

**C L I F F O R D**  
**C H A N C E**

**EMPLOYEE BENEFITS IN M&A TRANSACTIONS**

# SAMPLE DUE DILIGENCE REQUEST LIST

## DUE DILIGENCE REQUEST LIST:

1. Please provide **all employment agreements, offer letters, and similar agreements** either entered into or proposed to be entered into with key employees.
2. Please provide any non-competition, **restrictive covenant** or similar agreements entered into with employees.
3. Please provide all (or confirm there are no) **equity-based compensation arrangements** (including, without limitation, stock option, stock grant and phantom stock plans), including all plan documents and award agreements issued under any such plan.
4. Please confirm whether any employees are covered by change in control, retention, transaction bonus or severance plans, agreements or arrangements. To the extent applicable, provide copies of all such plans, agreements or arrangements. Please also provide a copy of any **Section 280G analysis** undertaken with respect to the proposed transaction.
5. Please provide copies of all deferred compensation plans, including information on the funding status of and account balance information for each such plan. Please describe how **compliance with Section 409A** of the Code is monitored and reviewed. Please include a description of any prior non-compliance with respect to Section 409A of the Code.

# SAMPLE DUE DILIGENCE REQUEST LIST

## (CONTINUED)

### DUE DILIGENCE REQUEST LIST:

6. Please provide details regarding any compliance issues with respect to employees or employee benefit plans arising in the prior six years.
7. Please provide copies of (or confirm such plan is not maintained) **all welfare plans** (including, but not limited to, medical, dental, vision, life insurance, disability insurance, and cafeteria plans) and all **retirement plans** (including profit sharing, deferred compensation plans, supplemental retirement, “top-hat” and other employee benefit arrangements). To the extent applicable, please provide (i) summary plan descriptions for each such plan, (ii) IRS Form 5500s for the three most recent tax years, (iii) actuarial reports, (iv) all tax determination letters for all benefit plans that are tax qualified under applicable law, (v) a description of any potential material liabilities under any pension plans, to the extent not described in the Company’s audited financial statements, (vi) non-discrimination testing results, (vii) if any welfare plan is self-funded, please provide information regarding any stop loss protection maintained by the Company, and (viii) information on the Company’s **compliance with the Affordable Care Act**, including with respect to reporting.
8. Please confirm whether the Company maintains or has any liability with respect to any **defined benefit pension, multiemployer, multiple employer, retiree medical** or similar benefit plan or program. To the extent applicable, please also provide copies of all such plans or programs.
9. Please provide all **employee handbooks** and other employee policies.
10. Please confirm if the Company is a party or subject to any **collective bargaining agreement** or any other labor agreement. Please confirm if any employees of the Company have made efforts to unionize or collectively bargain in the prior six years.
11. Please provide an **employee roster** listing annual salary, bonus, commission, job title, FLSA status, length of service and current location.

# **SAMPLE DUE DILIGENCE REQUEST LIST**

(CONTINUED)

## **DUE DILIGENCE REQUEST LIST:**

12. Please provide details regarding **wage and hour compliance**, including with respect to the tracking of hours and payment of overtime. Please provide details regarding the exempt or non-exempt status of each employee. Please provide details regarding classification methodology and the basis for classifying any employee as exempt under the FLSA.
13. Please provide details regarding any current or former **independent contractors**, consultants or similar service providers. Please provide information regarding the number of such individuals engaged in each of the prior three years, the amount of compensation paid to such individuals in each of the prior three years, and the basis for classifying such individuals as independent contractors.
14. Please describe each labor, employment, or employee benefits related dispute, grievance, arbitration, unfair labor practice, litigation, agency action, governmental investigation, audit, and claim (including claims brought by, or related to, employees or other service providers) arising in the prior six years.
15. Information regarding any current or past **allegations of sexual misconduct, sexual harassment, similar conduct** against any employees or service providers of the Company.
16. Please provide information regarding the Company's compliance with immigration related laws and regulations.

# FINANCIAL ISSUES RELATED TO EMPLOYEE MATTERS



## What costs might be associated with retaining and incentivizing employees after the transaction?

- Are employees vesting in their equity awards?
- Are employees receiving transaction-based deal bonuses or retention awards tied to the transaction?
- Are employees forfeiting compensation or benefits as a result of the transaction?

## Does the target entity have significant employee benefits obligations?

- Does the target company maintain or have liability with respect to a defined benefit pension plan?
- Does the target company employ union workers who participate in a multiemployer pension plan?
- Does the target company offer medical or other coverage to retired employees?

