

Please Release Me, Let Me Go For I Don't Employ You Anymore: Will Your Separation and Release Agreements Hold Up In Court?

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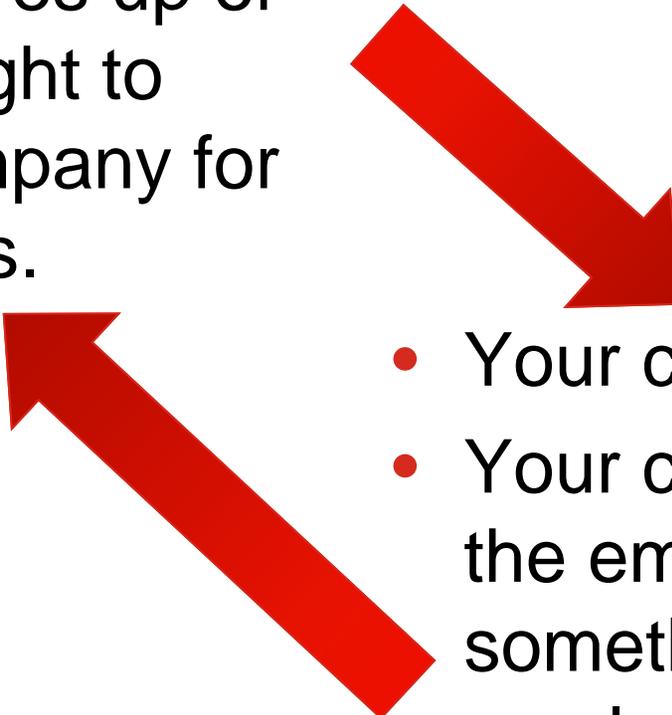
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What is a Separation and Release Agreement?

- Employee gives up or waives the right to sue your company for certain claims.

- 
- Your company
 - Your company gives the employee something of value the employee is not otherwise entitled to by virtue of his/her employment.

Use of Separation and Release Agreements

- Reductions in force, plant closings, mass layoffs, outsourcing of an entire function or department.
- Voluntary early retirement incentive programs.
- Difficult terminations.
- Resignations that warrant some period of transition assistance.
- To settle pending legal claims in connection with a separation of employment.
- Any separation situation where you need to reduce the risk of a lawsuit.

**“Not worth the paper
it is printed on.”**

VALID RELEASE?

I agree to release, waive, and forever discharge any and all claims I may have had or may now have, whether discovered or undiscovered, against the Company, including, but not limited to, all claims under the following statutes: Title VII of the Civil Rights Act of 1964, The Employee Retirement Income Security Act of 1974, The Fair Labor Standards Act, The Americans with Disabilities Act, The Family and Medical Leave Act, the Genetic Nondiscrimination In Employment Act, and, any other similar federal, state or local law, ordinance, or administrative regulation, or any common law or case law theory of liability or damage including all claims of discrimination, retaliation (including, but not limited to, workers' compensation retaliatory discharge claims); and claims for breach of actual or implied contract.

“How do you know your
separation and release
agreement is worth
the paper
it is printed on.”

**Waivers and releases of
employment claims are
generally valid if they are
“knowing and voluntary.”**

“Knowing and voluntary” depends on:

- Federal law and the specific statute in question;
- State law and the specific statute in question;
- Federal case law; and
- State case law.

Release Agreements May Not Either Directly or By Implication:

- Prohibit the filing of EEOC (or other Agency) Charges; *EEOC v. Lockheed Martin Corp.* 444 F. Supp.2d 214 (D. Md. 2006)
- Preclude cooperation with the EEOC (or other Agencies) in connection with an investigation;
- Releases that are overly broad can be struck down as violating public policy.
- In addition, the EEOC and some courts have held that overly broad releases are “per se” retaliation against an employee.



*Enforcement Guidance
on non-waivable
employee rights under
EEOC enforced statutes*

Published April 10, 1997
<http://www.eeoc.gov/policy/docs/waiver.html>

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**If you can't include a
release of EEOC or other
Agency Charges, what
good is the release?**

The Benefit If You Draft A Solid Release

- The employee can waive the right to file a lawsuit; and
- The employee can waive their right to recover in any lawsuit brought by the EEOC on their behalf. *EEOC v. Cosmair, Inc.*, 821 F. 2d at 1091)

*Enforcement Guidance on
non-waivable employee rights under
EEOC enforced statutes*

What other claims cannot be waived in separation agreements?

- Fair Labor Standards Act claims without court approval/DOL approval
- Pending workers compensation claims without court approval
- ERISA claims – depends on nature of the claim and the court jurisdiction

Can you include anything in a separation agreement that might help you defend FLSA, workers' comp, or ERISA claims?

**Don't Forget To Check State
Laws and State Court Decisions
For Claims That Cannot Be
Waived.**

Examples of State Laws Governing Releases – FL.

- In Florida, an employee's right to unemployment compensation cannot be waived (*Fla. Stat. § 443.041 (2012)*).
- In addition, an agreement by an employee to waive his right to workers' compensation benefits is invalid. *Fla. Stat. § 440.21 (2012)*.

