



WAIVER OF DEFAULT (LOAN) & GUIDE

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Sample Waiver of Default (Loan)

1. Overview

No matter the protective measures taken, it is a simple market fact that borrowers sometimes default on loan terms or payments. There is little a lender can do to prevent such defaults, but some steps can be taken to remedy the situation. One of the simplest and most important things a lender can do after a default is provide notice of that fact and negotiate a workable solution to the problem.

The enclosed document allows the lender to waive a borrower's default, and continue the lending relationship as if that default had not happened, and contains everything you'll need to waive that default. A written contract minimizes confusion, misunderstanding, and error, and sets forth the parties' expectations and fulfillment obligations. If obligations can't be completed in a timely fashion, or if the parties want to continue a thriving and successful arrangement, a waiver can help the parties achieve their goals. In every way, this promotes successful and profitable business arrangements.

2. Dos & Don'ts Checklist

- Before sitting down to write, decide exactly what your goals are for the waiver. Try to capture the revisions without invalidating or confusing the original agreement. Is the waiver temporary? Will it continue indefinitely? Are there other changes to the contract that will need to be made? Clarify these terms before writing them down.
- Review the terms of your promissory note or loan agreement. It should include information about the steps a lender must take after a default, and about the consequences that can or will result for the borrower. If there are specific procedures that you must follow according to your agreement, make sure that you have followed them.
- Allow each party to spend time reviewing both the original agreement and the waiver. This will reduce the likelihood, or at least the efficacy, of a claim that a party did not understand any new terms or how those might affect the agreement as a whole.
- Both parties should review the waiver carefully to ensure that **all relevant deal points** have been included. It is better to be over-inclusive than under-inclusive. Do not assume that certain expectations or terms are agreed to if they are not stated expressly on the document.
- The terms of your original loan agreement are still in effect, so make sure both parties continue to perform their obligations under that agreement until the waiver is completed and signed.
- Sign two copies of the waiver, one for you and one for the other party.
- Keep your copy of the signed waiver with the original loan agreement it modifies. Once the waiver is drafted and signed, it is part of the original agreement and should be treated accordingly.
- Depending on the nature of its terms, you may decide to have your waiver witnessed or notarized. This will limit later challenges to the validity of a party's signature.

- If your agreement is complicated, do not use the enclosed form. Contact an attorney to help you draft a document that will meet your specific needs.

3. Waiver of Default (Loan) Instructions

The following provision-by-provision instructions will help you understand the terms of your waiver.

The numbers below (e.g., Section 1, Section 2, etc.) correspond to the provisions in the waiver. Please review the entire document before starting your step-by-step process.

- **Introduction.** Identifies the document as a waiver of default. Identify the parties and the date of the waiver. The parties must be the same as those who signed the original agreement (unless one of the new signers is an agent of the same company that originally signed) and should have the same designations as well (i.e., the Borrower is still the Borrower, the Lender is still the Lender).
- **Recitals.** Identifies the document as a waiver of the default of a loan agreement and explains what is being requested. Put in the effective date of the loan agreement and the amount of the loan that was provided. Use the final blank space to indicate how the Borrower is in default under the loan agreement. Note that the recitals require that you attach a signed copy of the loan agreement as an exhibit to the document.
- **Section 1: Waiver.** The Lender's waiver of the Borrower's default. Note that the waiver is conditioned on the Borrower's representations and warranties being true.
- **Section 2: Borrower's Representations and Warranties.** This section provides the Borrower's promises about its current financial condition and viability. The Lender's willingness to provide the waiver is made contingent on these promises, so both parties should read them carefully.
 - (a) Representations and Warranties. Review the representations and warranties in the original Loan Agreement. Enter the number of the section that includes these provisions.
 - (b) No Defaults. The Borrower's promise that except for the default being waived, it has not defaulted under the terms of the Loan Agreement.
 - (c) No Change in Condition. A statement that the Borrower's financial condition remains the same, providing reassurance to the Lender that the Borrower will indeed be able to repay the loan.
 - (d) No Authorizations. Indicates that the Borrower does not need to obtain permission from a third party to sign the Waiver (e.g., a parent company or another lender).
 - (e) Due Execution. States that the Waiver will be a binding obligation of the Borrower and that it is being properly signed by an authorized representative.
- **Section 3: No General Waiver.** Emphasizes that the waiver being provided by the Lender is specific to the Default that is the subject of this document. In other words, if there is another Borrower default, or if either party wants to terminate the Loan Agreement, all remedies remain available: neither party's rights are in any way compromised by this specific waiver.

- **Section 4: Inconsistency.** Notes if there is a conflict between waiver language and the language of the original loan agreement, the waiver's language will be the final word on the question. If you would rather that the loan agreement terms have priority, replace "this Waiver" with "the Loan Agreement" in the clause "the terms of this Waiver shall govern."
- **Section 5: Continuation of Agreement.** This serves as an "affirmation" of the original loan agreement. In other words, the only thing that changes in the original agreement is the specific waiver being made: all of the other terms of that agreement remain effective.
- **Section 6: Entire Agreement.** The parties' agreement that the document they're signing (when taken together with the original loan agreement) is "the agreement" about the issues involved. Unfortunately, the inclusion of this provision will not prevent a party from arguing that other enforceable promises exist, but it will provide you some protection from these claims.
- **Section 7: Modification.** Indicates that any changes to the waiver will be in writing and signed by both parties.
- **Section 8: Governing Law.** Allows the parties to choose the state law that will be used to interpret the waiver. Note that this is not a venue provision: the included language will not impact where a potential claim can be brought. Please write the applicable state in the blank provided.
- **Section 9: Counterparts/Electronic Signatures.** The title of this provision sounds complicated, but it is simple to explain: it says that even if the parties sign the waiver in different locations, or use electronic devices to transmit signatures (e.g., fax machines or computers), all of the separate pieces will be considered part of the same agreement. In a modern world where signing parties are often not in the same city - much less the same room - this provision ensures that business can be transacted efficiently, without sacrificing the validity of the agreement as a whole.

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Form Sample

WAIVER OF DEFAULT (LOAN)

This waiver of default (the "Waiver") is entered into as of _____, 20____ (the "Effective Date"), by and between _____ (the "Lender") and _____ (the "Borrower," and together with the Lender, the "Parties").

RECITALS

WHEREAS, the Lender and the Borrower are parties to that certain loan agreement dated as of _____, 20____ (the "Loan Agreement"), a copy of which is attached to this Waiver as Exhibit A; and

WHEREAS, pursuant to the Loan Agreement, the Lender provided a loan of \$ _____ to the Borrower; and

WHEREAS, the Borrower has defaulted under the terms of the Loan Agreement (the "Default") by _____; and

WHEREAS, the Borrower has asked that the Lender waive the Default; and

WHEREAS, the Lender desires to waive the Default pursuant to the terms and conditions of this Waiver.

NOW THEREFORE, in consideration of the above recitals and promises and benefits contained herein, the Parties hereby agree:

1. WAIVER.