



American Staffing Association



National Association of Personnel Services

Model Recruiting Agreement

The American Staffing Association and the National Association of Personnel Services have jointly developed the first authoritative, professional template for firms that provide recruiting, search, and placement services to use as a model in preparing client agreements.

The model adopts a unique approach that offers recruiting firms a basic agreement plus extensive optional provisions—along with detailed explanations as to their purpose and use—to afford great flexibility in tailoring the documents to particular client circumstances. The model includes language dealing with alternative fee calculations, volume discounts, retainer and engagement fees, and various guarantee clauses, such as replacements, refunds, and credits. The model also lists provisions best avoided.

IMPORTANT NOTES

- *The basic agreement and accompanying optional or alternative provisions provide suggested language only; modification may be necessary or desirable in particular cases.*
- **Recruiting firms are strongly urged to consult with their own counsel before using this agreement or any of the optional or alternative provisions.**

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BASIC AGREEMENT

AGREEMENT FOR SEARCH, RECRUITMENT, AND PLACEMENT SERVICES

FEES AND EXPENSES: CLIENT agrees to pay a placement fee to RECRUITING FIRM in the amount of ____ % of the candidate’s estimated total first year’s compensation, including estimated commissions and bonuses, and any signing bonus. Such fee is not subject to reduction even if the candidate’s employment terminates. CLIENT will be obligated to pay such fee whenever

1. A candidate referred to CLIENT by RECRUITING FIRM is hired, directly or indirectly, for any position, as an employee, consultant, or independent contractor, by CLIENT, its affiliates, parents, or subsidiaries, or
2. A candidate referred to CLIENT by RECRUITING FIRM is referred by CLIENT to another employer or recruiting firm and the candidate is hired, directly or indirectly, for any position, as an employee, consultant, or independent contractor, by such employer or through such recruiting firm.

For the purpose of paragraphs 1 and 2 above, the word “referred” means any manner or means of communication of a candidate’s identity.

In addition to any fees, CLIENT agrees to pay all reasonable CLIENT preapproved expenses incurred by RECRUITING FIRM related to the performance of its services under this agreement.

Optional and Alternative Fee Provisions (see pages 3-6)

- | | |
|--|---|
| 1. Proximate Cause | 4. One-Year Limit on Fees |
| 2. Alternative Calculation Methods, Retainer/Engagement Fees, Volume Discounts | 5. Waiver of Fee Where Candidate Is Already Under Active Client Consideration |
| 3. Fee Look-Back | 6. Guarantees: Replacement, Refund, Credit |
| | 7. No Client Recoupment of Fees From Candidates |

PAYMENT TERMS: CLIENT agrees to pay all placement fees and related expenses within ____ days after _____. [Insert reference point, such as candidate’s date of hire or start date, or receipt of invoice.] Interest of 1% per month will be charged on unpaid fees more than ____ days past due. CLIENT agrees to reimburse RECRUITING FIRM for all reasonable costs of collection, including attorney fees.

CONFIDENTIALITY OF REFERRALS: All candidate referrals made by RECRUITING FIRM are made on a confidential basis and CLIENT shall hold RECRUITING FIRM harmless from any liability resulting from CLIENT’S unauthorized disclosure or misuse of information regarding any candidates or their candidacy.

DISCLAIMER: RECRUITING FIRM does not guarantee the performance of any candidate or the accuracy of information provided regarding a candidate, and disclaims any responsibility for claim, loss, or liability as a result of a candidate’s acts or omissions. RECRUITING FIRM urges CLIENT to conduct such investigations, as it deems necessary to verify candidate information or to obtain such other information, as it may deem relevant.

CLIENT

RECRUITING FIRM

By: _____
 Print name and title of client representative

 Print name of client company

 Sign and print date

By: _____
 Print name and title of recruiting firm representative

 Print name of recruiting firm

 Sign and print date

OPTIONAL AND ALTERNATIVE PROVISIONS

The following provisions may be added to the basic agreement depending on the needs or desires of the recruiting firm or its client. **As with the basic agreement itself, recruiting firms should consult with their own counsel before using any of these provisions.**

SIGNATURE PROVISION

Only one state (Massachusetts) requires written, signed, agreements between a recruiting firm and its clients. However, it is **strongly recommended that recruiting firms work with signed agreements** wherever possible. If a signed agreement is impractical, the signature section of the sample agreement should be replaced with the following provision:

CLIENT'S acceptance of referrals from RECRUITING FIRM, interviewing of candidates referred by RECRUITING FIRM, or employment of any such candidates shall constitute CLIENT'S acceptance of the terms and conditions of this agreement.