Courts in Texas have applied the principle that a waiver of the right to file a charge with the Texas Workforce Commission is prohibited based on the same principle that applies to barring waivers of EEOC Charges.

All Releases Must Be Knowing & Voluntary Regardless of Age

- Nine Federal Circuit Courts of Appeal including the 6th Circuit use a *totality of the circumstances* test to determine if a release is knowing and voluntary.
- The 4th and 8th Circuits use basic contract analysis.

The Totality of the Circumstances Test

- Contains no *per se* requirements to determine if a waiver/release was “knowing and voluntary.”
- Test includes six or more factors (depending on the circuit) that a court will weigh to make that determination.

Employer Controlled TOC Factors

- Clear understandable release language?
- Valuable consideration to the employee in exchange for the release of claims?
- Adequate time in which to review and consider the release agreement?
- Advice to employee to consult with an attorney prior to signing the release?

Employee Controlled TOC Factors

- The employee's education, background, and business experience?
- Whether the employee actually consulted with an attorney before signing the waiver?
- The role the employee played in deciding the terms of the agreement?
- Whether the employee actually knew or should have known of his/her employment rights at the time of signing?
- Whether the employee actually read and considered the waiver before signing it?

Sixth Circuit TOC Test:

- The employee's experience, background, and education;
- The amount of time to consider the terms, including whether employee had an opportunity to consult with counsel;
- Consideration for the waiver;
- The totality of the circumstances.

Adams v. Phillip Morris, Inc.,
67 F.3d 580 (6th Cir. 1995)

Applying the TOC Test to *Adams*

- Adams had supervisory experience and was “generally knowledgeable and aware of his rights;”
- The clear waiver was “easily understandable by someone of Adams’ abilities;” and
- Adams had five days in which to consider the waiver and consult an attorney before signing it.

Knowing and Voluntary Tests Are Stricter When Releasing Age Claims Under the ADEA

OWBPA -- 1990

- Congress viewed older workers as more susceptible to being “manipulated or even coerced into signing away their ADEA protections.”

OWBPA States:

- A person may not waive any ADEA claim “unless the waiver is knowing and voluntary.”
- This ADEA “waiver may not be considered knowing and voluntary unless at a minimum” the following seven per se requirements are met:

OWBPA *Per Se* Minimum Requirements

1. The waiver is part of an employer-employee agreement that is “written in a manner calculated to be understood” by that employee or “the average individual eligible to participate” in the severance package or program;
2. The waiver “specifically refers to rights or claims arising under” the ADEA;

OWBPA *Per Se* Minimum Requirements

3. The waiver does not encompass rights or claims that arise after the date the waiver is signed;

4. The waiver is in exchange for consideration that is in addition to anything to which the employee is already entitled;

OWBPA *Per Se* Minimum Requirements

5. The employee is “advised in writing to consult with an attorney prior to executing the agreement.”

6. The employee is given at least 21 days in which to consider the agreement; and

7. The agreement affords the employee at least seven days after the agreement to revoke it.

OWBPA *Per Se* Minimum Requirements

1. The waiver is part of an employer-employee agreement that is “written in a manner calculated to be understood” by that employee or “the average individual eligible to participate” in the severance package or program;

Make it clear, concise, and understandable.

**ur2 funny
imrotflol**

OWBPA *Per Se* Minimum Requirements

- The waiver specifically refers to rights or claims under the Age Discrimination In Employment Act.

Spell it out and don't leave it out.

OWBPA *Per Se* Minimum Requirements

3. The waiver does not encompass rights or claims that arise after the date the waiver is signed.

Do not have it signed before the last day of employment. If necessary, use two separation agreements.

OWBPA *Per Se* Minimum Requirements

4. The waiver is in exchange for consideration that is in addition to anything to which the employee is already entitled.

Accrued vacation they are already entitled to receive is not sufficient consideration.

Severance pay they are already entitled to receive is not sufficient consideration.

Consideration can be non-monetary.

OWBPA *Per Se* Minimum Requirements

5. The employee is advised in writing to consult with an attorney prior to executing the agreement.

Which of these statements complies?

- a) I have had the opportunity to consult with an attorney to the extent I chose to do so.
- b) You are free to consult with an attorney before signing this Agreement.
- c) You are advised to consult with an attorney before signing this Agreement.
- d) Either a or b.

A release stating: “I have had reasonable and sufficient time and opportunity to consult with an independent legal representative of my own choosing before signing this Complete Release of All Claims,” did not comply with OWBPA’s requirement that an individual be *advised* to consult with an attorney. Although the voluntary early retirement agreement advised employees to consult financial and tax advisors, to seek advice from local personnel representatives, and to attend retirement seminars, it said nothing about seeking independent legal advice prior to making the election to retire and accepting the agreement.

American Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111 (1st Cir. 1998) (to “*advise*” employees to consult an attorney means affirmatively to “*caution,*” “*warn,*” or “*recommend*”).

