

Association of Workplace Investigators Training Institute

RETENTION AGREEMENTS

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It is critical that an outside investigator document the terms governing the investigator's retention by the client. If the investigator is a California attorney, then, pursuant to the California Private Investigators Act, California Business & Professions Code §§7512 – 7573, that attorney's investigation must constitute the rendering of legal services in order to be lawful. Accordingly, California law governing the practice of law including the California Rules of Professional Conduct, are applicable to the client's retention of the investigator/attorney. Other jurisdictions have similar rules. The attorney/investigator may wish to consider titling the document "Legal Services Agreement" or some other title emphasizing the legal nature of the services being performed. If the investigator is not an attorney, then, of course, attorney rules do not apply.

There is no required format for an investigator's retention agreement. It can be in the form of a business letter or in a more traditional contract format. If in the form of a letter, the agreement should include language to the effect that the investigator's signature constitutes the investigator's agreement to perform services as set forth in the letter. *[See sample]*

Attached are three sample agreements supplied by experienced investigators. The first two are for attorneys in California; the third is not.

NOTE: This paper, including the attached sample agreements, is not intended to nor does it constitute legal advice, and no representation is made that the provisions set forth in the attached sample agreements are complete or legally appropriate. No attorney-client relationship is established as a result of dissemination of this paper, and any persons wishing legal advice concerning the subject matter of this paper should consult their legal counsel.

Confidential Attorney-Client Privileged Communication

Legal Services Agreement

1. **Parties.** This contract for legal services is entered into by and between Client and “Attorney”, collectively, “the parties.” The contract is binding upon Client, and its officers, directors, employees, agents, heirs, assigns, and successors in interest.
2. **Scope of Services.** Client has retained Attorney to conduct an independent investigation of employee X’s allegations of “[Describe].” The scope of the investigative assignment includes reaching factual findings in regard to X’s above-mentioned allegations [as well as evaluating whether, based on those factual findings, Client’s policy against sexual harassment has been violated]. The investigation will be performed by Attorney. It is understood and agreed that this contract shall create an attorney-client relationship between Client and Attorney.
3. **Limitation on Scope of Services.** This agreement constitutes an agreement for “limited scope legal services.” That is, Attorney has been retained in her capacity as an attorney at law to bring her skill, training, and professional judgment to bear in conducting an impartial investigation of the above-described allegations. Client understands that Attorney has not been retained to represent Client in litigation, to advocate on behalf of Client, or to advise Client in regard to any steps Client should take based on the investigation results. The parties agree that [Firm X] is client’s regular outside employment counsel, and, as such, shall be responsible for providing Client with all such necessary and appropriate legal advice, as well as legal advice in regard to, without limitation, such matters as whether to conduct a privileged or non-privileged investigation, steps to create and preserve any privilege, the consequences of any decision to reveal all or part of the results of the investigation to third parties, the need for any interim measures, such as the propriety of placing employees on administrative leave during the pendency of the investigation, any steps Client should take to preserve evidence, the proper scope (i.e., issues to be investigated) of the investigation, the propriety and scope of any confidentiality admonitions in light of the Banner decision, the propriety of any electronic or other searches, any obligations under state or federal fair credit reporting laws, and any need for specialized workplace “threat assessment.” With respect to the California Investigative Consumer Reporting Agencies Act (ICRAA), Client states that it has made and will make any required disclosures to employee(s) and that the investigation is for employment-related purposes. Client further agrees that, if this should change, Client will notify Attorney. By this contract, Client grants its informed consent for Attorney to perform the limited scope legal services as described above.

