

Drafting Effective and Enforceable Employee Termination and Release Agreements

By Bennett Pine

In today's workplace employers must view virtually every terminated employee as a prospective plaintiff. It is, therefore, remarkable how many employers provide terminated employees with severance pay, bonuses or other valuable financial incentives without requiring the employee to provide a release in exchange for their "parting gifts." At the same time many employers that *do* present terminated employees with "homemade" separation agreements are dismayed to learn that the releases they have received are neither valid nor legally enforceable, leaving the former employee free to pursue a discrimination or other claim, and the employer open to potential costly liability.

Having successfully drafted hundreds of termination and release agreements, it is our strongly held conclusion that a valid release agreement is the best and (over the long run) most cost-effective way for an employer to avoid expensive litigation and potential liability. This article reviews some of the legal and practical issues and requirements which underlie separation and release agreements and the provisions that should be included in such agreements.

Consideration

"Consideration" means something of value given in exchange for something else of value. For a terminated employee's release of legal claims to be enforceable, the employer must provide the employee with a monetary incentive or other item of value *to which the employee otherwise is not entitled*. Payments or benefits to which the terminated employee is otherwise entitled pursuant to employer policy or law (e.g., accrued and earned salary, commissions, vacation pay or severance pay specified

by an employee handbook) will not qualify as consideration. Examples of "consideration" employers may consider offering in exchange for a valid release are extremely broad and include: notice pay; severance pay; continuation of health or other fringe benefits at the employer's expense; bonuses; unearned vacations pay; outplacement services; continued use or transfer of the company car previously provided; stock options; continuation of office, secretarial, computer access and support services; and/or a positive letter of reference.

A Few Words About Severance Pay

While severance pay is the most common form of consideration provided by the employer, it must be noted that the severance provided by the employer in exchange for a release must be *in addition* to what the employee otherwise is entitled to receive upon termination from employment. Thus, if the employer has a written severance pay plan, contained in an employment handbook or written policy, which provides for e.g., one week of severance for each year of service, the severance payment offered to the employee in exchange for a release must *exceed* that which the employee would have received under the severance plan (unless the written plan or policy expressly conditions the receipt of severance upon the employee executing a release).

Severance pay generally takes two basic forms — a lump sum payment to the employee or salary continuation through regular payroll procedures. While employees generally opt for the "pile of money," employers are well advised to fashion the severance as a series of periodic payments. In addition to easing cash flow, the salary continu-

ation form of severance enables the employer to maintain leverage to ensure that the employee will comply with his obligations under other provisions of the termination (e.g., preservation of confidential information, non-competition and non-disparagement of the employer). For all practical purposes, such leverage is lost upon delivery of a lump sum severance payment to the employee.

Employers may also consider having at least a portion of the severance payment (and/or continuation of medical benefits) conditional upon whether the terminatee has obtained alternate employment. For example, an employer could agree to guarantee the first three months of severance pay, and offer up to an additional three months of severance pay (on a week-to-week or month-to-month basis) subject to a notice from the terminatee that s/he has not obtained alternate employment. I have found this to be a useful negotiating tool often helping to bridge the gap between the severance positions of the respective parties.

Requirements for all Releases

The release is the heart of the separation agreement. It states the employee's promise not to sue the employer, its agents, employees, subsidiaries, affiliates, etc. based on any claims arising out of the employment relationship or its termination. The release should detail the specific types of claims the employee is releasing to show the employee knew that s/he had certain rights and knowingly chose to waive them. The waived rights typically referred to include those arising under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Fair Labor Standards Act, the National Labor Relations Act, ERISA, any employer handbook, policy or collective bargaining agreement, as well as corresponding state or local laws pertaining to discrimination in employment.

It is worth noting that while an employee may release claims from "the beginning of time" through the end of the employment relationship, an employee may *not* validly waive "prospective" claims, i.e., those arising *after* the release is executed or effective.

Additionally, a release governed by California law must contain specific language addressing an employee's ability to release "unknown" claims.

