

Buy-Sell Agreement Review Checklist

1. Type of Buy-Sell Agreement:

- Redemption
- Cross-purchase
- Hybrid

2. Parties:

Who are the parties to the buy-sell agreement?

- All of the owners
- Less than all of the owners List:

What owners aren't parties? _____

- The entity
- Spouses of owners
- Prospective owners

3. Right of First Refusal:

- Yes or No? If yes, what are the terms? _____
- Terms contained in a third-party offer? _____
- Does the third party offer have to be a proven bona fide offer? _____
- What proves the bona fide offer? A deposit of earnest money? Proof of financial ability to consummate the purchase? _____
- Does the right of first refusal provide relative to whether it is the buy-sell agreement price and terms? _____

___ Is the rights exercise price the higher of the third-party offer or the buy-sell agreement? Or is it the lower of the third-party offer or the buy-sell agreement? _____

___ Will the owner who exercises a right of first refusal be able to pay in installments, or is that owner bound by the terms of the third-party offer, such that if it is a cash offer, then the rights terms are all cash at the closing? _____

4. Transfers:

___ Does the buy-sell agreement prohibit all transfers except those made pursuant to the buy-sell agreement? If not, what are the exceptions? _____

___ Are there any permitted transferees to whom transfers won't trigger the buy-sell agreement? If so, who are they? Family members? If so, which ones (i.e., descendants, in-laws, spouses)? _____

5. Triggering Events:

What are the triggering events?

___ Gift

___ Death

___ Divorce

___ Disability: If so, who determines disability:

___ The insurance company

___ The leadership of the entity

___ Is there any ground of presumptive disability? _____

___ What happens if there is a presumptive disability determination? _____

___ What is the definition of disability? _____

___ Is it an "own occupation"

- ___ or does it require absolute disability?_
- ___ How long must the disability last before the buy-sell agreement is triggered? _____
- ___ Must disability be permanent? _
- ___ Termination of employment for cause:
 - ___ If so, is cause defined in the buy-sell agreement? _
 - ___ What is that definition of cause? _____
- ___ Termination of employment without cause.
- ___ Competition with the entity.
- ___ Disclosure of confidential information to a competitor.
- ___ Retirement. What are the qualification requirements? _____
- ___ Voluntary termination of employment.
- ___ Seizure of an interest.
- ___ Loss of license or other qualification.
- ___ Deadlock among the owners.
- ___ Attempted transfer.
- ___ Bankruptcy or insolvency.
- ___ Other: _____

6. Responses to Triggering Events:

- ___ **Gift:** Is this a permitted transfer or will it trigger a right under the buy-sell agreement? If so, what right? _____
- ___ Death:
- ___ No action.
- ___ Unrestricted permitted transfer.

Restricted permitted transfer.

Right of first refusal:

Mandatory sale but with only a purchase option.

Mandatory purchase and sale.

Put option right but not a mandatory offer.

Co-existent call option right and put option right.

All of the interests of the deceased owner be purchased or sold.

Disability:

Not covered.

Right of first refusal.

Mandatory sale but with only a purchase option.

Mandatory purchase and sale.

Put option right but not a mandatory offer.

All of the interests of the disabled owner be purchased or sold.

Divorce, death, or bankruptcy of a spouse:

Not covered.

No action.

Call option right in favor of the spouse owner.

Call option right in favor of all owners.

Call option right in favor of the entity.

Involuntary termination of employment for cause:

Not covered.

No action.

Call option right in favor of the other owners.

- Call option right in favor of the entity.
- Put option right in favor of the terminated employee owner.

Involuntary termination of employment without cause:

- Not covered.
- No action.
- Call option right in favor of the other owners.
- Call option right in favor of the entity.
- Put option right in favor of the terminated owner.

Competition with the entity:

- Not covered.
- No action.
- Call option right in favor of the other owners.
- Call option right in favor of the entity.

Disclosure of confidential information to a competitor:

- Not covered.
- No action.
- Call option right in favor of the other owners.
- Call option right in favor of the entity.

Retirement:

- Not covered.
- No action.
- Call option right in favor of the other owners.
- Call option right in favor of the entity.
- Put option right in favor of the retired employee owner.

Voluntary termination of employment other than retirement or disability:

- Not covered.
- No action.
- Call option right in favor of the other owners.
- Call option right in favor of the entity.
- Put option right.

Seizure of an interest:

- Not covered.
- No action.
- Call option right in favor of the other owners.
- Call option right in favor of the entity.
- Put option right.

Loss of license or other qualification:

- Not covered.
- No action.
- Call option right in favor of the other owners.
- Call option right in favor of the entity.
- Put option right.