4. **Impartiality and No Guarantee of Results.** Client and Attorney agree that the objective of this engagement is for Attorney to conduct an impartial investigation into the above-described allegations, and that Attorney fulfills its duty to Client by conducting this investigation impartially and objectively. Attorney does not guarantee any particular result or finding. Rather, Attorney will reach findings based on an impartial and professional evaluation of the evidence available to it. Client understands that its obligation to pay fees and costs does not depend on the outcome of the investigation.
5. **Confidentiality/Privilege.** The parties understand that work performed by Attorney will be protected by the attorney-client and work product privileges to the extent applicable law permits and that work performed by Attorney in the investigation is intended to be protected specifically by Evidence Code 952. Attorney will communicate findings to Client's counsel, Firm X, to facilitate the rendering of legal advice by such counsel to Client.
6. **Fees and Billing.** Client agrees to compensate Attorney at the rate of [] per hour for work performed by Attorney. Invoices shall be sent monthly and payment is due on receipt. [Specify travel time policy.]
7. **Costs.** Client shall reimburse Attorney for all costs associated with rendering the above services. Such costs include, but are not limited to: messenger, mail, and delivery costs; telephone and telefax costs; legal database charges; photocopying charges; and transportation, parking, and travel costs, excluding automobile mileage costs. Attorney shall itemize such costs in the monthly billing statement.
8. **Compensation for Post-Investigative Work.** This engagement shall be considered concluded after Attorney has provided an investigation report in this matter, whether oral or written. After the conclusion of this engagement, should a need arise for Attorney to respond to any subpoena, or to otherwise provide deposition or trial testimony in connection with this matter, Client shall compensate Attorney at its then applicable rates for time expended, including time involved in preparing for such deposition or testimony, or responding to any subpoena. Client agrees to reimburse Attorney for all reasonable fees and costs incurred in obtaining necessary representation for such proceedings, including legal fees and costs that Attorney incurs in preparing for such proceedings. Client shall also compensate Attorney at its then applicable rates for time expended in defending against any actual or threatened claim with respect to which Attorney is entitled to indemnification pursuant to paragraph 9, below. [Specify what shall be done with file]
9. **Indemnity.** Client agrees to defend, indemnify, and hold Attorney harmless for and against all actions, claims, and complaints, whether formal or informal, actual or threatened, arising from or related to the investigation brought or asserted against Attorney by anyone other than Client. This provision includes an obligation to indemnify Attorney for all costs (including, without limitation, settlement costs and other legal expenses) incurred in defending or resolving such actions. In accordance with California

Rule of Professional Conduct 3-400, this provision is not intended to apply to any potential professional malpractice action brought by Client against Attorney.

10. **Payment Where No Findings Reached.** The parties understand that Attorney's performance of its services is dependent on the cooperation of Client to provide access to all reasonably necessary information to render factual findings. In the event that circumstances prevent access to information precluding Attorney from reaching factual findings, Client understands that Attorney will still be entitled to full compensation.
11. **Termination.** Client may terminate this contract at any time. Attorney also may terminate this contract at any time, provided such termination complies with any applicable State Bar of California Rules of Professional Conduct. Upon termination, any outstanding fees and costs shall become immediately payable. Provisions number six through ten and the provisions below shall survive termination of this contract.
12. **Choice of Law.** This contract is entered into in the State of California; disputes relating to it shall be resolved under the laws of the State of California.
13. **Severability.** Should any provisions of this contract be declared to be invalid or unenforceable, the remainder of this contract shall remain in full force and effect.
14. **Binding Arbitration of Disputes.** Should a dispute arise between the parties, including regarding fees or costs, and should the parties be unable to resolve such dispute through voluntary mediation or otherwise, the parties agree to submit their dispute to binding arbitration pursuant to the California Arbitration Act. This agreement to arbitrate is subject to the right of the Client to non-binding fee arbitration under the State Bar Fee Arbitration Program. Client understands that, by agreeing to binding arbitration, it waives the right to a jury or court trial and attendant procedural rights, such as full discovery and appeal rights.
15. **Complete Agreement.** This contract contains the complete agreement between Attorney and Client and represents the final and exclusive embodiment of their agreement. It supersedes all prior agreements, whether written or oral, relating to the subject matter. Changes to this agreement can only be made in a writing signed by both parties.

I understand and agree to the above terms.

Date: _____

Client

By: _____

Title:

Date: _____

Attorney

By: _____

Title:

Sample Retention Letter – California Attorney

[Attorney Letterhead]

[Client name and address]

Re: Legal Services Agreement: Retention of _____ to Perform
Impartial Workplace Investigation

Dear [Client Representative]:

Thank you for contacting me to perform an independent workplace investigation. I am pleased to welcome [Client] as a client. As we discussed, this letter sets forth the terms of my retention.

1. **Parties.** The parties to this letter agreement are [Attorney] “Attorney” and [Client] “Client.” It is binding on Client’s successors and assigns, if any.

[Comment: If an attorney is being retained by more than one entity, e.g. a primary and secondary employer, such that a joint representation exists, the attorney must comply with the Rule 3-310 of the California Rules of Professional Conduct concerning joint representations.]

