

# EMPLOYMENT LAW INSTRUCTIONS

## Introduction

The Employment Protection Act (“EPA”), A.R.S. § 23-1501 *et seq.*, became effective on July 20, 1996. This Act affected wrongful termination and breach of contract claims, as reflected in these instructions. The revisions to the RAJI (CIVIL) 5TH instructions assume there are no claims pending which occurred or arose prior to July 20, 1996.

In addition, this revision to the Employment Law Instructions intentionally omitted instructions for statutory discrimination and harassment, as there are other sources of model jury instructions that cover these areas. The Committee recommends MODEL JURY INSTRUCTIONS, EMPLOYMENT LITIGATION, Employment and Labor Relations Law Committee, Section of Litigation, American Bar Association and the Ninth Circuit Model Civil Jury Instructions. This Committee recommendation includes claims under the Arizona Civil Rights Act involving less than 15 employees.

The word “occurring” is used in these instructions in reference to claims based on contracts in existence at the time of the effectiveness of the EPA. It remains undecided whether the EPA contract provisions apply to contracts formed before the EPA’s effective date, but not breached until after the effective date. The word “accruing” is used in reference to non-contractual claims because the Supreme Court has held that with respect to tort claims, the EPA is effective only on claims accruing after its effective date. *Cronin v. Sheldon*, 195 Ariz. 531 (1999).

**Public Policy Claims under EPA section 3(b).** There is a tension between the language of the EPA section 3(b) and cases interpreting the same. This tension was referenced by the Arizona Court of Appeals. “Whether a common law tort for wrongful termination still exists after the EPA is an open and much debated question in Arizona law.” *Galati v. Am. W. Airlines, Inc.*, 205 Ariz. 290, 294 at ¶ 18 (App. 2003) (Whistleblower case decided on separate grounds of federal preemption by FAA regulations). The question centers around apparent inconsistency between the express language of the EPA and the cases interpreting it. The EPA purports to preclude a *Wagenseller* type common law cause of action and provide the exclusive remedy for any termination of employment in violation of public policy. Moreover, the EPA requires a plaintiff to show a violation of Arizona statute in order to support a section 3(b) claim of wrongful termination in violation of public policy. *Wagenseller*, on the other hand, recognized a common-law cause of action based on public policy. *Wagenseller v. Scottsdale Mem. Hosp.*, 147 Ariz. 370 (1985). *Wagenseller* did not require a technical violation of statute, and recognized three sources of public policy: statute, constitution and court decisions. Interpreting the EPA, the Supreme Court upheld the constitutionality of section 3(b), but expressly held that “neither the rationale nor the holding in *Wagenseller* is implicated by the EPA or by today’s opinion.” *Cronin v. Sheldon*, 195 Ariz. 531, 536 (1999) (“Accordingly, neither the rationale nor holding in *Wagenseller* is implicated by the EPA or by today’s opinion.”). The court has also held “For purposes of wrongful termination claims under the EPA, it is not necessary that an actual violation of a statute occur.” *Logan v. Forever Living Prods. Int’l*, 203 Ariz. 191, 194 (2002).

**USE NOTE:** Use bracketed language appropriate to the facts.

## EMPLOYMENT LAW 1

### Contracts—Employment-at-Will Presumption

The law presumes that employment is “at will.” This means that an employer may discharge an employee for any reason or for no reason at all but may not discharge an employee for an unlawful reason.

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**SOURCE:** A.R.S. § 23-1501. *Taylor v. Graham Cty. Chamber of Commerce*, 201 Ariz. 184 (App. 2001) (applying EPA).

**USE NOTE:** The at-will presumption may be rebutted by the existence of a contract, *see* Employment Law Instructions 2-4. *See also* Employment Law Instructions 7-9 for exceptions to the at-will presumption.

This instruction may not be appropriate where the plaintiff's only claim for wrongful termination is based on the violation of a statute with its own remedy, such as a claim for wrongful termination under the Arizona Civil Rights Act.

**EMPLOYMENT LAW 2**  
**Implied and Express Contracts**  
**(Good Faith and Fair Dealing)**

Every employment agreement contains a duty to act fairly and in good faith. This duty is implied by law and has the same force as if it were set forth in writing.

