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## LEGAL BRIEFS

### Contracting with a Technology Executive

Despite recent downward turns in the technology sector of the market, technology-based companies remain a viable economic contributor and continue to impact us in numerous ways. For these technology-based companies, finding the *right* people to manage and operate the company's affairs continues to be an enormous challenge and, in many cases, an obstacle to growing the business to the next level. For those companies that have been fortunate enough to find those *right* people, hanging on to those employees and keeping them from taking a job with a competitor is critical. After all, next to the technology itself, valued employees are often the company's biggest asset.

Although written employment contracts are not necessary to create an employer-employee relationship, they can prove to be an invaluable document and are particularly critical when hiring a senior executive in a technology-based company. The following contract terms are likely to be included in most agreements between a technology-based company and one of its senior executives, but because every relationship is unique, there may be others terms and provisions that are appropriate in your situation:

***Duration.*** Whether the employment relationship is intended to last for a few years or indefinitely, the duration of the contract should be clearly established. If the employer and the employee fail to agree to continue the employment relationship for a specific period of time or until the occurrence of a specific event (i.e., the completion of a project), the contract will only continue at the voluntarily will of each party and can be terminated by either at any time. Having a senior executive learn your business, and then voluntarily leave your employment and go work

for your competitor is the last thing you want to have happen.

***Duties.*** In addition to certain duties implied by law, such as the employee's duty of loyalty, the employee's duty to exercise skill in performing his or her duties, and the employer's duty to provide adequate compensation for services rendered, the specific duties and responsibilities of each party should be clearly documented. Some or all of these duties can be enumerated in an employee's formal job description, or can be made in employment policy statements or in an employment manual/handbook.

***Compensation.*** While the payment of some form of compensation to an employee for services rendered is implied by law, the actual amount and the particular kind of compensation is dictated by the terms of the contract itself. The compensation provisions of a contract typically not only address the obvious matter of a salary or commissions, but issues such as bonuses, vacations, pension plans and severance pay. Signing bonuses, bonuses based on the incremental growth of the company, and commissions based on sales are often used to lure those *right* people to accept a position and provide additional incentive for an employee to perform at a superior level.

***Stock Grants, Purchases and Options.*** While salaries and bonuses are a key element of compensation, in the technology world, so too are stock grants, stock purchase rights and stock options. With stock grants, an employee may be given stock as an incentive to join the company or upon achieving certain milestones. With stock purchase rights, an employee is given the opportunity to purchase stock in the company, typically at a price under current market value. And finally, with stock options, the employee



is not actually given any stock or offered the right to purchase stock at that time, but rather, is given an option to purchase a pre-determined number of shares at a certain price at some point in time in the future. Unlike stock grants and stock purchase rights, stock options typically vest over a period of time, thereby incenting the executive to stay with company for a longer period of time.

Restrictive Covenants. Under these types of provision, employees agree not to engage in a business or vocation which competes with that of their employer, as well as not to solicit the company's employees. (However, this must be balanced with an employee's right to earn a living.) The Maryland Court of Appeals has repeatedly held that these types of covenants will be sustained only "if the restraint is confined within limits which are no wider as to area and duration than are reasonably necessary for the protection of the business of the employer and do not impose an undue hardship on the employee or disregard the interest of the public."

Confidentiality of Trade Secrets. Because a technology-based company's know-how, its staff and its ideas are often its biggest asset, confidentiality provisions are imperative. At a minimum, the provision should provide for a prohibition on an employee's right to disclose information concerning client or customer lists, business operations or the internal structure of the company, research performed, technological know-how, or any other material of a sensitive nature. In addition, the provision should provide that the employee assigns any rights that he or she may have in any trade secret or proprietary information to the company.

Discharge. Employment contracts at will (those with no specific duration) can be terminated by either party at any time for any reason whatsoever, so long as the motivation for the termination does not violate public policy or a statutory prohibition against such a

termination. Employment contracts for a fixed period of time, however, can only be terminated by the employer when the employee breaches the employment contract or when there is otherwise a good cause for the discharge. Although there is no magic as to what is and what is not good cause, misconduct, disloyalty, insubordination or an inability to competently perform one's duties are all clearly legitimate grounds for discharge.

Miscellaneous. Other standard contract issues such as notice requirements, jurisdiction and venue, attorney's fees and costs, and construction and integration should also all be included.

While most employers today do not require their employees to execute employment contracts, doing so can help to ensure that each party fully and clearly understands what is expected of them. Agreeing on such expectations before the relationship begins can not only serve to more easily resolve disputes and misunderstandings, but can often effectively eliminate problems and disagreements altogether. And finally, having contracts, particularly with executives, can help ensure that you don't lose the best talent to one of your competitors!