b. Quality of work.

c. Compliance with performance schedules.

5. Location in general geographical area of project and knowledge of locality of project.

NOTE:

Criterion based on location and knowledge of location will be applied only if it results in an appropriate number of qualified firms, given the nature and size of the project [*48 C.F.R. § 36.602-1(a)(5)*].

6. Acceptability under other appropriate criteria.

7. Nature and quality of design proposed for particular project [48 C.F.R. § 36.602(b)].

NOTE:

Agencies may evaluate firms on the basis of conceptual design of the project when use of design competition is approved by the agency head. Design competition is used when the situation is unique and involves "prestige projects" such as a memorial or structure of unusual significance, there is sufficient time for evaluation of concepts, and design competition, within its costs, will substantially benefit the project [*48 C.F.R. § 36.602-1(b)*].

[2] Documents

1. Evidence of professional qualifications, special experience, and technical competence for type of work required.

2. Evidence of past performance and contracts with government and private industry.

3. Evidence of knowledge of locality of particular project.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewGovernmentsFederal GovernmentGeneral OverviewPublic Contracts LawTypes of ContractsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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30-90B California Legal Forms--Transaction Guide § 90B.103

§ 90B.103 Small Business or Small Disadvantaged Business

NOTE:

The small business preference is available to qualifying firms [*48 C.F.R. § 19.301-1(a)*; *see 13 C.F.R. §§ 121.902, 121.601* (SIC codes and size eligibility requirements); *48 C.F.R. § 19.102* (size eligibility requirements for small businesses and small disadvantaged businesses)]. A "small business concern" is one that is independently owned and operated and that is not dominant in its field [*48 C.F.R. § 19.001*]. For discussion of qualifying as a small business, see *§ 90B.70[1][b]*.

There are also preferences for small disadvantaged businesses, small women-owned businesses, and small Indian-owned businesses [***see** 48 C.F.R. §§ 19.201, 26.102*]. For further discussion of these preferences, see *§ 90B.71*.

[1] Facts

1. Name and address of:

a. Principal office of business.

b. Any affiliate.

NOTE:

Business concerns are affiliates of each other if, directly or indirectly, either one controls or has power to control the other, or another concern has the power to control both [*48 C.F.R. § 19.101(1)*].

2. If small business applicant has affiliate, whether affiliate is owner of firm or subsidiary.

3. Following information for client or client and affiliate combined:

NOTE:
To qualify as a small business firm, a small business (or together with any affiliate) must not be dominant in its field of operation. A concern is "not dominant in its field of operation" when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged [*48 C.F.R. § 19.001*].

a. Annual dollar volume of business.

b. Number of employees.

c. Financial resources.

d. Competitive status or position.

e. Ownership or control of materials or processes.

f. Patents or license agreements.

g. Facilities.

h. Sales territory.

i. Nature of business activity.

4. Addresses of firm's officers.

5. Type of work firm specializes in:

a. Construction contracting.

b. Non-manufacturer engaged in contracting to supply goods.

c. Manufacturer engaged in contracting to supply goods.

6. Aggregate amount of gross receipts from business operations of firm and its affiliates for preceding three years.

7. Information relating to:

a. Capitalization or financial backing.

b. Bondability.

c. Prior experience of individuals within small business firm.

d. Suppliers' willingness to make adequate supplies available.

8. If applying as small disadvantaged business [*see 48 C.F.R. § 19.001*]:

a. Percentage of ownership and control by socially and economically disadvantaged individuals.

b. Qualifying membership of socially and economically disadvantaged individuals in named minority groups.

9. If applying as small women-owned business [*see 48 C.F.R. § 19.001*]:

a. Percentage of ownership by women.

b. Whether controlled and operated by women.

10. If applying as small Indian-owned business, percentage of Indian ownership [*see 48 C.F.R. § 26.101*].

[2] Documents

1. Financial information for business and affiliate.

2. If applying as disadvantaged business, evidence of 51-percent ownership or control by qualified minorities with membership in prescribed racial or ethnic groups.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewGovernmentsFederal GovernmentGeneral OverviewPublic Contracts LawBusiness Aids & AssistanceMinority, Women-Owned & Disadvantaged BusinessesDisadvantaged BusinessesPublic Contracts LawBusiness Aids & AssistanceSmall BusinessesPublic Contracts LawTypes of ContractsGeneral Overview

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[Reserved]

§§ 90B.104[Reserved]

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30-90B California Legal Forms--Transaction Guide § 90B.110

§ 90B.110 Qualifying as a Responsible Bidder or Offeror

NOTE:

No purchase or award of government contract will be made unless the contracting officer makes an affirmative determination of responsibility [*48 C.F.R. § 9.103(b)*]. To be determined "responsible," a contractor must have the required financial and technical ability, necessary personnel and facilities for performance, a satisfactory record of past performance and business integrity, and otherwise considered eligible under applicable laws and regulations [***see*** *48 C.F.R. § 9.104-1*; ***see*** *48 C.F.R. § 9.104-2* (special standards)]. For a discussion of elements of responsibility for a contractor, see *§ 90B.22[1]*.

1. Does bidder have adequate financial resources, or ability to obtain such resources, to perform contract [*48 C.F.R. § 9.104-1(a)*]?

2. Is bidder able to comply with required or proposed delivery or performance schedule, considering existing commercial or governmental business commitments [*48 C.F.R. § 9.104-1(b)*]?

3. Does bidder have satisfactory record of performance [*48 C.F.R. § 9.104-1(c)*]?

NOTE:

Prospective contractors who are or have been seriously deficient in current or recent contract performance are presumed unable to meet this requirement [*48 C.F.R. § 9.104-3(d)*].

4. Does bidder have satisfactory record of integrity and business ethics, including satisfactory compliance with the law including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws [*48 C.F.R. § 9.104-1(d)*]?

5. Does bidder have, or is it able to obtain, necessary [*48 C.F.R. § 9.104-1(e), (f)*]:

NOTE:
Generally, the prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors [*48 C.F.R. § 9.104-4*].

a. Organization?

b. Technical experience?

c. Operational controls?

d. Production, construction, and technical equipment and facilities?

6. Is bidder otherwise qualified and eligible under applicable laws and regulations [*48 C.F.R. § 9.104-1(g)*], such as:

a. "Buy American" requirement [*see § 90B.43[2]*]?

b. Federal wage, hour, and workplace standards [*see § 90B.43[3]*]?

c. Equal employment opportunity and affirmative action hiring requirements [*see § 90B.43[4]*]?

d. Environment and conservation requirements [*see § 90B.43[5]*]?

e. Federal requirements for procurement integrity [*see § 90B.45*]?

7. Has bidder's prior work for government been satisfactory?

NOTE:
The contracting officer may consult contractor experience lists and performance evaluations of previous contract work maintained by the government [***see** 48 C.F.R. § 9.105-1(c)(2), (6)*].

8. If bidder is party to joint venture, what is sum of all financial resources and all individual capacities of its members?

9. If procurement is for construction, can bidder meet following additional minimum standards for bonding requirements [*see 48 C.F.R. § 28.000 et seq.* (bonds and insurance)]:

NOTE:
For procedures relating to posting of bonds, see *§ 90B.141*.

a. Is it able to furnish bid bond [*48 C.F.R. § 28.101-1*]?

NOTE:
A bid bond is not required unless performance and payment bonds are required [*48 C.F.R. § 28.101-1*].

b. Is it able to furnish performance and payment bonds [48 C.F.R. § 28.102]?

NOTE:
Performance and payment bonds generally are not required for contracts other than for construction [*48 C.F.R. § 28.103-1(a)*] unless posting of bonds is considered necessary to protect government interests [*48 C.F.R. §§ 28.103-2, 28.103-3*]. Performance and payment bonds are required for construction contracts exceeding the $100,000 small purchase limitation [*48 C.F.R. § 28.102-1(a)*].

c. As prerequisite to obtaining these bonds, can bidder demonstrate to surety following business characteristics:

(1) Financial resources.

(2) Technical expertise for type of work involved.

(3) Management and organization ability.

(4) Current workload (compatible with proposed contract work).

(5) Capability to complete contract in required time.

NOTE:
The contracting officer relies on the survey of the contractor by the surety [***see** 48 C.F.R. § 28.203(b)*].

10. Has bidder ever been debarred, suspended, or placed on list of ineligible concerns or individuals established by any government agency [*48 C.F.R. § 9.105-1(c)(1)*; *see § 90B.23*]?

NOTE:
The GSA maintains a list of contractors disqualified by federal agencies or the GAO [*48 C.F.R. § 9.404*]. Listed contractors are excluded from contracting with government agencies [*48 C.F.R. § 9.405(a)*].

11. Can bidder demonstrate that it meets responsibility standards from any of following sources:

NOTE:
The following sources may be used by the contracting officer to ascertain and clarify a prospective contractor's responsibility [*48 C.F.R. § 9.105-1(c)(1)*)]. When information on hand or readily available to the contracting officer is not sufficient to make a determination of responsibility, the contracting officer may require a pre-award survey to evaluate a prospective contractor's ability to perform the contract [*48 C.F.R. § 9.106-1(a)*].

a. Information from bidder:

NOTE:
Information is obtained from the bidder in the form of representations made in or attached to its bid and its replies to questionnaires required or requested by the contracting officer [*48 C.F.R. § 9.105-1(c)(3)*].

(1) Personnel records.

(2) Financial data, including balance sheets and profit and loss statements.

(3) Lists of tools, equipment, and facilities.

(4) Financial commitments.

(5) Subcontracts.

(6) Analyses of operational control procedures.

b. Publications such as credit rating, trade, and financial journals.

c. Lenders.

d. Credit agencies.

e. Trade associations.

f. Better Business Bureau or chambers of commerce.

12. If bidder is small business, can it qualify for SBA Certificate of Competency (in event it is determined nonresponsible by contracting officer after bid opening) [*48 C.F.R. §§ 19.601(a), 19.602-1* (procedure); *see § 90B.122*]?

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewGovernmentsFederal GovernmentGeneral OverviewPublic Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral OverviewPublic Contracts LawTypes of ContractsGeneral Overview

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30-90B California Legal Forms--Transaction Guide § 90B.111

§ 90B.111 Qualifying as a Manufacturer or Regular Dealer

NOTE:

A contractor seeking to contract with government agencies for the manufacture or the furnishing of supplies must certify that it is a manufacturer or regular dealer of such supplies [48 C.F.R. § 22.608-1]. A bidder/offeror qualifies as a manufacturer or regular dealer if it can show that it is either (1) an established manufacturer of the particular supplies sought by the government and has sufficient plant, equipment, and personnel to supply contract requirements; or, (2) a manufacturer newly entered into the manufacturing activity that has made all necessary commitments for plant, equipment, and personnel [48 C.F.R. § 22.606-1(a)]. Paragraph 1 applies generally to qualifying as a manufacturer or regular dealer; Paragraph 2 applies to qualifying as a newly established manufacturer.

1. Does prospective bidder/offeror qualify as business able to adequately supply government agency:

a. Is it currently able to provide satisfactory service to areas beyond those normally served by its business?

b. Do its products comply with qualifications requirements, specifications, and standards as required by particular agency it seeks to do business with?

NOTE:

Prospective contractors can demonstrate their products' compliance with qualifications requirements of individual agencies by requesting that they be listed on qualified products' lists [*48 C.F.R. § 9.203*; ***see*** *§ 90B.22[2][b][i]*]. Prospective contractors may also obtain federal and military indexes of mandatory specifications and standards for commercial products [*48 C.F.R. § 9.203*; ***see*** *§ 90B.22[2][b][ii]*].

c. Is there ready availability of inventories:

(1) New products and, if applicable, replacement or repair parts; or

(2) Ability to augment inventory from other sources adequate to assure timely delivery?

d. Are appropriate personnel and facilities available?

e. Does prospective bidder/offeror have all licenses and permits needed to furnish required supplies?

f. If prospective contractor qualifies as small business [*see § 90B.113*], does it have:

(1) Adequate capitalization or financial backing?

(2) Bondability?

(3) Prior experience of individuals within small business firm?

(4) Adequate supplies to meet government needs?

2. If prospective contractor is newly entered into manufacturing activity:

a. Has it made necessary arrangements and commitments for [48 C.F.R. § 22.606-1(a)(2)]:

(1) Manufacturing space?

(2) Equipment?

(3) Personnel?

b. Can it show that it [48 C.F.R. § 22.606-1(b)]:

(1) Has made written legally binding arrangements and commitments to enter manufacturing business?

(2) Has not been set up solely to produce for government contract and that its operation will not be terminated on completion of contract?

(3) Has established arrangements for production on continuous basis of supplies needed by government?

(4) Has documentation to prove that necessary legally binding written arrangements or commitments have been met before award?

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewGovernmentsFederal GovernmentGeneral OverviewPublic Contracts LawBids & FormationGeneral OverviewPublic Contracts LawTypes of ContractsGeneral Overview

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§ 90B.112 Qualifying as a Selected Architect-Engineer Firm

1. Has prospective bidder submitted appropriate questionnaires?

NOTE:
To be considered for A-E contracts, interested firms must have first filed Standard Form 330, Architect-Engineer Qualifications [*48 C.F.R. § 53.301-330* (form); see *§ 90B.240*] with the appropriate agencies seeking acquisition of A-E services [*48 C.F.R. § 36.702*]. After the procuring agency evaluation board has reviewed the information and data on the submitted questionnaires, the board recommends the most highly qualified firms to the agency head for final selection for a specific contract [*48 C.F.R. § 36.602-3*]. The agency head then makes a final choice of the "selected firms" with whom the contracting officer will negotiate according to specific required procedure [*48 C.F.R. § 36.602-4(a), (b)*]. The contract is negotiated, starting with the firm first listed, and continues with successive firms until a firm is selected for award of the contract [*48 C.F.R. § 36.606(a)*].

2. Does prospective bidder qualify under prescribed evaluation criteria [*48 C.F.R. § 36.602-1(a)*]:

NOTE:
Firms are evaluated in accord with prescribed selection criteria [*48 C.F.R. § 36.602-3(a)*].

a. Does it have professional qualifications necessary for satisfactory performance of contract [*48 C.F.R. § 36.602-1(a)(1)*]?]

b. Does it have specialized experience and technical competence in type of work required [*48 C.F.R. § 36.602-1(a)(2)*]?

c. Does it have capacity to accomplish work in required time [*48 C.F.R. § 36.602-1(a)(3)*]?

d. What is its record of past performance on contracts with government and private industry in terms of cost control, quality of work, and compliance with schedules [*48 C.F.R. § 36.602-1(a)(4)*]?

e. Is it acceptable under other appropriate evaluation criteria [*48 C.F.R. § 36.602-1(a)(6)*]?

3. In relation to particular project [*48 C.F.R. § 36.602-1(a)(5)*]:

a. Is bidder's firm located in general geographical area of project?

b. Is bidder's firm knowledgeable about location of project?

NOTE:
Evaluation criterion relating to location of project will only be applied if it results in an appropriate number of qualified firms, given the nature and size of the project [*48 C.F.R. § 36.602-1(a)(5)*].

4. If conceptual design is relevant criterion, is prospective bidder's design competitive [*48 C.F.R. § 36.602-1(b)*]?

NOTE:
Agencies may evaluate firms on the basis of their conceptual design of the project when the use of design competition is approved by the agency head or a designee. Design competition may be used (1) when a unique situation is involved such as the design of memorials or structures of unusual national significance; (2) when there is sufficient time for evaluation of conceptual designs; and (3) when the design competition, with its costs, will substantially benefit the project [*48 C.F.R. § 36.602-1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewGovernmentsFederal GovernmentGeneral OverviewPublic Contracts LawBids & FormationGeneral OverviewPublic Contracts LawTypes of ContractsGeneral Overview

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§ 90B.113 Qualifying as a Small Business or Small Disadvantaged Business

NOTE:

To obtain the small business preference, a firm must be independently owned and operated and also qualify under size requirements established by the SBA [*48 C.F.R. § 19.001*; ***see*** 13 C.F.R. § 121.000 et seq. (small business size regulations)]. A contracting officer may determine that a small business does not qualify as a responsible bidder/offeror [*48 C.F.R. § 19.602-1*; ***see*** *§ 90B.22[4]* (elements of responsibility)]. In such a case, the small business bidder/offeror should apply to the SBA for a Certificate of Competency (COC) [***see*** *48 C.F.R. § 19.602-2*]. For the procedures used for representation as a small business concern and for obtaining a COC, see *§§ 90B.121* and *90B.122*.

1. Is prospective bidder independently owned and operated business (including affiliates) [*48 C.F.R. § 19.001*]?

NOTE:

Business concerns are affiliates of each other when one concern directly or indirectly controls or has the power to control the other, or both are subject to the same relationship with a third party [*48 C.F.R. § 19.101(1)*].

2. Can prospective bidder show that it is not dominant in field of operation in which it is bidding [*48 C.F.R. § 19.001*]?

NOTE:

A concern is not "dominant in its field" when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged [*48 C.F.R. § 19.001*].

3. Can prospective bidder show that it is within SBA size criteria for particular industry or type of goods involved in procurement [*see 48 C.F.R. § 19.001*; *see also 13 C.F.R. § 120.100* (basic eligibility requirements for all applicants for SBA business loans)]?

4. If prospective bidder/offeror qualifies as small business, does it meet all requirements of contractor responsibility [*48 C.F.R. § 9.104-1*]?

NOTE:

For preliminary determination regarding a prospective contractor's responsibility, see *§ 90B.110*. If a small business is determined to lack elements of responsibility by a contracting officer, it may apply to the SBA for a Certificate of Competency (COC) certifying its responsibility [*48 C.F.R. § 19.602-2(a)-(d)*]. For procedures involved in applying for a COC, see *§ 90B.122*.

5. If applying as small disadvantaged business, can prospective bidder/offeror show that [*48 C.F.R. § 19.001*]:

a. It is 51 percent unconditionally owned by one or more individuals who are socially and economically disadvantaged?

NOTE:

A firm may also qualify as a small disadvantaged business concern if it is a publicly owned business that has at least 51 percent of its stock unconditionally owned by one or more socially and economically disadvantaged individuals with its management and daily business controlled by one or more such individuals [*48 C.F.R. § 19.001*]. For a discussion of what constitutes a disadvantaged business, see *§ 90B.70[1][c]*.

b. Socially and economically disadvantaged individuals who own and control small business can be identified with or shown to be members of qualifying groups?

NOTE:

There is a prescribed definition of who qualifies as a socially or economically disadvantaged individual [***see** 48 C.F.R. § 19.001*]. For discussion of what constitutes a socially and economically disadvantaged individual, see *§ 90B.70[1][c]*. For discussion of qualifying as a small disadvantaged business, see *§ 90B.70[1][c]*.

6. If applying as small women-owned business, can prospective bidder/offeror show that business is [*see 48 C.F.R. § 19.001*]:

a. At least 51 percent owned by women?

b. Controlled and operated by women?

7. If applying as small Indian-owned business, can prospective bidder/offeror show that business is at least 51 percent owned by Indians [*see 48 C.F.R. § 26.101*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral OverviewPublic Contracts LawBusiness Aids & AssistanceMinority, Women-Owned &

Disadvantaged BusinessesDisadvantaged BusinessesPublic Contracts LawBusiness Aids & AssistanceSmall BusinessesPublic Contracts LawTypes of ContractsGeneral Overview

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§§ 90B.114[Reserved]

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C. Procedural Guide

30-90B California Legal Forms--Transaction Guide § 90B.120

§ 90B.120 Obtaining Information on Government Procurement

NOTE:
Electronic databases generally have replaced paper-based sources of contractor information. For discussion, see *§ 90B.20*.

1. Obtain information about current procurements (outstanding Invitations for Bids (IFB), Requests for Proposals (RFP), bidding procedures, and contracts generally) from[*48 C.F.R. § 5.101*]:

a. Online, at FedBizOpps.gov. website [http://www.FedBizOpps.gov].

NOTE:
The FedBizOpps.gov website is the single government point of entry (GPE) for federal government procurement opportunities over $25,000 [***see*** *48 C.F.R. §§ 5.101(a)(1), 5.201(d)*].

b. Periodic government handouts [*see 48 C.F.R. § 5.101(a)(2)* (display requirements)].

c. Client's trade association.

d. Newspapers, trade journals, magazines, or other mass media.

2. Obtain copy of "U.S. Government Purchasing and Sales Directory" (containing comprehensive list of federal installations nationwide, including military services, with indications of items purchased by each) from Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

3. If client is manufacturer of commercial products, advise client to:

a. Obtain specific qualifications requirements from individual agencies that might need client's products [*48 C.F.R. § 9.205*].

NOTE:

If an agency has qualifications requirements, it is required to encourage potential sources to demonstrate their ability to meet the standards specified and to give sufficient time, when possible, to arrange for qualification before an award [*48 C.F.R. § 9.205(a)*].

b. Comply with agency procedures for testing and other assurance demonstrations in order to qualify for products, manufacturers, or bidders mailing lists [*48 C.F.R. § 9.203*].

NOTE:

Qualification and listing on a Qualified Products List, Qualified Manufacturers List, or Qualified Bidders List is the process by which products are obtained from manufacturers or distributors and examined and tested for compliance with specified requirements. Manufacturers and potential offerors are given the opportunity to demonstrate their ability to meet the specified standards, and names of successful manufacturers or potential offerors are put on lists evidencing their status. Qualification is generally performed in advance and independent of any specific acquisition [*48 C.F.R. § 9.203(a)*].

4. Advise client to become listed on Central Contractor Registration (CCR) database.

NOTE:

The Federal Acquisition Regulation (FAR) requires contractor registration in the Central Contractor Registration (CCR) database prior to award of any contract, basic agreement, basic ordering agreement, or blanket purchase agreement on or after October 1, 2003 *[68 Fed. Reg. 43856 (2003)* ; Federal Acquisition Circular 2001-16]. Contractors can register in the CCR database by going to http://www.ccr.gov. For further discussion, see *§ 90B.20[2]*. For a sample registration form, see 90B.200[2].

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsFederal GovernmentGeneral OverviewPublic Contracts LawBids & FormationGeneral OverviewPublic Contracts LawTypes of ContractsGeneral Overview

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30-90B California Legal Forms--Transaction Guide § 90B.121

§ 90B.121 Competing for Small Business Preferences--Representation as a Small Business Concern

NOTE:

Under programs administered by the SBA, a small business may obtain preference when contracting with the government on certifying that it is a small business [*see 48 C.F.R. §§ 19.301-1-19.301-3*; *see also 13 C.F.R. §§ 125.2(a), 125.3* (contracting assistance for small business concern); ***see*** *§ 90B.70*]. To be eligible for the preference, a firm must fall within SBA size standards for a small business [***see*** *48 C.F.R. § 19.102*]. A firm's representation as a small business may be challenged by another offeror or the contracting officer [48 C.F.R. § 19.301(b), (c)].

1. Advise small business client that it may qualify for small business preference on "self-certification" as small business in particular procurement if it believes in good faith it qualifies as small business firm [*48 C.F.R. § 19.301-1(a)*].

NOTE:

For a guide to determining whether the client qualifies a small business, see *§ 90B.113*.

2. Advise client that it may challenge small business status of any other bidder/offeror by [*48 C.F.R. § 19.302(c), (d)*]:

NOTE:

A small business's representation that it is a small business is not binding on the SBA [*48 C.F.R. § 19.301-1(c)*]. A bidder/offeror's representation generally may be protested by another bidder/offeror, by the contracting officer, or by another interested party [*48 C.F.R. § 19.302(a), (b)*]. However, for competitive "Section 8a contracts" [***see*** *§ 90B.70[3]*], the filing of a protest is limited to an offeror, the contracting officer, or the SBA [*48 C.F.R. § 19.302(a)*]. The SBA will make the final determination of the firm's

status as a small business [*48 C.F.R. § 19.302(g)(1)*].

a. Communicating protest to contracting officer [*48 C.F.R. § 19.302(c)(2), (d)*]:
(1) Orally, with written confirmation timely delivered; or

(2) By mail, timely delivered.

NOTE:
To be timely, a protest, including the written confirmation of an oral protest, must be received by the contracting officer by the close of the fifth business day after the bid opening [*48 C.F.R. § 19.302(d)(1)*].

b. Including in oral and written protest:

(1) Allegations that bidder who is subject of protest is not small business firm.

(2) Basis for statement and specific detailed evidence in support thereof.

3. If client's representation as small business is challenged, advise client that it will be required to file answer of allegations in protest with evidence to support its position with SBA regional office [*48 C.F.R. § 19.302(f)*].]

NOTE:
The contracting officer will forward the protest of another offeror to, or file its own protest with, the appropriate SBA Government Contracting regional office [*48 C.F.R. § 19.302(c)(1)*]. On receipt of the protest from the contracting officer, the SBA regional office will notify the challenged firm of the protest and furnish a blank SBA Form 355, Application for Small Business Determination [*48 C.F.R. § 19.302(e)*]. Within three business days after receiving a copy of the protest and the SBA Form 355, the challenged offeror must complete and file the form with the SBA regional office; failure to do so may result in a determination by the SBA that disclosure would be contrary to the offeror's interest [*48 C.F.R. § 19.302(f)*]. The SBA will make a size determination within 10 days after receipt of the protest [*48 C.F.R. § 19.302(g)(1)*].]

4. Advise client that it may appeal the decision of the SBA regional office to the SBA Office of Hearings and Appeals [*48 C.F.R. § 19.302(i)*].

NOTE:
Within 10 business days after receiving the protest, challenged offeror's response, and other pertinent information, the SBA will make a size determination and notify interested parties by certified mail [*48 C.F.R. § 19.302(g)(1)*]. The decision on size determination is final and appealable to the SBA Central Office, Office of Hearing and Appeals, Washington, D.C. 20416, in accord with SBA procedures [*48 C.F.R. § 19.302(g)(1), (i)*].

5. Advise client that it will be eligible for award of contract in question if [*48 C.F.R. § 19.302(g)(2)*]:

NOTE:
The SBA Central Office will inform the contractor of its ruling on appeal. If the decision is received before the award, it will apply to the pending acquisition; if received after the award, it will not apply [*48 C.F.R. § 19.302(g)(2)*].

a. Ruling is favorable to client.

b. SBA Central Office decision is received before award of contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsFederal GovernmentGeneral OverviewPublic Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBids & FormationCompetitive ProposalsPublic Contracts LawBusiness Aids & AssistanceSmall BusinessesPublic Contracts LawBusiness Aids & AssistanceSource Preference

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30-90B California Legal Forms--Transaction Guide § 90B.122

§ 90B.122 Competing for Small Business Preferences--Obtaining a Certification of Competency

NOTE:

Requirements of responsibility are applicable to all government contractors [*48 C.F.R. § 9.104-1*]. A contracting officer may determine that a small business lacks elements of responsibility with relation to a particular contract, and must refer the matter to the SBA [*48 C.F.R. § 19.601(a)*]. The small business will be given the opportunity to apply to the SBA for a Certificate of Competency (COC), certifying it as to all elements of responsibility [*48 C.F.R. § 19.602-2(a)-(c)*]. For a discussion of obtaining a COC, see *§ 90B.70[1][b][ii]*.

1. If small business client's ability to perform specific contract is questioned and contracting officer makes determination of nonresponsibility, advise client that [*48 C.F.R. § 19.602-1(a)*]:

a. Contracting officer will request review by SBA [*48 C.F.R. § 19.602-1(a)*].

b. Award of contract will be withheld pending determination of responsibility by SBA area office [*48 C.F.R. § 19.602-1(a)(1)*].

c. Client should apply at SBA area office for COC [*48 C.F.R. § 19.602-2(a)*].

NOTE:

Within 15 days of receipt of a request from the contracting officer for review of a prospective small business contractor's responsibility, the SBA must notify the small business and offer it the opportunity to apply to the SBA area office for a COC [*48 C.F.R. § 19.602-2(a)*]. A COC issued by the SBA states that the holder is responsible, with respect to all elements of responsibility, including capability, competency, capacity, credit, integrity, perseverance, and tenacity to receive and perform a specific government

contract [*48 C.F.R. § 19.601(a)*].

d. Client should prepare for investigation by SBA.

NOTE:

On timely receipt of application for a COC and required documents, an SBA team will visit a small business concern to investigate it for specific elements of responsibility that the contracting officer noticed were lacking in order to make a recommendation to the SBA regional office [*48 C.F.R. § 19.602-2(b)*]. The SBA area office may consider denying a COC for reasons of nonresponsibility not originally cited by the contracting officer [*48 C.F.R. § 19.602-2(c)*; ***see*** *48 C.F.R. § 19.602-3* (resolving differences between contracting officer and SBA)].

e. Failure of SBA to issue COC within 15 days of referral, or within a longer time if agreed on by SBA and procuring agency, will result in contract award to another appropriate selected and responsible offeror [*48 C.F.R. § 19.602-4(c)*].

2. If award of contract not already made, advise client to provide any new information that might cause contracting officer to determine that client's small business is responsible.

NOTE:

If a contracting officer determines that a small business is responsible, it must reverse its determination of nonresponsibility, notify the SBA of its action, and proceed to award the contract [*48 C.F.R. § 19.602-4(a)*].

3. If SBA issues COC, advise client that it is entitled to award of contract.

NOTE:

The COC is conclusive with respect to all elements of responsibility, and the contracting officer must award a contract to the small business on SBA certification [*48 C.F.R. § 19.602-4(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBids & FormationCompetency of PartiesPublic Contracts LawBids & FormationCompetitive ProposalsPublic Contracts LawBusiness Aids & AssistanceSmall BusinessesPublic Contracts LawBusiness Aids & AssistanceSource Preference

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30-90B California Legal Forms--Transaction Guide § 90B.123

§ 90B.123 Competing for Architect-Engineer Contracts

NOTE:

There are prescribed competitive procedures for government acquisition of architect-engineer (A--E) services [***see*** *48 C.F.R. § 36.000 et seq.*]. For discussion of contracting for A--E services, see *§ 90B.40[4]*. For preliminary determinations regarding qualification as an A & E contractor, see *§ 90B.112*.

1. If client is prospective offeror that wishes to qualify as A--E selected firm, advise client to submit information to particular agency for evaluation by agency board by [*48 C.F.R. § 36.603*]:

NOTE:

Architect-engineer firms must provide agencies with information on their qualifications in order to be evaluated by agency boards before selection for the negotiation process with regard to a particular contract [***see*** *48 C.F.R. § 36.600 et seq.* (contracting for architect-engineer services)]. For forms used to provide information to procuring agency, see *§ 90B.240*.

a. Filing Standard Form 330, Architect-Engineer Qualifications [*48 C.F.R. § 53.301-330* (form); *see § 90B.240*].

b. Updating information annually on Standard Form 330 [*see § 90B.240*].

NOTE:

Agencies are required to review and update A--E files at least once a year [*48 C.F.R. § 36.603(d)*].

2. Advise client to respond to procuring agency with respect to specific solicitations for A--E contracts.

NOTE:

The government publicly announces all requirements for A--E for A--E services contracts [*48 C.F.R. § 36.601.1*]. Information ordinarily is disseminated electronically [***see*** *48 C.F.R. §§ 5.101(a)(1), 5.201(d)*; § 90B.20[1]]; see a web site at http://www.FedBizOpps.gov. Location in the general geographical area of a specific project and knowledge of that location can be important criteria for selection for performance of a specific contract [***see*** *48 C.F.R. § 36.602-1(a)(5)*].

3. Advise client, if chosen as one of most highly qualified firms, to prepare for discussion with the agency evaluation board.

NOTE:

Firms are evaluated in accord with prescribed selection criteria [*48 C.F.R. § 36.602-3(b)*]. An agency evaluation board must hold discussions with at least three of the most highly qualified firms regarding concepts and the relative utility of alternative methods of furnishing the required services [*48 C.F.R. § 36.602-3(c)*]. Based on the discussions and its evaluations, an evaluation board makes a report and recommends, in order of preference, the most highly qualified firms to the agency head for final selection [*48 C.F.R. § 36.602-3(d)*].

4. Advise client, if chosen as selected firm by agency head, to prepare for negotiation of contract with agency contracting officer [*see 48 C.F.R. § 36.602-4(b)*].

NOTE:

The agency head or its designated authority makes a final selection based on the recommendation of the agency evaluation board and with the advice of appropriate technical and staff representatives [*48 C.F.R. § 36.602-4(a), (b)*].

5. Advise client, if requested to submit proposal by contracting officer, that:

a. Use of modern design method is not precluded by solicitation [*48 C.F.R. § 36.606(b)*].

b. Conceptual design may be important criterion for making award.

NOTE:

Agencies may evaluate firms on the basis of their conceptual design of the project if the use of design competition is approved by the particular agency. Design competition may be used when unique situations exist involving "prestige projects," there is sufficient time for production and evaluation of conceptual designs, and the design competition will substantially benefit the project [*48 C.F.R. § 36.602-1(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationCompetency of PartiesPublic Contracts LawBids & FormationCompetitive ProposalsPublic Contracts LawTypes of ContractsGeneral Overview

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30-90B California Legal Forms--Transaction Guide § 90B.124

§ 90B.124 Submission of Bid or Proposal

1. Advise prospective bidder/offeror to obtain bid or proposal package from procuring agency.

NOTE:
The advertisement for procurement will inform the prospective bidder/offeror of the bidding opportunity and the address from which the bid or proposal package can be obtained.

2. Advise prospective bidder that after receipt of bid or proposal package, it should review plans and specifications carefully to understand what is required and to determine that there are no errors or inconsistencies in them.

NOTE:
If there are apparent defects or ambiguities in the terms of the bid or proposal, a prospective bidder/offeror may request clarification; the contracting officer, in appropriate situations, will issue amendments on Standard Form 30, Amendment of Solicitations/Modification of Contracts [*48 C.F.R. § 14.208(a)*; ***see*** *48 C.F.R. § 53.301-30*].

3. Advise prospective bidder to complete bid or proposal contained in package on prescribed standard forms provided, according to instructions provided.

NOTE:
To be considered responsive, bid offers must be in full conformance with the elements of the invitation for bids [*48 C.F.R. § 14.301*]. If the bidder uses its own form or a letter to submit a bid, the bid will be considered only if it accepts all the terms and conditions of the bid invitation and an award on the bid would result in a binding contract with terms

and conditions that do not vary from the terms and conditions of the invitation [*48 C.F.R. § 14.301(d)*]. In order to be selected for the negotiation procedure, proposal offers must be within the competitive range, as determined by an initial cost comparison [*48 C.F.R. § 15.609(a)*]. For the forms used in submitting bids or proposals, see *§§ 90B.220-90B.223*.

a. Propose price for which bidder will supply all materials and services and perform all work required by plans and specifications contained in bid or proposal package.

b. State in figures, all unit prices, lump-sum prices, and extensions.

c. Bid, or make an offer, on all items listed unless otherwise indicated in bid or proposal form.

d. Fill in all blanks in bid or proposal form.

e. Make no changes in wording of bid or proposal since any additions, deletions, conditions, limitations, or provisions by bidder may cause rejection of bid.

f. Date bid form.

4. Advise bidder/offeror to comply with subcontracting requirements.

NOTE:

The prime contractor is generally considered responsible for its subcontractors [*48 C.F.R. § 9.104-4*]. Government consent to subcontracts is specifically required when subcontract work is complex, the dollar value is substantial, or the government's interests would not otherwise be adequately protected [48 C.F.R. § 44.102(a)].

5. Advise bidder/offeror to comply with federal and state labor requirements.

NOTE:

Procuring agencies must encourage cooperation by contractors with federal and state labor requirements concerning matters such as safety, health and sanitation, maximum hours and minimum wages, equal employment opportunity, child and convict labor, age discrimination, disabled and veteran employment, and employment of the handicapped [*48 C.F.R. § 22.102-1*]. For discussion of mandatory wage, hour, and workplace standards, see *§ 90B.43[3]*.

6. Advise bidder/offeror to comply with affirmative action hiring requirements such as:

NOTE:

For discussion of affirmative action requirements, see *§ 90B.43[4]*.

a. Equal employment opportunity [*48 C.F.R. § 22.802*].

b. Employment of disabled and Vietnam era veterans [*48 C.F.R. § 22.1302*].

c. Employment of individuals with disabilities, without discrimination based on their

physical or mental disability [*48 C.F.R. § 22.1402*].

7. Advised bidder/offeror to comply with conservation and environment requirements such as:

NOTE:
For discussion of conservation and environment requirements, see *§ 90B.43[5]*.

a. Standards required under Clean Air Act and Clean Water Act [*see* 48 C.F.R. § 23.103].

b. Identification of hazardous materials and working conditions under Occupational Safety and Health Act [*48 C.F.R. § 23.302*].

8. Have bidder/offeror certify that workplace is drug-free.

NOTE:
All government contractors must certify that a drug-free workplace will be provided [*48 C.F.R. § 23.504(a)*].

9. Have bidder/offeror execute representations or certifications regarding procurement integrity such as:

NOTE:
Government procurement contracts must be conducted in a manner above reproach and parties must avoid any conflicts of interest [*48 C.F.R. § 3.101-1*]. For coverage of prohibited conduct, see *§ 90B.45*.

a. Prohibition on payment of gratuities to government employees or Congressional members [*48 C.F.R. §§ 3.101-2*, 3.102-1].

b. Required disclosure of contingent fee arrangement [*48 C.F.R. § 3.404*].

c. Prohibition against kickback payments from subcontractors [*48 C.F.R. § 3.502-2*; *see 48 C.F.R. § 3.502-1*].

10. If bid or offer is signed by agent other than owner, partner, or corporate officer, have bidder/offeror accompany bid or offer with power of attorney.

NOTE:
For coverage of powers of attorney, see Ch. 98, ***Powers of Attorney*** **.**

11. Have bidder/offeror present bid or offer and all accompanying documents in sealed envelope no later than time designated in bid or proposal for opening of bids and receipt of proposals.

NOTE:
Bids must be submitted so that they will reach the office designated in the invitation for bid no later than the exact time set for the opening of bids [*48 C.F.R. § 14.302(a)*]. Offers and proposals must reach the government office designated in the solicitation on time; unless the solicitation states a specific time, the time for receipt is 4:30 P.M. local time for the designated office on the date that the proposals are due [48 C.F.R. § 15.412(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral Overview

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30-90B California Legal Forms--Transaction Guide § 90B.125

§ 90B.125 Withdrawal or Modification of Bid or Proposal

NOTE:
The process of withdrawal or modification of bids or proposals [*48 C.F.R. §§ 14.303, 15.400* et seq.] is distinguished from the correction of mistakes in bids or proposals [*48 C.F.R. §§ 14.406 et seq., 15.600* et seq.]. For the procedure used to correct bid mistakes, see *§ 90B.126*.

1. If client is responding to an invitation for bids (IFB), advise client that it may:

a. Modify or withdraw bid before time set for bid opening [*48 C.F.R. § 14.303(a)*]:
(1) By written or telegraphic notice only if notice is received in office designated in IFB not later than exact time set for bid opening.

NOTE:
A telegraphic modification or withdrawal received by telephone from the telegrapher's office will be considered only if the message is confirmed by the telephone company by sending a copy of the written telegram [*48 C.F.R. § 14.303(a)*].

(2) In person by bidder or authorized representative if, before exact time set for opening of bids, identification of person requesting withdrawal is established and that person signs receipt for bid [*48 C.F.R. § 14.303(b)*].

b. Submit late bid or modify or withdraw bid before time of award [*see 48 C.F.R. § 14.304(a), (b)*]:

NOTE:
Modification or withdrawal after bid opening is known as "late" modification or withdrawal and is subject to the rules governing late bids [***see*** *48 C.F.R. § 14.304*]. However, a late modification of an

otherwise successful bid that makes the terms of the bid more favorable to the government will be opened at any time it is received [*48 C.F.R. § 14.304(b)(2)*].

(1) If transmitted through electronic commerce method authorized by invitation for bid, it must be received at initial point of entry to government infrastructure not later than 5:00 p.m. on day before the date specified for the receipt of bids.

(2) If transmitted by any other method authorized by the invitation to bid (that is, regular mail or facsimile), there must acceptable evidence to establish that it was received and was under the government's control before the time set for the receipt of bids.

2. If client is responding to request for proposals (RFP), advise client that offers and modifications of offers in response to RFP reaching agency office on date later than that designated in solicitation must, in order to be accepted [48 C.F.R. § 15.412(b), (c)]:

a. Be received before award is made.

b. Meet specified mailing requirements [*48 C.F.R. § 52.215-10(a)*; *see* NOTE, *below*].

NOTE:

A late proposal or modification must be sent by registered or certified mail no later than the fifth calendar day before the date specified for receipt of offers. If it is sent by mail or, if authorized by solicitation, it is sent by telegram, it must be determined that late receipt was solely due to mishandling by government after receipt by the government. If it is sent by next-day service by the U.S. Postal Service, it must be sent not later than 5 P.M. at the place of mailing, two working days before the date specified for the receipt of proposals. It will also be acceptable if it is the only proposal received [*48 C.F.R. § 52.215-10(a)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral OverviewPublic Contracts LawBids & FormationSealed BidsInvitations for Bids

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30-90B California Legal Forms--Transaction Guide § 90B.126

§ 90B.126 Correction of Mistakes in Bid or Proposal

1. If client is responding to invitation for bid, advise client to:

a. Make corrections before award:
(1) Of minor informalities and irregularities [*48 C.F.R. § 14.405*].

NOTE:
A minor informality or irregularity is one that is merely a matter of form and not of substance, and pertains to some immaterial defect in the bid that can be corrected or waived without being prejudicial to other bidders. The contracting officer will either give the bidder opportunity to cure or to waive the deficiency, whichever is to the advantage of the government [*48 C.F.R. § 14.405*].

(2) Of apparent clerical mistakes.

NOTE:
If a contracting officer notes an apparent clerical mistake, the bidder will be asked to verify the bid and, on receipt of a verification stating the bid that was actually intended, the contracting officer will correct the bid [48 C.F.R. § 14.406-2(a)].

(3) Of other mistakes by requesting permission to do so [48 C.F.R. § 14.406-3].

NOTE:
Permission to correct mistakes may not be used to make otherwise unresponsive bids responsive [48 C.F.R. § 14.406-3]. Permission to correct a mistake will only be given on a show of clear and convincing evidence establishing both the existence of the mistake and the bid actually intended. If the correction would result in displacing one or more lower bids, permission will not be given unless the existence of

the mistake and the bid actually intended are ascertainable substantially from the invitation and the bid itself [48 C.F.R. § 14.406-3(b)]. For a form used for making a request for correction of a bid mistake, see *Section 90B.250*.

b. Request withdrawal of bid rather than permission to correct it, but only if there is clear and convincing evidence as to mistake only or evidence reasonably supports the mistake and is not clear and convincing [48 C.F.R. § 14.406-3(c)].

NOTE:

If the evidence is clear and convincing both as to the existence of the mistake and the bid actually intended, and the bid, both as uncorrected and corrected is the lowest received, the agency head may make a determination to correct the bid and not permit withdrawal [48 C.F.R. § 14.406-3(b)]. In specified circumstances, an agency also has the discretion to determine that a bid should neither be withdrawn nor corrected [***see*** 48 C.F.R. § 14.406-3(d)].

c. Make corrections after the award by [48 C.F.R. § 14.406-4]:

NOTE:

The contracting officer will request the bidder to support the alleged mistake by submission of written statements and pertinent evidence [48 C.F.R. § 14.406-4(e); ***see*** P 3, ***below***]. For a form that is adaptable for use for making a request for correction of a bid mistake after the award, see *Section 90B.250*.

(1) Obtaining contract amendment if correction of mistake would be favorable to government without changing essential requirements of specifications [48 C.F.R. § 14.406-4(a)].]

(2) Making claim under procedures authorized by Contract Disputes Act [48 C.F.R. § 14.406-4(b); *see 48 C.F.R. § 33.201 et seq.* (protests, disputes, and appeals)].

(3) Obtaining determination from agency to rescind or reform contract on basis of clear and convincing evidence that mistake made in bid [48 C.F.R. § 14.406-4(c)].

2. If client is responding to request for proposals, advise client to:

a. Make corrections before award by resolving during negotiations [*48 C.F.R. § 15.607(a), (b)*]:

(1) Minor informalities, irregularities, and apparent clerical mistakes.

(2) Other types of alleged mistakes.

b. Make corrections after award by using same procedures as for correction of mistakes in bids [48 C.F.R. § 15.1005]; *see* P 1c, *above*]

c. If contracting officer denies request, advise contractor that it may dispute that decision under Contract Disputes clause [*see 48 C.F.R. § 33.000 et seq.*; *see also § 90B.140*].

3. If correction of bid or proposal made after award, present clear and convincing evidence that mistake in bid made by providing the following [48 C.F.R. § 14.406-4(c), (e)(1)]:

a. Contractor's file copy of its bid.

b. Original worksheets and other data used in preparing bid.

c. Subcontractors' and suppliers' quotations, if any.

d. Published price lists.

e. Any other evidence that would serve to establish mistake, manner i n which it occurred, and bid actually intended.

NOTE:

In addition to a show of clear and convincing evidence as to the mistaken bid, it must also be shown that the mistake was (1) mutual or, (2) if unilaterally made by the contracting officer, so apparent as to have charged the contracting officer with notice of the probability of mistake [48 C.F.R. § 14.406-4(c)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral OverviewPublic Contracts LawVoiding the ContractAmbiguity & MistakeGeneral Overview

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§ 90B.127 Protests Against Awards

NOTE:

A protest is a written objection by an interested party to an agency's solicitation for a proposed contract for supplies or services, or a written objection by an interested party to a proposed award of such contract [*48 C.F.R. § 33.101*]. Contract officers must consider all protests, whether submitted before or after the award, and whether filed with the procuring agency, the General Accounting Office (GAO), or, for automatic data processing equipment (ADPE), with the General Services Board of Contract Appeals (GSBCA) [*48 C.F.R. § 33.102*]. For discussion of protest as a remedy, see *Section 90B.60*. For forms used in making protests to the agency and the GAO, see *Section 90B.270*.

1. On receipt of notice from contracting officer that bid or offer is unsuccessful, request additional information, including [*48 C.F.R. § 14.408-1(c)*]:

a. Name and address of successful bidder.

b. Proposed contract price.

c. Place where abstract of bids is available for inspection.

d. Full explanation of basis for award if award was made to other than low bidder [*48 C.F.R. § 14.408-1(a)(1)(iii)*].

2. Advise unsuccessful bidder/offeror to protest any improprieties in solicitation or award of contract to [*48 C.F.R. § 33.102*]:

a. Procuring agency, either in writing or orally with written confirmation.

NOTE:

Interested parties are encouraged to seek resolution within the agency before filing a protest with the GAO or the GSA [*48 C.F.R. § 33.102(c)*]. When a protest is filed before an award, the agency may not make the award before the protest is resolved, except as provided in the agency's procurement regulations [***see** 48 C.F.R. § 33.103(a)*].

b. Comptroller General of GAO.

NOTE:

Protests to the GAO must be made in accordance with GAO Bid Protest Regulations [***see** 4 C.F.R. § 21.0 et seq.*]. If a protest is pending with the GAO, the protestant may not file a protest with the GSBCA with respect to the same contract [*48 C.F.R. § 33.102(c)(2)*].

c. GSBCA, if protest relates to contract for acquisition of ADPE.

NOTE:

The GSBCA has authority over government acquisition of ADPE, including handling of protests [***see** 48 C.F.R. §§ 33.105*, 61.01.2]. An interested party may protest the award of an ADPE contract to the GSBCA in accord with GSBCA Rules of Procedure [***see** 48 C.F.R. § 6101.0 et seq.*]. If a protest regarding an ADPE contract is pending with the GSBCA, the protestor may not file a protest with the GAO with respect to the same contract [*48 C.F.R. § 33.102(c)(3)*].

3. If protest directed to agency:

a. Address to individual or location designated in bid or proposal.

NOTE:

Agency protests are submitted to the individual or location designated in the Service of Protest clause [***see** 48 C.F.R. § 52.233-2*] on the proposal or bid form [*48 C.F.R. § 33.103(b)*].

b. Submit as soon as possible and before award.

NOTE:

To be effective, the protest must be lodged before the contract is awarded. Protests based on alleged improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of proposals must be filed before those dates. In other cases, protests must be filed not later than 10 working days after the basis of the protest is known or should have been known, whichever is earlier. On a showing of good cause, an agency has discretion to consider a protest that is untimely filed, or that raises issues significant to the agency's acquisition system [*48 C.F.R. § 33.103(b)(2)*]. Protests received after an award and filed with the procuring agency must be handled in accord with agency procedures [*48 C.F.R. § 33.103(b)(2)*]. If the contract has been awarded and it is determined that the protest is valid, but the improperly awarded contract is not canceled or terminated, the protesting bidder may be able to recover its bid preparation costs [***see** Keco Industries, Inc. v. United States (Ct. Cl. 1970) 428 F.2d 1233, 1240]* .

c. Include following information [*48 C.F.R. § 33.103(b)(3)*]:

NOTE:

Failure to provide the required contents of the protest may be grounds for dismissal of the

protest; protests should be concise and logically presented to facilitate review by the agency [*48 C.F.R. § 33.103(b)(4)*].

(1) Name, address, and telephone number of protestor.

(2) Solicitation or contract number.

(3) Detailed statement of legal and factual grounds of protest, including copies of relevant documents.

(4) Request for ruling by agency.

(5) Statement of form of relief requested.

4. If protest is directed to GAO [*48 C.F.R. § 33.104*]:

NOTE:
Protests to GAO must be in accord with GAO bid protest regulations [***see*** 4 C.F.R. § 21 et seq.]. The GAO will dismiss any protest if the matter involved is the subject of litigation before a court of competent jurisdiction unless the court requests determination by the GAO [*4 C.F.R. § 21.9(a)*].

a. Furnish copy of complete protest filed with GAO to agency contracting officer [*see 4 C.F.R. § 21.1(d)*].

NOTE:
The protestor must furnish a complete copy of the protest to the soliciting official or agency location no later than one day after the protest is filed with the GAO; failure to do so may result in dismissal [*48 C.F.R. § 33.104(a)*].

b. File written protest directed to GAO as follows [*4 C.F.R. § 21.1(b)*]:

(1) Addressed to General Counsel, General Accounting Office, 441 G Street NW, Washington, D.C. 20548.

(2) Mark envelope: "Attention: Procurement Law Control Group."

c. File protest by transmittal or delivery in manner that will assure earliest receipt.

NOTE:
A protest that is not timely on its face may be dismissed [*4 C.F.R. § 21.2(b)*; ***see*** P 3b, ***above*** (time for filing)]. It is the protestor's obligation to include in a protest all information needed to demonstrate its timeliness. Protesters are not permitted to introduce for the first time in a request for reconsideration the information on which the timeliness of the protest relies [*4 C.F.R. § 21.2(b)*]. However, late protests may be considered if good cause is shown or the GAO determines that the protest raises significant issues relating to procurement practices or procedures [*4 C.F.R. § 21.2(c)*].

d. Include following [*see 4 C.F.R. § 21.1(c), (d)*; *see also* § 90.260 (form)]:

NOTE:

No formal briefs or other technical forms of pleading are required, but the protest and other items submitted should be concise, logically arranged, and clearly state sufficient grounds for the protest [*4 C.F.R. § 21.1(e)*].

(1) Name, address, and telephone number of protestor [*4 C.F.R. § 21.1(c)(1)*].

(2) Original signed by protester or representative, and at least one copy [*4 C.F.R. § 21.1(c)(2)*].

(3) Identification of issuing agency and either solicitation or contract number or both [*4 C.F.R. § 21.1(c)(3)*].]

(4) Detailed statement of legal and factual grounds of protest, including copies of relevant documents [*4 C.F.R. § 21.1(c)(4)*].

(5) Specific request for ruling by Comptroller General [*4 C.F.R. § 21.1(c)(5)*].

(6) Statement of form of relief requested [*4 C.F.R. § 21.1(c)(6)*].

(7) Statement that copy of protest document has been or will be furnished within one day to appropriate officer or agency [*4 C.F.R. § 21.1(d)*].

e. Obtain required agency report.

NOTE:

When a protest before or after an award is lodged with the GAO, the agency involved is required to prepare a report that must include copies of the protest, protest submitted by the protestor and offer being considered for the award, solicitation, abstract of offers, and any other relevant documents and the contracting officer's signed statement setting forth findings, actions, recommendations, evidence, and information deemed necessary in determining the validity of the protest. The report must also identify all parties being furnished copies of such report [*48 C.F.R. § 33.104(a)(3)(ii)(I)*; *4 C.F.R. § 21.3(c)*].

f. Request bid protest conference.

NOTE:

A conference on the merits of the protest may, at the discretion of the GAO, be held at the request of the protestor, agency, or interested party [*48 C.F.R. § 33.104(e)*]. The fact-finding conference is intended to resolve specific factual disputes essential to the resolution of the protest that cannot otherwise be resolved from the record [*48 C.F.R. § 33.104(e)*; *4 C.F.R. § 21.5(a)*].

g. If recommendation by GAO is adverse, request reconsideration in writing, containing [*4 C.F.R. § 21.14(c)*]:

NOTE:

The GAO will ordinarily issue its recommendation on a protest within 90 work days [*48 C.F.R. § 33.104(f)*; *4 C.F.R. § 21.7(a)*]. The GAO will reconsider its decision on written

request by the protestor or any interested party filed within 10 working days after the basis for its recommendation is known [*4 C.F.R. § 21.2(a), (b)*].

(1) Detailed statement of factual and legal grounds on which reversal or modification is deemed warranted.

(2) Specification of any errors of law made or information not previously considered.

5. If protest involves award of contract for ADPE acquisition, it may be filed directly with GSBCA [*48 C.F.R. § 33.102(c)(3)*; *see 48 C.F.R. 33.105(a)-(g)* (procedures for filing with GSBCA)].

NOTE:

Protests filed with the GSBCA are reviewed in accord with GSBCA rules of procedure [***see*** 48 C.F.R. pt. 61]. Final decision by the GSBCA is appealable by any interested party under provisions of the Contract Disputes Act [*48 C.F.R. § 33.105(g)*]. For discussion of appeals under the Contract Disputes Act, see *Section 90B.61 [3]*.

6. Consider filing suit directly in federal district court to contest award, and to have contract arbitrarily awarded to another declared void.

NOTE:

Suit regarding protest of an award may be filed directly in federal district court if (1) the complainant can allege injury in fact, (2) the complainant can assert that arbitrary or capricious action by the agency injured an interest arguably within zone of interests to be protected or regulated by the procurement statute, and (3) there is no clear and convincing indication of legislative intent to withhold judicial review [***see*** *Gull Airborne Instruments, Inc. v. Weinberger (D.C. Cir. 1982) 694 F.2d 838, 841* ; ***see also*** *5 U.S.C. §§ 702, 706* (scope of review of agency action)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral OverviewPublic Contracts LawDispute ResolutionBid ProtestsPublic Contracts LawVoiding the ContractGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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C. Procedural Guide

30-90B California Legal Forms--Transaction Guide §§ 90B.128-90B.139

[Reserved]

§§ 90B.128[Reserved]

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30-90B California Legal Forms--Transaction Guide § 90B.140

§ 90B.140 Resolving Claims and Disputes

NOTE:

A "claim" is a written demand or assertion by a contracting party seeking as a matter of right the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to a contract. [*48 C.F.R. § 2.101*]. However, a written demand or written assertion by the contractor seeking the payment of money exceeding $100,000 is not a "claim" under the Contract Disputes Act of 1978 [*41 U.S.C. § 601 et seq.*] until certified as required by the Act [*48 C.F.R. § 2.101*]. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in *48 C.F.R. § 33.206(a)*, if it is disputed either as to liability or amount or is not acted upon in a reasonable time [*48 C.F.R. § 2.101*].

A claim arising under a contract, unlike a claim relating to a contract, is a claim that can be resolved under the contract clause that provides for the relief sought by the claimant [*48 C.F.R. § 33.213(a)*]. Disputes between the contractor and the government may arise during performance, for example, because the government has expressly or constructively ordered extra or unanticipated work for which the contractor seeks additional compensation or a time extension [***see** § 90B.44 [1], [2]*]. The following procedures are prescribed for all government contracting agencies, both civilian and military, pursuant to procedures established under the Contract Disputes Act of 1978, [*48 C.F.R. § 33.202*]. For discussion of the resolution of claims and disputes, see *§ 90B.61*. For the forms used for making a claim to the contracting officer and noticing an appeal of an agency's decision, see *§§ 90B.270*, *90B.271*.

1. File claim for money, adjustment or interpretation of contract, or other relief under contract with contracting officer [*see 48 C.F.R. § 33.106*].

NOTE:

It is the government's policy to attempt resolution of contract disputes by mutual agreement at the contracting officer's level without litigation under the Contract Disputes Act of 1978 [*48 C.F.R. § 33.204*]. This resolution process includes informal discussions between the parties, conducted to the extent feasible, by persons who did not participate in the matter at issue [*48 C.F.R. § 33.204*]. The contracting officer is authorized, within the limits of its certification of authority, to settle all disputes arising under contract containing a Disputes clause (except in certain circumstances) [***see** 48 C.F.R. § 33.210*].

2. Support all parts of claim to avoid possible liability for fraud.

NOTE:

If there is evidence that the inability to support all parts of the claim is attributable to misrepresentation of fact or fraud on the part of the contractor, the contracting officer will refer the matter to the agency officer responsible for investigating fraud [*48 C.F.R. § 33.209*]. If there is evidence supporting the finding of fraud, a contractor may be liable for both civil and criminal penalties. For discussion of fraudulent claims, see *§ 90B.61 [2][b]*.

3. If claim exceeds $1,000,000, or arbitration or other alternative dispute resolution is used, include prescribed certification clause [*48 C.F.R. § 33.207*; *41 U.S.C. § 605*; *see § 90B.270[2]* (text of certification)].

4. Prepare to continue performance of contract in accord with contracting officer's decision pending final decision on claim [*48 C.F.R. § 33.213(a)*].

NOTE:

Agencies are authorized to require a contractor to continue contract performance in accordance with the contracting officer's decision pending final decision on a claim relating to a contract [*48 C.F.R. § 33.213(a)*].

5. If contracting officer's response is unsatisfactory, either [*see 48 C.F.R. § 33.211(a)*]:

NOTE:

When a claim cannot be satisfied or settled by mutual agreement, the contracting officer must issue a written decision containing a description of the claim or dispute, reference to pertinent contract terms, a statement of the factual areas of agreement and disagreement, a statement of its decision with supporting rationale, and notice of claimant's appeal rights [*48 C.F.R. § 33.211(a)(4)(i)-(v)*]. Failure of the contracting officer to issue a decision within the required time period is deemed a decision to deny the claim and authorizes the claimant to file an appeal or suit on the claim [*48 C.F.R. § 33.211(g)*].

a. File written notice of appeal with agency board of contract appeals within 90 days of receipt of written final decision [*see* § 90.271 (form)]; or

NOTE:

If the appeal is made to the agency board of contract appeals, the claimant may elect to proceed under the board's small claims proceedings for claims of $50,000 or less or, in the case of a small business concern [*see 48 C.F.R. § 19.001* (definition); § 90B.22[4]], $150,000 or less, or under the accelerated procedure if the claim is $100,000 or less [***see** 48 C.F.R. § 33.211(a)(4)(v)*]. For a detailed discussion of the procedures involved in filing and pursuing an appeal from the decision of a contracting officer through the appropriate

board of contract appeals, see J. McBride, I. Wachtel, & T. Touhey, Government Contracts, Ch. 6, ***Contract Appeal Boards*** (Matthew Bender), and N. Steiger, Federal Contract Management, Ch. 14, ***Disputes and Claims*** (Matthew Bender).

b. Bring suit in Court of Federal Claims within 12 months of receipt of written final decision by contracting officer.

6. If agency board of contact appeals renders decision adverse to contractor, appeal decision to federal Court of Appeals for Federal Circuit.

NOTE:

Agency board of contract appeals decisions are final, except that a claimant may appeal such decisions to the Court of Appeals for the Federal Circuit within 120 days after receipt of a copy of such a decision and the agency also has the same right [***see*** *41 U.S.C. § 607(g)(1)(A)* (right of review of agency action under Contract Disputes Act)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral OverviewPublic Contracts LawDispute ResolutionGeneral Overview

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30-90B California Legal Forms--Transaction Guide § 90B.141

§ 90B.141 Posting Bonds for Construction Contracts

NOTE:

Bid, payment, and performance bonds are generally not required for other than construction contracts unless they are necessary to protect the government's interests [*48 C.F.R. §§ 28.103-1(a), 28.103-2(a)*; ***see*** *§ 90B.22[5]*]. For forms used for posting bid, payment, and performance bonds, see *§§ 90B.231-90B.233*.

1. On award of contract exceeding small purchase limitation, post required payment and performance bonds.

NOTE:

If payment and performance bonds are required, then a bid bond must also be posted at the time of submission of the bid [***see*** *48 C.F.R. § 28.101-1(a)*; ***see also*** *§ 90B.124*]. Payment and performance bonds are required for construction contracts exceeding $100,000 [*48 C.F.R. § 28.102-1(a)*]. The contractor must furnish all bonds, including any necessary reinsurance agreements, before receiving notice to proceed with the work or being allowed to start work [*48 C.F.R. § 28.102-1(c)*; ***see*** *48 C.F.R. § 28.102-1(b)* (types of payment protection for construction contracts let for more than $25,000 but less than $100,000)].

2. If using individual surety for bonds [*see 48 C.F.R. § 28.203*]:

NOTE:

Agencies must obtain adequate security for bonds required or used with contracts for supplies and services, including construction contracts. Acceptable forms of sureties include corporate or individual sureties, U.S. bonds or notes, certified or cashier checks,

bank drafts, money orders, or currency [*48 C.F.R. § 28.201(a)*]. Corporate sureties must appear on the list contained in Department of the Treasury Circular 570, entitled "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and Acceptable Reinsuring Companies" [*48 C.F.R. § 28.202(a)(1)*]. An individual surety is acceptable for all types of bonds except position schedule bonds; the contracting officer will determine its acceptability [*48 C.F.R. § 28.203(a), (b)*].

a. Have surety execute bonds.

b. Have surety execute standard affidavit form.

NOTE:
Standard Form 28, Affidavit of Individual Surety, executed by the individual surety must accompany standard payment and performance bonds [***see** 48 C.F.R. § 53.301-28*]. For the form used for an affidavit of individual surety, see *§ 90B.234*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewContracts LawTypes of ContractsConstruction ContractsPublic Contracts LawTypes of ContractsConstruction Contracts

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[Reserved]

§§ 90B.142[Reserved]

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1. Registering as Government Contractor

30-90B California Legal Forms--Transaction Guide § 90B.200

§ 90B.200 Central Contractor Registration Worksheet

[1] Comment--Use of Form

This form is the official Central Contractor Registration Worksheet. It may be used by potential government contractors to collect necessary data required to register online as a potential supplier for government contracts.

The Central Contractor Registration (CCR) is the primary government repository for contractor information required to conduct business with the United States government [*48 C.F.R. § 2.101*]. The Federal Acquisition Regulation (FAR) requires contractor registration in the CCR database prior to award of any contract, basic agreement, basic ordering agreement, or blanket purchase agreement on or after October 1, 2003 *[68 Fed. Reg. 43856 (2003)* ; *see* Federal Acquisition Circular 2001-16]. Contractors can register in the CCR database by going to http://www.ccr.gov. The actual registration process must be completed online. The online registration process begins by entering the contractor's Dunn and Bradstreet number.

For further discussion, see *§ 90B.20[2]*. Additional information on filling out the form and completing the registration process is available on the CCR website, www.ccr.gov.

[2] FORM

Central Contractor Registration Worksheet

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Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawTypes of ContractsBlanket Purchase AgreementsPublic Contracts LawTypes of ContractsOrdering Agreements

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30-90B California Legal Forms--Transaction Guide §§ 90B.201-90B.209

[Reserved]

§§ 90B.201[Reserved]

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2. Quotations for Small Purchases

30-90B California Legal Forms--Transaction Guide § 90B.210

§ 90B.210 Request for Quotations--Standard Form 18

[1] Comment

[a] Use of Form

This form is the official GSA form used by government agencies to obtain information from prospective suppliers about the cost and availability of small purchases of supplies for the government.

Standard Form 18, Request for Quotations [*48 C.F.R. § 53.301-18*], is prescribed for use in obtaining price, cost, delivery, and related information from suppliers for purchases of supplies and services, the aggregate amount of which does not exceed $100,000 (or $200,000 in the case of certain contracts awarded and performed, or purchases to be made, outside the United States) [*48 C.F.R. §§ 13.000, 53.213(a)*; *see § 90B.21[2][b]*]. It is used when the contracting officer decides that a written, rather than an oral, request for quotation is needed, and is a request for information only; information and quotations furnished in response are not considered offers [*see* 48 C.F.R. §§ 13.107(b), *15.406-2*]. If the price quoted on the form is considered acceptable, the contracting officer then issues a purchase order, using either the individual agency's optional form or Standard Form 44, Purchase Order-Invoice-Voucher [*48 C.F.R. § 53.213(a)*; *see 48 C.F.R. § 53.301-44*].

Paper copies of the form can be ordered by calling Federal Supply customer assistance at (800) 525-8027. The form also may be downloaded from the Department of General Services web site (GSA Forms Library) at http://www.gsa.gov/. The applicant may complete the application online and then print it or may print the application and then fill it out manually. Instructions for completing the application are located at the web site.

[b] Classification as Small Business

Although Standard Form 18 no longer has a business classification space for indicating that the application is made on behalf of a small, disadvantaged, or women-owned business concern, the instructions opposite item 10 of the form [*see* [2], *below*] note that any representations or certifications attached to the form must be completed by the quoter. There

are prescribed clauses for making small-business representations [*see 48 C.F.R. §§ 52.219-1, 52.219-2*]. Classification as one of these types of businesses can result in preferential treatment in contracting [*see §§ 90B.70, 90B.71*].

[c] Amendment and Modification

The contracting officer uses Standard Form 30, Amendment of Solicitation/Modification of Contract [*48 C.F.R. § 53.301-30*], to modify small purchase orders issued in response to offers regarding oral or written requests for quotations [48 C.F.R. § 13.503(b); *see § 90B.223* (Standard Form 30)].

[2] FORM

Request for Quotations--Standard Form 18

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Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawTypes of ContractsPurchase Orders

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DIVISION VI: PERFORMANCE OF SERVICES
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30-90B California Legal Forms--Transaction Guide §§ 90B.211-90B.219

[Reserved]

§§ 90B.211[Reserved]

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3. Solicited Bids and Proposals for Supplies or Services

30-90B California Legal Forms--Transaction Guide § 90B.220

§ 90B.220 Solicitation, Offer, and Award--Standard Form 33

[1] Comment

[a] Use of Form

This form is the official GSA form used by government agencies to solicit bids on a supplies or services contract, and for awarding the contract that results from the bids [*see 48 C.F.R. § 53.214(c)*].

Standard Form 33, Solicitation, Offer, and Award [*48 C.F.R. § 53.301-33*], is prescribed for use in soliciting bids for supplies and services and for awarding the contracts that result from the bids, as specified in *48 C.F.R. 14.201-2(a)(1)*, unless award is accomplished by Standard Form 26 [*48 C.F.R. § 53.214(c)*; *see § 90B.221* (Standard Form 26)]. It also may be used in connection with the solicitation and award of negotiated contracts [*48 C.F.R. § 53.215-1(c)*]. For discussion of the competitive bid and the negotiated proposal methods, see *§§ 90B.24* and *90B.25*. There is a space on this form for identifying the procurement as either a sealed bid or negotiated proposal [*see* [2], *below* (item 4 of form)].

As required by the prescribed Uniform Contract Format, Standard Form 33 has four main sections, which are further subdivided into 13 subsections: Part I, The Schedule; Part II, Contract Clauses; Part III, List of Documents; and Part IV, Representations and Instructions [*see 48 C.F.R. §§ 14.201-1*, 15.204-1, *53.301-33*]. These four parts are listed in Item 11, Table of Contents, of Form 33. In essence, Standard Form 33 is a cover sheet or table of contents that serves as a guide to the many parts of a contract, which may consist of a variety of separate forms and attachments. For discussion of elements of bids and proposals as prescribed by the Uniform Contract Format, see *§§ 90B.24 [1][c]* and *90B.25[1][c]*. A bidder/offeror's response, in order to be considered responsive, must be fully in compliance with all terms of the bid [*48 C.F.R. § 14.301(d)*].

Paper copies of the form can be ordered by calling Federal Supply customer assistance at (800) 525-8027. The form also may be downloaded from the Department of General Services web site (GSA Forms Library) at http://www.gsa.gov/. The applicant may complete the application online and then print it or may print the application and then fill it out manually. Instructions for completing the application are located at the web site.

[b] Plans and Specifications

Part I, The Schedule, is used to explain the requirements and specifications of the particular procurement [*48 C.F.R. §§ 14.201-2, 15.406-2*]. In this part, the procuring agency sets forth details relating to specific requirements concerning the solicitation or contract form, supplies or services sought, prices and costs, descriptions and specifications, packaging and marking, inspection and acceptance delivery or performance, contract administration data, and special contract requirements [*see* [2], *below* (Subparts A--H of Part I)].

[c] Prescribed Contract Clauses

Part II, Contract Clauses, contains contract clauses as prescribed under the Solicitation Provisions and Contract Clauses [*48 C.F.R. § 52.000 et seq.*], section of the FAR [*48 C.F.R. §§ 14.201-3*, 15.204-3; *see § 90B.11[3]*]. The contracting officer uses this part to insert, or to incorporate by reference, prescribed contract clauses that are required in most government contracts such as contract administration clauses [*see 48 C.F.R. §§ 52.233-1* (disputes), 52.243-1-52.243-7 (changes clauses), 52.249-1-52.249-10 (termination for convenience and default)], clauses requiring the use of American produced or designated country end-products [*48 C.F.R. §§ 52.225-1-52.225-17*], and the clauses for certifying as to procurement integrity [*48 C.F.R. §§ 52.203-8, 52.203-9*]. For a discussion of the most commonly used prescribed clauses, see *§§ 90B.43-90B.45*.

[d] Documents and Attachments

Part III, List of Documents, Exhibits, and Other Attachments, is an inventory of all documents, information, and attachments to the solicitation [*48 C.F.R. § 14.201-4*].

[e] Representations and Instructions

Part IV is designated as Representations and Instructions. Subpart K, Representations, Certifications, and other Statements of Bidders/Offerors or Quoters, is the section used by the bidder or offeror to make representations concerning its business and to certify that it is in compliance with all applicable laws and regulations. The contracting officer uses Subpart K for inserting, or incorporating by reference, prescribed clauses to which the bidder/offeror must certify [*48 C.F.R. §§ 14.201-5(a),* 15.204-5(a)]. Commonly used clauses concern such matters as the following:

- Whether or not the bidder/offeror is a small, small disadvantaged, or women-owned business [*see 48 C.F.R. §§ 52.219-1-52.219-3*].

- Whether it complies with affirmative action hiring requirements [*see 48 C.F.R. §§ 52.222-21-52.222-37*].

- Whether it provides a drug-free workplace [*see 48 C.F.R. § 52.223-6*].

- Whether it complies with requirements under the Clean Air Act and the Clean Water Act [*see 48 C.F.R. §§ 52.223-1, 52.223-2*].

- Whether it has made a contingent fee arrangement [*see 48 C.F.R. § 52.203-4*].

The representations and certifications made by the proposed bidder/offeror as required by Subpart K do not physically become part of the resulting contract, but are incorporated by reference only, and retained as part of the agency's contract file in case of later dispute over their validity [*48 C.F.R. §§ 14.201-1(c), 15.204-1(b)*].

Subpart L of Part IV, Instructions, Conditions, and Notices to Offerors or Quoters, is the section used by the

government to give instructions to the bidder/offeror as to how to prepare and submit the bid or offer, and puts the bidder/offeror on notice of any special conditions or circumstances that may affect the bid or proposal [*48 C.F.R. §§ 14.201-5(b)*, 15.406-5(b)].

[f] Labor Laws

The principal labor law applicable to supplies contracts is the Walsh-Healey Public Contracts Act [*41 U.S.C. § 35 et seq.*], which requires that contractors who furnish supplies to the government under contracts in excess of $10,000 must comply with minimum wage and maximum hours requirements [*48 C.F.R. § 22.602*; *see 48 C.F.R. § 52.222-20* (prescribed contract clauses)]. The principal labor law applicable to services contracts is the Service Contract Act of 1965 [*41 U.S.C. § 351 et seq.*], which requires payment of minimum wage to service contract employees [*48 C.F.R. § 22.1002-1*; *see 48 C.F.R. §§ 52.222-40*, *52.222-41* (prescribed contract clauses)]. For discussion of wage, hour, and workplace standards applicable to supplies and services contracts, see *§ 90B.43[3]*.

[g] Small Business Preference

To apply for a small business preference, a firm must represent itself in good faith as a small business at the time of written self-certification [*48 C.F.R. § 19.301-1(a)*]. The prescribed clause, Small Business Concern Representation, included in Subpart K [*see* [e], *above*] of Part IV of Standard Form 33, is used for making the self-certification [*48 C.F.R. § 52.219-1*]. For a discussion of qualifying as a small business or small disadvantaged business, see *§ 90B.70[1][b], [c]*. For procedures used for making a representation as a small business and for obtaining, when necessary, a Certificate of Competency certifying a small business as responsible, see *§§ 90B.121* and *90B.122*.

[h] Submission, Withdrawal, and Award of Bid

In most cases, Standard Form 33 is used for both solicitation and award of the contract; award is made on the Award section of the form to the successful bidder or offeror with execution by the contracting officer only [*48 C.F.R. §§ 14.201-2(a) (bid)*, 15.204-1(b) (proposal); *see* [2], *below* (items 19-28)]. However, if negotiation results in changes, and signatures of both the contractor and the agency contracting officer are required on the same document, then the award is made on Standard Form 26, Award/Contract [*48 C.F.R. § 53.301-26*; *see § 90B.221* (form)].

For the procedures used for submitting, withdrawing, and correcting mistakes in bids and proposals, see *§§ 90B.124-90B.126*. For a form provided for use for correction of a mistake in a bid, see *§ 90B.250*.

[i] Bid Bond

A bid bond is required if payment and performance bonds are required [*48 C.F.R. § 28.101-1(a)*; *see 48 C.F.R. § 53.301-24* (form)]. Bonds are generally not required for other than construction contracts unless they are necessary to protect the government's interests [*48 C.F.R. §§ 28.103-1(a), 28.103-2(a)*]. For discussion of bonding requirements for construction contracts, see *§ 90B.22[5]*. For sample forms used for posting bonds, see *§§ 90B.231-90B.234*.

[j] Modification

The contracting officer uses Standard Form 30, Amendment of Solicitation/Modification of Contract [*48 C.F.R. § 53.301-30*], to amend an invitation for bid as specified [*48 C.F.R. § 14.208(a)*; *see § 90B.223* (form)].

[2] FORM

Solicitation, Offer, and Award--Standard Form 33

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Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral Overview

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30-90B California Legal Forms--Transaction Guide § 90B.221

§ 90B.221 Award/Contract--Standard Form 26

[1] Comment--Use of Form

This form is the official GSA form used by government agencies to award negotiated contracts for supplies and services [*see 48 C.F.R. § 53.214(a)*]. Pending issuance of a new form, the reference in block one should be amended to read 15 C.F.R. § 700 [*48 C.F.R. § 53.214(a)*].

Standard Form 26 [*48 C.F.R. § 53.301-26*], is used in contracting by negotiation, except for construction, architect-engineer services, or small purchases [48 C.F.R. § 15.414(b)(1)-(3)]. It is prescribed for use in awarding sealed bid contracts for supplies and services when the bid is obtained on Standard Form 33, Solicitation, Offer and Award [*see § 90B.220*], but the bidder's offer leads to further changes and the resulting contract is prepared as a bilateral document on Standard Form 26 [*48 C.F.R. § 53.214(a)*; *see 48 C.F.R. § 14.408-1(d)*]. It also may be used in entering into negotiated contracts when the signature of both parties on a single document is appropriate, as when the prospective contractor has amended its offer [*48 C.F.R. § 53.215-1(a)*; *see 48 C.F.R. § 15.509*]. Pending issuance of a new form, the reference in block one should be amended to read 15 C.F.R. § 700 [*48 C.F.R. § 53.214(a)*].

Paper copies of the form can be ordered by calling Federal Supply customer assistance at (800) 525-8027. The form also may be downloaded from the Department of General Services web site (GSA Forms Library) at http://www.gsa.gov/. The applicant may complete the application online and then print it or may print the application and then fill it out manually. Instructions for completing the application are located at the web site.

For discussion of the Uniform Contract Format, see *§ 90B.220[1]*.

[2] FORM

Award/Contract--Standard Form 26

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Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceAcceptances & AwardsPublic Contracts LawTypes of ContractsGeneral Overview

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30-90B California Legal Forms--Transaction Guide § 90B.222

§ 90B.222 Solicitation/Contract--Standard Form 1447

[1] Comment--Use of Form

This form is the official GSA form used by government agencies to award contracts that result from bids or offers [*see 48 C.F.R. § 53.214(a)*].

Standard Form 1447, Solicitation/Contract [*48 C.F.R. § 53.301-1447*], is prescribed for use for soliciting offers for supplies or services and for awarding contracts that result from the bid or offer. It must be used when the simplified contract format is used [*see 48 C.F.R. 14.201-9*], and may be used in place of the Standard Form 26 [*see § 90B.221*] or Standard Form 33 [*see § 90B.220*] with other solicitations and awards [*see* 48 C.F.R. § 53. 214(d) (optional use)]. Agencies may prescribe additional detailed instructions for use of the form [*48 C.F.R. § 53.214(d)*]. For firm-fixed-price and fixed-price with economic adjustment contracts for acquisition of supplies and services, the contracting officer may use Standard Form 1447 in lieu of the Uniform Contract Format [48 C.F.R. §§ 14.201(a)(5), *15.204-1(c)*].

Paper copies of the form can be ordered by calling Federal Supply customer assistance at (800) 525-8027. The form also may be downloaded from the Department of General Services web site (GSA Forms Library) at http://www.gsa.gov/. The applicant may complete the application online and then print it or may print the application and then fill it out manually. Instructions for completing the application are located at the web site.

For discussion of the Uniform Contract Format used with Standard Form 33 for bids and proposals, see *§§ 90B.24[1][c]*, *90B.25[1][c]*, and *90B.220[1]*.

[2] FORM

Solicitation/Contract--Standard Form 1447

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Legal Topics:

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30-90B California Legal Forms--Transaction Guide § 90B.223

§ 90B.223 Amendment of Solicitation/Modification of Contract--Standard Form 30

[1] Comment--Use of Form

This form is the official GSA form used by government agencies to amend or modify various types of solicitations, orders, and contracts for supplies and services [*see 48 C.F.R. § 53.243*].

Standard Form 30, Amendment of Solicitation/Modification of Contract [*48 C.F.R. § 53.301-30*], is used by a contracting officer to amend solicitations, modify purchase and delivery orders, and modify contracts regarding procurement for supplies and services, other than construction contracts or contracts for architect-engineer services [*48 C.F.R. § 53.243*]. It is also used when there are modifications of contracts resulting from change orders, or termination for default or convenience of the government [*48 C.F.R. § 53.243*; *see 48 C.F.R. §§ 42.1203(g), 43.301, 49.602-5*]. For a discussion of modification and termination of procurement contracts, see *§§ 90B.44[1] through [4]*.

In addition, this form may be used for modifying purchase orders issued in response to oral or written requests for quotations [*48 C.F.R. § 53.213(b)*; *see* 48 C.F.R. § 13.503(b); *see also § 90B.210* (Standard Form 18, Request for Quotations)]. Standard Form 30 is issued before execution of the contract and must be acknowledged by the contractor as an amendment to the original [*see* [2], *below* (item 11)].

Paper copies of the form can be ordered by calling Federal Supply customer assistance at (800) 525-8027. The form also may be downloaded from the Department of General Services web site (GSA Forms Library) at http://www.gsa.gov/. The applicant may complete the application online and then print it or may print the application and then fill it out manually. Instructions for completing the application are located at the web site.

[2] FORM

Amendment of Solicitation/Modification of Contract--Standard Form 30

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Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral OverviewPublic Contracts LawBids & FormationGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral OverviewPublic Contracts LawContract ProvisionsGeneral Overview

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30-90B California Legal Forms--Transaction Guide §§ 90B.224-90B.229

[Reserved]

§§ 90B.224[Reserved]

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30-90B California Legal Forms--Transaction Guide § 90B.230

§ 90B.230 Solicitation, Offer and Award--Standard Form 1442

[1] Comment

[a] Use of Form

This form is the official GSA form used by government agencies to solicit offers and award contracts relating to construction, repair, and alteration [*see 48 C.F.R. § 53.236-1*].

Standard Form 1442, Solicitation, Offer, and Award (Construction, Alteration, or Repair) [*48 C.F.R. § 53.301-1442*], is prescribed for use in soliciting offers and awarding contracts expected to exceed the small purchase limitation for (1) construction, alteration, or repair, or (2) dismantling, demolition, or removal of improvements. It may also be used for construction contracts within the small purchase limitation [*48 C.F.R. § 53.236-1(d)*; *see 48 C.F.R. § 36.701(a)*].

Although the official form itself has not been revised, *48 C.F.R. § 53.236-1(e)* has been amended to replace the date on the form reproduced here with "(Rev. 3/2005)" [*see 69 Fed. Reg. 14955 (2005)]* .

Contracting officers are required to provide access to presolicitation notices electronically through the government point of entry (GPE), via the Internet, for federal government procurement opportunities over $25,000 [*see 48 C.F.R. § 5.204*; www.FedBizOpps.gov; § 90B.20[1]].

Either the sealed bid method or the competitive proposal may be used when negotiating prices for construction [*48 C.F.R. §§ 36.103* (bids), 36.402 (proposals); *see* [2], *below* (item 2, type of solicitation)]. Most construction contracts are invitations for bids, however, and use similar procedures, contract format, and prescribed clauses as those used in contracts for supplies or services [*see § 90B.220 [1]*], with the most common differences as noted [*see* [c]-[h], *below*].

Paper copies of the form can be ordered by calling Federal Supply customer assistance at (800) 525-8027. The form also may be downloaded from the Department of General Services web site (GSA Forms Library) at http://www.gsa.gov/. The applicant may complete the application online and then print it or may print the application

and then fill it out manually. Instructions for completing the application are located at the web site.

[b] Negotiation Procedures

Procedures for negotiated procurements of construction are similar to those used for negotiating contracts for supplies or services [*see* 48 C.F.R. § 36.402]. For a discussion of negotiation procedures for competitive proposals, see *§ 90B.25[1][f]*.

[c] Specifications and Drawings

The Specifications and Drawings for Construction clause [*48 C.F.R. § 52.236-21*] must be included in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed $25,000 [*48 C.F.R. § 36.521*]. The clause specifies that the contractor must keep on the worksite a copy of the specifications and drawings to which the contracting officer must have access at all times [*see 48 C.F.R. § 52.236-21(a)*].

[d] Differing Site Conditions

The Differing Site Conditions clause [*48 C.F.R. § 52.236-2*] must be included in solicitations and contracts when a fixed-price construction contract or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to exceed $25,000 [*48 C.F.R. § 36.502*]. The clause provides for an adjustment in contract price if the contractor discovers that (1) the subsurface or latent physical conditions at the site differ materially from those indicated in the contract, or (2) unusual physical conditions exist that differ materially from those ordinarily encountered in the type of work specified in the contract [*48 C.F.R. § 52.236-2(a)*].

[e] Subcontracting

Government consent for subcontracting is generally not required under prime contracts that are firm-fixed-price or fixed-price with economic price adjustment provisions [*48 C.F.R. § 44.201-1(a)*]. However, if the prime contractor does not have an approved purchase system, consent is required if the subcontract is estimated to be over $100,000 or the subcontract is one of a number of contracts under the prime contract, with the same subcontractor for the the same supplies or services, that in the aggregate is estimated to be over $100,000 [*48 C.F.R. § 44.201-1(c), (d)*]. For government consent requirements for subcontracting, see *§ 90B.44[6]*.

Under the Anti-Kickback Act [*41 U.S.C. § 51 et seq.*], construction contracts must also contain an anti-kickback clause [*see 48 C.F.R. § 52.203-7*] that prohibits contractors from receiving, and subcontractors from making, payments or favorable treatment in relation to prime contracts for the government [*48 C.F.R. § 3.502-2*; *see § 90B.45[4]*].

[f] Labor Laws

There are three main labor laws applicable to construction contracts: the Davis-Bacon Act [*40 U.S.C. §§ 3141-3144, 3146, 3148*], requiring that minimum wage be paid to laborers and mechanics in construction contracts for over $2,000; the Kickback (Copeland) Act [*18 U.S.C. § 874*], making it unlawful to induce any person employed on a construction or repair project for the government to give up any part of his or her compensation; and the Contract Work Hours and Safety Standards Act [*40 U.S.C. § 3703 et seq.*], requiring that laborers on construction contracts be paid at least one and one-half times the basic rate of pay for hours worked in excess of 40 hours per week. For discussion of labor laws applicable to construction contracts, see *§ 90B.43[3][a][iii]*.

[g] Liquidated Damages Clause

A liquidated damages clause may be included if considered in the best interests of the government [*see 48 C.F.R. §*

11.502(a); *see also 48 C.F.R. § 52.211-12* (prescribed Liquidated Damages--Construction clause)]. This might occur, for example, when the time of delivery or performance is so important that the government could reasonably be expected to suffer damages in the event of failure of performance and the extent of damages would be difficult to discern. Construction contracts with liquidated damages provisions must describe the rates of the liquidated damages assessed per day of delay. The rates should include an amount for other expected expenses associated with delayed completion, such as renting substitute property, or paying additional allowance for living quarters [*48 C.F.R. § 11.502(b)*]. If the contract specifies more than one completion date for separate parts or stages of the work, the amount of liquidated damages for delay of each separate part or stage of the work should be stated [*48 C.F.R. § 11.503(b)*].

[h] Bonding

A bid bond is required for construction contracts when payment and performance bonds are required [*48 C.F.R. § 28.101-1(a)*]. Posting of payment and performance bonds is required for construction contracts exceeding the small purchase limitation [*48 C.F.R. § 28.102-1*]. Payment and performance bonds may also be required for contracts other than construction contracts [*see 48 C.F.R. § 28.103-1(a)*; *see also 48 C.F.R. §§ 28.103-2*, *28.103-3*]. For the forms used for posting bid and payment and performance bonds, see *§§ 90B.231-90B.234*.

[2] FORM

Solicitation, Offer and Award--Standard Form 1442

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Legal Topics:

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30-90B California Legal Forms--Transaction Guide § 90B.231

§ 90B.231 Bid Bond--Standard Form 24

[1] Comment

[a] Use of Form

This form is the official GSA bid bond, which is used by a contractor to submit a bid bond for a construction contract. Bid bonds are generally required only when payment and performance bonds are required [*48 C.F.R. § 28.101-1*; *see* [b], *below*].

Paper copies of the form can be ordered by calling Federal Supply customer assistance at (800) 525-8027. The form also may be downloaded from the Department of General Services web site (GSA Forms Library) at http://www.gsa.gov/. The applicant may complete the application online and then print it or may print the application and then fill it out manually. Instructions for completing the application are located at the web site.

[b] When Bid Bond Is Required

Standard Form 24, Bid Bond [*48 C.F.R. § 53.301-24*], is required when payment and performance bonds are required under a construction contract, and must accompany the response to a solicitation for bid [*48 C.F.R. § 28.101-1(a)*]. Payment and performance bonds are required for construction contracts exceeding $100,000 [*48 C.F.R. § 28.102-1(a)*; *see 48 C.F.R. § 28.102-1(b)* (exceptions)]. A bid bond states that the bidder will be able to obtain payment and performance bonds within a certain period of time, if a contract is awarded [*see 48 C.F.R. § 28.001*; *see also § 90B.22[5]*]. Payment and performance bonds may also be required for contracts other than construction contracts, thereby invoking the requirement for a bid bond [*see 48 C.F.R. § 28.103-1(a)*].

The chief of the contracting office may waive the requirement for a bid bond if he or she determines that it is not in the best interest of the government for a specific acquisition (such as overseas construction or emergency acquisitions) [*48 C.F.R. § 28.101-1(c)*].

For procedures used for the submission of bids, see *§ 90B.124*.

[c] Amount of Bond

The bid bond must be in an bid guarantee amount adequate to protect the government from loss if the successful bidder fails to execute further contractual documents and bonds as required. The bid guarantee amount must be at least 20 percent of the bid price, but must not exceed $3 million [*48 C.F.R. § 28.101-2*].

[2] FORM

Bid Bond--Standard Form 24

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Legal Topics:

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30-90B California Legal Forms--Transaction Guide § 90B.232

§ 90B.232 Performance Bond--Standard Form 25

[1] Comment

[a] Use of Form

This form is the official GSA performance bond, which is used by a contractor to submit a performance bond for a government contract [*48 C.F.R. § 28.102-1*; *see* [b], *below*].

Paper copies of the form can be ordered by calling Federal Supply customer assistance at (800) 525-8027. The form also may be downloaded from the Department of General Services web site (GSA Forms Library) at http://www.gsa.gov/. The applicant may complete the application online and then print it or may print the application and then fill it out manually. Instructions for completing the application are located at the web site.

[b] When Performance Bond Is Required

Standard Form 25, Performance Bond [*48 C.F.R. § 53.301-25*], is required for construction contracts exceeding $100,000 [*48 C.F.R. § 28.102-1(a)*; *see 48 C.F.R. § 28.102-1(b)* (exceptions)]. Performance bonds may also be required for contracts other than construction contracts [*see 48 C.F.R. § 28.103-1(a)*]. Performance bonds must be furnished by the successful bidder after the Notice of Award is given but before the contract is awarded [*48 C.F.R. § 28.102-1(c)*]. The contractor may not begin work until the required bonds have been furnished [*48 C.F.R. § 28.102-1(c)*].

For procedures relating to the posting of performance bonds, see *§ 90B.141*.

[c] Amount of Bond

The amount of the performance bond is normally 100 percent of the original contract price, plus an additional amount equal to 100 percent of any increase [*48 C.F.R. § 28.102-2(b)(1)*]. However, the contracting officer may determine that a lesser amount is adequate [*48 C.F.R. § 28.102-2(b)(1),(e)*], or that additional protection is required if the contract price

is increased [*48 C.F.R. § 28.102-2(d)*].

[2] FORM

Performance Bond--Standard Form 25

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Legal Topics:

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30-90B California Legal Forms--Transaction Guide § 90B.233

§ 90B.233 Payment Bond--Standard Form 25A

[1] Comment

[a] Use of Form

This form is the official GSA payment bond, which is used by a contractor to submit a payment bond for a government contract [*48 C.F.R. § 28.102-1*; *see* [b], *below*].

Paper copies of the form can be ordered by calling Federal Supply customer assistance at (800) 525-8027. The form also may be downloaded from the Department of General Services web site (GSA Forms Library) at http://www.gsa.gov/. The applicant may complete the application online and then print it or may print the application and then fill it out manually. Instructions for completing the application are located at the web site.

[b] When Payment Bond Is Required

Standard Form 25A, Payment Bond [*48 C.F.R. § 53.301-25-A*], is required for construction contracts exceeding $100,000 [*48 C.F.R. § 28.102-1(a)*; *see 48 C.F.R. § 28.102-1(b)* (exceptions)]. Payment bonds may also be required for contracts other than construction contracts [*see 48 C.F.R. § 28.103-1(a)*]. For other than construction contracts, a payment bond is required only when a performance bond is required [*48 C.F.R. § 28.103-3(a)*]. A payment bond must be furnished by the successful bidder after the Notice of Award is given but before the contract is awarded [*48 C.F.R. § 28.102-1(c)*]. The contractor may not begin work until the required bonds have been furnished [*48 C.F.R. § 28.102-1(c)*].

For procedures relating to the posting of payment bonds, see *§ 90B.141*.

[c] Amount of Bond

The amount of a payment bond must be no less than the amount of a performance bond [*48 C.F.R. § 28.102-2(b)(2)*; *see*

§ 90.232[1][c]]. For contracts exceeding $25,000 but not exceeding $100,000, the penal amount of the payment bond or the amount of alternate payment protection must equal 100 percent of the contract price, plus an additional amount equal to 100 percent of any increase [*48 C.F.R. § 28.102-2(b)(2)*]. The contracting officer also may reduce the amount of security to support a bond [*48 C.F.R. § 28.102-2(d)*], subject to specified limitations [*see 48 C.F.R. §§ 28.203-5(c), 28.204(b)*].

[2] FORM

Payment Bond--Standard Form 25A

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Legal Topics:

For related research and practice materials, see the following legal topics:
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30-90B California Legal Forms--Transaction Guide § 90B.234

§ 90B.234 Affidavit of Individual Surety--Standard Form 28

[1] Comment

[a] Use of Form

This form is the official GSA affidavit of an individual surety, which is submitted by a contractor in support of its bonds on a construction contract [*48 C.F.R. § 28.203*; *see* [b], [c], *below*].

Paper copies of the form can be ordered by calling Federal Supply customer assistance at (800) 525-8027. The form also may be downloaded from the Department of General Services web site (GSA Forms Library) at http://www.gsa.gov/. The applicant may complete the application online and then print it or may print the application and then fill it out manually. Instructions for completing the application are located at the web site.

[b] When Affidavit Is Required

Standard Form 28, Affidavit of Individual Surety [*48 C.F.R. § 53.301-28*], is prescribed for use when a contractor is using an individual surety for its bonds. The affidavit must be executed by the surety and submitted with the payment and performance bonds. The surety must also execute the bond. The unencumbered value of the assets pledged must equal or exceed the amount of each bond [*48 C.F.R. § 28.203(b)*; *see §§ 90B.232*, *90B.233* (bond forms)].

For procedures relating to the use of sureties and the submission of this affidavit, see *§ 90B.141*.

[c] Use of Sureties

All contracting agencies must obtain adequate security for bonds required or used on supplies and services contracts (including construction contracts). Acceptable forms of security include corporate or individual sureties, or other specified acceptable forms of security [*48 C.F.R. § 28.201(a)*; *see 48 C.F.R. §§ 28.204-1*, *28.204-2* (other forms of security)].

To be acceptable security, corporate sureties must appear on the list contained in Treasury Department Circular 570 [*48 C.F.R. § 28.202(a)(1)*].

Individual sureties are acceptable for all types of bonds except position schedule bonds. The contracting officer will determine the acceptability of individual sureties, and will ensure that the surety's pledged assets are sufficient to cover the bond obligation [*48 C.F.R. § 28.203(a)*]. Acceptable assets from an individual surety include cash, readily marketable assets, and irrevocable letters of credit from a federally insured financial institution [*see 48 C.F.R. § 28.203-2(a), (b)*; *see also 48 C.F.R. § 28.203-2(c)* (unacceptable assets)].

[2] FORM

Affidavit of Individual Surety--Standard Form 28

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Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsConstruction ContractsContracts LawTypes of ContractsGuaranty ContractsPublic Contracts LawBids & FormationOffer & AcceptanceGeneral OverviewPublic Contracts LawCosts & PricesGeneral OverviewPublic Contracts LawTypes of ContractsConstruction Contracts

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DIVISION VI: PERFORMANCE OF SERVICES
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A. Initiating the Contractual Relationship--Quotations, Bids, and Proposal Packages
4. Construction Contract

30-90B California Legal Forms--Transaction Guide §§ 90B.235-90B.239

[Reserved]

§§ 90B.235[Reserved]

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5. Architect and Engineer Services

30-90B California Legal Forms--Transaction Guide § 90B.240

§ 90B.240 Architect-Engineer Qualifications

[1] Comment

[a] Use of Form

This form, Standard Form (SF) 330, Architect-Engineer Qualifications, is the consolidated form for selection of architect-engineer contractors by federal agencies. The form replaces Standard Form 254, Architect-Engineer and Related Services Questionnaire, and Standard Form 255, Architect-Engineer and Related Services Questionnaire for Specific Project.

The form was created based on the results of a joint government-industry survey of the superseded forms. The objectives of this form are to merge the superseded forms into a single streamlined form, expand essential information about qualifications and experience, reflect current architect-engineer disciplines, experience types, and technology, eliminate information of marginal value, permit limitations on submission length, and facilitate electronic usage [*69 Fed. Reg. 1050]* .

Architect-engineer (A-E) firms must use this form to provide information to federal agencies about their professional qualifications [*48 C.F.R. § 53.236-2(b)*; *see 48 C.F.R. § 36.702(b)*]. Federal agencies use the information submitted on this form to evaluate and select the most highly qualified firms from which to make the final selection for the award of a contract [*see 48 C.F.R. § 36.602-3(a),(c)*; *see also* [b], *below*].

Part I of this form presents the qualifications for a specific contract; part II presents the general qualifications of a firm or of a specific branch of the firm [*see* [2], *below*].

This form is available online at the General Services Administration web site at www.gsa.gov/ and can also be found at *48 C.F.R. § 53.301-330*. For clarification of content, contact the Procurement Analyst at (202) 219-0202.

[b] Procedures for Acquisition of Services

Federal agencies obtain A-E services by negotiating in accord with distinct competitive procedures applicable only to A-E contracting [*48 C.F.R. § 36.103(b)*; *see 48 C.F.R. § 36.000 et seq.* (procedures)]. Firms interested in obtaining A-E contracts must file the form in [2], *below*, with the appropriate federal agency and regional or district office for construction activities [*48 C.F.R. § 36.603(b)*].

For discussion of A-E contracts, see *§ 90B.40[4]*. For procedures used in competing for A-E contracts, see *§ 90B.123*.

[2] FORM

Architect Questionnaire--Standard Form 254

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral OverviewPublic Contracts LawTypes of ContractsGeneral Overview

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5. Architect and Engineer Services

30-90B California Legal Forms--Transaction Guide § 90B.241

§ 90B.241 Architect-Engineer Contract--Standard Form 252

[1] Comment

[a] Use of Form

This form is the official GSA contract used by a contracting agency to award fixed-price contracts for architect-engineer (A--E) services [*48 C.F.R. § 52.236-2(a)*].

Standard Form 252, Architect-Engineer Contract [*48 C.F.R. § 53.301-252*], is prescribed for use for award of fixed-price contracts for A--E services, and includes the project description, location, and amount of the contract [*48 C.F.R. § 52.236-2(a)*; *see 48 C.F.R. § 36.702(a)*]. Pending issuance of a new edition of the form, Block 8, Negotiation Authority, is deleted [*48 C.F.R. § 52.236-2(a)*].

Paper copies of the form can be ordered by calling Federal Supply customer assistance at (800) 525-8027. The form also may be downloaded from the Department of General Services web site (GSA Forms Library) at http://www.gsa.gov/. The applicant may complete the application online and then print it or may print the application and then fill it out manually. Instructions for completing the application are located at the web site.

[b] Evaluation and Selection

Agency contracting officers acquire A--E services by negotiation in accord with distinct competitive procedures applicable only to A--E contracting [*48 C.F.R. § 36.103(b)*; *see 48 C.F.R. § 36.000 et seq.* (procedures for the acquisition of A & E services)]. The response of a firm to a solicitation, as indicated on Standard Form 252, is used by the agency evaluation board in conjunction with information and data submitted on Standard Form 330 [*see § 90B.240* A--E], and with reference to the prescribed selection criteria, to make an initial selection of the most highly qualified firms, before final selection of the firm to be awarded the contract [*48 C.F.R. § 36.602-3(a)-(c)*].

For a discussion of A--E contracts and the selection criteria used for award of such contracts, see *§ 90B.40 [4]*. For

procedures used in competing for A--E contracts, see *§ 90B.123*.

[2] FORM

Architect-Engineer Contract--Standard Form 252

Click here to view image.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral OverviewPublic Contracts LawTypes of ContractsGeneral Overview

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30-90B California Legal Forms--Transaction Guide §§ 90B.243-90B.249

[Reserved]

§§ 90B.243[Reserved]

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B. Bid Mistakes, Protests, and Claims
1. Correction of Bid Mistakes

30-90B California Legal Forms--Transaction Guide § 90B.250

§ 90B.250 Request for Correction of Mistaken Bid Before Award

[1] Comment

[a] Use of Form

This form is a letter from a bidder to the contracting officer in charge of a procurement requesting permission to correct a mistaken bid before award of the contract is made. Mistakes having to do with the bid actually intended may be corrected before or after the award [48 C.F.R. §§ 14.406-3 (before award), 14.406-4 (after award)]. Correction of mistakes in proposals before the award can be made during negotiations [*48 C.F.R. § 15.607(a), (b)*]. Minor informalities and irregularities in bids may be waived or corrected before the award if doing so does not prejudice other bidders [*48 C.F.R. § 14.405*]. Apparent clerical mistakes on their face may be corrected by the contracting officer before the award, such as obvious misplacement of decimal points or obvious incorrect discounts on verification by the bidder stating the bid actually intended [48 C.F.R. § 14.406-2].

This form is for use by a bidder who discovers a mistake in its bid before award [*see* 48 C.F.R. § 14.406-3(a)]. It may be adapted for use by a contractor who discovers, after the award has been made, that there is a mistake in the bid that led to award of the contract [*see* [c], *below*]. However, a post-award request for "correction" is actually a request either for an amendment to the contract, a supplemental agreement, or rescission or reformation of the contract [*see* 48 C.F.R. § 14.406-4(a), (b)]. For procedures used for correction of mistakes in bids or proposals after award, see *Section 90B.126*.

[b] Correction Before Award

If a bid, as submitted, was responsive to the solicitation, the bidder may request permission to correct a bid mistake before award; permission to correct a mistake in a bid may not be used to make an otherwise unresponsive bid responsive [48 C.F.R. § 14.406-3]. The request must be supported by clear and convincing evidence establishing both the existence of the mistake and the bid actually intended [48 C.F.R. § 14.406-3(a)]. However, if the correction would displace lower acceptable bids, the correction will not be allowed unless the existence of the mistake and the bid

actually intended are ascertainable substantially from the invitation for bid and the bid itself [48 C.F.R. § 14.406-3(a)].

If a bidder requests permission to withdraw a bid, rather than to correct it, and the evidence is clear and convincing both as to the existence of the mistake and as to the bid actually intended, and the bid, both as uncorrected and corrected, is the lowest bid received, the agency head may make a determination to correct, rather than to allow withdrawal [48 C.F.R. § 14.406-3(b)]. If a bidder requests permission to correct a mistake or to withdraw it, and the evidence of the mistake is clear and convincing only as to the mistake but not as to the intended bid or the evidence reasonably supports the existence of a mistake but is not clear and convincing, the bidder may be allowed to withdraw [48 C.F.R. § 14.406-3(c)].

[c] Correction After Award

If the bid mistake is not discovered until after a contract has been awarded, the contractor may seek only the contracting officer's agreement to either an amendment to the contract or a rescission or reformation of the contract [48 C.F.R. § 14.406-4(a), (b)]. An amendment may be approved only if the amendment would make the contract more favorable to the government without changing its essential requirements [48 C.F.R. § 14.406-4(a)]. A rescission or reformation deleting the items as to which a mistake is proven or increasing the price will be allowed if the new contract price does not exceed that of the next lowest acceptable bid [48 C.F.R. § 14.406-4(b)].

The request for relief must be supported with clear and convincing evidence that a mistake was made and either that it was mutual or that it was unilateral but so apparent that the contracting officer should be charged with notice of the probability that there was a mistake [48 C.F.R. § 14.406-4(c)].

The denial of the contractor's request to correct a mistake after the award may be disputed under the Disputes clause contained in the contract [*see* 41 C.F.R. §§ 14.406-4, 33.201 et seq. (disputes and appeals)]. For discussion of resolving claims and disputes under the Contract Disputes Act, see *Section 90B.61*. For procedures used for filing a claim or making a dispute under the Disputes clause, see *Section 90B.140*.

[d] Supporting Evidence

A request for the correction of a bid mistake, whether submitted before or after an award, must be supported with clear and convincing evidence [48 C.F.R. §§ 14.406-3(a), 14.406-4(c)]. The evidence for correction of the bid after the award may consist of written statements by the bidder (illustrated in this form), supported by such documents as the bidder's file copy of its bid, original worksheets and other data used in preparing the bid, any relevant quotations from subcontractors and suppliers, any published price lists bearing on the issue, and any other evidence that would serve to establish the mistake, the manner in which it occurred, and the bid actually intended [48 C.F.R. § 14.406-4(e)(1)].

[2] FORM

Request for Correction of Mistaken Bid Before Award

CLAIM OF BID MISTAKE

..... _____[*date*]

RE: Bid of [*name of claimant*]
Under I.F.B. No. _____,
Issued by: [*agency name*],
On _____ [*date of issue*].
TO: [*name of contracting officer*]

_____ [*name of issuing agency*]
_____ [*address*]

Please take note that the above referenced bid of _____[*name of claimant*] contains a mistake. The bid, which was opened on _____[*date*], was in the amount of $_____. That price, however, resulted from a mistake in bid. The intended bid was $_____. We hereby request correction of our bid from $[*mistaken bid price*] to $[*intended bid price*].

The bid price stated above is mistaken [*set forth reason for mistake, e.g.,* because of a clerical error in the assembly and transcription of quotes from the _____ (*type*) subcontractor] that resulted in _____[*set forth effect of mistake, e.g.,* a transposition of the subcontract price from $_____ (*correct price*) to $_____ (*lower price*)] so that the bid indicated a total price of $_____ instead of the intended $_____.

The following documents are submitted to support this claim of bid mistake: _____[*list documents, e.g.,* (1) quote of _____ (*name of subcontractor whose quote was mistakenly transposed*); (2) copy of our worksheet showing the transposition; (3) sworn statement of _____ (*name and title of person responsible for the mistake*) explaining the nature of the mistake; and (4) sworn statement of _____ (*name and title of bidder's treasurer, accountant, or comptroller*) explaining the effect of the mistake on other computations in our bid].

If there are any questions or if further evidence is required, please call _____[*name of individual making claim of bid mistake*], [*title*] of _____[*name of bidder*] at [*telephone number*].

_____ [*name of bidder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawBids & FormationGeneral OverviewPublic Contracts LawDispute ResolutionBid ProtestsPublic Contracts LawVoiding the ContractAmbiguity & MistakeGeneral Overview

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B. Bid Mistakes, Protests, and Claims
1. Correction of Bid Mistakes

30-90B California Legal Forms--Transaction Guide §§ 90B.251-90B.259

[Reserved]

§§ 90B.251[Reserved]

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B. Bid Mistakes, Protests, and Claims
2. Protest Against Award

30-90B California Legal Forms--Transaction Guide § 90B.260

§ 90B.260 Protest to Individual Agency or to General Accounting Office

[1] Comment

[a] Use of Form

This form is a letter for use by a bidder to protest the award or proposed award of a contract to any other bidder on the grounds that the protesting bidder, rather than the successful bidder, is the low responsive responsible bidder and the bidder to whom the contract should be awarded [*see 48 C.F.R. § 7.307(b)*]. It is not used to protest the results of calculations based on cost-comparison for which an informal administrative appeal process must be provided [*48 C.F.R. § 7.307*].

An interested party wishing to protest a contract award is encouraged to seek resolution with the contracting agency before filing a protest with the General Accounting Office (GAO) or, for protests against award of contracts for acquisition of automatic data processing equipment (ADPE), with the General Services Board of Contract Appeals (GSBCA) [*48 C.F.R. § 33.102(c)(1)*].

This form is for making a protest directly to the agency contracting officer and is adaptable for use for making a protest to the GAO. This form may be modified to protest a proposed award on any other ground, such as claimed defects in the procurement process, including defects in the specifications contained in the invitation for bids [*see* [e], *below*].

For the award protest procedures, see *Section 90B.127*. For a thorough discussion of the strategy and tactics of bid protests, see Steiger, Federal Contract Management, Volume 1, Chapter 6, *Bids and Awards* (Matthew Bender).

[b] Notice of Bid Rejection

When an award is made to a bidder other than the low bidder, the contracting agency must promptly notify the unsuccessful lower bidders that their bids were rejected, stating in general terms the reason for rejection [*48 C.F.R. § 14.408-1(a)(1)*]. The unsuccessful bidder may request additional information from the contracting officer, including the

name and address of the successful bidder, the contract price, and the place where an abstract of bids may be inspected [*see 48 C.F.R. § 14.408-1(c)*].

[c] Permitted Protests

Contracting officers are required to consider all protests or objections concerning the award of a contract, whether submitted before or after the award, and whether filed directly with the agency, the GAO, or with the GSBCA for protests regarding contracts for ADPE acquisitions [*see 48 C.F.R. § 33.102(a)*].

[d] Agency Protest

An interested party wishing to protest is encouraged to seek resolution with the agency before filing a protest with the GAO or the GSBCA [*48 C.F.R. § 33.102(c)(1)*]. Agency protests may be submitted by interested parties to the individual or location designated for the agency in the Service of Protest space on the bid or proposal form [*48 C.F.R. § 33.103(b)(1)*; *see 48 C.F.R. § 52.233-2* (prescribed Service of Protest clause)]. The written protest must include the following information [*48 C.F.R. § 33.103(b)(3)*]:

(1) The name, address, and telephone number of the protester;

(2) The identity of the issuing agency and the solicitation and/or contract number;

(3) A detailed statement of the factual and legal grounds of the protest, including relevant documents;

(4) A specific request for a ruling; and

(5) A statement of the relief requested.

For discussion of protests to the individual agency, see *Section 90B.60 [2]*. For procedures used for making protests to an individual agency, see *Section 90B.127*.

[e] Protest to General Accounting Office

In accord with GAO bid protest regulations [4 C.F.R. pt. 21 et seq.], a party wishing to do so may protest an award to the GAO [*48 C.F.R. § 33.102(c)(2)*]. The GAO will consider protests directed to it in advance of any protest to the procuring agency, including protests concerning solicitations and against awards and proposed awards [*see 4 C.F.R. § 21.1(a)*]. The GAO will also consider protests submitted initially to the procuring agency [*see 4 C.F.R. § 21.2(a)(3)*]. The protest filed with the GAO must include the following information [*4 C.F.R. § 21.1(c)*]:

(1) The name, address, and telephone number of the protester;

(2) The original protest signed by the protester and at least one copy;

(3) The identity of the issuing agency and the solicitation and/or contract number;

(4) A detailed statement of the factual and legal grounds of the protest, including relevant documents;

(5) A specific request for a ruling by the Comptroller general of the United States; and

(6) A statement of the relief requested.

No formal briefs or other technical forms, pleadings, or motions are required, but the protest submission should be concise, logically arranged, and clearly state legally sufficient grounds for the protest. A complete copy of the protest must be provided to the contracting officer no later than one day after it is filed with the GAO [*4 C.F.R. § 21.1(e)*].

An agency report must be filed with the GAO within 25 days from the date of notification to it of protest filed with the GAO. In addition, copies of the agency report must be furnished to all interested parties [*4 C.F.R. § 21.3(c)*]. Comments on the agency report must be filed within 10 days after receipt of the report; the protester's failure to file comments, file a written statement requesting that the case be decided on its merits, or to require an extension within a 10-day period, will result in dismissal of the protest [*4 C.F.R. § 21.3(j)*].

A hearing on the merits of the protest may, at the sole discretion of the GAO, be held at the request of the protester for purposes of resolving specific factual disputes essential to the resolution of the protest and that cannot be otherwise resolved from the record. Interested parties may submit written comments on matters developed at the conference within three days of receipt of a transcript of the hearing [*4 C.F.R. § 21.5(a)*]. This form includes a request for a bid protest hearing and the opportunity to comment on the submissions of other parties.

A decision by the Comptroller General of the GAO will be issued generally within 90 days following the filing of the protest [*4 C.F.R. § 21.7(a)*]. Any party may request reconsideration of the GAO's decision [*4 C.F.R. § 21.14(a)*]. For procedures used for making protests to the GAO, see *Section 90B.127*.

[f] Protest to the General Services Administration Board of Contract Appeals

The General Services Administration (GSA) has authority over government acquisition of automatic data processing equipment, including authority of the General Services Board of Contract Appeals (GSBCA) to review decisions of individual agencies' contracting officers regarding the award of such contracts [*48 C.F.R. § 33.102(a)*; *see* 48 C.F.R. pt. 61 (GSBCA rules)]. For discussion of protests to the GSBCA, see *Section 90B.60[4]*. For procedures used for making protests against an award generally, see *Section 90B.127*. This form is drafted for use for protest to the individual agency, but may be adapted for protest to the GSBCA regarding ADPE acquisitions.

[2] FORM

Protest to Individual Agency or to General Accounting Office

PROTEST AGAINST AWARD

..... _____[*date*]
RE: Award of contract under I.F.B. No. _____,
By [*contracting activity*],
On _____ [*date of award*].

[*Choose one of the following:*]

[*If protest is being made directly to the agency contracting officer, use:*]

TO: [*name of contracting officer*]
_____ [*name of issuing agency*]
_____ [*address*]

[*OR*]

[*If protest is being made to the GAO, use:*]

TO: General Counsel

General Accounting Office

441 G Street NW

Washington, D.C. 20548

[*Continue with the following:*]

Please take note that the undersigned, _____[*name*], of _____[*address*], protests the award on _____[*date*] of contract number _____ for [*describe procurement*] pursuant to Invitation for Bids No. _____, _____[*date*], issued by _____[*name of procurement entity of issuing agency*]. The award was made following the opening of bids on _____[*date*].

The undersigned protests the award on the ground that [*state reason, e.g.*, it was the lowest responsive, responsible bidder] and, pursuant to [*cite governing procurement regulation*], should receive the award. The undersigned was the _____[*e.g.*, lowest responsive, responsible bidder because _____ (*specify facts substantiating protestant's claim*)]. The successful bidder was not the _____[*e.g.*, lowest responsive, responsible bidder because _____ (*specify substantiating facts*)]. The following documents are submitted to support this protest: [*list documents*].

[*If protest is being made directly to the agency contracting officer:*]

The undersigned requests a ruling by the _____[*name of agency*] on this protest. The undersigned also requests the following relief: [*specify type of relief requested*].

[*OR*]

[*If protest is being made to the GAO:*]

The undersigned requests a bid protest hearing and the opportunity to comment on the submissions of other parties. The undersigned also requests a decision of the Comptroller General on this protest. A copy of this protest has been transmitted to the Contracting Officer, [*name of contracting officer*], at _____[*contracting officer's official address*].

[*Continue with the following:*]

_____ [*name of bidder*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Public Contracts LawDispute ResolutionGeneral OverviewPublic Contracts LawDispute ResolutionBid Protests

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 90B FEDERAL GOVERNMENT CONTRACTS
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B. Bid Mistakes, Protests, and Claims
2. Protest Against Award

30-90B California Legal Forms--Transaction Guide §§ 90B.261-90B.269

[Reserved]

§§ 90B.261[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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B. Bid Mistakes, Protests, and Claims
3. Contract Claims and Disputes

30-90B California Legal Forms--Transaction Guide § 90B.270

§ 90B.270 Initial Claim of Contractor Under Disputes Clause--Claim Directed to Contracting Officer

[1] Comment

[a] Use of Form

This form is a letter for use by a contractor to initiate a claim against the contracting agency pursuant to the Disputes clause [*see 48 C.F.R. § 52.233-1*] and any other pertinent clause contained in the contract. The contractor's claim must be initiated by submission in writing to the contracting officer for decision [*48 C.F.R. § 33.206(a)*]. This form includes a certification [*see* [2] P 6, *below*] for use when the claim involves more than $100,000 (or any claim, regardless of amount, when using alternative dispute resolution), as required by the Contract Disputes Act, and states that the claim is made in good faith, is supported with accurate and complete data, that the amount requested reflects the contract adjustment for which the contractor believes the government is liable, and that the person signing the form is authorized to certify the claim on behalf of the contractor [*48 C.F.R. § 33.207(a), (c), (e)*; *see 48 C.F.R. § 52.233-1(d)(2)(iii)*]. This form also includes a paragraph formally demanding the relief sought as well as a final decision on the subject by the contracting officer.

For discussion of resolving contract claims and disputes, see *§ 90B.61*. For procedures used in filing claims, see *§ 90B.140*.

[b] Claims Arising Under the Contract

A claim is a written demand or assertion by one of the contracting parties seeking, as a legal right, the payment of money, an adjustment or interpretation of contract terms, or other relief arising under or related to the contract [*48 C.F.R. § 2.101*]. However, a written demand or written assertion by the contractor seeking the payment of money exceeding $100,000 is not a "claim" under the Contract Disputes Act of 1978 [*41 U.S.C. § 601 et seq.*] until certified as required by the Act [*48 C.F.R. § 2.101*]. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by written notice to the contracting officer as provided in *48 C.F.R. § 33.206(a)*, if it is disputed either as to liability or amount or is not acted upon in a reasonable

time [*48 C.F.R. § 2.101*].

A claim "arising under" a contract, unlike a claim "relating to" that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant [*48 C.F.R. § 33.213(a)*]. Thus, for example, a contractor's claim could be for more money or more time in which to perform the contract under the Changes clause [*see 48 C.F.R. §§ 52.243-1-52.243-7*], or the conversion of a termination of the contract for default to a termination for the convenience of the government under the provisions of the Termination for Convenience of the Government clause [*see 48 C.F.R. §§ 52.249-1-52.249-5*]. Claims for reformation of the contract or monetary relief in mitigation of a unilateral bid mistake are also proper legal claims subject to this process [*see Paragon Energy Corp. v. United States (Ct. Cl. 1981) 645 F.2d 966, 975]* .

[c] Fraudulent Claims

The contents of a claim should be carefully considered. If a contractor cannot support any part of the claim and it is determined that the inability is attributable to misrepresentation of fact or fraud, the claim will be referred to the agency office responsible for investigating fraud [*48 C.F.R. § 33.209*]. For discussion of fraudulent claims, see *§ 90B.61[2][b]*.

[d] Decision by Contracting Officer

The contracting officer must issue a written decision and mail or deliver a copy of it to the contractor. The decision must include a description of the claim or dispute, state the reasons for the contracting officer's decision, and inform the contractor of its rights of appeal [*48 C.F.R. § 33.211(a)(4)(i)-(v)*]. Specific findings of fact are not required. If they are made, they are not binding in subsequent appeals [*41 U.S.C. § 605(a)*]. The decision is final and conclusive and is subject only to review by the agency board of contract appeals or the Court of Federal Claims [*48 C.F.R. § 33.211(a)(4)(v)*; *see 41 U.S.C. § 605(b)*]. The failure of the contracting officer to issue a decision within the time required will be deemed a denial by the contracting officer and will authorize the contractor to file an appeal or suit on the claim [*48 C.F.R. § 33.211(g)*].

[e] Interest on Amounts Due on Claims

A contractor is entitled to interest on amounts found undue and unpaid from (1) the date the contracting officer receives the claim (properly certified if required), or (2) the date payment would otherwise be due, if that date is later [*48 C.F.R. § 33.208(a)*]. Interest is paid at the rate established by the Secretary of the Treasury [*48 C.F.R. § 33.208(b)*].

[f] Contractor's Right of Appeal

The contractor may appeal a contracting officer's decision to the contracting agency's board of contract appeals or to the Court of Federal Claims [*48 C.F.R. § 33.211(a)(4)(v)*]. For the form used for noticing an appeal to an agency board of contract appeals, see *§ 90B.271*.

[2] FORM

Initial Claim of Contractor Under Disputes Clause--Claim Directed to Contracting Officer

CONTRACTOR'S CLAIM IN CONTRACT DISPUTE
RE: Claim Under Disputes Clause Contained in Contract No. _____

[*Name of contracting officer*]
Contracting Officer

_____[*Name of procurement entity*]

_____[*address*]

Summary of Claim

1. This is a claim by [*name of contractor*] (the contractor), against the United States of America, as represented by _____[*name of procurement entity*] (the Government), under Contract Number _____, of _____[*date*] (the contract). The contractor claims [*set forth summary of claim, including whether claim is for money (indicating amount claimed), more time for performance, conversion of termination for default to termination for convenience of the government, or a combination of these*] and seeks such other relief as may be appropriate.

Contract Bases for Claim

2. This claim is presented under the provisions of Paragraph _____, the Disputes clause, of the contract. That clause reads as follows:

"_____ [*Indent and set forth number and contents of Disputes clause verbatim*]."

The following provisions of the contract also have a bearing on this claim:

"_____ [*Indent and set forth number and contents of each clause verbatim*]."

Factual Statement Concerning Claim

3. This claim arises from the fact that _____[*set forth factual statement of events giving rise to claim*]. These facts are evidenced by [*specify all documentary evidence to be submitted with claim*], which [is *or* are] attached. The [*summarize event or events giving rise to claim, e.g.,* constructive change imposed by the government] caused _____[*state all of the effects resulting from the cited causal event, referring to documentary or other proof supporting chain of causation*]. The [additional cost of performance *or* delay in performance *or other claimed effect*] [was partially the *or* was entirely without any] fault of the contractor. _____[*If claimed effect was partially the contractor's fault, add:* The extent to which the _____ (*claimed effect*) was the contractor's fault and diminished the contractor's claim to the amount stated above is _____ (*specify dollar or other amount*)].

Support for Claim

4. [*If the claim is for money or more performance time, add the following:* This claim for _____[$_____ *or* _____ (*number of additional days*)] is based on _____[the following calculations *or* the _____ (accounting data *or* computations *or* computer computations) attached as Exhibit A].

[*Continue with the following:*]

The contractor is entitled to [the relief sought *or* the money claimed] and the government is liable to the contractor therefor under [*set forth citation of authority, including statutes, executive orders, procurement regulations, court*

decisions, decisions of boards of contract appeals, Comptroller General decisions, or other authority] stating that [*specify pertinent statement of law or decision cited to support contractor's position that government is liable for and contractor is entitled to relief sought*].

Demand

5. Based on the above, the contractor hereby demands [*specify relief sought*]. Accordingly, the contractor hereby demands a decision by the Contracting Officer with respect to the claim stated herein.

[*Add the following certificate if the claim exceeds $100,000:*]

Certificate

6. I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

[*Continue with the following:*]

_____ [*name of contractor*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawRemediesGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral OverviewPublic Contracts LawDispute ResolutionGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 90B FEDERAL GOVERNMENT CONTRACTS
PART IV. FORMS
B. Bid Mistakes, Protests, and Claims
3. Contract Claims and Disputes

30-90B California Legal Forms--Transaction Guide § 90B.271

§ 90B.271 Notice of Appeal of Contracting Officer's Final Decision on Contract Claim to Agency Board of Contract Appeals

[1] Comment

[a] Use of Form

This form is a contractor's notice that it is appealing a contracting officer's decision on a disputed claim. This notice of appeal is given in order to initiate the appeal process and it must be filed with the contracting agency's board of contract appeals within 90 days from the date on which the contractor receives the contracting officer's decision. The contractor may appeal after the contracting officer's final decision is received [48 C.F.R. § 32.211]. A copy of this notice must be furnished to the contracting officer [48 C.F.R. § 32.211(a)(4)(v); *41 U.S.C. § 606*].

The contractor may elect to use the board's expedited procedures for small claims of $10,000 or less, with simplified rules of procedure and a decision rendered within 120 days, or accelerated procedures for disputes of $50,000 or less, with a decision rendered within 180 days [48 C.F.R. § 32.211(a)(4)(v)].

[b] Decision by Agency Board of Contract Appeals

Each agency's board of contract appeals has jurisdiction to decide any appeal from a decision of a contracting officer relating to (1) a contract made by its agency, or (2) a contract made by another agency if that agency has delegated jurisdiction. The board may grant any relief that would be available in the Court of Federal Claims, such as damages for breach of contract, compensation for changes or constructive changes, or time or other adjustments [*41 U.S.C. § 607(d)*].

[c] Review of Board's Decision

The contractor or the agency may appeal a decision of the agency board of contract appeals to the Court of Appeals for the Federal Circuit within 120 days after receipt of a copy of the decision [*41 U.S.C. § 607(g)(1)*]. On review, a board

decision on any question of law is not final or conclusive. However, a decision on any question of fact is final and conclusive and may not be set aside unless it is fraudulent, so arbitrary, capricious, or grossly erroneous as to necessarily imply bad faith, or not supported by substantial evidence [*41 U.S.C. § 609(b)*].

[d] Contractor's Duty to Continue Performance

The standard Disputes clause used in government contracts requires that, pending final decision of an appeal or action, a contractor must proceed with performance of the contract in accordance with the contracting officer's decision [*48 C.F.R. § 33.213(a), 41 U.S.C. § 605(b)*]. This requirement applies to claims, appeals, and actions whether arising under a contract or relating to it [*see 48 C.F.R. § 33.213*; *see also 48 C.F.R. § 52.233-1(i)* (Disputes clause)].

[2] FORM

Notice of Appeal of Contracting Officer's Final Decision on Contract Claim to Agency Board of Contract Appeals

NOTICE OF APPEAL
RE: Appeal of Decision of
Contracting Officer,
No. _____,
Dated: _____,
Under Contract No. _____.

_____[*Name of agency*]
Board of Contract Appeals
_____[*address*]

This is a notice of appeal from the decision _____[*set forth decision number and/or date or other identification*] of [*name of contracting officer*], Contracting Officer for [*name of contracting agency and procurement entity*], with respect to the claim of contractor, [*name of contractor appealing contracting officer's decision*], under contract number _____, _____[*date*], by and between contractor and [*name of contracting agency and procurement entity*].

The contractor claimed [*set forth summary of claim including whether claim was for money (indicating amount claimed), more time for performance, conversion of termination for default to termination for convenience of the government, or a combination of these*]. A copy of the contractor's demand on the Contracting Officer and the data submitted in support thereof is attached as Exhibit A. The Contracting Officer has denied the contractor's claim on the grounds that [*paraphrase basis for denial stated by contracting officer*]. A copy of the Contracting Officer's denial is attached as Exhibit B. Accordingly, the nature of the dispute is [*summarize exact point or points in dispute*].

_____ [*name of contractor*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureAppealsGeneral OverviewContracts LawRemediesGeneral OverviewPublic Contracts LawBids & FormationOffer & AcceptanceGeneral OverviewPublic Contracts LawDispute ResolutionGeneral OverviewPublic Contracts LawDispute ResolutionU.S. Comptroller General & U.S. Government Accountability Office

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 91 CONTRACTS WITH SALES REPRESENTATIVES

30-91 California Legal Forms--Transaction Guide 91.syn

§ 91.syn Synopsis to Chapter 91: CONTRACTS WITH SALES REPRESENTATIVES

§ 91.01 California Sources

§ 91.02 Federal Sources

§ 91.05 Law Reviews and Periodicals

§ 91.06 Annotations

§ 91.07 Text References

§ 91.10 General Characteristics of Agency Relationships

§ 91.11 Manufacturer's or Supplier's Agent

§ 91.12 Distributor

§ 91.13 Consignee

[1] Elements of Consignment

[2] Duty of Disclosure

§ 91.14 Commission Merchant

[1] Terminology

[2] Authority and Operations of Commission Merchant

[3] Consignment or Farm Products to Commission Merchant

§ 91.15 Independent Wholesale Sales Representative

§ 91.30 Federal Antitrust Regulation

[1] Sherman Antitrust Act

[2] Clayton Act and Robinson-Patman Antidiscrimination Act

[3] Federal Trade Commission Act

[4] Structuring Sales Agencies to Avoid Antitrust Violations

§ 91.31 California Antitrust Regulation

[1] Cartwright Act

[2] Unfair Practices Act

[3] Unfair Competition Act

§ 91.32 Foreign Corrupt Practices Act

§ 91.40 Classification of Sales Representative as Independent Contractor

§ 91.41 Tax Treatment of Consignment and Commission Merchant Transactions

§ 91.42 Tax Treatment of Distributorship

§ 91.100 Facts

Scope

§ 91.101 Documents

Scope

§ 91.110 Relationship Between Principal and Representative

Scope

§ 91.120 Contract With Manufacturer's or Supplier's Agent

Scope

§ 91.121 Distributorship Agreement

Scope

§ 91.122 Consignment Agreement

Scope

§ 91.123 Special Provisions for Contract With Commission Merchant

Scope

§ 91.124 Special Requirements for Independent Wholesale Sales Representative Contract

Scope

§ 91.200 Agreement Between Manufacturer or Supplier and Sales Representative--General Form

[1] Comment--Use of Form

[2] Form

Scope

§ 91.201 Agreement Between Manufacturer or Supplier and Sales Representative Handling Only Principal's Products

[1] Comment--Use of Form

[2] Form

Scope

§ 91.210 Agreement Between Manufacturer or Supplier and Distributor

[1] Comment--Use of Form

[2] Form

Scope

§ 91.211 Agreement Between Manufacturer or Supplier and Distributor--Overseas Distributorship

[1] Comment--Use of Form

[2] Form

Scope

§ 91.212 Distributorship Provision--Nonexclusive Appointment

[1] Comment--Use of Form

[2] Form

Scope

§ 91.213 Distributorship Provision--Nonexclusive Appointment But With Primary Responsibility for Designated Territory

[1] Comment--Use of Form

[2] Form

Scope

§ 91.214 Distributorship Provision--Purchase Price of Products

[1] Comment--Use of Form

[2] Form

Scope

§ 91.215 Distributorship Provision--Change of Price

[1] Comment--Use of Form

[2] Form

Scope

§ 91.216 Distributorship Provision--Minimum Purchase

[1] Comment--Use of Form

[2] Form

Scope

§ 91.217 Distributorship Provision--Delivery of Products

[1] Comment--Use of Form

[2] Form

Scope

§ 91.218 Distributorship Provision--Suggested Sales Price on Resale of Products

[1] Comment--Use of Form

[2] Form

Scope

§ 91.219 Distributorship Provision--Retention of Title as Security for Performance

[1] Comment--Use of Form

[2] Form

Scope

§ 91.220 Distributorship Provision--Deposit as Security for Performance

[1] Comment--Use of Form

[2] Form

Scope

§ 91.221 Distributorship Provision--Warranty of Quality

[1] Comment--Use of Form

[2] Form

Scope

§ 91.222 Distributorship Provision--Catalogs and Advertising Matter

[1] Comment--Use of Form

[2] Form

Scope

§ 91.223 Distributorship Provision--Notice of Claims

[1] Comment--Use of Form

[2] Form

Scope

§ 91.230 Consignment Agreement--Letter Form

[1] Comment--Use of Form

[2] Form

Scope

§ 91.231 Consignment Agreement With Vehicle Dealer

[1] Comment--Use of Form

[2] Form

Scope

§ 91.240 Consignment Agreement With Commission Merchant

[1] Comment--Use of Form

[2] Form

Scope

§ 91.241 Consignment Agreement for Sale of Farm Products--Letter Form

[1] Comment--Use of Form

[2] Form

Scope

§ 91.250 Agreement Between Independent Wholesale Sales Representative and Manufacturer, Jobber, or Distributor

[1] Comment--Use of Form

[2] Form

Scope

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 91 CONTRACTS WITH SALES REPRESENTATIVES

30-91 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers agreements for the services of various kinds of independent sales representatives who sell products of manufacturers and suppliers. Included are discussion, drafting guides, and forms for agreements with manufacturers' and suppliers' agents, distributors, consignees, commission merchants, and independent wholesale sales representatives. For general coverage of sales of goods, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

This chapter does not cover employment contracts with sales representatives who are employees of manufacturers and suppliers. For employment contracts, including those with sales personnel, see Ch. 85, *Employment Agreements* .

This chapter does not cover agency agreements, used in transactions involving sales or exchanges of real property, which are dealt with in Ch. 21, *Agreements With Real Estate Brokers and Agents*.

For coverage of distributorships that operate as franchises, see Ch. 51A, *Franchise Registration* .

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PART I. RESEARCH GUIDE
A. Primary Sources

30-91 California Legal Forms--Transaction Guide § 91.01

§ 91.01 California Sources

Cartwright Act. *Cal. Bus. & Prof. Code § 16700 et seq.*

Unfair Practices Act. *Cal. Bus. & Prof. Code § 17000 et seq.*

Unfair Competition Act. *Cal. Bus. & Prof. Code § 17200 et seq.*

Independent Wholesale Sales Representatives Contractual Relations Act of 1990. *Cal. Civ. Code § 1738.10 et seq.*

Factors (commission merchants). *Cal.Civ. Code §§ 2026 et seq., 2367 et seq.*

Agency. *Cal. Civ. Code § 2295 et seq.*

Criminal penalties for consignee's failure to make necessary disclosures. *Cal. Penal Code §§ 536, 536a*.