This duty requires that neither party do anything that prevents the other from receiving the benefits of the agreement.

If you find the defendant has breached the duty of good faith and fair dealing, [*name of plaintiff*] is entitled to recover as damages those benefits of the agreement that were denied.

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**SOURCE:** *Broomfield v. Lundell*, 159 Ariz. 349, 353-54 (App. 1988); *Wagenseller v. Scottsdale Mem. Hosp.*, 147 Ariz. 370, 381 (1985); *Woerth v. City of Flagstaff*, 167 Ariz. 412, 418 (App. 1990).

**USE NOTE:** Courts should also consider *Demasse v. ITT Corp.*, 194 Ariz. 500 (1999) in reference to instructions related to this claim and the Employment Protection Act and applicable case law.

In employment cases, only contract damages are allowed for a breach of the duty of good faith and fair dealing. Tort damages are not available in these cases. *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 198 (App. 1994).

**EMPLOYMENT LAW 3**  
**Breach of an Implied Contract**

[*Name of plaintiff*] claims that there was an agreement that changed the “at will” relationship and that [*name of defendant*] breached the agreement. [*Name of defendant*] claims there was no change in the “at will” relationship.

To establish a breach of an employment agreement, [*name of plaintiff*] must prove:

1. There was an agreement between [*name of plaintiff*] and [*name of defendant*] that changed their “at will” relationship;
2. The specific terms of the agreement;
3. [*Name of defendant*] [*materially*] breached the agreement; and
4. The damages suffered by [*name of plaintiff*].

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**SOURCE:** A.R.S. 23-1501(1), (2) and (3)(a); *Broomfield v. Lundell*, 159 Ariz. 349, 353-54 (App. 1988); *Wagenseller v. Scottsdale Mem. Hosp.*, 147 Ariz. 370, 381 (1985); *Woerth v. City of Flagstaff*, 167 Ariz. 412, 416-19 (App. 1990); *see also White v. AKDHC, L.L.C.*, 664 F. Supp. 2d 1054 (D. Ariz. 2009).

## EMPLOYMENT LAW 4

### Contracts (Measure of Damages)

If you find that [*name of defendant*] [materially] breached the agreement between the parties, you must then determine the full amount of money that reasonably and fairly compensates [*name of plaintiff*] for that breach. This should, as nearly as possible, put [*name of plaintiff*] in the same monetary position that [he] [she] would have been in had [*name of defendant*] not breached the agreement. That amount is the value of all sums that would have been due from the time of the breach through the end of the agreement, less any sums that [reasonably could have been] [were] earned from substitute employment before the end of the agreement.

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**SOURCE:** *Fogleman v. Peruvian Assocs.*, 127 Ariz. 504, 506 (1980), *overruled on other grounds*, *Fleming v. Pima Cty.*, 141 Ariz. 149 (1984); *Perry v. Apache Junction Elementary Sch. Dist.*, 20 Ariz. App. 561, 563 (1973); *Lindsey v. Univ. of Ariz.*, 157 Ariz. 48, 54 (App. 1987).

**EMPLOYMENT LAW 5**  
**Implied and Express Contract**  
**(Mitigation of Damages)**

[Name of defendant] claims that [name of plaintiff] could have earned money from other substantially similar employment, and therefore [name of plaintiff]'s damages should be reduced. [Name of plaintiff] is required to make reasonable efforts to reduce damages by trying to find substantially similar employment. To establish this, [name of defendant] must show [name of plaintiff] failed to make reasonable efforts to reduce damages by trying to find substantially similar employment. [Name of plaintiff] has no responsibility to accept employment that is not substantially similar to his or her prior employment, nor does [name of plaintiff] have a responsibility to accept employment that imposes an undue burden or hardship.

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**SOURCE:** *W. Pinal Family Health Ctr., Inc. v. McBryde*, 162 Ariz. 546, 548-49 (App. 1989) (discussing principles in context of contract actions with citation to relevant cases and authorities); *Barnes v. Lopez*, 25 Ariz. App. 477, 481 (1976) (discussing related tort-based concept of avoidable consequences in context of a fraud claim); *Solar-West, Inc. v. Falk*, 141 Ariz. 414, 419 (App. 1984); RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981); RESTATEMENT (SECOND) OF TORTS § 918.

