

# **FLEXIBLE BENEFITS ADMINISTRATION SERVICES AGREEMENT**

This Agreement made effective as of January 1, 2017 (the "Effective Date"), by and between **SAMPLE COMPANY**, 123 Main Street, Buffalo, NY 14202 (the "**Employer**"), and **P&A ADMINISTRATIVE SERVICES, INC.**, 17 Court Street, Suite 500, Buffalo, NY 14202-3294 ("**P&A**").

## **W I T N E S S E T H:**

**WHEREAS**, the Employer maintains a cafeteria plan as defined in Section 125 of the Internal Revenue Code for its eligible employees (the "Plan"); and

**WHEREAS**, the Employer desires to retain P&A to provide administrative services with respect to the Plan, and P&A desires to provide such services upon certain terms and conditions;

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements contained herein and for other good and valuable consideration, receipt of which is hereby acknowledged, the parties hereto, with the intention of being legally bound hereby, covenant and agree as follows:

1. **Services.** P&A shall provide the following services with respect to the Plan:
  - a. prepare such Plan documents as shall be necessary to properly restate the Plan as of the Effective Date, including a Plan document, a summary of the Plan for distribution to employees eligible to participate in the Plan ("Participants"), and an enrollment form. At the time provided to the Employer, such documents shall conform in all respects with applicable laws and regulations;
  - b. with the assistance of the Employer, enroll Participants in the Plan;
  - c. provide to each Participant who elects benefits under the Plan's Medical Expense Reimbursement Account benefit option or Dependent Care Assistance Account benefit option an electronic payment card that may be used to pay expenses that are eligible for reimbursement under that benefit option, and such additional cards for use by family members of the Participant as he or she reasonably shall request;
  - d. substantiate the eligibility of expenses paid by use of an electronic payment card to the extent required by applicable law;
  - e. provide Participants who have elected flexible spending account benefits under the Plan with a form to use in submitting flexible spending account claims;
  - f. receive, review and, when authorized by the Plan and by applicable law, approve flexible spending account claims;
  - g. from time to time, notify the Employer of the aggregate amount of funds needed from the Employer to pay pending approved claims and receive said funds as transmitted by the Employer;
  - h. pay approved flexible spending account claims from funds made available by the

Employer for that purpose. Claims shall be paid by check or, where authorized by a claimant, by direct electronic deposit to a bank account of the claimant;

- i. provide with each flexible spending account claim paid by check a statement of the Participant's remaining account balance under the flexible spending account from which the payment has been made;
- j. before the end of each Plan Year of the Plan as described in the Plan document (the "Plan Year"), provide to each Participant who elected any flexible spending account benefits for that Plan Year a statement setting forth each of his or her flexible spending account balances and advise of the potential forfeiture of any balances not used to reimburse the Participant for eligible expenses incurred prior to the end of that Plan Year;
- k. perform such benefits discrimination testing as P&A shall deem necessary to assure the Plan's continuing compliance under Code Section 125; and
- l. prepare any annual return (Form 5500 Series or equivalent) required by applicable federal law with respect to the Plan for filing by the Employer with respect to each Plan Year ending prior to the termination of this Agreement.

**2. Compensation.** As compensation for the services rendered hereunder, the Employer shall pay P&A such fees as are set forth in Schedule A attached hereto and made a part hereof. P&A may modify this fee schedule as of the beginning of any Plan Year commencing on or after the initial term of the Agreement (as described in Section 5 hereof). P&A shall notify the Employer in writing of any modification to the fee schedule not less than ninety (90) days before the beginning of the Plan Year in which the modification is to become effective. Should the Employer be unwilling to accept any such modification, it may exercise its right to terminate the Agreement in accordance with Section 5 below.

**3. Employer Responsibilities.**

- a. The Employer shall notify P&A in writing of any event or occurrence that affects the group of employees who are eligible for reimbursement of expenses under the Plan (e.g., hiring of a new employee, termination of an employee, change in hours worked) as soon as is reasonably practicable.
- b. The Employer shall provide P&A on a timely basis with such other information as P&A reasonably shall request in furtherance of its responsibilities hereunder as soon as is reasonably practicable.
- c. The Employer shall provide P&A with the funds necessary to pay all claims that qualify for reimbursement under the Plan. P&A shall not be obligated to advance funds to the Employer for this purpose.
- d. The Employer shall be responsible for assuring that withholding from its payroll is consistent in all respects with salary reduction elections made under the Plan and for

preparing Forms W-2 that reflect benefits that were received by Participants during the reporting year to the extent required by law.

**4. Responsibilities of the Parties and Indemnification.** The responsibilities and liabilities of P&A are only those set forth herein, and no others shall be implied. P&A shall have no duty or authority to make, or to compel the Employer to make payment of any benefit under the Plan. Except for its own misconduct or negligence, P&A shall not indemnify the Employer or any other provider of benefits under the Plan, with respect to its liability to pay benefits to Participants.