# OPERATIONAL ISSUES RELATED TO EMPLOYEE MATTERS

## Benefit Plan Implementation:

Is the acquiror able to provide employee benefits immediately after Closing?

## Employee Morale:

Will adjusting compensation or benefits affect the morale of the incoming employees?  
Would maintaining separate benefit plans for different groups affect the morale of existing employees?

## Union Employees:

Are there consultation or notification obligations related to the transaction?  
Does the acquiror need to engage in any bargaining with the union on how the relationship with operate after closing of the transaction?

# DEAL STRUCTURE

## Acquiring the Entire Group

- Buyer is purchasing an entire group of companies.
- Typically undertaken through a stock acquisition of a top tier entity, or by way of merger.
- Diligence scope is much broader as everything “transfers” in the transaction.

## Carve-Out Transaction

- Buyer is purchasing a particular entity or business line.
- Typically undertaken through a stock or asset purchase, or a combination of both.
- Diligence may be more focused on the benefits and employees who will transfer in the transaction.

## Asset Acquisition

- Buyer is purchasing certain specified assets.
- Undertaken through an asset purchase.
- Scope of diligence is based on the particular assets to be transferred.

# DEAL STRUCTURE

## (CONTINUED)

### Stock Acquisition or Merger

- Typically, employees, benefit plans and associated liabilities “continue” on with the target company or the surviving company.
- No specific action is needed to become the employer of the target employees.
- Acquiror can decide if it will leave the current arrangements in place or prepare new agreements in connection with the transaction.

### Asset Acquisition

- Parties negotiate which employees, benefit plans and associated liabilities will transfer.
- Affirmative steps need to be taken by the acquiror and target employees to establish an employment relationship.
- Acquiror may need to prepare formal offers of employment or other documentation to effect transfers.





# EXAMPLES OF OFFER AND ACCEPTANCE PROVISIONS IN ASSET PURCHASE AGREEMENTS

## Transfer of Employees

At least 30 Business Days prior to the Closing Date (or earlier, if required by applicable Law), Purchaser agrees to offer continued employment effective as of the Closing Date to each Business Employee. Each such offer shall be subject to the prior review and approval of Seller. Each offer of employment to a Business Employee shall provide that for a period of at least one year following the Closing Date (or such longer period as required by applicable Law), Purchaser shall, or shall cause its Affiliates to, provide to each Business Employee (A) a Comparable Position, (B) base salary or wage rates, and bonus and short-term and long-term incentive pay opportunities (whether in the form of cash or equity) that, in each case, are no less favorable than those in effect for each such Business Employee immediately prior to the Closing, (C) employee benefits that, in the aggregate, are no less favorable than those in effect for each such Business Employee immediately prior to the Closing and

(D) severance benefits that are no less favorable than the severance benefits that would have been payable to each such Business Employee under the Plans in which such Business Employee participated or was eligible for benefits immediately prior to the Closing, taking into account such Business Employee's additional period of service and increases (but not decreases) in compensation following the Closing. A "Comparable Position" is a position with Purchaser or its Affiliates in which (A) the Business Employee's level of responsibilities is the same as the Business Employee's level of responsibilities immediately prior to the Closing, and (B) the Business Employee is not required to relocate more than 25 miles from the Business Employee's principal business location immediately prior to the Closing.