FEE PROVISIONS

1. Proximate Cause

The fee provision in the basic agreement does not expressly require the recruiting firm to prove that its referral of a candidate is the proximate cause of the client's employment of the candidate. Nevertheless, since some courts might still require such proof even in the absence of an express provision, many recruiting firms prefer to include language requiring proximate cause as a condition of earning their fee. This makes it less likely that the client will find itself in a position where it owes fees to more than one recruiting firm and may help prevent fee disputes. The following provision may be added to the Fees and Expenses section of the basic agreement to expressly incorporate the concept of proximate cause:

RECRUITING FIRM'S fee is earned if the firm is a cause of a candidate accepting a position with CLIENT, or any related company, in any capacity, as employee, consultant, or independent contractor.

On the other hand, even though it may be harder to sell to a client, a recruiting firm may wish to use a provision that expressly states that the firm is entitled to a fee even if it is *not* the proximate cause of the placement. The following language accomplishes that through the use of the phrase "or otherwise":

RECRUITING FIRM'S fee is earned if a candidate referred by RECRUITING FIRM accepts a position, as a result of RECRUITING FIRM'S referral or otherwise, with CLIENT, or any related company, in any capacity, as employee, consultant, or independent contractor, within 12 months of the most recent activity on behalf of that candidate by RECRUITING FIRM.

2. Alternative Calculation Methods, Retainer/Engagement Fees, Volume Discounts

The basic agreement uses a percentage of earnings method of calculating the fee because of the prevalence of that practice in the industry. But there are many alternative fee arrangements, including flat fees, hourly charges, retainer/engagement fees, and volume discounts. Below are suggested retainer/engagement fee and volume discount provisions:

RETAINER/ENGAGEMENT FEE: Upon signing this agreement, CLIENT will pay RECRUITING FIRM a nonrefundable retainer of \$_____. [Insert flat fee, percentage of anticipated placement fee, or other fee.] This retainer will be credited against any further fee that may become due under our agreement dated _____. No search may begin until the retainer/engagement fee is paid.

Note that the above retainer/engagement fee provision is designed to be included as part of the basic agreement and is intended to cover all transactions between the recruiting firm and its client during the period of the agreement. However, where a retainer/engagement fee is used for a specific search, it is recommended that the retainer/engagement fee, as well as related expenses, be addressed in a separate letter agreement for each search, which could include the following provision:

In connection with RECRUITING FIRM'S search for a _____, [describe position] CLIENT will pay RECRUITING FIRM a nonrefundable retainer of \$_____. This retainer will be credited against any further fee that may become due in connection with this search under our agreement dated _____. You also agree to reimburse us for preapproved expenses incurred in connection with this search, for which we shall invoice you monthly. All other terms and provisions of our agreement dated _____ shall remain in full force and effect.

VOLUME DISCOUNT: If CLIENT hires multiple candidates referred by RECRUITING FIRM in a calendar year, the fee for all placements in the calendar year after the ___th placement shall be _____.

3. Fee Look-Back

In some industries, where large year-end bonuses may be commonplace, the recruiting firm may wish to provide for a "look-back" after one year to recalculate the fee and capture any increase in compensation beyond what was estimated at the outset. The following provision may be used for that purpose:

In the event the first year's compensation of a candidate placed by RECRUITING FIRM exceeds the estimated compensation upon which the initial fee was based, RECRUITING FIRM shall be entitled to an additional fee of ____ % of such additional compensation. This additional fee shall be paid no later than ____ months [allow time for client to calculate and pay bonus] following the candidate's first day of employment.

4. One-Year Limit on Fees

The basic agreement imposes no time limit on when a placement must occur for a recruiting firm to earn its fee. The reason for including such a limit is that, in the event of a dispute, a court might refuse to enforce an agreement that appears to allow the recruiting firm an unlimited amount of time to collect its fee. A time limit, such as one year, would be helpful in persuading a court that the fee provision is reasonable, especially if the agreement does not contain a proximate cause provision. If it does contain such a provision, a time limit probably is unnecessary, although some recruiting firms have found that a relatively long time limit (e.g., one year) deters clients from later arguing that a shorter time limit should apply.

If the recruiting firm wishes to use a one-year limit on the collection of fees, it should substitute the following provisions for paragraphs 1 and 2 in the FEES AND EXPENSES section of the basic agreement:

1. A candidate referred to CLIENT by RECRUITING FIRM is hired, directly or indirectly, for any position, as an employee, consultant, or independent contractor, by CLIENT, its affiliates, parents, or subsidiaries, within 12 months of the most recent activity on behalf of that candidate by RECRUITING FIRM, or
2. A candidate referred to CLIENT by RECRUITING FIRM is referred by CLIENT to another employer or recruiting firm and the candidate is hired, directly or indirectly, for any position, as an employee, consultant, or independent contractor, by such employer or through such recruiting firm within 12 months of the most recent activity on behalf of that candidate by RECRUITING FIRM.

