

ENTERING INTO AND SEVERING
THE EMPLOYMENT RELATIONSHIP:
CONCEPTS FOR THE EMPLOYER'S COUNSEL
WHEN DRAFTING
THE GOVERNING AGREEMENTS©

By

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I. INTRODUCTION

Agreements are an important part of an employment relationship, both at the beginning and the end of the relationship. When drafting these agreements, the art of negotiation is a key skill. The goal of the agreements, whether at the commencement of the employment relationship or the time of ending the relationship, is to address all issues that are important to the parties and to resolve matters to remove uncertainty on the topics covered.

The skill to negotiate and reach agreement is one of the most important skills that a lawyer needs to provide adequate representation to his or her client.

This paper addresses important considerations for the employer and the employer's counsel in drafting agreements at the beginning of the employment relationship, drafting separation agreements, and negotiating both types of agreements.

II. NEGOTIATION FORUMS

A. NEGOTIATION FORUMS

Negotiation may transpire through a number of different means, including:

- 1) Direct negotiations between the parties (knowledge and consent issues);
- 2) Direct negotiations between the parties' counsel;
- 3) Facilitative discussions involving a mediator (usually transpiring in connection with negotiation of a dispute);

- 4) Hybrid forums, like evaluative mediation or mediation/arbitration situations (again, usually used in connection with a dispute);
- 5) “Forum-assisted” settlements, such as agency conciliation processes and Magistrate Judge settlement conferences; and
- 6) Other creative processes.

Obviously, when the prospective employee and the employer are commencing the employment relationship, the negotiations are frequently most successful when they are handled by the parties directly, except when the issues are complex and require the assistance of counsel. It is not atypical for the prospective employee and the employer to agree upon the entire set of concepts and for the lawyers to then be the drafters and scriveners, charged with ensuring that the language of the agreement reflects the parties agreed-upon concepts and making sure that any potential issues are spotted and resolved.

At the end of an employment relationship, how the negotiations will transpire is largely a function of how the need for an agreement arises. For example, if the employee is departing on somewhat amicable terms, the negotiations may take place between the parties themselves or between the counsel for the parties through a series of communications. Communications may be in written form (including correspondence, memoranda, and emails), by telephone, or in-person. If the matter is particularly heated and/or if litigation ensues, the agreement governing the terms of separation and/or settlement may be negotiated through the help of some facilitative process, such as mediation.

Regardless of how the negotiations take place, in-person communication is an excellent form of communication because it enables the parties and/or their counsel to develop better rapport, to read the body language for non-verbal signals (so as to be in a position to better respond accordingly), and to expedite the process of reaching agreement on the terms at issue.

B. THE IMPORTANCE OF THE FORUM, ESPECIALLY IF THE MATTER IS HOTLY CONTESTED.

At the beginning of the employment relationship, conventional wisdom suggests that the best negotiators are the parties themselves – *i.e.*, the prospective employee and the employer. After all, they are the two parties who are the most motivated to get the deal done, and they readily know what they are willing to concede to get the agreement executed. One caveat, though, is that the parties may, in the zeal to seal the deal, be more willing to concede issues than they should be in their own best interests.

If the matter is hotly contested, as may be the case at the end of an employment relationship, the above vehicles for settlement are beneficial and may frequently assist in effectuating a settlement. It is important to be successful – if at all possible – in the first instance. In many cases, the unfortunate result of a failed settlement negotiation is that it may well preclude future, successful settlement negotiations or, at the very least, make future settlement more difficult and/or expensive.

III. THE BENEFITS OF AN AGREEMENT AT THE BEGINNING OF THE EMPLOYMENT RELATIONSHIP

A. TYPICAL BENEFITS

An agreement that governs the employment relationship before it starts serves many purposes. The benefits include the following:

- 1) The length of the relationship and terms governing termination are set.

Whether the relationship is at-will or for a period of time subject only to termination if there is some kind of just cause, there is a benefit to setting forth how long the relationship will last and under what circumstance it can end.

- 2) Hot-button issues like salary, stock-options, benefits, vacation, and the like can be addressed.

When a prospective employee and the employer are discussing the beginning of a the employment relationship, it is not unusual for the employer to say one thing and the prospective employee to hear another. Committing the agreements on hot-button issues like salary, benefits, and the like to writing reduces the chance that there is an misperception of what the terms are.

- 3) Key commitments that exist during and survive the ending of the employment relationship can be addressed.

An employee's commitment to keep proprietary information confidential is extremely important to most, if not all, employers. Further, the employee's commitment not to compete or to solicit employee's for a period of time after the employment relationship ends can also be valuable. These items are best addressed at the beginning of the employment relationship, so the prospective employee knows from the outset how important these issues are to the employer. Further, as is well-known, in order to obtain a valid agreement not to compete, the rules of law in the applicable state forum must be followed. For example, under Minnesota law, a non-competition provision must be entered into prior to commencement of employment, or alternatively, must have independent consideration if entered into after employment commences. *See Overholt Crop. Ins. Serv. Co. v. Bredeson*, 437 N.W.2d 698 (Minn. App. 1989) (signing of non-competition agreement at the inception of the employment relationship provides sufficient consideration for the enforcement of the non-competition agreement); *National Recruiters, Inc. v. Cashman*, 323 N.W.2d 736 (Minn. 1982) (the employer needs independent consideration to enforce a non-competition provision entered into after an employee has commenced employment).

- 4) Duties may be established clearly.

The duties of the new employee may be spelled out in the agreement in order that there is no dispute over the services that the employee agrees to perform. The agreement may address whether the employee may engage in outside activities for pay or as a volunteer.

- 5) Important behavioral codes may be established, and the prospective employee's agreement to abide by such codes may be documented in writing.

Many corporations have codes of conduct. Adherence to these codes is important, especially post-Sarbanes Oxley. The employment agreement can identify the codes and memorialize the employee's agreement to be bound by them.

- 6) Transparency exists.

With senior executives, the employment relationship should, and depending on the nature of the company and the level of the executive, must be transparent. The employment agreement serves the benefit of letting the shareholders and interested parties know the terms of the executive's employment relationship with the company.

- 7) Service may be secured during times of change.

The employment agreement may provide compensation and other incentives to an employee to remain at in the corporation's employ and to assist the corporation during times of turmoil (*e.g.*, a change in control).

- 8) Terms may be set that govern the ending of the relationship.

The initial employment agreement may actually address, in whole or in part, how the ending of the employment relationship shall be handled. For example, the initial employment agreement may provide that any disputes regarding the agreement, including the interpretation of the agreement and the employee's employment under the agreement, shall be handled by arbitration. Agreement regarding remedies and/or limits on remedies, to the extent permissible under the applicable law, may also be addressed in the initial employment agreement.

- 9) Ownership may be established.

The agreement may set forth who owns work such as inventions.

10) Other.

There may be other benefits that the initial employment agreement may achieve. For example, in the initial employment agreement, the prospective employee may be required to commit that he or she has no impediments to entering into employment with the employer. Such a provision may assist later when the employer is brought into a non-compete by the former employer – as this provision will enable the new employer to establish that it was unaware of restrictive covenants that the new employee had with his or her former employer.

B. THE BENEFITS ARE OFTEN CIRCUMSTANCE DEPENDENT

The number of additional benefits that can be achieved in the initial employment agreement are as varied as the items that an employer may seek to cover in such an agreement.

IV. THE POSSIBLE TERMS OF AN AGREEMENT AT THE BEGINNING OF THE EMPLOYMENT RELATIONSHIP

Not every employment agreement will cover the same terms. For this and other reasons, a comprehensive checklist of every item that may need to be addressed from the employer's perspective in an employment agreement is not possible. Indeed, because such an agreement is so fact-specific, it will be necessary before the negotiation process begins for the employer and/or the employer's counsel to make a checklist of the items that will need to be addressed. That checklist should be examined at various points in the process to ensure its completeness and to supplement or refine as appropriate.

A. COMMON POSSIBLE TERMS

Although a comprehensive, generic checklist is beyond the scope of this paper, the following items may be appropriate to consider in the employment agreement:

1) Employment.

Identify exactly what the employer is employing the individual to do. Make it clear that the agreement governs the employee's employment (and anything else it governs).

2) Term.

The agreement should set forth the term of employment. If the agreement is automatically renewable absent a new agreement, the agreement should also make that clear. In the event the employer plans to use an automatically renewable agreement, it is important for the employer to remember the effects of doing so as the employment relationship continues.

3) Type of employment.

If the employment is at-will, the agreement should so state. If the employment is for a period of time and can only end for something like good cause, the agreement should likewise so state. In the event that the employer agrees upon a limitation of the circumstances upon which the employee's employment may end, it is important to identify clearly what those situations are. It may be advisable to include an economic downturn as a basis for termination of the employment relationship. *See also*, Just Cause below at Section IV(A)(15)..

4) Title.

It is a good idea to list the exact job title so there is no dispute about what the new employee's job title will be. Further, it may be advisable to spell out, if possible, that a change in job title is within the employer's sole discretion.

5) Duties and responsibilities.

The employer should set forth the duties and responsibilities of the position for which the employee is being hired. It is important to provide some catch-all considerations, such as "and any other duties and responsibilities that may be assigned to the executive by the CEO from time to time".

6) Scope of employment.

It is advisable to note the scope of the new employee's employment. For example, if hiring an executive, it may be wholly appropriate to provide that the executive is to devote his or her "full and exclusive" efforts to the job duties.

7) Outside activities.

It is wise for the employer to identify what outside activities in which the new employee may engage. If the employee must obtain prior approval to engage in an outside activity (*e.g.*, board work), the employer should note that or reference the applicable policy.

8) Reference to the policies of the employer, including the code of ethics.

The employer should reference its policies and secure the employee's agreement to abide by those policies.

9) Compensation.

