

 **BrownWinick**  
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*Fundamentals of Drafting  
Executive Employment  
Agreements*

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*A Firm Commitment to Business™*

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Reminder...

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Please note, nothing in this presentation constitutes legal advice. The information is offered only for informational or educational purposes, and it should not be relied upon as, or substituted for, legal advice.

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Term

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- Specify:
  - The beginning date of the agreement
  - Whether the term should be fixed, be indefinite or should automatically renew
  - The expiration date of the agreement

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### Term: Examples

- **Fixed Term:** The term of Executive's employment under this Agreement shall begin on the January 1, 2018 and shall continue thereafter for a period of three (3) years.
- **No Termination Date:** The term of Executive's employment under this Agreement shall begin on January 1, 2018.

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### Term: Examples cont.

- **Evergreen:** The Executive's employment hereunder shall be effective as of January 1, 2018 ("Effective Date") and shall continue until the 3rd anniversary thereof, unless terminated earlier pursuant to Section 5 of this Agreement; provided that, on such 3<sup>rd</sup> anniversary of the Effective Date and each annual anniversary thereafter (such date and each annual anniversary thereof, a "Renewal Date"), the Agreement shall be deemed to be automatically extended, upon the same terms and conditions, for successive periods of one year, unless either party provides written notice of its intention not to extend the term of the Agreement at least 90 days' prior to the applicable Renewal Date. The period during which the Executive is employed by the Company hereunder is hereinafter referred to as the "Term."

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### Executive's Position and Duties

- Title
- General Duties
- Reporting Channel
- Board Service
- Service to Affiliates
- Scope of Outside Activities
- Other Duties as Assigned

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### Position and Duties: Example

- **Duties:** Executive shall have the title of Chief Executive Officer of the Hospital, reporting directly to the Board of Trustees (the "Board"), and shall have such duties, authorities and responsibilities as are consistent with such position and as the Board may designate from time to time and as designated on Exhibit A. Executive shall devote Executive's full working time and attention and Executive's best efforts to Executive's employment and shall perform Executive's services in a diligent, responsible and efficient manner in accordance with all applicable federal and state laws and regulations and all Hospital policies and procedures; provided, that this Section 2 shall not be interpreted as prohibiting Executive from (i) managing Executive's personal investments (so long as such investment activities are of a passive nature), or (ii) engaging in charitable or civic activities, so long as such activities do not, individually or in the aggregate materially interfere with the performance of Executive's duties and responsibilities hereunder or otherwise create a conflict of interest among the parties.

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### Position and Duties: Example (cont.)

- **Duties:** Executive shall serve as the Company's Director of Business Development, reporting to the Chief Executive Officer and shall perform such services and duties in connection with the business development affairs of the Company typically commensurate with such position and as may be assigned or delegated ("Duties"). The Executive shall devote her full-time and best efforts to the discharge of her duties and do nothing that will in any way prejudice the name or reputation of the Company. The Executive shall not engage in any other business activity that conflicts with the business of the Company.

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### Compensation and Benefits

- Base Salary
- Escalation (Automatic or Discretionary)
- Bonus
  - Signing bonus
  - Equity Awards
- Employee Benefits
- Reimbursement for Legal Fees
- Gross up

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Legal Fees

- **Legal Fees:** The Company shall pay or the Executive shall be reimbursed for the Executive's reasonable legal fees incurred in negotiating and drafting this Agreement up to a maximum of \$\_\_\_\_\_, provided that any such payment shall be made on or before March 15 of the calendar year immediately following the Effective Date.

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Vacation/Paid Time Off

- Specific allotment vs. General permission
- Increments
- Process

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Vacation/ Paid Time Off (Cont.)

- **Paid Time-Off:** During the Term, Executive shall be entitled to \_\_\_\_\_ of paid vacation days per calendar [Fiscal] year in accordance with the Company's vacation policies, as in effect from time to time.
- **Paid Time Off:** During the Term, Executive will be entitled to paid vacation on a basis that is at least as favorable as that provided to other similarly situated executives of the Company. The Executive shall request use of the same in accordance with the Company's policies for executive officers as may exist from time to time.

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### Relocation Expenses

- Amount
- Reimbursement vs. Allocation
- Taxable
- Clawbacks

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### Relocation Expenses

- **Relocation Expenses:** The Company shall pay, or reimburse the Executive for, all reasonable relocation expenses incurred by the Executive relating to his relocation to Des Moines, Iowa in accordance with the terms of the Company's relocation policy. If the Executive terminates his employment without Good Reason or is terminated by the Company for Cause prior to x Date, the Executive shall be required to repay the Company the gross amount of any relocation expenses paid or reimbursed pursuant to this Section 4.13 and the Company's relocation policy.

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### Termination Events

- **Termination of employment:**
  - On the executive's death
  - On the executive's disability
  - By either party on non-renewal
  - By Employer with or without cause
  - By Executive for good reason or without good reason

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## Payments and Benefits Upon Termination

- Cash severance payment
  - Lump sum vs. installments
  - Duty to seek alternate employment
- Bonus Allocation
- Health Care Coverage

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## Termination Trigger: Death and Disability

- **Disability and Death:** Executive's employment under this Agreement shall terminate automatically upon Executive's death and the Company may terminate Executive's employment on account of the Executive's Disability. If Executive's employment is terminated during the Employment Term on account of Executive's death or Disability, the Executive (or the Executive's estate and/or beneficiaries, as the case may be) shall be entitled to receive the following:
  - Accrued Salary; and
  - Accrued and unused vacation time
- Note: Include definition of what constitutes disability.