Requirements for commission merchants selling farm products. *Cal.Food & Agric. Code §§ 56105, 56271 et seq.*

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A. Primary Sources

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§ 91.02 Federal Sources

Sherman Antitrust Act. *15 U.S.C. § 1 et seq.*

Clayton Act. *15 U.S.C. § 12 et seq.*

Federal Trade Commission Act. *15 U.S.C. § 41 et seq.*

Foreign Corrupt Practices Act. *15 U.S.C. § 78dd-1 et seq.*

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PART I. RESEARCH GUIDE
B. Secondary Sources

30-91 California Legal Forms--Transaction Guide § 91.05

§ 91.05 Law Reviews and Periodicals

Barak Y. Orbach, *Antitrust Vertical Myopia: The Allure of High Prices, 50 Ariz. L. Rev. 261 (2008)*

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B. Secondary Sources

30-91 California Legal Forms--Transaction Guide § 91.06

§ 91.06 Annotations

Annot., Construction and Application of Foreign Corrupt Practices Act of 1977, 6 A.L.R. Fed. 2d 351 (2005)

Annot., Primary-Line Price Discrimination Under § 2(a) of the Clayton Act, as Amended by the Robinson-Patman Price Discrimination Act (*15 U.S.C.A. § 13(a)*), *171 A.L.R. Fed. 581 (2001)*

Annot., "Meeting Competition" Defense Under § 2(b) of Clayton Act, as Amended by Robinson-Patman Act (*15 U.S.C.A. § 13(a)*), *164 A.L.R. Fed. 633 (2000)*

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B. Secondary Sources

30-91 California Legal Forms--Transaction Guide § 91.07

§ 91.07 Text References

Rabkin & Johnson, Current Legal Forms with Tax Analysis (Matthew Bender).
Ch. 4, *Sale of Goods*
Ch. 12, *Employment and Compensation*

California Legal Forms (Matthew Bender).
Ch. 42, *Secured Transactions*
Ch. 50, *Advertising and Promotion*
Ch. 51, *Franchise Agreements*

California Forms of Pleading and Practice (Matthew Bender).
Ch. 7, *Action for Accounting*
Ch. 150, *Conversion*

California Points and Authorities(Matthew Bender).
Ch. 12, *Accounting*

von Kalinowski et al., Antitrust Laws and Trade Regulation (2d ed. Matthew Bender)
Ch. 1, *Antitrust Policy and Enforcement*
Ch. 2, *The Sherman Act*
Ch. 3, *The Clayton Act*
Ch. 11, *Restraints of Trade: An Introduction*
Ch. 13, *Horizontal Price Fixing*
Ch. 14, *Horizontal Market Allocation*
Ch. 18, *Vertical Price Restraints*
Ch. 19, *Nonprice Vertical Restraints*
Ch. 21, *General Principles Relating to All Exclusionary Purchasing Arrangements*

Ch. 22, *Tying Arrangements*
Ch. 23, *Exclusive Dealing/Requirements Contracts and Reciprocal Dealing Arrangements*
Ch. 105, *California*

Antitrust Counseling and Litigation Techniques (Matthew Bender).
Ch. 9, *Franchising: Antitrust Considerations*
Ch. 10, *Terminating Distributor Relationships*
Ch. 11, *How To Analyze Dual Distribution Problems*

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 91 CONTRACTS WITH SALES REPRESENTATIVES
PART II. LEGAL BACKGROUND
A. Legal Relationship Between Seller and Sales Representative

30-91 California Legal Forms--Transaction Guide § 91.10

§ 91.10 General Characteristics of Agency Relationships

A sales representative is usually an agent of the manufacturer or producer whose products are being sold. Generally, an agent is one who represents another (the principal) in dealings with third persons [*Cal. Civ. Code § 2295*; *see* Restatement (Second) of Agency § 1(1)]. Any person having capacity to contract may appoint an agent, and any person may be an agent [*Cal. Civ. Code § 2296*].

The sales agency relationships discussed in this chapter are actual agencies created by express agreement of the parties [*see Cal. Civ. Code § 2299* (agency is actual when principal really employs agent)]. However, an ostensible agency may arise when a principal engages in conduct that leads a third person to believe that the principal has employed another to be his or her agent [*see Cal. Civ. Code §§ 2300, 2317*]. For example, an ostensible agency may result on the termination of a contract sales agency if the principal does not take steps to ensure that advertising materials are revised to reflect that the former agent no longer represents the principal.

A sales agency may take one of several forms, depending primarily on which party has possession and title to the products subject to the agreement. Thus, for example, an agent selling products on behalf of a principal may be classified as a traditional sales representative [*see § 91.11*], a consignee [*see § 91.13*], a commission merchant [*see § 91.14*], or an independent wholesale representative [*see § 91.15*]. In contrast, a distributor generally purchases goods from a manufacturer or supplier and resells the goods for the distributor's own account. Thus, at least with regard to the act of reselling the goods, the distributor is not an agent of the manufacturer or supplier, although the distributor may be deemed an agent based on other circumstances (for example, by servicing products under the manufacturer's warranty) [*see Cal. Civ. Code § 2295* (agent is "one who represents another ... in dealings with third persons"); *Alvarez v. Felker Mfg. Co. (1964) 230 Cal. App. 2d 987, 1000, 41 Cal. Rptr. 514* (buyer-seller relation between distributor and the manufacturer or supplier is not agency); *see also § 91.12*].

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DIVISION VI: PERFORMANCE OF SERVICES
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PART II. LEGAL BACKGROUND
A. Legal Relationship Between Seller and Sales Representative

30-91 California Legal Forms--Transaction Guide § 91.11

§ 91.11 Manufacturer's or Supplier's Agent

A manufacturer's or supplier's agent is one who sells the goods of a manufacturer or supplier to retailers or others, generally on an extended contractual basis within a territory that may be exclusive or nonexclusive. The agent may have limited authority with regard to the prices and terms of sales. Typically, the agent generally also handles noncompeting but related lines of goods. This type of agent also is sometimes referred to as a "selling agent," "sales agent," "broker," or "manufacturer's representative."

A manufacturer's or supplier's agent ordinarily has neither possession of nor title to the goods that the agent sells. Rather, the agent sells on the basis of a sample or samples, taking purchasers' orders and forwarding them to the manufacturer or supplier for acceptance. The manufacturer or supplier then fills the orders accepted and ships directly to the purchasers. This manner of operation distinguishes the manufacturer's or supplier's agent from a distributor, consignee, and commission merchant [see *§§ 91.12*, *91.13*, *91.14*].

A manufacturer's or supplier's agent who solicits wholesale orders only is called an "independent wholesale sales representative" and is subject to special statutory requirements [*see Cal. Civ. Code § 1738.10 et seq.*]. For detailed discussion, see *§ 91.15*].

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PART II. LEGAL BACKGROUND
A. Legal Relationship Between Seller and Sales Representative

30-91 California Legal Forms--Transaction Guide § 91.12

§ 91.12 Distributor

A distributor is a sales representative that purchases products from the manufacturer or supplier for resale. Thus, title to the goods passes to the distributor at the time of delivery of the products to the distributor from the manufacturer or supplier. Distributors generally operate at the wholesale level, selling only to retail outlets, but some distributors sell partially or entirely to retail customers.

A distributor differs from a manufacturer's or supplier's agent, and from a consignee, in that the distributor has both possession of and title to the goods that the distributor sells, while a consignee has only possession and not title [*see § 91.13*], and a manufacturer's or supplier's agent has neither possession nor title [*see § 91.11*].

Nonmutual profit is inherent in the contractual relationship between a distributor and a manufacturer. The manufacturer is free to make pricing and distribution decisions for the purpose of increasing profits at the expense of distributors. Although, such decisions usually are made to increase the manufacturer's overall sales and have the effect of benefiting both the manufacturer and the distributors. However, since nonmutual profit is inherent in the relationship, it is not a fiduciary relationship [*Rickel v. Schwinn Bicycle Co. (1983) 144 Cal. App. 3d 648, 654-655, 192 Cal. Rptr. 732* (manufacturer had no fiduciary duty to exercise good faith in deciding whether to approve proposed buyer of distributor's business)].

Distributors are commonly used by manufacturers or suppliers for the marketing of automobiles and automotive parts, electronic equipment and supplies, machine tools and related equipment, plumbing fixtures and supplies, hospital equipment and supplies, furniture, drugs, and toiletries, jewelry, and paper supplies. A distributor may handle the products of only one manufacturer or supplier, or those of several noncompeting manufacturers or suppliers.

A distributor that handles the products of only one manufacturer or supplier may operate as a franchise. The discussion and forms in this chapter focus on nonfranchised distributors. For coverage of franchising, see Ch. 51, *Franchise Agreements* .

A distributorship may or may not include an agency relationship. Considered in isolation, the distributor's sales to its

customers are for the distributor's own account rather than on behalf of the manufacturer or supplier. Thus, the buyer-seller relation between the distributor and the manufacturer or supplier is not an agency relationship [*see Cal. Civ. Code § 2295* (agent is "one who represents another ... in dealings with third persons")]. However, other circumstances may lead to a finding that the distributor is acting as the manufacturer's or supplier's agent [*see Alvarez v. Felker Mfg. Co. (1964) 230 Cal. App. 2d 987, 1000, 41 Cal. Rptr. 514* ("One who receives goods from another for resale to a third person is not thereby the other's agent in the transaction: whether he is an agent for this purpose or is himself a buyer depends upon whether the parties agree that his duty is to act primarily for the benefit of the one delivering the goods to him or is to act primarily for his own benefit." (quoting Restatement (Second) of Agency, § 14J].

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PART II. LEGAL BACKGROUND
A. Legal Relationship Between Seller and Sales Representative

30-91 California Legal Forms--Transaction Guide § 91.13

§ 91.13 Consignee

[1] Elements of Consignment

A consignment is an agency relationship in which the consignor (the manufacturer or supplier) places goods in the possession of the consignee (the sales agent), who then sells the goods to the ultimate purchasers. Until an item is sold to the ultimate purchaser, the consignor retains ownership of the product. While in the hands of the consignee, the goods are referred to as being "on consignment," or sometimes "on memorandum," "on behalf of seller," or "in trust." Although the consignee acts as the agent of consignor's agent in procuring a sale of the product, that relationship does not necessarily create fiduciary duties between the parties [*see* City of Hope Nat'l Med. Ctr. v. Genentech, Inc. (Apr. 24, 2008) _____ Cal. 4th _____, _____ Cal. Rptr. 3d _____, _____ P.3d _____, *2008 Cal. LEXIS 4435, at *25* (stating, in dictum, that " no court has ever held or suggested, as far as we know, that [when a car owner takes the car to a garage for repairs,] the garage operator owes fiduciary duties to the car owner. A similar situation might be presented when a manufacturer entrusts its product to a retailer on consignment.")].

A consignee differs from a distributor and from a manufacturer's or supplier's agent, in that the consignee has possession of the goods but not title to them, while a distributor has both title and possession [*see § 91.12*], and a manufacturer's or supplier's agent has neither [*see § 91.11*]. Thus, it is a misnomer to refer to a consignment as a "consignment sale," since the consignee is not a purchaser. The ownership of the goods does not move to or through the consignee; it moves directly from consignor to purchaser [*cf. Cal. U. Com. Code § 2326(4)* (personal, family, or household goods consigned for sale do not become property of consignee unless consignee purchases and fully pays for goods)].

The consignees discussed in this chapter are those whose primary business is selling goods on consignment. However, if the consignee is a merchant thatis not generally known by its creditors to be substantially engaged in selling the goods of others, the consignment agreement can create a security interest in the goods in favor of the consignor, so as to provide protection against claims of the consignee's creditors [*see Cal. U. Com. Code §§ 9102(a)(12)(C), (20), 9109(a)(4)*]. For detailed coverage of the creation and perfection of security interests in personal property, see Ch. 42, *Secured Transactions* .

[2] Duty of Disclosure

A consignee, commission merchant, broker, or factor [*see § 91.14*] to whom any property is consigned or entrusted for sale generally must, when accounting for the property or subsequently on the written demand of the principal or consignor, prepare a written statement setting forth the name and address of the person or persons to whom the property (or any part of it) was sold, the quantity sold to each purchaser, and the prices obtained for the property. However, unless a separate written demand is made, prior to sale, as to each consignment or shipment, it is sufficient to set forth in the statement only as much of the required information as can be obtained from the books of account kept by the consignee, commission merchant, broker, or factor. The written statement is not required for a cash sale for an amount less than $50. Any person violating the foregoing requirements is guilty of a misdemeanor [*Cal. Penal Code § 536a*].

It is also a misdemeanor for any consignee, commission merchant, broker, agent, or factor to willfully and corruptly make, or cause to be made, to the consignor or principal a false statement as to the price obtained for any property consigned or entrusted for sale, or as to the quality or quantity of that property, or as to any expenditures made in connection with that property. This offense is punishable by fine not less than $200 and not more than $1,000, by imprisonment in the county jail for not less than 10 days and not more than 6 months, or by both of fine and imprisonment [*Cal. Penal Code § 536*].

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A. Legal Relationship Between Seller and Sales Representative

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§ 91.14 Commission Merchant

[1] Terminology

A "commission merchant" is a sales representative similar to a consignee, in that he or she is entrusted with possession of the products of a manufacturer or supplier of goods for sale but does not actually purchase the goods. In addition, however, a commission merchant is entrusted with control of the goods, whereas in a true consignment the consignor undertakes to retain as much control as possible of the goods in the consignee's possession. Moreover, a commission merchant generally may sell in his or her own name as well as in the name of the principal, whereas in a true consignment the consignee sells only in the name of the principal (the consignor).

The term "commission merchant" is generally used today to mean what formerly was called a "factor." The Civil Code does not define "commission merchant," but (in provisions enacted in 1872 and never amended) it defines "factor" as an agent who, in the pursuit of an independent calling, is employed by another to sell property for him or her, and is vested by the employer with possession or control of the property, or is authorized to receive payment for the property from the purchaser [*Cal. Civ. Code § 2026*; *see also Cal. Civ. Code § 2367*]. In commercial circles, "commission merchant" is now used instead of the term "factor" to avoid confusion with financial institutions that provide accounts receivable financing [*see* Ch. 44, *Accounts Receivable Financing and Factoring*]. The Food and Agricultural Code does use the term "commission merchant" [*see Cal. Food & Agric. Code § 56105*; *see also* [3], *below*].

[2] Authority and Operations of Commission Merchant

A commission merchant handles commodities assigned to him or her for selling on a commission basis. The consignor, in order to protect his or her interests against possible abuse, often stipulates a minimum price at which the goods may be sold. The commission merchant generally has authority to consummate sales without obtaining approval from the consignor. The purchaser usually does not know the identity of the consignor, as the commission merchant conducts the sale as if the goods were his or her own. The commission merchant may extend credit to the buyer if desirable and usually arranges for delivery of the goods, renders a bill in the commission merchant's own name to the purchaser, and collects the purchase price. Finally, the commission merchant sends the consignor an accounting of the transaction and the proceeds of the sale, less the commission charged for the commission merchant's services.

Commission merchants are used by owners of commodities who need an immediate outlet for goods that can be consigned quickly without complicated arrangements. Commission merchants thus are most frequently used for the wholesale marketing of produce (vegetables and fruit), livestock, grain, cotton, and tobacco.

A commission merchant must obey the principal's instructions, notwithstanding any advances made to the principal on the consigned property, except that, if the principal forbids a sale at the market price, the commission merchant may nevertheless sell for his or her reimbursement, provided that he or she gives the principal reasonable notice of his or her intention to do so and of the time and place of sale, and proceeds in all respects as a pledgee [*Cal. Civ. Code § 2027*]. A commission merchant may sell consigned property on such credit as is usual, but after having agreed with the purchaser on credit terms, the commission merchant may not extend it [*Cal. Civ. Code § 2028*]. If a commission merchant guarantees that the principal will receive a fixed price, the commission merchant thereby absolutely assumes to pay the price when it falls due as if it were a debt of his or her own. However, he or she does not thereby assume any additional responsibility for the safety of remittance of the proceeds [*Cal. Civ. Code § 2029*]. A commission merchant who receives property for sale under a general agreement or usage to guarantee its sale or the remittance of the proceeds cannot relieve himself or herself from responsibility for the sale or remittance without the principal's consent [*Cal. Civ. Code § 2030*].

A commission merchant (unless specially restricted by the consignor) has the actual authority of agents in general and in addition has the authority to do the following [*Cal. Civ. Code § 2368*]:

- Insure consigned property that is otherwise uninsured;

- Sell on credit goods entrusted to him or her for sale, unless that would be contrary to the usage in the particular situation (but he or she cannot pledge, mortgage, or barter the goods); and

- Delegate his or her authority to a partner or employee, but not to one in an independent employment.

A commission merchant also has ostensible authority to deal with the consignor's property as his or her own in transactions with persons not having notice of the actual ownership [*Cal. Civ. Code § 2369*].

The Commercial Code protects a person who purchases goods from a commission merchant. Thus, a principal's entrusting of the possession of goods to a commission merchant who deals in goods of that kind gives the merchant the power to transfer all rights of the principal to a buyer in the ordinary course of business [*Cal. Com. Code § 2403(2)*]. "Entrusting" in this context includes any delivery and any acquiescence in retention of possession for the purpose of sale, obtaining offers to purchase, locating a buyer, or the like, regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the entrusting or the possessor's disposition of the goods have been procured through criminal larceny [*Cal. Com. Code § 2403(3)*].

Some commission merchants also do merchant wholesaling, that is, buying goods in their own name and selling them for their own account. This practice is often criticized because of the opportunities if offers for the commission merchant to profit at the expense of the original owner of the goods.

For a drafting guide to agreements with commission merchants, see *§ 91.123*. For contract forms, see *§§ 91.240, 91.241*.

[3] Consignment or Farm Products to Commission Merchant

The Food and Agricultural Code imposes special requirements on commission merchants who sell farm products on consignment. A "commission merchant" for this purpose is any person who (1) receives on consignment or solicits any

farm product from a licensed produce dealer or producer of the product, (2) accepts any farm product in trust from a licensed produce dealer or the producer of the product for purposes of sale, (3) sells any farm product on commission, or (4) handles any farm product in any way for the account of or as an agent of the consignor of the product [*Cal. Food & Agric. Code § 56105*]. Thus, a person who accepts a farm product from a licensed produce dealer or the producer of the product for the purpose of sale or resale is a commission merchant, unless the person has bought, or agreed to buy, the farm product by a contract that designates the price to be paid to the seller [*Cal. Food & Agric. Code § 56105(d)*]. Commission merchants are also included within the meaning of the term "produce dealer" [*Cal. Food & Agric. Code §§ 56808, 57010*].

"Farm products" includes agricultural, horticultural, viticultural, and vegetable products of the soil; poultry and poultry products; livestock not for immediate slaughter and livestock products; bees and apiary products including honey; hay; dried beans; and cut flowers [*Cal.Food & Agric. Code § 56109*]."Farm products" do not include flower seed or agricultural or vegetable seed not purchased from a producer [*Food & Agric. Code 56109*]. The term does not include timber or timber products or any milk product subject to the licensing and bonding provisions of *Cal.Food & Agric. Code § 61801 et seq.*]

Any person engaged in the business of buying, receiving on consignment, soliciting for sale on commission, or negotiating the sale of farm products from a licensee or producer for resale, must have a state license [*Cal.Food & Agric. Code § 56181*]. A commission merchant must post his or her license or a copy of it in his or her office or sales room in plain view of the public [Cal.Food & Agric. § Code 56193].

Every commission merchant receiving farm products must keep detailed records showing all of the following [*Cal.Food & Agric. Code § 56271*]:

- The consignor's name and address;
- The date received;
- Condition and quantity of farm products on arrival;
- Date of each sale for consignor's account;
- Sales price;
- Itemized statement of the charges to be paid by the consignor in connection with the sale;
- The names and addresses of all purchasers if the commission merchant has a financial interest in the business of the purchasers or if the purchasers have any financial interest, directly or indirectly, in the business of the commission merchant;
- A lot number or other identifying mark for each consignment, which number or mark must appear on every sales tag, and every other essential record which is needed to identify each consignment from receipt through final sale; and
- Any claim by the commission merchant against any person for overcharges or damages resulting from the injury or deterioration of the farm products. These records must be open to the inspection of the Director of Food and Agriculture and the consignor of the farm product for which such a claim is made.

When requested a consignor, a commission merchant must, before the close of the next business day following the request, transmit to the consignor a true written report of the quantity sold and the selling price [*Cal.Food & Agric.*

Code 56272]. Remittance in full of the amount realized from sales, including all collections, overcharges, and damages, less the agreed commission and other charges, together with a complete account of the sales, must be made to the consignor within 10 days after receipt of the moneys by the commission merchant, unless otherwise agreed in writing [*Cal.Food & Agric. Code § 56273*]. The account of the sales must include the following [*Cal. Food & Agric. Code § 56273, 56273.1(a)*]:

- The date of shipment.
- The terms of original sale concerning where and when title passes.
- The commodity, variety, size, and grade.
- The quantity shipped.
- The quantity disposed of in a manner other than sale by the buyer, if applicable.
- The original selling price.
- The adjusted selling price, if applicable.
- The reason for adjustment, if applicable.
- Any inspection certificate required to be obtained as stated in *Cal. Food & Agric. Code § 56280*.
- The amounts billed and collected from the buyer for services rendered to the buyer by the commission merchant.
- The gross and net returns received from the buyer.
- Any authorized commission merchant charges.
- Any additional amounts paid to the consignor by the commission merchant to support the original price.
- The net amount due the consignor.

In the account, the names and addresses of the purchasers need not be given. When a commission merchant has contracted with two or more consignors that the returns for farm products sold be pooled on a definite basis as to size or grade or both, during a certain period of time, then the commission merchant must obtain the consignor's written consent and must render an account of sales, showing the net average pool return on each size or grade, or both, from sales made and shall keep a correct record of such sales [*Cal.Food & Agric. Code § 56274*].

The commission merchant must retain a copy of all records for each transaction. These records must be available at all times for the confidential inspection of the Director of Food and Agriculture or the consignor or the authorized representative of either [*Cal.Food & Agric. Code § 56275*].

Proof of any sale of farm products by a commission merchant for less than the current market price to any person with whom he or she has any direct or indirect financial connection as owner of its corporate stock, as a partner or otherwise, or of any sale out of which the commission merchant receives, directly or indirectly, any portion of the purchase price, except the commission named in the licensee's application or in a specific contract with the consignor, establishes a

rebuttable presumption of fraud [*Cal.Food & Agric. Code § 56278*(presumption affects burden of proof)].

A commission merchant may not directly or indirectly purchase for his or her own account any farm product that is received on consignment without prior authority from the consignor, together with the price fixed by the consignor, or without promptly notifying the consignor of the purchase. However, a commission merchant may take to account of sales, in order to close the day's business, miscellaneous lots of parcels of any farm product that remains unsold, if he or she forthwith enters the transaction on his or her account of sales [*Cal.Food & Agric. Code § 56605*].

If a commission merchant to whom a consignment is made reconsigns it to another commission merchant or employs a broker to effect the sale, he or she may not deduct more than one charge for effecting the sale without the prior written consent of the consignor [*Cal.Food & Agric. Code § 56608*].

A commission merchant that fails to account promptly, correctly, fully, and properly for funds received on behalf of the consignor is guilty of a misdemeanor [*see Cal. Food & Agric. Code §§ 56623, 56631, 56634*]. In such a case the consignor may also pursue a common-law action for conversion [*Fischer v. Machado (1996) 50 Cal. App. 4th 1069, 1074-1075, 58 Cal. Rptr. 2d 213* (commission merchant commingled general accounts and sale proceeds of farm products that merchant sold as agent for farmer); *see also Mendoza v. Rast Produce Co. (2006) 140 Cal. App. 4th 1395, 1404-1405, 45 Cal. Rptr. 3d 525* (duly authorized subagent owes same duty to principal as agent, and can be held liable for conversion if that duty is breached)].

For a drafting guide to agreements with commission merchants, see *§ 91.123*. For a form of contract for the consignment of farm products to a commission merchant, see *§ 91.241*.

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A. Legal Relationship Between Seller and Sales Representative

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§ 91.15 Independent Wholesale Sales Representative

The Independent Wholesale Sales Representatives Contractual Relations Act of 1990 provides special protections for independent wholesale sales representatives [*see Cal. Civ. Code § 1738.10 et seq.*]. For this purpose, a "wholesale sales representative" is a person who contracts with a manufacturer, jobber, or distributor for the purpose of soliciting wholesale orders, and who is compensated in whole or part by commission. The term does not include one who places orders or purchases exclusively for his or her own account for resale (i.e., a distributor), or a sales representative who sells or takes orders for the direct sale of products to the ultimate consumer [*Cal. Civ. Code § 1738.12(e)*; *see Cal. Civ. Code § 1738.12(a),(b),(c)* ("manufacturer," "jobber," and "distributor" defined)]. The protections of the Act do not apply to a person licensed under the Alcoholic Beverage Control Act [*Cal. Civ. Code § 1738.17*; see *Bus. & Prof. Code § 23000 et seq.*].

When a manufacturer, jobber, or distributor is engaged in business in California and uses the services of an independent wholesale sales representative to solicit wholesale orders at least partially within California, the parties must enter into a written contract that includes the rate and method by which the commission is computed, the time when commissions will be paid, the territory assigned to the sales representative, any exceptions to the assigned territory and customers in that territory, and what chargebacks will be made against the commission [*Cal. Civ. Code § 1738.13(a),(b)*; *see Cal. Civ. Code § 1738.14*; *see also §§ 91.124* (drafting guide), 91.250 (form)]. For this purpose, a "chargeback" is any deduction not required by federal or state law [*Cal. Civ. Code § 1738.12(d)*]. The contract may not contain any provision waiving any of the sales representative's rights under the Act [*Cal. Civ. Code § 1738.13(e)*].

The written contract must be signed and distributed to both parties, and the sales representative must sign a receipt acknowledging receipt of the signed contract [*Cal. Civ. Code § 1738.13(c)*].

Any payment of commission to the sales representative must be accompanied by a written accounting of the orders for which payment is made, including customer names and invoice numbers, the rate of commission on each order, and information relating to any chargebacks included in the accounting [*Cal. Civ. Code § 1738.13(d)*].

Willful failure to enter into the required written contract or to pay commissions as required in the contract subjects a

manufacturer, jobber, or distributor to liability to the sales representative in a civil action for treble damages [*Cal. Civ. Code § 1738.15*]. In any action brought by the sales representative pursuant to the Act, the prevailing party will be entitled to reasonable attorney's fees and costs [*Cal. Civ. Code § 1738.16*].

A manufacturer, jobber, or distributor who is not a resident of California, and who enters into a contract regulated by the Act, is deemed to be doing business in California for purposes of personal jurisdiction [*Cal. Civ. Code § 1738.14*].

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B. Trade Regulation

30-91 California Legal Forms--Transaction Guide § 91.30

§ 91.30 Federal Antitrust Regulation

[1] Sherman Antitrust Act

The Sherman Antitrust Act [*15 U.S.C. § 1 et seq.*] provides that every contract, combination in the form of a trust, or conspiracy in restraint of trade or commerce among the states and with foreign nations is illegal [*15 U.S.C. § 1*]. In particular, the Act prohibits monopolies [*see 15 U.S.C. § 2*; *see also Christofferson Dairy, Inc. v. MMM Sales, Inc. (9th Cir. 1988) 849 F.2d 1168, 1174]* ; vertical price fixing, which is a supplier's attempt to set the price charged by those who resell its products [*see General Cinema Corp. v. Buena Vista Distribution (9th Cir. 1982) 681 F.2d 594, 597* ; *see also Dr. Miles Med. Co. v. John D. Park & Sons Co. (1911) 220 U.S. 373, 407-409, 31 S. Ct. 376, 55 L. Ed. 502]* ; horizontal price fixing, which is an agreement among competitors that interferes with the setting of a price by free market forces [*see United States v. Socony-Vacuum Oil Co. (1940) 310 U.S. 150, 224, 60 S. Ct. 811, 84 L. Ed. 1129]* ; and tying arrangements, which are agreements by a seller to sell a product only on the condition that the buyer purchase a product from the seller, or not purchase from any other supplier [*Northern Pac. R. Co. v. United States (1958) 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545]* .

The Sherman Act applies to every person, including sales representatives and their manufacturers and suppliers, engaged in business whose activities might restrain or monopolize commercial dealings in interstate commerce [*see United States v. South-Eastern Underwriters Ass'n (1944) 322 U.S. 533, 553, 64 S. Ct. 1162, 88 L. Ed. 1440]* .

[2] Clayton Act and Robinson-Patman Antidiscrimination Act

The Clayton Act [*15 U.S.C. § 12 et seq.*] prohibits price fixing and tying and exclusive dealing arrangements that have the effect of substantially lessening competition or tending to create a monopoly in any line of commerce [*15 U.S.C. § 14*]. The Robinson-Patman Antidiscrimination Act [*15 U.S.C. § 13a, 13b, 21a*] amends the Clayton Act and prohibits price discrimination if the effect of the discrimination is to substantially lessen competition or tend to create a monopoly. However, good faith discrimination is permissible to meet competition [*15 U.S.C. § 12(a)*].

A sales representative contract that provides for an exclusive dealing arrangement may have antitrust implications. Section 3 of the Clayton Act makes it unlawful for any person engaged in interstate or foreign commerce to lease, sell,

or contract to sell goods or commodities for resale on the condition, agreement, or understanding that the lessee or purchaser must not deal in goods of a competitor, when the effect of that transaction may be to substantially lessen competition or tend to create a monopoly in any line of commerce [*15 U.S.C. § 14*].

Section 3 of the Clayton Act is considerably broader than the Sherman Act [*see 15 U.S.C. § 1 et seq.*; *see also* [1], above], and thus if a particular arrangement does not violate the Clayton Act, it will not violate the Sherman Act [*see Times-Picayune Pub. Co. v. United States (1952) 345 U.S. 594, 608-609, 73 S. Ct. 872, 97 L. Ed. 1277]* .

For the Clayton Act to apply, a transaction or agreement must have five essential elements. First, there must be a sale, lease, or a contract to sell. Thus, a consignment or sales agency arrangement does not fall within the scope of the Act, because title to the goods does not pass to the consignee or sales representative [*see FTC v. Curtis Pub. Co. (1923) 260 U.S. 568, 581, 43 S. Ct. 210, 67 L. Ed. 408]* . However, a distributorship arrangement may be subject to the Act, because a distributor generally acquires title to the goods for ultimate resale in the distributor's own name.

Second, the sale or lease must involve goods or commodities, as opposed to services, for example [*see Columbia Broad. Sys. v. Amana Refrigeration (7th Cir. 1961) 295 F.2d 375, 378]* . Distributorships clearly meet this element.

Third, the seller or lessor must be engaged in and acting in the course of interstate commerce [*see 15 U.S.C. § 12*; *see also United Shoe Mach. Corp. v. United States (1922) 258 U.S. 451, 465, 42 S. Ct. 363, 66 L. Ed. 708]* . Business acts that, although intrinsically intrastate in nature, substantially affect interstate commerce fall within the scope of the federal antitrust acts, including the Clayton Act [*Burke v. Ford (1967) 389 U.S. 320, 321, 88 S. Ct. 443, 19 L. Ed. 2d 554* (business practices of statewide wholesalers involving distribution of goods manufactured out of state held to substantially affect interstate commerce); *but see Gulf Oil Corp. v. Copp Paving Co. (1974) 419 U.S. 186, 196-199, 95 S. Ct. 392, 42 L. Ed. 2d 378* (intrastate sales of asphaltic concrete for purposes of interstate highway construction affected interstate commerce but were not sales in flow of commerce, which is necessary to satisfy jurisdictional requirements of Clayton Act)]. However, if the effect of a local business practice on interstate commerce is merely incidental, such as having out-of-state customers who account for an extremely small portion of all customers, the seller or lessor will not be deemed to be engaged in and acting in the course of interstate commerce [*Kallen v. Nexus Corp. (N.D. Ill. 1973) 353 F. Supp. 33, 36]* .

The fourth element for the application of the Clayton Act is that the sale or lease include a condition, agreement, or understanding that the purchaser or lessee not deal in the goods or commodities of a competitor. In certain instances, an exclusive dealing contract may not expressly provide that all purchases are to be made exclusively from the seller; however, the courts may infer the existence of the restrictive condition [*Times-Picayune Pub. Co. v. United States (1953) 345 U.S. 594, 606 n.23, 73 S. Ct. 872, 97 L. Ed. 1277]* , especially when the purchaser or lessee is by virtue of the business arrangement unable to purchase or lease the goods in question from a source of his choosing [*see United Shoe Mach. Corp. v. United States (1922) 258 U.S. 451, 464, 42 S. Ct. 363, 66 L. Ed. 708* ; *see also McElhenney Co. v. Western Auto Supply Co. (4th Cir. 1959) 269 F.2d 332, 338]* .

Fifth, the probable effect of the business agreement must be such that it will lessen competition substantially or tend to create a monopoly [*see 15 U.S.C. § 14*]. The courts have developed two significant tests to determine whether the proscribed effects of this element exist. These tests are referred to as the "quantitative substantiality test" and the "qualitative substantiality test."

Under the quantitative substantiality test, the effects of an agreement alleged to violate Section 3 of the Clayton Act are examined in terms of such quantitative factors as the percentage of market foreclosed to competitors of the alleged offender due to the exclusionary condition of the agreement. An exclusive dealing contract is deemed, under this test, to violate Section 3 of the Clayton Act when the competition foreclosed by the contract constitutes, in quantitative terms, a substantial share of the market [*Standard Oil Co. v. United States (1949) 337 U.S. 293, 314, 69 S. Ct. 1051, 93 L. Ed. 1371]* . In one case, the United States Supreme Court found a substantial effect on competition when a manufacturer of

clothing patterns controlled 40 percent of the nation's pattern business [*see Standard Fashion Co. v. Magrane-Houston Co. (1922) 258 U.S. 346, 356-357, 42 S. Ct. 360, 66 L. Ed. 653]* . In another case, the Court held that domination of the market by a company using restrictive contracts was sufficient in itself to support an inference that competition had been or probably would be lessened in a substantial way [*see United Shoe Mach. Corp. v. United States (1922) 258 U.S. 451, 455, 42 S. Ct. 363, 66 L. Ed. 708]* . In a third case, the Court found that there was a violation where an association of dress manufacturers controlled 60 percent of all but the least expensive dress market, despite the association's argument that use of requirements contracts was reasonable and necessary to prevent industrial pirating of styles [*see Fashion Originators' Guild v. Federal Trade Comm'n (1940) 312 U.S. 457, 466, 61 S. Ct. 703, 85 L. Ed. 949]* . In another case, the Court held that, although a company did not dominate the market and did not improve its market position due to its use of restrictive contracts, the company violated Section 3 of the Clayton Act since it foreclosed competition in 6.7 percent ($58,000,000) of an extremely large market [*see Standard Oil Co. v. United States (1949) 337 U.S. 293, 314, 69 S. Ct. 1051, 93 L. Ed. 1371]* .

Under the quantitative substantiality test, if a court determines that an exclusionary agreement affects a substantial share of the market in which the seller or lessor participates, that determination is sufficient to support a finding that Section 3 of the Clayton Act has been violated [*see Times-Picayune Pub. Co. v. United States (1953) 345 U.S. 594, 608-609, 73 S. Ct. 872, 97 L. Ed. 1277]* .

The second, alternative standard to determine whether a contract substantially lessens competition or tends to create a monopoly is known as the "qualitative substantiality test." This test supplements the quantitative test by providing further guidelines for those situations in which the seller or lessor does not dominate the relevant market. This test, like the quantitative test, requires a determination of the share of the market affected by the restraining practice and an evaluation of whether the portion of commerce foreclosed in the relevant market is substantial [*see Tampa Elec. Co. v. Nashville Coal Co. (1961) 365 U.S. 320, 329, 81 S. Ct. 623, 5 L. Ed. 2d 580]* . The qualitative substantiality test requires a court, in determining the weight of the probable effect of the contract on the relevant area of effective competition, to take into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects that preemption of that share of the market might have on effective competition in that market [*Tampa Elec. Co. v. Nashville Coal Co. (1961) 365 U.S. 320, 329, 81 S. Ct. 623, 5 L. Ed. 2d 580]* .

Under the qualitative test, a violation will normally be found when more than five percent of the market is foreclosed by anticompetitive agreements coupled with the existence of any of the following adverse economic and business factors: the difficulty for new competitors to enter the market [*see United States v. Richfield Oil Corp. (S.D. Cal. 1951) 99 F. Supp. 280, 292 , aff'd, 343 U.S. 922 (1952)]* ; the excessive bargaining power of the seller over the buyers [*see Lessig v. Tidewater Oil Co. (9th Cir. 1964) 327 F.2d 459, 467-470* (violation found where five percent of the market was controlled)]; and the lack of business justification for using exclusive dealing or requirements contracts [*see Susser v. Carvel Corp. (S.D.N.Y. 1962) 206 F. Supp. 636 , aff'd, 332 F.2d 505 (1964)]* .

[3] Federal Trade Commission Act

The Federal Trade Commission Act [*15 U.S.C. § 41 et seq.*] prohibits unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce [*15 U.S.C. § 45*]. "Unfair competition" that violates this Act is a flexible concept and may involve a variety of unrelated activities [*see FTC v. Bunte Bros., Inc. (1941) 312 U.S. 349, 353-354, 61 S. Ct. 580, 85 L. Ed. 881]* . Exclusive dealing arrangements may run afoul of the prohibition against unfair methods of competition [*see Times-Picayune Pub. Co. v. United States (1952) 345 U.S. 594, 609, 73 S. Ct. 872, 97 L. Ed. 1277]* . For a comprehensive discussion of the Federal Trade Commission Act, see von Kalinowski et al., Antitrust Laws and Trade Regulation (2d ed. Matthew Bender).

[4] Structuring Sales Agencies to Avoid Antitrust Violations

A business arrangement for the purpose of establishing exclusive sales distributorships may be classified as one of two types. When the arrangement involves companies on the same level of distribution (e.g., manufacturers, distributors, or retailers), it is described as a "horizontal" arrangement; if the arrangement is between companies of different levels of distribution (e.g., manufacturer and distributor, or distributor and retailer), it is described as a "vertical" arrangement.

The primary objective of a horizontal arrangement is to eliminate competition by apportioning a particular market between participating companies. Horizontal arrangements constitute per se violations of the federal antitrust laws [*see White Motor Co. v. United States (1963) 372 U.S. 253, 263, 83 S. Ct. 696, 9 L. Ed. 2d 738* (decided under Sherman Act)].

Vertical arrangements do not directly cause the apportionment of markets; however, they tend to establish business relationships that result in the exclusion of competitors and the consequential lessening of competition. Such arrangements, although not constituting per se violations of the law, do have antitrust implications [*see Tampa Elec. Co. v. Nashville Coal Co. (1961) 365 U.S. 320, 81 S. Ct. 623, 5 L. Ed. 2d 580* ; *Standard Oil Co. v. United States (1949) 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371]* and so should be organized with extreme care.

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§ 91.31 California Antitrust Regulation

[1] Cartwright Act

The most important California statute regulating trade is the Cartwright Act [*Cal. Bus. & Prof. Code § 16700 et seq.*], which prohibits most trusts as unlawful, against public policy, and void [*Cal. Bus. & Prof. Code § 16726*; *but see Cal. Bus. & Prof. Code § 16725* (agreements to promote competition or trade not unlawful)]. A "trust" in this context is a combination of capital, skill, or acts by two or more persons for any of the following purposes [*Cal. Bus. & Prof. Code § 16720*]:

- To create or carry out restrictions in trade or commerce.
- To limit or reduce the production, or increase the price, of merchandise or any commodity.
- To prevent competition in manufacturing, making, transporting, selling, or purchasing merchandise, produce, or any commodity.
- To fix at any standard or figure, whereby its price to the public or consumer will be in any manner controlled or established, any article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in California.
- To make, enter into, execute, or carry out any contracts, obligation, or agreements of any kind or description, by which the persons do all, any, or any combination of the following:
    - Bind themselves not to sell, dispose of, or transport any article, commodity, or article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value.
    - Agree in any manner to keep the price of any article, commodity, or transportation at

a fixed or graduated figure.

- Establish or settle the price of any article, commodity, or transportation between them or between themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale or transportation of any article or commodity.

- Agree to pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any article or commodity, that its price might in any manner be affected.

Any contract or agreement that violates the Cartwright Act is void and unenforceable [*Cal. Bus. & Prof. Code § 16722*]. A civil action based on a violation of the Act may be brought by the Attorney General, a district attorney, or any person whose business or property is injured by reason of anything forbidden or declared wrongful by the Act [*Cal. Bus. & Prof. Code § 16750*].

A pricing agreement made as part of a consignment transaction is not subject to the Cartwright Act. The consignor, as owner of the goods, has right to fix the price at which the consignee sells them, and such an arrangement does not violate the Act or other antitrust laws [*Shasta Douglas Oil Co. v. Work (1963) 212 Cal. App. 2d 618, 622, 28 Cal. Rptr. 190* (no violation of Cartwright Act; citing federal antitrust cases); *see Consolidated Accessories Corp. v. Franchise Tax Bd. (1984) 161 Cal. App. 3d 1036, 1040, 208 Cal. Rptr. 74* (consignor's right to set sale price is basic feature of consignment relationship)].

[2] Unfair Practices Act

The Unfair Practices Act [*Cal. Bus. & Prof. Code § 17000 et seq.*] promotes fair and honest competition by prohibiting unfair, dishonest, deceptive, disruptive, destructive, fraudulent, and discriminatory practices [*Cal. Bus. & Prof. Code § 17001*]. The Act prohibits the following:

- Creating locality discriminations in the production, manufacture, distribution, or sale of any article or product with the intent to destroy or prevent competition [*Cal. Bus. & Prof. Code § 17040*].

- Selling below cost or giving away any article or product for the purpose of injuring competitors or destroying competition [*Cal. Bus. & Prof. Code § 17043*]; *see Cal. Bus. & Prof. Code § 17026* (definition of "cost"); *see also Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company (1999) 20 Cal. 4th 163, 169, 83 Cal. Rptr. 2d 548, 973 P.2d 527* (to violate *Cal. Bus. & Prof. Code § 17043* and *17044*, company must act with purpose of injuring competitors or destroying competition)].

- Selling or using any article or product as a "loss leader" [*Cal. Bus. & Prof. Code § 17044*; *see Cal. Bus. & Prof. Code § 17030* (definition of "loss leader"); *see also Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Company (1999) 20 Cal. 4th 163, 169, 83 Cal. Rptr. 2d 548, 973 P.2d 527]* .

- Secretly paying or allowing rebates, refunds, commissions, unearned discounts, or special services or privileges not extended to all purchasers that injury competitors [*Cal. Bus. & Prof. Code § 17045*].

- Using any threat, intimidation, or boycott to violate any of these provisions [*Cal. Bus. & Prof. Code § 17046*].

- Soliciting, or participating or colluding in, a violation of the Act [*Cal. Bus. & Prof. Code §§ 17047,*

17048].

Any person or trade association can bring an action to enjoin a violation of these provisions or to recover damages [*Cal. Bus. & Prof. Code § 17070*]. In addition, it is a misdemeanor to violate any of these provisions [*Cal. Bus. & Prof. Code § 17100*].

[3] Unfair Competition Act

The Unfair Competition Act [*Cal. Bus. & Prof. Code § 17200 et seq.*] authorizes courts to enjoin any act of unfair competition [*Cal. Bus. & Prof. Code § 17203*]. "Unfair competition" means any unlawful, unfair, or fraudulent business practice, and any unfair, deceptive, untrue, or misleading advertisement. The term also includes false advertising [*Cal. Bus. & Prof. Code § 17200*; *see Cal. Bus. & Prof. Code § 17500 et seq.*].

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DIVISION VI: PERFORMANCE OF SERVICES
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PART II. LEGAL BACKGROUND
B. Trade Regulation

30-91 California Legal Forms--Transaction Guide § 91.32

§ 91.32 Foreign Corrupt Practices Act

If a sales representation agreement contemplates sales activity in a foreign country, the principal should take steps to ensure compliance with the Foreign Corrupt Practices Act (FCPA) [*see 15 U.S.C. § 78dd-1 et seq.*].The FCPA makes it illegal for a domestic concern (including its officers, directors, employees, agents, or stockholders) to corruptly use interstate commerce or do any act outside the United States in furtherance of any offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value directly or indirectly to a foreign official, political party, party official or a candidate for political office in order to influence official acts or decisions of that person or entity, to obtain or retain business or to secure any improper advantage [*15 U.S.C. §§ 78dd-1(a),(g), 78dd-2(a),(i)*; *see 15 U.S.C. §§ 78dd-1(f)(1), 78dd-2(h)(2)* ("foreign official" defined)]. A"domestic concern" for purposes of the FCPA includes any individual who is U.S. citizen, resident, or national, as well as any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that has its principal place of business in the United States or that is organized under the laws of a state or a territory, possession, or commonwealth of the United States [*15 U.S.C. § 78dd-2(h)(1)* ("foreign official" defined)]. The FCPA imposes a similar prohibition on non-U.S. persons who use interstate commerce in furtherance of such payments [*15 U.S.C. § 78dd-3(a)*].

Prohibited payments under the FCPA include not only those made to directly influence the making of contracts with a foreign government, but also those made to indirectly facilitate the conduct of business in a foreign country, such as payments made to foreign officials for illegal reductions of taxes on products imported into the foreign country [*see United States v. Kay (5th Cir. 2004) 359 F.3d 738, 748-750]* .

The FCPA does not apply to any facilitating or expediting payment made to expedite or to secure the performance of a routine governmental action by a foreign official, political party, or party official [*15 U.S.C. §§ 78dd-1(b), 78dd-2(b), 78dd-3(b)*]. The FCPA also authorizes the following [*15 U.S.C. §§ 78dd-1(c), 78dd-2(c), 78dd-3(c)*]:

- A payment, gift, offer, or promise of anything of value that is lawful under the written laws and regulations of the foreign official's, political party's, party official's, or candidate's country.

- A payment, gift, offer, or promise of anything of value that is a reasonable and bona fide expenditure, such as travel and lodging expenses, incurred by or on behalf of a foreign official, party, party official, or candidate and was directly related to the promotion, demonstration, or explanation of products or services, or the execution or performance of a contract with a foreign government or agency of a foreign government.

A violation of the FCPA carries civil and criminal penalties [*see 15 U.S.C. § 78ff*].

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C. Tax Considerations

30-91 California Legal Forms--Transaction Guide § 91.40

§ 91.40 Classification of Sales Representative as Independent Contractor

The sales representation arrangements discussed in this chapter involve agents who are independent contractors. For coverage of salespersons who work as employees of a manufacturer or supplier, see Chapter 85, *Employment Agreements* .

Generally, to be treated as an independent contractor for income-tax purposes, a sales representative should operate a business independent of the manufacturer or supplier, and the parties' relationship should be structured so that the manufacturer or supplier does not have the right to control the means and methods by which the sales representative accomplishes the mutually desired result--sales to customers [see *Treas. Reg. § 31.3401(c)-1(b)*].

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30-91 California Legal Forms--Transaction Guide § 91.41

§ 91.41 Tax Treatment of Consignment and Commission Merchant Transactions

In a consignment relationship, the consignee never acquires ownership of the product to be sold; rather, when the consignee sells the product, ownership passes directly from the consignor to the ultimate customer [*see § 91.13[1]*]. As a result, no taxable event occurs for either party until the consignee sells the goods; until that time, the goods are includable in the inventory of the consignor, not that of the consignee.

Any failure of the consignee to account for the consigned goods, or the proceeds from sale when they are received by the consignee instead of by the consignor, creates a deductible loss, rather than a bad debt. This is so because the relationship between the consignor and consignee is not that of creditor-debtor [*see I.R.C. § 166*].

Because a commission merchant is similar to a consignee in that neither ever holds title to the products to be sold [*see §§ 91.13[1], 91.14*], the tax principles applicable to a consignment transaction apply, as a general rule, to the relationship between the commission merchant and the principal.

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30-91 California Legal Forms--Transaction Guide § 91.42

§ 91.42 Tax Treatment of Distributorship

The structure of a distributorship involves two separate sales of each product: first, the distributor purchases the product from the manufacturer or supplier; then, the distributor resells the product to the customer [*see § 91.12*]. Thus, the manufacturer or supplier's taxable event occurs on the first sale, and the distributor's taxable event occurs on the second sale.

Products handled under a distribution agreement are generally treated as inventory or stock in trade, rather than capital assets [*see I.R.C. § 1221(a)(1)*].

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 91 CONTRACTS WITH SALES REPRESENTATIVES
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

30-91 California Legal Forms--Transaction Guide § 91.100

§ 91.100 Facts

1. Facts about principal.

a. If corporation or other business entity:
(1) Name, address, telephone number, and e-mail address.

(2) Name, telephone number, and e-mail address of contact person at entity.

(3) State and date of incorporation or organization.

(4) Names, addresses, and telephone numbers of principal officers of firm.

b. If sole proprietorship:

(1) Name, address, telephone number, and e-mail address of proprietor.

(2) Fictitious name, if any, under which proprietor does business.

c. Nature of principal's business.

NOTE:
Within a given industry, firms may concentrate on manufacture, wholesale, or retail business. They may be integrated horizontally or vertically. These circumstances affect their buying and selling terms as well as their market areas.

d. Age of principal's business.

e. Principal's business reputation and performance record, including credit status.

f. Marketing focus, such as national coverage or concentration on particular geographical areas.

g. Principal's products to be sold, including description of styles, types, or models of merchandise.

h. Present selling organization in relevant territory, including any:

(1) Manufacturer's or supplier's agents.

(2) Distributors.

(3) Consignees.

(4) Commission merchants.

(5) Employees [*see* Ch. 85, *Employment Agreements*].

(6) Advertising programs.

i. Amount and method of compensation proposed by principal.

j. Samples and selling aids to be furnished to sales representative.

2. Facts about sales representative.

a. If corporation or other business entity:

(1) Name, address, telephone number, and e-mail address.

(2) Name, telephone number, and e-mail address of contact person at entity.

(3) State and date of incorporation or organization.

(4) Names, addresses, and telephone numbers of principal officers of firm.

b. If sole proprietorship:

(1) Name, address, telephone number, and e-mail address of proprietor.

(2) Fictitious name, if any, under which proprietor does business.

c. Summary of sales representative's marketing and sales experience, including:

(1) Industry.

(2) Function within industry.

(3) Geographical area.

(4) Products sold.

(5) Compensation earned.

d. Summary of sales representative's marketing capability, including:

(1) Financial resources.

(2) Physical resources.

(3) Number of employees.

e. Sales representative's business reputation and performance record, including credit status.

f. Amount and method of compensation desired by sales representative.

3. Type of relationship desired, such as:

a. Manufacturer's agent [*see § 91.11*].

b. Distributor [*see § 91.12*].

c. Consignee [*see § 91.13*].

d. Commission merchant [*see § 91.14*].

e. Independent wholesale sales representative [*see § 91.15*].

f. Employee [*see* Ch. 85, *Employment Agreements*].

4. Desired period of contractual relationship.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsForm, Formation & ReadjustmentFormation

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DIVISION VI: PERFORMANCE OF SERVICES
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30-91 California Legal Forms--Transaction Guide § 91.101

§ 91.101 Documents

1. Manufacturer's or supplier's catalog or other list of products to be sold.

2. Manufacturer's or supplier's advertising materials pertaining products to be sold.

3. Any current or former sales representation contracts covering relevant territory.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsForm, Formation & ReadjustmentFormation

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B. Preliminary Determinations

30-91 California Legal Forms--Transaction Guide § 91.110

§ 91.110 Relationship Between Principal and Representative

1. Determine whether representative should function as sales representative, consignee, distributor, independent wholesale sales representative, or commission merchant, considering following:

a. Product or products to be marketed.

NOTE:
Perishable goods, such as farm products, are usually handled by commission merchants. Distributors are commonly used by manufacturers or suppliers for the marketing of products such as automobiles and automotive parts, electronic equipment and supplies, machine tools and related equipment, and plumbing fixtures and supplies.

b. Compensation arrangement desired by each party.

c. Whether:

(1) Principal will sell products to distributor, who will resell to customers.

(2) Principal will sell products directly to customers solicited by agent.

d. Whether principal wishes to control selling price of products.

NOTE:
Maintaining control over retail prices can be one reason for using a consignment arrangement. The consignor, as owner of the goods, has the right to fix the price at which the consignee sells them, and such an arrangement does not violate other antitrust laws [*Shasta Douglas Oil Co. v. Work (1963) 212 Cal. App. 2d 618, 622, 28 Cal. Rptr. 190* (no violation of Cartwright Act; citing federal antitrust cases);

see Consolidated Accessories Corp. v. Franchise Tax Bd. (1984) 161 Cal. App. 3d 1036, 1040, 208 Cal. Rptr. 74 **(consignor's right to set sale price is basic feature of consignment relationship)]**

2. Determine territory for which representative will be responsible.

3. Determine whether representation will be exclusive within assigned territory.

4. Determine whether representative will be authorized to sell competing products.

5. Determine term of relationship between parties, including renewal options.

6. Determine circumstances under which either party may terminate relationship.

Legal Topics:

For related research and practice materials, see the following legal topics:
Commercial Law (UCC)Documents of Title (Article 7)DefinitionsContracts LawSales of GoodsForm, Formation & ReadjustmentFormation

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C. Drafting Guide

30-91 California Legal Forms--Transaction Guide § 91.120

§ 91.120 Contract With Manufacturer's or Supplier's Agent

1. Identify each party by name, legal status, and address of principal place of business [*see § 91.200[2]*; *§ 91.201[2]*, art. 1].

2. Include provision expressly appointing agent to be sales representative for principal, either [*see § 91.200[2]*, PP 1, 2]:

a. As exclusive agent within specified territory, with any exceptions to exclusivity clearly defined [*see § 91.201[2]*, P 2.01].

NOTE:
An exclusive agency may have antitrust implications and should be drafted carefully so as to avoid running afoul of federal and state antitrust laws. For discussion of those laws, see *§§ 91.30* and *91.31*.

b. As nonexclusive agent within specified territory.

3. Specify any restrictions on customers that agent may sell to [*see § 91.200[2]*, P 2].

4. Identify products agent will be responsible for selling [*see § 91.200[2]*, P 1].

5. Specify duration of agent's appointment, such as [*see § 91.200[2]*, P 3; § 91.201[2], P 2.05]:

a. Indefinite duration, subject to cancellation on notice by either party.

b. Specified number of years after execution of agreement, with options to renew for succeeding periods, if desired.

6. Specify duties of agent, such as [*see § 91.200[2]*, P 4]:

a. Promoting and marketing principal's products [*see § 91.201[2]*, P 3.03].

b. Establishing and maintaining showroom or other place of business [*see § 91.201[2]*, P 2.04].

c. Meeting specified sales quotas [*see § 91.200[2]*, P 3].

d. Protecting confidentiality of principal's trade secrets such as customer lists.

7. Specify any restrictions on agent's ability to handle products of principal's competitors [*see § 91.200[2]*, P 4].

8. Specify details of sales of products covered by agreement, including [*see § 91.200[2]*, P 5]:

a. Prices.

b. Terms of sale.

c. Whether agent may make sales on credit.

9. Provide for compensation of agent [*see § 91.200[2]*, P 6; § 91.201[2], art. 4].

a. Specify type of compensation, such as commission at specified rate.

b. Define method of computing compensation.

c. Specify when compensation is payable.

d. Specify whether agent will be entitled to any commissions on:

(1) Sales to customers within agent's assigned territory that are not actually solicited by agent.

(2) Sales made outside agent's territory but shipped to customers within that territory.

10. Define procedure for handling orders from customers, including [*see § 91.200[2]*, P 7; § 91.201[2], P 2.08]]:

a. Forwarding of orders to principal.

b. Acceptance of orders by principal.

c. Time frame for shipment of accepted orders.

d. Issuance of invoices on orders.

e. Handling of orders submitted directly to principal by customers within agent's territory.

11. State miscellaneous duties of principal, such as:

a. Maintaining sufficient inventory to fulfill orders as they come in [*see § 91.200[2]*, P 8].

b. Collection of accounts receivable [*see § 91.200[2]*, P 9].

c. Providing agent with samples of products, displays, advertising and other selling aids, and necessary sales training [*see § 91.200[2]*, PP 10, 11, 12; § 91.201[2], P 3.01]].

d. Providing agent with reports of orders shipped [*see § 91.200[2]*, P 15].

12. Describe nature and scope of any product warranty offered to customers by principal, and specify [*see § 91.200[2]*, P 13]:

a. Agent is not authorized to make additional warranty [*see § 91.200[2]*, P 13].

b. Procedure when agent is contacted by customers with warranty inquiries [*see § 91.200[2]*, P 14].

13. Provide for termination of agreement [*see § 91.200[2]*, P 16; § 91.201[2], art. 5].

a. Specify grounds for termination.

b. Specify method of termination, such as by written notice.

c. Specify rights of each party on termination.

14. Include miscellaneous provisions governing:

a. Agent's status as independent contractor rather than employee of principal [*see § 91.200[2]*, P 17].

b. Indemnification for injuries caused by negligence of party [*see § 91.200[2]*, P 18].

c. Giving of notices [*see § 91.200[2]*, P 19].

d. Resolution of disputes arising under agreement, including arbitration provision if desired [*see § 91.200[2]*, P 20].

e. Assignment of rights under agreement [*see § 91.200[2]*, P 21].

f. Waiver of rights under agreement [*see § 91.200[2]*, P 22].

g. Choice of governing law [*see § 91.200[2]*, P 23].

h. Merger of other agreements in present agreement [*see § 91.200[2]*, P 25].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsForm, Formation & ReadjustmentFormation

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30-91 California Legal Forms--Transaction Guide § 91.121

§ 91.121 Distributorship Agreement

1. Identify each party by name, legal status, and address of principal place of business [*see § 91.210[2]*, art. 1].

2. Include provision creating distributorship relationship [*see § 91.210[2]*, PP 2.01-2.03].

a. Specify either:
(1) Exclusive distributorship within specified territory, with any exceptions to exclusivity clearly defined.

NOTE:
An exclusive distributorship may have antitrust implications and should be drafted carefully so as to avoid running afoul of federal and state antitrust laws. For discussion of those laws, see *§§ 91.30* and *91.31*.

(2) Nonexclusive distributorship within specified territory or with no territorial limits [*see §§ 91.212[2], 91.213[2]*].

b. State that distributor will not act as agent of manufacturer or supplier; rather, distributor will purchase products from manufacturer or supplier and then resell those products to customers for distributor's own account [91.210[2], P 5.02].

3. Identify products distributor will handle [*see § 91.210[2]*, P 1.03].

4. Specify duration of distributorship, such as [*see § 91.210[2]*, P 2.04]:

a. Indefinite duration, subject to cancellation on notice by either party.

b. Specified number of years after execution of agreement, with options to renew for succeeding periods, if desired.

5. Include terms governing purchase of goods by distributor from manufacturer or supplier.

a. Specify prices (or formula for computing prices) at which manufacturer or supplier will sell products to distributor [*see § 91.210[2],* P 3.02; §§ 91.214[2], 91.215[2]].

b. Specify payment terms, including and method and timing of payments [*see § 91.210[2],* P 3.02].

6. If desired, specify minimum quotas for distributor's purchases of products from manufacturer or supplier [*see § 91.216[2]*].

7. Set forth parties' responsibilities regarding advertising and marketing of products covered by agreement, including provision authorizing, and specifying any limits on, distributor's use of manufacturer's or supplier's name in marketing products.

8. Specify any restrictions on customers or industries that distributor may sell to.

9. Specify requirements pertaining to distributor's establishment of showroom or other place of business, including facilities necessary to install and service products, if appropriate [*see § 91.210[2],* P 3.04].

10. If desired, specify any pricing policy and terms of sale that distributor must comply with in selling products to its customers [*see § 91.210[2],* P 3.07; § 91.218[2]].

11. Describe nature and scope of any product warranty offered to customers by manufacturer or supplier, including any responsibilities of distributor in handling of warranty claims [*see § 91.222[2]*].

12. Include provisions as desired requiring distributor to provide manufacturer or supplier with periodic reports of sales, returns, and related information.

13. Provide for termination of agreement [*see § 91.210[2],* P art. 4].

a. Specify grounds for termination.

b. Specify method of termination, such as by written notice.

c. Specify rights of each party on termination.

14. Include miscellaneous provisions governing:

a. Giving of notices [*see § 91.210[2],* P 5.01].

b. Resolution of disputes arising under agreement, including arbitration provision if desired [*see § 91.210[2],* P 5.02].

c. Nonagency nature of relationship [*see § 91.210[2],* P 5.03].

d. Assignment of rights under agreement [*see § 91.210[2],* P 5.04].

e. Waiver of rights under agreement [*see § 91.210[2]*, P 5.05].

f. Choice of governing law [*see § 91.210[2]*, P 5.06].

h. Merger of other agreements in present agreement [*see § 91.210[2]*, P 5.07].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & Franchises

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30-91 California Legal Forms--Transaction Guide § 91.122

§ 91.122 Consignment Agreement

1. Identify each party by name, legal status, and address of principal place of business [*see § 91.230[2]*].

2. Include provision expressly stating that entrustment of goods by consignor to consignee will be "on consignment," and that [*see § 91.230[2]*, P 1]:

a. Title to goods will remain in consignor until sold by consignee.

b. Consignee is authorized to transfer title to goods to ultimate purchasers.

c. Consignor is entitled to proceeds of any sale until consignee remits consignor's price.

3. Identify goods, or kinds of goods, that will be consigned [*see § 91.230[2]*].

4. Specify duration of agreement, such as [*see § 91.230[2]*, P 12]:

a. Indefinite duration, subject to cancellation on notice by either party.

b. Specified number of years after execution of agreement, with options to renew for succeeding periods, if desired.

5. Provide for documentation of goods on consignment [*see § 91.230[2]*, P 2].

a. Documentation may consist of such as consignment invoice or memorandum showing consignor's price.

b. State that any consignment invoice or other documentation of goods on consignment is for convenience of parties and does not constitute evidence of sale or transfer of title to consignee.

6. Specify duties of consignee relating to possession of consigned goods, such as:

a. Requirement that consignee bear expenses of storing and handling goods from time of receipt [*see § 91.230[2]*, P 4].

b. Requirement that consignee secure insurance against loss or destruction of goods, with [*see § 91.230[2]*, P 11]:
(1) Both consignor and consignee named as beneficiaries according to their respective interests.

(2) Goods insured at full wholesale value.

7. Specify terms of, and any restrictions on, sales by consignee, such as [*see § 91.230[2]*, PP 3, 6]:

a. Prices.

b. Terms of sale.

c. Whether agent may make sales on credit.

d. Limitations on customers to whom consignee may sell.

e. Requirement that sales are subject to consignor's approval.

8. Provide for compensation of consignee, such as difference between selling price and consignor's price listed in consignment invoice [*see § 91.230[2]*, P 7].

9. Provide for return of unsold goods to consignor, either [*see § 91.230[2]*, P 8].

a. On consignor's demand.

b. At consignee's option.

10. Include requirement that consignee keep records showing [*see § 91.230[2]*, P 9]:

a. All goods received on consignment, with consignor's price for each item.

b. All sales, with names of customers, quantities, and terms of sale.

c. Consigned goods remaining on hand.

d. Goods returned to consignor.

11. Include provision requiring consignee to deliver following to consignor at regular periods (e.g., monthly or more frequently) [*see § 91.230[2]*, P 10]:

a. Accounting of sales made during most recent period.

b. Consignor's price on goods sold during most recent period.

12. Provide for termination of agreement [*see § 91.230[2]*, P 12].

a. Specify grounds for termination.

b. Specify method of termination, such as by written notice.

c. Specify rights of each party on termination.

13. If desired, include miscellaneous provisions governing:

a. Giving of notices.

b. Resolution of disputes arising under agreement, including arbitration provision if desired.

c. Waiver of rights under agreement.

d. Choice of governing law.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of Contracts

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DIVISION VI: PERFORMANCE OF SERVICES
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30-91 California Legal Forms--Transaction Guide § 91.123

§ 91.123 Special Provisions for Contract With Commission Merchant

NOTE:

A commission merchant operates basically on a consignment basis. However, a commission merchant is permitted to exercise at least some control over the goods, whereas in the normal consignment the consignor typically retains as much control as possible over the consigned goods. Further, the commission merchant is customarily permitted to sell either in the commission merchant's own name or in the name of the consignor, whereas in the normal consignment the consignee sells only in the name of the consignor for the consignor's account [***see*** *§ 91.14*]. This section presents special provisions for use in an agreement with a commission merchant. In additional to the following provisions, any provision contained in a standard consignment contract may be included in the commission merchant's contract. For a guide to drafting a standard consignment contract, see *§ 91.122*.

1. Include provision expressly stating that entrustment of goods by consignor to commission merchant will be "on consignment" [*see § 91.240[2],* P 2.02], and that:

a. Title to goods will remain in consignor until sold by commission merchant [*see § 91.240[2],* P 2.05].

b. Commission merchant may sell goods in name of consignor or in name of commission merchant [*see § 91.240[2],* P 3.03].

2. 2. Include specification of terms of, and any restrictions on, sales by commission merchant, such as [*see § 91.240[2],* P 3.02]:

a. Requirement that sales be made at:
(1) Specified minimum price.

(2) Highest market price available.

b. Restrictions on customers to whom commission merchant may sell.

c. If desired, express authorization or prohibition of commission merchant's purchase of goods for own account.

d. Any desired restrictions on credit sales.

e. If desired, include provision expressly authorizing or forbidding commission merchant to reconsign goods to another commission merchant.

NOTE:

Generally, an agent cannot delegate a nonmechanical task without express authorization from the principal [*Cal. Civ. Code § 2349*]. If the agreement authorizes the commission merchant to reconsign the goods, any reconsignee will effectively become a subagent that owes the same duty to the consignor as that owed by the original commission merchant [*Mendoza v. Rast Produce Co. (2006) 140 Cal. App. 4th 1395, 1404-1405, 45 Cal. Rptr. 3d 525* (duly authorized subagent owes same duty to principal as agent, and can be held liable for conversion if that duty is breached)].

3. Provide for compensation of commission merchant, such as specified percentage of sales proceeds [*see § 91.240[2]*, P 2.04].

NOTE:

If a commission merchant handling farm products reconsigns the products to another commission merchant or employs a broker to effect the sale, he or she cannot deduct more than one charge for effecting the sale without the written consent of the consignor [*Cal. Food & Agric. Code § 56608*].

4. If desired, include provision governing return of unsold goods to consignor [*see § 91.240[2]*, P 3.08].

NOTE:

Often, the commodities involved in sales through commission merchants are perishable (for example, produce or other farm products). In such a case, the commission merchant will sell them at the highest available price and not return them to the consignor. However, if the goods involved are not perishable, the parties may wish to delineate their respective rights and responsibilities concerning the logistics and expenses involved in returning unsold goods.

5. If farm products are consigned, include following provisions, with any alterations agreed by parties [*see § 91.241[2]*]:

NOTE:

The following requirements are imposed by statute unless the parties agree otherwise in writing [*Cal. Food & Agric. Code § 56273*; ***see*** *Cal. Food & Agric. Code § 56273.1(b)*].

a. Requirement that commission merchant remit full amount realized from sales, including all collections, overcharges, and damages, less agreed commission and other charges, within 10 days after receiving money [*Cal. Food & Agric. Code § 56273*].

b. Requirement that commission merchant provide, along with amount realized, complete account of

sales [*Cal. Food & Agric. Code § 56273, 56273.1*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsForm, Formation & ReadjustmentFormationContracts LawTypes of Contracts

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 91 CONTRACTS WITH SALES REPRESENTATIVES
PART III. TRANSACTION GUIDE
C. Drafting Guide

30-91 California Legal Forms--Transaction Guide § 91.124

§ 91.124 Special Requirements for Independent Wholesale Sales Representative Contract

NOTE:

Listed below are provisions that, under the Independent Wholesale Sales Representatives Contractual Relations Act of 1990 [***see*** *Cal. Civ. Code § 1738.10 et seq.*], must be included in a written contract for the services of an independent wholesale sales representative [*Cal. Civ. Code § 1738.13(a),(b)*]. For this purpose, a "wholesale sales representative" is a person who contracts with a manufacturer, jobber, or distributor for the purpose of soliciting wholesale orders, and who is compensated in whole or part by commission. The term does not include one who places orders or purchases exclusively for his or her own account for resale (i.e., a distributor), or a sales representative who sells or takes orders for the direct sale of products to the ultimate consumer [*Cal. Civ. Code § 1738.12(e)*; ***see*** *Cal. Civ. Code § 1738.12(a),(b),(c)* ("manufacturer," "jobber," and "distributor" defined)]. Also, the protections of the Act do not apply to a person licensed under the Alcoholic Beverage Control Act [*Cal. Civ. Code § 1738.17*; see *Cal. Bus. & Prof. Code § 23000 et seq.*].

The Independent Wholesale Sales Representative Act requires that the contract be signed and distributed to both parties, and the sales representative must sign a receipt acknowledging receipt of the signed contract [*Cal. Civ. Code § 1738.13(c)*]. For further discussion of the Act, see *§ 91.15*.

In additional to the following provisions, any provision contained in a standard sales representative contract generally may be included in a wholesale sales representative contract. However, the contract may not include any provision waiving any rights under the Independent Wholesale Sales Representative Act [*Cal. Civ. Code § 1738.13(e)*]. For a guide to drafting a standard sales representative contract, see *§ 91.120*.

1. Specify rate and method by which wholesale sales representative's commission will be computed [*Cal. Civ. Code § 1738.13(b)(1)*; *see § 91.250*, P 5(a)].

2. Specify time when commissions will be paid [*Cal. Civ. Code § 1738.13(b)(2)*; *see § 91.250*, P 5(a)].

3. Specify territory assigned to wholesale sales representative [*Cal. Civ. Code § 1738.13(b)(3)*; *see § 91.250*, P 1].

4. Specify any exceptions to assigned territory and customers in that territory [*Cal. Civ. Code § 1738.13(b)(3)*; *see § 91.250*, P 1].

5. Specify what chargebacks, if any, will be made against commissions [*Cal. Civ. Code § 1738.13(b)(4)*; *see § 91.250*, P 5(b)].

NOTE:

A "chargeback" is any deduction not required by federal or state law [*Cal. Civ. Code § 1738.12(d)*].

6. State duty of manufacturer, jobber, or distributor to provide, with each payment of commission to wholesale sales representative, written accounting of orders for which payment is made, including [*Cal. Civ. Code § 1738.13(d)*; *see § 91.250*, P 5(b)]:

a. Customer names and invoice numbers.

b. Rate of commission on each order.

c. Information relating to any chargebacks included in accounting.

7. Prepare acknowledgment of receipt of signed copy of contract, to be signed by wholesale sales representative after receiving copy of signed contract [*Cal. Civ. Code § 1738.13(c)*; *see § 91.250[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawSales of GoodsForm, Formation & ReadjustmentFormation

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 91 CONTRACTS WITH SALES REPRESENTATIVES
PART IV. FORMS
A. Contracts With Manufacturers' or Suppliers' Agents

30-91 California Legal Forms--Transaction Guide § 91.200

§ 91.200 Agreement Between Manufacturer or Supplier and Sales Representative--General Form

[1] Comment--Use of Form

The following form is intended for use by a manufacturer or supplier in contracting for the services of an agent to promote and sell products. For discussion of sales agents, see *§§ 91.10* and *91.11*. For a drafting guide, see *§ 91.120*. Relevant antitrust considerations are discussed in *§§ 91.30* and *91.31*.

[2] Form

SALES AGENCY AGREEMENTSALES AGENCY AGREEMENT

This AGREEMENT is made this _____ day of _____ [*month*], _____ [*year*], by and between _____ [*name of principal*], _____ [an individual *or* an individual doing business as _____ (*name*) *or* a partnership *or* a partnership doing business as _____ (*name*) *or* a California corporation having a principal office at _____ (*street address, city, state, zip*)], hereinafter referred to as "Principal" and _____ [*name of agent*], _____ an individual *or* an individual doing business as _____ (*name*) *or* a partnership *or* a partnership doing business as _____ (*name*) *or* a California corporation having a principal office at _____ (*street address, city, state, zip*)], hereinafter referred to as "Agent."

Recitals

Principal is in the business of _____ [manufacturing *or* supplying *or* manufacturing and supplying] the products described in Exhibit A attached hereto ("Products").

Principal and Agent desire to enter into a relationship by which Agent will act as the [exclusive] sales representative of

Principal for the Products in the geographical area described in Exhibit B attached hereto ("Territory"), on the terms and conditions set forth in the Agreement.

THERFORE, IT IS HEREBY AGREED AS FOLLOWS:

[*Select one of the following:*]

Exclusive Sales Representative

1. Principal hereby appoints Agent as exclusive sales representative to solicit orders for the Products within the Territory. Agent's exclusive authority under this Agreement shall extend to and include the Products, plus any products developed or offered by Principal during the term of this Agreement, subject to Agent's right to refuse acceptance of exclusive sales representation rights with respect to any or all additional products.

[*OR*]

Nonexclusive Sales Representative

1. Principal hereby appoints Agent as nonexclusive sales representative to solicit orders for the Products within the Territory. Agent's nonexclusive authority under this Agreement shall extend to and include the Products, plus any products developed or offered by Principal during the term of this Agreement, subject to Agent's right to refuse acceptance of exclusive sales representation rights with respect to any or all additional products. Principal reserves the right to sell the Products in the Territory, directly and through other sales representatives, and Agent shall not be entitled to any compensation with respect to any sales made by Principal directly or through another sales representative.

[*Continue with the following:*]

Territory and Customers

2. (a) Agent shall have the _____ [exclusive *or* nonexclusive] right to solicit orders for the Products from any potential customer located within the Territory, except those described in Exhibit C attached hereto. In addition, in any geographical area outside the Territory, Principal also grants to Agent the _____ [exclusive *or* nonexclusive] right to solicit orders for the Products from those customers ("Selected Customers"), if any, specifically named or designated in Exhibit D attached hereto.

(b) All sales within the Territory to the United States Government, either directly or indirectly, for any purpose whatever, including for national defense and security, shall be subject to the provisions of this Agreement. Principal shall submit to the United States Government or its contractors or subcontractors as an item of legitimate expense all compensation contracted, owing, or paid to Agent under this Agreement and shall defend Agent's right to the payment of the same in the same way and with as much force and sincerity as it would do with respect to sums or salaries paid to members of Principal's own private organization.

Term

[*Select one of the following:*]

3. This Agreement shall continue in full force and effect until the date or termination specified in a notice given by one party to the other, which termination date shall be at least _____ days after the date notice is given.

[*OR*]

3. The term of this Agreement shall be _____ years from the date of execution of this Agreement. The Agreement will automatically be renewed on the same terms and conditions for successive one-year periods term unless one party gives to the other notice of its intention to terminate the Agreement at least 60 days prior to the expiration of the term or of any renewal period. However, if during the 12 months immediately preceding the last date for giving termination notice the Agent has satisfied the Sales Quota Requirements set forth in Exhibit E attached hereto, the Agreement shall be automatically renewed for another one-year term unless the Agent gives notice of termination.

[*Continue with the following:*]

Selling Effort

[*Select one of the following:*]

4. Agent must use Agent's reasonable best efforts to solicit orders in the Territory and from Selected Customers. During the term of this Agreement (including renewals and extensions), Agent shall have the right to promote, solicit orders for, sell, and/or otherwise market products manufactured or supplied by persons or firms other than Principal. [*If desired, add:* Agent agrees to obtain and forward orders in accordance with the Sales Quota Requirements set forth in Exhibit E attached hereto; failure to meet the applicable quota for any _____ (*specify, e.g.,* one-year) period shall constitute a breach of this Agreement, but Principal only remedy for such breach shall be termination of this Agreement in accordance with Paragraph 3 above.]

[*OR*]

4. (a) Agent must use Agent's reasonable best efforts to solicit orders in the Territory and from Selected Customers. [*If desired, add:* Agent agrees to obtain and forward orders in accordance with the Sales Quota Requirements set forth in Exhibit E attached hereto; failure to meet the applicable quota for any _____ (*specify, e.g.,* one-year) period shall constitute a breach of this Agreement, but Principal only remedy for such breach shall be termination of this Agreement in accordance with Paragraph 3 above.]

(b) During the term of this Agreement (including renewals and extensions), Agent shall have the right to promote, solicit orders for, sell, and/or otherwise market products manufactured or supplied by persons or firms other than Principal ("Other Accounts"), provided that if such Other Accounts compete directly or indirectly with the Products, Agent must first obtain the written consent of Principal with respect to those activities, which consent may not be unreasonably withheld.

[*Continue with the following:*]

Pricing and Terms of Purchase

5. Principal shall have the absolute right to establish the prices, charges, and terms governing the sale of Products (collectively the "Sales Policies"). The Sales Policies in effect from the date of this Agreement until further notice are set forth in Exhibit F attached hereto. Notwithstanding the Sales Policies, Principal must provide to customers solicited by Agent sales terms that are no less favorable than those generally offered to customers outside the Territory, with reasonable adjustments based on differentials in costs due to Principal's distance from the relevant territory and other relevant factors. At least 60 days prior to any change in the Sales Policies, Principal must give written notice to Agent of the proposed change.

Commissions Payable

6. (a) On each order (represented by a contract or sales order) for a Product or Products that is solicited within the Territory, and that is delivered or to be delivered to the Territory, Principal shall pay to Agent commissions determined in accordance with Exhibit G attached hereto. The same commissions shall be payable on each order solicited from a store in a chain or series of stores whenever the order is subject to approval by a customer headquartered outside the Territory, provided the Products are to be or are delivered to the Territory.

(b) On each order that is solicited from a customer headquartered within the Territory but that is to be delivered outside the Territory, Principal shall pay to Agent an amount equal to 50 percent of the fee or other form of commission otherwise generally payable to the sales representative in the territory where the Product is to be delivered. Exhibit G shall not be applicable to such orders. If there is no sales representative in that territory, however, Principal shall pay to Agent an amount equal to 100 percent of the commission that would otherwise be earned by Agent according to Exhibit G but for the fact of Product delivery outside the Territory.

(c) On each order that is solicited from a customer headquartered outside the Territory but that is to be or is delivered to the Territory, Principal shall pay to Agent an amount equal to 50 percent of the commission that would otherwise be due to Agent in accordance with Exhibit G for an order of the identical Product sold within the Territory.

(d) A commissions shall be deemed earned by Agent on acceptance of the order by Principal pursuant to Paragraph 7. The commission earned by Agent shall be computed on the net amount of the invoice rendered for each order or part of an order, exclusive of freight and transportation costs (including insurance), normal and recurring bona fide trade discounts, and any applicable sales or similar taxes. All commissions earned by Agent under this Agreement shall be due and payable to Agent on or before the 20th day of the month immediately following the calendar month during which the invoice applicable to an order solicited by Agent is sent by Principal. The invoice must be sent by Principal no later than 120 days after acceptance of the order.

(e) If this Agreement shall terminate for any reason whatsoever, Agent shall be entitled to receive Agent's full commissions determined in accordance with the provisions of this Paragraph 6 with respect to orders solicited prior to the effective date of the termination, regardless of when those orders are accepted by Principal and regardless of when shipments are made or invoices rendered.

Handling and Acceptance of Orders

7. Agent must forward to Principal the original of each completed order obtained by Agent not later than 10 business days immediately following receipt of the order by Agent. All contracts and sales orders shall be subject to acceptance

or rejection by Principal. Acceptance must not be unreasonably withheld. Any rejection must be given by written notice to the customer, with a true copy of the notice provided to the Agent. Acceptance of an order shall be deemed to have occurred at the earliest of (1) Principal's written notice of acceptance to the purchaser (with a true copy to Agent), (2) Principal's rendering an invoice for the order, or (3) Principal's failure to properly give written notice of rejection to the customer within 30 days after Agent's forwarding the order to Principal. A true copy of any order sent by a customer directly to Principal must be sent immediately to Agent for Agent's information and records.

Supplies and Deliveries

8. Principal must maintain sufficient inventory and supplies to enable it to fulfill all orders solicited by Agent, and Principal must stand ready to deliver promptly all such orders. Principal must furnish to Agent such information relating to the delivery of Products as Agent may reasonably require under this Agreement in the interest of the customer and the parties to this Agreement.

Invoices and Collections

9. All invoices in connection with orders solicited by Agent must be rendered by Principal, directly to the customer, with a true copy to Agent, whether or not any commission to Agent is involved in the transaction. Full responsibility for all collections and bad debts rests with Principal, which exercises complete control over the approval of all customer credits, orders, and contracts. Principal shall have no right to debit Agent for the loss of any sum involved in any invoice from Principal to the customer, unless that customer is the Agent. Agent must forward promptly to Principal any and all monies or remittances in any form that Agent may collect or that may be placed in Agent's hands by customers of Principal. Furthermore, Agent shall make no allowances or adjustments in accounts, or authorize the return of any Products, unless given specific advance authorization, in individual cases, in writing by Principal.

Selling Aids, Supplies, and Promotion

10. Principal must from time to time supply to Agent, at no cost to Agent, reasonable quantities of Principal's advertising and selling literature, samples, displays, drawings, engineering and other Product data, as designed and made available by Principal, that would be helpful in procuring orders. Principal must strive diligently to maintain and enhance the reputation, usefulness, and acceptance of the Products, and in all reasonable and proper ways to assist Agent in promoting the sale of the Products in the Territory and to Selected Customers.

Assistance in Training

11. Principal must, as reasonably requested by Agent, (1) render advice to Agent in connection with Agent's soliciting orders, (2) familiarize Agent with the operation of the Products; and (3) render assistance to Agent in training Agent's employees and representatives, if any, in connection with soliciting orders.

Availability of Information

12. During the term of this Agreement, Principal must, at its expense, promptly make available to Agent and, as appropriate, to customers solicited by Agent, copies of Principal's brochures, customer lists, forms of orders and contracts, and other information reasonably necessary for Agent's performance under this Agreement, all with the same degree of promptness and quality with which Principal furnishes and makes available those materials to its other

representatives and customers.

Product Warranty

13. Principal must furnish, to each customer solicited by Agent, Principal's standard warranty' covering the Products, as established by Principal from time to time.

Handling of Inquiries

14. Principal must promptly forward to Agent the original of any inquiry regarding the Products received by Principal from Selected Customers or any potential or actual customers within the Territory, along with a copy of any acknowledgment Principal may wish to forward to the customer, and Principal must make available to Agent any information, including but not limited to estimates, specifications, and proposals, as required, that may be reasonably advantageous or required by Agent to enable it to process the inquiry intelligently and successfully.

Shipment Reports

15. Principal must furnish to Agent, not later than the 20th day of each calendar month, a list indicating by customer name and Products, the shipments of Products, invoices rendered for Products, and acceptance and rejection of orders during the immediately preceding calendar month. Each such list must be certified by an authorized officer of Principal and shall be subject to audit by public accountants selected by Agent at _____ [his *or* her *or* its] expense, not more frequently than once each calendar quarter.

Termination

16. (a) Either party shall have the right to terminate this Agreement, prior to the expiration of the term (or any renewal term), upon the occurrence of any of the following events:

(1) Breach or default by the other of any of the terms, obligations, covenants, representations of warranties under this Agreement that is not waived in writing by the non-defaulting party. In such case, the non-defaulting party must notify the other of the alleged breach or default, and the defaulting party shall have a period of 30 days to cure the default.

(2) The other party is declared insolvent or bankrupt or makes an assignment for the benefit of creditors.

(3) A receiver or trustee is appointed for the other party.

(b) Promptly upon expiration of the term or other termination (for any reason) of this Agreement, Agent must immediately cease to solicit orders or to represent in any manner that _____ [he *or* she *or* it] is associated with Principal. Upon termination, Agent must return or cause to be returned to Principal, on receiving Principal's written request and at Principal's expense, all equipment, all manner of identification, decals, advertising material, promotional items, sample contracts, and other materials not previously returned to Principal or previously expended in solicitation activities, that have been furnished by Principal in connection with this Agreement.

Relationship Created

17. Agent is not an employee of Principal for any purpose whatsoever; rather, Agent is an independent contractor. Principal is interested only in the results obtained by Agent, who shall have sole control of the manner and means of performing under this Agreement. Except as set forth in Exhibit H attached hereto, Principal shall not have the right to require Agent to collect accounts, investigate customer complaints, attend sales meetings, periodically report to Principal, conform to any fixed or minimum number of hours devoted to selling effort, follow prescribed itineraries, keep records of business transacted, make adjustments, bind the Principal, conform to particular promotional or solicitation policies of Principal, or do anything else that would jeopardize the relationship of independent contractor between Principal and Agent. All expenses and disbursements, including but not limited to those for travel and maintenance, entertainment, office, clerical, and general selling expenses, that may be incurred by Agent in connection with this Agreement shall be borne by Agent, and Principal shall not be in any way responsible or liable for them. Agent does not have, and Agent must not hold _____ [himself *or* herself *or* itself] out as having, any right, power, or authority to create any contract or obligation, either express or implied, on behalf of, in the name of, or binding upon Principal, or to pledge Principal's credit, or to extend credit in Principal's name, unless Principal consents to such representation or activity in advance in writing. Agent shall have the right to appoint suitable and desirable salespersons, employees, and subagents, and Agent shall be solely responsible for those persons and their acts. Compensation of such persons shall be Agent's sole responsibility, and no salesperson, employee, or subagent shall have any claim against Principal for salaries, commissions, items of cost, or other form of compensation or reimbursement. Principal shall be solely responsible for and must bear all expenses of supplying or producing, assembling, packaging, shipping and, wherever required, installing the Products, and for all expenses of the operation of the Principal's offices, plants, and equipment and facilities, and its business activities as a whole. Principal shall have no right or authority to commit Agent in any matter, cause, or thing whatever, without the prior written consent of Agent either under this Agreement or otherwise, or to use Agent's name in any way not specifically authorized by this Agreement.

Indemnification

18. Each party shall save the other harmless from and against, and shall indemnify the other for, any liability, loss, costs, expenses, or damages howsoever caused by reason of any injury (whether to body, property, or personal or business character or reputation) sustained by any person or to any person or to property by reason of any act, neglect, default, or omission of the indemnifying party or any of that party's agents, employees, or other representatives. If either party is sued in any court for damages by reason of any of the acts of the indemnifying party referred to in this Paragraph 18, the indemnifying party must defend the action (or cause a defense to be provided) at the indemnifying party's own expense and must pay and discharge any judgment that may be rendered in the action. If the indemnifying party fails or neglects to defend the action, the party sued may defend the action, and any expenses, including reasonable attorney's fees, that it may pay or incur in defending the action, and the amount of any judgment that it may be required to pay, must be promptly reimbursed upon demand. Nothing in this Paragraph 18 is intended to relieve, nor shall it relieve, either party from liability for the party's own act, omission, or negligence.

Notices and Requests

19. Any notice, demand, or request required or permitted to be given under this Agreement must be in writing and deposited in the United States mail, postage prepaid, registered or certified, and addressed to the addressee at the principal office set forth above. Either party may change that party's address for purposes of this Agreement by written notice given in accordance with this Paragraph 19.

Dispute Resolution

20. Any dispute arising out of or relating to this agreement, or the breach thereof shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment on the award rendered may be entered in any court having jurisdiction.

Assignment

21. The rights or obligations of either party to the Agreement may not be assigned or delegated, unless the other party has consented in writing to the assignment or delegation

No Implied Waiver

22. The failure of either party at any time to require performance by the other party of any provision of this Agreement shall not affect in any way the full right to require such performance at any subsequent time. The waiver by either party of a breach of any provision of this Agreement shall not be taken or held to be a waiver of the provision itself.

Governing Law; Enforcement of Agreement; Attorney's Fees and Costs

23. This Agreement shall be subject to and shall be enforced and construed pursuant to the laws of the State of California. If any provision or term of this Agreement is held to be invalid, void, or unenforceable, the remainder of the provisions shall remain in full force and effect and shall in no way be affected, impaired, or invalidated. In the event of litigation to enforce any of the provisions of this Agreement, the prevailing party may recover court costs and reasonable attorney's fees. Principal shall pay all expenses incurred by Agent in the collection of any commissions that may become due to Agent under this Agreement.

Exhibits

24. Any additional or modified terms and/or conditions, if any, that the parties consider desirable are embodied in Exhibit I attached hereto. The following Exhibits have been attached to this Agreement and are hereby incorporated by reference in this Agreement: "A," Products; "B," Territory; "C," Excluded Customers; "D," Selected Customers; "E," Sales Quota Requirements; "F," Sales Policies; "G," Commissions; "H," Agent's Additional Responsibilities; and "I," Additional Items. Nothing contained in any Exhibit shall be interpreted as superseding or nullifying the terms and provisions of this Agreement, except as expressly stated in the Exhibit, and in the event of any ambiguity in meaning or understanding between the Agreement proper and the appended Exhibits, the Agreement shall control.

Entire Agreement

25. This Agreement, including the Exhibits attached to it, constitutes the entire agreement between Principal and Agent concerning the subject matter of this Agreement and supersedes all prior and contemporaneous agreements between the parties. This Agreement may be amended only by an instrument in writing that expressly refers to this Agreement and specifically states that it is intended to amend it. Neither party is relying upon any warranties, representations, or inducements not set forth in this Agreement. In the event of any conflict between the provisions of this Agreement and the provisions contained in any contract or sales order form used by Principal, the provisions of this Agreement shall control

Executed on _____ [*date*], at _____ [*city and state*].

PRINCIPAL
[*typed name of principal*]
By _____ [*signature*]
[*typed name and title*]

AGENT
_____ [*typed name of principal*]
BY_____[*signature*]

[*typed name and title*]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 91 CONTRACTS WITH SALES REPRESENTATIVES
PART IV. FORMS
A. Contracts With Manufacturers' or Suppliers' Agents

30-91 California Legal Forms--Transaction Guide § 91.201

§ 91.201 Agreement Between Manufacturer or Supplier and Sales Representative Handling Only Principal's Products

[1] Comment--Use of Form

This form is designed for use between a manufacturer or supplier of products and an agent who will devote his or her entire time to the sale of the principal's products. This form also provides for price maintenance by the principal.

For discussion of sales agents, see *§§ 91.10* and *91.11*. For a drafting guide, see *§ 91.120*. Relevant antitrust considerations are discussed in *§§ 91.30* and *91.31*.

[2] Form

SALES AGENCY AGREEMENT

This AGREEMENT is made this _____ day of _____ [*month*], _____ [*year*], by and between _____ [*name of principal*], hereinafter referred to as "Principal," and _____ [*name of agent*], hereinafter referred to as "Agent."

ARTICLE 1.
RECITALS

Legal Status of Principal

1.01. The Principal is a corporation duly organized, validly existing, and in good standing under the laws of the State of California [*or specify other state*], with corporate power to own property and carry on its business as it is now being

conducted. The Principal has its primary place of business at _____ [*street address, city, and state*].

Legal Status of Agent

1.02. The Agent is an individual residing at _____ [*street address, city, and state*]. [*Add if applicable:* Agent is engaged in business under the name of _____, with a primary place of business at _____ (*street address, city, and state*).]

Business of Principal

1.03. The Principal is engaged in the business of manufacturing [*or* assembling *or* processing] and selling _____ [*specify products*].

Desire to Appoint and Become Agent

1.04. The Principal desires to appoint the Agent as a sales representative of the Principal for its products, and the Agent desires to become such a sales representative.

ARTICLE 2

CREATION AND REGULATION OF AGENCY

Exclusive Agency

2.01. The Principal appoints the Agent as exclusive sales agent in _____ [*specify territory*] to sell the _____ [*type*] products of the Principal. [*If the territory is less than the entire area of any state or other clearly defined area, add:* A map is attached to this Agreement as Exhibit A, delineating the territory assigned to the Agent.]

No Other Agent

2.02. The Principal must not appoint any other agent to sell any of the same products in the territory assigned to the Agent.

No Solicitation Outside Territory

2.03. The Agent must not solicit nor accept any orders for the products of the Principal outside the territory assigned to him.

Maintenance of Showroom

2.04. On or before _____ [*date*], the Agent shall establish an office and showroom in _____ [*specify city and state*] for the display and sale of the products of the Principal and shall maintain the office and showroom, or a similar office and showroom, during the term of this Agreement.

Term of Agreement

[*Select one of the following:*]

2.05. This Agreement shall continue for a term of _____ years from the date of its execution.

[*OR*]

2.05. (a) Unless this Agreement is terminated as authorized in Article 5, it shall continue for a term of _____ years from the date of its execution.

(b) At the end of the original term of _____ years, in the absence of cancellation by either party, the Agreement shall automatically renew from year to year.

[*Continue with the following:*]

Quoting Prices

2.06. In obtaining sales of the products of the Principal, the Agent shall quote only the prices and terms set forth in the attached schedule, marked Exhibit B, or such prices and terms as the Principal may fix hereafter.

Assignment or Delegation

2.07. The Agent shall not assign _____ [his *or* her] rights or delegate the performance of _____ [his *or* her] duties under this Agreement without the prior written consent of the Principal.

Acceptance of Orders

2.08. The Agent shall take but shall not accept orders for the products of the Principal. The Agent must forward promptly all orders to the Principal for acceptance or rejection by it.

ARTICLE 3

PROCEDURAL PROVISIONS

Furnishing Samples and Advertising Matter

3.01. The Principal, at its expense, shall furnish to the Agent a reasonable supply of samples and advertising matter for the Agent to use in connection with the agency established under this Agreement. All samples shall remain the exclusive property of the Principal and, on the termination of this Agreement, the Agent must return them to the Principal, at the Principal's expense.

Copies of Invoices to Agent

3.02. The Principal shall forward to the Agent two copies of each invoice covering any shipment of its products to any part of the territory of the Agent.

Devotion of Agent's Attention and Time

3.03. The Agent shall devote _____ [his *or* her] entire attention and time to the sale of the products of the Principal during the term of this Agreement.

ARTICLE 4

INFORMATIONAL PROVISIONS

Compensation of Agent

[*Select one of the following:*]

4.01. The Principal shall pay to the Agent as compensation for Agent's services a commission of _____ percent of the net invoice value of all shipments of its products to any part of the Agent's territory for which the Principal shall have received payment. The Principal shall pay the commissions on the _____ day of each month for all shipments paid during the preceding calendar month.

[*OR*]

4.01. The Principal shall pay to the Agent as compensation for Agent's services a commission of _____ percent of the net invoice value of all shipments of its products to any part of the Agent's territory. The Principal shall pay all commissions monthly, on the _____ day of the month in which payment has been received, on all amounts or moneys collected from or remitted by customers, or on behalf of customers, regardless of whether those amounts are in full or only partial fulfillment of the entire obligation to the Principal.

[*OR*]

4.01. Upon acceptance of any order or part of order, the Principal shall credit immediately to the account of the Agent a commission of _____ percent of the net invoice value of the order or part of order, and the Principal shall pay to the Agent the commission on the _____ day of the month following the date for shipment of the order, or part of order. If any accepted order, or part of order, is thereafter rejected or cancelled, the amount of

commission or compensation to the credit of the Agent on such order, or part of order, shall be charged against the account of the Agent.

[*Continue with the following:*]

Authority to Employ Salespersons

4.02. The Agent may employ such sales personnel at such compensation and on such other conditions as the Agent deems proper to sell the products of the Principal in the territory assigned to the Agent. In employing any salesperson, the Agent shall enter into a written agreement with him or her containing a provision that he or she is the employee of the Agent and is to be paid by Agent alone and that, in employing the salesperson, the Agent is acting individually and not as agent or attorney for the Principal.

Payment of Expenses

4.03. The Agent shall assume and pay all of the costs of conducting the sales agency under this Agreement. This shall include the commissions or other form of compensation to sales personnel in the Agent's employ.

[*Optional:*]

Share of Net Profits

4.04. If the net profits of the Principal from the sales made for it by the Agent during the period of one year from the date of execution of this Agreement, or during any successive term of one year thereafter, exceed the sum of $ _____, the Principal shall pay to the Agent, in addition to the compensation otherwise agreed to be paid to the Agent under this Agreement, _____percent of the net profit over and above such sum. The net profits shall be ascertained by deducting from the gross profits of such business all expenses and losses incurred in the transaction of such business.

[*Optional:*]

Commissions for Sales Outside Territory

4.05. If the Agent, with the prior written approval of the Principal, shall sell any of the products of the Principal for delivery outside the sales territory granted to the Agent under this Agreement, the Agent shall be entitled to receive as full compensation for that sale a sum equal to _____ percent of the usual commissions involved in any such sale or sales.

[*Continue with the following:*]

ARTICLE 5

TERMINATION

Grounds

[*Select one of the following:*]

5.01. If the Agent violates any provision of this Agreement, or becomes insolvent or bankrupt, the Principal may, on 10 days' written notice to the Agent, terminate this Agreement. Notice to the Agent shall be addressed to the principal place of business of the Agent as stated in this Agreement or as subsequently established by written notice to the Principal.

[*OR*]

5.01. If during any period of one year during the term of this Agreement the Agent shall sell less than a total amount of $ _____ of the products of the Principal as determined by the products wholesale prices, the Principal shall have the option of terminating this Agreement by giving to the Agent two weeks' written notice. Notice to the Agent shall be addressed to the principal place of business of the Agent as stated in this Agreement or as subsequently established by written notice to the Principal.

[*OR*]

5.01. Either party may terminate this Agreement by giving to the other party 30 days' written notice. Notice to either party shall be addressed to the principal place of business of that party as stated in this Agreement or as subsequently established by written notice to the other party.

[*OR*]

5.01. The Principal shall have the right to terminate this Agreement at any time after the expiration of one year from the date of this Agreement, for any cause whatsoever, upon giving two weeks' written notice. Notice to the Agent shall be addressed to the principal place of business of the Agent as stated in this Agreement or as subsequently established by written notice to the Principal.

[*Continue with the following:*]

Applicability of Terms After Termination

5.02. In the event of termination, this Agreement shall remain applicable to any orders for products that the Agent has previously placed with the Principal.

Executed on _____ [*date*], at _____ [*city and state*].

PRINCIPAL
[*typed name of principal*]
By _____ [*signature*]

[*typed name and title*]
AGENT
_____ [*typed name of agent*]
[*signature of agent*]
[*typed name of agent*]

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 91 CONTRACTS WITH SALES REPRESENTATIVES
PART IV. FORMS
B. Distributorship Agreements

30-91 California Legal Forms--Transaction Guide § 91.210

§ 91.210 Agreement Between Manufacturer or Supplier and Distributor

[1] Comment--Use of Form

This form is an agreement between a manufacturer or supplier and a distributor. It provides for an exclusive distributorship to sell the manufacturer's or supplier's product line at wholesale within a described territory.

For discussion of distributorships generally, see *§ 91.12*. For a drafting guide for distributorship contracts, see *§ 91.121*.

Any of the provisions presented in §§ 91.212-91.223 may be adapted for use in this form.

[2] Form

DISTRIBUTORSHIP AGREEMENT

_____ [*Name of company*], hereinafter referred to as the "Company," and _____ [*name of distributor*], hereinafter referred to as the "Distributor," in consideration of the promises made in this Agreement and intending to be legally bound, agree as follows:

ARTICLE 1

RECITALS

Legal Status of Company

1.01. The Company is a corporation duly organized, validly existing, and in good standing under the laws of the State of _____, with corporate power to own property and carry on its business as it is now being conducted. The Company has its principal office and place of business at _____ [*street address, city, and state*].

Legal Status of Distributor

[*Select one of the following:*]

1.02. The Distributor is an individual having _____ [his *or* her] principal office and place of business at _____ [*street address, city and state*].

[*OR*]

1.02. The Distributor is a partnership composed of _____ [*names of partners*], having its principal office and place of business at _____ [*street address, city, and state*].

[*OR*]

1.02. The Distributor is a corporation duly organized, validly existing, and in good standing under the laws of the State of _____, with corporate power to own property and carry on its business as contemplated by this Agreement. The Distributor has its principal office and place of business at _____ [*street address, city, and state*].

[*Continue with the following:*]

Company Business

1.03. The Company is engaged in the manufacture and sale of _____ [*specify products*] and other products from time to time manufactured and sold under the trade name " _____" [*specify*].

Facilities, Ability, and Desire to Be Distributor

1.04. (a) The Distributor represents that _____ [he *or* she *or* it] possesses the technical facilities and ability to promote the sale and use of products manufactured by the Company and is desirous of developing demand for and selling those products on an exclusive basis in the territory described in this Agreement.

(b) The Company is desirous of having the Distributor develop demand for and sell its products in the territory described in this Agreement on the terms and conditions set forth in this Agreement.

ARTICLE 2

DISTRIBUTORSHIP

Exclusive Appointment

2.01. (a) The Company appoints the Distributor as the exclusive distributor for the sale of its products at wholesale within the territory described in Schedule A attached to this Agreement. The territory so described, and as may be subsequently enlarged, reduced, or otherwise changed in area with the mutual consent of the parties, is hereinafter sometimes referred to as "the territory."

(b) During the continuation of this Agreement, the Company shall not appoint any other or different person, firm, or corporation to sell the same products in the territory.

Selling Rights Reserved

2.02. The Company reserves the right to sell, either directly or through its branch offices, any of its products to any of the following, the gross profit from the sales to be divided as provided in this Agreement:

(a) The United States or any of its agencies, bureaus, commissions, or departments.

(b) Any foreign government or any of its agencies, bureaus, commissions, or departments.

(c) Any office, factory, or branch of _____ [*name of company*].

Acceptance

2.03. The Distributor accepts the appointment to develop demand for and to sell Company products within the territory and will make all sales of Company products in accordance with this Agreement.

Term

[*Select one of the following:*]

2.04. Unless terminated as provided in Article 4, this Agreement and the appointment of the Distributor under this Agreement shall continue in force indefinitely and govern all transactions between the parties.

[*OR*]

2.04. This Agreement shall continue in force for the period of _____ [*e.g.*, three] years from the date of this Agreement and thereafter for successive periods of _____ [*e.g.*, three] years each, unless either of the parties has given the other party written notice of its election to terminate this Agreement at least _____ [*e.g.*, 90] days prior to the end of any _____ [*e.g.*, three]-year period,.

[*Continue with the following:*]

ARTICLE 3

OPERATIONS

Acceptance of Orders; Filling

3.01. (a) All orders the Company receives for its products from the Distributor are subject to acceptance by Company.

(b) The Company will use its best efforts to fill the accepted orders as promptly as practicable subject, however, to delays caused by government orders or requirements, transportation conditions, labor or material shortages, strikes, riots, fires, or any other cause beyond the Company's control. In all cases, the Company will use its best efforts to advise the Distributor in advance of any inability to make full and timely delivery of any products that the Distributor has previously ordered.

Payment

3.02. (a) The Distributor shall pay the Company for its products the Distributor's net prices f.o.b. _____[*city and state*], according to the following schedule of prices: _____[*set forth*].

(b) The Company may change the schedule of prices at any time without notice.

(c) The Distributor shall pay the Company for products on any of the following terms: cash with order, sight draft with bill of lading attached payable with collection charges and exchange, or C.O.D. by express, all f.o.b. _____ [*city and state*].

Distributor's Efforts, Facilities, and Personnel

3.03. The Distributor will use _____ [his *or* her *or* its] best efforts to promote demand for and sale of the Company's products and will maintain adequate facilities and sales and personnel for that purpose.

Place of Business, Display Room, and Service Department

3.04. The Distributor shall maintain a place of business, display room, and service department satisfactory to the Company at all times, and the Company shall have the right at all reasonable times during business hours to inspect the place of business, display room, and service department.

Appointment of Dealers, Salesmen, or Other Representatives

3.05. (a) The Distributor shall work and develop the territory to the satisfaction of the Company, and in doing so shall appoint dealers, salespersons, or other representatives to sell the Company's products.

(b) The Distributor shall file with the Company a copy of each agreement entered into with such dealers, salespersons, or other representatives defining the territory to be served, which agreements shall be on appropriate forms supplied by

the Company.

(c) Upon expiration or prior termination of any such agreement for any cause, the Distributor shall furnish the Company with notice of the termination in order that the Company's field personnel records will be up to date at all times.

Installation and Maintenance Service

3.06. (a) The Distributor shall provide and maintain at _____ [his *or* her *or* its] own expense an efficient installation and maintenance service on all of the Company's products installed in the territory, in accordance with instructions issued from time to time by the Company.

(b) The Distributor shall see that all necessary repairs to and replacements of Company's products are promptly and properly made, and shall use every reasonable effort to maintain a standard of service consistent with the policy of the Company.

(c) In connection with the maintenance of service on the Company's products, the Distributor shall carry in stock an adequate quantity of repair and replacement parts, as the Company stipulates. In stipulating the quantity of parts to be carried in stock, the Company will be governed by the number of products in the Distributor's territory to be serviced. The Company shall have the right at any reasonable time during business hours to inspect Distributor's stock of parts and, if in the Company's judgment a sufficient quantity of parts for repair and replacement purposes are not then in the Distributor's stock, the Distributor shall promptly order such parts as the Company recommends.

Freight and Installation Charges

3.07. The Distributor may charge to and collect from each person to whom the Distributor sells products acquired hereunder the following items:

(a) Freight charges as paid by the Distributor.

(b) Installation charges, to be set forth on the invoice that the Distributor renders to the purchaser.

Return of Products or Service Parts for Repair or Credit

3.08. (a) Unless the Company has authorized or permitted the return of any products or parts, the Company shall not be obligated to accept from the Distributor any products or parts returned, or to make any exchange thereof, or to credit the Distributor for any returned products or parts.

(b) Except in the case of damage or defect attributable to the Company, the Distributor shall not make any claim against the Company for any damaged or defective product or part.

Common Carriers Agents of Distributor

3.09. Whenever the Company delivers or causes to be delivered to a common carrier any goods ordered by the Distributor, whether or not the particular carrier has been designated in the shipping or routing instructions of the Distributor, the Company shall not be responsible for any delays or damages in shipment. For this purpose, the common carrier to which the Company delivers goods shipped to the Distributor shall be treated as the agent of the Distributor.

Report of Sales

3.10. In order to enable the Company to have a complete record of all products sold, the Distributor shall furnish the Company weekly, or at such intervals as the Company and the Distributor shall otherwise agree, a report of all sales of the Company's products in the territory.

Change of Design

3.11. The Company reserves the right to change the design of any product, or any part of any product, at any time without notice to the Distributor. If any such change is made, the Company may, but shall not be obligated to, make the change upon any products or parts shipped thereafter on the orders of the Distributor, but the Company shall not be obligated to make a similar change on any products or parts previously shipped to the Distributor, or to install or furnish any other or different parts than were there when shipment was made.

Division of Profit on Sales in Other Territory

3.12. (a) Subject to the provisions of Subparagraph (b), if a sale of a Company product is made in the territory of one distributor and installation is made in the territory of another distributor, the gross profit (the difference between the distributor's regular cost and the actual selling price resulting from the sale) shall be divided between distributors as follows: _____percent of the gross profit to the selling distributor and _____ percent of the gross profit to the distributor in whose territory installation is made.

(b) In case of removal or resale of products by the purchaser for use in another territory, Subparagraph (a) shall not apply.

(c) If any dispute arises between the distributors over the division of gross profits as referred to in Subparagraph (a), they shall submit the dispute to the Company, and its decision shall be binding and final.

Sales to United States

3.13. (a) When the Company, either directly or through its branch offices, solicits business from the United States Government, the Company will make the price quotation to the government on Company products on whatever basis it deems most advisable.

(b) In the case of purchases of Company products by the United States that are to be installed in the territory of Distributor, the gross profit (the difference between the Distributor's regular cost and the actual selling price) shall be divided as follows: _____percent to the Distributor in whose territory the products are installed and _____ percent to the Company or its branch, as the case may be.

(c) In making installation of products, the Distributor shall see that installation is made promptly in accordance with instructions issued by the Company and that all necessary repairs and replacements are promptly made.

Right to Use Name

3.14. (a) Subject to the provisions of Subparagraph (b), the Distributor may use the name _____ [*set forth name*] as applied to Company products in any sign or advertising during the continuation of this Agreement.

(b) In case of termination of this Agreement, or upon request of the Company, the Distributor shall discontinue use of the name _____ [*set forth name*] in any sign or advertising and thereafter shall not use the name directly or indirectly in connection with the Distributor's business, and shall not use any other name, title, or expression so nearly resembling it as would be likely to lead to confusion or uncertainty or to deceive the public.

Audits of Books

3.15. The Distributor shall have _____ [his *or* her *or* its] books audited at least annually by a competent accountant or auditor and shall furnish a certified copy of the audit to the Company.

ARTICLE 4

TERMINATION

Right of Company to Cancel

4.01. The Company may at its option cancel this Agreement without advance notice to the Distributor if any of the following occurs:

(a) A petition is filed to have the Distributor declared bankrupt.

(b) A petition is filed to appoint a receiver or trustee for the Distributor.

(c) The insolvency of the Distributor.

[*If the distributor is an individual:*]

(d) The death or incapacity of the Distributor.

[*If the distributor is a partnership:*]

(d) The Distributor's existence as a partnership is terminated, or a disagreement of any nature arises between the members of the partnership, whereby the Company determines that its interests may be imperiled.

[*If the distributor is a corporation:*]

(d) The Distributor's existence as a corporation is terminated.

[*Continue with the following:*]

Termination by Either Without Cause

4.02. Either party may terminate this Agreement at any time without cause by giving the other party _____ days' written notice of termination.

Applicability of Terms After Termination

4.03. In the event of termination, this Agreement shall remain applicable to any orders for products that the Distributor has previously placed and to any other orders that may be executed within _____ [*e.g.,* 90] days subsequent to the effective date of termination.

Repurchase of Products on Termination

4.04. In the event of the termination of this Agreement by either party for any reason, the Company may at its option repurchase from the Distributor any Company products and repair and replacement parts on hand in the Distributor's place of business or in the possession of the Distributor. The repurchase shall be made at the net price paid by the Distributor to the Company, plus actual freight on the shipment of the products and repair or replacement parts to the Distributor. On demand and the tender of the repurchase price, the Distributor shall be obligated to deliver such goods to the Company forthwith. The Company reserves the right, however, to reject any product or repair or replacement part that is not in first-class condition.

Uninstalled Products on Termination

4.05. In case of the termination of this Agreement by either party for any reason, if any products have been sold but not yet installed, the Company may install the products and charge all expenses to the Distributor's account, to be deducted at time of final settlement.

Subrogation on Termination

4.06. In case this Agreement shall be terminated for any reason, the Company shall at its option be subrogated immediately to any agreements, rights, and relations of the Distributor with dealers, salespersons, or other representatives appointed by the Distributor with regard to the sale of Company products and service parts, and all such agreements shall contain a clause to make this provision effective in favor of the Company when this Agreement shall be terminated.

ARTICLE 5

INTERPRETATION AND ENFORCEMENT

Notices

5.01. Any notice, request, demand, or other communication required or permitted under this Agreement shall be deemed

to be properly given when deposited in the United States mail, postage prepaid, addressed as follows:

(a) In the case of notice given to the Company, to _____ [*corporate name, name of officer concerned, street address, city, and state*], or to such other person or address as the Company may from time to time furnish to the Distributor.

(b) In the case of notice given to the Distributor, to _____ [*specify name and title, if appropriate, and street address, city, and state*], or to such other person or address as the Distributor may from time to time furnish to the Company.

Dispute Resolution

5.02. Any dispute arising out of or relating to this agreement, or the breach thereof shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment on the award rendered may be entered in any court having jurisdiction.

Distributor Not Agent or Legal Representative

5.03. This Agreement does not constitute the Distributor the agent or legal representative of the Company for any purpose whatsoever. The Distributor is not granted any right or authority to assume or to create any obligation or responsibility, express or implied, in behalf of or in the name of the Company, or to bind the Company in any manner.

Assignment

5.04. This Agreement constitutes a personal contract and the Distributor shall not transfer or assign the Agreement or any part of it without written consent of the Company.

No Implied Waiver

5.05. The failure of either party at any time to require performance by the other party of any provision of this Agreement shall not affect in any way the full right to require such performance at any subsequent time. Nor shall the waiver by either party of a breach of any provision of this Agreement be taken or held to be a waiver of the provision itself.

Controlling Law

5.06. The validity, interpretation, and performance of this Agreement shall be controlled by and construed under the laws of the State of _____, the state in which this Agreement is being executed. It is understood, however, that this is a general form of agreement, designed for use in the United States wherever the Company may desire to sell its products, and that any provision in this Agreement that in any way contravenes the laws of any state or jurisdiction shall be deemed not to be a part of this Agreement in that state or jurisdiction.

Complete Agreement

5.07. This Agreement contains all of the agreements, understandings, representations, conditions, warranties, and covenants made between the parties concerning this distributorship. Neither party shall be liable for any representations made that are not set forth in this Agreement, and all modifications and amendments to this Agreement must be in writing.

Executed on _____ [*date*], at _____ [*city and state*].

COMPANY
[*typed name of company*]
By _____ [*signature*]
[*typed name and title*]

DISTRIBUTOR
_____ [*typed name of distributor*]
By _____[*signature*]
[*typed name and title*]

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DIVISION VI: PERFORMANCE OF SERVICES
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30-91 California Legal Forms--Transaction Guide § 91.211

§ 91.211 Agreement Between Manufacturer or Supplier and Distributor--Overseas Distributorship

[1] Comment--Use of Form

This form is designed for use in appointing an overseas company as an exclusive distributor. It includes a provision authorizing sales to both wholesale and retail outlets. Because the distributor will operate in one or more foreign jurisdictions, this form includes a provision expressly prohibiting any activity that would violate the Foreign Corrupt Practices Act [*see 15 U.S.C. § 78dd-1 et seq.*; *see also § 91.32*].

For discussion of distributorships generally, see *§ 91.12*. For a drafting guide for distributorship contracts, see *§ 91.121*.

Any of the provisions presented in §§ 91.212-91.223 may be adapted for use in this form.

[2] Form

DISTRIBUTOR AGREEMENT

_____, hereinafter referred to as the "Company," and _____, hereinafter referred to as the "Distributor," in consideration of the promises made herein and intending to be legally bound, agree as follows:

ARTICLE 1

RECITALS

Legal Status of Company

1.01. The Company is a corporation duly organized, validly existing, and in good standing under the laws of the State of _____, with corporate power to own property and carry on its business as it is now being conducted. Company has its principal office and place of business at _____ [*street address, city, and state*].

Status of Distributor

1.02. The Distributor is a corporation duly organized, validly existing, and in good standing under the laws of the State of _____, with corporate power to own property and carry on its business as contemplated by this Agreement. The Distributor has its principal office and place of business at _____ [*street address, city, and state*].

Purpose

1.03. The purpose of this Agreement is to appoint an overseas distributor for certain of the Company's products.

ARTICLE 2

TERMS AND CONDITIONS

Appointment

2.01. The Company appoints the Distributor as its exclusive distributor with authority to sell to wholesale and retail outlets in _____ [*name of foreign country*] certain of the Company's products, hereinafter collectively referred to as "products," namely, _____[*list products*].

Best Efforts

2.02. In consideration of this appointment, the Distributor shall exert its best efforts to promote the sale of the products, and shall not handle any products of any other person, firm, or corporation that compete with, or are of like nature to, the products referred to in Paragraph 2.01.

Prices and Discounts

2.03. The Company, or other sources that the Company approves, will sell the products to the Distributor at regular prices and discounts for overseas distributors quoted in price lists issued from time to time. The annexed price list is in effect now and applies until further notice.

Advertising and Promotion

2.04. (a) On a monthly basis, the Distributor shall pay into the account of the Company, at such bank or depository as the Company shall designate, in local currency, amounts for each product unit computed on a basis to be agreed on from

time to time by the Company and the Distributor. The Company shall expend the amounts paid into the Company account, or such portion thereof as the Company may select, in the advertising and promotion of the products, all as the Company may deem desirable and proper.

(b) The net selling prices to wholesalers are to be agreed on from time to time by the Company and the Distributor.

(c) Until further notice, the amounts to be paid into the Company account and the net selling prices to wholesalers shall be as shown on the attached Schedule.

Reports

2.05. In order that the Company may be apprised of the distribution of its products, the Distributor shall submit all sales reports and marketing information that the Company may from time to time require. The Company or its authorized representative may inspect and audit the books and records of the Distributor relating to the sale of products at any time during usual business hours.

Trademarks

2.06. The Distributor acknowledges the validity of all trademark registrations in _____ [*name of country*] owned by the Company during the term of this Agreement, including the registrations of the trademarks _____, _____, and _____. The Distributor further acknowledges that the Company is the sole owner of the entire right, title, and interest in the trademarks covered by these registrations, hereinafter called "marks," both in _____ [*name of country*] and elsewhere in the world. The Distributor shall not do any thing or commit any act which might prejudice or adversely affect the validity of the marks or the ownership by the Company thereof, and shall cease to use the marks, or any similar marks, in any manner on the expiration or other termination of this Agreement.

Compliance With Foreign Corrupt Practices Act

2.07. In performing its obligations under this Agreement, Distributor shall not undertake any activity that would constitute a violation of the Foreign Corrupt Practices Act, *15 U.S.C. § 78dd-1 et seq.*

Term

2.08. This Agreement shall become effective as of _____ [*date*] and shall bind the parties for a period of one year from that date, but it shall be terminable at any time on _____ [*e.g.*, 90 days'] written notice sent by registered mail by either party to the other at the address set out above, such notice to be complete upon mailing. The Company shall have the right to purchase at the Distributor's cost all products sold under this Agreement and in the Distributor's possession on the date of expiration or other termination of this Agreement. Such expiration or other termination shall not relieve the Distributor of the obligation to pay for products sold to the Distributor prior to the date of expiration or other termination, nor the obligation to account for all amounts owing to the Company under Paragraph 2.04 with respect to products sold by the Distributor prior to such expiration or termination.

Executed on _____ [*date*], at _____ [*city and state*].

COMPANY

[*typed name of company*]
By _____ [*signature*]
[*typed name and title*]

DISTRIBUTOR
_____ [*typed name of distributor*]
By _____[*signature*]
[*typed name and title*]

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30-91 California Legal Forms--Transaction Guide § 91.212

§ 91.212 Distributorship Provision--Nonexclusive Appointment

[1] Comment--Use of Form

This form is designed for use as a provision in an agreement where a distributor is appointed on a nonexclusive basis. With appropriate modifications, this form may be used with the *forms in §§ 91.210* and *91.211*.

For general discussion of how distributors operate, see *§ 91.12*.

[2] Form

Nonexclusive Appointment

The Company appoints the Distributor as a wholesale distributor of its products [*or specify particular products*]. The Distributor may sell anywhere within the United States, but without any exclusive rights in any territory.

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30-91 California Legal Forms--Transaction Guide § 91.213

§ 91.213 Distributorship Provision--Nonexclusive Appointment But With Primary Responsibility for Designated Territory

[1] Comment--Use of Form

This form, like the*form in § 91.212*, is a contractual provision for appointing a distributor on a nonexclusive basis. However, this form makes it clear that the appointing company considers the distributor to be primarily responsible for the development of sales in the territory that includes the principal place of business of the distributor.

For general discussion of how distributors operate, see *§ 91.12*.

[2] Form

Nonexclusive Appointment But With Primary Responsibility for Designated Area

The Company appoints the Distributor as a wholesale distributor of its products [*or specify particular products*]. This territory that is described in that attached Exhibit _____ and that includes the Distributor's principal place of business shall be considered the area in which the Distributor is primarily responsible for development of the mass volume of potential sales of the products of the Company. This territory is not exclusive to the Distributor, and the Company reserves the unrestricted right to sell Company products to anyone anywhere.

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30-91 California Legal Forms--Transaction Guide § 91.214

§ 91.214 Distributorship Provision--Purchase Price of Products

[1] Comment--Use of Form

This form is a contractual provision specifying how the price at which the distributor will purchase products from the manufacturer or supplier is to be determined. For general discussion of how distributors operate, see *§ 91.12*.

[2] Form

Purchase Price of Products

The Company shall sell all products to the Distributor at the price set forth in its then-current price list, which shall be furnished to the Distributor not later than _____ days before the prices take effect. The Distributor shall be entitled, however, to a discount of _____ percent from the prices shown in such price list.

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30-91 California Legal Forms--Transaction Guide § 91.215

§ 91.215 Distributorship Provision--Change of Price

[1] Comment--Use of Form

This form is a contractual provision reserving the right of the manufacturer or supplier to change the price of any of its products that the distributor will purchase for resale to the distributor's customers. For general discussion of how distributors operate, see *§ 91.12*.

[2] Form

Change of Price

The Company reserves the right to change the price of any of its products from those shown in its present price list. In the event the prices are reduced, the Distributor shall have the benefit of the reduction. If it shall become necessary for the Company to increase the prices of products, the Company shall serve on the Distributor written notice thereof at least _____ days before the increased prices take effect.

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B. Distributorship Agreements

30-91 California Legal Forms--Transaction Guide § 91.216

§ 91.216 Distributorship Provision--Minimum Purchase

[1] Comment--Use of Form

This form is designed for use as a provision by which the manufacturer or supplier can require the distributor to make a minimum monthly purchase of products for distribution. For general discussion of how distributors operate, see *§ 91.12*.

[2] Form

Minimum Purchase

The Distributor shall purchase from the Company at least _____ [*specify minimum number of units of products or minimum amount in money value*] each month during the term of this Agreement. In order to ensure delivery to the Distributor during any month of such additional amount, the Distributor shall place the order for the additional amount of products not later than the _____ day of each month, for delivery during the following month. In the event that the order is not given by that date, the Company will endeavor to make delivery within a reasonable time after the order is placed, but it cannot guarantee delivery during the same time period.

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30-91 California Legal Forms--Transaction Guide § 91.217

§ 91.217 Distributorship Provision--Delivery of Products

[1] Comment--Use of Form

This form may be incorporated in any distributorship agreement to provide for the time and place of delivery of products that the distributor purchases from the manufacturer or supplier. For general discussion of how distributors operate, see *§ 91.12*.

[2] Form

Delivery of Products

Products ordered by the Distributor shall be delivered by the Company to the Distributor within _____ days after receipt of the order by the Company. The Company shall make such delivery to the Distributor either at the Distributor's place of business as set forth in this Agreement or at any other place within the United States and to any other person, firm, or corporation designated by the Distributor. However, if the Company is unable to make delivery of any products for any reason beyond its control, the Distributor shall not have the right to cancel the order until the expiration of _____ days after the time for delivery specified in this Paragraph.

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30-91 California Legal Forms--Transaction Guide § 91.218

§ 91.218 Distributorship Provision--Suggested Sales Price on Resale of Products

[1] Comment--Use of Form

This form is intended for use as a contractual provision when the manufacturer or supplier wants to suggest the prices at which the distributor sells products to its customers. It does not attempt to control the prices at which the distributor sells the products it has purchased. For general discussion of how distributors operate, see *§ 91.12*.

[2] Form

Suggested Sales Price on Resale of Products

The Company shall furnish to the Distributor a current list of suggested resale prices for all of the products of the Company that the Distributor has agreed to sell. However, the Distributor is under no obligation to sell the products of the Company at the prices specified in the price list or at any other price suggested by the Company.

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B. Distributorship Agreements

30-91 California Legal Forms--Transaction Guide § 91.219

§ 91.219 Distributorship Provision--Retention of Title as Security for Performance

[1] Comment--Use of Form

This form is intended as a contractual provision that will operate as a security device enabling the manufacturer or supplier to retain title to the products delivered to the distributor, or to the proceeds from their sale, until it has received payment from the distributor.

[2] Form

Retention of Title as Security for Performance

The Distributor shall be liable for payment of the purchase price of any products covered by this Agreement as soon as they have been delivered to the Distributor. Until the purchase price has been paid in full, notwithstanding such delivery, title to the products shall remain in the Company. However, such products after delivery shall be at the risk and expense of the Distributor as to loss, destruction, or damage, and taxes and charges of every kind. In the event that the Distributor resells and delivers any of the products prior to making full payment for them, title to the proceeds of such resale received by the Distributor shall be in the Company until the full purchase price due the Company has been paid.

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30-91 California Legal Forms--Transaction Guide § 91.220

§ 91.220 Distributorship Provision--Deposit as Security for Performance

[1] Comment--Use of Form

As an alternative to the *form in § 91.219*, which undertakes to retain title to the products delivered or to the proceeds from their sales until the manufacturer or supplier receives payment, this is a contractual provision requiring a deposit at the time of making the distributor agreement. For general discussion of how distributors operate, see *§ 91.12*.

[2] Form

Deposit as Security for Performance

At the time of execution and delivery of this Agreement, the Distributor shall deposit with the Company the sum of $ _____ for the faithful performance by the Distributor of the provisions of this Agreement. At the termination of the Agreement, the Company shall have the right to deduct from the amount deposited with it the purchase price of any of its products previously sold and delivered to, but not yet paid for by, the Distributor. The Company shall then return to the Distributor any remaining balance of the amount deposited.

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30-91 California Legal Forms--Transaction Guide § 91.221

§ 91.221 Distributorship Provision--Warranty of Quality

[1] Comment--Use of Form

This form provides an express warranty by the manufacturer or supplier that its products are free from defects in workmanship or materials.

[2] Form

Warranty of Quality

The Company warrants that the products it sells to the Distributor shall be free from defects in workmanship or materials. In the event that any product or part of a product proves to be defective in workmanship or materials within a period of _____ [days *or* months] from its delivery to the Distributor, the Company shall repair or replace the product or part without cost to the Distributor. Except as stated in this paragraph, the Company shall not be liable for any damages or for the breach of any express or implied warranty or for any other obligation or liability on account of the products covered by this Agreement that it may sell to the Distributor.

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B. Distributorship Agreements

30-91 California Legal Forms--Transaction Guide § 91.222

§ 91.222 Distributorship Provision--Catalogs and Advertising Matter

[1] Comment--Use of Form

Most manufacturers or suppliers of products furnish descriptive and illustrative brochures, catalogs, or other advertising matter to distributors of their products. This form is intended as a contractual provision establishing the arrangement under which such material will be supplied to the distributor for use in marketing the products. For general discussion of how distributors operate, see *§ 91.12*.

[2] Form

Catalogs and Advertising Matter

The Company shall furnish to the Distributor a reasonable quantity of its catalogs and other advertising matter for use by the Distributor for display or mailing in the advertising of Company products. The Company shall furnish such catalogs and other advertising matter to the Distributor, from time to time as they are prepared by it, at _____ [no cost to the Distributor *or* at the actual cost to the Company].

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30-91 California Legal Forms--Transaction Guide § 91.223

§ 91.223 Distributorship Provision--Notice of Claims

[1] Comment--Use of Form

This form is a contractual provision that will govern the making of any claims by the distributor against the manufacturer or supplier of the products. For general discussion of how distributors operate, see *§ 91.12*.

[2] Form

Notice of Claims

(a) If during the term of this Agreement the Distributor shall have reason to believe Distributor has any claim against the Company regarding any transaction growing out of this Agreement, the Distributor shall notify Company in writing within _____ days after Distributor knows or has reason to know the basis of any such claim.

(b) Failure to give the notice prescribed by Subparagraph (a) shall relieve the Company from all liability on the claim.

(c) The provisions of this Paragraph shall survive the termination of any other portions of this Agreement.

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C. Consignment Agreements

30-91 California Legal Forms--Transaction Guide § 91.230

§ 91.230 Consignment Agreement--Letter Form

[1] Comment--Use of Form

This form of consignment agreement, in letter format, is appropriate when the relationship between the parties is meant to be informal and the variety of products consigned is limited. In a consignment, there is no sale between the consignor and consignee; rather, the consignor's goods are entrusted to the consignee, who sells them for the consignor's account [*see § 91.13[1]*]. For a drafting guide for consignment agreements, see *§ 91.122*.

For a consignment agreement between the owner of a motor vehicle and a dealer, see *§ 91.231*.

[2] Form

[*Letterhead of consignor*]

[*Date*]

[*Name and address of consignee*]

Dear _____:

This letter is intended to confirm our understanding that you are appointed one of our sales agents within the State of _____, for the sale of _____ [*specify product or products*], hereinafter referred to as "goods," upon the following terms and conditions.

Consignment

1 We shall ship to you from time to time, on consignment, such quantities and styles of goods as we in our discretion may determine, being mindful of the sales potential in your territory.

Consignment Invoices

2. We shall accompany each shipment with a consignment invoice, invoicing the goods to you at our current factory price, less the usual trade discount. This method of invoicing is followed for our mutual convenience and is not to be construed as a sale of the goods to you.

Acceptance of Possession and Sale

3. You shall accept possession of the goods, on consignment, and sell the goods [*if desired, specify* to retail dealers only], for our account, _____[at list prices as we may establish or authorize from time to time *or* at not less than the consignment invoice price].

Expenses

4. From the time you receive possession of the consigned goods, you shall be liable for and shall pay all expenses incident to that possession, including all expenses of cartage, handling, storage, insuring, selling, and delivering to customers.

Title

5. Title to the goods shipped and consigned to you hereunder shall remain in us at all times until you sell them to your customers, at which time title shall pass directly from us to the respective customers. Similarly, title to the proceeds of all goods sold shall vest in and remain in us until you account for and remit to us our share of the proceeds.

Sales

6. In writing up the sales, you shall employ our sales memoranda, which contain the statement that the sale is conditioned on our approval and the receipt by the purchaser from us of a sales confirmation. You shall undertake sales on credit only to customers you judge to be good credit risks.

Compensation

7. You shall be allowed as compensation the amount of the difference between our consignment invoice price to you and the price for which you sell the goods to customers.

Returns of Goods

8. At all times, consigned goods shall be subject to our direction and control. Upon our demand for the return of any unsold goods consigned to you hereunder, you shall promptly return such goods to us. In the event you find any consigned goods to be unsalable, you may return them to us with our prior consent in writing. We shall bear the expense

of return of any consigned goods.

Records

9. You shall keep accurate records showing all of the following: all goods received from us on consignment with the consignment invoice price; all sales to customers, with the names of the customers, quantities purchased, and the terms of sale; all consigned goods remaining on hand with you; all goods returned by or repossessed from customers, together with credits allowed; and all goods returned to us and credits therefor. You shall allow our representatives to have access to such records on demand and, in addition, shall permit our representatives at reasonable times to inventory the consigned goods in your possession.

Accounting and Remittance

10. You shall render to us not later than the _____ [*e.g.*, 15th] day of each month an accurate, detailed account of all sales of goods made from the consigned stock the previous month, together with returns and repossessions, if any. Simultaneously with such accounting, you shall remit to us a sum equal to the consignment invoice price of all goods sold, less the usual trade discount allowed.

Insurance

11. You shall keep the goods insured at the full wholesale list price against damage, destruction, and loss of every kind while the goods are in your possession, and you shall cause us to be the beneficiaries of such insurance together with you, as our respective interests appear. You shall deposit the current insurance policies with us.

Term

12. This Agreement shall continue in force _____ [until terminated *or specify definite period*]. Either party may terminate the Agreement at any time by giving the other party _____ [*e.g.*, 30 days'] notice in writing in advance of the termination date. Upon the giving of a notice of termination, you shall return to us within the _____ [*e.g.*, 30-day] period all consigned goods remaining unsold and shall account for and remit all compensation due us and remaining unpaid.

If this letter expresses your understanding of our agreement, kindly date and sign the enclosed copy where indicated and return it to us for our files.

Sincerely yours,

_____
[*typed name of consignor*]
Accepted and Agreed to
on_____[*date*]
By_____[*signature*]
[*typed name and title of consignee*]

Accepted and Agreed to
on _____ [*date*]

By [*signature*]
[*typed name and title of consignee*]

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30-91 California Legal Forms--Transaction Guide § 91.231

§ 91.231 Consignment Agreement With Vehicle Dealer

[1] Comment--Use of Form

This form is a consignment agreement between the owner of record of a motor vehicle and a dealer who will sell the vehicle. This form presents standard terms, disclosures, and conditions designed to elicit all necessary information to ensure a clear understanding of the consignment the parties seek to conclude.

For these purposes, a "consignment" is an arrangement under which a dealer agrees to accept possession of a vehicle of a type required to be registered under the Vehicle Code from an owner for the purpose of selling the vehicle and to pay the owner or the owner's designee from the proceeds of the sale [*Cal.Veh. Code § 266*].

If the consignor is not a licensed dealer, manufacturer, manufacturer branch, distributor, or a distributor branch, the consignment agreement must contain certain disclosures to protect the consignor [*Cal. Veh. Code § 11729(a)*]. In addition to setting forth the date on which it was executed [*Cal.Veh. Code § 11730(a)*], the agreement must contain the following statements, using the language set forth in the statute [*Cal.Veh. Code § 11730(b)*]:

- A statement of consignment.

- An option to return the vehicle or enter into a new agreement at the termination of the present agreement.

- A statement regarding the disbursement of the proceeds of any sale of the vehicle.

- A statement regarding the value and condition of the vehicle, including its current market value, any outstanding liens, any repairs that are to be made, and the percentage of the fee, or the flat fee amount, to be paid to the consignor.

- A statement requiring an accounting within 20 days after any sale.

- A statement prohibiting the use of the vehicle for any purpose other than that stated in the agreement without the consignor's express written consent.

- The consignor's agreement to furnish all documents necessary to transfer title to the vehicle on the payment of all money due.

- The signatures and addresses of the consignor and the consignee.

- Notice of the consignor's rights on any failure by the consignee to comply with the terms of the agreement.

This form contains the necessary statements.

The failure of a vehicle dealer to comply with the foregoing requirements or to pay the agreed amount to the consignor or his or her designee within 20 days after the date of sale, is cause for revocation or suspension of the dealer's license [*Cal.Veh. Code 11729(a)*; *see Cal.Veh. Code 11705(a)(10)*].