The agreement should set forth the terms of the employee's compensation. If the base salary is annualized, the term "annualized" should be adequately described, particularly if the employee starts mid-year. If the employee is eligible for a

bonus, the bonus plan should be referenced or the eligibility criteria for the bonus should be identified. In drafting, it is important to remember that some courts uphold the bonus plan or a recurrent bonus as a contract right, unless the employer takes appropriate safeguards (*e.g.*, making clear the bonus is within the employer's sole discretion). If there are other types of compensation available (*e.g.*, incentive-based compensation), that compensation should likewise be set forth with the requisite clarity. The goal is to ensure that the agreement governs and spells out what is to transpire. The employer must strive to avoid a situation where a court or some arbitrator is deciding what compensation is due because the agreement is ambiguous. If there are ERISA issues, Section 409A implications, or other considerations that are appropriate, the employer should seek the advice of appropriate counsel. (Most employment lawyers are not ERISA or tax lawyers, and the employer is wise to seek specific counsel of lawyers in the area(s) at issue.)

10) Signing bonus.

If the employer has agreed to a signing bonus, that should be set forth in the agreement. The employer may want to consider repayment of the signing bonus (or payment over time) in the event the employee does not remain in the employer's employment for a period of time (*e.g.*, three years). Many employers are unwilling to provide a signing bonus unless the employee will remain employed long enough for the employer to reap the benefits of the bargain.

11) Relocation expenses.

If the employer has agreed to pay relocation expenses, the amount and circumstances under which those expenses will be paid should be covered in the agreement. As in the case of the signing bonus, the employer may wish to provide for repayment of the relocation expenses in the event the employee does not remain in the employer's employment for a specified period of time.

12) Stock rights.

As set forth above, any options and/or stock rights must be clearly set forth in the agreement or in a written agreement referenced within the agreement.

13) Fringe benefits.

All fringe benefits should be identified, including the employee's rights and obligations regarding reimbursement of expenses, the employee's right to participate in and duties regarding benefits plans relating to all types of insurance and retirement plans, and the employee's rights and obligations regarding vacation and other leave(s).

14) Nothing preventing employment.

It is advisable for the employer to obtain the employee's written agreement that he or she has nothing (including no contract obligation to a prior employer) that prevents the new employee from accepting employment with the employer and fully discharging his or her duties to the employer. Specifically, the employee should covenant that he or she is not subject to any instrument, agreement, judgment, order, or decree of any kind preventing the employee from entering into the agreement. The employer should obtain the employee's agreement and consent that if there is something that prevents the employee from being employed, the employer may terminate the employee's employment without expense to the employer.

15) Just cause termination.

Assuming the employment is not at-will¹ and the employer is going to agree to a just cause termination standard, it is necessary for the employer to spell out what constitutes just cause. Reliance upon case law to determine the meaning of a key phrase like "Just Cause" is not a good idea, as the case law is too inconsistent and does not provide effective guidance. The employer should define the term with clarity, considering all of the potential circumstances that the employer believes would be good grounds for termination and including them in the definition. It is also advisable to create some catch-all categories (*e.g.*, "conduct unbecoming an officer of the corporation"). The agreement should set forth the employee will not receive any additional compensation (except that already due – *e.g.*, salary due for hours worked) in the event of a just-cause termination.

16) Termination in the event of death or disability.

The employer should identify what happens in the event of the employee's death or disability. It is important to make sure such a provision complies with applicable law (*e.g.*, the Americans with Disabilities Act; the Family and Medical Leave Act; etc.). The employer should identify what compensation, if any, the employee (or his or her heirs) will receive in the event his or her employment ends as a result of death or disability.

17) Termination by the employee voluntarily and without cause attributable to the employer.

If the employment is not at-will but the employee nevertheless terminates voluntarily and without cause attributable to the employer, the agreement should state the effect of such termination and that the employee will not receive any additional compensation (except that already due – *e.g.*, salary due for hours worked).

¹ If the employment is at-will, the agreement should state that and should define the term "at-will".

- 18) Termination by the employer without cause or by the employee with good cause attributable to the employer.

If the employment is not at-will and the employee's employment is ended by the employer without cause or is ended by the employee for good cause attributable to the employer, the agreement should set forth what it means for the employer to end the employment "without cause" or for the employee to end the employment "with good cause attributable to the employer." The agreement should also set forth what the employee will receive as a result of such an ending to the employment relationship.

- 19) Change in control.

If the employee's agreement ends as a result of a change in control of the corporation, in the case of executives, it is not unusual for the employer to set forth in the agreement an economic incentive for the employee to remain through all or a part of the transition period. The agreement must be reasonable and comport with applicable law.

- 20) Compensation considerations, including Section 409A.

It is important to consider applicable laws (and the optics) when deciding the compensation package for an employee. ERISA and the tax laws must be considered. In particular, Section 409A must be considered. (*See* applicable conference papers on Section 409A.) Additionally, the compensation should pass scrutiny from an SEC and corporate governance perspective.

- 21) Effect of termination of employment.

In addition to identifying what, if any, compensation the employee will receive in the event of termination (*see* Section IV(A)(15)-(19) above regarding the various ways employment may end), the agreement should identify any other impact that the termination may have. For example, if the employee has a duty to mitigate his or her damages, the agreement should make that clear.

- 22) Notice and cure.

If the employer desires to receive notice and the opportunity to cure (*e.g.*, in the case of a termination for good cause attributable to the employer), the agreement should set forth the circumstances under which notice must be given, how notice must be given, and the details of how long and what the employer may do to cure the default.

23) Proprietary interests.

The agreement should identify the employer's confidential and proprietary interests, and it should secure the employee's agreement to keep such matters forever confidential and not to use them.

24) Intellectual property and the effect of inventions.

The agreement should identify who owns the inventions and work done for hire. It is important to ensure that the employer's assertion of rights to such inventions complies with applicable law.

25) Restrictive covenants.

The agreement should set forth the employee's existing and post-termination obligations not to compete and not to solicit business and employees. Again, it is important to ensure that there is adequate consideration for such restrictive covenants and to make certain the covenants comply with applicable law/case law governing the scope, duration, and geographic restrictions. It may be advisable to secure the employee's agreements that the restrictive covenants are valid under the applicable law. The remedies available to the employer for the employee's breach of a restrictive covenant should be identified in the agreement. It may also be advisable to secure the employee's written agreement that the employer may provide the restrictive covenants to a prospective or future employer of the employee, in order that such employer may know of the employee's obligations. To the fullest extent permitted by law, the employer may also require the employee to seek written approval of the employer before accepting subsequent employment to ensure that the employee does not accept competing employment. If the employer desires to toll the time of the restriction for the period of the employee's non-compliance, the agreement should so provide.

26) Effect of a breach by the employee.

If the employer desires to impose a consequence for the employee's breach of his or her obligations in the agreement (*e.g.*, breach of confidentiality by the employee relieves the employer of any obligation to make any monetary payment to the employee), the effect of a breach should be set forth clearly in the agreement.

27) Governing law.

The agreement should set forth the law that governs (*e.g.*, the agreement is governed by California law).

28) Non-waiver.

The agreement should state that the employer's failure to enforce any provision of the agreement is not a waiver of the employer's right to insist on performance of other provisions or to sue for breach.

29) Assignment.

The agreement should provide when, if ever, the agreement is assignable.

30) Severability.

The agreement should specify the effect of an invalid provision. *But see* Section VI(B)(29) regarding severability clauses.

31) Key person insurance.

If the employer intends to secure key person insurance on the employee, the agreement should detail the employee's obligation to cooperate in securing the insurance and should make clear that the proceeds of the insurance go to the employer.

32) Notice.

If notice is required for any reason under the agreement, the agreement should set forth what constitutes notice, including how, to whom, and when it is to be given.

33) Jurisdiction issues (including arbitration).

The agreement should set forth what court or forum has jurisdiction over disputes concerning the agreement (including if there is to be arbitration of disputes) and to further specify that the employee agrees to submit to the personal jurisdiction of that forum and waives particular service requirements. If arbitration is the agreed-upon dispute resolution process, it is still advisable for the employer to retain the right to seek and obtain appropriate injunctive relief in the courts (*e.g.*, in the event of a breach of the non-compete agreement).

34) Employee's representations.

If the employee made representations that are material to the employment, it may be advisable to set forth those representations in the agreement or as an appendix to the agreement (*e.g.*, attach the employee's resume).

- 35) Entire agreement; no other representations.

The agreement should make clear that the agreement is the entire agreement (except for incorporated plans) and that all representations of the employer (and perhaps the employee) are set forth in the agreement.

- 36) Advice of counsel.

The agreement should advise the employee to consult counsel before signing.

- 37) Conditions.

If the employment is conditioned on a satisfactory pre-employment investigation or something else (*e.g.*, satisfactorily passing a drug-test conducted pursuant to a lawful drug testing policy), the preconditions to commencing and/or remaining in the employer's continued employment should be set forth in the agreement. Make sure any testing complies with applicable law.

- 38) Knowing and voluntary execution with sufficient time to consider whether to sign.

The agreement should specify that the employee has had sufficient time to decide whether to sign the agreement, and that by signing, the employee is signifying that he or she understands the agreement's terms and conditions and is knowingly and voluntarily agreeing to such terms and conditions.

- 39) Withholdings.

The agreement should make clear the employer's rights to make any tax or other legally-required withholdings (*e.g.*, child support). The employee should also be required to covenant as to all rights that third parties may have to compensation he or she will receive from the employer (*e.g.*, child support).

- 40) Other standard clauses.

The agreement should make clear the effect of headings in the agreement (*e.g.*, for reference purposes only), the effect of signing in counterparts (*e.g.*, the counterpart signatures make the agreement one original), and the like (*e.g.*, no construction against the drafter as all parties had the opportunity to request and make changes).

- 41) Other agreements.