5. Waiver of Fee Where Candidate Is Already Under Active Client Consideration

Although many recruiting firms choose not to use such a provision, its purpose is to deal with client assertions that no fee is owed because it has “discovered,” after the fact, that the candidate was already in its files or that it saw the candidate’s résumé on an Internet job board. By specifically stating when prior contact with an applicant justifies waiver of the fee, and requiring documentation of the facts, the provision is intended to deter clients from unjustifiably maintaining that no fee is owed. Recruiting firms wishing to use such a provision can use the following language:

If RECRUITING FIRM refers a candidate to CLIENT with whom CLIENT has already interviewed or scheduled an interview, and CLIENT so advises RECRUITING FIRM within ____ business days following the referral, CLIENT will not owe RECRUITING FIRM a fee in the event CLIENT hires the candidate. CLIENT shall provide RECRUITING FIRM with documentation at RECRUITING FIRM’S request sufficient to establish that the interview has been held or scheduled.

6. Guarantees: Replacement, Refund, Credit

Recruiting firms differ on whether or not to offer guarantees, and if one is offered, how long it should be, whether it should be conditional or unconditional, and whether it should be in the form of a refund or an offer to replace the candidate. ASA and NAPS take no position on those issues, but the provisions below offer several alternatives.

REPLACEMENT GUARANTEE: In the event the employment of a candidate referred to CLIENT under this agreement lasts less than ____ calendar days, and provided that all fees and expenses relating to such referral have been paid, RECRUITING FIRM will attempt to refer a replacement candidate for the same position at no additional charge to CLIENT. RECRUITING FIRM’S obligation under this agreement is limited to attempting to find a replacement candidate. No refund will be made if CLIENT hires a replacement from any source, or if CLIENT is no longer actively seeking to fill the position.

Note that the above language expressly limits the recruiting firm’s obligation to referring candidates to fill the same position that was vacated and makes clear that the guarantee only extends to finding a replacement for that position. It does not apply to new or different positions. Nor does it allow the client to fill the position internally, or leave it vacant, and then seek a refund.

Instead of replacement, a refund may be used—either full or prorated—as the following examples provide:

REFUND: In the event the candidate’s employment lasts less than ____ calendar days, and if CLIENT notifies RECRUITING FIRM in writing of the termination within ____ days thereafter, RECRUITING FIRM shall refund the fee to CLIENT.

Or

PRO RATA REFUND: In the event the candidate's employment lasts less than ____ calendar days, and if CLIENT notifies RECRUITING FIRM in writing of the termination within ____ days thereafter, RECRUITING FIRM shall be entitled to ____ % of its fee for each day upon which candidate was employed by CLIENT, and RECRUITING FIRM shall refund the balance of the fee to CLIENT.

Or a credit could be offered rather than a refund, as the following example provides:

CREDIT: In the event the candidate's employment lasts less than ____ calendar days, and if CLIENT notifies RECRUITING FIRM in writing of the termination within ____ days thereafter, RECRUITING FIRM shall credit ____ % of its fee to each of the next ____ placements it makes with CLIENT.

Whether a replacement, refund, or credit guarantee is used, the recruiting firm may wish to consider making the guarantee conditional by adding language such as follows:

This provision shall not apply if the candidate is laid off for lack of work, or resigns because CLIENT has significantly modified the candidate's job duties or assigned him or her to another position.

Or the guarantee could be limited just to the situations where the candidate resigns, in which case just change the beginning of the first sentence of the guarantee to read:

In the event the candidate resigns his or her position in less than ____ calendar days of employment....

7. No Client Recoupment of Fees From Candidates

Some recruiting firms expressly prohibit their clients from recouping the firm's fees and expenses from the candidate. A recruiting firm wishing to include such a provision may use the following language:

CLIENT agrees not to require any candidate to reimburse CLIENT for any fee or expense paid to RECRUITING FIRM.

MISCELLANEOUS PROVISIONS

1. Background Checks

For clients that request background checks, the following provision may be used:

BACKGROUND CHECKS: RECRUITING FIRM will conduct background checks on candidates as requested by CLIENT. Requests must be in writing and must specify the scope of the background check requested. All background checks will be conducted at CLIENT'S expense.

2. Confidentiality of Client Information

Some clients may ask the recruiting firm to expressly agree to maintain the confidentiality of client information that the recruiting firm may obtain while providing services. The following provision may be used for this purpose:

CONFIDENTIALITY OF CLIENT INFORMATION: RECRUITING FIRM agrees to maintain the confidentiality of any nonpublic proprietary client information that it may obtain in the course of performing services under this agreement and shall hold CLIENT harmless from any claim, loss, or liability resulting from RECRUITING FIRM'S unauthorized disclosure of such information.