*See also* *Britt v. Red Mesa Unified Sch. Dist. No. 27, Cty. of Apache*, 165 Ariz. 389, 391-92 (App. 1990); *Suciu v. Amsac Distrib. Corp.*, 138 Ariz. 514, 520 (App. 1983); *Coury Bros. Ranches, Inc. v. Ellsworth*, 103 Ariz. 515, 518 (1968); *Fairway Builders, Inc. v. Malouf Towers Rental Co., Inc.*, 124 Ariz. 242, 255 (App. 1979); C. MCCORMICK, LAW OF DAMAGES § 127 (1935).

## EMPLOYMENT LAW 6

### Public Policy Tort Claims—“At Will” Exception

[*Name of plaintiff*] claims [*name of defendant*] terminated [*him*]/[*her*] in violation of public policy. On this claim, [*name of plaintiff*] has the burden of proving that [*name of defendant*] terminated [*him*]/[*her*] for [insert specific unlawful reason or reasons]. If you find [*name of defendant*] terminated [*name of plaintiff*] for [*the reason stated above*], you should find [*name of defendant*] unlawfully terminated [*name of plaintiff*].

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**SOURCE:** A.R.S. § 23-1501(3)(b) and (3)(c)(i) and (iii-ix); *Galati v. Am. W. Airlines, Inc.*, 205 Ariz. 290 (App. 2003); *Taylor v. Graham Cty. Chamber of Commerce*, 201 Ariz. 184, 189 (App. 2001) (*Wagenseller*'s public policy tort claim included in EPA either by A.R.S. § 23-1501(3)(c)(i) or covered by § 23-1501(3)(b)'s “residual clause.”); *Cronin v. Sheldon*, 195 Ariz. 531, 536 (1999) (“Accordingly, neither the rationale nor holding in *Wagenseller* is implicated by the EPA or by today’s opinion.”); *Logan v. Forever Living Prod. Int’l*, 203 Ariz. 191, 194 (2002) citing *Wagenseller v. Scottsdale Mem. Hosp.*, 147 Ariz. 370, 380 (1985) (“For purposes of wrongful termination claims under the AEPA, it is not necessary that an actual violation of a statute occur.”)

**USE NOTE:** There is a disagreement with respect to what constitutes an “unlawful reason.” The committee directs courts to the Employment Protection Act and case law interpretation thereof. See e.g. *Cronin v. Sheldon*, 195 Ariz. 531, 536 (1999) (“Accordingly, neither the rationale nor holding in *Wagenseller* is implicated by the EPA or by today’s opinion.”); *Galati v. Am. W. Airlines, Inc.*, 205 Ariz. 290, 293-94 (2003) (“As mentioned previously, the AEPA was enacted in direct response to *Wagenseller* and with the intent of limiting the availability of wrongful termination for the violation of public policy. Nevertheless, *Wagenseller* was a case which would have been cognizable under the AEPA had it existed at the time.” The question of “[w]hether a common law tort for wrongful termination still exists after the AEPA is an open and much debated question in Arizona law.”).

## EMPLOYMENT LAW 7

### Public Policy Tort Claims—Whistleblower (Good Faith)

[*Name of plaintiff*] claims that [*he or she*] is a whistle-blower. [*Name of plaintiff*] must prove [*he or she*] was terminated in retaliation for whistle-blowing activity. On this claim, [*he or she*] has the burden of proving:

1. [*Name of employee*] had information or a reasonable belief that [*name of employer*] or an employee of [*name of employer*], had violated or was violating, or would violate the constitution of Arizona or the statutes of this State; and
2. The information or belief must have been disclosed to either the employer or a representative of the employer whom the employee reasonably believed was in a managerial or supervisory position and had the authority to investigate the information provided by the employee and to take action to prevent further violations of the Constitution of Arizona or statutes of this State. Or, the employee must have disclosed the information to an employee of a public body or political subdivision of this State or any agency of a public body or political subdivision that had the authority to investigate or otherwise act on the information; and
3. [*He or she*] was terminated because of 1 and 2.