[2] Form

CONSIGNMENT AGREEMENT

1. I [*or* We], the undersigned consignor[s], hereby consign and deliver possession of [my *or* our] vehicle, which is a _____ [*year*] _____ [*make*], Vehicle Identification Number _____, License Number _____, registered in _____ [*state*], with current mileage of _____, to _____ [*name*] (Consignee), Dealer Number _____, for the sole purpose of selling the vehicle and paying, to the consignor or his or her designee from the proceeds of the sale of the vehicle, the amount agreed upon under terms of this agreement. This agreement is effective and valid only for a period of _____ days from this date.

2. At the termination of this agreement, the consignee shall return the vehicle to the consignor, or, at the option of both the consignor and consignee, enter into a new agreement.

3. If the vehicle is sold by the consignee during the term of this agreement, the money due the consignor shall be disbursed within 20 days after the date of sale in accordance with the terms of this agreement. As used in this agreement, a "sale" occurs when the consignee either (A) receives the purchase price or its equivalent or executes a conditional sales contract for the vehicle, or (B) when the purchaser takes delivery of the vehicle, whichever occurs first.

4. The following information shall be completed prior to the signing of this agreement:

Current market value: $ _____ Source: _____.

Outstanding liens: $ _____ Lienholder: _____.

(Any difference between the outstanding amount shown and the actual payoff to the lienholder will be credited to the consignor.)

Repairs to be made: $ _____ Work Order # _____.

Moneys to the consignor: _____percent of sale price, flat fee of $ _____, or the following specific formula: _____.

5. Within 20 days after sale, the consignee shall make an accounting to the consignor of all of the following: date of sale, repairs authorized by consignor (supported by work records), exact amount of any liens payable to lienholders, evidence of payment of any liens, and the total sales price.

6. The consigned vehicle is delivered to the consignee in trust for the exact terms set forth in this agreement. The consignee agrees to receive this vehicle in trust and not to permit its use for any purpose other than contained in this agreement without the express written consent of the consignor.

7. Upon payment of the moneys due the consignor, the consignor agrees to furnish the consignee those documents necessary to transfer the ownership of the vehicle to the purchaser.

Signatures:

Consignor _____ _____ Date _____

Address

Consignee _____ _____ Date _____

Address

NOTICE TO CONSIGNOR: Failure of the consignee to comply with the terms of this agreement may be a violation of statute that could result in criminal or administrative sanctions, or both. If you feel the consignee has not complied with the terms of this agreement, please contact the Department of Motor Vehicles.

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D. Agreements With Commission Merchants

30-91 California Legal Forms--Transaction Guide § 91.240

§ 91.240 Consignment Agreement With Commission Merchant

[1] Comment--Use of Form

This form is intended for use in consignment transactions between a consignor and a commission merchant. Provisions are necessarily included to cover the differences in status between a commission merchant and a consignee, which primarily relate to the entrustment to the commission merchant of control of the consigned goods, and the authority to sell in his or her own name as well as in the name of the consignor [*see § 91.14*]. The appointment in this form is nonexclusive.

Special statutory requirements apply to a consignment of farm products to a commission merchant [*see Cal. Food & Agric. Code § 56271 et seq.*]. For a form of consignment reflecting those requirements, see *§ 91.241*.

[2] Form

CONSIGNMENT AGREEMENT

_____, referred to as the "Consignor," and _____, referred to as the "Commission Merchant," in consideration of their mutual promises and intending to be legally bound, agree as follows:

ARTICLE 1.
RECITALS

Legal Status of Principal

1.01. The Consignor is a corporation duly organized, validly existing, and in good standing under the laws of the State

of _____, with corporate power to own property and carry on its business as it is now being conducted. The Consignor has its principal office and place of business at _____ [*street address, city, and state*].

Status of Commission Merchant

[*Select one of the following:*]

1.02. The Commission Merchant is an individual having _____ [his *or* her] principal office and place of business at _____ [*street address, city, and state*].

[*OR*]

1.02. The Commission Merchant is a partnership composed of _____ and _____, having its principal office and place of business at _____ [*street address, city, and state*].

[*OR*]

1.02. The Commission Merchant is a corporation duly organized, validly existing, and in good standing under the laws of the State of _____, with corporate power to own property and carry on its business as contemplated by this Agreement. The Commission Merchant has its principal office and place of business at _____ [*street address, city, and state*].

[*Continue with the following:*]

Consignor's Business

1.03. The Consignor is engaged in _____ [manufacturing *or* supplying] certain hereinafter described _____ [*e.g.,* goods *or* equipment], all of which are hereinafter referred to as "products."

Facilities, Ability, and Desire to Be Commission Merchant

1.04. (a) The Commission Merchant represents that _____ [he *or* she *or* it] possesses the technical facilities and ability to sell the products of the Consignor and is desirous of selling such products on a consignment basis.

(b) The Consignor desires to have the Commission Merchant distribute its products on that basis and the terms and conditions set forth herein.

ARTICLE 2

CONSIGNMENT

Appointment and Acceptance

2.01. (a) The Consignor appoints the Commission Merchant as one of its commission merchants for the sale of products described in Schedule A, attached to this Agreement and incorporated by reference, and other products as the Consignor may hereafter consign to the Commission Merchant.

(b) The Commission Merchant accepts the appointment and will act as commission merchant in accordance with the terms and conditions of this Agreement.

Consignment

[*Select one of the following:*]

2.02. The Consignor shall maintain on consignment in the custody of the Commission Merchant, for the purpose of filling orders therefore, a stock of the respective products as the Commission Merchant may designate or select up to the amounts specified in Schedule A. The Consignor shall determine the length of time the products shall remain in stock.

[*OR*]

2.02. The Consignor shall maintain on consignment in the custody of the Commission Merchant for the purpose of filling orders therefore a stock of the respective products. The Consignor shall determine the classes, types, sizes, and quantities of the products and the length of time the products shall remain in stock.

[*Continue with the following:*]

Reserved Rights

2.03. The Consignor reserves to itself the following rights:

(a) To add to or change its products as described in Schedule A and to bring within the provisions of this Agreement any additional products that it may hereafter desire to market through the Commission Merchant, on giving to the Commission Merchant a notice in writing setting forth the name and purpose of such products, the wholesale list price, and such other information as the Commission Merchant may require in order to properly handle such products.

(b) To designate such purchasers or classes of purchasers from whom the Commission Merchant may solicit orders and to designate those purchasers from whom the Commission Merchant shall not solicit orders.

Compensation

2.04. As compensation for the Commission Merchant's services, the Consignor shall allow the Commission Merchant out of the sales price of all products that _____ [he *or* she *or* it] sells a commission of _____ percent of the wholesale list price of such products. In addition, the Consignor shall allow the Commission Merchant a service fee of _____ percent of the wholesale list price of all orders for products amounting to $ _____ or over that the Commission Merchant delivers from the stocks consigned to

_____ [him *or* her *or* it].

Title

2.05. Until the products have been delivered to a purchaser or purchasers obtained by the Commission Merchant, the absolute title to all products shall remain in the Consignor.

Duration of Agreement

2.06. This Agreement shall continue in effect for a period of one year from the date of execution, and, unless terminated by either party by written notice to the other, for successive periods of one year. Termination shall become effective at the end of the year in which notice is received. Within _____ [*e.g.*, 10 days] after termination, the Commission Merchant shall return to the Consignor all unsold consigned products in the custody of the Commission Merchant, properly packed and delivered in good condition and, except for transportation charges, without expense to the Consignor.

ARTICLE 3

OPERATIONS

Place of Business and Activity

[*Select one of the following:*]

3.01. At all times during the continuation of this Agreement, the Commission Merchant shall use _____ [his *or* her *or* its] best efforts to sell the products to the retail trade [*or* merchants] and for that purpose to maintain a place of business in the City of _____, State of _____, and to employ such sales staff to handle the products throughout the State of _____ as may be required in order to sell the largest amount of products possible.

[*OR*]

Showing Products Consigned

3.01. The Commission Merchant shall maintain in the City of _____, California, a place of business in which the products consigned to _____ [him *or* her *or* it] may be kept and displayed to customers. The Commission Merchant shall keep that place of business open during all reasonable business hours. The Commission Merchant shall show the products to all persons desiring to see the products for the purchase thereof and shall employ at _____ [his *or* her *or* its] place of business sufficient clerks and salespersons to enable _____ [him *or* her *or* it] to show the products to customers without unreasonably delaying time.

[*Continue with the following:*]

Prices and Discounts

[*Select one of the following:*]

3.02. (a) The Commission Merchant shall fill all orders _____ [he *or* she *or* it] receives for the products of the Consignor at the wholesale list prices set forth in the Consignor's current catalog and shall allow retailers purchasing the products the quantity and cash discounts set forth in the Catalog. At no time shall _____ [he *or* she *or* it] sell any of the products for a lower price or allow greater discounts than the Consignor advises.

(b) The Consignor shall have the right to change all prices and discounts at any time by written notice to the Commission Merchant specifying the changes and the effective date thereof.

[*OR*]

Prices and Purchasers

3.02. The Commission Merchant shall sell the products, for the Consignor's account, at no less than the consignment invoice price, to such purchasers as the Commission Merchant shall judge to be of good credit standing.

[*Continue with the following:*]

Invoices and Collections

[*Select one of the following:*]

3.03. It shall be part of the duties of the Commission Merchant to use all reasonable efforts to collect from the purchasers thereof the purchase price of all products consigned to the Commission Merchant and sold by _____ [him *or* her *or* it]. The Commission Merchant shall render invoices to the purchasers of those products at regular intervals in the name of the Commission Merchant, and the Commission Merchant shall either personally or through some person employed and paid by _____ [him *or* her *or* it] make personal effort to collect the purchase price of any products not paid for at the end of one month from the date of sale. Unless it appears that _____ [he *or* she *or* it] has sold products to persons known to be financially irresponsible, however, the Commission Merchant is not required to guarantee the collectability of the purchase price of any products sold by _____ [him *or* her *or* it]. The Commission Merchant shall use reasonable care before selling any products on credit to ascertain whether the purchaser has the ability and willingness to pay for the same.

[*OR*]

Invoices

3.03. The Commission Merchant shall render to purchasers invoices for all products removed from stock. These

invoices may be in the name of either the Commission Merchant or the Consignor, but if in the name of the Commission Merchant, the invoice shall have printed, stamped, or typed on it a statement indicating that the products listed in the invoice are from stock consigned to the Commission Merchant by the Consignor and that the purchase price belongs to the Consignor but is to be paid to the Commission Merchant as the representative of the Consignor.

[*Continue with the following:*]

Remittances to Consignor

3.04. The Commission Merchant shall remit to the Consignor on or before the _____ day of each month an amount equal to the wholesale list price of all products of the Consignor which the Commission Merchant sells and delivers during the previous calendar month [*or other period*], as shown by the report referred to in Section 3.05, less the compensation allowable to the Commission Merchant under the provisions of this Agreement.

Reports

[*Select one of the following:*]

3.05. During the continuation of this Agreement, the Commission Merchant shall render a report in writing to the Consignor on the _____ day of each month, showing the following:

(a) All products of the Consignor received during the preceding calendar month; and

(b) Names and addresses of all purchasers of the products of the Consignor during that period, along with the quantities purchased, the wholesale list price charged, and the percentage discounts allowed.

[*OR*]

Reports

3.05. The Commission Merchant shall furnish to the Consignor on the _____ day of each month a report in writing, showing the following:

(a) All products of the Consignor received during the period accounted for and products on hand at the beginning and end of such period; and

(b) Names and addresses of all purchasers of products of the Consignor during the period whose purchases amount to $ _____ or over, together with the quantities purchased by such purchasers, the wholesale list price charged, and the percentage discounts allowed.

[*Select one of the following:*]

Books and Records

3.06. The Commission Merchant shall keep proper books of account and records containing complete information relating to all products of the Consignor received, stored, and sold, including the names of purchasers, the quantities purchased, and the terms of each sale, and the Consignor shall have access to such records at all reasonable business hours.

Freight Charges

3.07. The Commission Merchant shall prepay the freight charges on all orders that the Commission Merchant fills and ships to retailers from consigned stock. In the case of shipments to retailers amounting to $ _____ or more, the Consignor shall refund to the Commission Merchant the freight charges paid if the Commission Merchant forwards the freight bills to the Consignor within _____ months after the date of shipment.

Disposition of Products Not Sold

3.08. In the event that any of the products of the Consignor remain in the custody of the Commission Merchant for a period in excess of _____ months and are then unsold, the Commission Merchant may return the products to the Consignor and obtain full credit for the wholesale price thereof, or the Commission Merchant may purchase those products by paying the Consignor the wholesale list price less a discount of _____ percent.

Right of Access to Consigned Products

3.09. At any time during the continuation of this Agreement, the Consignor shall have the right to enter on any of the property of the Commission Merchant in which products consigned to _____ [him *or* her *or* it] by the Consignor shall be stored and to make an inventory of the products and examine into their condition and the manner in which they are stored and kept.

Insurance

3.10. At all times during the continuation of this Agreement, the Commission Merchant shall keep the products insured against loss by fire, theft, and other causes in an amount and under a form of policy sufficient to cover all products of the Consignor then in the possession of the Commission Merchant. The insurance shall be taken in the name of and for the benefit of the Consignor, and the policy or policies of insurance shall be delivered to the Consignor. The Commission Merchant shall pay all premiums or other expenses of the insurance.

ARTICLE 4

TERMINATION

Without Cause

4.01. Either party may terminate this Agreement at any time without cause by giving the other party _____ [*e.g.,* 30 days'] written notice of its intention to terminate, and the Agreement shall terminate at

the end of that _____ [*e.g.*, 30-day] period.

For Cause

4.02. In the event that the Commission Merchant violates any provision of this Agreement or the Consignor reasonably becomes dissatisfied with the financial stability of the Commission Merchant, the Consignor may terminate this Agreement by written notice to the Commission Merchant, and the Agreement shall terminate on the giving of notice.

Return of Products

4.03. On termination of this Agreement, the Commission Merchant shall return immediately to the Consignor, without cost to it except for transportation charges, all products of the Consignor that are then in the possession or under the control of the Commission Merchant.

ARTICLE 5

INTERPRETATION AND ENFORCEMENT

Lien of Commission Merchant

5.01. The Commission Merchant shall have a lien on all products consigned to _____ [him *or* her *or* it] by the Consignor, whether or not in the Commission Merchant's constructive, actual, or exclusive possession, and on any accounts receivable or other proceeds resulting from the sale or other disposition of the products, for all of _____ [his *or* her *or* its] loans and advances to and for the account of the Consignor, and also for the commissions, charges, and expenses properly chargeable against, or due from, the Consignor, and for the amount due on any notes or other obligations given to or received by the Commission Merchant for or on account of any such loans, advances, interest, commissions, charges, and expenses.

Notices

5.02. Any notice, request, demand, or other communication required or permitted under this Agreement shall be deemed to be properly given when deposited in the United States mail, postage prepaid, or when deposited with a public telegraph company for transmittal, charges prepaid, addressed as follows:

(a) In the case of notice to the Consignor, to _____ [*corporate name, name of officer concerned, street address, city, and state*], or to such other person or address as the Consignor may from time to time furnish to the Commission Merchant.

(b) In the case of notice to the Commission Merchant, to _____ [*specify relevant data as in subsection*(*a*) *and as appropriate to the form of organization*], or to such other person or address as the Commission Merchant may from time to time furnish to the Consignor.

Completeness of Instrument

5.03. This instrument contains all of the agreements, understandings, representations, conditions, warranties, and covenants made between the parties to this Agreement. Unless set forth herein, neither party shall be liable for any representations made, and all modifications and amendments to this Agreement must be in writing.

Executed on _____ [*date*], at _____ [*city and state*].

CONSIGNOR
_____[*typed name of consignor*]
By _____ [*signature*]
[*typed name and title*]
COMMISSION MERCHANT
_____ [*typed name of commission merchant*]
By [*signature*]
[*typed name and title*]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 91 CONTRACTS WITH SALES REPRESENTATIVES
PART IV. FORMS
D. Agreements With Commission Merchants

30-91 California Legal Forms--Transaction Guide § 91.241

§ 91.241 Consignment Agreement for Sale of Farm Products--Letter Form

[1] Comment--Use of Form

This form is an agreement in letter form written by a commission merchant to a consignor, in which the commission merchant agrees to sell all of a particular type of farm product grown by the consignor during a specified calendar year. A commission merchant handling sales of farm products on a consignment basis must be licensed to do so by the state. This form conforms with the duties and obligations imposed by the Food and Agricultural Code on commission merchants dealing in farm products [*see Cal.Food & Agric. Code § 56271 et seq.*]. The appointment of the commission merchant in this form is exclusive and for a limited period.

For discussion of special requirements for commission merchants who sell farm products, see *§ 91.14[3]*.

[2] Form

[*Letterhead of commission merchant*]

[*Date*]

[*Name and address of consignor*]

Dear _____:

This letter is written to set forth all of the terms of the agreement under which this firm will act as the commission merchant for the sale of all _____ [*e.g.,* tomatoes] grown by you during the calendar year _____ [*year*], hereinafter referred to as "farm products."

It is our understanding that you will at your expense deliver on consignment during our regular business hours to our

warehouse located at _____ [*address*] all such farm products, and that each lot will arrive packed at your expense as follows: _____[*describe in detail, including type, size, quality, and labeling of box, carton, or other package to be used*].

We will accept possession of each such delivered lot of farm products for the purpose of selling it on your account. All expenses incurred in handling and selling it subsequent to the time of its delivery to us will be paid by our firm. However, absolute legal title to the farm products shall remain with you until such time as each of them has been actually sold by us to purchasers; you shall have legal title to the proceeds of each sale of the farm products made by us until such time as we actually remit your share of the sales proceeds to you.

Sales for the farm products will be made by us in the name of our firm and will be at the highest available market price. All sales will be made either for cash or to customers deemed by us to be good credit risks on terms requiring full payments within _____ [*e.g.,* 10 days]. The commission for our services in selling your farm products shall be _____ percent of the gross sales price. We will not purchase any of the farm products for our own account unless we have first obtained your written consent.

At your request, we will, before the close of the next business day following the request, transmit to you a true written report of such sale showing the quantity sold and the selling price. Remittance in full of all amounts realized from such sales, less the agreed commission, together with a complete account of sales, shall be made to you within 10 days after receipt of the moneys by our firm.

All of your farm products consigned to us will be properly insured against fire, burglary, and theft at our expense for your benefit.

If this letter meets with your complete approval, please sign the enclosed copy where indicated and return it to this office in the enclosed addressed envelope.

Yours very truly,
_____ [*signature*]
[*typed name of commission merchant*]

ACCEPTED AND AGREED to on _____[*date*]
_____ [*signature*]
_____ [*typed name of consignor*]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 91 CONTRACTS WITH SALES REPRESENTATIVES
PART IV. FORMS
E. Agreements With Independent Wholesale Sales Representatives

30-91 California Legal Forms--Transaction Guide § 91.250

§ 91.250 Agreement Between Independent Wholesale Sales Representative and Manufacturer, Jobber, or Distributor

[1] Comment--Use of Form

This form is a contract between a wholesale sales representative and a manufacturer, jobber, or distributor. When a manufacturer, jobber, or distributor is engaged in business in California and uses the services of an independent wholesale sales representative to solicit wholesale orders at least partially within California, the Independent Wholesale Sales Representatives Contractual Relations Act of 1990 requires the parties to make a written contract that includes certain provisions specified by the Act. For this purpose, a "wholesale sales representative" is a person who contracts with a manufacturer, jobber, or distributor for the purpose of soliciting wholesale orders, and who is compensated in whole or part by commission. The term does not include one who places orders or purchases exclusively for his or her own account for resale (i.e., a distributor), or a sales representative who sells or takes orders for the direct sale of products to the ultimate consumer [*Cal. Civ. Code § 1738.12(e)*; *see Cal. Civ. Code § 1738.12(a),(b),(c)* ("manufacturer," "jobber," and "distributor" defined)]. The protections of the Act do not apply to a person licensed under the Alcoholic Beverage Control Act [*Cal. Civ. Code § 1738.17*; see *Cal. Bus. & Prof. Code § 23000 et seq.*].

A contract with a wholesale sales representative must include the rate and method by which the commission is computed, the time when commissions will be paid, the territory assigned to the sales representative, any exceptions to the assigned territory and customers in that territory, and what chargebacks will be made against the commission [*Cal. Civ. Code § 1738.13(a),(b)*; *see Cal. Civ. Code § 1738.14*; *see also* [2], below, PP 1, 5]. The contract may not contain any provision waiving any of the sales representative's rights under the Act [*Cal. Civ. Code § 1738.13(e)*]. This form includes all of the required provisions.

The written contract must be signed and distributed to both parties, and the sales representative must sign a receipt acknowledging receipt of the signed contract [*Cal. Civ. Code § 1738.13(c)*]. At the end of this form is an acknowledgement of receipt.

For further discussion of wholesale sales representatives, see *§ 91.15*. For a drafting guide, see *§ 91.124*.

[2] Form

AGREEMENT BETWEEN INDEPENDENT WHOLESALE SALES REPRESENTATIVE AND _____ [MANUFACTURER *or* **JOBBER** *or* **DISTRIBUTOR**]

This Agreement is made between _____ [*name of manufacturer, jobber, or distributor*], _____ [an individual *or* a California corporation *or* a California partnership *or specify other business organization*] (Principal), and _____ [*name of sales representative*], _____ [an individual *or specify other designation*] (Sales Representative).

Recitals

Principal is a _____ [manufacturer *or* jobber *or* distributor] of _____ [*type of product*]. Sales Representative is an independent wholesale sales representative. The parties wish to enter into an agreement in which Sales Representative will solicit wholesale orders for Principal for a commission, on the terms and conditions set forth below.

Therefore, the parties agree as follows:

Territory and Customers

1. Sales Representative has the exclusive right to solicit wholesale orders in _____ [*specify territory, e.g.,* Alameda and Contra Costa Counties] for Principal. [*Optional:* However, Sales Representative does not have the right to solicit orders _____ (*specify particular customers or areas excepted, e.g.,* within the City of Martinez *or* from the ABC Canning Company) for Principal.]

Sales Policy

2. All of the prices, terms, and conditions of sale will be established by Principal and adhered to by Sales Representative. Principal may change these policies and conditions from time to time, and will give Sales Representative _____ [*e.g.,* 30 days'] notice before any change is to take effect.

Orders and Collections

3. All orders for products solicited by Sales Representative will be sent to Principal within _____ days of the order. All orders are subject to acceptance by Principal. Any sales inquiries made to Principal will be referred to Sales Representative, accompanied by any relevant correspondence or documents. All invoices in connection with orders solicited by Sales Representative will be rendered by Principal directly to the purchaser. A copy of each filled invoice will be sent by Principal to Sales Representative. Principal has full responsibility for collections, bad debts, and credits, orders, and contracts. Sales Representative will forward to Principal any payments it receives on behalf of Principal.

Relationship Created

4. Sales Representative is not an employee of Principal for any purpose, but is rather an independent contractor. Principal is concerned only with the results obtained by Sales Representative. Sales Representative has sole control over the manner and means of performing the duties required under this Agreement, including hiring and managing Sales Representative's own employees. Principal does not have the right to require Sales Representative to do anything to jeopardize the relationship of independent contractor between Principal and Sales Representative. All costs and expenses of performing this Agreement will be borne by Sales Representative. Sales Representative does not have the power or authority to bind Principal to any contract or obligation, express or implied, without Principal's written consent.

Commissions and Chargebacks

5. (a) Principal will pay Sales Representative a commission on wholesale orders solicited or delivered within the agreed territory at a rate of _____ percent. Commissions are calculated on the net amount of the invoice rendered, less shipping costs, insurance, normal bona fide discounts, and taxes. Commissions are deemed earned by Sales Representative on acceptance or delivery of the order by Principal, whichever occurs first. Principal will pay commissions to Sales Representative _____ [*specify time for payment, e.g.,* on the tenth day of each month for commissions earned during the previous month].

(b) On payment of any commission, Principal will provide Sales Representative with an accounting of the orders for which payment is made, including the customer's name and invoice number, the rate of commission on each order, and information relating to any chargebacks included in the accounting. Chargebacks will be made against commissions in the following manner: _____[*specify method of calculating chargebacks*].

Hold-Harmless Provision

6. Each party agrees to hold the other harmless from and against, and agrees to indemnify the other for, any liability, loss, cost, expense, or other damage brought about by an injury of any kind suffered by any person or property as the result of any act, neglect, default, omission of the party or any of its agents, employees, or other representatives. If either party is sued in court for damages because of the acts of the other party, the other party agrees to defend the action at its own expense. Nothing in this paragraph relieves either party from liability for its own act, omission, or negligence.

Term

7. This Agreement is effective beginning on _____ [*date*]. It is effective until _____ [*specify date or* either party gives the other party notice of intent to terminate the Agreement, to take effect _____ (*e.g.,* 90 days) after notice is given *or* both parties mutually agree in a written agreement to terminate]. Principal will pay Sales Representative's commission on orders solicited by Sales Representative before the termination date, regardless of the date and method of termination or the date Principal accepts the orders.

Other Provisions

8. (a) This Agreement is controlled by and is to be construed under the laws of the State of California, the state in which the Agreement is executed.

(b) Principal appoints Sales Representative as its agent for service of process in California for any matter occurring

there concerning this Agreement.

(c) In the event of litigation between the parties concerning this Agreement, the prevailing party will be entitled to reasonable attorney's fees, court costs, and expenses of collection.

(d) This Agreement is the entire agreement between the parties. If any portion of this agreement is determined by a court of competent jurisdiction to be void, invalid, or unenforceable, the remaining provisions will remain in full force and effect and will be in no way affected or invalidated.

This Agreement is executed at _____ [*location*], California, on _____ [*date*].

PRINCIPAL
_____ [*typed name of principal*]
By _____ [*signature*]

SALES REPRESENTATIVE
_____
[*typed name of sales representative*]
By _____ [*signature*]
[*typed name and title*

[*After both parties have signed above and received signed copies of Agreement, have sales representative sign following:*]

ACKNOWLEDGMENT OF RECEIPT

Sales Representative hereby acknowledges receiving a signed copy of the **AGREEMENT BETWEEN INDEPENDENT WHOLESALE SALES REPRESENTATIVE AND _____ [MANUFACTURER** *or* **JOBBER** ***o***r **DISTRIBUTOR**] that was executed on _____ [*date*].

Dated: _____

SALES REPRESENTATIVE
_____ [*typed name of sales representative*]
By _____ [*signature*]
[*typed name and title*]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS

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This chapter covers written contracts for the performance of services. The Legal Background examines the formation and enforcement of service contracts and discusses various consumer protection laws designed to protect individuals purchasing services. The Research Guide lists federal and state statutes and regulations that govern contracts for various types of services. The Transaction Guide sets forth the facts, documents, determinations, and procedures required for drafting a service contract. The forms section contains examples and discussions of contracts in the following basic categories:

- Maintenance and repairs of real property.
- Security services for property.
- Maintenance and repairs of personal property.
- Employment--related services.
- Credit-related services.
- Funeral services.

For a detailed discussion of contract formation generally, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* . Contracts for the sale of goods are covered in Ch. 52, *Sales of Goods Under the Uniform Commercial Code* . For a discussion of contracts for professional services, see Ch. 86, *Agreements for Professional Services* . Computer maintenance and other computer-related services are discussed in Ch. 57, *Computer-Related and Internet Transactions* . For discussion of services for the storage of personal property, see Ch. 54A, *Storage of Goods* . For a discussion of consumer protection laws regulating the advertising of services, Ch. 50, *Advertising and Promotion.* Employment contracts are covered in Ch. 85, *Employment Agreements* . For a list of other chapters that cover contracts for particular types of services, see the Research Guide in this chapter.

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[1] California Statutes

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Interpretation of contracts. *Civ. Code §§ 1635-1663*.

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Commercial dance studio lessons and other services. *Civ. Code §§ 1812.50-1812.69*.

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Trucking and hauling contracts. *Civ. Code § 2784.5*.

Medical services contract containing arbitration clause. *Code Civ. Proc. § 1295*.

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License and other administrative requirements for specific services.

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Credit reporting agencies. *Civ. Code §§ 1785.1-1785.36*.

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Investigative reporting agencies. *Civ. Code § 1786 et seq.*

Credit services organizations. *Civ. Code §§ 1789.10-1789.26*.

Employment agents, counselors, and job listing providers. *Civ. Code § 1812.500 et seq.*

Nurses' registries. *Civ. Code §§ 1812.524-1812.533*.

Sentry dog companies. *Health & Safety Code § 121875 et seq.*

Home protection companies. *Ins. Code § 12740 et seq.*

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Possessory liens on serviced property.

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Thresher's lien. *Civ. Code § 3061*.

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Vehicle liens. *Civ. Code §§ 3067-3074*.

Livestock service liens. *Civ. Code §§ 3080-3080.22*.

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Home solicitation contracts. *Civ. Code §§ 1689.5-1693*.

Solicitations by invoice. *Civ. Code § 1716*.

Consumers Legal Remedies Act. *Civ. Code § 1750 et seq.*

Song-Beverly Consumer Warranty Act. *Civ. Code § 1790 et seq.*

Unruh Act. *Civ. Code § 1801 et seq.*

[2] California Regulations

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Electronic and appliance repair services. *16 Cal. Code Reg. § 2701 et seq.*

Automotive repair services. *16 Cal. Code Reg. § 3303 et seq.*

[3] California Attorney General Opinions

Service fees authorized under Rosenthal Fair Debt Collection Practices Act. 85 Ops. Cal. Atty. Gen. 215 (2002) .

Home maintenance service contracts that represent insurance transactions. *61 Ops. Cal. Atty. Gen. 214 (1978)* .

License requirements of funeral establishment, funeral director, and cemetery broker. *58 Ops. Cal. Atty. Gen. 876 (1975)* .

Finance charges for health studio contracts. *57 Ops. Cal. Atty. Gen. 394 (1974)* .

Application of Automotive Repair Act to painting or refinishing vehicles. *58 Ops. Cal. Atty. Gen. 837 (1975)* .

Requirement that machine shops and others rebuilding parts of motor vehicles register as automotive repair dealers. *55 Ops. Cal. Atty. Gen. 276 (1972)* .

Approval of employment agency contracts. *52 Ops. Cal. Atty. Gen. 242 (1969)* .

Validity of preneed funeral contracts. *52 Ops. Cal. Atty. Gen. 202 (1969)* .

Preneed funeral trust requirements. *47 Ops. Cal. Atty. Gen. 91 (1966)* .

Liability of electronic and appliance service dealer. *45 Ops. Cal. Atty. Gen. 65 (1965)* .

Contracts between coroner and related private mortuaries. *42 Ops. Cal. Atty. Gen. 151 (1963)* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview

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[1] Federal Statutes

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Fair Credit Reporting Act. *15 U.S.C. § 1681 et seq.*

Fair Debt Collection Practices Act. *15 U.S.C. §§ 1692 et seq.*

Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. *15 U.S.C. § 2301 et seq.*

[2] Federal Regulations

Regulation Z (Truth in Lending). 12 C.F.R. Part 226 et seq.

Rules and regulations under the Fair Credit Reporting Act. *16 C.F.R. §§ 1.71-1.73.*

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-92 California Legal Forms--Transaction Guide § 92.05

§ 92.05 Law Reviews

Holt, *Sellers of "Laundered Lemons" Forced to Come Clean*, 4 Trial 78 (Apr. 2002).

Griffith, *The Fair Debt Collection Practices Act-Reconciling the Interests of Consumers and Debt Collectors, 28 Hofstra L. Rev. 1 (Fall 1999).*

Groth, *The Enforceability of Exculpatory Clauses in Service Contracts, 36 Prac. Law. 61 (Sept. 1990).*

Zimmerman, *Exclusivity of Personal Services: the Viability and Enforceability of Contractual Rights*, 19 Beverly Hills L.J. 73 (1985).

Comment, *Unconscionability and the Enforcement of Standardized Contracts in Commercial Transactions, 16 Pac. L.J. 247 (1984).*

Comment, *Unconscionability Redefined: California Imposes New Duties on Commercial Parties Using Form Contracts, 35 Hastings L.J. 161 (1983).*

Comment, *Consumer Warranty Law in California Under the Commercial Code and the Song-Beverly and Magnuson-Moss Warranty Acts, 26 UCLA L. Rev. 583 (1979).*

Note, *Incentives for Warrantor Formation of Informal Dispute Settlement Mechanisms, 52 S. Cal. L. Rev. 235 (1978).*

Comment, *A New Remedy for California Consumers: The Right to Cancel a Home Solicitation Contract, 3 Pac. L.J. 633 (1972).*

Note, *Protecting Privacy in Credit Reporting, 24 Stan. L. Rev. 550 (1972).*

Comment, *Protecting Consumers From Arbitrary, Erroneous, and Malicious Credit Information, 4 U.C. Davis L. Rev. 403 (1971).*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionGeneral OverviewAntitrust & Trade LawConsumer ProtectionMagnuson-Moss Warranty ActGeneral OverviewBanking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview

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§ 92.06 Annotations

Annot., Who Is "Consumer" Entitled to Protection of State Deceptive Trade Practice and Consumer Protection Acts, 63 A.L.R.5th 1 (1998) .

Annot., Validity and Construction of Statutes or Ordinances Imposing Civil or Criminal Penalties on Alarm System Users, Installers, or Servicers for False Alarms, 17 A.L.R.5th 825 (1994) .

Annot., Construction and Effect of Contracts or Insurance Policies Providing Preneed Coverage of Burial Expense or Services, 67 A.L.R.4th 36 (1989) .

Annot., Liability of Person Furnishing, Installing, or Servicing Burglary or Fire Alarm System for Burglary or Fire Loss, 37 A.L.R.4th 47 (1985) .

Annot., Automobile Repairman's Duty to Provide Customer with Information, Estimates, or Replaced Parts, Under Automobile Repair Consumer Protection Act, 25 A.L.R.4th 506 (1983) .

Annot., Regulation of Private Detectives, Private Investigators, and Security Agencies, 86 A.L.R.3d 691 (1978) .

Annot., Liability of Owner or Operator of Parking Lot or Garage for Loss of or Damage to Contents of Parked Motor Vehicle, 78 A.L.R.3d 1057 (1977).

Annot., Recovery Back of Money Paid to Unlicensed Person Required by Law to Have Occupational or Business License or Permit to Make Contract, 74 A.L.R.3d 637 (1976) .

Annot., Liability of One Hiring Private Investigator or Detective for Tortious Acts Committed in Course of Investigation, 73 A.L.R.3d 1175 (1976) .

Annot., Liability of Telephone Company to Subscriber for Failure or Interruption of Service, 67 A.L.R.3d 76 (1975) .

Annot., Liability of Installer or Maintenance Company for Injury Caused by Door of Automatic Passenger Elevator, 64 A.L.R.3d 1005 (1975) .

Annot., Liability of Owner or Operator for Injury Caused by Door of Automatic Passenger Elevator, 63 A.L.R.3d 893 (1975) .

Annot., Validity and Construction of Statutes or Ordinances Regulating Telephone Answering Services, 35 A.L.R.3d 1430 (1971) .

Annot., Failure of Artisan or Construction Contractor to Comply With Statute or Regulation Requiring Work Permit or Submission of Plans Affecting His Right to Recover Compensation from Contractee, 26 A.L.R.3d 1395 (1969) .

Legal Topics:

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§ 92.07 Text References

[1] Matthew Bender Sources

California Legal Forms (Matthew Bender).

Ch. 21, *Agreements With Brokers and Agents* .

Ch. 30C, *Agreements With Architects, Engineers, and Other Design Professionals* .

Ch. 30D, *Construction Contracts and Subcontracts* .

Ch. 31, *Mechanics' Liens* .

Ch. 38, *Real Property Management* .

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Ch. 104, *Health Care Transactions, Consents, and Directives* .

Ch. 105, *Nursing Homes and Care for the Elderly* .

California Forms of Pleading and Practice (Matthew Bender).

Ch. 91, *Automobiles: Actions Involving Defects and Repairs* .

Ch. 127, *Consumer Contracts and Loans* .

Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts.*

Ch. 129, *Consumer Credit Reporting* .

Ch. 140, *Contracts* .

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Ch. 342, *Liens and Wage Preferences* .

Ch. 484, *Radio and Television* .

Ch. 500, *Sales: Sales Under the Commercial Code* .

Ch. 501, *Sales: Retail Installment Sales* .

Ch. 502, *Sales: Warranties* .

Ch. 504, *Sales: Consumers Legal Remedies Act* .

Ch. 528, *Specific Performance* .

California Points and Authorities (Matthew Bender).

Ch. 50, *Contracts* .

Ch. 206, *Sales* .

Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 12, *Employment and Compensation* , Forms 12.69-12.12.87 (agency and personal service agreements)(Matthew Bender).

Warren' S Forms of Agreements (Matthew Bender), Ch. 67, *Service Contracts* .

[2] Additional Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 1-1042; vol. 2, *Insurance §§ 21*, *22*, *26-28*, *32-33*, *37-42*, 51, 53-60, 62-67, 70-80, 82, 89-113, *116-122*, *127-130*, *132-135*; 137-151, 153-157, 159, 163, 174, 216-219, 221-232, 239-241, 243-250, 253, 277-280, 283, 299, 317, 320, 322-323; vol. 4, *Sales*, §§ 216-245 (10th ed. 2005).

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30-92 California Legal Forms--Transaction Guide §§ 92.08-92.09

[Reserved]

§§ 92.08[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART II. LEGAL BACKGROUND
A. Service Contracts--In General

30-92 California Legal Forms--Transaction Guide § 92.10

§ 92.10 When Written Contract Is Required

All contracts may be oral, except those required by statute to be in writing [*Civ. Code § 1622*]. The statute of frauds [*Civ. Code § 1624*] enumerates various categories of contracts that are invalid unless the contract, or a note or memorandum of that contract, is in writing and is signed by the party to be charged or that party's agent [*see Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.14*]. Service contracts generally do not fall within any of those categories, unless the contract is for future services. An agreement that by its terms is incapable of being performed within a year of its making must be in writing [*Civ. Code § 1624(a)(1)*; *see White Lightning Co. v. Wolfson (1968) 68 Cal. 2d 336, 343, 66 Cal. Rptr. 697, 438 P.2d 345]* .

In addition to the statute of frauds, other statutes intended to protect customers from potential fraud on the part of service providers require a written contract. For example, contracts for purchases of services requiring installment payments must be contained in a single written document [*Civ. Code §§ 1803.1, 1803.2*]. Similarly, contracts for services to be performed over time, such as health club services [*see Civ. Code § 1812.82*; *see § 92.12[3]*] or credit services [*see Civ. Code § 1789.16*; *see § 92.252[1][c]*], often require a written contract.

Although many types of services are performed pursuant to oral contracts or contracts "implied" by conduct [*see Civ. Code § 1621*], the remainder of this chapter discusses only written agreements for services.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawStatutes of FraudsGeneral OverviewContracts LawStatutes of FraudsRequirementsGeneral OverviewContracts LawTypes of ContractsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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A. Service Contracts--In General

30-92 California Legal Forms--Transaction Guide § 92.11

§ 92.11 Elements of Contract

[1] Essential Elements

Contracts for the performance of services, like all other contracts, must include the consent of parties capable of contracting, a lawful object, and consideration [*Civ. Code § 1550*]. For discussion of these essential elements, see *Ch. 75, Formation of Contracts and Standard Contractual Provisions, § 75.11*.

Depending on the nature of the services to be performed, a service contract may also require specific content set forth by statute or regulation. Those additional requirements are discussed throughout this chapter.

[2] Typical Provisions

A contract for services generally contains various provisions in addition to its basic elements [*see* [1], *above*]. For example, typical provisions include a description of the services to be performed, particular conditions under which the services will be performed, time for performance, customer responsibilities, qualification of employees performing services, insurance and bonds, and use of materials and parts. In addition, service contracts often contain standard contractual provisions regarding such matters as attorneys' fees, arbitration, assignment, governing law, and entirety of the agreement.

[3] Term of Contract

There are a number of alternatives for the term of a service contract, including the following:

- Continuance of the term of agreement indefinitely until either party terminates it by giving the other written notice.

- A fixed period of time but with each party having the right to terminate the contract prior to the completion of that period.

- A fixed term with neither party having the right to terminate it prior to completion of the specified term.

If performance by the parties is to be made over an extended period of time, most contracts (other than service contracts) provide for a fixed term of definite length with neither party having the right to terminate prior to completion of the term, as described in the third method above.

Service contracts, however, are different from most other contracts. The relationship is a more personal one that depends on mutual faith, confidence, and trust. If at any time during the performance of a service contract either party becomes dissatisfied, it is usually best for the interests of both parties that the contract be terminated as soon as possible.

Another factor supporting a flexible termination date in service contracts is that the costs of constituent labor and goods often fluctuate suddenly and materially. Finally, a service contract with a fixed term and no right of termination may subject the service contract to the disclosure requirements of the federal Truth in Lending Act and the California Unruh Act [*see § 92.12[1]*].

For these reasons, the first two methods listed above are the more popular methods for handling this problem in service contracts; in each of these two methods both parties have the right to terminate the contract by giving written notice to the other. Of these two methods, the first, under which the contract continues indefinitely until either party terminates by giving written notice to the other, is often considered the better one because the parties are not obliged to enter into another contract at some fixed date in order for the services to continue.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawConsiderationGeneral OverviewContracts LawFormationGeneral OverviewContracts LawFormationAcceptanceGeneral OverviewContracts LawFormationOffersGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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30-92 California Legal Forms--Transaction Guide § 92.12

§ 92.12 Consumer Protection Laws

[1] Truth in Lending Laws

[a] Governing Law

There are both federal and state consumer protection laws that govern service contracts involving an extension of credit to the consumer. Specifically, the Federal Truth in Lending Act (TILA) [*15 U.S.C. § 1601 et seq.*] and the Unruh Act [*Civ. Code § 1801 et seq.*] require specific disclosures to be given to a consumer if the service contract in question meets certain criteria, as discussed in [b] and [c], *below*. An in-depth discussion of the requirements of TILA and the Unruh Act, as well as the required disclosure forms, are included in Ch. 45, *Consumer Installment Loans and Credit Sales*. Discussion of the applicability of these Acts to home improvement contracts may be *found in Ch. 89, Home Improvement and Specialty Contracts, § 89.18*.

The provisions of TILA and the Unruh Act have similar disclosure requirements. Generally, if the service contract is subject to the Unruh Act, it will also be subject to TILA. In the event of inconsistent provisions, TILA prevails [*15 U.S.C. § 1610(a)*]. It is usually feasible to provide one set of disclosures that comply with both acts [*see Ch. 45, Consumer Installment Loans and Credit Sales, § 45.30*].

[b] Unruh Act

The Unruh Act provides consumer protection from abusive credit practices in retail installment sales of services and goods [*see* Comment, *The Unruh Act: A Legislative History, 4 U.C.D. L. Rev. 1 (1971)*]. It protects the individual consumer, rather than persons involved in business transactions who are more accustomed to dealing in arm's length transactions. The Unruh Act applies to service contracts that meet the following criteria:

- The goods or services involved must be primarily for personal, family, or household purposes [*Civ. Code § 1799.90(a)*]. Exempted are services provided by physicians and dentists and certain services that are subject to federal tariffs [*see Civ. Code § 1802.2*]. Also exempted are services for the construction of an entire residence [*see Civ. Code § 1801.4*].

- The contract must involve a fixed price, payable in installments [*Civ. Code § 1802.5*; *Mackey v. Bristol West Ins. Services of Cal., Inc. (2003) 105 Cal. App. 4th 1247, 1270-1271, 130 Cal. Rptr. 2d 536]* .

- There must be either a finance charge (or a discounted price if paid by cash or credit card, or higher quality services if paid in cash), or there must be more than four payment installments [*Civ. Code § 1802.6*].

- The service provider must be engaged in the business of selling goods and services to consumers, not principally for the purpose of resale [*Civ. Code §§ 1802.3, 1802.4*].

- The contract must be entered into or performed in California [*Civ. Code § 1802.6*; *see Civ. Code § 1802.19(a)*].

Most of the service contracts discussed in this chapter are not subject to the Unruh Act because consumer service agreements often provide for flexible termination rights by one or both parties [*see § 92.11[3]*], thereby defeating the second requirement of a fixed price. For example, if a service contract in the nature of an insurance policy provides for a six-month term with payment to be made in monthly installments, the insurance contract will not be subject to the Unruh Act if the customer can terminate the agreement prior to the end of the six-month period [*see Crawford v. Farmers Group, Inc. (1984) 160 Cal. App. 3d 1164, 1169-1170, 207 Cal. Rptr. 155]* . Other service contracts fail to meet the third requirement, above, because the fees are neither subject to a finance charge nor payable in more than four installments.

For further discussion of the Unruh Act and its requirements, see Ch. 45, *Consumer Installment Loans and Credit Sales* . For a discussion of the provisions of the Unruh Act dealing with "open-end" (revolving) credit, see Ch. 46, *Credit Card and Other Open-End Credit Transactions* .

[c] Truth in Lending Act

The Truth in Lending Act governs service contracts that meet the following criteria:

- The goods or services involved must be primarily for personal, family, or household purposes [*15 U.S.C. § 1602(h)*; *12 C.F.R. § 226.2(a)(12)*]. Exempted are services for agricultural purposes [*15 U.S.C. § 1603(1)*] and service contracts in excess of $25,000, unless secured by real property [*12 C.F.R. § 226.3(b)*].

- There must be a finance charge or more than four payment installments [*12 C.F.R. § 226.1(c)(1)*].

- The service provider must be in the business of regularly extending consumer credit, generally defined as doing more than 25 transactions per year [*see 12 C.F.R. § 226.2(a)(17)(v)*].

An example of a service contract that meets the above criteria is a health club membership in which the buyer is obligated to pay a fixed price, payable in installments over a period of time [*see Glaire v. La Lanne-Paris Health Spa, Inc. (1974) 12 Cal. 3d 915, 920-921, 117 Cal. Rptr. 541, 528 P.2d 357* (health club membership for a fixed price, payable in installments over two-year period, is subject to TILA)]. Likewise, the alarm system contract in § 92.212[2] requires the customer to pay a fixed price, a portion of which is payable in monthly installments over a one year period, with no right of termination by the customer. This contract therefore would be subject to the TILA and Unruh Act [*see* [b], *above*] disclosure requirements.

For further discussion of TILA and its requirements, see Ch. 45, *Consumer Installment Loans and Credit Sales* . For a discussion of the provisions of TILA dealing with "open-end" (revolving) credit, see Ch. 46, *Credit Card and Other Open-End Credit Transactions* .

[2] Express Warranties

The Song-Beverly Consumer Warranty Act [*Civ. Code § 1790 et seq.*] and the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act [*15 U.S.C. § 2301 et seq.*] regulate express and implied warranties for new and used consumer goods. These acts are discussed in *§ 92.52*.

[3] Dance Studio and Health Club Services

Statutes with anti-fraud objectives similar to those of the Unruh Act [*see* [1][b], *above*] have been enacted to protect persons purchasing commercial dance services and health studio services (commonly known as health clubs) [*see Civ. Code §§ 1812.50 et seq.* (Dance Studio Act), 1812.80 et seq. (Health Studio Act)]. Contracts for commercial dance studio lessons and related services and for health club services must comply with certain requirements, including the following [*see Civ. Code §§ 1812.50-1812.69* (commercial dance studio), 1812.80-1812.98 (health club)]:

- The contract must be in writing.
- The contract must contain certain disclosure provisions regarding the beginning of performance, cancellation rights, and hourly rates.
- The contract must comply with statutory limitations on finance or interest charges, total payment, and term of the contract.

For further discussion of the statutory requirements for dance studio and health club services, *see California Forms of Pleading and Practice, Ch. 128, Consumer Contracts: Statutes Regulating Specific Types of Contracts, § 128.10* (Matthew Bender).

[4] Weight Loss and Dating Services

Contracts for weight loss and dating services must meet statutory requirements to be enforceable. Among these are the following requirements [*see Civ. Code §§ 1694.2, 1694.3* (dating service contracts), 1694.7, 1694.8 (weight loss service contracts)]:

- The contract must be in writing.
- The contract must contain specific disclosures concerning the buyer's cancellation rights.
- The contract must contain language providing for the buyer's refund rights in the event of the buyer's death, disability, or change of residence.

For further discussion of the statutory requirements for weight loss and dating services, *see California Forms of Pleading and Practice, Ch. 128, Consumer Contracts: Statutes Regulating Specific Types of Contracts, § 128.11* (Matthew Bender).

[5] Home Solicitation Contracts

[a] Governing Law

Consumers receive special protection against the pressures that arise when salespeople sell services or goods pursuant to home solicitation contracts or offers [*see Weatherall Aluminum Products Co. v. Scott (1977) 71 Cal. App. 3d 245, 248, 139 Cal. Rptr. 329]* . Home solicitation contracts and offers are governed by *Civ. Code § 1689.5 et seq.*

[b] Home Solicitation Contract Defined

A "home solicitation contract or offer" is any contract or offer for the sale, lease, or rental of goods or services, or both, made at other than a normal business location [*see Civ. Code § 1689.5(b)* (definition "appropriate trade premises")] for $25 or more, including any interest or service charges [*Civ. Code § 1689.5(a)*; *see* [c], *below* (exempt transactions)].

The term "services" means work, labor, and services, including, but not limited to, the following [*see Civ. Code § 1689.5(d)*]:

- Services furnished in connection with the repair, restoration, alteration, or improvement of residential premises.

- Services for the repair of goods [*see Civ. Code § 1802.1* (definition of "goods")].

- Courses of instruction, regardless of the purpose for which they are taken.

[c] Exempted Transactions

Certain transactions are exempted from laws governing home solicitation contracts, including the following:

- The services of attorneys, real estate brokers, physicians, or other specified professionals, or the services of financial institutions [*see Civ. Code § 1689.5(d)*].

- Any transaction in which the consumer has rescission rights under the Truth in Lending Act [*Civ. Code § 1689.5(a)*; *see 15 U.S.C. § 1601 et seq.*].

[d] Consumer's Right to Cancel

A consumer has the right to cancel a home solicitation contract as follows:

- For most home solicitation contracts and offers, within three business days after execution of the contract [*see Civ. Code § 1689.6(a)*].

- For home service and repair contracts or offers to purchase written pursuant to a service and repair contract [*see Bus. & Prof. Code § 7159.10(a)* (definition)], until (1) the buyer receives a signed and dated copy of the service and repair contract complying with the contract requirements of *Bus. & Prof. Code § 7159.10* and *(2)* the work begins [Bus. & Prof. Code § 1689.6(a)(3)(A)]. Service and repair contracts that do not conform to specified requirements [*see Bus. & Prof. Code § 7159.10*] are subject to the requirements of *Bus. & Prof. Code § 7159*, applicable to home insurance contracts, regardless of aggregate price [Bus. & Prof. Code § 1689.6(a)(3)(B); *see Bus. & Prof. Code § 7159(e)(6)* (three-day right to cancel)].

- For contracts relating to certain personal emergency response units [*Civ. Code § 1689.6(b)*], within seven business days after execution of the contract [*Civ. Code § 1689.6(b)*].

- For contracts for repair or restoration of residential premises damaged in disaster [*Civ. Code §*

1689.6(c)], within seven business days after execution of the contract, unless Bus. & Prof. Code § 1689.15 is applicable [*Civ. Code § 1689.6(c)*]. Bus. & Prof. Code § 1689.15 provides that the buyer retains any right of cancellation applicable to home solicitation contracts under Bus. & Prof. Code § 1689.5-1689.14 until the buyer receives a signed and dated copy of a service and repair contract that meets all of the specified requirements of *Bus. & Prof. Code § 7159.10*, and the contractor, in fact, begins the project, at which time the cancellation rights provided in Bus. & Prof. Code § 1689.5-1689.14 are extinguished by operation of law.

For the statutory notice of the buyer's right to cancel and the cancellation form, see *§ 92.212[2]*.

[6] Unsolicited Services

A person or entity may not offer services for sale if the offer includes providing services not actually ordered or requested by the recipient, either orally or in writing. The term "services" includes any services that will be provided to the customer unless he or she exercises an option to reject them [*Civ. Code § 1584.5*].

The receipt of any such services will be deemed an unconditional gift to the recipient, who may use them in any manner that he or she sees fit without any obligation to the service provider. If the provider of unsolicited services sends bill statements or requests for payment with respect to the "gift," the recipient may bring an action to enjoin the billing [*Civ. Code § 1584.5*].

Certain exceptions apply. For further discussion of these exceptions, unsolicited advertising by e-mail (commonly known as SPAM), and what must be done to comply with *Civ. Code § 1584.5*, see *Ch. 50, Advertising and Promotion, § 50.11*(6)(anti-spam legislation) and Ch. 52, *Sales of Goods Under the Uniform Commercial Code*, § 52.152.

It is also unlawful for any person to solicit payment of money by a written statement or invoice, or any writing that reasonably could be considered a bill, invoice, or statement of account due, but is actually a solicitation for an order, unless the solicitation includes a boldface disclaimer in prescribed language, located conspicuously, as specified [*see Civ. Code § 1716(a)-(f)*]. Any person damaged by noncompliance with this requirement is entitled to damages in an amount equal to three times the sum solicited [*Civ. Code § 1716(g)*; *see California Forms of Pleading and Practice, Ch. 128, Consumer Contracts: Statutes Regulating Specific Types of Contracts, § 128.13[6]* (Matthew Bender)].

[7] Miscellaneous Services

Contracts for other types of services, such as discount buying services, seller-assisted marketing plans, and invention-development services are similarly regulated to provide consumers with adequate disclosures of the services they are purchasing [*see Civ. Code §§ 1812.100-1812.129* (discount buying services), *Civ. Code §§ 1812.200-1812.221* (seller-assisted marketing plans), *Bus. & Prof. Code §§ 22370-22395* (invention-development services)].

[8] Consumer Affairs Act

[a] Prohibited Activities

Under the Consumer Affairs Act [*Bus. & Prof. Code § 300 et seq.*], a consumer may submit a complaint to the Director of the Department of Consumer Affairs ("Director") regarding any of the following matters [*Bus. & Prof. Code § 325*; *see Bus. & Prof. Code § 302*]:

- Unfair competition.
- Unfair or deceptive acts or practices by any person in the conduct of trade or commerce.

- The production, distribution, sale, or lease of services or goods that may endanger the public.

- Violations of the Business and Professions Code or regulations relating to licensed businesses or professions.

For purposes of the Consumer Affairs Act, "consumer" means any individual who seeks or acquires by purchase or lease any goods, services, money, or credit for personal, family, or household purposes [*Bus. & Prof. Code § 302(c)*].

[b] Complaint Procedure

On receipt of a consumer's complaint [*see* [a], *above*], the Director may notify the person against whom the complaint is made and request appropriate relief for the consumer [*Bus. & Prof. Code § 326(a)*]. The Director must also transmit the complaint to the local, state, or federal agency whose authority provides the most effective means to secure relief [*Bus. & Prof. Code § 326(b)*].

If the complaint indicates a probable violation of any law, rule, or order of any regulatory agency of the state, or if a pattern of complaints from consumers develops, the Director must either (1) transmit any valid complaint together with any evidence or information to the appropriate law enforcement or regulatory agency, or (2) request the Attorney General to undertake appropriate legal action [*Bus. & Prof. Code § 326(c)*].

[9] Consumer Legal Remedies Act

Under the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*], a consumer who suffers any damage as a result of specified unfair methods of competition or deceptive acts or practices in a transaction that is intended to result or does result in the sale of services or goods may bring an action for damages or injunctive relief against the person causing that damage [*see Civ. Code §§ 1770, 1780*; *see also Consumer Advocates v. Echostar Satellite Corporation (2003) 113 Cal. App. 4th 1351, 1353-1354, 8 Cal. Rptr. 3d 22* (consumers alleged provider of satellite TV service violated *Civ. Code § 1770(a)(5), (7), (9)*; triable issues of fact found on whether defendants violated statute with representations about number of channels and program schedule)]. If caused damage by the unlawful acts, other consumers similarly situated may bring a class action [*Civ. Code § 1781*].

For purposes of the Consumers Legal Remedies Act, "services" means work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods [*Civ. Code § 1761(b)*]. "Consumer" means an individual who seeks or acquires by purchase or lease, services or goods for personal, family, or household purposes [*Civ. Code § 1761(d)*].

Any consumer who is a senior citizen or a disabled person, in an action for damages resulting from unfair methods of competition or deceptive practices relating to the sale or lease of services or goods, may seek additional damages prescribed by statute [*see Civ. Code §§ 1780(b), 3345*; *see also Civ. Code § 1761(f), (g)* ("senior citizen" and "disabled person" defined)]. In any litigation commenced pursuant to *Civ. Code § 1780*, a prevailing plaintiff is entitled to court costs and attorneys' fees. A prevailing defendant may be awarded reasonable attorneys' fees if the court finds that the plaintiff's prosecution of the action was not brought in good faith [*Civ. Code § 1780(e)*; *see Hayward v. Ventura Volvo (2003) 108 Cal. App. 4th 509, 513, 133 Cal. Rptr. 2d 514* (prevailing plaintiff is entitled to "reasonable" fees, although word omitted from statute; court not limited in awarding fees to those incurred under contingency fee contract)]. A prevailing plaintiff may be awarded treble damages, in addition to all other remedies provided by *Civ. Code § 1780*, for a violation of *Civ. Code § 1770(a)(24)*, which prohibits receiving an unreasonable fee [*see Civ. Code § 1770(a)(24)(B)(ii)* (definition)] to prepare, aid, or advise any prospective applicant, applicant, or recipient in the procurement, maintenance, or securing of public social services [*Civ. Code § 1780(c)*; *see Civ. Code § 1770(a)(24)(B)(i)* ("public social service" defined); *see also Civ. Code § 1770(a)(24)(C)* (exceptions)].

For further discussion and examples of complaints in actions brought under this act, see California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionGeneral OverviewBanking LawConsumer ProtectionTruth in LendingGeneral Overview

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§ 92.13 Assignment of Service Contracts

In general, the rights under a contract are assignable, unless prohibited by an express contract provision or statute [*see Civ. Code § 1458*]. However, the duties under a contract generally may not be delegated without the consent of the party to whom the duty is owed [*see Civ. Code § 1457*].

Thus, personal service contracts in which the skill, credit, or other personal quality of the promisor is a distinctive characteristic or a material inducement to the contract are not assignable [*La Rue v. Groezinger (1890) 84 Cal. 281, 285, 24 P. 42* ; *Knipe v. Barkdull (1963) 222 Cal. App. 2d 547, 551, 35 Cal. Rptr. 283]* unless the assignment is with the consent and approval of the promisee [*Madison v. Moon (1957) 148 Cal. App. 2d 135, 145, 306 P.2d 15]* . Performance by an assignee would be essentially different from that for which the promisee contracted.

This prohibition against assignment is inapplicable to contracts for the services of a corporation, which cannot perform personal functions [*see Haldor v. Beebe (1945) 72 Cal. App. 2d 357, 365, 164 P.2d 568]* .

For a general discussion of the assignment of obligations, see Ch. 76, *Assignment of Rights and Obligations* . For examples of contract provisions permitting and prohibiting assignment, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAssignmentGeneral OverviewContracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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§ 92.14 Survival of Obligation to Perform Services

In general, the administrator of an estate has the duty to perform the contracts of a decedent, except for personal service contracts, such as a contract for an artist to produce a work of art or a contract for a lawyer's or physician's services. Such contracts are discharged by the death or disability of the person who was to perform the services. However, if personal services could be performed in an equally satisfactory manner by someone other than the promisor, or if the contract by its terms shows that performance by others was contemplated, the obligation will survive and bind the administrator or executor of the promisor [*Didier v. American Casualty Co. (1968) 261 Cal. App. 2d 742, 750, 68 Cal. Rptr. 217]* .

A contract may contain several obligations, including one for performance of personal services. If the personal services are incidental to substantial performance, the obligations will be held to be independent, and death or disability will excuse only the performance of the personal services. If, however, the personal services are the basis of the agreement, the several obligations are dependent, and death or disability terminates all of those obligations [*see Carver v. Fitzsimmons (1935) 5 Cal. App. 2d 320, 327, 42 P.2d 1066]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceGeneral OverviewContracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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§ 92.15 Enforcement of Service Contracts

A contract to render personal services may not be enforced by specific performance [*Civ. Code § 3390(1)*; *see* California Forms of Pleading and Practice, Ch. 528, *Specific Performance* (Matthew Bender)]. Equity will not compel one person to perform personal services against his or her will, and therefore the wronged party is limited to legal redress, namely, damages for breach of contract [*Emirzian v. Asato (1913) 23 Cal. App. 251, 255, 137 P. 1072]* .

Similarly, an injunction will not be granted to prevent the breach of a contract for personal services that may not be specifically enforced unless the contract meets the following criteria [*see Civ. Code § 3423(e)*]:

- The contract is in writing.

- The promised service has a special, unique, unusual, extraordinary, or intellectual character that gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law.

- The compensation provided for under the contract meets certain statutory minimums [*see Civ. Code § 3423(e)*; *Code Civ. Proc. § 526(b)(5)*].

For discussion and complaint forms for injunctive relief, see California Forms of Pleading and Practice, Ch. 303, *Injunctions* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceGeneral OverviewContracts LawRemediesSpecific PerformanceContracts LawTypes of ContractsPersonal Service Agreements

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B. Maintenance and Repairs of Real Property

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§ 92.30 Elevator Maintenance and Repairs

[1] Governing Law

Safety and inspection requirements for elevators and other moving conveyances are governed by *Lab. Code § 7300 et seq.* This law also establishes minimum standards for persons operating or maintaining elevators and other moving conveyances. These persons must be familiar with the operation and safety functions of the components and equipment. Their documented training or experience, or both, must include, but not be limited to, recognizing the safety hazards and performing assigned procedures in conformance with all legal requirements [*Lab. Code § 7300(b)*].

[2] Elevators and Conveyances Subject to Statutory Regulation

Equipment subject to regulation by *Lab. Code § 7300 et seq.* includes the following [*Lab. Code § 7300.2*; *see Lab. Code § 7300.3* (exempt equipment)]:

- Elevators.
- Platform lifts and stairway chair lifts.
- Escalators.
- Moving walks.
- Dumbwaiters.
- Automated people movers.

Any of the above equipment located in a dwelling of not more than two units and not open to the public is exempt from *Lab. Code § 7300 et seq.* Elevators and other conveyances in multi-residential buildings of two units nevertheless must be inspected after installation or major alterations before being placed in service [*Lab. Code § 7317*; *see* [5], *below*

(inspection requirements)].

The term "elevator" is used in this section to mean all of the conveyances subject to *Lab. Code § 7300 et seq.*

[3] Required Permits

[a] Operating Permit

No elevator may be operated in California unless a permit for its operation is issued by the Division of Occupational Safety and Health of the Department of Industrial Relations (Division) and unless the permit remains in effect and is kept posted conspicuously on the elevator [*Lab. Code § 7301*]. The Division may prohibit the use of any elevator that is operated without a permit, or for which a permit is not conspicuously posted, unless a request for issuance or renewal of a permit has been made and the Division has not acted on the request [*Lab. Code § 7301*].

An operating permit may be issued for an elevator in a safe condition for a period not to exceed one year, unless the elevator is subject to a full maintenance service contract, in which case a permit may be issued for a period not to exceed two years [*Lab. Code § 7304*; *see § 92.202* (full maintenance service contract form)].

A "full maintenance service contract" is an agreement by a certified competent conveyance company and the person owning or having the custody, management, or control of the operation of the elevator [*Lab. Code § 7300.1(p)*]. A "certified qualified conveyance company" is any person, firm, or corporation that (1) has a valid contractor's license if required under *Bus. & Prof. Code § 7000 et seq.*, and *(2)* is certified as a qualified conveyance company by the Division in accordance with *Lab. Code § 7300 et seq.* [*Lab. Code § 7300.1(g)*].

[b] Construction, Repairs, and Alterations

No elevator may be erected, constructed, installed, or materially altered unless a permit has been obtained from the Division before the work is begun [*Lab. Code § 7301.1(a)*]. If the operation of an elevator during repairs or alterations is not immediately dangerous to the safety of persons, the Division may issue a temporary permit for its operation for a period not to exceed 30 days during the making of repairs or alterations [*Lab. Code § 7308*; *see Lab. Code § 7300.1(t)* ("temporary permit" defined)].

[4] Failure to Obtain Permit

The Division may assess a civil penalty not to exceed $1,000 against any person owning or having custody, management, or control of the operation of an elevator who operates an elevator without a permit or fails to conspicuously post the permit [*Lab. Code § 7320*; *see Lab. Code §§ 7321.5, 6317, 6319* (citation and notice of penalty procedures)]. However, a penalty may not be assessed against a person who has requested the issuance or renewal of a permit, if the request has not been acted on by the Division [*Lab. Code § 7320*].

Additionally, if an elevator is being operated without a current valid permit, and is in a condition that its use is dangerous to the life or safety of any person, the Division or any affected person may apply to the superior court of the county in which the elevator is located for an injunction against its operation until the condition is corrected [*Lab. Code § 7303(a)*].

[5] Required Inspections

If an elevator is subject to a full maintenance service contract [*see* [3][a], *above* (definition)], inspection must be at least once every two years [*Lab. Code § 7304(b)*; *see Lab. Code § 7309.1(a)* (inspectors)]. All other elevators are subject to an annual inspection [*Lab. Code § 7304(a)*; *see Lab. Code § 7309.1(a)* (inspectors)].

[6] Dangerous Conditions

The Division may assess a civil penalty not to exceed $70,000 against any person owning or having custody, management, or control of the operation of an elevator, who operates or permits its operation in a condition that is dangerous to the life or safety of any person, or who operates or permits the operation of the elevator in violation of an order prohibiting its use [*Lab. Code § 7321(a)*; *see Lab. Code §§ 7301*, *7305*, *7314* (grounds for orders)].

The Division must issue an order prohibiting use and may assess a civil penalty not to exceed $70,000 against any person who, without a permit, constructs, installs, or materially alters an elevator that is dangerous to the life or safety of any person [*Lab. Code § 7321(b)*; *see* [3][b], *above* (permit requirement); *see also Lab. Code §§ 6319*, *7321.5*, *7322(a)* (procedures to contest and appeal penalties and orders)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
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B. Maintenance and Repairs of Real Property

30-92 California Legal Forms--Transaction Guide § 92.31

§ 92.31 Boiler Maintenance and Repairs

[1] Governing Law

Safety and inspection requirements relating to boilers are governed by *Lab. Code § 7620 et seq.* A "boiler" is defined as any fired or unfired pressure vessel used to generate steam pressure by the application of heat [*Lab. Code § 7621*]. Steam boilers that are exempt from *Lab. Code § 7620 et seq.* include the following [*Lab. Code § 7625*]:

- Boilers under the jurisdiction or inspection of the Federal Government.
- Boilers operated by employers not subject to workers' compensation insurance laws [*see Lab. Code § 3201 et seq.*].
- Boilers on which the pressure does not exceed 15 pounds per square inch.
- Automobile boilers and boilers on road motor vehicles.

[2] Inspections and Permits

The Division of Occupational Safety and Health of the Department of Industrial Relations (Division) must inspect, or cause to be inspected, each installed fired boiler internally and externally at least every year. However, if the Division determines that the operating experience and design of the boiler is such that equivalent safety will be maintained, the Division may grant extensions to permit internal inspections to be increased to a maximum interval of 36 months [*Lab. Code § 7682*].

For all other boilers, the Division must establish internal inspection intervals which will insure the safety of people working in the vicinity of the boiler. In determining the intervals, the Division must consider the design of the boilers, the construction of the boilers, and the conditions under which they operate [*Lab. Code § 7682*].

External inspection must be made of all boilers at the time of internal inspection and at such other intervals as are

deemed necessary by the Division, acting through qualified engineers and certified inspectors [*Lab. Code § 7682*].

If a boiler is found to be in a safe condition for operation, the Division issues a permit for a period not to exceed one year [*Lab. Code §§ 7683(a), (d)*]. The permit for each boiler must be posted in a protective container in a conspicuous place at or near the boiler [*Lab. Code § 7684*].

[3] Dangerous Conditions

If inspection shows a boiler to be in an unsafe or dangerous condition, the Division may issue a preliminary report requiring appropriate repairs or alterations and may order its use discontinued until the condition is remedied [*Lab. Code § 7687*]. The owner, operator, or other person in charge of the boiler may request a hearing before the Division to show cause why he or she should not comply with the order [*Lab. Code § 7688*]. If it thereafter appears to the Division that the boiler is unsafe, it may make a final order as it deems proper [*Lab. Code § 7689*]. Such an order may be reheard by the Division or reviewed by the courts [*Lab. Code § 7690*].

If the operation of a boiler constitutes a serious menace to the life or safety of any person employed about it, the Division or any of its safety engineers or any affected person may apply to the superior court of the county in which the boiler is located for an injunction restraining its operation until the condition has been corrected [*Lab. Code § 7691*]. The certification of the Division that no valid permit exists for the operation of a boiler and the affidavit of any safety engineer of the Division that its operation constitutes a menace to the life or safety of any person employed about it are sufficient proof to warrant the immediate granting of a temporary restraining order [*Lab. Code § 7692*].

[4] Criminal Liability

Any person owning or having the custody, management, or operation of a boiler who operates it without a permit is guilty of a misdemeanor, except during the time that a request for a permit has been made and the Division has not acted on the request. Each day of such operation is a separate offense [*Lab. Code § 7750*].

An engineer or other person having charge of a boiler or other apparatus for generating or employing steam used in a factory, railway, or other mechanical works, who willfully or from ignorance or from gross neglect creates or allows to be created such an undue quantity of steam as to burst or break the boiler or other apparatus, endangering human life, is guilty of a felony [*Lab. Code § 7770*]. If such an offense causes the death of a human being, it is punishable by imprisonment in the state prison for two, three, or four years [*Lab. Code § 7771*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service AgreementsLabor & Employment LawGeneral Overview

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30-92 California Legal Forms--Transaction Guide § 92.32

§ 92.32 Property Maintenance and Cleaning

[1] License Requirements

There are no state license requirements for individuals and companies who provide general building maintenance services. However, when the service provided goes beyond general maintenance duties, the service provider may be subject to specific licensing requirements, including, for example, the following:

- A person who engages in repairing buildings and other improvements, servicing air conditioning, heating, or refrigeration equipment that is a fixed part of a structure, or trimming or removing trees is a "contractor" and is required to be licensed under *Bus. & Prof. Code § 7000 et seq.* [*see Bus. & Prof. Code §§ 7026, 7026.1(a), 7026.1(d)*].

- A person who engages in rekeying, installing, repairing, opening, modifying locks, or who originates keys for locks is a "locksmith," who is required to be licensed under *Bus. & Prof. Code § 6980 et seq.* [*see Bus. & Prof. Code § 6980(j)*].

- A person who engages in identifying infestations of household pests and wood destroying pests or organisms, or the performance of any work for the purpose of eliminating, exterminating, controlling, or preventing infestations or infections of such pests or organisms, is a "structural pest control operator," who is required to be licensed under *Bus. & Prof. Code § 8505 et seq.* [*see Bus. & Prof. Code §§ 8505, 8506*].

For discussion and a sample form for a janitorial service contract, see *§ 92.200*. For discussion and a sample form for a swimming pool service contract, see *§ 92.201*.

[2] Window Cleaners

Safety devices on buildings to safeguard window cleaners are governed by *Lab. Code §§ 7325-7332*. *Lab. Code § 7325* defines "building" as any building three stories or more in height, but it excludes dwelling houses occupied by not more

than three families and all buildings constructed with windows that may be, and are, entirely washed and cleaned from inside the building or from a sitting position on the window sill in the manner provided by safety orders issued by the Division of Industrial Safety of the Department of Industrial Relations (Division). The Division defines a "building" as "any building more than one story in height or having window sills more than 12 feet above grade, which is a place of employment" [*8 Cal. Code Reg. § 3281(a)*].

Rings, bolts, lugs, fittings, or other devices (to which may be fastened safety belts or other devices to be used by persons cleaning windows) must be securely fastened to the outside window sills or frames of any building [*Lab. Code § 7326*]. The Division is directed and authorized to do the following:

- It must approve such safety devices before installation [*Lab. Code § 7326*].

- It must designate the manner in which the safety devices are to be attached, installed, and used [*Lab. Code § 7326*].

- It may approve the installation and use of any other devices or means that will effectively safeguard persons engaged in cleaning windows [*Lab. Code § 7327*].

The Division has issued detailed rules and regulations relating to safety devices for window cleaning [*see 8 Cal. Code Reg. § 3281 et seq.*].

Any person employing, directing, or permitting another to wash windows that do not have the proper safety devices for window cleaning is guilty of a misdemeanor [*Lab. Code § 7328*]. Any person who owns or is entitled to possession of a building under a lease, sublease, or other agreement for a period longer than one year and who fails to install, provide, or maintain in good condition the proper safety devices for window cleaning, is guilty of a misdemeanor [*Lab. Code §§ 7329, 7330*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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DIVISION VI: PERFORMANCE OF SERVICES
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[Reserved]

§§ 92.33[Reserved]

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30-92 California Legal Forms--Transaction Guide § 92.40

§ 92.40 Security Patrol and Guard Services

[1] Governing Law

Private patrol operators are regulated by the Private Security Services Act [*Bus. & Prof. Code § 7580 et seq.*], which is administered and enforced by the Department of Consumer Affairs, Bureau of Security and Investigative Services ("Bureau") [*see Bus. & Prof. Code §§ 7580.1, 7580.2, 7580.4*].

[2] Patrol and Security Officers Defined

A "private patrol operator" is a person, other than an armored contract carrier, who for consideration agrees to furnish, or furnishes, a watchman, guard, patrolperson, or other person to protect persons or property or to prevent the theft, unlawful taking, loss, embezzlement, misappropriation, or concealment of any goods, wares, merchandise, money, bonds, stocks, notes, documents, papers, or property of any kind; or performs the service of a watchman, guard, patrolperson, or other person, for any of these purposes [*Bus. & Prof. Code § 7582.1(a)*].

A "security guard" or security officer is an employee of a private patrol operator who performs the functions of the private patrol operator [*Bus. & Prof. Code § 7582.1(e)*].

[3] Exempt Persons and Organizations

The provisions of the Private Security Services Act do not apply to the following [*Bus. & Prof. Code § 7582.2*]:

- Persons who do not meet the requirements to be a proprietary private security officer [*see Bus. & Prof. Code § 7574.1* (definition)] and are employed exclusively and regularly by any employer who does not provide contract security services for other entities or persons.
- Government employees acting within the scope of official duties.
- Persons engaged exclusively in the business of obtaining and furnishing financial ratings.

- Charitable organizations maintained for the public good and not for profit.

- Patrol special officers appointed by a police commission under the express terms of its charter.

- Attorneys performing their duties as attorneys.

- A collection agency or its employees who are acting within the scope of their employment.

- Licensed insurers, agents, and brokers performing their duties in connection with insurance.

- Banks or savings associations subject to the jurisdiction of the Commissioner of Financial Institutions under Division 1 of the Financial Code [*see Fin. Code § 99 et seq.*] or the Comptroller of the Currency.

- Persons solely engaged in the business of securing information about persons or property from public records.

- Peace officers in off-duty employment [*see Gov. Code § 1126*] (except peace officers who contract for services as private investigators or armed private investigators).

- Retired police officers employed by a private employer in employment approved by the chief law enforcement officer of that jurisdiction, provided the retired officer is in the uniform of a public law enforcement agency, has registered with the Bureau, and has met any training requirements established for security personnel [*see Bus. & Prof. Code § 7583.5*].

- Licensed insurance adjusters performing their duties within the scope of their licenses.

- Secured creditors or lessors repossessing the collateral or leased property.

- Peace officers in official police uniform acting in accordance with *Penal Code § 70(c), (d)*.

- Unarmed uniformed security employees employed exclusively by a motion picture studio facility employer, who do not provide contract services for other persons or entities in connection with their employer's affairs, if they do not carry or use any deadly weapon in the performance of their duties.

[4] License and Registration Requirements

A person who engages in the business of a private patrol operator must be licensed [*Bus. & Prof. Code § 7582.3(a)*; *see Bus. & Prof. Code §§ 7582.6-7582.14, 7583.1* (license application and requirements)]. In addition, any employee of a private patrol operator who performs the function of a security guard or security patrolperson must register with the Bureau [*see Bus. & Prof. Code § 7583.9*]. A person required to be registered as a security guard must carry on his or her person, while on duty, a valid and current security guard registration card [*Bus. & Prof. Code § 7583.3(a)*].

[5] Obligations of Private Patrol Operator

A person licensed as a private patrol operator ("licensee") must comply with all of the following [*see Bus. & Prof. Code § 7583.2*]:

- Properly maintain an accurate and current record of all firearms or other deadly weapons that are in

the possession of the licensee or of any employee while on duty [*see Bus. & Prof. Code § 7583.2(a)* (reports of missing or stolen firearms)].

- Properly maintain an accurate and current record of the name, address, commencement date, and position of each employee, and the date of termination of employment when an employee is terminated.

- Properly maintain an accurate and current record of proof of completion by each employee of the course of training required under the Private Security Services Act.

- Certify an employee's completion of the course of training in the exercise of the power to arrest prior to placing the employee at a duty station.

- Certify proof of current and valid registration for each employee who is subject to registration.

- Not permit any employee to carry a firearm or other deadly weapon without first ascertaining that the employee is proficient in the use of each weapon to be carried.

- Deliver to the Director of Consumer Affairs a written report describing fully the circumstances surrounding the discharge of any firearm, or physical altercation with a member of the public while on duty, by a licensee or any officer, partner, or employee of a licensee while acting within the course and scope of his or her employment within seven days after the incident.

- Notify the Bureau in writing and within 30 days that a manager previously qualified is no longer connected with the licensee.

- Administer to each registered employee the review or practice training required by *Bus. & Prof. Code § 7583.6(f)*.

[6] Obligations of Security Guard

A person required to be registered as a security guard must do all of the following [*Bus. & Prof. Code § 7583.3*]:

- Carry on his or her person, while on duty, a valid and current security guard registration card.

- Carry on his or her person a valid and current firearms permit when carrying a firearm on duty.

- Refrain from carrying or using a firearm unless he or she possesses a valid and current firearms permit.

- Report to his or her employer within 24 hours of the incident the circumstances surrounding any incident involving the discharge of any firearm in which he or she is involved while acting within the course and scope of his or her employment [*see* [9], *below*].

[7] Information Reported by Private Patrol Operator

Any licensee, including officers, directors, partners, or managers, may divulge information concerning criminal offenses to law enforcement officers or district attorneys, but may not divulge that information to any other person unless required by law to do so or directed to do so by the client for whom the information was obtained [*Bus. & Prof. Code § 7582.26(a)*]. No licensee may knowingly make any false report to the client for whom information was obtained [*Bus. & Prof. Code § 7582.26(b)*].

Written reports may be submitted to a client only by the licensee, its qualifying manager, or persons authorized by them to do so. The person who submits the report must exercise diligence in ascertaining whether or not the facts and information reported are true and correct [*Bus. & Prof. Code § 7582.26(c)*].

[8] Training and Use of Firearms and Other Weapons

Every licensee and any person employed by a licensee as a security guard or security patrolperson (with the exception of armored vehicle guards hired before January 1, 1977) who carries a firearm in the course of that employment or business must complete a course of training, at an approved training facility, in the carrying and use of firearms [*Bus. & Prof. Code §§ 7583.5, 7583.22*; *see Bus. & Prof. Code § 7585 et seq.* (firearms and baton training facilities)].

Employees may not carry or use firearms, loaded or unloaded, or operative or inoperative, unless they have in their possession both a valid guard registration card and a valid firearm qualification card issued by the Bureau [*Bus. & Prof. Code §§ 7583.12, 7583.22*; *see Bus. & Prof. Code §§ 7583.13-7583.20* (registration and renewal procedures)]. A firearms qualification card does not authorize the holder to carry a pistol, revolver, or other firearm in a concealed manner [*Bus. & Prof. Code § 7583.31*; *see Bus. & Prof. Code § 7583.37(e)* (exceptions); *see also Penal Code § 12050* (concealed weapons)].

It is also illegal for a licensee's employee to carry an inoperable, replica, or other simulated firearm [*Bus. & Prof. Code § 7583.37(a)*], to illegally use, carry, or possess a dangerous weapon, to brandish a weapon, to draw a weapon without cause, to provoke a shooting incident without cause, or to carry or use a firearm while on duty under the influence of alcohol or dangerous drugs [*Bus. & Prof. Code § 7583.37(b)*]. If an employee carries a firearm on duty, the licensee must also maintain an insurance policy [*see Bus. & Prof. Code §§ 7583.39-7583.42*].

Similarly, personnel who carry a baton on duty must qualify to carry the weapon [*Bus. & Prof. Code § 7583.33*]. Evidence of proficiency includes a certificate of proficiency from an approved baton training facility [*Bus. & Prof. Code § 7583.34*]. Personnel who carry tear gas or other nonlethal chemical agents must complete a course of instruction [*see Bus. & Prof. Code § 7583.35*] and carry a certificate of proficiency from an approved training facility [*see Bus. & Prof. Code § 7583.36*].

[9] Discharge of Firearms

Persons required to be registered as security guards [*see* [4], *above*] must report to their employer within 24 hours the circumstances surrounding any incident involving the discharge of a firearm while acting within the course and scope of their employment [*Bus. & Prof. Code § 7583.3(d)*].

A written report describing the circumstances surrounding the incident must be filed with the Director of Consumer Affairs and with the local police department within seven days of the incident [*see Bus. & Prof. Code § 7583.4* (applies both to security guards and to patrolpersons)]. The written report must include the name, address, date of birth, registration number, and firearm permit number of the guard, a description of the injuries and damages that occurred, the identity of all participants, whether a police investigation was conducted, and the date and location of the incident [*Bus. & Prof. Code § 7583.4(a)-(h)*].

[10] Training in Power to Arrest

A person employed by a private patrol operator to perform the functions of a security guard or a security patrolperson must complete a course in the exercise of the power to arrest prior to being assigned to a duty location [*see Bus. & Prof. Code § 7583.6(a)*].

[11] Uniforms and Other Forms of Identification

Uniforms and insignias worn by uniformed employees of a private patrol operator must be clearly distinguishable from the uniforms worn by regular local law enforcement officers [*Bus. & Prof. Code § 7583.38*]. No private patrol licensee or employee may wear a badge, except while engaged in guard or patrol work and while wearing a distinctive uniform [*Bus. & Prof. Code § 7582.26(f)*]. Patches that read "private security" and include the name of the private patrol company by which the person is employed must be worn on the uniform [*Bus. & Prof. Code § 7582.26(f)*; *see Bus. & Prof. Code § 7582.28*]. The patches must be clearly visible at all times, and must be of a standard design approved by the Bureau [*Bus. & Prof. Code § 7582.26(f)*].

Private patrol operator personnel must not use or wear a baton or an exposed firearm unless wearing a uniform in compliance with *Bus. & Prof. Code § 7582.27* [*Bus. & Prof. Code § 7582.26(i)*]. There must be a patch on each arm of the uniform that reads "Private Security" and includes the company name of the employer. The patches must be clearly visible at all times, and must be of a standard design approved by the Bureau [*Bus. & Prof. Code § 7582.27*].

[12] Use of Fictitious Business Name

Licensees may not conduct business under any business name, fictitious or otherwise, without written authorization from the Bureau. The Bureau will not authorize the use of a fictitious or other business name if the name is so similar to that of a public officer or agency or a name used by another licensee that the public could be confused or misled. The Bureau will require, as a condition precedent to the use of a fictitious name, that the licensee file a statement of fictitious business name [*Bus. & Prof. Code § 7582.17*; *see Bus. & Prof. Code § 17900 et seq.*; *see also* Ch. 1A, *Role of Counsel in Starting a New Business*].

[13] Violations of the Private Security Services Act

Any person who violates any provision of the Private Security Services Act, or who conspires with another person to violate any provision the Act relating to private patrol operator licensure, or who knowingly engages a nonexempt unlicensed person, is guilty of a misdemeanor punishable by a fine of $5,000, or by imprisonment in the county jail not to exceed one year, or by both that fine and imprisonment [*Bus. & Prof. Code § 7582.3(b)*].

In addition, civil penalties not to exceed $10,000 and an injunction may be imposed on a person who violates the license requirement of *Bus. & Prof. Code § 7582.3* [*Bus. & Prof. Code § 7582.4(a)*; *see* [4], *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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C. Security Services for Property

30-92 California Legal Forms--Transaction Guide § 92.41

§ 92.41 Alarm Systems

[1] Governing Law

The practices of alarm companies and their employees are governed by the Alarm Company Act [*Bus. & Prof. Code § 7590 et seq.*], which is administered and enforced by the Department of Consumer Affairs, Bureau of Security and Investigative Services ("Bureau") [*see Bus. & Prof. Code §§ 7591-7591.20*].

The provisions of the Alarm Company Act do not prevent local authorities from enacting ordinances requiring alarm company operators, and in some cases their employees, to obtain a business permit, a permit to operate an alarm system, or register with the local authority. The local authorities may also enact ordinances governing false alarm activations and responses [*Bus. & Prof. Code § 7592.8*].

[2] Alarm Company Operator and Alarm Agent Defined

An "alarm company operator" is any person who, for any consideration whatsoever, engages in business or accepts employment to install, maintain, alter, sell on premises, monitor, or service alarm systems or who responds to alarm systems, but an alarm company operator does not include an alarm agent, as defined below. An alarm company operator also includes any entity hired to monitor one or more alarm systems, whether or not the entity performs any other duties within the definition of an alarm company operator [*Bus. & Prof. Code § 7590.2*].

An "alarm system" is an assembly of equipment and devices arranged to signal the presence of a hazard requiring urgent attention and to which police are expected to respond [*Bus. & Prof. Code § 7590.1(n)*; *see Novar Corp. v. Bureau of Collection & Investigative Services (1984) 160 Cal. App. 3d 1, 5, 206 Cal. Rptr. 287* (system that results in horn sounding and light flashing for 10 seconds to deter or frighten an intruder, but that is not connected to any police or alarm agency, is probably not an alarm system under Alarm Company Act)].

An "alarm agent" is a person employed by an alarm company operator whose duties include selling on the premises, or altering, installing, maintaining, moving, repairing, replacing, servicing, responding, or monitoring an alarm system, or a person who manages or supervises a person employed by an alarm company to perform any of these duties, or any

person in training for any of these duties [*Bus. & Prof. Code § 7590.1(o)*].

[3] Exempt Persons

The Alarm Company Act does not apply to the following persons [*see Bus. & Prof. Code § 7590.3*]:

- A person employed exclusively and regularly by any employer who does not provide contract alarm services for other entities or persons. A person so employed may at no time carry or use any deadly weapon in the performance of his or her duties.

- An officer or employee of California or the United States of America, while that person is engaged in the performance of his or her official duties.

- Patrol special police officers appointed by the police commission of any city or county.

- A licensed private patrol operator or any employee of a licensed private patrol operator who is employed as a security guard, security officer, or street patrolperson [*see Bus. & Prof. Code § 7582.1*] and who is employed to respond to alarm systems [*see § 92.40[2]*].

[4] License and Registration Requirements

[a] Alarm Company Operator

Any person who engages in the activities of an alarm company operator must obtain a license to do so, unless exempted from the provisions of the Alarm Company Act [*Bus. & Prof. Code § 7592*; *see* [3], *above* (exempt persons); *see also Bus. & Prof. Code § 7593* (license requirements)]. An applicant for an alarm company operator license must be at least 18 years old [*Bus. & Prof. Code § 7590.5*]. The term "licensee" is used throughout this section to refer to a licensed alarm company operator.

A person who is required to be licensed may not bring an action for compensation for the performance of any act or agreement, without alleging and proving that the person was duly licensed at all times during the performance of the act or agreement [*Bus. & Prof. Code § 7592.5*].

[b] Alarm Agent

Within three working days of commencing employment as an alarm agent, the employee, if not currently registered, must submit to the Bureau an application for registration [*Bus. & Prof. Code § 7598.4(a)*; *see Bus. & Prof. Code §§ 7598.5-7598.7* (application requirements)]. An applicant for an alarm agent registration must be at least 18 years old [*Bus. & Prof. Code § 7590.5*].

If the alarm agent is currently registered with the Bureau, the alarm company operator must verify proof of current and valid registration within three working days from the time an employee is first compensated for alarm agent services [*Bus. & Prof. Code § 7599.39*].

[5] Business Operations of Alarm Company Operator

In addition to certain record keeping requirements [*see* [9], *below*], a licensed alarm company operator must comply with the following requirements:

- The license must be conspicuously displayed at the operator's place of business [*Bus. & Prof. Code § 7593.9*].

- A licensee may not conduct an alarm company operator business in any name other than the name for which he or she is licensed. If the licensee desires to operate under a fictitious business name, he or she must apply and qualify for a license under that name [*Bus. & Prof. Code § 7594*].

- A licensee who desires to operate a business at a location other than the principal place of business shown on the license must apply for a branch office registration for each additional location [*Bus. & Prof. Code § 7594.1*; *see Bus. & Prof. Code §§ 7599.20-7599.29* (branch office requirements)].

- Each office of an alarm company operator must be managed by a qualified manager or branch office manager [*see Bus. & Prof. Code §§ 7594.2-7592.6*; *see also Bus. & Prof. Code §§ 7599-7599.10* (qualifications and examination of qualified managers)].

- A licensee must at all times be responsible for ascertaining that his or her employees subject to registration are currently registered or have made proper application for registration [*Bus. & Prof. Code § 7598.16*; *see* [4][b], *above* (registration requirements)].

[6] Obligations Regarding Performance of Services

A licensed alarm company operator and, in some cases, his or her employees, must comply with the following requirements:

- A licensee must not allow any employee to carry a firearm or other deadly weapon without first ascertaining that the employee is proficient in the use of each weapon to be carried [*Bus. & Prof. Code § 7599.40*; *see* [7][a], *below* (firearms training course)].

- A licensee and his or her employees must not enter any private buildings, except those open to the public, without the consent of the owner or the person entitled to possession [*Bus. & Prof. Code § 7599.45*].

- A licensee and his or her employees must not knowingly make any false reports to an employer or client [*Bus. & Prof. Code § 7599.48*].

- A licensee and his or her alarm agents must not make any untrue or misleading statements in connection with the business of the licensee, such as a statement that (1) an alarm system is "Underwriters Laboratory approved or listed" (UL approved or listed) unless the entire system, and not only one or more components, is in fact, UL approved or listed, or (2) an alarm system is insurance approved, police approved, or approved by the Department of Defense, unless in fact the approval has been obtained in writing [*Bus. & Prof. Code § 7599.55*].

- A licensee must not abandon the installation of an alarm system prior to completion without legal excuse [*Bus. & Prof. Code § 7599.49*], or willfully refuse, without legal excuse, to pursue the installation of an alarm system with reasonable diligence, causing material injury to another [*Bus. & Prof. Code § 7599.53*].

- A licensee must not fail in any material respect to complete an alarm system installation for the price stated in the alarm system contract [*Bus. & Prof. Code § 7599.52*].

- Each contract for the installation of an alarm system, including lease agreements, monitoring agreements, and service agreements, must be in writing and must satisfy certain other requirements [*see*

Bus. & Prof. Code § 7599.54]. For discussion and a sample lease agreement for an alarm system, see *§ 92.212*.

- A licensee must not willfully depart from or disregard any plans or specifications (or in the absence of specific requirements, the plans or specifications of accepted trade standards for good and workerlike construction) in any material and prejudicial manner, without consent of the owner or his or her duly authorized representative, and without the consent of the person entitled to have the particular installation of alarm system substantially completed in accordance with the plans and specifications [*Bus. & Prof. Code § 7599.50*].

- A licensee must not willfully or deliberately disregard any building laws, safety law, or labor laws of California, or its political subdivisions [*Bus. & Prof. Code § 7599.51*].

Additionally, a licensee must not do any of the following [*Bus. & Prof. Code § 7599.58*]:

- Knowingly install a defective alarm system.

- Willfully fail to service the alarm system pursuant to the terms of the warranty or service agreement.

- Willfully fail to notify the owner of a defective system when the alarm company operator makes a discovery of a defect in a system after installation.

- Willfully fail to provide any service described in the agreement for the installation of the alarm system [*see Bus. & Prof. Code § 7599.54* (installation agreement requirements)].

[7] Training Programs

[a] Firearms

Every licensee and registrant under the Alarm Company Act who carries a firearm in the course of his or her employment must complete a training course in the carrying and use of firearms and obtain a firearms qualification card prior to carrying firearms [*Bus. & Prof. Code § 7596*; *see Bus. & Prof. Code §§ 7596.3-7596.83* (use of firearms)].

[b] Powers to Arrest

Every licensee and registrant under the Alarm Company Act who carries a firearm in the course of his or her employment must complete a training course in the exercise of the powers to arrest [*Bus. & Prof. Code § 7596*]. Additionally, every alarm agent who responds to alarm systems must complete a course in the exercise of the powers to arrest prior to being assigned to a duty location responding to an alarm system [*Bus. & Prof. Code §§ 7598.1-7598.3*].

[c] Tear Gas

Every person licensed or registered under the Alarm Company Act who carries tear gas, or any other nonlethal chemical agent, must complete a training course in the use of tear gas [*Bus. & Prof. Code § 7596.12*].

[8] Uniforms and Other Forms of Identification

An alarm agent who responds to an alarm system must wear a prominently displayed patch or other designation that clearly identifies the name of the licensee. If the alarm agent carries a deadly weapon while responding to an alarm system, he or she must wear a recognizable uniform bearing the identifying patch. The uniform must be distinguishable from the uniforms worn by local regular law enforcement officers [*Bus. & Prof. Code § 7598.53*].

[9] Record Keeping

[a] Required Records

A licensed alarm company operator must maintain the following records:

- Accurate and current record of all firearms or other deadly weapons that are in the possession of the licensee, or of any employee of the licensee, while on duty [*see Bus. & Prof. Code § 7599.41*].

- Employee records containing the name, address, commencement and termination dates of employment, and position of each employee. These records must be retained for at least two years after employment ceases, and must be available for inspection by the Bureau [*Bus. & Prof. Code § 7599.36*].

[b] Required Reports

A licensed alarm company operator must prepare and submit the following reports and documents to the Bureau:

- Reports of any violent incident involving a dangerous weapon that has been caused by or occurred upon a licensee or its officers, partners, qualified managers, or employees, while acting within the course and scope of employment, and that (1) results in bodily injury or death to any person, or (2) involves the discharge of a weapon, excluding any discharge which occurs on the range. The report must describe fully the circumstances surrounding the incident, any injuries or damages incurred, the identity of all participants, and whether a police investigation was conducted. The report must be mailed to the Bureau within seven days of the incident [*Bus. & Prof. Code § 7599.42*].

- A copy of any final civil court judgment against the licensee or its officers, partners, qualified managers, or employees for an amount of more than $500 pertaining to any act done within the course and scope of employment and that may be in violation of the Alarm Company Act. The report must be mailed to the Bureau within seven days after receipt of the final judgment [*Bus. & Prof. Code § 7599.43*].

[c] Inspections and Investigations

The Chief of the Bureau of Security and Investigative Services may inspect the books and records of an alarm company operator, excluding client information relating to the operational integrity of the alarm system [*Bus. & Prof. Code § 7591.7*]. It is also the duty of the Chief to conduct investigations into the business operations of an alarm company operator who is not operating in accordance with the provisions of the Alarm Company Act, or about whom a written complaint has been filed with the Bureau about the actions and conduct of the alarm company operator or his or her employees or agents [*Bus. & Prof. Code § 7591.5*].

[10] Violations of Alarm Company Act

Any person who violates, or who conspires with another person to violate, any provision of the Alarm Company Act, or who knowingly engages an unlicensed alarm company operator after being notified in writing by the Bureau of the alarm company operator's unlicensed status, is guilty of a misdemeanor, and is punishable by a fine of $1,000, or by imprisonment in the county jail for not more than one year, or by both the fine and imprisonment [*Bus. & Prof. Code § 7592.2*]. Administrative fines may also be imposed for violations of the Alarm Company Act [*see Bus. & Prof. Code §§ 7591.9, 7598.50, 7599.30*].

A licensed alarm company operator is at all times responsible for those actions of his or her employees, including a qualified manager, that are performed within the course and scope of employment and are in violation of the Alarm

Company Act [*Bus. & Prof. Code § 7599.31*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service AgreementsReal Property LawGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART II. LEGAL BACKGROUND
C. Security Services for Property

30-92 California Legal Forms--Transaction Guide § 92.42

§ 92.42 Sentry Dog Services

[1] Governing Law

The use of trained dogs for security and investigative purposes is governed by the Dog Act of 1969 ("Dog Act") [*Health & Safety Code § 121875 et seq.*]. Four types of dogs are covered by the Dog Act:

- A "sentry dog" is a dog trained to work without supervision in a fenced facility and to deter or detain unauthorized persons found within the facility [*Health & Safety Code § 121880*].

- A "narcotic detection dog" is a dog trained to locate narcotics by scent [*Health & Safety Code § 121885*].

- A "tracker or attack dog" is a dog trained to work with a handler in searching out facilities for burglary suspects and other intruders [*Health & Safety Code § 121890*].

- A "guard dog" or "attack dog" is any dog trained to guard, protect, patrol, or defend any premises, area, or yard, or any dog trained as a sentry or to protect, defend, or guard any person or property, or any dog such as a schutzhund or any similar classification [*Health & Safety § 121881*].

Unless otherwise specified, any violation of any provision of the Dog Act (other than *Health & Safety § 121945*, discussed *below*) is punishable by a civil penalty of up to $1,000 [*Health & Safety Code § 121940*]. Alternatively, any person or owner who violates the Dog Act is subject to a civil penalty of up to $1,000, or prohibition from selling, renting, leasing, or training any attack, guard, or sentry dog for up to 30 days, or both. For a second offense, the person or owner is subject to a civil penalty of up to $2,500, or a prohibition of up to 90 days, or both. For a third offense, the person or owner is subject to a civil penalty of up to $5,000 or a prohibition of up to six months, or both. For a fourth or any subsequent offense, the person or owner is subject to a civil penalty of up to $10,000 or a prohibition of up to one year, or both. For purposes of this section, however, a violation that occurred more than five years before the most recent violation will not be considered [*Health & Safety Code § 121945*].

For discussion and a sample contract for sentry dog services, see *§ 92.213*.

[2] Definitions

For purposes of the Dog Act, a "person" means any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity [*Health & Safety Code § 121906*]. An "owner" means any person who has purchased, or obtained legal custody of, an attack, guard, or sentry dog [*Health & Safety Code § 121907*]. A "trainer" means any person who engages in the practice of training any attack, guard, or sentry dog [*Health & Safety Code § 121896*].

A "sentry dog company" is "any person who agrees to furnish trained sentry, attack, or narcotic detection dogs for hire" [*Health & Safety Code § 121895*]. "Hire" includes, but is not limited to, the renting or leasing of a dog with or without a dog handler, or the sale of a dog with an option to repurchase [*Health & Safety Code § 121905*].

A "dog handler" is any person trained in the handling of dogs, including their care, feeding, and maintenance, and in the procedures necessary to control the dog's behavior [*Health & Safety Code § 121900*].

[3] Registration and Notification Requirements

Each sentry dog company must register each sentry, narcotic detection, and tracker or attack dog handled by it with the: (1) local law enforcement agency and (2) state, city, county, or district fire department that has the responsibility for the prevention and suppression of fires in the area in which the sentry dog company is located [*Health & Safety Code § 121910*].

Each sentry dog company must also notify the appropriate local law enforcement agency and the appropriate fire department by mail not more than 15 days before a sentry, narcotic detection, tracker, or attack dog is sent on an assignment of the location and duration of the assignment. The local law enforcement agency and fire department must maintain a file of such assignments [*Health & Safety Code § 121915*].

[4] Identification and Supervision of Sentry Dog

The owner or trainer of any attack, guard, or sentry dog must ensure that the dog has been microchipped and the owner's identification entered into a local or national registry [*Health & Safety Code § 121920(a)*].

An identification tag provided by the attack, guard, or company furnishing the dog for hire must be worn at all times by each dog subject to the Dog Act. The identification tag must include the attack, guard, or name of the dog and the name, address, and telephone number of the sentry dog company furnishing the dog. The telephone number must be to a telephone manned by a person 24 hours per day every day of the year so that calls from the public may be received and answered [*Health & Safety Code § 121920(a)*]. The above identification tag is in addition to any tag required or issued by any governmental agency to show that a dog has been immunized or inoculated against disease [Health & Safety Code § 121920b].

No person may let for hire, sell, or give away any guard, attack, or sentry dog unless immunization and certification of vaccine requirements are met [*see Health & Safety Code § 121921(a)*].

Whenever such a dog is being transported anywhere, it must be well secured in a humane manner that will reasonably prevent its possible escape [*Health & Safety Code § 121925*].

Wherever and whenever such a dog is on actual duty, the dog must be visited by a dog handler at least once every 12

hours to insure that the dog's physical condition, its surroundings, and its food and water supply are adequate, and, if inadequate, the dog handler must do whatever is necessary to remedy the situation. The dog handler must be either the owner of, or be employed by or under contract to, the sentry dog company that placed the dog on assignment [*Health & Safety Code § 121930*].

[5] Permit Requirements

Any person or owner of an attack, guard, or sentry dog that operates or maintains a business to sell, rent, or train an attack, guard, or sentry dog must obtain a permit from the local public agency or private society or pound contracting with the local public agency for animal care or protection services [*Health & Safety Code § 121916(a)*; *see Health & Safety Code § 121916(c)* ("local public agency" means city, county, or city and county)]. When applying for a permit, the applicant must furnish the local public agency with a list of the types of animals to be kept or used for any purpose, the estimated maximum number of animals to be kept, and the name and telephone number of a responsible person who has access to the animals and can be reached in an emergency [*Health & Safety Code § 121917(a),(b)*; *see Health & Safety Code § 121917(c)-(f)* (additional operational requirements)].

[6] Grounds for Suspension or Revocation of Permit

The local public agency may suspend or revoke a permit issued under the Dog Act if the agency determines that the permittee has done any of the following [*Health & Safety Code § 121919*]:

- Made any false statement or given any false information in connection with an application for a license, or a renewal or reinstatement.
- Violated any provisions of the Dog Act.
- Violated any rule of an ordinance adopted pursuant to the authority contained in the Dog Act [*see Health & Safety Code § 121918* (list of ordinances local public agency may adopt regarding dog welfare)].
- Committed any other act that would be grounds for denial of a license.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service AgreementsGovernmentsAgriculture & FoodAnimal Protection

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[Reserved]

§§ 92.43[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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30-92 California Legal Forms--Transaction Guide § 92.50

§ 92.50 Repair of Electronics and Appliances

[1] Governing Law

Repair services of electronics and appliances [*see* [2], *below* (products covered)] are governed by the Electronic and Appliance Repair Dealer Registration Law ("Repair Act") [*Bus. & Prof. Code § 9800 et seq.*] and its implementing regulations [*16 Cal. Code Reg. § 2701 et seq.*]. The Repair Act is administered by the Bureau of Electronic and Appliance Repair, Home Furnishings, and Thermal Insulation ("Bureau"), within the Department of Consumer Affairs [*Bus. & Prof. Code § 9810*].

The Director of the Department of Consumer Affairs ("Director") must distribute to each registered service dealer [*see* [2], *below* (definition)] copies of applicable statutory provisions and implementing regulations [*Bus. & Prof. Code § 9814*].

For discussion and a sample of a receipt and estimate form that meets the requirements of the Repair Act, see *§ 92.220*. For discussion and a sample of an invoice form that meets the requirements of the Repair Act, see *§ 92.221*.

[2] Service Dealer Defined

A "service dealer" is a person ("person" includes firm, partnership, association, limited liability company, or corporation [*Bus. & Prof. Code § 9801(a)*]) who for compensation engages in, or holds himself or herself out to the public as offering services in, the business of any of the following activities [*Bus. & Prof. Code § 9801(f)*]:

- Repairing, servicing, or maintaining television, radio, audio or video recorders or playback equipment, video cameras, video games, video monitors, computer systems, photocopiers, or fax machines [*see Bus. & Prof. Code § 9801(h)* ("electronic set" defined)] normally used or sold for personal, family, household, or home office use.

- Installing, repairing, servicing, or maintaining "equipment" (*i.e.*, an electronic set, appliance, antenna, rotator, and accessories [*see Bus. & Prof. Code § 9801(g)*]) or a burglar alarm system for use in

private motor vehicles.

- Installing, repairing, servicing, or maintaining television or radio receiver antennas , rotators, and accessories or direct satellite receiving equipment located on or adjacent to a residence and not involving a contractor's function [*see Bus. & Prof. Code § 7000 et seq.*].

- Repairing, servicing, or maintaining major home appliances.

A person is classified as a service dealer if he or she does any of the following [*16 Cal. Code Reg. § 2711*]:

- Solicits or advertises the repair or installation of equipment by telephone directory, newspaper, printed handbill, printed business card, printed poster, or painted or electric sign, or any other method that might lead the customer to believe that he or she repairs or installs such equipment.

- Bills a customer for repair or the installation of equipment as provided in the Repair Act, on his or her own invoice.

- Sells service contracts for the repair of equipment and accepts requests for the repair of such equipment under the service contract [*see § 92.51* (service contracts)].

- Accepts requests for repair or receives equipment for repair or, as part of a sales transaction, provides for the installation of equipment and renders control of the equipment received or transmits the requests for repair or installation to another service dealer.

- Repairs or installs equipment as an independent contractor.

[3] Registration Requirement

[a] Who Must Register

It is unlawful to act as a service dealer without first having registered with the Bureau and unless the registration is currently valid [*Bus. & Prof. Code § 9840*]. Each service dealer must display the registration certificate in a conspicuous place at the place of business for which the registration was issued [*16 Cal. Code Reg. § 2714*].

However, licensed automobile dealers or manufacturers are not required to register as service dealers solely because they install or replace an electronic set or automobile burglar alarm as a function related to the sale or repair of a motor vehicle [*Bus. & Prof. Code § 9806(a)*]. Similarly, a licensed automotive repair dealer [*see § 92.53[1]*] is not required to have a separate service dealer's license if the dealer's activities are within the scope of the dealer's license and consist of installing an electronic set or automobile burglar alarm system for use in private motor vehicles [*Bus. & Prof. Code § 9806(b)*].

A service dealer who does not operate a place of business in California, but who engages in the electronics repair industry or the appliance repair industry in California, must hold a valid registration issued by the Bureau and must pay the required registration fee [*see* [b], *below*] as if the dealer had a place of business in California [*Bus. & Prof. Code § 9830*].

[b] Fees and Forms

Each service dealer must pay a registration fee [*see Bus. & Prof. Code § 9873*] for each place of business and each drop-off location the dealer operates in California and must register with the Bureau on forms prescribed by the

Director. The forms must contain sufficient information to identify the service dealer, including specific information required by statute and other information that is prescribed by the Bureau [*see Bus. & Prof. Code § 9830*].

[c] Renewal of Registration

Original registrations are issued for a maximum of 12 months [*Bus. & Prof. Code § 9832(a)*]. Renewal of a dealer's registration requires submission of a renewal application and payment of a renewal fee [*Bus. & Prof. Code § 9832(b)*; *see Bus. & Prof. Code § 9873* (fees)].

[d] Invalidation of Registration

The Director may deny, suspend, revoke, or place on probation, the registration of a service dealer for any of the following acts or omissions done by the dealer (or by any employee, partner, officer, or member of the service dealer) related to the conduct of the dealer's business [*Bus. & Prof. Code § 9841(a)*]:

- Making or authorizing any statement or advertisement that is untrue or misleading, and that is known, or that by the exercise of reasonable care should be known, to be untrue or misleading.

- Making any false promises of a character likely to influence, persuade, or induce a customer to authorize the repair, installation, service, or maintenance of the equipment covered by the Repair Act.

- Any conduct that constitutes fraud, dishonest dealing, incompetence, or negligence.

- Failure to comply with the provisions of the Repair Act or any implementing regulation, rule, or standard.

- Any willful departure from or disregard of accepted trade standards for good and workmanlike installation or repair.

- Conviction of a crime that has a substantial relationship to the qualifications, functions, and duties of a registrant under the Repair Act, in which event the record of the conviction will be conclusive evidence of the conviction.

- Violation of any order of the Bureau of Electronic and Appliance Repair in the Department of Consumer Affairs under the Repair Act.

Additionally, the director may also deny, or may suspend, revoke, or place on probation, the registration of a service dealer if the dealer has committed acts or crimes constituting grounds for denial of licensure [*Bus. & Prof. Code § 9841(b)*; *see Bus. & Prof. Code § 480*]. The director may also deny, or may suspend, revoke, or place on probation, the registration of a service dealer if the service dealer will be or is holding the registration for the benefit of a former registrant whose registration has been suspended or revoked and who will continue to have some involvement in the service dealer's business [*Bus. & Prof. Code § 9841(c)*].

[4] Relationship to Contractors' State License Law

A licensed contractor [*see Bus. & Prof. Code § 7000 et seq.*] is not prohibited from repairing, servicing, or maintaining equipment of any type, if installing that equipment may be performed under the contractor's license [*Bus. & Prof. Code § 9804*].

A licensed service dealer is not required to hold a contractor's license if the dealer's activities consist only of: (1)

installing satellite antenna systems on residential structures or property, or (2) installing, repairing, servicing, or maintaining televisions, or an electronic set normally used or sold for personal, family, household, or home office use, or any appliances, and that installation, repair, service, or maintenance is not subject to and regulated under the contractors' licensing law [*Bus. & Prof. Code § 9805*]. For detailed coverage of contractor licensing requirements, see Ch. 88, *Licensing of Contractors* .

[5] Quotation for Service Calls

Before making a service call [*see 16 Cal. Code Reg. § 2702(r)* (definition)], a service dealer must quote a charge for the service call and for a diagnosis fee, if there is one. Additional charges may be added to the quoted charge only for time spent determining the nature of the malfunction in preparing a written estimate. If a diagnosis fee is charged, it must be included in the service call charge [*16 Cal. Code Reg. § 2752*; *see Bus. & Prof. Code § 9844*].

[6] Receipt, Estimate, and Invoice

Service dealers must comply with specific requirements of the Repair Act as to the contents and format of documents furnished to the customer, including a receipt or claim check at the time the dealer accepts possession of equipment for service, an estimate of the service charges, and an invoice for the work actually completed [*see Bus. & Prof. Code §§ 9842* (invoices), 9844 (estimates); *16 Cal. Code Reg. § 2721* (receipts)]. These requirements are discussed in detail in *§ 92.220[1]* and *§ 92.221[1]*.

[7] Lien Rights

A lien or other right to maintain possession of the equipment pending payment of charges for repair or installation is prohibited if the total charges for the repair of the equipment exceeds the higher of (1) any amount estimated in writing pursuant to *Bus. & Prof. Code § 9844*, or *(2)* a written revision of the estimate signed and dated by the owner of the equipment, or an oral revision of the written estimate when the oral revision is authorized by the owner and fully documented by the service dealer [*Bus. & Prof. Code § 9844.5*].

[8] Replaced Parts

[a] Returned to Customer

The service dealer must return all replaced parts to the customer, except the following [*Bus. & Prof. Code § 9843*; *16 Cal. Code Reg. § 2765*]:

- Those parts that the service dealer must return to the manufacturer or distributor under a warranty arrangement.

- Electronic or appliance parts replaced or sold on an exchange basis, such as picture tubes, printed circuit components, tuners, and plug-in modules.

- Parts removed from appliances if the customer has waived return of the parts in writing.

- Parts that contain toxic material identified as a health hazard or for which the manufacturer provides a safety disposal procedure.

[b] Compensation to Employees

A service dealer may not make the compensation of any employee, partner, officer, or member dependent on the value of the parts replaced in any equipment by, or with the consent of, the employee, partner, officer, subcontractor, or

member [*Bus. & Prof. Code § 9845*]. This restriction does not apply to certain sales of equipment [*Bus. & Prof. Code § 9845*; *see Bus. & Prof. Code § 9801(g)* (equipment)].

[9] Untrue or Misleading Advertising

[a] Requirements for Advertisements

As discussed in [3][d], *above*, the Director may refuse to validate, or may invalidate temporarily or permanently, the registration of a service dealer for making any untrue or misleading statement or advertisement [*Bus. & Prof. Code § 9841(a)*]. In order not to be deemed untrue or misleading, an advertisement for the repair of equipment must contain the following information: (1) the firm name and address of the business enterprise as shown on the service dealer's state registration certificate and (2) the business telephone number as listed in the telephone directory [*16 Cal. Code Reg. § 2751(a)(1), (2)*]. This information must be included as a protection to persons answering advertisements [*16 Cal. Code Reg. § 2751(a)*].

[b] Specific Language

The use of words like "guaranty, "guaranteed," and "no fix-no pay," or similar phrases, are prohibited as untrue or misleading advertising unless their terms or qualifications are clearly and completely stated. Thus, the nature and extent of the guaranty as to time, parts, or labor must be clearly and completely stated. Likewise, the guarantor must be identified (that is, the advertisement must clearly identify whether the service dealer, the retailer, the manufacturer, or any combination of those persons is the guarantor) [*16 Cal. Code Reg. § 2751(b)(1), (2)*].

If the advertisement includes terms like "repaired in the home," it must also state that there will be a charge if repairs cannot be completed in the home if it is in fact the policy of the dealer to assess those additional charges [*16 Cal. Code Reg. § 2751(c)*].

If the advertisement quotes the price of the picture tube, it must also disclose whether the quoted price includes installation and whether the picture tube offered is new, used, rebuilt, or rejuvenated [*16 Cal. Code Reg. § 2751(d)*].

No service dealer may use the word "free" in an advertisement unless the article or service is actually free, or, if the offer is conditioned in any way, those conditions are clearly specified in the advertisement [*16 Cal. Code Reg. § 2751(e)*].

A service dealer may not use the terms "24-Hour," "Day and Night" or similar terms to describe operations of the firm unless service is actually available to the public at any time during the 24 hours of the day and night [*16 Cal. Code Reg. § 2751(f)*]. Use of an answering service to relay messages for scheduling service calls at a later time is not sufficient to allow a service dealer to claim 24-hour service [*16 Cal. Code Reg. § 2751(f)*].

A dealer must not state or imply in any advertisement that repairs or services will be performed by a person who is "Factory Trained," a "Factory Specialist," "Factory Authorized," "Authorized," "Licensed," "Certified," or a similar term unless the term used is true and not misleading [*16 Cal. Code Reg. § 2751(g)*].

A dealer's advertisement may not contain the words "Discount Coupons," "Discount Prices," or similar words unless the normal or customary price that is being discounted is prominently displayed in the advertisement and is specifically referred to as the normal or customary price (e.g., "$5 off regular service call price ... regular service call $17.50") [*16 Cal. Code Reg. § 2751(h)*].

If the price of a service call [*see 16 Cal. Code Reg. § 2702(r)*] is quoted in an advertisement, no charges generally may be made in addition to the service call charge advertised [*16 Cal. Code Reg. § 2751(i)*; *see Bus. & Prof. Code § 9844*

(service dealer may charge reasonable fee for services provided in determining malfunction in preparation of written estimate for repair)].

[10] Violations of the Electronic and Appliance Repair Dealer Registration Law

[a] Effect of Failure to Register

A service dealer required to have a valid registration by the Repair Act [*see* [3], *above* (registration requirement)] cannot acquire any lien for labor and materials without possession of a valid registration [*Bus. & Prof. Code § 9852*]. A service dealer is also required to have a registration as a condition of the dealer's right to sue on a contract for repairs or installation performed by the dealer [*Bus. & Prof. Code § 9852*].

[b] Criminal Liability

Failure to comply with any provision of the Repair Act, or its implementing regulations, is a misdemeanor punishable by fine, imprisonment, or by both [*Bus. & Prof. Code § 9850*].

[c] Injunctions Against Service Dealer

The superior court for the county in which anyone carries on, or attempts to carry on, business as a service dealer in violation of the Repair Act or its implementing regulations must, on the application of the Director, issue an injunction or other appropriate order restraining that conduct. The proceeding is governed by *Code Civ. Proc. §§ 525-535*, except that the Director is not required to allege facts necessary to show, or tending to show, lack of an adequate remedy at law or irreparable injury [*Bus. & Prof. Code § 9851*].

[d] Customer Complaints

A customer who is dissatisfied with the service received from a service dealer may make a complaint by contacting the Bureau of Electronic and Appliance Repair, Department of Consumer Affairs, Sacramento, California 95814 [*see Bus. & Prof. Code § 9860*]. If the complaint does not appear to state any violation of the Repair Act or of its implementing regulations, the Director will advise the complainant and take no further action [*Bus. & Prof. Code § 9861*].

If the complaint indicates a possible violation of the Repair Act or of its implementing regulations, the Director may advise the service dealer of the contents of the complaint and, after the service dealer has had a reasonable opportunity to reply, must make a summary investigation of the facts [*Bus. & Prof. Code § 9862*]. The commission of certain acts or omissions constitutes grounds for the temporary or permanent invalidation of a service dealer's registration [*see Bus. & Prof. Code § 9841*; *see also* [3][d], *above*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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§ 92.51 Service Contracts for Electronics, Appliances, and Other Consumer Products

[1] Governing Law

Service contracts for electronics, appliances, and certain consumer products are governed by the Electronic and Appliance Repair Dealer Registration Law ("Repair Act") [*see Bus. & Prof. Code §§ 9855-9855.9*] and its implementing regulations [*16 Cal. Code Reg. § 2701 et seq.*]. The Repair Act is administered by the Bureau of Electronic and Appliance Repair, Home Furnishings, and Thermal Insulation ("Bureau"), within the Department of Consumer Affairs [*Bus. & Prof. Code § 9810*].

In addition to the requirements of the Repair Act, service contracts must comply with the service contract provisions of the Song-Beverly Consumer Warranty Act ("Warranty Act") [*see Civ. Code §§ 1794.4, 1794.41*; *see also* [4], [5], and [7], *below*].

A "service contract" is a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance, replacement, or repair of products covered under the Repair Act [*Bus. & Prof. Code § 9855(a)(1)*] or the Warranty Act [*Civ. Code § 1791(o)*; *see* [3], *below* (products subject to statutory regulation)].

All the statutory requirements of the Repair Act that pertain to service contracts [*see Bus. & Prof. Code §§ 9855-9855.9*] are slated for repeal on January 1, 2013, absent contrary legislative action prior to that date [*Bus. & Prof. Code § 9855.9*]. However, in the event of repeal, most service contracts will still be subject to applicable provisions of the Warranty Act [*see Civ. Code §§ 1794.4, 1794.41*; *see also* [4], [5], and [7], *below*].

This section discusses the statutory requirements of the Repair Act and the Warranty Act relating to service contracts for products governed by both acts [*see* [3], *below* (products subject to statutory regulation)]. For further discussion and a sample of a service contract form that meets the requirements of both statutes, see *§ 92.222*.

For discussion of violations of the Repair Act, see *§ 92.50[10]*. For discussion of the provisions of the Warranty Act that relate to repairs made under a warranty rather than a service contract, see *§ 92.52[2]*. For discussion of the

provisions of the requirements of the Warranty Act that relate to motor vehicles, see *§ 92.53[3]*. For discussion of a consumer's remedies for violations of the Warranty Act for both repairs made under warranty and repairs under a service contract, see *§ 92.52[2][t]*.

[2] Service Contractor Defined

Under the Repair Act, a "service contractor" is a person who either sells or offers to sell a service contract or who administers a service contract [*see Bus. & Prof. Code § 9855(b), (c), (e)* (applicable definitions)]. Service contractors are regulated separately from "service dealers" under the Repair Act [*see § 92.50[2]* (service dealers)].

[3] Products Subject to Statutory Regulation

[a] Electronic and Appliance Repair Dealer Registration Law

The Repair Act contains provisions regulating service contracts for specified categories of products [*see Bus. & Prof. Code § 9855(a)(1)*]. These provisions originally applied to home electronic equipment and appliances, but their application has been considerably expanded to apply to other types of products and equipment as well. The Repair Act now applies to service contracts relating to the maintenance, replacement, or repair of the following [*Bus. & Prof. Code § 9855(a)(1)*]:

- An electronic set or appliance. An "electronic set" includes, but is not limited to, any television, radio, audio recorder, video recorder, playback equipment, video camera, video game, video monitor, computer system, photocopier, or fax machine normally used or sold for personal, family, household, or home office use [*Bus. & Prof. Code § 9801(h)*]. An "appliance" includes, but is not limited to, any refrigerator, freezer, range, microwave oven, washer, dryer, dishwasher, trash compactor, or room air conditioner normally used or sold for personal, family, household, or home office use, or for use in private motor vehicles [*Bus. & Prof. Code § 9801(i)*].

- Furniture.

- Jewelry.

- Lawn and garden equipment.

- Power tools.

- Fitness equipment.

- Telephone equipment.

- Small kitchen appliances and tools.

- Home health care products.

[b] Song-Beverly Consumer Warranty Act

The products covered under the Warranty Act are broader in scope than those covered by the Repair Act. The Warranty Act applies to "consumer goods," defined as any new product that is used, bought, or leased for use primarily for personal, family, or household purposes, including new and used assistive devices [*see Civ. Code § 1791(p)*], but excluding clothing and consumables [*Civ. Code § 1791(a)*]. However, the Warranty Act requirements for service contracts do not apply to home protection plans issued by a home protection company that is regulated under the

Insurance Code [*Civ. Code § 1794.4(a)*; *see Ins. Code § 12740 et seq.*] or automobile insurance policies as defined in *Ins. Code § 116* [*Civ. Code § 1791(o)*].

[4] Obligations of Service Contractor

Except as provided in the contract, a service contract obligates the "service contractor" to provide the buyer of the product all the services and functional parts necessary to maintain proper operation of the entire product under normal operation and service for the duration of the service contract, without additional charge [*Civ. Code § 1794.4(b)*].

During the period in which the service contract is in effect, a retailer that sells a service contract, with the exception of a vehicle service contract [*see Ins. Code § 12800* (definition)] must [*Civ. Code § 1794.45*]:

- Maintain contract information that includes a description of the terms and conditions of the service contract, and provide that information to the purchaser of the service contract or other beneficiary on request; or

- Obtain a copy of the service contract on request from the purchaser of the service contract or other beneficiary, and provide that copy to the requester within 10 business days after receiving the request.

[5] Relationship to Express Warranty

Under the Warranty Act, service contracts and express warranties are mutually exclusive categories, except when the manufacturer chooses to use the terms "warrant" or "guarantee" in a service contract, in which event the service contract is subject to the provisions of the Warranty Act relating to express warranties [*see Gavaldon v. DaimlerChrysler Corp. (2004) 32 Cal. 4th 1246, 1259* ; *13 Cal. Rptr. 3d 793* ; *90 P.3d 752]* .

There is no law that prohibits the sale of a service contract to the buyer in addition to or in lieu of an express warranty if the service contract fully and conspicuously discloses the terms, conditions, and exclusions of the contract in simple and readily understood language [*Civ. Code § 1794.4(a)*].

[6] Registration and Filing Requirements

The Repair Act requires any service contractor to register with the Bureau [*Bus. & Prof. Code § 9855.1*] and to maintain and furnish proof of service contract reimbursement insurance [*see Bus. & Prof. Code §§ 9855.2-9855.4*]. In addition, any service contract form to be issued by the service contractor must be filed with the Director of the Department of Consumer Affairs (which oversees the Bureau) prior to its use by the service contractor [*Bus. & Prof. Code § 9855.3(a)*].

[7] Disclosure and Other Requirements

Service contracts covering home appliances and home electronic products purchased for use in California must comply with the following [*Civ. Code § 1794.41(a)*]:

- The contract must contain certain required disclosures [*see Civ. Code § 1794.4*; *see also § 92.222* (sample contract form)] and a statement of the buyer's cancellation and refund rights.

- The contract must be available for inspection by the buyer before sale and delivered to the buyer within 60 days after sale.

- The contract must apply only to items, costs, and time periods not covered by the express warranty. However, a service contract may run concurrently with or overlap an express warranty if the contract

covers items and costs not covered by the express warranty, or if it provides relief to a buyer not available under the express warranty.

[8] Incidental Indemnity Payment

A service contract may include provisions for incidental payment of indemnity under limited circumstances, including, but not limited to, power surges, food spoilage, or accidental damage from handling [*Bus. & Prof. Code § 9855(a)(1)*], provided that this incidental indemnity payment does not exceed a retail value of $250 per year [*Bus. & Prof. Code § 9855(a)(2)*].

[9] Time of Service or Repair

[a] Four-Hour Repair Period

If a service contract between a consumer and a retailer with 25 or more employees for service or repair of merchandise requires the presence of the consumer at the time the service or repair is to be performed, then on receiving a request for service or repair, the retailer and consumer must agree, prior to the date of service or repair, on a four-hour period within which the service or repair will be commenced [*Civ. Code § 1722(a)(1)*].

Once the service or repair period is established, the retailer or the retailer's agent must begin service or repair of the merchandise within the period specified. This requirement applies whether or not the retailer sold the merchandise to the consumer [*Civ. Code § 1722(a)(1)*; *see Civ. Code § 1722(a)(2)-(5)* (remedies for failure to commence repairs within four-hour period)].

Any provision included in a service or repair contract in which the consumer or subscriber agrees to modify or waive rights afforded by *Civ. Code § 1722* (four-hour repair provisions) is void as contrary to public policy [*Civ. Code § 1722(d)*].

[b] Consumer's Remedies for Failure to Comply

If service or repair is not begun within the specified four-hour period, except for delays caused by unforeseen or unavoidable occurrences beyond the control of the retailer, the consumer may bring an action in small claims court against the retailer for lost wages, expenses actually incurred, or other actual damages not exceeding a total of $600 [*Civ. Code § 1722(a)(2)*]. The action is not considered valid if the consumer is not present at the time, within the specified period, when the retailer or retailer's agent attempted to perform the service or repairs, or made a diligent attempt to notify the consumer, by telephone or in person, of its inability to do so [*Civ. Code § 1722(a)(3)*]. If notification is by telephone, the retailer must leave a telephone number for a return call by the consumer, to enable the consumer to arrange a new two-hour period for delivery, service, or repair [*Civ. Code § 1722(a)(3)*].

[c] Service Provider's Defenses

Delays caused by unforeseen or unavoidable occurrences beyond the control of the retailer provide a defense to the consumer's action for damages if the retailer made a diligent attempt to notify the consumer of the delay. It is also a defense to the action that the retailer or the retailer's agent was unable to notify the consumer of the delay because of the consumer's absence or unavailability during the specified four-hour period [*Civ. Code § 1722(a)(5)*].

Neither of these defenses is available unless the retailer or the retailer's agent makes the service or repairs within two hours of a newly agreed upon time, or unless the consumer unreasonably declines to arrange a new time for the service or repairs [*Civ. Code § 1722(a)(5)*].

In a small claims action, logs and other business records maintained by the retailer or the retailer's agent in the ordinary

course of business are prima facie evidence of the time period specified for service or repairs, and of a diligent attempt by the retailer or the retailer's agent to notify the consumer of the justified delay [*Civ. Code § 1722(a)(4)*].

[d] Cable Television and Utility Companies

Cable television and utility companies are bound by rules similar to those stated in [a], *above*. Whenever a subscriber contracts with a cable television company or utility for a service connection or repair that is to take place at a later date, and the parties have agreed that the presence of the subscriber is required, the company and the subscriber must agree, before the date of service connection or repair, on the time for commencement of the four-hour period for service connection or repair [*Civ. Code § 1722(b)(1), (c)(1)*].

The remedies of the subscriber and the defenses of the cable television company or utility are similar to those applicable to service or repair contracts [*see Civ. Code § 1722(b)(2)-(5), (c)(2)-(5)*; *see also* [b] and [c], *above*]. However, no action is valid against a cable television company if the franchise or any local ordinance provides the subscriber with a remedy for a delay in commencement of a service connection or repair and the subscriber elects to pursue that remedy. If the subscriber elects to bring an action in small claims court instead of pursuing the remedy provided by the franchise or ordinance, the franchising or state or local licensing authority is barred from imposing any fine, penalty, or other sanction against the company arising out of the same incident [*Civ. Code § 1722(b)(6)*].

Legal Topics:

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California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART II. LEGAL BACKGROUND
D. Maintenance and Repair of Personal Property

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§ 92.52 Express Warranties for Consumer Goods

[1] Governing Law

Consumer product warranties are governed by the federal Magnuson-Moss Warranty--Federal Trade Commission Improvement Act ("Magnuson-Moss Act") [*15 U.S.C. § 2301 et seq.*; *see* [3], *below*] and the Song-Beverly Consumer Warranty Act ("Warranty Act") [*Civ. Code § 1790 et seq.*; *see* [2], *below*]. The Warranty Act also includes certain provisions relating to service contracts for consumer goods [*see Civ. Code §§ 1794.4*, 1794.45, *1794.41*; *see also § 92.51* (service contracts)].

The remedies provided by the Warranty Act are cumulative and will not be construed as restricting any remedy that is otherwise available [*Civ. Code § 1790.4*]. For example, the provisions of the Warranty Act do not affect the rights and obligations of parties under the Commercial Code, except in the case of a conflict, in which case the provisions of the Warranty Act prevail [*Civ. Code § 1790.3*]. For discussion and sample forms for express warranties under the Commercial Code, see *Ch. 52, Sales of Goods Under the Uniform Commercial Code, §§ 52.128, 52.290-52.297*.

This section focuses on the rights and obligations relating to express warranties under the Warranty Act and, to the extent required by the Warranty Act, the provisions of the Magnuson-Moss Act. For further discussion of the Magnuson-Moss Act, see *Ch. 52, Sales of Goods Under the Uniform Commercial Code, §§ 52.128, 52.290*.

[2] Song-Beverly Consumer Warranty Act

[a] Products and Transactions Covered

The Warranty Act governs express warranties of "consumer goods," defined as any new product or part thereof that is used, bought, or leased primarily for personal, family, or household purposes, including assistive devices (designed to assist the physically disabled), but excluding clothing and consumables [*Civ. Code § 1791(a)*; *see Civ. Code § 1791(p)* ("assistive devices" defined); *see also Atkinson v. Elk Corporation (2003) 109 Cal. App. 4th 739, 757, 135 Cal. Rptr. 2d 433* (analyzing statutory definition of "consumer goods" and holding that roof shingles are not consumer goods under the Warranty Act)]. The Warranty Act also governs express warranties of used goods, with certain qualifications [

see [b], *below*].

Clothing and consumables, the retail sale of which is accompanied by an express warranty, are subject to special provisions concerning the obligation of the manufacturer to allow the buyer to return nonconforming goods [*see Civ. Code § 1793.35*; *see* [m], *below*].

A "lease" is a contract for the lease or bailment for the use of consumer goods by an individual for a term exceeding four months primarily for personal, family, or household purposes, whether or not it is agreed that the lessee bears the risk of the consumer goods' depreciation [*Civ. Code § 1791(g)*].

If express warranties are regularly furnished to buyers of the same kind of goods, the same warranties will apply to both new and used leased goods, and the lessor and lessee will each be deemed the first purchaser for the purpose of the warranty provision limiting warranty benefits to the original purchaser [*Civ. Code § 1795.4(a)*]. The lessee has the same rights against the manufacturer, the lessor, and the party who sold the goods to the lessor that the lessee would have if the lessee had purchased the goods [*Civ. Code § 1795.4(b)-(d)*].

The Warranty Act does not apply to a defect or nonconformity in consumer goods caused by the unauthorized or unreasonable use of the goods following sale [*Civ. Code § 1794.3*].

The requirements of the Warranty Act apply to any equipment or any mechanical, electrical, or thermal component of a system designed to heat, cool, or otherwise condition air. However, the Warranty Act does not apply to the system as a whole if such a system becomes a fixed part of a structure [*Civ. Code § 1795.1*].

[b] Used Goods

Notwithstanding the definition of "consumer goods" to mean only new items [*Civ. Code § 1791(a)*; *see* [a], *above*], a distributor or retail seller of used consumer goods in which an express warranty is given has the same obligations as that imposed on manufacturers in a sale of new goods, with the following qualifications:

- The distributor or retail seller making express warranties with respect to used consumer goods (and not the original manufacturer, distributor, or retail seller making express warranties with respect to those goods when new) must maintain sufficient service and repair facilities within California to carry out the terms of those express warranties [*Civ. Code § 1795.5(a)*].

- The provisions of *Civ. Code § 1793.5* (liability to retail seller relating to failure to maintain repair and service facilities in California) do not apply to the sale of used consumer goods [*Civ. Code § 1795.5(b)*].

- The duration of the implied warranty of merchantability or of fitness will be coextensive in duration with the accompanying express warranty, but not less than 30 days or more than three months [*Civ. Code § 1795.5(c)*].

- The obligation of a distributor or retail seller who makes express warranties with respect to used goods sold in California extends to the sale of all such used goods, regardless of when those goods may have been manufactured [*Civ. Code § 1795.5(d)*].

