

## ***First Wednesday — A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management***

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***By Jeffrey A. Snyder - Issue No. 10: May 7, 2003***

Jeff is a Shareholder of Thoits, Love, Hershberger & McLean, specializing in employment law and commercial litigation. He can be reached at (650) 327-4200 or [jsnyder@thoits.com](mailto:jsnyder@thoits.com).

### **Seven Essential Terms for Written Employment Agreements**

A good defense to an ex-employee's wrongful termination case often begins, and sometimes ends, with solid proof of an at-will employment agreement. Thus, I am amazed when a company fails to secure written employment agreements which can later be used to defend the company in these cases. While written employment agreements are typically required for executive-level employees, a standardized one- or two-page offer letter, countersigned by each non-executive employee, is highly recommended for at least three reasons.

First, the offer letter should confirm that the employment relationship is "at-will," meaning that either side can terminate the relationship at any time, with or without cause. Though employment in California is presumed to be "at-will," a company's personnel documents and other evidence can be shown to rebut the at-will presumption. Thus, an offer letter that includes a specific "at-will" agreement provides a first line of defense to wrongful termination claims.

Second, by using an "integration clause" in the offer letter, the company may negate contrary statements made in the hiring process. An integration clause seeks to specifically affirm that all the material terms are included in the offer letter and, if a term is not included, then the term does not exist. For example, an employee might claim that he was promised a certain position or salary before accepting the job. However, if the offer letter is reasonably clear *and* includes an integration clause, it will be difficult for the employee to

successfully argue that a contrary promise was made during the hiring process. By including an integration clause, the company will have a defense to these so-called “truth-in-hiring” cases.

Third, the material terms of employment should be documented at the outset because it will be more difficult to legally change or add terms midway through the employment relationship. Obviously not all terms can be spelled out in a one- or two-page offer letter. The company should, therefore, cover other important terms in separate confidentiality and assignment of inventions agreements. The company should also refer to its employee handbook for guidelines, policies and procedures, but realize that the handbook may not be enforceable in court as a contract. In fact, employee handbooks often include a statement to the effect that they are not binding contracts; thus, the need for an effective written employment agreement.

### **Seven Terms (and a Possible Eighth) To Include In The Offer Letter**

The following skeletal terms, in quotes, should be considered for use in standardized offer letter/employment agreements:

1. Description of title or position held. “You are being hired as \_\_\_\_\_.”
2. Beginning salary and benefits. “Your starting salary is \$\_\_\_\_\_ and your beginning benefits are \_\_\_\_\_.”
3. The starting salary and benefits are subject to being changed by the company in its sole discretion. “Your starting salary and beginning benefits may be changed by the Company in its sole discretion, but we will attempt to notify you of any changes.”
4. Confirm the employment relationship is at-will. “Your employment with the Company is at-will, meaning that either you or the Company can terminate the relationship at any time, with or without notice, and with or without cause.”
5. No modifications. “This Agreement cannot be modified orally or in writing except in a document which refers to this Agreement and is signed by you and the President of the Company.”

6. Acknowledge receipt and understanding of separate employee handbook, manual, guidelines, protocols and any other agreements. “You acknowledge that you have received, read and understood the Company’s \_\_\_\_\_.”

7. Integration Clause. “This Agreement is the only agreement between you and the Company regarding the terms and conditions of your employment, and this Agreement supersedes any written or oral promises, negotiations, representations or agreements previously made, and you have not relied upon any other promises or agreements in accepting employment with the Company.”

[8.] Binding Arbitration. This topic was covered more extensively in Issue No. 3 of *First Wednesday* (October 2, 2002). Arbitration agreements are generally enforceable, so long as the arbitration program is fair to the employee. There are a few essentials: (1) the arbitrator must be neutral; (2) the arbitrator must give a written decision explaining the reasons for the award; (3) there must be adequate pre-hearing discovery; (4) remedies that would be available to the employee in court must remain available in the arbitration; and (5) the agreement cannot require the employee to pay any type of costs or arbitrators’ fees unique to the arbitration form. Within these guidelines, there are many possible variations for an effective arbitration program. Consider the following simple clause: “Any claim relating to this Agreement, the employment relationship, or the termination of your employment, shall be subject to final, binding arbitration conducted by \_\_\_\_\_ in \_\_\_\_\_, California. The arbitrator shall allow limited pre-arbitration discovery, and shall issue a written decision following a hearing. Each party waives its right to trial in court by a judge or jury, and waives any right to appeal. The arbitrator’s decision shall be final and binding.”

### **Summary**

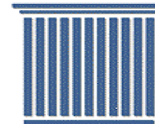
The first seven items listed above are the minimum terms to create an effective, standardized short-form offer letter meant to cover about 90% of the workforce. The letter should be signed by both parties. Each employer will, of course, want to customize this generic form to fit its own unique circumstances. Note: This simple form is not recommended for executive-level employees.

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Jeffrey A. Snyder  
Thoits, Love, Hershberger & McLean  
245 Lytton Avenue, Suite 300  
Palo Alto, California 94301-1426  
Telephone: (650) 327-4200  
Facsimile: (650) 325-5572  
E-mail: [jsnyder@thoits.com](mailto:jsnyder@thoits.com)

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LOVE  
HERSHBERGER  
& McLEAN  
Attorneys at Law



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