There may be other agreements (*e.g.*, standard non-disclosure agreements) that an executive may be required to sign. It may be appropriate for the employment

agreement to require the employee to sign all such agreements required of other executives.

B. THE CHECKLIST IS CIRCUMSTANCE DEPENDENT

As set forth above, the contents of an employment agreement are as peculiar as the particular facts and circumstances. Therefore, it is important to examine what, if any, additional provisions may be important based on the particular employment relationship that is commencing.

V. THE BENEFITS OF AN AGREEMENT AT THE END OF AN EMPLOYMENT RELATIONSHIP

A. THE MANY BENEFITS TO A SEPARATION OR SETTLEMENT AGREEMENT

There are many benefits to a separation and/or settlement agreement that governs all issues relating to the ending of the employment relationship and any terms that will continue thereafter (such as confidentiality). It is sometimes helpful for a lawyer to review these benefits with his or her client, as a review of these benefits may increase the interest in negotiating an agreement and may enhance the likelihood of resolution of all issues relating to the ending of the employment relationship.

The benefits of a separation and/or settlement agreement include but are not limited to the following:

- 1) Control over the outcome.

An agreement enables the parties to control the outcome of the matter.

- 2) Certainty and finality.

An agreement brings certainty and removes the variables of whether the employee might sue, what a judge, jury, or appellate court might do, how the employee may or may not compete, etc. It also ends the matter (provided that there is compliance with the agreement terms) and/or sets forth the terms that must be followed (as in the case of a non-compete obligation that continues after the employment relationship).

- 3) Cutting one's losses.

Entering into a separation agreement and/or a settlement agreement may enable the employer to settle today for less than it will cost to settle a year from now or for less than the likely judgment will be. An agreement frequently avoids the further expenditure of legal fees.

- 4) Avoidance of a possible judgment remedy.

Agreeing upon terms acceptable to the employer may result in avoiding a judgment on terms that are not acceptable. For example, an employer may settle with an agreement that the plaintiff employee will not seek reinstatement or reapply for employment and may thereby avoid a court's order of reinstatement.

- 5) Obtaining relief that one may not obtain through litigation.

In settlement, an employer may obtain relief/concessions that are not available through the court system. For example, the employer may obtain the employee's agreement not to compete or to solicit employees for a period of time.

B. THE EMPLOYER'S AWARENESS OF THE BENEFITS

The prudent lawyer will make certain that his or her employer/client is aware of the benefits of settlement, in order that the client may make an educated decision regarding the interest in resolving matters through a separation and/or settlement agreement. For most corporations, in today's world, they are savvy about the benefits of reaching agreement with a departing, aggrieved employee before that employee commences suit.

VI. THE POSSIBLE TERMS AND CONDITIONS OF A SEPARATION AND/OR SETTLEMENT AGREEMENT

A. NOT EVERY SEPARATION OR SETTLEMENT AGREEMENT WILL INVOLVE JUST MONEY AND A GENERAL RELEASE

Not every agreement ending an employment relationship will involve simply the payment of money in exchange for a general release. There may be other important considerations, such as assignment of one's rights to the paying party or a clause requiring the reasonable cooperation of the former employee in some other forum (*e.g.*, assistance in responding to a governmental inquiry). In advance of drafting an agreement ending the employment relationship, it is important to identify the provisions and covenants (including affirmative terms and agreements to forego something) that may need to be addressed in the agreement.

B. HAVE A CHECKLIST AT HAND

It is important to have a checklist at hand. A comprehensive checklist of every item that may need to be addressed in a separation agreement is not possible. Indeed, because such an agreement is so case-specific, it will be necessary before the negotiation process begins for the employer and/or the employer's counsel to make a checklist of the items that will need to be addressed. That checklist should be examined at various points in the process to ensure its completeness and to supplement or refine as appropriate.

Although a comprehensive, generic checklist is beyond the scope of this paper, the following items may be appropriate to consider in the separation and/or settlement agreement:

1) A full and complete release.

The release should include appropriate parties (*e.g.*, heirs for an individual and officers, directors, employees, insurers, agents, and other representatives for a corporation). In deciding the scope of the release, it is important to identify whether the release is limited (*e.g.*, limited to releasing the claims made in the lawsuit) or global (*e.g.*, releasing all claims that were or could have been brought as of the time of settlement). Generally, releases that seek to release future rights are unenforceable. (*See Appendix A on Releases*). Further, it is important to recognize that there are some rights that cannot by law be released (*e.g.*, the right to seek unemployment compensation benefits). (*See Appendix A on Releases*).

2) Stipulation of dismissal with prejudice and without costs and corresponding court order.

If the matter is resolving as the result of a suit, the stipulation is necessary to secure the court order dismissing the lawsuit with prejudice and without costs to any party and ordering the entry of judgment of dismissal.

3) Confidentiality.

It is important to address whether the terms of the agreement are confidential. If the agreement is silent regarding confidentiality, the presumption is that the parties are free to discuss the terms of the agreement. If confidentiality is sought, it is important to identify who may know the terms of the agreement and the circumstances under which the terms of the agreement may be revealed. It is also important to identify what the parties may say in response to inquiries about the lawsuit (*e.g.*, “the matter has been successfully resolved to the mutual satisfaction of all parties”). It is further wise to identify who is bound by the confidentiality (*e.g.*, husband and wife, a clause that may be particularly important if the tax return is a joint return). In drafting the confidentiality regarding the terms of the agreement, it is important to make sure that the provisions do not have a chilling effect on the employee as it relates to his or her right to file an EEOC charge, participate in an EEOC or other governmental proceeding, and the like. (*See Appendix A on Releases*).

4) Monetary payments.

The payment of money should be addressed, not only as to amount, but also as to timing of the payment (*e.g.*, 30 days after full execution of the agreement, some period of time after the agreement has been executed and the rescission/revocation period has passed without rescission/revocation, etc.), method of payment (*e.g.*, wire transfer), to whom the payment is made (*e.g.*,

jointly to the party and his or her/its lawyer), and whether the payment is gross or net of taxes (*e.g.*, “less ordinary withholdings”).

5) Taxation.

It is important to address the tax consequences of the payment and what, if any, tax forms will be sent to the taxing authority such as the IRS. For example, if ordinary withholdings are not taken and a 1099 is given instead, it may be appropriate to include a clause that so states and that further contains a defense and indemnification provision stating that the employer makes no representations as to the taxability of the settlement and that the employee agrees to defend and indemnify the employer for certain or all tax consequences, if any, of the settlement. Similarly, it is appropriate to consider the consequences of Section 409A. (*See* applicable conference papers on Section 409A.). The tax laws should be considered when drafting any agreement relating to employment, including separation from employment. If there are ERISA issues, Section 409A implications, or other considerations that are appropriate, the employer should seek the advice of appropriate counsel. (Most employment lawyers are not ERISA or tax lawyers, and the employer is wise to seek specific counsel of lawyers in the area(s) at issue.)

6) No admission clause.

It is typical to include a clause that provides that the employer is not admitting liability by signing the agreement.

7) Covenant not to sue.

A covenant that no suit will be initiated for claims released may be important, depending on the circumstances. But it is advisable to make sure the covenant complies with existing law and does not create an ambiguity, particularly when considered in connection with the release. (*See* Appendix A on Releases).

8) Liquidated damages and/or injunctive relief.

The employer may wish to identify that liquidated damages (a pre-specified sum that will be awarded in the event of a proven breach of a clause in the agreement such as the confidentiality clause) and/or injunctive relief (the ability of the employer to seek injunctive relief for example, concerning the non-competition provisions) are available in the event of a breach.

9) Statutorily required cooling-off periods.

There may be statutorily required consideration and rescission periods and it may be necessary to identify these legal requirements in the written text of the settlement agreement. (*See* Appendix A on Releases). For example, the Older

Workers' Benefits Protection Act requires that aggrieved parties 40 and over who are settling an age claim must have 21 days to consider whether to sign the agreement and 7 days to revoke it. As another example, the Minnesota Human Rights Act requires that if a party is settling a claim covered by the Act, it may be required under certain circumstances (*e.g.*, pre-charge) to provide the settling party with 15 days to rescind the agreement.

10) Future events.

It may be important to identify whether future acts may occur (*e.g.*, to the fullest extent permitted by law, the employer may wish to obtain the employee's agreement that he or she will not reapply for employment with the employer). If the employer includes a no-rehire provision, it is important to consult the law of the jurisdiction, as some courts have invalidated such provisions. It is always wise to provide that the no-rehire provision is only valid to the extent permitted by law.

11) Return or retention of property.

It may be important to identify what property of the employer must be returned by the employee (*e.g.*, all records obtained in employment, except records relating to the employee's benefits). Similarly, it may be worthwhile to identify what property may be retained (*e.g.*, the employee may retain his or her "contacts" database). It may also be advisable to get the employee's written agreement that the employer does not have any of the employee's property.

12) Ability to enter into the agreement.

It may be wise to state expressly that the employee has the full authority to enter into the agreement, that he or she has not assigned his or her rights to others, and that the employee is not in bankruptcy (which could, depending on the situation, result in the loss of ownership of the claim). *See In re Senior Cottages of America*, 482 F.2d 997, 1001 (8th Cir. 2007), citing 11 U.S.C. § 541(a)(1) ("The property of the estate includes 'all legal or equitable interests of the debtor in property as of the commencement of the case. * * * Causes of action are interests in property and are therefore included in the estate* * *.'"). *Harvey v. Southern Minnesota Beet Sugar Cooperative*, 2004 WL 368471, *2 (D. Minn. 2004) ("An asset that is the property of the bankruptcy estate is no longer the property of the debtor and the bankruptcy trustee must determine whether to pursue the asset.").

13) Governing law.

The agreement should identify the laws that govern it.

- 14) Integrated agreement vs. the existence of other agreements.

