

SAMPLE DOCUMENT

DEATH BENEFIT ONLY (DBO) PLAN

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Background Information:

- A Death Benefit Only (“DBO”) plan is an agreement between an employer and a key employee (executive) to provide benefits after the employee’s death. The benefits are paid to the employee’s named beneficiary (e.g., spouse or children), and can be paid in a lump sum or in installments.
- A DBO is an unsecured promise under which there is no employer tax deduction and no taxable income to the employee during the employee’s life.
- It is only when the employee dies and benefits are paid to the employee’s beneficiary that the employer obtains a deduction for the DBO amount (presuming the amount constitutes reasonable compensation). The employee’s beneficiary is subject to income tax on the DBO amount simultaneously. See I.R.C. §§ 61(a) and 404(a)(5); and Treas. Regs. §§ 1.404(a)-12(b)(2) and 1.162-7(b)(3).
- Typically, the agreement is “informally” funded by life insurance that is applied for, owned by, and payable at the insured’s death to the employer. The employee and the employee’s designated beneficiaries under the DBO plan have no rights whatsoever in the insurance policy. When there is employer-owned life insurance, the premiums are not deductible for the employer pursuant to I.R.C. § 264, but the insurance death proceeds are generally received by the employer income tax-free under I.R.C. § 101 (presuming the employer complies with certain requirements, such as the “notice and consent” rules of I.R.C. § 101(j)).
- If the parties don’t like the tax results of a DBO plan, but instead want the death benefit paid to the employee’s beneficiaries to be income tax-free to them, the parties should generally enter into a split dollar agreement instead of a DBO plan. Under a split dollar plan, the employee is subject to income tax annually on (or pays for) the value of the insurance coverage during the employee’s life.
- DBO plans can be structured so that no estate tax liability is imposed on the employee. The plan must be written so that the death benefit is treated as a gratuity passing from the company directly to the beneficiary, rather than passing through the employee to the beneficiary. To achieve this, care must be given to show that the employee does not have control over the death benefit. The employee’s ability to change the beneficiary could create estate inclusion under 26 U.S.C. §§ 2036(a)(2) or 2038(a)(1). The issue becomes more complex when the employee is also an owner of the employer-company as now the employee may have more sway to make changes to the

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agreement, but courts have found no estate inclusion when the employee/owner did not have unilateral authority to make changes. The power over the death benefit, “. . . must be demonstrable, real, apparent and evident, not speculative”. See Estate of Tully v. United States, 528 F.2d 1401 (Ct. Cl. 1976). In many cases the death benefit will ultimately be going to the employee’s spouse, so even if the death benefit is included in the employee’s estate they would be able to use the unlimited marital deduction. In such cases, estate inclusion may not be a concern. If, however, the death benefit creates an estate tax liability for the employee, the beneficiary may be able to exclude some of the death benefits received from taxable income under 26 U.S.C. § 691(c).

DEATH BENEFIT ONLY (DBO) PLAN

THIS DEATH BENEFIT ONLY PLAN (the “Agreement”), is made and entered into as of this _____ day of _____, 20____, by and between [Name of Employer], a [Name of State] [Form of Entity] (the “Company”), and [Name of Employee] (the “Employee”) hereby enter into this Death Benefit Only Plan (Agreement), and agree as follows:

RECITALS

WHEREAS, the Employee has for many years been employed by the Company and has rendered valuable services which have contributed to the growth and prosperity of the Company.

WHEREAS, the Employer wants to retain Employee, as an inducement to continue this employment, wishes to provide the Employee with a death benefit pursuant to this Agreement.

AGREEMENT

NOW THEREFORE, in consideration of the mutual promises set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. **Participation.** Employee is eligible to participate in this Death Benefit Only (DBO) plan because Employee is a highly valued employee of Employer and is part of a select group of management and/or is a highly compensated employee of the Employer. Nothing in this Agreement shall be construed as conferring upon the Employee the right to continue in the employ of Employer.
2. **Beneficiary.** The beneficiary of any payments due under this Agreement upon the death of the Employee shall be [Insert Name of Beneficiary] (“Beneficiary”).

