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# **10 Workplace Agreements Energy Companies Can Use To Protect Their Business**

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## Introduction

The energy technology industry continues to grow, as does the number of companies that offer energy-related services. Faced with this increased competition, many companies in the industry have tried to stay profitable by seeking government and private funding, and by launching more visible marketing campaigns. However, in their external efforts to boost profitability, some energy companies could be overlooking a major area of liability -- their employees.

Indeed, many employers send employees to other sites of employment (most often a client's company), and it is difficult to monitor the employees' day-to-day activities and performance. Further, it is possible employees will be lured away by the client, or a competitor, while working off-site. Also, there has been a general increase in employment-related lawsuits throughout the business community, and the energy industry is not likely going to be immune from employment issues such as unfair competition, wage and hour law compliance, immigration barriers, theft of trade secrets and workplace harassment and discrimination. Accordingly, employers need to be proactive in protecting their business.

In their efforts to protect themselves from employment liabilities, some employers follow the advice to "PUT IT IN WRITING." Yet, many of these companies are simply unsure what it is that needs to be written down. Even more frustrating is when the companies discover that the written document they prepared does not accomplish the intended goal or, even worse, undermines their position in litigation.

This guide outlines the benefits of 10 different workplace agreements that energy companies should consider using in their business, as well as the types of provisions that the agreements should contain. A properly drafted agreement that complies with all federal, state and local laws can help protect a company, and potentially avoid the misunderstandings that lead to employment-related litigation.



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## Workplace Agreement Summary

|                                  |  |
|----------------------------------|--|
| Employment Agreement             | Establishes the terms and conditions of an employee's employment.  |
| Independent Contractor Agreement | Establishes a relationship, pursuant to a fixed set of legal criteria, in which an individual or business (independent contractor) will perform specific services for your company without becoming one of your employees. |
| Relocation Agreement             | Establishes the terms and conditions of an employee's relocation to a new residence as part of an offer of employment and/or continued employment with your company.   |
| Consent Agreement                | Contains an employee's authorization allowing your company to take actions that could otherwise be considered an invasion of the employee's privacy.   |
| Non-Compete Agreement            | Restricts an employee from accepting a job with a competitor of your company.  |
| Confidentiality Agreement        | Prohibits an employee from disclosing information about your company to a competitor or other third-party.   |
| Non-Solicitation Agreement       | Prohibits an employee who resigns or is terminated from soliciting your employees and/or clients.  |
| Arbitration Agreement            | Requires that any dispute between an employee and your company be resolved through arbitration, as opposed to filing a lawsuit in state or federal court.  |
| Last Chance Agreement            | Contains an employee's acknowledgement that he/she has engaged in prior misconduct and that any future misconduct, no matter how minor, will result in his/her immediate discharge from your company.                      |
| Separation Agreement             | Establishes the terms and conditions of an employee's separation of employment from your company and will usually contain the employee's agreement to waive all claims he/she may have against your company.               |



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By taking the time to familiarize yourself with the types of workplace agreements that are available, as well as what they contain, you can help try to protect your business from economically disastrous consequences. As you review the agreements described below, begin thinking about how you can utilize them at your own company.

## Employment Agreement

**Establishes the terms and conditions of an employee's employment with your company.**

An employment agreement is typically entered into when a company first hires a person. The agreement specifies the employee's compensation (wages and benefits), as well as his/her job duties and responsibilities to the company. The agreement may also reiterate the at-will nature of the individual's employment. This type of provision confirms that the employee can be discharged for any reason, with or without notice, so long as the reason is not unlawful. Conversely, some employers may include provisions in the agreement indicating that the individual's employment with the company will be for a fixed number of months or years and specify the type of misconduct that will cause the employee to be fired prior to expiration of the agreement. By placing their goals in writing, the parties can minimize the possibility of a future dispute as to what they each expect from the other.

Example: XYZ Energy, Inc. has decided to hire Ms. Smith as a business manager and it prepared an employment agreement for her to sign. The document sets forth her salary, as well as her commission schedule. The agreement also establishes Ms. Smith's hours of work and her health and vacation benefits. More importantly, the employment agreement obligates Ms. Smith to increase the Sales Department's revenue by five percent over the next 12 months and states that failure to meet this goal could result in her discharge.