The agreement should identify whether it is the sole agreement between the parties and supersedes other agreements, whether oral or written. In so deciding whether it is the sole surviving agreement, it is important to identify whether there are other agreements that must survive (*e.g.*, a stock option agreement, an agreement not to compete, etc.).

- 15) Effective date of the agreement and whether it may be signed in counterparts.

It is important to identify the effective date of the agreement. For example, is it effective when signed or when the period for revocation has passed without revocation? It is also important to indicate that it may be signed in counterparts, if such is the case.

- 16) Knowing and voluntary execution.

It is important for the agreement to contain a clause that acknowledges that the employee is making a knowing and voluntary agreement.

- 17) Advice of counsel.

It may be important to identify that the employee has been advised that he or she should seek the advice of counsel before settling and that the employee has done so, or has chosen not to do so of his or her own accord. For example, the Older Workers Benefits Protection Act requires that the employer advise the settling party of the right to obtain counsel before executing the agreement. (*See* Appendix A on Releases).

- 18) Drafting.

It may be appropriate to indicate that the employee has had the full opportunity to make changes to the agreement and that the employee, therefore, agrees that the agreement shall not be construed against the employer as the drafter.

- 19) Assignment rights, writing to change the terms.

It may be important to identify whether the agreement may be assigned to another party. It is also wise to specify the circumstances under which the agreement may be changed (*e.g.*, in writing) and the person/party authorized to alter the agreement.

20) Disputes clause.

It may be prudent to consider a clause whereby the employee agrees to submit disputes concerning the agreement to arbitration or some forum other than court. As the employer makes the decision to require the employee to submit to arbitration, it is wise to consider the applicable case law and to draft the provision in such a fashion so as to increase the likelihood of its enforceability.

21) Jurisdiction clause.

Similarly, it may be important to identify what court or forum has jurisdiction over disputes concerning the agreement and to further specify that the employee agrees to submit to the personal jurisdiction of that forum and waives particular service requirements.

22) Proprietary interest clauses.

It may be important to obtain protection for the employer in the form of, for example, a covenant not to compete, a covenant not to solicit employees or customers, or an agreement not to use confidential information.

23) Consideration.

It is important to verify that there is consideration (*e.g.*, monetary payment, provision of a mutual release, agreement to forbear, etc) and that the consideration exceeds that to which the employee is entitled absent agreement. (*See* Appendix A on Releases).

24) Mutuality.

If certain covenants are mutual, the agreement should so specify. An employer may decide to provide mutuality in order to enhance the likelihood that an employee will agree to a certain provision. If the employer is not willing to agree to mutuality, the employer's counsel must be prepared to explain to the employee's why mutuality is not appropriate or is not acceptable.

25) Binding effect.

It is important to highlight that the agreement is legally binding and that by signing the agreement, the employee is acknowledging that it may adversely affect his or her rights.

26) Mediator-assisted language.

If the agreement is reached as part of a mediation, it is necessary to review Minn. Stat. § 572.35 and related case law to ascertain what language, if any, must be added to the agreement.

27) Cooperation clauses.

If the employee's cooperation is desired (*e.g.*, in defending against another lawsuit, assisting in client transition, etc.), it is important to identify under what circumstances cooperation may be needed and the terms of the cooperation (*e.g.*, reasonable pay and the scope of cooperation).

28) Representations.

It is important to identify what representations govern the settlement and equally important to identify what does not. For example, it may be important for the agreement to state that all representations causing the employee to enter into the agreement are set forth in the agreement or that the party is not relying upon representations of the employer (except as set forth in the agreement) in entering into the agreement.

29) Severability.

If the employer wants the terms of the agreement to be severable in the event that one clause is declared invalid by a court or an arbitrator, the agreement should so specify. The prudent lawyer will not automatically include such a clause, but rather will decide whether it is advisable under the circumstances. Some clauses to an agreement are so integral that, if they were to be declared invalid, the employer may not want any other provisions of the agreement to survive.

30) Non-disparagement.

After hotly contesting the claims or defenses in a lawsuit or being subjected to disparaging comments by the employee, the employer may desire a clause whereby the employee agrees not to disparage the employer and/or its employees, board, agents, etc. in the future. It is important to recognize that, in the absence of any clause, the employer may sue for defamatory comments made after the date of the release, but, generally, not for unflattering but true comments unless they violate some other tenet such as unfair competition. Because the protection of the defamation laws may not alone be enough, the employer may wish to prevent the employee from not only uttering untruths, but also uttering truths that are, nevertheless, not flattering. Thus, a non-disparagement clause may be appropriate. A word of caution is in order, though, because insertion of a non-disparagement clause may cause the employee's lawyer to ask for mutuality. It is

much more difficult for an employer to silence the entire workforce than it is for the employee to keep his or her mouth shut. Thus, if the employer has to agree to some form of mutuality, it is advisable to limit it to particular people at a high level that the employer reasonably believes it can control.

31) Notice provisions.

The employer may wish to provide notice under certain circumstances (*e.g.*, notice of a breach and an opportunity to cure before suit; notice before testifying under a subpoena about the contents of the settlement agreement, etc.).

32) Statements that may assist/statements of the absence of claims.

The employer may wish to have the employee make affirmative statements in the agreement that may be of assistance in another forum (*e.g.*, the employee voluntarily quit his or her job) or statements that confirm the absence of an event.

33) COBRA.

It may be appropriate to obtain the employee's acknowledgment that he or she has been provided with information regarding his or her COBRA rights.

34) Other statutory rights.

It may be appropriate to cover other statutory rights in the agreement.

35) No unlawful restriction.

The agreement should make clear that nothing in it is intended to and/or shall prohibit the employee from exercising rights that cannot by law be waived (*e.g.*, the right to file a charge with the EEOC).

36) Creative clauses.

It is important to consider options and be creative. For example, if money is an object and the employee is concerned about being reemployed, the agreement could provide for 3 months' severance with an additional 3 months' pay if the employee is unemployed at the expiration of the first 3 months, provided that the employee has exercised due diligence in searching for new employment. In drafting such clauses, the employer should be cognizant of the potential issues it is creating (*e.g.*, the obligation to monitor the employee's diligence in seeking alternative employment).

37) Consulting agreement.

A consulting agreement may be a palatable way to provide payment to the employee. It may also provide important benefits, such as availability of the employee (*e.g.*, for institutional memory, expertise, handling client issues, etc.). Consulting agreements may be tied to the actual provision of service or simply the willingness to be “on call” if needed.

38) Structured settlement.

Determine whether it is appropriate to structure the settlement.

39) Stock options, ownership of stock, and other benefits.

Specify the status of other critical benefits, such as the right to exercise stock options, whether the options become immediately capable of being exercised, whether stock ownership must be retained or a forced sale back to the company is required, etc. As set forth above, it is important to understand what other laws, such as ERISA or the Internal Revenue Code, may apply. Again, because most employment lawyers are not also knowledgeable in the areas of ERISA, federal taxation, or the like, it is advisable to consult appropriate legal counsel regarding the implications of certain provisions.

40) Outplacement services.

An employee may desire for some of the settlement proceeds to be allocated to the employer’s provision of outplacement services. This not only helps the employee to obtain alternate employment, but also eases the “pain” that the employer has in paying any money to the departing employee.

41) Attorneys’ fees.

The agreement should make clear (if it is the case) that each side is responsible for his or her/its own attorneys’ fees and costs, that no money is owed by the other side to cover such fees and costs, and that any statutory right to recovery is waived by virtue of the settlement agreement.

42) “Gag” clauses.

It is important to consider whether a clause prohibiting the other party from providing information to a third party or entity is necessary and/or advisable (*e.g.*, the employee agrees not to speak with the media). Before inserting a “gag” clause into an agreement, it is necessary to ensure that such a clause is legal and further to examine the “optics” – *i.e.*, what such a clause may look like to a third party that views it.

- 43) Assignment of inventions.

It may be appropriate to secure the legal right to certain items including inventions, patents, etc.

- 44) Other clauses.

Other clauses should be added as appropriate.

VII. NEGOTIATION STYLE OF THE LAWYER

A. THE LAWYER'S STYLE IS IMPORTANT

Perhaps the hardest thing for a lawyer to learn is to be “comfortable in his or her own skin” negotiating. The author of this paper is a firm believer that a lawyer must choose a style that is natural. A lawyer can rarely adopt a style of another person and be truly effective. That being said, a lawyer may learn a tremendous amount from watching other lawyers negotiate.

Identifying one's style is appropriate. It is also important to recognize the effect of one's style and to tailor it accordingly as needed for the situation. For example, if the employer's counsel is typically a person who likes to be in control and the negotiation will take place through a court-assisted process (such as a Magistrate Judge settlement conference), it is important to recognize and respect the role of the third party responsible for overseeing the settlement negotiations. That does not mean that the employer's counsel must abdicate responsibility for the outcome of the negotiations. Indeed, it is even more important to recognize how the third party may affect the negotiations and to exercise appropriate control to ensure that the employer's rights and interests are protected. The only difference is to appreciate the dynamics of the court-assisted process and to be prepared accordingly, which includes educating the employer to the process as well. As another example, if the employer's counsel is a “control freak” and he or she enters into direct negotiation with the employer's counsel, it may be important to temper the need to control and to have an awareness of how the employee's counsel may perceive the attempts to control the process.

B. THE DOS AND DON'TS IN NEGOTIATING

When negotiating, the following dos and don'ts are important to consider and remember:

- 1) Be professional and separate the human element from the process where appropriate.

Deliver the employer's position in a manner that is professional and encourages a favorable response. A lawyer may be polite and still be an advocate. Do not raise your voice. Do not swear. Be politically correct. Generally, it is important to focus on the problem, not the people, when delivering your comments.

- 2) Be honest.