2. **Legal Services to be Rendered.** Attorney will render legal services to Client in the form of an impartial workplace investigation regarding the *[specify claim, e.g. sexual harassment and retaliation complaint made by Employee X, an employee of Client, as set forth in the written complaint submitted to Human Resources.]* Attorney will make factual findings, utilizing Attorney’s legal skills, knowledge and experience in so doing. Unless otherwise directed, Attorney will provide a written report to Client.

3. **Limitation on Legal Services.** The scope of this representation is limited. Attorney will not render a legal determination whether there was *[specify claim, e.g. unlawful discrimination, retaliation or harassment under the FEHA, Title VII]* or a violation of any other law or statute. Attorney will not act as an advocate, provide advice to Client with respect to what employment actions, if any, should be taken as a result of her findings or represent Client in any legal action or proceeding. It is expressly agreed that Client will look to its regular legal counsel, _____, or such other counsel as it may choose, for such services as well as for advice with respect to issues which may arise concerning or be implicated by the investigation, including, without limitation, identifying such issues. This includes, without limitation, the admonitions, if any, to be given to employees who are interviewed concerning confidentiality, the appropriate scope of investigation, the consequences of employee failure to cooperate in the investigation, the accessing of electronic and other data, document retention, litigation holds, appropriate interim employment measures pending investigation, compliance with the federal Fair Credit Reporting Act (FCRA), including, without limitation, FCRA sections 603(d)(2)(D) and 603(y)(1) [15 U.S.C. §§1681a(d)(2)(D) and 1681a(y)], and compliance with the California

Investigative Consumer Reporting Agencies Act (ICRAA), California Civil Code §1786 *et seq.* With respect to these statutes, Client states that it has made and will make any required disclosures to employee(s) and that the investigation is for employment-related purposes. (If this should change, Client agrees to notify Attorney.) Client also agrees it will look to its regular outside counsel, _____, or such other counsel as it may choose, for advice with respect to issues of attorney-client privilege, scope of privilege, waiver, and work product in connection with Attorney's services. Client and Attorney intend that Attorney's investigation will be covered by the attorney-client privilege to the extent legally permitted, although Attorney understands that Client may choose to waive the privilege in the future. Client specifically gives its informed consent to a limited scope engagement and understands that it may seek independent legal advice concerning the proposed limited scope engagement if it wishes.

4. Client Cooperation. Client agrees to make available the witnesses and documents requested by Attorney to permit Attorney to perform this independent investigation. _____ will be the primary point of contact at Client's facility. This will include arranging access to witnesses and documents and arranging a location for interviews. Attorney is also authorized to discuss all aspects of the investigation with _____, Client's regular legal counsel or such other counsel as Client may choose.

5. No Guarantees. It is understood that there is no guarantee or assurance that any particular result will be reached by this impartial investigation. Nor does Attorney guarantee, despite Attorney's good faith efforts, that any purported facts, conclusions or opinions reported to Client will be accurate or complete.

6. Billing and Payment. Client will be billed monthly for services rendered plus costs and expenses. Services are billed at Attorney's current rate of \$____/hour which is billed in 1/10th hour increments and which shall remain in effect for a period of not less than 12 months from the date of this letter agreement. Expenses may include such items as telephone charges, document reproduction charges, postage, messenger service fees and travel costs. These items will be separately itemized. A retainer fee is of \$____ is being charged. Payment is due upon presentation of the billing statement, but in no event to exceed 30 days from presentation of the statement. Attorney reserves the right to postpone or defer providing additional services or to discontinue providing legal services, to the extent legally permissible, if billed amounts are not paid when due. Attorney also reserves the right to charge a late fee of 1% per month on all sums that are not paid within 30 days of presentation of the statement. Client agrees to promptly review billing statements and raise any questions regarding the amounts and items billed within 30 days of presentation. If Client objects to only a portion of the charges on a statement, then Client agrees to pay the remainder of the charges, which will not constitute a waiver of Client's objection. Client requests that all billing statements be sent to _____.

[Comment: If a retainer is received, the attorney must comply with California Rules of Professional Conduct, Rule 4-100, re the deposit of funds held for benefit of a client in a trust account. Consider adding the following if a retainer is required: "Attorney will place these funds on account and upon presentation to you of a statement for services rendered and costs and expenses incurred, Attorney will apply the advance payment against Attorney's fees, costs and expenses, which will be deemed to have been earned immediately upon presentation to

Client of such statement. Client agrees to pay promptly any fees, costs and expenses in excess of the advance payment.”]