[c] Express Warranty Defined

Express warranty means either of the following [*Civ. Code § 1791.2(a)*]:

- A written statement arising out of a sale to the consumer of a consumer good under which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance.

- In the event of any sample or model, that the whole of the goods conforms to the sample or model.

[d] How Express Warranty Is Created

To create an express warranty, it is not necessary that formal words, such as "warrant" or "guarantee," be used; but if such words are used, then an express warranty is created. However, an affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty [*Civ. Code § 1791.2(b)*]. Statements or representations, such as expressions of a general policy concerning customer satisfaction, which are not subject to any limitation, also do not create an express warranty [*Civ. Code § 1791.2(c)*].

Every manufacturer, distributor, or retailer making express warranties with respect to consumer goods must set forth the warranties in readily comprehensible language and clearly identify the party making the express warranties [*Civ. Code § 1793.1(a)(1)*]. The warranties must conform to the federal standards for disclosure of warranty terms and conditions set forth in the federal Magnuson-Moss Act [*see* [3], *below*] and in the regulations of the Federal Trade Commission adopted pursuant to the provisions of that act [*Civ. Code § 1793.1(a)(1)*; *see § 92.223* (sample warranty form)].

[e] Impact on Implied Warranties

Nothing in the Warranty Act affects the right of a manufacturer to make express warranties with respect to consumer goods. However, a manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by the Warranty Act [*Civ. Code § 1793*].

[f] Relationship to Service Contracts

Nothing in the Warranty Act may be construed to prevent the sale of a service contract to the buyer in addition to, or in lieu of, an express warranty if the contract fully and conspicuously discloses the terms, conditions, and exclusions in simple and readily understandable language [*Civ. Code § 1794.4(a)*; *see § 92.51* (service contracts)].

Under the Warranty Act, service contracts and express warranties are mutually exclusive categories, except when the manufacturer chooses to use the terms "warrant" or "guarantee" in a service contract. Thus, unless the manufacturer uses those terms in its service contract, the service contract is not subject to the express warranty provisions of the Warranty Act [*see Gavaldon v. DaimlerChrysler Corp. (2004) 32 Cal. 4th 1246, 1259* ; *13 Cal. Rptr. 3d 793* ; *90 P.3d 752]* .

[g] California Service Facilities Required

To carry out the terms of its warranties, every manufacturer of consumer goods sold in California for which the manufacturer makes an express warranty must maintain sufficient service and repair facilities in California reasonably close to all areas where its consumer goods are sold. Alternatively, the manufacturer may designate and authorize in California independent service and repair facilities reasonably close to all areas where its consumer goods are sold [*Civ. Code § 1793.2(a)(1)(A)*].

In the event that the manufacturer fails to provide qualifying service and repair facilities, the manufacturer is liable to a retailer who performs services or incurs obligations in giving effect to express warranties [*Civ. Code § 1793.5*; *see* [p], *below*].

[h] Service Literature and Parts

Every manufacturer of consumer goods sold in California for which the manufacturer has made an express warranty must provide to authorized service and repair facilities enough service literature and replacement parts to make repairs during the express warranty period [*Civ. Code § 1793.2(a)(3)*].

This requirement applies only to products with a wholesale price to the retailer of not less than $50 and not more than $99.99 [*Civ. Code § 1793.03(a)*]. If the products have a wholesale price to the retailer of $100 or more, then the manufacturer must provide sufficient service literature and functional parts to service and repair facilities to make repairs for at least seven years after the date a product model or type was manufactured, regardless of the product's warranty period [*Civ. Code § 1793.03(b)*].

Additionally, every manufacturer making an express warranty with respect to most electronic equipment and appliance products [*see Bus. & Prof. Code § 9801(g)-(j)* (definitions of specific products covered)] must provide enough service literature and functional parts to service and repair facilities to make product repairs for at least three years after the date a product model or type was manufactured, regardless of whether the three-year period exceeds the product's warranty period.

For discussion of the consumer's remedies for the manufacturer's failure to comply with the requirements in this subsection, see [q], *below.*

[i] Notification to Buyer of Service Facilities

Every manufacturer, distributor, or retailer who makes express warranties and who elects to maintain service and repair facilities in California must do one or more of the following [*Civ. Code § 1793.1(e)*]:

- At the time of the sale, furnish the buyer with the name and address of each service and repair facility in California.

- At the time of the sale, furnish the buyer with the name, address, and telephone number of a service and repair facility central directory in California, or a toll-free telephone number of a service and repair facility central directory outside California. This directory must provide, on inquiry, the name and address of the authorized service and repair facility nearest the buyer.

- Maintain at the retailer's premises a current listing of the warrantor's authorized service and repair facilities, or retail sellers to whom the consumer goods are to be returned for service and repair, whichever is applicable, in California. It is the duty of every retail seller provided with that listing to provide, on inquiry, the name, address, and telephone number of the nearest authorized facility, or the retail seller to whom the consumer goods are to be returned for service and repair, whichever is applicable.

[j] Registration Card or Form

Any manufacturer, distributor, or retailer that provides a warranty or product registration card or form, or an electronic online warranty or product registration form, must inform the buyer that the card or form is for product registration and that failure to return the card or form does not diminish the warranty rights during the warranty period [*Civ. Code § 1793.1(a)(1)(A), (B)*]. A warranty or product registration card or form may not be labeled as a warranty registration or a warranty confirmation [*Civ. Code § 1793.1(b)*].

[k] Time Period for Repairs

If service and repair facilities are maintained in California and service or repair of the goods is necessary because they do not conform to the applicable express warranties, service and repair must be commenced within a reasonable time following receipt of the goods by the manufacturer or its representative in California. Unless the buyer agrees otherwise in writing, the goods must be serviced or repaired so as to conform to the applicable warranties within 30 days. Delay caused by conditions beyond the control of the manufacturer or its representative serve to extend this 30-day period. When this type of delay arises, conforming goods must be tendered as soon as possible following termination of the condition giving rise to the delay [*Civ. Code § 1793.2(b)*].

[l] Receipt or Work Order

Every manufacturer or seller performing warranty repairs or service on consumer goods must provide to the buyer a work order or receipt with the date of return and either the date the buyer was notified that the goods were repaired or serviced or, if applicable, the date the goods were shipped or delivered to the buyer [*Civ. Code § 1795.6(d)*].

[m] Tolling of Warranty Period

Every warranty period relating to an implied or express warranty accompanying a sale or consignment for sale of consumer goods selling for $50 or more is automatically tolled for a period commencing on the date on which the buyer does either of the following [*Civ. Code § 1795.6(a)*]:

- Delivers nonconforming goods to the manufacturer or seller for warranty repairs or service.

- Notifies the manufacturer or seller of the nonconformity of the goods [*see Civ. Code §§ 1793.2(c), 1793.22*].

The warranty period is tolled up to, and including, the date on which one of the following events occurs [*Civ. Code § 1795.6(a)*]:

- The repaired or serviced goods are delivered to the buyer.

- The buyer is notified the goods are repaired or serviced and are available for the buyer's possession.

- The buyer is notified that repairs or service has been completed, if repairs or service have been made at the buyer's residence.

Moreover, a warranty period will not expire if either or both of the following situations occur [*Civ. Code § 1795.6(b)*]:

- After the buyer delivers the nonconforming goods to the manufacturer or seller or notifies these parties of the nonconformity of the goods, as mentioned, *above*, the warranty repairs or services have not been performed due to delays caused by circumstances beyond the control of the buyer.

- The warranty repairs or service performed on the nonconforming goods does not remedy the nonconformity for which the repairs or service was performed, and the buyer notifies the manufacturer or seller of this failure within 60 days after the repairs or service was completed.

Every work order for warranty repairs or service must include a statement explaining the extension of the warranty period in prescribed statutory language [*see Civ. Code § 1793.1(a)(2)*; *see also § 92.220[1][d]*]. The term "manufacturer," as used in this subsection, includes the manufacturer's service or repair facility [*Civ. Code § 1795.6(c)*].

[n] Goods That Cannot Be Returned Easily

The buyer has a duty to deliver nonconforming goods to the manufacturer's service and repair facility in California, unless, due to reasons of size and weight, or method of attachment, or method of installation, or nature of the nonconformity, delivery cannot reasonably be accomplished. Should the buyer be unable to effect return of nonconforming goods for any of these reasons, the buyer must notify the manufacturer or its nearest service and repair facility in California. Written notice of nonconformity to the manufacturer or its service and repair facility constitutes return of the goods [*Civ. Code § 1793.2(c)*].

On receipt of the notice of nonconformity the manufacturer must, at its option, service or repair at the buyer's residence, or pick up the goods for service and repair, or arrange for transporting the goods to its service and repair facility. All reasonable costs of transporting the goods if the buyer is unable to effect return are the manufacturer's responsibility. The reasonable costs of transporting nonconforming goods after delivery to the service and repair facility until return of the goods to the buyer are at the manufacturer's expense [*Civ. Code § 1793.2(c)*].

[o] Replacement or Reimbursement Alternative

If the manufacturer or its representative in California is unable to service or repair the goods to conform to applicable express warranties after a reasonable number of attempts, the manufacturer must either replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer, less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity [*Civ. Code § 1793.2(d)(1)*].

Similarly, if goods cannot practicably be serviced or repaired by the manufacturer or its representative to conform to the applicable express warranties because of the way they are installed or because the goods have become so affixed to real property that they are now a part of it, the manufacturer must either replace and install the goods or reimburse the buyer in an amount equal to the purchase price, including installation costs, less any amount directly attributable to the buyer's use, before the discovery of the nonconformity [*Civ. Code § 1793.2(e)(1)*; *see Civ. Code § 1793.2(e)(2)* (certain exceptions for deficiencies in construction of new residential dwelling)].

For discussion of warranty repair or replacement of defective motor vehicles, see *§ 92.53[3]*.

[p] Liability for Failure to Provide California Facilities

A manufacturer making express warranties that does not provide service or repair facilities in California [*see Civ. Code § 1793.2*; *see also* [g], *above*] is liable to a retail seller of the manufacturer's goods if the retailer incurs liability in giving effect to the express warranties that accompany the manufacturer's consumer goods. The amount of liability is determined as follows [*Civ. Code § 1793.5*]:

- In the event of replacement, in an amount equal to the actual cost to the retail seller of the replaced goods, and costs of transporting the goods, if those costs are incurred, plus a reasonable handling charge.

- In the event of service or repair, in an amount equal to that which would be received by the retail seller for like service rendered to retail consumers who are not entitled to warranty protection, including actual and reasonable costs of the service and repair and the cost of transporting the goods, plus a reasonable profit.

- In the event of reimbursement to the buyer of the purchase price, in an amount equal to that reimbursed to the buyer plus a reasonable handling charge.

Every manufacturer making express warranties whose consumer goods are sold in California is liable to every independent service provider who performs services or incurs obligations in giving effect to the express warranties that

accompany the manufacturer's consumer goods. The amount of the liability is an amount equal to the actual and reasonable costs of the service and repair, including any costs for parts and any reasonable cost of transporting the goods or parts, plus a reasonable profit [*Civ. Code § 1793.6*].

For discussion and a sample form for a complaint by a retail seller or independent service provider against a manufacturer for failing to maintain repair facilities in California, see *California Forms of Pleading and Practice, Ch. 502, Sales: Warranties, § 502.162* (Matthew Bender).

[q] Buyer's Alternatives If Service Facilities Not In California

If the manufacturer making express warranties for consumer goods sold in California does not provide service and repair facilities within California or fails to provide sufficient service literature and replacement parts to service and repair facilities [*see* [g] and [h], *above*], the buyer may pursue any one of the following courses of action:

- Return the nonconforming consumer goods to the retail seller of those goods, who in turn must do one of the following [*Civ. Code § 1793.3(a)*]:
  - Service or repair the nonconforming goods to conform to the applicable warranty.
  - Direct the buyer to a reasonably close independent repair or service facility willing to accept service or repair under the relevant provisions of the Warranty Act. In such an event, the manufacturer is liable for the reasonable cost of repair services [*Civ. Code § 1793.3(d)*].
  - Replace the nonconforming goods with goods that are identical or reasonably equivalent to the warranted goods.
  - Refund to the buyer the original purchase price less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity.
- Return the nonconforming consumer goods to any retail seller of like goods of the same manufacturer within California who may do one of the following [*Civ. Code § 1793.3(b)*]:
  - Service or repair the nonconforming goods to conform to the applicable warranty.
  - Direct the buyer to a reasonably close independent repair or service facility willing to accept service or repair under this section. In such an event, the manufacturer is liable for the reasonable cost of repair services [*Civ. Code § 1793.3(d)*].
  - Replace the nonconforming goods with goods that are identical or reasonably equivalent to the warranted goods.
  - Refund to the buyer the original purchase price less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity.
- Secure the services of an independent repair or service facility for the service or repair of the nonconforming consumer goods, when (1) service or repair of the goods can be economically accomplished and (2) the buyer is not furnished appropriate relief by returning the goods to the retailer of those goods, or to any retail seller in California of like goods of the same manufacturer. In that event, the manufacturer is liable to the buyer, or to the independent repair or service facility on the assignment of

the buyer's rights. The amount of liability is the actual and reasonable cost of service and repair, including any cost for parts and any reasonable cost of transporting the goods or parts, plus a reasonable profit [*Civ. Code § 1793.3(c)*].

In the event that the buyer is unable to return nonconforming goods to the retailer due to reasons of size and weight, or method of attachment, or method of installation, or nature of nonconformity, the buyer must give notice to the retailer. On receipt of the notice of nonconformity, the retailer must, at its option, service or repair the goods at the buyer's residence, or pick up the goods for service or repair, or arrange for transporting the goods to its place of business. The reasonable costs of transporting the goods are at the expense of the retailer, and the retailer is entitled to recover all such costs from the manufacturer [*Civ. Code § 1793.3(e)*].

If an option is exercised in favor of service and repair under *Civ. Code § 1793.3*, the service and repair must be commenced within a reasonable time and, unless the buyer agrees otherwise in writing, the goods conforming to the applicable express warranties must be tendered within 30 days. Delay caused by the conditions beyond the control of the retail seller or the seller's representative extends this 30-day requirement. When this type of a delay arises, conforming goods must be tendered as soon as possible following termination of the condition giving rise to the delay [*Civ. Code § 1793.4*].

[r] Notification to Buyer of Alternatives If Service Facilities Not in California

The manufacturer of consumer goods with a wholesale price to the retailer of $50 or more for which the manufacturer has made express warranties must provide written notice to the buyer of the courses of action available to the buyer [*Civ. Code § 1793.3(f)*; *see* [q], *above* (buyer's courses of action); *see also § 92.223[2]* (express warranty form)].

[s] Return of Clothing or Consumables

If the retail sale of clothing or consumables is accompanied by an express warranty and those items do not conform to the terms of the express warranty, the buyer may return the goods within 30 days of purchase or the period specified in the warranty, whichever is greater. The manufacturer may, in the express warranty, direct the purchaser to return the goods to the retail seller of like goods of the same manufacturer for replacement. Upon return, the retailer must replace the nonconforming goods if the manufacturer has so directed in the express warranty. If replacement is not directed by the manufacturer, the retailer may replace the goods or reimburse the buyer in an amount equal to the purchase price paid by the buyer for the goods, at the option of the retailer. Costs for those remedies are recoverable from the manufacturer [*Civ. Code § 1793.35(a),(b)*; see *Civ. Code § 1793.5*].

[t] Violations of Song-Beverly Consumer Warranty Act

A buyer of consumer goods who is damaged because of a violation of the Warranty Act, or because of a failure to comply with obligations under express or implied warranties or service contracts, may bring an action for legal or equitable relief, or both [*Civ. Code § 1794(a)*].

If the buyer has accepted the goods and given notice that they do not conform to the contract terms, the buyer may recover reasonable damages for any loss resulting from that nonconformity [*Civ. Code § 1794(b)(2)*; *see Com. Code §§ 2714(1)*, 2607(3)]. If the nonconformity of accepted goods constitutes a breach of warranty, the buyer may recover the difference, at the time and place of acceptance, between the value of the goods accepted and the value they would have had if they had been as warranted [*see Civ. Code § 1794(b)(2)*; *see also Com. Code §§ 2714(2), 2715*].

A buyer who rightfully rejects or revokes acceptance of consumer goods or exercises a right to cancel the sale may do any of the following [*Civ. Code § 1794(b)(1)*]:

- Purchase substitute goods and recover the difference between their cost and the contract price [*see Com. Code §§ 2711(1), 2712*].

- Recover the difference between the contract price and the market price of the goods at the time the buyer learned of the seller's breach [*see Com. Code §§ 2711(1)(b), 2713*].

- Obtain a decree of specific performance if the goods are unique, or other proper circumstances [*see Com. Code §§ 2711(2)(b), 2716*].

- Recover any unshipped goods from an insolvent seller if the buyer has paid at least part of the purchase price and tenders any unpaid balance [*see Com. Code § 2711(2)(a)*; *see also Com. Code § 2502*].

- Take a security interest in goods the buyer controls or possesses [*see Com. Code § 2711(3)*].

The damaged buyer of consumer goods generally may also recover incidental damages (commercially reasonable charges and expenses) and consequential damages occasioned by the seller's breach [*see Civ. Code § 1794(a), (b)*; *see also Com. Code § 2715*]. The court must award costs and attorneys' fees to a buyer who prevails in an action brought under *Civ. Code § 1794* [*see Civ. Code § 1794(d)*].

Defendant sellers who are prevailing parties are also entitled to recover their costs and expert witness fees under the Warranty Act. Although *Civ. Code § 1794(d)* refers only to "prevailing buyers," it may be reconciled with Civ. Code Proc. § 1032(b) under which prevailing defendants are entitled to costs [*Murillo v. Fleetwood Enterprises, Inc. (1998) 17 Cal. 4th 985, 999, 73 Cal. Rptr. 2d 682, 953 P. 2d 858]* .

If the seller's noncompliance was willful, the buyer may also recover a civil penalty of up to twice the actual damages [*see Civ. Code § 1794(c)*]. The term "willful" means the seller knew of its obligations but intentionally declined to fulfill them; there is no requirement of blame, malice or moral delinquency [*Schreidel v. American Honda Motor Co., Inc. (1995) 34 Cal. App. 4th 1242, 1249-1250, 40 Cal. Rptr. 2d 576]* .

This civil penalty, however, is not available to buyers who bring actions under *Code Civ. Proc. § 382* (class actions naming unwilling plaintiffs as defendants) or *Civ. Code § 1781* (Consumers Legal Remedies Act), or to claims based solely on breach of implied warranties [*see Civ. Code § 1794(c)*].

For discussion and a sample of a complaint by a retail buyer against a manufacturer and a retail seller for violations of the Warranty Act, see *California Forms of Pleading and Practice, Ch. 502, Sales: Warranties, § 502.160* (Matthew Bender).

[3] Magnuson-Moss Warranty--Federal Trade Commission Improvement Act

The Magnuson-Moss Act applies to "consumer products," defined as tangible personal property that is distributed in commerce and that is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed) [*15 U.S.C. 2301(1)*]. "Commerce" means trade, traffic, commerce, or transportation between a place in a state and anywhere outside, or that which affects such movement [*15 U.S.C. 2301(14)*].

The Warranty Act [*see* [2], *above*] requires that written warranties of consumer goods conform to the standards of disclosure of terms and conditions under the Magnuson-Moss Act [*Civ. Code § 1793.1*]. The terms and conditions of any written warranty must be fully and conspicuously disclosed and must contain certain detailed statements [*see 15 U.S.C. 2302(a)*; *see also § 92.223[1][b]* (required statements)].

If, after a reasonable number of attempts, the warrantor is unable to repair a defective product, it must permit the consumer to elect either a replacement of the product without charge or a refund [*see 15 U.S.C. 2304(a)(1)-(4)*].

Nothing in the Magnuson-Moss Act invalidates or restricts any right or remedy of a consumer under the Warranty Act [*15 U.S.C. 2311(b)(1)*]. For discussion and a sample of an express warranty for consumer goods that satisfies the Warranty Act and the required elements of the Magnuson-Moss Act, see *§ 92.223*. For further discussion of the Magnuson-Moss Act, see California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties* (Matthew Bender) and Ch. 52, *Sales of Goods Under the Uniform Commercial Code.*

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionMagnuson-Moss Warranty ActGeneral OverviewAntitrust & Trade LawConsumer ProtectionMagnuson-Moss Warranty ActCoverage

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART II. LEGAL BACKGROUND
D. Maintenance and Repair of Personal Property

30-92 California Legal Forms--Transaction Guide § 92.53

§ 92.53 Motor Vehicle Repairs

[1] Repairs in General

[a] Governing Law

Motor vehicle repairs generally are governed by the Automotive Repair Act ("Automotive Act") [*Bus. & Prof. Code § 9880 et seq.*] and its implementing regulations [*16 Cal. Code Reg. § 3303 et seq.*]. The Automotive Act is administered by the Bureau of Automotive Repair ("Bureau"), within the Department of Consumer Affairs [*see Bus. & Prof. Code § 9882*].

[b] Persons, Products, and Activities Defined

An "automotive repair dealer" is a person (or firm, partnership, association, limited liability company, or corporation) who, for compensation, engages in the business of repairing or diagnosing malfunctions of motor vehicles [*Bus. & Prof. Code § 9880.1(a), (f)*]. Also included as an automotive repair dealer is a person who, for compensation, adjusts, installs, or tests retrofit systems for purposes of *Health & Safety Code § 44200 et seq.*, which governs direct import used motor vehicles [*Bus. & Prof. Code § 9884.6(b)*; *see Health & Safety Code § 44200 et seq.*].

A "motor vehicle" is a passenger vehicle required to be registered, and all motorcycles whether or not so required, under the Vehicle Code [*Bus. & Prof. Code § 9880.1(d)*].

"Repair of motor vehicles" means all maintenance of and repairs to motor vehicles performed by an automotive repair dealer, including automotive body repair work, but excluding the following [*Bus. & Prof. Code § 9880.1(e)*]:

- Repairs made pursuant to a commercial business agreement.

- Repairing of tires, changing tires, lubricating vehicles, installing light bulbs, batteries, windshield wiper blades, and other minor accessories, cleaning, adjusting, and replacing spark plugs, replacing fan belts, oil, and air filters, and other minor services which by regulation (for example, a transmission fluid

change [*16 Cal. Code Reg. § 3303(i)*]), are determined to be customarily performed by gasoline service stations. However, no service will be designated as minor if it is found that performance requires a mechanical expertise, has given rise to a high incidence of fraud or deceptive practices, or involves a part of the vehicle essential to its safe operation.

Repair of a motor vehicle does not include the repair of that portion of a recreational vehicle that is intended for human habitation and that is unrelated to the operation of the vehicle or a transmission fluid change [*16 Cal. Code Reg. § 3303(h)*].

An "automotive technician" is an employee of an automotive repair dealer or is that dealer, if the employer or dealer repairs motor vehicles, and who for salary or wage performs maintenance, diagnostics, repair, removal, or installation of any integral component parts of an engine, driveline, chassis or body of any vehicle. The job description excludes those services which customarily are performed by a gasoline service station [*Bus. & Prof. Code § 9880.1(g)*].

[c] Persons Exempted

The following persons are exempt from the registration requirements [*see* [d], *below*] of the Automotive Act:

- Any employee of an automotive repair dealer if the employee repairs motor vehicles only as an employee [*Bus. & Prof. Code § 9880.2(a)*].

- Any person who engages solely in the business of repairing the motor vehicles of one or more commercial, industrial, or governmental establishments [*Bus. & Prof. Code § 9880.2(b)*].

- Persons registered as electronic and appliance repair dealers [*see § 92.50[3]*] if their work is limited to the installation or replacement of a motor vehicle radio, antenna, audio playback equipment, or burglar alarm [*Bus. & Prof. Code § 9880.2(c)*].

- A person whose primary business is the wholesale supply of new or rebuilt automotive parts who engages solely in the re-machining of individual automotive parts without compensation for warranty adjustments to those parts and who does not engage in repairing or diagnosing malfunctions of motor vehicles or motorcycles [*Bus. & Prof. Code § 9880.2(d)*]. However, a person in this category, before commencing work, must (1) provide a notice containing the Bureau of Automotive Repair's toll-free telephone number to the customer that the person is not regulated by the Bureau, and (2) provide a written description of the re-machining services to be performed to the customer [*Bus. & Prof. Code § 9880.2(d)*].

[d] Registration Requirements

Automotive repair dealers must hold a currently valid registration with the Bureau and adhere to the requirements of the Automotive Act, including requirements that affect invoices [*Bus. & Prof. Code §§ 9884.2, 9884.6(a)*, 9884.8; *see § 92.224* (estimate/invoice form)].

No person required to have a valid registration as an automotive repair dealer may have the benefit of any lien for labor or materials or the right to sue on a contract for motor vehicle repair provided without a valid registration [*Bus. & Prof. Code § 9884.16*; *see § 92.55[4]* (motor vehicle liens)].

[e] Suspension or Revocation of Registration

The automotive repair dealer's registration may be denied, suspended, revoked, or placed on probation for certain

business acts or omissions if the dealer cannot show there was a bona fide error on the part of the automotive technician, employee, partner, officer, or member of the organization concerned [*Bus. & Prof. Code § 9884.7(a)*]. These acts and omissions include the following [*Bus. & Prof. Code § 9884.7(a)(1)-(10)*]:

- Making or authorizing a written or oral statement that is untrue or misleading and that is known, or by the exercise of reasonable care, should be known to be so.

- Causing or allowing a customer to sign any work order that does not state the repairs the customer requested or the vehicle's odometer reading at the time.

- Failing or refusing to give the customer, as soon as signed, a copy of any document requiring his or her signature.

- Any fraudulent conduct.

- Any grossly negligent conduct.

- Failure in any material respect to comply with the relevant regulatory provisions.

- Willful departure from, or disregard of, accepted trade standards for good and workmanlike repair in any material respect, if prejudicial to another, without consent of the owner or the owner's duly authorized representative.

- Making false promises of a character likely to influence, persuade, or induce a customer to authorize the repair, services, or maintenance of automobiles.

- Having repair work done by someone other than the dealer or the dealer's employees without the knowledge or consent of the customer, unless the dealer can demonstrate that the customer could not reasonably have been notified.

- Criminal misconduct relating to insurance referrals [*see Penal Code § 551*].

The suspension, revocation, or probationary status will only affect the registration of the specific place of the repair dealer's business that has violated the provisions. It will not affect in any manner the dealer's right to operate any other place of business. However, the registrations for all places of business operated in California may be suspended, revoked, or placed on probation if it is officially found that the dealer has, or is, engaged in a course of repeated and willful violations of the Automotive Act [*Bus. & Prof. Code § 9884.7(b), (c)*].

[f] Estimate and Invoice Requirements

There are specific statutory requirements under the Automotive Act relating to repair estimates [*see Bus. & Prof. Code § 9884.9*] and invoices [*see Bus. & Prof. Code § 9884.8*] for motor vehicle repairs. For discussion and a sample form containing the required terms and conditions for a combined estimate and invoice, see *§ 92.224*.

[g] Return of Replaced Parts to Customer

On request of the customer at the time the work order is taken, the automotive repair dealer must return replaced parts at the time the work is completed, except parts that are exempted by regulation because of size, weight, or similar factors, and except parts that must be returned to the manufacturer under a warranty arrangement [*Bus. & Prof. Code § 9884.10*].

In the latter excepted case, the dealer at the time the work order is taken needs to offer to show, and on acceptance of the offer or request must show, any such parts to the customer on completion of the work, unless no charge is being made for the replacement [*Bus. & Prof. Code § 9884.10*].

[2] Vehicle Service Contracts

[a] Governing Law

A "vehicle service contract" to repair, replace, or maintain a motor vehicle or watercraft [*see Ins. Code § 12800(a), (b)* (definitions)] is subject to various regulatory provisions, including requirements relating to licensing, contract forms, notices, cancellations, and insurance [*see Ins. Code §§ 12800-12865*]. Additionally, certain provisions of the Song-Beverly Warranty Act ("Warranty Act") apply to vehicle service contracts [*see Civ. Code 1794.41*; *see also § 92.51*]. In case of conflict between *Civ. Code 1794.41* and Ins. Code *§ 12800 et seq., the Insurance Code* provisions control [*Civ. Code 1794.41(d)*].

For discussion and a sample of a service contract that may be modified for motor vehicles, see *§ 92.222*. The contract requirements discussed in [3], *below*, should be integrated into the extended service contract *set forth in § 92.222*.

On the assumption that a vehicle service contract is an insurance contract, there can be no doubt that *Ins. Code § 700* (requiring every person transacting any class of insurance business in California to have a license from the Insurance Commissioner) and the policy behind that statute require that a consumer who innocently purchases a vehicle service contract from a company unlicensed in California may still enforce that contract, even though it is illegal [*Medina v. Safe-Guard Prods., Int'l, Inc. (2008) 164 Cal. App. 4th 105, 108-109, 78 Cal. Rptr. 3d 672]* .

[b] Vehicle Service Contract Defined

"Vehicle service contract" means any of the following contracts or agreements [*Ins. Code § 12800(c)(1)-(3)*]:

- An agreement, for separately stated consideration and for a specific duration, to repair, replace, or maintain a motor vehicle or watercraft.

- An agreement to indemnify for the repair, replacement, or maintenance of a motor vehicle or watercraft necessitated by an operational or structural failure due to a defect in materials or workmanship, or due to normal wear and tear.

- An agreement for at least one year, for separately stated consideration, that promises routine maintenance.

A "vehicle service contract" also includes an agreement that promises the repair or replacement of a tire or wheel necessitated by wear and tear, defect, or damage caused by a road hazard. However, if the obligor is the tire manufacturer, the agreement is exempt from the requirements of a vehicle service contract. A warranty provided by a tire or wheel distributor or retailer is also exempt, provided the warranty covers only defects in the material or workmanship of the tire or wheel [*Ins. Code § 12800(c)(4)(A)*].

Similarly, a "vehicle service contract" includes an agreement that promises the repair or replacement of glass on a vehicle necessitated by wear and tear, defect, or damage caused by a road hazard. However, a warranty provided by a vehicle glass manufacturer is exempt from the requirements of a vehicle service contract. A warranty provided by a vehicle glass distributor or retailer is also exempt, provided the warranty covers only defects in the material or workmanship of the vehicle glass [*Ins. Code § 12800(c)(4)(B)*].

Finally, "vehicle service contract" includes an agreement that promises to remove a dent, ding, or crease without affecting the existing paint finish using paintless dent repair techniques, and that expressly excludes replacing vehicle body panels, sanding, bonding, or painting [*Ins. Code § 12800(c)(4)(C)*].

[c] Persons Authorized to Sell Vehicle Service Contracts

No one other than a seller may sell or offer a vehicle service contract to a purchaser [*Ins. Code § 12810(a)*]. "Seller" with respect to motor vehicles means a dealer or lessor-retailer licensed in one of those capacities by the Department of Motor Vehicles, who sells vehicle service contracts incidental to the business of selling or leasing motor vehicles [*Ins. Code § 12800(f)(1)*].

[d] License and Insurance Requirements

The obligor of a vehicle service contract, that is, the party who is obligated under the service contract, as distinguished from the seller [*see Ins. Code § 12800(g)* (definition)], must obtain and maintain a vehicle service contract license [*see Ins. Code § 12815(a)*; *see also Ins. Code § 12845* (penalties for violation)].

A service contract administrator [*see Ins. Code § 12800(d)* (definition)] must be licensed as a fire and casualty broker-agent [*Ins. Code § 12815(b)*].

An obligor of a vehicle service contract must also file with the Insurance Commissioner ("Commissioner"), and receive the Commissioner's approval to use, a copy of an insurance policy covering 100 percent of the obligor's vehicle service contract obligations [*see Ins. Code §§ 12830, 12835*; *see also Ins. Code § 12845* (penalties for violation)].

[e] Contract Requirements

Prior to offering a vehicle service contract form to a purchaser or providing a vehicle service contract form to a seller, an obligor must file with the Commissioner a specimen of that vehicle service contract form [*Ins. Code § 12820(a)*].

The vehicle service contract form may include any or all of the benefits described in *Ins. Code § 12800(c)* [*see § 92.53[2][b]*] and must comply with the following requirements:

- Either:
    - If an obligor has filed with the Insurance Commissioner a copy of an insurance policy covering 100 percent of the obligor's vehicle service contract obligations [*see Ins. Code § 12830*], the contract must include a disclosure in substantially the following form: "Performance to you under this contract is guaranteed by a California approved insurance company. You may file a claim with this insurance company if any promise made in the contract has been denied or has not been honored within 60 days after your request. The name and address of the insurance company is: (insert name and address). If you are not satisfied with the insurance company's response, you may contact the California Department of Insurance at 1-800 -927-4357" [*Ins. Code § 12820(b)(1)(A)*]; or
    - If an obligor has, as an alternative to filing a copy of its insurance policy[*see Ins. Code § 12830*], established to the Commissioner's satisfaction that is possesses a net worth of $100,000,000 [*see Ins. Code § 12836*], the contract must include a disclosure in substantially the following form: "If any promise made in the contract has been denied or has not been honored within 60 days after your request, you may contact the California

Department of Insurance at 1-800 -927-4357" [*Ins. Code § 12820(b)(1)(B)*].

- All language that excludes coverage, or imposes duties on the purchaser, must be conspicuously printed in boldface type no smaller than the surrounding type [*Ins. Code § 12820(b)(2)*].

- The vehicle service contract must do each of the following [*Ins. Code § 12820(b)(3)*]:

  - State the obligor's full corporate name or a fictitious name approved by the Commissioner, the obligor's mailing address, the obligor's telephone number, and the obligor's vehicle service contract provider license number.

  - State the name of the purchaser and the name of the seller.

  - Conspicuously state the vehicle service contract's purchase price.

  - Comply with *Civ. Code §§ 1794.4, 1794.41* [*see § 92.51[4], [5], [7]*].

  - Name the administrator, if any, and provide the administrator's license number.

- If the vehicle service contract excludes coverage for preexisting conditions, the contract must disclose this exclusion in 12-point type [*Ins. Code § 12820(b)(4)*].

[f] Incidental Payment of Indemnity

A vehicle service contract may also provide for the incidental payment of indemnity under limited circumstances for the following additional benefits only: coverage for towing, substitute transportation, emergency road service, rental car reimbursement, reimbursement of deductible amounts under a manufacturer's warranty, and reimbursement for travel, lodging, or meals [*Ins. Code § 12800(c)(2)*].

[g] Obligor's Right to Cancel Contract

An obligor may include a provision in a vehicle service contract that reserves its right to cancel the contract within 60 days subject to the following conditions [*Ins. Code § 12825(a)*]:

- Notice of cancellation is mailed to the purchaser postmarked before the 61st day after the date the contract was sold by the seller.

- The obligor provides the purchaser with a refund equal to the full purchase price stated on the contract within 30 days from the date of cancellation. However, if the obligor has paid a claim, or has advised the purchaser in writing that it will pay a claim, it may provide a pro rata refund, less the amount of any claims paid prior to cancellation.

- The service contract ceases to be valid no less than five days after the postmark date of the notice.

- The notice states the specific grounds for the cancellation.

An obligor may at any time cancel a service contract for nonpayment by the purchaser, conditioned on each of the following [*Ins. Code § 12825(b)*]:

- Notice of cancellation is mailed to the purchaser.

- If any refund is owed pursuant to *Civ. Code § 1794.41* [*see § 92.222[1][g]*], the refund is paid within 30 days of the date of cancellation.

- The service contract ceases to be valid no less than five days after the postmark date of the notice.

- The notice states the specific grounds for the cancellation.

An obligor may at any time cancel a service contract for material misrepresentation or fraud by the purchaser, conditioned on each of the following [*Ins. Code § 12825(c)*]:

- Notice of cancellation is mailed to the purchaser.

- A pro rata refund of the purchase price stated on the contract is paid within 30 days of the date of cancellation.

- The notice states the specific nature of the misrepresentation.

An obligor who cancels a contract is liable for claims reported prior to the effective date of cancellation [*see Ins. Code § 12825(d)*]. In such an event, an obligor may pay a pro rata rather than a full refund of the purchase price [*see Ins. Code § 12825(e)*].

[h] Maintenance and Inspection of Records

Every obligor or its administrator must maintain at its principal office complete and accurate accounts, books, and records of all transactions among the obligor, its administrator, if any, sellers, insurers, and purchasers [*Ins. Code § 12840(a)*]. These records must be made available to the Commissioner on reasonable request. Any computerized recordkeeping system must be capable of producing a legible hard copy of all required records. Accounts, books, and records must include [*Ins. Code § 12840(a)*]:

- A complete set of accounting records, including, but not limited to, a general ledger, cash receipts and disbursements journals, accounts receivable registers, and accounts payable registers.

- Copies of each type of service contract sold.

- The name and address of each service contract purchaser to the extent that the name and address have been furnished by the service contract purchaser.

- A list of the locations where service contracts are marketed, sold, or offered for sale.

- Written claims files, which must contain at least the dates and descriptions of claims related to the service contracts.

All required records pertaining to a service contract must be maintained by the obligor, its administrator, or the insurer underwriting the contract, for at least three years after the expiration of the contract [*Ins. Code § 12840(b)*].

Every insurer that has issued a policy to an obligor has an ongoing right to access that obligor's books and records in order to permit the insurer to fulfill all obligations to purchasers [*Ins. Code § 12840(c)*].

The Commissioner may also examine and investigate the affairs of every obligor and its administrator. Any

examination or investigation will be at the expense of the obligor or the administrator, in the discretion of the Commissioner. Any information contained in the books and records, including, but not limited to, the identity and addresses of sellers and purchasers of service contracts, will be kept confidential, except that the Commissioner may use the information in any proceeding or investigation instituted against an obligor or an administrator [*Ins. Code § 12840(d)*].

An obligor's failure to keep or maintain the required accounts, books, or records, or to provide the Commissioner with full and immediate access to those records, are grounds for the immediate suspension or revocation of the obligor's vehicle service contract provider's license, and also are grounds for the Commissioner to issue a cease and desist order [*Ins. Code § 12840(e)*; *see Ins. Code § 1065.2* (cease and desist order)].

[i] Settlement of Claims

An obligor has the burden of proving that a claim is not covered by a service contract. The obligor also has the burden of proving that a claim settlement amount is proper under the terms of the contract [*Ins. Code § 12850(a)*].

No seller of a service contract who participates in or influences, directly or indirectly, the processing, administration, or adjustment of claims, may enter into any agreement or understanding the effect of which is to make the amount of the seller's commission or compensation contingent on savings effected in the adjustment, settlement, or payment of losses covered by the contract [*Ins. Code § 12850(b)*].

[3] Vehicle Warranties--Special Rules

[a] Governing Law

Consumer warranties generally are governed by the Song-Beverly Warranty Act ("Warranty Act") [*Civ. Code § 1790 et seq.*] and the federal Magnuson-Moss Warranty--Federal Trade Commission Improvement Act [*15 U.S.C. 2301 et seq.*]. Under the Warranty Act, the term "consumer goods" includes any new product that is used, bought, or leased primarily for personal, family, or household purposes [*see Civ. Code § 1791(a)*]. Most motor vehicles would come within this definition. For discussion of the Warranty Act in general, see *§ 92.52[2]*.

Within the Warranty Act is the Tanner Consumer Protection Act [*Civ. Code § 1793.22*], more commonly known as the Lemon Law. This discussion focuses on the Lemon Law and other provisions of the Warranty Act that apply specifically to motor vehicles.

For discussion and sample complaint forms for breach of warranties relating to the sale of motor vehicles, see *California Forms of Pleading and Practice, Ch. 91, Automobiles: Actions Involving Defects and Repairs, §§ 91.60, 91.64*.

[b] New Motor Vehicle Defined

A "new motor vehicle" means a new motor vehicle that is bought or used primarily for (1) personal, family, or household purposes, or (2) business purposes if the gross vehicle weight is under 10,000 pounds and the owner has not registered more than five vehicles in California. The term "new motor vehicle" includes the chassis, chassis cab, and portion of a motorhome devoted to propulsion, a dealer-owned vehicle, and a demonstrator or other motor vehicle sold with a manufacturer's new car warranty [*Civ. Code § 1793.22(e)(2)*; *see Civ. Code § 1793.22(e)(3)* ("motorhome" defined)]. Even though the coach portion of a motorhome is excluded from the Lemon Law, it nevertheless qualifies as "consumer goods" under the Warranty Act, and its owner is entitled to the protections under the Warranty Act [*National R.V., Inc. v. Foreman (1995) 34 Cal. App. 4th 1072, 1079, 40 Cal. Rptr. 2d 672]* .

An automobile sold with a balance remaining on the manufacturer's new motor vehicle warranty qualifies as a new

motor vehicle under the "other motor vehicle sold with a manufacturer's new car warranty" definition [*see Civ. Code § 1793.22(e)(2)*; *Jensen v. BMW of North America, Inc. (1995) 35 Cal. App. 4th 112, 125-127, 41 Cal. Rptr. 2d 295]* .

A new motor vehicle does not include a motorcycle or motor vehicle not registered because it is to be operated or used exclusively off the highways [*Civ. Code § 1793.22(e)(2)*].

Insofar as the Warranty Act applies to new motor vehicles [*see Civ. Code §§ 1793.2(d)(2), 1793.22*], the Act is limited in application to vehicles that were bought in California. The Act has been held inapplicable to a new vehicle that a California resident had bought in Idaho and that could not be repaired after repeated attempts at the manufacturer's authorized repair facility in California [*Cummins, Inc. v. Superior Court (2005) 36 Cal. 4th 478, 483, 493, 30 Cal. Rptr. 3d 823, 115 P.3d 98]* .

[c] Restitution or Replacement Remedy

If the manufacturer of a new motor vehicle [*see* [b], *above* (definition)], or its agent, is unable to conform the vehicle to any applicable express warranties after a reasonable number of attempts, the buyer is entitled to restitution (refund) or a replacement vehicle [*Civ. Code § 1793.2(d)(2)*]. The buyer is free to elect a refund in lieu of replacement and may not be required to accept a replacement vehicle [*Civ. Code § 1793.2(d)(2)*].

Reasonable continued use of the motor vehicle does not impair the buyer's right to assert these remedies [*see Ibrahim v. Ford Motor Co. (1989) 214 Cal. App. 3d 878, 897-898, 263 Cal. Rptr. 64]* , but the manufacturer is entitled to a credit for the buyer's use prior to repair or replacement [*see Civ. Code § 1793.2(d)(2)(C)*]. Nor does the failure of the buyer to exercise these remedies within a reasonable time impair the buyer's rights for restitution or a replacement [*Krotin v. Porsche Cars North America, Inc. (1995) 38 Cal. App. 4th 294, 301-302, 45 Cal. Rptr. 2d 10]* .

In the case of replacement, the manufacturer must replace the buyer's vehicle with a new motor vehicle substantially identical to the vehicle replaced. The replacement vehicle must be accompanied by all express and implied warranties that normally accompany new motor vehicles of that specific kind. The manufacturer also must pay the amount of any sales or use tax, license fees, registration fees, and other official fees that the buyer is obligated to pay in connection with the replacement, plus any incidental damages to which the buyer is entitled [*see Civ. Code § 1794*], including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer [*Civ. Code § 1793.2(d)(2)(A)*].

In the case of restitution, the manufacturer must make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation, manufacturer-installed options, collateral charges such as sales tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled [*see Civ. Code § 1794*], including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer. However, the manufacturer is not required to make restitution for nonmanufacturer items installed by a dealer or the buyer [*Civ. Code § 1793.2(d)(2)(B)*].

A buyer exercising the restitution remedy is also entitled to recover finance charges paid; those charges constitute part of "the actual price paid or payable" under *Civ. Code § 1793.2(d)(2)(B)* [*Mitchell v. Blue Bird Body Co. (2000) 80 Cal. App. 4th 32, 35-39, 95 Cal. Rptr. 2d 81* (although *Civ. Code § 1793.2(d)(2)(B)* does not expressly allow recovery of paid finance charges, reasonable construction is that California legislature intended to allow buyers to recover entire amount actually expended for new motor vehicle less any expenses expressly excluded by statute)].

[d] Reasonable Number of Attempts to Repair

There is a rebuttable presumption that the manufacturer has made a reasonable number of attempts to conform a new motor vehicle to applicable express warranties if, within 18 months from delivery to the buyer or 18,000 miles, one or

more of the following occurs [*Civ. Code § 1793.22(b)*]:

- The same nonconformity results in a condition that is likely to cause death or serious bodily injury if the vehicle is driven, and the nonconformity has been subject to repair two or more times by the manufacturer or its agents, and the buyer or lessee (having been notified of these requirements) has at least once directly notified the manufacturer of the need for the repair of the nonconformity.

- The manufacturer or its agents have repaired the same nonconformity four or more times, and the buyer or lessee (having been notified of these requirements) has at least once directly notified the manufacturer of the need for the repair.

- The vehicle has been out of service due to repairs for more than a cumulative total of 30 days (which may be extended if repairs cannot be made due to conditions beyond the control of the manufacturer or its agents) since delivery to the buyer.

Because the phrase "reasonable number of attempts" is written in plural, *Civ. Code § 1793.22(b)* clearly does not require the manufacturer to make restitution or replacement after only one opportunity to repair [*see Silvio v. Ford Motor Company (2003) 109 Cal. App. 4th 1205, 1207-1208, 135 Cal. Rptr. 2d 846]* , at least if the vehicle has not been out of service due to repairs for more than 30 days [*see Civ. Code § 1793.22(b)*].

Before invoking the presumption concerning reasonable attempts to repair, the buyer must submit the dispute for resolution to a qualified third-party panel, if one exists and if the buyer has received timely notice of the existence, operation, and effect of the third-party process [*Civ. Code § 1793.22(c)*].

If the buyer accepts the decision of a qualified third-party panel, that decision will be binding on the manufacturer [*see Civ. Code § 1793.22(d)(2)*]. A third-party dispute resolution process used for arbitration of disputes concerning defects in new motor vehicles must be certified by the Department of Consumer Affairs before operation [Bus. & Prof. Code § 1793.22(d)(9); *see Bus. & Prof. Code §§ 472.1, 472.2*]. The process is subject to annual review to determine whether it is in substantial compliance with the requirements of *Civ. Code § 1793.22(d)* and *Bus. & Prof. Code §§ 472-472.5* [*Bus. & Prof. Code § 472.3(a)*].

[e] Buyer's Damages for Failure to Provide Restitution or Replacement

The measure of a buyer's damages for the manufacturer's (or its agents') failure to provide restitution or replacement as discussed in [c], *above*, includes the damages for violations of the Warranty Act set forth *Civ. Code § 1794* [*see § 92.52[2][t]* (damages for violations)] and specifically includes a civil penalty of up to two times the amount of damages [*Civ. Code § 1794(e)*; *see also Oregel v. American Isuzu Motors, Inc. (2001) 90 Cal. App. 4th 1094, 1104-1105, 109 Cal. Rptr. 2d 583* (substantial evidence supported jury's finding that oil leak was nonconformity impairing use and value, that manufacturer was unable to fix leak after reasonable number of attempts, and that manufacturer willfully violated its obligation to give restitution to the buyer and should pay civil penalty equal to amount of damage award)]. However, the penalty for failure to replace or make restitution is not available if any of the following conditions applies:

- The manufacturer maintains a qualified third-party dispute resolution process in substantial compliance with *Civ. Code § 1793.22* [*Civ. Code § 1794(e)(2)*].

- After occurrence of the events giving rise to the presumption that a reasonable number of attempts to conform a new motor vehicle to the applicable express warranties have been made, the buyer fails to give the manufacturer a written notice requesting replacement or restitution [*Civ. Code § 1794(e)(3)*].

- The manufacturer receives the notice requesting replacement or restitution and complies within 30

days [*Civ. Code § 1794(e)(4)*].

- The buyer recovers the similar penalty available under *Civ. Code § 1794(c)* for willful violations of the Warranty Act [*Civ. Code § 1794(e)(5)*].

Damages for emotional distress are not recoverable by the buyer [*Bishop v. Hyundai Motor America (1996) 44 Cal. App. 4th 750, 757-758, 52 Cal. Rptr. 2d 134* ; *Kwan v. Mercedes Benz of North America, Inc. (1994) 23 Cal. App. 4th 174, 187-192, 28 Cal. Rptr. 2d 371]* .

[f] Relationship to Service Contracts

Under the Warranty Act, service contracts and express warranties are mutually exclusive categories, except if the manufacturer chooses to use the terms "warrant" or "guarantee" in a service contract. Thus, unless the manufacturer uses those terms in its service contract, the breach of its service contract does not make it subject to the replacement/restitution remedy reserved in *Civ. Code § 1793.2(d)(2)* for purchasers of motor vehicles sold with express warranties [*Gavaldon v. DaimlerChrysler Corp. (2004) 32 Cal. 4th 1246, 1259,, 90 P.3d 752* ; *13 Cal. Rptr. 3d 793]* .

[g] Warranty, Disclosures, and Corrective Repairs for Vehicle Reacquired by Manufacturer

No one may sell (either at wholesale or retail), lease, or transfer a motor vehicle transferred by a buyer or lessee to a manufacturer pursuant to the restitution or replacement provisions of *Civ. Code § 1793.2(d)(2)* (or a similar statute of another state) unless the nature of the nonconformity experienced by the original buyer or lessee is clearly and conspicuously disclosed to the prospective buyer, lessee, or transferee [*Civ. Code § 1793.22(f)(1)*].

In addition, the nonconformity must be corrected and the manufacturer must warrant for a period of one year to the new buyer, lessee, or transferee, in writing, that the motor vehicle is free of that nonconformity [*Civ. Code § 1793.22(f)(1)*; *see Civ. Code § 1793.22(f)(2)* (exception for vehicles transferred to educational institutions for use in automotive repair courses)].

"Nonconformity" means a nonconformity that substantially impairs the use, value, or safety of the new motor vehicle to the buyer or lessee [*Civ. Code § 1793.22(e)(1)*]. Whether an impairment is "substantial" [*see Civ. Code § 1793.22(e)(1)*] is determined by an objective test, based on what a reasonable person would understand to be a defect [*Lundy v. Ford Motor Company (2001) 87 Cal. App. 4th 472, 478-479, 104 Cal. Rptr. 2d 545]* .

Further, the reacquired vehicle must be retitled in the name of the manufacturer, a notation of "Lemon Law Buyback" made on the ownership certificate, and a decal affixed to the vehicle [*see Veh. Code § 11713.12*] prior to sale or lease in California or transfer to another state for sale or lease, if the manufacturer knows or should have known that the vehicle was subject to the restitution or replacement provisions of *Civ. Code § 1793.2(d)(2)* [*see Civ. Code § 1793.23(c)*].

In addition, the manufacturer of a reacquired vehicle must, before the sale, lease, or other transfer of the vehicle, execute and deliver to the subsequent transferee a notice and obtain the transferee's written acknowledgment of a notice, as prescribed by *Civ. Code § 1793.24* [*Civ. Code § 1793.23(d)*].

Any person, including any dealer, who acquires a motor vehicle for resale and knows or should have known that the vehicle was reacquired by the vehicle's manufacturer in response to a request by the last retail owner or lessee of the vehicle that it be replaced or accepted for restitution because the vehicle did not conform to express warranties must, prior to the sale, lease, or other transfer, execute and deliver to the subsequent transferee a notice and obtain the transferee's written acknowledgment of a notice, as prescribed by *Civ. Code § 1793.24* [*Civ. Code § 1793.23(e)*].

Any person, including any manufacturer or dealer, who sells, leases, or transfers ownership of a motor vehicle when the

vehicle's ownership certificate is inscribed with the notation "Lemon Law Buyback" must, before the sale, lease, or ownership transfer of the vehicle, provide the transferee with a disclosure statement signed by the transferee that includes information specified by statute [*Civ. Code § 1793.23(f)*].

The disclosure requirements in *Civ. Code § 1793.23(d), (e),* and *(f)* are cumulative with all other consumer notice requirements and do not relieve any person, including any dealer or manufacturer, from complying with any other applicable law, including any requirement of *Civ. Code § 1793.22(f)* [*Civ. Code § 1793.23(g)*].

[h] Restrictions on Buyer's Disclosures Relating to Reacquired Vehicle Prohibited

Any automobile manufacturer, importer, distributor, dealer, or lienholder who reacquires, or assists in reacquiring, a motor vehicle is prohibited from the following:

- Requiring, as a condition of the reacquisition, that a buyer or lessee who is a California resident agree not to disclose the problems experienced with the vehicle or the nonfinancial terms of the reacquisition [*Civ. Code § 1793.26(a)(1)*].

- Including in any release or other agreement for signature by the buyer or lessee, a confidentiality clause, or gag clause, prohibiting the buyer or lessee from disclosing information to anyone about the problems with the vehicle or the nonfinancial terms of the reacquisition [*Civ. Code § 1793.26(a)(2)*]. Any such confidentiality clause is null and void as a violation of public policy [*Civ. Code § 1793.26(b)*; *see Civ. Code § 1793.26(c)* (confidentiality clauses relating to financial terms of reacquisition are unaffected by this code section)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service AgreementsTransportation LawPrivate VehiclesGeneral Overview

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§ 92.54 Home Protection Contracts

[1] Governing Law

Home protection contracts are governed by *Ins. Code § 12740 et seq.* and are subject to certain other provisions of the Insurance Code [*see Ins. Code § 12743*] and to regulations issued by the Insurance Commissioner [*see 10 Cal. Code Reg. § 2570 et seq.*]. Home protection contracts are exempted from the Song-Beverly Warranty Act [*Civ. Code § 1794.4(a)*; *see § 92.51[3][b]*].

For discussion of the required contents of a home protection contract and a sample contract form, see *§ 92.225*.

[2] Home Protection Contract and Home Protection Company Defined

A "home protection contract" is a contract in which a person, other than a builder, seller, or lessor of the home that is the subject of the contract undertakes, for a specified period of time and for a predetermined fee, to repair or replace all or any part of any component, system, or appliance of a home necessitated by wear and tear, deterioration, or inherent defect arising during the effective period of the contract, and, if there is a prequalification inspection [*see* [10], *below*], by the failure of that inspection to detect the likelihood of any such loss [*Ins. Code § 12740(a)*].

A "home protection company" means any licensed person who issues home protection contracts [*Ins. Code § 12740(b)*].

[3] Exempted Services

The statutory provisions governing home protection contracts do not apply to any of the following [*Ins. Code § 12741*]:

- Performance guarantees or service contracts given by either the builder or manufacturer of a home or the seller or manufacturer of an appliance or other system or component, whether or not an identifiable charge is made for such a guarantee or service contract.

- Any service contract, guarantee, or warranty intending to guarantee or warrant the repairs or service

of a home appliance, system or component, provided that the service contract, guarantee, or warranty is issued by a person who has sold, serviced, repaired or provided replacement of that appliance, system or component at the time of, or prior to issuance of the contract, guarantee, or warranty, and, provided, further, that the person issuing the service contract, guarantee, or warranty does not engage in the business of a home protection company.

- The provider of any pest control service agreement pursuant to [*Bus. & Prof. Code § 8516*].

[4] License Requirements

Any person who issues or offers to issue home protection contracts must be licensed by the Department of Insurance [*Ins. Code § 12744(a)*; *see Ins. Code § 12744(b)* (exception); *see also Ins. Code § 12744(c)* (requirements for foreign applicant)] and must also hold a valid Certificate of Authority to transact miscellaneous insurance under *Ins. Code § 120* [*10 Cal. Code Reg. § 2570.03*]. The application procedures to obtain a license are found in *10 Cal. Code Reg. §§ 2570.04-2570.09*.

However, insurance companies with home protection affiliates are exempted from the general licensing and regulatory requirements of *Ins. Code § 12740 et seq.* [*see Ins. Code § 12745*].

[5] Net Worth Requirements

In addition to obtaining a license as a home protection company [*see Ins. Code § 12744*; *see also* [4], *above*], the company must maintain a minimum net worth of $40,000 for up to 1,000 contracts issued or renewed in the preceding calendar year. For each additional 500 contracts, or any fraction thereof, up to 10,000 contracts, an additional $20,000 net worth is required [*Ins. Code § 12750(a)*; *see Ins. Code § 12750(b)* ("net worth" defined)]. A home protection company will be deemed insolvent whenever its net worth is reduced below 50 percent of this amount [*Ins. Code § 12755*].

[6] Reserve and Investment Requirements

A home protection company must maintain a reserve for unearned premiums in an amount not less than 40 percent of the aggregate premiums charged on its contracts currently in force. Amounts to be reserved must be on a 12-month basis. Specified rules apply to reserves for contracts for periods of more than 12 months and contracts for coverage during the selling or listing period of the real property [*see Ins. Code § 12753(a)*]. There are also specific rules for reserves for contracts that were issued prior to January 1, 1979, and that are otherwise exempt from the statutory provisions regarding home protection contracts [*see Ins. Code § 12751*; *see also 10 Cal. Code Reg. § 2570.02*].

A home protection company may invest only in those assets defined in *Ins. Code § 1170 et seq.* and *Ins. Code § 1190 et seq.*, except that an amount of its admitted assets (as determined by the Insurance Commissioner) may be invested in tangible personal property held by it for the purpose of repair or replacement of home components, systems or appliances under its home protection contracts [*Ins. Code § 12756*].

[7] Commissions and Other Inducements Prohibited

A home protection company may not pay a commission to any person as an inducement or compensation for the issuance, purchase or acquisition of a home protection contract. In addition, a home protection company may not, either directly or indirectly, as a part of any real property transaction in which a home protection contract will be issued, purchased, or acquired, require that a home protection contract be issued in conjunction with or as a condition precedent to the issuance, purchase, or acquisition, of any other policy of insurance [*Ins. Code § 12760*].

However, a home protection company is not prohibited from paying an override commission or marketing fee to an

employee or commission sales agent who is the marketing representative of the home protection company (or its parent, subsidiary, or affiliate) on the sale or marketing of a home protection contract, provided that the person is not a real estate licensee sharing in or entitled to share in, or affiliated with a real estate brokerage firm that is entitled to share in the real estate commission generated by the underlying real property transaction [*Ins. Code § 12760*].

[8] Consideration for Contract Required

The furnishing of a home protection contract without charge to any person is unlawful. A home protection contract providing coverage prior to the time an interest in the home to which it attaches is sold may not be issued unless it provides for consideration, but that consideration may consist of a bona fide promise to pay the protection contract fee at the time of and only upon transfer of title [*Ins. Code § 12761(a)*].

[9] Cancellation of Contract

A home protection contract may not be cancelled during the initial term for which it was issued, except in any of the following circumstances [*Ins. Code § 12764(a)*]:

- Nonpayment of protection contract fees.
- Fraud or misrepresentation of facts material to the issuance of such a contract.
- For contracts providing coverage prior to the time that a residential property to which it attaches is sold, if the sale does not occur.

However, this does not confer any right on the contract holder to renew any contract [*Ins. Code § 12764(b)*].

[10] On-Site Inspection

A home protection company may require an on-site inspection as a prequalification for a home protection contract, and in such an event offer a report on the inspection in connection with a bona fide application for the issuance of such a contract, even though the issuance of a contract on the property that is the subject of the inspection does not occur [*Ins. Code § 12761(b)*].

[11] Review of Business Conditions and Affairs

Each home protection company must file annual statements with the Insurance Commissioner exhibiting its conditions and affairs [*see Ins. Code § 12752(a)*].

In addition, the Insurance Commissioner, prior to licensure and at other times as appears necessary, must examine the business and affairs of any home protection company. Every home protection company so examined must open its books and records for inspection by the Insurance Commissioner and must otherwise facilitate and cooperate in the examination [*Ins. Code § 12752(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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§ 92.55 Possessory Liens

[1] Personal Property in General

A person who, while in lawful possession of an article of personal property, renders any service to its owner by labor or skill for its protection, improvement, safekeeping, or carriage, has a special lien for compensation due for that service as long as that person continues to possess the property [*Civ. Code § 3051*].

Similarly, a person who makes, alters, or repairs an article of personal property at the request of the owner or legal possessor has a lien on that property for the reasonable charges for the balance due for work and materials furnished [*Civ. Code § 3051*]. In particular, laundry and dry cleaning proprietors, veterinarians, foundry proprietors, and plastic fabricators have liens dependent on possession for the balance due from a customer for services rendered on the customer's personal property [*Civ. Code § 3051*].

If the service has been requested by a person other than the holder of the legal title, the portion of the lien in excess of $300 for any work, services, or care, or in excess of $200 for any safekeeping, will be invalid unless the lien claimant gives actual notice in writing either by registered letter addressed to the title holder or by personal service [*Civ. Code § 3051a*; *see* Ch. 102A, *Personal Property Liens*].

[2] Sale of Property Subject to Lien

The lienholder may sell the property if payment for services is not received within 10 days after it becomes due, provided that previous notice is given [*Civ. Code § 3052*; *see* Ch. 102A, *Personal Property Liens*]. The proceeds must be applied to the discharge of the lien and the costs of keeping and selling the property. Any remainder must be paid to the legal owner [*Civ. Code § 3052*].

However, a lienholder who is a service dealer registered with the Bureau of Electronic and Appliance Repair [*see Bus. & Prof. Code § 9800 et seq.*; *see also § 92.50[3]*] may instead dispose of the property pursuant to one of several other methods if the lienholder reasonably believes that the serviced product is of nominal value [*Civ. Code § 3052.5*; *see* Ch. 102A, *Personal Property Liens*].

[3] Watches, Clocks, and Jewelry

Every person who performs work on any watch, clock, or jewelry for a price has a lien for the amount due for that work, including the value or agreed price of materials furnished by the lienholder in connection with the work. If the amount due remains unpaid for one year after completion of the work, the lienholder may sell the article upon written notice to satisfy the account [*Civ. Code § 3052a*]. For an example and discussion of the notice of sale, see *Ch. 102A, Personal Property Liens, § 102A.327*.

[4] Motor Vehicles

Every person has a lien dependent upon possession for compensation to which that person is entitled for (1) making repairs or performing labor on, (2) furnishing materials for, (3) storing, repairing, safekeeping, or (4) renting parking space for, any vehicle of a type subject to registration under the Vehicle Code [*Civ. Code § 3068(a)*]. Special rules govern the enforcement of vehicle liens [*see Civ. Code §§ 3067-3074*]. For examples and discussion of vehicle liens, see *Ch. 102A, Personal Property Liens, § 102A.200* et seq.

However, if an automotive repair dealer [*see Bus. & Prof. Code § 9880 et seq.* (Automotive Repair Act)] wrongfully withholds possession of an automobile based on a lien for repairs that the customer never authorized or for which no written estimate was given, the dealer will be liable for return of the vehicle, conversion, actual damages, and possibly punitive damages [*see Harris v. Dixon Cadillac Co. (1982) 132 Cal. App. 3d 485, 489-493, 183 Cal. Rptr. 299* ; *see also Zhadan v. Downtown Los Angeles Motor Distributors, Inc. (1979) 100 Cal. App. 3d 821, 831, 834-839, 161 Cal. Rptr. 225* (approving punitive damages of $90,000 on compensatory damages of $5,260)].

[5] Freight

A carrier has a lien on freight in its possession for the total amount owed for freightage, services, and advances due on freight previously delivered pursuant to the shipper's promises to pay those amounts [*Civ. Code § 3051.5(a)*]. For further discussion, see *Ch. 54, Shipment of Property, § 54.34*. For forms related to the carrier's lien, see *Ch. 102A, Personal Property Liens, §§ 102A.340, 102A.341*.

[6] Other Services

Possessory liens also exist for various financial, agricultural, and other services. For an extensive list of liens for services performed on personal property, see Ch. 102A, *Personal Property Liens* .

If no statutory lien exists, or the service provider wants to provide for different lien arrangements, the parties may create a lien by contract provision [*see Civ. Code § 2881(1)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service AgreementsReal Property LawNonmortgage LiensGeneral OverviewReal Property LawNonmortgage LiensMechanics' Liens

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[Reserved]

§§ 92.56[Reserved]

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§ 92.70 Employment Agency Services

[1] Governing Law

Employment agencies are governed by the Employment Agency, Employment Counseling, and Job Listing Services Act ("Employment Act") [*see Civ. Code § 1812.500 et seq.*]. There are specific statutory requirements for a contract between an employment agency and a jobseeker [*see Civ. Code § 1812.504*]. For a discussion of these requirements and a sample employment agency contract, see *§ 92.240*. The Employment Act also governs job listing services [*see § 92.71*], employment counseling services [*see § 92.72*], and nurses' registries [*see § 92.73*].

For discussion and a sample contract between a temporary help employment agency and an employee of the agency, see *Ch. 85, Employment Agreements, § 85.223*.

[2] Employment Agency Defined

Under the Employment Act, an "employment agency" is any person [*see Civ. Code § 1812.501(l)*("person" defined)] who, for a fee or other valuable consideration to be paid directly or indirectly by a jobseeker, performs, offers to perform, or represents that it can perform any of the following services [*Civ. Code § 1812.501(a)(1)(A)*]:

- Procure, offer, promise, or attempt to procure employment or engagements for others, or employees for employers.
- Register persons seeking to procure or retain employment or engagement.
- Give information as to where and from whom this help, employment, or engagement may be procured.
- Provide employment or engagements.

In addition, "employment agency" includes any person who offers, as one of its main objectives or purposes, to procure

employment for any person who will pay for its services, or that collects dues, tuition, or membership or registration fees of any sort, if the main object of the person paying those fees is to secure employment [*Civ. Code § 1812.501(a)(1)(B)*; *see Civ. Code § 1812.501(k)* ("registration fee" defined)]. The term also includes any person who, for a fee or other valuable consideration, procures, offers, promises, provides, or attempts to procure babysitting or domestic employment for others or domestics or babysitters for others [*Civ. Code § 1812.501(a)(1)(C)*].

"Employment agency" does not include a nursing, business, or vocational school, unless the school charges a fee for placement [*Civ. Code § 1812.502(e)*]. The term also does not include a job listing service or an employment counseling service [*Civ. Code § 1812.501(a)(2)*; *see §§ 92.71, 92.72*, respectively]. Nor does it include a business that sells lists of job opportunities, but has no contact with employers in regard to any individual job applicant [*Sacramento Data Processing Etc. Sales v. Department of Consumer Affairs (1982) 129 Cal. App. 3d 348, 352, 181 Cal. Rptr. 51* (interpreting *Bus & Prof. Code § 9902(a)*, predecessor of *Civ. Code § 1812.501(a)*]. However, a business that sells job listings may not place advertisements for specific job openings because it may not give the appearance that it is an employment agency that need not comply with the advertising regulations that apply to employment agencies [*Sacramento Data Processing Etc. Sales v. Department of Consumer Affairs (1982) 129 Cal. App. 3d 348, 355, 181 Cal. Rptr. 51]* .

[3] Exempt Persons

Persons who provide and charge fees for employment agency services exclusively to employers are exempt from the Employment Act's regulations, except for persons who provide babysitting or domestic employment [*Civ. Code § 1812.502(a)*]. However, this exemption does not apply to employment counseling services [*Civ. Code § 1812.502(a)*; *see § 92.72*].

Nonprofit corporations organized for the purpose of economic adjustment, civic betterment, and providing vocational guidance and placement to its members or others, are exempt from the Employment Act's regulations when all of the following conditions exist [*Civ. Code § 1812.502(b)*]:

- None of the directors, officers, or employees of the corporation receives any profit other than a nominal salary for services performed for the corporation or organization.

- No fee is charged for the services, though a voluntary contribution may be requested.

- Membership dues or fees charged are used solely for maintenance of the organization or corporation.

Also exempt from the Employment Act are nonprofit corporations formed in good faith for the promotion and advancement of the general professional interests of their members, and that maintain placement services principally engaged in securing employment for those members with the state or any county, city, district, or other public agency under employment contracts for one year or longer [*Civ. Code § 1812.502(c)*]. Labor organizations also are exempt from the Employment Act, as are newspapers of general circulation, bona fide newsletters, magazines, trade or professional journals, or other publications of general circulation not specifically designed to assist in locating employment for others [*Civ. Code § 1812.502(d)*; *see Lab. Code § 1117* (labor organizations)].

[4] Inspection of Records and Record Keeping

An employment agency, employment counseling service [*see § 92.72*], or job listing service [*see § 92.71*] must make available all books, records, files, schedules, and other papers required under the Employment Act for inspection at all reasonable hours by a representative of the Attorney General, any district attorney, or any city attorney. Upon request, an employment agency, employment counseling service, or job listing service must furnish to any of those persons a true copy of the required papers. Further, an employment agency, employment counseling service, or job listing service

must make reports as prescribed by the Attorney General [*Civ. Code § 1812.522(a)*].

An employment agency must maintain a record of all advertised jobs, correlated to show the date and the publication in which the advertisement appeared and the job order number of each job advertised. This record must be kept for one year [*Civ. Code § 1812.508(f)*].

If an employment agency, employment counseling service, or job listing service also engages in any other business not subject to the provisions of the Employment Act, the records of the agency or service pertaining to matters regulated by the Employment Act must be kept separate from the records of the other business [*Civ. Code § 1812.522(b)*].

[5] Surety Bond

An employment agency must maintain a surety bond for the principal sum of $3,000 at all times while conducting business [*see Civ. Code § 1812.503(a)-(m)*]. The bond is for the benefit of persons damaged by any violation of the Employment Act, or by fraud, dishonesty, misstatement, misrepresentation, deceit, unlawful acts or omissions, or failure to provide contractual services, by the agency or its agents, representatives, or employees while acting within the scope of their employment [*Civ. Code § 1812.503(b)*]. A copy of the bond must be filed with the Secretary of State [*Civ. Code § 1812.503(a)*].

Before January 1, 1999, instead of obtaining a bond, the agency could make a deposit with the Secretary of State in an amount equal to or greater than the bond requirement [*see Code Civ. Proc. § 995.710(a)*; *see Civ. Code § 1812.503(d)* (claims against deposit)]. Any agency that made such a deposit may continue to utilize it in lieu of a bond; however, the deposit will not be renewable [*Code Civ. Proc. § 995.710(e)*].

[6] Fees

[a] Fee Schedule

An employment agency must provide a copy of the agency's fee schedule and payment terms to any jobseeker prior to an interview by a counselor [*Civ. Code § 1812.505(a)(1)*]. For discussion and a sample fee schedule, see *§ 92.241*.

[b] Deposits

If the employment agency requires a deposit from the jobseeker it must give a receipt to the jobseeker [*see Civ. Code § 1812.501(i)* ("deposit" defined)]. No other deposit or prepayment may be required by the agency. If the jobseeker accepts employment, the deposit must be applied to the fee to be paid by the jobseeker [*Civ. Code § 1812.505(e)*].

[c] Employment for 90 Days or Fewer

A jobseeker's fee for temporary employment must not exceed 1/90th of the fee for permanent employment for each consecutive calendar day during the period that the jobseeker is employed or compensated as though employed [*Civ. Code § 1812.505(g)*]. The distinction between "permanent" and "temporary" employment is based on the number of days for which the employment lasts. Employment lasting 90 days or fewer is considered "temporary"; employment lasting more than 90 days is "permanent" [*Civ. Code § 1812.506(b)(1)*].

If a jobseeker leaves employment for just cause or is discharged for reasons other than work-related misconduct within 90 days from the starting date of employment, the agency must reduce the jobseeker's fee to that payable for temporary employment and must refund any fee paid in excess of that amount [*Civ. Code § 1812.505(f)(1)*; *see Civ. Code § 1812.506(b)(2)* ("just cause" and "discharge for reasons other than misconduct" defined)].

If the jobseeker leaves employment without just cause or is discharged for misconduct within 90 days from the starting

date, the agency may charge a fee in excess of that authorized for temporary employment only if the agency's fee schedules, contracts, and agreements specifically provide for the charge, and if lack of just cause or misconduct exists [*Civ. Code § 1812.505(f)(2)*; *see Civ. Code § 1812.506(b)(3)* ("lack of just cause" and "discharge for misconduct" defined)].

[d] Fee Based on Commission or Draw

If a jobseeker accepts employment that pays on the basis of straight commissions, or a drawing account against commissions, or either a drawing account or salary plus commissions, the jobseeker's employment fee may be based on the employer's estimate of the jobseeker's projected total gross earnings during the first year of employment [*Civ. Code § 1812.505(h)(1)*]. At the conclusion of that year, the jobseeker may provide the employment agency with a computation of his or her actual gross earnings and, based on appropriate proof of earnings, the fee must be adjusted. The agency must refund any excess fee paid by the jobseeker, or the jobseeker must pay any deficiency to the agency [*Civ. Code § 1812.505(h)(2)*].

If the jobseeker's employment is terminated prior to the conclusion of the first year, the jobseeker's actual total gross earnings for the period of employment must be projected to 12 months on a pro rata basis as though the jobseeker had been employed for the entire 12-month period, and the fee to be paid will be determined as though the jobseeker had been employed for that period [*Civ. Code § 1812.505(h)(3)*].

[e] Fee for Employment in Different Position With Same Employer

If a jobseeker accepts employment with an employer to whom the jobseeker has been sent by the agency, but in a position other than the one specified in the order for employment, the agency is entitled to a fee payable by the jobseeker, computed under the terms of the fee schedule in effect at the time of referral. In order for the agency to be entitled to a fee under those circumstances, the jobseeker must have accepted employment within 180 days of the date of referral. The expiration date of the referral must be stated in the contract [*Civ. Code § 1812.505(i)*].

[f] Interagency Disputes

In interagency disputes concerning the fee for placement of a jobseeker, the fee is earned by the agency responsible for the placement of the jobseeker. A billing agency must make a reasonable effort to determine that it is entitled to the fee. The jobseeker is responsible for only one full fee for any single placement, and this fact must be stated in the contract [*Civ. Code § 1812.505(i)*].

[g] Fee Restrictions

An employment agency may not charge or divide fees as follows:

- It may not divide fees with an employer, agent, or other employee of an employer or person to whom help is furnished [*Civ. Code § 1812.505(j)(1)*].

- It may not charge a jobseeker a fee for accepting employment with the employment agency or any subsidiary of the agency [*Civ. Code § 1812.505(j)(2)*].

- It may not charge a jobseeker a fee when help is furnished to an employer, an agent, an employee of an employer, a member, or a person who has a financial interest in the employment agency [*Civ. Code § 1812.505(j)(3)*].

- It may not charge or collect from a jobseeker a fee in excess of the scheduled fee [*Civ. Code § 1812.505(b)*].

- If employment is accepted and subsequently terminated, the jobseeker may not be charged a fee greater than the jobseeker's total gross income from the employment [*Civ. Code § 1812.505(f)(3)*].

- It may neither accept a fee from a jobseeker nor send a jobseeker for employment unless the agency has obtained a bona fide oral or written job order for employment [*Civ. Code § 1812.507(a)*; *see Civ. Code § 1812.507(b)* (job orders)].

- It may not accept a registration fee of any kind [*Civ. Code § 1812.505(c)*; *see Civ. Code § 1812.501(k)* ("registration fee" defined)]. For example, an agency may not charge a fee for simply arranging a job interview for a jobseeker, without regard to whether the jobseeker accepts employment [*Smith v. La Farge (1966) 242 Cal. App. 2d 806, 809, 51 Cal. Rptr. 877* (citing Lab. Code § 1633, predecessor to *Civ. Code § 1812.505(c)*)].

[h] Refunds

If the jobseeker pays or makes a deposit on a fee for placement and fails to accept employment, the employment agency, upon demand, must repay the amount of the fee or deposit to the jobseeker. If the agency fails to return the deposit within 48 hours after demand, the agency must pay to the jobseeker an additional sum equal to the amount of the deposit. A notice to this effect must be included in all contracts between the agency and the jobseeker, in all receipts given to the jobseeker for cash payment in advance of employment, and in the fee schedule posted in the agency's office [*Civ. Code § 1812.506(a)*].

If a refund is due for any reason other than the jobseeker's failure to accept employment, the agency must make the refund within 10 working days after request by the jobseeker. If the agency decides not to make a refund, it must notify the jobseeker in writing within the 10 working day period, stating the specific reasons why the refund is not being made. If the agency fails either to tender a refund or to notify the jobseeker of the reasons why it will not make a refund within the required period, it is liable to the jobseeker for an additional sum equal to the amount of the refund [*Civ. Code § 1812.506(c)*].

[i] Deferred Payment of Fee

An employment agency may not take a confession of judgment, a promissory note or notes, or an assignment of wages from a jobseeker to cover its fees [*Civ. Code § 1812.505(d)*]. However, there are situations in which the jobseeker is unable or unwilling to pay the fee in cash and the employment agency agrees to allow the jobseeker to pay the fee in installments. Any employment agency extending credit must comply with the provisions of the Federal Truth in Lending Act [52 Ops. Cal. Atty. Gen 242 (1969) ; *see 15 U.S.C. § 1601 et seq.*; 12 C.F.R. § 226 et seq. (Reg. Z)] and of the Unruh Act [*Civ. Code § 1801 et seq.*].

For discussion and a form containing the required disclosures under the Truth in Lending Act and the Unruh Act, see *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.225*.

[7] Advertisements and Representations

It is unlawful for an employment agency to do any of the following:

- Make any false, misleading, or deceptive advertisements or representations concerning its services [*Civ. Code § 1812.508(a)*].

- Publish or cause to be published any false, fraudulent, or misleading information, representation,

notice, or advertisements [*Civ. Code § 1812.520(b)(1)*].

- Give any false information or make any false promise or representation concerning an engagement or employment to any jobseeker who applies for an engagement, employment, or help [*Civ. Code § 1812.508(b)(4)*].

- Refer a jobseeker to a job knowing, or having reason to know, that the job does not exist or that the jobseeker is not qualified for the job [*Civ. Code § 1812.507(c)(1)*].

- Refer a jobseeker to a job knowing, or having reason to know, that the job has been described in a false, misleading, or deceptive manner [*Civ. Code § 1812.507(c)(2)*].

- Refer the jobseeker without having obtained written or oral permission to list the job from the employer or the employer's authorized agent [*Civ. Code § 1812.507(c)(3)*].

An employment agency must comply with specified advertising restrictions, including disclosures regarding the service's name, street address, telephone number, special requirements of the job, salaries, fees, and, except for a nurses' registry qualifying as an employment agency, a designation of the agency as "agency" or "personnel service" [*see Civ. Code § 1812.508(b)-(e)*; *see § 92.73* (nurses' registry services)].

[8] Minors

An employment agency must not accept any application for employment made by or on behalf of any minor, or place or assist in placing any minor in violation of specified California law regarding employees' wages, hours, and working conditions or regarding the employment of pupils [*Civ. Code § 1812.509(a)*; *see Lab. Code § 1171 et seq.* (wages, hours, and working conditions), *Educ. Code § 49100 et seq.* (employment of pupils); *see also* Ch. 100B, *Contracts and Employment of Minors*].

[9] Domestic Jobs

Before referring a jobseeker for babysitting or domestic employment, an employment agency must conduct a personal interview of the jobseeker and make a reasonable effort to verify his or her experience or training [*Civ. Code § 1812.509(d)*].

[10] Residential Nursing Services

It is unlawful for an employment agency to represent that it is or performs the services of a home health agency [*Civ. Code § 1812.508(b)(5)*; *see Health & Safety Code § 1727(a)* ("home health agency" defined)].

The employment agency must provide a written disclosure to each individual receiving residential nursing services that includes (1) a statement that the agency does not perform the services of a home health agency, and that it is an employment agency only, and (2) a listing of the appropriate health and law enforcement officials with whom a complaint concerning nursing services should be filed [*Civ. Code § 1812.508(b)(5)*].

The agency must provide the addresses and telephone numbers of the officials mentioned above to all patients before they are under the care of any nursing services personnel [*Civ. Code § 1812.508(b)(5)*].

[11] Union Membership and Labor Troubles

Before sending a jobseeker to a place of employment, an employment agency must disclose to the jobseeker whether a labor contract is in existence at the place of employment and whether union membership is required [*Civ. Code §*

1812.509(b)]. Additionally, the employment agency must disclose to a jobseeker the fact that a strike, lockout, or other labor trouble exists at the place of employment, which disclosure must be included in the contract between an employment agency and a jobseeker [*Civ. Code §§ 1812.504(a)(8), 1812.509(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.71 Job Listing Services

[1] Governing Law

Job listing services are governed by the Employment Agency, Employment Counseling, and Job Listing Services Act ("Employment Act") [*see Civ. Code § 1812.500 et seq.*]. There are specific requirements for a contract between a job listing service and a jobseeker [*see Civ. Code § 1812.516(a), (c)*]. For a discussion of these requirements and a sample contract for job listing services, see *§ 92.242*. For discussion of record keeping and inspection of records of job listing services, see *§ 92.70[4]*.

The Employment Act also governs employment agencies [*see § 92.70*], employment counseling services [*see § 92.72*], and nurses' registries [*see § 92.73*].

[2] Job Listing Service Defined

A "job listing service" is any person [*see Civ. Code § 1812.501*(*l*)("person" defined)] who provides, offers, or represents that it can provide any of the following services for a fee or other valuable consideration paid directly or indirectly by the jobseeker [*Civ. Code § 1812.501(c)*]:

- Matching jobseekers with employment opportunities.
- Providing or offering to provide jobseekers lists of job openings or like publications.
- Preparing resumes or lists of jobseekers for distribution to potential employers.

[3] Exempt Persons

Certain nonprofit corporations, labor organizations, newspapers, and other publications are exempt from the Employment Act, as discussed in *§ 92.70[3]*. Additionally job listing services that meet specific criteria [*see Civ. Code § 1812.502(f)* (qualifying criteria)] are exempt from certain provisions of the Employment Act [*Civ. Code §*

1812.502(f)(1)], including the bond requirement [*see Civ. Code § 1812.515*; *see also* [7], *below*], the contract requirements [*see § 92.242[1][b]*], the fee schedule [*see Civ. Code § 1812.517*; *see also* [4], *below*], fee restrictions [*see Civ. Code § 1812.516*; *see also* [5], *below*], refund provisions [*see Civ. Code § 1812.518*; *see also* [6], *below*], certain job order provisions [*see Civ. Code § 1812.519(a), (b), (c)(3), (d)*], certain provisions relating to advertisements [*see Civ. Code § 1812.520(b)(2), (c)-(f)*], provisions relating to minors [*see Civ. Code § 1812.521(a)*; *see also* [10], *below*], and provisions relating to union membership and labor troubles [*see Civ. Code § 1812.521(b),(c)*; *see also* [11], *below*].

[4] Fee Schedule

A job listing service must provide a copy of its fee schedule and payment terms to any jobseeker prior to an interview by a counselor [*Civ. Code § 1812.517(a)(1)*]. The fee schedule must indicate the maximum fee and must include the charges of every kind to be rendered. The job listing service may make changes in the schedule, but changes are not effective until seven days after they have been posted in a conspicuous place in the job listing service [*Civ. Code § 1812.517(a)(2)*].

A copy of the fee schedule in effect, including all changes to it, must be posted in the job listing service in a conspicuous place. The posted schedule and all changes to it must be in lettering or printing of not less than standard pica capitals. The effective date of the schedule and of all changes must appear on the posted copies [*Civ. Code § 1812.517(a)(3)*]. Copies of all fee schedules and of all changes to those fee schedules must be kept on file at the job listing service for a period of one year [*Civ. Code § 1812.517(a)(4)*]. For a sample fee schedule that may be modified for use by a job listing service, see *§ 92.241[2]*.

[5] Fee Restrictions

A job listing service may not charge or collect from a jobseeker a fee in excess of the scheduled fee [*Civ. Code § 1812.517(b)*]. Moreover, a job listing service may neither accept a fee from a jobseeker nor send a jobseeker for employment unless the job listing service has obtained a bona fide written job order for employment [*Civ. Code § 1812.519(a)*; *see Civ. Code § 1812.519(b)* (job orders)].

The fee charged the jobseeker must not be based on a portion or percentage of the salary or wages earned or to be earned in the employment obtained through the job listing service [*Civ. Code § 1812.517(d)*]. It is unlawful for a job listing service to do any of the following [*Civ. Code § 1812.517(e)*]:

- Divide fees with an employer, an agent, or other employee of any employer or person to whom help is furnished.

- Charge any jobseeker a fee for accepting employment with the job listing service or its subsidiary.

- Charge the jobseeker a fee when help is furnished to an employer, an agent, any employee of any employer, a member, or person who has a financial interest in the job listing service.

Additionally, a job listing service may not take from a jobseeker a confession of judgment, a promissory note or notes, or an assignment of wages to cover its fees [*Civ. Code § 1812.517(c)*].

[6] Right to Refund

[a] Full Refund

If the job listing service does not supply the jobseeker at least three employment opportunities that meet contract specifications, and that are then available to the jobseeker, within seven business days after execution of the contract, it must refund in full the advance fee paid by the jobseeker [*Civ. Code § 1812.518(a)(1)*].

The job listing service will be deemed to have supplied conforming information if the information meets the contract specifications with respect to type of job, the jobseeker's interests and qualifications, hours, salary, benefits, and other conditions of employment, job location, and any other specifications expressly set forth in the contract [*Civ. Code § 1812.518(a)(2)*].

The jobseeker's fee must be refunded to the jobseeker within 10 days after the jobseeker's request. If the refund is not made within the 10-day period, the job listing service must pay an additional sum equal to the amount of the deposit [*Civ. Code § 1812.518(c)*].

[b] Partial Refund

If the jobseeker does not obtain a job or the job obtained lasts fewer than 90 days, the job listing service must refund any amount over and above the sum of a $25 service charge [*Civ. Code § 1812.518(b)*]. The job listing service must return the fee within 10 days after the jobseeker's request for a refund. If the refund is not made within the 10-day period, the job listing service must pay an additional sum equal to the amount of the deposit [*Civ. Code § 1812.518(c)*].

[7] Surety bond

A job listing service must maintain a surety bond for the principal sum of $10,000 at all times while conducting business [*see Civ. Code § 1812.515(a)-(m)*]. The bond is for the benefit of persons damaged by any violation of the Employment Act, or by misrepresentation, deceit, unlawful acts or omissions, or failure to provide contractual services, by the service or its agents, representatives, or employees while acting within the scope of their employment [*Civ. Code § 1812.515(b)*]. A copy of the bond must be filed with the Secretary of State [*see Civ. Code § 1812.515(a)*].

Instead of obtaining a bond, before January 1, 1999, the service could make a deposit with the Secretary of State in an amount equal to or greater than the bond requirement [*see Code Civ. Proc. § 995.710(a)*; *see also Civ. Code § 1812.515(d)* (claims against deposit)]. Any service that made such a deposit may continue to utilize it in lieu of a bond; however, the deposit will not be renewable [*Code Civ. Proc. § 995.710(e)*].

[8] Job Orders

A job listing service must not send a jobseeker for employment without first obtaining a bona fide job order for employment [*Civ. Code § 1812.519(a)*]. The service must identify itself as a job listing service to the employer when contacting an employer for the purposes of soliciting a job order [*Civ. Code § 1812.519(b)(1)*].

All job orders must be recorded in writing. A job order is considered to have been given if the employer requests or gives permission that the job listing service recruit or refer jobseekers who meet the job specifications and the employer provides sufficient job description information [*Civ. Code § 1812.519(b)(1)*]. A job order is valid for the referral of any qualified jobseeker until it is filled or canceled by the employer [*Civ. Code § 1812.519(b)(2)*].

A job listing service may not refer a job to a jobseeker if it has not confirmed the availability of the job during the four-day period prior to the date on which it disseminates the listing information [*Civ. Code § 1812.519(b)(2)*]. It is illegal for a job listing service to refer a jobseeker to a job if it knows or has reason to know that the job does not exist, that the jobseeker is unqualified for the job, that the job has been described in a false, misleading, or deceptive manner, or that it has not obtained written permission from the employer to list the job [*Civ. Code § 1812.519(c)*].

A job order may serve as the basis for job listing service advertising [*Civ. Code § 1812.519(b)(2)*; *see* [9], *below*]. A job listing service must not exchange job orders with an employment agency that charges a placement fee [*Civ. Code § 1812.519(d)*; *see § 92.70*].

[9] Advertisements and Representations

A job listing service may not make any false, misleading, or deceptive advertisements or representations concerning its services [*Civ. Code § 1812.520(a)*]. Additionally, a job listing service must not publish or cause to be published any false, fraudulent, or misleading information, representation, notice, or advertisements [*Civ. Code § 1812.520(b)(1)*].

A job listing service must comply with specified advertising restrictions, including disclosures of the service's name, street address, telephone number, and special requirements of the job and salaries [*see Civ. Code § 1812.520(b)-(d)*]. In addition, a job listing service must not, by its choice of name or by advertisement or representation, represent itself to be or to perform the services of an employment agency [*Civ. Code § 1812.520(b)(4)*; *see Civ. Code § 1812.501(a)(2)* ("employment agency" defined)].

A job listing service must maintain a record of all advertised jobs, correlated to show the date and the publication in which the advertisement appeared, and the job order number of each job advertised. This record must be kept for one year [*Civ. Code § 1812.520(e)*].

[10] Minors

A job listing service must not accept any application for employment made by or on behalf of any minor, or place or assist placing any minor in violation of specified California law regarding employees' wages, hours, and working conditions or regarding the employment of pupils [*Civ. Code § 1812.521(a)*; *see Lab. Code § 1171 et seq.* (wages, hours, and working conditions); *Educ. Code § 49100 et seq.* (employment of pupils); *see also* Ch. 100B, *Contracts and Employment of Minors*].

[11] Union Membership and Labor Troubles

Before sending a jobseeker out in response to a request for employment, a job listing service must disclose to the jobseeker whether a labor contract is in existence at the place of employment and whether union membership is required [*Civ. Code § 1812.521(b)*]. Additionally, the job listing service must not send a jobseeker to a place of employment that has a strike, lockout, or other labor trouble without notifying the jobseeker of that condition. This disclosure must be included in the contract or receipt [*Civ. Code § 1812.521(c)*].

Legal Topics:

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§ 92.72 Employment Counseling Services

[1] Governing Law

Employment counseling services are governed by the Employment Agency, Employment Counseling, and Job Listing Services Act ("Employment Act") [*see Civ. Code § 1812.500 et seq.*]. There are specific requirements for a contract between an employment counseling service and a jobseeker [*see Civ. Code § 1812.511(a)*]. For a discussion of these requirements and a sample contract for employment counseling services, see *§ 92.243*. For discussion of record keeping and inspection of records of employment counseling services, see *§ 92.70[4]*.

The Employment Act also governs employment agencies [*see § 92.70*], job listing services [*see § 92.71*], and nurses' registries [*see § 92.73*].

[2] Employment Counseling Service Defined

An "employment counseling service" is any person [*see Civ. Code § 1812.501*(*l*)("person" defined)] who advertises or represents that it can or will provide any of the following services for a fee [*Civ. Code § 1812.501(b)(1)*]:

- Career counseling.
- Vocational guidance.
- Aptitude testing.
- Executive consulting.
- Personnel consulting.
- Career management, evaluation, or planning.

- Development of resumes and other promotional materials relating to preparation for employment.

However, the following are excluded from the definition of an employment counseling service [*Civ. Code § 1812.501(b)(2)*]:

- Employer-retained firms that do not require the jobseeker to sign a contract or pay a fee.
- Certain vocational rehabilitation counselors [*see Civ. Code § 1812.501(b)(2)(B)*].
- Resume-writing services that do not hold themselves out as offering other jobseeking or placement services, and that do not charge more than $300 for any resume, cover letter, or a combination of both.
- Public educational institutions.
- Qualifying private educational institution employment counselors [*see Educ. Code § 94760 et seq.*].
- Licensed psychologists providing psychological assessment, career or occupational counseling, or consultation and related professional services within their scope of practice.
- Licensed educational psychologists.

An "employment counseling service" also does not include persons who provide services strictly on an hourly basis with no financial obligation required of the consumer beyond the hourly fee for services rendered [*Civ. Code § 1812.501(b)(1)*]. Nor does it include the functions of an "employment agency" [*Civ. Code § 1812.501(b)(1)*; *see Civ. Code § 1812.501(a)* ("employment agency" defined); § 92.70[2]].

Specified nonprofit corporations, labor organizations, newspapers, and other publications also are exempt from the Employment Act [*see § 92.70[3]*].

[3] Surety Bond

An employment counseling service must maintain a surety bond for the principal sum of $10,000 at all times while conducting business [*see Civ. Code § 1812.510(a)-(m)*]. The bond is for the benefit of persons damaged by any violation of the Employment Act, or by fraud, dishonesty, misstatement, misrepresentation, deceit, unlawful acts or omissions, or failure to provide contractual services, by the service or its agents, representatives, or employees while acting within the scope of their employment [*Civ. Code § 1812.510(b)*]. A copy of the bond must be filed with the Secretary of State [*Civ. Code § 1812.510(a)*].

Instead of obtaining a bond, before January 1, 1999, the service could make a deposit with the Secretary of State in an amount equal to or greater than the bond requirement [*see Code Civ. Proc. § 995.710(a)*; *see Civ. Code § 1812.510(d)* (claims against deposit)]. Any service that made such a deposit may continue to utilize it in lieu of a bond; however, the deposit will not be renewable [*Code Civ. Proc. § 995.710(e)*].

[4] Fee Schedule

An employment counseling service must provide a copy of its fee schedule and payment terms to any customer before an interview by the service [*Civ. Code § 1812.512(a)(1)*]. The fee schedule must indicate the maximum fee and must include charges of every kind. The service may make changes in the schedule, but changes are not effective until seven days after they have been posted in a conspicuous place at the service [*Civ. Code § 1812.512(a)(2)*].

A copy of the fee schedule in effect must be posted in the employment counseling service in a conspicuous place. The posted schedule and all changes to it must be in lettering or printing of not less than standard pica capitals. The effective date of the schedule and of all changes must appear on the posted copies [*Civ. Code § 1812.512(a)(3)*]. A copy of all fee schedules and of all changes to those fee schedules must be kept on file at the service for a period of one year [*Civ. Code § 1812.512(a)(4)*]. For a sample fee schedule that may be modified for use by an employment counseling service, see *§ 92.241[2]*.

[5] Fee Restrictions

It is unlawful for an employment counseling service to do any of the following:

- Accept, directly or indirectly, a registration fee of any kind [*Civ. Code § 1812.512(c)*].
- Charge a fee in excess of the scheduled fee [*Civ. Code § 1812.512(b)*].
- Accept from a customer a confession of judgment, a promissory note or notes, or an assignment of wages to cover its fees [*Civ. Code § 1812.512(d)*].

[6] Advertisements and Representations

An employment counseling service must not make any false, misleading, or deceptive advertisements or representations concerning its services [*Civ. Code § 1812.513(a)*]. Additionally, a service must not publish or cause to be published any false, fraudulent, or misleading information, representation, notice, or advertisements [*Civ. Code § 1812.513(b)(1)*].

An employment counseling service must maintain a record of all advertisements for the service, correlated to show the date and the publication in which the advertisement appeared. This record must be kept for one year [*Civ. Code § 1812.513(d)*].

A service must also comply with specified advertising restrictions, including disclosures of the service's name, street address, and telephone number [*Civ. Code § 1812.513(b)(2)*]. An employment counseling service must not represent itself, by its choice of name or by advertisement or representation, to be an employment agency or to perform the job placement services of an employment agency [*Civ. Code § 1812.513(e)*].

Additionally, a service must not give any false information or make any false promises or representations concerning engagement or employment to any customer, or make any oral or written promise or guarantee of any job or employment [*Civ. Code § 1812.513(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 92.73 Nurses' Registry Services

[1] Governing Law

Nurses' registries are governed by the Employment Agency, Employment Counseling, and Job Listing Services Act ("Employment Act") [*see Civ. Code §§ 1812.500 et seq.*]. A nurses' registry that makes referrals for nurses' employment other than private duty nursing must comply with the provisions of Chs. 1 and 2 of the Employment Act applicable to employment agencies [*Civ. Code § 1812.524(b)*; *see Civ. Code §§ 1812.500-1812.502*, *Civ. Code §§ 1812.503-1812.5095*; *see also § 92.70*]. A nurses' registry that makes referrals for the employment of private duty nurses must comply with other specific provisions of the Employment Act [*see Civ. Code §§ 1812.524-1812.533*]. The remainder of this discussion will cover referrals for employment of private duty nurses.

The Employment Act also governs employment agencies [*see § 92.70*], job listing services [*see § 92.71*], and employment counseling services [*see § 92.72*].

[2] Nurses' Registry Defined

A "nurses' registry" is any person [*see Civ. Code § 1812.501*(*l*)("person" defined)] who engages in the business of obtaining and filling commitments for nursing service [*Civ. Code § 1812.524(b)*]. "Nursing service" means the assignment of a nurse as a private duty, self-employed, licensed registered nurse, licensed vocational nurse, or practical nurse to render service to a patient under the direction or supervision of a physician or surgeon registered to practice in California [*Civ. Code § 1812.524(a)*]. A "private duty nurse" is a self-employed nurse who renders service in the care of either a physically or mentally ill patient under the direction of a physician or surgeon, who is paid by the patient or the patient's agent, and who acts as a private contractor [*Civ. Code § 1812.524(c)*].

Certain nonprofit corporations, labor organizations, newspapers, and other publications are exempt from the Employment Act, as discussed in *§ 92.70[3]*.

[3] Surety Bond

A nurses' registry must maintain a surety bond for the principal sum of $3,000 at all times while conducting business [*see Civ. Code § 1812.525(a)-(m)*]. The bond is for the benefit of persons damaged by any violation of the Employment Act, or by fraud, dishonesty, misstatement, misrepresentation, deceit, unlawful acts or omissions, or failure to provide contractual services, by the registry or its agents, representatives, or employees while acting within the scope of their employment [*Civ. Code § 1812.525(b)*]. A copy of the bond must be filed with the Secretary of State [*Civ. Code § 1812.525(a)*].

Instead of obtaining a bond, before January 1, 1999, the registry could make a deposit with the Secretary of State in an amount equal to or greater than the bond requirement [*see Code Civ. Proc. § 995.710(a)*; *see Civ. Code § 1812.525(d)* (claims against deposit)]. Any registry that made such a deposit may continue to utilize it in lieu of a bond; however, the deposit will not be renewable [*Code Civ. Proc. § 995.710(e)*].

[4] Fee Schedule

A nurses' registry must provide a copy of its fee schedule and payment terms to any nurse prior to an interview by the registry [*Civ. Code § 1812.527(a)(1)*]. The fee schedule must indicate the maximum fee and must include charges of every kind to be rendered. The nurses' registry may make changes in the schedule, but changes are not effective until seven days after they have been posted in a conspicuous place in the nurses' registry [*Civ. Code § 1812.527(a)(2)*].

A copy of the fee schedule in effect must be posted in the nurses' registry in a conspicuous place. The posted schedule and all changes to it must be in lettering or printing of not less than standard pica capitals. The effective date of the schedule and of all changes must appear on the posted copies [*Civ. Code § 1812.527(a)(3)*]. The fee schedule must also be included in any contract with a private duty nurse [*Civ. Code § 1812.526(c)*].

A copy of all fee schedules and of all changes to those fee schedules must be kept on file at the nurses' registry for a period of one year [*Civ. Code § 1812.527(a)(4)*]. For a sample fee schedule that may be modified for use by a nurses' registry, see *§ 92.241[2]*.

[5] Fee Restrictions

It is unlawful for a nurses' registry to charge, accept, or divide fees as follows:

- It must not accept, directly or indirectly, a registration fee of any kind [*Civ. Code § 1812.530(a)*].

- It must not divide fees with any physician, surgeon, nurse, hospital, patient, or an agent or employee of any of these persons or entities [*Civ. Code § 1812.531*].

- It may not accept from a nurse a confession of judgment, a promissory note, or an assignment of wages to cover its fees [*Civ. Code § 1812.530(b)*].

If the nurse's registry collects a fee or expenses for an assignment, and the nurse fails to obtain or be paid for the assignment, the nurses' registry must, upon demand, repay the amount of the fees and expenses to the nurse. If the registry fails to make repayment within 48 hours after demand, the registry must pay to the nurse an additional sum equal to the amount of the fee [*Civ. Code § 1812.532*].

[6] Verification of Nurse's Experience

A nurses' registry must verify in writing the claims as to experience or training listed on the nurse's application. The registry must keep a file of those records in the nurse's folder at the nurses' registry. The person interviewing the nurse must require the nurse to show his or her license and must then make a notation on the application that the license has

been inspected and note the date of the license's expiration [*Civ. Code § 1812.528*].

[7] Record Keeping

A nurses' registry must continuously maintain in its offices true and correct permanent log sheets and other records disclosing the following information [*Civ. Code § 1812.529*]:

- The date and hour of the receipt of an order for a private duty nurse by the registry.
- The date and hour of the making or giving of each assignment to the nurse by the registry.
- The name of the nurse assigned.
- The name of the patient and the address where the nurse is assigned.
- The name of the attending physician.
- The start date of the assignment.
- The period of actual service for each assignment.
- The amount of the fee charged for each assignment.

These log sheets must be maintained for a period of one year [*Civ. Code § 1812.529*]. Falsification of the records by the registry or its agent or employee is a violation of the Employment Act [*see Civ. Code § 1812.523*].

[8] Advertisements and Representations

A nurses' registry must not make any false, misleading, or deceptive advertisements or representations concerning its services [*Civ. Code § 1812.533(a)*]. Additionally, a nurses' registry must not publish or cause to be published any false, fraudulent, or misleading information, representation, notice, or advertisements [*Civ. Code § 1812.533(b)(1)*]. A nurses' registry must not give any false information or make any false promises or representations concerning an assignment or employment to any nurse who registers or applies for an assignment or employment [*Civ. Code § 1812.533(b)(3)*].

A nurses' registry must comply with specified advertising restrictions, including disclosures of the registry's name, and street address or telephone number [*see Civ. Code § 1812.533(b)(2)*]. A nurses' registry must also maintain a record of all advertisements, correlated to show the date and the publication in which the advertisement appeared. This record must be kept for one year [*Civ. Code § 1812.533(c)*].

In addition, it is unlawful for a nurses' registry to represent that it is, or performs the services of, a home health agency [*Civ. Code § 1812.533(b)(4)*; *see Health & Safety Code § 1727(a)* ("home health agency" defined)].

The nurses' registry must provide a written disclosure of the following to each individual receiving residential nursing services [*Civ. Code § 1812.508(b)(5)*; *see Civ. Code § 1812.524(a)* ("nursing services" defined)]:

- That the agency does not perform the services of a home health agency.
- A clear statement that that it is a nurses' registry only.
- That any complaints against licensed personnel providing nursing services must be brought to the

local district attorney and the Department of Consumer Affairs. The agency must provide the addresses and telephone numbers of these officials to all patients before they are under the care of any nursing services personnel.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewContracts LawTypes of ContractsPersonal Service AgreementsLabor & Employment LawEmployment RelationshipsGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
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E. Employment--Related Services

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§ 92.74 Violations of the Employment Agency, Employment Counseling, and Job Listing Services Act

Any violation of the provisions of the Employment Agency, Employment Counseling, and Job Listing Services Act ("Employment Act") [*Civ. Code § 1812.500 et seq.*] is a misdemeanor subject to criminal prosecution and suit for restraint and injunction instituted by the Attorney General, any district attorney, or any city attorney [*see Civ. Code § 1812.523(a), (b)*].

If any person [*see Civ. Code § 1812.501(l)*("person" defined)] uses any untrue or misleading statement, information, or advertisement to sell its services, or if that person or a contract fails to comply with the applicable provisions of the Employment Act, the contract will be void and unenforceable as contrary to public policy, and the jobseeker, customer, or nurse will be entitled to the return of all sums paid [*Civ. Code § 1812.523(c)*].

Any person injured by a violation of the Employment Act or by the breach of a contract subject to the Employment Act may bring an action for the recovery of damages, an equity action to restrain and enjoin the violations, or both. The damage recovery may be up to three times actual damages, but in no event may it be less than the amount paid by the jobseeker, customer, or nurse. If the person liable for a damage award refuses to pay the award, the amount may be satisfied by the security required under the Employment Act [*Civ. Code § 1812.523(d)*; *see Civ. Code §§ 1812.503, 1812.510, 1812.515, 1812.525*]. A prevailing plaintiff will be awarded reasonable attorneys' fees and costs. The court may also award punitive damages if the violation or breach was willful [*Civ. Code § 1812.523(d)*].

The provisions of the Employment Act are not exclusive and do not relieve persons subject to the Employment Act from the duty to comply with all other applicable laws [*Civ. Code § 1812.523(e)*]. Likewise, the remedies provided by the Employment Act are not exclusive and are in addition to any other remedies or procedures provided in any other law [*Civ. Code § 1812.523(f)*].

Any waiver by a consumer, jobseeker, or nurse of the provisions of the Employment Act is contrary to public policy and is void and unenforceable. Any attempt by a person subject to the Employment Act to have a jobseeker, customer, or nurse waive rights granted under the Employment Act is a violation of the Employment Act [*Civ. Code § 1812.523(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewContracts LawTypes of ContractsPersonal Service AgreementsLabor & Employment LawEmployment RelationshipsGeneral Overview

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[Reserved]

§§ 92.75[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART II. LEGAL BACKGROUND
F. Credit Reporting and Collection Services

30-92 California Legal Forms--Transaction Guide § 92.80

§ 92.80 Consumer Credit Reporting Services

[1] Governing Law

Consumer credit reporting services are governed by the federal Fair Credit Reporting Act [*15 U.S.C. § 1681 et seq.*; *see* [3], *below*] and the Consumer Credit Reporting Agencies Act [*see Civ. Code §§ 1785.1-1785.36*; *see* [2], *below*].

With certain specified exceptions [*see* [4][b], *below*], the Fair Credit Reporting Act does not annul, alter, affect, or exempt any person from complying with state laws with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that a state law is inconsistent with any provision of the Fair Credit Reporting Act, and then only to the extent of the inconsistency [*see 15 U.S.C. § 1681t(a) et seq.*].

In enacting the Fair Credit Reporting Act, Congress did not attempt to reserve to itself all efforts to regulate the consumer credit reporting business. California is not foreclosed from enacting greater protections for consumers injured by the activities of reporting agencies, nor is the California legislature's decision to include an attorneys' fee provision for any prevailing party barred, notwithstanding the fact that the federal Act provides for the recovery of attorneys' fees by the prevailing plaintiff only [*Cisneros v. U.D. Registry, Inc. (1995) 39 Cal. App. 4th 548, 577, 46 Cal. Rptr. 2d 233]* .

For discussion and sample forms related to credit card transactions, see Ch. 46, *Credit Card and Other Open-End Credit Transactions* .

[2] Consumer Credit Reporting Agencies Act

[a] Purpose of Legislation

The purpose of the Consumer Credit Reporting Agencies Act ("Credit Reporting Act") [*see Civ. Code §§ 1785.1-1785.36*] is to require consumer credit reporting agencies to adopt reasonable procedures in the furnishing of consumer information that meets the needs of commerce and that is fair and equitable to the consumer [*Civ. Code §*

1785.1(d)].

Among other requirements, the Credit Reporting Act requires agencies to allow consumers to inspect their credit files, requires certain disclosures to consumers, and prevents certain types of information from being reported [*see Civ. Code §§ 1785.10, 1785.11, 1785.20*].

The notices and disclosures to consumers provided for under the Credit Reporting Act are required to be made only to those consumers who have a mailing address in California [*Civ. Code § 1785.6*].

[b] License Not Required

A state license is not required to operate a credit agency. Although persons who make investigations of others are generally required to be licensed as private investigators [*see Bus. & Prof. Code §§ 7520, 7521(a)*], persons engaged exclusively in the business of obtaining and furnishing information on the credit ratings of persons are exempt from this licensing requirement [*Bus. & Prof. Code § 7522(c)*].

[c] Consumer Credit Reporting Agency Defined

A "consumer credit reporting agency" ("credit agency") is a person [*see Civ. Code § 1785.3(j)* ("person" defined)] that, for compensation or on a nonprofit cooperative basis, regularly engages in the business of assembling or evaluating consumer credit information or other consumer information for the purpose of furnishing consumer credit reports to third parties. The term does not include a governmental agency whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes [*Civ. Code § 1785.3(d)*].

In addition, a person who, for compensation or on a nonprofit cooperative basis, regularly engages in the practice of assembling, evaluating, or disseminating information on the checking account experiences of consumer customers of banks and other financial institutions, with the exception of compliance with the requirements of *Civ. Code § 1785.10(c),(d),(e)* (inspection of files by consumer [*see* (p), *below*]) only with regard to the provision of address and phone number, is subject to the laws governing consumer credit reporting agencies [*Civ. Code § 1785.5*].

A "consumer" is a natural individual [*Civ. Code § 1785.3(b)*].

[d] Consumer Credit Report Defined

A "consumer credit report" is any written, oral, or other communication of any information by a credit agency relating to a consumer's creditworthiness, credit standing, or credit capacity that is used or expected to be used in determining a consumer's eligibility for one of the following [*Civ. Code § 1785.3(c)*]:

- Credit to be used primarily for personal, family, or household purposes.
- Employment purposes.
- The hiring of a dwelling unit [*see Civ. Code § 1940(c)*].
- Other purposes for which a consumer credit report may be used [*see Civ. Code § 1785.11*].

Many types of reports and communications are exempted from the definition of "consumer credit report" [*see Civ. Code § 1785.3(c)*]. For example, the consumer's address or employment information by itself, having no bearing on the consumer's credit, is not a consumer credit report under *Civ. Code § 1785.3(c)* [*Gomon v. TRW, Inc. (1994) 28 Cal. App. 4th 1161, 1167, 34 Cal. Rptr. 2d 256]* .

[e] Information Released by Credit Agency

A credit agency may furnish a consumer credit report only in the following circumstances [*Civ. Code § 1785.11(a)*; *see Olson v. Six Rivers National Bank (2003) 111 Cal. App. 4th 1, 11-13, 3 Cal. Rptr. 3d 301* (bank's request for husband's credit information in connection with wife's loan application was permissible under *Civ. Code § 1785.11(a)(3)(A), (F)*)]:

- In response to a proper court order.
- In accordance with the written instructions of the consumer to whom it relates.
- To a person the credit agency has reason to believe will use the information for certain legitimate business purposes [*see* [f], *below*].

In furnishing information to be used in connection with a credit transaction not initiated by the consumer, the credit agency may provide the information only if the consumer authorizes the agency to furnish the consumer credit report, or if the proposed transaction involves a firm offer of credit to the consumer and other requirements are met [*see Civ. Code § 1785.11(b)*].

If a credit agency furnishes a prequalifying report in connection with a credit transaction not initiated by the consumer [*see Civ. Code § 1785.11(b)(2)*], the agency must provide a notification system, including a toll-free telephone number, that permits the consumer to notify the agency of the consumer's election to have his or her name removed from any list of names provided by the agency [*Civ. Code § 1785.11(e)*].

A credit agency may not furnish to any person (other than the consumer, who has a statutory right to receive this information [*see Civ. Code § 1785.15(a)(3)*]) a record of inquiries solely resulting from credit transactions that were not initiated by the consumer [*Civ. Code § 1785.11(c)*].

[f] Permissible Purposes

A credit agency may not issue a credit report to any person (other than pursuant to a court order or with the consumer's consent [*see* [e], *above*]) unless it has reason to believe that the person intends to use the information for the following purposes only [*Civ. Code § 1785.11(a)(3)*]:

- A credit transaction, or a court order for support, involving the extension of credit to, or review or collection of an account of, the consumer.
- Employment purposes.
- The underwriting of insurance involving the consumer, or for insurance claims settlements.
- A determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider the applicant's financial responsibility or status.
- The hiring of a dwelling unit.
- A legitimate business need for the information in connection with a business transaction involving the consumer.

[g] Inaccurate or Incomplete Information Furnished to Credit Agency

Civ. Code § 1785.25 covers the furnishing of incomplete or inaccurate information to any consumer credit reporting agency. That section, specifically *Civ. Code § 1785.25(g)*, as well as *Civ. Code § 1785.31*, are recognized as preempted by the federal Fair Credit Reporting Act [*see 15 U.S.C. § 1681 et seq.*; *see also* [2][x], [3], *below*] in *Howard v. Blue Ridge Bank (2005) 371 F. Supp. 2d 1139, 1144* .

A person may not furnish information on a specific transaction or experience to a credit agency if the person knows or should know the information is incomplete or inaccurate [*Civ. Code § 1785.25(a)*; *see Hussey-Head v. World Savings and Loan (2003) 111 Cal. App. 4th 773, 779-780, 4 Cal. Rptr. 3d 171* (consumer claimed lender furnished incomplete and inaccurate information to credit reporting agencies; court found triable issues of material fact concerning violation of *Civ. Code § 1785.25(a)*)].

If a person who regularly furnishes information to a credit agency determines that information on a specific transaction or experience is not complete or accurate, he or she must notify the agency and provide corrections to make the information complete and accurate [*Civ. Code § 1785.25(b)*].

[h] Disputed Information

If a dispute between a furnisher of credit information and a consumer is ongoing, the furnisher may not furnish information to a credit agency without including a notice about the dispute [*Civ. Code § 1785.25(c)*].

If a person who provided information about a consumer receives notice of a dispute [*see Civ. Code § 1785.16*; *see also* [i], *below*], the person must conduct an investigation about the disputed information and report to the credit agency within 30 business days [*Civ. Code § 1785.25(f)*].

If a consumer disputes the completeness or accuracy of any information in his or her consumer credit file and communicates the dispute to the credit agency, the agency, within a reasonable period and without charge, must reinvestigate and record the current status of the disputed information within 30 business days from the date the agency received notice of the dispute. The agency need not reinvestigate if it has reasonable grounds to believe the dispute is frivolous or irrelevant, which includes a consumer's failure to provide sufficient information to investigate a dispute [*Civ. Code § 1785.16(a)*].

Unless the agency determines the dispute is frivolous or irrelevant, the agency must notify any person who provided information that is in dispute within five business days of the dispute. The credit agency may require that disputes by consumers be in writing [*Civ. Code § 1785.16(a)*].

In conducting that reinvestigation, the agency must review and consider all relevant information submitted by the consumer. If the agency determines the dispute is frivolous or irrelevant, it must notify the consumer by mail or other authorized means within five business days that it is ending the reinvestigation. This notice must state the specific reasons why the agency has determined the dispute is frivolous or irrelevant [*Civ. Code § 1785.16(b)*].

Information in the consumer's file that contradicts the consumer's contention is not, of itself, reasonable grounds for believing the dispute is frivolous or irrelevant [*Civ. Code § 1785.16(e)*].

If, after reinvestigation, the agency finds that the disputed information is missing, inaccurate, or can no longer be verified by the evidence submitted, the agency must correct the consumer's file [*Civ. Code § 1785.16(b)*]. The agency must provide written notice to the consumer of the results of the reinvestigation within five days of completing the reinvestigation. The notice must contain specified information about the reinvestigation [*see Civ. Code § 1785.16(d)*].

On notification of the results of a reinvestigation, a consumer may demand that any person furnishing information to the credit agency correct information the consumer believes to be inaccurate. The consumer may require the agency to

indicate in subsequent reports that the information is disputed. Information determined to be inaccurate or incomplete must be deleted or corrected within a reasonable time [*Civ. Code § 1785.30*].

If information is deleted from a consumer's file or if a consumer disputes information in his or her file, on the consumer's request, the credit agency must give notice of the deletion or dispute to any person designated by the consumer who, within two years for employment purposes, or within 12 months for any other purpose, has received a consumer credit report about the consumer [*Civ. Code § 1785.16(h)*].

Information may not be reinserted in a consumer's file after having been deleted unless the furnisher of the information certifies its accuracy. When information is reinserted in a consumer's file, the agency must notify the consumer of the reinsertion [*Civ. Code § 1785.16(c)*]. Agencies must maintain reasonable procedures to prevent properly deleted information from reappearing in a consumer's file [*Civ. Code § 1785.16(i)*].

Whenever a consumer files a dispute, the agency must note in any subsequent consumer credit report containing the disputed information that the consumer disputes the information, and must include in the report the consumer's statement about the dispute or a summary of the statement [*Civ. Code § 1785.16(f), (g)*].

[i] Negative Information Furnished to Credit Agency

A creditor may submit negative credit information [*see Civ. Code § 1785.26(a)* (definitions)] about a consumer to a credit agency only if the creditor notifies the consumer [*Civ. Code § 1785.26(b)*; *see Civ. Code § 1785.26(c)(2)* (form for giving notice)]. The notice must be in writing and must be delivered in person or by mail before or within 30 days after transmission of the information [*Civ. Code § 1785.26(c)*].

In general, a creditor may not provide adverse information to a credit agency about a cosigner of a consumer credit contract entered into on or after July 1, 1992, unless written notice is provided to the cosigner [*Civ. Code § 1799.101(b)*]. For further discussion, see Ch. 45, *Consumer Installment Loans and Credit Sales* .

[j] Content of Consumer Credit Report

The Credit Reporting Act restricts the content of consumer credit reports. A credit agency may not include any of the following in a consumer credit report [*Civ. Code § 1785.13(a)*]:

- Bankruptcies that, from the date of the order for relief, antedate the report by more than 10 years.

- Suits and judgments which, from the date of entry or renewal, predate the report by more than seven years, or until the governing statute of limitations has expired, whichever is longer.

- Unlawful detainer actions, unless the lessor was the prevailing party. However, this provision has been held to be unconstitutional by the Court of Appeal for the Second District, as a violation of the free speech rights of the *First Amendment* [*U.D. Registry, Inc. v. State of California (1995) 34 Cal. App. 4th 107, 114-116, 40 Cal. Rptr. 2d 228]* .

- Paid tax liens that predate the report by more than seven years.

- Accounts placed for collection, or charged to profit and loss, that predate the report by more than seven years.

- Certain criminal records that predate the report by more than seven years [*see Civ. Code § 1785.13(a)(6)*]. Criminal records must not be reported if no conviction resulted or if a full pardon was

granted.

- Any other adverse information that predates the report by more than seven years.

If an agency is notified that a consumer's open-end credit account has been closed, any future report about that consumer must indicate the account is closed [*Civ. Code § 1785.13(e)*]. Medical information about a consumer may not be included in a file or furnished for credit, employment, or insurance purposes without the consumer's consent [*Civ. Code § 1785.13(f)*]. However, a report must include information about a consumer's failure to pay overdue child or spousal support in certain circumstances [*see Civ. Code § 1785.13(g)*; *see also Fam. Code § 4701*].

A credit agency that compiles and reports items about consumers that are matters of public record must specify in any report containing public record information the source of the information, including the particular court, if that was the source, and the date the information was initially reported or publicized [*Civ. Code § 1785.18(a)*]. Agencies that report potentially adverse public record information for employment purposes must maintain procedures to ensure that the information is complete and up to date [*see Civ. Code § 1785.18(b)*].

A credit agency that furnishes credit reports for employment purposes may not report information on the age, marital status, race, color, or creed of a consumer [*Civ. Code § 1785.18(c)*].

[k] Credit Card Solicitations

A consumer may elect to have his or her name removed from any list that a credit agency furnishes for credit card solicitation by notifying the agency, by telephone or in writing, in accordance with specified notification procedures [*Civ. Code § 1785.11*.8; *see Civ. Code § 1785.11(d)* (notification procedures)]. This election is effective for a minimum of two years, unless otherwise specified by the consumer [*Civ. Code § 1785.11*.8].

[l] Security Alert Notice

Credit agencies must accept security alerts from consumers, by written request or via a toll-free telephone number [*Civ. Code § 1785.11*.1(a); *see also Civ. Code § 1785.11*.1(c), (d)(requirements for toll-free number)]. A "security alert" is a notice placed in a consumer's credit report, at the request of the consumer, that notifies a recipient of the credit report that the consumer's identity may have been used without the consumer's consent to obtain goods or services fraudulently in the consumer's name [*Civ. Code § 1785.11*.1(a)].

Consumer credit reporting agencies must place a security alert in a consumer credit report within five business days of receiving a request from the consumer [*Civ. Code § 1785.11*.1(e)]. The security alert must remain in place for at least 90 days, and the consumer has the right to request its renewal [*Civ. Code § 1785.11*.1(f)].

Agencies must notify each person requesting a consumer's credit information of a security alert in the consumer's credit report, regardless of whether a full credit report, credit score, or summary report is requested [*Civ. Code § 1785.11*.1(b)]. A credit agency must notify each consumer who has requested that a security alert be placed on his or her consumer credit report of the expiration date of the alert [*Civ. Code § 1785.11*.1(j)].

Any person who uses a consumer credit report in connection with the approval of credit based on an application for an extension of credit, or with the purchase, lease, or rental of goods or non-credit-related services, and who receives notification of a security alert in accordance with *Civ. Code § 1785.11*.1(a), may not lend money, extend credit, or complete the purchase, lease, or rental of goods or non-credit-related services without taking reasonable steps to verify the consumer's identity, in order to ensure that the application for an extension of credit or for the purchase, lease, or rental of goods or non-credit-related services is not the result of identity theft [*Civ. Code § 1785.11*.1(g); *see Civ. Code § 1785.11*.1(h)("extension of credit" does not include increase in dollar limit of existing open-end credit plan or any

change to, or review of, existing credit account); *see also Civ. Code § 1785.11*.1(i)(steps taken to verify consumer's identity in accordance with *Civ. Code § 1785.20*.3(b) may constitute compliance with *Civ. Code § 1785.11*.1)].

If the consumer has placed a statement with the security alert in his or her file requesting that identity be verified by calling a specified telephone number, any person who receives that statement, with the security alert in a consumer's file in accordance with *Civ. Code § 1785.11*.1(a), must take reasonable steps to verify the identity of the consumer by contacting the consumer, using the specified telephone number before lending money, extending credit, or completing the purchase, lease, or rental of goods or non-credit-related services [*Civ. Code § 1785.11*.1(g)].

If a person uses a consumer credit report to facilitate the extension of credit or for another permissible purpose on behalf of a subsidiary, affiliate, agent, assignee, or prospective assignee, that person may verify a consumer's identity, in lieu of the subsidiary, affiliate, agent, assignee, or prospective assignee [*Civ. Code § 1785.11*.1(g)].

[m] Security Freeze Notice

Civ. Code § 1785.11.2 governs security freezes on credit reports. A prior version of this section, however, was held unconstitutional as applied to plaintiff credit reporting agency, as violating free speech [*U.D. Registry, Inc. v. State (2006) 144 Cal. App. 4th 405, 412, 50 Cal. Rptr. 3d 647]* .

A credit agency must place a security freeze on a consumer credit report within three business days of receiving a request from the consumer, submitted in writing by mail [*Civ. Code § 1785.11*.2(a), (b)]. A "security freeze" is a notice placed in a consumer's credit report, at the request of the consumer and subject to certain exceptions, that prohibits the credit agency from releasing the consumer's credit report or any information from it without the express authorization of the consumer [*Civ. Code § 1785.11*.2(a)].

If a security freeze is in place, the agency may not release information from a consumer's credit report to a third party without prior express authorization from the consumer [*Civ. Code § 1785.11*.2(a)]. However, a credit agency may advise a third party that a security freeze is in effect with respect to the consumer's credit report [*Civ. Code § 1785.11*.2(a)].

A third party who requests access to a consumer credit report in connection with an application for credit or any other use may treat the application as incomplete if a security freeze is in effect and the consumer does not allow his or her credit report to be accessed for that specific party or period of time [*Civ. Code § 1785.11*.2(h)].

A security freeze must remain in place until either the consumer requests to have the security freeze removed [*see Civ. Code § 1785.11*.2(d), (j)], or on discovery by the credit agency that the consumer's credit report was frozen due to a material misrepresentation by the consumer [*see Civ. Code § 1785.11*.2(g)(2)].

A credit agency may charge a fee to freeze, remove a freeze, or temporarily lift a freeze regarding access to a consumer credit report [*see Civ. Code § 1785.11*.2(m)]. However, a credit agency may not charge a fee to a victim of identity theft who has submitted a valid police report or valid Department of Motor Vehicles investigative report that alleges a violation of *Penal Code § 530.5* [*Civ. Code § 1785.11(m)*].

Certain information service companies are not required to place in a credit report either a security alert or a security freeze [*see Civ. Code § 1785.11*.6; *see also Civ. Code § 1785.11*.2(*l*)(exceptions to application of *Civ. Code § 1785.11*.2)]. Certain credit agencies that act only as resellers of consumer credit information and do not maintain permanent consumer credit data bases from which new credit reports are produced are also exempt from the requirements of *Civ. Code §§ 1785.11*.1-1785.11.3. However, these agencies are required to honor any security freeze placed on a credit report by any other credit agency [*see Civ. Code § 1785.11*.4].

[n] Identity Theft

In addition to any other rights the consumer may have under the Credit Reporting Act, every credit agency, after being contacted by telephone, mail, or in person by any consumer who has reason to believe he or she may be a victim of identity theft, must promptly provide the consumer with a statement, written in a clear and conspicuous manner, describing the statutory rights of victims of identity theft under the Credit Reporting Act [*Civ. Code § 1785.15*.3(a); *see Civ. Code § 1785.15*.3(c)(exception for certain consumer credit reporting agencies that act only as resellers of credit information collected from other credit reporting agencies)]. This written statement must include information about security alerts and security freezes and their consequences [*see Civ. Code § 1785.15(f)*; *see also Ch. 45, Consumer Installment Loans and Credit Sales, § 45.231[2]* (sample of statement form)].

Further, every credit agency, on receipt from a victim of identity theft of a police report prepared in accordance with *Penal Code § 530.6*, or a valid investigative report made by a Department of Motor Vehicles investigator with peace officer status regarding the public offenses described in *Penal Code § 530.5* (which prohibits unauthorized use of personal identifying information) must provide the victim, free of charge and on request, with up to 12 copies of his or her file during a consecutive 12-month period, not to exceed one copy per month, following the date of the police report [*Civ. Code § 1785.15*.3(b)].

[o] Procedures for Ensuring Proper Use of Credit Information

Credit agencies must maintain reasonable procedures designed to avoid providing prohibited information [*see Civ. Code § 1785.13*] and to limit the furnishing of consumer credit reports to proper purposes [*Civ. Code § 1785.14(a)*; *see Civ. Code § 1785.11*]. A one-time certification from an organization that it will use information requested about consumers for one or more of the proper purposes is sufficient; it is not necessary that a separate certification be furnished for each request about an individual consumer [*Hiemstra v. TRW, Inc. (1987) 195 Cal. App. 3d 1629, 1632-1633, 241 Cal. Rptr. 564]* . Agencies must also follow reasonable procedures to assure maximum accuracy of information furnished [*Civ. Code § 1785.14(b)*].

In addition, agencies must provide written notice about the person's obligations imposed by the Credit Reporting Act to (1) any person who regularly, and in the ordinary course of business, supplies consumer credit information to the agency, and (2) any person to whom the agency furnishes a consumer credit report [*Civ. Code § 1785.14(d)*]. On request, an agency must create a procedure to prevent a credit report or credit information from being provided for marketing purposes or for a credit offer not requested by the consumer [*Civ. Code § 1785.19*.5].

In addition, agencies must maintain reasonable procedures to prevent properly deleted information from reappearing in a consumer's file [*see Civ. Code § 1785.16(i)*]. Agencies that report potentially adverse public record information for employment purposes must maintain procedures to ensure that the information is complete and up to date [*see Civ. Code § 1785.18(b)*].

The federal Fair Credit Reporting Act [*see* [3], *below*] imposes similar compliance procedure requirements [*see 15 U.S.C. § 1681e*; *see also Schoendorf v. U.D. Registry, Inc. (2002) 97 Cal. App. 4th 227, 238, 118 Cal. Rptr. 2d 313* (tenant's action against reporting agency for refusal to add clarifying information to her report in violation of both state and federal acts)].

[p] Consumer's Inspection of Credit Agency Files

On request and proper identification of a consumer, a credit agency must allow the consumer to visually inspect all files regarding that consumer maintained at the time of the request [*Civ. Code § 1785.10(a)*]. All information in the files must be available for inspection, including the names and addresses of the sources of the information [*Civ. Code § 1785.10(c)*]. For discussion and a sample form for use by a consumer to request disclosure of information in his or her

credit agency file, see *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.230*.

On being contacted by a consumer by telephone, mail, or in person regarding information that may be contained in the agency's files on that consumer, a credit agency must advise the consumer of his or her rights under *Civ. Code §§ 1785.11*.8 [*see* [k], *above*], 1785.19 [*see* [w], *below*] and 1785.19.5 [*see* [o], *above*], and of the agency's obligation to provide disclosure of the files [*see Civ. Code § 1785.15*], as discussed in this subsection [*Civ. Code § 1785.10(b)*]. The agency may impose a reasonable charge for allowing a consumer to examine a file [*Civ. Code § 1785.17(a)*; *see Civ. Code § 1785.10*].

A credit agency must also disclose the following information to the consumer:

- A record of any recipients of the consumer's credit report for employment purposes within two years preceding the request [*Civ. Code § 1785.10(d)(1)(A)*].

- A record of any recipients of the consumer's credit report for any purpose, other than for employment purposes, within the 12 month period preceding the request [*Civ. Code § 1785.10(d)(1)(B)*].

- A record of all inquiries received in the 12 months preceding the request that identified the consumer in connection with a credit transaction not initiated by the consumer. This record of inquiries must also include the name, address and, if provided by the recipient, the telephone number identified for customer service for each recipient making an inquiry [*Civ. Code § 1785.10(e)*].

- The consumer's credit score and an explanation of the credit score, and the key factors as defined in and required by *Civ. Code § 1785.15*.1 [*see* [t], *below*], if the consumer so requests [*Civ. Code § 1785.10(b)*].

Disclosure of the recipients of consumer credit reports must include the recipient's name or, if applicable, the recipient's fictitious business name, the recipient's address and, if provided by the recipient, its customer service telephone number [*Civ. Code § 1785.10(d)(2)*].

[q] Inspection Procedures

Credit agencies must supply files and information required to be available to consumers [*see Civ. Code § 1785.10*; *see also* [p], *above*] during normal business hours and on reasonable notice [*Civ. Code § 1785.15(a)*]. The consumer may be accompanied by one other person [*Civ. Code § 1785.15(e)*]. Agencies must provide trained personnel to explain information to consumers [*Civ. Code § 1785.15(d)*]. Files may be disclosed in person, by mail, by summary, or by another form if authorized by the consumer [*Civ. Code § 1785.15(b)*].

[r] General Disclosures to Consumer

In addition to the disclosures required as part of a consumer's inspection of the credit agency's files [*see* [p], *above*], a consumer has the right to request and receive all of the following [*Civ. Code § 1785.15(a)*]:

- Either a decoded written version of the file or a written copy of the file, including all information in the file at the time of the request, with an explanation of any code used.

- A credit score for the consumer, the key factors, and the related information, as defined in and required by *Civ. Code § 1785.15*.1 [*see* [t], *below*].

- A record of all inquiries, by recipient, concerning credit transactions not initiated by the consumer

during the 12-month period preceding the request.

- The recipients of any consumer credit report on the consumer for employment purposes within the two-year period preceding the request, and for any other purpose, within the 12-month period preceding the request.

Identification of the recipients above must include the name of the recipient or, if applicable, the fictitious business name, and if requested by the consumer, the address of the recipient [*Civ. Code § 1785.15(a)*].

In addition, any written disclosure required by *Civ. Code § 1785.15* must include a summary of the consumer's rights under the Credit Reporting Act [*Civ. Code § 1785.15(f)*]. For a sample form for this summary statement, see *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.231[2]*.

[s] Disclosures Regarding Adverse Action

If any person takes adverse action with respect to a consumer and the action is based, in whole or in part, on information contained in a consumer credit report, that person must provide all of the following to the consumer [*Civ. Code § 1785.20(a)*]:

- A written notice of the adverse action.

- The name, address, and telephone number of the credit agency that furnished the report.

- A statement that the decision to take adverse action was based in whole or in part on information in the report.

- A written notice of the consumer's right to obtain a free copy of the report and right to dispute the information furnished by the credit reporting agency.

If credit or insurance for personal, family, or household purposes is denied or the charge for that credit is increased because of information about a consumer's creditworthiness or credit standing obtained from other than a credit agency, on the consumer's request, the user of that information must disclose the nature and substance of the information to the consumer within a reasonable time [*Civ. Code § 1785.20(b)*].

Any person who uses a consumer credit report in connection with a credit transaction not initiated by the consumer that is a firm offer of credit must include specified information about the credit report in any solicitation made to the consumer [*see Civ. Code § 1785.20*.1].

Before requesting a consumer credit report for employment purposes, the user of the report must provide written notice to the consumer stating that a report will be used and identifying the source of the report; it must also state that the consumer may request a copy of the report [*Civ. Code § 1785.20*.5(a)]. If employment is denied because of information contained in a consumer credit report from a credit agency, the user of the report must advise the consumer of the adverse action and supply the name and address of the credit agency making the report [*Civ. Code § 1785.20*.5(b)].

A user of consumer credit information may notify a consumer that, on the consumer's request, the user will contact the credit agency regarding an investigation of the current status of credit information if the consumer disputes the accuracy or completeness of the information [*Civ. Code § 1785.21(a)*]. If the request is properly made, the agency must review the consumer's file and report the current status to the user and the consumer [*Civ. Code § 1785.21(b), (c)*].

