

# SAMPLE DOCUMENT

## ELIGIBLE SECTION 457 DEFERRED COMPENSATION AGREEMENT

— For the Use of Legal Counsel Only. Not for use by Financial Representatives with the public. —

### Drafter's Notes

1. Provides for the deferral of currently payable salary or bonus (or both).
2. Provides for a safety valve in the event annual deferrals exceed allowable limitations.
3. Provides that elections to defer must be made 30 days prior to the beginning of the calendar year and can only be made once a year; elections to discontinue deferral can be made 30 days prior to the next calendar year.
4. For ERISA purposes, participation should be limited to a select group of management or highly compensated employees, unless the employer is a church or government entity.
5. Beneficiary should be separately designated; sample form attached at end of the agreement.
6. Department of Labor form should be filed within 120 days of adoption; sample form attached as Exhibit D.
7. This form does not provide for a trust; it should not be used to create an eligible, governmental 457 plan.

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This sample document is intended only as guidance for the client's own legal counsel. The document is general in nature and does not reflect the specific circumstances of any individual or situation. The document does not constitute tax or legal advice and cannot be used to avoid any penalties that may be imposed on a taxpayer. It is intended that the client's legal counsel will modify the document where necessary to satisfy the client's objectives and the requirements of any applicable federal, state or local law. Northwestern Mutual does not guarantee the effectiveness of this document and is not responsible for any tax or legal consequences resulting from use.

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ELIGIBLE Section 457  
Deferred Compensation Plan for  
Tax-Exempt Organizations

THIS MASTER AGREEMENT is made as of this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by and between \_\_\_\_\_ (Organization) and the Participants who become a party to this agreement by reason of a Joinder Agreement signed at this time or at a time in the future.

RECITALS

The Participants are valued employees or independent contractors performing valuable services for the Organization, and the Organization desires to retain these individuals in its service;

It is to the mutual benefit of the parties to this Agreement that the relationship continue for an extended period of time so that the Participants will continue to contribute to the operations of the Organization; and

The Participants desire to defer a portion of their compensation for payment at a later time.

AGREEMENT

In consideration of the payments provided for and the mutual promises set forth, the parties agree as follows:

1. Any management employee of the Organization, or any independent contractor who, with the consent of the Organization, irrevocably elects to reduce and defer compensation as specified in Section 2 and as elected through the Joinder Agreement shall be a Participant.
2. The Organization and Participant agree that the Participant's compensation which would otherwise be receivable during a period of employment subsequent to the effective date of the Joinder Agreement shall be irrevocably reduced and that the portion of compensation reduced shall be deferred as specified in this Agreement.
3. With regard to the amount which a Participant defers in any calendar year, it is agreed that:
  - a. The amount of reduction in a Participant's annual compensation will not exceed the lesser of:
    - 1) 100 percent of the Participant's includible compensation; or

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- 2) the dollar amount specified in IRC Sections 457(b)(2)(A) and 457(e)(15).
- b. An eligible Participant may utilize a limited “catch-up” provision for one or more of the last three payable years of a Participant immediately preceding the normal retirement age specified in paragraph 10(d). The maximum amount which can be deferred in any taxable year through the utilization of both the defined contribution limits and the “catch-up” provision is the lesser of:
- 1) twice the dollar amount in effect under IRC Sections 457(b)(2)(A) and 457(e)(15); or
  - 2) the sum of the maximum deferral allowed under paragraph 3(a), determined without regard to paragraph 3(b), plus the cumulative amount which could have been deferred under this Agreement in prior years but which the Participant did not elect to defer.
- c. In the event a Participant’s annual deferral exceeds the limits described above, any benefits payable under paragraph 4 below and attributable to such excess deferrals shall be paid only if the following conditions are satisfied:
- 1) The Participant must continue his relationship with the Organization until the normal retirement age specified in paragraph 10(b), unless the relationship is terminated because of the total disability or death of the Participant; and
  - 2) While retirement benefits are being paid to the Participant, the Participant shall remain available to provide consulting services to the Organization at such times and in such manner as the Organization may request and the Participant shall refrain from rendering services, assistance or advice to any enterprise which competes with the Organization.
- Determination by the Board of Directors that the Participant has failed to satisfy the conditions set forth above shall be binding on all parties to this Agreement and on anyone else having an interest in benefits due under this Agreement.
- d. An eligible person, with respect to participation commencing in the initial year of the plan, or an individual when he or she first becomes eligible to participate, may become a Participant within 60 days after the plan becomes effective or the employee first becomes eligible, by agreeing to defer compensation for the following calendar year, but such agreement must be made at least 30 days prior to the beginning of the calendar year in which it is to become effective.
- e. A Participant shall have the right exercisable at least 30 days prior to the beginning of any calendar year to elect to increase or decrease the compensation reduction for the ensuing calendar year by executing another Joinder Agreement.

