Separation and Release Agreement for a Group – Separation Guide

Overview

One goal of a good separation process is to avoid litigation. A separation and release agreement will provide some level of protection for the employer and something of value to the employee. In practice, people who sign releases and accept timely payment rarely file lawsuits.* The decision to present a release for additional compensation to an employee to sign is not a simple one. Each situation should be carefully reviewed. This guide will discuss separation and release agreements for a group separation. Another guide is available for a reduction in force (or layoff) for an individual employee. As a practical matter, there will be some overlap of the information contained in the guides for these two types of releases.

> **Legally speaking, an employee who signed a release may still file suit. However, the release is generally a reason for dismissal of the suit if written and executed properly. In addition, please note that a separation agreement cannot cover the release of all possible claims, as certain laws prohibit this (e.g., unemployment benefits and workers' compensation claims).*

Discussion

When workforce reductions occur on a group basis, rather than on an individual basis, it is usually known as a reduction in force (RIF). Separation and release agreements can be effective tools to minimize the risk of litigation in the event of a RIF, where there are risks of multiple claims from multiple individuals.

Once a company has decided on the scope of the RIF and documented its justification for the layoff, the company must then decide how employees will be selected for the RIF. The criteria used in the selection process should be as objective as possible, supported by documentation. The more objective the criteria, the less likely the decision will be vulnerable to a claim of discrimination.

Examples of commonly used criteria include length of service, attendance record (not including consideration of absences protected by law such as FMLA, ADA, military, etc.), disciplinary record, past performance evaluations over a set period of time, the positions/functions that are being eliminated, loss of business in a service or product, and/or the absence of skills that will be needed in the reduced workforce.

In most cases, the release should be a "general release," releasing all claims of any nature, not just claims arising out of the separation of employment. In addition, employers should be careful in defining who is being released - the employer and its employees, directors, and related entities should be included. Moreover, a separation and release of claims agreement is only enforceable if it offers the employee something of value to which he or she is not already entitled. In legal terms, this is called "consideration." Thus, an employer cannot withhold payment of final wages, vacation pay, or expenses owed until the employee signs a separation agreement or require a release when an existing policy omits such a requirement. However, in these types of group releases, the terms of a severance agreement are determined by the employer and are typically non-negotiable.

Additional Requirements for Group Layoffs of Employees Age 40 and Older

Employers should also ensure that any release offered to an employee age 40 or older complies with the Older Workers Benefit Protection Act ("OWBPA") (unless release of the age claims are not desired). A compliant agreement must include the following provisions (among others). Otherwise, the release will not cover age claims under the Age Discrimination in Employment Act ("ADEA"):

- The waiver is part of an agreement written in understandable language.
- The waiver specifically refers to rights or claims arising under the ADEA.
- The waiver extends only to past or present claims, not future ones.
- The employer provides valuable consideration for the waiver above and beyond the benefits to which the employee is already entitled.
- The employee is advised, in writing, to consult with a lawyer before signing the waiver.
- If the waiver is part of an exit incentive program or other employment separation program offered to a group of employees (two or more), each employee who is 40 or older must be given a period of 45 days to review the offer.

- For a period of seven days following the execution of the waiver, the employee may revoke the agreement; the waiver is not effective until the revocation period has passed.
- if the waiver is offered in conjunction with an exit incentive program or other employment separation program to a group of employees (two or more), the employer must provide the employees who are 40 or older with a written description of the "decisional unit," i.e. the class, unit, or group of employees covered by the program, the eligibility factors for the program, the time limits applicable to the program, the job titles and ages of all eligible employees selected for the program, and the job titles and ages of all individuals in the same job classification or organizational unit who were not selected for the program.

When employers decide to reduce their workforce by laying off or terminating a group of employees, they usually do so pursuant to two types of programs: "exit incentive programs" and "other employment separation programs." When a waiver is offered to ADEA-protected employees in connection with one of these types of programs, an employer must provide enough information about the factors it used in making selections to allow employees who were laid off to determine whether older employees were terminated while younger ones were retained.

Typically, an "exit incentive program" is a voluntary reduction in force program where an employer offers two or more employees (such as to employees in specific organizational units or job functions) additional consideration to persuade them to voluntarily resign and sign a waiver. An "other employment separation program" generally refers to a program where two or more employees are involuntarily terminated and are offered additional consideration in return for their decision to sign a waiver.

Example 1: A bank must eliminate 20 percent of its 200 teller positions in a particular geographic location and decides to retain only those employees who most recently received the highest performance ratings. The bank sends a letter to 50 tellers who were rated "needs improvement" offering them six months' pay if they voluntarily agree to resign and sign a waiver. This is an "exit incentive program."