[t] Credit Score Disclosures

A "credit score" is a numerical value or a categorization derived from a statistical tool or modeling system used by a person who makes or arranges a loan, to predict the likelihood of certain credit behaviors, including default. The numerical value or the categorization derived from this analysis may also be referred to as a "risk predictor" or "risk score" [*Civ. Code § 1785.15*.1(b)].

The term "credit score" does not include any mortgage score or rating of an automated underwriting system that considers any factors in addition to credit information, including, but not limited to, the loan-to-value ratio, the amount of down payment, or a consumer's financial assets. The term also does not include other elements of the underwriting process or underwriting decision [*Civ. Code § 1785.15*.1(b)].

On receiving a consumer's request for a credit score, a credit agency must supply to the consumer a notice that includes the following information, along with a statement indicating that the information and credit scoring model may be different than the credit score used by the lender [*Civ. Code § 1785.15*.1(a)]:

- The consumer's current credit score or the consumer's most recent credit score that was previously calculated by the credit reporting agency for a purpose related to the extension of credit.

- The range of possible credit scores under the model used.

- All of the key factors that adversely affected the consumer's credit score in the model used, the total number of which must not exceed four [*see Civ. Code § 1785.15*.1(c)("key factors" means all relevant elements or reasons adversely affecting credit score for particular individual, listed in order of their importance based on their effect on credit score)].

- The date the credit score was created.

- The name of the person or entity that provided the credit score or credit file on which the credit score was created.

However, if the consumer requests the credit file and not the credit score, then the consumer must receive the credit file and a statement that he or she may request and obtain a credit score [*Civ. Code § 1785.15*.1(a)].

A credit agency must supply the consumer with either a credit score that is derived from a credit scoring model that is widely distributed to users by that credit agency in connection with residential real property loans, or with a credit score that assists the consumer in understanding the credit scoring assessment of his or her credit behavior and predictions about his or her future credit behavior, along with a statement indicating that the information and credit scoring model may be different than that used by the lender [*Civ. Code § 1785.15*.2(a)]. A credit agency may charge a reasonable fee for providing the required information [*Civ. Code § 1785.15*.2(b)].

A credit agency cannot be compelled to develop or disclose a score if the agency does not distribute scores that are used in connection with residential real property loans and does not develop scores that assist credit providers in understanding a consumer's general credit behavior and predicting his or her future credit behavior [*Civ. Code § 1785.15*.1(e)].

A credit agency that distributes credit scores developed by another person or entity is not required to provide a further explanation of them, or to process a dispute arising pursuant to *Civ. Code § 1785.16(a)* [*see* [h], *above*], except that the credit agency must provide the consumer with the name and address and website for contacting the person or entity who developed the score or the methodology of the score. This does not apply to a credit agency that develops or modifies scores that are developed by another person or entity [*Civ. Code § 1785.15*.1(f)].

A credit agency is not required to maintain credit scores in its files [*Civ. Code § 1785.15*.1(g)]. Any provision in a contract that prohibits the disclosure of a credit score by a person who makes or arranges loans or a credit agency is void. A lender has no liability under any contractual provision for disclosure of a credit score [*Civ. Code § 1785.16(m)*].

[u] Reselling Consumer Credit Reports

A person may not procure a consumer credit report for the purpose of reselling the report or information in it unless the person discloses to the credit agency issuing the report the identity of the ultimate end user and each permissible purpose for which the report is issued [*Civ. Code § 1785.22(a)*]. A person procuring a consumer credit report to resell the report or information in it must do both of the following [*Civ. Code § 1785.22(b)*]:

- Establish and comply with reasonable procedures designed to ensure that the report or information in it is resold only for a permitted purpose, including identifying each prospective user and certifying each purpose for which the report or information will be used.

- Before reselling the report or information, make reasonable efforts to verify those identities and certifications.

[v] Information Blocked from Credit File

If a consumer submits to a credit reporting agency a copy of a valid police report or a valid investigative report made by a Department of Motor Vehicles Investigator with peace officer status, filed pursuant to *Penal Code § 530.5* (identity theft), the credit agency must promptly and permanently block reporting of any information that, the consumer alleges, appears on his or her credit report as a violation of *Penal Code § 530.5*, so that the information cannot be reported [*Civ. Code § 1785.16(k)*].

Information may be unblocked only on a preponderance of the evidence showing that either (1) the information was blocked due to a material misrepresentation of fact by the consumer or fraud, or (2) the consumer agrees that the blocked information, or a portion of the blocked information, was blocked in error, or (3) the consumer knowingly obtained (or should have known that he or she obtained) possession of goods, services, or money as a result of the blocked information. If the blocked information is unblocked, the consumer must be promptly notified [*Civ. Code § 1785.16(k)*; *see Civ. Code § 1785.16(c)* (notification procedures)].

In unblocking information, a consumer reporting agency must comply with all requirements of *Civ. Code § 1785.16* and *15* U.S.C. § 1681i [*see* [h], *above* and [3][j], *below*] relating to reinvestigating disputed information [*Civ. Code § 1785.16(l)*].

In addition, a credit agency must accept the consumer's version of the disputed information and correct or delete the disputed item when the consumer submits to the credit agency documentation obtained from the source of the item in dispute or from public records confirming that the report was inaccurate or incomplete, unless the credit agency, in the exercise of good faith and reasonable judgment, has substantial reason based on specific, verifiable facts to doubt the authenticity of the documentation submitted and notifies the consumer in writing of that decision, explaining its reasons for unblocking the information and setting forth the specific, verifiable facts on which the decision was based [*Civ. Code § 1785.16*(*l*)].

[w] Waiver of Act Unenforceable

Any waiver of the provisions of the Consumer Credit Reporting Agencies Act is contrary to public policy, and is void and unenforceable [*Civ. Code § 1785.36*].

[x] Violations of Consumer Credit Reporting Agencies Act

A consumer who suffers damage from any person's violation of the Consumer Credit Reporting Agencies Act ("Credit Reporting Act") may bring an action to recover damages [*see Civ. Code § 1785.31(a)*; *see also Schoendorf v. U.D. Registry, Inc. (2002) 97 Cal. App. 4th 227, 238, 118 Cal. Rptr. 2d 313* (tenant's action against reporting agency for refusal to add clarifying information to her report in violation of both state Credit Reporting Act and federal Fair Credit Act)]. However, *Civ. Code § 1785.31* and *Civ. Code § 1785.25(g)*, the provisions that create a private right of action to enforce § 1785.25(a), were recognized as preempted by the federal Fair Credit Reporting Act [*see 15 U.S.C. § 1681 et seq.*; *see also* [2][g], *above*, and [3], *below*] in *Howard v. Blue Ridge Bank (2005) 371 F. Supp. 2d 1139, 1144* .

Ordinarily, a consumer may recover actual damages including lost wages, attorneys' fees, court costs, and pain and suffering [*Civ. Code § 1785.31(a)(1)*]. Injunctive relief is also available, whether or not the consumer seeks any other remedy [*Civ. Code § 1785.31(b)*]. In cases of willful violations, punitive damages are available [*Civ. Code § 1785.31(a)(2), (c)*].

In addition, a consumer or the person or entity responsible for a consumer credit file may bring a civil action against anyone who improperly gains access to or obtains data from a consumer credit file [*see Civ. Code § 1785.11*], or who uses data received from a file contrary to an agreement [*Civ. Code § 1785.19*].

Any action must be brought within two years of the date the plaintiff knew (or should have known) of the violation, but not more than seven years from the earliest date liability could have arisen, or within two years of the date of discovery of a misrepresentation [*Civ. Code § 1785.33*].

If the defendant agency prevails in an action brought for a violation of the Credit Reporting Act, it also is entitled to recover reasonable attorneys' fees and court costs [*Civ. Code § 1785.31(d)*], notwithstanding the fact that the Fair Credit Act does not provide for attorneys' fees to the prevailing defendant [*Gomon v. TRW, Inc. (1994) 28 Cal. App. 4th 1161, 1173, 34 Cal. Rptr. 2d 256]* .

If a plaintiff brings an action under *Civ. Code § 1785.31* against a debt collector [*see Civ. Code § 1788.2* ("debt collector" defined)], and the basis of the action is related to the collection of a debt, whether issues relating to the debt collection are raised in the same or another proceeding, the debt collector may recover reasonable attorneys' fees on a finding by the court that the action was not brought in good faith [*Civ. Code § 1785.31(e)*].

Other remedies are provided by the Consumers Legal Remedies Act [*see Civ. Code § 1750 et seq.*; *see also § 92.12[9]*]. For discussion and sample complaint forms based on violations of the Credit Reporting Act, see *California Forms of Pleading and Practice, Ch. 129, Consumer Credit Reporting, §§ 129.110*-129..120 (Matthew Bender).

[3] Federal Fair Credit Reporting Act

[a] Purpose of Legislation

Congress has determined that inaccurate credit reports directly impair the efficiency of the banking system, and unfair credit reporting methods undermine the public confidence essential to the working of that system. It has recognized that the credit industry, particularly consumer reporting agencies, has developed an elaborate mechanism for investigating and evaluating the creditworthiness, credit standing, credit capacity, character, and general reputation of consumers. To assure that these agencies exercise their responsibilities with fairness, impartiality, and respect for the consumer's right to privacy, Congress has passed the Fair Credit Reporting Act ("Fair Credit Act") [*15 U.S.C. § 1681 (a)*; *see 15 U.S.C. § 1681 et seq.*].

All consumer reporting agencies are required to adopt reasonable procedures for meeting the needs of commerce for

consumer credit, personnel, insurance, and other information in a manner that is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information under the Fair Credit Act [*15 U.S.C. § 1681(b)*].

[b] Consumer Reporting Agency Defined

A "consumer reporting agency" under the Fair Credit Act is any individual or entity [*see 15 U.S.C.A. § 1681a(b)* ("person" defined)] that for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in the practice of assembling or evaluating consumer credit information, or other information on consumers, for the purpose of furnishing consumer reports to third parties, and that uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports [*15 U.S.C. § 1681a(f)*].

Most forms of transportation and communication are capable of being involved in interstate commerce, such as the telephone, the telegraph, and the mails. It should be noted that the Fair Credit Act does not specify that the reporting in any particular case itself be an instance of interstate commerce, but only that it use the means or facilities of interstate commerce to come under the auspices of the Fair Credit Act.

[c] Consumer Report Defined

A "consumer" entitled to protection under the Fair Credit Act must be an individual [*15 U.S.C. § 1681a(c)*]. A "consumer report" is any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used, or expected to be used or collected, as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, household, or employment purposes, or other purposes expressly authorized under the Fair Credit Act [*15 U.S.C. § 1681a(d)(1)*; *see* [d], *below* (permissible purposes)].

A consumer report, however, does not include the following [*see 15 U.S.C. § 1681a(d)(2)*]:

- A report that contains information solely as to transactions between the consumer and the person making the report.

- Certain communications among persons related by common ownership or affiliated by corporate control [*see 15 U.S.C. § 1681a(d)(2)(A)(iii)*].

- An authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device.

- A report in which a person who has been requested by a third party to make a specific extension of credit directly or indirectly to a consumer conveys his or her decision with respect to the request, if the third party advises the consumer of the name and address of the person to whom the request was made, and if that person then makes the disclosures to the consumer as required under *15 U.S.C. § 1681m* [*see* [g], [i], *below* (required disclosures)].

- Certain other communications related to investigative consumer reports, employment opportunities, investigations of employees, and communications for which the consumer's consent is obtained [*see 15 U.S.C. § 1681a(o), (x)*; *see also* [f], *below*].

In addition, there are certain restrictions regarding the release of the consumer's medical information [*see 15 U.S.C. §§ 1681a(d)(3), 1681b(g)*].

[d] Permissible Purposes

A consumer reporting agency may furnish a consumer report only under certain legally permissible circumstances. It may do so in response to the order of a competent court, in response to a subpoena issued in connection with proceedings before a federal grand jury, or in accordance with the written instructions of the consumer to whom it relates [*15 U.S.C. § 1681b(a)(1), (2)*]. A consumer reporting agency may also furnish a consumer report to a person that the agency has reason to believe intends to use the information for the following purposes [*15 U.S.C. § 1681b(a)(3)*]:

- In connection with a credit transaction involving the consumer about whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer.

- In connection with an extension of credit to the consumer or for employment purposes.

- In connection with the underwriting of insurance involving the consumer.

- In connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status.

- In connection with a valuation or assessment of the credit or prepayment risks associated with an existing credit obligation by a current insurer or a potential investor or servicer.

- In connection with a business transaction initiated by the consumer, or to review an account to determine whether the consumer continues to meet the terms of the account, for which the recipient of the report otherwise has a legitimate business need for the information.

- To executive departments and agencies in connection with the issuance of government-sponsored individually-billed travel charge cards.

In addition, under specified circumstances, a consumer reporting agency may furnish a consumer report to a local child-support-enforcement agency [*see 15 U.S.C. § 1681b(a)(4)*] and a state agency that administers support programs for children [*see 15 U.S.C. § 1681b(a)(5)*]. Furthermore, a consumer reporting agency may furnish a consumer report to the FDIC or the National Credit Union Administration under circumstances in which it acts as conservator, receiver, or liquidating agent for an insured depository institution or credit union [*see 15 U.S.C.A. § 1681(b)(6)*].

Additionally, notwithstanding the strict classification of permissible information, a consumer reporting agency may furnish identifying information respecting any consumer to a governmental agency, consisting only of any of the following kinds of items: name, address, former addresses, places of employment, or former places of employment [*15 U.S.C. § 1681f*].

[e] Content of Consumer Report

Except as noted below, a consumer report may not contain any of the following information [*15 U.S.C. § 1681c(a)*]:

- Bankruptcies that, from date of adjudication of the most recent one, antedate the report by more than 10 years.

- Civil suits, civil judgments, and records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is longer.

- Paid tax liens that, from date of payment, antedate the report by more than seven years.

- Accounts placed for collection, or charged to profit and loss, that antedate the report by more than seven years.

- Any other adverse item of information, other than records of criminal convictions, that antedates the report by more than seven years (or longer for specified adverse information relating to U.S. government insured or guaranteed student loans or to national direct student loans [*see 20 U.S.C. §§ 1080a(f), 1087cc(c)(3)*]).

- The name, address, or telephone number of any medical-information furnisher that has notified the agency of its status, unless either (1) that information is restricted or reported using codes that do not identify, and do not provide information sufficient to infer, the specific provider or the nature of the medical services, products, or devices, to a person other than the consumer, or (2) the report is being provided to an insurance company for a purpose relating to engaging in the business of insurance other than property and casualty insurance.

However, the prohibition on reporting the first five items above does not apply for those reports to be used in connection with the following matters [*15 U.S.C. § 1681c(b)*]:

- A credit transaction involving, or that may reasonably be expected to involve, a principal amount of $150,000 or more.

- The underwriting of life insurance involving, or that may reasonably be expected to involve, a face amount of $150,000 or more.

- The employment of any individual at an annual salary that equals, or that may reasonably be expected to equal, $75,000 or more.

[f] Reports for Employment Purposes

Consumer reporting agencies also furnish consumer reports for employment purposes [*see 15 U.S.C. § 1681a(h)* (employment purposes defined as evaluating consumer for employment, promotion, reassignment, or retention as employee)], and for that purpose compile and report items of information on consumers that are matters of public record and are likely to have an adverse effect on a consumer's ability to obtain employment. With respect to these reports, the agency must do one or the other of the following [*15 U.S.C. § 1681k(a)*; *see 15 U.S.C. § 1681k(b)* (exception for national security investigations)]:

- At the time public record information is reported to the user, notify the consumer of that fact, together with the name and address of the person to whom it is being reported.

- Maintain strict procedures designed to insure that whenever public record information that is likely to have an adverse effect on a consumer's ability to obtain employment is reporated, it is complete and up to date.

Within the context of the employment purposes report, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments are considered up to date if the current public record status of these items at the time of the report is reported [*15 U.S.C. § 1681k(a)(2)*].

Certain communications relating to the employer's investigation of employees are not subject to the disclosure and

consent requirements. To fall within this exclusion, a communication must be made to an employer and must be made in connection with an investigation of one of the following [*15 U.S.C. § 1681a(x)(1)(B)*]:

- Suspected misconduct relating to employment.
- Compliance with federal, state, or local laws.
- Compliance with the rules of a self-regulatory organization [*see 15 U.S.C. § 1681a(x)(3)* (definition)].
- Compliance with any pre-existing written policies of the employer.

Further, the communication must not be for the purpose of investigating a consumer's creditworthiness, credit standing, or credit capacity and must not be provided to anyone other than the employer or its agent, a governmental authority, or a self-regulatory organization with regulatory authority over the employer [*15 U.S.C. § 1681a(x)(1)(C)*]. Employees have a right to notice if the employer takes adverse action based on these communications [*15 U.S.C. § 1681a(x)(1)(D)(v)*]. Employees also have a right to a summary of the nature and substance of the communications [*15 U.S.C. § 1681a(x)(2)*].

[g] General Disclosures to Consumers

Every consumer agency, on request and on proper identification of the consumer, must clearly and accurately disclose in writing, unless otherwise specified by the consumer [*see 15 U.S.C. § 1681h(a), (b)*], the following matters:

- All information in the consumer's file at the time of the request, with the exception of credit scores, any other risk scores, or predictors relating to the consumer, and provided that if on request of the consumer, the first five digits of the consumer's social security number may be omitted [*15 U.S.C. § 1681g(a)(1)*].
- The sources of the information, with the exception of sources used to prepare an investigative consumer report [*see* [f], *above*; *§ 92.81*] and actually used for no other purpose, and with limited exceptions relating to discovery in the event that an action is brought under the Fair Credit Act [*15 U.S.C. § 1681g(a)(2)*].
- The identification of each person (including each end-user identified under *15 U.S.C. § 1681e(e)(1)* relating to consumer reports for resale) who procured a consumer report for employment purposes, during the two-year period preceding the date the request is made, or for any other purpose, during the one-year period preceding the date the request is made, with certain exceptions for government agencies and departments for security clearances [*see 15 U.S.C. § 1681g(a)(3)*].
- The dates, original payees, and amounts of any checks on which any adverse characterization of the consumer is based [*15 U.S.C. § 1681g(a)(4)*].
- A record of all inquiries received by the agency during the one-year period preceding the request in connection with a credit or insurance transaction that was not initiated by the consumer [*15 U.S.C. § 1681g(a)(5)*].
- If the consumer requests the credit file and not the credit score, a statement that the consumer may request and obtain a credit score [*15 U.S.C. § 1681g(a)(6)*].

A consumer reporting agency must also provide the consumer, along with each written disclosure required under *15 U.S.C. § 1681g* [*15 U.S.C. § 1681g(c)(2)*]:

- A written summary of the consumer's rights prepared by the FTC [*see 15 U.S.C. § 1681g(c)(1)* (specific items required to be disclosed)].
- A toll-free telephone number for any nationwide credit reporting agency.
- A list, with telephone numbers, of federal agencies responsible for enforcing the Fair Credit Reporting Act [*see 15 U.S.C. § 1681g(c)(2)(C)*].
- A statement that the consumer may have additional rights under state law and may wish to contact a state or local consumer protection agency or a state attorney general to learn those rights.
- A statement that a consumer reporting agency is not required to remove accurate derogatory information from a consumer's file unless the information is outdated [*see 15 U.S.C. § 1681c*] or cannot be verified.

Additional required disclosures include:

- A summary of rights of identity theft victims [*see 15 U.S.C. § 1681g(d)*; [4][c], *below*].
- For identity theft victims, and for any federal, state, or local government law enforcement agency, copies of an identity thief's application and business transaction records [*15 U.S.C. § 1681g(e)(1)*; *see 15 U.S.C. § 1681g(e)(2), (3), (5)* (procedures to request information; exceptions)].
- An explanation of the factors that went into deriving the credit score [*see 15 U.S.C. § 1681g(f)*; *see also 15 U.S.C. § 1681g(g)* (disclosure of credit scores by certain mortgage lenders)].

[h] Disclosure Procedures

With specified exceptions, the disclosures required to be made under *15 U.S.C. § 1681g* [*see* [g], *above*] must be made in writing [*15 U.S.C. § 1681h(a)(2)*]. However, if authorized by a consumer, a credit agency may make the required disclosures other than in writing and in a form specified by the consumer in accordance with statutory requirements, if available from the agency [*15 U.S.C. § 1681h(b)(1)*; *see 15 U.S.C. § 1681h(b)(2)* (requests may be in person, by telephone after written request, by electronic or other reasonable means, if available from the agency)].

The agency must provide trained personnel to explain to the consumer any information which is being furnished to him or her [*15 U.S.C. § 1681h(c)*]. The consumer may be accompanied by another person of his or her choosing, who needs to furnish reasonable identification; however, the agency may require the consumer to give it a written statement granting permission to discuss the consumer's file in that person's presence [*15 U.S.C. § 1681h(d)*].

[i] Disclosures Regarding Adverse Action

If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in a consumer report, the person must notify the consumer of the following [*see 15 U.S.C. § 1681m(a)*]:

- An adverse action against the consumer has been taken.
- The name, address, and telephone number (including the toll-free number of any nationwide credit

reporting agency) of the consumer reporting agency making the report.

- A statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer specific reasons why the action was taken.

- Notification that the consumer may obtain a free copy of this report within 60 days after learning of the adverse action and may dispute the accuracy or completeness of the adverse information.

A similar procedure is involved when the decision of denial or increase of charges relating to credit for personal, family, or household purposes is based wholly or partly on certain information obtained from a third party other than a consumer reporting agency. The information must bear on the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. The user, within a reasonable period of time, upon the consumer's written request for the reasons for the adverse action received within 60 days after learning of the adverse action, must disclose the nature of the information to the consumer. The user of the information must clearly and accurately disclose to the consumer the consumer's right to make such a written request at the time the adverse action is communicated to the consumer [*15 U.S.C. § 1681m(b)*].

There is no liability under the above requirements for advising the consumer if the defendant shows by a preponderance of the evidence that at the time of the alleged violation the defendant maintained reasonable procedures to assure compliance with all such provisions [*15 U.S.C. § 1681m(c)*].

Any person who uses a consumer report in connection with any credit or insurance transaction that is not initiated by the consumer must provide with each written statement made to the consumer regarding the transaction specified disclosures, including a statement that information contained in the consumer's credit report was used in connection with the transaction, that the consumer received the offer of credit or insurance because of having satisfied certain criteria for creditworthiness or insurability, that credit or insurance may not be extended if the consumer does not meet these criteria, that the consumer has a right to prohibit information contained in his or her consumer credit file from being used in connection with credit or insurance transactions not initiated by the consumer, and that the consumer may exercise this right by using the notification system established under *15 U.S.C. § 1681b(e)* [*15 U.S.C. § 1681m(d)*].

[j] Disputed Information

The consumer may notify the consumer reporting agency directly, or indirectly through a reseller, of any dispute about either the completeness or accuracy of any item of information contained in the consumer's file. The agency then must reinvestigate free of charge and record the current status of that information in accordance with specified procedures [*see 15 U.S.C. § 1681i(a)*], before the end of the 30-day period beginning on the date on which the agency receives notice of the dispute by the consumer [*15 U.S.C. § 1681i(a)(1)(A)*; *see 15 U.S.C. § 1681i(a)(1)(B), (C)* (extension of period to investigate and limitations on extension)].

Within five business days, a consumer reporting agency must provide prompt notice of the dispute to the furnisher of the information [*see 15 U.S.C. § 1681i(a)(2)*] and must review and consider all relevant information submitted by the consumer [*see 15 U.S.C. § 1681i(a)(4)*]. After reinvestigation, it must promptly delete inaccurate or unverifiable information [*see 15 U.S.C. § 1681i(a)(5)*] and must provide written notice of the results of the reinvestigation, including a description of the reinvestigation procedure, to the consumer within five business days of completion of the reinvestigation [*see 15 U.S.C. § 1681i(a)(6)*].

If the reinvestigation does not resolve the dispute, the customer is entitled to file a brief statement setting forth the nature of the dispute. The agency may limit such statements to not more than 100 words if it assists the consumer in writing a clear summary of the dispute [*15 U.S.C. § 1681i(b)*].

After a statement of the dispute is filed (unless there are reasonable grounds to believe that the dispute is frivolous or irrelevant), the consumer reporting agency in any subsequent consumer report containing the information in question, must clearly note that it is disputed by the consumer, and it must provide either the consumer's statement or a clear and accurate codification or summary of the dispute [*15 U.S.C. § 1681i(c)*].

Following any deletion of information which is found to be inaccurate, or the accuracy of which can no longer be verified, or following any notation as to disputed information, at the request of the consumer, the agency must furnish either (1) a notification that the item has been deleted or (2) a statement, codification, or summary of the dispute. These must be furnished to any person specifically designated by the consumer who, within the previous two years, has received a consumer report for employment purposes or who, within six months, has received a consumer report for any other purpose, if the report contained the deleted or disputed information [*15 U.S.C. § 1681i(d)*].

A consumer may dispute the accuracy of furnished information directly with a furnisher of information that is a financial institution, if the circumstances of the dispute meet conditions required to be specified in regulations by the federal banking agencies, the National Credit Union Administration, and the Federal Trade Commission [*see 15 U.S.C. § 1681s-2(a)(8)(A)-(D)*]. In that event, the financial institution has a duty to investigate (unless the dispute is frivolous or irrelevant) and to notify consumer reporting agencies of any discovered inaccuracies in the information furnished by the financial institution to those agencies [*15 U.S.C. § 1681s-2(a)(8)(E),(F)*].

When a furnisher of inaccurate information is not a financial institution, a consumer is obliged to deal with the consumer reporting agency whose report disclosed the inaccurate information [*see 15 U.S.C. § 1681s-2(b)* (duties of furnishers of information on receiving notice of dispute)]. If the consumer directly notifies the furnisher of the information, stating that the accuracy of the information is disputed, that notification will not trigger any duty by the furnisher to investigate the dispute [*Sanai v. Saltz (2009) 170 Cal. App. 4th 746, 764-765, 88 Cal. Rptr. 3d 673* (furnisher of credit information has no responsibility to investigate credit dispute under *15 U.S.C. § 1681s-2(b)* until after it receives notice from consumer reporting agency; notification from consumer is not enough)]. When the furnisher of the information receives notice of the dispute from the consumer reporting agency, the furnisher must [*15 U.S.C. § 1681s-2(b)(1)*]:

- Investigate the consumer's claim.
- Review all relevant information provided by the consumer reporting agency [*see 15 U.S.C. § 1681i(a)(2)*].
- Report the results of the investigation to the consumer reporting agency.
- Correct the information with each nationwide agency to which the furnisher has given the information, if the furnisher finds the information is inaccurate.
- Modify, delete, or permanently block that item of information, if the furnisher find the information is inaccurate.

The agency must complete all investigations and reports before the end of the 30-day period beginning on the date the furnisher receives notice of the dispute by the consumer [*15 U.S.C. § 1681s-2(b)(2)*; *see 15 U.S.C. § 1681i(a)(1)*; *see also 15 U.S.C. § 1681s-2(c), (d)* (limitations on liability; enforcement)].

If a furnisher violates its obligations to provide accurate information [*see 15 U.S.C. § 1681s-2(a)*] or to comply with accuracy guidelines designed to protect the integrity of consumer information [*see 15 U.S.C. § 1681s-2(e)*], the state may not immediately bring an action for damages on behalf of its residents [*15 U.S.C. § 1681s(c)(5)(A)*]. Instead, the state first must obtain an injunction against the violator [*15 U.S.C. § 1681s(c)(5)(A)(i)*]; then, if the furnisher violates

the injunction, the damages are limited to those incurred after the date of the injunction [*15 U.S.C. § 1681s(c)(5)(A)(ii),(B)*].

[k] Violations of the Fair Credit Reporting Act

Willful failure of a consumer reporting agency or user of information to comply with any requirement of the Fair Credit Reporting Act ("Fair Credit Act") with respect to any consumer may lead to liability for actual and punitive damages as well as attorneys' fees [*15 U.S.C. § 1681n(a)*; *see Safeco Ins. Co. of Am. v. Burr (2007) 551 U.S. 47, 127 S. Ct. 2201, 167 L. Ed. 2d 1045, 1058-1060* (when consumer's action is based on "willful" failure to comply with Fair Credit Reporting Act, that may encompass not only knowing violations but also defendant's reckless disregard of statutory duties)]. Negligent failure to comply may lead to liability for actual damages and attorneys' fees [*15 U.S.C. § 1681o*].

An action to enforce liability created under the Fair Credit Act may be brought in any appropriate United States District Court, without regard to the amount in controversy, within two years from the date of discovery by plaintiff of the violation that is the basis for the liability, or five years after the date on which the violation occurs, whichever occurs first [*15 U.S.C. § 1681p*].

Any person who knowingly and willfully obtains information regarding a consumer from a consumer reporting agency under false pretenses may be fined or imprisoned for not more than two years, or both [*see 15 U.S.C. § 1681q*]. Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency's files to an unauthorized person is subject to those same penalties [*15 U.S.C. § 1681r*].

[l] Administrative Enforcement of Fair Credit Reporting Act

The Federal Trade Commission (FTC) has the primary responsibility for enforcing the federal Fair Credit Reporting Act [*15 U.S.C. § 1681s(a)*]. The FTC has concentrated its supervisory and investigative forces in this area within the Bureau of Consumer Protection, Division of Credit Practices, which is available for advance consultation and interpretations relating to proposed practices under the law [*16 C.F.R. §§ 1.71-1.73*].

PRACTICE TIP:

The federal Bureau of Consumer Protection's website provides information on the Fair Credit Reporting Act, including instructions about ordering a free annual credit report [*see* www.ftc.gov; *see also* [4][c], *below*].

Parallel responsibilities are given to the traditional federal regulatory bodies in the more specialized areas, such as banks, savings and loan associations, credit unions, common carriers, air carriers, and certain agricultural entities [*see 15 U.S.C. § 1681s(b)*]. States are also authorized to bring actions to enjoin violations under this law and to recover damages [*see 15 U.S.C. § 1681s(c)*].

[4] Fair Credit Transactions Act

[a] General Purposes and Effective Dates

The Fair and Accurate Credit Transactions Act of 2003 (FACTA) added provisions to the Fair Credit Reporting Act (FCRA) [*15 U.S.C. § 1681 et seq.*; *see generally § 92.80[3], above*] to ensure the accuracy of information in credit transactions and to help fight identity theft [*see* Pub. Law No. 108-159, § 514(a)(2)(J)]. FACTA also included provisions related to privacy, limits on information sharing, and consumer rights to disclosure.

Generally, the FACTA provisions without a specific effective date became effective on December 1, 2004; however, in some cases, FACTA provided that the FTC or the Federal Reserve Board will determine the effective date [*see* 16 C.F.R. pt. 602; *69 Fed. Reg. 6526, 29061]* , but regulations are not required to be issued by any particular date [*see,*

e.g., 15 U.S.C. § 1681c(h)(2) (procedures to deal with address discrepancies in consumer reports); *15 U.S.C. § 1681g(c)(1)* (summary of rights to obtain and dispute credit information in consumer reports and to obtain credit scores); *15 U.S.C. § 1681m(e)* ("red flag" guidelines regarding identity theft)].

[b] Preemption

The Fair Credit Reporting Act provides that no requirement or prohibition may be imposed under the laws of any state with respect to any subject matter regulated under the following [*15 U.S.C. § 1681t(b)(1)(A)-(F)*]: *15 U.S.C § 1681b (c),(e)* (relating to the prescreening of consumer reports); *15 U.S.C. § 1681i* (relating to the time by which a consumer reporting agency must take any action in any procedure related to the disputed accuracy of information in a consumer's file); *15 U.S.C § 1681m(a), (b)* (relating to the duties of a person who takes any adverse action with respect to a consumer); *15 U.S.C. § 1681m(d)*(relating to the duties of persons who use a consumer report of a consumer in connection with any credit or insurance transaction that is not initiated by the consumer and that consists of a firm offer of credit or insurance); *15 U.S.C. § 1681c* (relating to information contained in consumer reports); *15 U.S.C. § 1681s-2* (relating to the responsibilities of persons who furnish information to consumer reporting agencies, except that this paragraph does not apply with respect to *Civ. Code § 1785.25(a)* (as in effect on September 30, 1996).

FACTA added the following to the FCRA list of preempted subjects [*15 U.S.C. § 1681t(b)(1)(G)-(I)*; *see 15 U.S.C. § 1681g(e)* (requiring business entities that have done business with identity thief to provide transaction information to victim); *15 U.S.C. § 1681m(h)* (requiring creditors to issue new risk-based pricing notices); *15 U.S.C. § 1681s-3* (right to opt out of certain affiliate marketing solicitations); *see also § 92.80[1], above* (governing law)]. In addition, FACTA preempts state laws imposing any requirement or prohibition regarding specified disclosures about credit scores [*15 U.S.C. § 1681t(b)(3)*; *see 15 U.S.C. § 1681g(c)* (summary of consumer's rights to dispute information and obtain credit scores to be provided to consumers); *15 U.S.C. § 1681g(d)* (summary of identity theft victim's rights to consumers who believe they are or might be victims); *15 U.S.C. § 1681g(e), (g)* (right to credit scores from credit agencies and mortgage lenders)]. However, certain California laws are not preempted: *Civ. Code §§ 1785.15-1785.15.2* (general disclosures and credit score disclosures) [*see § 92.80[2][r], [t], above*]; *Civ. Code § 1785.10* (consumer's inspection of credit agency files) [*see § 92.80[2][p], above*]; *Civ. Code § 1785.16* (disputed information) [*see § 92.80[2][h], above*]; *Civ. Code § 1785.20.2* (required information and notice for consumer loan secured by one to four units of residential property)[*15 U.S.C. § 1681t(b)(3)(A)*].

In the context of identity theft, FACTA preempts state law "requirements or prohibitions" with respect to specified conduct [*see 15 U.S.C. § 1681t(b)(5)*; *see also 15 U.S.C. § 1681c(g)* (truncating credit card and debit card numbers); *15 U.S.C. § 1681c-1* (placing fraud and active duty alerts on credit reports); *15 U.S.C. § 1681c-2* (blocking identity theft-related information); *15 U.S.C. § 1681g(a)(1)(A)* (omitting first five digits of consumer's social security number); *15 U.S.C. § 1681j(a)* (providing free annual credit report); *15 U.S.C. § 1681m(e)* (establishing "red flag" guidelines and regulations by creditors); *15 U.S.C. § 1681m(f)* (sale or transfer of debt caused by identity theft); *15 U.S.C. § 1681m(g)* (notifying consumers of fraudulent debts); *15 U.S.C. § 1681s(f)* (coordinating consumer complaint investigations); *15 U.S.C. § 1681s-2(a)(6)* (furnisher's duties on notice of identity theft-related information); *15 U.S.C. § 1681w* (disposing of consumer records)]. However, language added to the general preemption section of the act [*15 U.S.C. § 1681t*] appears to preserve the rights of states to enact laws protecting consumers from identity theft, provided they are not inconsistent with other provisions of the FCRA [*see 15 U.S.C. § 1681t(a)*; *but see 15 U.S.C. § 1681t(b)(2)* (state law is preempted by provisions of federal act concerning exchange of information among persons affiliated by common ownership or common corporate control); American Bankers Ass'n v. Lockyer (9th Cir. 2008) 541 F.3d 1214, 1216, 1218 (*Fin. Code § 4053(b)(1)* is preempted insofar as it applies to consumer-report information as defined in *15 U.S.C. § 1681a(d)(1)* but is not preempted insofar as it applies to nonconsumer-report information); American Bankers Ass'n v. Gould (9th Cir. 2005) 412 F.3d 1081, 1087 (federal act preempts California Financial Information Privacy Act, *Fin. Code § 4050 et seq.*, insofar as California law attempts to regulate inter-affiliate communication of "information," as that term is defined in *15 U.S.C. § 1681a(d)(1)*)].

[c] Significant Provisions

FACTA adds a number of significant provisions to the FCRA.

- Numerous steps are mandated to prevent identity theft or provide help for identity-theft victims, including:

  - *Free credit reports:* A consumer is entitled to one free credit report during any 12-month period from the three major nationwide credit reporting agencies and all nationwide speciality consumer reporting agencies [*see 15 U.S.C. § 1681j(a)(1)*]. Reports from specialty agencies may contain data regarding the consumer's employment history, residential rental history, check writing history, insurance claims, or medical records or payments [*see 15 U.S.C. § 1681a(w)*].

  - *Fraud alerts:* Consumers who believe they have been the victim of fraud or a related crime, including identity theft, may add a fraud alert to their files with a nationwide consumer reporting agency [*see 15 U.S.C. § 1681c-1(a), (b)*]. The agency must provide the alert to other agencies, and all agencies must include the alert in the consumer's file and provide the alert each time they generate the consumer's credit score. Initial fraud alerts are effective for 90 days and may be extended, by consumer request, for seven years [*see 15 U.S.C. § 1681c-1(a)(1), (b)(1)*]. These alerts entitle the consumer to a free credit report [*15 U.S.C. § 1681c-1(a)(2), (b)(2)*]. (California law requires that credit agencies must accept "security alerts" from consumers [*see Civ. Code § 1785.11*.1; [2][*l*], *above*].)

  - *Active duty alerts:* Consumers on active duty may add an alert of their status to their files. The alert must be kept in the file for at least 12 months. The active duty alert does not entitle the consumer to a free credit report [*see 15 U.S.C. § 1681c-1(c)*].

  - *"Red flags":* The FTC and the National Credit Union Administration are charged with issuing regulations for implementing "red flag" guidelines regarding identity theft [*see 15 U.S.C. § 1681m(e)*]. In addition, they are charged with imposing special verification procedures when a card issuer receives a change of address followed shortly by a request for a replacement card [*see 15 U.S.C. § 1681m(e)(1)(C)*].

  - *Truncating numbers on credit cards and debit cards:* Businesses must not print more than the last five digits, or the expiration date, of a consumer's credit card or debit card number on electronically printed receipts [*15 U.S.C. § 1681c(g)(1)*; *see 15 U.S.C. § 1681c(g)(2), (3)* (limitations; effective dates one year and three years after enactment)].

  - *Truncating social security number:* A consumer who requests a copy of his or her file may also request that the first five digits of the consumer's social security number be omitted on that report [*see 15 U.S.C. § 1681g(a)(1)(A)*].

  - *Business transaction information available to victim:* Businesses that have dealt with identity thieves must provide information about the transactions to the victim and to law enforcement [*15 U.S.C. § 1681g(e)(1)*; *see 15 U.S.C. § 1681g(e)(2), (3), (5)* (procedures to request information; exceptions)].

  - *Selling or transferring debt resulting from identity theft:* Once a creditor is notified that a debt is the result of identity theft, the creditor may not sell or transfer the debt [*15*

U.S.C. § 1681m(f)].

- *Blocking identity theft information:* Credit agencies must block identity theft information within four days of receiving proof of identity, a copy of the identity-theft report, the consumer's identification of the fraudulent information, and the consumer's statement that the information does not relate to any transaction by the consumer [*15 U.S.C. § 1681c-2(a)*].

- *Notice of consumer rights:* The FTC must prepare a summary of the rights of identity theft and fraud victims (including the rights to file a fraud alert, to block information in a report that resulted from fraud, and to obtain copies of documents used to commit fraud), and a credit agency reporting must provide the summary to any victim who contacts the agency about a theft or fraud [*see 15 U.S.C. § 1681g(d)*].

- *Disposal of consumer records:* Consumer reporting agencies and any business that uses a consumer report must adopt procedures for proper disposal [*see 15 U.S.C. § 1681w(a)(1)*].

- Credit agencies and mortgage lenders must disclose the consumer's credit score, the range of possible scores, the key factors that adversely affected the score, the date the score was created, and the source of the credit score [*15 U.S.C. § 1681g(f)*].

- A consumer may dispute the accuracy of furnished information directly with a furnisher of information that is a financial institution, if the circumstances of the dispute meet conditions required to be specified in regulations [*see 15 U.S.C. § 1681s-2(a)(8)*]. When a furnisher of inaccurate information is not a financial institution, a consumer is obliged to deal with the consumer reporting agency whose report disclosed the inaccurate information [*see 15 U.S.C. § 1681s* 2(b); *Sanai v. Saltz (2009) 170 Cal. App. 4th 746, 764-765, 88 Cal. Rptr. 3d 673]* .

- A financial institution must notify a consumer on furnishing negative information about the consumer [*see 15 U.S.C. § 1681s-2(a)(7)*; *see also 15 U.S.C. § 1681s-2(a)(7)(F)* (protection from liability)]. However, once the consumer had been notified, the financial institution may report additional negative information without notifying the consumer [*15 U.S.C. § 1681s-2(a)(7)(A)(ii)*].

- When a creditor extends credit on terms "materially less favorable than the most favorable terms available to a substantial portion of consumers," the creditor must provide the consumer with a notice explaining that the terms are based on information in a credit report and that the consumer can request a free credit report [*15 U.S.C. § 1681m(h)(1)*].

- The consumer may opt out of an affiliate's use of information relating to consumer transactions to market the affiliate's products or services. Affiliates must also notify the consumer of the possibility that the affiliate will use the consumer's information for marketing and of the consumer's right to opt out of that use [*15 U.S.C. § 1681s-3(a)(1), (2)*; *see 15 U.S.C. § 1681s-3(a)(4)* (exceptions)]. California residents may use opt out provisions in the Financial Information Privacy Act [*Fin. Code § 4050 et seq.*], which affords better protection than the federal law [*see Fin. Code § 4053(a)*; *see also Ch. 46, Credit Cards and Other Open-End Credit Transactions, § 46.98[2]*]. However, state laws are preempted by provisions of the federal act concerning the exchange of information among persons affiliated by common ownership or common corporate control [*15 U.S.C. § 1681t(b)(2)*], and the federal act preempts the Financial Information Privacy Act insofar as the California law attempts to regulate the communication between affiliates of consumer-report information as that term is defined in *15 U.S.C. § 1681a(d)(1)* [

American Bankers Ass'n v. Lockyer (9th Cir. 2008) 541 F.3d 1214, 1216, 1218 (*Fin. Code § 4053(b)(1)* is preempted insofar as it applies to consumer-report information as defined in *15 U.S.C. § 1681a(d)(1)* but is not preempted insofar as it applies to nonconsumer-report information); American Bankers Ass'n v. Gould (9th Cir. 2005) 412 F.3d 1081, 1087] .

- A credit reporting agency is prohibited from furnishing a report for employment purposes, or in connection with a credit or insurance transaction, that contains medical information, without the consumer's specific written consent that describes in "clear and conspicuous language" the use for which the information will be furnished [*15 U.S.C. § 1681b(g)(1)(B)(ii)*]. An agency may furnish medical information that pertains solely to financial transactions, provided the information does not disclose the specific medical provider or the nature of the medical services [*15 U.S.C. § 1681b(g)(1)(C)*].

The disclosure and consent requirements of the FCRA do not apply when an employee is suspected of misconduct and the employer hires an outside investigator [*see 15 U.S.C. § 1681a(d)(2)(D), (x)*; *see also § 92.81[3][d]*]. However, the investigation must not be for the purpose of investigating a consumer's creditworthiness, credit standing, or credit capacity, and must not be provided to anyone other than the employer or its agent, a governmental authority, or a self-regulatory organization with regulatory authority over the employer [*15 U.S.C. § 1681a(x)(1)(C), (D)*]. Employees have a right to notice if the employer takes adverse action based on the investigation [*see 15 U.S.C. § 1681a(x)(1)(D)(v)*]. Employees also have a right to a summary of the nature and substance of the investigator's communications to the employer [*see 15 U.S.C. § 1681a(x)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingGeneral OverviewBusiness & Corporate LawAgency RelationshipsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART II. LEGAL BACKGROUND
F. Credit Reporting and Collection Services

30-92 California Legal Forms--Transaction Guide § 92.81

§ 92.81 Investigative Consumer Reports

[1] Governing Law

Investigative consumer reports are governed by the Investigative Consumer Reporting Agencies Act [*Civ. Code § 1786 et seq.*; *see § 92.81[2], below*] and the federal Fair Credit Reporting Act [*15 U.S.C. § 1681 et seq.*]. The provisions of the Fair Credit Reporting Act relating to consumer reporting agencies generally are discussed in *§ 92.80[3]*. There are a few requirements of that Act that are specific to investigative consumer reports, as discussed in *§ 92.81[3], below*.

[2] Investigative Consumer Reporting Agencies Act

[a] Purpose of Legislation

The Investigative Consumer Reporting Agencies Act ("Investigative Act") [*Civ. Code § 1786 et seq.*] establishes guidelines for organizations that collect, assemble, evaluate, compile, report, transmit, transfer, or communicate information on consumers for purposes of employment, insurance, the hiring of dwelling units, subpoenas and court orders, licensure, and other lawful purposes [*see Civ. Code § 1786(a)*].

The purpose of the Investigative Act is to require that investigative consumer reporting agencies adopt reasonable procedures for assuring that their compilation and use of employment and insurance information, and information relating to the hiring of dwelling units, is fair and equitable to the consumer with respect to confidentiality, accuracy, relevancy, and proper utilization [*see Civ. Code § 1786(f)*].

Further, the California legislature has declared that because identity theft has become the fastest growing white collar crime in the United States, and notice of identity theft is critical before the victim can take steps to stop and prosecute the crime, consumers are best protected if they are automatically given copies of investigative reports made on them [*Civ. Code § 1786(c)-(e)*; *see Civ. Code § 1798.92(b)* ("identity theft" defined)].

[b] Investigative Consumer Reporting Agency Defined

For purposes of the Investigative Act, an "investigative consumer reporting agency" is any person [*see Civ. Code § 1786.2(a)* ("person" defined)] who, for compensation, engages in whole or in part in the practice of collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information concerning consumers for the purpose of furnishing investigative consumer reports to third parties [*Civ. Code § 1786.2(d)*].

The term does not include governmental agencies whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes, licensed private investigators and their employees, licensed insurance agents, insurance brokers, solicitors, insurers, or life insurance agents [*Civ. Code § 1786.2(d)*].

[c] Investigative Consumer Report Defined

An "investigative consumer report" means a consumer report in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through any means [*Civ. Code § 1786.2(c)*]. However, it does not include a consumer credit report that is limited to specific factual information relating to a consumer's credit record or manner of obtaining credit [*see Civ. Code § 1786.2(c)*]. *Civ. Code § 1786.2(c)* has been held unconstitutionally vague as applied to tenant screening reports containing unlawful detainer information [*Trujillo v. First American Registry, Inc. (2007) 157 Cal. App. 4th 628, 640, 68 Cal. Rptr. 3d 732* (stating that persons of reasonable intelligence cannot determine whether unlawful detainer information is character information subject to the Investigative Consumer Reporting Agencies Act, or creditworthiness information subject to the Consumer Credit Reporting Agencies Act)].

[d] Permissible Purposes

An investigative consumer reporting agency ("agency") may furnish an investigative consumer report under the following circumstances [*Civ. Code § 1786.12*]:

- In response to a court order or a lawful subpoena.
- In accordance with the consumer's written instructions.
- To a person whom the agency has reason to believe intends to use the information for one or more of the following purposes (except that a report may not be furnished if it contains medical information about the consumer, unless the consumer consents to the furnishing of the report [*see Civ. Code § 1786.12(f)*]):
    - Employment purposes.
    - As a factor in determining a consumer's eligibility for insurance or the rate for any insurance.
    - A determination of the consumer's eligibility for a license or other governmental benefit in which the applicant's financial responsibility or status is considered.
    - A court support order.
    - The hiring of a dwelling unit.

An agency may also furnish to a governmental agency a consumer's name, address, former address, places of employment, or former places of employment [*Civ. Code § 1786.14*].

[e] Conditions Under Which Report May Be Furnished

An investigative consumer report may not be procured or caused to be prepared unless certain conditions are met [*see Civ. Code § 1786.16*]. If the report is sought in connection with the underwriting of insurance, it must be clearly and accurately disclosed in writing at the time the application form, medical form, binder, or similar document is signed by the consumer that a report regarding the consumer's character, general reputation, personal characteristics, and mode of living may be made [*Civ. Code § 1786.16(a)(1)*].

If no signed application form, medical form, binder, or similar document is involved in the underwriting transaction, the disclosure must be made to the consumer in a writing mailed or otherwise delivered to the consumer no later than three days after the report was first requested. The disclosure must include the name and address of any consumer reporting agency conducting an investigation, the nature and scope of the investigation, and a summary of the provisions of *Civ. Code § 1786.22*, governing supplying files and information and explaining coded information [*Civ. Code § 1786.16(a)(1)*].

If the report is sought for employment purposes other than suspicion of wrongdoing or misconduct by the subject of the investigation, the person seeking the report may procure the report or cause it to be made subject to the following conditions [*Civ. Code § 1786.16(a)(2)*]:

- The person procuring or causing the report to be made has a permissible purpose [*see Civ. Code § 1786.12* (permissible purposes); *see also* [d], *above*].

- The person procuring or causing the report to be made provides a clear and conspicuous disclosure in writing to the consumer at any time before the report is procured or caused to be made in a document that consists solely of the disclosure, that does all of the following:

    - States that an investigative consumer report may be obtained.

    - Identifies the permissible purpose of the report. (The disclosure may include information on the consumer's character, general reputation, personal characteristics, and mode of living).

    - Identifies the name, address, and telephone number of the agency conducting the investigation.

    - Notifies the consumer in writing of the nature and scope of the investigation requested, including a summary of the provisions of *Civ. Code § 1786.22* [*see* [h], *below*].

- The consumer has authorized in writing the procurement of the report.

If the report is sought in connection with the hiring of a dwelling unit, the person who procures or requests the report must, no later than three days after requesting it, provide the consumer with written notice, including the name of the consumer reporting agency, that an investigative consumer report will be made regarding the consumer's character, general reputation, personal characteristics, and mode of living [*see Civ. Code § 1786.16(a)(3)*].

[f] Procedures for Procuring Report

Prospective users of an investigative consumer report must identify themselves, certify to the agency the purposes for which the information is sought and that the information will be used for no other purposes. The agency must make a reasonable effort to verify the identity of a new prospective user and the uses certified by the prospective user prior to

furnishing the user any investigative consumer reports. Furthermore, an agency may not furnish a report to a person unless it has a written agreement that the reports will be used by that person only for approved purposes [*Civ. Code § 1786.20(a)*; *see Civ. Code § 1786.12* (approved purposes)].

In addition, the person procuring or causing the report to be made must certify that the person has made the applicable disclosures to the consumer required by *Civ. Code § 1786.16(a)* [*see* [e], *above*] and that the person will comply with written disclosure requirements specified by *Civ. Code § 1786.16(b)* [*Civ. Code § 1786.16(a)(4)*], as discussed in this section.

The person procuring the report or causing it to be prepared must provide a copy of the report to the consumer, if requested, within three business days of the date the report is provided to the recipient [*Civ. Code § 1786.16(a)(5)*; *see Civ. Code § 1786.16(b)(1)*]. The notice to request the report may be contained on either the disclosure form, as required by *Civ. Code § 1786.16(a)(2)*, or a separate consent form. The copy of the report must contain the name, address, and telephone number of the person who issued the report and information on how to contact that person [*Civ. Code § 1786.16(b)(1)*].

If the taking of adverse action is a consideration, the user must comply with *Civ. Code § 1786.40* (specifying mandatory disclosures to consumers against whom adverse action, such as denial of or increased cost of insurance, or denial of employment or housing, has been taken based on an investigative consumer report) [*Civ. Code § 1786.16(b)(2)*]. These rules do not apply to a report procured or caused to be prepared by an employer if the report is sought for employment purposes and the employer suspects wrongdoing or misconduct by the subject of the investigation [*Civ. Code § 1786.16(c)*].

[g] Content of Investigative Consumer Report

An agency must follow reasonable procedures to assure maximum possible accuracy of the information on a consumer in an investigative consumer report [*Civ. Code § 1786.20(b)*]. The first page of the report must include the following [*Civ. Code § 1786.29*]:

- A notice in at least 12-point boldface type stating that the report does not guarantee the accuracy or truthfulness of the information as to the subject of the investigation, but only that it is accurately copied from public records, and information generated as a result of identity theft, including evidence of criminal activity, may be inaccurately associated with the consumer who is the subject of the report.

- The agency will provide a consumer seeking to obtain a copy of a report or making a request to review a file, a written notice in simple, plain English and Spanish setting forth the terms and conditions of his or her right to receive all disclosures, as provided in *Civ. Code § 1786.26*.

Except as noted below, an investigative consumer report may not contain any of the following items [*Civ. Code § 1786.18(a)*]:

- Bankruptcies that, from the date of the order for relief, antedate the report by more than 10 years.

- Lawsuits that, from the date of filing and satisfied judgments that, from the date of entry, antedate the report by more than seven years.

- Unsatisfied judgments that, from the date of entry, antedate the report by more than seven years.

- Unlawful detainer actions in which the defendant was the prevailing party or the action was resolved by settlement agreement.

- Paid tax liens that, from the date of payment, antedate the report by more than seven years.

- Accounts placed for collection, or charged to profit and loss, that antedate the report by more than seven years.

- Records of arrest, indictment, information, misdemeanor complaint, or conviction of a crime that, from the date of disposition, release, or parole, antedate the report by more than seven years. These items of information must not be reported if at any time it is learned that, in the case of a conviction, a full pardon has been granted or, in the case of an arrest, indictment, information, or misdemeanor complaint, a conviction did not result, except that records of arrest, indictment, information, or misdemeanor complaints may be reported pending pronouncement of judgment on the particular subject matter of those records.

- Any other adverse information that antedates the report by more than seven years.

However, the preceding items need not be excluded from reports in the following circumstances [*Civ. Code § 1786.18(b)*]:

- If the report is to be used in the underwriting of life insurance involving, or that may reasonably be expected to involve, an amount of $250,000 or more.

- If the report is to be used by an employer who is explicitly required by a governmental regulatory agency to check for records that are otherwise excluded, as set forth above, in reviewing a consumer's qualification for employment.

An agency must not furnish a report that includes information that is a matter of public record and that relates to an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment, unless the agency has verified the accuracy of the information during the 30-day period ending on the date on which the report is furnished [*Civ. Code § 1786.18(c)*].

In the case of reports for employment purposes, an agency must maintain strict procedures designed to insure that whenever it reports public record information that is likely to have an adverse effect on a consumer's ability to obtain employment, the reported information is complete and up to date [*Civ. Code § 1786.28(b)*].

Furthermore, an agency must not furnish a report on a consumer that contains adverse information and that is obtained through a personal interview with a neighbor, friend, or associate of the consumer, or with an acquaintance who has knowledge of the information, unless either (1) the agency has followed reasonable procedures to obtain confirmation of the information from an additional independent source who has direct knowledge of the information, or (2) the person interviewed is the best possible source of the information [*Civ. Code § 1786.18(d)*].

No adverse information in the report (other than information that is a matter of public record) may be included in a subsequent report unless that adverse information has been verified in the process of making the subsequent report, or unless the adverse information was received within the three-month period preceding the date the subsequent report is furnished [*Civ. Code § 1786.30*].

[h] Consumer's Inspection of Files

The agency must make its files available for visual inspection by a consumer by the following means [*Civ. Code §§ 1786.22(b), 1786.10*; *see Civ. Code § 1786.26* (fees permitted to be charged to consumer)]:

- In person, if the consumer appears in person and furnishes proper identification.

- By certified mail, if the consumer makes a written request with proper identification for copies to be sent to a specified addressee.

- By telephone in summary form if the consumer has made a written request with proper identification for telephone disclosure.

All items of information must be available for inspection, except that the sources of information, other than public records and data bases, acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed. However, those sources must be available to the consumer under appropriate discovery procedures in the court in which any action is brought [*Civ. Code § 1786.10(b)*].

The agency must also identify the recipients of any investigative consumer report within the three-year period preceding the request [*Civ. Code § 1786.10(c), (d)*] and the dates, original payees, and amounts of any checks or charges on which any adverse characterization of the consumer is based [*Civ. Code § 1786.10(e)*].

The agency must provide trained personnel to explain to the consumer any information furnished to him or her [*Civ. Code § 1786.22(d)*], as well as a written explanation of any coded information contained in files maintained on a consumer [*Civ. Code § 1786.22(e)*].

The consumer may be accompanied by one other person, who must furnish reasonable identification. An agency may require the consumer to furnish a written statement granting permission to the agency to discuss the consumer's file in that person's presence [*Civ. Code § 1786.22(f)*].

[i] Disputed Information

If a consumer disputes the completeness or accuracy of any information in his or her file, and the dispute is conveyed directly to the agency, the agency must, without charge, reinvestigate and record the current status of the disputed information or delete the item from the file within 30 days of receipt of notice of the dispute from the consumer [*Civ. Code § 1786.24(a)*].

The agency must notify any person who provided information in dispute at the address and in the manner specified by that person. The notice must include all relevant information regarding the dispute that the agency has received from the consumer. The agency must also promptly provide the person who provided the disputed information all relevant information regarding the dispute that is received by the agency from the consumer during the reinvestigation [*Civ. Code § 1786.24(b)*].

In conducting a reinvestigation, the agency must review and consider all relevant information submitted by the consumer with respect to the disputed item of information [*Civ. Code § 1786.24(c)*]. If the agency reasonably determines that the dispute is frivolous or irrelevant, including by reason of a failure by a consumer to provide sufficient information to investigate the disputed information, the agency may terminate a reinvestigation of disputed information [*Civ. Code § 1786.24(d)*].

The presence of information in the consumer's file that contradicts the contention of the consumer does not, in and of itself, constitute reasonable grounds for believing the dispute is frivolous or irrelevant [*Civ. Code § 1786.24(h)*].

Upon making a determination that a dispute is frivolous or irrelevant, the agency must notify the consumer, by mail or, if authorized by the consumer for that purpose, by any other means available to the agency. In this notification, the

agency must state the specific reasons why it has determined that the consumer's dispute is frivolous or irrelevant and provide a description of any information required to investigate the disputed information [*Civ. Code § 1786.24(d)*].

If a reinvestigation is made and, after reinvestigation, the disputed information is found to be inaccurate, incomplete, or cannot be verified by the evidence submitted, the agency must promptly delete that information from the consumer's file or modify the information, as appropriate, based on the results of the reinvestigation, and must notify the consumer that the information has been deleted or modified [*Civ. Code § 1786.24(e)*].

In that instance, the agency must also notify any and all sources from which the disputed information was obtained and inform them in writing of the reasons and results of the reinvestigation, and send a copy of this notification to the consumer. The copy of the notification sent to the consumer need not reveal the identity of the source of information, unless otherwise required by law [*Civ. Code § 1786.24(e)*; *see Civ. Code § 1786.10(b)*].

No information may be reinserted into the consumer's file after having been deleted, unless the person who furnished the information verifies that the information is complete and accurate. If any information deleted from a consumer's file is reinserted, the consumer reporting agency must promptly notify the consumer of the reinsertion in writing or, if authorized by the consumer for that purpose, by any other means available to the agency [*Civ. Code § 1786.24(f)*].

The agency must also provide to the consumer the following in writing [*Civ. Code § 1786.24(f)*]:

- A statement that the disputed information has been reinserted.
- The name, address, and telephone number of any furnisher of information that was reinserted.
- A notice that the consumer has the right to a reinvestigation of the information reinserted by the agency and the right to add a statement to his or her file disputing the accuracy or completeness of the information.

An agency must provide notice to the consumer of the results of any reinvestigation by mail or, if authorized by the consumer for that purpose, by other means available to the agency. The notice must include the following [*Civ. Code § 1786.24(g)*; *see Civ. Code § 1786.24(m)* (agency exempt from this requirement under certain circumstances if dispute resolved within three business days)]:

- A statement that the reinvestigation is completed.
- A copy of the investigative consumer report based on the consumer's file as revised as a result of the reinvestigation.
- A description or indication of any changes made in the report as a result of those revisions to the consumer's file.
- A notice that if requested by the consumer, a description of the procedure used to determine the accuracy and completeness of the information will be provided to the consumer, including the name, business address, and telephone number of any furnisher of information contacted in connection with that information.
- A notice that the consumer has the right to add a statement to the consumer's file disputing the accuracy or completeness of the information.
- A notice that the consumer has the right to request that the agency furnish notifications to certain

persons who received reports in the past [*see Civ. Code § 1786.24(k)*].

If the agency determines that the dispute is frivolous or irrelevant, or if the reinvestigation does not resolve the dispute, or if the information is reinserted into the consumer's file, the consumer may file a brief statement setting forth the nature of the dispute [*Civ. Code § 1786.24(i)*; *see Civ. Code § 1786.24(m)* (agency exempt from this requirement under certain circumstances if dispute is resolved within three business days)]. The agency may limit these statements to not more than 500 words if it provides the consumer with assistance in writing a clear summary of the dispute [*Civ. Code § 1786.24(i)*].

Furthermore, if a statement of dispute is filed, the agency, in any subsequent investigative consumer report containing the information in question, must clearly note that the information is disputed by the consumer and include in the report either the statement of the consumer or a clear and accurate summary of the dispute [*Civ. Code § 1786.24(j)*; *see Civ. Code § 1786.24(m)* (agency exempt from this requirement under certain circumstances if dispute is resolved within three business days)].

In addition, following the deletion of information from the consumer's file, or following the filing of a dispute by the consumer, the agency must, at the consumer's request, furnish notification that the item of information has been deleted or that the item of information is disputed [*Civ. Code § 1786.24(k)*].

In the case of disputed information, the notification must include the statement or summary of the dispute as described above. This notification must be furnished to any person who, within two years prior to the deletion or the filing of the dispute, has received a report concerning the consumer for employment purposes, or who, within one year of the deletion or the filing of the dispute, has received a report concerning the consumer for any other purpose, if these reports contained the deleted or disputed information, unless the consumer specifically requests in writing that this notification not be given to all persons or to any specified persons. The agency must clearly and conspicuously disclose to the consumer his or her rights to make a request that this notification not be made [*Civ. Code § 1786.24(k)*].

An agency must maintain reasonable procedures designed to prevent the reappearance in a consumer's file and reports information that has been deleted and not reinserted [*Civ. Code § 1786.24*(*l*)].

[j] Record Keeping

An agency must retain an investigative consumer report for two years after the report is provided [*Civ. Code § 1786.20(b)*]. It must also make available to the consumer a copy of any report for at least two years after the report is furnished to the person who requested it [*Civ. Code § 1786.11*; *see Civ. Code § 1786.26* (fees permitted to be charged to consumer)].

[k] Violations of Investigative Consumer Reporting Agencies Act

Any agency or user of information who fails to comply with any requirement under the Investigative Consumer Reporting Agencies Act with respect to an investigative consumer report is liable to the consumer who is the subject of the report in an amount equal to the sum of all the following [*Civ. Code § 1786.50*]:

- Any actual damages sustained by the consumer as a result of the failure or, except in the case of class actions, $10,000, whichever sum is greater.

- In the case of any successful action to enforce any liability, the costs of the action together with reasonable attorneys' fees as determined by the court.

- If the court determines that the violation was grossly negligent or willful, the consumer may recover

punitive damages.

However, an agency or user of information will not be liable to the consumer for failure to comply with the Investigative Consumer Reporting Agencies Act if the failure to comply results in a more favorable report than if there had not been a failure to comply [*Civ. Code § 1786.50(c)*].

[3] Federal Fair Credit Reporting Act

[a] Investigative Consumer Report Defined

Under the federal Fair Credit Reporting Act ("Fair Credit Act") [*15 U.S.C. § 1681 et seq.*], an "investigative consumer report" is a consumer report [*see 15 U.S.C. § 1681a(d)(1)* ("consumer report" defined)], or portion of such a report, in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on, or with others with whom the consumer is acquainted, or who may have knowledge concerning any such items of information [*15 U.S.C. § 1681a(e)*].

However, this kind of information does not include specific factual information on a consumer's credit record that is obtained directly from a creditor or a consumer reporting agency, if that information was obtained directly from a creditor or the consumer [*15 U.S.C. § 1681a(e)*].

[b] Disclosures to Consumer

An investigative consumer report cannot be procured or caused to be prepared on any consumer unless the person procuring or causing the report to be prepared satisfies the following requirements [*15 U.S.C. § 1681d(a)*]:

- It must be clearly and accurately disclosed to the consumer that an investigative consumer report, including information as to the consumer's character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made.

- The disclosure may be made in a writing mailed or otherwise delivered to the consumer not later than three days after the date on which the report was first requested.

- The disclosure must include a statement informing the consumer of his or her right to request a full additional disclosure and the written summary of rights of the consumer prepared in accordance with *15 U.S.C. § 1681g(c)*.

Anyone who does arrange for such a report must, on written request made by the consumer within a reasonable period of time after the consumer's receipt of the disclosure, make a complete and accurate disclosure of the nature and scope of the investigation requested. This subsequent disclosure must be made in a writing and mailed or otherwise delivered to the consumer not later than five days after the date the request was received, or on which the report was first requested, whichever is the later [*15 U.S.C. § 1681d(b)*].

The person arranging for the report must also certify to the consumer reporting agency that it has made the disclosure required under *15 U.S.C. § 1681d(a)* and that it will make the additional disclosure to the consumer required under *15 U.S.C. § 1681d(b)* [*15 U.S.C. § 1681d(a)(2)*].

No one is to be held liable for any violation of the above requirements if that person can show, by a preponderance of the evidence, that at the time of the violation he or she maintained reasonable procedures to assure compliance with this law [*15 U.S.C. § 1681d(c)*].

[c] Adverse Information

Whenever the consumer reporting agency prepares an investigative consumer report, no adverse information in the consumer report (other than information which is a matter of public record) may be included in a subsequent consumer report unless it has been verified in the process of making such a subsequent report, or the adverse information was received within the three-month period preceding the date the subsequent report is furnished [*15 U.S.C. § 1681 l*].

[d] Employee Misconduct Investigation

The Fair Credit and Transactions Act of 2003 (FACTA) excludes certain communications related to an employer's investigation of an employee from the FCRA disclosure and consent requirements. (This exclusion overrides an FTC opinion letter, called the Vail letter, stating that the FCRA disclosure and consent requirements applied even when an employee was suspected of misconduct and the employer hired an outside investigator.) To fall within this exclusion, the communications must be made to an employer and must be made in connection with an investigation of one of the following [*15 U.S.C. § 1681a(x)(1)(B)*]:

- Suspected misconduct relating to employment.
- Compliance with federal, state, or local laws.
- Compliance with the rules of a self-regulatory organization [*see 15 U.S.C. § 1681a(x)(3)* (definition)].
- Compliance with any pre-existing written policies of the employer.

Further, the communication must not be for the purpose of investigating a consumer's creditworthiness, credit standing, or credit capacity, and must not be provided to anyone other than the employer, or its agent, a governmental authority, or a self-regulatory organization with regulatory authority over the employer [*15 U.S.C. § 1681a(x)(1)(C)*]. Employees have a right to notice if the employer takes adverse action based on these communications [*15 U.S.C. § 1681a(x)(1)(D)(v)*]. Employees also have a right to a summary of the nature and substance of the communications [*15 U.S.C. § 1681a(x)(2)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingGeneral OverviewBanking LawConsumer ProtectionFair Credit ReportingConsumer ReportsContracts LawTypes of ContractsPersonal Service Agreements

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART II. LEGAL BACKGROUND
F. Credit Reporting and Collection Services

30-92 California Legal Forms--Transaction Guide § 92.82

§ 92.82 Services to Obtain Credit or Improve Credit Rating

[1] Governing Law

The ability to obtain and use credit has become of great importance to consumers, who have a vital interest in establishing and maintaining their creditworthiness and credit standing. As a result, consumers who have experienced credit problems may seek assistance from credit services organizations that offer to obtain credit or improve their credit standing [*Civ. Code § 1789.11(a)*].

The practices of credit service organizations are governed by the Credit Services Act of 1984 ("Credit Services Act") [*Civ. Code §§ 1789.10-1789.26*], which was enacted to provide prospective buyers of services of credit services organizations with the information necessary to make an intelligent decision regarding the purchase of those services and to protect the public from unfair or deceptive advertising and business practices [*Civ. Code § 1789.11(b)*].

[2] Credit Service Organization Defined

A "credit services organization" is a person [*see Civ. Code § 1789.12(f)* ("person" defined)] that, with respect to the extension of credit by other parties, sells, provides or offers to provide, for a fee or other valuable consideration, services designed to improve a person's credit record or rating or to obtain a loan or other extension of credit to a buyer [*Civ. Code § 1789.12(a)*; *see Civ. Code § 1789.12(c)*]. The term also includes one who provides advice or assistance to a buyer for either of these purposes [*see Civ. Code § 1789.12(a)*]. Banks and other lenders, licensed proraters, real estate brokers, attorneys, securities salespersons, and nonprofit organizations are excluded from the definition of "credit services organization" [*Civ. Code § 1789.12(b)*].

[3] Prohibited Conduct

Credit service organizations and their salespersons, agents, representatives, and independent contractors must not do any of the following [*Civ. Code § 1789.13*]:

- Charge or receive compensation before completing the services the organization has agreed to

perform.

- Fail to perform the agreed services within six months after the buyer signs the contract for the services.

- Charge or receive compensation for a referral of a buyer to a retailer if the credit extended is substantially on the same terms as those available to the general public, or on substantially the same terms that would have been extended without assistance of the organization; or if the credit grantor is paid money or consideration or derives money or consideration for any costs, fees, finance charges, or principal from the buyer's payments to the credit grantor.

- Make, or assist buyers in making, untrue or misleading statements.

- Remove, or assist buyers in removing, accurate and current adverse information from their credit records.

- Create, or help buyers to create, a new credit record by using different buyer information.

- Make or use untrue or misleading representations in offering or selling the services of a credit services organization.

- Engage in a fraudulent or deceptive act, practice, or course of business.

- Advertise the services of a credit services organization without being registered with the Department of Justice [*see Civ. Code § 1789.25*].

- Fail to maintain an agent for service of process in California.

- Transfer or assign their certificates of registration.

- Submit a buyer's dispute to a consumer credit reporting agency without the buyer's knowledge.

- Use a consumer credit reporting agency's telephone credit reporting system or toll-free telephone number to represent the caller as the buyer in submitting a dispute of a buyer or requesting disclosure without prior authorization of the buyer.

- Directly or indirectly extend credit to a buyer.

- Refer a buyer to a credit grantor that is related to the credit services organization by any common ownership, management, or control, including any common owner, director, or officer.

- Refer a buyer to a credit grantor for which the credit services organization provides, or arranges for a third party to provide, any services related to the extension of credit, such as underwriting, billing, payment processing, or debt collection.

- Provide a credit grantor with an assurance that any portion of an extension of credit to a buyer referred by the credit services organization will be repaid, including providing a guaranty, letter of credit, or agreement to acquire a part of the credit grantor's financial interest in the extension of credit.

- Use a scheme, device, or contrivance to evade any of the acts enumerated above.

[4] Surety Bond

To conduct business in California, a credit services organization must obtain a surety bond in the principal amount of $100,000, issued by an admitted surety. The bond must be in favor of the State of California and must be maintained for two years after the credit services organization ceases to conduct business in California. A copy of the bond must be filed with the Secretary of State [*Civ. Code § 1789.18*].

[5] Registration Requirement

Before conducting business in California, a credit services organization must register with the Department of Justice. The Department will issue a certificate of registration if the organization has completed the registration application, paid the registration fee, and filed a copy of the surety bond with the Secretary of State [*Civ. Code § 1789.25(a)*; *see Civ. Code § 1789.18*]. The Department will not issue the certificate, however, until it establishes that the organization has satisfied the requirements of *Civ. Code § 1789.25(f)* [*Civ. Code § 1789.25(a)*]. That subsection provides that the Department will not issue a certificate of registration to any person who has engaged in or proposes to engage in any activity violating *Civ. Code § 1789.13* [*see* [3], *above*], any law prohibiting the use of untrue or misleading statements, or any law related to the extension of credit to persons for personal, family, or household purposes [*Civ. Code § 1789.25(f)*]. Certificates of registration are renewable annually [*Civ. Code § 1789.25(d)*].

[6] Disclosure and Contract Requirements

Before execution of the contract, the organization must give the buyer a written statement with specified disclosures [*see Civ. Code §§ 1789.14*, *1789.15*]. The buyer must acknowledge receipt of the statement by signing the statement. The organization must retain the statement for a period of two years [*Civ. Code § 1789.14*].

The contract between a credit services organization and the buyer of the services must contain certain specified information [*see Civ. Code § 1789.16*]. For discussion and sample forms for the disclosure statement and the contract, see *§ 92.252*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingGeneral OverviewBanking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBusiness & Corporate LawAgency RelationshipsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
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PART II. LEGAL BACKGROUND
F. Credit Reporting and Collection Services

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§ 92.83 Debt Collection Services

[1] Governing Law

The practices of collection agencies and other debt collectors are governed by the Rosenthal Fair Debt Collection Practices Act [*Civ. Code §§ 1788-1788.33*; *see* [2], *below*] and the federal Fair Debt Collection Practices Act [*15 U.S.C. §§ 1692-1692p*; *see* [5], *below*].

The Fair Debt Collection Practices Act does not annul, alter, or affect, or exempt any person subject to the provisions of that act from complying with the laws of any state with respect to debt collection practices, except to the extent that those laws are inconsistent with any provision of the act, and then only to the extent of the inconsistency. A state law is not inconsistent with the act if the protection that law affords any consumer is greater than the protection provided by the act [*15 U.S.C. § 1692n*].

[2] Rosenthal Fair Debt Collection Practices Act

[a] Purpose of Legislation

Under the Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act") [*Civ. Code §§ 1788-1788.33*], debt collectors are prohibited from engaging in unfair or deceptive acts and practices in the collection of consumer debts. The Rosenthal Act also requires debtors to act fairly in entering into and honoring consumer debts [*Civ. Code § 1788.1(b)*]. This section, however, was held to be preempted by the Fair Credit Reporting Act in Nelson v. Equifax Information Services, LLC (2007) 522 F. Supp. 2d 1222, 1234 [*see 15 U.S.C. § 1681 et seq.*; *see also § 92.80[3], above*].

[b] Debt Collector Defined

A "debt collector" is any person who, in the ordinary course of business, regularly engages in debt collection for himself or herself, or for others. The term includes a person who composes and sells, or offers to compose and sell, forms, letters, and other types of communication meant to be used for debt collection. The term does not include attorneys or counselors at law [*Civ. Code § 1788.2(c)*].

[c] Consumer Credit Transaction Defined

A "consumer credit transaction" is a transaction between a natural person and another person in which property, services or money is acquired on credit by that natural person from such other person primarily for personal, family, or household purposes [*Civ. Code § 1788.2(e)*]. Thus, a typical automobile repair transaction, in which the garage repair shop performs services in advance of payment, does not constitute a consumer credit transaction because repair shops typically do not release the vehicle before payment is made and therefore the vehicle owner does not acquire the services [*Gouskos v. Aptos Village Garage, Inc. (2001) 94 Cal. App. 4th 754, 759-760, 114 Cal. Rptr. 2d 558]* .

[d] Prohibited Conduct of Debt Collector

A debt collector may not collect or attempt to collect a consumer debt (money, property or their equivalent, owing from a natural person by reason of a consumer credit transaction) by any of the following methods [*Civ. Code § 1788.10*; *see Civ. Code § 1788.2(f)* ("consumer debt" defined)]:

- Using or threatening to use physical force, violence, or criminal means to harm the person, reputation, or property of a person.

- Threatening that a debtor's failure to pay a debt will result in a criminal accusation, if the accusation would be false.

- Communicating or threatening to communicate to anyone that a debtor has engaged in conduct, other than failing to pay a consumer debt, that the debt collector knows or has reason to believe will defame the debtor.

- Threatening to sell or assign a debtor's obligation with a false representation that the sale or assignment will cause the debtor to lose a defense to the debt.

- Threatening anyone that nonpayment of the debt may result in a debtor's arrest, the seizure, garnishment, attachment, or sale of a debtor's property, or the garnishment or attachment of a debtor's wages, unless that action is lawful and actually contemplated by the debt collector.

- Threatening to take any action against a debtor prohibited by the Rosenthal Act.

A debt collector is also prohibited from engaging in the following improper uses of the courts as a method for collecting a debt [*Civ. Code § 1788.15*]:

- The use of judicial proceedings if the debt collector knows that service of process, if essential to jurisdiction over the debtor or his or her property, has not been legally effected.

- An attempt to collect a consumer debt, other than one reduced to judgment, by means of judicial proceedings in a county other than the county in which the debtor has incurred the consumer debt or the county in which the debtor resides at the time the proceedings are instituted, or resided at the time the debt was incurred.

Furthermore, a debt collector may not engage in any of the following practices when collecting or attempting to collect a consumer debt by [*Civ. Code § 1788.11*]:

- Using obscene or profane language.

- Placing telephone calls without disclosing the caller's identity or alias.

- Causing expense for long-distance telephone calls, telegram fees, or other communications charges by misrepresenting the purpose of the communication.

- Causing a telephone to ring repeatedly or continuously to annoy the person called.

- Communicating by telephone or in person with a debtor so frequently as to be unreasonable and to constitute harassment.

The litigation privilege [*see Civ. Code § 47*; *see generally California Forms of Pleading and Practice, Ch. 340, Libel and Slander, § 340.60* (Matthew Bender)] cannot be used to shield violations of the foregoing prohibitions [*Komarova v. National Credit Acceptance, Inc. (2009) 175 Cal. App. 4th 324, 337-340, 95 Cal. Rptr. 3d 880* (in action against debt collector who harassed plaintiff because of mistaken identity, court affirmed judgment for plaintiff on special verdicts finding violations of *Civ. Code §§ 1788.11* and *1788.15*)].

[e] Prohibited Communications by Debt Collector

A debt collector may make reasonable legitimate business communications about debtors [*see Civ. Code § 1788.12(e)*]. However, a debt collector may not collect or attempt to collect a consumer debt by communicating with the debtor's employer or family, except in limited circumstances [*see Civ. Code § 1788.12(a), (b)*; *see Komarova v. National Credit Acceptance, Inc. (2009) 175 Cal. App. 4th 324, 337-340, 95 Cal. Rptr. 3d 880* (court affirmed judgment against debt collector on special verdict finding violation of *Civ. Code § 1788.12(a)*; defendant could not rely on litigation privilege under *Civ. Code § 47* to shield violation)].

A debt collector may not provide a "deadbeat list" or communicate with a debtor in a manner intended to embarrass the debtor [*see Civ. Code § 1788.12(c), (d)*]. In addition, a debt collector must not send false simulated legal or judicial documents to a debtor [*see Civ. Code § 1788.16*].

If a debt collector has been notified in writing that a debtor is represented by an attorney regarding the debt, the debt collector must communicate with the attorney, not with the debtor, except concerning a statement of accounts. This does not apply if the attorney fails to communicate with the debt collector about the case [*see Civ. Code § 1788.14(c)*].

A debt collector is prohibited from making a variety of false representations in the collection of consumer debts [*see Civ. Code § 1788.13*]. If a consumer debt has been discharged in bankruptcy, a debt collector may not obtain an affirmation from the debtor without disclosing that the debtor is not obligated to make the affirmation [*Civ. Code § 1788.14(a)*].

[f] Identity Theft

A debt collector must cease collection activities on receipt from a debtor of both the following documents [*Civ. Code § 1788.18(a)*]:

- A copy of a police report filed by the debtor alleging that the debtor is the victim of an identity theft crime.

- The debtor's written statement or certification that the debtor claims to be the victim of identity theft with respect to the specific debt being collected by the debt collector [*see Civ. Code § 1788.18(b)* (statement requirements)].

If a debtor notifies a debt collector orally that he or she is a victim of identity theft, the debt collector must notify the consumer, orally or in writing, that the debtor's claim must be in writing. If a debtor notifies a debt collector in writing that he or she is a victim of identity theft but omits the information required by *Civ. Code § 1788.18(a), (b)*, the debt collector that does not cease collection activities must provide written notice to the debtor of the additional requirements [*Civ. Code § 1788.18(c)*].

On receipt of the complete statement and required information, the debt collector must review and consider all of the information provided by the debtor and the creditor and all information in the file. The debt collector may recommence debt collection activities only upon making a good faith determination that the information does not establish that the debtor is not responsible for the specific debt in question [*see Civ. Code § 1788.18(d)*].

The debt collector must notify the debtor in writing of that determination and the basis therefor before proceeding with any further collection activities [*Civ. Code § 1788.18(d)*].

[g] Violations of the Rosenthal Fair Debt Collection Practices Act

A debt collector that violates any provision of the Rosenthal Act is liable for actual damages, plus additional damages for willful, knowing violations [*see Civ. Code § 1788.30(a), (b)*].

However, there is no civil liability if the debt collector corrects its violation within 15 days of notification of the error, or if the debt collector shows by a preponderance of evidence that the violation was unintentional and occurred despite procedures reasonably adapted to avoid that type of violation [*see Civ. Code § 1788.30(d), (e)*].

[3] Consumer Collection Notice

Third-party debt collectors subject to the federal Fair Debt Collection Practices Act [*15 U.S.C. § 1692p* et seq.; *see § 92.83[5]*] must provide a notice to debtors that includes the following description of debtor rights [*Civ. Code § 1812.700(a)*]:

> "The state Rosenthal Fair Debt Collection Practices Act and the federal Fair Debt Collection Practices Act require that, except under unusual circumstances, collectors may not contact you before 8 a.m. or after 9 p.m. They may not harass you by using threats of violence or arrest or by using obscene language. Collectors may not use false or misleading statements or call you at work if they know or have reason to know that you may not receive personal calls at work. For the most part, collectors may not tell another person, other than your attorney or spouse, about your debt. Collectors may contact another person to confirm your location or enforce a judgment. For more information about debt collection activities, you may contact the Federal Trade Commission at 1-877-FTC-HELP or www.ftc.gov."

This notice may be changed only as necessary to reflect changes under the federal Fair Debt Collection Practices Act that would otherwise make the disclosure inaccurate [*Civ. Code § 1812.701(a)*].

The notice must be included with the first written notice initially addressed to a California address of a debtor in connection with collecting the debt by the third-party debt collector [*Civ. Code § 1812.700(b)*]. The type size used in the disclosure must be in at least the same type size as that used to inform the debtor of his or her specific debt, but is not required to be larger than 12-point type [*Civ. Code § 1812.701(b)*]. If a language other than English is principally used by the third-party debt collector in the initial oral contact with the debtor, the notice must be provided to the debtor in that language within five working days [*Civ. Code § 1812.700(c)*].

Any violation of this statute will be considered a violation of the Rosenthal Act [*Civ. Code § 1812.702*; *see § 92.83[2][g]*].

[4] Attorney as Debt Collector

Attorneys and any of their employees who are employed primarily to assist in the collection of a consumer debt owed to another person must comply with the Rosenthal Act governing debt collector responsibilities [*Bus. & Prof. Code § 6077.5(a)*; *see § 92.83[2]*]. Attorneys' employees, if not members of the State Bar, must identify themselves to debtors, state the name of their employer, and specify their title or job capacity [*Bus. & Prof. Code § 6077.5(b)*]. Communications between the attorneys or their employees and the debtor may not be made at any unusual or inconvenient time or place without the consent of the debtor [*see Bus. & Prof. Code § 6077.5(c)*].

If the debtor refuses to pay the debt or indicates a desire that the attorney or employees cease collection efforts, the attorney or employees may not continue to communicate with the debtor except as follows [*Bus. & Prof. Code § 6077.5(d)*]:

- To advise the debtor that the attorneys or their employees' further efforts are being terminated.

- To notify the debtor that the attorneys or their employees or the creditor may invoke specific remedies which ordinarily are invoked by the attorney or creditor.

- If applicable, to notify the debtor that the attorney or creditor intends to invoke a specific remedy.

- If a suit has been filed or is about to be filed and the debtor is not represented by counsel or has appeared in the action on the debt in propria persona.

Neither attorneys nor the employees may take or threaten to take any nonjudicial action to dispose of or disable property if there is no present right to possession of the property under an enforceable security interest, if there is no present intent to take possession of the property, or if the property is exempt by law from the threatened disposition or disablement [*Bus. & Prof. Code § 6077.5(e)*].

Within five days after the first debt collection communication with a debtor, the attorneys or employees must send the debtor a written notice specifying the facts involved (unless that information is contained in the initial communication or the debtor pays the debt) [*see Bus. & Prof. Code § 6077.5(g)*]. The attorneys or employees may not make collect telephone calls or other communications without disclosing the true purpose of the communication [*see Bus. & Prof. Code § 6077.5(f)*].

If a written notice is sent to the debtor and the debtor replies in writing disputing the debt or requesting the name and address of the creditor, the attorneys and employees must cease collection of the debt or disputed portion of the debt, except for filing suit, until the attorney obtains written evidence of the debt or judgment or the name and address of the original creditor and mails it to the debtor [*Bus. & Prof. Code § 6077.5(g)(5)*]. If the debtor owes multiple debts and makes any single payment to the attorney, the latter may not apply the payment to any disputed debt and must apply the payment in accordance with any direction from the debtor [*Bus. & Prof. Code § 6077.5(h)*].

Willful breach of any of these requirements constitutes grounds for discipline [*Bus. & Prof. Code § 6077.5(i)*].

[5] Federal Fair Debt Collection Practices Act

[a] Comparison to Rosenthal Act

The federal Fair Debt Collection Practices Act ("Debt Collection Act") [*15 U.S.C. § 1692p et seq.*] imposes restrictions on debt collectors that are generally similar to the restrictions of the California Rosenthal Fair Debt Collection Practices Act ("Rosenthal Act") [*Civ. Code § 1788 et seq.*; *see § 92.83[2]*]. Civil liability imposed by the Fair Credit Act is

similar to California liability [*see 15 U.S.C. § 1692k*; *see also § 92.83[2][g]*].

[b] Debt Collector Defined

For purposes of the Debt Collection Act, a "debt collector" is anyone who uses an instrumentality of interstate commerce or the United States mail in a business whose principal purpose is the collection of debts, or anyone who regularly collects or attempts to collect debts owed or due, or asserted to be owed or due, to another person [*15 U.S.C. § 1692a(6)*; *but see 15 U.S.C. § 1692a(6)(F)* (exemptions); *see also, e.g., Rowe v. Educational Credit Mgmt. Corp. (9th Cir. 2009) 559 F.3d 1028, 1035* (Educational Credit Management Corporation did not qualify for exemption under *15 U.S.C. § 1692a(6)(F)(i)*, covering debt-collection activity "incidental to a bona fide fiduciary obligation" of person or entity engaged in that activity, when ECMC's only role in this case was to collect student's educational loan assigned to it by lender after borrower's default; it was irrelevant that ECMC generally had bona fide fiduciary obligation as guaranty agency for educational loans)].

[c] Unfair or Unconscionable Means of Collection Prohibited

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt, including, but not limited to, the following: [*see 15 U.S.C. § 1692f*]:

- Collecting any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless that amount is expressly authorized by the agreement creating the debt or permitted by law.

- Accepting a check (or other payment instrument) postdated by more than five days unless the person writing the check is notified in writing of the debt collector's intent to deposit the check or instrument not more than 10 nor less than three business days prior to the deposit.

- Soliciting any postdated check (or other postdated payment instrument) for the purpose of threatening or instituting criminal prosecution.

- Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on the check or instrument.

- Causing charges to be made for communications (such as collect telephone calls and telegram fees) by concealing the true purpose of the communication.

- Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property under certain circumstances [*see 15 U.S.C. § 1692f(6)*].

- Communicating with a consumer regarding a debt by post card.

- Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his or her business name if the name does not indicate that the person is in the debt collection business.

[d] Harassment and Abuse Prohibited

A debt collector may not engage in any conduct the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt, including, but not limited to, the following [*15 U.S.C. § 1692d*]:

- The use or threat of use of violence or other criminal means to harm the physical person, reputation, or property of any person.

- The use of obscene or profane language or language the natural consequence of which is to abuse the hearer or reader.

- The publication of a list of consumers who allegedly refuse to pay debts, with limited exceptions [*see 15 U.S.C. § 1692d(3)*].

- The advertisement for sale of any debt to coerce payment of the debt.

- Causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number.

- Except for inquiries about the consumer's location [*see* [g], *below*] the placement of telephone calls without meaningful disclosure of the caller's identity.

[e] False or Misleading Representations Prohibited

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt, including, but not limited to, the following [*15 U.S.C. § 1692e*]:

- The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge or uniform.

- The false representation of the character, amount, or legal status of any debt.

- The false representation of any services rendered or compensation that may be lawfully received by any debt collector for the collection of a debt.

- The false representation or implication that any individual is an attorney or that any communication is from an attorney.

- The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person, or the seizure, garnishment, attachment, or sale of any property or wages of any person, unless that action is lawful and the debt collector or creditor intends to take such an action.

- The threat to take any action that cannot legally be taken or that is not intended to be taken.

- The false representation or implication that a sale, referral, or other transfer of any interest in a debt will cause the consumer to lose any claim or defense to payment of the debt, or subject the consumer any practice prohibited by the Debt Collection Act.

- The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

- Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

- The use or distribution of any written communication which simulates or is falsely represented to be

a document authorized, issued, or approved by any court, official, or agency of the United States or any state, or which creates a false impression as to its source, authorization, or approval.

- The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

- The failure to disclose in the initial written or oral communication with the consumer that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector (except for pleadings made in connection with a legal action).

- The false representation or implication that accounts have been turned over to innocent purchasers for value.

- The false representation or implication that documents are legal process.

- The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

- The false representation or implication that documents are not legal process forms or do not require action by the consumer.

- The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by *15 U.S.C. § 1681a(f)* [*see § 92.80[3][b]*].

[f] Validation of Debt

Within five days after the initial communication with a consumer [*see 15 U.S.C. § 1692g(d),(e)* (exclusions from definition of "initial communication"] in connection with the collection of any debt, a debt collector must, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing the following [*15 U.S.C. § 1692g(a)*; *see Mahon v. Credit Bureau of Placer County Inc. (9th Cir. 1999) 171 F.3d 1197, 1201-1203* (construing *15 U.S.C. § 1692g* regarding notice to debtor to require only that notice be sent; debt collector need not establish actual receipt by debtor); *see also Renick v. Dun & Bradstreet (9th Cir. 2002) 290 F.3d 1055, 1057-1058* (second collection notice did not violate validation of debts provision in *15 U.S.C. § 1692g(a)*)]:

- The amount of the debt.

- The name of the creditor.

- A statement that unless the consumer disputes the validity of the debt, in whole or in part, within 30 days after receipt of the notice, the debt will be assumed to be valid by the debt collector.

- A statement that if the consumer notifies the debt collector in writing within the 30-day period that the debt, in whole or in part, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of the verification or judgment will be mailed to the consumer by the debt collector.

- A statement that on the consumer's written request within the 30-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current

creditor.

If the consumer notifies the debt collector in writing within the 30-day period described above that the debt, in whole or in part, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector must cease collection of the debt until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of the verification or judgment, or name and address of the original creditor, is mailed to the consumer [*15 U.S.C. § 1692g(b)*]. Collection activities and communications that do not otherwise violate the Debt Collection Act may continue during the 30-day period referred to in *15 U.S.C. § 1692g(a)* unless the consumer has notified the debt collector in writing that the debt (or any portion of it) is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor [*15 U.S.C. § 1692g(b)*].

[g] Inquiries About Location of Consumer

Any debt collector communicating with any person other than the consumer for the purpose of acquiring location information about the consumer must comply with all of the following [*15 U.S.C. § 1692b*]:

- The debt collector must identify himself or herself, state that he or she is confirming or correcting location information concerning the consumer, and, only if expressly requested, identify his or her employer.

- The debt collector must not state that such consumer owes any debt.

- The debt collector must not communicate with any such person more than once unless requested to do so by that person or unless the debt collector reasonably believes that the person's earlier response is erroneous or incomplete and that the person now has correct or complete location information.

- The debt collector must not communicate by post card.

- The debt collector must not use any language or symbol on any envelope or in the contents of any communication by mail or telegram that indicates that the debt collector is in the debt collection business or that the communication relates to the collection of a debt.

- After the debt collector knows the consumer is represented by an attorney and has knowledge of, or can readily ascertain, the attorney's name and address, the debt collector must not communicate with any person other than that attorney, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector.

[h] Communications With Consumer

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer (or a consumer's spouse, parent [if the consumer is a minor], guardian, executor, or administrator) in connection with the collection of any debt in the following circumstances [*15 U.S.C. § 1692c(a), (d)*]:

- At any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector may not communicate with the consumer before 8:00 a.m. or after 9:00 p.m.

- If the debt collector knows the consumer is represented by an attorney with respect to the debt and has knowledge of, or can readily ascertain, the attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer.

- At the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving that communication.

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector must not communicate further with the consumer with respect to that debt, except for the following purposes [*15 U.S.C. § 1692c(c)*]:

- To advise the consumer that the debt collector's further efforts are being terminated.

- To notify the consumer that the debt collector or creditor may invoke specified remedies which ordinarily are invoked by the debt collector or creditor.

- If applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

[i] Communications With Third Parties

Except for inquiries about the consumer's location [*see 15 U.S.C. § 1692b*; *see also* [g], *above*], a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, the consumer's attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy [*15 U.S.C. § 1692c(b)*].

[6] Assignments for Collection

With the 1992 repeal of the Collection Agency Act [*see* former *Bus. & Prof. Code §§ 6850-6956*], collection assignments are no longer subject to specific drafting requirements. Therefore, the parties are free to draft an assignment that complies with general contract requirements [*see* Ch. 75, *Formation of Contracts and Standard Contractual Provisions*]. For discussion and a sample form for an assignment for collection, see *Ch. 76, Assignments of Rights and Obligations, § 76.203*.

Assignments for collection are generally recognized as valid, even though no consideration has been given [*Bechtel v. Baglieto (1936) 13 Cal. App. 2d 495, 501, 57 P.2d 192]* . The effect of an assignment for collection is to vest legal title in the assignee, sufficient to enable the assignee to maintain an action in his or her own name while the assignor retains the equitable or beneficial interest in the underlying claim [*Mihojevich v. Harrod (1963) 214 Cal. App. 2d 360, 363, 20 Cal. Rptr. 440]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Debt CollectionGeneral OverviewBusiness & Corporate LawAgency RelationshipsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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[Reserved]

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G. Funeral Services

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§ 92.90 Funeral Services For Decedent

[1] Governing Law

Funeral establishments and services are governded by the Funeral Directors and Embalmers Law ("Funeral Act") [*Bus. & Prof. Code § 7600 et seq.*] and its implementing regulations [*16 Cal. Code Reg. § 1202 et seq.*]. The Funeral Act is administered by the Cemetery and Funeral Bureau ("Bureau"), within the Department of Consumer Affairs [*Bus. & Prof. Code § 7602*].

Other statutes relating to funeral and related services are *Health & Safety Code §§ 7000-8030* (dead bodies), 8100-9677 (cemeteries), and 102100-103800 (vital statistics); *Penal Code § 642* (criminal offenses); *Gov. Code § 27471* and 27491-27491.8 (coroners); *Welf. & Inst. Code § 11158* and *17409* (exemption of funeral fund trusts and burial insurance in determining property of welfare recipient); and *Mil. & Vet. Code § 944*, *945* (veteran's burial allowance).

For discussion and a sample of an agreement for funeral services for a decedent, see *§ 92.260*.

[2] Funeral Director Defined

A funeral director is a person engaged in or conducting, or holding himself or herself out as engaged in any of the following [*Bus. & Prof. Code § 7615*]:

- Preparing for the transportation or burial or disposal, or directing and supervising for transportation or burial or disposal of human remains.

- Maintaining an establishment for the preparation for the transportation or disposition or for the care of human remains.

- Using, in connection with his or her name, the words "funeral director," or "undertaker," or "mortician," or any other title implying that he or she is engaged as a funeral director.

[3] Exempt Persons

The provisions of the Funeral Act do not apply to the following exempt persons [*Bus. & Prof. Code § 7609*]:

- Any officer of any public institution or of any duly accredited medical college.
- Any hospital licensed pursuant to *Health and Safety Code § 1250 et seq.*
- Anyone engaged only in the furnishing of burial receptacles.
- Anyone engaged in the operation of a cemetery solely for the interment of human dead.

[4] Funeral Establishment Defined

A licensed funeral establishment is a place of business conducted in a building or separate portion of a building that has a specific street address or location and is devoted exclusively to the activities as are incident, convenient, or related to the preparation and arrangements, financial or otherwise, for the funeral, transportation, burial, or other disposition of human remains. A funeral establishment includes, but is not limited to, either of the following [*Bus. & Prof. Code § 7616(a)*]:

- A suitable room for the storage of human remains.
- A preparation room that contains sanitary flooring, drainage, ventilation, instruments, and supplies for the preparation, sanitation, or embalming of human remains for burial or transportation.

Licensed funeral establishments under common ownership or by contractual agreement within close geographic proximity of each other are deemed to be in compliance with these requirements if at least one of the establishments has a room described in *Bus. & Prof. Code § 7616(a)* [*Bus. & Prof. Code § 7616(b)*].

There is no requirement that a funeral establishment conduct its business or financial transactions at the same location as its preparation or storage of human remains [*Bus. & Prof. Code § 7616(d)*]. However, the business of a licensed funeral establishment must be conducted and engaged in at a fixed place or facility [*Bus. & Prof. Code § 7617*].

[5] License Requirements

[a] Funeral Directors

A person (including a partnership, association, corporation, or other organization) may not open or maintain a place or establishment at which to engage in or conduct (or hold himself or herself or itself out as engaging in or conducting) the activities of a funeral director without a license [*Bus. & Prof. Code § 7622.2*; *see also Bus. & Prof. Code § 7618* (application requirements)]. The funeral director's license must be displayed conspicuously in the place of business [*Bus. & Prof. Code § 7680*].

Additionally, a licensed funeral director may not engage in or conduct (or hold himself or herself out as engaging in or conducting) the activities of a funeral director without being employed by, or without being a sole proprietor of, a licensed funeral establishment [*Bus. & Prof. Code § 7619.3*].

A person may not operate or maintain a preparation room for the preparation, sanitation, or embalming of human remains for burial or transportation unless he or she is licensed as a funeral director, except accredited mortuary science programs engaged in teaching students the art of embalming, and except those persons exempt from the Funeral Act [

Bus. & Prof. Code § 7616(c); *see Bus. & Prof. Code § 7616(a)(2)*; *see also Bus. & Prof. Code § 7609* (exempt persons)].

[b] Funeral Establishments

A person (including a partnership, association, corporation, or other organization) may not open or maintain a place or establishment at which to engage in or conduct (or hold himself or herself or itself out as engaging in or conducting) the business of a funeral establishment without a license [*Bus. & Prof. Code § 7617*; *see Bus. & Prof. Code § 7617.1* (applicant requirements)].

[6] Cremation Services

A funeral establishment must obtain a signed declaration designating specific instructions with respect to the disposition of cremated remains from the person with the right to control the disposition [*see Health & Safety Code § 7100*] or the person prearranging the cremation and disposition of his or her own remains [*Bus. & Prof. Code § 7685.2(b)*].

The declaration form must include, but is not limited to, the names of the persons with the right to control the disposition of the cremated remains and the person who is contracting for the cremation services; the name of the deceased; the name of the funeral establishment in possession of the remains; the name of the crematorium; and specific instructions regarding the manner, location, and other pertinent details regarding the disposition of cremated remains. The declaration form must be signed and dated by the person arranging for the cremation and the funeral director, employee, or agent of the funeral establishment in charge of arranging or prearranging the cremation service [*Bus. & Prof. Code § 7685.2(b)*].

PRACTICE TIP:

A declaration form for this purpose, entitled Declaration for Disposition of Cremated Remains, is available online on the Bureau's website [www.cfb.ca.gov].

[7] Embalming Services

Human remains may not be embalmed without the express authorization of a person having the legal right to control disposition of the remains [*see Health & Safety Code § 7100*], except that prior authorization is not required if embalming is necessary in order to comply with applicable laws or regulations, or is necessary to avoid irreparable deterioration of the dead body, in which case, a good faith effort must be made to obtain permission [*16 Cal. Code Reg. § 1214*; *see Health & Safety Code § 7304*].

PRACTICE TIP:

A form for this purpose, entitled "Authorization for Disposition With or Without Embalming," is available online on the Bureau's website [www.cfb.ca.gov].

Human remains must be embalmed by a licensed embalmer [*see Bus. & Prof. Code §§ 7640-7650*], by an apprentice embalmer under the supervision of a licensed supervising embalmer, or by a student in a program accredited by the American Board of Funeral Services Education, under the supervision of a licensed embalmer [*Bus. & Prof. Code § 7632*].

[8] Funeral and Cemetery Guide

The Bureau will make available to funeral establishments a copy of a consumer guide for funeral and cemetery purchases for purposes of reproduction and distribution [*Bus. & Prof. Code § 7685.5(a)*]. A funeral establishment must prominently display this consumer guide and make it available to any individual who, in person, inquires about funeral or cemetery purchases [*Bus. & Prof. Code § 7685.5(b)*]. In addition, the funeral establishment must provide the

consumer with a copy, for retention, of this consumer guide prior to drafting a contract for funeral services [*Bus. & Prof. Code § 7685.5(c)*].

PRACTICE TIP:

The Consumer Guide to Funeral and Cemetery Purchases is available online on the Bureau's website [www.cfb.ca.gov].

[9] Disclosure of Preneed Funeral Arrangements

Every funeral establishment, prior to drafting any contract for funeral goods or services, must present to the survivor of the deceased who is handling the funeral arrangements, or the responsible party, a statement disclosing whether the funeral establishment has any preneed agreement made by or on behalf of the deceased [*Bus. & Prof. Code § 7685.6(a)*].

If the funeral establishment has a preneed agreement, the statement must also declare the establishment's compliance with *Bus. & Prof. Code § 7745* (duty to give survivor copy of preneed agreement). The disclosure statement must be signed and dated by the representative of the funeral establishment and by the survivor or responsible party, with a copy given to the survivor or responsible party. The completed disclosure statement must be retained by the funeral establishment for a period of time determined by the Bureau [*Bus. & Prof. Code § 7685.6(a)*]. The Bureau is obligated to develop this disclosure form and make it available to funeral establishments [*Bus. & Prof. Code § 7685.6(b)*].

[10] Prices for Funeral Services and Caskets

Every funeral director must provide to any person, on beginning discussion of prices or of the funeral goods and services offered, a written or printed list containing, but not necessarily limited to, the price for professional services offered, which may include the funeral director's services, the preparation of the body, the use of facilities, and the use of automotive equipment. All services included in this price or prices must be enumerated [*Bus. & Prof. Code § 7685(a)*].

The list must also include a statement to the effect that the survivor of the deceased who is handling the funeral arrangements, or the responsible party, is entitled to receive, prior to the drafting of any contract, a copy of any preneed agreement that has been signed and paid for, in full or in part, by or on behalf of the deceased, and that is in the possession of the funeral establishment [*Bus. & Prof. Code § 7685(b)*].

The list must also include the price range for all caskets offered for sale. When a request for specific information on caskets is made in person by any individual, the funeral director must also provide a written statement or list that, at a minimum, specifically identifies a particular casket or caskets by price and by thickness of metal, or type of wood, or other construction, interior and color, in addition to other casket identification requirements under 16 C.F.R. § 453. The same information must also be provided over the telephone, if requested [*Bus. & Prof. Code § 7685(c)*].

The funeral director must place the price on each casket in a conspicuous manner. Each casket must be priced individually, irrespective of the type of service purchased. Each price tag must also include information about the type of construction of the casket. A funeral director who advertises a funeral service for a stated amount must display in a reasonably convenient location in the show room, and have available for sale, any casket that is used for determining the stated price [*Bus. & Prof. Code § 7685.1(a)*].

A funeral director may not charge a handling fee for a casket supplied by a survivor or responsible party, and may not charge an additional fee for handling or embalming a body when death was due to a contagious or infectious disease [*Bus. & Prof. Code § 7685.1(b), (c)*].

[11] Memorandum of Fees and Costs for Individual Purchaser

No funeral director may enter into a contract for furnishing services or property in connection with the burial or other disposal of human remains until after having submitted to the potential purchaser of those services or property a written or printed memorandum containing the following information, provided that information is available at the time of execution of the contract [*Bus. & Prof. Code § 7685.2(a)*]:

- The total charge for the funeral director's services and the use of his or her facilities, including the preparation of the body and other professional services, and the charge for the use of automotive and other necessary equipment.

- An itemization of charges for the following merchandise as selected: the casket, an outside receptacle, and clothing.

- An itemization of fees or charges and the total amount of cash advances made by the funeral director for transportation, flowers, cemetery or crematory charges, newspaper notices, clergy honorarium, transcripts, telegrams, long distance telephone calls, music, and any other advances as authorized by the purchaser.

- An itemization of any other fees or charges not included above.

- The total of the amount of the four items specified above.

If the charge for any of the above items is not known at the time the contract is entered into, the funeral director must advise the purchaser of the charge for such items within a reasonable period after the information becomes available. All prices charged for items on the funeral director's price list or displayed on the caskets [*see* [10], *above*] must agree with those in the memorandum [*Bus. & Prof. Code § 7685.2(a)*].

[12] Duty of Care

Funeral establishments and funeral directors have a duty to exercise the ordinary skill and competence of members of their profession, and a failure to discharge that duty will subject them to liability for their own negligence [*Hansell v. Santos Robinson Mortuary (1998) 64 Cal. App. 4th 608, 612, 75 Cal. Rptr. 2d 361]* .

That duty includes using reasonable care in selecting a crematorium, but it does not make the funeral establishment vicariously liable for the wrongful acts of the crematorium if the funeral establishment had no knowledge of the wrongful acts [*Hansell v. Santos Robinson Mortuary (1998) 64 Cal. App. 4th 608, 612-613, 75 Cal. Rptr. 2d 361]* . Even though a funeral establishment is authorized by statute to direct and supervise the burial or disposal of human remains [*see Bus. & Prof. Code § 7615*], that authorization does not impose on the funeral establishment a duty to actually supervise the cremations [*Hansell v. Santos Robinson Mortuary (1998) 64 Cal. App. 4th 608, 612-613, 75 Cal. Rptr. 2d 361]* .

There is an implied covenant in every contract for funeral services that the services will be conducted with dignity and respect toward the family members for whose benefit the services are performed [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 895, 2 Cal. Rptr. 2d 79, 820 P.2d 181* ; *Wilson v. Houston Funeral Home (1996) 42 Cal. App. 4th 1124, 1133, 50 Cal. Rptr. 2d 169]* .

Additionally, a funeral establishment may be liable to close family members for damages of emotional distress engendered by knowledge of the negligent or intentional mishandling of the decedent's remains even if they did not observe the misconduct or its consequences. This liability is not limited to the family member who holds the statutory right to control disposition of the remains [*see Health & Safety Code § 7100*] or the person who actually contracts for

the services [*Christensen v. Superior Court (1991) 54 Cal. 3d 868, 895, 2 Cal. Rptr. 2d 79, 820 P.2d 181]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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§ 92.91 Preneed Funeral Arrangements

[1] Governing Law

Preneed funeral services (arrangements for funeral services before the need arises) are governed by the Funeral Directors and Embalmers Law ("Funeral Act") [*see Bus. & Prof. Code §§ 7735-7746*] and its implementing regulations [*see Bus. & Prof. Code § 7740*; *16 Cal. Code Reg. § 1200 et seq.*]. The Funeral Act is administered by the Cemetery and Funeral Bureau ("Bureau"), within the Department of Consumer Affairs [*Bus. & Prof. Code § 7602*].

A preneed contract is one that requires payment of money or securities to a funeral establishment to pay for the final disposition of human remains or for funeral services, personal property, or funeral merchandise, when the use or delivery of those services, property or merchandise is not immediately required [*Bus. & Prof. Code § 7735*].

None of the statutory provisions that relate to preneed funeral arrangements [*see Bus. & Prof. Code §§ 7735-7746*] apply to cemetery property, cemetery commodities, cemetery service, or merchandise that is delivered as soon as paid for [*Bus. & Prof. Code § 7740*].

[2] Contract Requirements

Any preneed contract must require that all money paid and all securities delivered under the contract (or any collateral agreement) be held in trust for the purpose for which they were paid or delivered until the preneed contract is fulfilled [*Bus. & Prof. Code § 7735*]. The contract must also clearly state if benefits are unavailable or limited for any reason [*Bus. & Prof. Code § 7735.5*].

For discussion and a sample of a combined preneed funeral contract and trust agreement, including its required contents, see *§ 92.261*.

[3] Trust Requirements

[a] Deposit With Trustee

All money and securities received by a funeral establishment from the trustor under a preneed contract must be placed in trust with the trustee within 30 days of receipt pursuant to a trust agreement signed by the funeral establishment, the trustor, and the trustee. [*see Bus. & Prof. Code § 7737* (trust agreement requirements)].

Similarly, money received under an "agreement collateral" to a preened funeral agreement must also be placed in trust [*see American Funeral Concepts v. Board of Funeral Directors & Embalmers (1982) 136 Cal. App. 3d 303, 312-313, 186 Cal. Rptr. 196* (funeral society membership agreement with option to enter into preneed contract with fixed prices was an agreement collateral to preneed contract under *Bus. & Prof. Code § 7737*, requiring deposit of membership fee into trust)]. For discussion and a sample of a combined preneed funeral contract and trust agreement, including its required contents, see *§ 92.261*.

The trustee of a preneed trust may be either (1) a bank or trust company legally authorized by the State of California to act as trustee or (2) not less than three persons, one of whom may be an employee of the funeral establishment [*Bus. & Prof. Code § 7736*].

[b] Permissible Expenses

The corpus of a preneed trust may not be used for the payment of any commission or other expense of trust administration [*Bus. & Prof. Code § 7735*]. The income from the trust, however, may be used to pay a reasonable annual fee for administering the trust, including a trustee fee, and to establish a reserve, not to exceed 10 percent of the trust corpus, as a revocation fee in the event of cancellation on the part of the beneficiary [*Bus. & Prof. Code § 7735*].

The annual fee for trust administration may be recovered by withdrawals from accumulated trust income, provided that the total withdrawals for this purpose do not exceed the amount determined by the Bureau. However, the total amount withdrawn in a year for trust administration may not exceed the total amount of posted trust income in the immediate 12 preceding months [*Bus. & Prof. Code § 7735*]. Actual expenses for administering a preneed trust may be recovered from the trust income in an amount up to 4 percent of the corpus each year. All remaining trust income must be credited to the corpus [*16 Cal. Code Reg. § 1265*].

[c] Permissible Investments

The trustee of a preneed funeral arrangement trust may deposit the corpus of the trust in any financial institution insured by the Federal Deposit Insurance Corporation [*Bus. & Prof. Code § 7737.5*], or in any credit union insured by the National Credit Union Share Insurance Fund [*Bus. & Prof. Code § 7737.7*].

The trustee must invest the corpus in one of the following [*16 Cal. Code Reg. § 1263(a)*]:

- Bonds of or securities guaranteed by the United States, an agency of the United States, the State of California, or a county, city, or city and county of California.

- Bonds that are legal investments for commercial banks in California.

- Certificates of deposit or other interest-bearing accounts in any bank in California insured by the Federal Deposit Insurance Corporation.

- Investment certificates or shares in any state or federally chartered savings and loan association insured by the Federal Savings and Loan Insurance Corporation.

- Investments of the type and in the manner provided in *Prob. Code § 15001 et seq.*

For additional discussion of the investment rules applicable to trustees in general, see Ch. 64A, *Testamentary Trusts: Trustee Provisions* .

Loans may not be made to any licensed funeral establishment; owner, director, officer, partner, or stockholder of a licensed funeral establishment; trustees of the trust funds; or partners, relatives, agents, or employees of any trustee or any licensed funeral establishment [*16 Cal. Code Reg. § 1263(b)*].

[d] Restrictions on Commingling Funds

Preneed funeral arrangement trust funds may not be mingled or commingled with the funds of any other person, firm, or corporation, except that preneed funeral trust funds received and held by a single trustee or a single set of trustees may be commingled for investment [*16 Cal. Code Reg. § 1268*].

[4] Accounts and Records

[a] Maintenance and Retention Requirements

Each funeral establishment that enters into a preneed funeral arrangement trust agreement must maintain, or see that the trustee maintains, complete financial records of all preneed contracts and arrangements. These records must be maintained in California, must be available for inspection by the Bureau during reasonable working hours, and must be established and maintained in accordance with generally accepted accounting principles [*see 16 Cal. Code Reg. § 1267* (specific requirements); the State Board of Funeral Directors and Embalmers referred to in this regulation is now the Cemetery and Funeral Bureau; *see Bus. & Prof. § 7602*].

All records must be retained for one year after the account has been cancelled or serviced and audited by the Bureau and all recommendations have been complied with and all audit exceptions resolved, or for seven years from the date of service or cancellation, whichever comes first [*16 Cal. Code Reg. § 1267(j)*; the State Board of Funeral Directors and Embalmers referred to in this regulation is now the Cemetery and Funeral Bureau; *see Bus. & Prof. § 7602*].

[b] Annual Trust Fund Report

Each licensed funeral establishment and each licensed funeral director who enters into any preneed funeral arrangements, contracts, or plans must file annually with the Bureau on or before May 1 of each year, or on the transfer of a license or the cessation of business, a written verified or audited report of the funds received and held under the agreement on a form furnished by the Bureau. Firms that use a fiscal year accounting system may ask the executive officer, in writing, for permission to report on a fiscal year basis. If permission is given, the report must be filed within 120 days from the close of the firm's fiscal year [*see 16 Cal. Code Reg. § 1269* (specific requirements); the State Board of Funeral Directors and Embalmers referred to in this regulation is now the Cemetery and Funeral Bureau; *see Bus. & Prof. § 7602*].

PRACTICE TIP:

An annual report form for this purpose, entitled "Preneed Trust Fund Report," is available online on the Bureau's website [www.cfb.ca.gov].

Two or more funeral establishments that use a common preneed trust fund may have the trustee of that fund file one combined annual report, provided each funeral establishment's information is disclosed separately [*16 Cal. Code Reg. § 1269(f)*].

[c] Declaration of Nonreporting Status

A funeral establishment that is otherwise exempt from the requirement of filing an annual preneed trust report (e.g., a funeral establishment that does not have any preneed contracts or arrangements), or whose preneed trust funds are reported in a combined preneed annual trust report [*see* [b], *above*], must file annually a declaration of non-reporting status with the Bureau [*Bus. & Prof. Code § 7746(a)*]. The declaration must be filed on or before May 1 of each year and also on the transfer of ownership or the cessation of business [*Bus. & Prof. Code § 7746(b)*].

PRACTICE TIP:

An annual report form for this purpose, entitled "Preneed Funeral Trust Fund Declaration Of Non-Reporting Status," is available online on the Bureau's website [www.cfb.ca.gov].

[d] Commingled Trust Fund Audit Report

All commingled preneed trust funds held by a funeral establishment [*see* [3][d], *above*] must be subjected to an annual independent certified financial audit. A copy of the audit must be submitted to the Bureau within 120 days of the close of the fund's fiscal year. Any noncompliances found by the auditor must be reported to the Bureau in a separate report [*Bus. & Prof. Code § 7737.3*].

[5] Commingling With Special Endowment Care Fund Prohibited

A licensed funeral establishment that is also a licensed cemetery authority may not deposit any money or securities received in connection with preneed funeral arrangements into a special endowment care fund [*see Health & Safety Code §§ 8775-8779.5*]. Likewise, a licensed funeral establishment may not permit the deposit of any money or securities received in connection with a special endowment care fund into a preneed funeral trust fund. However, any such investment lawfully entered into and existing on December 31, 1981, need not be liquidated or converted [*Bus. & Prof. Code § 7738*].

[6] Revocability of Trust

If the beneficiary of a preneed funeral trust is a recipient of public assistance under the provisions of *Welf. & Inst. Code § 11158(a)* or *Welf. & Inst. Code § 12152(e)(1)* (and provided the value limitations of these statutes are not exceeded), the trust agreement may provide that the trust is irrevocable [*Bus. & Prof. Code § 7737*]. Moreover, because the corpus of a revocable preneed funeral trust is considered part of the beneficiary's personal property for purposes of determining his or her eligibility for public assistance [*see Welf. & Inst. Code §§ 11158(a), 12152(e)(1)*], it is advisable that such a trust be irrevocable.

If the beneficiary of the preneed trust is not a recipient of public assistance, the trust agreement must provide that the trustor or his or her representative may revoke the trust at any time before the funeral establishment furnishes the merchandise and services provided for in the contract. If, however, the trustor becomes otherwise eligible for public assistance [*see Welf. & Inst. Code §§ 11158(a), 12152(e)(1)*], he or she may agree at that time that the trust will be irrevocable [*Bus. & Prof. Code § 7737*].

[7] Delivery of Preneed Contract to Survivor

Every funeral establishment must present to the survivor of the deceased (or the responsible party handling the funeral arrangements) a copy of any preneed agreement that has been signed and paid for by or on behalf of the deceased and that is in the possession of the funeral establishment. The copy may be presented in person, by certified mail, or by facsimile transmission, as agreed on by the survivor of the deceased or the responsible party. A funeral establishment that knowingly fails to present a preneed agreement to the survivor of the deceased or the responsible party will be liable for a civil fine equal to three times the cost of the preneed agreement, or $1,000, whichever is greater [*Bus. & Prof. Code § 7745*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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§ 92.92 Funeral Societies

A funeral society is a nonprofit organization designed to enable its members to arrange in advance for the funerals of themselves and members of their immediate families. Such an organization generally includes in its title the words "funeral society" or "memorial society" or "memorial association" or "memorial-funeral society." "Funeral society" will be used consistently in this chapter to refer to such an organization.

The avowed purposes of funeral societies are to enable their members to do the following:

- Obtain funerals at a cost less than would otherwise have to be paid.
- Determine the funeral arrangements in advance of death so that the decision can be made in an atmosphere free of emotional vulnerability and stress.
- Avoid elaborate funeral rites, since they take the position that such rites act as a distraction to the commemoration of the deceased and fail to compensate for the loss of a loved one.

A funeral society enters into contracts with various funeral establishments in the area served by it whereby the funeral establishments agree to provide basic funeral services at specified rates for the society members and their immediate families [*see § 92.262* for a typical contract of this type]. The cost of joining a funeral society generally is a specified sum (such as $30) for a lifetime membership.

PRACTICE TIP:
The Funeral Consumers Alliance is a useful resource for obtaining information about funeral societies in California. Its website [www.funerals.org] provides a database of funeral societies throughout the United States and helpful consumer information about funeral services.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide §§ 92.93-92.99

[Reserved]

§§ 92.93[Reserved]

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NOTE:

Throughout this Transaction Guide, the term "service provider" is used to refer to the party who will perform the services. The term "customer" is used to refer to the party who will receive the services. The terms "contract" and "agreement" are used interchangeably to refer to the service contracts that are the subject of this chapter.

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30-92 California Legal Forms--Transaction Guide § 92.100

§ 92.100 Facts Regarding Parties to Service Contract

1. Name, address, telephone number, fax number, and e-mail address of client.

2. Whether contract will be between:

a. Client and known customer.

b. Client and undetermined customers.

NOTE:
Although an actual contract does not come into existence until two parties consent to be bound [***see*** *Civ. Code § 1550*], this Transaction Guide may be used to draft standard form contracts for service providers who will use them to contract with their customers.

3. Legal status of each known party:

a Individual.

d. Corporation.

e. Partnership.

f. Limited liability company.

g. Other.

4. Whether service provider is licensed or registered, and if so, license or registration number and expiration date [*see §*

92.114].

5. Whether other party is represented by counsel, and if so, name, address, telephone number, fax number, and e-mail address of attorney representing other party to agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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§ 92.101 Facts Regarding Services To Be Performed

1. Description of services to be performed.

2. Any particular conditions required for performance.

3. Time for performance, including if relevant:

    a. Particular date, time, or season.

    b. Frequency.

4. Proposed compensation arrangements:

    a. Nature and amount of compensation.

    b. Frequency of payment.

5. Whether materials or parts or both will be provided with services.

6. Any duties of customer with respect to performance of services.

7. Proposed term of agreement.

8. Local customs and trade usages or practices.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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§ 92.102 Documents

1. Any previous contracts for proposed services:

    a. Used by service provider.

    b. Executed by parties.

2. Any prior communications between parties regarding proposed contract, including:

    a. Memoranda.

    b. Letters.

    c. Notes of telephone conversations, e-mails, fax transmissions, and other transmissions.

3. Any of following related to performance of proposed services:

    a. License.

    b. Permit.

    c. Registration.

    d. Bond.

    e. Insurance policy.

f. Certification by industry association.

NOTE:
Some service providers may be required to carry insurance in order to perform particular services [***see** § 92.115*].

PRACTICE TIP:
Many trade and other industry associations offer a certification program as a way to insure high standards within their profession or industry. For example, alarm company operators may apply to have a central monitoring system listed by Underwriter's Laboratories Inc. as meeting certain industry standards. If representing a customer, it is desirable to check whether the service provider has obtained such a certification. If representing the service provider, an industry certification is useful in marketing services, but it should be not included in the contract. The certification may or may not continue for the duration of the contract and may give the customer a basis to claim reliance on an unintended representation of a certain level of competence or service.

4. If client is corporation, partnership, limited liability company, or association, copies of basic organizational documents, including (as appropriate):

NOTE:
Although it is unlikely, the basic organizational documents could contain prohibitions or restrictions on specified activities [***see** § 92.112*]. They may also specify who in the organization is authorized to enter into contracts.

a. If service provider is a corporation or an association, articles of incorporation or association and bylaws.

b. If service provider is a limited liability company, articles of organization and operating agreement.

c. If service provider is a partnership, partnership agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
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[Reserved]

§§ 92.103[Reserved]

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B. Preliminary Determinations

30-92 California Legal Forms--Transaction Guide § 92.110

§ 92.110 Need for Written Agreement--Statute of Frauds

1. Determine whether statute of frauds [*see Civ. Code § 1624*; *see also § 92.10*] requires contract to be in writing:

NOTE:
The following list includes only those portions of the statute of frauds that may be applicable to service contracts. For a complete list of contracts covered by that statute, see *Ch. 75*, ***Formation of Contracts and Standard Contractual Provisions****, § 75.115*.

a. Agreement that by its terms is incapable of being performed within one year of its making.

b. Agreement authorizing or employing agent, broker, or other person to buy or sell real estate, or to lease real estate for period of more than one year for compensation or commission.

c. Agreement authorizing or employing agent, broker, or other person to procure, introduce, or find buyer or seller of real estate or lessee or lessor of real estate when lease is for period of more than one year, for compensation or commission.

d. Agreement that by its terms is not to be performed during lifetime of promisor.

2. Determine whether statute or regulation governing particular type of service or transaction requires contract to be in writing.

NOTE:

Because of the wide variety of service contracts, and the fact that new legislation regulating additional types of services is frequently enacted, no attempt is made here to list all statutes and regulations governing service contracts. Contract requirements generally are imposed in conjunction with licensing or permit requirements for the performance of particular services, or on contracts containing the potential for fraud by the service provider, such as those providing for payment in installments. A partial list of these statutes and regulations is set forth in the Research Guide. Particular statutes and regulations that govern the contracts set forth as forms in this chapter are discussed in the comments to those forms.

3. If written contract is not required [*see* P 1, *above*], determine whether other type of writing is required by statute or regulation.

NOTE:

For example, the Electronic and Appliance Repair Dealer Registration Law [*Bus. & Prof. Code § 9800 et seq.*] and the Automotive Repair Act [*Bus. & Prof. Code § 9880 et seq.*] require the person providing repairs to provide the customer with a written invoice and estimate of charges [***see*** *Bus. & Prof. Code §§ 9842, 9844* (electronic repairs); ***see also*** *Bus. & Prof. Code §§ 9884.8, 9884.9* (automotive repairs)].

4. If written agreement is not required by law, determine whether agreement should nonetheless be in writing for either of following reasons:

a. Written form is customarily used for that type of service.

b. Possibility of misunderstanding between parties could result in hardship to either or both parties.

NOTE:

Many service contracts are not required to be in writing [***see*** *§ 92.10*]; but, with the possible exception of services that are small in scope and brief in duration, it is generally advisable to reduce the parties' understanding to a written agreement. By setting forth the agreed-upon terms of the parties' bargain, a written contract may prevent litigation that could arise in the absence of specificity. Thus, the remainder of this Transaction Guide assumes that a written contract will be drafted.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawStatutes of FraudsRequirementsGeneral OverviewContracts LawStatutes of FraudsRequirementsPerformanceContracts LawStatutes of FraudsRequirementsSignaturesContracts LawStatutes of FraudsRequirementsWritingsContracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
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30-92 California Legal Forms--Transaction Guide § 92.111

§ 92.111 Parties to Contract

1. Determine whether parties to contract have legal capacity to enter into contract:

NOTE:
All contracts must contain the consent of parties capable of contracting [*Civ. Code § 1550*; ***see*** *Civ. Code §§ 1565-1590*]. For a more detailed discussion of this requirement, see *Ch. 75,* ***Formation of Contracts and Standard Contractual Provisions****, § 75.11[2]*.

a. If party to contract is corporation, determine whether specific resolution authorizing execution of contract is required, and if so, whether it has been adopted.

b. If agent, employee, or attorney-in-fact will sign on behalf of party, determine whether that person has been granted authority to do so.

c. Determine whether any party is a minor.

NOTE:
Special considerations apply when a minor is involved. For a discussion of the capacity of minors to form contracts, see *Ch. 100B,* ***Contracts and Employment of Minors****, §§ 100B.20-100B.23*.

2. Verify that consent to contract is given freely [*see Civ. Code §§ 1565-1568*].

NOTE:
Apparent consent is not valid if obtained through duress, menace, fraud, undue influence, or mistake [*Civ. Code § 1567*; ***see*** *Ch. 75,* ***Formation of Contracts and Standard Contractual Provisions****, §*

75.11[2][a]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawFormationCapacity of PartiesGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide § 92.112

§ 92.112 Lawful Object of Contract

1. Determine whether proposed services meet following criteria:

NOTE:
For a detailed discussion of the statutory requirements regarding the purpose of a contract, see *Ch. 75, **Formation of Contracts and Standard Contractual Provisions**, § 75.11[3]*.

a. Lawful at time of execution [*Civ. Code §§ 1550, 1595-1599*].

b. Possible and ascertainable by time of performance.

2. If service provider is corporation, association, limited liability company, or partnership, determine whether basic organizational documents do either of following [*see § 92.102*]:

a. Prohibit or restrict proposed contractual activity.

b. Authorize, prohibit, or restrict entity's agents or employees from providing proposed services.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
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30-92 California Legal Forms--Transaction Guide § 92.113

§ 92.113 Term of Agreement

1. Determine what term of agreement should be, considering following options:

a. Term of short duration with exact date and, if appropriate, exact time, for expiration [*see, e.g., § 92.242[2],* P 5].

b. Term to commence on specified date and continue until terminated by advance written notice by one party [*see, e.g., § 92.200[2],* P 1].

c. Term for definite length, with right to terminate by advance written notice [*see, e.g., § 92.202[2],* P 1 (second alternative)].

d. Specific term without right of prior termination [*see, e.g., § 92.202[2],* P 1 (first alternative)].

NOTE:
This type of provision may be appropriate when one of the parties must substantially change position in order to enter into the contract. For example, the service provider may purchase expensive specialized equipment in order to perform the intended services.

e. Term for one year, to be automatically renewed for annual periods thereafter unless either party terminates by advance written notice [*see, e.g., § 92.203[2],* P 1].

f. Term that is terminable at any time by advance written notice [*see, e.g., § 92.210[2],* P 1].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide § 92.114

§ 92.114 License or Registration Requirements

1. Determine whether service provider must obtain license or registration from governmental entity before performing any services.

NOTE:

It is unlawful for some services to be performed unless a license or registration to carry on that service has been obtained from the appropriate governmental entity. For discussion of license and registration requirements relating to service contracts covered in this chapter, see *§ 92.40[4]* (private patrol and security guard personnel), § 92.41[4] (alarm company operators and alarm agents), §§ 92.50[3], 92.51[6] (electronic and appliance service dealers), § 92.53[1][d] (automotive repair dealers), § 92.53[2][d] (obligors of vehicle service contracts), § 92.54[4] (home protection companies), § 92.82[5] (credit services organization), and § 92.90[5] (funeral establishments and funeral directors).

2. Determine whether service provider must obtain specific certification from appropriate governmental agency before providing services.

NOTE:

For example, a company that provides full service maintenance services on elevators must be certified by the Division of Occupational Safety and Health [***see*** *Lab. Code § 7300.1(g), (p)*; ***see also*** *§ 92.30[3][a]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service AgreementsGovernmentsState & Territorial GovernmentsLicenses

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30-92 California Legal Forms--Transaction Guide § 92.115

§ 92.115 Insurance and Bond Requirements

1. Determine whether service provider is required to obtain and post bond.

NOTE:

Many service businesses are required to obtain and post a bond with the state [***see, e.g.,*** *Bus. & Prof. Code § 8697* (structural pest control operator); *Civ. Code § 1812.503(a)-(m)* (employment agency); *Civ. Code § 1812.515* (job listing service); *Civ. Code § 1812.510* (employment counseling service); *Civ. Code § 1812.525* (nurses' registry); *Civ. Code § 1789.18* (credit services organization)].

2. Determine whether service provider is either required or advised to carry insurance.

NOTE:

For example, if the service provider will use a car in the performance of services, auto insurance must be obtained [***see*** *Veh. Code § 16020*]. In contracts with the risk of substantial damages in the event of negligence on the part of the service provider, such as an elevator maintenance contract, a customer may require that the service provider carry public insurance liability insurance [***see*** *§ 92.202[2]*, P 12].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewContracts LawTypes of ContractsPersonal Service AgreementsInsurance LawBusiness InsuranceGeneral Overview

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30-92 California Legal Forms--Transaction Guide § 92.116

§ 92.116 Advertising Requirements

1. Determine whether service provider plans to advertise services prior to execution of contract.

NOTE:
Advertisements for services are subject to various requirements [***see*** Ch. 50, ***Advertising and Promotion***]. Specific regulations govern certain service contracts. For example, there are specific advertising requirements and restrictions for electronic and appliance repair dealers [***see*** *§ 92.50[9]*] and employment agencies [***see*** *§ 92.70[7]*].

2. Review any proposed or actual advertising used by service provider with respect to performance of services.

NOTE:
The attorney drafting the service contract should ensure that the contract provisions reflect any representations made in advertisements relating to the services.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide § 92.117

§ 92.117 Content of Contract

1. Determine whether particular category of contract is subject to statutes or regulations imposing specific content requirements.

NOTE:

Many licensing statutes (or their implementing regulations) require or prohibit certain provisions in contracts for the type of services or activities being licensed. For example, particular statutes and regulations govern the contents of elevator maintenance contracts [***see*** *§ 92.202[1][b]*], alarm system installations [***see*** *§ 92.212[1][b]*], service contracts for electronics, appliances, and other consumer products [***see*** *§ 92.222[1][c]*], home protection contracts [***see*** *§ 92.225[1][b]*], employment agency contracts [***see*** *§ 92.240[1][b]*], job listing contracts [***see*** *§ 92.242[1][b]*], employment counseling contracts [***see*** *§ 92.243[1][b]*, nurses' registry contracts [***see*** *§ 92.244[1][b]*], credit services contracts [***see*** *§ 92.252[1][c]*], funeral contracts [***see*** *§ 92.260[1][c]*], and preneed funeral trust agreements [***see*** *§ 92.261[1][b]*].

2. Determine whether agreement meets following criteria of "retail installment contract" for performance of work, labor, or services [*Civ. Code § 1802.6*; *see Civ. Code §§ 1799.90* ("consumer credit contract" defined), 1802.2 ("services" defined), 1802.5 ("retail installment sale" defined)]:

NOTE:

Under the Unruh Act ("Act") [*Civ. Code § 1801 et seq.*], "retail installment contracts" must contain certain disclosure statements [***see*** *Ch. 45,* ***Consumer Installment Loans and Credit Sales****, §§ 45.60-45.67*]. The Act does not cover the services of physicians or dentists, or services for which the tariffs, rates, charges, costs, or expenses, including the deferred payment price, are required by law to be filed with and approved by the federal government or any official, department, division, commission, or agency of the United

States [*Civ. Code § 1802.2*].

For further discussion of the Act, see Ch. 45, ***Consumer Installment Loans and Credit Sales*** . For a discussion of the provisions of the Act dealing with "open-end" (revolving) credit, see Ch. 46, ***Credit Card and Other Open-End Credit Transactions*** .

a. Services involved are primarily for personal, family, or household purposes.

b. Contract will be entered into or performed in California.

c. Services will be furnished by retail seller to retail buyer for deferred payment price.

d. Customer is required to pay finance charge (or higher price than if paid by cash or credit card), or amount due is payable in more than four installments.

3. Determine whether service contract is offered in addition to or instead of express warranty under Song-Beverly Consumer Warranty Act [*see Civ. Code § 1790 et seq.*; *see also § 92.52[2]*].