A lawyer's stock in trade is his or her integrity. Lose that and you have nothing. Further, the employer's counsel's integrity will reflect directly on the employer's integrity.

- 3) Know your facts and the law.

You cannot argue from a position of strength if you do not have a complete command of the facts of your case, the applicable law, and the merits of the employer's position.

- 4) Advocate, but do not argue.

Promote the employer's position. Be persuasive. But avoid being argumentative. When a person is confronted by another person who is argumentative, most often, negative feelings and consequences flow (*e.g.*, the listener shuts down, gets defensive, etc.). Similarly, do not lecture. Lawyers did not like being lectured at when they were in school – they like it less in practice. And while they likely tolerate it from the court, they will balk at it from the employer's counsel. A hostile, judgmental, condescending, threatening, or offensive style will not facilitate negotiations.

- 5) Know what the employer wants and truly needs.

You cannot be effective if you do not know what the employer wants and what it needs. Often, wants and needs are two entirely different things and the "wants" control, when the "needs" are what matter. Consider the emotional, psychological, physical, social, and economic needs of the employer, as appropriate.

- 6) Avoid personal attacks and hostile words.

Do not attack the employer and/or his or her counsel. Even if you think the employee's side is ignorant or wrong, leave the employee and his or her counsel their dignity in the process.

- 7) Avoid "in-your-face" threats.

Do not threaten. Rarely is a threat effective. This does not mean that you cannot forcefully explain the consequences of a matter or what the employer may lawfully and rightfully do. In some circumstances, this distinction may involve a fine line. Nevertheless, observe the line and do not cross over it.

- 8) Avoid ultimatums.

Do not state that something is the employer's bottom line or last and final offer unless the employer means it. You will lose great credibility and bargaining power if you issue an ultimatum and then back away from it.

- 9) Be fair.

Consider the employee's position. If you are going to reject it, be prepared to explain why and do so politely.

- 10) Avoid annoying the other side.

If you annoy the employee's side too greatly, successful negotiations may never be possible.

- 11) Talk to the employer and provide an honest evaluation.

Avoid "puffery" and telling the employer what you think the employer wants to hear. Deliver an accurate evaluation of the situation and do so early. Have the tough conversation when it is necessary. Repeat evaluations throughout the negotiations, so there are no surprises as the negotiations transpire.

- 12) Exercise client control.

To the extent proper and in the client's best interests, control the employer. To the extent appropriate, solicit the assistance of others (*e.g.*, the head of Human Resources, the CFO, etc.).

- 13) Be creative.

Creative solutions often make the difference. For example, if money is not available or will not successfully resolve the issue, offer something else (*e.g.*, some other perk; ownership of the computer; etc.). Consider alternatives. Weigh the pros and cons of the various options.

- 14) Listen.

Hear what the employee's side is saying. Careful listening may send you the best signals of what the employee's position truly is. Be open-minded.

- 15) Watch body language.

Body language sometimes reveals more about the employer's position than spoken words do.

- 16) Use humor as appropriate.

Sometimes humor can lighten the mood and enhance discussions with the employee's side. Just be careful how you employ humor, and do not use insensitive comments or jokes.

- 17) Consider acknowledging the weaknesses of the employer's position.

If appropriate, acknowledge weakness in the employer's position, as that may enhance your credibility and convince the employee's side that you have adequately assessed a particular issue, but that you are undaunted by its effect for some other legitimate reason.

- 18) Be patient.

Successful negotiations often take time. Do not establish arbitrary deadlines or requirements that must be satisfied before the employer will continue negotiating.

- 19) Use a checklist.

Keep a checklist of the issues and terms that are important to the employer at hand. Review the checklist to ensure that you are paying attention to the listed items.

- 20) Remain ethical.

Make sure your own interests are not adversely impacting the negotiation process. When negotiating, make sure that you do not violate the ethics rules (*e.g.*, ABA Model Rule 4.1 on a lawyer's obligation not to misrepresent a material fact). Remember, as the employer's lawyer, you cannot speak directly to the employee when the employee is represented by counsel.

- 21) Involve the correct people in the process.

Make sure that you have the right players involved and that the employee's side does as well. Negotiations sometimes fail because the people with the real monetary and decision-making authority are not involved.

- 22) Be prepared.

Preparation, preparation, preparation is the key to successful negotiations.

- 23) Know the last positions and keep detailed notes of what you said and what the employee's side said.

Negotiations sometimes take place over time (*i.e.*, in waves) and before recommencing negotiations, it is important to know what each side previously said and what has changed.

- 24) Do not assume.

You know the old saying about assuming. Do not assume. Ask. Probe.

- 25) Use aids as appropriate.

If visuals, summaries, copies of relevant decisions, etc., will advance the negotiations, use them.

- 26) Do not move backwards.

Rarely, if ever, should you alter the employer's position to increase the employer's demand or decrease the employer's offer. If you find that it is necessary to do so, make sure the situation is appropriate and provide an adequate explanation to the employee's side (*e.g.*, my client's financial picture has changed). If necessary, admit that you made a mistake before and that you are correcting the mistake now.

- 27) Identify what is really transpiring.

Try to identify if there is an underlying reason for the impasse.

- 28) Try to find the "win, win" situation.

Strive to identify the resolution that is a winner for both the employer and the employee, or, alternatively, that is the least painful alternative for both sides.

- 29) Do not abdicate responsibility.

Simply because the negotiations are taking place with the assistance of a third-party neutral, it is important not to assume that the third-party neutral will protect the employer's rights and interests. Indeed, that is your responsibility. That does not mean that you cannot take advantage of input from the third party. It simply means that you must make certain, at all steps in the process, that you have adequately protected your client.

- 30) Involve another lawyer if appropriate.

If your style is not helping the negotiations, involve someone else, such as another lawyer in your office.

- 31) Pay attention to detail.

Be careful not to become so immersed in the process that the critical details are missed. There is a delicate balance between keeping the big picture in perspective (*i.e.*, achieving agreement) and ensuring that the details are properly handled.

- 32) Pace yourself.

Negotiations can be grueling. It is important to pace yourself so that you have the stamina in the end to finalize the negotiations to ensure that the employer's needs and interests are met. Take a "time out" as necessary, but be careful to make sure that the hiatus will not adversely affect the likelihood of reaching agreement.

- 33) Know the financial impact/damages analysis.

If the matter is a disputed matter, often, the employer's focus is solely on liability considerations. But analyzing the employee's damages (particularly the economic situation) may provide another avenue for convincing the employee's counsel that resolution is in the employee's best interests.

- 34) Consider the litigation experience and expense.

If the matter is a disputed matter involving the employee, give thought to the costs of litigating, considering not just the economic toll, but also the emotional and time commitments as well.

- 35) Know what is a reasonable.

In connection with the commencement of employment, know what is a reasonable salary demand for the employee to make. In connection with the ending of employment and ensuing litigation, identify a reasonable range for settlement under the facts and circumstances of the case. Consult available tables (*e.g.*, tables that provide the range for a particular physical injury). If you are having trouble valuing a case, review reported cases to identify what courts and juries have done under similar circumstances, but remember that is no guarantee of what will happen in the case you are handling. Consult settlement reports. Seek the advice of other experienced practitioners in valuing your case – preview the employer's facts to obtain the advice of others regarding the value of the case, but remember that the person you are consulting will only be valuing the case based on the facts that you have chosen to present and the slant you place on those facts.

- 36) Do not forget the other incentives for the employee to reach agreement.

Friendship, fairness, guilt, fear of publicity, and other non-liability incentives often exist that motivate an employee to reach agreement. Be mindful of these items.

- 37) Know whether there is insurance or payment from a third party available.

It is prudent to know if there is another source of funds when deciding matters involving money.

- 38) Be cognizant of how the negotiations are unfolding.

Know the impact of discussing terms piecemeal vs. in total. For example, piecemeal negotiations may be an effective way to obtain agreement. Alternatively, it may be wise to know the whole package that is proposed by the employee so that you know on what terms the employer can acquiesce – *i.e.*, it may be easier to obtain one term important to the employer if you can trade it for agreement on a term that the employee desires and you know that there is nothing else that the employer will be asked to do thereafter.

- 39) Consider a diagram or critical path analysis.

It may help you and/or the employer to diagram the employer's options or to make a list of the pros and cons of giving up on particular terms.

- 40) Anticipate.

Anticipate the employee's requests and objections to the employer's requests. Be prepared with a persuasive response.

- 41) Know the process.

To be successful in negotiating, it is important to understand the process and the achievable goals. It may even be wise to invite both parties to identify their three main goals in settlement. Some lawyers believe that this interest-based process assists in resolution.

- 42) Bargain for information.

Try to learn information from the employee's side regarding expectations, motivations, concerns, and the like. Obtaining this information may be crucial to the outcome of a successful mediation.

- 43) Be armed with strategies.

Be prepared to use different tactics. For example, be prepared to deflect a question, answer a question with a question, give a non-answer, and to provide less or more than was asked. These tactics will help protect information that should not be divulged and may provide an opportunity for addressing and persuading the employee's side (*e.g.*, in providing more information than was asked).

- 44) Prioritize the agenda.

Know the priority of items and maintain the appropriate balance between major and minor matters.

- 45) Select carefully.

Carefully pick the employer's starting position, but be mindful that ridiculous positions can preclude further negotiations.

- 46) Be prepared to give concessions.

By definition, negotiation is a compromise. Get used to it now and be prepared to concede certain things – in fact, plan certain items that will be conceded. In so deciding what to concede, it is important to know what the employer values and how the employee values that same item. For example, a covenant not to reapply is often critical to the employer. Nevertheless, it is important not to overvalue that covenant – *i.e.*, although important to the employer, it may be a covenant that does not matter to the employee and one which the employee would readily concede. It may also be that if the employer thinks about it, that covenant is not truly important as the employer may conclude that the poorly-performing employee will never be real competition to the employer.