## Independent Contractor Agreement

**Establishes a relationship, pursuant to a fixed set of legal criteria, in which an individual or business (independent contractor) will perform services for your company, without becoming one of your employees.**

Under an independent contractor agreement, you can arrange for the independent contractor to perform services for your business, without having to hire the independent contractor (or any of its workers) as an employee. The benefit of this relationship is that your company can avoid many of the liabilities it would ordinarily face if you were to hire the contracting entity as an employee. For example, in an independent contractor relationship,



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you are typically not required to withhold taxes on payments to the contractor or provide unemployment insurance or workers' compensation coverage for the independent contractor or its employees. Also, an independent contractor relationship may shield you from liability under various state and federal employment laws that only apply to employees of an employer. While there are several different tests for determining who qualifies as an independent contractor, control over the direction and performance of the service is usually the key factor. Therefore, to receive the benefits of this type of arrangement, you are going to give up some of the control you usually have over your employees. Nevertheless, by placing the independent contractor's relationship with your company in writing, you will be able to ascertain whether your company can operate under a bona fide independent contractor arrangement and be in a better position to argue that your company is exempt from many of the liabilities that accompany the employer-employee relationship.

Example: XYZ Energy, Inc. enters into an independent contractor agreement with ABC Financing, Inc., stating that ABC will help XYZ solicit financing for energy efficient projects. Under the agreement, ABC is responsible for hiring the necessary personnel to solicit lending institutions and investors, and it will pay all of the expenses in its employer-employee relationships (e.g., wages, taxes, unemployment and workers' compensation insurance). Furthermore, ABC retains the exclusive right to determine when and how its employees will render their services. XYZ has reduced its liability to ABC's personnel and can rely upon the agreement to support its position that it is not the legal employer of ABC's employees.

## Relocation Agreement

**Establishes the terms and conditions of an employee's relocation to a new residence as part of an offer of employment and/or continued employment with your company.**

Companies that recruit employees from distant areas or open offices in new geographic areas should consider using relocation agreements to set forth the terms and conditions of an employee's relocation to a new work area.

The agreement will establish whether the employee is going to be reimbursed for any expenses associated with his/her relocation, and it will reiterate the time periods in which the employee must complete the move. If properly drafted, a relocation agreement can alleviate the ambiguities and uncertainties that are often caused by such transitions.

Example: XYZ Energy, Inc., a New York-based company, offers Ms. Smith a job as an engineering manager. Ms. Smith is currently living in California and must now move to New York for the position. XYZ and Ms. Smith sign a relocation agreement which provides that Ms. Smith will report for her new job by



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January 1, and she will receive a \$500 stipend to be applied toward any expenses she incurs during the move. Furthermore, the relocation agreement makes it clear that XYZ is not responsible for any damage to Ms. Smith's property or for any injuries she may sustain during the move.

## Consent Agreement

**Contains an employee's authorization allowing your company to take actions that could otherwise be considered an invasion of the employee's privacy.**

Ensuring a safe and productive job environment means that your company must monitor the activities of your workforce and simultaneously balance employees' privacy rights. Indeed, there may be occasions when you need to search company property, as well as employees and their personal property. To reduce the risk of an employee claiming that you "invaded his/her privacy," your company can enter into a consent agreement with the employee (ideally at the start of the individual's employment) that authorizes you to conduct various searches.

For example, the agreement will state that the employee acknowledges that your company is authorized to conduct drug testing; search the employee's desk, locker, pocketbook and briefcase; monitor his/her e-mails; and photograph or tape record his/her activities. These types of agreements can help reduce your employees' expectations of privacy, as well as the possibility of them feeling that your company violated their privacy during a search. Consent agreements also place employees on notice that you will be monitoring their work performance and, as a result, they could reduce the likelihood that employees will engage in workplace misconduct. Any consent agreement you use must comply with both federal and state laws.