- f. For purposes of this Agreement, a Participant's failure to file written notice of his or her elective choice as provided in paragraph 3(e) above shall constitute a waiver by the Participant of his or her right to elect a different reduction sum for the next succeeding calendar year and an affirmation and ratification to continue the stated compensation reduction as chosen for the prior period.
  - g. A Participant may elect to discontinue compensation reductions for any subsequent calendar year following the effective date of his or her Joinder Agreement provided that the Participant shall notify the Organization of such discontinuance at least 30 days prior to the subsequent calendar year.
4. Amounts deferred by a Participant shall be accrued in the following manner:
- a. A Deferred Compensation Account shall be established for each Participant on the Organization's books. The Deferred Compensation Amount shall be credited on the first day of each pay period with an amount equal to the amount that the Participant has notified the Organization in a Joinder Agreement that he wishes to have deferred.
  - b. Any amounts credited to the Deferred Compensation Account may be accumulated at a rate of interest equal to [an index such as Moody's Corporate Bond Yield Averages – Monthly Average Corporates for January of each calendar year] or the Organization may invest all or a portion of the amounts deferred in mutual funds, stocks, bonds, securities, life insurance, or any other assets as may be selected by the Participant, and approved by the Organization.
  - c. The Participant agrees on behalf of himself and his designated beneficiary to assume all risk in connection with any decrease in value of the funds which are invested or which continue to be invested in accordance with the provisions of this Agreement.
  - d. Title to and beneficial ownership of any assets, whether cash or investments which the Organization may earmark to pay the deferred compensation benefits due under this Agreement, shall at all times remain the sole property of the Organization subject to the claims of the Organization's general creditors and the Participant and his designated beneficiary shall not have any property interest whatsoever in any specific assets of the Organization.
5. The benefits to be paid as deferred compensation are as follows:
- a. If the Participant's employment continues until his normal retirement as specified in paragraph 10(d), the Organization shall pay to him in 180 monthly installments, commencing on the first day of the month next following the date of the Participant's retirement, an amount equal to the fair market value of the assets, if any, in the Deferred Compensation Account plus the

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accumulated amount credited to the Deferred Compensation Account in lieu of actual investments. The monthly amount payable to the Participant shall be appropriately increased or decreased as the case may be, but not more frequently than annually, to reflect the appreciation or depreciation in value of and the net income or loss realized on the amounts which remain invested in the Deferred Compensation Account. If the Participant should die after he retires and begins receiving payments but before the last payment has been made, the remaining payments shall continue to be paid in installments for the unexpired portion of the 180 month period to his designated beneficiary in the same manner as set forth above.