- 47) Know when to strike.

Timing of negotiations may be the single biggest factor affecting the success of reaching agreement. For example, it may be appropriate to discuss an agreement with the employee's side when there is the threat that the employer will obtain summary judgment.

- 48) Maintain a poker face.

Know that your body language sends signals to the other side and do not send them unless you intend the employee's side to understand something by virtue of your non-oral communications.

- 49) Do not bluff unless you can do so convincingly.

Avoid bluffing, and do not lie. The employee and/or his or her counsel may not be fearful, and the bluff may blow the deal for the employer. The unconvincing bluff destroys your credibility as a negotiator.

- 50) In the case of a dispute, be prepared to try the matter for the employer.

The employee will have a greater interest in settling if he or she knows and believes that the employer is ready, willing, and able to try the case.

- 51) Know when to stay and when to quit.

Recognize when continued negotiation pays even in the face of difficulty. But, know when to quit because there is nothing to be gained by continuing the process.

The above dos and don'ts merit consideration. However, like all lists, they are generalities and may not be appropriate in your particular circumstance.

VIII. IMPEDIMENTS TO REACHING AGREEMENT

A. IMPEDIMENTS TO REACHING AGREEMENT MAY BE GENERAL OR CASE-SPECIFIC

Frequently, there are impediments to reaching agreement. Some may be case-specific and others may be inherent in virtually every negotiation. Sometimes, it may make a difference in negotiations just to have an awareness that an impediment may be affecting the negotiations. A complete listing of impediments is not possible, because they are as varied as the situations involved. Nevertheless, there are some typical impediments to reaching agreement, and they are worth considering. Typical impediments include but are not limited to the following:

- 1) Genuine interest in not resolving the matter.

This impediment is not likely to exist when dealing with an agreement regarding the commencement of employment. But it may be operating when the employment relationship is ending. On occasion, an employee is so angry or otherwise bothered that he or she is not genuinely interested in resolving the matters at hand. It is important to recognize if this is the situation in order to avoid wasting time, resources, and energy.

- 2) Lack of knowledge of the facts.

If the process is at an early stage, there may be great reluctance to reach agreement because there is a lack of knowledge (*e.g.*, not knowing what a

reasonable salary under the employer's compensation system is; not knowing what the true merits of the claims and defenses are; etc.).

3) Lack of trust.

There may be a lack of trust between the sides, such that the employee does not trust the employer and/or the employer's counsel. In such a circumstance, it is important to analyze whether this fear is real or imagined and to ascertain how to overcome the lack of trust.

4) Overconfidence in a position/unrealistic views.

The employee (or for that matter, the employer) may have an unrealistic assessment of the strength of his or her position. It is important to identify if this inaccurate evaluation is affecting the employee's ability to engage in meaningful negotiations and to determine how to overcome such a situation.

5) Fear of "placing one's cards on the table".

Often, the employee and/or his counsel is reticent to provide information to the employer. The fear may be that the employee perceives that the employer will have some unfair or tactical advantage if the truth is known. For the employer's sake, it is important for the employer's counsel to analyze how to break this logjam.

6) The floodgates.

Frequently, an employer is unwilling to agree to a term in an employment agreement or to resolve issues with an aggrieved and departing employee because of the fears that such agreement will open the floodgates to similar requests from other employees. This concern should be discussed with the employer and the relative risks and benefits should be weighed.

7) Extrinsic matters.

There may be matters outside the instant situation that impact one party's ability to agree. For example, in the setting of the commencement of an employment relationship, the employee may not be able to agree that he or she has no restrictions preventing him or her from accepting employment. As another example, in the setting of the ending of an employment relationship, a governmental issue (*e.g.*, IRS concerns) or another suit (*e.g.*, another plaintiff raising the same issue) may affect the employer's settlement considerations.

- 8) Ego.

The effect of the almighty ego of the clients and/or their lawyers must never be discounted. One side may see quick agreement as a sign of weakness.
- 9) Time and timing.

A party may not have the “time” to negotiate. Further, timing of when negotiations are raised may make the difference (*e.g.*, how desperate the employee is to accept employment; whether a dispositive motion is pending, etc.).
- 10) Finances.

The employee’s finances may directly impact his or her willingness to concede (*e.g.*, if the prospective employee does not need the job or has multiple offers, that person is in a strong bargaining position).
- 11) The need for reciprocity.

The employee may be unwilling to move, unless the employer makes a comparable movement.
- 12) “Not bidding against oneself” concept.

The employee may be unwilling to continue negotiations if the employer has not meaningfully responded to the employee’s last position. In other words, the employee may cling to the concept that he or she will not bid against himself or herself in the negotiation process.
- 13) Underestimating one’s opponent.

The employer and the employer’s counsel may – but should not – underestimate the employee or his or her opposing counsel.
- 14) The negotiations are too easy.

The employee may be reluctant to agree if the negotiation with the employer seems too easy and concessions come too quickly. In other words, the fear that the employee has left something on the table or given up more than he or she should may prevent the employee from reaching agreement quickly or at all.
- 15) Other.

There are a number of other factors that may affect negotiations.

B. THE LAWYER'S AWARENESS OF THE IMPEDIMENTS TO SUCCESSFUL NEGOTIATION

In order for the lawyer to be an effective negotiator, the lawyer must have an awareness of the impediments to successful negotiation. Only with an awareness of what may be impeding reaching agreement in the particular case will the lawyer be able to address the impediment(s) successfully and, consequently, eliminate its effect (or, alternatively, recognize that the impediment is insurmountable).

IX. CONCLUSION

Being skilled at negotiating an agreement for the employer governing the employment situation –whether it is the agreement entered into at the beginning of employment or the agreement that governs the ending of the employment relationship – is an acquired skill that takes time. It is important to consider all of the terms that the employer may wish the agreement to cover and to know the laws governing such terms. Further, communication with the employer is important. Respectful communication with the employee's counsel is likewise important. The prudent lawyer will use all of his or her skills to achieve an effective agreement for the employer. With the ever-changing landscape (*e.g.*, Sarbanes Oxley, the heightened focus on executive compensation agreements, etc.) and the unsettled law on certain aspects of agreements (*see, e.g.*, the accompanying paper regarding releases), the wise employer will proceed with great caution.

The prudent employer's counsel will also recognize that there is no such thing as a good cookie-cutter agreement for every employment agreement or the separation agreement – indeed, the facts and circumstances of each individual situation make a difference and dictate particularized language for the specific circumstance.

APPENDIX A:

RELEASES

**WAIVERS AND RELEASES:
THE LATEST WORD©**

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I. INTRODUCTION

Releases have been a part of the American legal system for what seems like forever. The fact that releases have been a long-existing, legal way to obtain peace when a dispute exists would lead one to expect that the law on releases is settled. But that is not the case. The law on waivers and releases is not settled. Virtually every year, it seems a new case or two challenges the validity of some release, particularly under federal law. This seminar paper examines concepts and strategies for enhancing the likelihood that the release you draft will be valid.

II. THE BENEFITS OF RELEASES AND WAIVERS

A. BASIC RELEASE BENEFITS

Releases and waivers exist to document the peace that the parties have reached over disputed items. They should achieve the following goals:

1) Finality.

The waiver or release should end the dispute. It should finally and fully resolve whatever issues the parties have agreed to lay to rest.

2) Global vs. Limited Purpose.

Typically, a waiver or release is drafted to be global – *i.e.*, to end all disputes, known and unknown, that the parties have as of the date they sign the waiver or release. But, the waiver or release may be more limited in nature, as in the

case when the parties agree to resolve certain issues through written agreement, but intentionally decide to leave particular issues unresolved (either for future agreement or trial/arbitration).

3) Certainty.

The waiver or release should bring certainty. The waiver or release should remove the variables of what a judge, jury, or appellate court might do. The parties should have an assurance that they know what they have resolved by agreement. Certainty in a waiver or release is enhanced by the accurate and complete reflection of the parties' agreement.

4) Control Over The Outcome.

The waiver or release allows both parties to control the outcome of the dispute. In essence, the waiver or release allows the parties to predetermine the end of the story.

5) Cost-Effectiveness.

The waiver or release should help the parties to control their costs associated with their disputes. It should achieve the benefit of the further expenditure of legal fees.

6) Mutuality vs. Release Limited To One Party.

The waiver or release may be mutual – *i.e.*, it may be reciprocal with both sides giving up the same rights. Or the release may be limited to one side relinquishing rights.

7) Enforceability.

The waiver or release should comply with all applicable statutory and common law requirements relating to validity and enforceability. Although when entering into the waiver or release the parties rarely expect that they will have to test the enforceability of the release, it is important that the release be drafted with the goal of defending its enforceability.

B. ADDITIONAL BENEFITS TO A COMPREHENSIVE SETTLEMENT AGREEMENT

A waiver or release typically addresses the legal claims (whether statutory, contract, tort, or other) that the releasing party agrees to relinquish. A full-blown separation or settlement agreement may also achieve additional benefits (*e.g.*, obtaining relief that a party may not obtain through litigation, such as the employee's agreement not to compete).

III. FEDERAL AND STATE LAWS AFFECT RELEASES AND WAIVERS

Both federal and state laws affect the validity of a waiver or release. When drafting a waiver or release, it is necessary to examine the applicable laws on the subject for which the party is seeking a relinquishment of rights. Because the subject of a release or waiver may be extremely varied, a comprehensive review of all applicable laws is beyond the scope of this paper. Nevertheless, some common statutory requirements are reviewed.

A. THE OLDER WORKERS' BENEFIT PROTECTION ACT

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, et seq., was amended by the Older Workers' Benefit Protection Act ("OWBPA"). The OWBPA amendment to the ADEA prohibits waivers unless they meet certain specific requirements, all designed to ensure that the release is "knowing and voluntary." 29 U.S.C. § 626(f)(1).