Example: During a search of its employees' e-mails, XYZ Energy, Inc. discovers that Ms. Smith has been sending sexually explicit e-mails to a co-worker and terminates her employment. Unfortunately, Ms. Smith writes a letter to the company stating that it invaded her privacy by reading her e-mails, and she is considering whether to file a lawsuit against the company. XYZ can try to avoid litigation by reminding Ms. Smith of the consent agreement she signed, which authorized the company to search her e-mails. Also, the company will be able to defend any lawsuit filed by Ms. Smith on the grounds that she gave it permission to search her e-mails.

## Non-Compete Agreement

**Restricts an employee from accepting a job with a competitor of your company.**

Most employers invest substantial time and money in training their employees to better serve clients and customers. The danger is that these same employees could use their skills and knowledge to benefit a competitor and economically undermine the company. With a non-competes agreement, you can prohibit an employee from working for a specific competitor or even from working for all

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companies in a particular industry. This restriction will be in effect during the individual's employment, as well as for a reasonable period of time after his/her termination from your company. In order for a non-compete agreement to be enforceable against an employee, it must be reasonable in its restrictions so that the agreement is no more restrictive than necessary. Put simply, you cannot prevent a worker from accepting a job with another employer when doing so will not substantially harm your business. Also, the agreement must not restrain the employee for an unreasonably long time period. Naturally, a determination of what qualifies as reasonable depends on the precise factual circumstances, but non-compete agreements are recognized as useful tools.

Example: Ms. Smith was hired as the director of business development for XYZ Energy, Inc. Her primary job responsibility is to establish business relationships with prospective clients in an effort to increase revenue. At the start of her employment, Ms. Smith signed a non-compete agreement that prohibits her from working for a competitor of XYZ during her employment and for a period of one year following her termination of employment from XYZ. If Ms. Smith violates this restriction and accepts a job with a competitor during the year following her termination with XYZ, XYZ can sue Ms. Smith for damages and try to get a restraining order that prohibits her from continuing to work at the new employer.

## Confidentiality Agreement

**Prohibits an employee from disclosing information about your company to a competitor or other third-party.**

In the day-to-day course of your operations, you must often provide employees with confidential information about the business that, if disclosed, could harm your company. Although the exact nature of confidential information varies from job to job, it generally encompasses information about current and future clients, suppliers, products, profits and revenue-generating programs that is not publicly or generally known. In a confidentiality agreement, your employee acknowledges what information is "confidential," as well as your company's lawful right to protect that information. Additionally, the employee agrees that he/she will not disclose confidential information to a particular employer or entity unless you advise him/her otherwise.

Example: Ms. Smith is hired as the facility director of critical environments at XYZ Energy, Inc., and the company is going to give her access to its latest



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research findings, which XYZ developed at considerable expense. As a condition of her employment with XYZ, the company makes her sign a confidentiality agreement in which she agrees that XYZ's research data constitutes confidential information. Additionally, the agreement prohibits her from revealing the research data to any third-parties. Based on this agreement, if Ms. Smith resigns and goes to work for a competitor, the company might be able to get an injunction that prohibits Ms. Smith from disclosing or utilizing XYZ's confidential information and, possibly, bars her from working for the competitor.

## Non-Solicitation Agreement

**Prohibits an employee who resigns or is terminated from soliciting your employees and/or clients.**

To prevent your employees from leaving your company and then soliciting your current employees and clients, you should enter into non-solicitation agreements to protect your business. Put simply, a non-solicitation agreement prohibits a former employee from soliciting, directly or indirectly, your employees and clients for a reasonable period of time. These agreements can be entered into when the employee begins his/her employment or as part of a separation agreement when the individual leaves your company (discussed below).

Example: Ms. Smith is an estimator for XYZ Energy, Inc., but she decides to resign and open up her own competing business. Pursuant to the non-solicitation agreement she entered into with XYZ when she was first hired, Ms. Smith may be prohibited from directly or indirectly inducing any employee or client of XYZ to leave XYZ and come to her business for a period of two years following her separation of employment from XYZ.