Except for its own misconduct or negligence, neither P&A nor any of its officers, directors, or employees, nor any agent or counsel for any of the foregoing, shall be liable to anyone at any time interested in the Plan, for any act or omission in providing services hereunder. P&A shall indemnify and hold harmless the Employer from any claim, liability, obligation or charge arising out of P&A's misconduct, negligence or other wrongdoing in connection with activities or responsibilities arising out of or relating to this Agreement. The Employer shall indemnify and hold harmless P&A from any claim, liability, obligation or charge arising out of the Employer's misconduct, negligence or other wrongdoing in connection with activities or responsibilities arising out of or relating to this Agreement.

**5. Term; Termination.** The initial term of this Agreement shall commence on the Effective Date and shall end on the last day of the first twelve-month Plan Year commencing on or after that date. Thereafter, this Agreement automatically shall be renewed for each additional Plan Year unless one of the parties hereto gives the other party notice in writing of its desire to terminate the Agreement as of the end of a specified Plan Year not less than sixty (60) days prior to the end of that Plan Year. Notwithstanding the foregoing, this Agreement shall terminate (a) automatically if either party is adjudicated a bankrupt or suffers appointment of a temporary or permanent receiver, trustee or custodian for all or a substantial part of their assets, which shall not be discharged within thirty (30) days of appointment, or makes an assignment for the benefit of creditors, or (b) after written notice by one party of the other party's material breach of, or material failure to perform, its obligations hereunder unless such breach or failure is cured within ten (10) days of said notice. Any notice of breach must provide all such details as are known to the non-breaching party regarding the nature of the other party's alleged breach, the specific obligation hereunder to which the alleged material breach relates, the approximate date on which the alleged breach occurred and the identity of any personnel of the other party that were involved. Failure to provide such detail shall render said notice null and void for purposes of this Agreement.

Should the Employer cause this Agreement to be terminated other than in accordance with the preceding paragraph, the Employer immediately shall become obligated to pay P&A as liquidated damages an amount equal to seventy-five percent of the fees that would have been due had the Agreement remained in effect for the period (i) commencing on the date next following the date on which the Agreement prematurely was or will become terminated, and (ii) ending on the earliest date as of which

the Employer properly could have terminated the Agreement by giving the advance notice prescribed hereunder on the date the Employer first notified P&A in writing of the Employer's intention to terminate the Agreement. For purposes of calculating this liquidated damages amount, the fees due to P&A hereunder for services it provided in the month preceding the month within which P&A first was notified of the premature termination of the Agreement shall be the fees due for each month during the period described in the preceding sentence.

**6. Confidentiality.** All books and records, including the data therein, pertaining to each party which may come into the hands of the other are to be treated as confidential and private records, and the other party shall not disclose information from such records unless it is required by law or authorized by the initial party in writing prior to such disclosure. Both parties reserve the right to control the use of any of their symbols, trademarks, computer programs and service marks currently existing or hereafter established. Both parties agree that they will not use the computer programs work, symbols, trademarks, service marks, or other devices of the other in advertising, promotional material, or otherwise and will not advertise or display such devices without the prior written consent of the other party. In addition, both parties further agree that any such work, symbols, trademarks, service marks, or other devices furnished by one party to the other shall remain the property of the initial party and shall be returned by the other party upon demand of the initial party upon termination of this Agreement.

**7. HIPAA Compliance.** The parties hereto acknowledge that they have entered into a separate Business Associate Agreement of even date herewith, a copy of which is appended hereto as Exhibit 1, and agree that said Business Associate Agreement and all of the obligations and rights of the parties thereunder shall be incorporated herein by reference.

**8. Binding Effect.** This Agreement shall inure to the benefit of and be binding upon the parties, their legal representatives, contractors, agents, successors and assigns.

**9. Integration.** By their making of this Agreement, the parties hereto hereby acknowledge that this Agreement supersedes any previous understandings between them with respect to all matters contained herein and contains the entire understanding and agreement between them with respect to all matters contained herein and cannot be amended, modified or supplemented except by a subsequent written agreement entered into by both parties.

**10. Subcontracting.** P&A shall not subcontract any portion of this Agreement without the prior written approval of the Employer.

**11. Non-Exclusive Arrangement.** Nothing contained herein shall be construed to prevent either party from independently operating or participating in any other agreement concerning plan administration services independent and unrelated to the services and obligations of the parties pursuant to this Agreement.

**12. Waiver of Breach.** The waiver by either party of a breach or violation of any provision of this

Agreement shall not operate as or be construed as a waiver of a breach or violation of any other provision of this Agreement or of any subsequent breach or violation thereof.