NOTE:

Any express warranty offered by a manufacturer on its products sold in California or service agreement offered in addition to or instead of an express warranty must comply with the provisions of the Song-Beverly Consumer Warranty Act [*Civ. Code §§ 1793.2(a)(1)(A), 1794.4(a)*].

4. Determine whether service contract between consumer and retailer with 25 or more employees for service or repair of merchandise requires presence of consumer at time service or repair [*see Civ. Code § 1722*].

NOTE:

In the case of a service contract for electronics, appliances, or other consumer products, if the retailer has 25 or more employees and the service or repair of merchandise requires the presence of the consumer, the retailer and consumer must agree, prior to the date of service or repair, on a four-hour period within which the service or repair must be commenced [*Civ. Code § 1722(a)(1)*; ***see*** *§ 92.51[9]*].

5. Determine whether any other laws applicable to proposed services require or prohibit particular provisions.

NOTE:

Often contracts for services that will be performed over a long period of time or that may otherwise result in fraud on the part of the service provider are required to contain warnings or disclosures to the potential customer. For example, a contract for discount buying services must make various disclosures regarding the service provider [***see*** *Civ. Code § 1812.107*]. Other services that require specific disclosures to the customer include alarm system installations [***see*** *§ 92.212[1][b]*], electronic and appliances repairs [***see*** *§§ 92.220[1][d], 92.221[1][c]*], express warranties for consumer goods [***see*** *§ 92.223[1][b]*], consumer credit reporting services [***see*** *§ 92.80[2][r]-[t]*], investigative consumer reporting services [***see*** *§ 92.81[2][e]*], services to improve credit rating or obtain credit [***see*** *§ 92.82[6]*], and debt collection services [***see*** *§ 92.83[3]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide § 92.118

§ 92.118 Lien Rights

NOTE:
This section applies only to contracts that require services to be provided to a customer's personal property. Liens may be created by operation of law or by contract of the parties [*Civ. Code § 2881*].

1. Determine whether any statute provides for possessory liens on property to be serviced.

NOTE:
Various statutes give a special lien, dependent on possession, to persons who repair, improve, store, or protect personal property, for the compensation due for those services. Some of the more common liens for services of personal property include those for laundry and dry cleaning, veterinary services, watches, clocks, jewelry, motor vehicles, and freight services [***see*** *§ 92.55*]. For an extensive list of those liens, see Ch 102A, ***Personal Property Liens*** .

2. Determine whether service contract should give service provider lien rights over property to be serviced.

NOTE:
A person who repairs personal property at the request of the owner has a statutory lien on that property for the reasonable charges for work and materials furnished [*Civ. Code § 3051*]. However, in some cases, it is advisable to also create a contractual lien [***see*** *Civ. Code § 2881*], especially if the time required for enforcement of the statutory lien negates any value to be obtained from the lien.

For example, in the case of boarding contracts for animals, a lien is created by statute [***see*** *Civ. Code § 3051*]. However, boarding costs for the statutory period preceding sale may well exceed the market value

of the animal involved. Therefore, the parties may wish to create, by contract, a lien with a shorter enforcement period [***see, e.g.,*** *§ 92.226[2]*, P 5].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsPersonal Service AgreementsReal Property LawNonmortgage LiensGeneral Overview

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30-92 California Legal Forms--Transaction Guide § 92.119

§ 92.119 Assignment and Survival of Contract

1. Determine whether contract will be assignable:

a. Determine whether assignment is prohibited or restricted by statute.

NOTE:
A promisor may not transfer the burden of an obligation without the consent of the promisee [*Civ. Code § 1457*]. The laws governing a particular type of service may contain other restrictions or prohibitions on assignment.

b. Determine whether contract is for personal services.

NOTE:
Contracts for personal services in which the skill, credit, or other personal quality of the promisor is a distinctive characteristic or a material inducement to the contract generally are not assignable [***see § 92.13***]. However, this rule does not apply to corporations, which cannot perform personal functions [***see*** *Haldor v. Beebe (1945) 72 Cal. App. 2d 357, 365, 164 P.2d 568]* .

2. If contract is assignable, determine whether any laws specify procedures for making assignment.

NOTE:
For example, *Civ. Code § 1812.88* sets forth requirements for making an assignment of a contract for health studio services.

3. Determine whether contract will survive death or disability of either party [*see § 92.14*]:

a. Determine whether contract is for personal services.

b. Determine whether services could be performed in an equally satisfactory manner by someone other than promisor.

NOTE:

Generally, contracts for personal services will not bind the administrator or executor of an estate, unless the services could be performed in an equally satisfactory manner by someone other than promisor-decedent. In that situation, the obligation to perform those services will survive, despite the apparently "personal" nature of those services [*Didier v. American Casualty Co. (1968) 261 Cal. App. 2d 742, 750, 68 Cal. Rptr. 217]* .

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawPerformanceAssignmentGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide § 92.120

§ 92.120 Format and Delivery of Written Contract

1. Determine whether there are any specific format requirements imposed by statute or regulation.

NOTE:

For example, the statutory provisions required in some types of service contracts and forms must be in boldface type or a certain size print [***see, e.g.,*** *§ 92.220[1][d]* (receipt/estimate form for electronic and appliance repairs), § 92.221[1][c] (invoice form for electronic and appliance repairs), § 92.240[1][b], [c] (employment agency contract), § 92.242[1][b], [c] (job listing service contract), § 92.243[1][b], [c] (employment counseling service contract), § 92.244[1][b], [c] (nurses' registry contract), § 92.252[1][b], [c] (credit services contract), and § 92.260[1][c] (funeral services contract)].

2. Determine whether there are any execution or filing requirements imposed by statute or regulation.

NOTE:

For example, an original and duplicate contract must be executed for each transaction between an employment agency and a customer. The original must be given to the applicant, and the duplicate must be kept on file by the agency [***see*** *Civ. Code § 1812.504*; *see also § 92.240[1][c]*]. Similar requirements apply to job listing service contracts [***see*** *Civ. Code § 1812.516*; *see also § 92.242[1][c]*], employment counseling service contracts [***see*** *Civ. Code § 1812.511*; *see also § 92.243[1][c]*], and nurses' registry contracts [***see*** *Civ. Code § 1812.526*; *see also § 92.244[1][c]*].

3. Determine whether contract form itself must be approved by governmental agency before service provider offers services.

NOTE:

For example, a form for a service contract for electronics, appliances, and other consumer products must be filed with the Director of the Department of Consumer Affairs prior to its use [*Bus. & Prof. Code § 9855.3(a)*; ***see*** *§ 92.50[6]*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide §§ 92.121-92.129

[Reserved]

§§ 92.121[Reserved]

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C. Procedural Guide to Service Contracts

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NOTE:

For a list of general procedures relating to contract formation, such as preparation of outlines and drafts, and negotiation and revision of the final contract, see *Ch. 75,* ***Formation of Contracts and Standard Contractual Provisions****, § 75.130* et seq.

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30-92 California Legal Forms--Transaction Guide § 92.130

§ 92.130 Representing Parties

1. If requested to represent both parties to transaction, recommend that one party obtain separate counsel.

2. If parties do not withdraw request and do not appear to have conflicting or potentially conflicting interests, do the following [*see Cal. Rules of Prof. Conduct, Rule 3-310*]:

a. Make full disclosure to each party of nature of representation of other party.

b. Obtain written consent of both parties to arrangement before accepting employment.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide § 92.131

§ 92.131 Obtaining Licenses, Bonds, and Insurance

1. If any licensing, permit, or registration requirements apply to performance of proposed services [*see § 92.114*], ensure that service provider has satisfied requirements.

2. If any bonds or insurance are required for performance of services [*see § 92.115*], ensure that service provider has satisfied requirements.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewContracts LawTypes of ContractsPersonal Service AgreementsGovernmentsState & Territorial GovernmentsLicenses

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30-92 California Legal Forms--Transaction Guide § 92.132

§ 92.132 Drafting, Executing, and Filing Contract

1. Draft contract [*see* Part D of this Transaction Guide].

2. If required, prepare duplicate copies of contract [*see § 92.120*].

3. If contract is intended for an actual transaction rather than standard form to be used by service provider, have parties:

a. Read written contract.

b. Execute contract.

c. State date and place of execution.

4. If contract intended to be used as a standard form by service provider requires governmental approval [*see, e.g., § 92.222[1][b]* (service contract subject to Electronic and Appliance Repair Dealer Registration Law)], submit form to appropriate agency for approval.

5. Comply with any filing requirements [*see § 92.120*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide §§ 92.133-92.139

[Reserved]

§§ 92.133[Reserved]

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D. Drafting Guide to Service Contracts

30-92 California Legal Forms--Transaction Guide

NOTE:

Because this Part is intended as a general drafting guide to service contracts, it does not attempt to list the provisions of any one particular type of contract. The elements that are essential to every contract are discussed in *§ 92.110-§ 92.113* [***see*** *Civ. Code § 1550*]. Provisions required by law for certain types of contracts are discussed in *§ 92.114*, and *§ 92.115-§ 92.120* discuss various other provisions that may be appropriate for some service contracts. Particular requirements for the service contracts set forth as Forms for this chapter are discussed in the comments to those Forms.

For a general guide to drafting contracts, see *Ch. 75,* ***Formation of Contracts and Standard Contractual Provisions****, § 75.130* et seq.

In practice, of course, a great many service contracts are drafted as standard preprinted forms that contain blanks for the identity of the customer, the price, and other nonstandard information. An attorney who uses the following guide to draft such a standard form agreement should simply provide adequate blank space for those nonstandard items of information that must be completed at the time the parties actually enter into the contract.

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30-92 California Legal Forms--Transaction Guide § 92.140

§ 92.140 Introductory Provision

1. Specify all parties to agreement [*see § 92.111*].

NOTE:
All contracts must contain the consent of parties capable of contracting [*Civ. Code § 1550*; ***see*** *Civ. Code §§ 1565-1590*].

2. If one of the parties is a corporation, association, limited liability company, or partnership, specify each of the following:

a. Name of entity.

b. Form of organization.

c. Principal place of business.

3. Include effective date of agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide § 92.141

§ 92.141 Recitals

1. Add recitals that set forth basic intention of parties and purpose of agreement.

NOTE:
For a discussion and example of recitals, see *Ch. 75,* ***Formation of Contracts and Standard Contractual Provisions****, § 75.221*.

2. Include recital describing business of service provider, including reference to license, if required [*see, e.g., § 92.210[2]* (security patrol service contract)].

3. If customer's real property will be serviced, state customer's interest in property, such as [*see § 92.200[2]*]:

a. Customer is owner of property.

b. Customer is tenant of property, with full rights to contract for intended services.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide § 92.142

§ 92.142 Description of Services

1. Describe services to be performed:

NOTE:
Although the general purpose of the contract is often set forth in the recitals [***see § 92.141***], the specific details of the services should be described.

a. In one or more contract provisions; or

NOTE:
For examples of provisions describing in detail within the body of the contract the services to be performed, see *§ 92.200[2],* P 2 and § 92.201[2], P 2.

b. By reference to an attached document.

NOTE:
For an example of this method of describing the services, see *§ 92.261[2],* P 4(a).

2. If customer's personal property will be serviced, describe property to be serviced.

NOTE:
For example, if an item of personal property to be serviced is unique or valuable, such as a piece of jewelry, the contract should include a detailed description of the property to be serviced. Similarly, an estimate form for automobile repairs should include the license number of the vehicle.

3. Specify when services will be performed:

a. Once, at specified time [*see, e.g., § 92.260[2]*, P 1].

b. Once, with performance partially dependent on customer [*see, e.g., § 92.240[2]*, PP 1, 3].

c. For one specified period [*see, e.g., § 92.226[2]*, P 1].

d. For specified period of time each day during term of agreement [*see, e.g., § 92.213[2]*, P 2].

e. At specified times each day [*see, e.g., § 92.210[2]*, P 2(a)].

f. Specified number of times each week [*see, e.g., § 92.200[2]*, P 2].

g. Specified number of times weekly during particular seasons [*see, e.g., § 92.201[2]*, P 2].

h. Weekly or monthly [*see, e.g., § 92.202[2]*, P 4].

i. Bimonthly or semi-annually [*see, e.g., § 92.203[2]*, P 3].

j. At times to be mutually agreed upon [*see, e.g., § 92.222[2]*, P 12].

k. At irregular times during term of agreement [*see, e.g., § 92.250[2]*, P 4].

l. Whenever needed to keep equipment in good working order and repair [*see, e.g., § 92.212[2]*, P 2(d)].

m. On request of customer [*see, e.g., § 92.225[2]*, P 3].

4. If desired, include provision for additional services when required by customer [*see, e.g., § 92.202[2]*, P 8(b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide § 92.143

§ 92.143 Compensation

1. Include one of following provisions specifying how service provider will be compensated:

NOTE:

All contracts must contain a sufficient cause or consideration [*Civ. Code § 1550*; ***see*** *Civ. Code §§ 1605-1615*]. For a detailed discussion of this requirement, see *Ch. 75,* ***Formation of Contracts and Standard Contractual Provisions****, § 75.11[4]*.

a. Lump sum.

NOTE:

This type of provision is appropriate if the service will be performed at a known time shortly after execution of the contract [***see, e.g.,*** *§ 92.260[2]*], or if the time of performance is unknown but the exact services and compensation are specified [***see, e.g.,*** *§ 92.261[2]*].

b. Fixed amount per month [*see, e.g., § 92.200[2],* P 5].

NOTE:

This method is generally used when the amount of the services rendered each month is expected to be more or less constant. If the amount of services to be rendered will vary at different seasons of the year, the contract can provide for different rates for different seasons [***see, e.g.,*** *§ 92.201[2],* P 5].

c. Initial fee plus fixed monthly amounts [*see, e.g., § 92.212[2],* P 7].

d. Annual charge payable during first 30 days of each year that agreement is in effect [*see, e.g., § 92.203[2],* P 5].

NOTE:

This method is desirable when the services are performed less frequently than monthly, or the annual charge is relatively small with regard to the scope of the business involved.

e. Schedule of fixed charges for particular services that may be selected [*see, e.g., § 92.262[2],* P 1].

f. Contingent fee depending on degree of success achieved by service provider [*see, e.g., § 92.240[2],* P 5].

g. Specified amount for each hour expended by employees of service provider [*see, e.g., § 92.211[2],* P 7].

NOTE:

Compensation is generally determined by this method when the service provider will supply trained personnel for the customer's use, and no expenditures for materials are involved [***see, e.g.,*** *§ 92.211[2],* P 7(a)]. The contract should also include a provision requiring the service provider to furnish the customer with regular time sheets showing the hours expended in carrying out its contractual duties [***see, e.g.,*** *§ 92.211[2],* P 7(c)].

2. If appropriate, include provision for adjustment of compensation if conditions change:

a. Statement that compensation will be adjusted to reflect increases or decreases in cost to service provider of labor [*see, e.g., § 92.200[2],* P 5(b)], or parts and materials [*see, e.g., § 92.202[2],* P 9(c)].

b. Statement of additional compensation to be paid for anticipated additional work at irregular intervals [*see, e.g., § 92.211[2],* P 7(a)].

3. Include provision specifying manner of payment:

a. If service provider will be paid monthly, describe billing and payment procedures [*see, e.g., § 92.202[2],* P 9(d)].

b. If service provider will be paid annually, provide that customer will pay annual charge during specified period in each year that contract is in effect [*see, e.g., § 92.203[2],* P 5 (first 30 days of year)].

c. Payment in advance [*see, e.g., § 92.226[2],* P 2].

d. Payment due within certain number of days on completion of services [*see, e.g., § 92.240[2],* P 5].

e. Payment due on execution of contract [*see, e.g., § 92.212[2],* P 7(a)].

4. If contract is "retail installment contract" [*Civ. Code § 1802.6*; *see § 92.117*], ensure that all payment and finance provisions comply with the following:

NOTE:

The two acts listed below govern consumer credit terms in California. For a detailed discussion of their requirements, see Ch. 45, ***Consumer Installment Loans and Credit Sales*** . For an example of a retail

installment contract for services that complies with these acts, see *Ch. 45, **Consumer Installment Loans and Credit Sales**, § 45.225*.

a. Federal Truth in Lending Act [*15 U.S.C. § 1601 et seq.*; *see § 92.12[1][c]*].

b. Unruh Act [*Civ. Code § 1801 et seq.*; *see § 92.12[1][b]*].

5. If contract is not "retail installment contract" [*see* P 4, *above*], but interest will be imposed on delinquent accounts:

NOTE:
The detriment caused by breach of an obligation to pay money, only, is deemed to be the amount due with interest [*Civ. Code § 3302*]. Any legal rate of interest stipulated by a contract remains chargeable after a breach, until the contract is superseded by a verdict or other new obligation [*Civ. Code § 3289(a)*]. If a contract does not specify a legal rate of interest chargeable after a breach, the obligation will bear interest at a rate of 10 percent per annum [*Civ. Code § 3289(b)*].

a. Specify date on which interest will begin to accrue.

b. Specify interest rate not to exceed maximum legal rate.

6. If appropriate, include provision for reimbursement of expenses reasonably incurred by service provider.

7. If appropriate, add that travel expenses of service provider's representatives beyond specified distance will be charged to customer.

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-92 California Legal Forms--Transaction Guide § 92.144

§ 92.144 Statutory Requirements

NOTE:
Some provisions required by statute or regulation must follow format requirements, such as size or style of typeface [***see** § 92.120*].

1. If services are subject to license, registration, or certification requirements [*see § 92.114*], include provisions regarding current status of service provider.

NOTE:
For a sample provision requiring the service provider to maintain a specific certification, see *§ 92.202[2]*, P 3(a), (b).

2. If service contract is subject to statutory requirements for warnings or other disclosures to consumer, include required disclosures in contract.

NOTE:
For example, a contract and trust agreement for preneed funeral arrangements between a licensed funeral director and a customer must contain various disclosures and required statements [*Bus. & Prof. Code § 7735-7746*; ***see, e.g.,** § 92.261[2]*].

3. If contract will be used for solicitation of services not yet ordered or performed [*see § 92.170*], include statutory warning that contract constitutes solicitation only [*Civ. Code § 1716*].

NOTE:
The following warning must appear in conspicuous boldface capital letters of a color prominently contrasting with the background and at least as large, bold, and conspicuous

as any other print on the face of the solicitation but no smaller than 30-point type: "This Is Not a Bill. This Is a Solicitation. You Are Under No Obligation to Pay the Amount Stated Above Unless You Accept This Offer." [*Civ. Code § 1716(b)*].

4. If contract is a "home solicitation contract or offer" [*see § 92.171*], include the following [*Civ. Code § 1689.7*]:

a. On first page, name and address of seller to which notice of cancellation is to be mailed and date on which customer signed agreement.

b. In immediate proximity to space for customer's signature, statement of cancellation rights.

c. Completed form cancellation notice (in duplicate).

NOTE:
For a form containing the statutory cancellation provisions, see *§ 92.212[2]*. Although the service provider is required to provide a form containing those provisions, the notice of cancellation given by the customer need not be set forth on that particular form. A notice of cancellation, however expressed, is effective if it indicates the intention of the customer not to be bound by the home contract or offer [*Civ. Code § 1689.6(f)*].

5. If proposed services are subject to any specific statute or regulation governing contents of contract [*see § 92.117*]:

a. Include all required provisions.

NOTE:
For example, a contract for health studio services must include the customer's right to cancel the contract within a certain period, among other disclosures [***see*** *Civ. Code § 1812.85*].

b. Exclude any prohibited provisions.

NOTE:
For example, a contract for health studio services may not require payments or financing by the customer over a period exceeding three years from the date of execution, among other prohibited provisions [***see*** *Civ. Code § 1812.84*].

6. If desired, include provision stating that service provider will comply with all applicable federal, state, county, and city statutes, ordinances, and regulations [*see, e.g., § 92.202[2]*, P 10].

NOTE:
Such a provision may further state that if compliance is impossible, the service provider will immediately notify the customer of the reasons for noncompliance.

7. If agreement is service contract offered in addition to or instead of express warranty under Song-Beverly Consumer Warranty Act, include all of following [*Civ. Code § 1794.4(b), (c)*]:

NOTE:
The Song-Beverly Consumer Warranty Act [***see*** *Civ. Code § 1790 et seq.*] regulates service and repairs made under express and implied warranties on consumer goods [*Civ. Code §§ 1791(a), 1795.5*; ***see*** *§*

92.52[2]], as well as service contracts offered to a customer in addition to or in lieu of an express warranty [*Civ. Code § 1794.4(a)*; ***see*** *§ 92.51*]. Special rules apply to service contracts covering motor vehicles, home appliances, and home electronic products purchased for use in California [***see*** *Civ. Code § 1794.41(a)*; ***see also*** *§ 92.222[1]*].

a. Statement that service contract includes all services and functional parts that may be necessary to maintain proper operation of entire product under normal operation and service for duration of service contract and without additional charge.

b. Clear description and identification of covered product.

c. Point in time or event when term of service contract commences, and its duration measured by elapsed time or objective measure of use.

d. If enforceability of service contract is limited to original customer or persons other than every consumer owner of covered product during term of service contract, description of limits on transfer or assignment of service contract.

e. Description of any services, parts, characteristics, components, properties, defects, malfunctions, causes, conditions, repairs, or remedies excluded from scope of contract.

f. Any other limitations on application of language in (a), *above*, such as limit on total number of service calls.

g. Any additional services that service provider will provide.

h. Whether obligation of service provider includes preventive maintenance and, if so, nature and frequency of preventive maintenance that service provider will provide.

i. Whether customer has obligation to provide preventive maintenance or perform any other obligation and, if so, nature and frequency of preventive maintenance and of any other obligations, and consequences of noncompliance.

j. Step-by-step explanation of procedure that customer should follow to obtain performance of any obligation under service contract [*see Civ. Code § 1794.4(c)(5)*].

k. Explanation of steps that service provider will take to carry out its obligation under service contract.

l. Description of any right to cancel contract if customer returns product or product is sold, lost, stolen, or destroyed, or, if there is no right to cancel or right to cancel is limited, statement of that fact.

m. Information concerning availability of any informal dispute settlement process.

8. If agreement is service contract covering motor vehicle, home appliance, or home electronic product purchased for use in California, include all information in P 7, *above*, and all of following [*Civ. Code § 1794.41(a)*]:

NOTE:

For any service contract subject to the provisions of the Electronic and Appliance Repair Dealer Registration Law [***see*** *§ 92.50*], the form of the contract to be issued by a service provider must be filed

with the Director of the Department of Consumer Affairs (which oversees the Bureau of Electronic and Appliance Repair) prior to its use [*Bus. & Prof. Code § 9855.3(a)*; ***see*** *Bus. & Prof. Code § 9855.9* (requirement slated for repeal on January 1, 2013, absent contrary legislation prior to that date)]. Other provisions apply to service contracts for motor vehicles, home appliances, and home electronic products [***see*** *Civ. Code § 1794.41*; ***see also*** *Ins. Code § 12800 et seq.* (vehicle service contracts)]. For discussion of *Civ. Code § 1794.41*, see *§ 92.222[2][e], [f], [g]*. For discussion of *Ins. Code § 12800 et seq.*, governing vehicle service contracts, see *§ 92.53[2]*].

a. Unless contract provides for longer period, provision for cancellation of contract by purchaser and refund of full amount paid if purchaser has made no claim against contract and provides written notice of cancellation to person specified in contract within:

(1) 30 days after receipt of contract covering used motor vehicle without manufacturer's warranty, home appliance, or home electronic product; or

(2) 60 days after receipt of contract covering other than used motor vehicle without manufacturer's warranty, home appliance, or home electronic product.

NOTE:
If the purchase of the service contract was financed, the seller may make the refund payable to the purchaser, the assignee, or lender of record, or both [*Civ. Code § 1794.41(a)(4)(C)*].

Refunds on cancellation are made on a pro rata basis if a claim has been made within the first cancellation period. Pro rata refunds are based on either elapsed time or an objective measure of use, such as mileage or the retail value of any service performed, at the seller's option as indicated in the contract [*Civ. Code § 1794.41(a)(4)(A), (B)*].

b. Unless contract provides for longer period for obtaining full refund, provision allowing pro rata refund of contract price to purchaser on written notice of cancellation to person specified in contract after:

(1) 30 days after receipt of contract covering used motor vehicle without manufacturer's warranty, home appliance, or home electronic product; or

(2) 60 days after receipt of contract covering other than used motor vehicle without manufacturer's warranty, home appliance, or home electronic product.

NOTE:
If the purchase of the service contract was financed, the seller may make the refund payable to the purchaser, the assignee, or lender of record, or both [*Civ. Code § 1794.41(a)(4)(C)*].

All pro rata refunds are based on either elapsed time or an objective measure of use, such as mileage or the retail value of any service performed, at the seller's option as indicated in the contract [*Civ. Code § 1794.41(a)(4)(A), (B)*].

9. If service contract is between consumer and retailer with 25 or more employees for service or repair of merchandise requiring presence of consumer at time service or repair is to be done, include provision stating that on receipt of

request for service under contract, retailer and consumer must agree, prior to date of service or repair, on four-hour period within which service or repair will be commenced [*Civ. Code § 1722(a)(1)*; *see § 92.222[2]*, P 12].

10. If agreement is express warranty of consumer product by its manufacturer, include all of following [*see 15 U.S.C. § 2302(a)*; *see also § 92.223*]:

NOTE:

Every manufacturer, distributor, or retailer making express warranties with respect to consumer goods must set forth the warranties in simple and readily understood language, and must clearly identify the party making the express warranty. Express warranties on consumer goods must conform to federal standards for warranty terms and conditions, which require the following information [*Civ. Code § 1793.1(a)*; ***see*** *15 U.S.C. § 2302(a)*].

a. Clear identification of names and addresses of warrantors.

b. Identity of party or parties to whom warranty is extended.

c. Product or parts covered.

d. Statement of what warrantor will do, at whose expense, and for what period of time, in event of defect, malfunction, or failure to conform with written warranty.

e. Statement of what consumer must do and expenses consumer must bear.

f. Exceptions and exclusions from terms of warranty.

g. Step-by-step procedure that consumer should take to obtain performance of any obligation under warranty, including identification of any person or class of persons authorized to perform obligations set forth in warranty.

h. Information relating to availability of any informal dispute settlement procedure offered by warrantor and recital, if warranty so provides, that purchaser may be required to resort to procedure before pursuing any legal remedies in courts.

i. Brief, general description of legal remedies available to consumer.

j. Time at which warrantor will perform any obligations under warranty.

k. Period of time within which, after notice of defect, malfunction, or failure to conform with warranty, warrantor will perform any obligation under warranty.

l. Characteristics or properties of products or parts not covered by warranty.

m. Elements of warranty in words or phrases that would not mislead reasonable, average consumer about nature or scope of warranty.

n. Statement to buyer: "This warranty gives you specific legal rights, and you may also have other rights which vary from state to state" [*see 16 C.F.R. § 701.3(a)(9)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-92 California Legal Forms--Transaction Guide § 92.145

§ 92.145 Time for Performance

1. If appropriate, include one of following provisions:

a. That services will be performed only during service provider's regular working hours on regular working days [*see, e.g., § 92.202[2]*, P 8(a)].

NOTE:
Contracts of this type generally include another provision for increased compensation if service during overtime is requested by the customer [***see*** *§ 92.202[2]*, P 8(b)].

b. That emergency service will be provided 24 hours a day, seven days a week at no additional cost [*see, e.g., § 92.212[2]*, P 3(b)].

2. If retailer has 25 or more employees and consumer must be present for service or repair of merchandise under contract, add provision setting forth all of following [*Civ. Code § 1722(a)(1)*; *see § 92.222[2]*, P 12]:

a. Parties' agreement that presence of consumer is required at time of service or repair.

b. Consumer's obligations to request service or repair under contract and to be present during mutually agreed on period specified for commencement of service or repair.

c. Retailer's obligations, on receipt of request for service or repair under contract, to specify, before date of service or repair, four-hour period within which service or repair will be commenced and to commence service or repair during specified period.

NOTE:
If the service or repairs do not begin within the agreed on four-hour period, the consumer

may with certain exceptions bring an action in small claims court for lost wages, expenses actually incurred, or other actual damages not exceeding $600 [***see*** *Civ. Code § 1722(a)(2)*]. No action is valid if the consumer was not present when service or repair was attempted during the period, or if the retailer made a diligent effort to notify the consumer by telephone or in person of a delay caused by unforeseen or unavoidable occurrences beyond the retailer's control [*Civ. Code § 1722(a)(3)*]. If notification is by telephone, the retailer must leave a telephone number for a return call by the consumer, to enable the consumer to arrange a new two-hour period for delivery, service, or repair [*Civ. Code § 1722(a)(3)*]. Any provision included in the contract in which the consumer or subscriber agrees to modify or waive these rights is void as against public policy [*Civ. Code § 1722(d)*].

3. Describe types of delays or failure of performance that do not give rise to breach [*see, e.g., § 92.200[2]*, P 8].

NOTE:

Typical provisions excuse delays caused by labor disputes, acts of God, or causes beyond service provider's control.

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-92 California Legal Forms--Transaction Guide § 92.146

§ 92.146 Materials and Parts

1. If appropriate, provide that any materials or parts needed for proper service will be supplied by service provider:

a. At no additional cost [*see, e.g., § 92.201[2]*, P 3].

b. At no additional cost, except that certain specified materials are to be supplied by customer [*see, e.g., § 92.200[2]*, P 3].

c. Cost to be adjusted by reference to an industry index [*see, e.g., § 92.202[2]*, P 9(c)].

2. If service involves maintaining heavy equipment and supplying any necessary parts:

NOTE:
The service provider may want to protect itself with regard to expensive parts that are in workable condition but will need replacement in the future. In some cases, the cost of replacing a particular part can exceed the monthly service charge.

a. Require parts in question to be replaced at customer's expense before service is commenced under contract.

NOTE:
This alternative sacrifices the remaining useful life of those parts.

b. Prorate total cost of replacing parts.

NOTE:

Under this method, the service provider is liable only for that part of the replacement cost which is proportionate to the period of time the part was used during the contract period.

3. If appropriate, state that service provider will provide customer with signs to be posted on customer's property [*see, e.g., § 92.213[2]*, P 8(a)].

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30-92 California Legal Forms--Transaction Guide § 92.147

§ 92.147 Service Personnel

1. If customer desires assurance regarding qualifications of service provider's employees, include any of the following provisions:

NOTE:
Qualification may be an issue when the services to be performed require specialized training or certification. For example, employees of a service company that repairs and maintains elevators and other moving conveyances must be certified competent conveyance mechanics [*Lab. Code § 7311.2(a)*; ***see*** *Lab. Code § 7300.1(h)* (definition)].

a. Names and credentials of particular employees that will perform services.

b. All employees performing services must be well trained and properly qualified [*see, e.g., § 92.202[2],* P 3(c)].

c. All employees performing services must perform duties in strict accordance with recognized practices and with standards and special instructions issued by customer [*see, e.g., § 92.211[2],* P 4].

2. If desired, include following statements with respect to persons that will perform services:

NOTE:
A customer may want to establish that the persons performing the services are the employees of the service provider, in order to avoid liability regarding withholding of taxes, payment of payroll taxes, intentional or negligent acts committed by those persons, and worker's compensation. For an example of this type of provision, see *§ 92.211[2],* P

5.

a. Persons performing services will be employees of service provider.

b. Employees will be subject to direct supervision and control of service provider.

c. Service provider will have sole responsibility for paying salaries, taxes, and all other expenses relating to those persons.

3. If applicable, add following statements regarding supervision of service provider's employees:

a. Supervisory personnel from service provider will conduct systematic inspections of services performed [*see, e.g., § 92.200[2],* P 4].

b. Supervisory personnel of service provider will be available at all times to report to and confer with designated employees of customer [*see, e.g., § 92.211[2],* P 4(e)].

c. If for any reason customer believes that any employee of service provider is not properly carrying out duties, service provider will immediately replace that employee with another [*see, e.g., § 92.211[2],* P 4(d)].

Legal Topics:

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30-92 California Legal Forms--Transaction Guide § 92.148

§ 92.148 Responsibilities of Customer

1. If service provider requires access to customer's property, include agreement of customer to allow access to customer's property at agreed-upon times.

NOTE:

In some types of service contracts, the service provider should receive access to the equipment to be serviced at any time during regular working hours [***see, e.g.,*** *§ 92.202[2]*, P 8(a)]. In other situations, any employee of the service provider should be authorized to enter the customer's property at any time necessary to fulfill the service provider's duties [***see, e.g.,*** *§ 92.212[2]*, P 5].

2. If service provider agrees to keep equipment in proper operating condition, add provision allowing service provider to charge customer for costs of repairs necessitated by damage to equipment caused by customer, third parties, or acts of God [*see, e.g., § 92.212[2]*, P 6(a), (b)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-92 California Legal Forms--Transaction Guide § 92.149

§ 92.149 Term and Termination Rights

1. Specify term of agreement [*see § 92.113*].

2. If desired, include provisions for automatic termination of agreement upon occurrence of specified events, such as:

NOTE:
For discussion and examples of general termination provisions, see *Ch. 75,* ***Formation of Contracts and Standard Contract Provisions*** *§§ 75.240-75.243*. For examples of automatic termination provisions, see *Ch. 84,* ***Independent Contractors****, § 84.200*.

a. Bankruptcy or insolvency of either party.

b. Sale of either party's business.

c. Death of either party.

d. Any other event agreed upon by parties.

3. If desired, include provisions giving parties right to terminate agreement for:

NOTE:
For examples of these types of provisions, see *Ch. 84,* ***Independent Contractors****, § 84.200*.

a. Breach of contract by either party.

b. Failure of customer to make required payments to service provider, if failure is not remedied within specified time period.

4. If service provider is required to maintain a license, registration, or certification as condition to agreement, include provision granting customer right to terminate agreement if that service provider fails to maintain that license, registration, or certification.

NOTE:

For an example of this type of provision, see *§ 92.202[2]*, P 3(b).

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-92 California Legal Forms--Transaction Guide § 92.150

§ 92.150 Insurance and Bonds

1. If service provider is required to carry insurance [*see § 92.115*], include provision requiring service provider to keep insurance in full force and effect during term of agreement.

NOTE:
For an example of a provision requiring public liability and worker's compensation insurance, see *§ 92.203[2]*, P 8.

2. If service provider is required to obtain bond [*see § 92.115*], include provision requiring service provider to post and maintain bond [*see, e.g., § 92.252[2]*], if desired.

PRACTICE TIP:
Generally, a bond requirement is not included in service contracts drafted by the service provider unless it is required by law. However, if the attorney is representing the customer in a particular transaction, it may be advisable to include this obligation.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil ProcedureRemediesBondsGeneral OverviewContracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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§ 92.151 Liens

NOTE:
This section applies only when services will be rendered with respect to real or tangible personal property of the customer.

1. If desired, include reference to any statutory lien in contract [*see § 92.118*].

NOTE:
Although it is unnecessary to refer to the lien in the service contract, liens are sometimes mentioned to make the customer aware of the existence of the lien and to induce prompt payment [***see***, ***e.g.,*** *§ 92.224[2]*].

2. If appropriate, add provision creating lien in contract [*Civ. Code § 2881(1)*; *see § 92.118*].

NOTE:
For an example of a lien created by contract provision, see *§ 92.226[2]*, P 5.

3. If required, include notice-to-owner statement summarizing basics of mechanics' lien laws.

NOTE:
For example, an alarm system sales and lease agreement with a total cumulative cost exceeding $250 must include a Notice-to-Owner Statement [*Bus. & Prof Code § 7599.54(i)(4)*; ***see*** *§ 92.212[2]*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsPersonal Service AgreementsReal Property LawNonmortgage LiensGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART III. TRANSACTION GUIDE
D. Drafting Guide to Service Contracts

30-92 California Legal Forms--Transaction Guide § 92.152

§ 92.152 General Provisions

1. If desired, include exculpatory clause [*see, e.g., § 92.222,* P 8].

NOTE:

Exculpatory clauses are provisions intended to limit liability of a party, and his or her agents, usually for negligence. A contract cannot exempt one party from responsibility for fraud, willful injury to the person or property of another, or violation of law, whether willful or negligent [*Civ. Code § 1668*; ***see, e.g.,*** *Health Net of California, Inc. v. Department of Health Services (2003) 113 Cal. App. 4th 224, 226-227, 6 Cal. Rptr. 3d 235* (contractual clause that prohibited any recovery of damages, but not equitable relief, for any violation of statutory or regulatory law not made part of the parties' contractual obligations was held invalid under *Civ. Code § 1668*)]. For examples and discussion of exculpatory clauses, see *Ch, 75,* ***Formation of Contracts and Standard Contractual Provisions****, § 75.234*.

2. If appropriate, add provision obligating parties to keep information relating to contract confidential [*see, e.g., § 92.250[2],* P 11].

3. If desired, add provision for attorneys' fees and costs [*see, e.g., § 92.250[2],* P 14].

NOTE:

Most written contracts contain a provision for attorneys' fees [***see*** *Civ. Code § 1717* (contract provision regarding attorneys' fees)]. For a discussion and example of attorney fee provisions generally, see *Ch. 75,* ***Formation of Contracts and Standard Contractual Provisions****, § 75.252*.

4. Include provision for arbitration of matters in controversy, if desired [*see, e.g., § 92.202[2],* P 17].

NOTE:

Arbitration is the submission for determination of a disputed matter to private unofficial persons selected in the manner provided by law or by the agreement of the parties [*Stockwell v. Equitable F. & M. Ins. Co. (1933) 134 Cal. App. 534, 540, 25 P.2d 873* ; ***see*** *Tipton v. Systron Donner Corp. (1979) 99 Cal. App. 3d 501, 505, 160 Cal. Rptr. 303]* . For examples and discussion of arbitration clauses generally, see *Ch. 75,* ***Formation of Contracts and Standard Contractual Provisions****, § 75.250*.

5. If desired, include a prohibition on assignment by one party without written consent of other [*see, e.g., § 92.203[2],* P 12].

NOTE:

Many contracts for personal services are not assignable or survivable [***see*** *§ 92.119*]. For examples and discussion of assignment provisions generally, see *Ch. 75,* ***Formation of Contracts and Standard Contractual Provisions****, §§ 75.280-75.282*.

6. Statement that contract contains entire agreement of parties [*see, e.g., § 92.200[2],* P 9]:

NOTE:

For discussion of this type of provision in contracts generally, see *Ch. 75,* ***Formation of Contracts and Standard Contractual Provisions****, § 75.270*.

7. Statement (if appropriate) that California law will govern agreement [*see, e.g., § 92.200[2],* P 14].

NOTE:

For a discussion of choice of law provisions in contracts generally, see *Ch. 75,* ***Formation of Contracts and Standard Contractual Provisions****, § 75.273*.

8. Specify modification/amendment rights [*see, e.g., § 92.200[2],* P 10].

NOTE:

Modification is usually only permitted with the written consent of both parties.

9. Specify manner of giving notices [*see, e.g., § 92.200[2],* P 13].

NOTE:

For a discussion of notice provisions in contracts generally, see *Ch. 75,* ***Formation of Contracts and Standard Contractual Provisions****, § 75.294*.

10. If desired, provide that agreement will be severable in event of partial invalidity.

NOTE:

For a discussion of provisions regarding severability in contracts generally, see *Ch. 75,* ***Formation of Contracts and Standard Contractual Provisions****, § 75.271*.

11. If desired, include provision for liquidated damages [*see, e.g., § 92.212[2],* P 11].

NOTE:

A liquidated damages clause in a contract for services to be used primarily for the consumer's personal, family, or household purposes is void, unless it would be impracticable or extremely difficult to fix the actual damages sustained from a breach [***see*** *Civ. Code § 1671(c), (d)*]. In other types of contracts, a

liquidated damages provision is valid unless it was unreasonable under the circumstances existing at the time the contract was made [***see*** *Civ. Code § 1671(a), (b)*; ***see, e.g.,*** *Ridgley v. Topa Thrift and Loan Assn. (1998) 17 Cal. 4th 970, 979-981, 73 Cal. Rptr. 2d 378, 953 P.2d 484* (promissory note clause that imposed charge of six months' interest if borrowers prepaid loan principal, and provided that charge would not be imposed six months after execution of note unless borrowers had made late interest payment or otherwise defaulted, held to be unenforceable penalty for late payment)]. For a more detailed discussion of liquidated damages provisions, see *Ch. 75,* ***Formation of Contracts and Standard Contractual Provisions****, § 75.251*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide §§ 92.153-92.169

[Reserved]

§§ 92.153[Reserved]

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CHAPTER 92 SERVICE CONTRACTS
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E. Related and Subsequent Procedures

30-92 California Legal Forms--Transaction Guide § 92.170

§ 92.170 Unsolicited Services

1. Will contract accompany unsolicited services not actually ordered or requested by recipient?

NOTE:
Unsolicited services will be deemed a gift to the recipient, and the provider of those services cannot request payment for them [*Civ. Code § 1584.5*; ***see*** *§ 92.12[6]*].

2. Will invoice or statement be used for solicitation of services not yet ordered or performed?

NOTE:
A document used to solicit money for services not yet performed or ordered must contain a statutory warning that it is only a solicitation [*Civ. Code § 1716*; ***see*** *§ 92.12[6]*].

3. If customer receives services not actually ordered or requested orally or in writing, even if accompanied by bill statement, inform customer of his or her rights [*Civ. Code § 1584.5*]:

NOTE:
The receipt of services not requested, including any services that will be provided to the customer unless he or she exercises an option to reject the offer, will be deemed an unconditional gift [*Civ. Code § 1584.5*].

a. Customer may use services in any manner without any obligation to provider.

b. Customer may bring action to enjoin provider of services from sending bills or requests for payment.

4. If customer receives written statement or invoice for services not yet performed and not yet ordered, without statutory warning that statement is only a solicitation, inform customer of his or her right to bring action for damages equal to three times sum solicited [See *Civ. Code § 1716(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide § 92.171

§ 92.171 Home Solicitation Contracts

1. Determine whether contract meets following criteria for "home solicitation contract" [*Civ. Code § 1689.5(a)*]:

NOTE:
Home solicitation contracts or offers are required to contain certain statutory provisions [*Civ. Code § 1689.7*; ***see*** *§ 92.144*, P 4], unless the customer has the right to rescind under the federal Truth in Lending Act [*Civ. Code § 1689.5(a)*; ***see*** *15 U.S.C. § 1635*; ***see also*** *Ch. 89,* ***Home Improvement and Specialty Contracts****, § 89.17*].

a. Contract is for sale, lease, or rental of goods or services.

b. Service will be provided on premises other than where service provider normally carries on business, or where goods are normally offered for sale in course of business carried on at those premises.

c. Amount due for services is $25 or more.

NOTE:
The $25 minimum includes any interest or service charges [*Civ. Code § 1689.5(a)*].

2. If customer wishes to cancel "home solicitation contract or offer" for services, inform customer that contract may be cancelled during the following time periods:

NOTE:
Even if the service provider has already performed services before cancellation, the service provider is

not entitled to any compensation. Furthermore, if the service provider's services result in the alteration of the customer's property, the service provider must restore the property to substantially the same condition as it was when the services were rendered [*Civ. Code § 1689.11(c)*]. For further discussion of home solicitation contracts, ***see*** *Ch. 89,* ***Home Improvement and Specialty Contracts****, § 89.17*.

a. Within three business days after execution, if contract contains notification of right to cancel and form for cancellation, for most home solicitation contracts and offers [*see Civ. Code § 1689.6(a)*].

b. Within seven business days after execution, if contract contains notification of right to cancel and form for cancellation, for certain personal emergency response units [*Civ. Code § 1689.6(b)*] or for repair or restoration of residential premises damaged in disaster [*see Civ. Code § 1689.6(c)*].

NOTE:

A home solicitation contract or offer for the repair or restoration of residential premises signed by the customer on or after the date on which a disaster caused damage to the premises, but not later than midnight of the seventh business day, is void unless the customer or his or her agent or insurance representative solicited the contract at the trade premises of the seller [*Civ. Code § 1689.14(a)*].

c. At any time after execution, if required notice and form is not provided in contract [*Civ. Code § 1689.7(g)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
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30-92 California Legal Forms--Transaction Guide § 92.172

§ 92.172 Consumer Complaints

NOTE:

Individuals who seek or acquire services for personal, family, or household purposes ("consumers") [***see*** *Bus. & Prof. Code § 302(c)*; *Civ. Code § 1761(d)*] and who have complaints with respect to the services or service provider may pursue remedies under the Consumer Affairs Act [*Bus. & Prof. Code § 300 et seq.*] and the Consumer Legal Remedies Act [*Civ. Code § 1750 et seq.*].

1. If consumer has complaint regarding any of following with respect to services performed, advise customer to send complaint to Director of Department of Consumer Affairs [*Bus. & Prof. Code § 325*; *see Bus. & Prof. Code § 302*]:

NOTE:

Under the Consumer Affairs Act [*Bus. & Prof. Code § 300 et seq.*], the Director may request appropriate relief for a consumer from the person against whom the complaint is made [*Bus. & Prof. Code § 326(a)*], and must transmit the complaint to the local, state, or federal agency whose authority provides the most effective means to secure relief [*Bus. & Prof. Code § 326(b)*; ***see*** *§ 92.12[8][b]*].

a. Unfair or deceptive acts or practices by any person in conduct of trade or commerce.

b. Production, distribution, sale, or lease of services or goods that may endanger public.

c. Violations of code or regulations relating to licensed businesses or professions.

2. If consumer has complaint against person licensed or registered by Department of Consumer Affairs,

advise consumer to send complaint to appropriate board or bureau [*Bus. & Prof. Code § 129*; *see Bus. & Prof. Code § 101* (list of licensing boards)].

NOTE:

For example, complaints against a person registered as an electronics service dealer may be directed to the Bureau of Electronic and Appliance Repair [*Bus. & Prof. Code § 9860*; ***see*** *§ 92.50[10][d]*].

3. If consumer suffers damage from unfair methods of competition or deceptive acts or practices in transaction intended to result or resulting in sale of services, advise him or her of right to:

NOTE:

For purposes of an action under the Consumers Legal Remedies Act [*Civ. Code § 1750 et seq.*], "services" means work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods [*Civ. Code § 1761(b)*; ***see*** *§ 92.12[9]*]. The remedies under the Act are nonexclusive [*Civ. Code § 1752*].

Any consumer who is a senior citizen or a disabled person, in an action for damages resulting from unfair methods of competition or deceptive practices relating to the sale or lease of services or goods, may seek additional damages prescribed by statute [***see*** *Civ. Code §§ 1780(b), 3345*; ***see also*** *Civ. Code § 1761(f), (g)* ("senior citizen" and "disabled person" defined)]. A prevailing plaintiff may be awarded treble damages, in addition to all other remedies provided by *Civ. Code § 1780*, for a violation of *Civ. Code § 1770(a)(24)*, which prohibits receiving an unreasonable fee [***see*** *Civ. Code § 1770(a)(24)(B)(ii)* (definition)] to prepare, aid, or advise any prospective applicant, applicant, or recipient in the procurement, maintenance, or securing of public social services [*Civ. Code § 1780(c)*; ***see*** *Civ. Code § 1770(a)(24)(B)(i)* ("public social services" defined); ***see also*** *Civ. Code § 1770(a)(24)(C)* (exceptions)].

a. Bring action against person causing that damage [*see Civ. Code §§ 1770, 1780*]; or

b. Bring class action, if unlawful acts have caused damage to other consumers similarly situated [*see Civ. Code § 1781*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide § 92.173

§ 92.173 Enforcement of Possessory Liens

NOTE:
This section will be relevant to service providers who have not received payment for performing services to a customer's property, and who are entitled to a possessory lien pursuant to statute or contract provision [***see*** *§ 92.118*]. For more detailed coverage of possessory liens, see Ch. 102A, ***Personal Property Liens*** .

1. If service provider is entitled to statutory lien, enforce lien according to statutory provisions:

NOTE:
For further discussion of statutory liens, see *§ 92.55*.

a. Wait for statutory payment period to expire.

NOTE:
The length of the statutory period varies according to the type of lien. For example, a dry cleaning establishment may give a customer notice of sale as early as 10 days after the cleaning bill becomes due [***see*** *Civ. Code §§ 3051, 3052*]. However, a jeweler who has performed watch repairs must wait one year after the account becomes due before giving notice of sale [***see*** *Civ. Code § 3052a*].

b. Give notice of sale to title holder.

NOTE:
The notice period varies according to the type of lien. For example, a jeweler must

provide 30 days notice of sale [***see*** *Civ. Code § 3052a*], while a dry cleaner must provide only 10 days notice [***see*** *Civ. Code § 3052*].

c. Apply sale proceeds to liquidate indebtedness secured by lien.

d. Pay any remaining amount from sale to property owner.

e. If required, comply with redemption provisions.

NOTE:
For example, the legal owner of an animal sold by a veterinary surgeon to satisfy a medical lien may redeem the animal within 20 days after sale [***see*** *Civ. Code §§ 3051, 3052*].

2. If lien was created pursuant to contract provision [*see § 92.118*], comply with contract provisions regarding enforcement.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service AgreementsReal Property LawNonmortgage LiensGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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30-92 California Legal Forms--Transaction Guide §§ 92.174-92.199

[Reserved]

§§ 92.174[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
A. Maintenance and Repairs of Real Property

30-92 California Legal Forms--Transaction Guide § 92.200

§ 92.200 Janitorial Service Contract

[1] Comment--Use of Form

This form is an illustrative contract for janitorial service for a large office building. Janitorial service for small buildings is generally done by small firms without a written contract. Housecleaning service for a home is also typically done without a written contract. However, written contracts are common when a janitorial service firm is hired to do all the maintenance work necessary for a large building.

Most types of written service contracts usually are printed forms. However, printed forms generally are not used for janitorial service contracts. This is because the services to be performed vary a great deal in each case, depending on the particular desires of the owner or operator of the building, the type of businesses conducted by the various tenants, the design of the building, the type of construction, the age of the building, and the particular type and amount of furniture, furnishings, draperies, floor coverings, and office equipment.

Paragraphs 2, 3, and 4 of this form (services to be performed, materials and supplies, and supervision) are the parts of a contract for janitorial service that should be given the most attention by the attorney. These paragraphs are illustrative ones dealing with a hypothetical situation that may not apply to the particular circumstances in the case confronting the attorney. The attorney should carefully analyze the situation and then draft provisions that will fit the needs of the particular situation.

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contractual provisions.

[2] FORM

Janitorial Service Contract

JANITORIAL SERVICE CONTRACT

This AGREEMENT is made on _____[*date*] between _____[*name of service company*] ("Janitorial Service Company"), _____[*capacity, e.g.,* a Delaware corporation *or* a California limited liability company *or* a California general partnership] with its principal place of business at _____[*address*], and _____[*name of customer*] ("Customer"), _____[*capacity*] with _____[its *or* his *or* her] principal place of business at _____[*address*].

Recitals

Customer is _____[*specify property rights to building, e.g.,* the owner of *or* a lessee with full rights to maintain the building at] the property located at _____[*address of building*] ("building").

Janitorial Service Company desires to provide janitorial and cleaning maintenance services to Customer and Customer desires to obtain such services from Janitorial Service Company.

THEREFORE, in consideration of the mutual promises set forth below, the parties agree as follows:

Term of Agreement

1. The term of this agreement shall commence on _____[*date*] and shall continue in full force and effect thereafter until it is terminated by _____[*e.g.,* 30] days written notice from either party to the other.

Services to Be Performed

2. Janitorial Service Company agrees to perform the following janitorial and cleaning maintenance services for the building:

[*Describe specific maintenance services to be performed, e.g., as follows; or, in the alternative, attach a schedule of items to be maintained and refer to the schedule in this paragraph*]:

(a) Three times per week:

- Clean front door glass and threshold.
- Sweep and dust mop all tile floors.
- Sweep all halls and stairways.
- Vacuum all carpets and rugs, and spot clean as needed.
- Empty and clean all ashtrays.
- Empty all waste containers.
- Dust all office furniture, telephones, ledges, and woodwork, and all other surfaces within reach.

- Remove finger marks from both sides of all entrance doors and from all interior doors, walls, woodwork, and partitions.
- Scrub and disinfect all rest room floors and fixtures.
- Replace restroom supplies in respective containers.
- Dust light fixtures.
- Maintain janitorial room in a neat and orderly condition.

(b) One time per month:

- Thoroughly clean and wax all tile floors.
- Clean all exterior windows on both the inside and the outside.

Materials and Supplies

3. Janitorial Service Company shall furnish all materials and equipment necessary to perform the services described in Paragraph 2 of this agreement with the exception of hand soap, towels, toilet tissue, and seat covers, which are to be supplied by Customer, who shall maintain an adequate supply of these supplies in the janitorial room of the building.

Supervision

4. Systematic inspection shall be conducted by the field superintendents of Janitorial Service Company to ensure that all services are properly performed. To make certain that any problems that may arise will be promptly taken care of, Janitorial Service Company shall maintain a 24-hour answering service seven days per week for the receipt of any complaints. The telephone number for this service is _____.

Compensation

5. (a) Customer shall pay Janitorial Service Company at the rate of $_____ per month for the services to be performed under this agreement. Janitorial Service Company shall invoice Customer at the end of each month and Customer shall make full payment within _____[*e.g.*, 30] days of the billing date.

(b) The compensation in subparagraph (a) is based on the present union wage scale for employees of Janitorial Service Company and on the existing rates of federal, state, city, and county taxes. In the event of any increase or decrease in the union wage scale or in the aforementioned taxes, the compensation to be paid Janitorial Service Company by Customer shall be adjusted accordingly. That adjustment shall be operative no sooner than 10 days from the date Customer receives notice of that increase or decrease, provided that in the event of an increase, Customer shall have the right to terminate this agreement prior to the commencement date of the increased rates, with termination to be effective on written notice to Janitorial Service Company.

Compliance With Applicable Statutes, Ordinances, and Regulations

6. In performing the services required of it under this agreement, Janitorial Service Company shall comply with all applicable federal, state, county, and city statutes, ordinances, and regulations.

Insurance

7. Janitorial Service Company, at its own cost and expense, shall procure and maintain throughout the term of this agreement a workers' compensation insurance policy for the protection of its employees engaged in work under this agreement.

Excusable Delays and Failures

8. Neither party shall be liable for any delay or failure in its performance under this contract (except for payment obligations) caused by events beyond the reasonable control of the party, including, but not limited to, terrorism, war, riots, labor strikes, interruption of utility services, fires, floods, earthquakes, and other natural disasters.

Entire Agreement

9. This contract supersedes any and all other agreements, either oral or in writing, between the parties with respect to the subject of this contract. This contract contains all of the covenants and agreements between the parties with respect to the subject of this contract, and each party acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except the covenants and agreements embodied in this contract. Any agreement, statement, or promise not contained in this contract shall not be valid or binding between the parties with respect to the subject of this contract, except for a subsequent written modification signed by the party to be charged.

Amendment of Contract

10. This contract may be amended or modified at any time with respect to any provision by a written instrument executed by Janitorial Service Company and Customer.

Successors and Assigns

11. Neither party may assign or transfer this agreement, in whole or in part, without the prior written consent of the other party. This agreement shall be binding on, and inure to the benefit of, each party's heirs, executors, administrators, successors, and permitted assigns.

Attorneys' Fees

12. If any legal action, including arbitration, is brought to enforce or interpret the provisions of this contract, the prevailing party shall be entitled to recover reasonable attorneys' fees from the other party. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled.

Notices

13. Any notice required or permitted to be given under this contract shall be written, and may be given by personal delivery or by registered or certified mail, first-class postage prepaid, return receipt requested. Notice shall be deemed given upon actual receipt in the case of personal delivery, or upon mailing. Mailed notices shall be addressed as follows, but each party may change address by written notice in accordance with this paragraph:

To Janitorial Service Company at: _____ [*address*].
To Customer at: _____ [*address*].

Governing Law

14. This contract shall be governed by and construed in accordance with the laws of California.

Executed on _____[*date*], at _____, California.

JANITORIAL SERVICE COMPANY
_____ [*typed name of company*]
_____ [*signature*]
[*typed name and title*]
CUSTOMER
_____ [*typed name of customer*]
_____ [*signature*]
[*typed name and title or capacity, e.g.,* owner]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
A. Maintenance and Repairs of Real Property

30-92 California Legal Forms--Transaction Guide § 92.201

§ 92.201 Swimming Pool Service Contract

[1] Comment

[a] Use of Form

This form is a contract for maintenance service of a swimming pool. It is designed to be used for either a private or a public pool.

The form provides for more services to be rendered during the summer than during the winter season. Because swimming pools are generally used to a greater extent during the summer than during the winter months, more maintenance service is usually required during that period. For that reason, this form makes provision for different rates of compensation during these two periods of the year.

In addition to the differential rates for seasons, the amount charged by pool service companies generally depends on the size of the pool, the type of pool equipment (older equipment generally requires more service time), the anticipated amount of pool use (the charge for public pools is higher than for private use), the sanitation requirements of all applicable governmental authorities, and the individual needs or desires of the particular pool owner.

Paragraphs 2 and 3 of this form, describing the services to be provided by the pool service company, are illustrative provisions based on a hypothetical situation. The attorney should modify these provisions, if necessary or desirable, in order to meet the requirements of the particular situation.

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contractual provisions.

[b] Public Swimming Pools

Public swimming pool sanitation is governed by *Health & Safety Code §§ 116025-116068*. The Department of Health Services supervises the sanitation, healthfulness, and safety of public swimming pools [*Health & Safety Code § 116035*]

and has the authority to make and enforce rules and regulations pertaining to the sanitation, healthfulness, and safety of public swimming pools and to impose a fine for violation of any code provisions or department rule or regulation [*Health & Safety Code § 116050*]. Department of Health Services regulations apply to certain commercial and public pools, but not to private pools maintained by an individual for the use of family and friends [*see 22 Cal. Code Reg. § 65503(b)*].

A "public swimming pool" is any public swimming pool, bath-house, or public swimming and bathing place, and all related appurtenances [*Health & Safety Code § 116025*].

Every person operating or maintaining a public swimming pool must do so in a sanitary, healthful and safe manner [*Health & Safety Code § 116040*; *see Health & Safety Code § 116043*].

[2] FORM

Swimming Pool Service Contract

SWIMMING POOL SERVICE CONTRACT

This AGREEMENT is made on _____[*date*] between _____[*name of service company*] ("Pool Service Company"), _____[*capacity, e.g.,* a Delaware corporation *or* a California limited liability company *or* a California general partnership] with its principal place of business at _____[*address*], and _____[*name of customer*] ("Customer"), _____[*capacity*] with _____[its *or* his *or* her] principal place of business at _____[*address*].

Recitals

Customer is _____[*specify property rights to pool, e.g.,* the owner of *or* a lessee with full rights to maintain] the swimming pool ("pool") located at _____[*address of property location of pool*].

Pool Service Company desires to provide pool maintenance services to Customer and Customer desires to obtain such services from Pool Service Company.

THEREFORE, in consideration of the mutual promises set forth below, the parties agree as follows:

Term of Agreement

1. The term of this agreement shall commence on _____[*date*], and shall continue in full force and effect thereafter until it is terminated by _____[*e.g.,* 30] days written notice from either party to the other.

Services to Be Performed

2. Pool Service Company shall have a fully qualified pool service person perform the following services for the pool _____[*e.g.,* two *or* three] times each week during the summer season (May through September) and _____[*e.g.,* one *or* two] times each week during the winter season (October through April):

- Test pool water for chlorine residual and alkalinity each trip.
- Treat pool water with necessary chemicals for sanitation and pH control each trip.
- Vacuum pool each trip.
- Skim water surface to remove floating matter each trip.
- Backwash filter system as needed.
- Scrub tile in pool weekly in the summer season, and semimonthly in the winter season.
- Clean and polish chrome deck equipment weekly in the summer season and semimonthly in the winter season.
- Remove and clean strainer basket each trip.

Chemicals and Supplies

3. Pool Service Company shall provide all chemicals and supplies necessary to perform the above operations [*if the pool has a diatomaceous earth filter, add:* including the diatomaceous earth for the filter].

Service Reports

4. After each visit for maintenance purposes, Pool Service Company shall leave a service report in _____[*state location where service report is to be left*], indicating the maintenance that was performed during that visit. Recommendations for any necessary or desirable preventative measures shall be noted on the service report.

Compensation

5. Customer shall pay Pool Service Company at the rate of $_____ per month during the summer season (May through September) and $_____ per month during the winter season (October through April) for the services to be performed under this agreement. Pool Service Company shall invoice Customer at the end of each month and Customer shall make full payment within _____[*e.g.*, 10 days of the billing date].

Compliance With Applicable Statutes, Ordinances, and Regulations

6. In performing the services required of it under this agreement, Pool Service Company shall comply with all applicable federal, state, county, and city statutes, ordinances, and regulations concerning the sanitary requirements for swimming pools.

Insurance

7. Pool Service Company, at its own cost and expense, shall procure and maintain throughout the term of this agreement

a workers' compensation insurance policy for the protection of its employees engaged in work under this agreement.

Excusable Delays and Failures

8. Neither party shall be liable for any delay or failure in its performance under this contract (except for payment obligations) caused by events beyond the reasonable control of the party, including, but not limited to, terrorism, war, riots, labor strikes, interruption of utility services, fires, floods, earthquakes, and other natural disasters.

Entire Agreement

9. This contract supersedes any and all other agreements, either oral or in writing, between the parties with respect to the subject of this contract. This contract contains all of the covenants and agreements between the parties with respect to the subject of this contract, and each party acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except the covenants and agreements embodied in this contract. Any agreement, statement, or promise not contained in this contract shall not be valid or binding between the parties with respect to the subject of this contract, except for a subsequent written modification signed by the party to be charged.

Amendment of Contract

10. This contract may be amended or modified at any time with respect to any provision by a written instrument executed by Pool Service Company and Customer.

Successors and Assigns

11. Neither party may assign or transfer this agreement, in whole or in part, without the prior written consent of the other party. This agreement shall be binding on, and inure to the benefit of, each party's heirs, executors, administrators, successors, and permitted assigns.

Attorneys' Fees

12. If any legal action, including arbitration, is brought to enforce or interpret the provisions of this contract, the prevailing party shall be entitled to recover reasonable attorneys' fees from the other party. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled.

Notices

13. Any notice required or permitted to be given under this contract shall be written, and may be given by personal delivery or by registered or certified mail, first-class postage prepaid, return receipt requested. Notice shall be deemed given upon actual receipt in the case of personal delivery, or upon mailing. Mailed notices shall be addressed as follows, but each party may change address by written notice in accordance with this paragraph:

To Pool Service Company at: _____ [*address*].
To Customer at: _____ [*address*].

Governing Law

14. This contract shall be governed by and construed in accordance with the laws of California.

Executed on _____[*date*], at _____, California.

POOL SERVICE COMPANY
[*typed name of pool service company*]
_____ [*signature*]
[*typed name and title*]
CUSTOMER
[*typed name of customer*]
_____ [*signature*]
[*typed name and title or capacity, e.g.,* owner]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
A. Maintenance and Repairs of Real Property

30-92 California Legal Forms--Transaction Guide § 92.202

§ 92.202 Elevator Maintenance Contract

[1] Comment

[a] Use of Form

Safety and inspection requirements for elevators and other moving conveyances are governed by *Lab. Code § 7300 et seq.* This form is a "full maintenance service contract," covering passenger and freight elevators in a business location, between a "certified qualified conveyance company," and the owner (or the person who has custody, management, or charge of the operation) of those elevators [*see Lab. Code § 7300.1(g), (p)* (definitions)].

If an elevator is subject to a full maintenance service contract, it need only be inspected and permitted by the Division of Occupational Safety and Health once every two years rather than annually [*Lab. Code § 7304(b)*; *see § 92.30[3][a], [5]*]. For discussion of the safety, inspection and permit requirements for elevators and other conveyances, see *§ 92.30*.

This form is designed as a guide for drafting contracts for elevator maintenance services. Thus, it is necessarily somewhat general in nature. The attorney should modify it as needed to meet the requirements of the particular situation. For example, the specifications for service in Paragraph 4 of the form will vary depending on the type of elevator(s) involved.

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contract provisions.

[b] Contract Requirements

The agreement must provide that the conveyance company is responsible for effecting repairs required for the safe operation of the equipment and that it will provide services as frequently as is necessary, but no less often than monthly [*Lab. Code § 7300.1(p)*].

[c] Term of Agreement

In this form the service company undertakes at a stipulated monthly price both to provide maintenance service and to supply all necessary parts and materials. Many elevator parts are very expensive. For that reason, and because the amount of work to be done and the parts to be supplied can vary considerably from month to month, this type of contract is generally entered into for a lengthy minimum period, usually three to five years. However, if the elevators are few in number and the cost for materials needed for maintenance is not expected to be substantial, the owner of the elevators may be able to negotiate a right to terminate the contract with notice. Paragraph 1 of the form provides for both these options.

[d] Costs for Labor and Materials

Because of the relatively long term [*see* [c], *above*], it is a good idea to have the monthly contract price increase or decrease in accordance with changes in the cost of labor and materials. This is provided for in Paragraphs 9(b) and 9(c) of the form.

Emergency service work on elevators often must be done on overtime hours. This contract provides for additional compensation for overtime in Paragraph 8(b) of the form.

[e] Qualifications of Service Provider

Except in certain emergency situations [*see Lab. Code § 7301.5*], any person who, without supervision, erects, constructs, installs, alters, tests, maintains, services or repairs, removes, or dismantles any elevator must be certified as a certified competent conveyance mechanic by the Division for Occupational Safety and Health [*Lab. Code § 7311.2(a)*]. A "certified competent conveyance mechanic" means any person who has the qualifications and ability of a competent journey-level conveyance mechanic and is so certified by the Division [*Lab. Code § 7300.1(h)*].

[f] Liability to Third Parties--Nondelegable Duty

Paragraph 4 of the form requires the elevator service company to maintain the elevators to insure safe operation. However, an owner of an elevator may not escape liability to third parties for failure to maintain elevators in a safe condition by delegating that duty to an independent contractor. If an independent contractor, no matter how carefully selected, is employed to maintain property, the owner or possessor of the property is answerable for harm caused by the negligent failure of his or her contractor to maintain the buildings and structures in reasonably safe condition, irrespective of whether the contractor's negligence lies in his or her incompetence, carelessness, inattention or delay [*Brown v. George Pepperdine Foundation (1943) 23 Cal. 2d 256, 259-260, 143 P.2d 929]* .

[2] FORM

Elevator Maintenance Contract

ELEVATOR MAINTENANCE CONTRACT

This AGREEMENT is made on _____[*date*] between _____[*name of service company*] ("Service Company"), _____[*capacity, e.g.,* a Delaware corporation *or* a California limited liability company *or* a California general partnership] with its principal place of business at _____[*address*], and _____[*name of customer*] ("Customer"), _____[*capacity*] with _____[its *or* his *or* her] principal place of business at _____[*address*].

Recitals

Service Company is a Certified Qualified Elevator Company, certified by the Division of Occupational Safety and Health of the State of California in accordance with *Lab. Code § 7300 et seq.* Service Company operates a business of installing, repairing, and maintaining elevators and other moving conveyances.

Customer is _____[*specify property rights to elevators, e.g.,* the owner of *or* a lessee with full rights to repair and maintain the elevators at] the property located at _____[*address of property location of elevators*].

Service Company desires to provide elevator maintenance services to Customer and Customer desires to obtain such services from Service Company.

THEREFORE, in consideration of the mutual promises set forth below, the parties agree as follows:

Term of Agreement

[*Either:*]

1. The term of this contract shall commence on _____[*date*] and shall continue in full force and effect for a period of _____[*e.g.,* five] years.

[*Or:*]

1. The term of this contract shall commence on _____[*date*] and shall continue in full force and effect for a period of _____[*e.g.,* five] years, unless terminated earlier by _____[*e.g.,* 60] days written notice from either party to the other.

[*Continue with the following:*]

Elevators To Be Serviced

2. Subject to the terms and conditions of this contract, Service Company shall furnish maintenance service on the elevators [owned *or* operated] by Customer ("elevators") and more specifically described as: _____[*include list or schedule with specific description of each elevator, including make, capacity in pounds, year installed and number of stops. If list is extensive, attach schedule to contract and incorporate it by reference*].

Service Company Qualifications

3. (a) Service Company represents that it is a certified qualified conveyance company, certified by the Division of Occupational Safety and Health of the State of California in accordance with *Labor Code Section 7300 et seq.* Service Company shall use its best efforts to keep its certification current for the duration of this contract.

(b) If Service Company loses its certification, or if it has reason to know that its certification may be lost, at any time during the term of this contract, it shall promptly notify Customer in writing of this fact. In that case, Customer shall

have the right to terminate this contract on written notice to Service Company at any time during the period Service Company lacks such certification. In the event of termination under this paragraph, all fees and costs due under this contract shall be prorated as of the termination date.

(c) Service Company agrees that all services under this contract shall be performed by certified competent conveyance mechanics, as defined in *Labor Code Section 7300.1(h)*, employed and supervised by Service Company. Service Company agrees that each of its employees will be properly trained and qualified.

Services and Materials

4. Service Company shall do the following with regard to each of the elevators:

(a) Make all repairs and complete all preventative maintenance in accordance with the manufacturer's recommendations and to insure the safe operation and peak performance of the elevators, minimizing the amount of down time. Service shall be provided as often as necessary, but not less than monthly, and shall include the maintenance items described in subparagraphs (b) through (h), below. All service and repair work shall be performed in compliance with *Labor Code Section 7300 et seq.*

(b) Each _____[*e.g.*, week *or* month] examine, adjust, lubricate, and, if conditions warrant, repair or replace the motor, machine, generator, and controller parts, including gears, worms, bearings, thrusts, brake shoes, brake magnet coils or brake motors, commutators, brushings, windings, rotating elements, coils, contacts, magnet frames, resistance for operating and motor circuits and other mechanical parts [*add if desired:* using only _____ (*specify brand*) parts].

(c) Furnish all required lubricants and parts.

(d) When necessary to maintain safety, renew all wire ropes, equalize the tension on all hoisting ropes, and repair or replace conductor cables.

(e) When necessary to insure smooth and quiet operation, renew guide shoe gibs or guide rollers, and keep the guide rails properly lubricated, except where roller guides are used.

(f) Examine all safety devices and governors each _____[*e.g.*, week *or* month].

(g) Conduct a complete safety test _____[*e.g.*, annually].

(h) Provide prompt service in response to Customer's reports of equipment malfunctions (call-backs) with the intent of minimizing down time.

(i) Maintain a service chart for each elevator in which the date, the service provided, and the name of the employee of Service Company who completed the service are recorded for each service visit. A copy of each month's maintenance service charts shall be provided to Customer within _____[*e.g.*, 15] days of the end of each month.

(j) Maintain the machine room in a clean and orderly condition.

Excluded Equipment

5. The following items of elevator equipment are excluded from this contract and Service Company shall have no

responsibility whatsoever with regard to them: _____[*e.g.*, hoistway enclosure; hoistway doors, gates, sills, and frames; car enclosure, including door panels, removable panels, plenum chambers, hung ceilings, light tubes and bulbs, light diffusers, mirrors, carpets, and handrails; cylinders, plungers, and buried piping on hydraulic elevators].

Excluded Services

6. Unless authorized in writing by Customer, in which case additional reasonable charges shall be billed to Customer, Service Company shall not be required to:

(a) Make other safety tests or install new attachments on the elevators, whether or not recommended or directed by governmental authorities or by insurance companies.

(b) Make any replacements with parts of a different design.

(c) Make repairs or renewals caused by negligence or misuse of the equipment or any other factor except ordinary wear and tear.

Alterations

7. Service Company shall not make any changes or alterations to the existing mechanical equipment, circuit wiring, or sequencing unless such changes or alterations are first approved in writing by Customer. Any such approved alterations, if material, shall be done with a permit pursuant to *Labor Code Section 7301.1(a)*.

Working Hours

8. (a) The services required of Service Company under this contract, including emergency minor adjustment call-back service, shall be performed during its regular working hours of _____[*e.g.*, 9:00 a.m. to 5:00 p.m.] on its regular working days of _____[*e.g.*, Monday through Friday], except as provided in subparagraph (b).

(b) If Customer requests that Service Company perform any of its services at times other than during its regular working hours, then for the services performed during overtime hours Customer shall pay to Service Company an amount in addition to the regular monthly compensation provided for in this contract. This additional amount shall be computed by multiplying the total number of overtime hours worked on the elevators by the employees of Service Company by the difference in the usual hourly billing rates of Service Company for regular time and for overtime.

Compensation

9. (a) Customer shall pay Service Company a monthly fee of $_____ for the services described in Paragraph 4 of this contract.

(b) The amount specified in (a), above, shall be adjusted annually to reflect any changes in Service Company's cost of labor. $_____[*portion of the monthly contract price allocable to labor*] of the monthly contract price shall be increased or decreased on each anniversary of the commencement date of service under this contract by the percentage of increase or decrease in the straight-time hourly cost (which means the straight-time hourly labor rate, including fringe benefits, paid to elevator mechanics in the area where the elevators are located) for the month within

which falls the anniversary of the commencement of service under this contract as compared with the straight-time hourly cost for the month within which the commencement date of service under this contract falls.

(c) The amount specified in (a), above, shall be adjusted annually to reflect any changes in the costs of the parts, equipment, and materials supplied by Service Company under this contract. $_____[*that portion of the monthly contract price allocable to materials*] of the monthly contract price shall be increased or decreased on each anniversary of the commencement date of service under this contract by the percentage of increase or decrease shown by the index of "Wholesale Commodity Prices for Metals" published by the Bureau of Statistics, United States Department of Labor for the month within which falls the anniversary of the commencement date of service under this contract as compared with the same index for the month within which the commencement date of service under this contract falls.

(d) Service Company shall invoice Customer at the end of each month and Customer shall make payment within _____[*e.g.*, 30] days of the billing date.

Compliance With Applicable Statutes, Ordinances, and Regulations

10. In performing the services required of it under this agreement, Service Company shall comply with all applicable federal, state, county, and city statutes, ordinances, and regulations.

Indemnity Agreement

11. Service Company shall indemnify and hold Customer and the property of Customer free and harmless from any and all claims, losses, damages, injuries, and liabilities arising from the death or injury of any person or persons (including employees of Service Company), or from the damage or destruction of any property or properties, caused by or connected with the performance of this contract by Service Company or Service Company's agents or employees.

Insurance

12. Service Company, at its own cost and expense, shall procure and maintain throughout the term of this agreement the following insurance policies and shall, on demand, provide Customer a certificate evidencing the policies:

(a) Workers' compensation insurance for the protection of its employees engaged in work under this agreement.

(b) Public liability and property damage insurance in a minimum amount of $_____[*specify minimum insurance amount, e.g.*, $500,000] for any one loss due to bodily injury or death and $_____[*specify minimum insurance amount, e.g.*, $500,000] for any one loss due to damage or destruction of property.

Excusable Delays and Failures

13. Neither party shall be liable for any delay or failure in its performance under this contract (except for payment obligations) caused by events beyond the reasonable control of the party, including, but not limited to, terrorism, war, riots, labor strikes, interruption of utility services, fires, floods, earthquakes, and other natural disasters.

Entire Agreement

14. This contract supersedes any and all other agreements, either oral or in writing, between the parties with respect to the subject of this contract. This contract contains all of the covenants and agreements between the parties with respect to the subject of this contract, and each party acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except the covenants and agreements embodied in this contract. Any agreement, statement, or promise not contained in this contract shall not be valid or binding between the parties with respect to the subject of this contract, except for a subsequent written modification signed by the party to be charged.

Amendment of Contract

15. This contract may be amended or modified at any time with respect to any provision by a written instrument executed by Service Company and Customer.

Successors and Assigns

16. Neither party may assign or transfer this agreement, in whole or in part, without the prior written consent of the other party. This agreement shall be binding on, and inure to the benefit of, each party's heirs, executors, administrators, successors, and permitted assigns.

[*Add, if desired:*]

Arbitration

17. Any dispute arising under this contract shall be settled by arbitration in accordance with _____[*specify method of arbitration or refer to specific rules, e.g.,* the Commercial Arbitration Rules of the American Arbitration Association], and judgment on the award rendered by the Arbitrator may be entered in any court having jurisdiction.

[*Continue with the following:*]

Attorneys' Fees

18. If any legal action, including arbitration, is brought to enforce or interpret the provisions of this contract, the prevailing party shall be entitled to recover reasonable attorneys' fees from the other party. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled.

Notices

19. Any notice required or permitted to be given under this contract shall be written, and may be given by personal delivery or by registered or certified mail, first-class postage prepaid, return receipt requested. Notice shall be deemed given upon actual receipt in the case of personal delivery, or upon mailing. Mailed notices shall be addressed as follows,

but each party may change address by written notice in accordance with this paragraph:

To Service Company at: _____ [*address*].
To Customer at: _____ [*address*].

Governing Law

20. This contract shall be governed by and construed in accordance with the laws of California.

Executed on _____[*date*], at _____, California.

SERVICE COMPANY
[*typed name of service company*]
_____ [*signature*]
[*typed name and title*]
CUSTOMER
[*typed name of customer*]
_____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
A. Maintenance and Repairs of Real Property

30-92 California Legal Forms--Transaction Guide § 92.203

§ 92.203 Boiler Maintenance Contract

[1] Comment--Use of Form

This form is an agreement for preventive maintenance service of boilers. The parties are the owner or operator of the boilers and a service company. For discussion of the safety, inspection, and permit requirements for boilers, see *§ 92.31*.

This form provides for an attached Schedule A, which consists of detailed preventive maintenance schedule for the boilers that are the subject of the contract. This should be prepared by the service provider or customer, most likely the service provider, and approved by the other party. The manufacturer's recommendations for maintenance should be considered in drafting Schedule A.

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contract provisions.

[2] FORM

Boiler Maintenance Contract

BOILER MAINTENANCE CONTRACT

This AGREEMENT is made on _____[*date*] between _____[*name of service company*] ("Service Company"), _____[*capacity, e.g.*, a Delaware corporation *or* a California limited liability company *or* a California general partnership] with its principal place of business at _____[*address*], and _____[*name of customer*] ("Customer"), _____[*capacity*] with _____[its *or* his *or* her] principal place of business at _____[*address*].

Recitals

Service Company operates a business of installing, repairing, and maintaining steam boilers and _____[*add further description of service provider's business, if desired*].

Customer is _____[*specify property rights to boilers, e.g.,* the owner of *or* a lessee with full rights to repair and maintain the boilers located at] _____[*address of property location of elevators*] ("Customer's property").

Service Company desires to provide boiler maintenance services to Customer and Customer desires to obtain such services from Service Company.

THEREFORE, in consideration of the mutual promises set forth below, the parties agree as follows:

Term of Agreement

1. The term of this agreement shall commence as of the date of this agreement and shall continue in full force and effect for one year. This Agreement shall be automatically renewed thereafter for annual periods from year to year unless either party gives written notice of cancellation to the other party at least 30 days prior to the next renewal date.

Boilers To Be Serviced

2. Subject to the terms and conditions of this contract, Service Company shall furnish preventive maintenance service for the following equipment at Customer's property ("boiler equipment"):

MODEL	SERIAL	PRESSURE	LOCATION
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Services To Be Performed

3. Service Company agrees that:

(a) It shall have a fully qualified service engineer make _____[*frequency, e.g.,* bimonthly *or* semiannual] calls to make preventive inspections and adjustments on the equipment as set forth on the Preventive Maintenance Schedule attached to this agreement as Schedule A and incorporated into this agreement by this reference.

(b) Such inspections and adjustments shall be made in a thorough and workmanlike manner.

(c) All items on the attached Schedule A shall be cleaned, adjusted, inspected, tested, and recorded during each call, insofar as the equipment and operating conditions permit.

(d) Following each service visit Service Company shall furnish to Customer a report indicating that each scheduled item

on the Preventive Maintenance Schedule set forth in the attached Schedule A was inspected and adjusted as needed.

Additional Services, Materials, or Calls

4. If Customer requests Service Company to perform any services or to provide any materials or to make any calls other than those specified in this agreement, including the items listed on the attached Schedule A, Customer shall pay Service Company for those additional services, materials, or calls at the standard rates of Service Company in addition to the annual charges provided for in this agreement.

Compensation

5. Customer shall pay to Service Company for its services an annual charge of $_____. This annual charge shall be paid during the first 30 days of each annual period that this agreement is in effect.

Compliance With Applicable Statutes, Ordinances, and Regulations

6. In performing the services required of it under this agreement, Service Company shall comply with all applicable federal, state, county, and city statutes, ordinances, and regulations.

Indemnity Agreement

7. Service Company shall indemnify and hold Customer and the property of Customer free and harmless from any and all claims, losses, damages, injuries, and liabilities arising from the death or injury of any person or persons (including employees of Service Company), or from the damage or destruction of any property or properties, caused by or connected with the performance of this contract by Service Company or Service Company's agents or employees.

Insurance

8. Service Company, at its own cost and expense, shall procure and maintain throughout the term of this agreement the following insurance policies and must, on demand, provide Customer a certificate evidencing the policies:

(a) Workers' compensation insurance for the protection of its employees engaged in work under this agreement.

(b) Public liability and property damage insurance in a minimum amount of $_____[*specify minimum insurance amount, e.g.*, $500,000] for any one loss due to bodily injury or death and $_____[*specify minimum insurance amount, e.g.*, $500,000] for any one loss due to damage or destruction of property.

Excusable Delays and Failures

9. Neither party shall be liable for any delay or failure in its performance under this contract (except for payment obligations) caused by events beyond the reasonable control of the party, including, but not limited to, terrorism, war, riots, labor strikes, interruption of utility services, fires, floods, earthquakes, and other natural disasters.

Entire Agreement

10. This contract supersedes any and all other agreements, either oral or in writing, between the parties with respect to the subject of this contract. This contract contains all of the covenants and agreements between the parties with respect to the subject of this contract, and each party acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except the covenants and agreements embodied in this contract. Any agreement, statement, or promise not contained in this contract shall not be valid or binding between the parties with respect to the subject of this contract, except for a subsequent written modification signed by the party to be charged.

Amendment of Contract

11. This contract may be amended or modified at any time with respect to any provision by a written instrument executed by Service Company and Customer.

Successors and Assigns

12. Neither party may assign or transfer this agreement, in whole or in part, without the prior written consent of the other party. This agreement shall be binding on, and inure to the benefit of, each party's heirs, executors, administrators, successors, and permitted assigns.

[*Add, if desired:*]

Arbitration

13. Any dispute arising under this contract shall be settled by arbitration in accordance with _____[*specify method of arbitration or refer to specific rules, e.g.,* the Commercial Arbitration Rules of the American Arbitration Association], and judgment on the award rendered by the Arbitrator may be entered in any court having jurisdiction.

[*Continue with the following:*]

Attorneys' Fees

14. If any legal action, including arbitration, is brought to enforce or interpret the provisions of this contract, the prevailing party shall be entitled to recover reasonable attorneys' fees from the other party. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled.

Notices

15. Any notice required or permitted to be given under this contract shall be written, and may be given by personal delivery or by registered or certified mail, first-class postage prepaid, return receipt requested. Notice shall be deemed

given upon actual receipt in the case of personal delivery, or upon mailing. Mailed notices shall be addressed as follows, but each party may change address by written notice in accordance with this paragraph:

To Service Company at: _____ [*address*].
To Customer at: _____ [*address*].

Governing Law

16. This contract shall be governed by and construed in accordance with the laws of California.

Executed on _____[*date*], at _____, California.

SERVICE COMPANY
[*typed name of service company*]
_____ [*signature*]
[*typed name and title*]
CUSTOMER
[*typed name of customer*]
_____ [*signature*]
[*typed name and title*]

SCHEDULE A

[*Attach Preventive Maintenance Schedule for the boilers that are subject to this agreement.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
A. Maintenance and Repairs of Real Property

30-92 California Legal Forms--Transaction Guide §§ 92.204-92.209

[Reserved]

§§ 92.204[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
B. Security Services for Property

30-92 California Legal Forms--Transaction Guide § 92.210

§ 92.210 Security Patrol Service Contract

[1] Comment--Use of Form

This form is a contract between a private patrol operator and a client to provide regular patrol protection of the client's property. Private patrol operators may be hired to provide guards or patrol personnel to protect persons or property or to prevent the theft, unlawful taking, loss, embezzlement, misappropriation, or concealment of goods, money, securities, documents, or property of any kind [*Bus. & Prof. Code § 7582.1(a)*]. For detailed discussion of the licensing and other requirements of private patrol operators under the Private Security Services Act [*Bus. & Prof. Code § 7580 et seq.*], see *§ 92.40*.

Paragraph 2 of this form, describing the services to be provided by the private patrol operator, is an illustrative provision based on a hypothetical situation. The attorney should modify it, if necessary or desirable, in order to meet the requirements of the particular situation.

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contractual provisions.

[2] FORM

Security Patrol Service Contract

SECURITY PATROL SERVICE CONTRACT

_____[*Name of patrol service company (actual or fictitious name authorized by the Bureau of Security and Investigative Services)*]

License Number: _____[*license number issued by the Bureau of Security and Investigative Services*]

_____[*Address*]

_____[*Telephone number*]

Name of Client: _____

Job Site Address: _____

Telephone Number: _____

This AGREEMENT is made on _____[*date*] between _____[*name of patrol service company*] ("Patrol Service Company"), _____[*capacity, e.g.*, a Delaware corporation *or* a California limited liability company *or* a California general partnership] with its principal place of business at _____[*address*], and _____[*name of customer*] ("Client"), _____[*capacity*] with _____[its *or* his *or* her] principal place of business at _____[*address*].

Recitals

Patrol Service Company is a private patrol operator licensed under the Private Security Services Act. It operates a business of providing guards and patrol personnel to protect persons and property.

Client is _____[*specify property rights, e.g.*, the owner of *or* a lessee with full rights to protect] the property located at _____[*address of property location to be guarded*] ("Client's property").

Patrol Service Company desires to provide patrol services for Client's property and Client desires to obtain such services from Patrol Service Company.

THEREFORE, in consideration of the mutual promises set forth below, the parties agree as follows:

Term of Agreement

1. The term of this agreement shall begin on _____[*date*], and shall continue in full force and effect until it is terminated by _____[*e.g.*, 30 days] written notice from either party to the other.

Services to be Furnished

2. (a) Patrol Service Company shall furnish fully qualified, well trained patrol personnel to patrol Client's property. Each patrol employee of Patrol Service Company shall be registered with the California Bureau of Security and Investigative Services. The specific duties of the patrol personnel shall be to visually inspect the exterior and interior of Client's property at the times and frequencies noted below:

[*List time schedule for both exterior and interior patrol checks by day of the week*]

(b) In the event patrol personnel observe any suspicious criminal activity, bomb threats, evidence of actual or impending theft or damage to property, or evidence of actual or impending harm to persons on Client's property, the patrol personnel shall immediately notify appropriate local law enforcement agencies, supervisory personnel of Patrol

Service Company, and Client.

(c) The patrol services provided for by this agreement shall be performed by qualified, efficient, and discreet employees maintaining a professional demeanor at all times in strict accordance with the recognized best industry practices.

(d) Patrol Service Company shall have available by telephone a live supervisor 24 hours a day, 7 days a week, who can be reached by patrol personnel on duty and Client at _____[*telephone number*]. Patrol Service Company shall also have mobile supervisors available to provide backup assistance to patrol personnel at Client's property, as needed.

Uniforms and Equipment

3. While patrolling Client's property, patrol personnel furnished by Patrol Service Company shall be completely outfitted with a uniform bearing a patch on each shoulder having the words "Private Security" and the name of Patrol Service Company and a badge bearing the name of Patrol Service Company, and all necessary equipment, including _____[*specify weapons to be used, e.g.*, a firearm, baton, or other weapon].

Employees of Agency

4. All patrol personnel furnished by Patrol Service Company shall be employees of Patrol Service Company and shall at all times be subject to the direct supervision and control of Patrol Service Company. Patrol Service Company shall have the sole responsibility of paying the salaries, taxes (including, but not limited to, federal social security taxes and federal and California unemployment taxes) and all other expenses relating to each employee of Patrol Service Company.

Training and Qualifications of Guards

5. Each employee of Patrol Service Company who patrols Client's property shall satisfy the following requirements:

(a) Each employee shall have completed a course in the exercise of the power to arrest pursuant to *Business & Professions Code Section 7583.6*.

(b) Each employee who carries a firearm shall have completed the training course required by *Business & Professions Code Section 7583.22* and shall at all times carry a valid guard registration card and a valid firearm qualification card issued by the Bureau of Security and Investigative Services.

(c) Each employee who carries a baton shall have obtained a certificate of proficiency from an approved baton training facility pursuant to *Business & Professions Code Section 7583.34*.

(d) Each employee who carries tear gas or other nonlethal chemical agents shall have completed a course of instruction [*see Bus. & Prof. Code § 7583.35*] and carry a certificate of proficiency from an approved training facility pursuant to *Business & Professions Code Section 7583.35* and *7583.36*.

Compensation

6. (a) For the services agreed to be performed under this agreement, Client shall pay Patrol Service Company the sum of $_____ per month. The rate of $_____ per hour shall be charged for any additional

patrol services requested by Client.

(b) At the end of each month Patrol Service Company shall send to Client a statement showing the amount of compensation due it for services performed during that month. Client shall make payment within _____[*e.g.*, 10 *or* 30] days of the billing date.

Hiring Patrol Service's Employees

7. Client agrees that it shall not, either during the term of this agreement or for a period of _____[*e.g.*, one year] following termination of this agreement, hire for its own employment any of the employees of Patrol Service Company who performed services at any time in carrying out the terms of this agreement.

Compliance With Applicable Statutes, Ordinances, and Regulations

8. In performing the services required of it under this agreement, Patrol Service Company shall comply with all applicable federal, state, county, and city statutes, ordinances, and regulations.

Insurance

9. Patrol Service Company, at its own cost and expense, shall procure and maintain throughout the term of this agreement a workers' compensation insurance policy for the protection of its employees engaged in work under this agreement.

Excusable Delays and Failures

10. Neither party shall be liable for any delay or failure in its performance under this contract (except for payment obligations) caused by events beyond the reasonable control of the party, including, but not limited to, terrorism, war, riots, labor strikes, interruption of utility services, fires, floods, earthquakes, and other natural disasters.

Entire Agreement

11. This contract supersedes any and all other agreements, either oral or in writing, between the parties with respect to the subject of this contract. This contract contains all of the covenants and agreements between the parties with respect to the subject of this contract, and each party acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except the covenants and agreements embodied in this contract. Any agreement, statement, or promise not contained in this contract shall not be valid or binding between the parties with respect to the subject of this contract, except for a subsequent written modification signed by the party to be charged.

Amendment of Contract

12. This contract may be amended or modified at any time with respect to any provision by a written instrument executed by Patrol Service Company and Client.

Successors and Assigns

13. Neither party may assign or transfer this agreement, in whole or in part, without the prior written consent of the other party. This agreement shall be binding on, and inure to the benefit of, each party's heirs, executors, administrators, successors, and permitted assigns.

[*Add, if desired:*]

Arbitration

14. Any dispute arising under this contract shall be settled by arbitration in accordance with _____[*specify method of arbitration or refer to specific rules, e.g.,* the Commercial Arbitration Rules of the American Arbitration Association], and judgment on the award rendered by the Arbitrator may be entered in any court having jurisdiction.

[*Continue with the following:*]

Attorneys' Fees

15. If any legal action, including arbitration, is brought to enforce or interpret the provisions of this contract, the prevailing party shall be entitled to recover reasonable attorneys' fees from the other party. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled.

Notices

16. Any notice required or permitted to be given under this contract shall be written, and may be given by personal delivery or by registered or certified mail, first-class postage prepaid, return receipt requested. Notice shall be deemed given upon actual receipt in the case of personal delivery, or upon mailing. Mailed notices shall be addressed as follows, but each party may change address by written notice in accordance with this paragraph:

To Patrol Service Company at: _____ [*address*].
To Client at: _____ [*address*].

Governing Law

17. This contract shall be governed by and construed in accordance with the laws of California.

Executed on _____[*date*], at _____, California.

PATROL SERVICE COMPANY
[*typed name of patrol operator*]
_____ [*signature*]

[*typed name and title*]
CLIENT
[*typed name of client*]
_____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
B. Security Services for Property

30-92 California Legal Forms--Transaction Guide § 92.211

§ 92.211 Security Guard Service Contract

[1] Comment--Use of Form

This form is a contract between a private patrol operator (referred to in the form as the "guard service") and a client for uniformed guard protection service on the client's property. Private patrol operators may be hired to provide guards or patrol personnel to protect persons or property or to prevent the theft, loss, embezzlement, misappropriation, or concealment of goods, securities, documents, or other property [*Bus. & Prof. Code § 7582.1(a)*]. For detailed discussion of the licensing and other requirements of private patrol operators under the Private Security Services Act [*Bus. & Prof. Code § 7580 et seq.*], see *§ 92.40*.

This form is drafted in very general terms and is intended for use primarily when it is anticipated that the number of guards needed will vary from time to time. If the attorney drafting the contract knows exactly what the company will require for guard protection, this form can be used as a guide to draft a contract that will be more specific and that will fit the requirements of the particular situation.

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contractual provisions.

[2] FORM

Security Guard Service Contract

UNIFORMED GUARD SERVICE CONTRACT

_____[*Name of private patrol operator (actual or fictitious name authorized by the Bureau of Security and Investigative Services)*]

License Number: _____[*license number issued by the Bureau of Security and Investigative Services*]

_____[*Address*]

_____[*Telephone number*]

Name of Client: _____

Job Site Address: _____

Telephone Number: _____

This AGREEMENT is made on _____[*date*] between _____[*name of private patrol operator*] ("Guard Service Company"), _____[*capacity, e.g.,* a Delaware corporation *or* a California limited liability company *or* a California general partnership] with its principal place of business at _____[*address*], and _____[*name of customer*] ("Client"), _____[*capacity*] with _____[its *or* his *or* her] principal place of business at _____[*address*].

Recitals

Guard Service Company is a private patrol operator licensed under the Private Security Services Act. It operates a business of providing guards and patrol personnel to protect persons or property.

Client is _____[*specify property rights, e.g.,* the owner of *or* a lessee with full rights to protect] the property located at _____[*address of property location to be guarded*] ("Client's property").

Guard Service Company desires to provide uniformed guard services to Client at Client's property and Client desires to obtain such services from Guard Service Company.

THEREFORE, in consideration of the mutual promises set forth below, the parties agree as follows:

Term of Agreement

1. The term of this agreement shall begin on _____[*date*], and shall continue in full force and effect until it is terminated by _____[*e.g.,* 30 days] written notice from either party to the other.

Furnishing of Guards

2. Guard Service Company shall furnish fully qualified, well trained uniformed guards for Client's property as requested by Client. Each guard shall be registered with the California Bureau of Security and Investigative Services, and at all times while on duty, carry a valid security guard registration card. The exact number, principal posts, and hours of duty of the guards shall be as stipulated from time to time by Client.

Uniforms and Equipment

3. While on duty at Client's property, each guard furnished by Guard Service Company shall be completely outfitted with a uniform with a patch on each shoulder bearing the words "Private Security" and the name of Guard Service

Company and a badge bearing the name of Guard Service Company, and all necessary equipment, including _____[*specify weapons to be used, e.g.,* a firearm, baton, or other weapon].

Guards' Duties

4. (a) The specific duties of the guards shall be as follows, as modified from time to time by written instructions from time to time by Client:

[*Add description of duties and hours per week for each position, e.g.,* Perimeter Guard to tour first floor of building once every hour, checking that doors and windows are secured. Hours per week: 40.]

(b) Each guard who reports for duty shall sign in at the time his or her shift starts and sign out at the end of his or her shift. Each guard shall also prepare the following reports: _____[*describe reports, e.g.,* a daily log report, a written incident report within 24 hours of any unusual incident].

(c) The guard protection services provided for by this agreement shall be performed by qualified, efficient, and discreet employees maintaining a professional demeanor at all times in strict accordance with the recognized best practices and with the standards and special instructions issued by Client.

(d) If for any reason Client believes that any employee of Guard Service Company is not properly carrying out his or her duties, Guard Service Company shall immediately remove that employee from the performance of the services to be provided under this agreement and simultaneously substitute another employee.

(e) Guard Service Company shall have available by telephone a live supervisor 24 hours a day, seven days a week, who can be reached by the guards on duty and Client at _____[*telephone number*]. Guard Service Company shall also have mobile supervisors available to provide backup assistance to on-site guards at Client's property, as needed.

(f) In the event the guard on duty observes any suspicious criminal activity, bomb threats, evidence of actual or impending theft or damage to property, or evidence of actual or impending harm to persons on Client's property, the guard shall immediately notify appropriate local law enforcement agencies, supervisory personnel of Guard Service Company, and Client.

Employees of Agency

5. All uniformed guards furnished by Guard Service Company shall be employees of Guard Service Company and shall at all times be subject to the direct supervision and control of Guard Service Company. Guard Service Company shall have the sole responsibility of paying the salaries, taxes (including, but not limited to, federal social security taxes and federal and California unemployment taxes) and all other expenses relating to each employee of Guard Service Company.

Training and Qualifications of Guards

6. Each guard reporting for duty at Client's property shall satisfy the following requirements:

(a) Each guard shall have completed a course in the exercise of the power to arrest pursuant to *Business & Professions Code Section 7583.6.*

(b) Each guard who carries a firearm shall have completed the training course required by *Business & Professions Code Section 7583.22* and shall at all times carry a valid guard registration card and a valid firearm qualification card issued by the Bureau of Security and Investigative Services.

(c) Each guard who carries a baton shall have obtained a certificate of proficiency from an approved baton training facility pursuant to *Business & Professions Code Section 7583.34*.

(d) Each guard who carries tear gas or other nonlethal chemical agents shall have completed a course of instruction [*see Bus. & Prof. Code § 7583.35*] and carry a certificate of proficiency from an approved training facility pursuant to *Business & Professions Code Sections 7583.35* and *7583.36*.

Compensation

7. (a) For the services agreed to be performed, Client shall pay Guard Service Company at the rate of $_____ per hour per person. However, the overtime rate of $_____ per hour shall be charged if Client requests that a specific employee of Guard Service Company work more than 40 hours in any one work week, for all services on all legal holidays, and whenever required by law.

(b) The compensation in subparagraph (a) is based on the present union wage scale for employees of Guard Service Company and on the existing rates of federal, state, city, and county taxes. In the event of any increase or decrease in the union wage scale or in the aforementioned taxes, the compensation to be paid Guard Service Company by Client shall be adjusted accordingly. The adjustment shall be operative no sooner than 10 days from the date Client receives notice of the increase or decrease, provided that in the event of an increase, Client shall have the right to terminate this agreement prior to the commencement date of the increased rates, with termination to be effective on written notice to Guard Service Company.

(c) Guard Service Company shall furnish Client with daily [*or* weekly *or* monthly] time sheets covering all of the hours spent by its employees in carrying out the terms of this agreement.

(d) At the end of each month Guard Service Company shall send to Client a statement showing the amount of compensation due it for services performed during that month. Client shall make payment within _____[*e.g.*, 10 *or* 30] days of the billing date.

Hiring Guard Service's Employees

8. Client agrees that it shall not, either during the term of this agreement or for a period of _____[*e.g.*, one year] following its termination, hire for its own employment any of the employees of Guard Service Company who performed services at any time in carrying out the terms of this agreement.

Compliance With Applicable Statutes, Ordinances, and Regulations

9. In performing the services required of it under this agreement, Guard Service Company shall comply with all applicable federal, state, county, and city statutes, ordinances, and regulations.

Insurance

10. Guard Service Company, at its own cost and expense, shall procure and maintain throughout the term of this agreement a workers' compensation insurance policy for the protection of its employees engaged in work under this agreement.

Excusable Delays and Failures

11. Neither party shall be liable for any delay or failure in its performance under this contract (except for payment obligations) caused by events beyond the reasonable control of the party, including, but not limited to, terrorism, war, riots, labor strikes, interruption of utility services, fires, floods, earthquakes, and other natural disasters.

Entire Agreement

12. This contract supersedes any and all other agreements, either oral or in writing, between the parties with respect to the subject of this contract. This contract contains all of the covenants and agreements between the parties with respect to the subject of this contract, and each party acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except the covenants and agreements embodied in this contract. Any agreement, statement, or promise not contained in this contract shall not be valid or binding between the parties with respect to the subject of this contract, except for a subsequent written modification signed by the party to be charged.

Amendment of Contract

13. This contract may be amended or modified at any time with respect to any provision by a written instrument executed by Guard Service Company and Client.

Successors and Assigns

14. Neither party may assign or transfer this agreement, in whole or in part, without the prior written consent of the other party. This agreement shall be binding on, and inure to the benefit of, each party's heirs, executors, administrators, successors, and permitted assigns.

[*Add, if desired:*]

Arbitration

15. Any dispute arising under this contract shall be settled by arbitration in accordance with _____[*specify method of arbitration or refer to specific rules, e.g.,* the Commercial Arbitration Rules of the American Arbitration Association], and judgment on the award rendered by the Arbitrator may be entered in any court having jurisdiction.

[*Continue with the following:*]

Attorneys' Fees

16. If any legal action, including arbitration, is brought to enforce or interpret the provisions of this contract, the prevailing party shall be entitled to recover reasonable attorneys' fees from the other party. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled.

Notices

17. Any notice required or permitted to be given under this contract shall be written, and may be given by personal delivery or by registered or certified mail, first-class postage prepaid, return receipt requested. Notice shall be deemed given upon actual receipt in the case of personal delivery, or upon mailing. Mailed notices shall be addressed as follows, but each party may change address by written notice in accordance with this paragraph:

To Guard Service Company at: _____ [*address*].
To Client at: _____ [*address*].

Governing Law

18. This contract shall be governed by and construed in accordance with the laws of California.

Executed on _____[*date*], at _____, California.

GUARD SERVICE COMPANY
[*typed name of guard service*]
_____ [*signature*]
[*typed name and title*]
CLIENT
[*typed name of client*]
_____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
B. Security Services for Property

30-92 California Legal Forms--Transaction Guide § 92.212

§ 92.212 Alarm System Contract

[1] Comment

[a] Use of Form

This form is an installation and lease agreement between an alarm company and a customer for the installation and maintenance of an integrated alarm system at the customer's residence. The alarm equipment is designed to transmit a signal to a central monitoring station on any indication of a fire or intruder.

Alarm systems and alarm company operators are governed by the Alarm Company Act [*Bus. & Prof Code § 7590 et seq.*]. For further discussion of the requirements of the Alarm Company Act, see *§ 92.41*.

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contractual provisions.

[b] Installation Agreement Requirements

Every agreement, including lease agreements, monitoring agreements, and service agreements (and amendments to any such agreements), that includes labor, services, and materials for the installation of an alarm system must be in writing. Each initial agreement must contain the following [*Bus. & Prof Code § 7599.54(a)-(h)*]:

- The name, business address, business telephone number, and license number of the licensed alarm company operator and the registration number of any alarm agent who solicited or negotiated the agreement.

- The approximate dates when the work will begin and be substantially completed.

- A description of the work to be done, a description of the materials to be used, and the agreed consideration for the work.

- A disclosure that alarm company operators are licensed and regulated by the Bureau of Security and Investigative Services, Department of Consumer Affairs, Sacramento, CA, 95814.

- A description of the alarm system, including the major components and services to be provided to the purchaser once the alarm is installed, and including response or monitoring services, if any.

- A statement that on completion of the installation of the alarm system, the alarm company will thoroughly instruct the purchaser in the proper use of the alarm system.

- In the event a mechanic's lien is to be utilized, a notice-to-owner statement that describes, in nontechnical language and in a clear and coherent manner using words with common and everyday meaning, the pertinent provisions of California's mechanics' lien laws and the rights and responsibilities of an owner of property and a contractor, including the provisions relating to the filing of a contract concerning a work of improvement with the county recorder and the recording in the office of a contractor's payment bond for private work.

- Other matters agreed to by the parties of the contract.

In addition, any residential sales and lease agreement with a cumulative total cost exceeding $250, including the cost of all labor, service, or material for the installation, must comply with the following [*Bus. & Prof Code § 7599.54(i)*]:

- The agreement must include a schedule of payments showing the amount of each payment as a sum in dollars and cents. This schedule of payments must be referenced to the work for services to be performed or to any materials or equipment to be supplied.

- If the payment schedule contained in the agreement provides for a down payment to be paid before commencement of the work, that down payment must not exceed $1,000, or 10 percent of the contract price, excluding finance charges, whichever is less.

- The payment schedule may not provide that the alarm company will receive, nor may the alarm company actually receive, payment in excess of 100 percent of the value of the work performed on the project at any time, excluding finance charges, except that the alarm company may receive an initial down payment as described above.

- A failure by the alarm company, without legal excuse, to substantially commence work within 20 days of the approximate commencement date specified in the contract, will postpone the next succeeding payment for that period of time equivalent to the time between when substantial commencement was to have occurred and when it did occur. The contract must include a description of what constitutes substantial commencement of work.

- The contract must include a notice-to-owner statement that describes, in nontechnical language and in a clear and coherent manner using words with common and everyday meaning, the pertinent provisions of California's mechanics' lien laws, including the rights and responsibilities of an owner of property and a contractor and the provisions relating to the filing of a contract concerning a work of improvement with the county recorder and the recording in the office of a contractor's payment bond for private work. Note that *Bus. & Prof. Code § 7018.5*, which formerly set out the prescribed notice-to-owner statement, was repealed on January 1, 2006 [*see* 2005 Stats., ch. 48, § 3]. However, *Bus. & Prof. Code § 7599.54(h)*, which requires a notice-to-owner statement in an alarm system contract if a mechanic's lien is to be utilized, was not similarly repealed, and remains effective. Therefore, the form in

[2], *below*, includes the statutory notice to owner that was contained in former *Bus. & Prof. Code § 7018.5* [*see* former *Bus. & Prof. Code § 7018.5(a)* (official form)]. The notice describes the pertinent provisions of California's mechanics' lien laws and the rights and responsibilities of an owner of property and a contractor under those laws [*see* former *Bus. & Prof. Code § 7018.5(a)*; [2], *below*].

- The contract must include a disclosure that failure by the alarm company, without legal excuse, to substantially commence work within 20 days from the approximate date specified in the agreement when the work will begin is a violation of the Alarm Company Act.

- The contract must include a disclosure informing the buyer of any potential permit fees that may be required by local jurisdictions concerning the monitoring of an existing alarm system.

The agreement must be legible and in a form that clearly describes any other document that is to be incorporated into the contract. Before any work is done, the client must be furnished with a copy of the written agreement signed by the alarm company operator [*Bus. & Prof Code § 7599.54(f)*].

[c] Liquidated Damages

This agreement includes a provision for liquidated damages in the event the alarm system fails and there are resulting losses [*see* P 11 of form]. Such liquidated damages provisions are valid if they meet the requirements of *Civ. Code § 1671* [*see Atkinson v. Pacific Fire Extinguisher Co. (1953) 40 Cal. 2d 192, 196-197, 253 P.2d 18* ; *see also Feary v. Aaron Burglar Alarm, Inc. (1973) 32 Cal. App. 3d 553, 557-558]* .

In a contract for services primarily for personal, family, or household purposes, as is the case for the installation and maintenance of an alarm system in a residential property, a liquidated damages provision is void, unless, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage [*see Civ. Code § 1671(c)(1), (d)*].

[d] Truth in Lending Disclosures

The term of alarm system lease agreements is typically one or more years, payment to be made with an initial deposit and monthly lease payments. Consequently, because there will be more than four payment installments in a typical alarm system lease agreement for residential property, and the customer does not have the right to terminate the agreement before the term expires, the lease agreement is subject to the Federal Truth in Lending Act [*see 15 U.S.C. § 1601 et seq.*; 12 C.F.R. pt. 226 (Reg. Z)] and the Unruh Act [*Civ. Code § 1801 et seq.*; *see also § 92.12[1]*].

For discussion and a sample form for the required disclosures under the Truth in Lending Act and the Unruh Act, see *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.225*.

[e] Home Solicitation Contract

An alarm system contract qualifies as a "home solicitation contract" if it is entered into at the customer's residence and if the cost for the system is $25 or more [*see Civ. Code § 1689.5(a)*; *see also § 92.12[5][b]*]. A home solicitation contract must satisfy the following requirements:

- The contract must be written in the same language, e.g., Spanish, as principally used in the oral sales presentation, and it must be dated, signed by the buyer, and contain in immediate proximity to the space reserved for the buyer's signature a conspicuous statement in a size equal to at least 10-point bold type, as follows: "You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an

explanation of this right" [*Civ. Code § 1689.7(a)(1)*].

- The contract must contain on the first page, in a type size no smaller than that generally used in the body of the document, the (1) the name and address of the seller to which the cancellation notice is to be mailed, and (2) the date the buyer signed the agreement or offer to purchase [*Civ. Code § 1689.7(b)*].

- The contract must be accompanied by an easily detachable, completed form in duplicate, captioned "Notice of Cancellation," in language prescribed by statute [*Civ. Code § 1689.7(c)*; *see* Notice of Cancellation attached to this form].

- The seller must provide the buyer with a copy of the contract or offer to purchase and the attached notice of cancellation, and must inform the buyer orally of his or her right to cancel and the requirement that cancellation must be in writing, at the time the home solicitation contract or offer is executed *Civ. Code § 1689.7(f).*

[2] FORM

Alarm System Contract

ALARM SYSTEM INSTALLATION AND LEASE AGREEMENT

_____[*Name of alarm company operator (actual or fictitious name authorized by the Bureau of Security and Investigative Services)*]

License Number: _____[*license number issued by the Bureau of Security and Investigative Services*]

_____[*Address*]

_____[*Customer Service Telephone number*]

[*If alarm system contract qualifies as a home solicitation contract (see [1][e], above), add the following in type size no smaller than that generally used in body of document:*]

Name and address to which Cancellation Notice must be sent:

_____[*typed name of alarm company*]

_____[*address*]

Date Buyer signed this contract: _____

[*Continue with the following:*]

Alarm Agent: _____[*name of employee of alarm company operator who solicited or negotiated agreement*]

Registration Number: _____[*registration number of alarm agent issued by the Bureau of Security and Investigative Services*]

Name of Buyer: _____

Job Site Address: _____

Telephone Number: _____

This AGREEMENT is made on _____[*date*] between _____[*name of alarm company operator*] ("Alarm Company"), _____[*capacity, e.g.*, a Delaware corporation *or* a California limited liability company *or* a California general partnership] with its principal place of business at _____[*address*], and _____[*name of customer*] ("Buyer"), _____[*capacity*] with _____[its *or* his *or* her] principal place of business at _____[*address*].

Recitals

Alarm Company is licensed as an alarm company operator under the California Alarm Company Act [*Bus. & Prof Code § 7590 et seq.*]. It operates a business of installing, testing, and maintaining alarm systems for residential and commercial properties.

Buyer is _____[*specify property rights, e.g.*, the owner of *or* a lessee with full rights to install an alarm system on] the property located at _____[*address of residence*] ("Buyer's property").

Alarm Company and Buyer desire to enter into an agreement for the installation, maintenance, and operation of an alarm system for Buyer's residence.

THEREFORE, in consideration of the mutual promises set forth below, the parties agree as follows:

Term of Agreement

1. The term of the lease portion of this agreement shall be _____[*number, e.g.*, one *or* two] years, commencing on the first day of the month following substantial completion of the alarm system installation. The term of this agreement shall be automatically renewed for successive one-year periods, unless either party notifies the other party in writing at least _____[*number of days, e.g.*, 30] days prior to expiration that this agreement shall not be renewed.

Alarm Company's Obligations

2. Alarm Company shall undertake the following tasks in connection with an alarm system on Buyer's property:

(a) Within _____[*number, e.g.*, 15] days of the date of this agreement ("commencement date"), Alarm Company shall commence installation of the alarm system described in Paragraph 3 of this agreement ("alarm system"). Failure to substantially commence the installation of the alarm system within 20 days of the commencement date, without legal excuse, is a violation of the Alarm Company Act. Substantial commencement of the work means the installation of any wiring or equipment referred to in Paragraph 3 of this agreement.

(b) Alarm Company shall furnish all equipment and materials needed to install the alarm system. Once installed, Alarm Company shall test the system to ensure that it is functioning properly. Alarm Company agrees to complete the

installation and testing of the alarm system within _____[*number, e.g.,* 30] days of the date of this agreement.

(c) Once the alarm system is installed and tested, Alarm Company shall thoroughly instruct Buyer on the use and operation of the alarm system at a time mutually agreeable to both parties.

(d) Alarm Company shall maintain the alarm system in good operating condition throughout the term of this agreement. Maintenance services shall include, but not be limited, to _____[*list specific maintenance services, e.g.,* the inspection and testing of equipment at least once every _____ [*number, e.g.*, three] months, and promptly responding to Buyer's reports of malfunction of any part of the alarm system].

Alarm System Specifications

3. (a) The alarm system to be installed at Buyer's property shall consist of wiring, smoke detectors, carbon monoxide detectors, door and window contacts, motion sensors, and other equipment that is designed to alert occupants of a fire or an intruder and to transmit a signal to _____[*list either a third-party monitoring company, or if Alarm Company has its own monitory system, describe that system, e.g.,* our U.L. listed Central Monitoring Station] on any indication of a fire or intrusion to Buyer's property. The exact number and location of each type of equipment to be installed at Buyer's Property is set forth on Schedule A, which is attached to and incorporated into this agreement.

(b) Immediately on receiving a signal from the alarm system at any time of day 365 days a year, _____[*name of monitoring system*] shall, as appropriate, inspect Buyer's property or contact the appropriate local authorities to respond to the damage or threat to Buyer's property.

License and Registration

4. (a) Alarm company operators are licensed and regulated by the Bureau of Security and Investigative Services, Department of Consumer Affairs, Sacramento, CA, 95814. Alarm Company holds a valid, current license issued by the Bureau; (see license number at the top of this agreement).

(b) All employees of Alarm Company who engage in selling on the premises, or altering, installing, maintaining, moving, repairing, replacing, servicing, responding, or monitoring an alarm system, and any person who manages or supervises the employees of Alarm Company, shall be registered as alarm agents by the Bureau of Security and Investigative Services, Department of Consumer Affairs, Sacramento, CA 95814.

Entry on Buyer's Property

5. Buyer hereby grants to Alarm Company, its employees and its agents, [*add if third-party monitoring company is used:* including the central monitoring company referred to in Paragraph 3 of this agreement,] the right to enter Buyer's property for the purposes of installing and maintaining the alarm system, as provided in Paragraph 2 of this agreement, and for the purposes of responding to alarm signals, as provided in Paragraph 3(b) of this agreement.

Buyer's Obligations

6. (a) Buyer shall use Buyer's reasonable best efforts to prevent any damage or interference with the alarm system equipment installed at Buyer's property. If Buyer makes any alterations to Buyer's property that affect the alarm system

equipment in any way, or otherwise interferes with or damages the equipment, Buyer authorizes Alarm Company to do any resulting work on the alarm system required to maintain the full function and operation of the alarm system. Buyer shall pay Alarm Company the reasonable costs for any such work within _____[*number of days, e.g.*, 15] of receipt of the invoice for the costs.

(b) If the alarm system equipment sustains any damage from acts of God or interference from third parties, Alarm Company shall repair and restore the alarm system to its full operation. Buyer shall pay Alarm Company the reasonable costs for any such work within _____[*number of days, e.g.*, 15] of receipt of the invoice for the costs.

(c) Notwithstanding the provisions of subparagraph (b), if Buyer's property is damaged by fire or other casualty that renders the property uninhabitable, Buyer may terminate this agreement on written notice to Alarm Company, and no further lease payments shall be due under this agreement.

Compensation

7. Buyer shall pay Alarm Company for the alarm system services agreed to be performed under this agreement the total sum of $_____[*list the total sum of the initial deposit and the cumulative total of monthly lease payments due under this agreement*]. The schedule of payments to be made under this agreement is as follows:

(a) Installation fee of $_____[*dollar amount*]. An initial deposit of $_____[*dollar amount, which may not exceed $1,000, or 10 percent of the contract price, excluding finance charges, whichever is less*] is due on execution of this agreement, and the balance of the installation fee ($_____[*amount of balance due*]) is due on substantial completion of the installation.

(b) Monthly [lease] payments of $_____[*amount*], due on the first day of each month for _____[*number, e.g.,* 12 *or* 24] consecutive months, commencing on the first day of the month following substantial completion of the alarm system installation.

Compliance With Applicable Statutes, Ordinances, and Regulations

8. In performing the services required of it under this agreement, Alarm Company shall comply with all applicable federal, state, county, and city statutes, ordinances, and regulations, provided, however, that Buyer shall pay all permit fees required by any local jurisdiction for the monitoring of an alarm system, whether in effect at this time, or later enacted. At this time, the following permit fees apply to the alarm system to be installed at Buyer's property: $_____[*list amount, jurisdiction and any conditions of fees, e.g., fees based on dollar amount of installation cost or monthly lease payments*].

Insurance

9. Alarm Company, at its own cost and expense, shall procure and maintain throughout the term of this agreement a workers' compensation insurance policy for the protection of its employees engaged in work under this agreement.

Excusable Delays and Failures

10. Neither party shall be liable for any delay or failure in its performance under this contract (except for payment obligations) caused by events beyond the reasonable control of the party, including, but not limited to, terrorism, war,

riots, labor strikes, interruption of utility services, fires, floods, earthquakes, and other natural disasters.

Liquidated Damages

11. Alarm Company is not an insurer of Buyer's property and life safety, and the payments paid by Buyer under this agreement are solely for the value of the service in the operation of the alarm system. If the alarm system fails to function properly and there are resulting losses, determining the amount of actual damages would be impracticable or extremely difficult. Therefore, the parties agree that, in the event that Alarm Company is found to have breached any of its obligations under this agreement and Buyer has sustained losses as a result of that breach, Alarm Company shall pay the sum of $_____[*amount, e.g.*, $200] to Buyer as liquidated damages.

Entire Agreement

12. This contract supersedes any and all other agreements, either oral or in writing, between the parties with respect to the subject of this contract. This contract contains all of the covenants and agreements between the parties with respect to the subject of this contract, and each party acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except the covenants and agreements embodied in this contract. Any agreement, statement, or promise not contained in this contract shall not be valid or binding between the parties with respect to the subject of this contract, except for a subsequent written modification signed by the party to be charged.

Amendment of Contract

13. This contract may be amended or modified at any time with respect to any provision by a written instrument executed by Alarm Company and Buyer.

Successors and Assigns

14. Neither party may assign or transfer this agreement, in whole or in part, without the prior written consent of the other party. This agreement shall be binding on, and inure to the benefit of, each party's heirs, executors, administrators, successors, and permitted assigns.

[*Add, if desired:*]

Arbitration

15. Any dispute arising under this contract shall be settled by arbitration in accordance with _____[*specify method of arbitration or refer to specific rules, e.g.*, the Commercial Arbitration Rules of the American Arbitration Association] , and judgment on the award rendered by the Arbitrator may be entered in any court having jurisdiction.

[*Continue with the following:*]

Attorneys' Fees

16. If any legal action, including arbitration, is brought to enforce or interpret the provisions of this contract, the prevailing party shall be entitled to recover reasonable attorneys' fees from the other party. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled.

Notices

17. Any notice required or permitted to be given under this contract shall be written, and may be given by personal delivery or by registered or certified mail, first-class postage prepaid, return receipt requested. Notice shall be deemed given upon actual receipt in the case of personal delivery, or upon mailing. Mailed notices shall be addressed as follows, but each party may change address by written notice in accordance with this paragraph:

To Alarm Company at: _____ [*address*].
To Buyer at: _____ [*address*].

Governing Law

18. This contract shall be governed by and construed in accordance with the laws of California.

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

ALARM COMPANY
[*typed name of alarm company operator*]
_____ [*signature*]
[*typed name and title*]
Dated: _____
BUYER
[*typed name of Buyer*]
_____ [*signature*]
[*typed name and title*]
Dated: _____

ATTACHMENTS

SCHEDULE A

[*Add list of equipment, including their number and location, to be installed at the Buyer's property*].

NOTICE TO OWNER

Under the California Mechanics' Lien Law, any contractor, subcontractor, laborer, supplier, or other person or entity who helps to improve your property, but is not paid for his or her work or supplies, has a right to place a lien on your home, land, or property where the work was performed and to sue you in court to obtain payment.

This means that after a court hearing, your home, land, and property could be sold by a court officer and the proceeds of the sale used to satisfy what you owe. This can happen even if you have paid your contractor in full if the contractor's subcontractors, laborers, or suppliers remain unpaid.

To preserve their rights to file a claim or lien against your property, certain claimants such as subcontractors or material suppliers are each required to provide you with a document called a "Preliminary Notice." Contractors and laborers who contract with owners directly do not have to provide such notice since you are aware of their existence as an owner. A preliminary notice is not a lien against your property. Its purpose is to notify you of persons or entities that may have a right to file a lien against your property if they are not paid. In order to perfect their lien rights, a contractor, subcontractor, supplier, or laborer must file a mechanics' lien with the county recorder which then becomes a recorded lien against your property. Generally, the maximum time allowed for filing a mechanics' lien against your property is 90 days after substantial completion of your project.

TO INSURE EXTRA PROTECTION FOR YOURSELF AND YOUR PROPERTY, YOU MAY WISH TO TAKE ONE OR MORE OF THE FOLLOWING STEPS:

(1) Require that your contractor supply you with a payment and performance bond (not a license bond), which provides that the bonding company will either complete the project or pay damages up to the amount of the bond. This payment and performance bond as well as a copy of the construction contract should be filed with the county recorder for your further protection. The payment and performance bond will usually cost from 1 to 5 percent of the contract amount depending on the contractor's bonding ability. If a contractor cannot obtain such bonding, it may indicate his or her financial incapacity.

(2) Require that payments be made directly to subcontractors and material suppliers through a joint control. Funding services may be available, for a fee, in your area which will establish voucher or other means of payment to your contractor. These services may also provide you with lien waivers and other forms of protection. Any joint control agreement should include the addendum approved by the registrar.

(3) Issue joint checks for payment, made out to both your contractor and subcontractors or material suppliers involved in the project. The joint checks should be made payable to the persons or entities that send preliminary notices to you. Those persons or entities have indicated that they may have lien rights on your property, therefore you need to protect yourself. This will help to insure that all persons due payment are actually paid.

(4) On making payment on any completed phase of the project, and before making any further payments, require your contractor to provide you with unconditional "Waiver and Release" forms signed by each material supplier, subcontractor, and laborer involved in that portion of the work for which payment was made. The statutory lien releases are set forth in exact language in *Civil Code Section 3262*. Most stationery stores will sell the "Waiver and Release" forms if your contractor does not have them. The material suppliers, subcontractors, and laborers from whom you obtain releases are those persons or entities who have filed preliminary notices with you. If you are not certain of the material suppliers, subcontractors, and laborers working on your project, you may obtain a list from your contractor. On projects involving improvements to a single-family residence or a duplex owned by individuals, the persons signing these releases lose the right to file a mechanics' lien claim against your property. In other types of construction, this protection may still be important, but may not be as complete.

To protect yourself under this option, you must be certain that all material suppliers, subcontractors, and laborers have signed the "Waiver and Release" form. If a mechanics' lien has been filed against your property, it can only be

voluntarily released by a recorded "Release of Mechanics' Lien" signed by the person or entity that filed the mechanics' lien against your property unless the lawsuit to enforce the lien was not timely filed. You should not make any final payments until any and all such liens are removed. You should consult an attorney if a lien is filed against your property.

TRUTH IN LENDING DISCLOSURES

[*Add truth in lending disclosures (see 1 d , above)*].

[*If the alarm system contract qualifies as a home solicitation contract (see [1][e], above), add the following notice in an easily detachable form in duplicate, in at least 10-point type, in the same language, e.g., Spanish, as used in the contract:*]

NOTICE OF CANCELLATION

You may cancel this transaction, without any penalty or obligation, within three business days from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within 10 days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale, or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, or send a telegram to _____[*name of seller*] at _____[*address of seller's place of business*] not later than midnight of _____[*date*].

I hearby cancel this transaction.

_____[*date*]
_____[*buyer's signature*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
B. Security Services for Property

30-92 California Legal Forms--Transaction Guide § 92.213

§ 92.213 Sentry Dog Service Contract

[1] Comment--Use of Form

This form is a contract for sentry dog service. The Dog Act of 1969 [*Health & Safety Code § 121875 et seq.*] authorizes the use of sentry dogs to protect property. Sentry dogs are dogs trained to work without supervision in a fenced facility and to deter or detain unauthorized persons. This form is a complete contract between the owner or lessee of private property and a sentry dog company regarding the use of the services of sentry dogs for guarding and protecting property.

For discussion of the requirements of the Dog Act, see *§ 92.42*. The Dog Act's requirements for proper identification, registration, supervision, and notification to the local authorities of each sentry dog placed in service [*see Health & Safety Code §§ 121910* (registration), 121915 (notification), 121920 (identification), 121930 (visits by dog handler)] are set forth in Paragraphs 2-5 of this form.

Written contracts are commonly used for the services of sentry dogs. Because narcotic detection and attack dogs are not as frequently hired out under written contract, no form for those services is provided here. However, if it should become necessary to draft such a contract, this form may be used as a starting point.

This form, because it is designed as a guide for drafting any service contract involving the use of sentry dogs, is necessarily somewhat general in nature. The attorney should modify it, if necessary or desirable, in order to meet the requirements of the particular situation.

The contractual areas that should be given most careful consideration by the attorney drafting a sentry dog contract are: (1) the exact days on which the dogs are to work, (2) the precise times that the dogs are to be delivered and picked up, and (3) the measures to be taken to insure that the sentry dogs will not be able to leave the guarded property and that no persons will enter the guarded property while the dogs are on duty. It should be borne in mind that sentry dogs are trained to attack all persons encountered except their dog handlers.

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contractual provisions.

[2] FORM

Sentry Dog Service Contract

CONTRACT FOR SENTRY DOG SERVICE

This AGREEMENT is made on _____[*date*] between _____[*name of sentry dog company*] ("Sentry Dog Service"), _____[*capacity, e.g.,* a Delaware corporation *or* a California limited liability company *or* a California general partnership] with its principal place of business at _____[*address*], and _____[*name of client*] ("Client"), _____[*capacity*] with _____[its *or* his *or* her] principal place of business at _____[*address*].

Recitals

Sentry Dog Service is a sentry dog company as defined by *Health & Safety Code Section 121895* and offers trained sentry dogs to guard and protect property. Sentry Dog Service holds a valid permit to operate its business under *Health & Safety Code 121916*.

Client is _____[*specify property rights, e.g.,* the owner of *or* a lessee with full rights of protection for] the property located at _____ ("guarded property") [*address of property location to be guarded*].

Sentry Dog Service desires to provide sentry dog services to Client and Client desires to obtain such services from Sentry Dog Service.

THEREFORE, in consideration of the mutual promises set forth below, the parties agree as follows:

Term of Agreement

1. The term of this agreement shall commence on _____[*date*], and shall continue in full force and effect thereafter until it is terminated by _____[*e.g.,* 30] days written notice from either party to the other.

Sentry Dogs Furnished

2. Sentry Dog Service shall deliver _____[*specify number of dogs*] healthy sentry dogs to the guarded property on _____[*e.g.,* each and every day during the term of this agreement, including Saturdays, Sundays, and holidays]. Each dog shall be properly trained to work without supervision on the guarded property and to deter or detain unauthorized persons found within the guarded property. Sentry Dog Service shall ensure that each dog has been microchipped and the owner's identification entered into a local or national registry. Furthermore, each dog shall have an identification tag that shall include the name of the dog and the name, address, and telephone number of Sentry Dog Service. The dogs shall be delivered by Sentry Dog Service to the guarded property at [*or* after] _____ p.m. and shall be picked up at [*or* after] _____ a.m. of the following day.

Food and Water

3. Sentry Dog Service shall provide all food and water needed by its sentry dogs. [*If the sentry dogs will be on duty at any time for a period in excess of 12 hours, add:* A dog handler of Sentry Dog Service shall visit the sentry dogs at least once every 12 hours while the dogs are on duty at the guarded property to insure that the dogs' physical condition and their food and water are adequate.]

Registration and Notification Procedures

4. (a) Prior to delivery of the sentry dogs as provided in Paragraph 2 of this contract, Sentry Dog Service shall register each sentry dog furnished under this contract with the local law enforcement agency and fire department having responsibility for the area in which the guarded property is located.

(b) Sentry Dog Service shall notify the local law enforcement agency and the local fire department by mail not more than 15 days before the commencement of the services under this agreement of the location and duration of the assignment of the sentry dogs to the guarded property.

Twenty-Four Hour Telephone Service

5. The public access telephone number for Sentry Dog Service is _____[*phone number*], which telephone number shall be listed on the identification tags of each sentry dog. Sentry Dog Service shall arrange for this number to be answered by a live person (and not an answering machine or voice mail service) 24 hours per day every day of the year so that any calls regarding the sentry dogs may be received and answered.

Maintenance of Guarded Property

6. Client agrees to maintain the guarded property in a safe and secure condition and to assume sole responsibility for checking all fences, gates, doors, windows, and enclosures of any nature whatsoever so as to insure that the sentry dogs will not be able to leave the guarded property.

Defective Condition of Guarded Property

7. If Sentry Dog Service becomes aware of any defective condition on or about the guarded property, it shall notify Client as soon as possible. If the defective condition is not repaired by Client immediately after notified by Sentry Dog Service and if the defect is sufficient either to permit the sentry dogs to leave or to endanger their health and wellbeing, then Sentry Dog Service may at its option do any of the following:

(a) Place a dog handler on the premises to restrain the dogs until the defective condition is corrected. In addition to other compensation provided in this agreement, Client shall pay to Sentry Dog Service a fee of $_____ for each hour or each part of an hour that the dog handler remains on the guarded property for this purpose.

(b) Discontinue delivery of sentry dogs until the defective condition is corrected.

(c) Terminate this agreement on written notice to Client.

Notification to Persons Having Access to Guarded Property

8. (a) Sentry Dog Service shall provide Client with _____[*describe number and type of signs, e.g.,* four prominent] warning signs and Client shall install these signs on the guarded property to notify all persons that the guarded property is being protected by sentry dogs.

(b) Client shall notify all persons having access to the guarded property at times when the sentry dogs will be on duty of the presence of the sentry dogs and to warn them not to enter the guarded property while the sentry dogs are on duty.

Compensation

9. Client shall pay Sentry Dog Service at the rate of $_____ per month for the services agreed to be performed. Sentry Dog Service shall invoice Client at the end of each month and Client shall make payment within _____[*e.g.,* 10] days of the billing date.

Compliance With Applicable Statutes, Ordinances, and Regulations

10. In performing the services required of it under this agreement, Sentry Dog Service shall comply with all applicable federal, state, county, and city statutes, ordinances, and regulations.

Excusable Delays and Failures

11. Neither party shall be liable for any delay or failure in its performance under this contract (except for payment obligations) caused by events beyond the reasonable control of the party, including, but not limited to, terrorism, war, riots, labor strikes, interruption of utility services, fires, floods, earthquakes, and other natural disasters.

Entire Agreement

12. This contract supersedes any and all other agreements, either oral or in writing, between the parties with respect to the subject of this contract. This contract contains all of the covenants and agreements between the parties with respect to the subject of this contract, and each party acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except the covenants and agreements embodied in this contract. Any agreement, statement, or promise not contained in this contract shall not be valid or binding between the parties with respect to the subject of this contract, except for a subsequent written modification signed by the party to be charged.

Amendment of Contract

13. This contract may be amended or modified at any time with respect to any provision by a written instrument executed by Sentry Dog Company and Client.

Successors and Assigns

14. Neither party may assign or transfer this agreement, in whole or in part, without the prior written consent of the other party. This agreement shall be binding on, and inure to the benefit of, each party's heirs, executors, administrators, successors, and permitted assigns.

[*Add, if desired:*]

Arbitration

15. Any dispute arising under this contract shall be settled by arbitration in accordance with _____[*specify method of arbitration or refer to specific rules, e.g.,* the Commercial Arbitration Rules of the American Arbitration Association], and judgment on the award rendered by the Arbitrator may be entered in any court having jurisdiction.

[*Continue with the following:*]

Attorneys' Fees

16. If any legal action, including arbitration, is brought to enforce or interpret the provisions of this contract, the prevailing party shall be entitled to recover reasonable attorneys' fees from the other party. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled.

Notices

17. Any notice required or permitted to be given under this contract shall be written, and may be given by personal delivery or by registered or certified mail, first-class postage prepaid, return receipt requested. Notice shall be deemed given upon actual receipt in the case of personal delivery, or upon mailing. Mailed notices shall be addressed as follows, but each party may change address by written notice in accordance with this paragraph:

To Sentry Dog Company at: _____ [*address*].
To Client at: _____ [*address*].

Governing Law

18. This contract shall be governed by and construed in accordance with the laws of California.

Executed on _____[*date*], at _____, California.