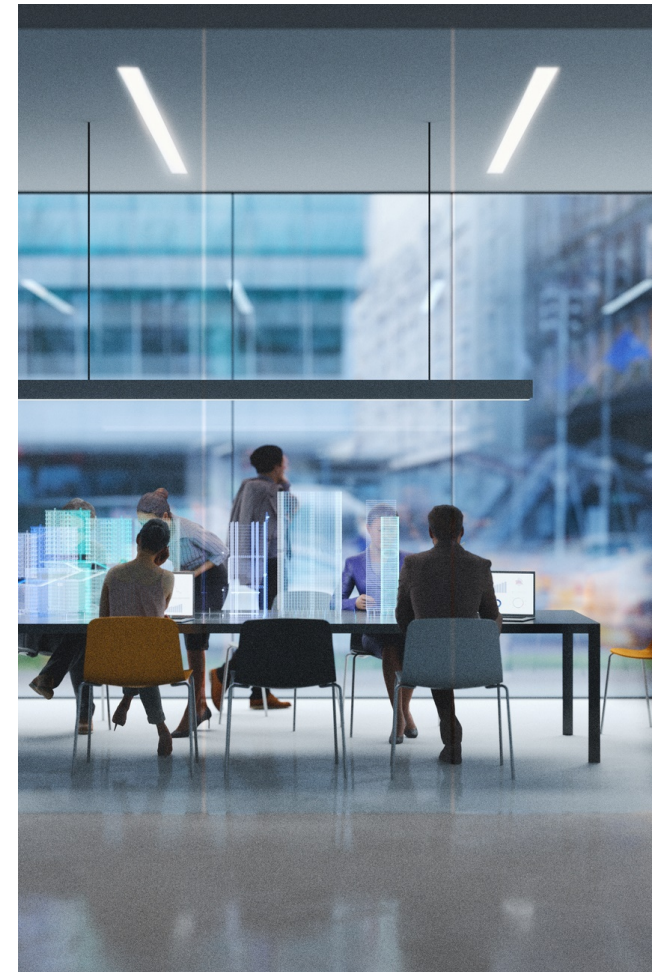
## Offers to Employees

Buyer agrees to offer continued employment effective as of the Closing Date to each Business Employee in the same or a Comparable Position (as defined herein) at a level of base compensation, wage rate, or commission, as applicable, not less favorable with respect to any such Business Employee than that in effect with respect to such Business Employee immediately prior to the Closing. A "Comparable Position" is a position with Buyer or its Affiliates in which the Business Employee has a similar title; provided, that, it shall not be a requirement that each such Business Employee's title convey the same level of decision-making authority as did their respective titles with Seller or its applicable Affiliate.

# EXAMPLES OF OFFER AND ACCEPTANCE PROVISIONS IN ASSET PURCHASE AGREEMENTS (CONTINUED)

## Employee Liabilities

Buyer and its Affiliates shall bear all Employee Liabilities, and shall indemnify Seller and its Affiliates from and against all Employee Liabilities, relating to (i) those Business Employees who receive an offer of employment from the Buyer but do not accept such offer, do not commence employment with the Buyer or object to the transfer of employment to the Buyer, and (ii) those Business Employees with respect to whom Buyer fails to make an offer of employment in accordance with requirements of Section \_\_, in each case, whether such Employee Liabilities arise prior to, on or after the Closing Date.



## EXAMPLES OF EMPLOYEE BENEFITS REPRESENTATIONS

Section \_\_ of the Disclosure Schedule **lists, as of the date hereof, each Benefit Plan. Seller has made available to Purchaser (i) a true and complete copy of each Benefit Plan** and all material amendments thereto and (ii) with respect to each Benefit Plan, as applicable, (A) the most recent summary plan description; (B) any trust documents or funding arrangements relating thereto (including group insurance contracts); (C) the most recent annual financial and actuarial reports with accompanying schedules and attachments, filed with the IRS or other equivalent Governmental Authority for jurisdictions outside the United States; (D) the most recent opinion or determination letter from the IRS or other equivalent Governmental Authority for jurisdictions outside the United States. Seller has disclosed details of all Benefit Plans to Purchaser; (E) the three (3) most recent nondiscrimination tests performed; (F) for the three (3) most recently completed plan years, timely and accurately filed Forms 1094-C and 1095-C in accordance with the requirements of Sections 6055 and 6056 of the Code and the regulations and related guidance promulgated thereunder; and (G) copies of notices, letters or other correspondence from the Internal Revenue Service, U.S. Department of Labor, U.S. Department of Health and Human Services, Pension Benefit Guaranty Corporation or any other Governmental Authority.

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**Each Benefit Plan has been established, maintained, funded, administered and operated in accordance and compliance with its terms and the requirements of all applicable Laws.** With respect to each Benefit Plan, all contributions, distributions, reimbursements and premium payments that are due have been timely made in accordance with the terms of such Benefit Plan and in compliance with the requirements of applicable Law, and all contributions, distributions, reimbursements and premium payments that are not yet due have been made or properly accrued. Other than routine claims for benefits, there has been no Action, claim or lawsuit and no Action, claim or lawsuit is pending or, to the Knowledge of the Business, threatened against, related to or arising out of a Benefit Plan. No Benefit Plan has been under audit or investigation by the Internal Revenue Service, the Department of Labor, the Pension Benefit Guaranty Corporation or any other Governmental Authority nor, to the Knowledge of the Business, is any such audit or investigation threatened.