Example 2: A bank must eliminate 20 percent of its 200 teller positions in a particular geographic location but does not offer any employees the opportunity to "volunteer" for the layoff. The bank evaluates and reviews all of its tellers based on the specific, defensible criteria it has established for the reduction, and chooses 40 tellers for layoff based on those criteria. Those tellers are offered a severance package in exchange for their waiver of claims, including waiver of age claims for tellers 40 or older. This is an "other separation program."
Whether a "program" exists depends on the facts and circumstances of each case; however, the general rule is that a "program" exists if an employer offers additional consideration – an incentive to leave – in exchange for signing a waiver to more than one employee. By contrast, if a large employer terminated five employees in different units for cause (e.g., poor performance) over the course of several days or months, it is unlikely that a "program" exists. In both exit incentive and other separation programs, the employer determines the terms of the agreement.

Instructions and Explanations for Group Release Agreements
These instructions and explanations match the numbered paragraphs in the Word document sample entitled "Group Separation and Release Agreement":

1. Date of Separation.
   This paragraph states the actual date the employee's employment with the employer ended or will end. Do not execute the agreement prior to this termination date, as the agreement only covers your liability up to and including the date of execution. It also clarifies that all other employer-paid benefits will cease as of the date of separation.

2. Final Pay.
   This paragraph states that the employee will be paid all final owed wages, including any accrued and unused paid time off payments (if applicable).

3. Consideration.

This paragraph describes the amount of money or other valuable items (such as a computer) that the employee will receive that is over and above that which the employee is already entitled to receive.

4. General Waiver and Release of Claims.
   This provision is the actual release by the employee of any and all claims, known or unknown, against the employer and other releases, that the employee has had, may have, or currently possesses.

5. Excluded Claims and Rights
   This provision notes claims which may not be waived as a matter of law and provides employees required notices regarding their rights under various whistleblower and/or government programs and, for employees 40 and older, the OWBPA.

6. Affirmations.
   This allows the employee to represent that he or she has not already filed any claims against the employer and that there has been no retaliation by the employer.

7. Non-Disparagement.
   This provision prohibits the employee from making any maliciously untrue statements about the Company. The limited nature of this non-disparagement provision is recommended based on National Labor Relations Board guidance as of 3.22.23. If you want to make any changes to this provision in particular, please seek legal counsel.

8. Confidentiality of Agreement.
   This clause requires the employee to keep the financial terms of the agreement confidential except to certain parties and in certain situations. The limited nature of this confidentiality provision is recommended based on National Labor Relations Board guidance as of 3.22.23. If you want to make any changes to this provision in particular, please seek legal counsel.

9. National Labor Relations Act and Other Protected Rights.
   Employers (unionized or not) should be cautious with non-disparagement and/or confidentiality provisions under Section 7 of the National Labor Relations Act ("NLRA"). This Act allows covered employees to discuss the terms and conditions of their employment as well as to engage in other Section 7 protected activities. Under National Labor Relations Board ("NLRB") decisions, a separation agreement with broad non-disparagement and/or confidentiality provisions is deemed to "chill" employees' Section 7 rights and therefore be unlawful. We have attempted to narrowly tailor the non-disparagement and confidentiality provisions to avoid this result. However, there is no NLRB decision that confirms our approach. Accordingly, there is some risk that if an employer includes the non-disparagement and/or confidentiality provisions, the Agreement could be deemed to violate the NLRA and be unenforceable. Therefore, employers should either omit Paragraphs 7 and 8, or consider using the disclaimer in Paragraph 9. Note not all workers have Section 7 rights. For example, most supervisors, public sector employees, and some agricultural workers are not covered by these NLRA protections. If you have any questions on this topic, please seek legal counsel.

10. Tax Liability.
    This section explains the tax responsibilities of each party to the release in relation to Internal Revenue Code Section 409A, which may have implications for employers providing any type of deferred compensation. Please reach out to a tax attorney or advisor with specific tax questions.

11. [OPTIONAL] No Re-Employment.
    This clause makes it clear that both parties have no intention of re-establishing an employment relationship. In the absence of such a provision, if the employee later applies for a job and the employer refuses to hire the employee, it opens up the door to a potential discrimination or retaliation claim. [Note: This provision may be less relevant in an economic layoff.]

12. No Admission of Wrongdoing.

    The provision simply affirms that neither party is admitting to any fault and that the signing of the release agreement cannot be used as an admission of legal fault in subsequent litigation by other parties.

13. Return of Employer Property and Nondisclosure of Information.

    Although it may seem obvious to the employer that any property belonging to the employer that is in the employee's possession should be returned after employment is terminated, it may not be as obvious to the employee. This section makes it clear that the employee must return the employer's property and should delineate any specific items that are needed.

    The section also serves largely as a reminder to the employee that confidential information must remain confidential, even after the separation is effective. National Labor Relations Board guidance as of 3.22.23 provides that any such non-disclosure provision must be restricted to a specified period of time based on the employer's legitimate business justifications. Unfortunately, the guidance fails explain how long of a restrictive period would be lawful. We have tried to take a conservative approach and have used a one (1) year restrictive period. Therefore, the limited nature of this non-disclosure provision is recommended based on National Labor Relations Board guidance as of 3.22.23.