Comment: *In order to minimize the risk of inclusion of the death benefit in the Employee’s estate, care should be taken to avoid creating a unilateral right in the Employee to change the*

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Beneficiary. Any amendment should require the approval of the Employer and, in the event that the Employee is also a principal of the Employer, some broader approval (e.g. disinterested principals) should be required.

3. **Payment of Benefit.** If the Employee dies while he or she is employed by the Employer, the Employer shall pay to the Beneficiary the sum of _____ Dollars (\$ _____) in a single payment of readily available funds within three (3) months after the month of Employee's death. If the Beneficiary does not survive the Employee, or if no Beneficiary has been designated, then the Employer shall pay the lump sum to the Employee's estate.
4. **Termination.** If Employee's employment with the Employer is terminated for any reason other than death, then no benefits shall be due or paid under this Agreement.

Comment: *The preceding paragraphs anticipate that the death benefit is no longer provided once the employee ceases employment for any reason, whether being fired, quitting, or retiring. Sometimes, however, the parties might prefer to continue the benefit after employment terminates if the employee had stayed with the employer until retirement. If so, the drafting attorney should amend the agreement to provide for the continuation of the death benefit if the employee retires after a certain time or event (e.g., retiring after reaching age 62).*

5. **Limitation on Benefit.** Notwithstanding anything contained in this Agreement to the contrary, no payment shall be made and all rights under this Agreement to receive such payments shall be forfeited if Employee dies by suicide within one year of the date of this Agreement, whether sane, insane, legally competent, or otherwise.
6. **Life Insurance Provisions.** If the Employer elects to purchase a life insurance policy on the life of the Employee to provide the Employer with the funds to assist it in making payments under this Agreement, the Employer shall at all times be the sole and complete owner of such policy and shall have the unrestricted right to use all amounts and exercise all options and privileges under the policy without the knowledge or consent of the Employee, the Beneficiary, or any other person. It is expressly agreed that the Employee, the Beneficiary, or any other person claiming through them or this Agreement shall not have any right, title or interest whatsoever in or to any such life insurance policy.
7. **Non-Transferability.** Neither the Employee, the Beneficiary, nor any other person entitled to payments under this Agreement or having an interest in it shall have the power to transfer, assign, anticipate, mortgage or otherwise encumber in advance any of such payments or interests that arise under this Agreement, nor shall such payments be subject to seizure for the payment of public or private debts, judgments, alimony, or separate maintenance, or be transferable by operation of law in the event of bankruptcy, insolvency or otherwise.

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8. **Enforcement.** The Employee and any other person or persons having or claiming a right to payments under this Agreement or to any interest in this Agreement shall rely solely on the unsecured promise of the Employer set forth herein. Nothing in this Agreement shall be construed to provide the Employee or any other person or persons any right, title, interest or claim in or to any specific asset, fund, reserve, account or property of any kind whatsoever owned by the Employer or in which it may have any right, title or interest on or in the future. The Employee or any person claiming a right to payments under this Agreement shall have the right to enforce his or her claim against the Employer in the same manner as any unsecured creditor.
9. **Governing Law.** This Agreement is being delivered and is intended to be performed in [*Name of State*] and shall be construed and enforced in accordance with the laws of [*Name of State*].
10. **Integration.** This Agreement embodies the entire understanding and agreement among the parties concerning the subject matter hereof and supersedes any and all prior written or oral negotiations, understandings, or agreements in regard thereto.
11. **Amendment.** This Agreement may not be amended except by an instrument in writing signed by all of the parties hereto. Any such amendment shall be effective when so signed, or as of such other effective date as is designated therein.
12. **Counterparts.** This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument, or with multiple signature pages which may be delivered electronically.
13. **Binding Effect.** This Agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns. The Employer agrees that it will not be a party to any merger, consolidation or reorganization, unless and until its obligations under this Agreement shall be expressly assumed by its successor or successors.
14. **ERISA Requirements.** The following provisions are part of this Agreement and are intended to meet the requirements of the Employee Retirement Income Security Act of 1974 (ERISA):
 - (a) The Named Fiduciary and Claims Manager: [*a representative of the Employer, e.g., The Secretary of the Employer*].
 - (b) The funding policy under this Plan is to be unfunded as described in paragraph 8, above.
 - (c) The basis of payments under this Plan is described in paragraphs 3, 4, and 5, above.
 - (d) Claims procedure:

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- (1) If for any reason a claim for benefits under this Plan is denied by the Employer, the Claims Manager shall deliver to the Claimant a written explanation setting forth the specific reasons for the adverse benefit determination; specific references to the Plan section on which the adverse benefit determination is based; a description of any additional material or information necessary for the Claimant to perfect the claim and an explanation of why such material or information is necessary; and a description of the Plan's review procedure including a statement of the Claimant's rights to bring a civil action under Section 502 of ERISA following an adverse determination on review, all written in a manner calculated to be understood by the Claimant. For this purpose:
 - (A) The Claimant's claim shall be deemed filed when presented orally or in writing to the Claims Manager.
 - (B) The Claims Manager's explanation shall be in writing delivered to the Claimant within (ninety) 90 days of the date the claim is filed unless the Claims Manager determines that special circumstances require an extension of time for processing the claim. If such an extension of time for processing is required, written notice of the extension shall be furnished to the Claimant prior to the termination of the initial (ninety) 90-day period. In no event shall such extension exceed a period of (ninety) 90 days from the end of such initial period. The extension notice shall indicate the special circumstances requiring an extension of time and the date by which the Claims Manager expects to render the benefit determination. If the period of time is extended because the Claimant has failed to provide necessary information to decide the claim, the period for making the benefit determination shall be tolled from the date on which the notification of the extension is sent to the Claimant, until the date on which the Claimant provides the information. Failure to provide notice of decision in the time specified is the same as denial of the claim and the Claimant is entitled to require a review of the denial under the review procedures.
- (2) The Claimant (or his or her duly authorized representative) shall have (sixty) 60 days following the receipt of the denial of the claim to file with the Claims Manager a written request for review of the denial. For such review, Claimant shall have the opportunity to submit written comments, documents, records, and other information relating to the claim for benefits. Claimant shall be provided, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to the claim for benefits. The review of the claim shall take into account all comments, documents, records, and other information submitted by the Claimant relating to the claim, without regard to whether such information was submitted or considered in the initial benefit determination.

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- (3) In the case of a request for review of an adverse benefit determination, the Claims Manager is designated as the appropriately Named Fiduciary for a full and fair review. On review, the Claims Manager shall notify the Claimant not later than (sixty) 60 days after the Company's receipt of the request for review, unless the Claims Manager determines that special circumstances require an extension of time for processing the claim, in which case a decision shall be rendered as soon as possible, but not later than (one hundred twenty) 120 days after receipt of the request for review. If such an extension of time for review is required because of special circumstances, written notice of the extension shall be furnished to the Claimant prior to the termination of the initial (sixty) 60-day period. In no event shall any such extension exceed a period of (sixty) 60 days from the end of the initial period. The extension notice shall indicate the special circumstances requiring an extension of time and the date by which the Plan expects to render the determination on review. If the period of time is extended because the Claimant has failed to provide necessary information to decide the claim, the period for making the benefit determination shall be tolled from the date on which the notification of the extension is sent to the Claimant, until the date on which the Claimant provides the information. The decision on review shall be in writing and in the case of an adverse benefit determination shall include: (i) the specific reason or reasons for the decision; (ii) references to the specific Plan provisions on which the benefit determination is based; (iii) a statement that the Claimant is entitled to receive, upon request and free of charge, reasonable access to, and copies of, all documents, records and other information relevant to the Claimant's claim for benefits; and (iv) a statement of the Claimant's right to bring an action under Section 502(a) of ERISA, all written in a manner calculated to be understood by the Claimant. If the decision on review is not furnished within such time, the claim shall be deemed denied on review.

[SIGNATURE PAGE FOLLOWS]

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IN WITNESS WHEREOF, the Parties have executed this Agreement this _____ day of _____, 20____.

[NAME OF EMPLOYER]

By: _____

Its: _____

Attest: _____

Its: _____

[NAME OF EMPLOYEE]

SSN: _____

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