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Each Benefit Plan that is intended to be qualified under Section 401(a) of the Code (i) has received a favorable determination letter from the IRS, (ii) has been established under pre-approved plan for which a current favorable IRS opinion letter has been obtained by the pre approved plan provider, or (iii) has time remaining under applicable Law to apply for a determination letter from the IRS or to make any amendments necessary to obtain a favorable determination letter from the IRS. Nothing has occurred, whether by action or failure to act, that could adversely affect the qualified status of any Benefit Plan or cause the imposition of any liability, penalty or tax under ERISA or the Code with respect to any Benefit Plan. The IRS has not taken any action to revoke the qualified status of any Benefit Plan.

# EXAMPLES OF EMPLOYEE BENEFITS REPRESENTATIONS

## (CONTINUED)

Except as set forth on Section \_\_\_ of the Disclosure Schedule, no Target Company has maintained, sponsored, contributed to or had any obligation to maintain, sponsor, or contribute to, or has had, or is reasonably expected to have (including on account of any ERISA Affiliate), any liability with respect to, **and no Benefit Plan is, and no Business Employee** (or dependent or beneficiary thereof) in connection with the Business Employee's employment with the Seller Group **is participating in** (i) **a plan** that is **subject to Title IV of ERISA** or the minimum funding standards of Section 302 of ERISA or Section 412 of the Code; (ii) **a Multiemployer Plan**; (iii) a multiple employer plan as described in Section 413(c) of the Code; or (iv) a "multiple employer welfare arrangement" (as defined in Section 3(40) of ERISA).

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**No Benefit Plan provides**, and none of the Transferred Entities has any obligation to provide, **post-termination or post-employment health, medical, life or other welfare benefits** to current or former employees or other service providers of the Transferred Entities or any other Person other than health continuation coverage pursuant to COBRA or other applicable Law for which the covered Person pays the full cost of coverage.

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**Each** individual who is classified under any Benefit Plan as an **independent contractor has been properly classified** for all purposes **under each Benefit Plan**, including, but not limited to, participation and benefit accrual.

# EXAMPLES OF EMPLOYEE BENEFITS REPRESENTATIONS

(CONTINUED)

**Neither the execution and delivery of this Agreement nor the consummation of the transactions contemplated hereby could,** directly or indirectly (either alone or in conjunction with any other event) (i) **cause the accelerated vesting, funding, timing of payment or delivery of,** or result in there becoming due or increase the amount or value of, **any payment** (whether in cash, property or the vesting of property) **or benefit to any Business Employee** or any current or former director, officer, employee, independent contractor or other service provider of the Transferred Entities or the Business (each, a “Business Service Provider”); (ii) result in an obligation to fund or otherwise set aside assets to secure to any extent any of the obligations under any Benefit Plan; (iii) **entitle any Business Employee** or any current or former Business Service Provider **to severance pay, unemployment compensation or any other payment or benefit;** (iv) trigger any loan forgiveness or any funding obligation under any Benefit Plan; or (v) impose any restrictions or limitations on a Transferred Entity’s rights to administer, amend or terminate any Benefit Plan. **No amount that could be received** (whether in cash or property or the vesting of property) **by any Business Employee** or any current or former Business Service Provider or any other Person, **as a result** of the consummation **of the transactions contemplated hereby would not be deductible by reason of Section 280G of the Code** or would be subject to an excise tax under Section 4999 of the Code. The Seller Group has made available to the Purchaser true and complete copies of any Section 280G reports prepared. There is no contract, agreement, plan or arrangement which requires any Transferred Entity or any member of the Seller Group to pay a Tax gross-up or reimbursement payment to any Person, including, without limitation, with respect to any Tax-related payments under Section 280G or 4999 of the Code.

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**Each Benefit Plan that is subject to Section 409A of the Code has been administered in compliance with its terms and Section 409A of the Code** (including the operational and documentary requirements thereof) and all applicable regulatory guidance thereunder (including, notices, rulings and proposed and final regulations). No payment to be made under any Benefit Plan is, or will be, subject to the penalties of Section 409A(a)(1) of the Code. No Transferred Entity or any Affiliate thereof has any obligation to gross up, indemnify or otherwise reimburse any individual for any excise taxes, interest or penalties incurred pursuant to Section 409A of the Code.