14. [OPTIONAL] Nondisclosure/Non-Compete Agreement.

    This provision simply reminds the employee about any existing obligations under any prior agreements regarding nondisclosure of confidential employer information and any non-compete agreement and that these prior agreements remain in full force and effect, even after separation.

15. [OPTIONAL] Unemployment Benefits.

    An employer's agreement not to contest a claim for unemployment benefits may be of real value to the employee as the employer is giving up a "right." However, please note that employers cannot ask an employee to not file for unemployment benefits.

16. [IMPORTANT: ONLY REQUIRED IF THE RELEASE INCLUDES AN ADEA WAIVER.] Time for Consideration of Separation Package.

    Employers should also ensure that any release offered to an employee age 40 or older complies with the OWBPA. For agreements meant for a group of employees, a compliant agreement must include notice that the employee has up to 45 days to review the agreement (an employee is not required to use all 45 days) and that the employee can revoke the agreement up to seven days after signing it. Without these features, a release is not effective against an age claim. This provision also references an attachment, which must be included in agreements for releases involving a group of employees and includes:

    - a written description of the "decisional unit," i.e. the class, unit, or group of employees covered by the program;
    - the eligibility factors for the program;
    - the time limits applicable to the program;
    - the selection criteria for the layoffs;
    - the job title and ages of all eligible employees selected for the program; and
    - the job titles and ages of all individuals in the same job classification or organizational unit who were not selected for the program.

17. Governing Law.

    This allows the parties to agree that North Carolina's law (or federal law, if applicable) will govern the interpretation of the agreement if there is a dispute. You may also add a particular county or venue within which disputes would be resolved (e.g., state and federal courts of Wake County, North Carolina). [Note: Another state might be substituted for North Carolina, but consult relevant state laws in your intended destination or utilize an attorney licensed in that jurisdiction to confirm that this agreement's provisions will remain in full force and effect.]

18. Breach of this Agreement.
    This provision makes it clear that if the employee does not abide by the terms of the agreement, the employer can seek relief in court against the employee and may recover damages. Based on National Labor Relations Board guidance as of 3.22.23, this provision does not authorize the recovery of attorneys' fees.

19. Amendment.
    If circumstances change and the parties want to alter the existing contract, it must be agreed to in writing by both parties.

20. Severability.
    This protects the basic agreement even if part of the agreement is later determined to be invalid.

21. Entire Agreement.
    This means oral conversations or other previous agreements are not part of the final agreement.

22. Headings.
    This means that only the actual language of the agreement, not the paragraph headings, will be used in interpreting and enforcing the agreement.

23. Signatures.
    This means that the parties can sign different, but identical copies of the agreement and that electronic signatures are valid.

24. Closing Notices.
    Lastly, employers want an agreement in which the employee waives claims in a way that a court would uphold. Therefore, a guiding principle here is to have a reasoned and intentional waiver from the employee that spells out their knowing and voluntary acceptance of the terms of the release.

Conclusion:

Each separation and release agreement is a contract and should be designed for the specific needs of each employer that accurately reflect the facts of each separation. No template is right for every situation, and the document should be customized to meet the employer's needs. However, there are common elements in most agreements, which may include:

- The agreement should contain a "severability" clause that allows a court to enforce the remainder of the agreement even when one provision is found invalid.
- The agreement should not be overly broad and suggest (directly or indirectly) that the employee is precluded from cooperating with any federal or state agency (such as the EEOC) investigation, giving up vested benefits, or waiving regulated claims, such as workers' compensation.
- Most employers prefer that amounts paid for separation are kept confidential, so separation agreements usually contain such provisions (with care taken to ensure that the provision is not overly broad).
- The agreement may include a provision on how references, if any, will be handled so that misunderstandings - and future disputes - may be avoided.
- The agreement may include a provision wherein the employer agrees not to contest any award of unemployment compensation, which can be of real value to a terminated employee and enhance the employee's perception of the worth of a separation package.
- Unless employer policy is to the contrary, the separation and release agreement should make it clear that the terminated employee is not subject to rehire and the employee expressly agrees not to seek re-employment with the company.
- Employers should also consider whether to have the employee reaffirm existing non-compete agreements or other restrictive agreements (such as a non-solicitation agreement).

- If the Agreement does not include an ADEA release (thus the 45-day review period is not required), an employer "best practice" is to include a reasonable time period (such as 7 days) for an employee to read and consider the Agreement before signing it to show that the employee entered the agreement knowingly and voluntarily.
- Employers need to deduct all applicable state and federal taxes from the consideration. In certain cases, consultation with a tax attorney or other tax professional may be prudent.