OWBPA *Per Se* Minimum Requirements

6. The employee is given at least 21 days in which to consider the agreement.

Consider putting the date the agreement was given to the employee in the document.

Set a firm deadline in writing for the 21 day period to run. Don't leave it up to the employee to do the calculation.

When Does The 21 Day Review Period Start To Run?

- The 21 day period runs from the date of the employer's final offer.
- Material changes to the final offer restart the running of the 21 day period.
- Changes made to the final offer that are not material do not restart the running of the 21 day period.
- The parties may agree that changes, whether material or immaterial, do not restart the running of the 21 or 45 day period. *29 C.F.R. Section 1625.22*

OWBPA *Per Se* Minimum Requirements

7. The agreement affords the employee at least seven days after the agreement to revoke it.

Give clear understandable instructions for how to revoke the Agreement. Include mailing address or email of the person to receive the revocation so there is no confusion.

OWBPA Additional Requirements For Group Terminations (Group = More than One)

- Review period is expanded to 45 days; and
- Employer is required to provide the employee with certain written information regarding the “termination program.”

OWBPA Disclosure Must Address

- The class or group of employees covered by the program (decisional unit);
- The program's eligibility factors and time limits;
- The job titles and ages of all employees selected for the program; and
- The ages of all employees in the same "job classification or organizational unit" who were not selected for the program (i.e., those who remain employed).

The class, unit, or group of individuals covered by the program includes all employees in the _____ [plant, location, area, etc.] whose employment is being terminated in the reduction in force during the following period : _____). All employees in _____ [plant, location, area, etc.] whose employment is being terminated are eligible for the program.

The following is a listing of the ages and job titles of employees who were and were not selected for layoff [or termination] and offered consideration for signing the waiver. Except for those employees selected for layoff [or termination], no other employee is eligible or offered consideration in exchange for signing the waiver:

Job Title	Age	Selected	Not Selected
Bookkeepers	25	2	4
	28	1	7
	45	6	2
Accountants	63	1	0
	24	3	5
Retail Sales			
Clerks	29	1	7
	40	2	1
Wholesale			
Clerks	33	0	3
	51	2	1

EEOC GUIDANCE

UNDERSTANDING WAIVERS OF DISCRIMINATION CLAIMS IN EMPLOYEE SEVERANCE AGREEMENTS



http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html

Key Terms For Release Agreements

- Have the release agreement bind the employee's heirs and assigns.
- Make sure the employee releases the company any affiliates, and management.
- Return of company property
- Employee agrees he is ineligible for rehire, agrees not to apply, and can be terminated if hired in error. Include this is a negotiated term of the agreement.
- Statement that employee has received all pay and benefits to which he is entitled under state and federal law.

Key Terms For Release Agreements

- Confidentiality of the agreement and its terms.
- No admission of liability clause
- Nondisparagement (don't agree to full reciprocity)
- Cooperation with future litigation
- Duty to disclose unlawful activity or threatened litigation. Not authorized to waive attorney/client privilege.
- Noncompete or nonsolicitation (of employees or customers)
- Incorporate other agreements that survive separation of employment.

Sampling of State Law

Minnesota State Court Case Sets Forth Minimum Requirements For Valid Releases

- Whether the release is supported by adequate consideration;
- Whether the employee had access to legal counsel;
- Whether the employee could negotiate changes to the agreement; and
- Whether fraud, duress or other inequitable conduct was present.

Chappell v. Butterfield-Odin School Dist. 836, No. 08-CV-0851, (D. Minn., Nov. 17, 2009)

Examples of State Laws Governing Releases – Minn.

- A releasing party shall be informed in writing of the right to rescind the release within 15 calendar days of its execution.
- The rescission must be in writing and delivered either by hand or mail within the 15-day period. If delivered by mail, the rescission must be:
 - (1) postmarked within the 15-day period;
 - (2) properly addressed to the released party; and
 - (3) sent by certified mail return receipt requested.

Examples of State Laws Governing Releases – Cal.

4.2 Waiver of California Civil Code Section 1542. The Employee understands that [he/she] may later discover Claims or facts that may be different than, or in addition to, those which the Employee now knows or believes to exist with regards to the subject matter of this Agreement, and which, if known at the time of signing this release, may have materially affected this Agreement or Employee's decision to enter into it. Nevertheless, the Releasers hereby waive any right or Claim that might arise as a result of such different or additional Claims or facts. The Releasers have been made aware of, and understand, the provisions of California Civil Code Section 1542 and hereby expressly waive any and all rights, benefits and protections of the statute, which provides, "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

Best Practices

- Have template separation agreements ready to go at all times for the following:
 - Under age 40
 - Age 40 and over (single separation)
 - Age 40 and over (group separation)
 - Under age 40 and age 40 and over for each state in which you do business

Best Practices

- OR use an electronic document builder
- Review templates/document builder annually for legal compliance
- Keep the templates separate from negotiated agreements.
- Always start with the template.
- Check with legal counsel when negotiating terms