- b. If the Participant's employment is terminated for any reason other than death before he retires on the date specified in paragraph 10(d), then the amount in the Deferred Compensation Account shall continue to be invested or accrued at interest as the Organization in its discretion may determine and no payments shall be made until the Participant reaches his normal retirement age at which time payments shall be made in the same manner and to the same extent as set forth in paragraph 4(a), above. Notwithstanding the foregoing, if the Participant should die prior to reaching his normal retirement age, then payments shall be made in the same manner and to the same extent as set forth in paragraph 4(c), below.
- c. If the Participant's employment is terminated because of death before he has reached his normal retirement age as specified in paragraph 10(d), then the Organization shall make 180 monthly payments, commencing on the first day of the month next following the date of the Participant's death, to the Participant's designated beneficiary in the same manner and to the same extent as provided in paragraph 4(a), above.
- d. If both the Participant and his designated beneficiary should die before a total of 180 monthly payments are made by the Organization, then the remaining value of the Deferred Compensation Account shall be determined as of the date of the death of the designated beneficiary or, if the designated beneficiary predeceases the Participant or if they die in a common disaster, as of the date of death of the Participant and the value of the Deferred Compensation Account shall be paid in a lump sum to the estate of the designated beneficiary or, if the designated beneficiary predeceases the Participant or if they die in a common disaster, to the estate of the Participant.
- e. The Participant shall designate in the Joinder Agreement a beneficiary to receive any payments due under this Agreement upon the death of the Participant. The Participant may change the beneficiary at any time by written notice to the Organization. If the Participant fails to designate a beneficiary, any payments due upon the death of the Participant shall be paid to the Participant's estate as provided in paragraph 4(d), above.
- f. Notwithstanding anything contained in this Agreement to the contrary, the Organization shall have the right, in its sole discretion, to vary the manner and time of making the installment

distributions provided in this paragraph and may make such distributions in lump sums or over a shorter or longer period than specified in this paragraph as it may find appropriate. All distributions under this Agreement, including any subsequent adjustments, shall satisfy the minimum distribution requirements of Sections 457(d) and 401(a)(9) of the Internal Revenue Code.

- g. A Participant may request a withdrawal under this Agreement prior to retirement or termination of employment in the event he or she is faced with an unforeseeable emergency. Withdrawals must be limited to amounts necessary to meet the emergency for which the Participant has not been reimbursed by insurance or otherwise. The withdrawal shall be effective upon approval by the Organization and shall be paid in a lump sum to the Participant. The Deferred Compensation Account of the Participant shall be reduced by the amount of the withdrawal.
6. Nothing contained in this Agreement and no action taken pursuant to the provisions of this Agreement shall create or be construed to create a trust of any kind, or a fiduciary relationship between the Organization and the Participant, his designated beneficiary or any other person. Any funds which may be invested under the provisions of this Agreement shall continue, for all purposes, to be a part of the general funds of the Organization and no person other than the Organization shall, by virtue of the provisions of this Agreement, have any interest in such funds. To the extent that any person acquires a right to receive payments from the Organization under this Agreement, such right shall be no greater than the right of any unsecured general creditor of the Organization.
7. Neither the Participant nor his designated beneficiary nor any other person entitled to payments under this Agreement shall have the power to transfer, assign, anticipate, mortgage or otherwise encumber in advance any of such payments, 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 event of bankruptcy, insolvency or otherwise.
8. Nothing contained in this Agreement shall be construed as conferring upon the Participant the right to continue in the employ of the Organization.
9. The Organization reserves the right to amend any provision of this Agreement at any time to the extent that it may deem advisable without the consent of any Participant or any beneficiary.
10. This Agreement shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns. The Organization agrees that it will not be party to any merger, consolidation or reorganization, unless and until its obligations under this Agreement shall be expressly assumed by its successor or successors.