# EXAMPLES OF LABOR AND EMPLOYMENT REPRESENTATIONS

**The Company and its Subsidiaries have complied** in all material respects **with all Applicable Laws relating to the employment, labor and employment practices**, including all Applicable Laws relating to terms and conditions of employment, hiring, promotion, assignment, termination, vacation pay, immigration, harassment, human rights, employee privacy, reductions in force, affirmative action, family, medical and other leaves, wages and hours, overtime, discrimination, civil rights, workers' compensation, pay equity, classification of employees and independent contractors, immigration, equal opportunity, collective bargaining, plant closing and mass layoff and health and safety. Within the past six years, **there has been no unfair labor practice charge, labor arbitration, lawsuit, grievance, investigation, hearing, action, claim, proceeding, complaint or other dispute** pending, unresolved or, to the Knowledge of the Company, threatened, before any court, arbitrator, the National Labor Relations Board or any other Governmental Entity **relating to any current or former employee or other service provider of any of the Companies or alleging violations** of any federal, foreign, state, local or other Applicable Laws **relating to labor and employment**.

Neither the Company nor any Subsidiary thereof is or has been **a party to, bound by or negotiating any collective bargaining agreement or other Contract with a union, works council or other labor organization** (collectively, "Union"), and there is not, and has not been, any Union representing or purporting to represent any employee of the Company or any Subsidiary thereof, and, to the Company's Knowledge, no Union or group of employees is seeking or has sought to organize employees for the purpose of collective bargaining. There has never been, nor has there been any threat of, any **strike, slowdown, work stoppage, lockout, concerted refusal to work overtime or other similar labor disruption or dispute** affecting the Asset Seller, the Company, any Subsidiary thereof or any employee of the foregoing. Neither the Company nor any Subsidiary thereof has received any written or, to the Knowledge of the Company, oral notice threatening any **organizational effort by or on behalf of any labor union, works council, employee association or similar organization**. Neither the Company nor any Subsidiary thereof has a **duty to bargain with any Union**.

# EXAMPLES OF LABOR AND EMPLOYMENT REPRESENTATIONS

## (CONTINUED)

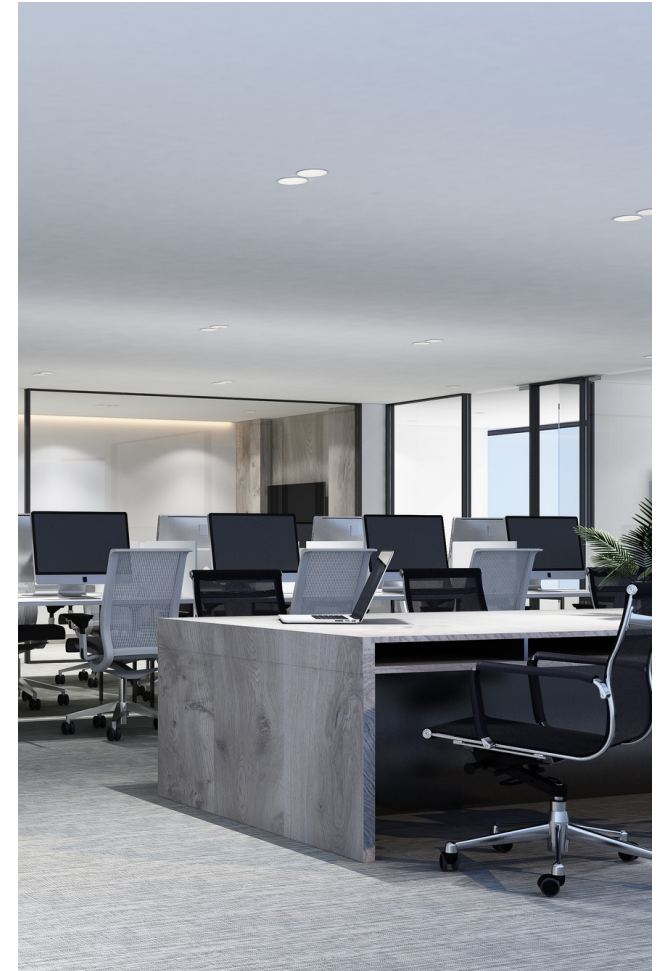
**Each** Person classified by the Company or its Subsidiaries as an **“independent contractor,” volunteer, subcontractor, “temp,” leased employee, or other contingent worker, is and has been properly classified under all Applicable Laws**, and each of the Companies and their Subsidiaries has fully and accurately reported all payments to all independent contractors, volunteers, subcontractors, temps, leased employees, and other contingent workers on IRS Form 1099s or as otherwise required by Applicable Laws and have satisfied all applicable withholding tax obligations. **Each employee classified** by the Company or its Subsidiaries **as “exempt” from overtime under the Fair Labor Standards Act** and/or any foreign, state, local or other Applicable Laws governing wages, hours, and overtime pay, **has been properly classified** as such, and none of the Company or any of its Subsidiaries has incurred any liability under the Fair Labor Standards Act or any foreign, state, local or other Applicable Laws governing wages, hours, and overtime pay.