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**SOURCE:** A.R.S. § 23-1501(3)(c)(ii).

## EMPLOYMENT LAW 8

### Tort Claims (Damages)

If you find that [*name of defendant*] [violated Arizona's public policy by discharging [*name of plaintiff*]] [*intentionally or recklessly caused [*name of plaintiff*] emotional distress*], you must then decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for each of the following elements of damages proved by the evidence to have resulted from the fault of [*name of defendant*]:

1. [*Name of plaintiff*]'s lost earnings and benefits to date and any decrease in earning power or capacity in the future;
2. The pain, discomfort, suffering [*disability*], anxiety already experienced, and reasonably probable to be experienced in the future as a result of the defendant's fault;
3. Reasonable expenses of necessary medical care, treatment, and services rendered and reasonably probable to be incurred in the future;
4. Physical injury to [*name of plaintiff*];
5. Harm to [*name of plaintiff*]'s reputation; and
6. Lost insurance coverage for [*name of plaintiff*]'s medical bills.

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**SOURCE:** *Thompson v. Better-Bilt Aluminum Prod. Co.*, 171 Ariz. 550 (1992) RESTATEMENT (SECOND) OF TORTS § 903-906 (1965); Negligence 10.

## EMPLOYMENT LAW 9

### Constructive Discharge (General)

[*Name of Plaintiff*] claims that [*he or she*] was constructively discharged from [*his or her*] employment. To establish constructive discharge, [*name of plaintiff*] must prove:

- [1.] That [*name of plaintiff*]'s working conditions were objectively difficult or unpleasant to the extent that a reasonable employee would feel compelled to resign; or
- [2.] That the employer or a managing agent of the employer engaged in outrageous conduct. "Outrageous conduct" includes: sexual assault, threats of violence directed at the employee, a continuous pattern of discriminatory harassment or other similar kinds of conduct, if the conduct would cause a reasonable employee to feel compelled to resign.

[WHERE DEFENDANT DOES NOT ALLEGE IT POSTED NOTICE  
REQUIRED BY LAW]

If you find either that the [*name of plaintiff*]'s working conditions were objectively difficult or unpleasant to the extent that a reasonable employee would feel compelled to resign or that the employer or a managing agent of the employer engaged in outrageous conduct, you should find that the [*name of plaintiff*] was constructively discharged.

[WHERE DEFENDANT ALLEGES IT POSTED NOTICE  
REQUIRED BY LAW]

If you find 2 [that the employer or a managing agent of the employer engaged in outrageous conduct] that led to [*name of plaintiff*]'s separation from employment, you should find for [*name of plaintiff*] was constructively discharged.

If you do not find 2 [that the employer or a managing agent of the employer engaged in outrageous conduct], but find 1 [that [*name of plaintiff*]'s working conditions were objectively difficult or unpleasant to the extent that a reasonable employee would feel compelled to resign], you should go to the following Jury Instruction [11A]

If you find that the [*name of plaintiff*]'s working conditions were not objectively difficult nor unpleasant to the extent that a reasonable employee would feel compelled to resign, and find that the employer or a managing agent of the employer did not engage in outrageous conduct, you should find [*name of plaintiff*] was not constructively discharged.

If you find that [*name of plaintiff*]'s working conditions were not objectively difficult or unpleasant to the extent that a reasonable employee would feel compelled to resign, and that neither the employer nor any managing agent of the employer engaged in outrageous conduct, you should find [*name of plaintiff*] was not constructively discharged.

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SOURCE: A.R.S. § 23-1502.

*Continued*

**EMPLOYMENT LAW 9**  
**Constructive Discharge**  
**(General)**

*Continued*

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**NOTE:** If only [2] is given, a court need not instruct on notice, as contained in Employment Law Instructions 9A and 9B.

There is an active debate among labor and employment practitioners as to whether constructive discharge is an independently actionable cause of action or an element of another claim (i.e. wrongful termination) or an element of damages.

The Committee also notes special interrogatories may be appropriate with respect to Employment Law Instructions 9, 9A and 9B.