SENTRY DOG SERVICE
[*typed name of sentry dog company*]
_____ [*signature*]
[*typed name and title*]
CLIENT
[*typed name of client*]

_____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
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30-92 California Legal Forms--Transaction Guide §§ 92.214-92.219

[Reserved]

§§ 92.214[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
C. Maintenance and Repairs of Personal Property

30-92 California Legal Forms--Transaction Guide § 92.220

§ 92.220 Receipt/Estimate Form for Repairs of Electronics and Appliances

[1] Comment

[a] Use of Form

This form may be used by a service dealer for the repair of electronics and appliances normally used or sold for personal, family, or household purposes. Repair services of electronics and appliances ("equipment") are governed by the Electronic and Appliance Repair Dealer Registration Law ("Repair Act") [*Bus. & Prof. Code § 9800 et seq.*] and its implementing regulations [*16 Cal. Code Reg. § 2701 et seq.*].

This form may be used to serve either or both of two functions: (1) to acknowledge receipt of equipment left by the customer with the dealer for repair; and (2) to provide an estimate of the cost of the labor and parts necessary to repair the equipment. This form meets the Repair Act's requirements for both purposes. For a full discussion of the products, persons, and activities governed by the Repair Act, see *§ 92.50*.

Separate requirements apply to a service dealer's invoice [*see § 92.221*]. Some electronic service dealers combine the invoice with the receipt/repair estimate into one set of interleaf forms.

[b] Receipt or Claim Check

A service dealer who removes equipment from a home, home office, or private motor vehicle, or accepts equipment for repair at his or her place of business, must give the owner of the equipment a receipt or claim check stating all of the following [*16 Cal. Code Reg. § 2721*]:

- The name and registration number of the service dealer and the address and telephone number of the location where the equipment will be repaired.

- The date the equipment was accepted or received for repair.

- A description of the equipment including model and serial numbers.

- A summary of the customer's description of the problem associated with the equipment.

- The name and address of the customer.

- The complete and legible signature or employee number of the service dealer or of the service dealer's representative.

- The following statement printed in prominent type:

"An estimate as required (*Section 9844 of the California Business and Professions Code*) for repairs shall be given to the customer by the service dealer in writing, and the service dealer may not charge for work done or parts supplied in excess of the estimate without prior consent of the customer. Where provided in writing, the service dealer may charge a reasonable fee for services provided in determining the nature of the malfunction in preparation of a written estimate for repair. For information contact the Bureau of Electronic and Appliance Repair, Department of Consumer Affairs, Sacramento, California 95814."

- Removal and reinstallation charge, if any.

- A statement, if appropriate, that the deposited property is not insured or protected to the amount of its actual cash value against loss occasioned by theft, fire, and vandalism while the property remains with the service dealer or his or her representative [*see Civ. Code § 1858.1*].

[c] Repair Estimate

The service dealer must give the customer a written estimate of the cost before performing any repairs. This estimate must include all costs for parts and labor [*Bus. & Prof. Code § 9844*]. In preparing the estimate, the dealer may not withhold or insert any statement or information that tends to mislead or deceive customers, prospective customers, or the consuming public [*16 Cal. Code Reg. § 2720*].

The dealer may not charge for work done or parts supplied in excess of the estimate without the previous consent of the customer [*Bus. & Prof. Code § 9844*]. Consent may be either written or oral. If consent is oral, the service dealer must note certain items on the invoice [*see 16 Cal. Code Reg. § 2722*; *see also § 92.221[2]* (invoice form)]

The service dealer may charge a reasonable fee for services provided in determining the nature of the malfunction in preparation of a written estimate for repair. The dealer must advise the customer in writing of the amount of this fee before a repair made in the residence, removal of the consumer goods from the customer's residence, or upon acceptance of the goods at the repair facility or registered location [*Bus. & Prof. Code § 9844*].

Estimates must be given for installations as well as repairs. This form may be modified to provide for installation of equipment. The charge for installing any equipment subject to the Repair Act must be given to the customer in writing before making the installation [*Bus. & Prof. Code § 9844.1*].

[d] Repairs Under Warranty

Every work order or repair invoice for warranty repairs or service [*see § 92.52* (express warranties)] of consumer goods

[*see Civ. Code § 1791(a)* (definition)] must clearly and conspicuously incorporate in 10-point boldface type the following statement, either on the face of the work order or repair invoice, or on the reverse side, or on an attachment to the work order or repair invoice [*Civ. Code § 1793.1(a)(2)*]:

> **"A buyer of this product in California has the right to have this product serviced or repaired during the warranty period. The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed. If, after a reasonable number of attempts, the defect has not been fixed, the buyer may return this product for a replacement or a refund subject, in either case, to deduction of a reasonable charge for usage. This time extension does not affect the protections or remedies the buyer has under other laws."**

If the required notice is placed on the reverse side of the work order or repair invoice, the face of the work order or repair invoice must include the following notice in 10-point boldface type: **"Notice to Consumer: Please read important information on back."** [*Civ. Code § 1793.1(a)(2)*]. A copy of the work order or repair invoice and any attachment must be presented to the customer at the time that warranty service or repairs are made [*Civ. Code § 1793.1(a)(2)*].

PRACTICE TIP:

The term, "work order," as used above, is not defined by statute, but it would be reasonable to conclude that a receipt/estimate form given to the customer at the time the equipment is delivered to the service dealer for repair could be construed as a work order. Thus, it is advisable to include the above disclosure on both the receipt/estimate form and the invoice form [*see § 92.221[2]* (invoice form)].

[2] FORM

Receipt/Estimate Form for Repairs of Electronics and Appliances

RECEIPT/REPAIR ESTIMATE

_____[*business name of service dealer*]

_____[*address of service dealer and, if equipment will be repaired at an address other than customer's home or service dealer's address, also list address where equipment will be repaired*]

_____[*telephone number at above address*]

California State Registration No. _____

Date: _____ [*if desired:*] Receipt No.: _____

CUSTOMER: _____ [*name of customer*]
ADDRESS: _____ [*customer's address*]
TELEPHONE NUMBER: _____ [*customer's telephone number*]

EQUIPMENT RECEIVED BY SERVICE DEALER:

_____

[*type of equipment*]
Make and Model:
_____
Serial Number:
_____
Summary of Customer's Description of Problem:
_____
_____

Signature of Receiving Employee
_____

ESTIMATED CHARGES

$_____ Fee for Determining Nature of Malfunction

$_____ Charges for Parts:
_____
_____

[*specify parts, including those under warranty for which a charge will not be levied and those parts not under warranty*]

$_____ Charges for Labor:
_____
_____

[*describe labor, including labor covered by warranty and labor not under warranty for which a charge will be levied*]

$_____ Removal and Reinstallation Charge

$_____ Other Charges:
_____

[*description of additional services or items*]

$_____ TOTAL ESTIMATED CHARGES

Signature of Employee Providing Estimate:
_____

[*The following paragraph must be printed in prominent type:*]

NOTICE TO CUSTOMER

An estimate as required (*Section 9844 of the California Business and Professions Code*) for repairs shall be given to the customer by the service dealer in writing, and the service dealer may not charge for work done or parts supplied in excess of the estimate without prior consent of the customer. Where provided in writing, the service dealer may charge a reasonable fee for services provided in determining the nature of the malfunction in preparation of a written estimate for repair. For information, contact the Bureau of Electronic and Appliance Repair, Department of Consumer Affairs, Sacramento, California 95814.

[*If the equipment is intended for personal, family, household, or home office purposes, include following statement, if appropriate:*]

RISK OF LOSS

The equipment you have left with us for repair is not insured or otherwise protected to its actual cash value by us against loss occasioned by theft, fire, or vandalism while it remains with us.

[*The following must be included if the repairs to be made relate to consumer goods under warranty:*]

REPAIRS OF CONSUMER GOODS UNDER WARRANTY
(Consumer Goods are products used primarily for personal, family or household purposes, except for clothing and consumables)

A buyer of this product in California has the right to have this product serviced or repaired during the warranty period. The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed. If, after a reasonable number of attempts, the defect has not been fixed, the buyer may return this product for a replacement or a refund subject, in either case, to deduction of a reasonable charge for usage. This time extension does not affect the protections or remedies the buyer has under other laws.

[*If preceding notice appears on reverse side of work order or repair invoice, include the following notice in 10-point boldface type on face of order or invoice:*]

Notice to Consumer: Please read important information on back.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
C. Maintenance and Repairs of Personal Property

30-92 California Legal Forms--Transaction Guide § 92.221

§ 92.221 Invoice Form for Repairs of Electronics and Appliances

[1] Comment

[a] Use of Form

This form may be used by a service dealer as an invoice for the repair of electronics and appliances normally used or sold for personal, family, or household purposes. Repair services of electronics and appliances ("equipment") are governed by the Electronic and Appliance Repair Dealer Registration Law ("Repair Act") [*Bus. & Prof. Code § 9800 et seq.*] and its implementing regulations [*16 Cal. Code Reg. § 2701 et seq.*].

This form meets the Repair Act's requirements for an invoice. For a more detailed discussion of the products, persons, and activities governed by the Repair Act, see *§ 92.50*.

Separate requirements apply to a service dealer's receipt or claim check and an estimate of the charges [*see § 92.220*]. Some electronic service dealers combine the invoice with the receipt/repair estimate into one set of interleaf forms. One copy of the invoice must be given to the customer and one copy must be retained by the service dealer for at least three years [*Bus. & Prof. Code § 9842*].

[b] Contents of Invoice

All work done by a service dealer must be recorded on an invoice. The invoice must describe all service work done and all parts supplied and must contain all information required by relevant regulations discussed below. If any used parts are supplied, the invoice must clearly state that fact [*Bus. & Prof. Code § 9842; see 16 Cal. Code Reg. § 2725*].

Invoices must be legible, not in checklist format, and must clearly set forth the following [*16 Cal. Code Reg. § 2725*]:

- The business name, address, and telephone number of the service dealer.
- The service dealer's state registration number.

- The date of the invoice.

- If the equipment is removed from a home, home office, or private motor vehicle, the address of the location where the equipment was repaired, and the state registration number of the service dealer.

- The name and address of the customer.

- A description of the equipment serviced, including the make, model number, and serial number.

- A summary of the customer's description of the problem associated with the equipment.

- A statement of the total charges.

- An itemization of each part in the equipment including a description by class and type if possible, indicating any part within warranty that was replaced, and the charge levied for any part or parts not covered by warranty.

- An itemization and description of labor or technical services performed within warranty or for which a charge was levied.

- An itemization and description of all other charges.

- If any used or exchanged parts are supplied, the invoice must state that fact indicating which parts are used or exchanged and the charge levied for each part. If a picture tube is installed, the description of the replacement picture tube must conform to regulatory requirements [*see 16 Cal. Code Reg. § 2727 et seq.*].

- The complete and legible signature, or employee number, of person filling out the invoice.

- The complete and legible signature or employee number of the person performing the actual repair on the equipment.

[c] Repairs Under Warranty

Every work order or repair invoice for warranty repairs or service [*see § 92.52* (express warranties)] of consumer goods [*see Civ. Code § 1791(a)* (definition)] must clearly and conspicuously incorporate in 10-point boldface type the following statement, either on the face of the work order or repair invoice, or on the reverse side, or on an attachment to the work order or repair invoice [*Civ. Code § 1793.1(a)(2)*]:

> **"A buyer of this product in California has the right to have this product serviced or repaired during the warranty period. The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed. If, after a reasonable number of attempts, the defect has not been fixed, the buyer may return this product for a replacement or a refund subject, in either case, to deduction of a reasonable charge for usage. This time extension does not affect the protections or**

remedies the buyer has under other laws."

If the required notice is placed on the reverse side of the work order or repair invoice, the face of the work order or repair invoice must include the following notice in 10-point boldface type: **"Notice to Consumer: Please read important information on back."** [*Civ. Code § 1793.1(a)(2)*]. A copy of the work order or repair invoice and any attachment must be presented to the customer at the time that warranty service or repairs are made [*Civ. Code § 1793.1(a)(2)*].

[d] Charges In Excess of Estimate

The dealer may not charge for work done or parts supplied in excess of the estimate without the previous consent of the customer [*Bus. & Prof. Code § 9844*; *see § 92.220[2]* (estimate form)]. Consent may be either written or oral. If consent is oral, the service dealer must note certain items on the invoice [*16 Cal. Code Reg. § 2722(a)*]:

- The date.
- The time.
- The name of the person authorizing additional repairs.
- Any telephone number called by the dealer.
- The name of the person receiving oral consent.
- The conditions of consent.
- The additional parts and labor.
- The total additional cost.

[2] FORM

Invoice Form for Repairs of Electronics and Appliances

INVOICE

_____[*business name of service dealer*]

_____[*address of service dealer and, if equipment was repaired at an address other than customer's home or service dealer's address, list address where equipment was repaired*]

_____[*telephone number at above address*]

California State Registration No. _____

Date: _____ [*if desired:*] Receipt No.: _____

CUSTOMER: _____ [*name of customer*]
ADDRESS: _____ [*customer's address*]
TELEPHONE NUMBER: _____ [*customer's telephone number*]

EQUIPMENT REPAIRED BY SERVICE DEALER:

_____

[*type of equipment*]
Make and Model:

_____

Serial Number:

_____

Summary of Customer's Description of Problem:

_____

_____

SUMMARY OF CHARGES

$_____ Fee for Determining Nature of Malfunction

_____

_____

$_____ Charges for Parts Replaced:

_____ _____

_____ _____

_____

[*specify parts by class and type, if possible, indicating which parts were covered by warranty and not subject to a charge, and the charges levied for any part not covered by warranty. Also indicate if any parts were used or exchanged and the charge for those parts.*]

$_____ Charges for Labor or Technical Services:

_____ _____

_____ _____

_____

[*describe labor and technical services performed within warranty and those for which a charge was levied*]

$_____ Removal and Reinstallation Charges

_____

_____

$_____ Other Charges:

_____ _____

_____

[*description of other services for which a charge was levied*]

Sales Tax

$_____ TOTAL CHARGES

_____

_____

—

The total charges cover this specific job only. We guarantee all parts installed by us for _____[*time*

period, e.g., 90 days] after the date of repair, but we do not guarantee other parts in your equipment. If new repairs become necessary in the future, they will be subject to our regular rates.

_____
Signature of employee who prepared invoice

_____
Signature of employee who performed repairs

[*The following must be included if the repairs to be made relate to consumer goods under warranty:*]

REPAIRS OF CONSUMER GOODS UNDER WARRANTY
(Consumer Goods are products used primarily for personal, family or household purposes, except for clothing and consumables)

A buyer of this product in California has the right to have this product serviced or repaired during the warranty period. The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed. If, after a reasonable number of attempts, the defect has not been fixed, the buyer may return this product for a replacement or a refund subject, in either case, to deduction of a reasonable charge for usage. This time extension does not affect the protections or remedies the buyer has under other laws.

[*If the preceding notice appears on reverse side of work order or repair invoice, include the following notice in 10-point boldface type on face of order or invoice:*]

Notice to Consumer: Please read important information on back.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
C. Maintenance and Repairs of Personal Property

30-92 California Legal Forms--Transaction Guide § 92.222

§ 92.222 Service Contract for Electronics, Appliances, and Other Consumer Products

[1] Comment

[a] Use of Form

This form is a service contract for electronics, appliances, and other consumer products. Typically, a service contract is sold to a buyer at the same time the buyer purchases a consumer product. Often the service contract goes into effect once an initial warranty period expires. For discussion and a sample form for an express warranty for a consumer product, see *§ 92.223*.

For purposes of this form and the discussion in this comment, the term "service contract" is not used in a general sense; but rather, it refers to the specific definition of that term contained in the Electronic and Appliance Repair Dealer Registration Law ("Repair Act") [*Bus. & Prof. Code § 9800 et seq.*; *see § 92.51*] and in the Song-Beverly Consumer Warranty Act ("Warranty Act") [*Civ. Code § 1790 et seq.*; *see § 92.51*]. Under these statutes, a service contract is a contract in writing to perform, for an additional cost, over a fixed period of time or for a specified duration, services relating to the maintenance, replacement, or repair of most consumer products, including electronic products and appliances [*Civ. Code § 1791(o)*; *Bus. & Prof. Code § 9855(a)(1)*].

This form meets the statutory requirements for a service contract under both the Repair Act and the Warranty Act. For detailed discussion of these requirements, including which products are covered under each statutory scheme, see *§ 92.51*.

The term "service contractor" is used in this form and comment to mean a service contractor under the Repair Act [*see Bus. & Prof. Code § 9855(e), (b), (c)* (applicable definitions)] and to a manufacturer, distributor, or retailer under the Warranty Act [*see Civ. Code § 1791(e), (j), (l)*]. The term "customer" is used in this form and comment to mean a service contract holder under the Repair Act [*see Bus. & Prof. Code § 9855(d)*] and a buyer or purchaser under the Warranty Act [*see Civ. Code § 1791(b)*].

The requirements of the Repair Act that relate to service contracts are slated for repeal on January 1, 2013, absent

contrary legislation prior to that date [*Bus. & Prof. Code § 9855.9*].

This form may be modified for a vehicle service contract by integrating the contract requirements discussed in *§ 92.53[2][e]*. See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contractual provisions.

[b] Approval of Contract Form

For any service contract subject to the provisions of the Repair Act [*see § 92.51[3][a]* (products covered)], the form of the contract to be issued by a service contractor must be filed with the Director of the Department of Consumer Affairs (which oversees the Bureau of Electronic and Appliance Repair) before it is used by the service contractor [*Bus. & Prof. Code § 9855.3(a)*].

[c] Contents of Contract

A service contract for new or used consumer products subject to the Warranty Act [*see § 92.51[3][b]* (products covered)] must contain all the following items of information:

- A statement that the service contract includes all services and functional parts that may be necessary to maintain proper operation of entire product under normal operation and service for duration of the service contract and without additional charge [*Civ. Code § 1794.4(b)*].

- A clear description and identification of the covered product [*Civ. Code § 1794.4(c)(1)*].

- The point in time or event when the term of the service contract commences, and its duration measured by elapsed time or an objective measure of use [*Civ. Code § 1794.4(c)(2)*].

- A description of the limits on transfer or assignment of the contract if the enforceability of the contract is limited to the original buyer or is limited to persons other than every consumer owner of the covered product during the term of the service contract [*Civ. Code § 1794.4(c)(3)*].

- Clear and conspicuous statements of all the following [*Civ. Code § 1794.4(c)(4)*]:

    - Any services, parts, characteristics, components, properties, defects, malfunctions, causes, conditions, repairs, or remedies excluded from the scope of the service contract.

    - Any other limits on the application of the language of the service contractor's general obligation, such as a limit on the total number of service calls.

    - Any additional services that the service contractor will provide.

    - Whether the obligation of the service contractor includes preventive maintenance and, if so, its nature and frequency.

    - Whether the customer has an obligation to provide preventive maintenance or perform any other obligations and, if so, the nature and frequency of the customer's obligations, and the consequences of noncompliance.

- A step-by-step explanation of the procedure that the customer must follow to obtain performance of any obligation under the service contract, including all the following [*Civ. Code § 1794.4(c)(5)*]:

- The full legal and business name of the service contractor.
- The mailing address of the service contractor.
- The persons or class of persons who are authorized to perform service.
- The name or title and address of any agent, employee, or department of the service contractor that is responsible for the performance of any obligations.
- The method of giving notice to the service contractor of the need for service.
- Whether in-home service is provided or, if not, whether the costs of transporting the product for service or repairs will be paid by the service contractor.
- If the product must be transported to the service contractor, either the place where the product may be delivered for service or repairs or a toll-free telephone number that the customer may call to obtain that information.
- All other steps the customer must take to obtain service.
- All fees, charges, and other costs that the customer must pay to obtain service.

- An explanation of the steps that the service contractor will take to carry out its obligations under the contract [*Civ. Code § 1794.4(c)(6)*].
- A description of any right to cancel the contract if the customer returns the product or the product is sold, lost, stolen, or destroyed, or if there is no right to cancel, or the right to cancel is limited, then a statement of that fact [*Civ. Code § 1794.4(c)(7)*].
- Information respecting the availability of any informal dispute settlement process [*Civ. Code § 1794.4(c)(8)*].

[d] Time of Service or Repair

If a contract between a customer and a service contractor with 25 or more employees for service or repair of merchandise requires the presence of the customer at the time the service or repair is to be performed, then on receiving a request for service or repair under the contract, the service contractor and customer must agree, prior to the date of service or repair, on a four-hour period within which the service or repair will be commenced [*Civ. Code § 1722(a)(1)*].

For a detailed discussion of the regulations relating to this four-hour repair period, see *§ 92.51[9][a]*.

[e] Customer's Inspection of Contract

Prior to purchase, a service contract covering a home electronic product, home appliance, or motor vehicle must be made available for inspection by the customer. In addition, either the contract or a brochure specifically describing the terms, conditions, and exclusions of the contract as well as provisions for contract delivery, cancellation, and refund must be delivered to the customer at or before the time of purchase of the contract [*Civ. Code § 1794.41(a)(2)*].

Within 60 days after the date of purchase, the contract itself must be delivered to the customer. If a service contract for a

home appliance or a home electronic product is sold by means of a telephone solicitation, the seller may elect to satisfy these requirements by mailing or delivering the contract to the customer not later than 30 days after the date of sale of the contract [*Civ. Code § 1794.41(a)(2)*].

During the period in which the service contract is in effect, a retailer that sells a service contract, with the exception of a vehicle service contract [*see Ins. Code § 12800* (definition)], also must [*Civ. Code § 1794.45*]:

- Maintain contract information that includes a description of the terms and conditions of the service contract, and provide that information to the purchaser of the service contract or other beneficiary on request; or

- Obtain a copy of the service contract on request from the purchaser of the service contract or other beneficiary, and provide that copy to the requester within 10 business days after receiving the request.

[f] Relationship to Express Warranty

A service contract for any home electronic product, home appliance, or motor vehicle is applicable only to items, cost, and time periods not covered by an express warranty. However, a service contract may run concurrently with or overlap an express warranty if: (1) the contract covers items or costs not covered by the express warranty, or (2) the contract provides relief to the customer not available under the express warranty, such as automatic replacement of a product when the express warranty only provides for repair [*Civ. Code § 1794.41(a)(3)*].

[g] Customer's Right to Cancel

The purchaser of a service contract for any home electronic product, home appliance, or motor vehicle must be permitted to cancel the contract under the following conditions [*Civ. Code § 1794.41(a)(4)*]:

- If no claims have been made against the contract and if the purchaser provides written notice of cancellation to the person specified in the contract within the first 60 days after receipt of the contract (or longer period provided by the contract), the seller must refund to the purchaser the full amount paid for the contract. With respect to a contract covering a used motor vehicle without manufacturer warranties, a home electronic product, or home appliance, the relevant time period is only 30 days after receipt of the contract.

- If a claim has been made against the contract within the first 60 days after receipt of the contract, the seller must make a pro rata refund to the purchaser based on either elapsed time or an objective measure of use (such as mileage or the retail value of any service performed), at the seller's option as indicated in the contract, if the purchaser provides a written notice of cancellation to the person specified in the contract. With respect to a contract covering a used motor vehicle without manufacturer warranties, a home electronic product, or home appliance, the statutory time period is 30 days after receipt of the contract.

- Unless the contract provides for a longer period for obtaining a full refund, after the first 60 days after receipt of the contract (or 30 days with respect to a contract covering a used motor vehicle without manufacturer warranties, a home electronic product, or home appliance), the seller must make a pro rata refund to the purchaser based on either elapsed time or an objective measure of use (such as mileage or the retail value of any service performed), at the seller's option as indicated in the contract, if the purchaser provides a written notice of cancellation to the person specified in the contract. In addition, the seller may assess a cancellation or administrative fee not to exceed 10 percent of the price of the service contract or $25, whichever is less.

- If the purchase of the service contract was financed, the seller may make the refund payable to the purchaser or assignee, or to the lender of record, or both.

For service contracts subject to the Repair Act [*see § 92.51[3][a]* (products covered)], a refund that is not timely paid bears interest until it is paid [*Bus. & Prof. Code § 9855.6*].

[2] FORM

Service Contract for Electronics, Appliances, and Other Consumer Products

EXTENDED SERVICE CONTRACT

Date: _____
Contract No. _____

Parties

1. This Extended Service Contract is entered into between the following parties:

SERVICE CONTRACTOR:
Name: _____
Address: _____
Customer Service Telephone Number: _____

CUSTOMER
Name: _____
Mailing Address: _____
Telephone Number: _____

Term of Contract

[*Either:*]

2. This contract shall commence on _____[*date*] and shall continue in force for a period of _____[*specify period, e.g.,* one year] unless terminated sooner as provided in Paragraph 13 of this contract.

[*Or:*]

2. This contract shall commence immediately on the expiration of the Express Warranty given to Customer in connection with the purchase of the covered equipment and attached to this contract on a form entitled "Express Warranty." This contract shall continue in force for a period of _____[*specify period, e.g.,* five years] unless terminated sooner as provided in Paragraph 13 of this contract.

[*Continue with the following:*]

Cost of Service

3. Customer agrees to pay the sum of $_____ for services under this contract, receipt of which is acknowledged. Except as otherwise specifically provided in this contract, Customer shall have no further obligation to pay for any service performed under this contract.

Description of Covered Equipment

4. Service Contractor shall provide maintenance and repair services for the equipment described below ("covered equipment") for the period and on the terms and conditions set forth in this contract:

Type of Equipment: _____
Brand and Model Number: _____
Serial Number: _____
Date of Purchase: _____
Place of Purchase: _____

Services Provided

5. Service Contractor shall provide to Customer during the term of this contract the following: all services and functional parts that may be necessary to maintain proper operation of the covered equipment under normal operation and service for duration of the service contract and without additional charge. _____[*list any additional specific services, parts, characteristics, components, properties, defects, malfunctions, causes, conditions, or repairs included in the scope of the contract, e.g.,* Annual cleaning of the covered equipment is included in this contract].

[*Add, if appropriate:* These services shall be in addition to those covered by the Express Warranty given to Customer in connection with the purchase of the covered equipment and attached to this contract on a form entitled "Express Warranty."]

Exclusions From Coverage

6. Accidental damage and damage to the covered equipment resulting from misuse or lack of proper care by the Customer are not included in the scope of this contract. If the equipment is used for any purpose other than primarily for personal, family, household, or home office use, this service contract shall be void and of no effect. Also excluded from this contract are _____[*list any services, parts, characteristics, components, properties, defects, malfunctions, causes, conditions, repairs, or remedies excluded from the scope of the contract*].

Excusable Delays and Failures

7. Service Contractor shall not be liable for any delay or failure in its performance under this contract caused by events beyond the reasonable control of Service Contractor, including, but not limited to, terrorism, war, riots, labor strikes, interruption of utility services, fires, floods, earthquakes, and other natural disasters.

Limitation of Liability

8. Neither Service Contractor nor any of its authorized representatives or authorized service facilities shall be liable for any consequential or incidental damages related to services provided under this contract.

Customer's Obligations

9. Customer agrees to exercise proper care in the use and handling of the covered equipment, including following the manufacturer's recommended guidelines regarding the proper use and care of the covered equipment. Any damage to the covered equipment resulting from Customer's failure to exercise proper care shall not be covered under this service contract.

Authorized Service Facilities

10. The names, addresses, and telephone numbers of personnel and facilities authorized to perform service under this contract are _____[*specify, or* provided on the attached list, entitled "Authorized Service Facilities," which is incorporated into this contract as if fully set out here]. Customer may obtain updated information on the locations and business hours of service facilities by calling the following toll-free number: _____[*phone number*], or by checking the website: _____[*website address*].

The name and address of the person financially and legally obligated to perform the services specified in this contract are: _____[*name and address*].

Procedure to Obtain Service

11. To obtain service under this contract, Customer must comply with the procedures checked below:

[*The service contractor will check one of the two options below, depending on the type of product involved.*]

_____ In-Home Service. Customer shall call the toll-free number _____ [*phone number*] to report a malfunction of the covered equipment and to request in-home service. Customer shall have a copy of this contract available when making this telephone call. The Service Contractor will attempt to diagnose and troubleshoot the problem and if not solved with telephone support, an appointment for a service call will be made [*add if Paragraph 12 is included:*, in accordance with the provisions of Paragraph 12 of this contract].

_____ Drop-Off Service. Customer, at his or her own cost, shall bring the covered equipment to an authorized service facility during business hours with a copy of this contract, fill out a service authorization form, and leave the covered equipment for service. Service Contractor shall provide a receipt for the covered equipment, and shall contact Customer at the address or telephone number listed in Paragraph 1 above when service has been completed. In-home service is _____ [not available under this contract *or specify, e.g.*, available at an additional charge of $_____ per service call by contacting, by telephone or by mail, the authorized service facility nearest to Customer's address].

In the event the covered equipment cannot be serviced or repaired to a level of normal use and functionality, Service Contractor shall provide a replacement of the same product or, at the option of Service Contractor, a reasonable equivalent of the same product to Customer. Customer may be required to return the damaged equipment to Service

Contractor on receipt of the replaced equipment.

[*Add if service provider has 25 or more employees and the customer's presence is required during the repair period:*]

Time of Service or Repair

12. Customer must request service or repairs under this agreement. On receipt of that request, Service Contractor and Customer must agree, prior to the date of service or repair, on a four-hour period within which the service or repair must begin. Customer, or an adult authorized by Customer, shall be present and available during that four-hour period. Service Contractor shall begin the requested service or repairs within the specified period, unless delayed by unforeseen or unavoidable occurrences beyond Service Contractor's control. In case of such a delay, Service Contractor shall make a diligent attempt to notify Customer of the delay, by telephone or in person, and the parties shall arrange a new two-hour period for the performance of the service or repairs.

Customer's Right to Cancel

13. (a) Within _____[30 *or* 60, *depending on type of produce (see [1][g], above*] days after receipt of this contract Customer may cancel this contract and receive a refund of the full amount paid if Customer provides a written notice of cancellation to Service Contractor at the address specified in Paragraph 1, above, provided that no claim has been made against the contract during that _____[30-day *or* 60-day] period. If a claim has been made during that period, Service Contractor shall pay Customer a pro rata refund, based on _____[elapsed time *or another objective measure of use, e.g.*, the retail value of any service performed].

(b) After the expiration of _____[30 *or* 60, *depending on type of produce (see [1][g], above)*] days following the receipt of this contract, Customer may cancel this contract and receive a pro rata refund, based on _____[elapsed time *or another objective measure of use, e.g.*, the retail value of any service performed] if Customer provides a written notice of cancellation to Service Contractor at the address specified in Paragraph 1, *above*. [*Add if desired:* Cancellation after the expiration of the _____ (30-day *or* 60-day) period shall be subject to _____ (a cancellation *or* an administrative) fee of $_____ (*amount that does not exceed 10 percent of the price of the contract or $25.00, whichever is less*)].

[*For service contracts regulated under the Repair Act, add:*]

(c) If any refund due by law is not paid to Customer or credited to Customer's account within 30 days after Service Contractor's receipt of Customer's written notice of cancellation, the amount of the required refund or credit shall bear interest, payable to Customer, at the annual rate of 10 percent for each additional 30 days (or fraction of each 30-day period) the refund or credit remains unpaid by Service Contractor.]

Transferability

14. Customer may transfer his or her rights under this contract to subsequent consumer owners of the covered equipment during the term of this contract, provided that the transferring owner gives Service Contractor written notice of any transfer of this contract within 30 days of that transfer. Notice of the transfer shall be sent to: _____[*address*]. Failure of the transferring owner to give this notice shall terminate this contract.

Governing Law

15. This contract shall be governed by and construed in accordance with the laws of California.

Executed on _____[*date*], at _____, California.

SERVICE CONTRACTOR
[*typed name of contractor company*]
_____ [*signature*]
[*typed name and title*]

CUSTOMER
_____ [*signature*]
[*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
C. Maintenance and Repairs of Personal Property

30-92 California Legal Forms--Transaction Guide § 92.223

§ 92.223 Express Warranty for Consumer Goods

[1] Comment

[a] Use of Form

This form is designed for use as an express warranty of a consumer product by its manufacturer. In it the manufacturer agrees to replace or repair, at its service center located in California, any part proving defective in material and workmanship. If the manufacturer does not maintain service facilities in California, the buyer's alternatives are set forth in the express warranty form.

Consumer product warranties are governed by the federal Magnuson-Moss Warranty--Federal Trade Commission Improvement Act ("Magnuson-Moss Act") [*15 U.S.C. 2301 et seq.*] and the Song-Beverly Consumer Warranty Act ("Warranty Act") [*Civ. Code § 1790 et seq.*]. For further discussion of the these acts, see *§ 92.52*.

[b] Warranty Requirements

Every manufacturer, distributor, or retailer making express warranties with respect to consumer goods must set forth the warranties in readily understood language and clearly identify the party making the express warranties [*Civ. Code § 1793.1(a)*].

The Warranty Act requires that express warranties with respect to consumer goods conform to federal standards for disclosure of warranty terms and conditions set forth in the Magnuson-Moss Act [*Civ. Code § 1793.1*; *see 15 U.S.C. § 2301 et seq.*]. Accordingly, all such warranties must contain the following information [*see 15 U.S.C. § 2302(a)*; *see also 16 C.F.R. § 701.3(a)(1)*]:

- Name and address of warrantor.

- Identification of the party to whom the warranty is extended, and whether enforceability of the written warranty is limited to the original consumer purchaser or is otherwise limited to persons other

than every consumer owner during the term of the warranty [*see 16 C.F.R. § 701.3(a)(1)*].

- Identification of the product or part covered.

- Statement of what the warrantor will do (for what period of time and at whose expense) if the goods malfunction, are defective, or fail to conform to a written warranty.

- Statement of what the consumer must do and what expense he or she must bear.

- Exceptions to and exclusions from the warranty terms.

- Step by step procedures the consumer must take to obtain performance of any obligation under the warranty, including an identification of any person or class of persons authorized to perform that obligation.

- Availability of informal dispute settlement procedures offered by the warrantor and a recital as to whether the purchaser may be required to resort to those procedures before pursuing any legal remedies.

- A brief, general description of the legal remedies available to the consumer.

- The time at which the warrantor will perform obligations under the warranty.

- The period of time within which, after notice of a defect, malfunction, or nonconformity, the warrantor will perform obligations under the warranty.

- Characteristics or properties of any products or parts not covered by the warranty.

- The elements of the warranty listed in a manner that would not mislead a reasonable, average consumer regarding the warranty's nature or scope.

- A statement to the buyer: "This warranty gives you specific legal rights, and you may also have other rights which vary from State to State" [*see 16 C.F.R. § 701.3(a)(9)*].

[c] Restrictions and Limitations

The warrantor of a consumer product may not condition the warranty on the consumer's use, in connection with that product, of any article or service identified by a brand, trade, or corporate name unless that article or service is provided without charge under the terms of the warranty, or unless the Federal Trade Commission waives this requirement [*see 15 U.S.C. § 2302(c)*].

Moreover, the warrantor may not exclude or limit consequential damages for breach of the warranty unless the exclusion or limitation appears conspicuously on the face of the warranty [*15 U.S.C. § 2304(a)(3)*]. Any such limitation must be accompanied by the following statement [*16 C.F.R. § 701.3(a)(8)*]:

> "Some States do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you."

[2] FORM

Express Warranty for Consumer Goods

_____ [FULL *or if limitation of damages paragraph is included (see below)* **LIMITED] WARRANTY**

Covered Product:

_____[*brand name of product*] _____[*type of product, e.g.,* color television set *or* electronic organ]

Model Number _____, Serial Number _____

Buyer:

Name: _____

Address: _____

[*Add the following paragraph, if desired. It must appear conspicuously on the face of the warranty:*]

Limitation of Damages

In no event shall _____[*name of manufacturer*] be liable for consequential damages for breach of this warranty. Some States do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to the buyer.

Warranty Coverage

_____[*Name of manufacturer*] warrants the Covered Product to be free of all defects in material and workmanship for _____[*specify period, e.g.,* one year] from _____[*commencement date, e.g.,* date of original purchase *or* date of installation]. This warranty extends to the original buyer [only *or* and each successive buyer within the warranty period].

Within the period of this warranty, _____[*name of manufacturer*] will repair or replace, free of charge, any part proving defective in material or workmanship. All warranty repairs and service must be performed _____[*specify manner or location of service, e.g.,* by an authorized _____ [*name of manufacturer*] technician, *or* at an authorized _____ (*name of manufacturer*) service facility].

All expenses related to replacing or repairing a defective part under this warranty shall be assumed by _____[*name of manufacturer*] except for the following expenses, which shall be assumed by the buyer: _____[*list expenses for which buyer will be responsible, e.g.,* cost of transporting the product to service center at the address listed below].

Warranty Exclusions

This warranty does not apply to any costs, repairs, or services for the following:

- Service calls to correct the installation of the Covered Product, or to explain the usage of the product

to the buyer.

- Repairs necessitated by use other than normal home use.
- Damage resulting from misuse, abuse, accidents, alterations, or improper installation.
- Corrective work necessitated by repairs made by anyone other than a _____ [*name of manufacturer*] authorized service technician.

How To Obtain Warranty Service

[*Choose one of the following alternatives:*]

[*If warranty repairs will be made in the home, as in the case of large appliances, add the following:*]

The buyer must notify _____[*name of manufacturer*] by calling the toll-free number _____[*phone number*] of any defect, malfunction, or nonconformity promptly upon discovery. Within _____[*number, e.g.,* 15, *but in no event more than 30 days if service facilities are maintained in California*] days, an authorized service technician shall visit the buyer's home for the purpose of repairing or replacing the defective part.

[*If warranty repairs will be made at an authorized service center in California, add the following:*]

The buyer should carefully pack the Covered Product, preferably in the original packing materials, and deliver it, together with a copy of the original purchase receipt and a description of the problem, to one of the following repair and service facilities in California:

_____ [*Name(s) and address(es) of authorized service centers, or, in the alternative, attach a list of names and addresses of authorized service centers*]

If the buyer sends the product by U.S. mail, we recommend that the buyer insure it and send it return receipt requested. We accept no liability for products lost or misplaced in shipment.

[*If the manufacturer of consumer goods does not maintain service facilities for express warranty repairs in California and warranty repairs will not be made in the home, add the following:*]

Upon discovery of any defect, malfunction, or nonconformity in the Covered Product, the buyer may choose one of the following options for obtaining warranty service and repairs:

(a) The buyer should carefully pack the Covered Product, preferably in the original packing materials, and deliver it, together with a copy of the original purchase receipt and a description of the problem, to:

_____ [*Name(s) and address(es) of authorized service center, or, in the alternative, attach a list of names and addresses of authorized service centers*]

If the buyer sends the product by U.S. mail, we recommend that the buyer insure it and send it return receipt requested. We accept no liability for products lost or misplaced in shipment.

(b) The buyer may return the Covered Product to the retail seller, or to any retail seller in California of like goods of the same manufacturer, who will do one of the following:

- Service or repair the Covered Product to conform to the applicable warranty.
- Direct the buyer to a reasonably close independent repair or service facility.
- Replace the Covered Product with goods that are identical or reasonably equivalent to the warranted goods.
- Refund to the buyer the original purchase price less that amount directly attributable to use by the buyer prior to the discovery of the nonconformity.

(c) The buyer may secure the services of an independent repair or service facility for the service or repair of the Covered Product, when service or repair of the goods can be economically accomplished and when the buyer is not furnished appropriate relief the provisions of subparagraph (b). In that event, _____[*name of manufacturer*] will reimburse the independent repair or service facility for the reasonable cost of service and repair, including any cost for parts and any reasonable cost of transporting the goods or parts, plus a reasonable profit.

[*Continue with the following:*]

Registration Card

We recommend that the buyer fill out and send in the registration card included in the original package of the Covered Product. This will facilitate any warranty repairs or service, if needed. It is not required that the buyer send in this registration card for this warranty to be effective.

Notice to Buyer

This warranty gives you specific legal rights, and you may also have other rights which vary from state to state. You have the right to bring any action at law or equity to resolve disputes concerning or to enforce the provisions of this warranty.

[*Add, if informal settlement procedures are offered:*]

If the buyer and _____[*name of manufacturer*] disagree over either's performance under the terms of this warranty, the buyer may submit the matter for resolution to _____[*specify panel or other body that will arbitrate dispute*]. The buyer shall not be responsible for expenses incurred in submitting a dispute for resolution under the terms of this paragraph. The buyer _____[is *or* is not] required to submit any dispute for resolution under this paragraph before pursuing any legal remedies to which he or she may be entitled.

_____ [*printed name of manufacturer*]
[*manufacturer's address*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract Conditions & ProvisionsExpress WarrantiesContracts LawSales of GoodsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
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C. Maintenance and Repairs of Personal Property

30-92 California Legal Forms--Transaction Guide § 92.224

§ 92.224 Terms and Conditions in Motor Vehicle Repair Estimate/Invoice

[1] Comment

[a] Use of Form

This form contains the terms and conditions that appear in a typical estimate and invoice form for motor vehicle repairs. The estimate and invoice forms are essentially identical in format and are sometimes prepared as multiple copies of one form. Typically these conditions appear in small print, and most automobile owners sign the form without being aware of these terms. Portions of the estimate/invoice that include space for description of the work, price estimate, descriptive information about the vehicle, and so forth, have been omitted from this form.

The Automotive Repair Act [*Bus. & Prof. Code § 9880 et seq.*] includes certain requirements for a written estimate and an invoice for motor vehicle repairs, which are discussed in [b]-[e], *below*. Additionally, if the repairs are done under a warranty, the buyer must be provided with notice in specific statutory language that the warranty period is tolled during the period of repairs [*see Civ. Code § 1793.1(a)(2)*]. For further discussion of the requirements of the Automotive Repair Act, see *§ 92.53[1]*.

For discussion and a sample complaint by an automotive repair dealer to collect amounts due for repairs, see *California Forms of Pleading and Practice, Ch. 274, Garages and Gas Stations, § 274.48* (Matthew Bender). For discussion and a sample complaint by an automobile owner for breach of contract to make repairs, see *California Forms of Pleading and Practice, Ch. 274, Garages and Gas Stations, § 274.47* (Matthew Bender). For discussion and sample complaints by an automobile owner against a dealer for the negligent operation, repair, or maintenance of motor vehicle, see California Forms of Pleading and Practice, *Automobiles: Actions Including Defects and Repairs*, Ch. 91, §§ 91.80-91.83 (Matthew Bender).

[b] Estimate Requirements

The automotive repair dealer must satisfy the following requirements with respect to motor vehicle repairs or service [*Bus. & Prof. Code § 9884.9(a)*]:

- A written estimated price for labor and parts necessary for a specific job must be given to the customer.

- Work may not be done and charges may not accrue before authorization to proceed is obtained from the customer.

- The dealer may not charge for work done or parts supplied in excess of the estimated price without the oral or written consent of the customer, which must be obtained at some time after it is determined that the estimated price is insufficient and before the work not estimated is done or the parts not estimated are supplied.

The automotive repair dealer must also include with the written estimate a statement of any automotive repair service that, if required to be done, will be done by someone other than the dealer or the dealer's employees [*Bus. & Prof. Code § 9884.9(b)*].

Additionally, an automotive dealer, when doing auto body or collision repairs, must provide the customer with an itemized written estimate of all parts and labor. The estimate must describe labor and parts separately and must identify each part, indicating whether the replacement part is new, used, rebuilt, or reconditioned. The written estimate must identify each "crash part" (nonmechanical sheet metal or plastic parts that generally constitute the exterior of a motor vehicle, including inner and outer panels) and indicate whether the crash part is an original equipment manufacturer crash part or a nonoriginal equipment manufacturer aftermarket crash part [*Bus. & Prof. Code § 9884.9(c)*; *see Bus & Prof. Code § 9875(b)* (definition)].

A customer may designate another person to authorize work or parts supplied in excess of the estimated price, if the designation is made in writing at the time the initial authorization is signed by the customer. The designee may not be the automotive repair dealer providing the services or an insurer involved in a claim that includes the motor vehicle being repaired, or any employee or agent acting on behalf of the dealer or insurer [*Bus. & Prof. Code § 9884.9(d)*].

If a dealer fails to give a written estimate or a precise oral estimate of the costs or extent of the repairs to be performed in violation of *Bus. & Prof. Code § 9884.9*, the repair contract is unenforceable at law, and equitable relief will be granted in such cases only under narrowly drawn exceptions to the general rule designed to discourage such violations by refusing relief [*Bennett v. Hayes (1975) 53 Cal. App. 3d 700, 704, 125 Cal. Rptr. 825]* .

[c] Charges in Excess of Estimate

The customer may provide written consent or authorization for an increase in the original estimated price by electronic mail or facsimile transmission. If the customer's consent is oral, the dealer must make a notation on the work order of the date, time, name of person authorizing the additional repairs, and telephone number called, if any, together with a specification of the additional parts and labor and the total additional cost [*Bus. & Prof. Code § 9884.9(a)*].

Furthermore, the dealer must either (1) make a notation on the invoice of the same facts set forth in the notation on the work order or (2) on completion of repairs, obtain the customer's signature or initials to an acknowledgment of notice and consent in the following language: "I acknowledge notice and oral approval of an increase in the original estimated price" [*Bus. & Prof. Code § 9884.9(a)*].

This form contains two optional provisions, either of which may be used by an automotive repair dealer to confirm the oral consent of a customer for additional repairs.

[d] Lack of Insurance

If the motor vehicle received by the automotive dealer is used for personal, family, or household purposes, the automotive dealer's receipt/estimate must include a statement, if appropriate, that the vehicle is not insured or protected to the amount of its actual cash value against loss occasioned by theft, fire, and vandalism while the vehicle remains with the automotive dealer [*see Civ. Code § 1858.1*].

[e] Invoice Requirements

Under the Automotive Repair Act, all work done by an automotive repair dealer, including all warranty work, must be recorded on an invoice describing all service work done and parts supplied. Service work and parts must be listed separately on the invoice, which also must state separately the subtotal prices for service work and for parts (not including sales tax) and state separately the sales tax which is applicable to each. If any used, rebuilt, or reconditioned parts are used, the invoice must clearly state that fact. If a part of a component system is composed of new and used, rebuilt or reconditioned parts, that invoice must clearly state that fact [*Bus. & Prof. Code § 9884.8*].

The invoice must also include a statement indicating whether any "crash parts" (nonmechanical sheet metal or plastic parts that generally constitute the exterior of a motor vehicle, including inner and outer panels [*see Bus & Prof. Code § 9875* (definition)]) are original equipment manufacturer crash parts or nonoriginal equipment manufacturer aftermarket crash parts. One copy of the invoice must be given to the customer and one copy is to be retained by the dealer [*Bus. & Prof. Code § 9884.8*].

[2] FORM

Terms and Conditions in Motor Vehicle Repair Estimate/Invoice

[*Include the following in the estimate form directly above the customer's signature line:*]

I hereby authorize _____[*name of automotive service dealer*] to perform the repair work described above, including any sublet work noted in the above estimate, and to furnish all necessary materials and parts. I understand storage will be charged beginning three days after I receive notice that repairs are completed at a rate of _____[*amount, e.g.,* $15] per day. You and your employees may operate the vehicle at my risk for the purposes of testing, inspection, moving, or delivery. A lien on the vehicle to secure the amount of labor, parts and storage is acknowledged. You will not be held responsible for loss or damage to the vehicle or any articles left in the vehicle in case of fire, theft, accident, or any other cause beyond your control. In the event that any contract action is necessary to enforce or interpret the terms of this contract, the prevailing party will be entitled to reasonable attorneys' fees and court costs.
_____ Dated:

_____ [*signature*]
[*typed name*]

[*If the equipment is intended for personal, family, household, or home office purposes, include following statement, if appropriate:*]

RISK OF LOSS

The equipment you have left with us for repair is not insured or otherwise protected to its actual cash value by us against loss occasioned by theft, fire, or vandalism while it remains with us.

[*Optional provision if dealer obtains oral consent for additional automotive repairs and desires to make a notation of the consent on the work order and invoice:*]

_____[*Name of automotive repair dealer*] acknowledges that _____[*name of person authorizing additional repairs*] [, whose telephone number is _____,] orally authorized the additional repairs described below on _____[*date*], at _____[a.m. *or* p.m.]. The additional parts and labor and total additional cost authorized by the above-named person are as follows:
_____[*specify additional parts and labor and total additional cost; if any "crash parts"--nonmechanical sheet metal or plastic parts that generally constitute the exterior of a motor vehicle, including inner and outer panels--are involved, identify each crash part and indicate whether part is an original equipment manufacturer crash part or a nonoriginal equipment manufacturer aftermarket crash part (see Bus & Prof. Code § 9875)*].

[*Alternative optional provision when dealer, on completion of repairs, obtains the customer's signature or initials to an acknowledgment of notice and consent for additional repairs:*]

I acknowledge notice and oral approval of an increase in the original estimated price.

[*Continue with the following:*]

_____ [*signature or initials*]
[*typed name*]

[*Include the following paragraph in 10 point boldface type if the repairs are subject to express warranties:*]

A buyer of this product in California has the right to have this product serviced or repaired during the warranty period. The warranty period will be extended for the number of whole days that the product has been out of the buyer's hands for warranty repairs. If a defect exists within the warranty period, the warranty will not expire until the defect has been fixed. The warranty period will also be extended if the warranty repairs have not been performed due to delays caused by circumstances beyond the control of the buyer, or if the warranty repairs did not remedy the defect and the buyer notifies the manufacturer or seller of the failure of the repairs within 60 days after they were completed. If, after a reasonable number of attempts, the defect has not been fixed, the buyer may return this product for a replacement or a refund subject, in either case, to deduction of a reasonable charge for usage. This time extension does not affect the protections or remedies the buyer has under other laws.

[*If preceding statement appears on reverse side of work order, repair invoice, or an attachment, that fact must be noted on face of order or invoice in 10-point boldface type as follows:*]

Notice to Consumer: Please read important information on back.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service AgreementsTransportation LawPrivate VehiclesGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
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30-92 California Legal Forms--Transaction Guide § 92.225

§ 92.225 Home Protection Contract

[1] Comment

[a] Use of Form

A home protection contract is a contract in which a home protection company undertakes, for a specified period of time and for a predetermined fee, to repair or replace all or any part of any component, system or appliance of a home necessitated by wear and tear, deterioration or inherent defect, arising during the effective period of the contract. The home protection contract generally covers major home appliances, and plumbing, heating, and electrical systems, with optional coverage for pools, roofs, and septic systems.

This type of contract, also known as a home warranty plan, typically is issued in connection with the sale of residential property, although a home owner can purchase or renew a home protection contract independently of a sale of the subject property. For an additional premium, a home warranty plan may also be issued during the period the property is listed for sale, protecting the seller during the listing period and the buyer after the title passes on the property.

Home protection contracts generally are not signed by either party, but appear in format similar to an insurance policy. The form of the contract must be filed with the Insurance Commissioner prior to its use by a home protection company [*Ins. Code § 12763*].

Home protection contracts are governed by *Ins. Code §§ 12740-12764*. For discussion of the law that applies to home protection companies, see *§ 92.54*.

[b] Contract Requirements

A home protection contract must specify, in clear and conspicuous terms, the following information [*Ins. Code § 12762(a)*]:

- Each of the appliances, systems and components covered by the contract.

- All exclusions and limitations respecting the extent of coverage.

- The period during which the contract will remain in effect, the home protection contract fee and the renewal terms, if any.

- With respect to the performance of services by the home protection company, all of the following:

    - The services to be performed by the company and the terms and conditions of that performance.

    - The service fee or fees, if any, to be charged for the services.

    - All limitations respecting the performance of services, including any restrictions as to the time period when or geographical area within which services may be requested or will be performed.

    - A statement that services will be performed on telephonic request to the home protection company, without any requirement that claim forms or applications be filed prior to the rendition of service.

    - A representation that services will be initiated within 48 hours of a request made by any person entitled to make such a request under the contract, or the agent of such a person.

[2] FORM

Home Protection Contract

HOME PROTECTION CONTRACT

_____[*Name of home protection company*] ("the Company")
_____[*Address*]
_____[*Telephone number*]

Contract Number: _____
Contract Holder: _____[*name of homeowner of the subject property*]
Coverage Period: _____[*list commencement and expiration dates*
Covered Property: _____[*address of covered property*]
Service Call Fee: _____[*fee to be paid by homeowner for each repair visit, e.g.*, $45]
Service Call Telephone Number: _____

A. COVERAGE INCLUDED

Basic Coverage (see Section C. below for description of coverage):

- Single family home under 5,000 square feet: $_____[*cost of premium, e.g.*, $350]

- Single family home of 5,000 to 10,000 square feet: $_____[*cost of premium, e.g.*, $495]

Listing Option Upgrade (see Section B. Paragraph 5 for description of coverage): $_____[*cost of upgrade, e.g.,* $100]

Optional Coverage (see Section C. below for description of coverage):

[*list optional coverage available and the premium for each option:*]

- Clothes washer and dryer: $_____[*cost of premium, e.g.,* $50]
- Refrigerator: $_____[*cost of premium, e.g.,* $50]
- Roof: $_____[*cost of premium, e.g.,* $100]
- Pool/Spa: $_____[*cost of premium, e.g.,* $150]
- Septic System: $_____[*cost of premium, e.g.,* $50]

$_____ Basic Coverage

$_____ Total Optional Coverage

$_____ Listing Option Upgrade

$_____ Total Cost

B. TERMS OF CONTRACT

1. This contract covers the systems and appliances checked above ("Covered Systems") and excludes all other items.

2. The Company, or its authorized service contractors, shall make repairs and replacements to Covered Systems to restore them to full operating condition, subject to the following conditions:

- A Covered System that was not installed properly is not covered under this contract.
- The Covered System must be in good working order at the commencement date of this contract.
- Repairs or replacement necessitated by manufacturer's defects or covered under manufacturer's warranties are not covered under this contract.
- Repairs or replacement necessitated from conditions other than normal wear and tear are not covered under this contract. Cosmetic defects and damage resulting from fire, flood, earthquake, storms, and other acts of God, theft, vandalism, pest damage, or misuse are not covered.
- Covered Systems must be located within the perimeter of the main foundation of the home or garage on the Covered Property (except for covered pools, air conditioning, well pumps, and septic systems).

3. Contract Holder must call the Service Call Telephone Number indicated above to report a malfunction of a Covered System and to request repair of the Covered System. All telephone calls must be made within the effective period of this contract. The Company shall contact its authorized service contractor ("contractor") within _____[

number of hours, e.g., four, *but not to exceed 48*] hours on weekdays or _____[*number of hours, not to exceed 48*] hours on Saturdays and Sundays of receiving telephonic notice from Contract Holder. The contractor shall promptly contact Contract Holder to arrange a mutually beneficial time for a repair visit.

4. (a) Contract Holder shall pay the Service Call Fee listed above directly to the contractor for each trade service call, defined as a single repair visit by a contractor, plus any additional repair visits required to remedy the same problem. If the Covered System cannot be repaired to full operating condition, the Company shall arrange for replacement of the Covered System, subject to the following limitations:

[*List any limitations in coverage, e.g., a dollar limitation for replacing heating systems or roofs, or excluding costs for removing inoperable appliances that are replaced*].

(b) If a covered appliance needs to be replaced, the Company shall attempt to match the color of the appliance, but it cannot guarantee a perfect match. The Company also has the option to replace a Covered System rather than repair it.

[*Continue with the following:*]

5. If Contract Holder is a homeowner who has listed the Covered Property for sale and has elected to pay the Listing Option Upgrade cost listed above, this contract shall be assigned to the buyer of the Covered Property at the time title passes to the buyer. In such an event, an additional premium equal to the cost for Basic Coverage, prorated for each day between the commencement date of this contract and the date title passes, shall be due and payable on close of escrow. Upon payment of the additional premium, the period of coverage shall be extended to the first anniversary of the close of escrow date.

6. In no event shall the Company be liable for any incidental or consequential damages or for any delay or failure in its performance under this contract caused by events beyond the reasonable control of the Company, including, but not limited to, terrorism, war, riots, labor strikes, interruption of utility services, fires, floods, earthquakes, and other natural disasters.

C. DESCRIPTION OF COVERAGE

Basic Coverage includes the following appliances and systems:

[*For each of the following items, specify exactly what is covered and what is not covered:*]

Water Heater: _____
Heating System: _____
Ductwork: _____
Plumbing: _____
Electrical: _____
Telephone Wiring: _____
Central Vacuum System: _____
Oven/Range/Cooktop: _____
Microwave Oven: _____
Dishwasher: _____
Garbage Disposal: _____
Trash Compactor: _____

Optional Coverage includes the following appliances and systems:

[*For each of the following items, specify exactly what is covered and what is not covered:*]

Refrigerator: _____
Clothes washer and dryer: _____
Roof: _____
Pool/Spa: _____
Septic System: _____

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
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30-92 California Legal Forms--Transaction Guide § 92.226

§ 92.226 Boarding Contract for Domestic Animal

[1] Comment

[a] Use of Form

This form is a contract between a kennel and the owner of a domestic animal for the boarding of the animal. It also contains provisions for other services to be performed during the boarding period, such as bathing or clipping the animal. This form is likely to be used as a standard form to be drafted for the kennel. The attorney should modify it, if necessary or desirable, in order to meet the requirements of the kennel.

This form is not designed to be used in connection with the boarding of livestock or wild animals [*see 14 Cal. Code Reg. § 671.4* (regulations concerning boarding of wild animals)].

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative contractual provisions.

[b] Provision for Lien

Most kennel contracts provide the kennel with a lien on the animal for services performed. This type of provision is used because the length of time required to enforce a statutory lien often results in the incurring of boarding costs in excess of the value of the animal. A lien may be created by contract [*Civ. Code § 2881*]. This form provides for a contractual lien, which can be enforced in a shorter period than that required for a statutory lien. For detailed discussion of the laws relating to personal property liens, see Ch. 102A, *Personal Property Liens* .

[c] Confinement of Animal

Any person who keeps an animal confined in an enclosed area must provide the animal with an adequate exercise area. If the animal is restricted by a leash, rope, or chain, the leash, rope, or chain must be affixed so as to prevent the animal from becoming entangled or injured and permit the animal to obtain adequate food, water, and shelter. Failure to

comply with these requirements is a misdemeanor. These requirements do not apply to an animal that is in transit, in a vehicle, or in the immediate control of a person [*Penal Code § 597t*].

[2] FORM

Boarding Contract for Domestic Animal

BOARDING CONTRACT

_____[*Name of kennel*]
_____[*Address*]
_____[*Telephone number*]

Owner: _____
Address: _____
Daytime Telephone: _____
Evening Telephone: _____
Alternate Party to Call: _____
Daytime Telephone: _____
Evening Telephone: _____
Relationship to Owner: _____

Owner's Veterinarian: _____
Telephone: _____

Type of Animal: _____
Breed: _____
Name: _____
Age: _____
Sex: _____
Weight: _____
Color: _____
Inoculated? _____
When? _____
For What? _____

Date Received: _____
Expected Stay: _____

BOARDING RATES:
Day: _____
Week: _____
Month: _____

RECEIVED:
$_____ Advance Deposit

[*note if nonrefundable*]

SPECIAL INSTRUCTIONS (if any):

_____
_____
_____

CHARGES FOR SPECIAL SERVICES ORDERED:
Bathing: _____
Clipping: _____
Pickup and Delivery Charge: _____
Other: _____

_____ ESTIMATED BOARDING CHARGES
_____ SPECIAL SERVICES CHARGES
_____ TOTAL CHARGES

Services to Be Rendered

1. _____[*name of kennel*] ("Kennel") agrees to board the animal described above and to provide other services as specified above, at the rates stated above. The kennel shall be open each day [except _____ (*e.g.,* Sunday)] from _____ A.M. to _____ P.M.

Charges

2. _____[*name of owner*] ("Owner") agrees to pay for the services specified above at the rates stated above _____[in advance *or* at the time the animal is picked up by Owner]. For purposes of computing boarding charges, any part of a calendar day shall be considered as a full day.

Status of Animal

3. Owner represents that he or she is the sole owner of the animal and that there is no lien or mortgage against the animal. Owner certifies that all the information stated above regarding the animal is correct. Owner guarantees that the animal is in good health and has not been exposed to any contagious disease within the past _____[*e.g.,* 30] days.

Illness or Injury

4. If the animal becomes ill or injured, Kennel shall immediately attempt to notify Owner or, if Owner cannot be contacted, the alternate party listed above. If Owner cannot be reached, or fails to instruct Kennel regarding measures to be taken, or if an emergency situation exists, Kennel is authorized to engage the services of a veterinarian or administer medicine or give other attention that appears advisable. Owner shall pay to Kennel all costs for these services at the time the animal is picked up.

Lien

5. Owner hereby grants a lien on the animal to Kennel for all charges resulting from boarding and rendering other services as described above to the animal. If any such charges are not paid within _____[*e.g.,* 15] days

after they become due under the terms of this contract, Kennel may, on _____[*e.g.,* five] days written notice to Owner, specifying the amount due and informing Owner that payment of that amount within _____[*e.g.,* five] days shall entitle Owner to redeem the animal, sell the animal at a public or private sale to satisfy the account. The notice may be served by registered or certified mail with return receipt requested, delivered to Owner's address as stated above. The proceeds of the sale, after paying the expenses of sale, shall be applied to liquidate the debt, including all charges accrued in caring for the animal up to the date of sale. The balance, if any, shall be paid over to Owner. If the proceeds of the sale are insufficient to pay the expenses of the sale and satisfy the account, Owner shall pay the balance to Kennel. This provision does not in any way limit Kennel's legal remedies against Owner.

Compliance With Applicable Statutes, Ordinances, and Regulations

6. In performing the services required of it under this agreement, Kennel shall comply with all applicable federal, state, county, and city statutes, ordinances, and regulations.
Dated: _____.

KENNEL
_____ [*typed name of kennel*]
_____ [*signature*]
OWNER
_____ [*signature*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service AgreementsGovernmentsAgriculture & FoodAnimal Protection

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DIVISION VI: PERFORMANCE OF SERVICES
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C. Maintenance and Repairs of Personal Property

30-92 California Legal Forms--Transaction Guide §§ 92.227-92.239

[Reserved]

§§ 92.227[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
D. Employment--Related Services

30-92 California Legal Forms--Transaction Guide § 92.240

§ 92.240 Employment Agency Contract

[1] Comment

[a] Use of Form

This form is a contract between an employment agency [*see Civ. Code § 1812.501(a)* ("employment agency" defined)] and a jobseeker to be signed by the parties at the time the employment agency refers a specific position to the jobseeker. Employment agencies are governed by the Employment Agency, Employment Counseling, and Job Listing Services Act ("Employment Act") [*see Civ. Code § 1812.500 et seq.*].

An employment agency must give a written contract to each jobseeker from whom a fee or deposit is to be received, whether directly or indirectly [*Civ. Code § 1812.504(a)*]. This form incorporates the minimum requirements of the Employment Act for a contract between an employment agency and a jobseeker [*see* [b], *below*]. For general discussion of the Employment Act's requirements regarding employment agencies in general, see *§ 92.70*.

For discussion and a sample form illustrating a schedule of fees that may be appended to the agreement in this form or posted at the agency's premises, see *§ 92.241*. For discussion and a sample contract for job listing services, see *§ 92.242*. For discussion and a sample contract to be used by an employment counseling service, see *§ 92.243*. For discussion and a sample contract to be used by a nurses' registry, see *§ 92.244*. For discussion of remedies for violations of the Employment Act, breaches of contracts subject to the Employment Act, and enforcement of the Employment Act's provisions [*see Civ. Code § 1812.523*], see *§ 92.74*.

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contract provisions.

[b] Contents of Contract

The contract between the jobseeker and the employment agency must include all of the following [*Civ. Code § 1812.504(a)(1)-(10)*]:

- The name, address, and telephone number of the employment agency. If the employment agency has more than one office or location, the contract must state the address and telephone number of the principal office and the address of the location providing services to the jobseeker.

- The name and address of the person giving the order for help, the date and consecutive number of the receipt of the order by the agency and its manner of transmission.

- The name of the jobseeker, the name and address of the person to whom the jobseeker is sent for employment, and the address to which the jobseeker is to report for employment.

- The date and consecutive number of the contract.

- The amount of the fee to be charged and collected from the jobseeker and the amount of the fee paid or advanced by the prospective employer and by whom paid or advanced. The fee clause must include a statement that if the employment is terminated, the fee may not exceed the gross earnings of the jobseeker in that employment [*see Civ. Code § 1812.501(j)* ("fee" defined)].

- The kind of work or employment.

- The daily hours of work, the wages or salary, including any consideration or privilege, the benefits, and any other conditions of employment.

- Whether any labor trouble exists at the place of employment [*see Civ. Code § 1812.509(b), (c)*].

- A contract expiration date not later than 180 days from the date of the referral or signing of the contract, whichever is first (however, a domestic agency operating as a registry may enter into a continuing contract subject to termination by written notice by either the domestic worker or the agency).

- Any other term, condition, or understanding agreed upon between the agency and the jobseeker.

The contract must also include a statutory statement of the jobseeker's right to a refund [*See Civ. Code § 1812.506(a)*]. The refund caption must be set out in type no smaller than 10-point boldface type and the remaining portion in full capitals, boldface, or italics, in type no smaller than that generally used throughout the contract [*Civ. Code § 1812.504(a)(11)*].

There is no legal requirement that the fee schedule be included in the contract or receipt of the employment agency. However, many employment agencies do include it so that the client-jobseeker can readily refer to it and to minimize any misunderstandings as to the amount of the fee.

For discussion of the limitations on fees charged to jobseekers, see *§ 92.70[6]*.

[c] Contract Format and Delivery

The complete agreement between a jobseeker and the employment agency must be set out in a single document and must contain certain elements required by statute [*Civ. Code § 1812.504(c)*; *see* [b], *above* (required contents of contract)]. Contracts must be numbered consecutively and each must be dated [*Civ. Code § 1812.504(b)*].

An original and a duplicate contract must each be executed by the jobseeker and by the person acting for the employment agency [*Civ. Code § 1812.504(b)*]. The original must be given to the jobseeker at the time the contract is

signed and before the employment agency accepts any fee or deposit or before the jobseeker becomes obligated to pay a fee or deposit, and the duplicate kept on file at the agency [*Civ. Code § 1812.504(a), (b)*].

When a referral is made by telephone, the agency must execute the contract in triplicate and must mail the original and duplicate to the jobseeker on the day the referral is made. The date of mailing of the contract must be entered on the contract by the agency. The jobseeker must be instructed to sign both copies and return the duplicate to the agency. The same contract may not be used for more than one referral [*Civ. Code § 1812.504(d)*].

[d] Truth in Lending Laws

If the employment agency agrees to finance the fee charged to the jobseeker, and the terms of the loan include a finance charge or more than four installments, the contract is subject to the Federal Truth in Lending Act [52 Ops. Cal. Atty. Gen 242 (1969) ; *see 15 U.S.C. § 1601 et seq.*; 12 C.F.R. pt. 226 (Reg. Z)] and the Unruh Act [*Civ. Code § 1801 et seq.*; *see also § 92.12[1]*]. For discussion and a sample form with the required disclosures under the Truth in Lending Act and the Unruh Act, see *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.225*.

[2] FORM

Employment Agency Contract

EMPLOYMENT AGENCY CONTRACT

_____[*name of agency*]
_____[*address of principal office*]
_____[*city, state, zip*]
_____[*telephone number*]

Date: _____
Contract Number: _____

[*If contract is mailed to jobseeker, add:* Date Contract Mailed to Jobseeker: _____]

This Agreement is entered into between _____, an employment agency ("Agency"), [*if office providing services to jobseeker is other than the principal office of the employment agency, add:*, whose office for services provided under this agreement is located at _____,] and _____[*name of jobseeker*] ("Jobseeker").

Purpose of Agreement

1. In consideration of payment of the fee provided in Paragraph 5 to be paid by Jobseeker, Agency agrees to refer to Jobseeker the prospective employment opportunity referred to in Paragraphs 2 and 3 of this agreement.

Conditions of Employment

2. The conditions of employment are as follows:

(a) Title of position/type of work: _____[*e.g.*, Legal Secretary].

(b) Days and Hours of Work: _____[*e.g.*, Monday through Friday from 9:00 a.m. to 5:00 p.m.].

(c) Rate of pay: $_____ per _____[*period, e.g.,* hour *or* month *or* year].

(d) Additional Benefits:

(1) Health Benefits: _____ [*describe benefits*].

(2) Vacation time: _____ [*specify*].

[*Specify additional terms, if any:*]

(e) Additional terms of employment: _____

Prospective Employer

3. Information regarding the prospective employer is as follows:

(a) Name of prospective employer: _____[*name of firm*]

(b) Address of prospective employer: _____[*address*]

(c) Job Order submitted by: _____[*name of person requesting help*].

(d) Date and receipt number of Job Order: _____.

(e) Method of transmission: _____[*e.g.*, phone, e-mail, messenger, *etc.*].

(f) Amount of fee, if any, paid by prospective employer: $_____. [*Add if appropriate:* This fee has been paid on behalf of prospective employer by: _____ (*name of person making payment for employer*)].

(g) Amount of fee, if any, advanced by prospective employer: $_____. [*Add if appropriate:* This fee has been advanced on behalf of prospective employer by: _____ (*name of person making payment for employer*)].

(h) Jobseeker shall report to: _____[*name of supervisor*] at _____[*address and phone number*] on _____[*date*] at _____[*time*].

[*Add, if appropriate:*]

Labor Matters

4. A labor contract is in force at the employer's establishment and union membership _____[is *or* is not] required. [*Add following if labor trouble exists at place of employment:* The place of employment to which Jobseeker is being referred is currently involved in a labor dispute between its regular employees and the management.]

[*Continue with the following:*]

Fee

5. Jobseeker shall pay Agency a fee of $_____[*actual fee for the job contemplated under this agreement, e.g.,* $300] for the services provided under this agreement. Payment of the fee, less the deposit, if any, paid by Jobseeker as provided in Paragraph 6 of this agreement, is due within _____[*number of days, e.g.,* 15] days of the first day of employment. If employment is terminated, the fee, as specified above, shall not exceed the gross earnings of Jobseeker in the employment designated in this agreement. In no event shall Jobseeker be obligated to pay to Agency or any other employment agency more than the one fee stipulated in this paragraph.

Deposit

6. This contract constitutes an acknowledgment and receipt of a deposit of $_____ paid by Jobseeker, which deposit shall be deducted from the total fee due referred to in Paragraph 5 of this agreement. If Jobseeker does not accept the employment described in Paragraphs 2 and 3 of this agreement, the deposit shall be returned to Jobseeker within 48 hours of Jobseeker's demand for a refund. If Agency fails to return the deposit within 48 hours after demand, Agency must pay to Jobseeker an additional sum equal to the amount of the deposit.

Attorneys' Fees

7. If Agency or Jobseeker brings any legal action regarding any provision of this contract, the prevailing party in the litigation shall be entitled to recover reasonable attorneys' fees from the other party, in addition to any other relief that may be granted.

Expiration Date

8. This Agreement shall expire on _____[*date not later than 180 days from referral*].

[*Include the following four paragraphs in boldface, italics, or full capitals in a size no smaller than that generally used throughout the contract; and with the caption in no less than 10-point boldfaced type*]:

RIGHT TO REFUND

If you pay all or any portion of a fee and fail to accept employment, the employment agency shall, upon your request, return the amount paid to you within 48 hours after your request for a refund.

If you leave employment for just cause or are discharged for reasons other than misconduct connected with your work within 90 days from the starting date of employment, the agency shall reduce your fee to that payable for temporary employment and shall refund any excess paid within 10 days of your request for a refund.

No fee larger than that for temporary employment may be charged to you for employment lasting 90 days or less unless the agency's fee schedules, contracts, and agreements provide for a further charge if you leave employment without just cause or are discharged for misconduct in connection with your work.

If any refund due is not made within the time limits set forth above, the employment agency shall pay you an additional sum equal to the amount of the refund.

Executed on _____[*date*], at _____, California.

EMPLOYMENT AGENCY
_____ [*typed name of agency*]
_____ [*signature of employee or agent*]
[*typed name and title*]
JOBSEEKER
_____ [*signature*]
[*typed name*]

ATTACHMENTS

FEE SCHEDULE

[*Attach schedule of fees, if desired (see § 92.241[2]).*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
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30-92 California Legal Forms--Transaction Guide § 92.241

§ 92.241 Employment Agency Fee Schedule

[1] Comment

[a] Use of Form

This form is a schedule of employment agency fees. It meets the requirements of the Employment Agency, Employment Counseling, and Job Listing Services Act ("Employment Act") [*see Civ. Code § 1812.500 et seq.*]. For discussion and a sample contract between an employment agency and a jobseeker, see *§ 92.240*. For general discussion of the Employment Act's requirements regarding employment agency fees, see *§ 92.70[6]*.

An employment agency must provide the jobseeker with a copy of its fee schedule [*Civ. Code § 1812.505(a)(1)*] and must also post the fee schedule in a conspicuous place [*Civ. Code § 1812.505(a)(3)*]. A copy of all fee schedules and of all changes to those fee schedules must be kept on file at the employment agency for a period of one year [*Civ. Code § 1812.505(a)(4)*].

There is no legal requirement that the fee schedule be included in the contract or receipt of the employment agency. However, many employment agencies do include it so that the client-jobseeker can readily refer to it and to minimize any misunderstandings as to the amount of the fee.

[b] Contents of Fee Schedule

The fee schedule of the employment agency must include all of the following:

- A list of classes of various employments or salary ranges by which the fee will be computed or determined [*Civ. Code § 1812.505(a)(2)*].

- The maximum fee in each class, which must include all charges in each transaction [*Civ. Code § 1812.505(a)(2)*].

- The percentage of both the projected annual and first month's total gross earnings represented by the fees [*Civ. Code § 1812.505(a)(1)*].

The agency may make changes in the schedule, but changes are not effective until seven days after they have been posted in a conspicuous place in the agency [*Civ. Code § 1812.505(a)(2)*].

[c] Format of Fee Schedule

The fee schedule that is required to be posted in the employment agency in a conspicuous place, including all changes made to it, must be in lettering or printing of not less than standard pica capitals. The effective date of the schedule and of all changes must appear on the posted copies [*Civ. Code § 1812.505(a)(3)*].

[2] FORM

Employment Agency Fee Schedule

EMPLOYMENT AGENCY FEE SCHEDULE

_____[*name of agency*]
_____[*address*]
_____[*city, state, zip*]
_____[*telephone number*]

SCHEDULE OF FEES EFFECTIVE _____ [*effective date*]

A. Permanent Positions (Lasting More Than 90 Days)

[*The following figures are for illustrative purposes only. The actual range of salaries and agency fees used by the employment agency should be inserted.*]

Monthly Salary	Agency Fee*	Monthly Percent	Annual Percent
$1,000 or less	Up to $300	30%	2.5%
$1,001-$2,000	$400-$800	40%	3.3%
Over $2,000	(based on percent)	50%	4.1%

* The exact fee will be calculated based on the applicable percentage (see the percent columns above) of the actual salary.

If a jobseeker leaves employment for just cause or is discharged for reasons other than work-related misconduct within 90 days from the starting date of employment, the agency shall reduce the jobseeker's fee to that payable for temporary employment and shall refund any fee paid in excess of that amount. Moreover, if employment is accepted and subsequently terminated, the jobseeker shall not be charged a fee greater than the jobseeker's total gross income from the employment.

B. Temporary Positions (Lasting 90 Days or Less):

The fee for temporary positions is _____[*e.g.*, 20] percent of the total gross amount earned. The fee shall not exceed any of the following: (1) the fee for a permanent position, (2) 1/90 of the permanent fee for each

calendar day employed, or (3) total gross earnings.

C. Miscellaneous Fees:

[*Insert fees for any optional services, such as resume preparation, interview coaching, etc.*]

D. Terms of Payment:

[*Add if a deposit is required of the jobseeker:*]

A deposit of _____[*specify number, e.g.,* 20] percent of the estimated fee is due at the time the referral to a job is given to the jobseeker. If the jobseeker does not accept the employment, the deposit shall be returned to the jobseeker within 48 hours of the jobseeker's demand for a refund. If the agency fails to return the deposit within 48 hours after demand, the agency must pay to the jobseeker an additional sum equal to the amount of the deposit.

[*Continue with the following:*]

The total fee, less the deposit, if any, shall be paid by the jobseeker within _____[*specify number, e.g.,* 15] days of the first day of employment.

If a jobseeker accepts a position that was not referred by the agency, but with the same employer as a position that was referred by the agency, the jobseeker shall owe the agency a fee that is in effect at the time of the referral.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
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30-92 California Legal Forms--Transaction Guide § 92.242

§ 92.242 Job Listing Service Contract

[1] Comment

[a] Use of Form

This form combines a contract between a jobseeker and a job listing service [*see Civ. Code § 1812.501(c)* ("job listing service" defined)] with a receipt for the fee paid by the jobseeker. Job listing services are governed by the Employment Agency, Employment Counseling, and Job Listing Services Act ("Employment Act") [*see Civ. Code § 1812.500 et seq.*]. For discussion of the Employment Act's requirements regarding job listing services in general, see *§ 92.71*.

This form contains the minimum contract requirements imposed by the Employment Act and must be completed, executed, and given to the jobseeker by the service before it accepts a fee from the jobseeker [*see Civ. Code § 1812.516(a)*].

For discussion and a sample contract to be used by employment agencies that charge a placement fee, see *§ 92.240*. For discussion and a sample contract to be used by an employment counseling service, see *§ 92.243*. For discussion and a sample contract to be used by a nurses' registry, see *§ 92.244*. For discussion of remedies for violations of the Employment Act, breaches of contracts subject to the Employment Act, and enforcement of the Employment Act's provisions [*see Civ. Code § 1812.523*], see *§ 92.74*.

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contract provisions.

[b] Contents of Contract

A job listing service must give the jobseeker a written contract that includes the following information [*see Civ. Code § 1812.516(a)*]:

- The name of the job listing service and the addresses and telephone numbers of the principal office

of the job listing service and the location that provides the services to the jobseeker.

- The amount of the fee to be charged and collected from the jobseeker.

- A description of the service to be provided, including significant conditions, restrictions, and limitations, if any.

- The jobseeker's specifications for the job, clearly expressed, including but not limited to the kind of work, interests of jobseeker, qualifications of jobseeker, daily hours of work, wages or salary, benefits, other conditions of employment, and location of the job.

- A contract expiration date, no later than 90 days from the date of the contract.

- A statement of the jobseeker's right to cancel, in statutory language [*see Civ. Code § 1812.516(a)(6)* (statutory language)].

- A statement of the jobseeker's right to a refund of the fee paid in advance, in statutory language [*see Civ. Code § 1812.516(a)(7)* (statutory language); *see also § 92.71[6]*].

- If any labor trouble exists at the place of employment, that fact must be stated in the listing for the employment [*see Civ. Code § 1812.516(a)(8)*; *see also Civ. Code § 1812.521(b), (c)*].

There is no legal requirement that the fee schedule be included in the contract of the job listing service. However, a job listing service must provide a copy of its fee schedule and payment terms to any jobseeker prior to an interview by a counselor [*Civ. Code § 1812.517(a)(1)*] and many services attach it to the contract for ease of reference and to minimize any misunderstandings as to the amount of the fee. For a sample fee schedule that may be modified for a job listing service, see *§ 92.241[2]*.

[c] Contract Format and Delivery

A job listing service contract must be contained in a single document [*Civ. Code § 1812.516(c)*] and must be dated and consecutively numbered in sets consisting of an original and two copies [*Civ. Code § 1812.516(b)*]. The original and both copies must be signed by the jobseeker and the person acting for the job listing service. The original and one copy must be given to the jobseeker and the other copy must be kept on file by the job listing service [*Civ. Code § 1812.516(b)*].

[2] FORM

Job Listing Service Contract

JOB LISTING SERVICE CONTRACT

_____[*name of job listing service*]
_____[*address of principal office*]
_____[*telephone number*]

Date: _____
Contract Number: _____

Receipt

1. _____[*name of job listing service*] ("Agency"), [*if office providing services to jobseeker is other than the principal office of the job listing service, add:*, whose office for services provided under this agreement is located at _____,] acknowledges the receipt of a fee of $_____ paid by _____[*name of jobseeker*] ("Jobseeker"), as full compensation for the services to be provided to Jobseeker under this agreement.

Services to Be Performed

2. Agency undertakes to _____[*specify service to be performed, e.g.*, match Jobseeker with employment opportunities that meet Jobseekers' specifications as set forth in Paragraph 3 of this agreement *or* provide Jobseeker with lists of employers *or* provide Jobseeker with lists of job openings *or* include Jobseeker's name and qualifications on a list of applicants and to distribute that list to potential employers]. Agency further agrees to _____ [*set forth additional undertakings, e.g.,:*

(a) Contact Jobseeker not less than once every _____ (*specify period, e.g.*, week) to ascertain whether Jobseeker is still seeking employment.

(b) Process, not less than once every _____ (*specify period, e.g.*, week), all data through its computer system to obtain matches of Jobseeker with prospective employers and notify _____ (*specify recipient, e.g.*, prospective employers of Jobseeker's name, qualifications, address, and telephone number *or* Jobseeker of those prospective employers' names, addresses, telephone numbers, and job requirements) within _____ (*specify period, e.g.*, 24 hours)].

[*List all applicable conditions, restrictions, and limitations to agency's services, if any.*]

Jobseeker's Job Specifications

3. Jobseeker's specifications for the employment opportunity being sought are as follows:

(a) Type of job: _____

(b) Jobseeker's interests: _____

(c) Jobseeker's qualifications: _____

(d) Daily hours of work: _____

(e) Salary or salary range: $_____

(f) Employment benefits desired: _____

(g) Other conditions of employment: _____

(h) Location of job: _____

Labor Disputes

4. If a place of employment to which Jobseeker is referred has a labor contract in existence at the time of the referral, Agency shall notify Jobseeker of that fact and of any requirement of union membership before Jobseeker is sent to that job opportunity. Jobseeker shall not be sent to any place of employment where a strike, lockout, or other labor trouble exists without being first notified of that fact in the listing for the employment opportunity.

Expiration Date

5. This Agreement shall expire on _____[*date not later than 90 days from date of contract*].

Receipt of Original and Duplicate

6. Jobseeker hereby acknowledges receipt of the original and a duplicate of this agreement.

[*Include the following three paragraphs with the caption in no less than 10-point boldface type, and the rest in either boldface, italics, or full capitals in type no smaller than that used in the rest of the agreement:*]

RIGHT TO REFUND

If, within seven business days after payment of a fee or deposit, the job listing service has not supplied you with at least three available employment opportunities meeting the specifications of the contract as to type of job; interests of jobseeker; qualifications of jobseeker; hours, salary, benefits, and other conditions of employment; location of job; and any other specifications expressly set forth in the contract, the full amount of the fee or deposit paid shall be refunded to you upon your request.

If you do not obtain a job through the services of the job listing service, or if you obtain employment which lasts less than 90 days, any amount paid in fees or deposits in excess of a twenty-five dollar ($25) service charge shall be refunded to you, upon your request after expiration of the contract.

Any refund due must be made to you within 10 days of your request. If the refund is not made in that time, the job listing service must pay to you an additional sum equal to the amount of your fee or deposit.

[*Include the following paragraphs concerning cancellation in type no smaller than 10-point boldfaced type:*]

YOUR RIGHT TO CANCEL
_____ [*enter date of transaction* **]**

You may cancel this contract for job listing services without any penalty or obligation, if notice of cancellation is given, in writing, within three business days from the above date.

To cancel this contract, just mail or deliver a signed and dated copy of the following cancellation notice, or any other written notice of cancellation, to _____[*name of job listing service*] at _____[*address of its place of business*], NOT LATER THAN MIDNIGHT OF _____[*date*].

CANCELLATION NOTICE
I hereby cancel this contract.

Dated: _____
_____ Customer's Signature

Executed on _____[*date*], at _____, California.

AGENCY
_____ [*typed name of job listing service*]
_____ [*signature of employee or agent*]
[*typed name and title*]
JOBSEEKER
_____ [*signature*]
[*typed name*]

ATTACHMENTS

FEE SCHEDULE

[*Attach schedule of fees, if desired (see § 92.241[2]).*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawAgency RelationshipsGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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§ 92.243 Contract for Employment Counseling Services

[1] Comment

[a] Use of Form

This form is an agreement between an employment counseling service [*see Civ. Code § 1812.501(b)* ("employment counseling service" defined)] and an individual who seeks the services of an employment counseling service. Employment counseling services are governed by the Employment Agency, Employment Counseling, and Job Listing Services Act ("Employment Act") [*Civ. Code § 1812.500 et seq.*]. For general discussion of the Employment Act's requirements regarding employment counseling services, see *§ 92.72*.

This form incorporates the minimum requirements of the Employment Act for a contract between an employment counseling service and its customer [*see Civ. Code § 1812.511*].

For discussion and a sample contract to be used by employment agencies that charge a placement fee, see *§ 92.240*. For discussion and a sample contract to be used by a job listing service, see *§ 92.242*. For discussion and a sample contract to be used by a nurses' registry, see *§ 92.244*. For discussion of remedies for violations of the Employment Act, breaches of contracts subject to the Employment Act, and enforcement of the Employment Act's provisions [*see Civ. Code § 1812.523*], see *§ 92.74*.

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contract provisions.

[b] Contents of Contract

An employment counseling service contract must include all of the following [*Civ. Code § 1812.511(a)(1)-(6)*]:

- The name, address, and telephone number of the counseling service.

- The name and address of the person signing the contract and the person to whom the services are to be provided.
- A description of the services to be provided.
- A statement indicating when the services are to be provided.
- A statement indicating the duration of the contract.
- The refund provisions that apply if the described services are not provided according to the contract.
- The amount of the fee and the date or dates when the fee must be paid.
- A statement in type no smaller than 10-point boldface, in language prescribed by statute, disclaiming any promise or guarantee of employment [*see Civ. Code § 1812.511(a)(5)* (statutory language)].
- A statement in type no smaller than 10-point boldface, in language prescribed by statute, of the customer's right to cancel the contract, with space for the customer to do so [*see Civ. Code § 1812.511(a)(6)* (statutory language)].

There is no legal requirement that the fee schedule be included in the contract of the employment counseling service. However, an employment counseling service must provide a copy of its fee schedule and payment terms to any customer before an interview by the service [*Civ. Code § 1812.512(a)(1)*] and many services do attach it to the contract for ease of reference and to minimize any misunderstandings as to the amount of the fee. For a sample fee schedule that may be modified for an employment counseling service, see *§ 92.241[2]*.

[c] Contract Format and Delivery

The full agreement between the parties must be in writing and must be contained in a single document [*Civ. Code § 1812.511 (a), (c)*]. It must also be dated and numbered consecutively in triplicate. The completed contract and two duplicates must each be signed by the customer and the person acting for the employment counseling service [*Civ. Code § 1812.511(b)*]. The original and one copy must be given to the customer when he or she signs it and before the counseling service accepts any fee or deposit [*Civ. Code § 1812.511(a)*]. The service must retain the other copy on file [*Civ. Code § 1812.511(b)*].

[d] Truth in Lending Laws

If the employment counseling service agrees to finance the fee charged to the customer, and the terms of the loan include a finance charge or more than four installments, the contract is subject to the Federal Truth in Lending Act [52 Ops. Cal. Atty. Gen 242 (1969) ; *see 15 U.S.C. § 1601 et seq.*; 12 C.F.R. pt. 226 (Reg. Z)] and the Unruh Act [*Civ. Code § 1801 et seq.*; *see also § 92.12[1]*]. For discussion and a sample form containing the required disclosures under the Truth in Lending Act and the Unruh Act, see *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.225*.

[2] FORM

Contract for Employment Counseling Services

EMPLOYMENT COUNSELING SERVICES CONTRACT

_____[*name of employment counseling service*]
_____[*address*]

_____[*city, state, zip*]
_____[*telephone number*]

Date: _____
Contract Number: _____

Parties to Agreement

1. This employment counseling services agreement is entered into between _____[*name of employment counseling service*] ("Service") and _____[*name of customer*] ("Customer"), of _____[*customer's address*], telephone number _____.

Term

2. The duration of this agreement is _____[from _____ (*date*) through _____ (*date*) *or* for a period of _____ (*specify time period*) from the date on which it is signed by Customer *or* for a period of _____ (*specify time period*) from the date on which Customer's right to cancel this agreement expires].

Services to be Provided

3. (a) Service shall provide Customer with the employment counseling services checked below:

_____ Career counseling.

_____ Vocational guidance.

_____ Aptitude testing.

_____ Executive consulting.

_____ Personnel consulting.

_____ Career management, evaluation, or planning.

_____ Development of resumes and other promotional materials relating to preparation for employment.

[*Add more detailed description of services as needed*]

(b) These services shall be provided _____[*specify when, e.g.,* during the term of this agreement *or* on _____ (*date*) *or* between _____ (*date*) and _____ (*date*)].

Fees

[*Either:*]

4. (a) Customer agrees to pay Service a total fee of $_____[*amount*] for the services specified in Paragraph 3(a) of this agreement.

[*Or:*]

4. (a) Customer agrees to pay Service a fee for the services specified in Paragraph 3(a) of this agreement as follows: _____[*specify a separate fee for each service specified in Paragraph 3(a)*].

[*Or:*]

4. (a) Customer agrees to pay Service a fee for the services specified in Paragraph 3(a) of this agreement as set forth on the fee schedule attached to and incorporated into this agreement by reference.

[*Continue with the following:*]

(b) Customer further agrees to pay the fee specified in Paragraph 4(a) _____[*specify date or dates, e.g.*, in full on _____ (*date*) or in two equal installments with the first installment payable on _____ (*date*) and the second installment payable on _____ (*date*)].

(c) In the event that the services to be provided under this agreement are not provided as described, Customer shall be entitled to a refund as follows: _____[*specify refund policy*].

[*Add the following statement in type no smaller than 10-point boldfaced type:*]

Disclaimer

No verbal or written promise or guarantee of any job or employment is made or implied under the terms of this contract.

[*Add the following statement in type no smaller than 10-point boldfaced type:*]

YOUR RIGHT TO CANCEL
_____ [*enter date of transaction* **]**

You may cancel this contract for employment counseling services, without any penalty or obligation, if notice of cancellation is given, in writing, within three business days from the above date.

To cancel this contract, just mail or deliver a signed and dated copy of the following cancellation notice or any other written notice of cancellation, or send a telegram containing a notice of cancellation, to _____[*name of employment counseling service*] at _____[*address of place of business*] NOT LATER THAN MIDNIGHT OF _____[*date*].

CANCELLATION NOTICE
I hereby cancel this contract.
Dated: _____.
_____ Customer's Signature

Executed on _____[*date*], at _____, California.

EMPLOYMENT COUNSELING SERVICE
_____ [*typed name of employment counseling service*]
_____ [*signature of employee or agent*]
[*typed name and title*]
CUSTOMER
_____ [*signature*]
[*typed name*]

ATTACHMENTS

FEE SCHEDULE

[*Attach schedule of fees, if desired (see § 92.241[2].*)]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
D. Employment--Related Services

30-92 California Legal Forms--Transaction Guide § 92.244

§ 92.244 Nurses' Registry Contract

[1] Comment

[a] Use of Form

This form is an agreement between a nurses' registry [*see Civ. Code §§ 1812.501(d),* 1812.514(b) ("nurses' registry" defined)] and a self-employed private duty nurse for continuing work assignments. Nurses' registries are governed by the Employment Agency, Employment Counseling, and Job Listing Services Act ("Employment Act") [*see Civ. Code § 1812.500 et seq.*]. For discussion of the Employment Act's requirements relating to nurses' registries in general, see *§ 92.73*.

Nurses' registries may enter into continuing contracts with private duty nurses covering the assignment of those nurses to nursing duties [*see Civ. Code § 1812.526*]. This form incorporates the minimum requirements for those contracts [*see Civ. Code § 1812.526(a)-(e)*; *see also* [b], *below*].

For discussion and a sample contract to be used by employment agencies that charge a placement fee, see *§ 92.240*. For discussion and a sample contract to be used by a job listing service, see *§ 92.242*. For discussion and a sample contract to be used by an employment counseling service, see *§ 92.243*. For discussion of remedies for violations of the Employment Act, breaches of contracts subject to the Employment Act, and enforcement of the Employment Act's provisions [*see Civ. Code § 1812.523*], see *§ 92.74*.

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contract provisions.

[b] Contents of Contract

A nurses' registry agreement governing continuing work assignments by the registry must state the following information [*Civ. Code § 1812.526*]:

- The name, address, and telephone number of the registry.
- The name, address, and telephone number of the nurse.
- The nurses' registry current fee schedule [*see § 92.241[2]* for a sample fee schedule that may be modified for a nurses' registry].
- The date on which the agreement was signed by the parties.
- A statement that the agreement's provisions are to govern only the assignment of private duty nurses.
- A designation of the registry as the nurse's continuous agent for purposes of assignment.
- A provision that the agreement may be terminated at any time by written notice from either party to the other for any future assignment.
- A provision for delivery to the nurse, at the time the agreement is executed, of a written schedule of the rates of nurses' charges currently agreed upon between the registry and the nurse for patient services.
- A provision stating that the registry will immediately notify the nurse in writing of all subsequent changes in the rates to be charged the patient, and that the nurse will agree to abide by those rates.
- An express undertaking by the registry that it will continuously maintain true and correct records of orders for private duty nursing service and assignments to the nurse.
- A provision that the registry will periodically (at least monthly) render to the nurse a written statement of fees claimed to be due the registry, and an identification of each assignment by inception date, period of service covered, the name of the patient, and the amount of service fee claimed.
- A notice advising the nurse of his or her right to dispute the correctness of any service fee claimed by the registry in its periodic statement and that, in the absence of objections within a reasonable time, any such fee may be presumed to be correctly charged.
- All other terms, conditions, or understandings agreed upon between the parties.

[c] Contract Format and Delivery

The full agreement between the parties must be contained in a single document containing all required elements [*Civ. Code § 1812.526(g)*; *see* [b], *above* (required elements)]. Contracts must be numbered consecutively in original and duplicate, and both copies of the completed agreement must be signed by both the nurse and the registry. The original copy must be given to the nurse and the registry must retain the duplicate on file in the nurse's records [*Civ. Code § 1812.526(f)*].

[2] FORM

Nurses' Registry Contract

NURSES' REGISTRY AGREEMENT

_____[*name of nurses' registry*]
_____[*address*]

_____[*telephone number*]

Date: _____
Contract Number: _____

Parties to Agreement

1. This nurses' registry agreement is entered into between _____[*name of nurses' registry*] ("Registry"), and _____[*name of nurse*] ("Nurse"), of _____[*nurse's address*], telephone number _____.

Agency Agreement

2. Nurse designates Registry as Nurse's continuous agent for the purpose of assigning Nurse to nursing service duties as a self-employed private duty _____[*specify one:* licensed registered nurse *or* licensed vocational nurse *or* practical nurse]. The provisions of this agreement shall govern only the assignment of Nurse as a self-employed private duty nurse for continuing work assignments.

Referral of Nursing Assignments

3. (a) To be eligible for referral of work assignments, Nurse must notify Registry that Nurse wishes to be placed on "on call" status. Nurse may advise Registry of any preferences or restrictions on the hours, days, locations, and type of work that Nurse will accept. Nurse may also indicate that he or she will be "on call" only for a limited period. Nurse may discontinue "on call" status at any time, and may reinstate "on call" status at any time after any such discontinuance.

(b) Registry makes no promise or guarantee of any referrals. In referring work assignments, Registry shall not be obligated to give Nurse preference over any other nurse registered with Registry.

(c) Nurse may reject all or any portion of any assignment for any reason. Rejection of any assignment shall be without penalty and shall not affect Nurse's eligibility for subsequent assignments.

(d) The agency created by this agreement is non-exclusive. Nurse may place his or her name "on call" with other registries without penalty. If offered conflicting assignments by two or more registries, Nurse may accept the one he or she considers most desirable. Nurse agrees, however, that he or she will not accept a conflicting assignment during the course of another assignment.

(e) A referral by Registry does not guarantee that Nurse will be found acceptable for the assignment. The party for whom the services are to be performed, or any person authorized by that party, may require Nurse to satisfy that party as to Nurse's experience, qualifications, and overall suitability for the assignment before agreeing to accept Nurse's services.

(f) Nurse shall not be required to work any additional time beyond that originally contemplated for an assignment, and may refuse without penalty to work additional time. If Nurse does agree to work additional time on an assignment, Nurse agrees to notify Registry of that fact and of the amount of additional time involved.

Registry's Rate Schedule for Nursing Services

4. Registry's schedule of rates for nursing services is attached to this agreement as Schedule A and incorporated into this agreement by this reference. Nurse agrees to charge for his or her services in accordance with the rates set forth in that schedule. Registry shall immediately notify Nurse in writing of all subsequent changes in the rates to be charged, and Nurse agrees to abide by those rates.

Billing

5. (a) Registry shall supply Nurse with forms to be used for keeping time records. Nurse shall indicate on these forms all days and hours worked in connection with each assignment accepted from Registry. Upon conclusion of each assignment, or _____[*specify period, e.g.,* weekly] for assignments in excess of _____[*specify period, e.g.,* one week], Nurse shall forward to Registry the original copy of the time record indicating the hours and days worked during that period. Nurse may retain the duplicate copy for his or her records.

(b) Nurse may have Registry bill the responsible party for Nurse's services, or, at Nurse's option, may make his or her own billing arrangements with the responsible party. If Registry bills the responsible party, Registry may deduct its fee from any payment received, and shall forward the remainder to Nurse promptly upon receipt.

Registry's Fee for Referrals

6. (a) Nurse agrees to pay Registry a fee in accordance with the fee schedule attached to this agreement as Schedule B and incorporated into this agreement by this reference for any assignment referred by Registry and actually performed by Nurse. This fee shall be payable _____ [*specify terms of payment, e.g.,* at the time Nurse receives compensation for the assignment, either on completion of the assignment or _____ (*specify period, e.g.,* weekly) for assignments in excess of _____ (*specify period, e.g.,* one week)].

(b) Registry shall render to Nurse a written statement of all fees due to it from Nurse _____[*specify period (at least monthly)*]. That statement shall identify each assignment by inception date, period of service covered, the name of the patient, and the amount of service fee claimed by Registry.

(c) Nurse shall have the right to dispute the correctness of any service fee claimed by Registry in its periodic statement. In the absence of objections within a reasonable time, any such fee shall be presumed to have been correctly charged.

Independent Contractor Status

7. Nurse and Registry understand and agree that Registry's function shall be limited to that of a nurses' registry, as defined in *California Civil Code Section 1812.524,* and that Nurse is and at all times during the term of this agreement shall remain an independent contractor and not an employee of Registry. Registry shall not be responsible for collecting unemployment insurance, disability insurance, or social security, or for withholding federal or state income tax from amounts received by Nurse for services rendered in connection with any assignment received from Registry.

Insurance

8. Nurse agrees to maintain in force, at all times during the term of this agreement, a policy of malpractice insurance in an amount and on terms acceptable to Registry, and, on request by Registry at any time, to furnish Registry with

evidence acceptable to Registry that such a policy is then in full force and effect.

Incidental Expenses

9. Nurse shall be responsible for providing, at his or her own expense, any uniforms, caps, shoes, and other incidental items required in connection with any assignment. Nurse shall also be responsible for providing his or her own meals and for any travel or other incidental expenses incurred in connection with any assignment.

Hold Harmless Clause

10. Nurse agrees to indemnify and hold Registry harmless from any liability resulting from Nurse's representations to Registry or any third party regarding Nurse's experience or qualifications, and from any liability resulting from Nurse's performance of any assignment referred by Registry.

Records of Orders and Assignments

11. Registry expressly agrees that it shall continuously maintain true and correct records of orders for private duty nursing service and its assignments to Nurse.

Termination

12. This agreement may be terminated at any time by written notice from either party to the other, effective for any assignments not yet accepted by Nurse.

Executed on _____[*date*], at _____, California.

NURSES' REGISTRY
_____ [*typed name of nurses' registry*]
_____ [*signature of employee or agent*]
[*typed name and title*]
NURSE
_____ [*signature*]
[*typed name*]

ATTACHMENTS

SCHEDULE A

[*Attach copy of current schedule of rates of charges for nurse's service to patient.*]

SCHEDULE B

[*Attach copy of current fee schedule (see § 92.241 2 for sample fee schedule that may be modified for a nurses' registry).*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
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30-92 California Legal Forms--Transaction Guide §§ 92.245-92.249

[Reserved]

§§ 92.245[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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30-92 California Legal Forms--Transaction Guide § 92.250

§ 92.250 Contract for Consumer Credit Reporting Services

[1] Comment--Use of Form

This form is a contract between a consumer credit reporting agency and its customer for the furnishing of credit information and credit reports. The practices of consumer credit reporting agencies are regulated by the Consumer Credit Reporting Agencies Act [*see Civ. Code §§ 1785.1-1785.36*] and the federal Fair Credit Reporting Act [*see 15 U.S.C. § 1681 et seq.*]. For detailed discussion of the requirements of these acts, see *§ 92.80*.

Credit reporting agencies often refer to their customers as "members" or "subscribers" and the latter term is used in this contract to refer to the party contracting for the credit reporting service.

Many credit reporting agencies also act as collection agencies. For discussion and a sample form for use by a consumer to request disclosure of information in his or her credit agency file, see *Ch. 45, Consumer Installment Loans and Credit Sales, § 45.230*.

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contractual provisions.

[2] FORM

Contract for Consumer Credit Reporting Services

CONSUMER CREDIT REPORTING SERVICES AGREEMENT

This AGREEMENT is made and entered into on _____[*date*], by and between _____[*name of credit bureau*] ("Bureau"), _____[*status, e.g.,* a California corporation], with its principal place of business at _____[*address*], and _____[*name of customer*] ("Subscriber"), _____[*status, e.g.,* a California general partnership], with its principal place of business at _____[*address*], subject to the following terms and conditions:

Purpose of Agreement

1. The purpose of this agreement is to state the terms and conditions under which Bureau shall furnish to Subscriber credit information relating to persons designated by Subscriber in accordance with the provisions of the Consumer Credit Reporting Agencies Act [*Civ. Code §§ 1785.1-1785.36*] and the federal Fair Credit Reporting Act [*15 U.S.C. § 1681 et seq.*].

Information Supplied by Subscriber

2. (a) Subscriber shall provide Bureau with relevant identifying information about itself and a statement of the purpose for which consumer credit reports provided by Bureau will be used.

(b) Subscriber shall also provide identifying information on each person for whom a credit report is to be issued by Bureau. Subscriber may communicate this information to Bureau by _____[*specify acceptable modes of communication, e.g.*, United States mail, facsimile, e-mail, or on Bureau's website _____ (*website address*)] in formats designated by Bureau.

Compilation of Information by Bureau

3. Bureau shall use its reasonable best efforts to obtain and compile credit information from appropriate sources deemed reliable relating to the financial fitness of persons. However, Bureau does not guarantee the accuracy of the credit reports based on this information.

Services Provided by Bureau

4. Upon the request of Subscriber, Bureau shall furnish to Subscriber credit information, including credit scores from credit repository systems ("Repositories"), including _____[*list companies used, e.g.*, Experian, Equifax, Trans Union], regarding the person for whom the information is sought. Any credit report submitted by Bureau shall exclude prior bankruptcies, lawsuits, liens, unpaid accounts, and other adverse information that precedes the report by a specified time period, as required by *California Civil Code Section 1785.13(a)* and *15 United States Code Section 1681c(a)*.

PRACTICE TIP:

With respect to 4., *above*, note that a prior version of Civ. Code § 1786.13(a)(3) was held unconstitutional as a violation of the *First Amendment* [*U.D. Registry, Inc. v. State of California (1995) 34 Cal. App. 4th 107, 116, 40 Cal. Rptr. 2d 228]* ; *see § 92.80[2][j], above*.

Subscriber Use Limitations

5. Subscriber certifies and agrees that it shall request and use credit data received from Bureau solely for the following purposes and no other:

(a) Determining the credit fitness of a consumer or in connection with the review or collection of an account of the consumer;

(b) Determining employment fitness of a prospective employee;

(c) In connection with underwriting of insurance for a consumer;

(d) Determining a consumer's eligibility for a license or other benefit granted by a governmental instrumentality requiring a consideration of the applicant's financial responsibility or status;

(e) In connection with the hiring of a dwelling unit; or

(f) A legitimate business need for the information in connection with a business transaction involving the consumer.

Bureau's Obligations

6. In furnishing to its other subscribers and customers credit data emanating from Subscriber, Bureau shall exercise its best efforts to confine the ultimate use of the data to credit transactions, or non-credit business transactions as specified in Paragraph 5 of this agreement, or transactions for which applicable federal or state law authorizes the furnishing of consumer credit data. Bureau agrees to comply with all disclosure and other obligations required of it under the Consumer Credit Reporting Agencies Act and the federal Fair Credit Reporting Act.

Subscriber's Obligations

7. Pursuant to *Civil Code Section 1785.14(d)*, Bureau shall provide Subscriber with written notice of Subscriber's obligations under the Consumer Credit Reporting Agencies Act by attaching to this agreement photocopies of the code sections of the Act that apply to Subscriber. Subscriber agrees to comply with all disclosure and other obligations required of it under the Consumer Credit Reporting Agencies Act and the federal Fair Credit Reporting Act.

Excusable Delays and Failures

8. Neither party shall be liable for any delay or failure in its performance under this contract (except for payment obligations) caused by events beyond the reasonable control of the party, including, but not limited to, terrorism, war, riots, labor strikes, interruption of utility services, fires, floods, earthquakes, and other natural disasters.

Compensation

9. For each request submitted by Subscriber, Subscriber agrees to pay to Bureau the charges listed on Bureau's price schedule, as set forth on the attached Schedule A, which is incorporated into this agreement. Bureau may make changes to its price schedule on _____[*e.g.*, 30] days written notice to Subscriber. Bureau shall invoice Subscriber at the end of each month and Subscriber shall make full payment within _____[*e.g.*, 30] days of the invoice date.

Term of Agreement

10. The term of this agreement shall commence as of the date of execution of this agreement, and shall continue in full force and effect until terminated by either party on _____[*number of days, not to be greater than the*

number of days for any change in the price schedule as set forth in Paragraph 9, e.g., 30] days written notice from either party to the other.

Confidentiality of Information

11. All information passing to and from Bureau and Subscriber shall be strictly confidential, except for those disclosures authorized or required under the Consumer Credit Reporting Agencies Act [*Civil Code Sections 1785.1-1785.36*] or the federal Fair Credit Reporting Act [*15 U.S. Code Section 1681 et seq.*]. Subscriber shall use its reasonable best efforts to ensure that its employees and agents are properly informed and trained to comply with this provision.

Indemnification

12. Subscriber agrees to indemnify and hold Bureau and Repositories harmless on account of any loss, injury, damage, or claim that may result from the failure of Subscriber to maintain the confidentiality of the information provided under this agreement, or from any violation by Subscriber, its employees or agents, of the Consumer Credit Reporting Agencies Act [*Civil Code Sections 1785.1-1785.36*] or the federal Fair Credit Reporting Act [*15 United States Code Section 1681 et seq.*].

Nonliability of Bureau

13. Bureau shall not be liable to Subscriber in any manner, including but not limited to incidental or consequential damages, for any loss or injury resulting from its obtaining, compiling, and communicating information relating to the credit information of persons.

Attorneys' Fees

14. If any legal action, including arbitration, is brought to enforce or interpret the provisions of this contract, the prevailing party shall be entitled to recover reasonable attorneys' fees from the other party. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled.

Notices

15. Any notice required or permitted to be given under this contract shall be written, and may be given by personal delivery or by registered or certified mail, first-class postage prepaid, return receipt requested. Notice shall be deemed given upon actual receipt in the case of personal delivery, or upon mailing. Mailed notices shall be addressed as follows, but each party may change address by written notice in accordance with this paragraph:

To Bureau at: _____ [*address*].
To Subscriber at: _____ [*address*].

Governing Law

16. This contract shall be governed by and construed in accordance with the laws of California.

Executed on _____[*date*], at _____, California.

BUREAU
[*typed name of credit bureau*]
_____ [*signature*]
[*typed name and title*]
SUBSCRIBER
[*typed name of subscriber*]
_____ [*signature*]
[*typed name and title*]

ATTACHMENTS

SCHEDULE A

[*Attach bureau's price schedule for services.*]

SCHEDULE B

[*Attach notice of subscriber's obligations imposed by Consumer Credit Reporting Agencies Act by attaching photocopies of code sections applying to the subscriber; at a minimum, Civ. Code §§ 1785.20-1785.22 should be included.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
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30-92 California Legal Forms--Transaction Guide § 92.251

§ 92.251 Contract for Investigative Consumer Reports

[1] Comment--Use of Form

This form is a contract between an investigative consumer reporting agency and its customer for the furnishing of investigative consumer reports. An "investigative consumer report" is a consumer report in which information on a person's character, general reputation, personal characteristics, or mode of living is obtained through any means [*Civ. Code § 1786.2(c)*]. *Civ. Code § 1786.2(c)* has been held unconstitutionally vague as applied to tenant screening reports containing unlawful detainer information [*Trujillo v. First American Registry, Inc. (2007) 157 Cal. App. 4th 628, 640, 68 Cal. Rptr. 3d 732* (stating that persons of reasonable intelligence cannot determine whether unlawful detainer information is character information subject to the Investigative Consumer Reporting Agencies Act, or creditworthiness information subject to the Consumer Credit Reporting Agencies Act)]. This report is broader in scope than a credit report and typically includes information about the person's employment history, rental history, academic status and verification, as well as information gleaned from public records, such as criminal convictions or driving records.

Investigative Consumer Reports are governed by the Investigative Consumer Reporting Agencies Act [*Civ. Code § 1786 et seq.*] and the federal Fair Credit Reporting Act [*15 U.S.C. § 1681 et seq.*]. For detailed discussion of the requirements of these acts, see *§ 92.81*.

This type of report is frequently used by employers in evaluating a prospective employee. It may also be used in connection with insurance, subpoenas and court orders, licensure, and other lawful purposes [*see Civ. Code § 1786(a)*].

This form is drafted to comply with applicable state and federal law. See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contractual provisions.

[2] FORM

Contract for Investigative Consumer Reports

CONTRACT FOR INVESTIGATIVE CONSUMER REPORTS

This AGREEMENT is made and entered into on _____[*date*], by and between _____[*name of agency*] ("Agency"), _____[*status, e.g.,* a California corporation], with its principal place of business at _____[*address*], and _____[*name of customer*] ("Subscriber"), _____[*status, e.g.,* a California general partnership], with its principal place of business at _____[*address*], subject to the following terms and conditions:

Purpose of Agreement

1. The purpose of this agreement is to state the terms and conditions under which Agency shall furnish to Subscriber investigative consumer reports in accordance with the provisions of the Investigative Consumer Reporting Agencies Act [*Civ. Code § 1786 et seq.*] and the federal Fair Credit Reporting Act [*15 U.S.C. § 1681 et seq.*].

Information Supplied by Subscriber

2. (a) Subscriber shall provide Agency with relevant identifying information about itself, a statement of the purpose for which the investigative consumer reports will be used, and the certification described in Paragraph 6 of this agreement.

(b) Subscriber shall also provide identifying information on each person for whom an investigative consumer report is to be provided by Agency. Subscriber may communicate this information to Agency by _____ [*specify acceptable modes of communication, e.g.,* United States mail, facsimile, e-mail, or on Agency's website _____ (*website address*)] in formats designated by Agency.

Services Provided by Agency

3. (a) Upon Subscriber's request for an investigative consumer report, Agency shall investigate and report to Subscriber, subject to the provisions of subparagraph (b), below, any and all information about the character, general reputation, personal characteristics, and mode of living of the person about whom the report is to be issued, including, but not limited to, the following information: _____[*specify information to be included in the report, e.g.,* name, current address, previous addresses for the last 10 years, employment history, including the reason for any termination, academic history, including the date and type of degrees earned, professional credentials and references, references from current and prior landlords, personal references, history of drug or alcohol use, and information from public records such as credit reports, bankruptcy proceedings, worker's compensation claims, participation in lawsuits, criminal records, and driving records.]

(b) Any investigative consumer report submitted by Agency shall exclude prior bankruptcies, lawsuits, liens, unpaid accounts, and other adverse information that precedes the report by the time periods specified in *California Civil Code Section 1786.18* and *15* U.S. C. Section 1681c(a). The report shall exclude medical information of the person about whom the report is provided, unless that person consents to the issuance of the report.

(c) Agency shall use its reasonable best efforts to use reliable sources of information, but it does not guarantee the accuracy of the investigative consumer reports.

Subscriber Use Limitations

4. Subscriber certifies that it shall request and use the information in an investigative consumer report received from

Agency solely for the following purposes and no other:

(a) Determining employment fitness of a prospective employee;

(b) In connection with underwriting of insurance for a consumer;

(c) Determining a consumer's eligibility for a license or other benefits granted by a governmental instrumentality requiring a consideration of the applicant's financial responsibility or status;

PRACTICE TIP:

With respect to (d), *below*, note that *Civ. Code § 1786.2(c)* has been held unconstitutionally vague as applied to tenant screening reports containing unlawful detainer information [*Trujillo v. First American Registry, Inc. (2007) 157 Cal. App. 4th 628, 640, 68 Cal. Rptr. 3d 732]* ; *see § 92.251[1], above*.

(d) In connection with the hiring of a dwelling unit; or

(e) In connection with a court support order.

Agency's Obligations

5. Agency agrees to comply with all disclosure and other obligations required of it under the Investigative Consumer Reporting Agencies Act and the federal Fair Credit Reporting Act.

Subscriber's Obligations and Certification

6. Subscriber agrees to comply with all disclosure and other obligations required of it under the Investigative Consumer Reporting Agencies Act and the federal Fair Credit Reporting Act. With each request for an investigative consumer report, Subscriber shall certify to Agency that Subscriber has satisfied the disclosure requirements of *Civil Code Section 1786.16(a)* and *15* U.S.C. § 1681d(a), and that it agrees to comply with the disclosures requirements of *Civil Code Section 1786.16(b)* and *15* U.S.C. § 1681d(b).

Excusable Delays and Failures

7. Neither party shall be liable for any delay or failure in its performance under this contract (except for payment obligations) caused by events beyond the reasonable control of the party, including, but not limited to, terrorism, war, riots, labor strikes, interruption of utility services, fires, floods, earthquakes, and other natural disasters.

Compensation

8. For each request submitted by Subscriber, Subscriber agrees to pay to Agency the charges listed on Agency's price schedule, as set forth on the attached Schedule A, which is incorporated into this agreement. Agency may make changes to its price schedule on _____[*e.g.*, 30] days written notice to Subscriber. Agency shall invoice Subscriber at the end of each month and Subscriber shall make full payment within _____[*e.g.*, 30] days of the invoice date.

Term of Agreement

9. The term of this agreement shall commence as of the date of execution of this agreement, and shall continue in full force and effect until terminated by either party on _____[*number of days, not to be greater than the number of days for any change in the price schedule as set forth in Paragraph 8, e.g.,* 30] days written notice from either party to the other.

Confidentiality of Information

10. All information passing to and from Agency and Subscriber shall be strictly confidential, except for those disclosures authorized or required under the Investigative Consumer Reporting Agencies Act or the federal Fair Credit Reporting Act. Subscriber shall use its reasonable best efforts to ensure that its employees and agents are properly informed and trained to comply with this provision.

Indemnification

11. Subscriber and Agency each agree to indemnify and hold the other party harmless on account of any loss, injury, damage, or claim that may result from the failure of either party to maintain the confidentiality of the information provided under this agreement (except as authorized or required by law), or from any violation of the Investigative Consumer Reporting Agencies Act or the federal Fair Credit Reporting Act by either party, their employees or agents.

Nonliability of Agency

12. Except as provided in Paragraph 11 of this agreement, Agency shall not be liable to Subscriber in any manner, including but not limited to incidental or consequential damages, for any loss or injury resulting from its obtaining, compiling, and communicating information relating to the credit information of persons.

Attorneys' Fees

13. If any legal action, including arbitration, is brought to enforce or interpret the provisions of this contract, the prevailing party shall be entitled to recover reasonable attorneys' fees from the other party. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled.

Notices

14. Any notice required or permitted to be given under this contract shall be written, and may be given by personal delivery or by registered or certified mail, first-class postage prepaid, return receipt requested. Notice shall be deemed given upon actual receipt in the case of personal delivery, or upon mailing. Mailed notices shall be addressed as follows, but each party may change address by written notice in accordance with this paragraph:

To Agency at: _____ [*address*].
To Subscriber at: _____ [*address*].

Governing Law

15. This contract shall be governed by and construed in accordance with the laws of California.

Executed on _____[*date*], at _____, California.

AGENCY
_____ [*typed name of agency*]
_____ [*signature*]
[*typed name and title*]
SUBSCRIBER
_____ [*typed name of subscriber*]
_____ [*signature*]
[*typed name and title*]

ATTACHMENTS

SCHEDULE A

[*Attach agency's price schedule for services.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingConsumer ReportsContracts LawTypes of ContractsPersonal Service Agreements

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
E. Credit-Related Services

30-92 California Legal Forms--Transaction Guide § 92.252

§ 92.252 Contract for Services to Obtain Credit or Improve Credit Rating

[1] Comment

[a] Use of Form

This form is an agreement under which a credit services organization undertakes to provide its services to a client (that is, a buyer). It begins with the disclosures that must be made to the buyer before he or she executes a credit services agreement or pays a fee [*see Civ. Code §§ 1789.14, 1789.15*; *see also* [b], *below*] and continues with the contract itself [*see Civ. Code § 1789.16* (contents of contract); *see also* [c], *below*]. This form is required by the Credit Services Act of 1984 [*Civ. Code §§ 1789.10-1789.25*].

For a definition of "credit services organization" and discussion of the statutory limitations imposed on such organizations, see *§ 92.82*.

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contractual provisions.

[b] Disclosures to Consumer

Before execution of the contract, a credit services organization must provide the buyer with a written statement making the disclosures described below. The disclosure statement must be signed by the buyer as the buyer's acknowledgement of receipt [*Civ. Code § 1789.14*]. The statement must include all of the following information [*Civ. Code § 1789.15*]:

- A complete and detailed description of the services to be performed by the credit services organization for or on behalf of the buyer, and the total amount the buyer will have to pay for the services.

- A statement of the buyer's right to proceed against the bond [*see Civ. Code § 1789.18*].

- The name and address of the surety company that issued the bond.

- A complete and accurate statement of the availability of nonprofit credit counseling services.

The information statement must be printed in at least 10-point boldface type. It must be accompanied by a specified statement or its substantial equivalent concerning consumer credit file rights [*Civ. Code § 1789.15*]. This form includes this statement.

The credit services organization must maintain an exact copy of the signed statement on file or microfilm for a period of two years [*Civ. Code § 1789.14*].

[c] Contract Requirements

A contract between a credit services organization and a buyer must be in writing, dated, and signed by the buyer. It must include all of the following information [*Civ. Code § 1789.16(a)*]:

- A full, detailed description of the services to be performed and the estimated date by which they are to be performed or the estimated length of time involved, not to exceed six months, all guarantees, and all promises of full or partial refunds.

- The organization's principal business address and the name and address of its agent for the service of process.

- The terms and conditions of payment, including the total of all payments to be made by the buyer, whether to the organization or some other party.

- A conspicuous statutory statement in at least 10-point type, in immediate proximity to the signature block, disclosing the buyer's right to cancel the contract within a five-day period.

The contract must be accompanied by a completed notice of cancellation. That notice must be in duplicate, attached to the contract in an easily detachable manner, and must contain both a description of the buyer's right to cancel the contract, in language prescribed by statute, and space for the buyer to indicate his or her intent to cancel the transaction [*Civ. Code § 1789.16(b)*].

A copy of the fully completed contract and all other documents the organization requires the buyer to sign must be given to the buyer at the time they are signed [*Civ. Code § 1789.16(b)*].

The contract may not contain any language under which the buyer waives any of his or her rights under the Credit Services Act of 1984. Any such waiver is contrary to public policy, void, and unenforceable. An attempt to have a buyer waive his or her rights is a violation of the Act [*Civ. Code § 1789.19(a)*; *see Civ. Code §§ 1789.20* (violation is misdemeanor), 1789.21 (civil remedies for violation)].

[2] FORM

Contract for Services to Obtain Credit or Improve Credit Rating

CREDIT SERVICES ORGANIZATION CONTRACT AND DISCLOSURES

_____[*name of credit services organization*]
_____[*address*]
_____[*telephone number*]

[*Print information statement in at least 10-point boldface type:*]

CONSUMER INFORMATION STATEMENT

Consumer Credit File Rights Under State and Federal Law

You have a right to obtain a copy of your credit file from a consumer credit reporting agency. You may be charged a reasonable fee not exceeding $8. There is no fee, however, if you have been turned down for credit, employment, insurance, or a rental dwelling because of information in your credit report within the preceding 60 days. The consumer credit reporting agency must provide someone to help you interpret the information in your credit file.

You have a right to dispute inaccurate information by contacting the consumer credit reporting agency directly. However, neither you nor any credit repair company or credit services organization has the right to have accurate, current and verifiable information removed from your credit report. Under the Federal Fair Credit Reporting Act, the consumer credit reporting agency must remove accurate, negative information from your report only if it is over seven years old. Bankruptcy information can be reported for 10 years.

If you have notified a credit reporting agency in writing that you dispute the accuracy of information in your credit file, the consumer credit reporting agency must then reinvestigate and modify or remove inaccurate information. The consumer credit reporting agency may not charge a fee for this service. Any pertinent information and copies of all documents you have concerning an error should be given to the consumer credit reporting agency.

If reinvestigation does not resolve the dispute to your satisfaction, you may send a brief statement to the consumer credit reporting agency to keep in your file, explaining why you think the record is inaccurate. The consumer credit reporting agency must include your statement about disputed information in any report it issues about you.

You have a right to cancel the contract for any reason within five working days from the date you signed it. If for any reason you do cancel the contract during this time, you do not owe any money.

You have a right to sue a credit services organization if it misleads you.

Services to Be Performed

_____[*Name of credit services organization*] will provide you with services designed to improve your credit record, history, or rating, or to assist you to obtain a loan or other extension of credit, including those features checked below:

[*Set forth full and detailed description of services to be performed, e.g.,*

Review of Client's consumer credit reporting agency records

Assistance in correcting or updating those records

Attempts to arrange revised payment schedules or agreements on delinquent accounts

Budget planning

Credit improvement plan

Aid in completion of applications for credit and advice relating to those applications

_____

Other (*specify*)]

These services shall be provided to you for the total sum of $_____.

[*Continue with the following:*]

Rights Against Surety

_____[*Name of credit service organization*] has acquired a surety bond in the principal amount of $100,000 from _____[*name of admitted surety*], _____[*address*].

You have a right to bring a civil action for damages against _____[*name of credit services organization*] and against the surety bond if _____[*name of credit services organization*] violates any provision of the Credit Services Act of 1984.

Nonprofit Credit Counseling Services

If you wish, you may obtain further information about your credit file rights by contacting _____[*name of counseling service, e.g.,* Consumer Credit Counseling Service], a nonprofit credit counseling service. They are located at _____[*address*], and their telephone number is _____[*telephone number*].

I hereby acknowledge receipt of a copy of this information statement.
_____ Dated:

_____ [*client's signature*]
[*typed name*]

[*REVERSE SIDE OF CONTRACT*]

CREDIT SERVICES CONTRACT

_____[*name of credit services organization*]
_____[*address*]
_____[*telephone number*]

Contract No. _____

_____[*date of execution*]

Identification of Parties

1. (a) This credit services agreement is entered into between _____[*name of credit services organization*] ("Service"), _____[*organization's principal business address*], and _____[*name of client*] ("Buyer"), _____[*client's address*].

(b) The agent for service of process in California for _____[*name of credit services organization*] is _____[*name of agent*], at _____[*address of agent*].

Services to Be Provided

2. Service shall provide Buyer with the credit services checked in the Information Statement on the reverse side of this contract. These services shall be provided _____[*set forth time estimates, e.g.,* on or about _____ (*date*) *or* within _____ (*time period not to exceed six months*)].

Payment Terms and Conditions

3. (a) Buyer agrees to pay Service _____[a fee of $_____ for the services to be provided under Paragraph 2 of this agreement *or specify a separate fee for each service*]. The total of all payments to be made by Buyer, including those to Service and those to be made to third parties, is: $_____.

(b) Buyer further agrees to pay the fee specified in Paragraph 3(a) _____[*specify terms and date or dates, e.g.,* in full on _____ (*date*) *or* in two equal installments with the first installment payable on _____ (*date*) and the second installment payable on _____ (*date*)] and to make any payments to third parties in accordance with the terms of any agreements made between Service and those third parties on Buyer's behalf and with Buyer's consent.

[*Add the following if applicable:*]

Guarantees

4. (a) Service guarantees that it will _____[*set forth all guarantees, if any are to be given*].

(b) If the services specified in Paragraph 2 of this agreement are not provided, Service agrees to refund _____[*specify amount, e.g.,* all of the fee actually paid by Buyer *or* all of the fee actually paid by Buyer, less the reasonable value of all services actually performed by Service for Buyer or on Buyer's behalf].

[*Continue with the following:*]

NOTICE

You, the Buyer, may cancel this contract at any time prior to midnight of the fifth day after the date of the transaction. See the attached notice of cancellation form for an explanation of this right.

Executed on _____[*date*] at _____[*city*], California.

CREDIT SERVICES ORGANIZATION
_____ [*typed name of credit services organization*]
_____ [*signature*]
[*typed name and title*]
BUYER
_____ [*signature*]
[*typed name*]

[*Add the following in duplicate on detachable portion of agreement, in at least 10-point type:*]

Notice of Cancellation

You may cancel this contract, without any penalty or obligation, within five days from the date the contract is signed.

If you cancel, any payment made by you under this contract must be returned within 15 days following receipt by the Seller (Service) of your cancellation notice.

To cancel this contract, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, to _____[*name of credit services organization*] at _____[*address of service's place of business*] not later than midnight _____[*specify date of fifth day after date of transaction*].

CANCELLATION NOTICE

I hereby cancel this transaction.
Dated: _____

_____
[*Buyer's signature*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Banking LawConsumer ProtectionFair Credit ReportingGeneral OverviewContracts LawTypes of ContractsPersonal Service Agreements

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30-92 California Legal Forms--Transaction Guide §§ 92.253-92.259

[Reserved]

§§ 92.253[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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F. Funeral Services

30-92 California Legal Forms--Transaction Guide § 92.260

§ 92.260 Agreement for Funeral Services for Decedent

[1] Comment

[a] Use of Form

This form is an agreement with a funeral establishment for the funeral services of a decedent. Funeral establishments and services are governed by the Funeral Directors and Embalmers Law ("Funeral Act") [*Bus. & Prof. Code § 7600 et seq.*] and its implementing regulations [*16 Cal. Code Reg. § 1202 et seq.*]. For discussion of the requirements of the Funeral Act, see *§ 92.90*.

This type of agreement usually provides for interest on any balance that has not been paid within 30 days from the date of the agreement. However, it is customary for funeral establishments to waive this interest, since it usually takes some time before a probate estate is in a position to pay the funeral expenses.

Although the funeral expenses are usually paid out of the probate estate of the decedent, it should be noted that this type of agreement makes the person who arranges for the funeral services and who signs the agreement personally liable for the funeral expenses.

This form is signed only by the person or persons arranging for the funeral services and not by the funeral establishment. Most agreements used by funeral establishments are drafted in this unilateral manner.

For forms relating to litigation involving human remains, see California Forms of Pleading and Practice, Ch. 180, *Dead Bodies and Cemeteries* (Matthew Bender).

[b] Person Entitled to Make Funeral Arrangements

Unless the decedent leaves contrary written instructions, the persons who have the right to make decisions about disposition arrangements after an individual's death are the following in the order named [*see Health & Safety Code § 7100(a)*]:

- An agent under a power of attorney for health care that includes the power to dispose of the body.
- A competent surviving spouse.
- Adult children.
- Parents.
- Adult siblings.
- Other surviving competent adult kin.

[c] Contract Requirements

A funeral director must provide prescribed written information about the Cemetery and Funeral Bureau when presenting a sales contract to an individual. The information must appear in at least eight-point boldface type on the first page of any contract for goods or services offered by a funeral director [*Bus. & Prof. Code § 7685.3*; *see* [2], *below*].

For the Bureau's most current contact information, including mailing address, phone, and fax for use in the agreement, see www.cfb.ca.gov.

[d] Cremation Services

A funeral director entering into a contract to furnish cremation services must provide to the purchaser, either on the first page of the contract, or on a separate page attached to the contract, a written or printed notice containing the following information [*Bus. & Prof. Code § 7685.2(c)*]:

- A person having the right to control disposition of cremated remains may remove the remains in a durable container from the place of cremation or interment, pursuant to *Health & Safety Code § 7054.6*.
- If the cremated remains container cannot accommodate all cremated remains of the deceased, the crematory must provide a larger cremated remains container at no additional cost, or place the excess in a second container that cannot easily come apart from the first, pursuant to *Health & Safety Code § 8345*.

[e] Preneed Funeral Arrangements

Every funeral establishment, prior to drafting any contract for funeral goods or services, must present to the survivor of the deceased who is handling the funeral arrangements, or the responsible party, a statement disclosing whether or not the funeral establishment has any preneed agreement made by or on behalf of the deceased [*Bus. & Prof. Code § 7685.6(a)*; *see § 92.90[9]* (required disclosures)].

[2] FORM

Agreement for Funeral Services for Decedent

FUNERAL SERVICES AGREEMENT

_____[*name of funeral establishment*]
_____[*address*]
_____[*telephone number*]

[*Print information statement in at least 8-point boldface type:*]

FOR MORE INFORMATION ON FUNERAL, CEMETERY, OR CREMATION MATTERS, CONTACT THE DEPARTMENT OF CONSUMER AFFAIRS, CEMETERY AND FUNERAL BUREAU, 1625 NORTH MARKET BLVD., SUITE S208, SACRAMENTO, CA. 95834; TELEPHONE (916) 574-7870; FAX (916) 928-7988.

1. The undersigned hereby authorizes and directs _____[*name of funeral establishment*] to furnish the following material and professional services in connection with the funeral of the deceased to be held on the date and time listed below:

Name of Deceased _____

Date of Death _____

Date of Funeral _____

Time of Funeral _____

Social Security # _____

DESCRIPTION	AMOUNT
Professional Services:	
_____	$_____
_____	$_____
_____	$_____
Facilities and Staff:	
_____	$_____
_____	$_____
_____	$_____
Hearse and Motor Equipment:	
_____	$_____
_____	$_____
Casket Selection:	
_____	$_____
Embalming:	$_____
Transportation of Remains:	$_____

Use of Chapel: $_____

Outside Receptacle: $_____

Clothing: $_____

Cremation Services: $_____

Cemetery Charges: $_____

Certified Copies of Death Certificate: $_____

Number of copies: _____

Newspaper Notices [*list newspapers*]: $_____

_____
_____
_____

Contribution to Clergy or Church: $_____

_____ [*name of clergy or church*]

Flowers [*add list or description*]: $_____

_____
_____
_____

Miscellaneous Items:

_____ $_____

_____ $_____

_____ $_____

Sales Tax: $_____

Total Expenditure $_____

No cemetery charges are included unless set forth above.

2. The above total expenditure shall be reduced by any amounts received by _____[*name of funeral establishment*] on account of the veteran's burial allowance, social security death payment, or any other type of

payment.

3. Full payment for the above services is due _____[*specify time of payment, e.g.,* within 10 days of the conclusion of the probate proceeding for decedent's estate *or* in advance *or* within 30 days of the date of this agreement]. Interest on any unpaid balance of the above total expenditure that has not been paid within 30 days from the date of this agreement shall be charged at the rate of _____ percent per annum.

[*Add if cremation services are included in agreement:*]

4. (a) A person having the right to control disposition of cremated remains may remove the remains in a durable container from the place of cremation or interment, pursuant to *Health and Safety Code Section 7054.6(a)*.

(b) If the cremated remains container cannot accommodate all cremated remains of the deceased, the crematory shall provide a larger cremated remains container at no additional cost, or place the excess in a second container that cannot easily come apart from the first, pursuant to *Health and Safety Code Section 8345*.

(c) Prior to disposition of the cremated remains, _____[*name of funeral establishment*] shall do all of the following:

- Remove the cremated remains from the place of cremation in a durable container.
- Keep the cremated remains in a durable container.
- Store the cremated remains in a place free from exposure to the elements.
- Responsibly maintain the cremated remains.

[*Continue with the following:*]

5. _____[*Name of funeral establishment*] is hereby authorized to file a claim based on this obligation against the estate of decedent, or proceed against the undersigned for payment, or both. This obligation of the undersigned is deemed to be a joint and several obligation with the estate of decedent.

6. _____[*name of funeral establishment*] shall not be liable for any delay or failure in its performance under this contract (except for payment obligations) caused by events beyond its reasonable control, including, but not limited to, terrorism, war, riots, labor strikes, interruption of utility services, fires, floods, earthquakes, and other natural disasters.

7. If any action at law is necessary to enforce or interpret the terms of this agreement, the prevailing party shall be entitled to reasonable attorneys' fees, costs, and necessary disbursements in addition to any other relief to which that party may be entitled.