None of the Company or any of its Subsidiaries has **implemented any employee layoff that was not in compliance with the WARN Act or incurred any liability under the WARN Act** or any similar foreign, state, or local layoff notice law that remains unsatisfied.

## EXAMPLES OF “ME TOO” REPS

The Company is not party to a settlement agreement with a current or former officer, employee or independent contractor of the Company that involves allegations of sexual harassment by either (i) an officer of the Company or (ii) an employee of the Company at the level of Vice President or above. To the Knowledge of the Company, in the last five (5) years, no allegations of sexual harassment have been made against (i) any officer of the Company or (ii) an employee of the Company at a level of Vice President or above.

Except as set forth on Schedule \_\_, no allegations by a current or former Target Service Provider of sexual harassment, sexual misconduct or employment discrimination have been made against or related to any Target Company, Target Subsidiary or any current or former Target Service Provider. With respect to each allegation set forth on Schedule 5.18(e), the Target Companies and Target Subsidiaries have promptly, thoroughly and impartially investigated such allegation and, when applicable, taken prompt and necessary corrective action, including to prevent further harassment, misconduct and discrimination. No Target Company or Target Subsidiary has any liability with respect to any acts of sexual harassment, sexual misconduct or employment discrimination.





# EXCERPT FROM MERGER AGREEMENT REGARDING TREATMENT OF EQUITY AWARDS



- a) At the Effective Time, each outstanding In-the-Money Option shall be cancelled and converted into the right to receive for each share of Company Common Stock subject to such outstanding In-the-Money Option, the sum of (i) (A) the Per Share Merger Consideration minus (B) the per share exercise price of such In-the-Money Option (such difference, the “Closing Per Share Net Option Payment”), plus (iii) the Per Share Escrow Release Amount, if any. Notwithstanding the foregoing, with respect to each Optionholder that holds an outstanding In-the-Money Option, as a condition to such Optionholder receiving such Optionholder’s applicable portion of the Aggregate Merger Consideration in respect of such Optionholder’s In-the-Money Option, such Optionholder is required to execute and deliver the Joinder Agreement to Parent.
- b) At the Effective Time, each outstanding Out-of-the Money Option shall be cancelled and shall not be entitled to receive any Per Share Merger Consideration.
- c) At the Effective Time, each outstanding and unvested Company Option shall automatically be cancelled for no consideration.

## EXAMPLE OF INDEBTEDNESS DEFINITION

“Indebtedness” means, without duplication, and in each case as of immediately prior to the Closing, with respect to the Company, all indebtedness or other obligations of the Company: (a) with respect to borrowed money or notes payable; (b) evidenced by bonds, notes, debentures or similar debt instruments; (c) for all interest rate and currency swaps, caps, collars and similar agreements or hedging devices under which payments are obligated to be made by the Company whether periodically or upon the happening of a contingency; (d) secured by any Lien on any asset owned or held by the Company regardless of whether the indebtedness secured thereby shall have been assumed by the Company or is non-recourse to the credit of the Company; (e) in respect of letters of credit, surety, bond, performance bond, guarantees or bankers’ acceptances issued for the account of the Company, whether or not matured but solely to the extent drawn or otherwise outstanding;

(f) under any “keep well” or other agreement to maintain the financial condition of any other Person; (g) for any declared but unpaid dividends, or distributions otherwise payable to the Holders; (h) for any accrued but unpaid Taxes of the Company for Pre-Closing Periods, and any Taxes of the Company which would otherwise be due and payable on or before the Closing Date the payment of which is deferred pursuant to U.S. Pub. L. 116-136 (The Coronavirus Aid, Relief, and Economic Security, or “CARES,” Act) or any similar state, local or foreign Tax Law or official guidance effected in connection with COVID-19 or related economic dislocation; **(i) for any liability for unfunded or underfunded Company Benefit Plans and any liability for unsatisfied “withdrawal liability” (as defined under ERISA); (j) for any severance obligations or severance liabilities that arise from any termination of employment occurring on or prior to the Closing.**

**together with any Taxes payable with respect thereto; (k) any liability for any accrued and unpaid paid time off, sick pay or vacation, together with any Taxes payable with respect thereto; (l) for any unpaid bonuses with respect to calendar year 2019 and the pro rata portion, assuming bonuses are accrued on a daily basis and assuming a 365-day calendar year, of any unpaid bonuses with respect to calendar year 2020, together with any Taxes payable with respect thereto;** (m) with respect to any guarantees of obligations of the types described in the items set forth above of any other Person; and (n) for all accrued but unpaid interest, prepayment penalties, make-whole payments, breakage fees or the like, or any other fees or penalties related to any of the items set forth above.