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11. The following definitions shall be effective for terms used in this Agreement:

- a. "Compensation" shall mean all earnings for services performed by the Participant for the Organization, including but not limited to the gross salary of the Participant. The amount of a Participant's compensation for purposes of this Agreement shall be the amount he or she is entitled to receive before deductions for Federal or State Income, FICA, or FUTA taxes or pension plan contributions.
- b. "Includable Compensation" shall mean the Participant's compensation (as defined in IRC Section 415(c)(3)) from the Organization that is attributable to services performed for the Organization.
- c. "Compensation Reduction" shall mean that amount deferred which results from the Participant's election to reduce his or her compensation under the Joinder Agreement and which the participant and Organization mutually agree shall be deferred in accordance with this Agreement.
- d. "Normal Retirement" for purposes of this Agreement shall mean retirement from service with the Organization which becomes effective on the first day of the calendar month after the Participant attains age 65.
- e. "Unforeseeable emergency" for purposes of this Agreement shall mean a severe financial hardship to the Participant resulting from a sudden and unexpected illness or accident of the participant or of a dependent of the Participant, loss of the Participant's property due to casualty, or other similar extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the Participant.

12. This Agreement shall be construed under the law of the State of \_\_\_\_\_ and Section 457 of the Internal Revenue Code of 1986, as amended.

13. Determination of benefits, claims procedure and administration.

a. Claim.

A person who believes that he is being denied a benefit to which he is entitled under the Plan (hereinafter referred to as a "Claimant") may file a written request for such benefit with the employer, setting forth his claim. The request must be addressed to the \_\_\_\_\_ (named Fiduciary) of the employer at its then principal place of business.

b. Claim Decision.

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Upon receipt of a claim, the employer shall advise the Claimant that a reply will be forthcoming within ninety (90) days and shall, in fact, deliver such reply within such period. The employer may, however, extend the reply period for an additional ninety (90) days for reasonable cause.

If the claim is denied in whole or in part, the employer shall adopt a written opinion, using language calculated to be understood by the Claimant, setting forth:

- 1) The specific reason or reasons for such denial;
- 2) The specific reference to pertinent provisions of this Agreement on which such denial is based;
- 3) A description of any additional material or information necessary for the Claimant to perfect his claim and an explanation why such material or such information is necessary;
- 4) Appropriate information as to the steps to be taken if the Claimant wishes to submit the claim for review; and
- 5) The time limits for requesting a review under subsection c. and for review under subsection d. hereof.

c. Request for Review.

Within sixty (60) days after the receipt by the Claimant of the written opinion described above, the Claimant may request in writing that the named fiduciary review the determination of the employer. Such request must be addressed to the named fiduciary, at its then principal place of business. The Claimant or his duly authorized representative may, but need not, review the pertinent documents and submit issues and comments in writing for consideration by the employer. If the Claimant does not request a review of the employer's determination by the named fiduciary within such sixty (60) day period, he shall be barred and estopped from challenging the employer's determination.

d. Review of Decision.

Within sixty (60) days after the named fiduciary's receipt of a request for review, he will review the employer's determination. After considering all materials presented by the Claimant, the fiduciary will render a written opinion, written in a manner calculated to be understood by the Claimant, setting forth the specific reasons for the decision and containing specific references to the pertinent provisions of this Agreement on which the decision is based. If special circumstances require that the sixty (60) day time period be extended, the fiduciary will so



notify the Claimant and will render the decision as soon as possible, but no later than one hundred twenty (120) days after receipt of the request for review.

14. If any sections of the Internal Revenue Code that are referenced in this Agreement are changed by amendment, this Agreement shall be correspondingly changed to reflect these changes.

THE ORGANIZATION has caused this Agreement to be signed by its duly authorized Officer and attested by its Secretary on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

ATTEST:

\_\_\_\_\_

ORGANIZATION:

By \_\_\_\_\_

Title \_\_\_\_\_

JOINDER AGREEMENT

I, \_\_\_\_\_, hereby apply to participate in the \_\_\_\_\_ Deferred Compensation Plan.

I wish to defer the following amount of compensation otherwise payable to me during each pay period:

Amount of Deferral per pay period \$ \_\_\_\_\_.

This deferral should be made effective as of the beginning of the next calendar year and each year thereafter unless I notify the Organization in writing that I wish to modify or terminate the deferrals.

The beneficiary of any payments due under the Deferred Compensation Agreement payable upon or after by death shall be \_\_\_\_\_.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

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