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## Using a Release When you Terminate an Employee

By *Olivia Goodkin, Esq.*

Every employer fears wrongful termination suits, even in the best of circumstances. One way to minimize the risk of being sued is to offer severance money in exchange for a release agreement from the terminated employee. Here are the critical factors to consider when using a release.

### Will a Release Agreement Give the Employee "Ideas" About Suing?

Some employers speculate that asking an employee to release claims may put ideas in the employee's head about suing the company. Ask yourself: (1) Is the employee a litigious or adversarial type of person? (2) Does the employee have a relative or close personal friend who is a lawyer? (3) Does the employee have a potential claim against the company? If the answer to any of these is "yes," the employee has probably already thought about whether he or she has a claim. In that case, a release agreement provides some peace of mind that you would otherwise not have.

It is impossible to predict how terminated employees will behave. In one situation, where the employee was sophisticated, but very adversarial, we advised the employer **not** to offer a release agreement, as it would signal culpability. The employee had no legitimate claim, so it made more sense to display confidence (or bravado!) by not seeking a release. The employee did not pursue any claim against the former employer.

### How Much Severance Must Be Paid?

Some companies, especially large ones, have an established severance policy that provides for a set amount of severance, but only in exchange for a release. In some ways, this is the ideal situation, since every terminated employee is treated the same (usually depending only on whether the termination was for cause or not). Thus, the employee cannot "read" anything into the amount of money offered, or the fact that a release agreement is offered.

No matter the amount, the release will be valid only if the employer offers more severance than it otherwise is required to pay. The law does not require payment of any severance, but some companies have either written rules regarding severance, or have established a policy of severance pay through the course of several terminations. If the employees generally know that they will receive a week of pay because everybody else did when they were terminated, there likely is an established policy. In that case, the employer needs to offer and pay more than one week of wages for the release to be valid.

### What are the Key Provisions of a Release Agreement?



**Olivia Goodkin** has over two decades of experience representing corporations, individuals and closely-held businesses in employment law and business litigation. She advises on the hiring and termination of employees, wage and hour laws, employment contracts and other employment issues, and she defends companies in wrongful termination lawsuits. Olivia also creates trade secret programs for companies seeking to protect their valuable intellectual property.

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I recommend including the following recitations: the date understood to be the last day of work; the fact that all wages and benefits have been paid through the last day of work; that all company property has been returned; that medical benefits will cease by the end of the month in which the last day of work occurs; that the COBRA notice will be issued; that neither party will disparage the other; that the employee had the opportunity to consult an attorney of his or her choice before signing the agreement; and that the employee will continue to adhere to the confidentiality policy of the company. Depending on the circumstances, you may need to address stock options, retirement plans and other benefits. You may want to include a cooperation clause that requires the employee to cooperate with any litigation that the company becomes embroiled in, if the subject matter of the lawsuit is within the knowledge of the terminated employee. You may want to include remedies provisions that address what will happen if the employee breaches the agreement.

### **Is the Employee Allowed 21 Days to Consider the Release Before Signing It?**

You have likely seen releases that state the employee has 21 days in which to consider the offer made by the employer, and then has seven days in which to revoke the release agreement. The 21 and seven-day periods are required to release claims under the Age Discrimination in Employment Act ("ADEA") and its amendments. When the terminated employee is 40 years old, or older, the release agreement must include a 21-day consideration period. The employee is free to sign at any time before the 21-day period expires. The employee then is permitted to revoke the agreement within seven days of signing it. A U.S. Supreme Court case held that an employee was not required to return the severance pay upon revoking the release agreement. Since that decision was published, employment lawyers changed their standard release agreement to state that the severance payment is made after the seven-day revocation period is over.

The bottom line is that you do not need to include the 21 and seven-day periods in a release agreement relating to an employee under 40 years of age. Nevertheless, I recommend that you still do so. A release can be challenged on several grounds, including that the employee was under duress when signing the agreement, or was defrauded into signing the agreement. A duress or fraud claim is weakened when the employer shows that there was no pressure given to the employee to sign the agreement, and ample time was allowed for the employee to retain an attorney.

### **What Claims Do Release Agreements Release?**

All employment-related claims, including wrongful termination, discrimination, harassment, retaliation, violation of public policy, wage and hour claims, etc., can be released, assuming the release language is broad enough to include these types of claims. Claims for unemployment insurance cannot be released, even if referenced in the agreement. Workers' compensation claims can only be released with the approval of the Workers' Compensation Appeals Board and, therefore, usually are not included in release agreements.

### **Do Courts Ever Invalidate Release Agreements?**

Yes, they do sometimes. In a federal case decided this year, a court held that the language in a release was not calculated to be understood by the individual signing it or by the average individual eligible to participate, as required under the ADEA. The court threw out the release agreement for this reason and allowed the employee to sue for age discrimination.

Generally, however, release agreements are binding and valid. Although in litigation and in life there is little certainty, a properly worded release agreement, executed in exchange for consideration, will likely bar any wrongful termination, discrimination or other employment-related claims.

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