# EXAMPLE OF TRANSACTION EXPENSES DEFINITION



“Transaction Expenses” means all unpaid fees and expenses, as of the Closing, that have been incurred by the Companies or any of their Subsidiaries in connection with the sale of the Companies, the Transaction Documents and the consummation of the transactions contemplated by this Agreement and the other Transaction Documents, including (i) any brokerage commissions, finders’ fees, financial advisory fees, fees for counsel or accountants, or other advisor and service provider fees and, in each case, related costs and expenses, **(ii) the amount (other than the Retention Payment and the Post-Closing Severance Pool) of any retention bonus, change of control payment, severance, transaction bonus or discretionary bonus that is or becomes payable to any employee, officer, director, or consultant of a Company or a Subsidiary thereof,**

**or to any other Person in connection with the transactions contemplated by this Agreement, including (without limitation) the amounts payable with respect to the Transaction Bonus Pool (as defined in the Company Disclosure Schedules), (iii) the aggregate Deferred Compensation Payment Amount paid or payable to participants pursuant to the Deferred Compensation Plans (including all costs incurred by the Companies and their respective Subsidiaries in connection with the settlement and termination of these plans), (iv) any tax gross-up bonus and earnings credits paid to participants in the Deferred Compensation Plans in connection with the termination thereof, (v) the employer’s share of Taxes attributable to the payment of the amounts referred to in the preceding clauses (ii), (iii) and (iv) above,** which shall not be included in Closing Date Working Capital, and (vi) all amounts owing under the agreements terminated in accordance with Section 6.5.

# EXAMPLES OF INTERIM PERIOD COVENANTS

From the date hereof until Closing, Sellers shall, and shall cause the Target Companies and the Target Subsidiaries, to conduct their respective business substantially in accordance with all applicable Laws in all material respects and in the ordinary course of business, consistent with past practice and not to take any of the following actions:

(ix) except to the extent required by applicable Law, pay or provide to any current or former Target Service Provider any compensation or benefit, other than (A) the continued payment of base compensation, and (B) the continued provision of existing benefits and compensation arrangements under the Benefit Plans set forth on Schedule \_\_, in each case, in the ordinary course of business consistent with past practice;

(x) grant any equity, equity-based, incentive or similar awards or make any increase in the salaries, bonuses or other compensation or benefits payable to any current or former Target Service Provider, except in the ordinary course of business, consistent with past practice;

(xi) terminate any Target Company Plan or amend or modify any Target Company Plan other than as required by its terms or applicable Law,

(xii) establish, adopt or enter into any benefit or compensation plan, program, policy or arrangement that would be a Target Company Plan if it were in existence as of the date hereof;

(xiii) accelerate the time of payment, vesting or funding of any compensation or benefits to any Target Service Provider under any Benefit Plan or otherwise;

(xiv) hire or engage any employee or other individual service providers or, except in the ordinary course of business, consistent with past practice, terminate the employment or engagement of any Target Service Provider;

(xv) enter into, extend, terminate, or modify any collective bargaining agreement or other Contract with any labor union, labor organization, works council or other employee representative body, or recognize any labor union or labor organization as the bargaining representative for the employees of any Target Company;

(xvi) implement any employee layoffs that would require notification under the WARN Act; or ...

## EXAMPLES OF EMPLOYEE MATTERS COVENANTS

At the Closing and for a period of twelve (12) months following the Closing, the Buyer shall, and shall cause the Company and its Subsidiaries, to ensure that employees of the Company and any Subsidiary thereof who continue to be employed on and immediately after the Closing Date (the “Company Employees”) (i) shall be entitled to continue to receive base salaries, wage rates and cash bonus or commission opportunities (excluding any retention, change of control, transaction or similar bonuses) which are not less than those received by such employees immediately prior to the Closing, (ii) employee benefits that are in the aggregate substantially similar to the employee benefits (excluding any equity or equity-based compensation, any deferred compensation, any long-term incentive compensation, and any defined benefit pension or retiree medical arrangements) that were provided to such employees immediately prior to the Closing, and (iii) severance payments upon an actual termination without cause (but not, for example, due to a constructive termination) that are no less favorable than the severance payments described in Schedule \_\_\_\_.