## EMPLOYMENT LAW 9A

### Constructive Discharge (Written Notice Required)

[*Name of defendant*] claims it posted a notice substantially in the form required by law and therefore, [*name of plaintiff*] was required to, but failed to provide [*name of defendant*] with written notice of [*his or her*] intent to resign and reasons therefore at least 15 days prior to resigning. The Court has found the notice [*name of defendant*] claims to have posted is in the form required by law. Posting a notice requires:

1. That [*name of defendant*] posted the notice in conspicuous places on the premises where notices to employees are customarily posted; or
2. That [*name of defendant*] posted the notice in an employment handbook or policy manual that is distributed to employees; or
3. That [*name of defendant*] posted the notice by including the notice in a written communication that was provided to [*name of plaintiff*].

If you find that the employer did not do any of these things, then [*name of plaintiff*] is not required to have provided any prior written notice of the intent to resign and the reasons therefore. If you find that [*name of defendant*] did one or more of the above, you must then consider the following Employment Law Instruction [9B].

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SOURCE: A.R.S. § 23-1502.

**EMPLOYMENT LAW 9B**  
**Constructive Discharge**  
**(Employee Duty to Give Notice)**

If you find that [name of defendant] properly posted the notice discussed in Jury Instruction 11A, you must then determine whether [name of plaintiff] gave proper notice to [name of defendant] before resigning. On this issue, [name of plaintiff] has the burden of proving the following:

1. That [name of plaintiff] notified an appropriate representative of [name of defendant], in writing, that a working condition existed that [name of plaintiff] believed was objectively so difficult or unpleasant that [he or she] felt compelled to resign or intended to resign.
2. That [name of plaintiff] allowed [name of defendant] fifteen calendar days to respond in writing to the matters presented in the written communication.
3. That [name of plaintiff] read and considered [name of defendant]'s response [if any].

If you find [name of plaintiff] did not do these things prior to resigning and that there was no outrageous conduct by the employer or by a managing agent of the employer that led the employee to leave employment, then you must find that [name of plaintiff] was not constructively discharged.

If you find there has been outrageous conduct by the employer or by a managing agent of the employer that led the employee to resign, no notice by the employee to the employer is required.

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**SOURCE:** A.R.S. § 23-1502; *see also Barth v. Cochise Cty.*, 213 Ariz. 59 (App. 2006); *Farina v. Compuware Corp.*, 256 F. Supp. 2d 1033, 1051 (D. Ariz. 2003).

## EMPLOYMENT LAW INSTRUCTIONS

### EMPLOYMENT LAW 10

#### Intentional Infliction of Emotional Distress (Elements of Claim)

[*Name of plaintiff*] claims that [*name of defendant*] intentionally or recklessly caused [him/her] emotional distress. On this claim, [*name of plaintiff*] must prove:

1. [*Name of defendant*]’s conduct was extreme and outrageous;
2. [*Name of defendant*]’s conduct was either intentional or reckless; and
3. [*Name of defendant*]’s conduct caused [*name of plaintiff*] to suffer severe emotional distress.

Conduct is “extreme and outrageous” if an average member of the community would regard the conduct as atrocious, intolerable in a civilized community, and beyond all possible bounds of decency.

Conduct is “intentional” if the person seeks to cause emotional distress.

Conduct is “reckless” if the person is aware of and disregards the near certainty that the conduct would result in emotional distress.

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**SOURCE:** *Ford v. Revlon*, 153 Ariz. 38 (1987); *Wallace v. Casa Grande Union High Sch. Dist. 82 Bd. Of Governors*, 184 Ariz. 419 (App. 1995); *Mintz v. Bell Atl. Sys. Leasing Int’l, Inc.*, 183 Ariz. 550 (App. 1995); *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188 (App. 1994); *Lucchesi v. Frederic N. Stimmell, M.D., Ltd.*, 149 Ariz. 76 (1986); RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965).

**USE NOTE:** In appropriate cases, the court can instruct that action or inaction can be the conduct that is extreme and outrageous. *Ford v. Revlon*, 153 Ariz. 38, 43-44 (1987).