## Arbitration Agreement

**Requires that any dispute between an employee and your company be resolved through arbitration, as opposed to filing a lawsuit in state or federal court.**

Litigating employment claims in state and federal court is expensive and time-consuming. To limit or reduce the burdens and financial liabilities of litigation, you can enter into an arbitration agreement with an employee when he/she is first hired or when an employee has filed a lawsuit against the company or is threatening to sue. An arbitration agreement requires the employee to resolve his/her employment dispute before a mutually selected arbitrator, as opposed to going to court to litigate the case. Significantly, arbitration removes the threat of a "runaway jury" that simply distrusts employers, as an arbitrator is the individual who listens to witness testimony, considers documentary evidence and then issues a decision on the merits of the case. Also, arbitration hearings often can last only



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one or two days and can be initiated relatively quickly, versus court proceedings that can span several years. Arbitration is usually a faster and less expensive way to resolve employment-related claims.

Example: Ms. Smith was fired from XYZ Energy, Inc. roughly two months ago, and she has now filed a lawsuit in state court alleging that she was unlawfully terminated on the basis of her race. XYZ can go to court and seek dismissal of Ms. Smith's lawsuit since she signed an arbitration agreement at the beginning of her employment, which obligates her to submit any and all claims of discrimination she may have against the company to arbitration. While XYZ will still have to defend itself against Ms. Smith's allegations at arbitration, it will avoid the burden of litigating her claims in court and may reduce the overall cost of litigation.

## Last Chance Agreement

**Contains an employee's acknowledgment that he/she engaged in misconduct and that any future misconduct, no matter how minor, will result in his/her immediate discharge from your company.**

It's a common scenario: the employer has a worker with a lengthy disciplinary history, yet it decides that it will give the individual one last chance to shape up. Last chance agreements are the most underutilized tool that employers can use to properly document an employee's disciplinary history and to prepare its defense in the event the employee sues the company after being fired. In a last chance agreement, your company may be able to get a troublemaker to acknowledge that his/her prior misconduct and poor performance warrant immediate termination, but the company is giving him/her one last chance to act appropriately. Furthermore, the agreement contains the employee's admission that his/her next violation of your company's work rules (no matter how minor) will result in immediate termination.

Example: Ms. Smith has become increasingly insubordinate in her position as account manager for XYZ Energy, Inc. In order to place Ms. Smith on notice that any further insubordination will result in her termination, XYZ asks her to sign a last chance agreement. The agreement contains Ms. Smith's acknowledgment that she could have lawfully been fired for her previous insubordination and that any further disciplinary problems will result in her immediate dismissal.

## Separation Agreement

**Establishes the terms and conditions of an employee's separation of employment from your company and will usually contain the employee's agreement to waive all claims he/she may have against your company.**

Regardless of whether an individual leaves your company voluntarily or involuntarily, you should enter into a separation agreement indicating the general grounds for the employee's departure, as well as whether you will provide severance payments or contest his/her right to receive unemployment insurance. More importantly, your separation agreement should contain a



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provision in which the departing employee agrees to release certain claims that he/she could assert against your company – meaning, the employee will waive any right that he/she may have to file a lawsuit against your company for any act or omission relating to his/her employment with and/or separation of employment from your business.

Example: XYZ Energy, Inc. decides to lay off field technician Smith due to a decline in business. Although this termination decision is based on legitimate business reasons (a slowdown in the economy), XYZ is concerned about the expense of having to defend its decision if Ms. Smith files a lawsuit against the company. Therefore, XYZ agrees to give Ms. Smith two weeks severance pay in exchange for her signing a separation agreement. The separation agreement contains a provision that releases XYZ from any and all liability to Ms. Smith and prohibits her from filing a lawsuit against the company in court.

## Conclusion

While no contract can guarantee success in a litigation, a properly drafted workplace agreement can help better your chances. This guide simply provides a brief glimpse into workplace agreements, and their usefulness must be analyzed on a case-by-case basis, with each agreement individually tailored to comply with the appropriate federal and state laws. Employers should consult with legal counsel prior to drafting any of the above agreements.

For more information, please contact [John D. Horowitz](mailto:John.D.Horowitz@foxrothschild.com) at 212.878.7963 or 917.331.9053 or [jhorowitz@foxrothschild.com](mailto:jhorowitz@foxrothschild.com).

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