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Each offer of employment to a Business Employee pursuant to paragraph (A) above, shall be for at-will employment and provide that for a period of one year following the Closing Date (or such longer period as required by applicable Law), Purchaser shall, or shall cause its Affiliates to, provide to each Business Employee (1) a Comparable Position, (2) base salary or hourly wage rate that is no less favorable than the base salary or hourly wage rate in effect for each such Business Employee immediately prior to the Closing, (3) performance driven bonuses that are comparable to market practice for businesses in [State] that are similar to the Business (including the number of employees), (4) a package of employee benefits consisting of medical, dental, vision, disability, life insurance, vacation, and defined contribution retirement benefits that are, in the aggregate, comparable to market practice for businesses in [State] that are similar to the Business (including the number of employees), and (5) severance benefits that are not materially less favorable than the severance benefits that would have been payable to each such Business Employee under the terms of the Seller’s Severance Pay Plan, taking into account such Business Employee’s years of service as a Business Employee with Seller Parent and its Affiliates and their respective predecessors prior to the Closing and such Business Employee’s base salary or hourly wage rate as of the Closing.

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Effective as of the Closing, the Company Entities shall continue to employ all of the Business Employees. The Buyer covenants that for the period commencing on the Closing Date and ending on the date that is 12 months following the Closing Date (or, if earlier, the date of termination of the applicable Business Employee), each Business Employee shall receive (i) an annual base rate of salary or wages and annual cash incentive opportunities that in each case are no less favorable to such Business Employee than those in effect on the date of this Agreement, (ii) severance and other termination benefits that are no less favorable to such Business Employee than those in effect on the date of this Agreement, and (iii) employee benefits (not taking into account defined benefit pension benefits, retiree medical benefits, equity or equity based compensation, long-term incentive compensation, deferred compensation, and retention bonus, change of control bonus, transaction bonus and similar bonus compensation) that are substantially comparable in the aggregate to those in effect on the date of this Agreement.

## EXAMPLES OF RESTRICTIVE COVENANTS

During Executive's employment and ending on the [•]-month anniversary of the termination date, Executive shall not either directly or indirectly hire, or solicit, induce, recruit, encourage or otherwise endeavor to cause or attempt to cause to hire, any employee of the Company or any of its subsidiaries, who was employed by the Company or any of its subsidiaries within the six month period prior to the termination date.

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During Executive's employment or service and ending on the [•]-month anniversary of the termination date, Executive shall not either directly or indirectly solicit, induce, recruit, encourage or otherwise endeavor to cause or attempt to cause any past, current or prospective customer of the Company or any of its subsidiaries, to cease doing business in whole or in part with the Company or any of its subsidiaries or to change or alter in any adverse way the business relationship such customer has with the Company or any of its subsidiaries.

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During Executive's employment or service and ending on the [•]-month anniversary of the termination date, Executive shall not directly or indirectly own any interest in, manage, control, participate in, be employed by, consult with, render services for, or in any manner engage in any Competing Business (as defined below) within any geographical area in which the Company or any of its subsidiaries or affiliates engage or have active plans as of the termination date to engage in such businesses. Executive acknowledges and agrees that this restriction is without specific geographic limitation inasmuch as the Company and its subsidiaries or affiliates conduct business on a nationwide and international basis, that its sales and marketing prospects are for continued expansion both nationally and internationally, that access to the Company's and its subsidiaries' and affiliates' Confidential Information would provide any national or international competitor with an unfair competitive advantage, and that, therefore, the restrictions set forth in this section are reasonable and properly required for the adequate protection of the legitimate interests of the Company and its subsidiaries and affiliates. Nothing herein shall prohibit Executive from owning beneficially not more than 2% of any class of outstanding equity securities or other comparable interests of any issuer that is publicly traded, so long as Executive has no active participation in the business of such issuer. For purposes of this Agreement, the term "Competing Business" means any business that is engaged in the production or sale of products that compete with the products produced, distributed or sold by the Company or its affiliates (or are in the process of being actively developed by such entities) as of the termination date.

## YOUR CONTACTS



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