Beware Employees Over the Age of 40: Special Requirement of OWBPA

The Older Workers' Benefit Protection Act ("OWBPA") was passed by Congress in 1990 to amend the Age Discrimination in Employment Act of 1967 ("ADEA") and imposes special protective requirements in order to obtain "knowing and voluntary" releases of age discrimination claims. Thus, when obtaining a release from any employee over the age of 40, the following special requirements must be met:

- **Clear written contract.** The waiver must be part of a written agreement between the individual and the employer. The agreement must be written in plain English, and avoid "legalese" incomprehensible to the average person.
- **ADEA specificity.** The waiver must specifically refer to rights or claims arising under the ADEA.
- **Restricted scope.** The individual may not waive rights or claims based on incidents yet to happen, or incidents that occur after the waiver is signed.
- **Consideration.** The employee must receive some type of consideration for signing the waiver. As described above, consideration must involve some type of payment or benefit beyond what the individual already is entitled to receive.
- **Advice to seek counsel.** The employee must be advised in writing to see a lawyer before signing the agreement.
- **Pre-signing consideration period.** The employer must provide a period of time for the employee to consider the release prior to signing. In the case of an individual employee, this period must extend twenty-one days from the date of making the offer; in the case of a group or class of employees, the period must extend forty-five days from the date on which affected individuals are informed of the incentive or other termination plan.
- **Post-signing revocation period.** In addition to the time given to consider the agreement, the company also must allow an individual seven days to revoke or repudiate the agreement after signing. The agreement cannot become effective before the end of seven days.
- **Special provisions for group programs.** In the case of exit incentive or other termination

programs offered to “groups” of employees, the employer must provide each employee with three pieces of information in writing: (i) the class, unit, or group of employees covered by the program, the eligibility requirements for the program, and any time limits for accepting or participating in the program; (ii) the job titles and ages of all individuals eligible or selected for the program; and (iii) the job titles and ages of all individuals in the same facility or unit who are not eligible or selected for the program.

While, in our experience, employers typically balk at providing this amount of information to employees in the context of a “group” lay-off, (which incidentally, is not defined in the statute) they run the risk of non-compliance with the requirements of OWBPA and, therefore, may not obtain valid releases in such settings.

Additional Standard Provisions

- **Date of Termination.** The employee’s last day of work must be clearly specified. In some cases, employees may be asked to leave work immediately, although they may remain on the payroll for a period of time. In other instances, employees may be given a period of notice prior to the actual termination date, or may be required to “remain available as needed,” provide “consulting services,” or “assist in the orderly transition of their duties” as a condition to receive severance pay.
- **Non-admission of liability clause.** Most releases contain a clause in which the employer specifically recites that it is not conceding liability in any way by entering into the agreement.
- **Statement of non-coercion.** This statement asserts that the employee knowingly and voluntarily agreed to the release. Releases are not effective if the employee who signs the release can argue that he or she was coerced into signing the release or did not know what he or she was signing.
- **Non-disparagement clause.** Employers typically want to require that the terminated employee will not disparage or demean the Company, its reputation, products or management. As noted above, providing the severance payment in the form of salary

continuation over a period of time gives the employer additional leverage to enforce this type of clause.

- **No re-employment clause.** When an employer enters into a termination agreement and agrees to provide severance, it usually wants to be certain it has “seen the last of” the employee. As a result, it is a good idea to include a provision whereby the terminated employee agrees not to apply for, seek or accept future employment with the employer, its successors or assigns.

Additional Miscellaneous Provision

- a requirement that the employee return all company property and pay any outstanding loans;
- a description of the extent to which the employee will have future access to Company premises;
- an agreement to preserve the confidentiality of trade secrets and not to take away documents or lists belonging to the employer. If the terminated employee has previously signed a non-compete or other restrictive covenant, that agreement should be expressly incorporated by reference into the termination agreement;
- a statement that the signed form represents the “entire agreement,” of the parties, so that the employee cannot claim to have been promised rights or benefits under additional or prior oral agreements.

Conclusion

A tightly drafted Employment Termination and Release Agreement is an excellent, cost-effective way for an employer to avoid liability arising from employee lay-offs and other separations. We have vast experience negotiating and drafting such agreements and stand ready to help your organization avoid the hidden (and expensive) minefields of the employment termination process. ▲



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GUEST SPEAKER

Mississippi Attorney General, Jim Hood

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