**USE NOTE:** The trial court must first determine whether the alleged acts are sufficiently extreme and outrageous to state a claim for relief. *Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors*, 184 Ariz. 419, 428 (App. 1995); *Mintz v. Bell Atl. Sys. Leasing Int’l, Inc.*, 183 Ariz. 550, 554 (App. 1995). A plaintiff must show that the defendant’s acts were “so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.” *Mintz*, 183 Ariz. 550 (citing to RESTATEMENT (SECOND) OF TORTS, § 46, cmt. d) (1965). Only when reasonable minds could differ in determining whether conduct is sufficiently extreme or outrageous does the issue go to the jury. *Mintz*, 183 Ariz. 550; *Lucchesi*, 149 Ariz. at 79.

Relevant factors for the court in determining outrageous conduct may include: (1) defendant’s knowledge that plaintiff is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity, *Mintz*, 183 Ariz. at 554 (citing to RESTATEMENT (SECOND) OF TORTS § 46, cmt. f (1965)); (2) whether defendant’s conduct was privileged or defendant has done no more than to insist upon his legal rights in a permissible way, *Mintz*, 183 Ariz. at 554 (citing to RESTATEMENT (SECOND) OF TORTS § 46, cmt. (1965)); or (3) whether defendant abused a

**EMPLOYMENT LAW 10**

**Intentional Infliction of Emotional Distress  
(Elements of Claim)**

*Continued*

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position or relationship with the plaintiff which gives the defendant actual or apparent authority over the plaintiff or power to affect his or her interests, RESTATEMENT (SECOND) OF TORTS § 46, cmt. e (1965). The court may instruct on these factors as appropriate.

**COMMENT:** This instruction is identical to Intentional Torts Instruction 16 (Intentional Infliction of Emotional Distress (Elements of Claim)).

**EMPLOYMENT LAW INSTRUCTIONS**

**EMPLOYMENT LAW 11**

**Intentional Infliction of Emotional Distress  
(Extreme and Outrageous Conduct)**

This instruction is now part of **EMPLOYMENT LAW 10**.

**EMPLOYMENT LAW 12**  
**Tortious Interference With Contract**  
**(Elements of Claim)**

[*Name of plaintiff*] claims that [*name of defendant*] improperly interfered with [his] [her] employment agreement.

To establish this claim, [*name of plaintiff*] must prove:

1. [*Name of plaintiff*] had an employment agreement with [his] [her] employer;
2. [*Name of defendant*] knew of that agreement;
3. [*Name of defendant*] intentionally interfered with the agreement, causing the employer to breach or terminate the agreement;
4. [*Name of defendant*]'s conduct was improper; and
5. [*Name of plaintiff*] suffered damage caused by the breach or termination of the agreement.

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**SOURCE:** *Wagenseller v. Scottsdale Mem. Hosp.*, 147 Ariz. 370, 386 (1985).

**EMPLOYMENT LAW 13**  
**Tortious Interference with Contract**  
**(Damages)**

If you find that [*name of defendant*] improperly interfered with [*name of plaintiff*]'s employment agreement with [his] [her] employer, you must then decide the full amount of money that will reasonably and fairly compensate [*name of plaintiff*] for each of the following elements of damages proved by the evidence to have resulted from the interference with the agreement:

1. Loss of the benefits of the agreement;
2. Emotional suffering sustained by [*name of plaintiff*]; and
3. Harm to [*name of plaintiff*]'s reputation.

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**SOURCE:** RESTATEMENT (SECOND) OF TORTS §§ 774A, 912 (1965); *State Farm Mut. Ins. Co. v. St. Joseph's Hosp.*, 107 Ariz. 498 (1971); *Nelson v. Cail*, 120 Ariz. 64 (App. 1978).

**COMMENT:** While interference cases always involve contracts, interference with contract is nevertheless a tort. Accordingly, the measure of damages is not limited to those allowed in contract actions. Under appropriate circumstances, the plaintiff may recover damages for emotional distress, injury to reputation, or other consequential damages, such as impaired credit rating. *See* RESTATEMENT (SECOND) OF TORTS § 774A, cmt. d (1965).