Deadlock among the owners:

- Not covered.
- No action.
- Call option right in favor of the other owners.
- Call option right in favor of the entity.
- Put option right.

Attempted transfer:

- Not covered.
- No action.
- Call option right in favor of the other owners.
- Call option right in favor of the entity.
- Put option right.

Bankruptcy or other insolvency.

- Not covered.
- No action.
- Call option right in favor of the other owners.
- Call option right in favor of the entity.
- Put option right.

Other triggering events _____:

- Not covered.
- No action.
- Call option right in favor of the other owners.
- Call option right in favor of the entity.
- Put option right.

7. Miscellaneous:

- Valuation: Is the price the same for every triggering event? If not, what are the differences?___
- Appraisal: If so, who determines the value and who picks the appraiser?___
- Are there any minimum qualifications for the appraiser? .
- Is the appraiser given any valuation guidance? If so, standard of value? Level of value (i.e., whether valuation discounts are to be applied)?___

- ___ What is the date as of which the appraisal is to be conducted (i.e., the “as of” date)?___
- ___ Who pays for the appraisers?___
- ___ Is there a floor minimum value (e.g., the amount of the life insurance proceeds on the death of an owner)?_
- ___ Book value: If so, are there any adjustments to book value of assets to bring them to fair market value? _____
- ___ Are there any other adjustments to book value? If so, what are they?
As of when is the book value to be determined (i.e., the “as of” date)?_____
- ___ Who determines book value (e.g., the CPA for the company, the leadership of the entity)?_____
- ___ Formula, including capitalization of earnings methods? ___
- ___ Who made up the formula?_____
- ___ Has it ever been tested or used?_____
- ___ Who makes the formula calculation?_
- ___ Is there any failsafe opt-out valuation procedure in the buy-sell agreement where the formula produces an absurd result? _____
- ___ Fixed Price: If so, how often is the price re-determined? _
- ___ Who determines the price?_____
- ___ What happens if the owners are incapable of agreeing on a price?_____
- ___ How long will the price last (i.e., can it go stale)?___
- ___ Is there a failsafe alternative backup price determination plan if the price has gone stale or where the owners can’t agree on a price?_____
- ___ Special Deadlock Pricing: Does the buy-sell agreement provide for a special pricing procedure if there is deadlock between the owners on a significant event?

- ___ Payment for interests:
- ___ Cash only.
- ___ Installment payout.
- ___ Cash to the extent of life insurance death proceeds with the balance payable in installments.
- ___ Another combination of cash and installments.
- ___ Whose option is it on how to pay (e.g., the seller or the buyer)?
- ___ Does the buy-sell agreement stipulate how interests are to be paid for? _____
- ___ S corporation:
- ___ Is the entity an S corporation for tax purposes? If so, does the buy-sell agreement protect the S election against loss? _____
- ___ Does the buy-sell agreement stipulate a method for allocating income in a year where an owner transfers some interests? If so, is it the pro rata method or the per diem (per day) method? _
- ___ Are there any restrictions on the entity from issuing different classes of ownership other than voting and nonvoting? _____
- ___ What about not taking on debt other than “safe harbor debt”? _____
- ___ Minimum Distributions: If the entity is an S corporation or a partnership for income tax purposes, does the buy-sell agreement mandate any minimum cash distributions to the owners? If so, how much? _____
- ___ Corporate Redemption Limitations: If the entity is a corporation and the buy-sell agreement is a redemption agreement, does the buy-sell agreement provide what happens if the corporation can’t redeem stock for any reason (e.g., to do so would violate the minimum capital requirements or would violate a loan covenant)? _____
- ___ Alternate Dispute Resolution: Does the buy-sell agreement allow for either mediation or arbitration, or both, for disputes about the buy-sell agreement, or is the buy-sell agreement silent? _____

- ___ Termination: Does the buy-sell agreement provide for when it terminates? If so, when?_
- ___ Tag along (co-sale) or drag along call rights: Does the buy-sell agreement provide for either “tag along” or “drag along” provisions, or for both?_
- ___ Amendment: What is the procedure for amendment of the buy-sell agreement?_
- ___ What is the required vote (e.g., unanimity, mere majority, super majority)?_
- ___ Governing Law: Does the buy-sell agreement provide for which jurisdiction’s laws govern? If so, what jurisdiction? _____
- ___ Legend: Does the buy-sell agreement contain language about its existence that must be placed on all outstanding certificates of ownership?_____
- ___ Purposes of buy-sell agreement: Does the buy-sell agreement list out the purposes for the buy-sell agreement? If so, what purposes are listed?_