According to 29 U.S.C. § 626(f)(1), the release must be in writing and the minimum requirements for the written release are as follows:

1) Understandable.

The waiver or release must be "written in a manner calculated to be understood by such individual or by the average individual eligible to participate."

2) Rights Under The ADEA.

The release must specifically refer to the rights or claims arising under the ADEA.

3) No Future Rights.

The release may not seek to waive rights or claims that arise after the date of the release's execution.

4) Consideration.

The release must have consideration. The individual providing the release must receive something of value in

exchange for the release. The value must be something that the individual would not have gotten but for the release. In other words, consideration is not something the individual would have received in any event, absent the release.

5) Advice To Consult Counsel.

The release must advise the individual signing the release to consult counsel before execution of the release.

6) Time To Consider.

The release must provide the individual with time to consider what it says before signing. In the case of an ordinary release sought from a single individual, the consideration period is 21 days. In the event that the release is sought in connection with an “exit incentive or other employment termination program offered to a group or class of employees”, the consideration period is 45 days. (The prudent lawyer will ensure there is no obligation under state law to provide a specific time to consider whether to sign the agreement.)

7) Time To Revoke.

The release must give the individual time to revoke (or take back) the release after it has been signed. The individual must be given 7 days after signing to revoke the agreement, and the agreement shall not become effective until the revocation period has expired without revocation. This statutory cooling-off period is intended to permit the employee to have a period of time after signing to ensure that he/she wishes to live with the consequences of the release. (The prudent lawyer must ensure that there is no state law rights affecting revocation, *see e.g.*, Minn. Stat. § 363A.31, subd. 2, providing for a 15-day rescission period post-suit or charge.)

8) Exit Incentive Or Other Group Termination Program.

If the release is sought in connection with an “exit incentive or other employment termination program offered to a group or class of employees”, the employer must comply with additional requirements. The requirements are very specific, and it is advisable to check the requirements every time a release is drafted that relates to an exit incentive or

other group termination program. Nevertheless, it is important to understand that, in general, such a release must be in writing and written in a manner calculated to be easily understood and it must advise the individual as to:

(a) “any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program,” and

(b) “the job title and ages of all individuals eligible or selected for the program and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.”

9) Regulations Relating To An Exit Incentive And Other Employment Termination Program.

If the release is part of an exit incentive or other employment termination program, it must comply with the OWBPA and the OWBPA regulations. The regulations are found at 29 C.F.R. § 1625.22(f). They merit reading and analysis every time an employer devises a group termination or exit incentive program. The regulations define the words “program” and “other employment termination program”. They set forth to whom the required information must be given and when. They list the specific information that must be provided and they give examples. Nevertheless, as the Pagliolo case below demonstrates, there is still much uncertainty regarding what information an employer must provide and exactly how that information must be provided.

10) Waiver In The Event Of A Charge Or Suit.

If the release is sought in settlement of an Equal Employment Opportunity Commission (“EEOC”) charge or a suit filed under the ADEA, then it must be “knowing and voluntary” and it must comply with the OWBPA’s requirements (*e.g.*, advising in writing to consult counsel),

and it must give the individual “a reasonable period of time within which to consider the settlement agreement.” 29 U.S.C. § 626(f)(2).

11) Burden Of Proof.

In any dispute involving whether a waiver is valid or “knowing and voluntary” under the ADEA, the burden is on the party seeking to prove the validity of the waiver that it is, indeed, “knowing and voluntary”. 29 U.S.C. § 626(f)(3).

12) No Impact On The EEOC.

No waiver may impact the EEOC’s rights and responsibilities to enforce the ADEA. 29 U.S.C. § 626(f)(4).

13) No Interference.

No waiver may be used to “justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding” conducted by the EEOC. 29 U.S.C. § 626(f)(4).

14) Tender Back.

An individual who signs a release, receives the benefit of the release, and then sues to challenge the release “is not required to tender back the consideration given for that agreement before filing either a lawsuit or a charge of discrimination”. *See* 29 C.F.R. § 1625.23 (regulation providing there is no obligation to tender back); *see also*, *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 428 (1998) (non-compliant release and employee’s retention of consideration could not bar employee’s ADEA claims).

B. THE EEOC REGULATIONS

The EEOC regulations provide that a waiver or release must meet certain requirements. The regulations provide, among other things, as follows:

1) Plain Language.

The waiver “must be drafted in plain language” and must

be geared to be understood by who may be asked to sign it. 29 C.F.R. § 1625.22(b)(3). This requirement also applies to group terminations.

2) Consider The Person – Eliminate/Limit The Legal Jargon.

“Employers should take into account such factors as the level of comprehension and education of typical participants.” Id. “Consideration of these factors usually will require the limitation or elimination of technical jargon and of long, complex sentences.” Id.

3) Do Not Mislead.

“The waiver agreement must not have the effect of misleading, misinforming, or failing to inform participants and affected individuals.” 29 C.F.R. § 1625.22(b)(4).

4) Do Not Exaggerate.

“Any advantages or disadvantages...shall be presented without either exaggerating the benefits or minimizing the limitations.” Id.

C. CLAIMS THAT CANNOT BE RELEASED

Under both federal and state law, certain claims cannot be released. It is important to check the applicable law to ensure that the claim for which you are seeking a release can, indeed, be released. Examples of claims that cannot be legally released include but are not limited to the following:

1) EEOC Interference.

The EEOC has issued an Enforcement Guidance that prohibits interference. It states that an employer may not interfere with the right of an employee to file a charge, testify, assist, or participate in any manner in an investigation, hearing, or proceeding under Title VII, [the ADA, the ADEA], or the Equal Pay Act...These employee rights are non-waivable under the federal civil rights laws.

EEOC Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) enforced statutes (April 10, 1997) (“Guidance”).

Under the Guidance,

a) “Promises not to file a charge or participate in an EEOC proceeding are null and void as a matter of public policy.”

Id.

b) If an employer extracts an agreement to make a promise not to file a charge or participate in an EEOC proceeding, that “may also amount to separate and discrete violations of the antiretaliation provisions of the civil rights statutes.”

Id.

c) It is noteworthy that if an individual has signed a waiver that is valid under applicable law and that individual subsequently files a charge with the EEOC “based on the same claim, the employer will be shielded against any further recovery by the charging party”.

Id., citing EEOC v. Cosmair, Inc., 821 F.2d 1085, 1091 (5th Cir. 1987) (employee cannot waive the right to file a charge but can waive the right to obtain recovery).

2) Workers’ Compensation.

The prudent lawyer will check applicable state law for any prohibitions on releases under the applicable workers’ compensation law. For example, under Minnesota law, workers’ compensation claims cannot be released outside of the workers’ compensation system. Minn. Stat. § 176.521 (governing requirement of releasing under the system).

3) Fair Labor Standards Act.

According to Brooklyn Savings Bank v. O’Neil, 324 U.S. 697 (1945), claims for minimum wage, unpaid overtime, and liquidated damages may not be released.

According to Lynn’s Food Stores, Inc. v. U.S. Department of Labor, 679 F.2d 1350 (11th Cir. 1982), under the Fair Labor Standards Act (“FLSA”), claims for back wages can only be settled by: (a) supervision of the Secretary of Labor; and (b) in a court setting, wherein the district court may scrutinize the settlement to ensure that it is fair and then enter a stipulated judgment based on the parties’ settlement.

4) Unemployment Compensation.

The prudent lawyer will check applicable state law for any prohibitions on releases under the applicable workers’ compensation law. For example, under Minnesota law, an agreement seeking a party’s waiver of his or her rights to seek “unemployment benefits or any other rights under the Minnesota Unemployment Insurance Law shall be void. [Further,] [a]ny agreement by an employee to pay all or any portion of an employer’s taxes shall be void.” Minn. Stat. § 268.192, subd. 1. Indeed, if the employer violates the anti-waiver provisions of the unemployment laws, the employer is guilty of a misdemeanor. Id.

5) Family And Medical Leave Act.

Under the Family and Medical Leave Act (FMLA”), the regulations provide that “[e]mployees cannot waive, nor may employers induce employees to waive, their rights under the FMLA.” 29 C.F.R. § 825.220(d). There is a split in the circuits whether employees can waive post-termination claims. *See, e.g., Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 320 (5th Cir. 2003) (court held that regulations prohibit a “prospective waiver of rights, not the post-dispute settlement of claims”); *cf. Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 459 (4th Cir. 2007) (regulations prohibit “both the retrospective and prospective waiver or release of an employee’s FMLA rights”).

6) Future Claims.

Generally, future claims – *i.e.*, ones that arise after the execution of an agreement – cannot be waived. Many statutes specifically address this point. For example, the following statutes prohibit waivers of future claims:

- a) Title VII.

In Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 (1974), the Supreme Court made it “clear that there can be no prospective waiver of an employee’s rights under Title VII.”

- b) ADEA.

The ADEA prohibits waivers of any “rights or claims that may arise after the date the waiver is executed.” 29 U.S.C. § 626(f)(1)(c).

- c) State Law.

The prudent lawyer will check applicable state law for any prohibitions on release of future claims. For example, under the Minnesota Human Rights Act, a “waiver or release [that] purports to waive any claims arising out of acts or practices which occur after the execution of the waiver or release.” Minn. Stat. § 363A.31, subd. 1.

IV. RECENT CASE LAW ADDRESSING RELEASES AND WAIVERS

Although a complete review of federal decisions addressing releases and waivers is beyond the scope of this paper, several recent decisions are noteworthy. The cases below are not inclusive but are illustrative of the recent case law affecting releases:

A. EEOC V. WAFFLE HOUSE, INC., 534 U.S. 279, 297-98 (2002)

In this case, the Supreme Court made clear that arbitration agreements do not bind the right of the EEOC to pursue relief. In other words, a binding agreement between the employer and the employee to arbitrate an employment dispute does not bar the EEOC from pursuing victim-specific relief.

