

AGREEMENT DURING THE ONE (1) MONTH IMMEDIATELY PRIOR TO THE DATE UPON WHICH EMPLOYER'S CLAIM OR CAUSE OF ACTION AROSE. NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, BE SHALL NOT BE LIABLE TO EMPLOYER OR OTHERS FOR PUNITIVE OR EXEMPLARY DAMAGES OR ANY SPECIAL, INDIRECT OR CONSEQUENTIAL DAMAGES (INCLUDING LOST PROFITS) OR EMPLOYER, EVEN IF BENEFIT EXPRESS SERVICES HAS BEEN PREVIOUSLY ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

9.3 FURTHER, EMPLOYER UNDERSTANDS AND AGREES THAT THE USE OF THE SOFTWARE MAY FROM TIME TO TIME BE INTERRUPTED, AND BENEFIT EXPRESS SERVICES MAKES NO WARRANTY OR REPRESENTATION TO EMPLOYER THAT THE SOFTWARE WILL BE FUNCTIONAL AND AVAILABLE AT ALL TIMES. EMPLOYER SHALL NOT BE ENTITLED TO RECOVER FOR ANY LOSSES, INCLUDING, WITHOUT LIMITATION, ANY LOSS OF DATA, WHICH MAY RESULT FROM SUCH INTERRUPTION OF AVAILABILITY OF THE SOFTWARE. NOTWITHSTANDING ANY OTHER LIMITATION OF LIABILITY IN THIS AGREEMENT, IN THE EVENT THAT USE OF THE SOFTWARE IS INTERRUPTED FOR MORE THAN A 24 HOURS PERIOD, BENEFIT EXPRESS SERVICES AGREES TO CREDIT EMPLOYER IN AN AMOUNT EQUAL TO THE PRORATED PEPM FEES (AS SET FORTH IN EXHIBIT D) OTHERWISE DUE FROM THE EMPLOYER FOR EACH DAY THAT THE SOFTWARE IS NOT FUNCTIONAL OR OTHERWISE UNAVAILABLE.

10.0 Indemnification

10.1 In the event any suit or claim is brought against Employer based on a claim that the authorized use of the Software under this Agreement infringes any existing Intellectual Property Rights of a third party, BE agrees that:

10.1.1 To the extent that the claims or proof of the suit involve claims or factual allegations that the Software infringes any existing Intellectual Property Rights of a third party, expense and hold Employer harmless thereof, provided however that Employer promptly notifies BE in writing and gives BE complete authority and the information required to defend or settle the suit;

10.1.2 BE shall pay any settlement of the suit or claim agreed to by BE and to the extent that any judgment in any such suit is based on proof that the Software infringes any existing Intellectual Property rights of a third-party, BE shall pay all damages and costs awarded against Employer related thereto; provided however that BE shall not be responsible for any cost, expense or compromise made or incurred by Employer without BE's prior written consent;

10.1.3 BE shall allow Employer to participate in the defense of the suit at Employer's own expense, if Employer so elects; and

10.1.4 Notwithstanding anything to the contrary in this Agreement, BE shall have no obligation of indemnity with regard to any modifications of any kind by Employer, regardless of whether such changes were authorized.

10.2 In the event any suit or claim is brought against BE based on a claim that Employer improperly collected, used or disseminated any information or other data using the Software, Employer agrees that:

10.2.1 Employer shall defend the suit at its expense and hold BE harmless therefrom, provided however that BE promptly notifies Employer in writing and gives Employer complete authority and the information required to defend or settle the suit;

10.2.2 Employer shall allow BE to participate in the defense of the suit of BE's own expense, if BE so elects.

11.0 Protected Health Information

11.1 Employer and BE agree to comply and modify the Agreement as necessary to comply with the Administrative Simplification requirements of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), as set forth in Title 45, Parts 160 and 164 of the Code of Federal Regulations (the "CFR").

11.2 Capitalized terms not otherwise defined in the Agreement shall have the meanings given to them in Title 45, Parts 160 and 164 of the CFR and are incorporated herein by reference.

11.3 Employer shall use and/or disclose PHI only to the extent necessary to satisfy Employer's obligations under the Agreement. BE shall use and/or disclose PHI only to the extent necessary to satisfy BE's obligations under the Agreement. To the extent that the parties can limit uses and/or disclosures of PHI to a Limited Data Set (as defined in the HIPAA Regulations), each party agrees to do so. If use of a Limited Data Set is impracticable, the party using and/or disclosing PHI will document the necessity for use of additional PHI.

11.4 Neither party shall use or disclose any PHI received from or on behalf of a Covered Entity or Individual, except as permitted or required by the Agreement, as required by law or as otherwise authorized in writing by the respective party, a Covered Entity or an Individual.

11.5 BE and Employer shall ensure that any employee or subcontractor to whom it provides PHI agrees to the same restrictions and conditions that apply through this Agreement with respect to PHI.

11.6 All other terms and conditions covering the definition, notification, and remediation regarding the protection of PHI, shall be set forth in Exhibit C, Business Associate Addendum

12.0 Miscellaneous

12.1 Assignment. Neither party shall assign this Agreement or transfer, by operation of law or otherwise, any of its respective rights or obligations under this Agreement without the prior written consent of the other party, such consent shall not be unreasonably withheld. Except that, either party may assign the Agreement without such consent in connection with any merger, consolidation, any sale of all or substantially all of the party's assets or any other transaction in which more than fifty percent (50%) of the party's voting securities are transferred provided that the successor or assignee assumes all of such party's obligations hereunder. Any assignment or transfer in violation of this section shall be void.

12.2 Waiver. No term or provision of this Agreement shall be deemed waived and no breach shall be deemed excused, unless such waiver is in writing and signed by the Party who is alleged to have waived the term or provision.

12.3 Excusable Delay. Neither BE nor Employer shall be deemed to be in default of any provision of this Agreement or for any failure in performance, resulting from acts or events beyond the reasonable control of BE or Employer, as the case may be. For purposes of this Agreement, such acts shall include, but not be limited to, acts of God, civil or military authority, civil disturbance, war, strikes, fires, other catastrophes or other such major events beyond BE's or Employer's reasonable control. This section shall not excuse Employer's payment obligations.

12.4 Governing Law and Dispute Resolution. This Agreement is governed by and construed in accordance with the laws of the State of Texas, without giving effect to any choice or conflict of law provisions, principles or rules (whether of the State of Texas or any other jurisdiction) that would cause the application of any laws of any jurisdiction other than the State of Texas. The parties agree that all claims, actions, suits and proceedings between them relating to this Agreement will be filed, tried and litigated only in the Circuit or District Courts of Hildago County, Texas. In connection with the foregoing, the parties consent to the jurisdiction and venue of those courts and expressly waive any claims or defenses of lack of jurisdiction of or proper venue by those courts.