7. Related Post-Investigation Services. If Attorney is asked or required to prepare for and/or testify, including, without limitation, at deposition, trial, arbitration or any other proceeding, as a result of services rendered under this Agreement, if Attorney must respond to subpoenas or discovery or otherwise respond or perform services with respect to any matter relating to or arising out of the services performed for Client, Client agrees to pay Attorney for all time expended (including preparation time) at Attorney’s then current regular hourly rate and to reimburse Attorney for reasonable costs and expenses incurred, whether or not the investigation has been concluded. This includes reasonable costs of legal representation. Payment is due upon presentation of a bill for services, costs and expenses. If costs and/or expenses, including the costs of legal representation should reasonably be expected to exceed \$_____, Client shall advance the funds to Attorney or Attorney’s designee.

8. Indemnification. Client agrees to indemnify and hold Attorney harmless, to the full extent permitted by law, from and against all claims, formal or informal, actions, proceedings, liabilities or damages, whether actual or threatened, related to or arising out of Attorney’s services for Client. This includes indemnification for all costs incurred in investigating, preparing to defend, defending and resolving such claims or actions (including, without limitation, attorneys’ fees, experts’ fees, disbursements, settlement costs, and Attorney time to be compensated at Attorney’s then current hourly rate). Provided, however, this Agreement in no way limits Attorney’s liability for professional malpractice under California Rule of Professional Conduct 3-400. The Agreement to indemnify includes the obligation to advance funds to the maximum extent legally permissible.

[Comment: Rule 3-400 of the California Rules of Professional Conduct does not permit an attorney prospectively to contract to limit liability for professional malpractice.]

9. Termination. Client has the right to terminate Attorney’s services at any time. Attorney also has the right to withdraw from rendering services under this Agreement if, among other things, Client fails to honor the terms of this letter agreement, fails to make payment of any statement(s) in a timely manner, fails to cooperate or if any fact or circumstance occurs that would, in Attorney’s view, render continuing service unlawful or unethical, provide however any withdrawal must be legally permissible. In any event, this engagement will automatically terminate at the time Attorney presents a report on the investigation or is advised by Client that it does not wish a report. Notwithstanding termination of Attorney’s services, Client’s obligations under the provisions of paragraphs 6, 7 8, and 10-13 survive, and Client remains obligated to pay for all services provided and to reimburse all costs and expenses paid or incurred prior to the date of such termination or which are incurred thereafter as provided for herein.

10. Arbitration. If you become dissatisfied with Attorney’s charges or services, please bring that to Attorney’s attention immediately. Most problems of this nature can be resolved through good faith discussion. In the event that any dispute cannot be resolved through discussion or voluntary mediation, the parties agree to final and binding arbitration of any dispute, claim or controversy regarding Attorney’s services or the terms of this letter agreement under the then current commercial arbitration rules of *[JAMS or AAA]*. Attorney and Client are waiving the

right to a jury or court trial. Notwithstanding the above, this arbitration agreement is subject to Client's right to elect arbitration pursuant to the fee arbitration procedures of the State Bar of California, as set forth in California Business & Professions Code §§ 6200, et seq. The State Bar's fee arbitration procedures permit a trial after arbitration, unless the parties agree in writing, after the dispute over fees, costs, or both, has arisen, to be bound by the arbitration award. If Client does not elect to proceed under the State Bar fee arbitration procedures, any dispute over fees shall be resolved by binding arbitration in accordance with the then existing rules for commercial arbitration of *[JAMS or AAA]*.

11. Entire Agreement. This letter agreement supersedes all other prior and contemporaneous written and oral agreements and understandings and contains the entire agreement between the parties. This agreement may be modified only by subsequent written agreement of the parties. Client acknowledges that no promises have been made other than those stated in this letter agreement.

12. Applicable Law. This agreement shall be governed by the laws of the State of California.

13. Severability. If any section or portion of these terms is determined by any court or arbitrator to be illegal or invalid, the validity of the remaining terms shall not be affected therein and said illegal or invalid term shall be deemed not to be a part of this letter agreement.

