

*The sample forms provided as part of Ogletree Deakins' sponsorship of the Association of Corporate Counsel's Sports and Entertainment Law Network are intended merely for informational purposes. No representation is made as to the enforceability of these forms in any jurisdiction, and the materials should not be relied upon or construed as legal advice, or as a substitute for obtaining legal advice from an attorney licensed in the applicable jurisdiction(s).*

## RETENTION INCENTIVE AGREEMENT

**THIS RETENTION INCENTIVE AGREEMENT** (the "Agreement") is made as of *[date]*, by and between ABC Corporation and its successors and assigns (collectively, "Company"), and \_\_\_\_\_ ("Employee").

**[WHEREAS,** the Company is in the midst of an extensive internal restructuring and acquisition that involves the loss of employment for various employees (the "Closing");

**WHEREAS,** the Company considers continuing the services, leadership and support by Employee during the Retention Period (as defined herein) to be very important to the ongoing effective management of the business; and,

**WHEREAS,** subject to the terms of this Agreement, the Company wishes to incentivize Employee to remain in active employment with the Company and to work diligently from the date of this Agreement to the end of the Retention Period,]

*[Note: Include within recitals summary of basis/business case for providing Employee with retention incentive.]*

**NOW, THEREFORE,** for good and valuable consideration, Employee and the Company hereby agree as follows:

### 1. Definitions

(a) **Active Employee.** For the purposes of this Agreement, and subject to paragraphs 2(b) and (c) hereof, Employee will be considered an "Active Employee" on a given date if, on that date, Employee remains actively employed by the Company, has not given oral or written notice of intent to resign or retire as of a date prior to the end of the Retention Period (as defined herein), and has not engaged in conduct that would be grounds for discharge as determined by Company management, such as poor performance or violation of any Company policy, including those as outlined in the Company's *[Note: Include here source of Company policy (e.g., employee handbook or code of conduct)]*.

(b) **Retention Period.** For the purposes of this Agreement, and subject to paragraphs 2(b) and (c) hereof, the "Retention Period" shall mean the period beginning on the date of this Agreement and ending on *[Note: Include here date as of which Retention Period ends]*.

### 2. Retention Incentive Eligibility

(a) **Retention Incentive Bonus.** Subject to the terms of this Agreement, if and only if Employee has remained an Active Employee of the Company and worked diligently for the entire Retention Period (subject to paragraphs 2(b) and (c) hereof), then, within thirty (30) days following the end of the Retention Period, the Company will pay Employee a retention incentive bonus (a "Retention Bonus") in

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the gross amount of \$\_\_\_\_\_ payable in a lump sum in accordance with the Company's payroll procedures. *[Note: If applicable, replace lump sum payment with installments or periodic payments (e.g., five monthly or annual payments).]*

**(b) Termination of Employment.** Subject to paragraph 2(c), in the event that Employee resigns for any reason or is terminated by the Company for any reason prior to the end of the Retention Period, the unpaid Retention Bonus shall be cancelled without payment. *[Note: Consider whether all or a portion of the Retention Bonus should be paid upon termination without cause or resignation for good reason.]*

**(c) Death or Disability.** If Employee's employment with the Company terminates prior to the end of the Retention Period because of Employee's death or Disability (as defined herein) and Employee is otherwise an Active Employee at that time, the Retention Bonus will become fully vested and payable. If Employee is deceased, the Company will make a payment to Employee's estate within sixty (60) days following death. "Disability" means the inability of Employee to perform material duties pertaining to such Employee's employment due to a physical or mental injury, infirmity, or incapacity for 180 continuous days (including weekends and holidays) in a 365-day period, as determined by a physician selected by the Company. *[Note: Alternatively, may base Disability on Employee's eligibility for benefits under the Company's LTD plan.]*

**3. Proprietary Information.** Employee shall at all times, both during employment with the Company and following termination of employment with the Company for any reason, preserve the confidentiality of all Company proprietary information and trade secrets. "Proprietary Information" means information obtained or developed by Employee during Employee's employment with the Company, whether or not it constitutes a trade secret, including but not limited to information relating to the Company's business, operations, finances, products, services, sales plans, costs, pricing structures, suppliers, customers, and employees, that has not been fully disclosed in a writing generally circulated to the public at large through no wrongful act of Employee or any representative of Employee, and which is treated as confidential within the business of the Company. *[Note: If the Company has restrictive covenant agreements with Employee, consider adopting them by reference as part of this Agreement.]*