3. No-Hire Agreement

There is no need to volunteer a no-hire provision, but clients are increasingly asking for it. The following may be used in such case.

NO-HIRE AGREEMENT: RECRUITING FIRM agrees that, during the term of this agreement and for one year following its termination, RECRUITING FIRM will not recruit or solicit any employee of CLIENT to fill a position for another client of RECRUITING FIRM.

4. Additional Contract Language

The following provisions, which are largely self-explanatory, are typically found in longer, more formal contracts and may be used where appropriate.

INDEPENDENT CONTRACTOR: The services provided by RECRUITING FIRM under agreement are provided as an independent contractor. Nothing in this agreement shall be construed as creating the relationship of principal and agent, joint venturers, or employer and employee, between RECRUITING FIRM and CLIENT.

* * *

ASSIGNMENT: This agreement and all of its provisions are binding on and inure to the benefit of RECRUITING FIRM and CLIENT and their respective successors and permitted assigns, but neither this agreement nor any of the rights, interests, or obligations hereunder may be assigned by either party without the prior written consent of the other.

* * *

NON-DISCRIMINATION: RECRUITING FIRM does not discriminate in referrals, or consent to discrimination by its clients, against any candidate on the basis of age, race, color, religion, disability, sex, national origin, or veteran status.

* * *

GOVERNING LAW: This agreement will be governed by and enforced in accordance with the laws of the state of _____. The parties agree that state and federal courts within the state of _____ shall have the exclusive jurisdiction over any litigation brought or arising out of this agreement.

The advantage of this provision to a recruiting firm that inserts its home state is that an out-of-state client must come to the recruiting firm's state to defend any suit the recruiting firm may file against the client to enforce the agreement.

* * *

COST OF ENFORCING AGREEMENT: In the event RECRUITING FIRM institutes litigation to enforce its rights under this agreement and is the prevailing party in such litigation, RECRUITING FIRM shall be entitled to costs of suit and reasonable attorney fees incurred by it in connection with such litigation.

There is no guarantee that all courts will enforce this clause. But without it, a recruiting firm has little chance of recovering attorney fees. Clients may be more amenable to the alternate version below, which requires the party that loses to pay the other party's attorney fees—which, of course, could be imposed on the recruiting firm if it loses a fee collection case.

COST OF ENFORCING AGREEMENT: In the event either party files suit to enforce its rights under this agreement, the prevailing party shall be entitled to costs of suit and reasonable attorney fees incurred by it in connection with the suit.

* * *

TERMINATION AND SURVIVAL OF CERTAIN PROVISIONS: This agreement may be terminated by either party upon ____ days' written notice to the other party. However, CLIENT shall remain liable to RECRUITING FIRM for all fees and expenses due under this agreement for any candidate referred to CLIENT, its affiliates, parents, or subsidiaries, prior to termination. All other provisions of this agreement that by their terms extend beyond the termination of this agreement shall survive such termination and remain in full force and effect.

Unless an agreement is for a specified period of time, it is unnecessary to have a termination provision since the parties may simply choose to stop dealing with each other. If a termination provision is included, it is important to specify, as the above version does, that the client's obligation to pay any fees and expenses incurred during the term of this agreement survives the termination.

PROVISIONS TO AVOID

There are some contract provisions that are *not* recommended, or should at least be carefully considered before including, such as the following:

1. Best Efforts

Recruiting firms generally are paid for results, not for their time and effort. Therefore, do not agree to provisions stating that the firm will use its “best efforts” to identify and refer suitable candidates. Such provisions may create an issue for litigation: Did the recruiting firm really use its “best” efforts? If not, did it breach the contract with the client?

2. Sales Pitches

A contract is not the place to promote how well the recruiting firm performs its services. Provisions such as “we are proud of the fact that we carefully review and screen all candidates before referring them to our clients” can result in a lawsuit, regardless of any disclaimers that might appear elsewhere in the agreement.

3. Indemnification Clauses

Many clients will, as a matter of course, ask the recruiting firm to sign a clause indemnifying them for all sorts of things. Such provisions could have the recruiting firm assuming inappropriate risks, including bearing liability for the client’s products and services, and may be interpreted as a guarantee of candidate performance.

4. Contracts Limited to a Specific Position

Generally, it is preferable for the contract to cover any position. However, if the contract is for a specific position, be sure it provides for collection of a fee if the client hires the candidate for *any* position—as provided in paragraph 1 of the basic agreement.