B. RICHARDSON V. SUGG, 448 F.3D 1046, 1054-55 (8TH CIR. 2006)

An individual, by contract, cannot prospectively waive Title VII employment discrimination claims. Id. at 1054-55.

Additionally, an employee may individually decide to agree

to arbitration and contract away the right to have a federal court decide his or her Title VII claims. Id. at 1055 (citation omitted).

C. **PARSONS V. PIONEER SEED HI-BRED INTERNATIONAL, INC., 447 F.3D 1102, 1103-05 (8TH CIR. 2006)**

Despite the employee's challenges to the release arguing that the agreement was not easily understandable, the Eighth Circuit held that the employer's release was valid under the law. In its decision, the Eighth Circuit noted that the release in this case does not suffer from the same flaw that the Thomforde case did (*see below*), because the subject release did not contain a covenant not to sue. Id. at 1104. In the decision, the Court noted that the employer's "attempts to comply with the OWBPA and its accompanying regulations may make the agreement nuanced, but the language employed is written in a manner that is understandable by the average participant." Id. at 1105.

D. **THOMFORDE V. IBM CORP., 406 F.3D 500, 503-05 (8TH CIR. 2005)**

The Eighth Circuit invalidated a release on the grounds that it was not "written in a manner calculated to be understood by" participants as required by the OWBPA. Id. at 503. The Court was troubled by the employer's inclusion of a covenant not to sue that had language that seemed to contradict the language of the release. Id. The release provided that the employee releases claims arising from the ADEA, but the covenant not to sue stated that it "does not apply to actions based solely under the [ADEA], as amended" and that the employee would not be liable to the employer for attorneys' fees and costs occasioned by the employer in the event the employee brought an action under the ADEA. The covenant not to sue was intended to "preserve the employee's right to challenge the *validity* of the release through a lawsuit". Id. at 504. Thus, the employer focused on the fact that a release and covenant not to sue serve different purposes. But the Court found that "the differences between a release and a covenant not to sue are fairly amorphous and may not be readily apparent to the lay reader." Id.

The Court also commented on the fact that, in response to the employee's questions about what the agreement meant, the employer declined to interpret or clarify the agreement. *Id.* However, in *Parsons*, the Eighth Circuit noted that the employee's questioning of the meaning of the agreement was not necessary to the holding in *Thomforde*. *See Parsons*, 447 F.3d. at 1105.

E. PAGLIOLO V. GUIDANT CORP., 2007 WL 1567617 (D. MINN. MAY 29, 2007)

In a court order, *see* 483 F. Supp. 2d 847 (D. Minn. 2007), the court invalidated an employer's release used as part of a reduction in force, holding, among other things, that:

a) The employer materially misrepresented that deployed employees were eligible for severance benefits;

b) The employer failed to properly disclose the decisional unit, which should have been limited by facility and not improperly aggregated from six separate corporate subsidiaries into one decisional unit;

c) A fact issue existed as to whether employees of the parent corporation and the international facilities should have been included in the disclosures;

d) The OWBPA's "eligibility factors" phrase refers to the determination of who was subject to the termination program and not who was eligible for severance pay; and

e) The release disclosure failed to comply with the OWBPA regulations because it did not disclose ages (as opposed to dates of birth) and job titles of the individuals selected.

On May 29, 2007, the court, among other things, granted the employer's request for an interlocutory appeal to seek a ruling from the Eighth Circuit whether the releases, as drafted, are valid under the ADEA and the OWBPA. No appeal is yet shown as taken according to Westlaw or Lexis.

Most definitely, any appeal of the release issues in this case is worth watching, as the appellate decision will no doubt answer some questions on how an employer must provide the requisite OWBPA information for an exit incentive or group termination program.

F. EEOC V. LOCKHEED MARTIN CORP., 444 F. SUPP. 2D 414, 420-22 (D. MD. 2006)

The district court found that the employer's release was retaliatory because it required the employee, in exchange for severance benefits, to not only give up claims under Title VII, but also to give up the ability to pursue a charge. Id. at 421. The court held that the release language was so broad as to include the right to file an EEOC charge. Id. As such, the court found the provision impermissible and retaliatory. Id. at 422.

V. LESSONS LEARNED

A. WHAT THE LAW, REGULATIONS, AND CASE LAW TEACH

When drafting a release or waiver, there are some basic considerations that a drafter should bear in mind and some basic guidelines that a drafter should follow. The list below is by no means all-inclusive, but rather is provided to assist the drafter in enhancing the likelihood of obtaining a valid and enforceable release. When drafting, the prudent lawyer will be ever conscious of the fact that the goal is to achieve a "knowing and voluntary" waiver that will withstand scrutiny and be determined to be enforceable. Considerations include the following:

- 1) Is the language understandable, especially considering the level of comprehension and education of the person being asked to sign it?

When reviewing this question, do not forget to consider the releasing party's education, background, and business experience. It is generally advisable to make the release understandable by the average individual who is or would be able to obtain the benefits and suffer the burdens of the release.

- 2) Is the agreement in plain language?

Legal or technical jargon should be minimized or excluded.

- 3) Has the releasing party had sufficient time to decide whether to sign the waiver or release?

When reviewing the issue of whether the releasing party has had sufficient time to decide whether to sign the release, as set forth above, it is important to remember that certain statutory provisions prescribe the requisite amount of time for consideration.

- 4) Did the releasing party know of the right to consult counsel and have a full and fair opportunity to consult counsel?

The releasing party should be advised of his or her right to consult counsel. Indeed, as set forth above, certain statutory provisions require the employer to advise the releasing party of his or her right to consult counsel. Not only should (and, in some circumstances, must) the employee be advised of his or her right to counsel, but there must be a meaningful period of time for that employee to have the full and complete opportunity to consult counsel. If the employer did anything to discourage the employee from consulting counsel, despite what the agreement said, the employer will have greater difficulty convincing the court to enforce the release.

- 5) Did the releasing party have a meaningful opportunity to bargain?

The role that the employee had in negotiating the terms of the release may make a difference in resolving questions of enforceability. A release's likelihood of being enforced is typically enhanced by the fact that the releasing party had a meaningful opportunity to bargain for the terms of the agreement – *i.e.*, to suggest and make changes to the language and terms of the agreement.

- 6) Did the releasing party actually have counsel?

Although some of the cases above attacked the validity of the release even when the employee had counsel, generally, the fact that the employee had counsel may assist in arguing for enforceability of the agreement, depending on the facts and circumstances and the issues in question.

- 7) Is the agreement clear about what is being waived?

The release should specify the names of the actual statutes and claims that are being waived. The rationale behind specifically stating what is being waived is that the releasing party is then in a position to understand exactly what he or she is relinquishing. It removes any doubt.

- 8) Is there adequate consideration?

It is axiomatic that a release is a contract and for it to be enforceable, there must be adequate consideration. The consideration must be in excess of that to which the releasing party would be entitled without the release.

- 9) Is the release in writing?

Oral releases are generally not enforceable. The courts need a writing to be in a position to examine what is being released.

- 10) Does the release provide the releasing party with all of the requisite information that person would need to be able to make an educated decision that he or she freely and willingly desires to relinquish rights?

The release should tell the person what he or she would want to know to make an educated decision to give up his or her rights. Indeed, for example, in the case of a release provided as part of a group termination program (as in a reduction in force), the release has to, among other things, tell the releasing individual the jobs that are covered by the group termination program, the factors that make a person eligible for the program, the time limits for taking advantage of such program, the names and ages of all who are eligible/selected for the program, and the ages of all who are not eligible/selected for the program. *See* 29 U.S.C. § 626(f)(1)(setting forth the requirements for an exit incentive or other group termination program). The purpose behind such statutory requirements is to arm the releasing party with the information that person would like in order to decide if he or she truly desires to relinquish rights for the consideration being offered.

- 11) Are the rights being waived past or current rights?

Future rights generally cannot be waived, and, as set forth above, waivers of future rights are expressly against certain laws.

- 12) Are the benefits and limitations fairly described?

Any benefits and limitations should be identified in the waiver. The benefits should not be exaggerated, and the limitations should not be minimized.

- 13) Is the release fair and not misleading?

The release should not mislead or misinform the releasing party.

- 14) Did you answer the releasing party's questions?

If the releasing party/employee has a question about the release, the employer is well served by discussing the question with the employee in a fair, open, and complete fashion.

- 15) Has the employee had an opportunity to revoke/rescind his or her execution of the agreement?

As set forth above, certain statutes require the releasing party to have a specified period to cool off and to decide whether he or she wants to live with the terms of the release.

B. ADDITIONAL RESOURCE

A valuable secondary resource regarding releases is the treatise called *Employment Discrimination Law*. It addresses some of the above questions and sets forth guiding principles governing releases. *See, e.g.,* B. Lindemann and P. Grossman, *Employment Discrimination Law*, pp. 1917-21 (3d Ed. 1996) (discussing some of the above questions); *see also*, 29 C.F.R. § 1625.22 (setting forth regulations from the EEOC governing releases).

VI. CONCLUSION

The law on releases and waivers is not as settled as a drafter would like. Indeed, recent cases show that even the most sophisticated of employers can be faced with challenges to the releases they have drafted. Because the law is not clear, the prudent lawyer will continue to monitor legal developments governing releases and waivers. At bottom, it appears the basic

issue that continues to be litigated may be summed up in what may seem to be an oversimplification of the question whether the waiver was truly “knowing and voluntary?” Thus, until the law is more settled, the cautious lawyer will make every effort to strive to ensure that the release he or she has drafted is easily understandable such that the person signing the release is making, of his or her own free will, a conscious, educated, and deliberate decision to forever relinquish his or her rights and thus truly provide a “knowing and voluntary waiver”.