**4. Confidentiality.** Employee agrees not to disclose or discuss, other than with Employee's legal counsel, financial or tax adviser, and spouse (if any) either the existence of or any details of this Agreement, unless otherwise required to do so by law. Employee will obtain the agreement of any such legal counsel, financial or tax adviser, or spouse, and make a good faith effort to ensure, that they will not disclose or discuss the existence or any details of this Agreement with any other person. *[Note: These restrictions do not apply to truthful statements or disclosures regarding unlawful employment practices or criminal activity. Employee may also disclose this Agreement to a government agency or in response to a lawfully issued and served subpoena.]*

**5. Assignment by the Company.** The Company may assign this Agreement without Employee's consent to any company that acquires all or substantially all of the stock or assets of the Company, or into which or with which the Company is merged or consolidated. Employee may not assign this Agreement, and no person other than Employee (or Employee's estate) may assert the rights of Employee under this Agreement.

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**6. Employment-At-Will.** This Agreement does not obligate the Company to retain Employee in the employ of the Company for any prescribed period or term and does not modify the employment-at-will status of Employee.

**7. Non-Benefit Bearing Payments.** Amounts paid under this Agreement shall not be treated as compensation for purposes of computing or determining any additional benefit payable under any bonus plan, savings plan, insurance plan, pension plan, or other employee benefit plan maintained by the Company.

**8. Remedies.** Employee acknowledges that irreparable injury will result to the Company, and to the Company's business, in the event of a material breach by Employee of any of Employee's covenants and commitments under this Agreement. In the event of a material breach of any of Employee's covenants and commitments under this Agreement, Employee, in the sole discretion of the Company, may forfeit any amount otherwise payable to Employee under Section 2 of this Agreement. In addition, the Company reserves all rights to seek any remedies and damages permitted under law, including, but not limited to, injunctive relief, equitable relief and compensatory damages. *[Note: Consider whether a release agreement shall be required.]*

**9. Governing Law.** This Agreement shall be deemed to be made in, and in all respects shall be interpreted, construed and governed by and in accordance with, the laws of the *[State]*, without regard to any principles governing conflicts of laws or canons of construction interpreting written agreements against the drafter.

**10. Waiver of Right to Jury Trial.** The Company and Employee hereby agree to waive all rights to a jury trial in connection with any dispute arising out of or relating to the terms of this Agreement.

**11. Severability & Waiver.** If any clause, phrase or provision of this Agreement or the application thereof to any person or circumstance shall be invalid or unenforceable under any applicable law, this shall not affect or render invalid or unenforceable the remainder of this Agreement. The waiver by the Company of a breach by Employee of any provision of this Agreement shall not be construed as a waiver of any subsequent breach.

**12. Tax Consequences.** The Retention Bonus shall be subject to applicable tax withholdings and deductions. Amounts payable under this Agreement are intended to comply with the "short-term deferral" exception from Section 409A of the Internal Revenue Code of 1986, as amended (the "Code") and shall be interpreted in a manner consistent with that exception. If amounts payable under this Agreement are subject to Code Section 409A, this Agreement shall be construed in a manner calculated to meet the requirements of Code Section 409A to the maximum extent possible. "Termination of employment," "resignation," or words of similar import, as used in this Agreement shall mean, with respect to any payments subject to Code Section 409A, Employee's "separation from service" as defined by Code Section 409A. If any payment subject to Section 409A is contingent on Employee's delivery of a release and could occur in either of two calendar years, the payment will occur in the later year. Employee is solely responsible for the tax consequences with respect to all amounts payable under this Agreement, and in no event shall the Company have any responsibility or liability if this Agreement does not meet any applicable requirements of Code Section 409A.



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**13. Entire Agreement.** This Agreement supersedes all prior or contemporaneous agreements and statements, whether written or oral, concerning the subject matter herein, and no amendment or modification of this Agreement shall be binding unless it is set forth in a writing signed by both an authorized officer of the Company and Employee.

**14. Effectiveness.** This Agreement shall be effective only upon the occurrence of the Closing. In the event the Closing does not occur, this Agreement shall be null and void.

**15. Survival.** The provisions of Sections 3, 4, 5, and 8-10 shall survive the termination of this Agreement and remain in full force and effect.

**16. Counterparts.** This Agreement may be executed by the separate executive of identical counterparts.

IN WITNESS WHEREOF, the parties hereto have knowingly and voluntarily executed this Agreement on the date first set forth above.

**ABC Corporation**

By: \_\_\_\_\_

\_\_\_\_\_ Date

Title: \_\_\_\_\_

Accepted by:

\_\_\_\_\_  
**Employee**

\_\_\_\_\_ Date

Print Name: \_\_\_\_\_

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For more information, please contact:  
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