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## Termination Trigger: Cause

- **"Cause"** shall mean, (i) the conviction of Executive for, or the indictment of Executive for (or pleading guilty or *nolo contendere* to), a felony or a crime involving moral turpitude, (ii) Executive's continued failure to perform her duties hereunder (other than by reason of her incapacity or disability) or to follow the lawful direction of the Board, or a material breach of fiduciary duty owed to the Hospital; (iii) Executive's theft, fraud, or dishonesty with regard to the Hospital or in connection with Executive's duties; (iv) Executive's material violation of the Hospital's code of conduct or similar written policies in a manner that is detrimental to the best interests of the Hospital; (v) Executive's willful misconduct unrelated to the Hospital having, or likely to have, a material negative impact on the Hospital (economically or its reputation); (vi) an act of gross negligence or willful misconduct by the Executive that relates to the affairs of the Hospital; or (vii) material breach by Executive of any provisions of this Agreement, *provided*, that Executive shall be provided a period of ten (10) days to cure the first incidence of Cause in the preceding clauses (ii), (iv), (vi) and (vii) hereof, to the extent curable.

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### Conditions of Severance

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- Conditions of Payment. All payments and benefits due to Executive under this Section 7 which are not otherwise required by applicable law shall be payable only if Executive executes and delivers to the Company a **general release of all claims** within sixty (60) days following termination of employment. Failure to timely execute and return such release or the revocation of such release shall be a waiver by Executive of Executive's right to severance (which, for the avoidance of doubt, shall not include any amounts described in Section 7 of this Agreement). In addition, severance shall be conditioned on Executive's continued compliance with Section 9 of this Agreement.

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### Post Termination Healthcare Coverage

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- COBRA
- Subsidy
- Tax Consequences
- ACA

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### Cooperation Clause

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- Scope of Cooperation Required
- Time limit
- Compensation

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### Restrictive Covenants

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- Confidentiality / Non-Disclosure
- Non-Compete
- Non-Solicitation
- Non-Disparagement
- Non-Interference

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### Acknowledgement

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- Parties should acknowledge:
  - Need for the restraint(s)
  - Reasonableness of restraint(s)
  - Acknowledge position of Executive in conjunction with knowledge provided, access to information and public relations issues.

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### Confidentiality

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- Tailored to protect company business
- NLRA Considerations
- Use
- Disclosure
- 3<sup>rd</sup> Parties
- Previous Acquisition Representations

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## Defend Trade Secrets Act

- **Immunity Notice.** Executive shall not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made in confidence to a federal, state, or local government official or to an attorney solely for the purpose of reporting or investigating a suspected violation of law. Executive shall not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal. If Executive files a lawsuit for retaliation by the Company for reporting a suspected violation of law, Executive may disclose the trade secret to his attorney and may use the trade secret information in the court proceeding, as long as Executive files any document containing the trade secret under seal and does not disclose the trade secret, except pursuant to court order.

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## Non-Compete

- Define Prohibited Activity
- Temporal Restriction
- Geographic Restriction
- Narrowly Tailored

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## Non-Compete Clause

- **Non-Compete:** During the Term and for a period of two (2) years after Executive's employment with the Company terminates, Executive shall not, ...own, manage, operate, control, be employed by, consult for, participate or engage in, or be connected in any manner with any business, entity or person engaged in manufacturing industry and related businesses, within 100 miles of the Company's offices.

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### Non-Solicitation

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- Define Prohibited Activity
  - Customers
  - Employees
- Restraint Period
- Geographic Restriction
- Narrowly Tailored

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### Non-Solicitation Clause

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- Non-Solicitation: During Executive's employment by the Company, and for a period of two (2) years thereafter, Executive shall not, ... (i) solicit business from any existing customer of the Company; (ii) solicit for employment on behalf of himself or another entity, any current employee of the Company; or (iii) request, induce or advise any employee or customer of the Company to leave the employ of or cease affiliation with the Company.

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### Non-Disparagement

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- Mutual or Running to Benefit of Employer Only
- Scope
- Duration

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Non-Disparagement Clause

- Non-Disparagement. During Executive's employment and for a period of two (2) years thereafter, Executive shall not disparage the Company.

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Non-Interference

- Narrowly Tailored Scope
- Disclose Goal
- Temporal Restriction/Duration

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Non-Interference Clause

- Non-Interference. During Executive's employment and for a period of two (2) years thereafter, Executive shall not interfere with the business relationships of the Company.

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## Remedies

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- Injunctive Relief
- Damages
- Accounting

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## Remedies Provision: Example

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- Remedies. In the event of a breach or threatened breach by the Executive of Section 7, Section 8, or Section 9 of this Agreement, the Executive hereby consents and agrees that the Company shall be entitled to seek, in addition to other available remedies, a temporary or permanent injunction or other equitable relief against such breach or threatened breach from any court of competent jurisdiction, without the necessity of showing any actual damages and without the necessity of posting bond. The aforementioned equitable relief shall be in addition to, not in lieu of, legal remedies, monetary damages, or other available forms of relief.

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## Proprietary Rights

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- Inventions Assignment
- Inventions Disclosure

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Miscellaneous Provisions

- Arbitration
- Separate out obligations
- Choice of Law
- Jurisdiction/ Venue
- Amendments

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