8. This agreement shall be governed by and construed in accordance with the laws of California.

I [*or* We], the undersigned, have ordered and selected the above services and materials and I [*or* we], jointly and severally, promise and agree to pay for the same, together with any additional services and materials we order for the funeral, in accordance with the price list of _____[*name of funeral establishment*], which is attached to

this agreement.
_____ Dated:

_____ [*signature*]
_____ [*typed or printed name*]
_____ [*relationship to deceased*]
_____ [*address*]
_____ [*telephone number*]
_____ [*signature*]
_____ [*typed or printed name*]
_____ [*relationship to deceased*]
_____ [*address*]
_____ [*telephone number*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
F. Funeral Services

30-92 California Legal Forms--Transaction Guide § 92.261

§ 92.261 Agreement for Preneed Funeral Arrangements

[1] Comment

[a] Use of Form

This form is a contract and trust agreement between a trustor, a funeral establishment, and a trustee. The trustor contracts with the funeral establishment for funeral arrangements to be provided after the trustor dies. In the same document, the trustor establishes a trust for the purpose of paying the funeral establishment when it renders the services. In this situation, the trustor is also the beneficiary under the trust agreement.

Preneed funeral arrangements and contracts are governed by the Funeral Directors and Embalmers Law ("Funeral Act") [*see Bus. & Prof. Code §§ 7735-7746*] and its implementing regulations [*see Bus. & Prof. Code § 7740*; *16 Cal. Code Reg. § 1202 et seq.*]. The trustee of a preneed trust may be either (1) a bank or trust company legally authorized by the State of California to act as trustee or (2) not less than three persons, one of whom may be an employee of the funeral establishment [*Bus. & Prof. Code § 7736*].

For further discussion of the requirements of the Funeral Act as they relate to preneed funeral services, see *§ 92.91*.

[b] Required Contents

A preneed trust agreement must provide that the trustee will hold the money or securities in trust for the purposes for which deposited and that the trustee, upon the signature of a majority of the trustees, will deliver the corpus of the trust to the funeral establishment upon the filing of a certified copy of the death certificate or other satisfactory evidence of the death of the beneficiary, together with satisfactory evidence that the funeral establishment has furnished the merchandise and services [*Bus. & Prof. Code § 7737*].

Furthermore, if the beneficiary of a preneed funeral trust is a recipient of public assistance under the provisions of *Welf. & Inst. Code § 11158(a)* or *Welf. & Inst. Code § 12152(e)(1)* (and provided the value limitations of these statutes are not exceeded), the trust agreement may provide that the trust is irrevocable [*Bus. & Prof. Code § 7737*].

If the beneficiary of the preneed trust is not a recipient of public assistance, the trust agreement must provide that the trustor or his or her representative may revoke the trust at any time before the funeral establishment furnishes the merchandise and services provided for in the contract. On written demand of the trustor, or the legally appointed representative, the trustor is entitled to receive the return of the corpus of the trust, together with any income accrued in the trust, less a revocation fee not to exceed 10% of the corpus of the trust [*Bus. & Prof. Code § 7737*; *see Bus. & Prof. Code § 7735* (revocation fee)].

If, however, the trustor becomes otherwise eligible for public assistance [*see Welf. & Inst. Code §§ 11158(a), 12152(e)(1)*], he or she may agree at that time that the trust will be irrevocable [*Bus. & Prof. Code § 7737*].

Preneed trust contracts must also include the following information [*16 Cal. Code Reg. § 1275*]:

- The name and address of the trustor.
- The name and address of the beneficiary.
- The names and addresses of the trustees.
- The name, address and phone number of the funeral establishment.
- A sequential number which shall be continuous and in order of issue.
- A copy of the completed funeral arrangements forms including, but not limited to, the following:
    - A description of the merchandise and services selected that is sufficiently detailed to identify them.
    - Any disclosure of prices or itemization of services or merchandise that is required to be provided pursuant to state or federal law, rule or regulation then in effect.
- A statement that earned annual income is being credited to the account and that administrative expenses, if charged, are paid from income only.
- A statement, in clear nontechnical language, that the contract is or is not a guaranteed preneed contract and, if guaranteed only in part, the services or merchandise included in the guarantee must be specified. This statement shall be printed in bold face type and shall be located on the first page of the contract. It must also include the following:
    - If the contract is guaranteed, the contract must include a complete explanation of all the terms and conditions limiting the guarantee.
    - If the contract is not guaranteed, the contract must include a complete explanation of how the trust balance will be applied to pay for services and merchandise provided at the beneficiary's death and that there may be additional payments required or a refund due.
- A statement that the trustees will deliver the corpus of the trust and net income to the funeral establishment when it files a certified copy of the death certificate and evidence that it has furnished the merchandise and services [*Bus. & Prof. Code § 7737*].

- A statement that the amount of revocation fee to be charged in the event of revocation, will in no event exceed 10% of the paid-in corpus and is chargeable against earned income only.

- A statement that no revocation fee will be charged if the funeral establishment is unable to perform substantially according to the terms of the agreement.

- In immediate proximity to the space reserved for the purchaser's signature, in a size equal to at least 10 point bold type, the following statement: "All funds received will be deposited with the trustees within 30 days and held in a trust which is fully refundable upon 15 days written notice except when the beneficiary is the recipient of public assistance, as provided in the Welfare and Institutions Code and this trust agreement has been designated as being irrevocable thereunder."

[2] FORM

Agreement for Preneed Funeral Arrangements

CONTRACT AND TRUST AGREEMENT
FOR Preneed FUNERAL ARRANGEMENTS

_____[*name of funeral establishment*]
_____[*address of funeral establishment*]
_____[*telephone number of funeral establishment*]

Contract No. _____[*this number must be a based on a continuous, sequential numbering system, with each new contract issued receiving the next number in sequence.*]

Date: _____

This Contract and Trust Agreement is entered into on _____[*date*] between _____[*name of funeral establishment*] ("the Funeral Establishment"), _____[*name of trustor*] ("the Trustor"), _____[*address*], and _____[*name and address of each trustee; there must either be one trustee (in which case the trustee must be a bank or trust company legally authorized to act in California as a trustee) or not less than three trustees (in which case one of the trustees may be an employee of the funeral establishment*)] ("the Trustee" *or* "the Trustees").

Recitals

The Funeral Establishment holds a current license as a funeral establishment under *Business and Professions Code Section 7617* and provides funeral and related services for the disposition of human remains.

The Trustor desires to make advance arrangements for certain funeral and related services for _____[himself *or* herself].

[*If there is only one trustee, add:*]

The Trustee is a _____[*either* bank *or* trust company] legally authorized by the State of California to act as trustee.

[*Or, if there are at least three trustees, add:*]

The Trustees have agreed to serve as trustees for a preneed trust agreement pursuant to *Business and Professions Code Section 7736*.

THEREFORE, in consideration of the mutual promises set forth below, the parties agree as follows:

[*Select one of the three following options. This paragraph must be in boldface type and it must be printed on the first page of the contract.*]

[*Either:*]

Full Guarantee

1. This preneed contract is guaranteed in full. This means that the Funeral Establishment will provide the services and merchandise set forth in Paragraph 4 of this agreement in exchange for the amount of the trust balance at the time of the Trustor's death. This guarantee is limited by the following conditions: _____[*specify terms and conditions of limitations*].

[*Or:*]

Partial Guarantee

1. This preneed contract is guaranteed in part. This means that the Funeral Establishment shall guarantee only the following services and merchandise in exchange for the amount of the trust balance at the time of the Trustor's death: _____[*list services to be provided*]. The cost for any additional services or merchandise set forth in Paragraph 4 of this agreement in excess of the trust balance at the time of the Trustor's death shall be paid by the duly appointed executor or other legal representative of the estate of the Trustor. Those costs shall be based on the then current price list of the Funeral Establishment.

[*Or:*]

No Guarantee

1. This preneed funeral arrangement contract is not guaranteed. This means that, if at the time of the Trustor's death the trust balance is not sufficient to pay for all the services and merchandise set forth in Paragraph 4 of this agreement, the amount due in excess of the trust balance shall be paid by the duly appointed executor or other legal representative of the estate of the Trustor. The costs for the services and merchandise provided by the Funeral Establishment shall be based on the then current price list of the Funeral Establishment.

[*Continue with the following:*]

Corpus of Trust

2. On _____[*date*], the Trustor delivered to the Funeral Establishment the following money or securities, or both: _____[*describe money, securities, or other property*] ("trust corpus") as full payment for the funeral services described in Paragraph 4 of this agreement [*add, if Paragraph 1 provides for either a partial or no guarantee:*, subject to the provisions of Paragraph 1]. The Funeral Establishment shall transfer the trust corpus to the Trustee(s) within 30 days from the date of its receipt of the trust corpus.

Purpose of Trust

3. The Trustee(s) shall hold the trust corpus, invest, and reinvest the trust corpus for the purposes of providing the funeral services referred to in Paragraph 4 of this agreement. The Trustee(s) shall deliver the trust corpus to the Funeral Establishment, on the signature of _____[*either* the Trustee *or* a majority of the trustees] and on the filing of a certified copy of the death certificate or other satisfactory evidence of the death of the Trustor, together with satisfactory evidence that the Funeral Establishment has furnished the merchandise and services specified in this agreement for the funeral of the Trustor. If the trust corpus at that time is greater than the amount required for the payment of the funeral expenses, the Funeral Establishment shall refund the excess to the duly appointed executor or other legal representative of the estate of the Trustor.

Preneed Funeral Arrangements

4(a). As soon as convenient after the death of the Trustor, the Funeral Establishment shall conduct the funeral for the body of the Trustor in the following manner:

Services to be held at: _____
Clergy member to be: _____
Lodge or society to officiate: _____
Interment to be at: _____
Cremation: _____
If cremation, disposition of ashes: _____
Other: _____

4(b). The Funeral Establishment shall furnish the merchandise and services for the funeral of the Trustor, as set forth on the attached Schedule A, which is incorporated into this agreement. The current price list of the Funeral Establishment is attached to this Agreement as Schedule B.

Investments

5. The Trustee(s) shall invest and reinvest the trust corpus in any or all of the following:

(a) Bonds of or securities guaranteed by the United States or an Agency thereof or California, or of any County, City, or City and County of California.

(b) Bonds which are legal investments for commercial banks in California.

(c) Certificates of deposit or other interest-bearing accounts in any bank in California insured by the Federal Deposit Insurance Corporation.

(d) Investment certificates or shares in any state or federally chartered savings and loan association insured by the Federal Savings and Loan Insurance Corporation.

(e) Investments of the type and in the manner authorized by law for investment of trust funds, as set forth in *Probate Code Section 15001 et seq.*

Trust Income

6. Earned annual income shall be credited to the trust account. The Trustee(s) may utilize the income from the corpus to pay for a reasonable annual fee for administering the trust, including a trustee fee, to be determined by the Cemetery and Funeral Bureau of the Department of Consumer Affairs, and to establish a reserve of not exceeding 10 percent of the corpus as a revocation fee in the event of cancellation on the part of Trustor. None of the trust corpus shall be used for the payment of (a) expenses of trust administration or (b) any commission.

Revocability of Trust

[*Either, if the trustor-beneficiary is a recipient of public assistance under the Welfare and Institutions Code:*]

7. This contract and trust agreement is irrevocable and is not subject to amendment or cancellation by the Trustor.

[*Or, if the trustor-beneficiary is not a recipient of public assistance under the Welfare and Institutions Code:*]

7. The Trustor, at any time before the Funeral Establishment has furnished the merchandise and services provided for in this agreement, shall have the following rights:

(a) To amend this agreement by written instrument executed by the Trustor, the Funeral Establishment, and the Trustee(s).

(b) To revoke this agreement, and demand in writing and receive the return of the trust corpus together with any income accrued in the trust, less the revocation fee provided for in Paragraph 6 of this agreement. However, no revocation fee shall be charged if the Funeral Establishment is unable to substantially perform its duties under this agreement.

[*Continue with the following:*]

If Funeral Services Not Furnished

8. If for any reason the Funeral Establishment cannot provide the services and merchandise specified in Schedule A attached to this agreement on the death of the Trustor, then the Trustee(s) shall distribute and deliver the then remaining balance of the trust corpus to the duly appointed executor or other legal representative of the estate of the Trustor.

Entire Agreement

9. This contract supersedes any and all other agreements, either oral or in writing, among the parties with respect to the subject of this contract. This contract contains all of the covenants and agreements among the parties with respect to the

subject of this contract, and each party acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except the covenants and agreements embodied in this contract. Any agreement, statement, or promise not contained in this contract shall not be valid or binding among the parties with respect to the subject of this contract, except for a subsequent written modification signed by the party to be charged.

Amendment of Contract

10. This contract may be amended or modified at any time with respect to any provision by a written instrument executed by Funeral Establishment, Trustor, and Trustee.

Successors and Assigns

11. No party to this agreement may assign or transfer this agreement, in whole or in part, without the prior written consent of the other parties. This agreement shall be binding on, and inure to the benefit of, each party's heirs, executors, administrators, successors, and permitted assigns.

[*Add, if desired:*]

Arbitration

12. Any dispute arising under this contract shall be settled by arbitration in accordance with _____[*specify method of arbitration or refer to specific rules, e.g.*, the Commercial Arbitration Rules of the American Arbitration Association], and judgment on the award rendered by the Arbitrator may be entered in any court having jurisdiction.

[*Continue with the following:*]

Attorneys' Fees

13. If any legal action, including arbitration, is brought to enforce or interpret the provisions of this contract, the prevailing party shall be entitled to recover reasonable attorneys' fees from the party or parties at fault. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled.

Notices

14. Any notice required or permitted to be given under this contract shall be written, and may be given by personal delivery or by registered or certified mail, first-class postage prepaid, return receipt requested. Notice shall be deemed given upon actual receipt in the case of personal delivery, or upon mailing. Mailed notices shall be addressed as follows, but each party may change address by written notice in accordance with this paragraph:

To the Funeral Establishment at: _____ [*address*].
To the Trustor at: _____ [*address*].

To the Trustee(s) at: _____ [*address*].

Governing Law

15. This contract shall be governed by and construed in accordance with the laws of California.

[*The following paragraph must be printed in at least 10-point boldface type and in immediate proximity to the space reserved for the trustor's signature:*]

All funds received shall be deposited with the trustees within 30 days and held in a trust which is fully refundable upon 15 days written notice except when the beneficiary is the recipient of public assistance, as provided in the Welfare and Institutions Code and this trust agreement has been designated as being irrevocable thereunder.

Executed on _____[*date*], at _____[*city*], California.

TRUSTOR
_____ [*signature*]
[*typed name*]
FUNERAL ESTABLISHMENT
_____ [*typed name of funeral establishment*]
_____ [*signature*]
[*typed name and title*]
TRUSTEE(S)
_____ [*signature*]
[*typed name*]
_____ [*signature*]
[*typed name*]
_____ [*signature*]
[*typed name*]

ATTACHMENTS

SCHEDULE A

[*Attach list of services and merchandise to be provided to the trustor under this agreement.*]

SCHEDULE B

[*Attach the current price list of the funeral establishment.*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 92 SERVICE CONTRACTS
PART IV. FORMS
F. Funeral Services

30-92 California Legal Forms--Transaction Guide § 92.262

§ 92.262 Contract Between Funeral Society and Funeral Establishment

[1] Comment

[a] Use of Form

This form is designed for use as a complete contract between a funeral society and a funeral establishment that agrees to provide funeral services for those members of the funeral society who select that particular funeral establishment. For a discussion of funeral societies and how they operate, see *§ 92.92*.

A funeral society may be organized either as a nonprofit corporation or as a nonprofit unincorporated association [*see* Ch. 13, *Nonprofit Corporations* , and Ch. 13A, *Nonprofit Unincorporated Associations*].

The typical funeral society enters into this type of contract with a dozen or so different funeral establishments. The purpose of the funeral society in having that many funeral establishments available for the use of its members is twofold: (1) to cover all geographical parts of the area served by the funeral society, and (2) to afford its members in each part of that area some freedom of choice in selecting a funeral establishment.

The attorney drafting this type of contract should give most careful consideration to the schedule of services and costs (Paragraph 1). This is the part of the agreement that is most apt to cause problems later. It should be clearly written so that there will be no misunderstanding as to what is to be provided by the funeral establishment at what charge. Misunderstandings and disagreements in this matter are the most common cause for one party or the other exercising its right to terminate the contract.

See Ch. 75, *Formation of Contracts and Standard Contractual Provisions* , for additional and alternative standard contractual provisions.

[b] Term of Agreement

The provision for the term of the agreement (Paragraph 5) is different from those ordinarily used in service contracts. It

will take several weeks after the execution of this agreement before the members of the funeral society can be notified that the funeral establishment that signed it is available for service to the membership. It would normally be several months thereafter before any appreciable number of members would select this funeral establishment and much later before any deaths occurred in the families of such members. For this reason the agreement is not subject to termination by either party at any time on 30 days notice to the other. Instead it is automatically renewed from year to year unless prior to 30 days from the completion of the annual period then in effect either party terminates the agreement by giving written notice of termination to the other party.

[2] FORM

Contract Between Funeral Society and Funeral Establishment

FUNERAL SOCIETY CONTRACT

This AGREEMENT is made on _____[*date*] between _____[*name of funeral society*] ("Society"), _____[*type of organization, e.g.,* a California nonprofit corporation *or* an unincorporated association], _____[*address*], and _____[*name of funeral establishment*] ("Funeral Establishment"), _____[*type of organization, e.g.,* a partnership *or* a California corporation], _____[*address*].

Recitals

Funeral Establishment holds a current license as a funeral establishment under *Business and Professions Code Section 7617* and provides funeral and related services for the disposition of human remains.

Society is a consumer membership organization that desires to enter into this contract with Funeral Establishment for the purpose of obtaining funeral services for its members.

THEREFORE, in consideration of the mutual promises set forth below, the parties agree as follows:

Services and Costs

1. Funeral Establishment agrees to provide funeral services for members of Society and their families ("member") in accordance with the following schedule:

(a) Basic Funeral. Funeral Establishment shall charge $_____ for each basic funeral, which shall consist of a simple casket, transportation of the body from the place of decease to the Funeral Establishment and thereafter to the cemetery or crematory, and necessary legal papers (including one death certificate). Burial costs, cremation, embalming, and use of the chapel of Funeral Establishment are not included in the basic funeral. The burial or cremation, including the plot or niche, must be arranged for and paid by the member or the duly appointed executor or other legal representative of the member's estate. Funeral Establishment shall, if desired, assist in making such arrangements.

(b) Embalming. If embalming is necessary or desired, it shall be done by Funeral Establishment for an additional charge of $_____.

(c) Use of chapel. If it is desired that the chapel of Funeral Establishment be used for memorial services, the additional charge shall be $_____ if the body is present and $_____ if the body is not

present.

(d) Transportation charges. The transportation of the member's body shall be furnished at no additional cost only within an area whose limits are no farther than _____ miles from the Funeral Establishment. Any transportation of the body beyond this distance or to a church shall be at the rate of _____ cents per mile.

(e) Additional charges. An additional reasonable charge shall be made for any extra services (such as music or obituaries) requested by member in advance or by the responsible party who makes arrangements for member's funeral.

Other Obligations of Funeral Establishment

2. Funeral Establishment agrees that it shall:

(a) Conduct each funeral for a member of Society or any one of his immediate family in accordance with an instruction sheet to be provided by the member, which sheet shall contain the funeral instructions for the member and his immediate family.

(b) Immediately after each such funeral mail to Society an itemized copy of the statement for all services rendered by Funeral Establishment.

Obligations of Society

3. Society agrees to:

(a) Designate Funeral Establishment as an approved Funeral Establishment.

(b) Place Funeral Establishment on its approved list and to make the approved list available to all members of Society.

(c) Forward to Funeral Establishment an executed copy of the member instruction sheet for each member of Society who selects Funeral Establishment. This shall be done by Society within _____[*number of days, e.g.,* 15] days after receiving the instruction sheet from the member.

Responsibility for Funeral Expenses

4. Society shall not be responsible in any manner whatsoever for the cost of funeral services performed by Funeral Establishment. Such charges shall be paid by the member or by the duly appointed executor or other legal representative of the member's estate.

Term of Agreement

5. This contract shall become effective immediately as of the date of its execution and shall continue in effect for one year and be automatically renewed for annual periods thereafter from year to year, unless either party terminates the contract by giving written notice to the other party at least 30 days prior to the completion of the annual period then in effect.

Entire Agreement

6. This contract supersedes any and all other agreements, either oral or in writing, between the parties with respect to the subject of this contract. This contract contains all of the covenants and agreements between the parties with respect to the subject of this contract, and each party acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except the covenants and agreements embodied in this contract. Any agreement, statement, or promise not contained in this contract shall not be valid or binding between the parties with respect to the subject of this contract, except for a subsequent written modification signed by the party to be charged.

Amendment of Contract

7. This contract may be amended or modified at any time with respect to any provision by a written instrument executed by Funeral Establishment and Society.

Attorneys' Fees

8. If any legal action, including arbitration, is brought to enforce or interpret the provisions of this contract, the prevailing party shall be entitled to recover reasonable attorneys' fees from the other party. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled.

Notices

9. Any notice required or permitted to be given under this contract shall be written, and may be given by personal delivery or by registered or certified mail, first-class postage prepaid, return receipt requested. Notice shall be deemed given upon actual receipt in the case of personal delivery, or upon mailing. Mailed notices shall be addressed as follows, but each party may change address by written notice in accordance with this paragraph:

To Funeral Establishment at: _____ [*address*].
To Society at: _____ [*address*].

Governing Law

10. This contract shall be governed by and construed in accordance with the laws of California.

Executed on _____[*date*], at _____, California.

FUNERAL SOCIETY
[*typed name of funeral society*]
_____ [*signature*]
[*typed name and title*]
FUNERAL ESTABLISHMENT
[*typed name of funeral establishment*]
_____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsPersonal Service Agreements

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 93 AGREEMENTS FOR AUTOMATIC MERCHANDISING

30-93 California Legal Forms--Transaction Guide 93.syn

§ 93.syn Synopsis to Chapter 93: AGREEMENTS FOR AUTOMATIC MERCHANDISING

§ 93.01 California Statutes

§§ 93.02-93.04-93.04 [Reserved]

§ 93.05 Annotations

[1] Related Forms With Tax Analysis

[2] Related Forms

[3] Related California Forms

§§ 93.06-93.09 [Reserved]

§ 93.10 Definitions

§ 93.11 Types of Entities

§ 93.12 Types of Agreements

[1] Receipts and Space Leases

[2] Location Contracts

§ 93.13 Purposes of Location Contracts

§ 93.14 Applicable Laws

[1] Name and Address Requirement

[2] Sales of Cigarettes and Other Tobacco Products

[3] The California Retail Food Code

[4] Contracts to Buy or Lease Vending Machines, Products, or Supplies

§§ 93.15-93.99 [Reserved]

§ 93.100 Facts

Scope

§ 93.101 Documents

Scope

§§ 93.102-93.119 [Reserved]

§ 93.120 Preliminary Determinations

Scope

§ 93.121 Introductory and Recital Clauses

Scope

§ 93.122 Exclusive Grant Clause

Scope

§ 93.123 Vending Machines--Installation, Ownership, Maintenance, and Service

Scope

§ 93.124 Commission Payments, Records, and Statements

Scope

§ 93.125 Insurance and Indemnity Provisions

Scope

§ 93.126 Term, Termination, and Breach

Scope

§ 93.127 Standard Contractual Provisions

Scope

§§ 93.128-93.139 [Reserved]

Scope

§ 93.140 Preliminary Determinations

Scope

§ 93.141 Initial Procedures

Scope

§ 93.142 Disclosure Statement by Seller

Scope

§ 93.143 Information Sheet From Seller

Scope

§ 93.144 Seller Assisted Marketing Plan Contract

Scope

§§ 93.145-93.199 [Reserved]

§ 93.200 Receipt for Vending Machine

[1] Comment--Use of Form

[2] FORM

Receipt for Vending Machine

§ 93.201 Agreement Between Location Owner and Vending Machine Operator--Lease of Space for Vending Machines

[1] Comment--Use of Form

[2] FORM

Agreement Between Location Owner and Vending Machine Operator--Lease o f Space for Vending Machines

§ 93.202 Agreement Between Location Owner and Vending Machine Operator--Letter Agreement for the Installation and Servicing of One or More Vending Machines

[1] Comment--Use of Form

[2] FORM

Agreement Between Location Owner and Vending Machine Operator--Letter Agreement for the Installation and Servicing of One or More Vending Machines

§ 93.203 Agreement Between Location Owner and Vending Machine Operator--Agreement for the Installation and Servicing of Single Type of Machine

[1] Comment--Use of Form

[2] FORM

Agreement Between Location Owner and Vending Machine Operator--Agreement for the Installation and Servicing of Single Type of Machine

§ 93.204 Agreement Between Location Owner and Vending Machine Operator--Agreement for the Installation and Servicing of Full Line of Machines

[1] Comment--Use of Form

[2] FORM

Agreement Between Location Owner and Vending Machine Operator--Agreement for the Installation and Servicing of Full Line of Machines

§ 93.205 Agreement Between Location Owner and Vending Machine Operator--Agreement for the Operation of Full Line Vending Machine and Food Service Facility

[1] Comment--Use of Form

[2] FORM

Agreement Between Location Owner and Vending Machine Operator--Agreement for the Operation of Full Line Vending Machine and Food Service Facility

§§ 93.206-93.219 [Reserved]

§ 93.220 Disclosure Statement by Seller of Seller Assisted Marketing Plan

[1] Comment

[a] Use of Form

[b] Definitions

[c] Transactions Occurring in California

[d] Disclosure Document Contents

[e] Filing With the Attorney General

[2] FORM

Disclosure Statement by Seller of Seller Assisted Marketing Plan [Civ. Code § 1812.205]

§ 93.221 Seller Assisted Marketing Plan Information Sheet

[1] Comment

[a] Use of Form

[b] Information Sheet Contents

[2] FORM

Seller Assisted Marketing Plan Information Sheet [Civ. Code § 1812.206]

§ 93.222 Seller Assisted Marketing Plan Contract--Information Required by Law

[1] Comment

[a] Use of Form

[b] Contract Contents

[c] Purchaser's Copy of Contract

[d] Cancellation of Contract

[2] FORM

Seller Assisted Marketing Plan Contract--Information Required by Law [Civ. Code § 1812.207-1812.209]

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CHAPTER 93 AGREEMENTS FOR AUTOMATIC MERCHANDISING
PART I. RESEARCH GUIDE
A. Primary Sources

30-93 California Legal Forms--Transaction Guide § 93.01

§ 93.01 California Statutes

Regulation by Board of Pharmacy of sales of drugs or devices through vending machines. *Bus. & Prof. Code § 4005(a).*

Definition of vending machine and requirement that name and address of owner be affixed to machine. *Bus. & Prof. Code § 17570 et seq.*

Notice required under *Penal Code § 308(c)* stating that selling tobacco products to anyone under 18 years of age is illegal and subject to penalties. *Bus. & Prof. Code § 22952(b).*

Seller assisted marketing plan contracts. *Civ. Code § 1812.200 et seq.*
Seller assisted marketing plan contract defined. *Civ. Code § 1812.201(a), (j).*
Seller defined. *Civ. Code § 1812.201(c), (d).*
Purchaser defined. *Civ. Code § 1812.201(c), (e).*
Seller's disclosure requirements. *Civ. Code §§ 1812.203, 1812.205, 1812.206.*
Contract contents and requirements. *Civ. Code § 1812.207 et seq.*
Voidability of contract. *Civ. Code § 1812.215.*

Prohibition against sale of adulterated or misbranded foods. *Health & Safety Code § 110505 et seq.*

California Retail Food Code.*Health & Safety Code § 113700 et seq.*
"Equipment" includes vending machine. *Health & Safety Code § 113777(a).*
"Food facility" includes vending machines. *Health & Safety Code § 113789(b)(8).*
"Vending machine" defined. *Health & Safety Code § 113938.*
General food safety requirements for food facilities, including vending machines. *Health & Safety Code § 113980 et seq.*

Prohibition against sale of cigarettes or tobacco to minors under 18 and requirement of posting of copy of required notice stating that selling tobacco products to anyone under 18 years of age is illegal and subject to penalties. *Penal Code § 308*.

Inapplicability to vending machines of slot machine ban. *Penal Code § 330.5*.

Prohibition against manufacture or use of slugs in vending machines. *Penal Code § 640a*.

Prohibition against sale in vending machines of cigarettes without California tax stamps affixed. *Rev. & Tax. Code § 30476*.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionDeceptive Labeling & PackagingState RegulationGovernmentsAgriculture & FoodProcessing, Storage & Distribution

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[Reserved]

§§ 93.02-93.04[Reserved]

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PART I. RESEARCH GUIDE
B. Secondary Sources

30-93 California Legal Forms--Transaction Guide § 93.05

§ 93.05 Annotations

[1] Related Forms With Tax Analysis

Annot., Application of Zoning Regulations to Automatic Vending Machines, 11 A.L.R.3d 1004 (1967) .

Annot., Sales by Automatic Vending Machine as Subject to Retail Sales Tax, 91 A.L.R.2d 1138 (1963) .

Annot., Liability for Personal Injury to One Colliding With or Falling Over Scale or Other Machine Dispensing Merchandise or Services on Public Sidewalk, 65 A.L.R.2d 965 (1959) .

Rabkin & Johnson, Current Legal Forms with Tax Analysis, Ch. 3A, *Business Franchises* (Matthew Bender).

[2] Related Forms

Fern, Warren's Forms of Agreements, Ch. 13, *Miscellaneous* (Matthew Bender).

[3] Related California Forms

California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Tax LawState & Local TaxesFranchise TaxGeneral OverviewTax LawState & Local TaxesSales TaxGeneral Overview

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30-93 California Legal Forms--Transaction Guide §§ 93.06-93.09

[Reserved]

§§ 93.06[Reserved]

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PART II. LEGAL BACKGROUND

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§ 93.10 Definitions

Three different terms have been used interchangeably in business to describe the type of retailing operation discussed in this chapter. The three are "automatic merchandising," "machine selling," and "vending," the latter being perhaps the most commonly employed.

- "Automatic merchandising," "machine selling," or "vending" means a method of selling goods which employs a machine to complete automatically a sales transaction upon the insertion of coins by a customer. Its distinctive characteristic is the completion of a sales transaction without the aid of a sales clerk. It does not extend, for example, to the playing of music by a juke box because, although operated by a coin similarly to a vending machine, the juke box does not vend an item of goods.

- "Bulk vending" means the selling of unpackaged goods, usually candy, ball gum, and nuts.

- "Commission" means the compensation paid by the operator to the location-owner for the privilege of placing the vending machine in the owner's premises.

- "Location" means the premises or site in which the machine is placed.

- "Location-owner" means the individual or firm which owns the location in which the machine is placed.

- "Operator" means the individual or firm which owns, locates, services, and repairs vending machines.

- "Route" means the list of locations called upon by the service provider.

- "Servicing" means the periodic replenishment of the supply of goods in a machine, the collection of receipts, and the inspection, cleaning, and minor adjustment of the machine.

- "Traffic" means the number of consumers passing the site of the machine during a stated time interval.

- "Vending machine" or "vender" means a machine which automatically completes a sales transaction upon the insertion of coins by a customer. It is a slot machine which operates mechanically and (1) vends an item of goods; (2) operates either manually or electrically; (3) requires only periodic attention from service or repair personnel; and (4) is easily transported from one place to another.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionGeneral OverviewAntitrust & Trade LawConsumer ProtectionTobacco ProductsGeneral OverviewGovernmentsAgriculture & FoodProcessing, Storage & Distribution

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30-93 California Legal Forms--Transaction Guide § 93.11

§ 93.11 Types of Entities

Businesses connected with and having a significant interest in the field of vending are classifiable by function into four categories. These are: (1) manufacturers, (2) operators, (3) location-owners, and (4) suppliers. Some participants in the field combine two of these functions, while others combine one of these functions with another function outside the vending industry.

Legal Topics:

For related research and practice materials, see the following legal topics:
Antitrust & Trade LawConsumer ProtectionGeneral OverviewGovernmentsAgriculture & FoodProcessing, Storage & Distribution

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30-93 California Legal Forms--Transaction Guide § 93.12

§ 93.12 Types of Agreements

[1] Receipts and Space Leases

The simplest form of written agreement in the vending machine industry is the receipt, which is nothing more than an acknowledgment by the location owner that one or more machines have been placed on his premises and that in return he will receive a specified commission based upon the proceeds from sales made through the machine or machines. The receipt does not provide a definite term for the agreement and creates a mere license which may be revoked at any time by the location owner at his pleasure. Since the receipt offers the vending machine operator little or no protection, its use is necessarily limited to smaller operations where the capital investment in the individual machines is not very great and the machines can be readily moved from location to location at minimal expense.

The space lease is another type of agreement between a vending machine operator and a location owner. This form of agreement provides the vending machine operator with an outlet for the operator's products for a definite period of time during which the operator can amortize the cost of installing the machines. The main drawback of this form of agreement is that many occupants of locations do not own the location and cannot execute a lease because of some restriction contained in their own lease of the premises. In this situation, the standard location contract, or one of its variations, is a practical necessity.

[2] Location Contracts

The most common form of agreement used by the vending industry is the location contract, which consists of a written agreement between the vending machine operator and the owner or occupant of the premises on which the vending machines have been placed. The location contract embodies all of the basic terms of the parties' agreement, including such things as the installation of the vending machines, commission payments, maintenance and servicing of the machines and the premises, and any other terms which the parties desire to reduce to writing.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 93.13 Purposes of Location Contracts

Location contracts are designed to serve two main purposes: To guarantee business continuity and to set out the mutual benefits and obligations which flowfrom the business relationship. The degree to which one or the other of these purposes is emphasized in a given location contract will depend to a large degree upon the type of installation involved and the principal objectives of the parties. For example, a vending machine company which handles a single line of machines and whose route consists of a number of single-machine installations in public or "street" locations will be primarily interested in a simple contract which grants the vending company the exclusive right to operate its machines in their various locations for a specific term, generally from three to five years. On the other hand, a vending company which handles large multiple-machine and food service operations will be primarily interested in a contract which spells out the rights and duties of the respective parties in sufficient detail to prevent disputes from arising and to afford adequate protection in the event that they do arise.

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-93 California Legal Forms--Transaction Guide § 93.14

§ 93.14 Applicable Laws

[1] Name and Address Requirement

Several laws directly or indirectly affect owners and operators of vending machines. One law provides that every person who owns a vending machine must have his or her name and address affixed to the machine in a place where it may be seen by anyone using the machine [*Bus. & Prof. Code § 17570*]. In the event that a person owns more than one vending machine located at the same place, the person, in lieu of affixing his or her name and address to every machine, may post a clearly readable sign containing the same information in a conspicuous location near the machines [*Bus. & Prof. Code § 17570*]. For purposes of this requirement a "vending machine" is defined as any device the operation of which depends upon the insertion of a coin or other thing representative of value in the denomination of five cents or more and which dispenses or vends a product, service, or exchange of equal value, other than a telephone service furnished under public utility tariffs [*Bus. & Prof. Code § 17571*]. Excluded from this definition is any equipment used by a financial institution for the purpose of facilitating financial transactions, whether that equipment is located on the premises of the financial institution or at a remote location [*Bus. & Prof. Code § 17571*]. Also excluded from the definition are the "penny" vendors, whose greatest market has been the sale of bubble gum to children.

Any person who violates the name and address requirement is guilty of a misdemeanor punishable by imprisonment for a period not to exceed six months, or by a fine not to exceed $1,000, or by both, for each violation [*Bus. & Prof. Code § 17572*].

[2] Sales of Cigarettes and Other Tobacco Products

Cigarette vending machines (and vending machines for other tobacco products) are generally prohibited in California [Bus. & Prof. Code § 22960(a)]. A limited exception permits cigarette vending machines in premises with on-sale public premises alcoholic beverages licenses [*see* Bus & Prof. Code § 23039], provided the machines are located inside the premises and and are at least 15 feet away from the entrance [Bus. & Prof. Code § 22960(b)]. Furthermore, local governments are permitted to adopt even more restrictive standards, including a complete ban on the sale of cigarettes or tobacco products from vending machines [Bus. & Prof. Code § 22960(c)]. Civil penalties may be assessed for violations [Bus. & Prof. Code § 22958(a), (b)]. Cigarette or tobacco product distributors, wholesalers, and operators are required to comply with annual reporting requirements, including the requirements that operators annually report their

name and the address of each location where cigarette vending machines are placed [Bus. & Prof. Code § 22954].

In addition, furnishing tobacco or other products to minors is a misdemeanor punishable by a fine and imprisonment [Penal Code § 308]. Anyone who deals in tobacco must post at each point of purchase a notice required by the Stop Tobacco Access to Kids Enforcement Act [*see* Bus & Prof. Code § 22952(b)], and failure to do so may be punished by a fine or imprisonment [Penal Code § 308(c)].

Items that may not be sold, given, or furnished to a person under the age of 18 years include any tobacco, cigarette, or cigarette papers, or blunt wraps, or any instrument or paraphernalia that is designed for the smoking or ingestion of tobacco, products prepared from tobacco, or any controlled substance. In addition to criminal prosecution, every person, firm, or corporation that sells or furnishes tobacco to a person under 18 years old is subject to a civil penalty not to exceed $1,000. In the case of sales of tobacco and related products in a vending machine, the person authorizing the installation of the machine will be held liable if he or she knew or should have known that the machine would be used by minors [*Penal Code § 308(a)*].

If a civil penalty has been assessed, or a violator has been prosecuted for a single, specific violation of the Business and Professions Code provisions relating to tobacco sales, the violator may not also be prosecuted under Penal Code § 308 for a violation based on the same facts or specific incident for which the civil penalty was assessed, or for which the violator was prosecuted under the Business and Professions Code sections relating to tobacco sales [Bus. & Prof. Code § 22958(e)].

[3] The California Retail Food Code

Owners and operators of food vending machines, particularly those with their own food preparation and packing facilities, need to be aware of the California statutes governing preparation and sale of food. The governing statute is the California Retail Food Code (CRFC) [*see Health & Safety Code § 113777* et seq.]. The purpose of the CRFC is to safeguard public health and provide to consumers food that is "safe, unadulterated, and honestly presented through adoption of science-based standards" [*Health & Safety Code § 113703*]. The statewide health and sanitation standards for retail food facilities, including vending machines [*see* Health & Safety Code § 141145], are exclusive of all local health sanitation standards relating to retail food facilities [*Health & Safety Code § 113705*].

For purposes of the CRFC,, the terms "equipment" and "food facility" both include vending machine [*Health & Safety Code §§ 113777(a), 113789(b)(8)*; *see Health & Safety Code § 113781* ("food" defined)]. A "vending machine" is a self service device that, on insertion of money or tokens, dispenses food without the necessity of replenishing the device between each vending operation and that operates in conjunction with a commissary [*Health & Safety Code § 113938*]. "Vending machine" does not include any device dispensing exclusively peanuts, nuts, popcorn, gum, or hard candy, prepackaged candy, cookies, crackers, or similar snacks and beverages that are not potentially hazardous food, and prepackaged ice [*Health & Safety Code § 113938*].

Vending machines must meet all applicable requirements of the CRFC [Health & Safety Code § 141145]. In addition, vending machines must comply with the following [Health & Safety Code § 141145(a)-(h)]:

- Each vending machine or machine location must have posted in a prominent place a sign indicating the owner's name, address, and telephone number.

- Wet storage of prepackaged products is prohibited.

- Potentially hazardous food must be dispensed to the consumer in the original package into which it

was placed at the commissary or food processing plant. Bulk potentially hazardous food is prohibited.

- Single-use articles that are used in machines dispensing products in bulk must be obtained in sanitary packages. The single-use articles must be stored in the original package until introduced into the container magazine or dispenser of the vending machine.

- A record of cleaning and sanitizing must be maintained by the operator in each machine and must be current for at least the past 30 days.

- All vending machines must be constructed in accordance with applicable NSF International or National Automatic Merchandizing Association standards, or the equivalent.

- If located outside, a vending machine must be provided with overhead protection.

- The dispensing compartment of a vending machine must be equipped with a self closing door or cover if the machine is located in an outside area that does not otherwise afford the protection of an enclosure against the rain, windblown debris, insects, rodents, and other contaminants that are present in the environment, or if the machine is available for self service during hours when it is not under the full time supervision of an employee.

A person who proposes to build or remodel a food facility, including a vending machine, must submit complete plans and specifications to the enforcement agency for review, and must receive plan approval before starting any new construction or remodeling of any facility for use as a retail food facility [*see Health & Safety Code § 114380(a)*]. A permit must be obtained from the enforcement agency for each proposed food facility, after investigation of the machine has determined that its method of operation meets the specifications of the approved plans and conforms to legal requirements of the CFRC [*see Health & Safety Code § 114381(a), (b)*]. Once issued, a permit is nontransferable [*Health & Safety Code § 114381(c)*].

Vending machines must obtain food from sources that comply with all applicable laws [*see Health & Safety Code § 114021 et seq.*]. Those that dispense "potentially hazardous food" [*see Health & Safety Code § 113871* (definition)] are subject to the CRFC's time and temperature requirements [*see Health & Safety Code § 113996 et seq.*].

The general food safety requirements for food facilities, including vending machines, are set forth in *Health & Safety Code § 113980 et seq.* Vending machines must obtain food from sources that comply with all applicable laws [*see Health & Safety Code § 114021 et seq.*]. Those that dispense "potentially hazardous food" [*see Health & Safety Code § 113871* (definition) are subject to the CRFC's time and temperature requirements [*see Health & Safety Code § 113996 et seq.*]. Vending machines are also subject to requirements for cleanliness and freedom from litter [*see Health & Safety Code §§ 114257-114257.1*] and from vermin and animals [*see Health & Safety Code §§ 114259-114259.5*]; cleaning and sanitation requirements [*see Health & Safety Code §§ 114095 et seq.*; *114326 et seq.*], and provisions for employee sanitation [*see Health & Safety Code § 114250*]. The CRFC also includes provisions for the safety and sanitation of the facilities themselves [*see Health & Safety Code § 114326 et seq.*].

Food facilities are subject to inspection by enforcement officers, who are authorized to enter and inspect facilities and secure samples, photographs, or other evidence [*Health & Safety Code § 114390(b)(1)*]. The enforcement officers may impound food, equipment, or utensils that are found or suspected to be unsanitary or contaminated or in such disrepair that they may become contaminated [*Health & Safety Code § 114393(a)*]. A written report must be supplied to the owner, manager, or operator of the food facility [*Health & Safety Code § 114390(e)*]. Additionally, the enforcement agency that has impounded the food, equipment, or utensils must within 30 days either begin proceedings to release the impounded materials or seek an administrative or legal remedy for their disposition [*Health & Safety Code § 114393(c)*].

Any person who violates the CRFC or any of its implementing regulations is guilty of a misdemeanor and subject to fine or imprisonment [*see Health & Safety Code § 114395*]. The owner, manager, or operator of a food facility is responsible for violations by employees [*see Health & Safety Code § 114397*]. A permit may be suspended or revoked by a local enforcement officer for a violation of the statute [*see Health & Safety Code § 114405(a)*].

[4] Contracts to Buy or Lease Vending Machines, Products, or Supplies

The use of seller assisted marketing plans in connection with the sale of vending machines and related products, supplies, and services is subject to certain statutory restrictions [*Civ. Code § 1812.200 et seq.*]. A "seller assisted marketing plan" is any sale or lease or offer to sell or lease any product, equipment, supplies, or services that requires an initial payment of from more than $500 to less than $50,000 in cash when the seller has represented that the buyer "will earn, is likely to earn, or can earn" an amount in excess of the initial payment, that there is a market for the subject of the plan, and that the seller will buy the product or equipment back [*see Civ. Code § 1812.201(a)*]. The purpose of the statute is to provide prospective purchasers with information necessary to make an intelligent decision regarding the plansbeing offered, to safeguard the public against deceit and financial hardship, to require adequate disclosure by sellers, to prohibit misleading representations, and to prohibit or restrict unfair contract terms [*Civ. Code § 1812.200*]. Thus, any representation regarding a buyer's ability to earn an amount in excess of the purchase price, including a representation that it is *possible* to earn income exceeding the cost of the seller's products and services, is within the scope of the statute [People ex rel. Brown v. iMergent, Inc. (2009) 170 Cal. App. 4th 333, 339-341, 87 Cal. Rptr. 3d 844 (in light of statutory purpose, *Civ. Code § 1812.201(a)*'s reference to representation that buyer "will earn, is likely to earn, or can earn" amount in excess of initial payment is not unconstitutionally vague)].

These statutory provisions regulate certain sellers or lessors of vending machines or vending machine products, supplies, or services by requiring that they follow prescribed filing [*Civ. Code §§ 1812.203, 1812.214*], bookkeeping [*Civ. Code § 1812.213*], and disclosure requirements [*Civ. Code §§ 1812.205, 1812.206*]. Any seller assisted marketing plan contract must be in writing and contain specified information including a notification of the vending machine owner or operator's right to cancel the contract [*see Civ. Code §§ 1812.207-1812.209*]. Seller assisted marketing plans are currently regulated by the Attorney General's Office [*Civ. Code § 1812.203*].

For further discussion of seller assisted marketing plans, including definitions of important terms, see *§§ 93.220[1]-93.222[1]*.

Legal Topics:

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[Reserved]

§§ 93.15[Reserved]

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30-93 California Legal Forms--Transaction Guide § 93.100

§ 93.100 Facts

1. Names, addresses, and telephone numbers of the parties:

a. Vending machine operator.

b. Location owner or occupant.

c. Seller of seller assisted marketing plan, if:
(1) Seller will perform services in connection with placement of equipment at the location; or

(2) Seller assisted marketing plan contract governs or should govern operator's purchase or lease of vending machines [*see § 93.140* et seq.].

2. Legal status of parties as corporation, limited liability company, partnership, or sole proprietorship.

3. Names, addresses, and telephone numbers of any corporate shareholders or individual partners.

4. Determine financial profile and business experience of vending machine operator:

a. Number of years in vending business and size and scope of present operations.

b. Whether vending machine operator is or should be a party to a seller assisted marketing plan contract [*see § 93.140* et seq.].

5. Address of location where vending machines are to be placed.

6. Type of location involved, e.g., restaurant, office building, apartment house, bus terminal.

7. Name, address, and telephone number of location owner, if other than its present occupant.

8. Interest of present occupant in location if other than owner, e.g., lessee under a 10-year lease.

Legal Topics:

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§ 93.101 Documents

1. Articles of incorporation and bylaws of any corporate party and partnership agreement of any party that is a partnership.

2. Available financial statements of parties or bank account statements, documents of indebtedness, or other indicia of net worth.

3. Copies of any lease or purchase agreement covering:

a. The premises on which vending machines are to be located.

b. Placement of vending machines on premises.

4. Copies of any other location contracts which client currently has in force with this or any other party.

5. Copies of all seller assisted marketing plan documents which relate to operator's current lease or ownership of vending machines.

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-93 California Legal Forms--Transaction Guide §§ 93.102-93.119

[Reserved]

§§ 93.102[Reserved]

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30-93 California Legal Forms--Transaction Guide § 93.120

§ 93.120 Preliminary Determinations

1. Determine needs and objectives of the parties in order to determine what form or type of written agreement will best satisfy those needs.

2. Select the appropriate form for agreement.

    a. Simple receipt [*see § 93.200*].

    b. Lease of space [*see § 93.201*].

    c. Letter agreement [*see § 93.202*].

    d. Formal agreement [*see § 93.203-93.205*].

3. If formal written agreement is selected, determine which type of agreement will be involved.

    a. Single-machine agreement [*see § 93.203*].

    b. Full-line agreement [*see § 93.204*].

    c. Combination vending and food service agreement [*see § 93.205*].

Legal Topics:

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30-93 California Legal Forms--Transaction Guide § 93.121

§ 93.121 Introductory and Recital Clauses

1. Select appropriate short form names for the parties.

NOTE:
Normally terms such as "Proprietor" or "Location" are used to refer to the location owner and terms such as "Operator" or "Company" are used to refer to the vending machine operator.

2. Determine whether recitals are to be used and, if so, what facts are to be included.

NOTE:
Recitals normally contain such information as legal status of parties and capacity to enter into the particular agreement, plus any preliminary facts giving rise to the agreement, such as fact that one of the parties is the owner of a restaurant and the other party is the operator of a vending machine business.

Legal Topics:

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30-93 California Legal Forms--Transaction Guide § 93.122

§ 93.122 Exclusive Grant Clause

1. Determine whether an exclusive grant is desired by the parties and whether it will be practical [*see §§ 93.203[2]*, P 1, *93.204[2]*, P 1, *93.205[2]*, P 1].

NOTE:

The vending machine operator will ordinarily want the exclusive right to provide vending service on the premises of the location owner, free from competition from other vending machines as well as from direct selling by the location owner or anyone else. In some instances, however, an exclusive grant will be impractical, such as in the installation of a soft drink machine in a supermarket.

2. If the grant is not to be exclusive, determine scope of grant and extent to which other sales on premises are to be permitted.

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30-93 California Legal Forms--Transaction Guide § 93.123

§ 93.123 Vending Machines--Installation, Ownership, Maintenance, and Service

1. Determine number and type of machines to be installed and where they are to be placed [*see §§ 93.203[2]*, P 2, 93.204[2], P 2, 93.205[2] P 3].

2. Consider whether and to what extent replacement or substitution of machines should be permitted without requiring a rewriting of entire agreement [*see §§ 93.203[2]*, PP 3, 4, 93.204[2], P 3].

3. To protect rights of the vending operator against creditors of the location owner, consider inclusion of an express provision relating to ownership of vending machines which have been installed on premises [*see §§ 93.203[2]*, P 8, 93.204[2], P 4, 93.205[2] P 4].

4. Determine allocation between parties as to risks of loss, damage, or theft of or from vending machines [*see §§ 93.203[2]*, P 10, 93.204[2], P 15].

5. Determine duties of respective parties with regard to maintenance of machines and of premises and with regard to notice of machine failures or other matters needing attention [*see §§ 93.203[2]*, PP 11, 12, 93.204[2], P 9, 93.205[2] P 13].

6. Determine allocation of control over pricing and selection of goods offered for sale [*see §§ 93.203[2]*, P 9, 93.204[2], P 13].

7. Determine which party is to furnish and bear expense of utility and service connections [*see §§ 93.203[2]*, P 13, 93.204[2], P 10, 93.205[2] P 14].

Legal Topics:

For related research and practice materials, see the following legal topics:

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30-93 California Legal Forms--Transaction Guide § 93.124

§ 93.124 Commission Payments, Records, and Statements

1. Determine what form of compensation will be paid to location owner for the use of premises.

NOTE:
The commission may be a straight percentage of gross sales, or may be based on a schedule broken down by type and quantity of sales, or may consist of a profit-loss sharing type of agreement with provision for a management fee (as in the case of a food service operation) [*see §§ 93.203[2]*, P 5, 93.204[2], PP 5, 6, 93.205[2] PP 5, 6].

2. Consider whether vending operator should have the right to adjust the commission rate to reflect changes in taxes, costs, or other variables [*see § 93.204[2]* P 6].

3. Determine what records are to be required of receipts from operation and what statements are to be prepared and whether payment of commission is to accompany statement [*see §§ 93.203[2]*, P 6, 93.204[2], P 7, 93.205[2] P 8].

4. Determine whether and to what degree the location owner will be given the right to be present at the time that collections are made and extent to which location owner will be permitted to inspect records [*see §§ 93.203[2]*, P 6, 93.204[2], P 7, 93.205[2] P 8].

Legal Topics:

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30-93 California Legal Forms--Transaction Guide § 93.125

§ 93.125 Insurance and Indemnity Provisions

1. Determine whether and to what extent parties will be required to carry insurance. [*see §§ 93.203[2]*, P 15, 93.204[2], P 19, 93.205[2] P 19].

2. Determine extent to which each party will agree to indemnify the other party against claims made by persons injured by other party or its agents [*see §§ 93.203[2]*, P 15, 93.204[2], P 19, 93.205[2] P 19].

3. Consider inclusion of provision expressing intention of the parties that vending operator be an independent contractor and not an employee, agent, or joint venturer if such is the intention of the parties [*see §§ 93.203[2]*, P 16, 93.204[2], P 24, 93.205[2] P 25].

NOTE:
While such a clause will not be determinative of the status of the parties, it will have some weight as an expression of the parties' intention.

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-93 California Legal Forms--Transaction Guide § 93.126

§ 93.126 Term, Termination, and Breach

1. Determine length of agreement and consider whether provision should be made for automatic renewal [*see §§ 93.203[2]*, P 7, 93.204[2], P 20, 93.205[2] P 21].

2. Determine by whom and under what circumstances agreement may be terminated prior to expiration of its normal term [*see §§ 93.203[2]*, P 18, 93.204[2], P 21, 93.205[2] P 22]:

a. By either party by giving notice to the other. [*see §§ 93.204[2]*, P 21(a), 93.205[2] P 22(a)].

NOTE:
Consider whether the location owner should be required to pay a predetermined sum to the vending operator to compensate the operator for the expenses of installation should the location owner elect to terminate the agreement during, for example, the first six months.

b. By either party upon breach by the other [*see §§ 93.203[2]*, P 18(a), 93.204[2], P 21(c), 93.205[2] P 22(c)].

NOTE:
Consider whether the defaulting party should be given a period, such as five days, in which to cure a breach after receiving notice of the breach from the other party.

c. By vending operator due to unprofitability of operation [*see §§ 93.203[2]*, P 18(b), 93.204[2], P 21(b), 93.205[2] P 22(b)].

3. Consider inclusion of a provision requiring each party to comply with all applicable laws [*see §§ 93.203[2]*, P 17,

93.204[2], P 17, 93.205[2] P 17].

Legal Topics:

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30-93 California Legal Forms--Transaction Guide § 93.127

§ 93.127 Standard Contractual Provisions

1. Determine whether agreement will be assignable by either or both parties [*see §§ 93.203[2]*, P 19, 93.204[2], P 28, 93.205[2] P 28].

2. Determine manner in which notices are required or permitted to be given under the agreement and to what addresses [*see § 93.204[2]*, P 25, § 93.205[2], P 26].

3. Consider inclusion of a provision which suspends performance of agreement in event of an interruption in business operations from a force beyond control of the parties, such as fire, earthquake, war, riot, or strike [*see §§ 93.204[2]*, P 27, 93.205[2] P 27].

4. Consider inclusion of a provision stating that agreement constitutes final understanding between the parties [*see §§ 93.203[2]*, P 20, 93.204[2], P 29, 93.205[2] P 29].

5. Determine where the contract is to be entered into and where it is to be performed.

NOTE:
Although a choice of law provision will not be necessary in the typical situation, it may be desired if the vending company operates in more than one state. The state whose law is chosen should bear a reasonable relation to the contract and ordinarily will be the state where the premises are located [***see*** *§§ 93.204[2]*, P 30, 93.205[2] P 30].

Legal Topics:

For related research and practice materials, see the following legal topics:
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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 93 AGREEMENTS FOR AUTOMATIC MERCHANDISING
PART III. TRANSACTION GUIDE
B. Drafting the Location Contract

30-93 California Legal Forms--Transaction Guide §§ 93.128-93.139

[Reserved]

§§ 93.128[Reserved]

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DIVISION VI: PERFORMANCE OF SERVICES
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C. Drafting Seller Assisted Marketing Plan Documents

30-93 California Legal Forms--Transaction Guide

NOTE:

The seller assisted marketing plan contract provisions of the Civil Code [*Civ. Code § 1812.200 et seq.*] only pertain to certain sellers or lessors of vending machines and vending machine products, supplies, or services [***see*** *Civ. Code § 1812.201*]. These Civil Code provisions were enacted to protect individuals who are inexperienced in business matters and who are investing substantial portions of their life savings to purchase or lease vending machines and other related equipment, products, or supplies by requiring certain disclosures and contract terms from the sellers or lessors of these items [***see*** *Civ. Code § 1812.200*].

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30-93 California Legal Forms--Transaction Guide § 93.140

§ 93.140 Preliminary Determinations

1. Determine whether contract of sale or lease of vending machines qualifies under definition of seller assisted marketing plan contract [*see Civ. Code § 1812.201(a), (j)*].

NOTE:

A "seller assisted marketing plan" is any sale or lease or offer to sell or lease any product, equipment, supplies, or services that requires an initial payment of from more than $500 to less than $50,000 in cash when the seller has represented that the buyer "will earn, is likely to earn, or can earn" an amount in excess of the initial payment, that there is a market for the subject of the plan, and that the seller will buy the product or equipment back [see *Civ. Code § 1812.201(a)*]. Thus, any representation regarding a buyer's ability to earn an amount in excess of the purchase price, including a representation that it is *possible* to earn income exceeding the cost of the seller's products and services, is within the scope of the statute [People ex rel. Brown v. iMergent, Inc. (2009) 170 Cal. App. 4th 333, 339-341, 87 Cal. Rptr. 3d 844 (*Civ. Code § 1812.201(a)*'s reference to representation that buyer "will earn, is likely to earn, or can earn" amount in excess of initial payment is not unconstitutionally vague)].

2. Determine whether vending machine seller or lessor comes within definition of "seller" [*see Civ. Code § 1812.201(c), (d)*].

3. Determine whether offer to sell or to lease or sale or lease of vending machines, occurred in California [*see Civ. Code §1812.202*].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawDistributorships & FranchisesGeneral OverviewContracts LawTypes of ContractsGeneral OverviewGovernmentsAgriculture & FoodProcessing, Storage & Distribution

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30-93 California Legal Forms--Transaction Guide § 93.141

§ 93.141 Initial Procedures

1. Determine who will be seller's agent authorized to receive service of process for seller, and file appropriate consent with Secretary of State [*see Civ. Code § 1812.214*].

NOTE:
If the seller is other than a California corporation, the designation of the Secretary of State as the seller's agent to receive service of process is mandatory, and must be filed with the Attorney General [*Civ. Code § 1812.214(a)*].

2. Determine whether seller must obtain a surety bond or establish a trust account and, if required, obtain bond or establish trust account in prescribed manner [*see Civ. Code §§ 1812.204, 1812.214(b)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesGeneral OverviewContracts LawTypes of ContractsGeneral OverviewGovernmentsAgriculture & FoodProcessing, Storage & Distribution

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30-93 California Legal Forms--Transaction Guide § 93.142

§ 93.142 Disclosure Statement by Seller

1. Draft seller's disclosure statement, including information required by law [*see Civ. Code § 1812.205*; *see also § 93.220*].

2. Direct seller to file a copy of disclosure statement and other required list with California Attorney General [*see Civ. Code § 1812.203*; *see also § 93.220[1]*].

3. Direct seller to give purchaser the disclosure statement either [*Civ. Code § 1812.205*]:

a. In their first in-person communication, or

b. In seller's first written response to vending machine operator's inquiry about seller assisted marketing plan.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesGeneral OverviewContracts LawTypes of ContractsGeneral OverviewGovernmentsAgriculture & FoodProcessing, Storage & Distribution

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30-93 California Legal Forms--Transaction Guide § 93.143

§ 93.143 Information Sheet From Seller

1. Draft seller's information sheet, including all information required by law [*see Civ. Code § 1812.206*; *see also § 93.221*].

2. Direct seller to give vending machine operator the information sheet either [*Civ. Code § 1812.206*]:

a. At least 48 hours before execution of plan contract or agreement, or receipt of any consideration, whichever occurs first; or

b. If combined with disclosure statement [*see § 93.220*], at same time disclosure statement is given to vending machine operator, provided this time is at least 48 hours before execution of plan contract or agreement, or receipt of any consideration, whichever occurs first.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesGeneral OverviewGovernmentsAgriculture & FoodProcessing, Storage & Distribution

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30-93 California Legal Forms--Transaction Guide § 93.144

§ 93.144 Seller Assisted Marketing Plan Contract

1. Draft seller assisted marketing plan contract.

    a. Contract must be in writing [*Civ. Code § 1812.207*]

    b. Include information required by statute [*see Civ. Code § 1812.209*; *see also § 93.222*].

2. Have seller and vending machine operator execute contract.

3. Give vending machine operator copy of contract.

NOTE:
The vending machine operator must receive a copy of the contract [*Civ. Code § 1812.207*].

4. Direct seller to maintain all seller assisted marketing plan documents relating to sold or leased plan in seller's files for four years after date of contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesBusiness Opportunities

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30-93 California Legal Forms--Transaction Guide §§ 93.145-93.199

[Reserved]

§§ 93.145[Reserved]

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30-93 California Legal Forms--Transaction Guide § 93.200

§ 93.200 Receipt for Vending Machine

[1] Comment--Use of Form

This form is a receipt for a vending machine. The receipt is the simplest form of written agreement covering the installation of a vending machine on the premises of a location owner. The receipt is basically an acknowledgment by the location owner that one or more described machines have been installed on the premises. In addition to the acknowledgment of installation, the receipt may also set forth the commission rate to be paid to the location owner, the frequency of collection and servicing of the machines, and the ownership interest in the machines.

Because the receipt does not include many essential terms, it should be used only in limited circumstances when the parties do not wish a more complete written agreement and when a small financial investment is involved, as in the case of bulk vending machines that dispense candy, nuts, or gum. Under the receipt form of agreement, either party may terminate at will, and therefore such an agreement should not be used if installation or removal of the machines will be difficult or expensive. A more complete agreement should be used in such cases.

[2] FORM

Receipt for Vending Machine

RECEIPT

RECEIPT is hereby acknowledged of _____[*e.g.*, one bulk gum vending machine, serial number _____] installed on the premises of _____[*name of location owner*] at _____[*address of location*] by _____[*name of vending machine operator*] and to be operated, serviced, and maintained by it. In consideration of that installation, _____[*name of location owner*] is to receive _____ percent of the gross monthly proceeds from the machine[s], that sum to be paid within _____ [*e.g.*, five] days after the end of each month. It is understood and agreed that the vending machine[s] _____[is *or* are] and shall remain the property of _____[*name of vending machine operator*] and shall not be removed from the described premises except by _____[*name of vending*

machine operator] or its authorized representative.
Dated: _____.

_____ [*name of location owner*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-93 California Legal Forms--Transaction Guide § 93.201

§ 93.201 Agreement Between Location Owner and Vending Machine Operator--Lease of Space for Vending Machines

[1] Comment--Use of Form

This form is for use when the parties desire that their agreement be embodied in the form of a lease. The main purpose of this type of agreement is to provide a definite term during which the vending machine operator will be able to keep his vending machines on the premises of the location owner. This form of agreement differs from the normal lease in that the amount of the "rental" payment is based on the gross receipts of the vending machine operator rather than a fixed monthly sum. The use of this form of agreement rather than the normal location contract may bring into play landlord-tenant laws and procedures which would not otherwise be applicable.

[2] FORM

Agreement Between Location Owner and Vending Machine Operator--Lease o f Space for Vending Machines

LEASE OF SPACE FOR VENDING MACHINES

AGREEMENT made this _____ day of _____, 20 _____, by and between _____[*name of location owner*], hereinafter referred to as the "Lessor," and _____[*name of vending machine operator*], hereinafter referred to as the "Lessee."

In consideration of the mutual covenants and promises herein contained, it is agreed:

Lease of Portion of Premises

1. In order that the Lessee may install certain vending machines and sell products through the machines to patrons, the Lessor leases to the Lessee the portion of Lessor's premises described in Schedule A attached hereto and made a part

hereof [*or* as follows: _____ (*common description of portion of premises*)].

Compensation to Lessor

2. Lessee shall pay to Lessor as rental for the portion of premises so leased a sum equal to _____ percent of the gross receipts derived from sales of products through the vending machines during the term of the Lease.

Statements and Payments

3. (a) Lessee shall furnish to Lessor not later than the fifth [*or specify other*] day of each month a complete statement of all sales of products through the installed machines during the preceding month, which shall include a statement of the amount due from Lessee to Lessor for that month, computed as specified in Paragraph 2 hereof.

(b) Simultaneously with the furnishing of the statement, Lessee shall pay to Lessor the amount so computed and due to Lessor.

Property of Lessee

4. The vending machines so installed are and shall remain the property of Lessee. They are not to be removed during the continuance of this Lease by anyone other than the Lessee or a duly authorized representative.

Term of Lease

5. The term of this Lease is _____[*e.g.,* three years] from the date of execution. Thereafter, unless either party gives notice of termination of the occupancy to the other party, Lessee shall continue to occupy the designated portion of the premises on a month-to-month basis but otherwise on the same terms and conditions.

Termination for Cause

6. In the event either party hereto breaches this Lease, unless such breach is cured within _____[*e.g.,* 72 hours] after written notice thereof, the other party may terminate this Lease forthwith by notice to the breaching party.

Assignment

7. It is understood by both parties hereto that this Lease is not assignable.

Executed on _____, 20 _____, at _____[*city*], California.

LESSOR
_____ [*lessor*]
By _____ [*signature*]
[*typed name and title*]

LESSEE
_____ [*lessee*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral OverviewGovernmentsAgriculture & FoodProcessing, Storage & Distribution

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30-93 California Legal Forms--Transaction Guide § 93.202

§ 93.202 Agreement Between Location Owner and Vending Machine Operator--Letter Agreement for the Installation and Servicing of One or More Vending Machines

[1] Comment--Use of Form

The letter form of agreement permits the combination of a basic and informal style with a written embodiment of the terms and conditions of the contract between the parties. While the letter agreement ordinarily lacks the precision, detail, and complexity of the formal written agreement, it permits the expression of the terms of the agreement in language that is meaningful to and readily understood by the average layman, and therefore is more acceptable to him.

[2] FORM

Agreement Between Location Owner and Vending Machine Operator--Letter Agreement for the Installation and Servicing of One or More Vending Machines

[*Letterhead of operator*]

_____ [*date*]
_____ [*Name and address of owner of premises*]

Dear _____

In accordance with our conversation of _____, 20_____, relating to installation of a vending machine at your place of business, this Company _____ [*or make other designation as appropriate*] offers the following proposition to you.

We will install on your premises at _____[*street address, city, and state*], in the location which you have designated, namely _____ [*brief description of location*], one automatic vending machine for the sale of _____ [*specify products*] through the machine to patrons.

We will maintain, operate, and service the vending machine until further notice [*or specify definite term*], and in consideration for your permission to install and maintain the machine we will pay you a sum equal to _____ percent of the gross receipts derived from the sale of the products through the machine, such sum to be computed for each month and paid to you not later than the fifth [*or specify other*] day of the following month.

It is understood that the vending machine is and shall remain the personal property of this Company and only a duly authorized representative of it may remove the machine.

[*Add additional provisions if required by the particular transaction.*]

If this letter expresses your understanding of our agreement, kindly sign one copy hereof under the word "accepted" below and return it to us for our files.

Sincerely yours,
_____ [*operator*]
By _____ [*signature*]
[*typed name and title*]

Accepted:
_____ [*owner*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
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30-93 California Legal Forms--Transaction Guide § 93.203

§ 93.203 Agreement Between Location Owner and Vending Machine Operator--Agreement for the Installation and Servicing of Single Type of Machine

[1] Comment--Use of Form

This form constitutes what is known in the vending industry as a "single machine agreement." The form is for use by a vending machine operator who plans the installation of a single type of machine, on the premises of a location owner. The single machine agreement avoids some of the additional problems that may occur with a full-line or full-service agreement with multiple commission schedules and provisions for varying the numbers and types of machines placed on the premises.

[2] FORM

Agreement Between Location Owner and Vending Machine Operator--Agreement for the Installation and Servicing of Single Type of Machine

VENDING MACHINE AGREEMENT

AGREEMENT made this _____ day of _____, 20 _____, by and between _____[*name of location owner*], hereinafter referred to as the "Proprietor," and _____[*name of vending machine operator*], hereinafter referred to as the "Operator."

Recitals

1. The Operator is a sole proprietor [*or* partnership *or* corporation] with principal office and place of business at _____[*address*], City of _____, State of California, and is engaged in the business of installing and operating automatic vending machines at various business locations and of selling articles of merchandise, food, and beverage to the public through such machines.

2. The Proprietor is the owner [*or* operator] of a [*e.g.,* restaurant] located at _____[*address*], City of _____, State of California.

3. The Operator desires to install one or more automatic vending machines on the premises of the Proprietor for the sale of _____ [*e.g.,* soft drinks], and the Proprietor desires to grant to the Operator a license for such purpose on the terms and conditions contained in this Agreement.

THEREFORE, in consideration of the mutual covenants and promises herein contained, it is agreed:

Exclusive Grant

1. The proprietor hereby grants to the Operator the exclusive right and privilege to install, operate, and maintain one or more _____[*specify type, e.g.,* soft drink] vending machines on the premises owned [*or* leased *or* operated] bythe Proprietor at _____[*address*], City of _____, California, and it is expressly understood and agreed that all sales of _____[*specify type, e.g.,* soft drinks] on the aforementioned premises of the proprietor shall be by means of the _____[*specify type, e.g.,* soft drink] vending machines installed and operated by the Operator and that the Proprietor shall not cause or permit the sale of _____[*specify type, e.g.,* soft drinks] or the operation of a _____[*specify type, e.g.,* soft drink] vending machine or machines by any other person, firm, or corporation, including the Proprietor.

Installation of Machines

2. The Operator shall install on the premises of the Proprietor at a location mutually agreed upon by the parties the following _____[*specify type, e.g.,* soft drink] vending machines:

Kind	Serial Number
1. _____	_____
2. _____	_____

Removal and Replacement of Machines

3. The Operator shall have the right to remove any of the machines installed on the premises of the Proprietor under this Agreement and to replace any such machine with a vending machine of similar type, quality, and appearance.

Increase or Decrease in Numbers of Machines

4. The Operator shall have the right to increase or decrease the number of machines installed on the premises of the Proprietor to adjust to changes in demand, sales, or economic conditions, provided, however, that at least one machine shall be provided at all times during the term of this Agreement. The Proprietor shall have the right to impose reasonable restrictions on the number or placement of machines if such number or placement would interfere with the normal operation of the Proprietor's business.

Compensation

5. The Operator shall pay to the Proprietor for the exclusive right to sell _____[*specify type, e.g.,* soft drinks] on the described premises _____ percent of the gross receipts from sales through the vending machines [*or* the sum of _____ cents per can of soft drinks sold]. The Operator shall have the right to adjust the commission due the Proprietor hereunder to reflect any increase in _____[*e.g.,* wholesale soft drink costs license fees, or any other federal, state or local taxes affecting the cost of soft drinks] over the amounts prevailing on the date of the execution of this Agreement.

Records and Statements

6. The Operator shall maintain a complete and accurate record of all sales made through the vending machines located on the premises of the Proprietor and covered by this Agreement and shall, within _____[*e.g.,* 10 days] after the end of each month, submit a statement of such sales and of the commissions due the Proprietor under Paragraph 5 of this Agreement. Payment in full for such commissions shall accompany the statement.

Term

7. This Agreement shall be for a term of _____[*e.g.,* one year] from the date of its execution and shall continue in full force and effect for succeeding _____ [*e.g.,* one-year] periods unless terminated in writing at least _____[*e.g.,* 30] days prior to the expiration of the then current period.

Ownership of Machines

8. It is agreed by the parties that the vending machines installed on the premises of the Proprietor by the Operator shall remain the property of the Operator. On termination of this Agreement by any means the Operator shall have the right without further notice to the Proprietor to remove any and all of the vending machines belonging to the Operator which have been installed on the premises of the Proprietor.

Selection and Pricing

9. The Operator shall keep the machines stocked at all times with sufficient quantities of _____[*specify type, e.g.,* soft drinks] to insure continuous service to the patrons of the Proprietor. The Operator shall have sole control over the selection of brands of _____[*specify type, e.g.,* soft drinks] to be offered for sale through the vending machines and of the prices at which they are offered for sale, but the Operator shall seek, to the extent possible, to offer the patrons of the Proprietor a wide selection of brands at competitive prices.

Risk of Damage to Machines

10. Except as it may be attributable to the Proprietor by reason of the negligence of its officers, agents, or employees while acting within the scope of their employment, the Operator assumes the full risk and responsibility for any loss, destruction, or damage occurring to the vending machines.

Maintenance and Service

11. The Operator shall regularly service, clean, and maintain the described vending machines and shall promptly and at

its own expense repair or replace faulty or defective parts or equipment or broken glass.

Notification of Machine Failure

12. The Proprietor agrees to notify the Operator promptly of any failure of the_____[*specify type, e.g.,* soft drink] vending machines to function properly and further agrees to permit only authorized agents of the Operator to remove, open, or in any way tamper with the machines.

Utilities

13. The Proprietor shall furnish and bear the cost of all utilities necessary for the operation of the _____[*specify type, e.g.,* soft drink] vending machines installed under this agreement and shall furnish suitable electrical outlets for use by those machines.

Fees and Taxes

14. The Operator shall be responsible for and shall pay all state, county, and city license fees and sales or other merchandising taxes that may be imposed on the sales of _____[*specify type, e.g.,* soft drinks] through its vending machines.

Insurance

15. The Operator shall obtain and continue in force suitable policies of insurance to cover its potential liability for injury or damage to persons or property arising from the operation of its vending business and shall indemnify and hold the Proprietor harmless from any claims arising out of the actions of the Operator or its employees in installing, removing, or servicing any of the vending machines covered by this Agreement or carrying on any other activities on the premises of the Proprietor.

Relation of Parties

16. It is the intention of the parties that the Operator be an independent contractor and that no agency or employment relationship be created by this Agreement.

Compliance With Laws

17. Each party shall comply with all federal, state, local, or other laws or regulations applicable to the sale of _____[*specify type, e.g.,* soft drinks] through vending machines.

Termination

18. (a) This Agreement may be terminated by either party if the other party defaults in the performance of an obligation or materially breaches any of the terms or conditions of this Agreement and fails to cure the default or breach within five days after service of written notice on him or her of the default or breach.

(b) This Agreement may be terminated by the Operator if, during any period, sales from the vending machines fall below _____[*e.g.*, _____ cans per week].

Assignment

19. This Agreement shall not be assignable by either party without the prior written consent of the other party. Subject to this limitation, this Agreement is binding on the successors and assigns of the respective parties.

Entire Agreement

20. This Agreement constitutes the entire agreement of the parties with respect to the subject matter of the agreement and supersedes any and all other agreements, either oral or in writing.

Executed at _____[*city*], California, on _____[*date*].

PROPRIETOR
_____ [*name of proprietor*]
By _____ [*signature*]
[*typed name and title*]

OPERATOR
_____ [*name of operator*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral OverviewGovernmentsAgriculture & FoodProcessing, Storage & Distribution

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DIVISION VI: PERFORMANCE OF SERVICES
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30-93 California Legal Forms--Transaction Guide § 93.204

§ 93.204 Agreement Between Location Owner and Vending Machine Operator--Agreement for the Installation and Servicing of Full Line of Machines

[1] Comment--Use of Form

This form is for use in conjunction with a full-line vending machine operation when several types of machines are involved. This agreement also contemplates that an area adjacent to the vending machines will be provided with tables and chairs for use by vending machine patrons and others for eating and general relaxation. A basic feature of this agreement is the multiple-commission schedule which provides for the payment of commissions at varying rates for each of the enumerated classes of products sold through the vending machines.

[2] FORM

Agreement Between Location Owner and Vending Machine Operator--Agreement for the Installation and Servicing of Full Line of Machines

VENDING MACHINE AGREEMENT

AGREEMENT made on _____[*date*] between _____[*name of location owner*], the "Proprietor," and _____[*name of vending machine operator*], the "Operator."

Recitals

1. The Operator is a corporation [*or* partnership *or* sole proprietorship] with its principal office and place of business at _____[*street address and city*], California, and is engaged in the business of installing and operating automatic vending machines at various business locations and of selling articles of merchandise, food, and beverage to the public through such machines.

2. The Proprietor is the owner [*or* operator] of an _____[*e.g.*, office building] located at

_____[*street address and city*], California.

3. The Operator desires to install and operate a vending machine complex with adjoining public eating area on the premises of the Proprietor, and the Proprietor desires to grant to the Operator a license for such purpose on the terms and conditions of this Agreement.

THEREFORE, in consideration of the mutual covenants and promises herein contained, it is agreed:

Exclusive Grant

1. The Proprietor grants to the Operator the exclusive right and privilege to operate a full-line vending service on the premises of the Proprietor located at _____[*street address and city*], California, and to sell _____[*specify e.g.*, hot and cold beverages, ice cream, fresh fruits, candy and confections] to employees, guests, and patrons of the Proprietor.

Installation of Machines

2. The Operator shall install on the premises of the Proprietor at such locations as agreed upon by the parties such food, and beverage, vending machines as the Operator determines to be necessary to supply the needs of the employees, guests, and patrons of the Proprietor [*or* such machines for the sale of products as are set forth in Schedule A attached to this agreement and incorporated by this reference]. The Operator shall have the right to remove any of the machines installed and to replace such machine with a machine of like quality and appearance.

Changes in Machines

3. The Operator shall have the right, with the approval of the Proprietor, to furnish additional machines as required to meet the needs of the vending machine customers. The Operator shall have the further right to remove any machines whose operation proves unprofitable.

Ownership of Machines

4. All machines placed on the premises of the Proprietor by the Operator hereunder are and shall remain the property of the Operator, and the Proprietor shall not permit anyone other than a duly authorized agent of the Operator to remove or in any way tamper with or change any of the machines. Except as it may be attributable to the Proprietor by reason of the negligence of its officers, agents, or employees while acting within the scope of their employment, the Operator assumes the full risk and responsibility for any loss, destruction, or damage occurring to the vending machines.

Schedule of Commissions

5. The Operator shall pay to the Proprietor a monthly commission computed on the gross receipts of all classes of goods sold each month at the rate or percentage on each class of goods as shown by the following schedule of commissions:

(a) Coffee:

_____ cent(s) per cup on all sales up to _____ cups

_____ cent(s) per cup on all sales over _____ cups

(b) Soft Drinks:

_____ % of monthly sales up to $ _____
_____ % of monthly sales over $ _____

(c) Milk and ice cream:

_____ % of monthly sales

(d) Confections (Candy, gum, and nuts]:

Percentage	Monthly Sales
_____ %	Less than $ _____
_____ %	$ _____ to $ _____
_____ %	$ _____ to $ _____
_____ %	Over $ _____

Adjustments of Commission Schedule

6. It is understood that the commissions to be paid by the Operator to the Proprietor as set forth in Paragraph 5 are based upon federal, state, and local sales and excise taxes existing at the date of the execution of this Agreement. In the event of any change in such tax rates, the schedule shall be adjusted to conform with the change in the tax rate by proportionally increasing or decreasing the commission payment.

Records and Statements

7. The Operator shall at all times keep an accurate and true record of all inventories supplied to the vending machines on the premises of the Proprietor and of all sales and collections made in connection with the Operator's vending machine operation on said premises. The Operator shall permit the inspection of such records during normal business hours by the Proprietor or Proprietor's authorized representative for the purpose of verifying the correctness of the accounts and of the amounts due to the Proprietor as commissions. The Operator shall submit to the Proprietor within _____ [*e.g.*, 10] days following the end of each month a complete statement of all sales made during the month and of the commissions due to the Proprietor under Paragraph 5 of this Agreement. The Operator shall remit payment in full for commissions due along with the monthly statement.

Furniture in Eating Area

8. The Proprietor shall provide a suitable area on its premises for the placement of the vending machines provided under this Agreement and for use by patrons of the vending machines for eating or for rest and relaxation. The Operator shall

select, purchase, and install in that eating area chairs and tables which meet with the approval of the Proprietor. The Operator shall be reimbursed for the cost of such furniture by retaining _____ percent of the monthly commissions otherwise due to the Proprietor until the cost of such furniture has been reimbursed in full. Title to the furniture shall remain in the Operator until full reimbursement has been made, and, in the event of the termination of this Agreement prior to complete reimbursement of the Operator, the balance remaining shall become due and payable by the Proprietor to the Operator within _____[*e.g.,* 30] days after such termination.

Maintenance and Service

9. (a) The Operator shall regularly inspect and service the vending machines covered by this Agreement and shall keep them operating and in good working order at all times and shall maintain them in a clean and sanitary condition in accordance with all applicable federal, state, and local laws.

(b) The Proprietor shall furnish and bear the expense of regular janitorial service for the area in which the vending machines covered by this Agreement are located and shall at all times keep the tables, chairs, and floor and wall areas around, behind, and under the vending machines clean and free from rodents, insects, or other pests.

(c) The Proprietor shall supply suitable waste disposal containers for the convenience of users of the vending machines and of the adjacent eating areas and shall provide and bear the expense of garbage removal and disposal services. All trash containers shall be emptied at least once daily.

Utility and Service Connections

10. The Proprietor shall furnish and bear the expense of all necessary heat, lighting, hot and cold water, and electricity that may be required for the operation of the vending machines and eating area and shall provide a sufficient number of utility outlets in convenient positions where the vending machines are to be located. The Proprietor shall provide continuous service to the machines and machine areas and shall not cause or permit the interruption of such service except in the event of an emergency. The Proprietor shall notify the Operator promptly of any interruption in service to the machines or machine area.

Electrically Operated Machines

11. All electrically operated vending machines furnished hereunder shall be equipped so as to provide thermal overload protection, and shall comply with Specification _____ and any amendments thereto hereafter issued with regard to the elimination of radio interference. In addition, all machines furnished hereunder shall bear the seal of approval of the Underwriters' Laboratories, Inc. All electrical equipment and wiring required to be installed to provide for the operation of the machines shall be installed in strict accordance with the applicable ordinances and regulations of the City of _____.

Storage Room

12. (a) Upon request of the Operator, the Proprietor shall provide a suitable room for the storage of products to be used in the vending machines operated by the Operator on the Proprietor's premises. The storage room shall have a door which may be locked so as to prevent unauthorized entry and shall contain a minimum of _____ square feet of floor area. The Proprietor shall furnishthe Operator with two sets of keys to that storage room and shall prevent entry to such storage room by unauthorized persons.

(b) All products and merchandise stored by the Operator in the storage room provided hereunder shall remain the property of the Operator, and the Operator shall bear the risk of loss or destruction of such products and merchandise, except by the negligent or willful conduct of the Proprietor or its agents or employees.

Selection and Pricing

13. The Operator shall have sole control over the selection and pricing of products and merchandise offered for sale in the vending machines placed on the premises of the Proprietor hereunder, but it shall attempt insofar as possible to supply a variety of standard brands of quality merchandise at competitive prices prevailing in the area. The Proprietor may, from time to time, make suggestions to the Operator relating to the selection, stocking, or pricing of goods offered or to be offered in its machines.

Service Personnel

14. (a) The Operator's service personnel shall at all times be dressed in clean uniforms and shall observe all regulations in effect on the Proprietor's premises.

(b) The Proprietor shall furnish the Operator's service personnel with such identification passes as may be required for entrance to or exit from the Proprietor's premises.

Supervision of Premises

15. The Proprietor shall at all times maintain adequate supervision of the premises upon which the vending machines and eating area furniture are contained and shall protect the premises and contents from fire, theft, vandalism, or other preventable hazards. The Proprietor shall bear the expense of losses due to the use of slugs or tokens by the patrons of the vending machines and for losses due to the theft of money or merchandise from the vending machines or the theft or breakage of furniture placed on the premises under this Agreement. The liability of the Proprietor in any such circumstance shall be limited to the lower of (1) the repair or replacement cost of furniture plus the value of money and merchandise lost or (2) $ _____ per occurrence.

Cash Fund for Refunds

16. The Proprietor shall maintain a cash fund to be supplied by the Operator for the reimbursement of vending machine patrons for sums lost due to malfunctions of the machines or machine mechanisms. The Proprietor shall maintain a record of the names of customers who are reimbursed, the dates and amounts of the losses, and of the machines which have malfunctioned. The Operator shall, from time to time, replenish the cash fund. The Proprietor shall notify the Operator promptly of any machine malfunctions that are brought to its attention.

Compliance With Laws

17. Both the Operator and the Proprietor shall comply with all applicable federal, state, or local laws relating to the sale of products through vending machines.

Fees and Taxes

18. The Operator shall be responsible for and shall pay all state, county, and city license fees and sales or other taxes that may be imposed on the sales of articles through its vending machines.

Insurance and Indemnity

19. (a) The Operator shall procure and maintain in full force and effect during the term of this Agreement the following policies of insurance:

(1) Comprehensive Bodily Injury, Property Damage, and Liability Insurance covering losses caused by the operation of automobiles, trucks, or other vehicles with limits of $ _____ for injury or death of one person and $ _____ for injury or death of two or more persons in any one accident, and $ _____ for property damage in any one accident, and also including bodily injury and property damage or loss caused by independent contractors or by agents of the Operator.

(2) Product Liability Insurance with minimum limits of $ _____ for injury or death of one person and $ _____ for each accident or occurrence to cover the liability of both the Operator and the Proprietor and the agents and employees of each.

(3) Worker's Compensation Insurance as prescribed by the laws of the State of California.

(b) In addition, the Operator agrees to indemnify and hold the Proprietor harmless from any claims arising out of the actions of the Operator or its agents or employees in installing, removing, or servicing any of the vending machines covered by this Agreement or in carrying on any other activities on the premises of the Proprietor.

Term

20. This Agreement shall be for a term of one year from the date of execution and shall be renewed automatically for successive one-year periods unless notice of termination is given by either party to the other at least _____[*e.g.,* 30] days prior to the expiration of the then current yearly period.

Termination

21. (a) Either party may terminate this Agreement by giving_____[*e.g.,* 60] days notice in writing to the other party of intention to terminate, provided, however, that the Proprietor may not terminate this Agreement during the first _____[*e.g.,* six months] without first paying the Operator the sum of $ _____ to cover in part the expenses incurred in installing the machines and equipment on the premises.

(b) This Agreement may be terminated at any time by the Operator by reason of the unprofitability of the operation by giving _____[*e.g.,* 10] days notice in writing to the Proprietor.

(c) This Agreement may be terminated by either party upon the default of the other party in the performance of an obligation or upon a material breach of any of the terms or conditions of this Agreement if such other party fails to cure the default or breach within _____[*e.g.,* five] days after service upon it of notice of the default or

breach.

Removal of Machines

22. Upon termination of this Agreement the Operator shall vacate the premises of the Proprietor and shall remove all vending machines and vending machine products which have been placed by it on the premises. The Operator shall not remove any of the tables, chairs, or other furniture installed under Paragraph 8 of this Agreement. The Operator shall, however, to the extent possible, restore the premises to their condition prior to the installation of the vending machines. In the event that the Operator fails to remove its machines and products, the Proprietor may have them removed and stored at the expense of the Operator.

Damages for Breach

23. (a) In the event that this Agreement is terminated by reason of a breach or default in performance by the Proprietor, the Operator shall be entitled to recover, in addition to any other sums to which he may be entitled, the unamortized expenses incurred in the installation of the vending machines and equipment on the premises of the Proprietor plus _____ percent of the average monthly gross receipts from the vending machine operation up to the time of breach multiplied by the number of months remaining under the contract at the time of termination, prorated to take into account any partial monthly period.

(b) In the event that this Agreement is terminated due to a breach or default by the Operator, the Proprietor shall be entitled to receive an amount for lost commissions, such amount to be calculated by multiplying the average monthly commissions earned up to the time of breach by the number of months remaining under the Agreement at the time of termination, prorated to account for any partial monthly period.

Independent Contractor Status

24. It is the intention and understanding of the parties that the Operator be an independent contractor hereunder and that no agency or employment relationship be created between the parties by this Agreement.

Notices

25. All written notices required to be given hereunder shall be addressed, in the case of the Proprietor, to it at _____[*address*], and, in the case of the Operator, to it at _____[*address*]. Either party may change his address for the purpose of receiving notice by giving the other party written notice of such change.

Alterations in Facilities

26. The Operator shall make no alterations in the premises covered by the Agreement unless authorized in writing by the Proprietor. The Proprietor agrees to notify the Operator of any alterations in the premises that may affect the operation of the vending machine service or which will affect any of the areas covered by this Agreement. The Proprietor shall cooperate with the Operator in making any alterations which may be necessary by the expansion of the vending machine operation to meet increases in customer demand.

Business Interruption

27. In the event that business operations on the premises of the Proprietor are interrupted or stopped on account of fire, earthquakes, war, strikes, or other causes beyond the control of the parties, the performance of this Agreement, with the exception of the payment of money already due and owing, shall be suspended and excused until such time as the business operations are again resumed, and the term of this Agreement shall be extended for a period of time equal to the length of time during which performance was suspended or excused, provided, however, that no such extension shall be made if the interruption is permanent or lasts for a period in excess of _____[*e.g.*, six months], and in such case, this Agreement may be terminated by either party by giving notice in writing to the other.

Assignment

28. This Agreement shall not be assignable by either party without the prior written consent of the other party. Subject to the foregoing limitation, this Agreement shall inure to the benefit of and be binding on the successors and assigns of the respective parties.

Entire Agreement

29. This Agreement constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes any and all other agreements, understandings, statements, or representations, either oral or in writing.

Governing Law

30. The validity of this Agreement and of any of its terms or provisions, as wellas the rights and duties of the parties hereunder, shall be interpreted and construed pursuant to and in accordance with the laws of the State of California.

Executed at _____[*city*], California, on the day and year first above written.

PROPRIETOR
_____ [*name of proprietor*]
By _____ [*signature*]
[*typed name and title*]

OPERATOR
_____ [*name of operator*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral OverviewGovernmentsAgriculture & FoodProcessing, Storage & Distribution

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 93 AGREEMENTS FOR AUTOMATIC MERCHANDISING
PART IV. FORMS
A. Location Contracts

30-93 California Legal Forms--Transaction Guide § 93.205

§ 93.205 Agreement Between Location Owner and Vending Machine Operator--Agreement for the Operation of Full Line Vending Machine and Food Service Facility

[1] Comment--Use of Form

This form is for use by a vending machine operator who will also operate a food service facility on the premises. This agreement provides for the subsidy of the food service operation by the location owner and the payment of a guaranteed management fee to the vending operator by the use of a profit and loss clause combined with the inclusion in operational costs of the fee for managing the food service operation. Also built into the profit and loss clause is a provision for an incentive bonus in the form of a share of the profits if the food service operation results in a profit above a specified level. Another feature of this agreement is the provision for catering services, which will provide additional revenues to the parties depending on who sponsors the event to be catered.

[2] FORM

Agreement Between Location Owner and Vending Machine Operator--Agreement for the Operation of Full Line Vending Machine and Food Service Facility

VENDING AND FOOD SERVICE AGREEMENT

AGREEMENT made this _____ day of _____, 20 _____, by and between _____[*name of location owner*], hereinafter referred to as the "Proprietor," and _____[*name of food service operator*], hereinafter referred to as the "Operator."

Recitals

1. The Operator is a corporation [*or* partnership *or* sole proprietorship] with its principal office and place of business at _____[*street address and city*], California, and is engaged in the business of installing and operating automatic vending machines and food preparation facilities at various business locations for the purposes of serving the

patrons and employees of such locations.

2. The Proprietor owns [*or* leases] a _____[*e.g.*, manufacturing plant] located at _____[*street address and city*], California, with a total of _____[*number*] employees.

3. The Operator desires to install and operate a complete vending and food service operation on the premises of the Proprietor, and the Proprietor desires to grant to the Operator an exclusive license for such purpose on the terms and conditions of this Agreement.

THEREFORE, in consideration of the mutual covenants and promises of the parties herein contained, it is agreed:

Exclusive Grant

1. The Proprietor grants to the operator the exclusive right, privilege, andlicense to sell food and beverage products on the premises of the Proprietor located at _____[*address*] and to install and operate a complete vending, catering, and food service operation on the premises.

Food Preparation Facilities

2. The Proprietor shall provide on its premises a fully equipped kitchen and food service facility for use in the preparation and dispensing of food in connection with the Operator's vending machine and manual food service operation. The facilities provided shall include dressing rooms and sanitary toilet facilities and shall comply with the provisions of the California Restaurant Act. The Proprietor shall make all normal repairs that may be required to maintain the food preparation facilities and equipment in operating condition.

Installation of Machines

3. The Operator shall install on the premises of the Proprietor at such locations as agreed upon by the parties such food and beverage, vending machines as the Operator determines to be necessary to supply the needs of the employees, guests, and patrons of the Proprietor [*or* such machines for the sale of foods and beverages, as are set forth in Schedule A attached to this agreement and incorporated by reference]. The Operator shall have the right to remove any machine installed hereunder and to replace those machines with a machine of like appearance and quality.

Ownership of Machines

4. All machines placed on the premises of the Proprietor by the Operator hereunder are and shall remain the property of the Operator, and the Proprietor shall not permit anyone other than a duly authorized agent of the Operator to remove or in any way tamper with or change any of the machines.

Compensation

5. (a) The Operator shall pay to the Proprietor a monthly commission of _____ percent of the gross receipts of all sales made through vending machines covered by this Agreement. The Operator shall have the right to adjust the commission rate payable hereunder to reflect any increase in federal, state, or local sales or excise taxes after the date of the execution of this Agreement.

(b) The costs of operation of the food service under this Agreement shall be determined pursuant to Paragraph 6 of this Agreement and subtracted from the receipts from the food service operation during each monthly period of this Agreement. If the food service operation, after the deduction of such costs, has resulted in a deficit, such deficit shall be borne by the Proprietor, and the Proprietor shall reimburse the Operator for the amount of such deficit. In the event that the operations result in a surplus and the amount of the surplus is less than $ _____, the entire surplus shall be paid to the Proprietor. If the amount of the surplus exceeds $ _____ in any one month, the Operator shall be entitled to _____ percent of such surplus in excess of $ _____ and the balance shall be paid to the Proprietor.

Operational Costs

6. The costs of the operation of the food service facilities shall be determined on an accrual basis according to accepted accounting principles consistently applied by the Operator and shall consist of the following items:

(a) The costs of all labor employed in the food service operations by the Operator.

(b) The costs of all merchandise, materials, and supplies used in such operations.

(c) The costs of all operating expenses including taxes, insurance, licenses, and other expenses.

(d) An amount equal to the greater of _____ percent of gross receipts or $ _____ per week for general and administrative expenses to reimburse the Operator for costs incurred in office overhead and special administrative services.

(e) A sum equal to the lesser of _____ percent of gross receipts or $_____ per week as a management fee to compensate the Operator for management services rendered in the operation of the food service facilities.

Catering Service

7. The Operator may use the food preparation facilities on the described premises in providing catering services for dinners and parties sponsored by groups of employees or other persons if the prior approval of the Proprietor is obtained. The Operator shall pay _____ percent of the gross receipts from any such catering services to the Proprietor. The Operator shall provide a catering service for events and special functions sponsored by the Proprietor for a fee of cost plus _____ percent. The Proprietor shall give the Operator at least _____[*e.g.*, 10] days notice of any such event or special function where catering services will be required.

Records and Statements

8. The Operator shall maintain an accurate record of all merchandise, sales, and collections made in connection with the vending machine operation under this Agreement and shall maintain a separate record of the operational costs of the manual food service operation hereunder. Such records shall at all times be open to inspection by the Proprietor or its accountants and shall be retained by theOperator for a period of _____[*e.g.*, three] years. The Operator shall submit to the Proprietor within _____[*e.g.*, 10] days following the end of each month a complete statement showing receipts from the vending machines operations during the preceding month and commissions due to

the Proprietor. The Operator shall submit a separate statement showing the receipts from, and the costs of operation of, the food service and the amount of any resulting profit or loss. Payment in full for any amounts due to the Proprietor shall accompany each statement.

Furniture in Eating Area

9. The proprietor shall provide a suitable area on its premises adjacent to the vending machines and food service area for use by patrons and employees as an area for eating or for rest and relaxation. The Operator shall select, purchase, and install in such eating area chairs and tables which meet with the approval of the Proprietor. The cost of the tables and chairs shall be depreciated over the life of this Agreement and reflected as a cost of operation of the food service. In the event that this Agreement is terminated prior to the expiration of its term, the Proprietor shall pay the unamortized balance remaining to the Operator within _____[*e.g.*, 30] days after any such early termination. The furniture shall remain the property of the Operator until such time as it has been fully depreciated or the Operator has been paid in full for any undepreciated balance and it shall then become the property of the Proprietor without any further action on the part of the Operator.

Alterations in Facilities

10. The Operator shall make no alterations in the premises covered by this Agreement unless authorized in writing by the Proprietor. The Proprietor agrees to notify the Operator of any alterations in the premises that may affect the operation of the vending machine service or which will affect any of the areas covered by this Agreement. The Proprietor shall cooperate with the Operator in making any alterations which may be necessary by the expansion of the vending machine operation to meet increases in customer demand.

Equipment and Supplies

11. The Proprietor shall supply necessary office equipment and furniture including desk, safe, filing cabinet, typewriter, and adding machine. The Operator shall supply expendable items such as dishes, flatware, glassware, silverware, and kitchen utensils and may include the cost of those items as part of the cost of operations hereunder.

Storage Room

12. (a) The Proprietor shall provide a suitable room for the storage of products and merchandise for use by the Operator in connection with its vending machine operation on the Proprietor's premises. The storage room shall be conveniently located so as to be near to the vending machine area and shall be furnished with a door which may be locked so as to prevent unauthorized entry. Such room shall contain a minimum of _____ square feet of floor area and shall be furnished with suitable shelves for storage purposes.

(b) All products and merchandise stored by the Operator in the storage room provided hereunder shall remain the property of the Operator, and the Operator shall bear the risk of loss or destruction of such products and merchandise, except by the negligent or willful conduct of the Proprietor or its agents or employees.

Maintenance and Sanitation

13. (a) The Operator shall operate and maintain all vending machines and all food service equipment in a clean and

sanitary condition in accordance with recognized standards for such equipment and in accordance with all applicable federal, state, and local laws and regulations. The Operator shall provide for the regular inspection, cleaning, service, and repair of all machines and equipment covered by this Agreement.

(b) The Proprietor shall furnish and bear the expense of regular janitorial services and shall keep the vending machine and food service areas in a clean and sanitary condition and free from rodents, insects, or other pests. The Proprietor shall be responsible for the cleaning of the walls, ceilings, windows, floors, and furniture in and around the vending machine and food service area and for the cleaning of all hoods, ducts, drapes, and light fixtures.

(c) The Proprietor shall supply suitable waste disposal containers for the convenience of users of the vending machines and food service and adjacent eating areas. The Proprietor shall provide and bear the expense of trash and garbage disposal and shall see that all trash and garbage containers are emptied at least once daily.

Utilities and Service Connections

14. The Proprietor shall furnish without cost to the Operator all necessary heat, light, electricity, hot and cold water, steam, and gas as may be required for the operation of the machines and facilities covered by this Agreement. The Proprietor shall further install electrical outlets where needed and shall provide garbage and sewage disposal service for the facilities. The Proprietor shall not cause or permit the interruption or stoppage of any of the utility or service connections provided hereunder except in emergency situations. In the event that any such service is interrupted or stopped, the Proprietor shall notify the Operator immediately.

Food Service Personnel

15. (a) The Operator shall be responsible for providing suitable personnel tooperate the vending and food service facilities and shall hire only employees who meet with prescribed health and cleanliness standards and who comply with applicable rules and regulations relating to the preparation of food. The Operator shall not retain in his employ on the Proprietor's premises any employee who does not meet with the approval of the Proprietor.

(b) The Operator's service personnel shall at all times be dressed in clean uniforms and shall observe all regulations in effect on the Proprietor's premises.

(c) The Proprietor shall furnish the Operator's service personnel with such identification passes as may be required for entrance to or exit from the Proprietor's premises.

Employees of Parties

16. Each party agrees not to interfere in any way with the employment relationship between the other party and its employees. Neither party shall hire an employee or former employee of the other within _____ [*e.g.*, six months] of the date of termination of their employment without written permission of the other party.

Compliance With Laws

17. Both the Operator and the Proprietor shall comply with all applicable federal, state, or local laws relating to the sale of products through vending machines and to the operation and maintenance of a food preparation and dispensing facility. The Proprietor shall permit the posting of all signs required by law.

Fees and Taxes

18. The Operator shall be responsible for and shall pay all state, county, and city license fees and sales or other taxes which may be imposed on the sales of articles through its vending machines or on the preparation and sale of food and beverages in connection with its food service operations.

Insurance and Indemnity

19. (a) The Operator shall procure and maintain in full force and effect during the term of this Agreement the following policies of insurance:

(1) Comprehensive Bodily Injury, Property Damage, and Liability Insurance covering losses caused by the operation of automobiles, trucks, or other vehicles with limits of $ _____ for injury or death of one person and $ _____ for injury or death of two or more persons in any one accident, and $ _____ for property damage in any one accident, and also covering bodily injury and property damage or loss caused by independent contractors or by agents or employees of the Operator.

(2) Products Liability Insurance with minimum limits of $ _____ for injury or death of one person and $ _____ for each accident or occurrence to cover the liability of both the Operator and the Proprietor and the agents and employees of each.

(3) Worker's Compensation Insurance as prescribed by the laws of the State of California.

(b) The Operator shall further indemnify and hold the Proprietor harmless from any and all claims arising out of the Operator's vending and food service operations, including claims arising out of the actions of the Operator or its agents or employees in installing, removing, or servicing vending machines or equipment, or in preparing and dispensing food and beverages, or in carrying on any other activities on the premises of the Proprietor.

Notice of Claims

20. The Proprietor shall promptly notify the Operator in writing of any claims against either the Proprietor or against the Operator arising out of the vending machine or food service operations covered by this Agreement and, in the event of suit, shall forward copies of all papers promptly to the Operator. The Proprietor shall make no settlement of any claim nor incur any expense in connection therewith without first notifying and obtaining the consent of the Operator.

Term

21. This Agreement shall be for a term of _____[*e.g.*, one year] from the date of execution and shall be renewed automatically for successive _____[*e.g.*, one-year] periods unless notice of termination is given by either party to the other at least _____[*e.g.*, 30] days prior to the expiration of the then current _____[*e.g.*, yearly] period.

Termination

22. (a) Either party may terminate this Agreement by giving _____[*e.g.*, 60] days notice in writing to the other party of that party's intention to terminate, provided, however, that the Proprietor may not terminate this Agreement during the first _____[*e.g.*, six months] without first paying the Operator the sum of $ _____ to cover in part the expenses incurred in installing the machines and equipment on the premises.

(b) The Operator may terminate this Agreement at any time due to the unprofitability of the vending machine and food service operations by giving _____[*e.g.*, 30] days notice in writing to the Proprietor.

(c) Either party may terminate this Agreement upon a default by the other partyin the performance of an obligation or upon a material breach of any of the terms or conditions of this Agreement by the other party if such other party fails to cure such default in performance or material breach within _____[*e.g.*, five] days after service of notice upon it of such default or breach.

Removal of Property

23. Upon termination of this Agreement the Operator shall vacate the premises of the Proprietor and remove all vending machines, equipment, and property belonging to the Operator. The Operator shall not, however, remove the chairs, tables, and other furniture installed under Paragraph 9 of this Agreement, nor shall it remove any of the equipment, fixtures, or property belonging to the Proprietor. Upon vacating the premises the Operator shall restore them to the extent possible to the condition existing at the time that the Operator entered the premises, allowing for normal wear and tear. In the event that the Operator fails to remove its machines or other property, the Proprietor may have such property removed and stored at the expense of the Operator.

Damages for Breach

24. (a) In the event that this Agreement is terminated by reason of a breach or default in performance by the Proprietor, the Operator shall be entitled to recover, in addition to any other sums to which the Operator may be entitled, the unamortized expenses incurred in the installation of the vending machines and equipment on the premises of the Proprietor plus _____ percent of the average monthly gross receipts from the vending machine operation up to the time of breach multiplied by the number of months remaining under the contract at the time of termination, pro-rated to take into account any partial monthly period.

(b) In the event that this Agreement is terminated due to a breach or default by the Operator, the Proprietor shall be entitled to receive an amount for lost commissions, and that amount is to be calculated by multiplying the average monthly commissions earned up to the time of breach by the number of months remaining under the Agreement at the time of termination, pro-rated to account for any partial monthly period.

Independent Contractor Status

25. It is the intention of the parties that the Operator be an independent contractor under this Agreement and that no agency or employment relationship be created between the parties by this Agreement.

Notices

26. Any notice to be given hereunder by either party to the other may be effected by personal delivery in writing or by registered or certified mail, postage prepaid, return receipt requested, and shall be deemed communicated as of the time of mailing. The address of the Proprietor for the purpose of receiving notice shall be _____[*address*], and the address of the Operator for this purpose shall be _____[*address*]. Either party may designate another address for the purpose of receiving notice by giving the other party written notice of the other address.

Business Interruption

27. In the event that business operations on the premises of the Proprietor are interrupted or stopped on account of fire, earthquakes, war, strikes, or other causes beyond the control of the parties, the performance of this Agreement, with the exception of the payment of money already due and owing, shall be suspended and excused until such times as the business operations are again resumed, and the term of this Agreement shall be extended for a period of time equal to the length of time during which performance was suspended or excused, provided, however, that no such extension shall be in excess of _____[*e.g.*, six months], and in such case, this Agreement may be terminated by either party by giving notice in writing to the other.

Assignment

28. This Agreement shall not be assignable by either party without the prior written consent of the other party. Subject to the foregoing limitation, this Agreement shall inure to the benefit of and be binding on the successors and assigns of the respective parties.

Entire Agreement

29. This Agreement constitutes the entire agreement of the parties with respect to the subject matter hereof and supersedes any and all other agreements, understandings, statements, or representations, either oral or in writing.

Governing Law

30. The validity of this Agreement and of any of its terms or provisions, as well as the rights and duties of the parties hereunder, shall be interpreted and construed pursuant to and in accordance with the laws of the State of California.

Executed at _____[*city*], California, on _____[*date*].

PROPRIETOR
_____ [*name of proprietor*]
By _____ [*signature*]
[*typed name and title*]

OPERATOR
_____ [*name of operator*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesGeneral OverviewContracts LawTypes of ContractsLease AgreementsGeneral OverviewGovernmentsAgriculture & FoodProcessing, Storage & Distribution

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California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 93 AGREEMENTS FOR AUTOMATIC MERCHANDISING
PART IV. FORMS
A. Location Contracts

30-93 California Legal Forms--Transaction Guide §§ 93.206-93.219

[Reserved]

§§ 93.206[Reserved]

California Legal Forms--Transaction Guide

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 93 AGREEMENTS FOR AUTOMATIC MERCHANDISING
PART IV. FORMS
B. Seller Assisted Marketing Plan Documents

30-93 California Legal Forms--Transaction Guide § 93.220

§ 93.220 Disclosure Statement by Seller of Seller Assisted Marketing Plan

[1] Comment

[a] Use of Form

This form sets forth the disclosure information which must be given to potential purchasers of a seller assisted marketing plan. A seller assisted marketing plan, as applied to vending machine owners and operators, is any sale, or lease, or offer to sell or lease vending machines or vending machine products, supplies, or services that requires a total initial payment of an amount exceeding $500, but requires an initial cash payment of less than $50,000, that will aid a purchaser, or will be used by or on behalf of the purchaser, in connection with or incidental to beginning, maintaining, or operating a business when the marketing plan seller has advertised or in any way solicited the purchase or lease of the marketing plan and represented that the purchaser "will earn, is likely to earn, or can earn" or is likely to earn, an amount in excess of his or her initial payment, that there is a market for the product, equipment, supplies, or services, or that the seller will buy back, or is likely to buy back, any product made using the product, supplies, equipment, or services initially sold or leased, or offered for sale or lease to the purchaser by the seller of the marketing plan [*see Civ. Code § 1812.201(a)*]. Any representation regarding a buyer's ability to earn an amount in excess of the purchase price, including a representation that it is possible to earn income exceeding the cost of the seller's products and services, is within the scope of the statute [People ex rel. Brown v. iMergent, Inc. (2009) 170 Cal. App. 4th 333, 339-341, 87 Cal. Rptr. 3d 844 (*Civ. Code § 1812.201(a)*'s reference to representation that buyer "will earn, is likely to earn, or can earn" amount in excess of initial payment is not unconstitutionally vague)]. The definition of a seller assisted marketing plan does not, however include certain specified transactions, such as the sale of a franchise [*see Civ. Code § 1812.201(b)(2)*] nor the renewal or extension of an existing seller assisted marketing plan contract [*Civ. Code § 1812.201(b)(9)*]. A seller assisted marketing plan contract is any contract or agreement that obligates a "purchaser" to a "seller" as those terms are defined by law [*Civ. Code § 1812.201(j)*].

In the first in-person communication with a potential purchaser or in the first written response to an inquiry about the seller assisted marketing plan from a potential purchaser, the seller must provide the purchaser with a written document entitled "DISCLOSURE REQUIRED BY CALIFORNIA LAW" [*Civ. Code § 1812.205*]. The written document must disclose certain required information, and must contain a guarantee of earnings statement in exact language prescribed

by law [*Civ. Code § 1812.205*]. This disclosure form is appropriate for use in the first in-person communication or response to a written inquiry from a prospective purchaser.

The disclosure document set forth in this form may be combined with the seller assisted marketing plan information sheet [*see § 93.221*] if the time requirements of both documents are met. See *§ 93.221[1]* for the time requirement for that document.

[b] Definitions

Several important terms used in the definition of seller assisted marketing plan are also defined by law.

A "seller" is any person, including an individual, corporation, partnership, joint venture, or other business entity, who sells, or leases, or offers to sell or to lease a seller assisted marketing plan, and who either has sold or leased or represents or implies that the seller has sold or leased at least five such plans within two years prior to a solicitation, or intends or represents or implies that such seller intends to sell at least five such plans within one year after a solicitation is made [*Civ. Code § 1812.201(c), (d)*].

A "purchaser" is any person who is solicited to become or does become obligated on a contract [*Civ. Code § 1812.201(c), (e)*], such as a vending machine owner or operator who buys or leases on a seller assisted marketing plan.

A "product" includes any tangible chattel, including food or living animals, which the purchaser intends to sell or lease to the public [*see Civ. Code § 1812.201(h)*], and "supplies" includes any and all materials used to produce, grow, breed, or make any product [*Civ. Code § 1812.201(g)*].

"Services" is defined as any assistance, guidance, direction, work, labor, or services provided by the seller to initiate or maintain the plan [*Civ. Code § 1812.201(h)*].

"Initial payment" means the total amount a purchaser is obliged to pay to the seller under the contract either before or at the time of delivery of the vending machines, supplies, products or services, or within six months of the purchaser commencing operation of the plan [*Civ. Code § 1812.201(k)*]. Initial payment includes all specific monthly payments as well as any down payment [*Civ. Code § 1812.201(k)*].

"Initial cash payment" or "downpayment" means that portion of the initial payment that the purchaser is obligated to pay to the seller prior to or at the time of delivery of equipment, supplies, products, or services. It does not include any amount financed by or for which financing is to be obtained by the seller, or financing which the seller assists in obtaining [*Civ. Code § 1812.201(l)*].

Another term which will be encountered is "buy-back" or "secured investment," which means any representation that implies in any manner that the purchaser's initial payment is protected from loss [*Civ. Code § 1812.201(m)*].

[c] Transactions Occurring in California

Several restrictions are imposed on a seller when the seller sells, leases, or offers to sell or lease a seller assisted marketing plan in California. The seller is restricted in the manner in which the seller may use the phrase "buy-back" or "secured investment" [*see Civ. Code § 1812.204*], and the seller must substantiate any representation concerning income or earning potential, disclosing the data on which the claim is based [*see Civ. Code § 1812.204(d)*]. The seller also must be careful in its use of the trademark, service mark, trade name, logotype, advertising, or other commercial symbol of any business which is not a controlling owner of the seller or does not accept responsibility for all representations made by the seller regarding the plan [*Civ. Code § 1812.204(e)*], and any advertisement regarding a seller assisted marketing plan must include prescribed information [*see Civ. Code § 1812.204(f)*].

Specified actions or facts constitute a sale, or lease, or offer to sell or to lease occurring in California. Basically, these occur if the offer to sell or offer to lease is made or accepted in California, the purchaser resides in California at the time of the offer or sale, the offer to sell or to lease originates from California and is directed to and received at a place in California, or the acceptance is communicated to a seller situated in California [*Civ. Code § 1812.202*].

[d] Disclosure Document Contents

The cover sheet of the disclosure document must be entitled, in at least 16-point boldface capital letters, "DISCLOSURE REQUIRED BY CALIFORNIA LAW" [*Civ. Code § 1812.205*]. Under this title must appear, in at least 10-point type and in the precise language prescribed by statute, a statement which alerts the purchaser to the fact that the state of California has not reviewed nor approved any seller assisted marketing plan [*see Civ. Code § 1812.205*]. Nothing else may appear on the cover sheet except the title and required statement [*Civ. Code § 1812.205*].

The document must state the name of the seller, the seller's business name, and the name of any parent or affiliated company that will transact business with purchasers or accept responsibility for statements made by the seller [*Civ. Code § 1812.205(a)*].

A statement of the specific initial payment charged, or when not known, the approximate initial payment charged must be included [*Civ. Code § 1812.205(b)*]. There must also be a statement of the amount of the initial payment to be paid to a person inducing, directly or indirectly, a purchaser to contract for the plan [*Civ. Code § 1812.205(b)*].

The document must give a full and detailed description of the actual services which the seller will undertake to perform for the purchaser [*Civ. Code § 1812.205(c)*], and a complete description of any promised training and the length of the training [*Civ. Code § 1812.205(e)*]. If the seller promises services in connection with the placement of the vending machines, products, or supplies at a location from which these will be sold or used, the full nature of those services and the nature of the agreements to be made with the owner or manager of thelocation at which the purchaser's machines, products, or supplies will be placed, must be set forth [*Civ. Code § 1812.205(f)*].

When the seller makes any statement concerning earnings or range of earnings that may be made through the plan, the disclosure statement must contain information in the precise language prescribed by statute [*see Civ. Code § 1812.205(d)*].

If the seller represents orally or in writing at any time that there is a "buy-back" arrangement or that the initial payment is "secured," the entire and precise nature of the "buy-back" or "security" arrangement must be completely and clearly disclosed in the document [*Civ. Code § 1812.205(g)*].

[e] Filing With the Attorney General

At least 30 days before placing any advertisement or making any other representations to prospective purchasers, the seller of any seller assisted marketing plan must file a copy of the required disclosure statements with the California Attorney General's office [*Civ. Code § 1812.203(a)*; *see Civ. Code § 1812.205, 1812.206*; *see § 93.221*]. In addition, the seller of the plan must provide a list of the names and residence addresses of individuals who sell the plan on behalf of the seller. The filing will not be deemed to have occurred until a notice of filing has been issued by the Attorney General [*Civ. Code § 1812.203(a)*]. The seller may not make any advertisement or other representation to prospective purchasers until a notice of filing has been issued by the Attorney General [*Civ. Code § 1812.203(a)*].

The disclosure statements on file must be updated whenever material changes occur during the year following the filing. The update must include all the information required under *Civ. Code §§ 1812.205* and *1812.206* and a list of the names and residences of all current salespersons and all salespersons who have acted on behalf of the seller since the previous

filing [*Civ. Code § 1812.203(a)*].

The appropriate fee payable to the Attorney General must accompany all required filings [*see Civ. Code § 1812.203(a)*].

[2] FORM

Disclosure Statement by Seller of Seller Assisted Marketing Plan [Civ. Code § 1812.205]

DISCLOSURE REQUIRED BY CALIFORNIA LAW

The State of California has not reviewed and does not approve, recommend, endorse, or sponsor any seller assisted marketing plan. The information contained in this disclosure has not been checked by the state. If you have any questions about this purchase, see an attorney or other financial adviser before you sign a contract or agreement.

[*The following must begin on another page:*]

Seller and Seller's Parent or Affiliate Company

1. The name of the Seller of this seller assisted marketing plan for [*specify nature of the plan, e.g.*, the sale of 60 food and beverage vending machines] is _____[*name of seller*]. Seller intends to do business [*or* is doing business] under the name of _____[*business name*]. The name of the parent [*or* affiliate] company of Seller is _____[*name of parent or affiliate company*]. The parent [*or* affiliate] company will engage in business transactions with the purchasers of this seller assisted marketing plan [*or* accepts responsibility for the statements made by Seller in this document and any other documents or statements].

Initial Payments

2. The purchase of this plan will require an initial payment by Purchaser of [*specify exact, or if unknown, approximate initial payment charge*]. Of the initial payment, the amount that will be paid to the salesperson who induces the sale or lease of this plan is _____[*state amount to be paid salesperson*].

Services Performed by Seller

3. The services that Seller will perform for Purchaser of this plan are _____[*give full and detailed description of actual services to be performed*].

[*If seller makes any statement regarding earnings add the following statement, using exact language contained in Civ. Code § 1812.205(d):*]

Ranges of Earning Statement

4. No guarantee of earnings or ranges of earnings can be made. The number of purchasers who have earned through this business an amount in excess of the amount of their initial payment is at least _____, which represents _____ percent of the total number of purchasers of this seller assisted marketing plan.

Training

5. Seller will provide the following training to Purchaser: _____[*give complete description of training and length of training*].

Location Services

6. Seller will perform the following services in connection with the placement of the vending machines [*or* vending machine products *or* vending machine supplies] at locations where they will be sold [*or* used]:
_____[*specify full nature of services as well as nature of agreements to be made with owner or manager of location where machines or products or supplies will be placed*].

Buy-Back Policy

7. The initial payment made by Purchaser is secured [*or* Seller has a buy-back policy] as follows:
_____[*state entire and precise nature of the buy-back or security arrangement, if seller orally or in writing represents that such an arrangement exists*].
Dated: _____.

_____ [*name of seller*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
CHAPTER 93 AGREEMENTS FOR AUTOMATIC MERCHANDISING
PART IV. FORMS
B. Seller Assisted Marketing Plan Documents

30-93 California Legal Forms--Transaction Guide § 93.221

§ 93.221 Seller Assisted Marketing Plan Information Sheet

[1] Comment

[a] Use of Form

This form is the information sheet that a seller under a seller assisted marketing plan must provide to a prospective purchaser at least 48 hours prior to either the execution of the plan contract or agreement or the receipt of any consideration, whichever occurs first [*Civ. Code § 1812.206*]. The information sheet may be combined with the disclosure statement [*see § 93.220*] and given to a prospective purchaser at the time required for that document, but only if that time also meets the 48-hour requirement for this information sheet [*Civ. Code § 1812.206*].

[b] Information Sheet Contents

The title of the document must read "SELLER ASSISTED MARKETING PLAN INFORMATION SHEET" [*Civ. Code § 1812.206*]. Certain information must be contained in the document [*see Civ. Code § 1812.206*]:

- The names of the managers of the seller's business activities, and the names of and offices held by the seller's owners, officers, directors, trustees, and general or limited partners.

- A statement whether the seller, or any person identified in the preceding item in this list, or any other company managed by a person identified in the preceding item in this list, has been convicted of or pleaded nolo contendere to one or more specified felonies or misdemeanors, or has been found liable or has consented to the entry of a stipulated judgment in a civil action in which one or more specified allegations were made, is currently subject to certain agreements, injunctions, or restrictive orders, or has been the subject of an order for relief in bankruptcy or been reorganized due to insolvency. Any statement must include certain required information about the legal proceedings.

- A statement about the length of time the seller has been selling seller assisted marketing plans generally, and the length of time the seller has been selling the specific plan being offered.

- If the seller is required to secure a bond or establish a trust account [*see Civ. Code § 1812.204*], the information sheet must contain a statement about the bond or trust account in precise language as prescribed by statute [*see Civ. Code § 1812.206(d)*].

- The information sheet must contain an unexecuted copy of the entire seller assisted marketing plan contract.

- A copy of a recent (less than a year old) financial statement of the seller,together with a statement of any material changes in the financial condition of the seller from the date of the financial statement. The financial statement must be either audited or be signed under penalty of perjury in a prescribed manner by one of several specified persons. If seller is the subsidiary of another corporation, alternative documents are permitted.

[2] FORM

Seller Assisted Marketing Plan Information Sheet [Civ. Code § 1812.206]

SELLER ASSISTED MARKETING PLAN INFORMATION SHEET

1. The names and offices held by the Seller's officers, directors, trustees, and general or limited partners are the following:

_____[*name and title*]

_____[*name and title*]

_____[*name and title*]

2. The names of the individuals who have management responsibilities in connection with the Seller's business activities are the following:

_____[*name*]

_____[*name*]

3. Of the above named persons, _____[*name*] has _____[*specify nature of conviction, judgment, or other action, and state the court, date of conviction of judgment, and name of governmental agency (if applicable) that brought the action, e.g.,* consented to the entry of a stipulated judgment on the use of deceptive business practices. This judgment was entered by the Superior Court of the State of California for the County of Kern, on July 10, 1989].

4. The Seller, _____[*name of seller*] has sold seller assisted marketing plans for _____[*state length of time*]. Seller has sold this seller assisted marketing plan for _____[*specify nature of the plan, e.g.,* the sale of vending machines] for a period of _____[*state length of time*].

[*Choose appropriate statement, if applicable, and use exact language as set forth in Civ. Code § 1812.206(d):*]

5. Seller has secured a bond issued by _____[*name and address of surety company*], a surety company

admitted to do business in this state. Before signing a contract to purchase this seller assisted marketing plan, you should check with the surety company to determine the bond's current status.

[*OR*]

5. Seller has deposited with the office of the Attorney General information regarding its trust account. Before signing a contract to purchase this seller assisted marketing plan, you should check with the Attorney General to determine the current status of the trust account.

6. _____[A recent copy of the financial statement of Seller is attached *or* A recent copy of the financial statement of Seller and Seller's parent corporation are attached], together with a statement of any material changes thereto.

7. A copy of the seller assisted marketing plan contract is attached to this information sheet.
Dated: _____.

_____ [*name of seller*]
By _____ [*signature*]
[*typed name and title*]

Legal Topics:

For related research and practice materials, see the following legal topics:
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DIVISION VI: PERFORMANCE OF SERVICES
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B. Seller Assisted Marketing Plan Documents

30-93 California Legal Forms--Transaction Guide § 93.222

§ 93.222 Seller Assisted Marketing Plan Contract--Information Required by Law

[1] Comment

[a] Use of Form

This form sets forth the information that is required to be contained in a seller assisted marketing plan contract. Every contract for the sale or lease of a seller assisted marketing plan in California must be in writing and must comply with the seller assisted marketing plan provisions of the Civil Code [*Civ. Code § 1812.207*]. This form is appropriate for use as a guide to drafting a seller assisted marketing plan contract.

[b] Contract Contents

Every seller assisted marketing plan contract must include, in at least 10-point type or equivalent size if handwritten, all of the following information [*Civ. Code § 1812.209*]:

- The terms and conditions of payment including the initial payment, additional payments, and down payment. If the contract provides for the seller to receive more than 20 percent of the initial payment before delivery of the equipment, supplies, products, or services to the purchaser, the contract must contain the following information concerning the escrow account established pursuant to *Civ. Code § 1812.210(b)* [*see* discussion, *below*]: the name and address of the escrow account holder, and the institution, branch, and account number of the escrow account. Additionally, the contract must state that payment of the amount in excess of 20 percent must be by separate instrument made payable to the escrow account [*Civ. Code § 1812.209(a)*].

- A full and detailed description of the acts or services the seller will perform for the purchaser.

- The seller's principal business address, and the name and address of its agent in California authorized to receive service of process [*see Civ. Code § 1812.214*].

- The business form of seller, whether corporate, partnership, or otherwise.

- The delivery date of items to purchaser. When the contract provides for staggered delivery of items, the approximate date of delivery of sufficient items so as to enable purchaser to begin or maintain his or her business. In either case, also state whether the products, equipment (vending machines), or supplies are to be delivered to purchaser's address or will be placed at locations owned or managed by persons other than the purchaser.

- A complete description of the buy-back or security arrangement if seller has represented orally or in writing when soliciting, offering, selling, or leasing a seller assisted marketing plan that there is a buy-back or that the initial investment is secured.

- An accurate statement of the purchaser's right to void the contract [*see Civ. Code § 1812.215*].

- Immediately above the place for the purchaser's signature, the notification of the purchaser's right to cancel the contract, in bold face type and in the precise language that is prescribed by law [*see Civ. Code § 1812.209(b)*].

If the contract provides for a downpayment, it may not exceed 20 percent of the initial payment amount [*Civ. Code § 1812.210(b)*]. The contract payment schedule may provide for the seller to receive more than 20 percent of the initial payment before delivery of the products, supplies, or equipment to the purchaser or to the place where these items will be located, but only if all sums in excess of 20 percent are placed in an escrow account that cannot be released until the purchaser notifies the escrow agent in writing of the delivery of those items [*Civ. Code § 1812.210(b)*]. The notification of delivery by the purchaser must not be unreasonably withheld [*Civ. Code § 1812.210(b)*].

[c] Purchaser's Copy of Contract

A copy of the fully completed contract and all other documents that the seller requires the purchaser to sign must be given to the purchaser at the time they are signed [*Civ. Code § 1812.207*].

[d] Cancellation of Contract

Any purchaser has the right to cancel a contract for any reason at any time within three business days of the contract date, and the notice of the right to cancel and the procedures to be followed are prescribed by law [*see Civ. Code § 1812.209*]. The text of the statutory notice is set forth in this form in the space immediately preceding the signature line.

If a seller inadvertently fails to make a required disclosure [*see Civ. Code §§ 1812.205, 1812.206*] or to meet the requirements for a contract [*see Civ. Code §§ 1812.207-1812.211*], the seller may cure the defect in the manner prescribed by law [*see Civ. Code § 1812.215(a)*] and the purchaser will have an additional 15 days after the date on which the defect is cured within which to cancel the contract and receive a full refund of monies paid in exchange for the return of all items in the purchaser's possession [*Civ. Code § 1812.215(a)*]. If the purchaser does not cancel the contract within this 15-day period, he or she is precluded from laterexercising the right to void the contract under the voidability provision [*Civ. Code § 1812.215*] on the basis of noncompliance with the disclosure or contract requirements provisions which govern these seller assisted marketing plan contracts [*Civ. Code § 1812.215(a)*].

[2] FORM

Seller Assisted Marketing Plan Contract--Information Required by Law [Civ. Code § 1812.207-1812.209]

ABSTRACT OF SELLER ASSISTED MARKETING PLAN CONTRACT

AGREEMENT made this _____ day of _____[*date*], by and between _____[*name of seller*] ("Seller"), and _____[*name of purchaser*] ("Purchaser").

THE PARTIES TO THIS AGREEMENT AGREE AS FOLLOWS:

Payment

1. Purchaser shall pay to Seller of this seller assisted marketing plan contract for _____[*specify nature of plan, e.g.*, the sale of 60 food and beverage vending machines] a total sum of $ _____ payable as follows: _____[*specify terms and conditions of payment including initial payment, additional payments, and downpayment required*].

[*Add the following if more than 20 percent of initial payment is required before delivery of goods or services under contract; see Civ. Code § 1812.209(a):*]

Prior to delivery of the [equipment *or* products *or* supplies *or other*] pursuant to Paragraph 5, Purchaser shall pay $_____ by separate instrument to the escrow account designated below:

Name of escrow account holder: _____
Address of escrow account holder: _____
Name of institution where account is kept: _____
Branch of institution: _____
Account number: _____

Seller's Services

2. Seller shall undertake to perform the following acts or services for Purchaser: _____[*give full and detailed description of acts or services*].

Seller's Address and Agent

3. The principal business address of Seller is:

_____[*street address*]

_____[*city, state, zip*]

The name and address of Seller's agent in the State of California who is authorized to receive service of process is:

_____[*name*]

_____[*street address*]

_____[*city*], California [*zip*]

Seller's Form of Business

4. The business form of Seller is _____[*state form of business, e.g.,* a corporation, *or* a partnership, *or otherwise*].

Delivery Date and Place

5. (a) The equipment [*or* products *or* supplies *or other appropriate combination*], _____[*specify items to be sold or leased, e.g.,* 60 food and beverage vending machines], which are being sold [*or* leased] under this Seller Assisted Marketing Plan Contract, shall be delivered by or on _____[*date*].

[*Or, if the contract provides for staggered delivery dates:*]

(a) Of the _____[*specify total amount or number or other quantity and the equipment or products or supplies being sold or leased under this contract, e.g.,* 60 vending machines] which are being sold [*or* leased] under this Seller Assisted Marketing Plan Contract, _____[*specify amount or number or other quantity which will enable purchaser to begin or maintain his business, e.g.,* 30 vending machines] shall be delivered by or on _____[*state approximate delivery date*]. The balance to be delivered by or on _____[*date*].

(b) Delivery of the specified items shall be made to the following location(s): _____[*address(es)*] which is [*or* are] _____[*specify whether location is the business or home address of purchaser, or is a location owned or managed by persons other than purchaser, e.g.,* the places where the vending machines shall be located for the sale of food and beverages to the public].

Buy-Back or Security Arrangement

6. Purchaser's initial payment [*or* investment] is secured as follows [*or* Seller has a buy-back policy as follows]: _____[*give complete description of nature of buy-back or security arrangement, if seller represented orally or in writing at any time that there is a buy-back or security arrangement*].

Voidability of Contract

7. (a) Except as provided in subsection (b) of this Paragraph, if Seller makes or has made any untrue or misleading statements in order to sell this Seller Assisted Marketing Plan to Purchaser, or if Seller fails or has failed to give the Disclosure Statement and Information Sheet to Purchaser or fails or has failed to make thedisclosures therein that are prescribed by *California Civil Code Sections 1812.205* and *1812.206*, or if this Contract does not comply with the requirements of *California Civil Code Sections 1812.200 through 1812.221*, then within one year from the date of this Contract the Contract shall be voidable by Purchaser at Purchaser's election and upon written notice to Seller, and this Contract shall be unenforceable by Seller or Seller's assignee. Purchaser shall be entitled to receive from Seller all sums paid to Seller upon the return by Purchaser of all equipment, supplies, or products delivered by Seller. In the event that all equipment, products, or supplies cannot be returned, Purchaser shall receive from Seller all sums paid to seller less the fair market value at the time of delivery of the equipment, products, or supplies not returned by Purchaser but delivered by Seller. Upon the receipt of such sums, Purchaser shall make available to Seller at Purchaser's address or at the places at which they are located at the time Purchaser gives Seller the written notice voiding this Contract, the

equipment, products, or supplies received by Purchaser from Seller.

(b) If Seller inadvertently has failed to make any of the disclosures that are required by *California Civil Code Sections 1812.205* or *1812.206*, or if this Contract inadvertently fails to comply with the requirements of *California Civil Code Sections 1812.200 through 1812.221*, Seller may cure that inadvertent defect by providing Purchaser with the correct Disclosure Statement or Information Sheet or Contract, provided at that time, Seller also informs Purchaser in writing that, due to Seller's error, Purchaser has an additional 15-day period after receipt of the correct Disclosure Statement or Information Sheet or Contract within which to cancel this Contract and to receive a full return of all monies paid in exchange for the return of whatever equipment, products, or supplies Purchaser may have. If Purchaser does not cancel this Contract within 15 days after receipt of the correct Disclosure Statement or Information Sheet or Contract, Purchaser may not thereafter exercise Purchaser's right to void this contract on the ground of noncompliance with the disclosure or contract requirements of *California Civil Code Sections 1812.200 through 1812.221*.

(c) If Seller fails to deliver the equipment, products, or supplies within 30 days of the delivery date that is stated above (unless that delivery delay is beyond the control of Seller), then at any time prior to delivery or within 30 days after delivery, this Contract shall be voidable by Purchaser at Purchaser's election and upon written notice to Seller, and this Contract shall be unenforceable by Seller or Seller's assignee.

Executed at _____, California, on the day and year first above written.

SELLER
_____ [*name of seller*]
By _____ [*signature*]
[*typed name and title*]

Cancellation of Contract

[*Add the following statement in boldface type (see Civ. Code § 1812.209(b)):*]

You have three business days in which you may cancel this Contract for any reason by mailing or delivering written notice to the seller assisted marketing plan Seller. The three business days shall expire on _____[***last date to mail or deliver notice***], **and notice of cancellation should be mailed to** _____[***seller assisted marketing plan seller's name and business street address***]. If you choose to mail your notice, it must be placed in the United States mail properly addressed, first-class postage prepaid, and postmarked before midnight of the above date. If you choose to deliver your notice to the seller directly, it must be delivered to him by the end of his normal business day on the above date. Within five business days of receipt of the notice of cancellation, the Seller shall return to the Purchaser all sums paid by the Purchaser to the Seller pursuant to this Contract. Within five business days after receipt of all such sums, the Purchaser shall make available at his address or at the place at which they were caused to be located, all equipment, products, and supplies provided to the purchaser pursuant to this Contract. Upon demand of the Seller, such equipment, products, and supplies shall be made available at the time the Purchaser receives full repayment by cash, money order, or certified check.

PURCHASER
_____ [*signature*]
_____ [*typed name*]

Legal Topics:

For related research and practice materials, see the following legal topics:
Business & Corporate LawDistributorships & FranchisesGeneral Overview

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DIVISION VI: PERFORMANCE OF SERVICES
Chapters 94-95 [Reserved]

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[Reserved]

Chapters 94[Reserved]