An individual authorized to execute this agreement on behalf of Client, should sign, date and return a copy of this letter to me, signifying agreement to these terms. My signature below constitutes my agreement.

Very truly yours,

[Attorney Name]

I am authorized to, and hereby agree to the foregoing:

Date

Signature

Print name and title

Non-Attorney Agreement

RETAINER AGREEMENT

This document is a Retainer Agreement between _____ Agency (INVESTIGATOR) and _____ (CLIENT). INVESTIGATOR is being retained to conduct this investigation under the following terms:

1. INVESTIGATOR is being retained to conduct an investigation into a personnel matter. The investigation will be conducted by INVESTIGATOR's employees.
2. In order to conduct the investigation, INVESTIGATOR will be provided access to CLIENT's employees. In addition, INVESTIGATOR will be given access to any non-privileged documents relevant to the investigation requested by its personnel. CLIENT will also provide a copy of relevant employment policies.
3. During the course of the investigation, INVESTIGATOR will report to XXX. XXX shall direct the investigation and all privileges shall apply to the work performed by INVESTIGATOR. Upon completion of the investigation, INVESTIGATOR will provide an oral report of the results of the investigation. At CLIENT's request, INVESTIGATOR will provide a draft written report, a final written report, or both after completing the investigation.
4. INVESTIGATOR and its personnel are being retained as independent contractors and not as employees of CLIENT.
5. For all investigation services rendered, INVESTIGATOR will be paid an hourly rate of \$XXX. In addition, INVESTIGATOR will be reimbursed for reasonable out-of-pocket expenses incurred during the investigation including but not limited to travel expenses, parking fees, and messenger or overnight delivery charges. It is not expected that out-of-town travel costs will be associated with this investigation. Mileage will be billed at the rate of \$.75 per mile.
6. Costs and fees will be submitted on a monthly basis and will be paid in full by CLIENT within fourteen days of receipt. CLIENT will provide a retainer of \$XXX, and INVESTIGATOR will send a monthly statement showing the number of hours worked and the retainer balance. INVESTIGATOR will not exceed hourly fees of \$XXXX, if appropriate, without prior approval by CLIENT.
7. Given the sensitive nature of the investigation, it is understood that INVESTIGATOR's personnel will not disclose to anyone (outside of INVESTIGATOR) any facts relating to the investigation, except: (1) to CLIENT's representative as named in paragraph 3, above; (2) to others involved in the investigation, but then only to the extent strictly necessary to conduct the investigation; and (3) to others as required by law.

8. If there is a legal proceeding in which testimony of INVESTIGATOR personnel is required, said personnel will provide complete and truthful testimony. INVESTIGATOR will be reimbursed as provided in paragraph 5, above, for the cost of personnel testifying and preparing to testify at any legal proceedings. For purposes of billing, "legal proceedings" includes but is not limited to depositions, hearings, and trials.

9. Since the purpose of INVESTIGATOR's engagement is to assist CLIENT in determining the facts related to an internal personnel matter, CLIENT agrees to the following limited indemnity language. CLIENT agrees to indemnify, defend and hold INVESTIGATOR, its successors and assigns, and each of its officers and employees, harmless from any and all claims, suits, demands, losses and expenses, including reasonable attorney's fees, accruing or resulting to any and all persons, firms, or other entity arising out of INVESTIGATOR's performance or non-performance of its obligations under this Agreement, unless an error or erroneous omission by INVESTIGATOR causes such damage or loss. CLIENT shall not indemnify INVESTIGATOR for any matter involving a claim by CLIENT of professional negligence, or any matter for which INVESTIGATOR shall have been adjudicated to have acted in bad faith or engaged in willful misconduct or any conduct outside the scope of its retention under this Agreement.

10. If any provision of this Agreement is deemed unenforceable, the remaining provisions will be given full force and effect.

11. This Agreement will be governed by and construed, interpreted, applied, and enforced according to the laws of California, including California law relating to choice of law.

12. This Agreement may be signed in counterparts, each of which so executed shall be deemed an original irrespective of the date of the execution, and said counterparts shall together constitute one and the same agreement.

13. This Agreement constitutes the entire agreement between the parties relating to the subject matters set forth herein.

For INVESTIGATOR:

Dated:

Title: _____

Signature: _____

For CLIENT

Print Name: _____

Dated:

Title: _____

Signature: _____