**13. Severability.** In the event any provision of this Agreement is rendered invalid or unenforceable, the remaining provisions of this Agreement shall remain in full force and effect.

**14. Governing Law.** This Agreement is made in and shall be construed pursuant to the laws of the State of New York, to the extent that the law of the State of New York is not superseded by federal law.

**15. Enforcement.** If any action at law or in equity (including arbitration) is necessary to enforce or interpret any one or more of the terms of this Agreement, the prevailing party shall be entitled to reasonable attorneys' fees, costs and necessary disbursements in addition to any other relief to which such party may be entitled.

**16. Notice.** Any notice hereunder by either party shall be deemed to have been duly given three (3) business days after mailing, and shall be given by fax and by being mailed in any post office or post office box maintained by the United States Postal Service, enclosed in a postage paid envelope, registered or certified mail, return receipt requested, addressed to the party to whom or which notice is intended to be given at such party's address as stated above or to such other address as each party shall specify in writing to the other.

**IN WITNESS WHEREOF**, the parties have entered into this Agreement as of the Effective Date.

**SAMPLE COMPANY**

**P&A ADMINISTRATIVE SERVICES, INC.**

BY: \_\_\_\_\_

BY: \_\_\_\_\_

## SCHEDULE A-FEES

The Employer will pay to P&A:

1. **INSTALLATION FEE.** A fee of \$xx.xx for all of those services relating to the installation of the Plan, including preparation of Plan documents, data entry and processing of enrollment forms. P&A shall extract this fee from a bank account designated by the Employer for purposes of providing P&A with the funds needed for the administration of the Plan (the "Employer's Account")
2. **ADMINISTRATION FEES.** Administration fees for each calendar month commencing while this Agreement remains in effect.

After open enrollment of Plan Participants has been completed for each Plan Year, P&A shall determine if an Annual Minimum Fee in the amount of \$xx.xx is due with respect to that Plan Year. This Annual Minimum Fee shall be due only if the following total is less than \$xx.xx: The number of Plan Participants who enrolled in any of the Plan's Flexible Spending Account options during open enrollment multiplied by \$xx.xx (the per Participant monthly fees described below) then multiplied again by 12 months.

If it is determined, with respect to a particular Plan Year, that the Annual Minimum Fee provision above does not apply, P&A shall begin during the second month of this Agreement to extract the administrative fees due for services in the prior month from a bank account designated by the Employer for purposes of providing P&A with the funds needed for the administration of the Plan (the "Employer's Account"). The fees for a given month shall equal \$xx.xx for each individual who was eligible for the reimbursement of expenses under any of the Plan's Flexible Spending Account options as of the first day of that month on account of a salary reduction agreement in effect on that date or otherwise, including (i) any individual who, on that date, would have been eligible for reimbursement under any of the Plan's Flexible Spending Account options but for the fact that he or she previously was reimbursed for the full amount of his or her benefit election for the Plan Year; (ii) any individual whose eligibility to make additional salary reduction contributions to the Plan had terminated prior to that date but who, on that date, remained eligible to submit post-termination run-out claims under the terms of the Plan; and (iii) any individual who had elected COBRA coverage prior to that date and whose COBRA coverage remained in effect on that date.

If it is determined to apply with respect to a Plan Year, P&A shall extract the Annual Minimum Fee from the Employer's Account. Once extracted, this Annual Minimum Fee shall be credited against the Employer's obligation for monthly fees as determined in accordance with the preceding paragraph. As soon as the year-to-date total of those monthly fees exceeds the amount of the Annual Minimum Fee, P&A shall begin to extract the excess monthly fees from the Employer's Account.

3. **ANNUAL REPORT PREPARATION.** \$300.00 for each annual return (Form 5500 Series or equivalent) that is prepared by P&A pursuant to Section 1 of this Agreement.
4. **REQUESTED ADDITIONAL SERVICES AND MATERIALS.** For such services and materials requested by the Employer that are in addition to the services and materials described in Section 1 of this Agreement, P&A shall be entitled to such additional compensation from the requesting party as is mutually agreed upon by the requesting party and P&A.
5. **MAILING EXPENSES.** The cost of any mailing required under the Agreement the rate for which exceeds the first class rate charged by the U.S. Post Office.
6. **RECOUPMENT OF PENALTIES AND FEES.** The amount of any penalty or like fee that is imposed on P&A as a result of any action or inaction by the Employer or by the employees or other agents of the Employer with respect to the administration of the Plan, including but not limited to returned check charges or ACH rejection fees. P&A shall be entitled to immediately recoup any such penalty or fee from the Employer after giving the Employer written notice that P&A has paid such amount.

Note: Should the Employer elect to change the terms of the Plan or should changes in applicable laws necessitate changes to the Plan documents, P&A will provide the Employer with a quote as to the cost of having P&A make the document changes.